

NINTH CIRCUIT REVERSAL: THE REMOVAL OF OFFENSIVE COLLATERAL ESTOPPEL IN ALIENAGE PROCEEDINGS

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INTRODUCTION

All may agree that criminal procedure is based upon constitutional principles. However, disunity ensues when the question is posed as to what those principles are and how they are to be applied. In 2005, the Ninth Circuit reversed forty-six years of precedent when it ruled that offensive collateral estoppel could no longer be used by the government against criminal defendants.¹ This recent decision highlighted a circuit split regarding the government's use of offensive collateral estoppel in criminal cases.² Currently, the Third, Ninth, Tenth, and Eleventh Circuits hold that offensive collateral estoppel is unlawful.³ With the recent reversal in the Ninth Circuit, only the Eighth Circuit still allows the government to use collateral estoppel against criminal defendants.⁴ With the circuit split unresolved, this Note seeks to understand the role of offensive collateral estoppel, particularly in alienage proceedings, and concludes that the use of collateral estoppel by the government is both constitutional and beneficial to the United States court system.

Part I of this Note explores the doctrine of offensive collateral estoppel, also known as issue preclusion, and its current use in the United States court system. Part I further examines the prevalence of offensive collateral estoppel as used by the government in federal criminal cases, including the specific issue of collateral estoppel in alienage proceedings. Part II discusses the public policy concerns for the use of offensive collateral estoppel and why alienage proceedings are uniquely capable of supporting offensive collateral estoppel. These public policy concerns provide a reasonable basis for the acceptance of offensive collateral estoppel in alienage

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¹ *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005). *See generally* *United States v. Rangel-Perez*, 179 F. Supp. 619 (S.D. Cal. 1959) (acknowledging the use of collateral estoppel in criminal cases).

² *Current Circuit Splits*, 2 SETON HALL CIRCUIT REV. 509, 529–30 (2006).

³ *Id.* at 529.

⁴ Kristin C. Dunavant, Comment, *Criminal Procedure—State of Tennessee v. Scarbrough: Precluding the Application of Offensive Collateral Estoppel in Criminal Cases*, 37 U. MEM. L. REV. 639, 643 (2007).

proceedings. Reasons for the use of the doctrine include the conservation of judicial resources and the maintenance of court integrity through finality and consistency.

Part III turns to the recent removal of offensive collateral estoppel as a prosecutorial tool in alienage proceedings in *United States v. Smith-Baltiher*.⁵ Part IV discusses the question of whether a guilty plea is considered fully litigated for collateral estoppel purposes. This question is often discussed in relation to alienage proceedings where the defendant has previously been arrested, pled guilty, deported, and subsequently returned to the United States. This Part analyzes whether the first guilty plea can collaterally estop the defendant from relitigating the nationality element of 8 U.S.C. § 1326.

Part V will study the constitutionality of offensive collateral estoppel. The constitutionality of the doctrine includes studies of the Fifth, Sixth, and Fourteenth Amendments. Part V analyzes particular constitutional issues such as the right to a trial by jury, due process concerns, the Double Jeopardy Clause, the right to a speedy trial, and the Confrontation Clause as they relate to the doctrine of offensive collateral estoppel.

Part VI argues that if courts decide not to employ offensive collateral estoppel in alienage proceedings, then the burden of proof should shift to the defendant to present persuasive evidence that the previous finding of nationality was either incorrect or that his circumstances changed. The Note concludes that offensive collateral estoppel is both constitutional and necessary for good public policy.

I. HISTORY OF OFFENSIVE COLLATERAL ESTOPPEL

A. *Res Judicata and Collateral Estoppel*

Res judicata, also commonly referred to as claim preclusion, “attempts to avoid duplication of whole claims or cases.”⁶ In contrast, issue preclusion, or collateral estoppel, seeks to “avoid duplication of particular issues.”⁷ In essence, collateral estoppel looks to the first litigation and notes each issue decided.⁸ Then, if a second

⁵ 424 F.3d 913 (9th Cir. 2005).

⁶ Michelle S. Simon, *Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back*, 34 U. MEM. L. REV. 753, 754 (2004). *Res judicata*, when translated, literally means “a thing decided.” *Id.* at 753.

⁷ *Id.* *Black’s Law Dictionary* defines collateral estoppel as “[t]he binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based.” BLACK’S LAW DICTIONARY 279 (8th ed. 2004). Issue preclusion and collateral estoppel are used interchangeably by the courts. Susan M. Treyz, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719, 724 n.39 (1991). Although both terms will be used in this Note, collateral estoppel is preferred because the distinctive phrase “offensive collateral estoppel” is the specific topic of this Note.

⁸ Simon, *supra* note 6, at 754.

lawsuit is initiated that reintroduces the same issue, collateral estoppel prevents that issue from being relitigated and binds the parties to the original decision in the first litigation.⁹ Collateral estoppel can be asserted by the defendant against the plaintiff/prosecutor.

Collateral estoppel may be applied in both civil and criminal contexts if three elements are present.¹⁰ First, the issue in the pending litigation must be identical to the issue in the prior litigation.¹¹ Second, the issue must have been necessary for the decision of the prior litigation and must have resulted in a final judgment.¹² Third, the parties in the pending litigation must be the same as in the prior litigation.¹³

Offensive collateral estoppel differs from collateral estoppel in that it is asserted by the plaintiff against the defendant.¹⁴ Offensive collateral estoppel is defined as “[e]stoppel asserted by a plaintiff to prevent a defendant from relitigating an issue previously decided against the defendant.”¹⁵ Offensive collateral estoppel has been recognized as constitutional in civil cases.¹⁶

B. Expansion of Collateral Estoppel

Although collateral estoppel was originally developed in civil litigation, it has been used in federal criminal law since 1916 by both prosecutors and defendants.¹⁷

⁹ *Id.*

¹⁰ *Id.* at 759–60 (citing *Bernhard v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 122 P.2d 892, 895 (Cal. 1942)).

¹¹ *Id.* at 759.

¹² *Id.*

¹³ *Id.* at 760.

¹⁴ See BLACK’S LAW DICTIONARY, *supra* note 7, at 279. Collateral estoppel as originally intended could be termed “defensive collateral estoppel,” which is defined as “[e]stoppel asserted by a defendant to prevent a plaintiff from relitigating an issue previously decided against the plaintiff.” *Id.*

¹⁵ *Id.*

¹⁶ See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (holding that in federal civil actions trial courts have broad discretion in allowing offensive collateral estoppel).

¹⁷ *Simon*, *supra* note 6, at 756; see also *United States v. Oppenheimer*, 242 U.S. 85 (1916). The Court acknowledged that “[c]ollateral estoppel” is an awkward phrase in that it does not adequately describe its meaning. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). The Court, however, described collateral estoppel as “an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Id.* Further, the Court succinctly stated collateral estoppel’s history: “Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court’s decision more than 50 years ago in *United States v. Oppenheimer*.” *Id.* State courts also allowed for offensive collateral estoppel in criminal cases in limited circumstances well before the federal courts allowed its use. See, e.g., *People v. Mojado*, 70 P.2d 1015 (Cal. Dist. Ct. App. 1937); *Commonwealth v. Ellis*, 35 N.E. 773 (Mass. 1893); *In re Gottesfeld*, 91 A. 494 (Pa. 1914).

The ability of the defendant to collaterally estop the government from relitigating specific issues in criminal cases was upheld by the U.S. Supreme Court in 1970.¹⁸ The Court held that the defendant's right to use collateral estoppel against the government is based in "the Fifth Amendment's guarantee against double jeopardy."¹⁹

The ability of the government, however, to collaterally estop a defendant from relitigating a particular issue, recognized as offensive collateral estoppel in criminal cases, has not been addressed by the Supreme Court.²⁰ Currently, the federal circuit courts are split on their acceptance of offensive collateral estoppel by the government in criminal cases.²¹ In 1994, Richard B. Kennelly, Jr. argued that although the Court had yet to rule on the matter, leaving the lower courts split on the issue, the extension of offensive collateral estoppel in criminal cases was a "natural extension of the law of issue preclusion."²² He further argued that this extension into criminal cases "would then display the symmetry dictated by the doctrine's underlying policy, just as it does in the civil context."²³

¹⁸ See *Ashe*, 397 U.S. 436.

¹⁹ *Id.* at 442–44.

²⁰ Simon, *supra* note 6, at 756. Lower courts, however, have applied the doctrine of offensive collateral estoppel to allow the government to collaterally estop the defendant. Allan D. Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 314 & n.192 (1980); see *People v. Ford*, 416 P.2d 132, 137–38 (Cal. 1966), *cert. denied*, 385 U.S. 1018 (1967) (holding defendant's prior felony convictions conclusive for purposes of a felony-murder theory if murder occurred in the course of commission of the felonies); *Commonwealth v. Evans*, 101 Mass. 25, 26–27 (1869) (holding defendant's prior conviction for assault estopped him from asserting self-defense for murder charges when the victim died from wounds incurred in the assault); *Carmody v. Seventh Judicial Dist. Court*, 398 P.2d 706, 707 (Nev. 1965) (holding the defendants' robbery convictions based on guilty pleas estopped them from denying that they were the robbers in a subsequent trial for a murder committed during the course of the crime).

²¹ *Current Circuit Splits*, *supra* note 2, at 529 (noting that the Third, Tenth, Eleventh, and now the Ninth, Circuits determined that "collateral estoppel could not be used in a criminal case to prevent a defendant from contesting an element of the offense." (quoting *United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005))). For decisions by the Third, Tenth, and Eleventh Circuits ruling that the use of offensive collateral estoppel by the government is improper, see *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1244 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 889 (3d Cir. 1994), *rev'd in part*, 105 F.3d 117 (3d Cir. 1997), *cert. denied*, 528 U.S. 824 (1999); *United States v. Harnage*, 976 F.2d 633, 634–36 (11th Cir. 1992).

²² Richard B. Kennelly, Jr., Note, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379, 1380 (1994).

²³ *Id.* Likewise, Vestal suggested a hypothetical to aid in demonstrating the effectiveness of offensive collateral estoppel:

[A]n individual might be charged with the distribution of pornographic materials on several different days with the distribution on each day being a separate offense. Assuming that the defendant can be tried on the various separate offenses in separate trials, if there is a conviction on the first charge—assuming the incentive to litigate the matter

Notwithstanding this apparent “natural extension” of offensive collateral estoppel into criminal law and the willingness of some circuits to do so, other circuits have been reluctant to extend collateral estoppel, perhaps in fear of violating a defendant’s right to trial by jury as guaranteed in the Sixth Amendment.²⁴

Some courts have attempted to define the rules of applying offensive collateral estoppel in criminal cases. The court in *United States v. Romeo* applied a three-step approach in making the collateral estoppel determination.²⁵ This approach is very similar to the requirements of issue preclusion previously outlined.²⁶ First, “[a]n identification of the issues in the two actions” must be made in “determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine.”²⁷ Second, the record of the first proceeding must be examined to determine whether the issue was fully litigated in the first proceeding.²⁸ Third, the court must determine, through examining the record, “*whether the issue was necessarily decided in the first case.*”²⁹

The first and third steps in the analysis can be assessed by simply comparing the record of the first proceeding to the issues involved in the second proceeding to determine if the issues are identical and if they were sufficiently determined. The second inquiry, however, is particularly contentious for courts.³⁰ The circuit courts continue to be divided on the issue.³¹

fully—a finding that the materials were pornographic should be binding in the subsequent prosecutions if identical materials are at issue. Logic and the wise use of the time of the courts, attorneys, and litigants would indicate that relitigation of the question of the nature of the materials should not be allowed.

Vestal, *supra* note 20, at 297 (footnote omitted).

²⁴ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”). See also *infra* Part V.A for a discussion of the consistency of offensive collateral estoppel with the right to trial by jury. Other constitutional concerns regarding offensive collateral estoppel include the Due Process Clause, the Double Jeopardy Clause, the right to a speedy trial, and the Confrontation Clause. For a discussion on each of these constitutional issues, see *infra* Part V.

²⁵ 114 F.3d 141, 143 (9th Cir. 1997).

²⁶ See *supra* notes 10–13 and accompanying text.

²⁷ *Romeo*, 114 F.3d at 143.

²⁸ *Id.*

²⁹ *Id.* (noting a process of determining “whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration,” as discussed in *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)).

³⁰ Although the Ninth Circuit originally characterized guilty pleas by the defendant as “being fully litigated,” the court suddenly switched opinion on the matter. Compare *United States v. Bejar-Matrecios*, 618 F.2d 81, 83–84 (9th Cir. 1980), with *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005). For a discussion that a guilty plea should be considered as fully litigated, see *infra* Part IV.

³¹ See generally *Current Circuit Splits*, *supra* note 2, at 529–30 (describing the alignment

Conveying one side of this debate, the Ninth Circuit in *United States v. Bejar-Matrecios* stated that the “general rule is that the doctrine of collateral estoppel applies equally whether the previous criminal conviction was based on a jury verdict or a guilty plea.”³² The court further stated that by Bejar-Matrecios’s “plea of guilty, the voluntariness of which Bejar-Matrecios does not challenge, Bejar-Matrecios waived his right to confrontation and a jury trial.”³³ Therefore, “[b]ecause a knowing and voluntary guilty plea constitutes an admission of all the material facts alleged in the indictment it is fair to estop a defendant from relitigating a common material fact even at a subsequent criminal proceeding.”³⁴ The court concluded its analysis by stating that “evidence of a prior conviction, even though founded on a plea of guilty, may be relevant in a subsequent criminal proceeding to establish material facts necessary to sustain the prior judgment.”³⁵

This three-step process, although helpful, has not been accepted by all circuits. In fact, offensive collateral estoppel has not been accepted at all in some circuits, but other circuits have used it in limited types of cases.³⁶ One of the most prevalent of these specific types of cases is the “issue of a defendant’s nationality status.”³⁷

As early as 1959, the Ninth Circuit acknowledged that “[a]lthough invoked in criminal cases in the Federal courts primarily by and for the defendant, collateral estoppel has been applied against the interests of the accused in some limited situations.”³⁸ In *United States v. Rangel-Perez*, the defendant in the criminal trial was deported after being convicted in a federal district court of illegal entry into the United States in 1943.³⁹ The later trial in 1959 resulted when authorities found the defendant again in California in 1957.⁴⁰ The defendant was tried a second time, this

of the circuits on the issue of offensive collateral estoppel).

³² *Bejar-Matrecios*, 618 F.2d at 83 (citing *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978)) (proposing that “facts necessarily determined by conviction based on guilty plea cannot be relitigated in later forfeiture proceeding”); *see also* *Brazzell v. Adams*, 493 F.2d 489, 490 (5th Cir. 1974) (affirming the general rule that “collateral estoppel applies equally whether the prior criminal adjudication was based on a jury verdict or a guilty plea”).

³³ *Bejar-Matrecios*, 618 F.2d at 83–84 (citation omitted).

³⁴ *Id.* at 84 (citation omitted) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Hernandez-Uribe v. United States*, 515 F.2d 20, 21 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976)).

³⁵ *Id.* In applying this analysis to the specific facts of the case, the court concluded that “because alienage is an element of a § 1325 conviction, evidence of the § 1325 conviction would have established conclusively that Bejar was an alien at the time of the § 1325 conviction.” *Id.*

³⁶ *See Current Circuit Court Splits*, *supra* note 2, at 529–30.

³⁷ Kennelly, *supra* note 22, at 1382. The reasons for the courts allowing offensive collateral estoppel in alienage proceedings in criminal courts are outlined *infra* Part I.C.

³⁸ *United States v. Rangel-Perez*, 179 F. Supp. 619, 623 (S.D. Cal. 1959).

³⁹ *Id.* at 621–22.

⁴⁰ *Id.* at 622.

time for the felony of being a deported alien found within the United States in violation of 8 U.S.C. § 1326.⁴¹ The government sought to collaterally estop the defendant from contesting the alienage issue since it was previously decided in the 1943 conviction.⁴² The court ruled that the government could use offensive collateral estoppel to prevent the relitigation of the alienage issue.⁴³

Although the Ninth Circuit⁴⁴ followed this precedent for over forty-six years, it suddenly reversed itself in *United States v. Smith-Baltiher* in 2005.⁴⁵

C. Why Offensive Collateral Estoppel in Alienage Proceedings?

Not all criminal proceedings invite the use of offensive collateral estoppel. In fact, issue preclusion by the government would be ill-advised and perhaps unconstitutional for some proceedings. However, offensive collateral estoppel is readily acknowledged as both beneficial and constitutional in regard to alienage proceedings.⁴⁶

Kennelly argued that many courts allowed offensive collateral estoppel in alienage proceedings for three reasons.⁴⁷ First, alienage proceedings do not always involve jury trials.⁴⁸ Second, the consequences of conviction are vastly different in

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 626.

⁴⁴ The Ninth Circuit has been particularly generous towards alienage proceedings in recent years. *See* *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (ruling that women from countries that practice female mutilation are eligible for asylum in the United States); *Sagana v. Tenorio*, 384 F.3d 731, 740 (9th Cir. 2004), *cert. denied*, 543 U.S. 1149 (2005) (holding that “[a]liens who are in the jurisdiction of the United States under any status, even as illegal entrants or under a legal fiction, are entitled to the protections of the Fourteenth Amendment”); *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270–71 (9th Cir. 2001) (discussing Fifth Amendment protection of aliens in deportation proceedings). On the topic of female genital mutilation, Phyllis Schlafly observed: “Amnesty International estimates that 135 million girls and women, mostly in Africa, are victims of this horrendous practice, and that an additional two million more are currently at risk. The sheer number of applicants who could petition for asylum on this basis are mind boggling.” PHYLLIS SCHLAFLY, *THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT* 105 (rev. & expanded ed. 2006). Ninth Circuit Judge Michael Daly Hawkins acknowledged the Ninth Circuit’s popularity for immigration cases because of its pro-alien stance, saying: “Three years ago, immigration cases were 8 percent of our calendar. Today, as we speak, that percentage is 48 percent.” *Id.* at 105.

⁴⁵ 424 F.3d 913 (9th Cir. 2005).

⁴⁶ *See, e.g., United States v. Gracidias-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000); *United States v. Marin-Cuevas*, 147 F.3d 889 (9th Cir. 1998); *United States v. Meza-Soria*, 935 F.2d 166 (9th Cir. 1991); *United States v. Bejar-Matrecios*, 618 F.2d 81 (9th Cir. 1980). Other circuits followed this precedent as well, including the Eighth Circuit in *Hernandez-Uribe v. United States*, 515 F.2d 20, 21–22 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976).

⁴⁷ Kennelly, *supra* note 22, at 1383–84.

⁴⁸ *Id.* at 1384.

alienage proceedings than other criminal proceedings.⁴⁹ A convicted alien is simply “deported, not incarcerated.”⁵⁰ Finally, “illegal aliens often are repeat players, that is, able to enter the United States repeatedly in the hope of avoiding another arrest and deportation.”⁵¹

The court in *United States v. Rangel-Perez* noted that “[i]f the issue of alienage were to be tried each time a defendant makes an entry into the United States, after once having been found by judicial determination to be an alien, there would be less to deter future entries than at the present.”⁵² The court further stated that without offensive collateral estoppel “a defendant would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming and that such trial might, on one occasion, result in a favorable verdict.”⁵³

As Kennelly acknowledged, “[i]t is relatively costless to the alien to try his luck with successive illegal reentries. Allowing the government to invoke collateral estoppel achieves a balance by correspondingly easing the resource burden on the prosecution and the courts.”⁵⁴

II. PUBLIC POLICY SUPPORTS THE DOCTRINE OF OFFENSIVE COLLATERAL ESTOPPEL

Before discussing the constitutionality of offensive collateral estoppel and the recent removal of the doctrine in the Ninth Circuit, it is important to note the public policy considerations regarding the use of collateral estoppel by the government. Kennelly suggested that issue preclusion, or collateral estoppel, “is designed to further several important goals: finality, stability, certainty, consistency, judicial and litigant economy, and the moral force of a court’s judgments.”⁵⁵ These goals will be grouped into two separate categories: (1) the conservation of judicial resources, and (2) the maintenance of court integrity.

A. Conservation of Judicial Resources

Offensive collateral estoppel prevents unnecessary, duplicative litigation from clogging court dockets.⁵⁶ As Allan D. Vestal acknowledged, the real question

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 179 F. Supp. 619, 626 (S.D. Cal. 1959).

⁵³ *Id.*

⁵⁴ Kennelly, *supra* note 22, at 1384.

⁵⁵ *Id.* at 1395.

⁵⁶ Simon, *supra* note 6, at 781. It is well established that “the use of offensive issue preclusion by the government has resulted in judicial efficiency.” *Id.* Simon further noted that “[i]llegal immigration puts an added burden on federal courts by requiring the

regarding the use of offensive collateral estoppel is the amount of freedom to give the court system in controlling its “judicial administration.”⁵⁷ “When the state asserts issue preclusion *against* a criminal defendant, a discussion of double jeopardy or due process is inappropriate. Rather, the source of the state’s claim of issue preclusion must be the power of the courts to control judicial administration—that is, the courts’ power to administer justice.”⁵⁸ Such administration of justice is difficult if judicial resources are strained and overburdened.

The court in *United States v. Rangel-Perez* summarized the need for offensive collateral estoppel by stating that “[t]he doctrine of collateral estoppel, like its parent *res judicata*, is born of that sound public policy which would put an end to the litigation of a given subject matter, once the parties have had a full and fair hearing and adjudication of the issue.”⁵⁹ The court further reasoned that it was “wise public policy” and “common-sense” to “advocate application of collateral estoppel against a defendant in a criminal case, at least as to certain issues, where such issues have been in fact litigated and necessarily adjudicated in a prior criminal case between the identical prosecutor and the identical accused.”⁶⁰ Specifically, the court ruled that “[i]ssues as to status, for example, would seem most appropriate for application of the doctrine—especially so as to such an unchanging and indeed unchangeable, status as that of natural parent and child.”⁶¹

The court in *Rangel-Perez* summarized its findings that, without offensive collateral estoppel in alienage proceedings, “[t]he Government would be estopped by any unfavorable verdict, and accomplishment of the objectives of the immigration laws to discourage and effectively control the already difficult problem of illegal entries into this country would thus be weakened.”⁶² The court concluded that “[t]he Government should not be put to the expense and burden of proving the issue of alienage after one judicial determination has been made, each time an alien decides to reenter this country illegally.”⁶³

determination of an alien’s status prior to deportation. The federal docket backlog continues to grow and may deleteriously affect the quality of the federal courts.” *Id.*; see also Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 811 (1989) (noting that “*duplicative* litigation” and resulting docket delays cause major problems in federal courts).

⁵⁷ Vestal, *supra* note 20, at 284.

⁵⁸ *Id.*

⁵⁹ 179 F. Supp. 619, 625 (S.D. Cal. 1959).

⁶⁰ *Id.*

⁶¹ *Id.* This is precisely the reason why the doctrine of offensive collateral estoppel can be so readily applied to illegal immigration or alienage proceedings. Because alienage does not readily change and new evidence contrary to the finding of the first proceeding is rare, offensive collateral estoppel is a valuable tool in alienage proceedings in conserving judicial resources. See *supra* note 56 and accompanying text.

⁶² *Rangel-Perez*, 179 F. Supp. at 626.

⁶³ *Id.*

Because of the unique nature of illegal immigration cases, including the determination of the defendant's nationality status, offensive collateral estoppel is a useful tool for prosecutors and courts in conserving judicial resources.⁶⁴ Therefore, unless a defendant has new evidence that he is a U.S. citizen, he should be precluded from re-litigating previously decided issues in an attempt to preserve scarce judicial resources.⁶⁵

B. Maintenance of Court Integrity

"[F]inality, stability, certainty, [and] consistency" in decisions are required to preserve the integrity of the court system.⁶⁶ However, such noble standards and purposes are difficult to accomplish when "[t]he courts are inundated with work, and enormous backlogs are accumulating."⁶⁷ This is especially true when courts are backlogged with issues previously decided. In the absence of offensive collateral estoppel, such a predicament would nearly assure that certain issues would not be decided with consistency, as courts are required to decide the same issue from the same parties repeatedly. Additionally, with the ability of the defendant to relitigate previously decided issues, no finality would exist with court decisions.

The court in *United States v. Levasseur* explained the reasoning behind the doctrine of collateral estoppel, stating:

The primary concern of the doctrine of judicial estoppel is to protect the integrity of the judicial process. . . . [T]his court recognized that in certain constrained circumstances a party might be precluded from "asserting a position in one legal proceeding which is contrary to a position it has already asserted in another."⁶⁸

The court then concluded that "[i]n this circuit, then, when a litigant is 'playing fast and loose with the courts,' that party will be precluded from asserting a position inconsistent with a position he or she took in an earlier proceeding."⁶⁹

The primary purpose of offensive collateral estoppel is to avoid repetitious litigation.⁷⁰ Vestal observed "[s]ince the Supreme Court has endorsed the use of

⁶⁴ Kennelly, *supra* note 22, at 1383–84.

⁶⁵ For further discussion regarding the admittance of new evidence in alienage proceedings, see *infra* notes 102–03 and accompanying text.

⁶⁶ Kennelly, *supra* note 22, at 1395.

⁶⁷ Vestal, *supra* note 20, at 321.

⁶⁸ 846 F.2d 786, 792 (1st Cir. 1988) (quoting *Patriot Cinemas v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)).

⁶⁹ *Id.* (quoting *Patriot Cinemas*, 834 F.2d at 212). This public policy reasoning is advocated by both courts and law scholars alike. Vestal agreed, while acknowledging the limited role of offensive collateral estoppel. See Vestal, *supra* note 20, at 321.

⁷⁰ Vestal, *supra* note 20, at 321.

preclusion to avoid repetitive litigation in civil cases, it seems reasonable to use this concept in criminal cases.”⁷¹ However, Vestal continued his argument by stating that “[t]he infrequency of the possible application of the rule of preclusion against a defendant does not undercut its rationality or desirability.”⁷² Certainly, the consistency of the court system is as valued in criminal courts as it is in the civil arena.

III. *UNITED STATES V. SMITH-BALTIHER*

This Note has established that offensive collateral estoppel is constitutional in civil cases.⁷³ Some jurisdictions have also applied this doctrine to criminal cases since the early twentieth-century.⁷⁴ Among those jurisdictions embracing offensive collateral estoppel in criminal cases was the Ninth Circuit—particularly in alienage proceedings.⁷⁵ Thus, the Ninth Circuit’s 2005 decision to reverse its precedent by ruling that offensive collateral estoppel could no longer be used in criminal cases was surprising.⁷⁶

A. *Facts of the Case*

The facts of *Smith-Baltiher* are not complicated. Genaro Smith-Baltiher was found guilty in federal district court of violating 8 U.S.C. § 1326, which prohibited any previously deported alien to reenter the United States without express permission from the U.S. Attorney General.⁷⁷ The court established that Smith-Baltiher had, “on at least four prior occasions . . . been deported and removed to Mexico for being an illegal alien found in the U.S.”⁷⁸ Notwithstanding these previous deportations, Smith-Baltiher applied to enter the U.S. again.⁷⁹ He told the INS that he was a U.S. citizen by birth, having been born in California, but that he did not have any of his supporting documents.⁸⁰ He was given a second interview in the process.⁸¹ However, during the second interview, computer checks found that on at least four occasions he was deported for being in the U.S. illegally.⁸²

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See supra* notes 10–16 and accompanying text.

⁷⁴ *See supra* Part I.B.

⁷⁵ *See supra* Part I.C.

⁷⁶ *See United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005).

⁷⁷ *Id.* at 915; 8 U.S.C. § 1326(a)(2) (2000).

⁷⁸ *Smith-Baltiher*, 424 F.3d at 916.

⁷⁹ *Id.* at 915.

⁸⁰ *Id.* at 915–16.

⁸¹ *Id.* at 916.

⁸² *Id.*

Smith-Baltiher was arrested and brought in for questioning.⁸³ He waived his *Miranda* rights and informed the inspector that he was in fact born in Mexico and “that both of his parents were Mexican nationals.”⁸⁴ He admitted he had been deported at least four times and “had not obtained permission or a waiver to reenter.”⁸⁵ In fact, Smith-Baltiher previously pled guilty to being an illegal alien and was convicted in 1998 and 1999 to charges of illegal entry in violation of 8 U.S.C. § 1325.⁸⁶ “On both occasions, he stipulated as part of his guilty plea that he was not a U.S. citizen and in neither did he advance a claim of U.S. citizenship.”⁸⁷ Notwithstanding this evidence and prior convictions, Smith-Baltiher asserted before the court that he was a U.S. citizen and sought to submit supporting evidence of that assertion.⁸⁸

The evidence Smith-Baltiher sought to admit was a copy of his mother’s U.S. birth certificate.⁸⁹ Smith-Baltiher, himself, did not have a copy of this birth certificate but contended that the government had a copy and requested “that the government turn over a copy.”⁹⁰ This “new” evidence was not new at all. In fact, nowhere does the court argue that Smith-Baltiher obtained new evidence of his citizenship.⁹¹ The birth certificate Smith-Baltiher sought to admit into evidence was simply old evidence that he did not present in his previous four arrests and subsequent guilty pleas.⁹²

B. The Court’s Ruling

The federal district court ruled that the government could use offensive collateral estoppel to preclude Smith-Baltiher from presenting evidence of his citizenship.⁹³ The district court held that because Smith-Baltiher previously pled guilty to being an illegal alien and admitted that he was not a U.S. citizen, he could not then relitigate this issue in court.⁹⁴

The Ninth Circuit acknowledged in its decision to reverse that “[a]t the time of the district court decision, we had held that collateral estoppel could be used offensively

⁸³ *Id.*

⁸⁴ *Id.* In fact, Smith-Baltiher provided the authorities with a copy of his Mexican birth certificate that confirmed his Mexican birthplace. *Id.*

⁸⁵ *Id.* The Ninth Circuit acknowledged Smith-Baltiher’s “sordid criminal history.” *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 916–19.

⁸⁹ *Id.* at 916.

⁹⁰ *Id.*

⁹¹ *See id.* at 916, 919–23 (discussing the court’s treatment of Smith-Baltiher’s evidence pertinent to collateral estoppel).

⁹² *See id.* at 916–17.

⁹³ *Id.* at 919.

⁹⁴ *Id.* at 915. Specifically, Smith-Baltiher appealed the district court’s ruling that “he [was] collaterally estopped from challenging his status as an alien.” *Id.*

against a criminal defendant in the context of illegal reentry prosecutions.”⁹⁵ However, the court then cited opinions from the Third, Tenth, and Eleventh Circuits ruling that the government was precluded from using collateral estoppel against the defendant.⁹⁶ The Ninth Circuit also cited the government’s abandonment in a 2003 case, *United States v. Arnett*, of its use of offensive collateral estoppel.⁹⁷

The *Smith-Baltiher* opinion suggests that between the district and appeals court rulings the government decided that its use of collateral estoppel in this case was improper.⁹⁸ The court thus ruled: “collateral estoppel does not provide a basis for precluding Smith from contesting his alienage or offering evidence of his derivative citizenship, or from asserting that he did not possess the *mens rea* necessary to support a conviction.”⁹⁹

By effectively reaffirming the *Arnett* holding, this ruling prevents the government from using collateral estoppel in any criminal case.¹⁰⁰ Although this Note does not contend that offensive collateral estoppel is appropriate in all criminal cases, it advocates the appropriateness of the doctrine’s application in alienage proceedings, specifically because of the wording in 8 U.S.C. § 1326 and because of the recidivist nature of the offense of illegal reentry.¹⁰¹

Section 1326 provides a course of action for those previously convicted of illegal entry into the United States by allowing them to receive permission to enter the country from the U.S. Attorney General.¹⁰² This process includes submitting any evidence of derivative citizenship or other evidence in the establishment of citizenship in order to gain such permission or demonstrate good cause for an exception.¹⁰³ Consequently, if defendants in illegal immigration cases obtained new evidence of citizenship, they should be able to present such evidence to the court for review.

⁹⁵ *Id.* at 920. For the Ninth Circuit’s precedent on this issue, see *supra* note 59.

⁹⁶ *Smith-Baltiher*, 424 F.3d at 920.

⁹⁷ *Id.* The supplemental brief included the following statement by the government: “In federal criminal trials, the United States may not use collateral estoppel to establish, as a matter of law, an element of an offense or to conclusively rebut an affirmative defense on which the Government bears the burden of proof beyond a reasonable doubt.” *United States v. Arnett*, 353 F.3d 765, 766 (9th Cir. 2003).

⁹⁸ *Smith-Baltiher*, 424 F.3d at 920.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 920, 926.

¹⁰¹ Nationality and alienage determinations, or illegal immigration cases, tend to facilitate the use of offensive collateral estoppel because of the repeat nature of the offense. Often those convicted of violating 8 U.S.C. § 1326 are repeat offenders. See *supra* notes 51 and 78 and accompanying text. Therefore, the use of offensive collateral estoppel to prevent the accused from contesting previously decided issues, such as nationality, can be effective in preserving judicial resources and maintaining consistency in court rulings. See *supra* Part I.C.

¹⁰² 8 U.S.C. § 1326 (a)(2)(A) (2000).

¹⁰³ See *id.* § 1326 (a)(2)(A), (B).

This process was available to Smith-Baltiher. Smith-Baltiher was previously deported at least four times for violating 8 U.S.C. § 1326 and pled guilty on at least two occasions to all the elements of the statute.¹⁰⁴ In addition, he confessed to police that he was not born in California but in Mexico.¹⁰⁵ Notwithstanding all of this evidence, the Ninth Circuit wasted further judicial resources by allowing this issue to be relitigated.¹⁰⁶

Following the Ninth Circuit's reasoning, a man could be arrested and deported twenty-five times from the U.S. to Mexico. On every one of those occasions he could plead guilty to being an illegal alien and never assert a claim of citizenship. Yet, on arrest for his twenty-sixth illegal entry, he could claim to be a U.S. citizen and be allowed to re-litigate the previously decided issue of his citizenship.¹⁰⁷ Such an exercise is a waste of judicial resources.¹⁰⁸

IV. IS A GUILTY PLEA FULLY LITIGATED?

A main issue in *Smith-Baltiher* that received little attention from the Ninth Circuit was whether pleading guilty to an offense or issue should be considered fully litigated in subsequent trials in which offensive collateral estoppel is sought.¹⁰⁹ The Eighth Circuit in *Hernandez-Uribe v. United States* addressed this controversial issue and ruled that a previous guilty plea by the accused was considered fully litigated.¹¹⁰ The defendant, Alfredo Efren Hernandez-Uribe, was convicted by a

¹⁰⁴ *Smith-Baltiher*, 424 F.3d at 916.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 920.

¹⁰⁷ Such a scenario can be imagined based on the precedent established in *Smith-Baltiher* and *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998).

¹⁰⁸ *See supra* Part II.A.

¹⁰⁹ The only reference the Ninth Circuit made to whether a guilty plea is considered fully litigated was when it summarized the findings of the district court. *Smith-Baltiher*, 424 F.3d at 917–18. The district court quoted *United States v. Bejar-Matrecios*: “Because a knowing and voluntary guilty plea constitutes an admission of all of the material facts alleged in the indictment, it is fair to estop a defendant from re-litigating a common material fact even at a subsequent criminal proceeding.” *Id.* (quoting *United States v. Bejar-Matrecios*, 618 F.2d 81, 84 (9th Cir. 1980)).

¹¹⁰ 515 F.2d 20, 22 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976) (holding that the defendant's constitutional rights were not abridged when he was collaterally estopped from denying his alien status because he neither challenged his prior guilty plea nor claimed a subsequent change in status). Academics also conclude that guilty pleas should be considered fully litigated for subsequent proceedings. *See, e.g., Vestal, supra* note 20, at 294. Vestal asserted that

[f]ailure to controvert an issue may give rise to preclusion just as may a contest on the issue. . . . If a party elects not to contest an issue that is necessary for a decision and a judgment that is unfavorable to that party is handed down on that issue, a court in a subsequent trial should

federal district court of being an alien who unlawfully reentered the United States after being arrested and deported for being in the country illegally.¹¹¹ During his trial, Hernandez-Uribe was precluded by offensive collateral estoppel from relitigating the issue of whether he was an illegal alien.¹¹² On appeal, he argued that collateral estoppel by the government in his criminal trial “deprive[d] him of his right to a presumption of innocence, his sixth amendment right to a trial by jury, and his right to confrontation of witnesses against him.”¹¹³ However, Hernandez-Uribe admitted he previously pled guilty to being an illegal alien in the United States, notwithstanding the fact that he had information that he was born in El Paso, Texas.¹¹⁴

The court in *Hernandez-Uribe* stated that the defendant’s prior voluntary guilty plea meant that he “admitted all essential elements of the offense charged including the element that he was an alien.”¹¹⁵ The court recognized the defendant’s right “to have tried anew each time the facts as to his entry and its justification on other grounds . . . as well as any change of nationality status since the prior adjudication.”¹¹⁶ Additionally, the court concluded that it was “equally beyond question that the accused is always entitled to have any prior proceedings carefully examined in order to determine surely whether a prior adjudication of alienage was made after a full and adequate hearing, and was essential to a determination of the case.”¹¹⁷

Nevertheless, the court ruled that Hernandez-Uribe was not allowed to relitigate the issues previously decided in his guilty plea.¹¹⁸ The court held that a case resolved by the defendant’s guilty plea was to be considered fully litigated, just as if the case were decided by a jury verdict.¹¹⁹ “The general rule is that collateral estoppel, where

hold this sufficient to result in issue preclusion.

Id. In regards to prior criminal litigation and pending civil litigation, the U.S. District Court for the Southern District of New York in *United States v. Schneider* held that “[r]elitigation in a civil action of an issue determined adversely to the defendant in a prior criminal proceeding is foreclosed, whether the prior determination was based on the verdict of a jury, or on a plea of guilty.” 139 F. Supp. 826, 829 (S.D.N.Y. 1956) (citations omitted). The court further reasoned that “where the prior conviction resulted from a plea of guilty there would appear to be greater warrant for application of the doctrine since the defendant has admitted the truth of the charges contained in the indictment.” *Id.* If this is so in the civil context, why not also in the criminal context?

¹¹¹ *Hernandez-Uribe*, 515 F.2d at 20–21.

¹¹² *Id.* at 21.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 22 (citation omitted) (quoting *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968)).

¹¹⁷ *Id.* (quoting *Pena-Cabanillas*, 394 F.2d at 788).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

applicable, applies equally whether the previous criminal conviction was based on a jury verdict or a plea of guilty.”¹²⁰

The court further argued that the Federal Rules of Civil Procedure (FRCP) protect defendants who plead guilty.¹²¹ Specifically, the court stated that FRCP 11 “requires the court before accepting a plea of guilty to satisfy itself that the plea is made voluntarily with an understanding of the charge and the consequences of the plea. Additionally the rule requires the court to be satisfied that there is a factual basis for the guilty plea.”¹²²

The court in *Rangel-Perez*, decided sixteen years before *Hernandez-Uribe*, reached a similar conclusion by ruling that an opportunity for a “full and fair hearing” of an issue is sufficient to establish that issue as fully litigated.¹²³ The *Rangel-Perez* court argued that

[the] strength of [such a] policy is emphasized by recalling that, in civil litigation, the doctrine is applied even though the issue may not in fact have been litigated, if there was a fair opportunity to litigate in the prior proceeding—if it might have been litigated, and was necessarily, even though not expressly, adjudicated.¹²⁴

Extrapolating from these statements, one could argue that if the defendant had the opportunity to litigate in the first proceeding, but chose not to do so by pleading guilty; the mere fact that he had the opportunity to do so satisfies the constitutional guarantees because in pleading guilty the accused admits to all elements of the crime.

However, not all courts agree with the constitutional analysis set forth by the court in *Hernandez-Uribe* and *Rangel-Perez*.¹²⁵ In *United States v. Gallardo-Mendez*, the Tenth Circuit rejected such reasoning and precluded the government from allowing a guilty plea to collaterally estop a criminal defendant from “relitigating

¹²⁰ *Id.* To support its ruling, the court in *Hernandez-Uribe* quoted from the Supreme Court’s decision in *Ashe v. Swenson*, stating that “federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.” *Id.* (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)).

¹²¹ *Id.*; see also FED. R. CIV. P. 11.

¹²² *Id.*

¹²³ *United States v. Rangel-Perez*, 179 F. Supp. 619, 625 (S.D. Cal. 1959).

¹²⁴ *Id.* The *Rangel-Perez* court qualified this assertion, suggesting that collateral estoppel is most appropriately applied “where such issues have been in fact litigated.” *Id.*

¹²⁵ This reluctance to allow guilty pleas to count as fully litigated is likely to stem from traditional approaches, such as those offered in the *Restatement of Judgments*. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1982). The Restatement concludes that issue preclusion cannot occur “[i]n the case of a judgment entered by confession, consent, or default, [because] none of the issues is actually litigated.” *Id.*; see also Simon, *supra* note 6, at 759–60 n.27.

an issue of whether he was an alien prior to [an] earlier conviction.”¹²⁶ Although the court stated that “the facts of this case require us to answer only the narrower question of whether the government may use a judgment in a criminal case following a plea of guilty to collaterally estop a defendant from relitigating an issue in a subsequent criminal proceeding,”¹²⁷ it became evident the court wanted to discuss the larger issue of offensive collateral estoppel as a whole.

After discussing the rulings in *Hernandez-Uribe* and *Pena-Cabanillas*, the Tenth Circuit stated it was “not convinced according preclusive effect to guilty pleas would, in fact, serve the interests of ‘wise public policy and common sense judicial administration.’”¹²⁸ The court further reasoned that “[t]he prospect of being collaterally estopped at some future date may discourage criminal defendants from settling criminal charges by pleading guilty. . . . The judicial burdens of ensuring guilty pleas are entered ‘knowingly,’ given the prospect of potential complex collateral estoppel applications, arguably would be enhanced.”¹²⁹

Not only was the Tenth Circuit concerned about the effects on judicial resources of allowing offensive collateral estoppel, but “the process of determining whether . . . collateral estoppel is appropriate in a subsequent criminal proceeding can itself be cumbersome. Moreover, while ‘wise public policy and judicial efficiency’ may be sufficient reasons to apply collateral estoppel in civil cases, they do not have the same weight and value in criminal cases.”¹³⁰ In essence, the Tenth Circuit did not want offensive collateral estoppel by the government because it may “be cumbersome.”¹³¹ Indeed, applying the law and maintaining the resources, integrity, consistency, and finality of the court system can be difficult, but it is no reason to disallow a constitutional and necessary doctrine.

Michael P. Daly argued that the court in *Gallardo-Mendez* appropriately decided the case for several reasons.¹³² First, it is uncertain whether offensive collateral estoppel would conserve judicial resources.¹³³ Second, allowing offensive collateral estoppel in addition to defensive collateral estoppel would offend “fundamental principles of criminal jurisprudence.”¹³⁴ Third, allowing offensive collateral estoppel

¹²⁶ 150 F.3d 1240, 1246 (10th Cir. 1998).

¹²⁷ *Id.* at 1243.

¹²⁸ *Id.* (quoting *Pena-Cabanillas v. United States*, 394 F.2d 785, 787 (9th Cir. 1968)).

¹²⁹ *Id.* at 1243–44 (citations omitted).

¹³⁰ *Id.* at 1244 (citations omitted).

¹³¹ *Id.*

¹³² Michael P. Daly, Note, “Give Me Your Tired, Your Poor,” *Your Collaterally Estopped Masses? Guilty Pleas and Collateral Estoppel of Alienage in Criminal Proceedings*: *United States v. Gallardo-Mendez*, 44 VILL. L. REV. 671 (1999).

¹³³ *Id.* at 689–92.

¹³⁴ *Id.* at 689, 693–94. Would it offend criminal jurisprudence to allow the defendant only “one bite at the apple,” just as prosecutors are limited?

in illegal immigration cases “may create more problems than it would solve.”¹³⁵ “Fourth, existing procedural safeguards do not adequately protect defendants from the unexpected collateral effects of their guilty pleas.”¹³⁶ Fifth, offensive collateral estoppel violates the Sixth Amendment.¹³⁷

What Daly does not mention, however, is fairness. What about the fact that the criminal defendant was found guilty of the very same offense? Should the criminal defendant be allowed to have previously decided issues relitigated? To allow such action appears not only to be detrimental to the court system but unconstitutional.¹³⁸

What the court in *Gallardo-Mendez* most crucially neglected to discuss further was its brief mention of the very meaning and implication of a “guilty plea.”¹³⁹ A guilty plea is defined in *Black’s Law Dictionary* as “usu[ally] part of a plea bargain. It must be made voluntarily, and only after the accused has been informed of and understands his or her rights. A guilty plea ordinarily has the same effect as a guilty verdict and conviction after trial on the merits.”¹⁴⁰

If a guilty plea has the same effect as a guilty verdict, then it should govern any future decision in regard to the same issues. Although courts have been reluctant to always treat guilty pleas the same as guilty verdicts in allowing offensive collateral estoppel,¹⁴¹ the benefits of such an application seem evident, including maintaining consistency in the court system and the careful management of judicial resources.¹⁴²

V. CONSTITUTIONALITY OF OFFENSIVE COLLATERAL ESTOPPEL

Certainly defensive collateral estoppel is required to prevent a defendant from facing double jeopardy,¹⁴³ but what are the constitutional arguments for or against

¹³⁵ *Id.* at 689, 694–96. Allowing collateral estoppel, however, would clearly solve many problems. *See supra* Part II (suggesting that collateral estoppel protects judicial resources and court integrity). The problems that it would create, however, are merely problems the courts must deal with constantly in both civil and criminal litigation in determining if collateral estoppel applies to any of the issues in the case.

¹³⁶ Daly, *supra* note 132, at 689–90, 696–701. FRCP 11 provides that courts must ensure a guilty plea is, in fact, a guilty plea. *See supra* notes 121–22 and accompanying text.

¹³⁷ Daly, *supra* note 132, at 690, 701–03. The issue of whether offensive collateral estoppel as used by the government in criminal matters offends the Sixth Amendment will be addressed *infra* Parts V.A, V.D.

¹³⁸ *See infra* Part V.

¹³⁹ *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1245 (10th Cir. 1998).

¹⁴⁰ BLACK’S LAW DICTIONARY, *supra* note 7, at 1189.

¹⁴¹ *See, e.g., In re Gray*, 322 B.R. 682, 692 (Bankr. M.D. Ala. 2005) (noting that use of a guilty plea could be construed as “fall[ing] short of the ‘actually litigated’ requirement”).

¹⁴² For further discussion regarding the public policy decisions supporting the doctrine of offensive collateral estoppel, see *supra* Part II.

¹⁴³ *See Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970). The Supreme Court held in *Ashe* that the right of a defendant to collaterally estop the government from relitigating previously decided issues was a constitutional right. *Id.* The Court held defensive collateral estoppel to

offensive collateral estoppel? Some courts and law scholars have argued that offensive collateral estoppel violates the Constitution in numerous ways.¹⁴⁴ A summary of these constitutional arguments will be offered along with contrary supporting evidence and conclusions. This Note concludes that offensive collateral estoppel does not offend the Constitution and that offensive collateral estoppel should not only be permitted in many instances, but actually be required for public policy and constitutional reasons.

Vestal argued that in situations where certain issues were decided in previous proceedings, “the criminal defendant has had a full opportunity to litigate the fact issues involved.”¹⁴⁵ On the issue of constitutional rights, Vestal contended “[t]he defendant has not been deprived of his or her constitutional rights; the defendant is being denied the opportunity to present the identical issue to the courts a second time after he or she has lost on the issue or after a plea of guilty has been entered.”¹⁴⁶ Vestal concluded that “[c]ertainly there is no constitutional right to use the time of the courts in repetitive litigation of the same issues.”¹⁴⁷

However, numerous courts and commentators have argued that offensive collateral estoppel in criminal cases violates the constitutional rights of the defendant.¹⁴⁸ These alleged violations include those that infringe the rights to a trial by jury, due process, double jeopardy protections, a speedy trial, and confrontation of one’s accusers.

A. Trial by Jury

The Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”¹⁴⁹ Numerous

be constitutionally required stating, “[f]or whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to ‘run the gauntlet’ a second time.” *Id.* at 445–46 & n.10 (citations omitted).

¹⁴⁴ See *infra* Parts V.A–E.

¹⁴⁵ Vestal, *supra* note 20, at 320.

¹⁴⁶ *Id.* at 320–21.

¹⁴⁷ *Id.* at 321 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 354–55 (1979)). Vestal noted that he is not alone in contending that offensive collateral estoppel is constitutional. See *id.* at 314. He stated that “many of the courts that have considered the issue have reached the conclusion that there is no constitutional infirmity in the use of issue preclusion because the defendant was afforded the opportunity to exercise constitutional rights at the first trial.” *Id.* In support of this assertion, he cited state decisions from California, Massachusetts, Nevada, and New York as well as prior Ninth Circuit precedent. *Id.* at 314 n.192.

¹⁴⁸ See, e.g., *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998) (holding that a prior guilty plea does not prevent the defendant from relitigating his alienage status); *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994), *rev’d in part*, 105 F.3d 117 (3d Cir. 1997), *cert. denied*, 528 U.S. 824 (1999) (holding that the government could not use collateral estoppel in lieu of establishing a predicate offense); *Daly*, *supra* note 132, *passim* (arguing against the use of collateral estoppel in alienage cases).

¹⁴⁹ U.S. CONST. amend. VI.

courts have declared that the government cannot use collateral estoppel “in criminal cases because it deprives the defendant of the constitutionally guaranteed right to a trial by jury.”¹⁵⁰

The rebuttal to such an argument is that the defendant surely had “the opportunity to exercise [his] constitutional rights [during] the first trial.”¹⁵¹ It cannot be said the accused defendant is deprived of a trial by jury because a jury determined the issue in the first proceeding, but not the second when dealing with the same issues.¹⁵² In issue preclusion, or collateral estoppel, only those issues that are identical are precluded from being re-tried.¹⁵³ Because the identical issue was decided by a jury at the first proceeding, the constitutional right to a jury trial is satisfied.¹⁵⁴ Therefore, in a second proceeding, the accused may have a trial by jury in relation to all non-previously decided issues, but not to those issues already decided upon in the first proceeding.¹⁵⁵ Specifically, in illegal immigration cases, if the accused has already been found to not be a U.S. citizen in a proceeding before a jury, he would not be able to contest

¹⁵⁰ See Kennelly, *supra* note 22, at 1405 & n.166 (citing opinions by courts ruling that use of collateral estoppel by the government is improper because it violates the Sixth Amendment).

¹⁵¹ *Id.* at 1405. The court in *Hernandez-Uribe* explained this reasoning as it relates to alienage proceedings. *Hernandez-Uribe v. United States*, 515 F.2d 20, 22 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976). The court stated that the defendant, who previously pled guilty to being an illegal alien, had the “opportunity to contest the Government’s determination of alienage” in his first trial. *Id.* The court further reasoned that he “had a right to a jury trial in which he could have presented any evidence he had pertaining to the place of his birth.” *Id.* However, by pleading guilty, the “defendant waived those constitutional rights here challenged which are guaranteed every criminal defendant.” *Id.* Finally, because the defendant “has made no claim that his status as an alien has changed since” his first trial, “we see no violation of any constitutional right of the defendant in collaterally estopping him from denying his alien status.” *Id.*; see also *United States v. Colacurcio*, 514 F.2d 1, 6 (9th Cir. 1975) (holding that the defendant had the opportunity in his first trial to exercise his constitutional rights).

¹⁵² See *Colacurcio*, 514 F.2d at 6 (differentiating between “*fact*” and “*amount*” of payments as considered by a jury to determine whether collateral estoppel is appropriate, suggesting only those elements “distinctly put in issue” will be deemed fully litigated).

¹⁵³ See *supra* notes 7–8 and accompanying text.

¹⁵⁴ See *United States v. Arnett*, 327 F.3d 845, 850–51 (9th Cir. 2003).

¹⁵⁵ See *United States v. Rangel-Perez*, 179 F. Supp. 619, 626–28 (S.D. Cal. 1959) (discussing the “continuance rule”). Opponents of offensive collateral estoppel may argue that the jury must be presented with all of the evidence related to the charge, and that the jury, as fact-finders, should not be limited to receiving evidence filtered by the court. See Simon, *supra* note 6, at 771 (discussing the *Pena-Cabanillas* court’s decision to prevent the defendant from presenting evidence to the jury). However, much like stipulations, the court could instruct the jury that certain elements were already decided in previous proceedings, and that the jury remains the fact-finders for deciding the remaining issues applicable to the conviction of the accused. See *Hernandez-Uribe v. United States*, 515 F.2d 20, 21 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976).

that issue in a second proceeding before a jury.¹⁵⁶ The right to a trial by jury for that particular issue has already been granted.¹⁵⁷

Perhaps, the more appropriate question to ask in rebuttal to critics of offensive collateral estoppel in immigration cases would be “why the right to a jury trial should require a *second* jury to re-decide issues that were fully litigated and decided by the first jury.”¹⁵⁸ This right to a trial by jury becomes more complicated when a guilty plea was offered in the first proceeding. Returning to the previous analysis in Part IV, a guilty plea in relation to alienage satisfies the requirement of being fully litigated when the accused had the opportunity and the right to demand a trial by jury and chose instead to plead guilty.¹⁵⁹ In such a case, the defendant cannot then claim he was denied a trial by jury because he had the opportunity and waived his right.¹⁶⁰

A guilty plea is “[a]n accused person’s formal admission in court of having committed the charged offense.”¹⁶¹ As such, it is fully litigated and should be treated as conclusively determined in the first proceeding. The accused had the right to a trial by jury in the first proceeding and chose not to exercise this right. Therefore, the accused is not entitled to a second proceeding to determine the same issues by a jury, because such a constitutional right was already provided—and waived. Only when there are new issues to be determined in the second proceeding should the accused have the option of another trial by jury, but this right should only extend to the determination of issues not yet fully litigated in the first proceeding.¹⁶²

Government use of offensive collateral estoppel does not offend the right to a trial by jury. In fact, application of the doctrine preserves the right. Collateral estoppel merely prevents the accused from waiving the right by pleading guilty and then reintroducing it later at the accused’s convenience.¹⁶³ Judgments on particular issues are, and always ought to be, final.¹⁶⁴

¹⁵⁶ See *Rangel-Perez*, 179 F. Supp. at 626.

¹⁵⁷ Kennelly, *supra* note 22, at 1405.

¹⁵⁸ *Id.* at 1406.

¹⁵⁹ See *supra* Part IV; see also *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998); *Rangel-Perez*, 179 F. Supp. 619.

¹⁶⁰ See Julian A. Cook, III, *Crumbs from the Master’s Table: The Supreme Court, Pro Se Defendants and the Federal Guilty Plea Process*, 81 NOTRE DAME L. REV. 1895, 1914–15 (2006).

¹⁶¹ BLACK’S LAW DICTIONARY, *supra* note 7, at 1189.

¹⁶² *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

¹⁶³ For an in-depth analysis of offensive collateral estoppel and the constitutional right to a trial by jury, see Kennelly, *supra* note 22. Included in Kennelly’s analysis is a study of three court practices of criminal procedure that, like offensive collateral estoppel, take action against an accused without the benefit of a jury deliberation. *Id.* at 1407–10. These practices include harmless error review, revocation of probation, and appellate entry of conviction based on a lesser-included offense. *Id.*

¹⁶⁴ The Supreme Court explained that the entire function of collateral estoppel is to make a final judgment, stating: “the whole premise of collateral estoppel is that once an issue has

B. Due Process

The Fifth Amendment guarantees that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”¹⁶⁵ The Due Process Clause ensures “a criminal defendant has the right to a determination by a jury of whether the prosecution has proved every element of the crime charged beyond a reasonable doubt.”¹⁶⁶

The Eighth and Ninth Circuits both “stated that collateral estoppel of the accused does not substantially encroach upon the defendant’s due process guarantees because the defendant may contest the propriety of the prior criminal proceedings or argue that the alienage status has since changed.”¹⁶⁷ In other words, if the defendant’s nationality changed since the previous litigation, he should be allowed to show evidence of his new status. However, if his status has not changed, and the issue was already fully litigated (whether by a jury trial, bench trial, or a guilty plea), the Due Process Clause does not prohibit the defendant from being collaterally estopped from relitigating previously decided issues.¹⁶⁸

Kennelly contended that “[t]hose courts that have expressed concern that issue preclusion may violate due process either seem to use ‘due process’ as shorthand for the right to a jury trial and to confront adverse witnesses or else fail to elaborate on what process is due.”¹⁶⁹ He further stated that “[i]t is not clear whether due process requires more than these other two constitutional rights [the right to a trial by jury and the Confrontation Clause] and some vague notion of ‘fundamental fairness.’”¹⁷⁰ Kennelly promoted Justice Hugo Black’s concurring opinion in *Ashe v. Swenson*, in which he wrote “it is a wholly fallacious idea that a judge’s sense of what is fundamentally ‘fair’ or ‘unfair’ should ever serve as a substitute for the explicit, written provisions of our Bill of Rights.”¹⁷¹ Therefore, if collateral estoppel does not violate the defendant’s right to a trial by jury and the Confrontation Clause, it satisfies the due process inquiry as well.¹⁷²

been resolved in a prior proceeding, there is no further factfinding function to be performed.” *Parklane Hosiery Co. v. Shore, Inc.*, 439 U.S. 322, at 336 n.23 (1979). Therefore, a second jury trial would be useless in that two separate juries would act as fact-finders for the exact same issue. Such duplication of constitutional rights in successive criminal actions is both frivolous and dangerous.

¹⁶⁵ U.S. CONST. amend. V.

¹⁶⁶ Simon, *supra* note 6, at 779.

¹⁶⁷ Daly, *supra* note 132, at 677.

¹⁶⁸ See *Blonder-Tongue Labs v. Univ. of Ill. Found.*, 402 U.S. 313, 328–29 (1971) (suggesting that determining whether a party has a “full and fair opportunity to litigate is a most significant safeguard”).

¹⁶⁹ Kennelly, *supra* note 22, at 1411.

¹⁷⁰ *Id.* at 1411–12.

¹⁷¹ *Id.* at 1412 (quoting *Ashe v. Swenson*, 397 U.S. 436, 447 (1969) (Black, J., concurring)).

¹⁷² *Id.*; Simon, *supra* note 6, at 779–80 (“[I]f issue preclusion does not violate the right to

C. Double Jeopardy

The Double Jeopardy Clause is found in the Fifth Amendment. The amendment instructs that “[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.”¹⁷³ The Supreme Court previously ruled that collateral estoppel was essential in both criminal and civil cases because the doctrine protected the defendant against double jeopardy.¹⁷⁴ Allowing offensive collateral estoppel in criminal cases does not infringe upon this protection. Offensive collateral estoppel does not relitigate previously decided issues or previously decided cases, instead, it prevents the relitigation of such issues or cases.¹⁷⁵ The doctrine is actually complementary to this constitutional protection.

Kennelly asserted that “[o]ffensive issue preclusion is consistent with other visions of double jeopardy as well. For example, the practice shares with double jeopardy the values of minimizing multiple litigation, promoting certainty, and preventing the government from engaging in strategic serial prosecution.”¹⁷⁶ In fact, double jeopardy “promotes the same sorts of values” as collateral estoppel in civil cases.¹⁷⁷ However, in criminal cases, “it does so only for the defendant.”¹⁷⁸ Kennelly therefore argued that “a sensitive application” of offensive collateral estoppel “would promote these same values for the government as well. Such an extension of issue preclusion is consistent with double jeopardy principles.”¹⁷⁹

D. Speedy Trial

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”¹⁸⁰ Allowing offensive collateral estoppel guarantees the accused a speedy trial in accordance with the Sixth Amendment. With many dockets clogged up with litigation, allowing the government to estop the defendant from relitigating previously decided decisions, especially nationality in illegal immigration cases, enables speedy trials with less strain on judicial resources.¹⁸¹ Again, offensive collateral estoppel is complementary to this constitutional provision.

a jury trial or the right to confront witnesses, then it should satisfy due process.”).

¹⁷³ U.S. CONST. amend. V.

¹⁷⁴ *Ashe*, 397 U.S. 436.

¹⁷⁵ *See* Simon, *supra* note 6, at 754.

¹⁷⁶ Kennelly, *supra* note 22, at 1404.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ U.S. CONST. amend. VI.

¹⁸¹ *See supra* Part II.A.

E. Confrontation Clause

Another constitutional attack on offensive collateral estoppel is that the doctrine violates the Confrontation Clause of the Sixth Amendment.¹⁸² This clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹⁸³ Many courts and commentators, however, have expressed their support for offensive collateral estoppel, arguing that “collateral estoppel of the accused does not conflict with the Confrontation Clause because the defendant already had an opportunity to confront the adverse witnesses in the prior criminal proceeding.”¹⁸⁴

Kennelly stated that this constitutional concern is “much more readily dispelled than . . . the right to a jury trial because . . . ‘the defendant was afforded the opportunity to exercise constitutional rights at the first trial.’”¹⁸⁵ He continued by arguing that “the right to confront adverse witnesses has an established intertemporal scope.”¹⁸⁶ An example of this is found in the Federal Rules of Evidence, which states:

Testimony given as a witness at another hearing of the same or a different proceeding” is admissible hearsay if the declarant is unavailable at trial, so long as “the party against whom the testimony is now offered . . . had an opportunity . . . to develop the testimony by direct, cross, or redirect examination.”¹⁸⁷

The Supreme Court held that under the Confrontation Clause “the unavailability of the declarant at trial may not be constitutionally required where it is not required under the Federal Rules of Evidence. The scope of the right to confront adverse witnesses thus reaches back in time to the earlier proceeding.”¹⁸⁸ Kennelly concluded that in issue preclusion scenarios the defendant is not deprived “of the entire right to a confrontation, but only of a second confrontation.”¹⁸⁹ Therefore, “if a second confrontation may not be constitutionally required at the first trial,” then

¹⁸² Kennelly, *supra* note 22, at 1410.

¹⁸³ U.S. CONST. amend. VI.

¹⁸⁴ Daly, *supra* note 132, at 677; *see also* Hernandez-Uribe v. United States, 515 F.2d 20, 21–22 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976); United States v. Colacurcio, 514 F.2d 1, 6 (9th Cir. 1975); Vestal, *supra* note 20, at 314, 320–21.

¹⁸⁵ Kennelly, *supra* note 22, at 1410.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1410–11 (quoting FED. R. EVID. 804(b)(1)).

¹⁸⁸ *Id.* at 1411 (citing United States v. Inadi, 475 U.S. 387 (1986)).

¹⁸⁹ *Id.*

it certainly could not be required at the second trial.¹⁹⁰ Thus, the “abridgment of the right to confrontation is not a viable objection to collateral estoppel.”¹⁹¹

VI. BURDEN OF PROOF

This Note established that both federal and state criminal courts have allowed offensive collateral estoppel in criminal cases in at least limited circumstances.¹⁹² This practice is not only beneficial to the public policy of the United States, but is also a constitutional practice that protects the court system and maintains the credibility, stability, and finality of the courts.¹⁹³

However, if activist courts choose to dismiss the practice of offensive collateral estoppel in alienage proceedings, then, at a minimum, the burden of proof should be shifted to the defendant.¹⁹⁴ If previous litigation already established a ruling on an issue and the prosecution cannot bind the defendant to the previous decision in subsequent litigation, then it would be practical for the defendant to have the burden of disputing the previous finding.

United States v. Rangel-Perez offered such a suggestion.¹⁹⁵ The court held that “disputable presumption” is a “rule of evidence.”¹⁹⁶ This rule creates a “presumption of continuance of a condition or status, once proved to exist, [if] invoked against the accused in other criminal cases in the Federal courts.”¹⁹⁷ The rule “is one which relieves the prosecutor of proving a negative, namely, that a condition or status, once proved to exist, has not changed.”¹⁹⁸

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (quoting Note, *Collateral and Equitable Estoppel of Federal Criminal Defendants*, 29 RUTGERS L. REV. 1221, 1236 (1976)).

¹⁹² *See supra* Part I.

¹⁹³ *See supra* Parts II and V.

¹⁹⁴ *See Vestal, supra* note 20, at 321. Vestal posited that

[i]n considering the impact of issue preclusion in criminal prosecutions, it is necessary to remember that the doctrine of res judicata/preclusion is not an absolute. It is subject to numerous exceptions. . . . [T]he person who wishes to avoid preclusion has the burden of showing why the doctrine should not apply.

Id. He acknowledged that “[t]his is the position of the Supreme Court . . . in the *Parklane* case . . . and it seems to be the best compromise between the interests of litigants, courts, and society in terminating litigation and the interests of those parties who wish to litigate the issue a second time.” *Id.* (citations omitted); *see also Worcester v. Comm’r.*, 370 F.2d 713, 717 (1st Cir. 1966) (holding the burden of proof on the defendant to show that he did not commit tax fraud in subsequent proceedings).

¹⁹⁵ 179 F. Supp. 619, 628 (S.D. Cal. 1959).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Rangel-Perez referred to *Mills v. United States* in support of the proposition that a disputable presumption should be used as an evidentiary rule, acknowledging “that the presumption makes a prima facie case on the issue and thus permits the trier of fact to draw an inference of continued alienage, in the absence of evidence to the contrary of the fact presumed.”¹⁹⁹ *Rangel-Perez* concluded, “[t]hus, as a practical matter, the burden of coming forward with evidence to the contrary is placed upon the defendant.”²⁰⁰ It is common sense that the burden of proof, at a minimum, should be shifted to the defendant if the issue was previously decided in the first litigation.

CONCLUSION

Offensive collateral estoppel is a constitutional and useful prosecutorial tool in alienage proceedings. Collateral estoppel has been used in both civil and criminal courts for much of the twentieth and twenty-first centuries and has demonstrated both its constitutional role and its public policy benefits in maintaining the integrity of the court system.²⁰¹

The doctrine of offensive collateral estoppel is particularly beneficial when applied to the uniquely problematic nature of alienage proceedings and illegal immigration cases.²⁰² Thus, the recent decision of the Ninth Circuit in *United States v. Smith-Baltiher* to prohibit offensive collateral estoppel as a prosecutorial tool is both incorrect and harmful.²⁰³ Federal and state courts should reexamine offensive collateral estoppel and its appropriateness in criminal proceedings, especially in illegal immigration cases. Only in granting judges the ability to collaterally estop defendants in alienage proceedings from relitigating previously decided issues can our court system conserve judicial resources, maintain consistency, and finality in its decisions.²⁰⁴

However, if federal courts refuse to allow the use of offensive collateral estoppel in alienage proceedings, then, at a minimum, the burden of proof should be shifted to the defendant.²⁰⁵ This burden would require the defendant to dispute the previous finding rather than making the government prove its case twice.²⁰⁶

¹⁹⁹ *Id.* (citing *Mills v. United States*, 273 F. 625, 628 (1921)).

²⁰⁰ *Id.*

²⁰¹ *See supra* Parts I, II.

²⁰² *See supra* Part I.C.

²⁰³ *See supra* Part III.

²⁰⁴ *See supra* Part II.

²⁰⁵ *See supra* Part VI.

²⁰⁶ *See supra* Part VI.