Corporate Criminal Prosecution and Double Jeopardy

Robert Wagner

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Corporate Criminal Prosecutions and Double Jeopardy

Robert E. Wagner*

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Double Jeopardy has been an important feature of legal systems dating back to the Code of Hammurabi. This concept has been refined and implemented in numerous legal documents such as the Magna Carta, every state’s constitution, and in the Fifth Amendment of the federal Constitution. That said, the concept has changed considerably over the centuries and today offers more protection to defendants than ever before, while offering very little protection to the government. Meanwhile, the definition of criminal defendants has expanded to include corporations. At the time double jeopardy doctrines were originally developed, corporations were not able to be criminally prosecuted, so application of the doctrine to corporations was not explored. Over the centuries, the necessity of prosecuting corporations for criminal activity became apparent and was enacted. Once that happened, court after court started applying double jeopardy protection to corporations. Most courts, including the Supreme Court, never gave it serious analysis and simply

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assumed that corporations should have this protection. This Article argues that this assumption is wrong. This Article begins by examining how corporations came to be prosecuted criminally and how a lot of criminal procedure protections have been applied to corporations. It then looks to the history of the Double Jeopardy Clause and shows how this history does not support applying it to corporations, and in fact argues against it. Analysis of the principles of the Double Jeopardy Clause reveals that they do not warrant protecting corporations. Thus, this Article proposes that courts not allow corporations to invoke double jeopardy and that under special circumstances we even modify doctrines such as res judicata to allow for subsequent corporate prosecutions.

I. INTRODUCTION

Corporations are a vital part of our economy, but they also have the potential to engage in widespread criminal action. How should society protect itself from this possibly significant threat? As this Article discusses, courts have adapted criminal laws to be applicable to these types of organizations. At the same time, over the years and decades, courts have also developed and applied procedural protections for this context. Corporations hold more rights than at any other time in history. These increased rights came to mass attention with the Supreme Court case *Citizens United* a little over ten years ago. This case also began my investigation of what rights (in particular, those related to criminal law) a corporation should have. I have written several law review articles addressing protections like the right to remain silent, the exclusionary rule, admissibility of character evidence, and the right to be free from cruel and unusual punishment, which I extend here to the double jeopardy clause.1 In these articles, I examine both the goal behind a given general rule of evidence or constitutional provision, and analyze whether applying said rule or provision to corporations accomplishes that goal. The answers are mixed and complex, depending on the rule or provision.

This Article examines where the Double Jeopardy Clause of the Fifth Amendment falls on this spectrum. As this Article argues, the Double Jeopardy Clause contains many tensions, some of which are exacerbated when applied to corporations. In the next section, Part II, I examine the basis of prosecuting corporations for crimes in the first place. I look at the origin of this practice and its development in recent decades. I continue this examination by examining the possibility of classifying a corporation as a “person” and what impact that

has on criminal prosecutions. I conclude Part II by moving from the nature of the corporation to a focus on the nature of criminal law itself and the goals that it is trying to achieve.

In Part III, I analyze the Double Jeopardy Clause itself, beginning with the extensive history of the doctrine of double jeopardy that dates back several millennia. I then investigate the interests protected by the Double Jeopardy Clause, ending with a discussion of the significant issues in the general application of double jeopardy.

In Part IV, I combine the insights of the two previous parts by looking at how double jeopardy affects corporations specifically. I begin with an examination of current law and the way that double jeopardy has been applied to corporations for decades, often without any discussion of whether this is warranted. Next, I turn to the problems associated with applying double jeopardy to corporations, concluding that double jeopardy ought to cease benefiting such entities. Instead, corporations should be limited to using other procedural protections (such as res judicata) that may themselves be restricted in some circumstances at the discretion of judges.

II. CORPORATE CRIMINAL LIABILITY

A. The Framework of Corporate Criminal Liability

There is a strong public interest in the government exercising reasonable and effective regulations on corporations. However, for over a hundred years, there has been a debate about both the existence and appropriate level of corporate criminal liability.

Originally, corporations were not subject to the criminal law. William Blackstone, whose commentaries have been called the “most influential law book in Anglo-American history” and is cited approximately ten times a year by the U.S. Supreme Court, believed that the correctness of not holding a corporation criminally liable was so clear that it did not need to be elaborated upon. In 1701, American courts addressed the question and held that only individuals could be charged criminally. After


6. Albert W. Alschuler, Two Ways to Think About the Punishment of Corporations, 46 AM. CRIM. L. REV. 1359, 1363 (2009) (stating William Blackstone’s opinion that “[a] corporation cannot commit treason, or felony, or other crime” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *476)).

considerable debate and over two hundred years later, in the beginning of the twentieth century, the U.S. Supreme Court finally established corporate criminal liability in *New York Central & Hudson River Railroad Co. v. United States* and used the *respondeat superior* principle to determine guilt.

Today, a corporation can be held criminally liable for virtually every crime on the books, except those which need an actual body in their commission, such as for rape. The opponents of corporate criminal liability recognize that the survival of corporations is very dependent on positive public perceptions, which can be dramatically affected by criminal proceedings. These critics view corporate criminal liability as an “inefficient relic” that can better achieve its goals in the civil system or they believe that, even worse, corporate liability is a useless overreaction from an ignorant society. They are partially concerned with the fact that all corporations, large and small, cannot avoid the potentially devastating impact on public attitude of a criminal conviction. Even accusations can be very damaging to a corporation’s image, an image it may have crafted through great expense and planning. On the other hand, many people think that more corporate prosecutions would be appropriate, as evidenced by the Department of Justice’s increased focus on corporate crime over the last decade.

Yet, given the fact that a corporation has no body itself and that how it makes decisions is clearly different than the way a natural person does, what does it mean to say that a corporation has committed a crime or wrong? Many have asserted that we should ask if someone with a high level of decision-making authority in the corporation has committed a wrong. Shareholders are not usually able to affect the management of their corporation because the decision-making authority rests with the board and, on a day-to-day basis, with


15. Kane, supra note 2, at 748.


various levels of corporate officials. Therefore, some argue that it is appropriate to hold either the managers or employees liable for any criminal conduct, but not the corporation itself; they argue that it is unfair to punish innocent shareholders by imposing criminal penalties on the whole entity when only a small part may have done anything wrong. So when courts do impose criminal liability on corporations, the shareholders and employees become “collateral damage.” This point was raised in New York Central, when the defendants argued that when one punishes the corporation, one actually punishes innocent shareholders, and that it is impossible for the corporation as an entity to commit a crime because those actually making the decisions could not legally authorize criminal acts. At the time, this was not an unusual belief, given the current understanding that a corporation could not possess the moral blameworthiness necessary to perpetrate an intentional crime. Eventually courts determined that holding corporations criminally liable was necessary and used the tort law liability framework of *respondeat superior* as a viable criminal law theory.

Nevertheless, the use of a tort principle in criminal law was quickly attacked. People thought that its use was inconsistent with the purpose of criminal law (namely the punishment of those who are morally blameworthy) because it does not rely on personal fault but instead is based upon vicarious guilt. Critics also attacked the use of *respondeat superior* to criminally prosecute corporate behavior based on the claim that it was “overly broad.” For example, even if the corporation itself is a victim and it had told the employee specifically not to perform the action, it is still possible for a court to hold a corporation liable for the actions of its employee.

Some corporate convictions were based on individual actions, which resulted in disastrous results for the corporation, its employees, shareholders, and other stakeholders. For example, the collapse of Arthur Andersen resulted in 85,000 people losing their jobs and untold difficulties not only for those employees but also for people who relied on those employees and people

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20. See Alschuler, supra note 6, at 1359.
23. Khanna, supra note 3, at 1484.
24. Id. at 1484-85 (footnote omitted).
25. Sheley, supra note 8, at 236.
27. Alschuler, supra note 6, at 1367 (“The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty.”).
whose injuries were not rectified even though a court later reversed the conviction.\textsuperscript{28} In addition to the existence of inadvertent victims, scholars have argued that corporate criminal liability is unnecessary and in fact can lead to corporations spending more money avoiding crime than they should, which results in so-called overdeterrence.\textsuperscript{29} The concern is that a corporation will spend more money avoiding the violation than the harm could have caused, thereby resulting in a net loss.

Nonetheless, while corporations are almost unquestionably an essential part of modern life and bring many advantages, they also have the ability to cause a significant amount of harm.\textsuperscript{30} It is possible for a corporation to have as much or even more coercive power than a sovereign government.\textsuperscript{31} In fact, large modern corporations are very similar to sovereignties; they can have more economic power than nations, they often form alliances and partnerships with foreign entities, and some even have their own security forces.\textsuperscript{32} In addition to their possible size and power, corporations have taken actions that have contributed to, if not caused, many types of disasters.\textsuperscript{33} Their complexity, resources, and size enables them to commit significantly larger and more damaging crimes.\textsuperscript{34} There is also a possible expressive value of punishing corporations, and because of societal perceptions, if the government fails to punish corporations, the criminal law may seem less legitimate.\textsuperscript{35} A related argument used to justify corporate criminal liability is that it allows the community to express its moral judgment.\textsuperscript{36}

If people think that a corporation should be held criminally liable and it is not, that could weaken the criminal justice system because of appearances of favoritism and unequal application of the law.\textsuperscript{37} Perception could exacerbate this effect because people reportedly experience a heightened sense of moral indignation when dealing with a corporation than they do for a natural person,
even when dealing with the same crime.\textsuperscript{38} As a consequence, there would be a situation in which people feel that the criminal justice system is functioning below the norm when it should actually function at a higher level than the norm.\textsuperscript{39}

On the other side of the spectrum, there are those who conceive of corporations as mere legal fictions referring to those people and agreements that make up the organization; therefore, any liability should only attach to these individuals.\textsuperscript{40} That said, this model of the corporation has received numerous criticisms. One such criticism is that corporations have cultures that are different from those of the individuals in them.\textsuperscript{41} Another problem with imposing criminal liability only upon individuals is that, due to the nature of a large corporation and the possible complexity of its various hierarchies, determining which individual may have violated the law can be difficult, if not impossible.\textsuperscript{42} Furthermore, the individuals alone may not be perpetrating, or at least not orchestrating, the criminal behavior; rather, it may be an actual business strategy or a simple standard operating procedure that creates the criminal behavior.\textsuperscript{43} A corporation’s policies can encourage criminal behavior.\textsuperscript{44} In fact, there are many ways that corporate culture and organizational structure can influence individual decision-making.\textsuperscript{45} If the criminal law attributes the criminal behavior of corporations to the individual alone, it may disregard the institutional processes occurring within the organization that may have at least contributed to, if not caused, the criminal behavior.\textsuperscript{46} A famous and disturbing example of corporate misconduct inextricably tied to the character and culture of the corporation was the tobacco industry’s ‘longstanding pattern of fraudulently misleading regulators and the public about the obvious and known health risks involved in smoking.’\textsuperscript{47} The final argument in favor of corporate criminal liability is that it can protect corporations, or at least law-abiding corporations. In many circumstances,

\begin{itemize}
\item \textsuperscript{39} Gregory M. Gilchrist, \textit{The Expressive Cost of Corporate Immunity}, 64 \textit{HASTINGS L.J.} 1, 52 (2012).
\item \textsuperscript{40} Gilchrist, supra note 13, at 15.
\item \textsuperscript{41} \textit{Id.} at 16.
\item \textsuperscript{42} Brickey, supra note 7, at 608–09.
\item \textsuperscript{43} See Beale, supra note 34, at 1484 (discussing the engineering giant Siemens’ systemic use of bribes as one instance of when the corporation and not an individual committed a crime).
\item \textsuperscript{44} \textit{See} MARSHALL B. CLINARD & PETER C. YEAGER, \textit{CORPORATE CRIME} 58 (2006).
\item \textsuperscript{45} Goforth, supra note 18, at 634.
\item \textsuperscript{47} See Peter Pringle, \textit{The Chronicles of Tobacco: An Account of the Forces That Brought the Tobacco Industry to the Negotiating Table}, 25 \textit{WM. MITCHELL L. REV.} 387, 387–88 (1999).
\end{itemize}
corporations that disregard the law otherwise have a competitive advantage over corporations that follow the law.\textsuperscript{48}

It is possible that civil enforcement could control corporate misconduct, but this may also be ineffective because civil fines cannot replicate the reputational harm of criminal sanctions.\textsuperscript{49} Part of a criminal sanction is the stigma that attaches and will attach whether it is an individual’s or corporation’s sanction.\textsuperscript{50} This reputational damage stemming from criminal convictions is also problematic. The unpredictability associated with reputational damage may be advantageous,\textsuperscript{51} and yet, the general nature of reputational damage and the seeming inconsistency could lessen this advantage.\textsuperscript{52} Even though there clearly remain many objections to and detractors from the concept of corporate criminal liability, the supporters also very much outnumber their opponents.\textsuperscript{53} If we accept that criminal prosecution of some sort is useful when applied to corporations, we need to discuss which substantive laws and legal processes should then be applied to corporations. To do this, it is important to start by understanding the nature of corporate entities.

\textbf{B. Corporations and Personhood}

Most people recognize that the corporate structure is needed in the modern business world, and that the pooled resources at their command have been the source of most, if not all, the great modern enterprises.\textsuperscript{54} Nevertheless, since a corporation is unlike a natural person, it may face special challenges in criminal proceedings. In fact, scholars and commentators realized almost a hundred years ago that juries are more likely to find corporations guilty than they are to find individuals guilty.\textsuperscript{55} This may be somewhat ironic since many early corporations were explicitly benevolent institutions, including several new church congregations.\textsuperscript{56} In fact, corporations have a dramatic range of purposes, and many different types of organizations are formed as corporations, running the gambit from churches and the Guardian Angels (self-appointed public protectors) to the Ku Klux Klan.\textsuperscript{57} A corporation actually funded the


\textsuperscript{51} See Buell, supra note 49, at 514.

\textsuperscript{52} Gilchrist, supra note 13, at 38.


\textsuperscript{56} Goforth, supra note 18, at 625.

\textsuperscript{57} Miller, supra note 31, at 906.
first permanent new world colony,\textsuperscript{58} and the first Thanksgiving was instituted by a corporation.\textsuperscript{59} The first great corporation of the United States was the Bank of the United States,\textsuperscript{60} and even back then it was commonly criticized for having too much political and economic power.\textsuperscript{61}

Nonetheless, one must remember that most corporations are small in size and influence: Of the three million businesses that belong to the U.S. Chamber of Commerce, more than ninety-five percent have fewer than 100 employees, and of all federally taxed corporations, more than seventy-five percent have less than one million dollars in receipts reported per year.\textsuperscript{62} But in terms of purpose and/or size, the Supreme Court rarely differentiates between different types of corporations.\textsuperscript{63}

Many people are concerned with protecting democracy from the corruptive and often distorting effect of massive amounts of money collected through the corporate structure.\textsuperscript{64} Illustrative of the Founding Fathers' common concern with corporations, James Madison stated that “the indefinite accumulation of property” was “an evil which ought to be guarded against,” and that the “power of all corporations ought to be limited in this respect.”\textsuperscript{65} This fear of corporations led to a number of people referring to them as “soulless,” and some—such as President Thomas Jefferson—fearing that they “would subvert the Republic.”\textsuperscript{66} This fear is based at least partly on the claim that if corporations have the same constitutional rights as individuals but hold increased power, the result is clearly the supremacy of the corporate form over the natural form of personhood.\textsuperscript{67} The fear or dislike of corporations is far from universal, and many scholars maintain that while it may be true that corporations have been given too much power, this does not mean that they are “bad.”\textsuperscript{68} It is possible that corporations are in fact beneficent entities that simply need a certain level of control placed upon them and perhaps fewer constitutional protections.

Historically, at different points, American and English corporations have had limited constitutional protections when compared with individuals.\textsuperscript{69} Originally, corporations were not significantly addressed in the Constitution.

\begin{itemize}
\item \textsuperscript{58} WINKLER, \textit{WE THE CORPORATION}, supra note 5, at 6.
\item \textsuperscript{59} Id. at 17.
\item \textsuperscript{60} Id. at xxi.
\item \textsuperscript{61} Id. at 36.
\item \textsuperscript{62} Citizens United v. FEC, 558 U.S. 310, 354 (2010).
\item \textsuperscript{63} WINKLER, \textit{WE THE CORPORATION}, supra note 5, at xxi.
\item \textsuperscript{64} Miller, supra note 31, at 896 (quoting McConnell v. FEC, 240 U.S. 93, 205 (2003)).
\item \textsuperscript{65} WINKLER, \textit{WE THE CORPORATION}, supra note 5, at 4.
\item \textsuperscript{66} Citizens United, 558 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).
\item \textsuperscript{67} Mayer, supra note 54, at 658.
\item \textsuperscript{68} See, e.g., Reza Dibadj, (Mis)conceptions of the Corporation, 29 GA. ST. U. L. REV. 731, 734 (2013).
\item \textsuperscript{69} Okla. Press Publ’g Co. v. Walling, 327 U.S. 186, 204–05 (1946).\end{itemize}
The word corporation is not in the federal Constitution. In fact, only four states (Connecticut, Pennsylvania, Massachusetts, and Vermont) mention corporations in their original constitutions, and in situations in which state constitutions did award specific rights to corporations, these were different than those given to individuals. At the federal level, some courts (for example, during the Lochner era) took the position that in terms of constitutional protection of criminals, corporations were different and were entitled to the right of property but not liberty. Jurists dispute whether the corporation is an entity beyond the people involved and its legal status. One of the first descriptions of a corporation was from Chief Justice John Marshall, who described a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . .” Put succinctly, a corporation is not allowed to conduct business beyond the scope of its charter. In a very recent description of the corporate entity, the Court stated:

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.

Justice Stevens stated that even though corporations make many significant contributions to society, they are not members of society. In a similar vein, the Court has indicated that, while it is appropriate for courts to protect corporations from unlawful investigations, they do not have equivalent rights with people in terms of privacy. Justice Sotomayor has suggested the central problem is in giving corporations any constitutional rights. In a less critical position and in part because of the idea that corporations derive their existence and hence all privileges from the state, courts have limited corporations’ rights. For example, at one point, a Supreme Court Justice asserted that if a law enforcement agency was simply “curious” about a corporation, it would
have the legitimate right to satisfy that curiosity by conducting investigations. In the instance of such investigations, there would be some protection against the invasion of privacy but at a very minimal level; in fact, the only significant limitations were that the inquiry had to deal with subject matter in the domain of particular agencies, that the information requested could not be too indefinite, and that the information had to be reasonably relevant.

The Court’s decision in *Santa Clara County v. Southern Pacific Railroad Co.* portrays an alternate view that a corporation has rights and duties conferred upon it stemming from the rights and duties of its human members. This sentiment continues today, in that courts treat corporations in many ways as though they are natural people. For example, not only can corporations be held responsible for criminal actions, but they can also be parties to contracts, own property in their own name, and sue others in court or be sued by them. Most would agree that the law should treat actors differently if they are in fact different, but should treat them the same if they are significantly similar.

From a constitutional perspective, treating entities that clearly differ from one another the same is just as large an error as treating those that are the same differently.

The Supreme Court declared in 1886 that a corporation is a person for at least some constitutional purposes. However, as Justice Stevens pointed out, corporations have several unnatural and distinguishing attributes that increase their ability to raise capital and use that capital in ways that maximize investors’ returns. These attributes include limited liability, the separation of control from ownership, possibly unending life, and favorable legal treatment of both the accumulation of assets by the corporation and the eventual distribution of those assets. Justice Ruth Bader Ginsburg agreed with Justice Stevens that corporations do not have a conscience, belief, feelings, thoughts, or desires.

There are at least three different ways that the law can view a corporation as a person: a moral person, a natural person, and a legal person. Though impossible to argue that a corporation is a natural person, and equally

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83. *Id.* at 652–53.
85. *Id.* at 396.
89. *Santa Clara*, 118 U.S. at 396.
92. Kim, *supra* note 38, at 784.
impossible to argue it is not a legal person, one could argue that a corporation is a moral person, making it therefore appropriate to hold it morally accountable.\textsuperscript{93} Thus, a corporation is both the same and different in terms of whether the law should treat it in the same manner as an individual. Taking a different approach, some scholars claim that because corporations are not humans or citizens, and in fact are just tools to human ends, society has no need to honor any claim of autonomy unless that autonomy is itself useful for humans.\textsuperscript{94} Further evidence against a corporation’s personhood claim is that corporations can only decide, act, or intend anything through the human members of the corporation; without them, the corporation could not function or even have an identity.\textsuperscript{95} At the same time, this view of the corporation as an extension of the humans involved is undermined by the fact that even if every human involved has died, the same corporation can live on for several generations.\textsuperscript{96} An even stronger link to personhood is demonstrated by the fact that each corporation is unique and has its own personality and character that are social realities in the eyes of the American people.\textsuperscript{97}

After \textit{Citizens United v. FEC},\textsuperscript{98} some commentators have gone so far as to say that corporations are people, at least for First Amendment purposes.\textsuperscript{99} \textit{Citizens United} caused a backlash and inspired many to call for a constitutional amendment eliminating all constitutional protections for corporations.\textsuperscript{100} Relatedly, Justice Stevens explained that people with differing understandings of the nature of corporations can see that corporations are distinguishable from human beings and the government must therefore regulate them differently.\textsuperscript{101}

That said, the dispute about whether corporations should have constitutional protections did not begin with \textit{Citizens United}, but in fact, has been raging for two centuries.\textsuperscript{102} The actual decision in \textit{Citizens United} does not use personhood to grant the constitutional protections, but rather, focuses

\begin{itemize}
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Kent Greenfield et al., \textit{Should Corporations Have First Amendment Rights?}, 30 Seattle U. L. Rev. 875, 878 (2007).
\item \textsuperscript{95} Ripken, supra note 33, at 100-01.
\item \textsuperscript{96} Peter M. Blau & W. Richard Scott, \textit{Formal Organizations: A Comparative Approach} I (1962).
\item \textsuperscript{97} Andrew E. Taslitz, \textit{The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule}, 76 Miss. L.J. 483, 486-87 (2006).
\item \textsuperscript{98} 558 U.S. 310 (2010).
\item \textsuperscript{100} Winkler, \textit{We the Corporation}, supra note 5, at 326.
\item \textsuperscript{101} \textit{Citizens United v. FEC}, 558 U.S. at 466 n.72 (2010) (Stevens, J., concurring in part and dissenting in part).
\item \textsuperscript{102} Winkler, \textit{We the Corporation}, supra note 5, at 36.
\end{itemize}
on the rights of people like shareholders and listeners.103 Most decisions granting corporations rights do not rely on corporate personhood.104 In fact, corporate personhood has actually been used to limit the rights of corporations.105 One of the most ardent objectors to the rights of corporations was Justice Roger Taney, infamous author of the *Dred Scott* case.106 The Taney court embraced the corporate personhood argument and used this reasoning to restrict the rights of corporations.107 The debate has continued for such a long time and become so entrenched in controversy that it is possible that the United States may need a constitutional amendment to determine a corporation's ultimate status.108

One suggestion is to establish a constitutional amendment that states that corporations only have the rights specifically granted to them.109 Until such an amendment is passed, we need to decide which protections apply, which ones do not, and which ones apply in a different way. One approach that seems more promising than asking about the personhood of corporations, is to look at what the criminal law is attempting to accomplish in the first place.

**C. The Purpose of Corporate Criminal Liability**

Organizations are uniquely limited to being punished with fines and other non-incarcerating criminal penalties,110 but they are still subject to significant repercussions.111 As some have argued, it is possible that when a court punishes a corporation, what really happens is that the court punishes its stockholders, most of whom were perfectly innocent, and essentially deprives them of their property without the ability to object or even be heard regarding the issue.112 At the same time, scholars have argued that because of the difficulty involved in identifying and prosecuting an individual participating in corporate activities, the legal system needs to be able to use vicarious attribution for corporations.113

All that said, criminal prosecutions of corporations have occurred even when corporate management apparently took significant steps to avoid the

103. *Id.* at 364.
104. *Id.* at 37.
105. *Id.* at xx.
106. *Id.* at xix.
107. *Id.* at 75.
111. *Id.* at 386-87.
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commission of criminal activities. To better understand the specific prosecutorial options for corporations, it is useful to look at how the underlying goals of the criminal law interact with corporations generally and specifically. The generally accepted goals of criminal prosecutions are deterrence, retribution, rehabilitation, and incapacitation. When it comes to corporations, the Supreme Court has held that deterrence is an appropriate purpose of criminal liability and that retribution is another legitimate basis for criminal corporate prosecutions because corporations can appropriately be considered blameworthy. In addition to these goals, helping to shape and convey society’s feelings of condemnation is a possible goal of criminal law. There is almost always some level of condemnation involved in imposing corporate criminal punishment, and some argue that this expression serves purposes beyond deterrence.

Even though there are other significant goals of criminal law, many scholars and judges treat deterrence as the primary, if not sole, goal for such liability. Deterrence is divisible into specific and general deterrence. Specific deterrence is directed at the actual (or specific) person or institution that committed the offense and tries to prevent that entity from committing the same or similar acts in the future. General deterrence, on the other hand, refers to the idea that even those who are not themselves punished can be deterred from committing a crime by observing or at least being aware of the punishment that others received for the same crime. To successfully use the deterrence rationale, and thereby justify corporate criminal liability as opposed to simply individual liability, one needs to show that corporate criminal liability provides at least some increased deterrence in addition to what individual liability alone would accomplish. The survival and proliferation of these laws results partly from the law’s ability to simultaneously achieve expressive benefits, positive consequential benefits, and retributive and just goals. In relation to corporations, the existence, need and proliferation of these types of laws is only part of the question of how the law punishes or should punish them. The other part of the question is what types of protections a corporation should be able to

114. Id. at 386.
115. See Brickey, supra note 7, at 605–06; Sheley, supra note 8, at 230.
117. See Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 DUKE L.J. 1, 37.
119. Khanna, supra note 3, at 1494 nn.91–93.
120. Brickey, supra note 7, at 606.
121. Id.
122. Khanna, supra note 3, at 1494-95.
123. See Baer, supra note 19, at 1-2.
raise. The most formidable of defenses are those based in the Constitution. I have addressed the applicability of many other constitutional provisions to corporations in previous work, while Part III will focus on the Double Jeopardy Clause.

III. THE DOUBLE JEOPARDY CLAUSE

A. The History of Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment states: 

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The Supreme Court has “found more guidance in the common-law ancestry of the Clause than in its brief text.” The Court has gone so far as to state that “[s]ince the prohibition in the Constitution against double jeopardy is derived from history, its significance and scope must be determined, ‘not simply by taking the words and a dictionary, but by considering (its) origin and the line of (its) growth.’” The roots of double jeopardy have been firmly established, extending far back into not only the common law but also ancient history. It was one of the limitations of governmental power specified in the Magna Carta in 1215. Even before that, it extends back as early as Ancient Greek, Roman and Biblical times. Amazingly, laws against changing final judgements can be traced all the way back to the Code of Hammurabi. Even in the Dark Ages when very little protection of criminal defendants existed, double jeopardy did. The prohibition against double jeopardy is in every state’s constitution and has been described as “a part of all advanced systems of law.”

Modern double jeopardy “had its origin in the three common-law pleas autrefois acquit, autrefois convict, and pardon. These three pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense.” In an early and influential treatise on the law,

124. See supra note 1.
126. Id.
130. Lissa Griffin, Untangling Double Jeopardy in Mixed-Verdict Cases, 63 SMU L. Rev. 1033, 1033 (2010) [hereinafter “Griffin, Untangling”].
Blackstone stated that “the plea of autrefois acquit, or a formal acquittal, is grounded on this universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense.” 136 Blackstone stated the rule as “[W]hen a man is once fairly found not guilty upon an indictment, or other prosecution . . . he [can] plead such acquittal in bar of any subsequent accusation for the same crime.” 137 The ancient version of the right, however, also has significant differences. Originally, common law jeopardy only extended to felonies, 138 and, in Blackstone’s time, the right also applied to limit a defendant’s ability to appeal a sentence. 139 In fact, with autrefois acquit and autrefois convict there was originally no possibility of appeal or new trial by the defendant. 140 In discussing the Double Jeopardy Clause, the Framers were concerned that the defendant be entitled to an appeal if it was warranted. 141 “It was not until 1896 that it was made clear that a defendant could seek a new trial after conviction, even though the government enjoyed no similar right.” 142 The Double Jeopardy Clause did not apply to the states until 1969. 143 Its application took place via the Fourteenth Amendment 144 in Benton v. Maryland 145

Arguably, over the years, the Court has added to the complexity of the Double Jeopardy Clause by moving it farther from its original intention as a narrow but categorical protection. 146 Possibly the “most fundamental rule in the history of double jeopardy jurisprudence has been that ‘[a] verdict of acquittal . . . could not be reviewed on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution’.” 147 The Court has described three protections of the Double Jeopardy Clause, which are that “[i]t protects against a second prosecution for the same offense after acquittal, it protects against a second prosecution for the same offense after conviction and finally that it protects against multiple punishments for the same offense.” 148 Notably, the Court draws a distinction between protecting against

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137. Griffin, Untangling, supra note 130, at 1043 (citation omitted).
139. Ex Parte Lange, 85 U.S. 163, 169 (1873).
146. Henning, Rehabilitation, supra note 36, at 3.
multiple prosecutions and multiple punishments.\textsuperscript{149} Scholars have even argued that the primary motivation for the Double Jeopardy Clause is the prohibition against multiple punishments.\textsuperscript{150} That said, the question of whether a punishment is multiple and therefore prohibited is one of legislative intent.\textsuperscript{151} In some cases, the Double Jeopardy Clause does nothing more than prevent a court from sentencing a defendant to more than what the legislature intended.\textsuperscript{152} Even if the historical purpose of the right against double jeopardy was both to prohibit two punishments for the same crime as well as two prosecutions for the same crime, today the focus is much more on two prosecutions.\textsuperscript{153} This makes sense given that “[f]ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.”\textsuperscript{154}

Double jeopardy is one of the “great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom.”\textsuperscript{155} Indeed, “[t]he theory of double jeopardy is that a person need run the gantlet only once.”\textsuperscript{156} That said, the phrase “twice running the gauntlet” has been criticized by scholars and justices as leading to a “decision by slogan.”\textsuperscript{157} Furthermore, noted scholars have claimed that the language of the Fifth Amendment does not fit the modern way that the Court has interpreted it.\textsuperscript{158} For example, the term “life or limb” has not been interpreted to limit the clause to the death penalty or removal of a limb, and the clause instead applies to a vast array of punishments including fines;\textsuperscript{159} apparently “‘life or limb’ should be understood as a vivid and poetic metaphor for all criminal punishment.”\textsuperscript{160} Double jeopardy applies to all essentially criminal sanctions, and even misdemeanors qualify for the protection.\textsuperscript{161} Given its importance and the fact that it applies to such a broad category, what does it actually do?

At its core, the Double Jeopardy Clause, “prevents the retrial of a defendant on the same criminal charges.”\textsuperscript{162} The Court has repeatedly stated that the

\textsuperscript{149} Anne Bowen Poulin, \textit{Double Jeopardy: Grady and Dowling Stir the Muddy Waters}, 43 \textit{RUTGERS L. REV.} 889, 907-08 (1991) (citation omitted) [hereinafter “Poulin, Waters”].
\textsuperscript{150} Hessick & Hessick, \textit{supra} note 143, at 45.
\textsuperscript{153} Hessick & Hessick, \textit{supra} note 143, at 46.
\textsuperscript{155} Kepner v. United States, 195 U.S. 100, 122 (1904).
\textsuperscript{157} Griffin, \textit{Untangling, supra} note 130, at 1040 (citation omitted).
\textsuperscript{159} Hessick & Hessick, \textit{supra} note 143, at 63 (citation omitted).
\textsuperscript{160} Amar, \textit{supra} note 158, at 1810.
\textsuperscript{162} Kane, \textit{supra} note 2, at 727 (citation omitted).
prohibition is not only against being punished twice, but also against being tried twice for the same offense.\footnote{Kepner v. United States, 195 U.S. 100, 130 (1904).} Unfortunately, when the Double Jeopardy Clause was proposed, there was no clear understanding of what was meant by the “same offense.”\footnote{Henning, Rehabilitation, supra note 36, at 7.} The Framers used ambiguous language when drafting the Clause, possibly because at the time there were very few statutory crimes.\footnote{Lisa Griffin, Two Sides of a “Sargasso Sea”: Successive Prosecution for the “Same Offense” in the United States and The United Kingdom, 37 U. Rich. L. Rev. 471, 473-74 (2003) [hereinafter “Griffin, Sargasso”].} Today, the standard test for double jeopardy asks whether all the elements of one crime are part of another, such as how a crime for felony-murder based on a homicide committed in the middle of a robbery could not be later prosecuted as a robbery. This is because all the elements of the robbery charge were a part of the felony murder prosecution.\footnote{Poulin, Waters, supra note 149, at 893.} This is commonly referred to as the Blockburger test, under which “[a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”\footnote{Blockburger v. United States, 284 U.S. 299, 304 (1932).} The Blockburger, or Same-Elements, test asks whether each offense contains an element not contained in the other, if they do not, they are the “same offense” for double jeopardy purposes.\footnote{United States v. Dixon, 509 U.S. 688, 696 (1993).} The government cannot try a defendant for a greater offense once he has been convicted of a lesser included offense.\footnote{Jeffers v. United States, 432 U.S. 137, 150 (1977).} In fact, prosecuting either a lesser included offense first or second is equally offensive under the double jeopardy clause.\footnote{Id. at 151.} It is possible that if the facts necessary for the greater offense were not discovered despite due diligence before the first trial, an exception to the prohibition may apply.\footnote{Id. at 152.} There are some limited exceptions, for example when a victim later dies from the injuries sustained by the attempted murder.\footnote{Id. at 1813 (citations omitted).} The same-elements test is applied in both the multiple-punishments setting and the multiple-prosecution setting.\footnote{United States v. Dixon, 509 U.S. 688, 696 (1993).}

Double jeopardy begins (or attaches) at two different points: in a jury trial, when the jury is empaneled and sworn in, and in a bench trial, when evidence begins to be heard.\footnote{Serfass v. United States, 420 U.S. 377, 378 (1975).} After double jeopardy attaches a second trial is usually allowed, but there are exceptions. First, if a defendant has bribed a juror or
judge, double jeopardy will not apply, one can argue that the defendant was not really in jeopardy during the first trial. Second, a defendant can elect to have two trials without offending double jeopardy. After a defendant’s successful appeal there can be a second trial. This is allowed because the defendant waived his right with the appeal. An alternative explanation is that the jeopardy did not end until the verdict was final. If a reviewing court overrules a conviction for insufficient evidence, then no retrial is allowed, and the double jeopardy clause will bar the subsequent retrial in that situation.

It has been long established that double jeopardy cannot be avoided by “artful pleading.” For example, where felony murder is based on a robbery, the government cannot charge felony murder and then charge the robbery later if needed. In order to avoid this problem, the Double Jeopardy Clause prevents the government from relitigating any issue that had been necessarily decided by a jury’s acquittal in a prior trial. This is arguably a departure and expansion from the historic roots of double jeopardy. As Justice Ginsburg stated, “[i]n criminal prosecutions, as in civil litigation, the issue-preclusion principle means that ‘when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.’” The Supreme Court has pointed out that claim preclusion has been a long-standing part of civil litigation and is part of the Constitution’s prohibition on successive criminal prosecutions.

Similar to double jeopardy, res judicata is a possible defense to a subsequent proceeding in both civil and criminal proceedings. Res judicata will prevent a rehearing of the same cause of action, and collateral estoppel will preclude a rehearing of previously litigated issues even if the cause of action is different. It is clear that Congress can impose both a criminal sanction and a civil sanction for the same act or omission.

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176. Serfass, 420 U.S. at 393.
181. Theis, supra note Error! Bookmark not defined., at 279.
184. Bravo-Fernandez, 137 S.Ct. at 357.
proceedings have been increasing and becoming the norm in economic criminal settings for over 25 years.\footnote{188} Neither double jeopardy nor \textit{res judicata} is a bar in a civil proceeding following a criminal trial due to the difference in degree of the burden of proof.\footnote{189} In a civil trial, the defendant typically only has to be shown to be guilty by a preponderance of the evidence as opposed to beyond a reasonable doubt as required in a criminal trial.

If the two crimes contain the same elements, or the same issue that formed the basis for a verdict, a retrial is prohibited—but what if there is no verdict? Mistrials are a way of avoiding a verdict.\footnote{190} In cases where a mistrial was declared before reaching a verdict, it is clear that jeopardy did attach, but that is only the beginning of the question as to whether double jeopardy bars a retrial.\footnote{191} Once a defendant has been put to trial in front of a jury, even if the jury is dismissed without a verdict and without the defendant’s consent, he may be entitled to protection from a subsequent prosecution.\footnote{192} The Court has pointed out that in addition to those times when a second trial was meant to harass the defendant or allow the state to make a better case against the defendant, other instances of discharging a jury may invoke the Double Jeopardy Clause as well.\footnote{193}

Usually a retrial is allowed if a defendant requests a mistrial, but not if he was goaded into it by the prosecution.\footnote{194} Even in the earliest cases, the Court warned that the ability to dismiss a jury and thereby have another trial should “be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.”\footnote{195} As far back as 1824, the Court held that in cases of “manifest necessity,” a person can be retried after having gone through an initial trial that ended without a verdict.\footnote{196} The Court has recognized that under some circumstances where “the end of public justice would otherwise be defeated” a defendant can be tried again.\footnote{197} The classic example of a permissible retrial is when there is a mistrial due to the jury being unable to agree, a so-called hung-jury.\footnote{198} “A jury’s inability to reach a decision is the

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\footnote{188}{Peter J. Henning, Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy, 31 A.M. CRIM. L. REV. 1, 4 (1993) [hereinafter "Henning, Vacuum"].}
\footnote{189}{Helvering v. Mitchell, 303 U.S. 391, 397 (1938).}
\footnote{190}{Thomas, supra note 141, at 1554.}
\footnote{191}{Illinois v. Somerville, 410 U.S. 458, 467 (1973).}
\footnote{192}{Green v. United States, 355 U.S. 184, 188 (1957).}
\footnote{193}{Downum v. United States, 372 U.S. 734, 736-37 (1963).}
\footnote{194}{David L. Botsford & Stanley G. Schneider, The “Law Game”: Why Prosecutors Should be Prevented From a Rematch; Double Jeopardy Concerns Stemming From Prosecutorial Misconduct, 47 S. TEX. L. REV. 729, 730 (2006) (citation omitted).}
\footnote{195}{United States v. Perez, 22 U.S. 579, 580 (1824).}
\footnote{196}{Id.}
\footnote{197}{Peter J. Henning, The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions, 63 TENN. L. REV. 793, 843 (1996) (citation omitted) [hereinafter "Henning, Conundrum"].}
\footnote{198}{Downum v. United States, 372 U.S. 734, 736 (1963).}
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kind of ‘manifest necessity’ that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled.”

The “interest in giving the prosecution one complete opportunity to convict those who have violated its laws justifies treating the Jury’s inability to reach a verdict as a nonevent that does not bar retrial.” A judge is supposed to discharge a jury before reaching a verdict “only in very extraordinary and striking circumstances.” If a defendant moves for a mistrial, this is a presumed waiver of the prohibition against reprosecution. If the defendant does not consent to a motion for mistrial, however, the “doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant’s option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.” To satisfy the “manifest necessity” doctrine, the trial court should find that the “ends of public justice” would be defeated by allowing the trial to continue.

The ends of justice might be defeated when the court finds out that a juror knows the defendant and hence is likely prejudiced against the government. In addition to this example, there are multiple other acceptable reasons for not barring a reprosecution including: a letter published in the newspaper raising doubts about a jury’s impartiality, a jury that remained indecisive after forty hours of deliberation, a juror having served on the grand jury indicting the defendant, or a military court martial due to necessities in the field. Virtually all the cases of manifest necessity turn on the particular facts and are not easily categorized. Manifest necessity has also been called “imperious necessity” and said to be present “only in very extraordinary and striking circumstances”.

Even after jeopardy has attached and a verdict has been returned, at least one situation remains in which a defendant may be tried twice for the same crime. This can occur if a state and the federal government both decide to prosecute him. The vindication of criminal justice is a compelling counterbalance of which the Founding Fathers were aware and which they intended to have weighed against the possible oppression of the government and callousness of repeated prosecutions. Notwithstanding this, two states or sovereigns can prosecute a defendant for the same offense in two separate trials.

200. Id. at 117 (citing Arizona v. Washington, 434 U.S. 497, 509 (1978)).
201. Downum, 372 U.S. at 736.
204. Id. at 463.
205. Jorn, 400 U.S. at 481-82 (citations omitted).
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without running afoul of the Double Jeopardy Clause.\textsuperscript{209} According to the Supreme Court, two offenses, even if identical, are not the ‘same’ if they are prosecuted by two different sovereigns.\textsuperscript{210} Even though well established, the idea that two different sovereigns can prosecute the same crime has been criticized as inappropriately valuing the interests of the two sovereigns over the interests protected by the Double Jeopardy Clause.\textsuperscript{211} Given this position and the ultimate question of whether the Double Jeopardy Clause can be applied to corporations, it is useful to examine what the purported interests of the clause are.

\textbf{B. Interests Protected by the Double Jeopardy Clause}

The reasons behind the Double Jeopardy Clause have been described in multiple ways, but the general idea is to keep an “individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.”\textsuperscript{212} Over time, the Supreme Court has offered different specific interests which the Double Jeopardy Clause protects, and phrased them in a variety of manners. The most famous and often repeated statement from the Court is:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.\textsuperscript{213}

Double jeopardy is “one of the strong bulwarks of liberty: and if it be prostrated, every citizen would become liable, if guilty of an offense, to the unnecessary costs and vexations of repeated prosecutions, and if innocent, not only to those, but to the danger of an erroneous conviction from repeated trials.”\textsuperscript{214} If unlimited prosecutions were possible, it is almost a mathematical certainty that even an innocent man would eventually be convicted.\textsuperscript{215} Related to this mathematical certainty is the fact that plea bargaining is an important aspect of the criminal law\textsuperscript{216} and repeated prosecutions may encourage even an innocent defendant to plead guilty with a generous plea agreement.\textsuperscript{217} The

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\item \textsuperscript{209} Heath v. Alabama, 474 U.S. 82, 85-86 (1985).
\item \textsuperscript{210} Id. at 92.
\item \textsuperscript{211} Kane, \textit{supra} note 2, at 729 (citation omitted).
\item \textsuperscript{212} Serfass v. United States, 420 U.S. 377, 387 (1975).
\item \textsuperscript{213} Green v. United States, 355 U.S. 184, 187-188 (1957).
\item \textsuperscript{214} State v. Pennsylvania R. Co., 9 N.J. 194, 197 (1952).
\item \textsuperscript{216} Khanna, \textit{Asymmetric}, \textit{supra} note 175, at 386 (citation omitted).
\end{thebibliography}
Double Jeopardy Clause prevents the state from using the criminal process to harass an accused and wear him out by “a multitude of cases and accumulated trials.”\textsuperscript{218} One should note, however, that this type of “interest” arguably relies on the presumption of innocence—if the person is guilty do we not want the state to wear him out even at the risk of harasing him?

More reasons for the double jeopardy protection is to protect the defendant from mounting litigation costs and to prevent the government from previewing and subsequently adjusting to the defense strategy.\textsuperscript{219} Continual relitigation would be a drain on the time, energy, and finances of the parties involved.\textsuperscript{220} In addition to the defendant, the judicial system also has finite resources and cannot try cases over and over again.\textsuperscript{221} Relitigation would not only be a drain on judicial resources but also delay justice to those waiting to get into court.\textsuperscript{222} At one point, the Court identified two interests in the clause: one which is concerned about the “preservation of the finality of judgements.” and another which deals with the anxiety found in Green.\textsuperscript{223}

Originally, the purpose of double jeopardy protection was simply to preserve the finality of judgements.\textsuperscript{224} Scholars have suggested that even if a court’s decision is wrong, it is still just as important to have a clear end as it is a clear beginning.\textsuperscript{225} The finality of double jeopardy is supported by multiple factors, including the protection of the innocent and the idea of some that a jury acquittal can never be erroneous. Juries have the right to acquit for any reason, including bad reasons, or for no reason at all.\textsuperscript{226} In addition to protecting the ability of a jury to nullify, the fact of an acquittal gives an incentive to the government to want to try again and learn from the lesson in the first trial.\textsuperscript{227} Justice O’Connor explained that the Double Jeopardy Clause “serves primarily to preserve the finality of judgements in criminal prosecutions and to protect the defendant from prosecutorial overreach.”\textsuperscript{228}

Double jeopardy, among other things, helps to equalize unequal adversaries. It reflects our respect for juries and our appreciation for the


\textsuperscript{219} Hessick & Hessick, supra note 143, at 60 (citation omitted).

\textsuperscript{220} Mayers & Yarbrough, supra note 140.

\textsuperscript{221} Poulin, Waters, supra note 149, at 910.

\textsuperscript{222} Mayers & Yarbrough, supra note 140, at 31-32.


\textsuperscript{225} Fisher, supra note 215, at 594.

\textsuperscript{226} Griffin, Untangling, supra note 130, at 1044 (citation omitted).

\textsuperscript{227} Poulin, Waters, supra note 149, at 908-09 (citation omitted).

As the Court stated, “[e]very person acquainted with the history of government must know that state trials have been employed as a formidable engine in the hands of a dominate administration.” Scholars have pointed out that “the criminal law is the most powerful tool available to the government to silence its detractors. There is no better way to undermine a political dissident’s credibility, impair a candidate’s ability to finance a campaign, or prevent a reporter from presenting a viewpoint than to subject her to a series of criminal trials.” For several decades, government overreaching has been a significant consideration when determining if a retrial is permissible or not. Not only is the improved government position a concern, but a retrial will arguably undermine the judicial process itself because it disregards the validity of the initial judicial proceeding. Both prosecutors and the public may hold judgments that could be relitigated in contempt. It has been argued that repeat trials undermine the public’s respect for and confidence in the judicial system. Respect for the criminal justice system is necessary for our society and anything that may undermine it should not be undertaken lightly. “The government is permitted to strike hard but fair blows.”

In addition to the institutional interests, there are also very personal or individual interests involved in questions of double jeopardy. For example, the Court has used various cases to describe repeated prosecutions as entailing a “heavy personal strain.” In Jorn, the court specifically considered the individual saying, “society’s awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.”

These interests are not all or nothing, they come in degrees depending upon the circumstances. Before trial, much of the hazards like expense, strain, and embarrassment are not present for a defendant. The level of the burden is often considered; for example, it has been noted that the burden on a defendant who faces an entire new second trial after a full first one is considerably greater

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229. Kane, supra note 2, at 727 (citation omitted).
231. Lear, supra note 217, at 645-46.
232. Poulin, Dark, supra note 224, at 645 (citation omitted).
234. Id. at 594.
235. Lear, supra note 217, at 650.
236. Id. at 651.
237. Poulin, Dark, supra note 224, at 649-50 (citation omitted).
238. Henning, Conundrum, supra note 197, at 844 (citations omitted).
than the defendant whose first trial was cut short for various reasons. Further, we should also note that while a retrial may benefit the interests of the state, there are possible benefits for the defendant as well. An appellate court, or in some circumstances a trial court, may be less likely to rule in favor of the defendant if it knows that the ruling will be unreviewable and allow an almost certainly guilty defendant to go free. The Court said in Tateo:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to a conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of future prosecution.

The Court has said that “[c]orresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial.” There are multiple factors that the Court has said need to be balanced including, “the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgement on him . . ., against the public interest in insuring that justice is meted out to offenders.”

The Court also demonstrated an important balancing aspect of the Double Jeopardy Clause when it said that “society’s awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single proceeding to vindicate its very vital interest in enforcement of criminal laws.” On the other hand, some scholars and courts have stated that when someone has been previously acquitted “no balancing of interests is required to bar subsequent proceedings on the same offense.” Maximum fairness is arguably the result when the prosecution is allowed one chance to prosecute, but this may not be accurate. Scholars have argued that some of the holdings in the double jeopardy area seem to have been motivated by a visceral reaction to an abuse of prosecutorial power, rather than a reasoned examination of the defendants’ rights. This possibly visceral reaction, combined with the multiple interests

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241. Poulin, Dark, supra note 224, at 650 (citation omitted).
243. Poulin, Dark, supra note 224, at 640 (citation omitted).
247. Griffin, Untangling, supra note 130, at 1043-44 (citation omitted).
248. Kane, supra note 2, at 732 (citation omitted).
249. Henning, Vacuum, supra note 188, at 3.
that the Court has used (in extremely varying degrees), has caused numerous problems with the application of the Double Jeopardy Clause.

C. Difficulties with the Double Jeopardy Clause

The Supreme Court has ruled on an exceptionally large number of cases dealing with the interpretation of the Double Jeopardy Clause.\textsuperscript{250} In fact, it is one of the most frequently litigated provisions found in the Constitution.\textsuperscript{251} Both scholars and Supreme Court Justices claim it is one of the least understood provisions in the Bill of Rights.\textsuperscript{252} The Supreme Court has suffered for many years with the inability to “achieve a stable interpretation of the Double Jeopardy Clause.”\textsuperscript{253} Scholars have noted that the Court changes its mind about this constitutional guarantee seemingly quicker than about any other guarantee.\textsuperscript{254} The Supreme Court has overruled itself about cases that had just been decided more often in relation to double jeopardy than in any other area of criminal procedure.\textsuperscript{255} In one situation, the Court overruled a case from less than ten years prior.\textsuperscript{256} In another case, the Court overruled one double jeopardy case only a few years after it announced the initial decision.\textsuperscript{257} Double jeopardy has been criticized in many different ways being described as a troublesome concept,\textsuperscript{258} inconsistent, arguably unprincipled, and very often confusing.\textsuperscript{259} Specific decisions have also been criticized; Blockburger has been referred to as a “mess” by one of the most prominent constitutional scholars in the country.\textsuperscript{260} The fact that federalism has allowed dual prosecutions at both the state and federal level has been described as “unfortunate.”\textsuperscript{261} In addition to these criticisms, the Supreme Court’s position in several areas seems problematic, if not simply flawed.

The Court has recognized the inherent weaknesses of not allowing the government to appeal acquittals in criminal cases.\textsuperscript{262} This is particularly troublesome when one considers the fact that there is no such limitation on the defendant appealing the decision; thus, one could describe this as a defendant

\textsuperscript{251} Griffin, \textit{Untangling}, supra note 130, at 1033 (2010) (citation omitted).
\textsuperscript{252} Id.
\textsuperscript{253} THOMAS, supra note 131, at 1.
\textsuperscript{254} Id. at 5.
\textsuperscript{255} Griffin, \textit{Untangling}, supra note 130, at 1033.
\textsuperscript{256} Hudson v. United States, 522 U.S. 93, 96 (1997) (stating that double jeopardy only applies to criminal proceedings and not administrative/civil proceedings).
\textsuperscript{258} Fisher, \textit{supra} note 215, at 592.
\textsuperscript{259} Griffin, \textit{Sargasso}, supra note 165, at 471.
\textsuperscript{260} Amar, \textit{supra} note 158, at 1814.
\textsuperscript{261} Fisher, \textit{supra} note 215, at 599.
\textsuperscript{262} Bravo-Fernandez v. United States, 137 S.Ct. 352, 358 (2016).
getting two (or more) bites at the apple and the people only getting one. Nonetheless, a man cannot be retried under double jeopardy even when the acquittal is “based upon an egregiously erroneous foundation.”

In *Green v. United States*, the Court held that double jeopardy barred a retrial even though it was logically impossible for the verdict to be correct: it could not have been arson, as was found by the jury, without also being murder, because there was no question that the woman had died in the fire and by definition that would have been murder. Jury verdicts are often not products of logic, and are frequently due to unknown considerations. However, even if it can be convincingly proven that a jury erred, a new prosecution is barred by the Double Jeopardy Clause. In some ways, “juries are the ultimate referees, who are infallible because they are final.”

The Supreme Court has repeatedly said that a jury acquittal’s “finality is unassailable.”

“Under the Sixth Amendment . . . a criminal jury has the right to acquit a defendant even in the face of indisputable factual evidence of guilt.” Furthermore, “[a] jury’s verdict of acquittal represents the community’s collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is ‘based upon an egregiously erroneous foundation’”.

Even though defendants can appeal judgments, a state cannot appeal a judgment against itself regardless of the errors made by the judge or an absolute determination that the jury acted against the evidence. Outside a jury situation, there are other scenarios in which double jeopardy is problematic. Double jeopardy can preclude a retrial even when a judge has inappropriately and unnecessarily declared a mistrial. A wrongly declared mistrial can bar retrial both when it is an innocent mistake and when it is one that was calculated to benefit the prosecution. It is clear that “[a]t times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an imperative necessity to do so.”

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263. *Griffin, Untangling, supra* note 130, at 1043 (citation omitted).


265. *Id.* at 214.

266. *Id.* at 191.


269. *Amar, supra* note 158, at 1846.

270. *Yeager, 557 U.S.* at 122-23 (quoting *Fong Foo v. United States* 141, 143 (1962)).


273. *Id.* at 489 (citing *Gori v. United States*, 367 U.S. 364, 369 (1961)).

beholder, and the Court’s mistrial doctrine is nearly standardless.275 The Court balances the various interests in determining if a mistrial is necessary.276 Yet, the word “necessity,” much like life and limb, is not taken literally, and in fact courts have referred to degrees of necessity.277 Both “manifest necessity” and “ends of public justice” are very vague terms.278 This vague standard gives judges a lot of room to make mistakes. As scholars have pointed out, “[w]hen the trial judge acts ‘irrationally or irresponsibly’ . . . double jeopardy provides the defendant with a windfall from the judge’s precipitous act.”279 There are many situations in which a judge’s behavior should allow a new trial, but only a few where it does—the most obvious being judges taking bribes to acquit a defendant.280 Even erroneous application of the exclusionary rule281 will not allow a prosecutor to appeal an acquittal.282

Prohibiting incorrect rulings of law resulting in an acquittal from being reviewed by an appellate court is an “arbitrary windfall to the guilty, not a carefully structured scheme to protect the innocent. It is as if we simply said that every third (randomly selected) defendant should go free without good reason.”283 Judges have an incentive to rule for the defense because, if acquitted, even if totally wrong, they cannot be overturned.284 In these types of situations, the inability to appeal denies the public of its “fair opportunity to prosecute a criminal case” and further prevents judges from being held accountable for any errors or other misconduct in which they may have engaged.285

In addition to these general problems with double jeopardy, there are many case-driven specific issues that have and will continue to arise. For example, in one case the Court upheld the release of a killer with effectively a slap on the wrist because, at the time, the rule precluded trying him for vehicular manslaughter when he killed a young woman due to the completed adjudication of his traffic violation.286 Situations involving criminal conspiracies similarly raise case-driven problems. For example, when dealing with a criminal

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275. Thomas, supra note 141, at 1554.
276. Id.
277. Id. at 1561 (citation omitted).
278. Id. at 1559.
279. Henning, Misconduct, supra note 180, at 801 (citations omitted).
281. Arguably the exclusionary rule should not apply to corporations in the first place. See Wagner, Corporate Criminal Prosecutions and the Exclusionary Rule, supra note 1.
282. Khanna, Asymmetric, supra note 175, at 350 (citation omitted).
283. Amar, supra note 158, at 1844.
284. Khanna, supra note 175, at 389-90 (citations omitted).
285. Poulin, Accountability, supra note 280, at 954.
286. Poulin, Waters, supra note 149, at 891.
conspiracy, there is no doubt that the commission of the substantive offense and the conspiracy to commit it are separate and distinct offenses. But, given the nature of a conspiracy, when is there one long conspiracy and when are there multiple conspiracies? Even though the courts have not been consistent on this point, arguably since conspiracy is a continuing offense unless there is some evidence to the contrary, the better position usually holds that a defendant has simply continued with one conspiracy as opposed to leaving one and entering another. It is up to the prosecution to prove that there is an additional conspiracy rather than one continual conspiracy. If there is an attempt to prosecute a second conspiracy and it is deemed one conspiracy, the Double Jeopardy Clause will block a potential very meritorious prosecution.

Double jeopardy is unlike many constitutional protections because it is not subject to harmless error analysis, nor does it permit exceptions once it attaches. Double jeopardy has precluded a subsequent trial even when seemingly all the justifications like harassment or anxiety were not present and the second trial was only two days later. Double jeopardy can attach even when there is virtually no way the defendant could have been injured. Arguably, excessive application of the double jeopardy principle “makes an absolute of the interests of the accused in disregard of the interests of society.”

Many, if not all, of the interests supported by the Double Jeopardy Clause have counterarguments purportedly eliminating or, at least minimizing, these advantages. In response to the interest of avoiding a preview of a defendant’s case, or otherwise allowing the state to improve its case, it is odd that one of the arguments supporting double jeopardy boils down to the idea of wanting defendants (particularly guilty ones) to maintain the ability to surprise the state at their trial. Furthermore, scholars have claimed that the argument that double jeopardy protects the defendant from the state’s rehearsing its case is overblown. Relationally, in response to the interest in avoiding the ability of the state to harass a defendant, a counter-argument maintains that if the defendant is guilty, particularly of a serious offense, why do we care if the state’s repeated attempts to prosecute her result in repeated embarrassment or expense, or wears

288. Theis, supra note 181, at 306.
289. Id. at 307.
294. Lippke, supra note 271, at 518.
them down? In response to the cost argument, some have claimed that the inability to appeal may increase the cost spent by the state to maximize the chance of success and hence increase the cost to the defendant in the initial trial as well, in an attempt to keep up with the state’s expenditure. In terms of finality, some have argued that if it is a wrongful conviction, we should never fully close the door to a correction (and in fact we do not, via pardons), so we could argue that closing the door fully to a wrongful acquittal is also problematic. Arguably, “only the guilty have an interest in the ‘final’ finality of mistaken acquittals, and it is presumably not a legitimate one.” Often, an acquittal is the result of a defendant being able to cover up or destroy evidence, or he got lucky and did not have the evidence discovered or understood by the prosecutors. The interest of avoiding convicting an innocent person is countered by the fact that not allowing the prosecution to appeal an erroneous verdict means that the prosecutor may spend more resources in the initial trial than otherwise would have been spent, which possibly increases the chances of an innocent person being convicted. Further decreasing the chance of an innocent person being convicted is the fact that even if a correct acquittal was appealed, the appellate court and then likely another trial court would have to rule against the defendant for an erroneous conviction to occur.

The is no certain way of verifying a verdict, and at best we can review the process for errors. It has been argued that in a criminal trial, both sides should have at least one substantially error-free presentation of the evidence, and if a mistake is a made, we should be able to address a mistaken acquittal just as we address a mistaken conviction. One of the rationales for allowing some appellate options for the state after an acquittal is that the “state, like the accused, is entitled to assure itself of a trial ‘free from the corrosion of substantial legal errors’ which might have produced an adverse verdict.”

In some countries the appellate court can substitute a guilty verdict for an acquittal when the court finds it appropriate. For example, England allows an acquittal to be appealed by the government on legal questions. In much of

296. Lippke, supra note 271, at 515.
297. Khanna, Asymmetric, supra 175, at 343.
298. Lippke, supra note 271, at 517.
299. Id.
300. Id. at 519.
301. Id. at 372.
302. Khanna, supra note 175, at 343.
304. Lippke, supra note 271, at 512.
305. Id. at 513.
308. Khanna, supra note 175, at 353 (citation omitted).
the world the ability to appeal is much more equally shared, as it is in the civil context of both res judicata and collateral estoppel.\textsuperscript{309} Many, possibly the majority of, modern nations that allow the government to appeal.\textsuperscript{310} In countries where prosecutors are allowed to appeal, they seem to do so infrequently.\textsuperscript{311} In the United States, famous scholars and judges have expressed that it would be appropriate to consider a verdict final only after it has fully ripened into a final judgment after appeal whether through a conviction or an acquittal.\textsuperscript{312} In some limited circumstances, an acquittal could be deemed nonfinal, such as a midtrial acquittal where the state has a clearly defined rule establishing it as nonfinal.\textsuperscript{313} But, generally speaking, this is not an available option in the U.S., even though notable scholars argued over fifty years ago that double jeopardy should be modified in all criminal cases to allow a state to appeal.\textsuperscript{314} There have also been calls for more limited revisions of the Double Jeopardy Clause; for example, scholars have advocated limiting the double jeopardy protection in relation to judicial actions,\textsuperscript{315} or one proposed allowing a retrial only where there is new evidence that the state did not have prior to or during the initial trial.\textsuperscript{316} Whether calling for total review of criminal acquittals or limited reviews in some circumstances, the fact remains that there has been a question for at least fifty years, if not longer, on whether the prohibition on the state against appealing an acquittal “best protects the interests of either the defendant or the state.”\textsuperscript{317}

IV. DOUBLE JEOPARDY AND CORPORATIONS

This Section describes the current framework of the law as it relates to applying the Double Jeopardy Clause to corporations and then explains why this is wrong; it proposes that in the end, courts should determine that double jeopardy does not apply to corporations, and that in some limited circumstances a judge could use her discretion to allow a second trial when new evidence has been discovered.

\begin{footnotes}
\footnote{309. Id. at 344.}
\footnote{310. Id. at 353-55 (citations omitted).}
\footnote{311. Id. at 367 (citation omitted).}
\footnote{312. Amar, supra note 158, at 1842.}
\footnote{313. Janulewicz, supra note 128, at 867 (citation omitted).}
\footnote{314. Mayers & Yarbrough, supra note 140, at 35.}
\footnote{315. Poulin, Accountability, supra note 280, at 978.}
\footnote{316. Lippke, supra note 271, at 524.}
\footnote{317. Mayers & Yarbrough, supra note 140, at 4.}
\end{footnotes}
A. The Current Law of Double Jeopardy and Corporations

The Supreme Court has assumed applicability of double jeopardy to corporations without ever having specifically addressed the issue.\(^{318}\) Courts of Appeals have specifically held that corporations are entitled to the protection of double jeopardy.\(^{319}\) Scholars and judges have said that they see no valid reason why a corporation should not be entitled to double jeopardy protection.\(^{320}\) Further, commentators claim that, on the one hand, depriving a corporation of the protections of double jeopardy would hurt small corporations, and on the other hand, it would not necessarily be fair even to a large corporation.\(^{321}\) As an appellate court pointed out: “The small entrepreneur is not spared the embarrassment, expense, anxiety and insecurity resulting from repeated trials on criminal charges, simply because he has incorporated his modest business.”\(^{322}\) The U.S. Circuit Court of Appeals for the Second Circuit stated that the fact “[t]hat a large corporation may have more substantial financial resources is no more valid ground for depriving it of its constitutional rights than is the possession of greater wealth by an individual.”\(^{323}\)

Whether for big or small corporations, the Supreme Court has assumed, and multiple courts have held, that double jeopardy protections attach to corporations.\(^{324}\) Even though the Court has never expressly discussed the issue of applying double jeopardy to corporations, there have been several lower court cases granting corporations the protection and none in which it was denied.\(^{325}\) The government has tried unsuccessfully to claim that the Double Jeopardy Clause does not apply to corporations.\(^{326}\) In Fong Foo, the Supreme Court held that the Double Jeopardy Clause prevented retrying a corporation even though the Court asserted that there was reason to hold that the corporation had been acquitted by grave mistake.\(^{327}\) They did this without ever discussing if/why the Double Jeopardy Clause should apply to corporations in the first place. That case dealt with fraud on the United States, and a judge who considerably overstepped his power acquitted a corporation and essentially left the U.S. with no recourse due to the Double Jeopardy Clause.\(^{328}\) In another federal case, the government was prevented from claiming that the corporation was wrongfully acquitted because of an erroneous instruction given to the jury.

\(^{318}\) Henning, Conundrum, supra note 197, at 844.
\(^{320}\) Kane, supra note 2, at 732 (citation omitted).
\(^{321}\) Id. at 732.
\(^{323}\) Id.
\(^{324}\) Hosp. Monteflores, Inc., 575 F.2d at 333-34 (citations omitted).
\(^{325}\) Id. at 334.
\(^{326}\) Id. at 333.
\(^{327}\) Fong Foo v. United States, 369 U.S. 141, 143 (1962).
\(^{328}\) Id. at 145.
by the trial judge. The government claimed the corporation was not entitled to double jeopardy protection. The Court of Appeals pointed out that the Supreme Court “assumed” that corporations had the right. The appellate court rejected the government’s argument that double jeopardy only applies to “life and limb” and hence not to a corporation. The clause has long been construed as applying to much more than its literal interpretation would indicate. The appellate court pointed out that the Supreme Court in Lang recognized that the “life and limb” language was an embodiment of common law principles that encompassed misdemeanors as well. The appellate court stated: “[W]e see no valid reason why a corporation which is a ‘person’ entitled to both equal protection and due process under the constitution . . . should not also be entitled to the constitutional guaranty against double jeopardy.” Nonetheless, other than pointing out that corporations are of all sizes, can commit all types of crimes, and are organized for “religious, educational, charitable or social purposes, rather than for profit,” the decision did not explain exactly why the corporation should be entitled to claim double jeopardy protection.

It has been argued that a corporation should not have all of its assets drained out by continual prosecutions for the same thing. Furthermore, some courts have said that the goal of avoiding harassment and the concept of fairness would be violated if corporations were allowed to be re-prosecuted. Some courts have actually expanded double jeopardy when dealing with a corporation, stating that even if there is an additional element involved (which would typically mean it was a different offense under the Blockberger test), that element may be deemed not material or substantial enough to override the foundations of fairness and finality which are the basis of the double jeopardy bar.

330. Id.
331. Id.
332. Id.
334. Sec. Nat’l Bank, 546 F.2d at 493 (citation omitted). That said, the common law did not recognize the ability to criminally prosecute a corporation, so one may query how its principles could endorse the application to corporations.
335. Id. at 494.
336. Id.
337. Id.
338. Id.
339. Kane, supra note 2, at 747 (citation omitted).
341. Id. at 623.
Some justices have said in dissent that the Constitution has settled the balancing between societal interests and the defendant’s interests, and has sided with defendants in the end. A federal judge held:

Double Jeopardy is an absolute right, it is not modified such as searches and seizures by the word “unreasonable,” it is not modified as the right of condemnation which must be for “public use,” it is not subject to the elasticity of the phrase “due process of law” and other modifications of other rights, and under that clause, if a person is once placed in jeopardy for an offense he simply cannot be prosecuted for that offense again, regardless of the reasonable [sic] or unreasonableness or the public interest which may bespeak a prosecution.

In this same case in which the court held that double jeopardy was absolute, it also ruled that it is “beyond a doubt [...] that constitutional jeopardy extended to ‘persons’ includes corporations.” This absoluteness is connected to some of the reasons why corporations should not be granted double jeopardy protection.

B. The Problem with Double Jeopardy and Corporations

Justice O’Connor stated that “[d]ecisions by this Court have consistently recognized that the finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law.” In some circumstances, “the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.” Even though it is true, as scholars have pointed out “It is a basic principle of constitutional law that the government cannot ignore the Constitution simply because it impedes the government from accomplishing some goal.” That does not mean that those goals should not be taken into account and weighed against the constitutional interest involved. There have been cases in which almost undeniably, guilty corporations successfully used the Double Jeopardy Clause when a procedural or technical issue was violated but at a stage at which jeopardy had attached. In one case, double jeopardy has allowed a corporation to cause the death of eighty-four people and only get a $1,000 fine because the clause prevented it from being charged with more than one count of manslaughter.

344. Id. at 368.
347. Hessick & Hessick, supra note 143, at 71.
Scholars have pointed out that if the reasoning behind any protections afforded to individuals does not apply to corporations, or if there are specific reasons to deny the protection to corporations that only apply to corporations, then the protection should not be afforded.\footnote{50} Both of these conditions are met in the context of corporate double jeopardy protection.

Before discussing the interests involved and how that argues against corporate double jeopardy, it is helpful to begin with a discussion of the history of double jeopardy. The Supreme Court has repeatedly stated that double jeopardy “is derived from history, its significance and scope must be determined, ‘not simply by taking the words and a dictionary, but by considering its origin and the line of its growth’.”\footnote{51}

The doctrine of double jeopardy should be interpreted in light of the common law and history from which it came, and which were well known to the framers of the Constitution.\footnote{52} Judges have commented on the undesirability of “stretching the immunity from the double jeopardy provision of the Fifth Amendment to embrace a factual situation far beyond the purpose and reasoning of the Founding Fathers.”\footnote{53} However, this is exactly what the Court has done in relation to corporations. The Supreme Court has quoted the Blackstone Commentaries reflecting the history of the Double Jeopardy Clause and referring to “autrefois acquit.”\footnote{54} The ancient doctrines of \textit{autrefois acquit} and \textit{autrefois convict} have been described as applying to a “man.”\footnote{55} Furthermore, when recounting the history of \textit{autoforis aquit}, the Court has referred to Blackstone and the idea that it was established so that the “life of a man shall not be twice put in jeopardy.”\footnote{56} The focus is often on a “man” but the Court has not held this language to be significant, despite the fact that when the Bill of Rights was drafted and when the first double jeopardy cases were before the Supreme Court, Blackstone’s Commentaries were still fairly recent and heavily relied upon.\footnote{57}

In support of the Double Jeopardy Clause, the Court has stated that the historical references, including the idea “to try again one who had been previously convicted or acquitted of the same offense, was ‘abhorrent to the law of England.’”\footnote{58} That said, trying a corporation for a crime was also

\begin{footnotes}
\item50. Kane, supra note 2, at 742 (citation omitted).
\item51. Green v. United States, 355 U.S. 184, 199 (1957) (Frankfurter, J., dissenting) (citation omitted).
\item52. Kepner v. United States, 195 U.S. 100, 126 (1904).
\item54. Green, 355 U.S. at 200 (Frankfurter, J., dissenting).
\item55. Ex Parte Lange, 85 U.S. 163, 172 (1873).
\item56. Green, 355 U.S. at 200 (Frankfurter, J., dissenting).
\item57. Thomas, supra note 141, at 1565.
\item58. Green, 355 U.S. at 200. (Frankfurter, J., dissenting) (citation omitted).
\end{footnotes}
considered abhorrent in this period.\textsuperscript{359} Double jeopardy was described in very early cases as a “personal rights of the individual.”\textsuperscript{360} This same historic disconnect applies to the Fourteenth Amendment as well as the Fifth. Some justices have pointed out that it is questionable whether a single person who took part in drafting the Fourteenth Amendment had any idea that it would address corporate regulation at all.\textsuperscript{361}

Furthermore, application of the principles of the Fifth Amendment has changed considerably since adoption, making application significantly more difficult.\textsuperscript{362} For example, in an old case discussing double jeopardy, the Court said: “If there is anything settled in the Jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense.”\textsuperscript{363} This may have been settled then, but it is wrong today—you can be punished twice, if that is the legislative intent, just not tried twice.\textsuperscript{364}

Not only is the history of double jeopardy hostile toward granting it to corporations, but neither are the interests protected. A criminal proceeding “imposes heavy pressures and burdens—psychological, physical, and financial—on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once for the same offense.”\textsuperscript{365} A district court has stated:

A Power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the constitution establishes for the conduct of a criminal trial. And society’s awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the government to a single criminal proceeding to vindicate its very vital interest in the enforcement of criminal laws.\textsuperscript{366}

This quotation is from a case in which corporations were defendants, so even though the language and interests seem to apply to a natural person it was in fact applied to the corporation.

Individuals do suffer when a corporation is a defendant, particularly in the case of a small corporation or one with only a single shareholder.\textsuperscript{367} Yet, any such adversity is very different in both kind and level from that suffered by non-corporate defendants. It has been argued that at least in the context of a small corporation, the shareholders would suffer the same “anxiety and

\textsuperscript{359} See supra Section II.A.
\textsuperscript{360} Ex Parte Lange, 85 U.S. at 178.
\textsuperscript{361} Wheeling Steel Corp. v. Glander, 337 U.S. 562, 578 (1949).
\textsuperscript{362} United States v. Scott, 437 U.S. 82, 87-88 (1978) (Frankfurter, J., dissenting).
\textsuperscript{363} Ex Parte Lange, 85 U.S. at 168.
\textsuperscript{364} See supra Section III.A.
\textsuperscript{367} Kane, supra note 2, at 730.
psychological and emotional stress an individual would endure” with repeated prosecutions.\textsuperscript{368} This does not appear to be correct. Other scholars have already pointed out that the “anxiety” suffered by a corporation is not sufficient to establish the protection of avoiding a subsequent trial.\textsuperscript{369} Safeguarding a defendant’s state of mind does not apply to corporations, except possibly metaphorically,\textsuperscript{370} and how a corporation could suffer “emotional stress” is difficult even to imagine. While corporations do not experience emotions, that does not mean that they do not suffer harms, even significant harms to their legitimate interests.\textsuperscript{371} Nevertheless, these harms are different and should be weighed differently just as they are in other constitutional contexts.

For example, there seems to be a disconnect as to why the emotional appeal of protecting the small business owner provides double jeopardy protection but not the right to remain silent.\textsuperscript{372} Additionally, one factor the Court has looked at to determine if a sanction is criminal, and hence subject to double jeopardy analysis, is whether it is the “infamous punishment of imprisonment.”\textsuperscript{373} Furthermore, in looking at what sanctions should be considered criminal, the Court has included “whether it comes into play only on a finding of scienter.”\textsuperscript{374} Yet, obviously a corporation cannot be imprisoned, and corporate scienter is a very different thing than traditional scienter since there is no actual mind to form an intent or “knowingly” do anything. The government has actually already argued and lost that double jeopardy should not apply because corporations do not experience human emotions and cannot be put in jail.\textsuperscript{375} That said, it is possible that the government lost because rather than resting on these two points, it should have argued that these are two points in addition to many others. Additional points include the fact that corporations need less help than individuals when dealing with the government.

According to the Supreme Court, double jeopardy “is designed to help equalize the position of government and the individual, [and] to discourage abusive use of the awesome power of society.”\textsuperscript{376} Nevertheless, given the massive amount of power that some corporations have,\textsuperscript{377} less equalization is needed with these corporations. On the other hand, scholars have pointed out that the simple fact that a corporation has more resources should not be the basis for depriving it of its protections any more than the rights of a wealthy

\textsuperscript{368} Id. at 749 (citation omitted).
\textsuperscript{369} Henning, \textit{Conundrum}, supra note 197, at 844 (citation omitted).
\textsuperscript{370} Id. at 850.
\textsuperscript{372} Henning, \textit{Conundrum}, supra note 197, at 848.
\textsuperscript{373} Hudson v. United States, 522 U.S. 93, 104 (1997) (citation omitted).
\textsuperscript{374} Id. at 99.
\textsuperscript{377} \textit{See supra} Section II.A.
man should be deprived due to his wealth. Its greater resources, however, make a corporation more capable of defending itself, its form often makes prosecution harder, and its resources can make the harm it imposes greater. One reason why corporations have received the rights they now possess is because they have the financial ability to challenge the law when it does not suit their interests. Additionally, corporations have an improved ability to deal with repeated prosecutions or appeals of acquittals. As Justice Ruth Bader Ginsberg pointed out, “[b]usiness can pay for the best counsel money can buy.” Therefore it is appropriate that these differences be considered when determining if and how double jeopardy should be applied.

Scholars have also argued that the double jeopardy doctrine furthers the integrity and efficiency of the judiciary. Yet, this is not always the case, and the alternative is not a free hand for the prosecution but rather, other types of protections that work better.

Courts and commentators have argued that the possibility of misusing prosecutorial power and overwhelming a small business mandates giving double jeopardy protection to all corporations. However, a prosecutor is called upon to “seek justice, not merely to convict” and “to serve as a minister of justice and not simply [as] an advocate.” Vindicating society’s interests and hence a retributive motive for prosecutors is acceptable, even encouraged, but any kind of personal vindictiveness is unacceptable. The Supreme Court has pointed out that a prosecutor’s goal “in a criminal prosecution is not that it shall win a case, but that justice shall be done.” There are multiple ways to protect against improper prosecutorial behavior, ranging from the Due Process Clause to inherent judicial power, which in some states has been used to “bar vexatious or unfair reprosecution.” Prosecutors being allowed to harass the accused with multiple trials and relentless prosecutions, even outside the confines of double jeopardy, has been described by the Supreme Court as “an unseemly and oppressive use of a criminal trial that violates the concept of due process contained in the Fourteenth Amendment.” The prosecutor’s intent is often used by the Court to determine if possible misconduct was a violation of the defendant’s rights. A prosecutor’s discretion can also be limited by the

378. Kane, supra note 2, at 747 (citation omitted).
379. WINKLER, WE THE CORPORATIONS, supra note 5, at 73.
380. Id. at 346.
381. Kane, supra note 2, at 745 (citation omitted).
382. Henning, Conundrum, supra note 197, at 848.
383. Henning, Misconduct, supra note 180, at 727 (citations omitted).
384. Id. at 735.
386. Griffin, Sargasso, supra note 165, at 475.
388. Henning, Misconduct, supra note 180, at 715.
Equal Protection Clause if a claim of selective prosecution is made, but the number of selective prosecution defenses that have been successful has been fairly low. In addition to selective prosecution defenses, some due process rights belonging to a corporation could also be violated by subsequent trials.

There have even been state court cases in which repeated hung juries allowing multiple trials were eventually deemed inappropriate and the courts used their inherent power to bar further prosecutions. Multiple prosecutions may also rise to the level of harassment that can violate the due process provision of the Fifth Amendment, which reportedly boils down to a “requirement of fundamental fairness and fair play.” Scholars pointed out over fifty years ago that the Court had already implied that consecutive trials could be a denial of due process. There are often situations where the more flexible Due Process Clause would be better than the Double Jeopardy Clause at protecting the fair administration of justice. According to the Supreme Court, both the Equal Protection Clause and the Due Process Clause protect people from punishments that are “downright irrational.” It has also been argued that it is not the Double Jeopardy Clause that is best suited to address unjust punishments in successive actions, but rather the Eighth Amendment prohibition on cruel and unusual punishment.

In addition to the multiple means of supplementing the Double Jeopardy Clause, there are also repeated calls for not implementing double jeopardy itself in a manner where other interests outweigh it. The Court said that “a defendant’s valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public’s interest in fair trials designed to end in just judgments.” Scholars have argued that “[i]f the government has not manipulated the process to give itself an opportunity to rehearse the case or seek a conviction through repeated trials, then society’s interest in punishing criminals may outweigh a defendant’s interest in preventing a second prosecution.” The Court acknowledges that absolute rules are not always appropriate. Furthermore, the Court says that this type of rule could “create an insuperable obstacle to the administration of justice in

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389. Id. at 747.
390. Id. at 748.
392. Griffin, Sargasso, supra note 165, at 509 (citation omitted).
394. Id. (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)).
396. Amar, supra note 158, at 1816.
400. Henning, Facsim, supra note 188, at 8.
many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.\textsuperscript{401} Some of the interests weighed by the Court are also alterable; for example, the Court has pointed out that if a defendant does not rely on the finality of the judgment, some of the prejudice the defendant would experience are avoided.\textsuperscript{402} Some justices have also indicated that a number of the interests have shifted over time in that today there is a greater “danger that criminals will escape justice than that they will be subjected to tyranny.”\textsuperscript{403}

C. Proposals to Change the Rules

Given the dramatically different interests involved in corporate criminal prosecutions, the strict application of the Double Jeopardy Clause should not be granted. Further, given the goal of “fairness” represented by the Due Process Clause, there should be some flexibility on the part of the judge to allow a retrial of corporate defendants in rare circumstances and not follow an absolutely strict adherence even to standard \textit{res judicata} principles. In terms of withholding double jeopardy protection, one should keep in mind that it is not just repeated prosecutions of acquitted corporate defendants that are prevented by the Double Jeopardy Clause, but also the government’s challenges of errors made in trial after the acquittal of a corporation.\textsuperscript{404} A difference between \textit{res judicata} and double jeopardy is that \textit{res judicata} can be appealed by the state.\textsuperscript{405} A part of the reasoning for issue preclusion, as the Court has pointed out, is the confidence that the result reached was the correct result; a part of that confidence is a result of the appealability of the verdict, and without that appealability there is much less confidence that the result is correct.\textsuperscript{406} Decades ago, the government argued that the interests of corporations had been sufficiently protected by \textit{res judicata} and collateral estoppel.\textsuperscript{407} As one decision has stated, “[u]ntil we recognize that the United States, too, is entitled to all the benefits of a fair trial, we are affirmatively contributing to the general breakdown of effective law enforcement.”\textsuperscript{408} Justice O’Connor wrote that “absent governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect . . . the compelling public interest in punishing

\textsuperscript{402} Janulewicz, \textit{supra} note 128, at 869 (citation omitted).
\textsuperscript{403} Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting).
\textsuperscript{404} Henning, \textit{Conundrum}, \textit{supra} note 197, at 847 (citation omitted).
\textsuperscript{405} Kane, \textit{supra} note 2, at 727 (citation omitted).
\textsuperscript{406} Bravo-Fernandez v. United States, 137 S.Ct. 352, 358 (2016).
\textsuperscript{408} Carsey v. United States, 392 F.2d 810, 818 (D.C. Cir. 1967) (Tamm, J., dissenting).
crimes can outweigh the interest of the defendant in having his culpability conclusively resolved in one proceeding.”

Justices on the Supreme Court have recognized that “a criminal trial is, even in the best of circumstances, a complicated affair to manage.” A corporate criminal trial is even more difficult due to the nature of the corporation and the fact that the law has been extended to apply to corporations. Given this increased difficulty, mistakes are more likely, and the need to address them is more important. The government has been specifically authorized to appeal dismissals of an indictment except where they are prohibited by the Double Jeopardy Clause.

There are multiple ways that this goal could be accomplished. A court could conclude that given the different interests involved and the fact that a corporation is not a natural person, corporations are not entitled to double jeopardy protection at all. This scenario could resemble the situations in some territories of the United States, where historically the government could appeal acquittals that it believed were erroneous and possibly substitute a guilty finding for an acquittal. Another option would be simply to say that given the different interests involved in a corporate prosecution, double jeopardy should be applied in a different manner. For example, under some systems of law, a person is not deemed to have been in jeopardy until a final judgment in a court of last resort. One could regard a trial as one proceeding which continues until it has been concluded in that all possibilities of appealing have been exhausted, and only then would double jeopardy attach to prevent a second conviction following the first. Justices have argued that a statute may authorize an appeal by the government in the same way that an appeal by the defendant is allowed. At least one justice has viewed an appeal as a continuation of the trial and hence not barred by double jeopardy. Furthermore, when considering double jeopardy in the past, the Court has stated that it is the burden of the defendant and not the court to establish that the defense applies in the particular circumstance.

In the corporate criminal setting, a defendant could not make such a showing and the collateral protections would be more effective. A limited

\begin{itemize}
  \item 411. See supra Section III.A.
  \item 413. Kepner v. United States, 195 U.S. 100, 110 (1904).
  \item 414. Id. at 121.
  \item 415. Id.
  \item 416. Id. at 136 (Holmes, J., dissenting).
  \item 417. Id. at 137 (Holmes, J., dissenting).
\end{itemize}
version of collateral estoppel could be used in place of full double jeopardy protection. Under collateral estoppel, “where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties.”

Collateral estoppel also saves resources and provides finality in civil settings. There can be a significant impact on a corporation and in particular shareholders of a small corporation if repeated prosecutions are allowed. That said, it has been argued that the costs could be mitigated by allowing a corporation to recoup attorneys’ fees if a government appeal is unsuccessful. In England, there is broad judicial discretion allowing courts to prohibit successive prosecutions when there has been an abuse of power. This type of discretion may be more advantageous for our system as well when dealing with corporations. This would help to avoid the problem of distinguishing small corporations because a judge would be empowered to take into consideration the corporation’s interests, as well as the government’s, when deciding if a successive prosecution is warranted.

Additional limitations could also be imposed to avoid abuse. For example, scholars have called for allowing “acquittals to be quashed if state officials can convince a court that they have fresh, reliable, and compelling evidence of a person’s guilt.” In this setting, a new trial would be allowed if the prosecutor had new evidence of a corporation’s guilt. This determination would be at the judge’s discretion and allow for recouping of attorney’s fees if the government was ultimately unsuccessful. “Undeniably the framers of the Bill of Rights were concerned to protect defendants from oppression . . . . On the other hand, they were also aware of the countervailing interest in the vindication of criminal justice, which sets outer limits to the protections for those accused of crimes.”

By allowing the government to appeal the acquittal of a corporate defendant and in rare circumstances, retry cases involving new evidence, these goals of the criminal justice system can be achieved.

When the Court changed course and started applying criminal law to corporations, it said that “to give [corporations] 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.” This adage may be overstated in the sense that there are other mechanisms to address criminal

419. Griffin, Untangling, supra note 130, at 1037 (citation omitted).
420. Id. at 1040.
421. Henning, Conundrum, supra note 197, at 855.
422. Id. at 855-56.
423. Griffin, Sargasso, supra note 165, at 492.
424. Lippke, supra note 271, at 511.
conduct, but it is still very relevant in that it highlights the importance of effectively dealing with criminal corporate conduct. The proposal in this Article furthers that goal, and similar to the “old exploded doctrine” referred to by the Court, double jeopardy as well should be put aside. Fortunately, the Court often seems to change course when interpreting the Double Jeopardy Clause, and when dealing with this issue the Court has pointed out the need to apply “realism and rationality.” It is both rational and realistic for the Court to take the first opportunity to specifically address the application of double jeopardy to corporations and change the previously-made assumptions.

V. CONCLUSION

Given that corporations have fewer of the interests designed to be protected by the Double Jeopardy Clause, the interests they do have are lessened; the harms resulting from corporate crimes are harder to prosecute and potentially more damaging than individual crimes; and the history of the clause and the interests it protects do not apply to corporations, the Supreme Court should conclude that they do not have this right. Rather, corporations’ interests are protected by other constitutional provisions and common law rules like res judicata, which themselves may also be modified in rare circumstances where judicial discretion finds evidence that requires a new trial in the interest of justice. Corporate double jeopardy has had its day in the court of judgment, and it has lost—it is time to dismiss it without further appeals.

427. Poulin, Dark, supra note 224, at 633.