

THE APPLICABILITY OF THE DOUBLE JEOPARDY RIGHT TO CORPORATIONS

In May, 1976, the now defunct Security National Bank was acquitted by a jury of charges that it had illegally funneled funds to political campaigns, in violation of the act regulating political contributions by a national bank.¹ The United States appealed the judgment of acquittal, contending that the district court had erroneously instructed the jury on the elements necessary to establish a violation.² To maintain the appeal, however, the government had initially to establish that the appeal was not barred by the double jeopardy clause of the fifth amendment.³ It sought to do this by asserting that the fifth amendment protection from double jeopardy did not apply to the defendant in this case because it was a corporation and not a natural person.⁴ The Court of Appeals for the Second Circuit rejected this contention and dismissed the appeal.⁵

The government's unusual step of appealing a judgment of acquittal has raised the important question of whether the double jeopardy clause is applicable to corporations. This Note will analyze the Second Circuit's response to the government's contention, as well as additional case law touching on this question. Cases in which the applicability of other constitutional safeguards to corporations were at issue, and the policies underlying the double jeopardy prohibition will also be considered, in an attempt to determine whether a corporation should be granted this fifth amendment protection.

I. THE PRESENT DOUBLE JEOPARDY DOCTRINE

The fifth amendment provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb"⁶ Under

1. 18 U.S.C. § 610 (1970) (repealed 1976).

2. Brief for Appellant at 3, *United States v. Security National Bank*, 546 F.2d 492 (2d Cir. 1976).

3. U.S. CONST. amend. V.

4. "While such review is barred by the Double Jeopardy Clause where individual defendants have been tried and acquitted, the policies reflected by the Double Jeopardy Clause justify a contrary result where a corporation is a defendant." Brief for Appellant at 17-18, *United States v. Security National Bank*, 546 F.2d 492 (2d Cir. 1976).

5. *United States v. Security National Bank*, 546 F.2d 492 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1591 (1977).

6. U.S. CONST. amend. V. The Supreme Court concluded in *Benton v. Maryland*, 395 U.S. 784, 794 (1969), that the fifth amendment double jeopardy clause "represents a fundamental ideal in our constitutional heritage" and applies to the states through the fourteenth amendment. This overruled a 1937 case, *Palko v. Connecticut*, 302 U.S. 319 (1937), which had held that federal double jeopardy standards were not incorporated in the fourteenth amendment.

most circumstances this clause prevents the retrial of a defendant on the same criminal charges, as well as the infliction of multiple punishments for the same offense.⁷ Present interpretation of the clause is that a defendant is "in jeopardy" as soon as the jury has been impaneled and sworn,⁸ and, in the case of a non-jury trial, as soon as the court begins to hear the evidence.⁹ Thus, a final judgment in the prior proceeding is not required for the defendant to be placed in double jeopardy by a second criminal proceeding.¹⁰ But jeopardy may become "unattached" upon the occurrence of subsequent events, such as the inability of a jury to agree, and a new trial

7. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

8. *See Serfass v. United States*, 420 U.S. 377, 388 (1975); *Illinois v. Somerville*, 410 U.S. 458 (1973); *Downum v. United States*, 372 U.S. 734 (1963).

9. *Serfass v. United States*, 420 U.S. 377 (1975):

As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy" In case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. . . . In a nonjury trial, jeopardy attaches when the court begins to hear evidence. . . . The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or judge."

Id. at 388. A plea of double jeopardy, then, requires that the first criminal proceeding must have reached one of these two points. In *Serfass*, for example, the Court held that a government appeal from a pretrial order dismissing an indictment was not barred since in that situation the defendant had not been "put to a trial before the trier of the facts" *Id.* at 389. There had been no waiver of a jury trial; the court had no power to determine the defendant's guilt or innocence; and the defendant's motion to dismiss the indictment was premised on the belief that its consideration before trial would serve "expeditious administration of justice." *Id.*

10. The attachment of jeopardy before final judgment is a significant factor distinguishing this doctrine from the principle of *res judicata* which requires a final judgment on the merits. *See Note, Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision,"* 28 *STAN. L. REV.* 805 (1976), where it is claimed that "the only valid justifications for this early attachment result from concerns for the social and emotional well-being of the defendant. . . . However, these policies do not have any meaningful purpose when a corporate defendant is involved." *Id.* at 827. Because of this, it is argued, *res judicata* would provide sufficient protection to a corporate defendant. *Id.* Like the double jeopardy clause, *res judicata* would provide protection from imposition of multiple penalties. It would not, however, constitute a defense to a previous trial which did not end in final judgment. Another characteristic of the double jeopardy clause which distinguishes it significantly from *res judicata* is that the former prevents the state from appealing a judgment of acquittal and obtaining a new trial while the latter does not. Thus, *res judicata* allows direct attack on a final judgment, whereas the double jeopardy clause precludes it.

In addition to these distinctions between the two doctrines, their objectives are quite different. *Res judicata* is in essence a doctrine of finality and double jeopardy certainly shares this purpose,

[b]ut double jeopardy is not *res judicata* dressed in prison grey. It was called forth more by oppression than by crowded calendars. It equalizes, in some measure the adversary capabilities of grossly unequal litigants. It reflects not only our demand for speedy justice, but all of our civilized caution about criminal law—our respect for jury verdict and the presumption of innocence, our aversion to needless punishment, our distinction between prosecution and persecution.

Comment, *Twice in Jeopardy*, 75 *YALE L.J.* 262, 277-78 (1965). *See Developments in the Law—Res Judicata*, 65 *HARV. L. REV.* 818 (1952), for a general discussion of *res judicata*.

will be permitted.¹¹ If the trial continues uninterrupted and a final judgment is reached, a defendant may appeal an adverse outcome and undergo a new trial,¹² but the government is accorded no similar right.¹³

11. This is an example of an event which leads to application of the doctrine of "manifest necessity." There are times when the accused's right to have his trial completed before the then sworn and impaneled jury may be subordinated to the public interest. Another circumstance is the discovery of facts by the judge that one or more of the jurors might be biased against the defendant or prosecution. Much of the case law interpreting the double jeopardy clause has been concerned with whether the trial judge properly invoked the doctrine of manifest necessity. *See, e.g., Illinois v. Somerville*, 410 U.S. 458 (1973) (requirements of "manifest necessity" met where defective indictment could not be cured by amendment and it could be asserted on appeal to overturn any judgment of conviction); *Downum v. United States*, 372 U.S. 734 (1963) (conviction reversed on double jeopardy grounds where mistrial was declared to give the prosecution further opportunity to secure the presence of a key witness who should have been, but was not, subpoenaed); *Gori v. United States*, 367 U.S. 364 (1961) (retrial not barred after trial judge declared mistrial because of possible prejudice to the defendant, although the judge acted without defendant's consent, and the wisdom of granting a mistrial was doubtful); *United States v. Phillips*, 431 F.2d 949 (3d Cir. 1970) (defendant was not entitled to have indictment dismissed since his counsel's failure to object to trial judge's proposal to discharge jury because of irreconcilable disagreement constituted implied consent); *Carsey v. United States*, 393 F.2d 810 (D.C. Cir. 1967) (fourth trial constituted double jeopardy since defense counsel's alleged misconduct did not constitute "imperious necessity" for a mistrial); *Preston v. Blackedge*, 332 F. Supp. 681 (E.D.N.C. 1971) (where four previous trials had ended in hung juries, a fifth trial was barred since under the circumstances the right of the state to retry the defendant would be abused by a fifth trial).

12. If the conviction is set aside because of error in the proceedings leading to the conviction, the defendant has no choice but to undergo a retrial. This decision is left in the hands of the government. This "well-established part of our constitutional jurisprudence," *United States v. Tateo*, 377 U.S. 463, 465 (1964), was announced in *United States v. Ball*, 163 U.S. 662 (1896). The "Ball principle" has been supported by various theories. The predominant theory has been that the defendant, by successfully appealing his conviction, is deemed to have "waived" the double jeopardy protection against being retried which a former judgment otherwise gives him. Alternatively, the first jeopardy is considered to continue until the defendant is acquitted or his conviction becomes final. *See Green v. United States*, 355 U.S. 184 (1957). In *United States v. Tateo*, 377 U.S. 463 (1964), Mr. Justice Harlan concluded that "of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications for the sound administration of justice." Allowing retrials under these circumstances, he continued, is simply fairer to both the defendant and society. *Id.* at 466.

Where the government prosecuted the defendant at the first trial for a greater offense than the one for which he was convicted, the government cannot upon retrial prosecute the defendant again on the greater charge. *Price v. Georgia*, 398 U.S. 323 (1970); *Green v. United States*, 355 U.S. 184 (1957). For example, if the defendant were charged with first degree murder at the first trial, but was convicted of only second degree murder, on retrial after his appeal, he could not again be charged with first degree murder. "In this situation, the majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder." *Id.* at 190. However, the defendant could receive a more severe sentence upon reconviction. *North Carolina v. Pearce*, 395 U.S. 711 (1969).

13. *Kepner v. United States*, 195 U.S. 100 (1904). There is an exception: if the appellate court could reverse the judgment of the lower court—sustaining the government's appeal—without requiring a new trial, then double jeopardy does not prohibit the appeal. For example, if the trial judge set aside a jury verdict of guilty (an action equivalent to a civil "judgment non obstante veredicto"), a reversal on appeal would only require reinstating the jury verdict and there would be no necessity for a second trial. *See United States v. Jenkins*, 420 U.S. 358 (1975); *United States v. Wilson*, 420 U.S. 332 (1975).

Even if the defendant is successful in a trial and obtains a final judgment of acquittal, in a few situations he may nonetheless be required to defend against criminal charges again based on the same alleged misconduct. This may occur where the defendant's single act allegedly violated the laws of two sovereign entities—a state government and the federal government.¹⁴ By definition, the crime charged in the later proceeding must be the same as that charged in the first for the later proceeding to be barred.¹⁵ Thus, neither sovereign is barred from prosecuting by a judgment of its counterpart, because the previous judgment, emanating from a different sovereign, is technically not for the "same offense." Finally, while the amendment refers to "jeopardy of life or limb," its application is not limited to those situations where the defendant is in danger of incurring only those two punishments. Rather, it applies to any criminal proceeding, no matter what the possible penalty, whether it is a fine, imprisonment or loss of life.¹⁶

The Case Law

The first federal case in which the issue of the applicability of the double jeopardy clause to corporations was discussed was *United States v. Armco Steel Corp.*,¹⁷ in which it seemed to the court "beyond doubt . . .

14. See, e.g., *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. United States*, 359 U.S. 121 (1959). These decisions have been the subject of much criticism, primarily arguing that allowing two sovereigns to prosecute undermines the policies of the double jeopardy protection and that these policies outweigh the respective interests of the two sovereigns. See, e.g., Fisher, *Double Jeopardy, Two Sovereigns and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961).

15. See, e.g., *Ashe v. Swenson*, 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring). Defining "same offense" is perhaps the most difficult aspect of construing the double jeopardy clause. Assigning it a narrow meaning gives rise to the opportunity for prosecutorial abuse, as pointed out by one commentator:

[W]ith the ever-expanding number of statutory offenses the protection by this principle becomes less and less since the doctrine applies only where the defendant is twice placed in jeopardy for the *same offense*. Under rules generally applied by the courts in determining whether the same offense is being charged, the prosecutor may, with little imagination and with even less research, reindict for a different offense if his first venture was unsuccessful, even though the defendant is being retried for essentially the same anti-social conduct.

Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954) (emphasis in original). The rule referred to is the "same evidence" test which provides that a re-prosecution charging a different offense for the same alleged criminal conduct is not barred unless the evidence required for conviction on re-prosecution could have sustained a conviction for the offense charged in the first. The proper test, according to Justice Brennan in *Ashe v. Swenson*, 397 U.S. at 453-54, is the "same transaction" test, which requires the prosecution "to join at one trial all the charges that grow out of a single criminal act, occurrence, episode, or transaction." For a discussion of these tests, see, e.g., Comment, *Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 COLUM. L. REV. 321 (1971); Comment, *The Double Jeopardy Clause: Refining the Constitutional Proscription Against Successive Criminal Prosecutions*, 19 U.C.L.A.L. REV. 804 (1972).

16. *Breed v. Jones*, 421 U.S. 519, 528 (1975); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170-73 (1873); *United States v. Security National Bank*, 546 F.2d 492, 494 (2d Cir. 1976); *United States v. Armco Steel Corp.*, 252 F. Supp. 364, 368 (S.D. Cal. 1966).

17. 252 F. Supp. 364 (S.D. Cal. 1966).

that the constitutional jeopardy extended to 'persons' includes corporations. . . .'¹⁸ Because the Constitution contains no definition of "person," the court attempted to derive the meaning of "person" from the definition given to it by congressional enactments, and used that meaning in construing the double jeopardy clause. It found that the antitrust statutes define "persons" as including corporations and that section 1 of Title 1 of the United States Code provides that "in determining the meaning of any act or resolution of Congress" the word "persons" includes corporations.¹⁹ The court further noted that since corporations were owned ultimately by persons, penalties imposed on corporations for criminal offenses were borne by natural persons.²⁰ And, since the court held the view that double jeopardy protection was an absolute right the invocation of which could not be balanced against "the public interest,"²¹ it concluded that corporations were protected by it to the same extent as natural persons.²²

While the court's reliance on the definition of "persons" as used in congressional enactments seems misplaced, particularly in light of the different meanings the Supreme Court has given "persons" in different clauses of the Constitution,²³ it did properly recognize that natural persons suffer when a corporation is a criminal defendant.²⁴ This suffering is particularly acute when the corporation has only one or a small number of individual shareholders.²⁵ Of course, the double jeopardy clause is not the only protection for individual shareholders. Res judicata would protect a corporation and its shareholders from incurring multiple penalties, regardless of whether the fifth amendment double jeopardy clause applied to it.²⁶ Res judicata, however, does not give protection against the potentially devastating drain on the corporation's financial resources which would

18. *Id.* at 368.

19. *Id.*

20. *Id.*

21. In reaching this conclusion, the court pointed out that the language of other constitutional rights included modifying phrases, whereas the double jeopardy clause does not. Thus, searches and seizures are modified by "unreasonable" and the right of condemnation by "public use." It also said that the double jeopardy clause "is not subject to the elasticity of the phrase 'due process of law . . .'" *Id.* at 367. But as pointed out in Note, *supra* note 10, at 816, "it is not clear that the rights conferred by the double jeopardy clause are absolute." Thus, where jeopardy has attached, the "ends of public justice" may require that a mistrial be declared in which case the state would not be prevented from retrying the defendant. See note 11 *supra* and accompanying text.

22. 252 F. Supp. at 368.

23. See notes 38-90 *infra* and accompanying text. See also Note, *supra* note 10, at 816.

24. 252 F. Supp. at 368.

25. See note 123 *infra* and accompanying text.

26. This is because a final judgment on the merits must be reached before a penalty can be imposed. Therefore, if a corporation were subjected to a punishment, res judicata would effectively prevent imposition of a second punishment because a second prosecution for the same alleged crime would be barred. Note, *supra* note 10, at 817 makes this point.

result from defending multiple suits for the same alleged misconduct where none ends in final judgment. The double jeopardy clause prohibits the possibility of such retrials.²⁷ Though the *Armco Steel* court recognized this distinction in its analysis, it did not succeed in providing a sufficient conceptual basis for its conclusion that corporations are protected against double jeopardy.

The second opportunity a federal court had to address the issue posed by *Armco Steel* was in *United States v. Security National Bank*.²⁸ In dismissing the government's appeal from a judgment of acquittal of the corporate defendant, the Court of Appeals for the Second Circuit relied primarily on the Supreme Court's holding in *Fong Foo v. United States*.²⁹ In *Fong Foo*, the Court had held that the double jeopardy clause prevented a retrial of a corporate defendant and two of its employees where the trial judge had directed the jury to render verdicts of acquittal. The issue of whether corporations are entitled to double jeopardy protection was not discussed by the Court, however.³⁰ Because of this, the government contended in *Security National Bank* that *Fong Foo* was not "controlling or persuasive authority on the issue here raised."³¹ But the court disagreed, pointing out that the issue had indeed been raised and briefed in *Fong Foo* and that there simply had been "a failure by the Court to set forth reasons why it adopted petitioner's position."³² While a lower court may be constrained from reaching an opposite conclusion because of *Fong Foo*, the Supreme Court might accord less precedential value to the decision than an opinion which fully discussed the question.³³ Thus, while *Fong Foo* has

27. Of course, a retrial would not be precluded where the first trial was interrupted in order to promote the "ends of public justice." See note 11 *supra*.

28. 546 F.2d 422 (2d Cir. 1976). This is not the only other case, however, in which a defense of double jeopardy by a corporation has been allowed. In *United States v. Martin Linen Supply Co.*, 534 F.2d 585 (5th Cir.), *aff'd*, 51 L.Ed 2d 642 (1977), criminal contempt proceedings were brought by the government to enforce an antitrust consent decree. The government attempted to appeal directed verdicts of acquittal, but the Court of Appeals for the Fifth Circuit held that it had no jurisdiction over the appeal because further prosecution was barred by the double jeopardy clause. The issue of whether the double jeopardy clause applied to corporations was not discussed. In *United States v. Southern Ry.*, 485 F.2d 309, 312 (4th Cir. 1973), the court in dismissing an appeal, noted without further discussion of the issue, "that the double jeopardy clause of the Fifth Amendment has been applied to corporations as well as to natural persons" (citing *Fong Foo v. United States*, 369 U.S. 141 (1962) and *United States v. Armco Steel Corp.*, 252 F. Supp. 364 (S.D. Cal. 1966)).

29. 369 U.S. 141 (1962).

30. The issue decided was whether double jeopardy barred a second trial where the trial judge had directed the jury to render judgments of acquittal before the government had completed the presentation of its evidence.

31. Brief for Appellant at 21, *United States v. Security National Bank*, 546 F.2d 492 (2d Cir. 1976).

32. 546 F.2d at 493.

33. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court was confronted with the effect of four of its earlier decisions in which eleventh amendment contentions had been made by

some precedential value with respect to the issue of the applicability of the double jeopardy clause to corporations, it cannot be regarded as having settled the question.

The Second Circuit also concluded that its decision would have been no different even without *Fong Foo* as support, because it could perceive "no valid reason why a corporation . . . should not . . . be entitled to the constitutional guaranty against double jeopardy."³⁴ To justify this conclusion, the court first adduced that not all corporations are large enterprises³⁵ and not all corporate crimes are regulatory violations punishable by small fines. Therefore, corporations could be subjected to the harassment and oppression against which the double jeopardy clause affords protection. Denying that protection would be particularly harsh on the small businessman who had incorporated his business. Multiple prosecutions of his corporation for the same alleged crime would cause him no less "embarrassment, expense, anxiety, and insecurity" simply because of the fact of incorporation. And at the other end of the spectrum, a large, wealthy corporation should not be deprived of constitutional rights solely because of its wealth. Furthermore, the court declared, a corporation just as an individual, whether the incorporated business of the small entrepreneur or a large publicly held company, would suffer from the effect a conviction would have on the public attitude toward the firm. Finally, no corporation could match the state's resources so as to avoid harassment and the increasing probability of conviction resulting from retrials. Maximum fairness to the defendant results when the prosecution is given one full opportunity to establish criminal wrongdoing.³⁶

In finding no valid reason for a contrary result, the court alluded to policies underlying the double jeopardy clause which are applicable both to corporations and natural persons as defendants.³⁷ Before discussing these and other policies and their applications when a corporation is the criminal

petitioners but not discussed in the opinions. In overruling the eleventh amendment holdings of those cases, the Court said:

This case . . . is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion. *Shapiro v. Thompson* and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law. Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today.

Id. at 670-71.

34. 546 F.2d at 494.

35. The court noted that in New York most business corporations have only a few shareholders, and some have only one. *Id.*

36. *Id.* at 495.

37. See notes 91-106 *infra* and accompanying text.

defendant, the Supreme Court's decisions in cases where corporations have claimed other constitutional safeguards will be examined. The Court has not consistently held that a corporation is a "person" under the Constitution, so it is useful to assess the policies underlying the double jeopardy clause in light of the Court's mode of analysis in these other areas.

II. CORPORATIONS AND RELATED CONSTITUTIONAL SAFEGUARDS

The Supreme Court has considered claims by corporations under the fourteenth amendment, the self-incrimination clause of the fifth amendment, and the fourth amendment. Just as it has not been consistent in the results reached, it has elaborated on the reasons for its holdings in some cases and simply announced its decision in others.

A. *The Fourteenth Amendment*

Section one of the fourteenth amendment³⁸ provides guarantees to "citizens" in one clause and to "persons" in two other clauses within the same sentence. While it might be thought that rules of construction would attribute to the word "persons" the same meaning within the same clause and same sentence,³⁹ this has not been the result.

In *Santa Clara Co. v. Southern Pacific Ry.*,⁴⁰ the defendant was prepared to argue the broad proposition that "corporations are persons within the meaning of the Fourteenth Amendment." Mr. Chief Justice Waite, however, announced that:

The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does.⁴¹

In those few words, the Court set a precedent which has since been adhered to steadfastly,⁴² though it has been challenged in dissenting opinions,⁴³ most

38. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend. XIV, § 1 (emphasis added).

39. This type of analysis was made in Mr. Justice Douglas' dissenting opinion in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 579 (1949): "It requires distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause. It means, in my opinion, a substantial revision of the Fourteenth Amendment."

40. 118 U.S. 394 (1886).

41. *Id.* at 396 (announcement made before argument by Waite, C.J.).

42. *See, e.g.*, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

43. *See, e.g.*, *Connecticut General Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting).

recently by Mr. Justice Douglas.⁴⁴ As he pointed out, "There was no history, logic, or reason given to support that view. Nor was the result so obvious that exposition was unnecessary."⁴⁵ It is indeed unfortunate that such a fundamental holding was not placed on a more sound basis than the agreement of the Justices; nonetheless, the holding, that a corporation is a "person" for purposes of the equal protection clause of the fourteenth amendment, is established law and has been implicit in the Court's subsequent decisions.

Within the meaning of the privileges and immunities clause of the fourteenth amendment,⁴⁶ however, a corporation is not a "citizen" and thus is not entitled to its protection.⁴⁷ Again, this result has been supported by little more than conclusory assertions by the Court.

Under the due process clause of the fourteenth amendment, states are prohibited from depriving "any person of life, liberty, or property without due process of law"⁴⁸ The meaning of "person" in this clause depends upon whether the state is attempting to deprive the "person" of life, liberty or property. The Court has stated that life and liberty, as guaranteed by the amendment, can be possessed only by natural, and not artificial, persons.⁴⁹ On the other hand, a corporation is deemed capable of holding property, and is therefore a person when the state seeks to deprive the corporation of its property.⁵⁰ A corporation, then, cannot claim that some state action deprives it of life or liberty in violation of the fourteenth amendment, but it may assert a fourteenth amendment claim when the state tries to obtain its property without due process of law.

While determinations of when a corporation is or is not a person or citizen under the fourteenth amendment have been advanced in summary fashion on a seemingly intuitive basis, the Court has examined in depth whether a corporation is protected by the self-incrimination clause of the fifth amendment and the fourth amendment's right against unreasonable searches and seizures.

44. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576-81 (1949) (Douglas, J., dissenting).

45. *Id.* at 577.

46. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" U.S. CONST. amend. XIV, § 1.

47. *Hague v. CIO*, 307 U.S. 496, 514 (1939) (Roberts, J.); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).

48. U.S. CONST. amend. XIV, § 1.

49. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 579 (1949) (Douglas, J., dissenting); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907); *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

50. *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 28 (1889); *D.D.B. Realty Corp. v. Merrill*, 232 F. Supp. 629, 637 (D. Vt. 1964).

B. *The Self-Incrimination Clause of the Fifth Amendment*

In *Hale v. Henkel*,⁵¹ a corporate officer was commanded to appear before a grand jury to testify and give evidence in a pending antitrust action. Among the defenses he asserted upon appearance was the fifth amendment protection against self-incrimination.⁵² He was personally protected under a federal statute granting immunity from prosecution as to matters sworn to, but the corporation of which he was an agent and representative was not protected, and so the officer invoked the fifth amendment privilege on behalf of the corporation as its agent. The Court held that he could not do so:

The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were an agent of such person. . . . The question whether a corporation is a "person" within the meaning of this amendment really does not arise, except perhaps, where a corporation is called upon to answer bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employes.⁵³

The Court further ruled that the officer could not refuse the production of the corporation's books and records. This would be so, the Court said, even if the officer were allowed to assert the rights of the corporation, because "there is a clear distinction between an individual and a corporation," and a corporation has no right to withhold its books and records from examination when sued by the state.⁵⁴ The distinction to which the Court referred is that a corporation, unlike an individual, is a creature of the state. As such, it has been given certain benefits and franchises and it holds them subject to the laws of the state. To ascertain whether a corporation has properly exercised the benefits and franchises conferred upon it, the state has reserved a right to investigate it, and pursuant to this reserved right it may demand production of corporate books and records.⁵⁵

Five years later, in *Wilson v. United States*,⁵⁶ the Court referred approvingly to *Hale* in holding that, since corporate existence implies amenability to legal powers, a subpoena duces tecum⁵⁷ may be directed to

51. 201 U.S. 43 (1906).

52. "[N]or shall [any person] be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

53. 201 U.S. at 69-70.

54. *Id.* at 74.

55. *Id.* at 74-75. This visitatorial power of the state was the established law of seventeenth century England and was integrated into the American common law. The principle, as it then stood, was that "all corporations were subject to visitation in order to maintain their good government and secure their adherence to the purposes of their institution." Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 367, 371 (1936).

56. 221 U.S. 361 (1911).

57. A subpoena duces tecum is a process of writ whereby a court, at the instance of a

the corporation, rather than to the corporate officer who has possession of the corporation's books and records. The Court, in accord with *Hale*, held that the corporation could not "resist production upon the ground of self-incrimination [sic] It must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitational power of the State. . . ."⁵⁸

To the extent that these decisions base the denial of the right against self-incrimination on the power of the state to withhold that right in exchange for its grant of corporate status, they may have lost much of their validity. The doctrine of unconstitutional conditions, which is usually applied to laws which prohibit the exercise of a constitutional right, would not allow the state to force a corporation to surrender its fifth amendment rights.⁵⁹ For if that were so, then it seems that a state could, in the name of public regulation, include in its general incorporation laws a list of rights which an organization would have to forfeit in exchange for the privilege of incorporation. The Court's explicit recognition that a corporation does have certain fourteenth amendment rights which cannot be legislated out of existence is inconsistent with the suggestion that a state could demand forfeiture of such rights as a condition of incorporation.

In *United States v. White*,⁶⁰ the Court placed the denial of the right against self-incrimination as to corporations on a much broader ground. It held that the denial did not depend at all on the state's withholding the right

suitor, commands a person who has in his possession or control some book or paper which is pertinent to the issues of the pending controversy to attend and produce it for use at trial.

97 C.J.S. *Witnesses* § 25(a) (1957).

58. 221 U.S. at 382.

59. The principle, briefly stated, provides that while a person may voluntarily waive his constitutional rights, the government cannot condition the granting of benefits to him on his waiver or relinquishment of a right. Mr. Justice Sutherland stated the rationale for the principle in *Frost & Frost Trucking Co. v. Railway Comm'n*, 271 U.S. 583, 593-94 (1926):

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in a like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Decisions holding that the state cannot condition the granting of benefits on the waiver of the privilege against self-incrimination include *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (public employment) and *Gardner v. Broderick*, 392 U.S. 273 (1968) (government contracts). However, in the recent case of *Wyman v. James*, 400 U.S. 309 (1971), the Court held that conditioning a grant of welfare benefits on the recipient's submission to "home visits" by a welfare case-worker did not transgress the fourth amendment. For discussion of this principle, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

60. 322 U.S. 694 (1944).

in exchange for a privilege granted by the state.⁶¹ Rather, it concluded that the nature of the organization was the determining factor.⁶² Thus a union, which had not been granted corporate status by the state, could not withhold various records which a grand jury had subpoenaed on the ground that the records might tend to incriminate the union. This conclusion rested, the Court said, on the need for effective regulation of large organizations because of the economic power which they wield.⁶³ If these organizations were allowed to keep their books and records from official scrutiny, it would be virtually impossible for the state to exercise its inherent power of ensuring that its laws and regulations are not being violated.⁶⁴ In other words, there is a strong public interest in having reasonable and effective government regulation of corporations, unions and other similar entities. On the other hand, the Court continued, the privilege against self-incrimination was designed to prevent the state from forcing the accused to give testimony or produce documents which might convict or incriminate him.⁶⁵ This protection will deter the state from physically and psychologically abusing the accused in order to extract from him the evidence necessary to convict.⁶⁶ The strength of the policy of preventing the state from using reprehensible methods in order to obtain evidence during the criminal process far exceeds the societal interest in enforcing its criminal laws. Where an organization such as a corporation enters the criminal justice system, however, the policies underlying the self-incrimination privilege simply do not apply, as there is no identity of corporate interests with the interests of the individual that are protected by the privilege.⁶⁷ This, coupled with the "inherent and

61. While the chartering of corporations and exercising visitatorial rights over them is "a convenient vehicle for justification," this is not a necessity for investigation by the government. *Id.* at 700.

62. The test . . . is whether one can fairly say under all circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

Id. at 701. Although the defendant in this case was a union, it is clear that the holding is nevertheless applicable to corporations.

63. *Id.* at 700-01.

64. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

Id. at 700.

65. *Id.* at 698.

66. For this reason, then, the privilege is strictly a personal one and cannot be invoked on the basis that someone else may be incriminated. *Id.* at 704.

67. In other words, it is meaningless to speak of subjecting a corporation to physical torture or psychological stress; it is an entity incapable of undergoing these experiences. Since a corporation is incapable of being subjected to the abuses at which the self-incrimination privilege is directed, there would appear to be no reason why it should receive the protection.

necessary power of state and federal governments to enforce their laws," excludes a corporation, union or other organization from the benefits of the privilege against self-incrimination.⁶⁸

The Court also emphasized the personal nature of the protection, limiting its exercise to an individual on behalf of only himself. For this reason, it was impossible for the union's representative to invoke the union's privilege as an excuse for his refusal to answer questions or to produce documents.⁶⁹ The Court further stressed the fact that the evidence sought "must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity."⁷⁰

These decisions, then, articulate two valid reasons for denying a corporation the privilege against self-incrimination. First, there is the simple incapacity to incriminate itself—the corporation itself cannot give oral testimony and it personally cannot have in its possession books and documents. Its officers and agents cannot plead the privilege on behalf of the corporation because of the general principle that the privilege is a strictly personal one which cannot be invoked on the basis that one's testimony may incriminate a third person. In this context then, perhaps, as the *Hale* Court pointed out, "the question of whether a corporation is a 'person' within the meaning of this amendment really does not arise. . . ."⁷¹ Secondly, there is a need to investigate whether the regulatory rules which limit the scope of the organization's activities have been observed. Corporations, because they are entities which enable individuals to pool capital to conduct business, have the capacity to effect enormous impact upon society. They are chartered to use these funds to carry out socially approved purposes as defined by the laws and regulations which prevent them from doing some things and require them to do others. Lack of ability to investigate the enterprise would in most instances render these laws and regulations meaningless and their enforcement ineffective. The self-incrimination privilege is not permitted to be a shield behind which a corporation may conduct its affairs in total secrecy.

These decisions do not hold that the fifth amendment is one which applies exclusively to individuals. It may be that it is "directed primarily to the protection of individual and personal rights,"⁷² but the Court did not say that this was the exclusive purpose. It focused on one protection, the privilege against self-incrimination, and concluded that this privilege was

68. A balancing of the public interests against protected corporate interests is made easy in this case by the presence of strong policy reasons for denying the privilege and the absence of protected interests.

69. 322 U.S. at 704.

70. *Id.* at 699.

71. *Hale v. Henkel*, 201 U.S. 43, 70 (1906).

72. 322 U.S. at 698.

available exclusively to individuals. As the Court's treatment of the fourteenth amendment makes clear, the interpretation of the word "person" in this context does not necessarily indicate what the Court will interpret it to mean in the context of the fifth amendment's double jeopardy clause.

C. *The Fourth Amendment*

The cases hold that a corporation is entitled to the protection of the fourth amendment,⁷³ though apparently not to the same degree as is an individual. The *Hale* Court, which held that the self-incrimination clause of the fifth amendment was not applicable to corporations, stated that it did "not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures."⁷⁴ And in a very recent case,⁷⁵ the Court affirmed this by ruling that a corporation does have fourth amendment rights: where an intrusion into the corporation's privacy is not reasonable, there is no justification for treating it differently simply because it is a corporation.⁷⁶

In the landmark case of *Silverthorne Lumber Co. v. United States*,⁷⁷ the Court reversed a district court judgment fining a corporation for contempt of court because of its refusal to obey subpoenas and a court order to produce records and documents before a grand jury. The corporation claimed that the order violated its rights under the fourth amendment. The Court agreed, as the subpoenas were based on information obtained by the government through an unconstitutional search and seizure.⁷⁸ The Court

73. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

74. 201 U.S. at 76 (emphasis in original). The Court further said that although an association of people organizing itself as a corporation "waives no constitutional immunities appropriate to such body," it did not mean that a search or seizure, if authorized by Congress, would be unreasonable. *Id.* Mr. Justice Harlan, concurring, said that either a corporation had the protection or it did not, and that "Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the Fourth Amendment." *Id.* at 79. He then concluded that a corporation should not have the protection.

75. *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977).

76. The Internal Revenue Service entered the premises of the corporation without a warrant and seized books, records and other property. In finding that the warrantless entry and seizures violated the fourth amendment, the Court said that since the only basis for the intrusion was to satisfy tax assessments, the corporation could not be treated differently than an individual. The Court distinguished this type of intrusion from one "based on the nature of its business, its license or any regulation of its activities." *Id.* at 354.

77. 251 U.S. 385 (1920). The case is recognized for advancing the principle that the exclusionary rule of the fourth amendment forbids any use of evidence tainted by an unconstitutional search. In *Nardone v. United States*, 308 U.S. 338 (1939), Mr. Justice Frankfurter characterized such evidence as the "fruit of the poisonous tree," *id.* at 341, and the *Silverthorne* doctrine thereby became known by that phrase.

78. Government officials arrested the officers of the corporation at their homes and then

held that illegally obtained evidence could not be used for any purpose, including framing subpoenas. In reaching its decision, the Court noted that "it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected. . . ." ⁷⁹

It does not follow, therefore, that because a corporation cannot claim the privilege against self-incrimination, it is not protected from unreasonable searches and seizures. Further, when a corporation is confronted in a criminal prosecution, the restrictions on the uses of illegally obtained evidence are the same as when an individual is the defendant. It is only in the area of administrative searches that a corporation cannot claim the same degree of protection as an individual. This does not mean that evidence obtained in an illegal search would be admissible, but that the level of probable cause needed to authorize the search is not as high as when an individual is involved and that there is no limit on the type of evidence that can be subject to seizure. ⁸⁰

The real dichotomy, though, is not between individuals and corporations, but between individuals and businesses, ⁸¹ for the Court has recognized that "a business, by its special nature and voluntary existence may open itself to intrusions that would not be permissible in a purely private context." ⁸² Since most corporations are voluntary "artificial combinations of capital" ⁸³ organized for the purpose of carrying on a business, they are

went to the corporate offices where, without any authority, they seized the corporation's books and records. They took the documents to the district attorney's office, where they were photographed before a court issued an order to return the originals. Based on the information obtained from the copies, subpoenas to produce the originals were issued and enforced by a court order. The refusal to comply with the order resulted in the court finding the officers and the corporation in contempt.

79. 251 U.S. at 392.

80. In *Warden v. Hayden*, 387 U.S. 294 (1967), the Court rejected the so-called "mere evidence" rule which had distinguished "evidentiary items," which could not be seized, from those items which could be validly seized, including the instrumentalities of the crime, fruits of the crime and contraband. The Court suggested, however, that some items—those "testimonial" or "communicative" in nature which would force a person to incriminate himself in violation of the fifth amendment—may not be seized. Since a corporation does not have the privilege against self-incrimination and, in any event, could not have such items in "its" possession, there appears to be no restriction on the type of items, records or documents which the government could validly seize.

81. See generally *See v. City of Seattle*, 387 U.S. 541 (1967).

82. *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). See notes 75-76 *supra* and accompanying text. The Court then cited its decision in *United States v. Biswell*, 406 U.S. 311, 316 (1972), where in upholding an inspection procedure authorized by statute, it said: "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."

83. *United States v. Morton Salt Co.*, 338 U.S. 632, 651 (1950).

less protected by the fourth amendment than are individuals, and some corporations are less protected than others because of the type of business in which they are engaged.⁸⁴ The basis of the distinction runs not to the inherent differences between individuals and business entities, but to the need for effective regulation of the latter by the state to protect the public interest.⁸⁵ In the case of corporations generally, the collective economic impact which they have upon society demands that they be subject to effective regulation which is made possible only by access to their books and records.⁸⁶ Though arbitrary intrusions are precluded by the less stringent fourth amendment requirements applicable to businesses,⁸⁷ government agencies have great latitude "to satisfy themselves that corporate behavior is consistent with the law and public interest."⁸⁸ Policy considerations, thus, require that the government have greater access to a corporation and its books and records than in the case of an individual's home and his papers.

These fourth and fifth amendment cases illustrate that there must be a strong public policy consideration when a corporation is denied a constitutional protection. The Court found such a consideration in the need for regulation of these entities, which can be effective only when the corporation can be compelled to produce its books and records, where "the greater part of evidence of wrongdoing by an organization or its representatives is usually to be found. . . ."⁸⁹ Otherwise, the state would in effect be creating entities over which it could exercise little control, but whose impact could be overwhelming.

Although these amendments are concerned primarily with protection of an individual's right of privacy,⁹⁰ this is not their exclusive purpose. Other

84. *See, e.g.*, *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

85. *See* *See v. City of Seattle*, 387 U.S. 541 (1967); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944).

86. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

87. First, the intrusion must be pursuant to a law authorizing such for it to be reasonable. The authorizing statute is considered as satisfying the probable cause requirement. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946). It is not necessary that a charge or complaint of violation of law be pending. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. at 208-09; *Bowaters S. Paper Corp. v. Equal Opportunity Employment Comm'n*, 428 F.2d 799 (6th Cir. 1970). And secondly, when an authorized investigation or inquiry is conducted, the demand for documents or other evidence cannot be too indefinite and must be reasonably relevant to the investigation. *See v. City of Seattle*, 387 U.S. 541, 544 (1967); *United States v. Morton Salt Co.*, 338 U.S. at 652. Finally, where an authorized inspection is conducted on the corporation's premises to ascertain compliance with regulations, the search cannot extend to those objects or places which the inspector has no authority to inspect. *United States v. Stanack Sales Co.*, 387 F.2d 849 (3d Cir. 1968).

88. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

89. *United States v. White*, 322 U.S. 694, 699 (1944).

90. *Id.* at 698.

interests, not peculiar to individuals, may be found to be within the scope of their protections. An analysis of the policy reasons for the double jeopardy clause is necessary, then, to determine whether it is applicable to corporations or solely to individual defendants.

III. POLICY REASONS UNDERLYING DOUBLE JEOPARDY PROTECTION

If it were determined that a corporation shared none of the individual interests protected by the double jeopardy clause,⁹¹ or if there were policy reasons peculiar to corporations for denying them its protection, then the double jeopardy clause should not be applied to corporations. That is, if the double jeopardy clause protects only interests peculiar to individuals, such as those privacy interests protected by the fourth and fifth amendments or the liberty interests protected by the fourteenth amendment, then there would be no sound policy basis for allowing corporations within the definition of "person" in the double jeopardy clause of the fifth amendment. Alternatively, if there exists a need for denying the protection, such as that for effective regulation, then it might be determined that corporations should not have double jeopardy protection.

The primary societal interest in any prosecution, whether an individual or corporation is involved, is to convict those who have engaged in criminal conduct.⁹² The double jeopardy clause conflicts with this to some extent by acting as a restraint on governmental power to prosecute. It rests on certain societal interests which outweigh the desire to convict wrongdoers at any expense, as well as on defendant-related interests, such as those mentioned in *Security National Bank*.⁹³ These societal interests will be identified in this section and their applicability to corporations will be assessed in the following section.

A. *Restraints on Government Power to Harass and Oppress*

First, the double jeopardy prohibition "prevents the unwarranted harassment of the accused by multiple prosecutions."⁹⁴ The government is checked from misusing its prosecutorial power to harass those it may perceive as potential or actual adversaries. As against the limited funds of a defendant, the vast economic resources of the government are somewhat

91. The reasons underlying the double jeopardy clause have been discussed extensively by commentators. See, e.g., M. FRIEDLAND, *DOUBLE JEOPARDY* (1969); Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 U.C.L.A.L. REV. 81 (1967); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960); Comment, *Interest Balancing: An Alternative Approach to Resolution of Double Jeopardy Claims*, 58 IOWA L. REV. 1000 (1973); Comment, *supra* note 10.

92. See Comment, *Interest Balancing: An Alternative Approach to Resolution of Double Jeopardy Claims*, *supra* note 91, at 1001.

93. See notes 34-36 *supra* and accompanying text.

94. M. FRIEDLAND, *supra* note 91, at 4.

neutralized.⁹⁵ But more important, perhaps, this rationale reflects concern for the particular defendant, rather than just the societal concern “to lessen the danger of governmental tyranny.”⁹⁶ It reflects the concern that a defendant should not be forced to spend his limited funds in defense of repetitious prosecutions, nor should his reputation suffer because of the opprobrium that accompanies criminal prosecutions. It embodies the idea that the accused should not have to endure uncertainty and insecurity about a later trial for the same offense. Rather, he should be able to go about his business and make plans with assurance that he will not again be prosecuted for the same allegedly unlawful act.⁹⁷

Prevention of harassment and oppression of the accused is, however, only one of the purposes underlying the double jeopardy clause and does not serve as the sole basis of the standard for determining application of the clause.⁹⁸ If this were the sole standard, then applying it would involve judicial inquiry in each case into the degree of harassment endured by the defendant and whether it was unreasonable, for any trial or prosecution entails a certain amount of expense and harm to reputation. “Such a case-by-case inquiry into the harassment of each defendant would seem to place an intolerable burden on the courts as well as throw continual doubt on the scope of the protection against double jeopardy.”⁹⁹ There are other considerations upon which the prohibition is based which help to define its scope.

B. *Prevention of Enhancement of the Probability of Conviction*

Perhaps the core reason underlying the double jeopardy prohibition is that it prevents enhancement of the possibility that an innocent defendant may be convicted.¹⁰⁰ Given enough tries, the prosecutor is more likely to find the “right” jury before which to present his case. That is, with the opportunity to argue his case before several panels, there is a greater

95. Douglas, J., dissenting, in *Gori v. United States*, 367 U.S. 364, 372 (1961) stressed these points: “It is designed to help equalize the position of the government and the individual, to discourage abusive use of the awesome power of society.”

96. J. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 15 (1969).

97. The concern for these individual interests was summarized by Mr. Justice Black in his oft-quoted statement of the policy underlying the double jeopardy protection:

The underlying idea . . . is that the State . . . 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.

Green v. United States, 355 U.S. 184, 187-88 (1957).

98. That is, prevention of harassment alone cannot be used as the rule for decision-making in any particular case.

99. Fisher, *supra* note 91, at 91.

100. M. FRIEDLAND, *supra* note 91, at 4. This is also cited by Mr. Justice Black as one of the underlying reasons. See note 97 *supra*.

likelihood that he will eventually find a sympathetic jury.¹⁰¹ Faced with the possibility of multiple re-prosecutions after success in the first, a defendant might be induced to bargain away his innocence rather than endure a second trial.¹⁰² The double jeopardy doctrine prevents the defendant from being put in this position. And even where the defendant would not be disposed to bargain with the prosecution, it prohibits the prosecution from putting on a better case the second time thereby diminishing the innocent defendant's chances of a favorable outcome.

In addition, by allowing the prosecution only one chance to prove the accusations, the prosecutor is compelled to prepare adequately for the first trial, since it is his only opportunity to present his case. In other words, he "may not, without prejudice, have the jury discharged . . . because he has poorly prepared his case."¹⁰³ This forecloses using the results of a "trial run" to discover the defendant's defense so that the prosecutor has a better indication of what he must do next time in order to obtain a conviction.

C. *Prevention of Prosecution-Controlled and Multiple Sentences*

The double jeopardy clause prevents undue punishment of the accused by proscribing multiple punishments for the same offense¹⁰⁴ and by restraining the prosecuting authority from searching for the sentence it deems appropriate. Should he not, upon conviction, get the penalty he thinks the accused deserved, the prosecutor may not bring a second prosecution for the

101. Without the double jeopardy clause, if the prosecutor were dissatisfied with the jury selected, he could intentionally cause a mistrial in the hope of getting a more favorable jury the second time he begins the proceeding. *Downum v. United States*, 372 U.S. 734 (1963), provides an example of how this could be accomplished. The prosecutor was aware that a witness could not be found before the jury had been sworn and impaneled. Upon the jury's return, he made a motion for discharge of the jury on the ground that this witness, who was needed to testify about two of the six counts against the defendant, was not present. Over the defendant's motion to dismiss the two counts for failure to prosecute and to continue with the other four, the jury was discharged. The Supreme Court reversed the conviction obtained at a second proceeding on the ground that the second prosecution constituted double jeopardy. Except for the double jeopardy clause, a prosecutor could obtain the same result if, after the trial had advanced to a further stage, he was not satisfied with the way it was progressing.

102. The situation would be analogous to the unappealing aspect of plea-bargaining where an innocent defendant pleads guilty to an offense in order to have the charges or sentence sought by the prosecutor reduced rather than run the risk of having to face a more severe penalty if he went to trial and was convicted. For the "universal rule is that sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal." *Alschuler, The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 61 (1958). However, the Supreme Court has permitted a guilty plea that was accompanied by defendant's contentions that he did not commit the crime but that he was pleading guilty because he faced a more severe penalty if he did not do so. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

103. Comment, *supra* note 10, at 286.

104. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Even if the double jeopardy clause was inapplicable in the case of a corporate defendant, *res judicata* would prevent imposition of more than one punishment. See notes 10 & 26 *supra* and accompanying text.

same offense or maintain an appeal to obtain a more severe or additional penalty. Thus, the sentence is a product of the interaction among the prosecutor, judge and jury, and the prosecutor is not permitted several opportunities to seek acceptance of a sentence which pleases him.

D. *Promotion of the Efficiency and Integrity of the Judiciary*

The integrity and efficiency of the judicial system are advanced by the double jeopardy doctrine.¹⁰⁵ The rules of finality embodied in the doctrine serve to prevent inconsistent results and the erosive effect they would have on the public's respect for and confidence in the judiciary. Permitting repetitious reopenings of facts and law would cast doubt on the system's potential for just determinations.¹⁰⁶

By inducing the prosecutor to prepare his case with the knowledge that he has only one opportunity to prosecute, the already burdened courts are not plagued with several attempts to convict for the same offense, and the public is spared the waste of time and money of repeated prosecutions where one effort, by a capable and cautious prosecutor, should be sufficient. Also, the public fisc is less likely to be dissipated in the wasteful pursuit and persecution of those considered unfriendly by the government.

In summary, then, the double jeopardy clause embodies some basic notions about how our criminal justice system should operate. It reflects abhorrence for the misuse of government prosecutorial power to harass, oppress, and punish unduly, and demands that persons confronted with criminal charges be treated with fundamental fairness. It also reflects the idea that the prosecutorial and judicial machinery should be used efficiently and in such manner as to command respect and confidence.

IV. CORPORATE INTERESTS PROTECTED

Although a corporation as an entity¹⁰⁷ cannot experience the emotional trauma and psychological stress that an individual might endure because of

105. M. FRIEDLAND, *supra* note 91, at 4; Fisher, *supra* note 91, at 90.

106. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451-52 (1963).

107. The government argued in its brief for *Security National Bank*, that the considerations underlying the protection are uniquely applicable to individuals because only individuals are faced with a possible loss of liberty, whereas a corporation faces only a fine, "a 'jeopardy' which is no greater than it would face in an ordinary civil proceeding." *Brief for Appellant* at 17. This is a very narrow view of, first, the "in jeopardy of life or limb" phrase of the fifth amendment and, second, the scope of criminal sanctions which are and may be visited upon a corporate defendant.

If double jeopardy protection attached only when the defendant was in danger of losing his "life or limb," then the character of the defendant, natural or artificial, should not be controlling in any case. But since *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), it has been established that the "in jeopardy of life or limb" phrase is not given a literal reading, but is held to encompass all criminal penalties. See note 16 *supra* and accompanying text. Thus, double

multiple trials,¹⁰⁸ alleviation of this condition is but one goal of the protection from double jeopardy.¹⁰⁹ It does not follow that because a corporation does not need protection from this particular object of the double jeopardy right, that this provision of the fifth amendment only protects interests peculiar to individuals. Nor should the conclusion necessarily follow that because a corporation does not require the same degree or kind of protection as do individuals, that it should be completely denied protection.¹¹⁰ A corporation, as well as society, would be subjected to other harms which the double jeopardy clause is designed to prevent if it were denied this protection. The corporate interests protected, though not coextensive with those of the individual, are significant and should be safeguarded when the corporation is drawn into the criminal justice system. Furthermore, the societal concerns upon which the doctrine rests are just as real whether an individual or a corporation is the accused.

Among the goals of virtually all business corporations are those of profit maximization and, as a minimum, economic survival.¹¹¹ The corporation employs the limited supply of capital it is able to attract to attain its goals, and any suit, whether civil or criminal, will require funds which it

jeopardy attaches when the state prosecutes a defendant for a violation for which the penalty is a fine.

When a corporation is prosecuted by the government, a fine is not the only penalty which it is in jeopardy of incurring. A component of the total punishment is the adverse publicity which comes with a prosecution and conviction for a criminal offense. As one commentator noted, this unfavorable publicity may be the most important part of the punishment received This factor needs to be taken into account in any assessment of the total weight of sanction attached to violations of regulatory legislation Certainly, in contemplating behavior likely to be held in violation of a regulatory statute, a business firm risks, in the possible loss of public esteem, a highly vital economic asset—beside which the possibility of a minor fine may pale in significance.

Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225, 234 (1957). In sum, to contend that the only penalty a corporate defendant could ever face is a fine is to ignore other effects on the corporation that accompany prosecution for a criminal violation. See also notes 115-19 *infra* and accompanying text.

Furthermore, it is not settled that the only penalty a corporation could be faced with is a fine. There are other possibilities such as suspension of its activities in a certain area for a specified period of time or requiring that notice be given that it has been convicted of engaging in criminal activity. See the proposed re-codifications of federal criminal law, S. 1, 93d Cong., 1st Sess. § 1-4A1(c)(7) (1973) and S. 1400, 93d Cong., 1st Sess. § 2004 (1973). It is possible, then, that something other than a monetary penalty may be exacted from a corporate defendant.

108. But see note 122 *infra* and accompanying text.

109. See note 98 *supra* and accompanying text.

110. Thus, in applying the fourth and fourteenth amendments to corporations, the Court has determined that corporations do not have fully the same interests as individuals, yet corporations are entitled to some of the protections provided by these amendments. See notes 38-50 & 73-90 *supra* and accompanying text.

111. There are, of course, other goals, especially in the case of large corporations. These include maintaining and improving market position, achieving a desirable public image, developing good labor relations and discharging social responsibilities. These may not be distinct from the profit objective so much as they are an indirect means of increasing profits. See D. WATSON, *PRICE THEORY AND ITS USES* 154 (2d ed. 1968).

could more advantageously utilize elsewhere. It will incur expenses in defending itself and it will have to absorb the adverse economic impact of losing if its defense should be unsuccessful. A corporation should not, however, any more than an individual, have its resources drained by the debilitating necessity of defending several suits for the same alleged wrongdoing.¹¹² And like an individual, a corporation should not have to endure the uncertainty of a possible reprosecution. If such a second trial were a looming possibility in the corporation's future, it would be compelled to adjust its plans to take into account the possible expenses of litigation and an adverse outcome.¹¹³

The double jeopardy clause should function to enable the corporation to proceed without having to weigh and consider the possibility of having to cope with the detrimental effects of a retrial. The corporation is allowed securely to funnel its resources into more productive areas. Thus, conservation of its resources is an interest it has which is identical with that of an individual. And, as noted by the court in *Security National Bank*, "[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."¹¹⁴

Although a corporation is incapable of committing such crimes as murder and rape which raise public contempt for the accused to its highest point, the unfavorable publicity associated with a criminal proceeding will not be avoided simply because the defendant is a corporation.¹¹⁵ It cannot "escape the 'incalculable effect' which a conviction may have on the public attitude toward the company."¹¹⁶ Thus, while a corporation will never have

112. If the corporation is small or one operating at the margin, this could be catastrophic, since it would be difficult if not impossible for it to absorb the increased and unexpected costs. The government could, then, force the business out of operation by multiple prosecutions for the same alleged offense. This would cause losses to the firm's creditors and security holders, and would lessen competition in the markets in which it was engaged.

113. Not only would the corporation have to make internal adjustments, but it would also be required to include notice of a pending lawsuit in its financial statements. The Securities and Exchange Commission requires that a "brief statement as to contingent liabilities not reflected in the balance sheet be made." SEC Reg. S-X, 17 C.F.R. § 210.3-16(i)(2). Also, generally accepted accounting principles require that a corporation disclose an unsettled lawsuit in its financial statements. One method is to report the pertinent aspects of the suit in a footnote to the balance sheet. Another is to disclose it as an appropriation (restriction on use) of retained earnings along with a footnote. G. WELSCH, C. ZLATKOVICH & J. WHITE, *INTERMEDIATE ACCOUNTING* 483 (4th ed. 1976); E. HENDRIKSEN, *ACCOUNTING THEORY* 451 (rev. ed. 1970).

114. 546 F.2d at 494.

115. However, as noted by the court in *Security National Bank*, "It is well-settled . . . that a corporate entity may be guilty of a great variety of criminal acts." 546 F.2d at 493. In addition to statutorily defined crimes, corporations have been found guilty of common law crimes such as grand larceny, *People v. Canadian Fur Trappers Corp.*, 248 N.Y. 159 (1928), and manslaughter, *State v. Lehigh Valley R.R.*, 90 N.J.L. 372 (1917).

116. *United States v. Security National Bank*, 546 F.2d 492, 494 (2d Cir. 1976). See Rourke, quoted in note 107 *supra*.

to endure the stigma of a murderer or rapist, accusation of other criminal activity can be highly detrimental to an image it may have carefully cultivated, through institutional advertising, for example. A criminal prosecution under the False Claims Act,¹¹⁷ for instance, could seriously impair the reputation of a bank. Likewise, a criminal proceeding brought pursuant to the Federal Food, Drug and Cosmetic Act¹¹⁸ against a corporation engaged in the food business could have a severe impact on its reputation.¹¹⁹ The adverse effects may take the form of decreases in sales and difficulties in obtaining capital and in attracting quality employees. The double jeopardy protection should therefore be available to a corporation to prevent its name from being recurrently associated with criminal charges for the same offense.

Fair treatment and freedom from the heightened possibility of conviction are legitimate concerns of a corporation as well as an individual.¹²⁰ With the state as the adversary, the contest will still be unequal, so there is the same interest in having the overwhelming power of the state neutralized. There appears to be no basis upon which to hold that the state should be given multiple opportunities to convict a corporation or that it should be able to place the corporate defendant in the position of having to make a choice between pleading guilty and undergoing repetitious trials for the same offense. The fundamental fairness requirement is violated equally by denying a corporation protection from double jeopardy.¹²¹

When the focus of the analysis is on defendant-related interests protected by the double jeopardy clause, the case for not denying corporations the protection is even stronger when a small corporation, owned by one or

117. 18 U.S.C. §§ 287, 1001 (1970).

118. 21 U.S.C. §§ 301-392 (1970).

119. The effect on its public image, at least as perceived by the corporation and its officers, of being charged with criminal violations is illustrated by the reaction of the Good Humor Corporation to an indictment charging it with knowingly producing and marketing ice cream with an illegally high bacteria count. *N.Y. Times*, Aug. 8, 1975, at 1, col. 5. A week after the indictment was reported in the newspapers, a three-fourths page advertisement appeared in the *New York Times*, in which Good Humor tried to reassure the public that its ice cream is "good and wholesome." The advertisement continued: "We are extremely proud of the quality of our products and wish to assure you that there is no health hazard with any of our products." The advertisement ended with the following explanation: "The Brooklyn Plant which was the subject of investigation was closed by Good Humor in April, 1975 for economic reasons." *N. Y. Times*, Aug. 15, 1975, at 10.

Good Humor Corporation subsequently pleaded guilty to 50 counts of the 244 count indictment. It was fined \$85,000 and agreed to spend up to \$450,000 to modernize its Chicago and Baltimore plants. *N.Y. Times*, Apr. 2, 1976, at 33, col. 1.

120. See notes 100-03 *supra* and accompanying text.

121. In *United States v. United States Gypsum Co.*, 404 F. Supp. 619, 624 (D.D.C. 1975), the court pointed out how inequitable a reprosecution could be: "Multiple anti-trust prosecutions arising out of the same course of conduct are particularly unfair because of their length and expense and because of the complex and voluminous nature of the evidence which is customarily involved"

just a few shareholders, is considered.¹²² Here, the identity of the corporation's interests with the protected interests of the individual defendant comes very close to being indistinguishable. When a small corporation is subjected to a criminal prosecution, its shareholders will ordinarily be personally and directly affected to a far greater degree than with a large corporation. In addition to the economic interests affected, they will undergo the same suffering, anxiety and psychological and emotional stress that an individual would endure if subjected to repetitious prosecutions. Denying a small corporation double jeopardy protection would, consequently, unleash *all* the evils at which the clause is directed. It is not possible, however, to deny double jeopardy protection only to large corporations, since for constitutional purposes there is no rational method by which to treat large and small corporations differently.¹²³

Whether the corporation is large or small, denying it protection from double jeopardy would, moreover, ignore significant societal concerns.¹²⁴ While the denial to the corporation of some fourth and fifth amendment protections accorded individuals is necessary for effective regulation, the purpose is to allow the regulators the opportunity to see if the corporation has been employing its resources in conformance with laws and public policy. Its purpose, in other words, is to aid in implementing the objective of protecting the public welfare by ensuring that legislation is not being violated. It is not a purpose of the denial of these protections to give the state more convenient access to incriminating information so that it is in a better position to obtain a conviction, though this is an inseparable and, to the government, a highly beneficial incident. Unlike the rationale underlying denial of some fourth and fifth amendment protections, forcing a corporation to undergo successive trials for the same alleged criminal offense is not a *sine qua non* of effective regulation. The main reason for denying a corporation double jeopardy protection would be to give the government more chances to convict. That is, the objective would be to place the government in a better position to punish a corporate defendant than it occupies when prosecuting an individual.¹²⁵ But this clashes with those

122. See *United States v. Security National Bank*, 546 F.2d 492, 493-94 (2d Cir. 1976).

123. This is unlike permissible statutory classification of corporations to achieve a particular objective. For example, Subchapter S of the Internal Revenue Code permits small businesses to choose their legal forms without undue tax influence and aids small businesses by exempting income from taxation at the corporate level and taxing it directly to its shareholders. S. REP. NO. 1983, 85th Cong., 2d Sess. 87 (1958). A "small business corporation" is distinguished primarily by the number of shareholders it is permitted to have. In order to make the election, the corporation can have no more than ten shareholders (for tax years beginning after 1976, fifteen under certain circumstances). I.R.C. § 1371(a).

124. See notes 94-106 *supra* and accompanying text.

125. The government, however, already has an advantage when a corporation is the defendant since at the pretrial investigating stage there is no bar to its obtaining from the corporation evidence which is self-incriminating, and it has great latitude to investigate the various facets of

concerns of restraint of the government's potentially tyrannical impulses, respect for and confidence in the adjudicatory processes and efficient use of public resources used to finance the judicial system. These concerns certainly appear to mitigate, if not overcome, the desire to have corporate wrongdoers convicted at any expense.

V. CONCLUSION

Under the Constitution, a corporation is not on a parity with natural individuals. The Supreme Court has reached different results when addressing this distinction, depending upon the constitutional clause being construed. The applicability of each constitutional protection to corporations has been evaluated independently of the applicability of other protections, even of those contained in the same clause of an amendment. In deciding whether any constitutional guaranty to "persons" is applicable to a corporation, an analysis must be made of the policies underlying the protection and the public interest in denying the protection. The correct result is reached by balancing these two factors.

This Note has sought to demonstrate that the underlying policies of the double jeopardy clause are implicated to a substantial degree when the government prosecutes a corporation for alleged criminal conduct. Other than generating a greater likelihood that wrongdoers will be convicted (thereby only indirectly increasing the effectiveness of regulation), denying corporations the protection of the double jeopardy clause does not appear substantially to advance a public interest. Moreover, the denial of double jeopardy protection is not *demand*ed to protect the public interest, as the Court found to be the case when it denied corporations the privilege against self-incrimination.

Although a corporation would be protected from multiple penalties by the principle of *res judicata*, without double jeopardy protection it would still be exposed to the onerous burdens of successive prosecutions. In a system which guarantees fundamental fairness, it would be highly inequitable to deny a corporate defendant protection from possible governmental harassment and oppression from multiple prosecutions for the same offense.

the corporation's business. Because the government enters the courtroom with these advantages at the pretrial stage, it would appear to be weighting the contest unnecessarily in favor of the government to give it an additional advantage by denying a corporation double jeopardy protection.