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INTRODUCTION

"Corporations are people, my friend."[1] This now-famous statement by presidential candidate Mitt Romney has come to symbolize the predominant American perspective on the personhood of juridical entities and the similarities between their recognized personhood and that of natural persons under the law. Many American companies enjoy names and brands as famous as any American citizen. McDonald's and Coca-Cola are as well-known as LeBron James and Taylor Swift.[2] Individuals

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1. Ashley Parker, '*Corporations Are People,' Romney Tells Iowa Hecklers Angry Over His Tax Policy*, N.Y. TIMES (Aug. 11, 2011), http://www.nytimes.com/2011/08/12/us/politics/12romney.html [https://perma.cc/AZB5-A3HE] ("Mitt Romney was confronted on Thursday by hecklers on corporate tax policy and told one of them, 'Corporations are people, my friend.'").

2. Kurt Badenhausen, *Technology Brands Rule The Top 25*, FORBES (May 13, 2015), http://www.forbes.com/powerful-brands/ [https://perma.cc/HJ5S-7FZ4] (ranking Coca-Cola and McDonald's, along with six other American companies, among the ten most powerful brands in the world). *See also* Daniel Roberts & Leigh Gallagher, *40 Under 40*, FORTUNE (Sept. 24, 2015), http://fortune.com/40-under-40/taylor-swift-6/ [https://perma.cc/LJN4-BJAD] (ranking Taylor Swift the sixth

and organizations have also shared undesired notoriety and public scorn because of their own wrongdoing and that wrongdoing committed on their behalf. Mere mention of Enron, Arthur Andersen, WorldCom, and BP by name can evoke strong emotional responses similar to those caused by uttering Bernard Maddoff or Charles Ponzi himself.[3] Key disparities exist, however, in the sentencing approaches for organizations and individuals under the Sentencing Reform Act of 1984 ("Reform Act") and attendant sentencing guidelines.[4] Most profound are the disparities exhibited by the goals articulated for sentencing organizations and individuals, as well as the availability of incarceration as a sentencing option for individuals, but not for organizations. Courts and scholars justify this disparate treatment with the historical and commonly accepted philosophy that juridical persons have no soul to damn.[5] The Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*., ("*Hobby Lobby*") recognizing religious rights for business corporations, implicates the existence of a corporate soul and corresponding criminal culpability and justifies greater alignment of sentencing options for individuals and organizations.[6]

Part I of this Article explores the history and policies that explain the disparate sentencing treatment of organizations and individuals under the Reform Act and attendant sentencing guidelines. Part II examines the history and evolution of personhood theories underlying these policies and resulting statute and guidelines. Part III examines the *Hobby Lobby* decision and how the Supreme Court's recognition of a business corporation's religious rights necessarily implicates the existence of a corporate soul, making those entities morally culpable and justifying greater alignment of the goals and sentencing options provided in the Reform Act and attendant guidelines. Part IV addresses the arguments

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most influential person under 40 years old); Tyler Conway, *LeBron James Passes Michael Jordan as America's Favorite Athlete in Harris Poll*, BLEACHER REPORT (Jul. 17, 2014), http://bleacherreport.com/articles/2133370-lebron-james-passes-michael-jordan-as-americas-favorite-athlete-in-harris-poll [https://perma.cc/DYK8-QH4X] (ranking LeBron James ahead of Michael Jordan, Derek Jeter, and Peyton Manning in a Harris Poll measure of America's favorite athlete, measured after LeBron's return to play for the Cleveland Cavaliers).

3. Mary Darby, *In Ponzi We Trust*, SMITHSONIAN, http://www.smithsonianmag.com/people-places/in-ponzi-we-trust-64016168/?all [https://perma.cc/Z8UT-6VAX] (last updated Dec. 19, 2009).

4. *See infra* Part I (discussing Sentencing Reform Act of 1984).

5. 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, 445 (1981).

6. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

against amending the Reform Act and attendant guidelines for greater alignment of individual and organizational sentencing. The Article concludes that the Reform Act and attendant sentencing guidelines should be amended to better reflect the organizational soul and corresponding criminal culpability implicated by the *Hobby Lobby* Court's recognition of business corporations' religious rights.

I. AN OVERVIEW OF THE HISTORY AND PURPOSES OF THE FEDERAL SENTENCING GUIDELINES

The Reform Act, part of the Comprehensive Crime Control Act of 1984,[7] established the United States Sentencing Commission (the "Commission") as an independent agency of the judicial branch of the federal government. The Commission, under Congressional oversight, is charged with regulating and standardizing federal sentencing policies and procedures for convicted individuals and organizations.[8] The Commission promulgated the original set of Federal Sentencing Guidelines in 1987 to further two articulated goals of the Reform Act—preventing and deterring criminal conduct.[9] However, at the time, the Commission did not promulgate final guidelines for the sentencing of organizations "[d]ue to the complexity of the subject matter and the tight deadlines imposed by the Sentencing Reform Act."[10] While finalizing the individual sentencing guidelines, the Commission began yielding to the perspective "that corporate offenders were neither exempt nor should be exempted from

7. Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified at 18 U.S.C. § 3551; 28 U.S.C. §§ 991–998).

8. John R. Steer, Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit (Apr. 26, 2001) (unpublished paper presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma) (on file with author), http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/selected-articles/CorpBehavior2.pdf [https://perma.cc/AHW8-XLSX].

9. Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 699–702 (2002); 18 U.S.C. § 3553 (a)(2)(B) (1994) (stating that sentences should "afford adequate deterrence to criminal conduct"); *see also* 28 U.S.C. § 992(b)(1994) (requiring the Commission to promulgate guidelines "to assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18").

10. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS 1 (1991) [hereinafter SUPPLEMENTARY REPORT].

Congress' scheme for sentencing reform"[11] and decided "that drafting workable and reasonable corporate sentencing rules would serve [its] broader mandate of establishing sound and effective sentencing policies for the federal courts."[12]

A. Developing the Federal Sentencing Guidelines

The Commission began conducting research on the sentencing practices for organizations in 1986.[13] The Commission employed a range of methods to determine the best way to draft these guidelines, including consulting with experienced "white-collar" attorney-practitioners.[14] A very flexible set of non-binding "policy statements" were recommended, calling for a substantial fine reduction when the organization had implemented an effective compliance program.[15] The U.S. Department of Justice also provided a set of draft guidelines, focusing more on the aggravating factors that could increase an organization's base fine.[16]

The Commission finalized the organizational sentencing guidelines in 1991, using the offense levels from the guidelines for individuals to determine the initial fine, or the primary sanction, as well as to determine restitution, remedial orders, and probation.[17] The organizational guidelines also included mitigation credits for defendants who implemented self-policing programs and cooperated with investigative officials.[18] The emphasis on the mitigation credits stems from the Commission's belief that organizations should be self-policing and should be rewarded when they exercise the proper due diligence.[19] The guidelines describe due diligence as including effective

11. 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, 259 (1993).

12. *Id.* at 216.

13. *See* Murphy, *supra* note 9. *See also* SUPPLEMENTARY REPORT, *supra* note 10, at 1 ("Throughout the period from 1986 to 1991 . . . the Commission conducted empirical research and analysis on organizational sentencing practices.").

14. *See* Steer, *supra* note 8, at 5.

15. *Id.* at 5.

16. *Id*. The schedule of organizational fines was largely based on guidelines set for individuals. *Id*.

17. *Id.* at 6; *see also* Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 48–50 (2006).

18. *See* Orland, *supra* note 17, at 48.

19. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM'N 2011). Section 8B2.1(a) of the Guidelines Manual states:

compliance programs; due care not to delegate important responsibilities to known high-risk persons; audited and monitored program operations; and consistent discipline of employee violators.[20] Although the sentencing guidelines for organizations incorporate the assumption that organizations should generally be treated as persons in ways similar to individuals, the organizational guidelines omit a major sentencing option for individuals—incarceration.[21]

B. Policies Driving Individual and Organizational Sentencing

Under the Reform Act, there are three forms of sanctions available for individual offenders: fines, probation, and imprisonment.[22] These tools provide courts with viable options in crafting sentences best suited to the circumstances and the individual offender. However, the Reform Act section addressing organizations includes only two of these sanctions: probation and fines.[23] Included in both categories, and allowed for both individuals and organizations, is the sanction of forfeiture.[24] The policies driving the two sets of guidelines have apparent commonality, but disparities become most evident in implementation.

American criminal and civil laws draw distinctions between individuals and organizations. The federal sentencing guidelines for individuals focus on punishment and incapacitation.[25] The policy goal of punishing individual wrongdoing can be achieved through fines and probation as less intrusive sanctions, while imprisonment can be imposed to punish greater

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> To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall— (1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Id. § 8B2.1(a).

20. *See* Steer, *supra* note 8, at 7–8.

21. Steven Walt & William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263, 279 (1991).

22. *Id*.

23. *Id*.

24. *Id*. *See also* 37 C.J.S. *Forfeitures* §48 (2008) (defining forfeiture as the proceeding though which a person is forced to surrender money or other property as punishment for wrongdoing).

25. *See* Murphy, *supra* note 9, at 702.

culpability.[26] Punishment is derived, at least in part, from the perceived need of retribution and the concept of punishing individuals in proportion to their culpability.[27] Therefore, punishment is justified if the offender is morally culpable.[28] Incapacitation is designed to prevent the offender from committing future offenses.[29] The goal of incapacitation may be satisfied by sentences ranging from probation to imprisonment, and even death.[30] To achieve these goals, the individual guidelines provide a method for determining the appropriate term of probation or imprisonment in proportion to the offense.[31]

In contrast, the organizational sentencing guidelines focus on restitution and deterrence and generally allow only sentences of probation or fines.[32] Although the individual sentencing guidelines focus first on determining the term of imprisonment, the organizational sentencing guidelines focus first on providing restitution, with the amount of restitution calculated in proportion to the organization's culpability and the harm to the victim.[33] It is important to note that the amount imposed on the organization to remedy the harm caused by criminal conduct is not deemed a punishment, but a means of making victims whole again.[34] In advancing the deterrence objective, large organizational fines with the possibility of restrictive probation are presumed to effectively deter organizations from further criminal conduct.[35] Restrictive probation, if needed, may include the appointment of a "special master" or the creation of auditing and monitoring groups within the organization.[36] The

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26. *See* Walt & Laufer, *supra* note 21, at 279.

27. *See* Murphy, *supra* note 9, at 702–03.

28. *Id.*

29. Kevin Bennardo, *Incarceration's Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. 1, 2 (2014).

30. *Id.* at 3–5; *see also* 18 U.S.C. § 3591 (2012) (providing a death penalty for certain delineated crimes including espionage, treason, intentionally killing the victim, and violating the Controlled Substances Act with aggravating factors).

31. *See* Murphy, *supra* note 9, at 703.

32. U.S. SENTENCING GUIDELINES MANUAL § 8, introductory cmt. (U.S. SENTENCING COMM'N 2015).

33. Timothy A. Johnson, *Sentencing Organizations After* Booker, 116 YALE L.J. 632, 643–45 (2006). After a finding of guilt, the judge will calculate a "base fine" by looking at the offense level of the crime, and then use the "Offense Level Fine Table" to adjust the fine to the appropriate offense level. U.S. SENTENCING GUIDELINES MANUAL §§ 2A, 8C2.4(d) (U.S. SENTENCING COMM'N 2015). *See also id*. § 8C2.3-7.

34. *See* Murphy, *supra* note 9, at 705.

35. *Id*.

36. *Id.* at 708.

organizational sentencing guidelines set forth the circumstances in which an organization should be placed on probation to ensure payment of restitution and to keep the organization on track to a crime-free operation.[37]

Although not expressly stated as a goal of the sentencing guidelines, rehabilitation of the organizational defendant can be inferred from the sentencing conditions.[38] By comparison, rehabilitative sentencing for individuals addicted to drugs can prove effective in reforming the offender and preventing future crime along with attendant recidivism.[39] The importance of restitution as a means of rehabilitating an offender is highlighted in *Kelly v. Robinson*:

> Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.[40]

Determining whether the individual is actually rehabilitated is difficult because the standard is inherently subjective.[41] The rehabilitation of an organization can be more easily measured because the organization's reform efforts are more transparent and verifiable.[42] As a condition of probation, the court can require that the organization develop and submit an effective compliance and ethics program.[43] Although crafted for deterrence, these programs also assist in rehabilitating the organization by requiring that it develop new, more beneficial, and crime-free business practices.[44]

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37. U.S. SENTENCING GUIDELINES MANUAL § 8D1.1 (U.S. SENTENCING COMM'N 2015).

38. *See* Murphy, *supra* note 9, at 703 (stating that restitution is an example of organizational reformation through remediation of the harm).

39. Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427–29 (2009).

40. Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986).

41. *See* Henning, *supra* note 39, at 1428.

42. *Id*.

43. U.S. SENTENCING, GUIDELINES MANUAL § 8D1.4(b)(1) (U.S. SENTENCING COMM'N 2015). The programs that satisfy the requirement are outlined in Section 8B2.1 of the Guidelines Manual.

44. *See* Henning, *supra* note 39, at 1428.

The need for separate organizational and individual guidelines originally stemmed from distinct differences between the two.[45] Entities are deemed incapable of committing certain crimes because the elements of the crime require commission by an individual.[46] When the organization is inherently precluded from committing the offense, the organization cannot be charged, convicted, or sentenced regarding the same.[47] Courts have attempted to address this problem by importing the tort doctrine of vicarious liability.[48]

A connected rationale stemming from the generally recognized incorporeal nature of the organization is that incarceration, one of the harshest penalties available for individuals, is deemed not to be a viable option for sentencing organizations.[49] Incarcerating an entire organization is considered unrealistic and unworkable, especially if the incarceration would involve jailing innocent individuals.[50] Accordingly, courts use fines to make the greatest impact on organizations.[51]

C. Law in Action: Judicial and Prosecutorial Discretion in Sentencing

Despite the Reform Act and attendant guidelines being designed specifically to standardize federal sentencing and balance priorities for organizations and individuals, these efforts suffered arguably their biggest setback in *United States v. Booker*.[52] The *Booker* Court invalidated the Reform Act's § 3553 mandate that judges follow the sentencing guidelines.[53] Under § 3553, the sentencing guidelines required that a judge, in determining the sentence, make factual findings beyond those found at trial by the jury when determining guilt.[54] The Court held that this combination of judicial fact-finding with the mandatory nature of the sentencing guidelines

45. *See* discussion of Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), *infra* Part III.

46. *See* Walt & Laufer, *supra* note 21, at 278.

47. *Id*. at 265.

48. *See* discussion *infra* note 112 and accompanying text.

49. *See* Henning, *supra* note 39, at 1424.

50. *See* discussion *infra* Part IV.A.

51. Fines have been criticized as inadequate in deterring illegal activity, as large organizations with significant financial resources can build potential fines into their cost structures, negating any deterrent effect. *See* Johnson, *supra* note 33, at 645–48.

52. United States v. Booker, 543 U.S. 220 (2005).

53. *Id*. at 222–25; *see* Johnson, *supra* note 33, at 636.

54. Johnson, *supra* note 33, at 636.

violated the defendant's Sixth Amendment rights.[55] Although *Booker* addressed only the effect of § 3553 regarding the rights of individuals, the section's applicability to organizations likely extends the *Booker* prohibition to the sentencing of those juridical entities also.[56]

Similar to judicial sentencing discretion, prosecutorial discretion also plays an important role in the ultimate sentencing of organizations and individuals. As entity-related wrongdoing typically implicates multiple culpable parties, prosecutors must choose whether to prosecute the organization, the individual actors, or some combination of both.[57] Following the promulgation of the organizational guidelines and the Enron scandal, Deputy Attorneys General Eric Holder and Larry Thompson issued memoranda detailing factors to consider in deciding whether to charge an organization and emphasizing consideration of the existence of a compliance program.[58] Although the existence of a compliance program does not inhibit criminal prosecution, prosecutors were advised to consider the compliance program's design and effectiveness as mitigating factors.[59] Deferred Prosecution Agreements ("DPAs") and Non-Prosecution Agreements ("NPAs") serve as key prosecutorial tools, facilitating judicial efficiency and allowing the Justice Department to resolve criminal investigations of organizations often without the necessity of a formal indictment.[60] DPAs are explicitly authorized by federal statute.[61] This prosecutorial mechanism allows the corporation to avoid the stigma of a formal conviction and its

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55. *Id*. at 635; *see also Booker*, 543 U.S. at 244–45, 249.

56. *See* Johnson, *supra* note 33, at 634.

57. *See* Orland, *supra* note 17, at 51.

58. Memorandum from Deputy Attorney General Eric Holder, to All Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999) (on file with author), *rev'd by* Memorandum by Deputy Attorney General Larry Thompson, to All Heads of Department Components, Principles of Federal Prosecution of Business Organizations (January 20, 2003) (on file with author), *superseded by* Memorandum by Paul J. McNulty, to Heads of Department Components, United States Attorneys, Principles of Federal Prosecution of Business Organizations (December 12, 2006) (on file with author).

59. *Id*. (citing U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 4 (U.S. SENTENCING COMM'N 2015)). Larger, more impactful organization will tend to have more efficiently designed and complex compliance programs as compared to smaller organizations. Henning, *supra* note 39, at 1429–31.

60. *See* Orland, *supra* note 17, at 55–56. *See also* Henning, *supra* note 39, at 1432 (acknowledging that the line between DPAs and NPAs is unclear).

61. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 2086-88 (1975) (codified as amended at 18 U.S.C. §§ 3152–3154 (2000)).

collateral consequences.[62] Defendants are usually granted an opportunity to have the charges dismissed after an agreed upon period of time, typically one to two years, during which the defendant must comply with the terms of the agreement.[63]

DPAs can be readily compared to state-level, pre-trial diversion programs, in which prosecutors consider mitigating factors and can defer charges, contingent upon the defendants' completion of classes, completion of community services, or payment of restitution. Diversion programs originally were reserved for "first offender street criminals."[64] However, the Justice Department has experienced benefits from these agreements.[65]

II. PERSONHOOD DISTINCTIONS HISTORICALLY JUSTIFIED DISPARATE SENTENCING TREATMENT OF ORGANIZATIONS AND INDIVIDUALS

Enron, WorldCom, and BP became infamous examples of the disparate sentencing treatment afforded under the sentencing guidelines to individuals and organizations involved in the same wrongdoing. In each matter, the involved entity was considered a separate person under the law and deemed responsible for wrongdoing and resulting damages, yet faced sentences vastly different from those faced by individual defendants.

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62. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 944 (citing U.S. SENTENCING COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 21 (2003), http://www.ussc.gov/training/organizational-guidelines/report-ad-hoc-advisory-group-organizational-sentencing-guidelines-october-7-2003 [https://perma.cc/YSE3-FKBV] [hereinafter, U.S.S.C. REPORT]); *see also* Nagel & Winthrop, *supra* note 11, at 245.

63. Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. MIAMI L. REV. 1, 18–22 (2010) (providing an overview of deferred prosecution agreements, non-prosecution agreements, and the policies underlying their application).

64. *See* Orland, *supra* note 17, at 57.

65. *See id*. at 62 ("By and large, [deferred prosecution agreements have] worked well . . . . We've been able to recover a lot of money for victims without going through the delay and expense of a trial, and we've seen some positive . . . internal reforms.").

A. Enron, WorldCom, and BP: Case Studies in Sentencing Disparities

The Enron scandal and resulting collapse provides a good recent example of a company and its executives becoming symbols of public disdain over corporate abuses.[66] Enron Corporation was an American energy company that failed when an elaborate and unsupported corporate debt rubric justified through high-risk accounting practices was uncovered, leading to the company's Chapter 11 bankruptcy.[67] Enron was never prosecuted as an entity, perhaps because of its worthlessness as a going concern.[68] Perhaps bankruptcy proceedings were deemed sufficient to remedy the wrongs committed and attempt to compensate injured parties.[69] However, several high-ranking Enron officers were prosecuted and sentenced to federal prison. Jeffrey Skilling, former Enron CEO, was convicted of fraud and sentenced to 24 years in prison, though that sentence was later reduced to 14 years as a part of a plea bargain involving restitution to the victims of his fraudulent activities.[70] Andrew Fastow, Enron CFO, was sentenced to six years in federal prison and two years of probation after agreeing to plead guilty to wire fraud and securities fraud and to testify against Skilling and Kenneth Lay, Enron founder and

66. Matthew DiLallo, *Enron Scandal: A Devastating Reminder of the Dangers of Debt*, THE MOTLEY FOOL (Jun. 21, 2015, 7:00 PM), http://www.fool.com/investing/general/2015/06/21/enron-scandal-a-devastating-reminder-of-the-danger.aspx [https://perma.cc/LZ2P-TTRF].

67. *Id.*

68. *See generally* Alexei Barrionuevo, *Enron Chiefs Guilty of Fraud and Conspiracy*, N.Y. TIMES (May 25, 2006), http://www.nytimes.com/2006/05/25/business/25cnd-enron.html (detailing trials of several Enron executives, but mentioning Arthur Andersen's trial as an entity); *The Going Concern Principle*, ACCOUNTING TOOLS, http://www.accountingtools.com/going-concern-principle [https://perma.cc/HWG9-JKKY] (last visited Sept. 22, 2016) (defining going-concern principle as "the assumption that an entity will remain in business for the foreseeable future.").

69. Caitlin F. Saladrigas, *Corporate Criminal Liability: Lessons from the Rothstein Debacle*, 66 U. MIAMI L. REV. 435 (2012) (containing a detailed discussion of the complications in coordinating simultaneous prosecutions and bankruptcy proceedings involving the same corporate and individual wrongdoers).

70. Peter Lattman, *Ex-Enron Chief's Sentence is Cut by 10 Years, to 14*, N.Y. TIMES (Jun. 21, 2013, 4:52 PM), http://dealbook.nytimes.com/2013/06/21/prison-sentence-of-ex-enron-ceo-skilling-cut-by-10-years-2/ [https://perma.cc/R9QX-TCYJ].

chairman.[71] Lay was convicted on ten counts of securities fraud but died before sentencing.[72]

Arthur Andersen LLP ("Andersen") served as auditors for Enron during the accounting fraud scandal.[73] In an unprecedented entity prosecution, Andersen was convicted of obstruction of justice charges largely stemming from the destruction of files associated with Andersen's audit of Enron, deemed to have been based on the advice in Nancy Temple's memo.[74] Andersen's sentence of six years of probation and a $500,000 fine was the maximum provided in the Organizational Sentencing Guidelines and on par with penalties negotiated under other DPAs reached during that period.[75] The conviction was later overturned by the U.S. Supreme Court because the jury instructions did not require a specific finding of criminal intent by Andersen to support its conviction.[76] However, the victory provided little

71. Douglas O. Linder, *The Enron Trial: Andy Fastow's Plea Agreement*, U. OF MO.-KAN. CITY SCH. OF L., http://law2.umkc.edu/faculty/projects/ftrials/enron/fastowplea.html [https://perma.cc/HW8V-JL89] (last visited Aug. 3, 2016).

72. United States v. Lay, 456 F. Supp. 2d 869 (S.D. Tex. 2006).

73. Joel Roberts, *Andersen Gets Probation in Enron Case*, CBS NEWS (Oct. 16, 2002, 3:25 PM), http://www.cbsnews.com/news/andersen-gets-probation-in-enron-case/ [https://perma.cc/S37C-557M].

74. Steven R. Strahler, *Nancy Temple Reclaims Her Reputation and Rebuilds a Career Derailed by Andersen Trial*, CRAIN'S CHICAGO BUSINESS (Apr. 10, 2010), http://www.chicagobusiness.com/article/20100410/ISSUE01/100033245/nancy-temple-reclaims-her-reputation-and-rebuilds-a-career-derailed-by-andersen-trial [https://perma.cc/6R37-5JVR] (Temple, Andersen's in-house counsel, has been commonly referred to as the "corrupt persuader" for the document retention memo that was interpreted as advice to destroy Anderson files related to its representation of Enron. Temple invoked her Fifth Amendment right against self-incrimination and was never charged with a crime.); *see also* Luisa Beltran, Brett Gering & Alice Martin, *Andersen Guilty*, CNN MONEY (Jun. 16, 2002, 4:43 PM), http://money.cnn.com/2002/06/13/news/andersen_verdict/ [https://perma.cc/QT7K-7Q7B].

75. *See* Orland, *supra* note 17, at 72 tbl.I (showing a range of fines and probationary periods included in Deferred Prosecution Agreements between 1993 and 2004).

76. Arthur Andersen LLP v. U.S., 544 U.S. 696, 697 (2005) ("The jury instructions failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required. For example, the jury was told that, even if petitioner honestly and sincerely believed its conduct was lawful, the jury could convict. The instructions also diluted the meaning of 'corruptly' such that it covered innocent conduct.").

comfort to Andersen partners, employees, and prosecution critics, as the conviction effectively drove the accounting firm out of business.[77]

In the Andersen aftermath, federal prosecutors responded to a firestorm of criticism for what was deemed extreme prosecutorial overreach with a shift in favor of DPAs and NPAs.[78] The WorldCom prosecutions exhibited this stark contrast in sentencing approaches. As with Enron, the discovery of fraudulent accounting practices led by top WorldCom executives triggered the company's demise and subsequent Chapter 11 bankruptcy.[79] Unlike Enron or Andersen, WorldCom entered into a DPA with federal prosecutors under which the company received two years of probation and no fines.[80] CEO Bernard Ebbers was convicted of securities fraud and other charges and sentenced to 25 years in prison.[81] CFO Scott Sullivan pled

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77. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1364–66 (2009) (citing Ken Brown & Ianthe Jeanne Dugan, *Arthur Andersen's Fall from Grace is a Sad Tale of Greed and Miscues*, WALL ST. J. (Jun. 7, 2002), http://www.wsj.com/articles/SB102 3409436545200 [https://perma.cc/GG2V-69Y4] (reporting that Arthur Andersen employed 85,000 people worldwide).

78. *See* Orland, *supra* note 17, at 45 (noting that "[b]etween 1992 and 2006, the Justice Department resolved forty-four criminal cases by either a deferred prosecution or non-prosecution agreement").

79. Reuters, *The Rise and Fall of WorldCom*, *Chronology of Key Events*, USA TODAY, http://usatoday30.usatoday.com/money/industries/telecom/2002-07-21-worldcom-chronology_x.htm# [https://perma.cc/DP7C-G8M3] (last visited Feb. 6, 2016); DENNIS R. BERESFORD, NICHOLAS DEB. KATZENBACH & C.B. ROGERS, JR., SPECIAL INVESTIGATIVE COMM. OF THE BD. OF DIRECTORS OF WORLDCOM, INC., REPORT OF INVESTIGATION 47 (2003), https://www.sec.gov/Archives/edgar/data /723527/000093176303001862/dex991.htm [https://perma.cc/ARU2-KT8Y] (MCI merged with WorldCom and secured FCC approval of the deal in 1998); Press Release, Federal Commc'n Comm'n, FCC Approves Merger of WorldCom and MCI (Sept. 14, 1998), https://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases /1998/nrcc8061.html [https://perma.cc/5WQY-5RE9]. Following its emergence from bankruptcy, the company formally changed its name to MCI. MCI Inc., (Form 425) (Mar. 17, 2005), http://www.sec.gov/Archives/edgar/data/723527/0000950103-05-000464.txt [https://perma.cc/AC84-WMRN]. The company was later acquired by Verizon Communications. Press Release, Federal Commc'n Comm'n, FCC Approves SBC/AT&T and Verizon/MCI Mergers (Oct. 31, 2005), https://apps.fcc.gov/edocs_public/attachmatch/DOC-261936A1.pdf [https://perma.cc/TEU4-M4S8].

80. *See* Orland, *supra* note 17, at 72, tbl.II.

81. Dan Ackman, *Bernie Ebbers Guilty*, FORBES (Mar. 15, 2005, 2:30 PM), http://www.forbes.com/2005/03/15/cx_da_0315ebbersguilty.html [https://perma.cc /AVH5-VQG3]; *Top 10 Crooked CEOs*, TIME, http://content.time.com/time/specials

guilty to accounting fraud, agreed to pay restitution for investor losses, and received a reduced sentence of five years in exchange for helping federal prosecutors in convicting his former boss, Ebbers.[82] The scandal produced plea deals by other WorldCom executives while leaving former employees and creditors holding worthless claims against the company. The Enron and WorldCom scandals became catalysts for passage of federal legislation designed to prevent replication of their disastrous accounting and management practices.[83]

The 2010 BP Deepwater Horizon oil spill provides a more contemporary contrast in approaches to sentencing organizations and the individual agents involved in the same criminal wrongdoing. This unfortunate disaster claimed the lives of 11 people and impacted many more.[84] In 2014, BP reached a plea agreement with federal prosecutors, agreeing to plead guilty to 11 counts of felony manslaughter and one count of obstruction of justice, pay $4 billion in fines, and serve a five-year probation term.[85] This arrangement was not BP's

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/packages/article/0,28804,1903155_1903156_1903277,00.html [https://perma.cc/6NCW-XV4C] (last visited Aug. 3, 2016).

82. Jennifer Bayot & Roben Farzad, *Ex-WorldCom Officer Sentenced to 5 Years in Accounting Fraud*, N.Y. TIMES (Aug. 12, 2005), http://www.ny times.com/2005/08/12/business/exworldcom-officer-sentenced-to-5-years-in-accounting-fraud.html?_r=0 [https://perma.cc/9UCR-ND46] ("'Mr. Sullivan, you would have faced a substantial sentence had you not cooperated with the government,' Judge Barbara S. Jones gently told him in United States District Court in Manhattan."); *Ebbers Indicted, Ex-CFO Pleads Guilty*, CNN MONEY (Mar. 2, 2004, 4:07 PM), http://money.cnn.com/2004/03/02/technology/ebbers/ [https://perma.cc/S92V-D6U3].

83. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, & 29 U.S.C.) (increasing penalties for the destruction of evidence needed in a federal investigation).

84. *BP Settles Deepwater Horizon Oil Spill Claims*, CBS NEWS (Oct. 5, 2015, 4:02 PM), http://www.cbsnews.com/news/bp-settles-deepwater-horizon-oil-spill-in-gulf-of-mexico-for-20-billion/ ("The spill followed the April 2010 explosion on an offshore rig that killed 11 workers."). *See* Steven Mufson, *BP Settles Criminal Charges for $4 Billion in Spill: Supervisors Indicted on Manslaughter*, WASH. POST (Nov. 15, 2012), https://www.washingtonpost.com/business/economy/bp-to-pay-billions-in-gulf-oil-spill-settlement/2012/11/15/ba0b783a-2f2e-11e2-9f50-0308e1e75445_story.html (stating BP plead guilty to fourteen criminal counts, which included manslaughter resulting from the disaster).

85. Mark Schleifstein, *Federal Judge Accepts $4 Billion BP Guilty Plea for Deepwater Horizon Oil Disaster*, TIMES PICAYUNE (Jan. 30, 2013, 2:39 AM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/01/federal_judge_ accepts_4_billio.html [https://perma.cc/NQ59-6B7Y]. BP America Vice President expressly admitted culpability on behalf of the company:

first plea agreement, leading critics to cite the company as an example of problems in the system.[86] Meanwhile, Donald Valdrine and Robert Kaluza, two rig supervisors who became the faces of the safety and monitoring failures that led to the rig explosion, were charged with involuntary manslaughter, seaman's manslaughter, and violations of the Clean Water Act.[87] Each seaman's manslaughter count carried a potential ten-year prison term and each involuntary manslaughter count carried eight years.[88] By 2015, all charges had been dismissed, bringing the prosecution of both men to a close.[89] Neither BP nor any of its agents

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> "We—and by that I mean the men and the women of the management of BP, its Board of Directors, and its many employees—are deeply sorry for the tragic loss of the 11 men who died and the others who were injured that day," he said. "Our guilty plea makes clear, BP understands and acknowledges its role in that tragedy, and we apologize—BP apologizes—to all those injured and especially to the families of the lost loved ones. BP is also sorry for the harm to the environment that resulted from the spill, and we apologize to the individuals and communities who were injured."

Id.

86. Justin M. Davidson, Comment, *Polluting Without Consequence: How BP and Other Large Government Contractors Evade Suspension and Debarment for Environmental Crime and Misconduct*, 29 PACE ENVTL. L. REV. 257, 274–75 (2011) (citing Jason Leopold, *Ex-EPA Officials: Why Isn't BP Under Criminal Investigation?*, TRUTH-OUT (May 27, 2010), http://www.truth-out.org/ex-epa-officials-why-isnt-bp-under-criminal-investigation59936 [https://perma.cc/LD4E-YKRN] (criticizing a 2004 DPA between BP and the SEC involving an alleged price-fixing gas market scheme involving propane trading)).

87. Superseding Indictment for Involuntary Manslaughter and Seaman's Manslaughter and Clean Water Act, U.S. v. Robert Kaluza and Donald Valdrine, No. 12-265 (E.D. La. Nov. 14, 2012), http://www.justice.gov/iso/opa/resources/252012111514363874332 3.pdf [https://perma.cc/Q654-BALC].

88. Steven Mufson, *BP Settles Criminal Charges for $4 Billion in Spill; Supervisors Indicted on Manslaughter*, WASH. POST (Nov. 15, 2012), https://www.washingtonpost.com/business/economy/bp-to-pay-billions-in-gulf-oil-spill-settlement/2012/11/15/ba0b783a-2f2e-11e2-9f50-0308e1e75445_story.html [https://perma.cc/CAQ5-3H88].

89. U.S. v. Kaluza, 780 F.3d 647 (5th Cir. 2013); *see also* Oliver Milman, *Manslaughter Charges Dropped Against Two BP Employees in Deepwater Spill*, GUARDIAN (Dec. 3, 2015, 1:08 PM), http://www.theguardian.com/environment/2015/dec/03/manslaughter-charges-dropped-bp-employees-deepwater-horizon-oil-spill [https://perma.cc/SKP4-FME3].

ultimately received a penalty not set out in the Organizational Sentencing Guidelines.[90]

In each of the forgoing examples, the individuals involved faced incarceration, a penalty not faced by the companies involved. This disparity in consequences is directly tied to the Reform Act, the attendant guidelines, and the policy goals articulated in each for sentencing individuals and organizations. The disparity in policy goals and resulting treatment is rooted in historical personhood distinctions ascribed to organizations and individuals. The *Hobby Lobby* Court's recognition of a business corporation's religious rights and the implicated corporate soul mandates reconsideration of the disparate sentencing treatment of comparably culpable persons.

B. A History of "Personhood" and Criminal Culpability

Like other constitutional rights and responsibilities, criminal culpability is largely based on recognition of personhood.[91] At English common law, entities were not considered culpable because they lacked the requisite body and soul. As Baron Thurlow famously lamented when addressing corporate criminal culpability, "[d]id you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"[92]

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90. Jennifer Larino, *Jury Acquits BP Exec Accused of Lying About Oil Spill Flow*, TIMES PICAYUNE (Jun. 5, 2015, 2:35 PM, updated Jun. 5, 2015, 3:33 PM), http://www.nola.com/crime/index.ssf/2015/06/david_rainey_acquitted_ bp_oil.html [https://perma.cc/5V8R-UNQ7]; Walter Pavlo, *Government Drops Obstruction Charges Against Former BP Engineer Kurt Mix*, FORBES (Nov. 6, 2015, 11:56 AM), http://www.forbes.com/sites/walterpavlo/2015/11/06/government-drops-obstruction-charges-against-former-bp-engineer-kurt-mix/#293bc67653a3 [https://perma.cc/N5EL-PAVQ]. The Department of Justice agreed to drop the obstruction of justice charges, and Mix agreed to plead guilty to a misdemeanor charge of computer fraud and abuse, resulting in six months of probation and 60 hours of community service. *Id*.

91. Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 100 (2009).

92. Coffee, *supra* note 5, at 386 (first citing M. KING, PUBLIC POLICY AND THE CORPORATION 1 (1977); and then citing H.L. MENCKEN, A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 223 (1942) for the notation that "[o]ne version, probably apocryphal, reports that the Lord Chancellor added in a stage whisper, '[a]nd, by God, it ought to have both").

Similarly, corporate powers were generally restricted to purposes specifically provided in their charters under early English common law.[93] This constrained perspective of corporate personhood was adopted by the framers of the U.S. Constitution and incorporated into early American jurisprudence.[94] In *Trustees of Dartmouth College v. Woodward*, Justice Marshall famously declared, "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[95] This opinion represented the artificial entity theory, which holds that the entity's very existence was a function of sovereign grace.[96] Entities were chartered for specific purposes, usually involving a demonstrable public good.[97] This perspective represented a less developed economic system with few sophisticated business entities.[98]

As the needs of a growing nation changed, a more business-friendly political climate emerged favoring "free incorporation" in hopes of removing the threat of corruption incumbent in a more restricted incorporation process.[99] The artificial entity theory began to yield to the aggregate theory, a new perspective on corporate personhood that recognized

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93. Bank of the United States v. Deveaux, 9 U.S. 61, 88 (1809). The Supreme Court acknowledged that "our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character." *Id*. *See also* Citizens United v. Federal Election Com'n, 558 U.S. 310, 386 (2010) (Scalia, J., concurring).

94. 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2, at 7–8 (Carol A. Jones ed., Thomson/West 2006) (1917) ("Historically, there was a distrust or disfavor of private corporations. Some of the states ratified the Constitution with misgivings respecting the power of Congress to form corporations, which in fact created but few . . . leaving this matter to the states . . . .").

95. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

96. LAWRENCE M. FRIEDMAN, THE HISTORY OF AMERICAN LAW 129–32 (3d ed. 2005) (discussing the history of corporations as special charters from the state).

97. *Id*. at 131 (noting that early corporations "were chartered to do work that was traditionally public" and "tended to vest exclusive control over a public asset, a natural resource, or a business opportunity in one group of favorites or investors").

98. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1483 (1989) ("The economy closely resembled the atomistic type described in Adam Smith's classical theory. Economic units tended to be individual rather than collective. Individuals produced goods for sale in the market. Individuals bought goods for consumption in the market. To the extent production was organized, the market did the organizing by coordinating prices.").

99. Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985).

the corporation as a conduit for advancing the interests of natural persons represented by the corporation.[100] The philosophical evolution of corporate personhood was represented in the Railroad Tax Cases[101] and *Santa Clara County v. Southern Pacific Railroad*.[102] In the Railroad Tax Cases, Justice Field, sitting on the Circuit Court for the District of California, found California's property tax framework unconstitutionally discriminatory against corporations, which were deemed "persons" entitled to equal protection under the Fourteenth Amendment.[103] In *Santa Clara County v. Pacific Railroad*, the U.S. Supreme Court affirmed the corporate personhood findings of the Railroad Tax Cases in short, and Chief Justice Waite provided now famous prefatory remarks.[104] These cases provided the cornerstone of the aggregate theory.[105] A related philosophy, the real entity theory, also embraces the explanation of corporations as a natural consequence of group dynamics, analogous to a family, religious congregation, or other types of assemblies

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100. Bank of United States v. Deveaux, 9 U.S. 61, 91 (1805) ("[T]he term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.").

101. San Mateo Cty. v. S. Pac. R.R. Co. (*Railroad Tax Cases*), 13 F. 722 (C.C.D. Cal. 1882).

102. Santa Clara Cty. v. S. Pac. R.R. Co. 118 U.S. 394 (1886).

103. *See Railroad Tax Cases*, 13 F. at 730 ("Whatever acts may be imputed justly or unjustly to the corporations, they are entitled when they enter the tribunals of the nation to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others.").

104. *See Santa Clara Cty.*, 118 U.S. at 396 ("Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."). Although the Chief Justice's remarks could be considered dicta, the case has been cited over 900 times in court decisions and secondary sources.

105. *See Railroad Tax Cases*, 13 F. at 743 ("[W]e think that it is well established by numerous adjudications of the supreme court of the United States and of the several states, that whenever a provision of the constitution, or of a law, guaranties to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents."). For an overview of the 19th-century history of aggregate theory, *see* Horwitz*, supra* note 99, at 177–78.

formed by groups of natural persons.[106] However, real entity theorists advocate fully recognizing the entity as naturally existing beyond permission granted by its members or the government.[107] The potency of this perspective stems from the core recognition of separate entity personhood in ways that places it on par with natural persons under the Constitution.[108] However, the aggregate theory emerged as a more overtly popular option for courts in their attempts "to reap all of the benefits of the real entity theory without all of the metaphorical hocus pocus."[109]

The courts of the newly industrialized America struggled to hold these increasingly powerful and influential corporate citizens responsible for their wrongdoing.[110] Courts exhibited great creativity in fashioning methods of addressing culpable corporate behavior.[111] The U.S. Supreme Court changed the corporate criminal liability landscape for the next century in *New York Central & Hudson River Railroad Co. v. United States* ("*N.Y. Central & Hudson"*), importing the tort doctrine of respondeat superior as

106. 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 1 (2d ed. 1886) ("The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and is essential to many of the most ordinary processes of thought. Thus, the existence of tribes, village communities, families, clans, and nations implies a conception of these several bodies of individuals as entities having corporate rights and attributes . . . . So, in numberless other instances, associations which are not legally incorporated are considered as personified entities, acting as a unit and in one name; for example, political parties, societies, committees, courts.").

107. *See* Ripken, *supra* note 91*,* at 112–13.

108. A corporation is viewed as a separate entity for purposes of the Article III citizenship clause, without regard to the fact that it may contain shareholders of any number of states or countries. *See* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1187–88 (2010) (showing the development of the doctrine that a corporation is a citizen of the state where it is incorporated and has its principal place of business for jurisdiction purposes). *See* Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 924 n. 235 (2011).

109. *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

110. *See* Henning, *supra* note 39 (analyzing the prosecution of criminal actions against corporations).

111. Christopher Slobogin, *Citizens United and Corporate and Human Crime*, 41 STETSON L. REV. 127, 129 (2011). ("[S]trict liability and liability for simple negligence, currently staples of corporate criminal doctrine, are usually anathema when a person is being punished, at least when the punishment involves something other than a small fine." (citing N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493–94 (1909))).

a basis for imposing criminal liability on corporations for the actions of their agents.[112] This doctrine maintains its prominence in today's criminal justice jurisprudence, justifying real and aggregate entity theories and providing a primary basis for culpability in the Federal Sentencing Guidelines for Organizations.[113]

Since *N.Y. Central & Hudson*, entity personhood has grown increasingly similar to natural personhood in civil and criminal justice contexts. These entities enjoy Fourth Amendment rights against unreasonable searches.[114] Corporations possess Fifth Amendment rights against double jeopardy.[115] The Sixth Amendment guarantees corporations a right to trial by jury.[116] Corporations also have a right to the assistance of counsel.[117] The U.S.

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112. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495–96 (1909) ("While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.").

113. *See* Sheyn, *supra* note 63, at 3.

114. Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978) (finding a law permitting warrantless inspections by workplace safety regulators a violation of the corporation's constitutional rights); *see also* United States v. Morton Salt Co., 338 U.S. 632, 650–52 (1950) (finding lesser privacy protections for corporations than natural persons).

115. United States v. Martin Linen Supply Co., 430 U.S. 564, 565, 575 (1977) (recognizing a corporation's rights against double jeopardy); *but see* Hale v. Henkel, 201 U.S. 43, 74–75 (1906) (finding that a corporation has no power to claim the Fifth Amendment right against self-incrimination).

116. United States v. R.L. Polk & Co., 438 F.2d 377, 378–80 (6th Cir. 1971) (holding that corporations have the same Sixth Amendment right to jury as natural persons). Corporations also have a Seventh Amendment right to a jury in federal court. *See* Ross v. Bernhard, 396 U.S. 531, 536, 542 (1970) (holding that an individual can claim derivative right to civil jury under the Seventh Amendment if a corporation would have had a right to a jury).

117. United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740, 743 (3d Cir. 1979) ("[A]n accused has no less of a need for effective assistance due to the fact that it is a corporation. . . . A corporation would face these same dangers unless the agent representing it in court is a competent lawyer. Thus, the right to effective assistance of counsel is not so peculiarly applicable to individuals that corporations should not be entitled to it."); *but see* United States v. Unimex, Inc., 991 F.2d 546, 550 (9th Cir. 1993) ("Being incorporeal, corporations cannot be

Supreme Court has recognized growing corporate First Amendment free speech and press rights.[118] Nonprofit and business corporations further enjoy a right to the free exercise of religion.[119] Corporations are also "persons" who may spend money to influence voters, though denied voting rights under the Fourteenth, Fifteenth, Nineteenth, or Twenty-Fourth Amendments.[120] Despite providing a wealth of precedent, the Court has been criticized for creating an inconsistent personhood standard for entities.[121]

III. *HOBBY LOBBY*'S RECOGNITION OF BUSINESS CORPORATE RELIGIOUS RIGHTS MANDATES GREATER ALIGNMENT OF ORGANIZATIONAL AND INDIVIDUAL SENTENCING GUIDELINES

Hobby Lobby marked a watershed moment in the Court's recognition of corporate personhood. The Court addressed whether the contraception mandate in the Patient Protection and Affordable Care Act (the "Affordable Care Act") violated the constitutional rights to free exercise of religion of two corporations, Hobby Lobby Stores, Inc. and Conestoga Wood Specialties,

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imprisoned, so they have no constitutional right to appointed counsel."); United States v. Hartsell, 127 F.3d 343, 350 (4th Cir. 1997) (citing *Unimex,* 991 F.2d 546 with approval).

118. First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 795 (1978) (discussing the corporate right to political speech); *see also* Grosjean v. Am. Press Co., 297 U.S. 233, 244, 249–51 (1936) (holding that a press corporation is a person entitled to the protection of the First and Fourteenth Amendments).

119. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

120. *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) (striking down restrictions on corporate independent expenditures as a First Amendment violation); *see also* Texfi Indus., Inc. v. City of Fayetteville, 269 S.E.2d 142, 150 (N.C. 1980) (holding that corporations do not have the right to vote, maintaining the historical limitation of the right as a purely personal guarantee to individuals).

121. Miller, *supra* note 108, at 909–31 ("No unified theory governs when or to what extent the Constitution protects a corporation. Instead, the Justices resort to a grab bag of history, metaphysical rumination, *Lochner*ian tailings, and pragmatism to resolve the specific corporate constitutional claim at hand. The Court's approach has left us with a broken and disjointed jurisprudence, a string cite rather than a doctrine."); *see also* Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 U.C.L.A. L. REV. 1425, 1465 (1992).

under the Religious Freedom Restoration Act of 1993 ("RFRA").[122] In holding that the Affordable Care Act's contraceptive mandate violated RFRA, the Court articulated an unprecedented recognition of religious rights possessed and exercised by business corporations. This recognition implicates the existence of a corporate soul and the corresponding capacity for moral culpability. That moral culpability in turn justifies greater alignment of the goals and sentencing options provided in the Reform Act and attendant guidelines.

A. The Hobby Lobby *Decision*

Congress enacted RFRA in response to *Employment Division, Department of Human Resources of Oregon v. Smith.*[123] The *Smith* Court rejected a previously articulated balancing test for measuring government actions under the free religious exercise clause of the First Amendment, finding that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[124] Congress responded by codifying pre-*Smith* precedent, expressly stating that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[125] The *Hobby Lobby* Court held that business corporations enjoyed the same free exercise of religion protection generally afforded individuals and religious nonprofit corporations.[126] The Court justified its holding by employing the agency

122. *Hobby Lobby*, 134 S. Ct. 2751 (2014).

123. 494 U.S. 872, 877 (1990); LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 123 (9th ed. 2016) ("Congress enacted RFRA in direct response to the Court's decision in Employment Div. Dept. of Human Resources of Ore v. Smith . . . .").

124. *See Hobby Lobby*, 134 S. Ct. at 2760–61 ("In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest.").

125. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)(2) (1993); *see also* § 2000bb(a)(4) (1993).

126. *See Hobby Lobby*, 134 S. Ct. at 2770–71 ("While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. . . . If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.").

principles of the aggregate theory.[127] The dissent criticized the decision as effectively endowing religious rights on all corporations, regardless of size and complexity.[128] The majority sidestepped this issue by deeming the problem unlikely and unripe.[129]

The *Hobby Lobby* majority, while insisting that corporate free exercise of religious rights was recognized for the protection of individual beneficiaries, did not deny the separateness and fundamental personhood of each corporation under the law, leaning heavily on the companies' claims that their religious beliefs and those held by their owners forbade compliance with the Affordable Care Act's contraceptive mandate.[130] This separateness provided the predicate upon which each corporation's standing was based.[131] Personhood allows certain entities to shield their owners and management from personal liability.[132] In contrast, sole proprietorships and partnerships

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127. *Id.* at 2768 ("[I]t is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.").

128. *Id.* at 2797 ("The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.").

129. *Id.* at 2774 ("These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. . . . In any event, we have no occasion in these cases to consider RFRA's applicability to such companies.").

130. *Id.* at 2779 ("[T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

131. *Id*. at 2767–68.

132. N.L.R.B. v. Greater Kansas City Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993) ("The 'separate corporate identity' prong is meant to determine whether the stockholder and the corporation have maintained separate identities. There are strong public policy reasons for upholding the corporate fiction. Where stockholders follow the technical rules that govern the corporate structure, they are entitled to rely on the protections of limited liability that the corporation affords.").

expose the individual owners to unlimited personal liability for the businesses debts and obligations.[133] This "separateness" doctrine is also embodied in the federal tax code. Corporations generally pay entity-level income tax and shareholders are taxed on the ultimate distribution of that corporate income.[134] This "double taxation" is a natural consequence of the corporation's separateness. As Justice Ginsburg admonished, personhood should not be granted only when advantageous to the organization and its stakeholders.[135]

B. Religion and the Soul

The *Hobby Lobby* Court's recognition of a business corporation's religious rights necessitates the core consideration of what it means to have religious rights. Although the majority minimized distinctions between the exercise of religion by business entities and individuals or entities formed specifically for religious purposes, Justice Ginsburg recalled the policies underlying the stark historical distinction between the two types of entities.[136] Likewise, individuals are acknowledged as having religious

133. *See* UNIF. PARTNERSHIP ACT § 15, (UNIFORM LAW COMM'N 1997) (amended 2013); REV'D UNIF. PARTNERSHIP ACT § 306(a) (UNIFORM LAW COMM'N 1997) (amended 2013). Under the Uniform Partnership Act ("UPA"), partners' liability is joint and several for torts and joint but not several for contracts. Under the Revised Uniform Partnership Act ("RUPA"), partners are jointly and severally liable for all partnership obligations.

134. WILLIAM K. SJOSTROM, JR., BUSINESS ASSOCIATIONS: A TRANSACTIONAL APPROACH 15 (Vicki Been et al. eds., 2013) ("A C-corporation is considered a separate taxpaying entity. Thus, it must file an annual income tax return (usually on Form 1120) reporting its income, deductions, and credits for the year and pay any resulting income tax at corporate income tax rates. If a C-corporation distributes money to its shareholders, the shareholders must include the distribution in their taxable incomes." Variations on these entities have been developed to minimize the consequences of entity separateness while maintaining and maximizing the associated benefits. These variations include the development if the S-Corporation, various forms of limited partnerships, limited liability companies.).

135. *See Hobby Lobby*, 134 S. Ct. at 2797 ("By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.").

136. *Id.* at 2794–95 ("The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. . . . No such solicitude is traditional for commercial organizations.

rights historically denied to business corporations, with a seemingly consistent focus on the person seeking to exercise religion.[137]

Neither the majority nor the dissent expressly defined the concept of religion; however, one need not look far for assistance in understanding its meaning. The very word "religion" is derived from the Latin word *religionem*, which translates to "respect for what is sacred, reverence for the gods."[138] There is a necessary connection between the concept of having a soul and having religious beliefs. The Christian Bible and the Hebrew Torah both contain numerous references to that connection, including a well-known and often referenced admonition that even in a place of suffering if "you seek the Lord your God, you will find him if you seek him with all you heart and with all your soul."[139] Similarly, the Quran references the soul in the context of divine providence, providing "[a] soul will not die but with the permission of Allah."[140] The soul is credited as the distinguishing feature between life and death.[141]

C. The Soul and Criminal Culpability

The term "soul" is synonymous with the ancient Greek term *ethos*, which refers to both morals and spirit that make a person unique and

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Indeed, until today, religious exemptions had never been extended to any entity operating in 'the commercial, profit-making world.'") (quoting Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987)).

137. *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 466 (2010).

138. Douglas Harper, *Religion*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index.php?term=religion [https://perma.cc/3U32-QXFS] (last visited Aug. 3, 2016).

139. *Deuteronomy* 4:29, (New International Version); *see also Deuteronomy* 4:29 (Torah), *translated in* JEWISH PUBLICATION SOCIETY, TANAKH THE HOLY SCRIPTURES 281 (1988) ("But if you search there for the Lord your God, you will find Him, if only you seek Him with all your heart and soul . . . .").

140. Quran 3:145, (M.H. Shakir trans.).

141. *Soul*, ENCYC. BRITANNICA, http://www.britannica.com/topic/soul-religion-and-philosophy [https://perma.cc/479W-XR9N] (last visited Aug. 3, 2016) ("Many cultures have recognized some incorporeal principle of human life or existence corresponding to the soul, and many have attributed souls to all living things.").

alive.[142] *Ethos* can be traced back to the ancient Greek philosopher Aristotle as one of three modes of persuasion used by an effective speaker to communicate his or her message to the intended audience.[143] This notion is important as it allowed the listener to evaluate the message, at least in part, based on the credibility and trustworthiness, or moral character, of the speaker.[144] Contemporary references to *ethos* center on the characteristic spirit or prevalent tone of sentiment of a community, institution, or system.[145] The *ethos* of modern organizations are often composed of intricate intra-organizational relationships that distinguish the collective personality of the entity from any of its individual stakeholders. The organization has the same evolutionary capacity commonly accepted as a part of the human experience.[146] This phenomenon

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142. *Soul*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/soul [https://perma.cc/KPU8-NWV4] (last visited Mar. 27, 2016) (defining "soul" as "spiritual or moral force").

143. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1122 (1991) (the other two modes involved the content of the speech and placing the audience in a mindset receptive to the communicated message).

144. *Id.* at 1122–23 ("This kind of *eta theta omicron zeta* is most important . . . to the success of the speech: for the opinion of any audience as to the credibility of the speaker depends mainly upon the view they take of his intentions and character intellectual and moral; his ability to form a judgment, his integrity and truthfulness and his disposition toward themselves, to one they will listen with attention, respect and favor; another if they look upon him as of the opposite character, they will regard with dislike and impatience and an inclination to disbelief and criticism." (citing E. COPE, AN INTRODUCTION TO ARISTOTLE'S RHETORIC 109–10 (1867)).

145. *Modern Organizations*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1971).

146. Mark Lamport-Stokes, *Augusta, Home of the Masters, Admits First Female Members*, REUTERS, (Aug. 20, 2012, 6:25 PM), http://www.reuters.com/article/us-golf-augusta-idUSBRE87J0IE20120820 [https://perma.cc/9D26-EL9S] (discussing Augusta's changing position on its admission of women, though there undoubtedly are still individual longstanding male members who oppose the admission of female members to the association); Bruce Nolan, *Bitter Mardi Gras Debate of Race, Class Evolves 20 Years Later into a Diverse Celebration*, TIMES PICAYUNE (Feb. 12, 2012, 7:00 AM), http://www.nola.com/mardigras/index.ssf/2012/02/mardi_gras_debate_of_race_clas.html [https://perma.cc/V9HL-2DCA] (discussing the removal of membership restrictions based on race by carnival organizations); Melanie Dostis, *Hazing Embedded in College Culture?*, USA TODAY (Nov. 21, 2013, 4:03 PM) http://www.usatoday.com/story/news/nation/2013/11/21/hazing-policy-changes/3665143/ [https://perma.cc/SV2Q-HWSR] (discussing the changing policies and positions of higher learning institutions and the fraternities and sororities on their

is apparent in everyday examples ranging from business corporations to educational institutions, fraternities, sororities, and other social benefit organizations.[147]

The corporate *ethos* has also been examined and discussed as a primary motivator of criminal activity committed by corporate management and employees. Professor Pamela Bucy describes the *ethos* of an entity separate and apart from the business purpose for which it was formed.[148] Her research revealed that the wrongdoing of corporate employees can be traced and attributed to an organizational culture that encourages and rewards wrongful behavior.[149] Professor Bucy points to eight primary factors to consider in determining whether such an encouraging environment exists. The first factor asks whether corporate management is actively engaged in its operations or acts as a figurehead with plausible deniability for wrongdoing.[150] The second asks whether corporate performance goals reward and encourage lawful behavior or whether the goals articulate unrealistic expectations that pressure employees to engage in illegal activities to meet organizational goals. The third places greater responsibility on corporations with employees who have more opportunities to engage in wrongful acts to educate employees regarding laws and regulations pertinent to the industry.[151] The fourth points to

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campus regarding hazing); Micah Soloman, *9 Leadership Steps For Corporate Culture Change*, FORBES (Sep. 27, 2014, 12:51 PM), http://www.forbes.com/sites/micahsolomon/2014/09/27/a-leadership-checklist-for-culture-change-and-customer-experience-excellence/#717af3083c47 [https://perma.cc/V7UU-ZZZU].

147. *See* VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 1 (2d ed. 1886).

148. Bucy, *supra* note 143, at 1099–1100.

149. *Id*. at 1128.

150. *Id.* at 1129–30 ("The factfinder should focus its inquiries on whether management left unattended or inaccessible positions within the corporation where illegal behavior could have easily occurred. If positions were left unattended, the factfinder should scrutinize the reason for this: was there an honest and good faith oversight, or a callous recognition that if corporate employees commit illegal activity, it is best done outside the usual channels of supervision? Braithwaite's study of the pharmaceutical industry provides a graphic example of the latter. He found that many companies have systemic policies to protect the chief executive from the taint of knowledge of illegalities. They do so by having 'vice presidents responsible for going to jail.' The corporate directors tell the vice presidents: 'I don't want to know how you do it . . . just get the job done.'" (quoting JOHN BRAITHWAITE, CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY, 308, 322, 355–58, 365, 370 (1984))).

151. *Id*. at 1134–35 ("The following types of inquiries are relevant in assessing this factor: Are the appropriate employees informed of regulatory changes that

compliance programs as important in preventing a culture that encourages employee wrongdoing.[152] The fifth factor looks at whether an individual employee acted alone in committing wrongdoing or whether other agents participated in, aided, or "recklessly tolerated" the illegal activity.[153] The culpability of upper level management would usually be considered more important than the culpability of lower level employees in determining whether the wrongful activity was driven by the organizational *ethos*. The sixth factor involves past violations and whether the responsible parties suffered consequences for their actions or enjoyed rewards for their conduct.[154] Attempts by the corporation to conceal the wrongdoing and failures to remedy past wrongdoing can also be indicia of a culpable corporate environment.[155] The seventh factor accounts for compensation and bonus structures that, like unrealistic corporate goals, provide perverse incentives for employee wrongdoing.[156] The final factor is complex and controversial, involving indemnification and insurance policies that the vast majority of—if not all—corporations have in place for the benefit of officers and directors.[157] Professor Bucy acknowledges that using director and officer liability policies as indicia of a criminal *ethos* would make virtually every corporation in America indictable.[158] Accordingly, this factor requires a delicately deliberate application to ensure that valid mechanisms for defending agents and corporate interests are not subverted in the name of measuring *ethos*.

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affect their duties? Are the new regulations explained in a comprehensible manner? Do middle management executives hold regular meetings to discuss problems of compliance? Is the corporate legal staff available for discussions on compliance? Does middle management have specific training programs in the areas of ethics and government regulation?").

152. *Id*. at 1136. These programs would include internal audits, open door policies that welcome employee communication with management, requirements that employees sign written acknowledgements of relevant laws and the risk of termination for illegal activity, and the establishment of an ombudsman to field compliance questions and concerns.

153. *Id.* at 1138 (comparing the doctrine of respondeat superior and the MPC standard with the corporate ethos standard).

154. *Id.* at 1138–39.

155. *See id.*

156. *Id.* at 1139.

157. *See* Bucy, *supra* note 143, at 1134–35, 1140. This factor explores whether corporate indemnification or reimbursement of the culpable employee for associated criminal or civil exposure conceivably rewarded and incentivized the culpable behavior. *Id*. at 1140.

158. *See id.* at 1145.

An organizational personhood concept closely related to the corporate *ethos* doctrine is the corporate decision-making model referred to as the Corporate Internal Decision ("CID") Structure.[159] CID explains how an organization processes information and decides on a course of action based on goals and objectives it finds in its best interest.[160] As is the case with measuring the *ethos* of an organization, the decisions made by an organization usually extend beyond the preferences of an individual stakeholder and result from group collaboration.[161] The CID model contains two components most relevant to this analysis.[162] The first involves an organizational structure providing the divisions of authority and responsibility within the organization.[163] The second component describes the processes for making decisions, usually termed "policies and procedures."[164] This model has a number of demonstrated benefits in the traditional business context that can also be extended to measuring criminal culpability.[165] Thoughts and intentions are virtually impossible to measure without manifestations by which to measure them.[166] This fact is true of organizations and individuals.[167] The CID model allows for measuring organizational decisions upon which corporate agents base their actions, as well as the deliberations that produced those decisions.[168] Accordingly, models measuring organizational *ethos* and decision-making can help determine whether the *mens rea* element of corporate criminal liability has been satisfied, removing the need to rely on respondeat superior and other doctrines crafted to address the inability to satisfy the *mens rea* requirement generally embedded in criminal law.[169]

159. Robert E. Wagner, *Criminal Corporate Character*, 65 FLA. L. REV. 1293, 1309–10 (2013).

160. *Id*.

161. *See* Ripken, *supra* note 91, at 127.

162. *See* Wagner, *supra* note 159.

163. *Id*.

164. *Id*.

165. *See* Bucy, *supra* note 143, at 1161.

166. *See id.* at 1161–63.

167. *Id.*

168. *Id.* (discussing various means of evaluating mens rea through measurable actions). The CID structure aids in determining whether those in authority made decisions to engage in, encouraged, rewarded, or created an environment that facilitated criminal conduct conduct. *Id.*

169. *See generally id.*

IV. ARGUMENTS AGAINST GREATER ALIGNMENT OF ORGANIZATIONAL AND INDIVIDUAL SENTENCING

Critics of closer alignment between organizational and individual sentencing guidelines might offer several arguments for maintaining the status quo. First, critics might argue that alignment is pointless because corporations cannot be jailed, seemingly the primary purpose of aligning penalties for organizations with those imposed on individuals.[170] Furthermore, critics might argue that further punishment of the corporation is unnecessary because the entity-level liability shield does not protect the wrongdoer from civil or criminal liability for his actions.[171] Critics might also argue that punishing the corporation unfairly penalizes innocent parties who may not have engaged in or have direct knowledge of the culpable behavior; some might argue that the existing organizational guidelines are an unjustifiable overreach.[172] Still others might argue that any needed reforms can be addressed in the deferred prosecution and non-prosecution agreement processes.[173]

A. Sentencing Alignment is Unrealistic Because Organizations Cannot be Jailed

Some critics argue that equating the prosecution and sentencing of an organization to that of an individual is pointless because jail, among the most severe penalties that can be imposed on a convicted person, is not a realistic option for juridical entities.[174] This argument is based on the proposition that the juridical entity has "no body to be kicked."[175] A surface comparison of corporate personhood with the concept of jail might make the conclusion seem justified. The Reform Act provides for imprisonment of individuals but is silent with respect to organizations.[176] Imprisonment is not defined in that chapter, but § 3621 incorporates by reference the prison sentences permitted in § 3551 and grants the U.S. Department of Corrections the

170. *See id.* at 1178.
171. *See* Bucy, *supra* note 143, at 1180.
172. *See id.*
173. *See id.* at 1179–80.
174. *See* Wagner, *supra* note 159; *see also* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 135 (2014).
175. *See* Coffee, *supra* note 5.
176. 18 U.S.C. § 3551 (2012).

power to designate the geographic location of confinement, typically a government correctional facility.[177]

However, a deeper look reveals analogous mechanisms that might be employed to achieve the desired objectives for which imprisonment is designed.[178] First, it should be noted that jurisprudence and scholarship are generally devoid of a policy rationale disqualifying incarceration as a criminal sentencing option for organizations.[179] The finding that jailing an organization is not a viable option seems to rest on practical grounds. Critics might argue that placing the computers and furniture owned by a corporation in a designated place under lock and key for a proscribed period of time makes little sense.[180] One could also imagine a host of constitutional issues associated with attempting to place otherwise innocent members of the organization behind bars. However, existing bankruptcy law, and its reasons for why incarceration was established, provides translatable concepts that could be applied in the organizational

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177. 18 U.S.C. § 3621 (2012). Interestingly, this section refers to the imprisonment of a convicted "person," not individual which would better correlate with the distinctions made between organizations as persons and individuals as persons. *Id.*

178. 18 U.S.C. § 3553 (2012) (providing the factors to be considered in sentencing, but not distinguishing between individuals and organizations).

179. *See generally* Melrose Distillers, Inc. v. United States, 359 U.S. 271 (1959).

180. *See* Henning, *supra* note 39, at 1424–25 n.32 (citing United States v. Allegheny Bottling Co., 695 F.Supp. 856, 858-59 (E.D. Va. 1988), *reversed in part by* U.S. v. Allegheny Bottling Co., 870 F.2d 655 (4th Cir. 1989)).

> The district judge explained his analysis of a potential corporate imprisonment: "Corporate imprisonment requires only that the Court restrain or immobilize the corporation. Such restraint of individuals is accomplished by, for example, placing them in the custody of the United States Marshal. Likewise, corporate imprisonment can be accomplished by simply placing the corporation in the custody of the United States Marshal. The United States Marshal would restrain the corporation by seizing the corporation's physical assets or part of the assets or restricting its actions or liberty in a particular manner. When this sentence was contemplated, the United States Marshal for the Eastern District of Virginia, Roger Ray, was contacted. When asked if he could imprison Allegheny Pepsi, he stated that he could. He stated that he restrained corporations regularly for bankruptcy court. He stated that he could close the physical plant itself and guard it. He further stated that he could allow employees to come and go and limit certain actions or sales if that is what the Court imposes."

Id.

context.[181] In the bankruptcy context, a trustee is appointed to manage the affairs of a debtor for the benefit of creditors and other interested parties.[182] Under the supervision of the court, the trustee has complete control over the accumulation and disposition of assets and personnel decisions and otherwise conducts the entity's business affairs.[183] Because the corporation has no tangible body besides its accounts, assets, and relationships with natural persons, the bankruptcy trustee is charged with caring for and possessing the body of the corporation. Similarly, a prison warden is charged with the care and custody of inmates while having control of their physical persons.[184] Like trustees, wardens serve in primarily administrative capacities, managing the finances, personnel, and inmate population while maintaining a safe and secure facility for the protection of external and internal constituencies.[185] A fiduciary, similar to a bankruptcy trustee, who is responsible for the sentenced organization during the time served, could aid in the jailing of business entities.

B. Sentencing Alignment is Unnecessary Because Culpable Agents, Through Whom Organizations Act, Can be Held Criminally Responsible

Critics also argue that aligning organizational sentencing with individual sentencing is unnecessary because both are designed to address culpable behavior that can only be carried out by natural persons.[186] It is true that "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[187] However, current sentencing policy already accepts the concept of entity-level liability.[188] Furthermore, reserving certain types of sentences for culpable individuals will only incentivize scapegoating and other

181. *See* Saladrigas, *supra* note 69 (containing a detailed discussion of the complications in coordinating simultaneous prosecutions and bankruptcy proceedings involving the same corporate and individual wrongdoers).

182. *See* 11 U.S.C. § 704 (2012).

183. *Id*.; 11 U.S.C. § 541 (2012).

184. Casey Kennedy, *Roles of a Warden*, HOUSTON CHRON., http://work.chron.com/roles-warden-19102.html [https://perma.cc/6Q73-FMLH] (last visited Mar. 27, 2016).

185. *See id.*

186. Alschuler, *supra* note 77, at 1391–92.

187. *See Hobby Lobby*, 134 S. Ct. 2751, 2768 (2014).

188. *See* 18 U.S.C. § 3553.

gamesmanship within the organization.[189] It also fails to address situations in which identifying a single or group of culpable actors is difficult, but the wrongdoing and associate harm is evident.[190] Greater organizational sentencing exposure increases the likelihood that the wrongdoer will be brought to justice while providing a disincentive for the organization to tolerate or encourage such behavior.

C. Organizational Sentencing Already Punishes Innocent Parties and Enhanced Organizational Penalties Only Exacerbate the Problem

Critics further argue that organizational sentencing already harms innocent parties and any potential increase in organizational sentences only exacerbates the problem.[191] However, even the critics acknowledge that part of the fight is already lost because fines imposed on convicted corporations can have collateral effects on innocent parties in ways similar to incarceration.[192] These critics vigorously dispute the integrity of comparisons between the ancillary suffering endured by the beneficiaries of an organizational defendant and that of the families, employees, and other associates of a convicted and sentenced individual.[193] However, there is no noteworthy reason to offer more sympathy to those collaterally affected by organizational wrongdoing than those families, businesses,

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189. *See* Bucy, *supra* note 143, at 1129 (citing J. BRAITHWAITE, CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY 355–58, 365, 370 (1984)).

190. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 635–36 (1995) ("Corporations are highly decentralized, with responsibilities delegated down several levels of management. Thus, it can be difficult to establish individual responsibility for any criminal act. 'While the harmful consequences of the decision may be obvious, its exact source may be lost either accidentally or deliberately in the convolutions of the corporate decision making process.' Prosecuting the corporate entity can allocate responsibility to a party able to be penalized or pay compensation, even where an individual wrongdoer cannot be identified.").

191. Alschuler, *supra* note 77, at 1367 ("Of course criminal punishment cannot really be borne by a fictional entity. As Baron Thurlow, a Lord Chancellor of England, put it sometime before 1792, a corporation has 'no soul to damn, no body to kick.' This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too. The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty.").

192. *Id.*

193. *Id.* at 1368–69.

and communities the criminal justice system has left behind.[194] The question remains whether the shareholders and employees truly suffer any less when a talented but corrupt CEO is removed from the company after his crimes drove positive company valuation. Is that really worse than placing an administrator in charge of the company to ensure that past wrongs are remedied? These stakeholders are not helpless corporate dependents. The *Citizens United* majority referred to "the procedures of corporate democracy" as a means by which these persons can protect their interests.[195]

CONCLUSION

Organizational personhood has evolved to a point in modern American law where these persons are recognized as having characteristics quite similar to those historically reserved for individuals. However, the Reform Act and attendant guidelines maintain distinct approaches to sentencing individuals and organizations largely based on historical personhood differences. The *Hobby Lobby* Court's recognition of a business corporation's religious rights implicates a corporate soul and a corresponding increase in corporate criminal culpability. Accordingly, the Reform Act and attendant sentencing guidelines should be amended to better address the organizational soul and corresponding criminal culpability implicated by the *Hobby Lobby* Court's recognition of business corporations' religious rights.

194. Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 206–07 (1998) (discussing how the war on drugs and resulting incarceration of drug offenders has devastated families and neighborhoods).

195. *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 362 (2010).