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

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"GIVE ME YOUR TIRED, YOUR POOR,"
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1. Introduction

The doctrine of collateral estoppel provides that the determination of an issue of ultimate fact by a valid judgment precludes the relitigation of that issue in a subsequent action between those parties or their privies.\(^1\) Although civil litigants most frequently use the doctrine, the United States Supreme Court has allowed criminal defendants to invoke collateral estoppel against the state since 1916.\(^2\) The constitutionality of the prosecution's use of collateral estoppel against criminal defendants, however, has engendered a long-standing circuit split that the Court has yet to resolve.\(^3\)

This Note considers whether federal courts may use guilty pleas in previous criminal proceedings to collateral estop criminal defendants in subsequent criminal proceedings. First, Part II catalogues the reasoning of the circuits and commentators that have considered this question.\(^4\) Second, Part III summarizes the facts of United States v. Gallardo-Mendez,\(^5\) a recent federal case that ruled on this issue.\(^6\) Third, Part IV identifies the many factors considered by the Gallardo-Mendez court.\(^7\) Part IV also critiques the court's analysis and suggests that the Gallardo-Mendez decision properly subordinated public policy concerns to the constitutional man-

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1. See BLACK's LAW DICTIONARY 261 (6th ed. 1990). Another definition states that a "prior judgment between [the] same parties on [a] different cause of action is an estoppel as to those matters in issue or points controverted, on determination of which finding or verdict was rendered." Id. For a further discussion of the elements of collateral estoppel, see infra note 10 and accompanying text.


3. For a discussion of the circuit split on this issue, see infra note 16 and accompanying text.

4. For a discussion of the background of this issue, see infra notes 10-60 and accompanying text.

5. 150 F.3d 1240 (10th Cir. 1998).

6. See id. at 1240 (considering collateral estoppel of accused). For a discussion of the facts of Gallardo-Mendez, see infra notes 61-85 and accompanying text.

7. For a narrative of the Gallardo-Mendez court's analysis, see infra notes 86-99 and accompanying text.

(671)
dates implicit in the Sixth Amendment. Finally, Part V discusses the impact of Gallardo-Mendez on federal courts and suggests that a constitutional prohibition of collateral estoppel of criminal defendants would establish a bright-line rule binding on both federal and state courts.

II. BACKGROUND

A. Collateral Estoppel in Criminal Cases

A common definition of collateral estoppel states, "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Collateral estoppel constitutes a narrow application of the broader concept of res judicata, which bars relitigation of the same cause of action between the same parties. Traditional justifi-

8. For a critical analysis of whether pleading guilty to illegal alienage will act as collateral estoppel in subsequent criminal proceedings, see infra notes 100-65 and accompanying text.

9. For a discussion of the impact of the Gallardo-Mendez decision on federal courts, see infra notes 166-72 and accompanying text.

10. Restatement (Second) of Judgments § 27 (1982) [hereinafter Restatement]; 18 James Wm. Moore et al., Moore's Federal Practice, § 132.01 [2] (3d ed. 1998); see Hoag v. New Jersey, 356 U.S. 464, 470 (1958) (stating that doctrine of collateral estoppel provides that where question of fact essential to judgment is actually litigated and determined by valid and final judgment, determination is conclusive between parties in subsequent action on different cause of action), overruled in part by Ashe v. Swenson, 397 U.S. 436 (1970); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951) (noting that estoppel extends only to questions put distinctly in issue, directly determined and necessarily decided by earlier adjudication); Warren Freedman, Res Judicata and Collateral Estoppel: Tools for Plaintiffs and Defendants 2 (1988) (cataloguing classic elements of collateral estoppel doctrine); 18 Moore et al., supra, § 132.05 (stating that collateral estoppel requires: (1) sameness of issues; (2) that issue have been raised, litigated and adjudged in earlier proceeding; (3) that issue was material and relevant to disposition of prior action; and (4) that determination was necessary and essential to prior judgment); Note, Collateral and Equitable Estoppel of Federal Criminal Defendants, 29 Rutgers L. Rev. 1221, 1221-22 (1976) [hereinafter Collateral and Equitable Estoppel] (stating that collateral estoppel originated in civil litigation to avoid retrial of issues of fact necessarily litigated in prior actions between same parties). Some courts and authors refer to collateral estoppel with the more descriptive term "issue preclusion." See, e.g., Vestal, supra note 2, at 281 n.3 (stating that American Law Institute, courts and commentators use term "issue preclusion," which provides more precision than "collateral estoppel").

11. See, e.g., Pena-Cabanillas v. United States, 394 F.2d 785, 786 (9th Cir. 1968) (discussing relation of collateral estoppel to res judicata); 18 Moore et al., supra note 10, § 152.01[4][a] (comparing collateral estoppel to broader but closely related doctrine of res judicata). One common definition calls res judicata the rule that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive . . . and . . . constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." Black's Law Dictionary, supra note 1, at 1905. Collateral estoppel is narrower than res judicata in that res judicata bars the relitigation of the same cause of action between the same parties, whereas collateral estoppel bars relitigation of a particular issue or determinative
lications for collateral estoppel include promoting judicial economy, preserving judicial and litigant resources, protecting the parties from harassment and providing them with a sense of finality.12

Federal courts differentiate between offensive collateral estoppel by the plaintiff and defensive collateral estoppel by the defendant.13 In federal criminal cases, the use of the collateral estoppel doctrine has, until recently, remained the province of the defendant.14 In fact, the Court fact being litigated. See id. at 1306. Some commentators have noted that res judicata is obligatory while collateral estoppel is discretionary, because the former stems from the need to provide conclusiveness to judgments, while the latter primarily serves judicial economy. See FREEDMAN, supra note 10, at 4-5 (suggesting that purpose of promoting judicial economy does not require application of collateral estoppel).

12. See Montana v. United States, 440 U.S. 147, 153 (1979) (stating that collateral estoppel protects adversaries from “expense and vexation” and conserves judicial resources); FREEDMAN, supra note 10, at 32 (noting that many believe collateral estoppel invariably saves judicial and litigant resources and prevents harassment of parties to previous litigation); 18 MOORE ET AL., supra note 10, § 132.01[3] (noting that courts use collateral estoppel to promote judicial economy and prevent judicial embarrassment caused by inconsistent decisions); ALLAN D. VESTAL, RES JUDICATA/PRECLUSION v.8 to v.12 (1969) (stating that collateral estoppel establishes rights of individuals, prevents harassment, encourages efficient use of courts and promotes prestige of courts created by comity between different courts); 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4403, at 11-22 (1981) (stating that collateral estoppel promotes certainty, consistency of judgment, judicial stability, judicial and litigant economy, finality of judgments and moral force of judgments); Anne B. Poulin, Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal, 58 U. CIN. L. REV. 1, 16-19 (1989) (noting that collateral estoppel provides finality of judgments, prevents unfair prosecutorial harassment and preserves parties’ resources); Collateral and Equitable Estoppel, supra note 10, at 1221 (calling collateral estoppel “a rule of efficiency or convenience” developed to avoid unnecessary relitigation of facts); Note, Collateral Estoppel in Criminal Cases—A Supplement to the Double Jeopardy Protection, 21 RUTGERS L. REV. 274, 295 (1967) [hereinafter Collateral Estoppel in Criminal Cases] (stating that common justifications for collateral estoppel include conservation of public funds and judicial resources); Christopher Murray, Note, Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule, 46 S. CAL. L. REV. 922, 925 (1973) (stating that collateral estoppel eliminates expense, vexation, waste and inconsistent duplicative litigation).

13. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979) (stating that plaintiff uses offensive collateral estoppel to prevent relitigation of issues previously lost by defendant against another plaintiff, while defendant uses defensive collateral estoppel to prevent relitigation by plaintiff of issues previously lost against another defendant); FREEDMAN, supra note 10, at 31 (stating that offensive collateral estoppel occurs when party or non-party seeks to assert collateral estoppel as “sword” against defendant who lost prior judgment, while defensive collateral estoppel occurs where defendant uses prior judgment as “shield” against plaintiff who had been party to earlier suit); 18 MOORE ET AL., supra note 10, § 132.04[2][c][i] (comparing offensive and defensive collateral estoppel in federal litigation); Collateral and Equitable Estoppel, supra note 10, at 1222, 1222n.11 (suggesting distinction between collateral estoppel of government after acquittal and collateral estoppel of defendant following conviction).

14. See Pena-Cabanillas, 394 F.2d at 787 (stating that criminal cases most frequently involve defensive collateral estoppel); 18 WRIGHT ET AL., supra note 12, § 4474, at 747 (noting that collateral estoppel is most commonly applied in crimi-
recognizes the criminal defendant’s use of defensive collateral estoppel against the state as being “embodied in the Fifth Amendment guarantee against double jeopardy.”\(^\text{15}\) Whether federal courts may use collateral estoppel against criminal defendants, however, has engendered a clear circuit split.\(^\text{16}\) Although the Gallardo-Mendez decision limited its holding to guilty pleas as a source of estoppel, much of the case law in this area considers estoppel of the accused generally.\(^\text{17}\)

\(^\text{15}\) Ashe, 397 U.S. at 445-46; see 24 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 611.20[1] (3d ed. 1998) (citing Ashe for proposition that doctrine of collateral estoppel is embodied in Fifth Amendment protection against double jeopardy). Some courts, however, state that the defensive use of collateral estoppel in criminal cases differs in scope from the double jeopardy defense. See United States v. Harnage, 976 F.2d 633, 634 (11th Cir. 1992) (stating that double jeopardy prohibits prosecution of crime itself, whereas collateral estoppel forbids only relitigation of certain facts of crime); Ferenc v. Dugger, 867 F.2d 1301, 1303 (11th Cir. 1989) (stating that double jeopardy prohibits prosecution of crime itself, whereas collateral estoppel simply forbids government from relitigating certain facts).

\(^\text{16}\) Compare United States v. Gallardo-Mendez, 150 F.3d 1240, 1246 (10th Cir. 1998) (rej ecting government’s use of offensive collateral estoppel against accused), United States v. Pelullo, 14 F.3d 881, 892-93 (3d Cir. 1994) (same), and Harnage, 976 F.2d at 636 (same), with Hernandez-UrIBE v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (allowing government’s use of offensive collateral estoppel against accused), and Pena-Cabanillas, 394 F.2d at 785, 788 (same). The United States Court of Appeals for the Second Circuit, noting the surprising dearth of case law, refused to tackle the issue. See United States v. Ping, 555 F.2d 1069, 1076 (2d Cir. 1977) (deciding not to reach “the more difficult issue of whether collateral estoppel can ever be invoked by the government in a criminal case”). The confusion in this area of the law makes the Second Circuit’s refusal understand able. See United States v. Larkin, 605 F.2d 1360, 1361 (5th Cir. 1979) (stating that collateral estoppel involves arcane principles that defy bright-letter definition, and that “one entering this field must do so with trepidation”), opinion withdrawn in part on reh’g by United States v. Larkin, 611 F.2d 585 (5th Cir. 1980). The United States Supreme Court also avoided addressing the issue, leaving the circuit split unresolved. But see Ashe, 397 U.S. at 464-65 (Burger, C.J., dissenting) (“[C]ourts that have applied the collateral-estoppel concept to criminal actions would certainly not apply it to both parties, as is true in civil cases . . . .”); Frank v. Magnum, 237 U.S. 309, 334 (1915) (dictum) (stating that principle of collateral estoppel is as applicable to criminal cases as to civil cases).

\(^\text{17}\) See Gallardo-Mendez, 150 F.3d at 1243 (stating that facts of case required court to consider only whether guilty pleas may act as collateral estoppel in subsequent criminal proceedings). Most of the circuits confronted with this issue addressed the propriety of the government’s use of collateral estoppel in general, rather than limiting their holdings as the Gallardo-Mendez court did. Compare id. (limiting analysis to guilty pleas as basis of collateral estoppel), and Hernandez-UrIBE,
B. The Broad Issue: Estoppel of the Accused Generally

1. Allowing Collateral Estoppel

Two illegal alienage cases, Hernandez-Uribe v. United States\(^ {18} \) and Pena-Cabanillas v. United States\(^ {19} \) forced the United States Courts of Appeals for the Eighth and Ninth Circuits, respectively, to first consider whether federal courts may collaterally estop criminal defendants.\(^ {20} \) Both circuits adopted the policy arguments offered by the United States District Court for the Southern District of California in United States v. Rangel-Perez.\(^ {21} \) The Rangel-Perez court stated that wise public policy and common sense judicial administration combine to advocate allowing the government to collaterally estop criminal defendants.\(^ {22} \) Relying heavily on the government

515 F.2d at 22 (considering collateral estoppel based on guilty pleas), with Pellulo, 14 F.3d at 896 (addressing collateral estoppel of accused in general), Harnage, 976 F.2d at 634 (examining use of collateral estoppel generally), and Pena-Cabanillas, 394 F.2d at 787-88 (considering whether prior judgment in criminal case should collaterally estop criminal defendants generally).

18. 515 F.2d 20 (8th Cir. 1975).
19. 394 F.2d 785 (9th Cir. 1968).
20. See, e.g., Vestal, supra note 12, at v-364 to 365 (citing death of cases before Pena-Cabanillas concerning collateral estoppel of criminal defendant); Comment, The Use of Collateral Estoppel Against the Accused, 69 COLUM. L. REV. 515, 519 (1969) (hereinafter Collateral Estoppel Against the Accused) (stating that United States v. Rangel-Perez, 179 F. Supp. 619 (D.C. Cal. 1959), upon which Hernandez-Uribe and Pena-Cabanillas relied, invoked novel doctrine in federal court). In Hernandez-Uribe, a jury convicted the defendant of reentering the United States. See 515 F.2d at 20-21; see also 8 U.S.C. § 1326 (1994) (criminalizing repeated illegal entry). The defendant appealed his conviction, urging that the lower court erred in instructing the jury that a guilty plea some years earlier had a binding effect on the defendant in the instant proceeding. See Hernandez-Uribe, 515 F.2d at 20-21. The United States Court of Appeals for the Eighth Circuit upheld the conviction, finding no error in permitting the government to collaterally estop the defendant. See id.

In Pena-Cabanillas, a jury convicted the defendant of falsely and willfully representing himself as a citizen of the United States. See Pena-Cabanillas, 394 F.2d at 786; see also 18 U.S.C. § 911 (1994) (criminalizing false representation of one’s citizenship). The defendant’s status as an illegal alien constituted an essential element of that crime. See Pena-Cabanillas, 394 F.2d at 786. After a subsequent indictment for illegally re-entering the United States in violation of 8 U.S.C. § 1326, the government sought to collaterally estop the defendant from relitigating his alienage. See id. The United States Court of Appeals for the Ninth Circuit held that the government could collaterally estop the defendant, finding no error in the application of collateral estoppel against him. See id.

21. 179 F. Supp. 619 (D.C. Cal. 1959). In Rangel-Perez, the United States District Court for the Southern District of California used the defendant’s prior conviction for illegal entry as collateral estoppel of the defendant’s alienage after his illegal re-entry into the United States. See id. at 628-29. The Eighth and Ninth Circuits based much of their reasoning in favor of the government's collaterally estopping criminal defendants upon the policy arguments expressed in Rangel-Perez. See Pena-Cabanillas, 394 F.2d at 787-88 (adopting arguments of Rangel-Perez); Hernandez-Uribe, 515 F.2d at 21-22 (same).

22. See Rangel-Perez, 179 F. Supp. at 625 ("The wise public policy underlying the doctrine [of collateral estoppel], and common-sense judicial administration as well, combine to advocate application of collateral estoppel against a defendant in
ment's need to deter illegal immigration, the Eighth and Ninth Circuits concluded that allowing illegal aliens to continually relitigate their alienage would undermine the legislative intent behind prophylactic immigration statutes.\textsuperscript{23} These circuits agreed with the \textit{Rangel-Perez} court's conclusion that "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 . . . ."\textsuperscript{24} Thus, their decisions relied on the traditional justification for collateral estoppel—judicial economy.\textsuperscript{25}

The Eighth and Ninth Circuits did not rest solely on the judicial economy argument.\textsuperscript{26} The Ninth Circuit in \textit{Pena-Cabanillas} suggested that courts should, as in civil cases, allow mutuality of estoppel by both parties—the defendant and the state.\textsuperscript{27} Indeed, because the defendant may

\footnotesize{a criminal case . . . .\textsuperscript{28}). Both the Eighth and Ninth Circuits considered the \textit{Rangel-Perez} court's policy arguments persuasive. \textit{See Hernandez-Uribe}, 515 F.2d at 22 ("We find such reasoning to be persuasive."); \textit{Pena-Cabanillas}, 394 F.2d at 787 (adopting reasoning of "well written" \textit{Rangel-Perez} decision); \textit{see also United States v. Colacurcio}, 514 F.2d 1, 5 (9th Cir. 1975) (describing \textit{Rangel-Perez} decision as "a thorough analysis of relevant case law").

23. \textit{See Hernandez-Uribe}, 515 F.2d at 21-22 (suggesting that relitigation of issue would weaken federal statutes' deterrent effect on future illegal entries); \textit{Pena-Cabanillas}, 394 F.2d at 787-88 (stating that relitigation of alienage issue would undermine accomplishment of purposes of federal immigration laws); \textit{see also Rangel-Perez}, 179 F. Supp. at 626 (same).

24. \textit{Rangel-Perez}, 179 F. Supp. at 626 (suggesting 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"); \textit{see Hernandez-Uribe}, 515 F.2d at 22 (adopting \textit{Rangel-Perez} court's reasoning); \textit{Pena-Cabanillas}, 394 F.2d at 787 (stating that relitigation of alienage would undermine federal immigration laws).

25. \textit{See Hernandez-Uribe}, 515 F.2d at 21-22 (citing need to deter future illegal entries and increased litigation); \textit{Pena-Cabanillas}, 394 F.2d at 787-88 (relying on policy of promoting judicial administration); \textit{see also Rangel-Perez}, 179 F. Supp. at 625 (stating that need to prevent infinite defenses by accused is "sound public policy" that would foreclose litigation of given subject matter once parties have had full and fair hearing and adjudication of issue). This reliance on judicial economy makes sense in light of the traditional policy considerations justifying application of the doctrine. \textit{See, e.g., 18 Wright ET AL., supra note 12, § 4403, at 11-22} (stating that collateral estoppel promotes judicial and litigant economy).

26. \textit{See Hernandez-Uribe}, 515 F.2d at 22 (noting that federal decisions instruct courts to apply collateral estoppel in criminal cases with "realism and rationality" (quoting \textit{Ashe v. Swenson}, 397 U.S. 436, 444 (1970)); \textit{Pena-Cabanillas}, 394 F.2d at 787 (suggesting that mutuality of estoppel applies in both criminal and civil cases).

27. \textit{See Pena-Cabanillas}, 394 F.2d at 787 (agreeing with "well written" \textit{Rangel-Perez} decision that collateral estoppel "is closely connected with the question of whether the doctrine is to be applied with the same mutuality in criminal cases as it is in civil cases, to-wit, in favor of and against both the plaintiff and defendant"); \textit{see also Rangel-Perez}, 179 F. Supp. at 625 (stating that wise public policy and common sense judicial administration combine to advocate same mutuality of collateral estoppel in criminal as in civil cases). But \textit{see United States v. Ping}, 552 F.2d 1069, 1076 (2d Cir. 1977) (dictum) (disagreeing with government's argument that logic and fairness mandate that collateral estoppel be mutual even in criminal cases); \textit{Collateral Estoppel in Criminal Cases, supra note 12, at 276-78} (suggesting that reci-
collaterally estop the prosecution, one commentator wrote that, "in terms of ordinary [estoppel] principles, it would seem natural and logical to allow the government to use [collateral estoppel] to its advantage as well."28 Both the Eighth and Ninth Circuits also 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 proceeding or argue that the alienage status has since changed.29

Courts and commentators support collateral estoppel of the accused on other grounds as well. For example, commentators suggest 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.30 The Rangel-Perez procuracy of estoppel "is inapposite in criminal prosecutions" because due process requires that defendant be guaranteed trial as to each element of fact in every prosecution.

28. Richard B. Kennelly, Jr., Note, Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases, 80 Va. L. Rev. 1379, 1397 (1994). This statement finds support in the fact that both parties to a civil case may use collateral estoppel and that the Ashe court did not expressly forbid collateral estoppel of the accused. See id. (noting mutuality of estoppel in civil cases and limited scope of Ashe decision). Kennelly also rejected then Chief Justice Burger's dissent in Ashe, calling it "erroneous" and "flawed." Compare id. at 1398-99 ("Chief Justice Burger's dictum in dissent regarding collateral estoppel rested on flawed or since outdated assumptions, and presents no serious obstacle to allowing offensive use of [collateral estoppel] by the government in criminal cases.")., with Ashe, 397 U.S. at 464-65 (Burger, C.J., dissenting) ("[C]ourts that have applied the collateral-estoppel concept to criminal actions would certainly not apply it to both parties, as is true in civil cases . . . ."). Kennelly then pointed out that the district court had already used collateral estoppel against a criminal defendant before the Ashe decision and that Burger wrote his dissent nine years before the Court recognized offensive collateral estoppel in civil cases. See Kennelly, supra, at 1398-99 (noting that Rangel-Perez court allowed collateral estoppel of accused long before Ashe decision, which was nine years before Court endorsed offensive collateral estoppel in civil cases in Parklane Hosiery Co. v. Shore, 499 U.S. 322, 332-33 (1979) (permitting offensive collateral estoppel in federal civil cases)).

29. See Hernandez-Urìbe, 515 F.2d at 22 (noting that defendant may always examine whether prior adjudication was made after full and adequate hearing and was essential to determination of case); Pena-Cabanillas, 394 F.2d at 787-88 (same); Rangel-Perez, 179 F. Supp. at 626 (stating that, "beyond question," accused is always entitled to have any prior proceedings carefully scrutinized); see also Pena-Cabanillas, 394 F.2d at 786 (stating that defendant would be allowed to litigate possible change in alien status since earlier adjudication); Rangel-Perez, 179 F. Supp. at 626 (noting that estoppel of accused is not absolute because alien may have facts of entry tried anew, as well as its justification on other grounds); Kennelly, supra note 28, at 1410-12 (suggesting that collateral estoppel of accused does not violate abstract due process rights because "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." (quoting Ashe, 397 U.S. at 447 (Black, J., concurring))).

30. See Vestal, supra note 2, at 314, 320-21 (stating that defendant typically has already had opportunity to confront adverse witnesses, and that statistically infrequent incidence of collateral estoppel of accused presents no constitutional con-
court also supported collateral estoppel of status issues such as alienage.\textsuperscript{31} One commentator also considered criminal defendants' constitutional arguments unpersuasive because federal courts often abrogate defendants' Sixth Amendment rights to a trial by jury.\textsuperscript{32} This author reasoned that the criminal justice system, already skewed in favor of the defendant, should not grant defendants another weapon against the state.\textsuperscript{33}

2. *Precluding Collateral Estoppel*

Departing from the course set by the Eighth and Ninth Circuits, the United States Court of Appeals for the Third Circuit, in *United States v. Pelullo*,\textsuperscript{34} and the United States Court of Appeals for the Eleventh Circuit, in *United States v. Harnage*,\textsuperscript{35} both held that the government may not collaterally estop the accused.\textsuperscript{36} The Eleventh Circuit refuted the Eighth and

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Ninth Circuits' policy arguments by claiming that collateral estoppel of criminal defendants would, in fact, hinder judicial economy.\textsuperscript{37} Specifically, the \textit{Harnage} court contended that tests for allowing collateral estoppel consume more time than merely adjudicating the individual issue.\textsuperscript{38} The Eleventh Circuit also asserted that the need to determine the effectiveness of the defendant's prior counsel would further complicate lengthy evidentiary hearings.\textsuperscript{39} The Third Circuit dismissed the judicial economy argument, asserting that the gravity of the criminal defendant's possible

RICO convictions. \textit{See id.} The United States Court of Appeals for the Third Circuit reversed the conviction, holding that the defendant's prior jury conviction for wire fraud could not act as collateral estoppel to establish a predicate offense for the RICO violation, because the right to a jury trial "necessitates that every jury empaneled for a prosecution considers evidence of guilt afresh and without the judicial direction attending collateral estoppel." \textit{Id.} at 896 (citing \textit{In re Winship}, 397 U.S. 358, 364 (1970); \textit{State v. Ingenito}, 432 A.2d 912, 915-16 (N.J. 1981)).

In \textit{Harnage}, the federal prosecutors indicted the defendant in Florida and Texas on drug charges. \textit{See} 976 F.2d at 633. The defendant claimed that he had an attorney-client relationship with a key witness to both prosecutions, a fact that would preclude the introduction of any evidence that witness might have against him. \textit{See id.} After the Texas district court held that no such attorney-client relationship existed, the Florida district court held that the Texas determination would act as a collateral estoppel in the Florida adjudication. \textit{See id.} The defendant appealed to the United States Court of Appeals for the Eleventh Circuit, which held that the lower court's determination to collaterally estop the accused had been in error. \textit{See id.} The \textit{Harnage} court flatly rejected the government's judicial economy arguments, obviating the need for a detailed Constitutional analysis. \textit{See id.} at 636 n.2.

37. \textit{See Harnage}, 976 F.2d at 634-36 (stating that amount of time involved in determining whether to allow collateral estoppel "would [not] serve the original goal of collateral estoppel—judicial economy"); \textit{FREEDMAN}, supra note 10, at 32 (noting that, in civil cases, offensive collateral estoppel may not well serve judicial economy because litigants may wait to bring suits rather than intervening in current litigation); \textit{Vestal}, supra note 2, at 341 (conceding that giving preclusive effect to criminal prosecutions will occasionally result in additional litigation because some criminal defendants do not enter into pleas).

38. \textit{See Harnage}, 976 F.2d at 635 (describing collateral estoppel test that required examination of five elements); \textit{see also United States v. Lavasuer}, 699 F. Supp. 965, 981 (D. Mass. 1988) (implementing five-step collateral estoppel test for previous suppression hearing). The test offered by the \textit{Lavasuer} court required: (1) an "identity of issues" in the two proceedings; (2) that the defendant had sufficient incentive to litigate the issue; (3) that the defendant had been a party to the previous litigation; (4) that the applicable law be identical; and (5) that the prior proceeding result in a final judgment on the merits that provides opportunity and incentive to appeal. \textit{See id.} The \textit{Harnage} court suggested that the resolution of all five elements of the \textit{Lavasuer} test would drain judicial resources far more than the adjudication of the one issue the prosecution sought to collaterally estop. \textit{See Harnage}, 976 F.2d at 635 (rejecting \textit{Lavasuer} test because "it would create more problems than it was designed to solve").

39. \textit{See Harnage}, 976 F.2d at 636 (stating that examination of effectiveness of defendant's prior counsel would hinder judicial economy by requiring evidentiary hearings and review of records from prior proceedings). \textit{But see} Kennelly, \textit{supra} note 28, at 1420 (presuming that defendant would have challenged effectiveness of counsel earlier if colorable claim of ineffectiveness existed).
loss of liberty should trump such civil policy concerns.\textsuperscript{40} In contrast to the Third Circuit’s reasoning, the \textit{Harnage} court elected not to discuss the issue’s constitutional implications because it felt that collateral estoppel of criminal defendants would hinder judicial economy.\textsuperscript{41}

The Third Circuit, however, did address the constitutional implications of the issue, contending that collateral estoppel of the accused impermissibly interferes with fundamental due process protections.\textsuperscript{42} The \textit{Pelullo} court stated that collateral estoppel of the accused conflicts with the presumption of innocence that the defendant should enjoy in every criminal proceeding.\textsuperscript{43} Similarly, some defendants have argued that collateral estoppel conflicts with their constitutionally guaranteed right to confront adverse witnesses.\textsuperscript{44} Commentators have also suggested that collateral estoppel unfairly biases juries by informing them of the defendant’s prior

\textsuperscript{40} See \textit{Pelullo}, 14 F.3d at 893-94 (noting that accused’s interest in vindication has been held to trump “public interest concerns . . . of the highest magnitude”) (citing \textit{United States v. Nixon}, 418 U.S. 683, 703-16 (1974) (stating that right of accused to vindication trumps executive privilege); \textit{Davis v. Alaska}, 415 U.S. 308, 318-21 (1974) (stating that right of accused to vindication trumps juvenile offenders' interest in anonymity); \textit{United States v. Lindstrom}, 698 F.2d 1154, 1166-67 (11th Cir. 1983) (stating that right of accused to vindication trumps privacy interest in confidentiality of medical records)). In particular, the \textit{Pelullo} court noted that policy or efficiency arguments cannot modify the Sixth Amendment, which guarantees the right to a jury trial. See id. at 895 (stating that lack of criminal analogs to motion for directed verdict or summary judgment demonstrates insusceptibility of Sixth Amendment to policy considerations).

\textsuperscript{41} See \textit{Harnage}, 976 F.2d at 636 n.2 (considering inquiry into due process implications of issue unnecessary because “we reject the government’s use of [collateral estoppel] on the grounds of judicial economy”).

\textsuperscript{42} See \textit{Pelullo}, 14 F.3d at 892-95 (analyzing constitutional limitations of collateral estoppel in criminal cases); see also \textit{Collateral Estoppel in Criminal Cases}, supra note 12, at 276-77 (noting that due process requires trial of every issue of fact in every prosecution); Murray, supra note 12, at 936 (stating that due process is generally thought to prohibit prosecution from asserting collateral estoppel against accused).

\textsuperscript{43} See \textit{Pelullo}, 14 F.3d at 892 (citing favorably line of cases finding that government’s collateral estoppel of accused conflicts with presumption of defendant's innocence); see also \textit{State v. Ingenito}, 452 A.2d 912, 917 (N.J. 1981) (finding collateral estoppel of accused inapposite with defendant’s presumption of innocence as to every element of crime because it shifts burden of proof to defendant); \textit{Collateral Estoppel Against the Accused}, supra note 20, at 521 n.50 (suggesting that collateral estoppel of accused may violate defendant’s presumption of innocence by alleviating prosecution’s need to prove every essential element of offense “beyond a reasonable doubt”); Murray, supra note 12, at 936 (stating that collateral estoppel of criminal defendant may violate presumption of innocence). But see \textit{Hernandez-Uribe v. United States}, 515 F.2d 20, 21 (8th Cir. 1975) (rejecting defendant’s argument that government’s collateral estoppel of alienage undermined defendant’s presumption of innocence).

\textsuperscript{44} See \textit{Collateral Estoppel Against the Accused}, supra note 20, at 521-22 (noting that right to confront and cross-examine adverse witnesses casts doubt on constitutionality of collateral estoppel of accused). But see \textit{Hernandez-Uribe}, 515 F.2d at 21 (disagreeing with defendant’s argument that government’s collateral estoppel of accused deprives defendants of Sixth Amendment right to confront adverse witnesses).
conviction, interferes with juries' nullification power and allows questionable prosecutorial strategies.45

Noting that previous cases had all but ignored the constitutional implications of this issue, the Third Circuit set forth the first detailed judicial analysis of the constitutional limitations of collateral estoppel of the accused.46 Examining colonial conceptions of the Sixth Amendment right to a jury at the time of the ratification of the Bill of Rights in 1791, the Third Circuit found no historical antecedent for applying collateral estoppel against criminal defendants.47 The Third Circuit further suggested

45. See Collateral and Equitable Estoppel, supra note 10, at 1237-38 (stating that collateral estoppel of accused unfairly biases juries by informing them of defendants' prior convictions and encouraging them to make conclusions regarding defendant's character). Some commentators believe that collateral estoppel of the accused interferes with the jury's nullification power. See Peter Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 MICH. L. REV. 1001, 1015 n.49 (1980) (suggesting that removing certain issues from jury's consideration "blinds the jury to the 'whole picture' of a defendant's conduct" and thus denies jury information on which to exercise veto power); Collateral and Equitable Estoppel, supra note 10, at 1239-42 (concluding that collateral estoppel in some instances can interfere with juries' power to "nullify" because of sympathy for defendant). But see Kennelly, supra note 28, at 1403 (stating that defendant has already had chance at nullification at previous proceeding and lost). See generally 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 22.1(g), at 959-61 (2d ed. 1992) (discussing jury nullification doctrine). Some commentators also believe that allowing collateral estoppel of criminal defendants would encourage questionable prosecutorial strategies. See Collateral and Equitable Estoppel, supra note 10, at 1248 (fearing prosecutorial abuse of collateral estoppel in instances where prosecutor can join two related claims but strategically chooses not to); Collateral Estoppel Against the Accused, supra note 20, at 521-24 (same); Kennelly, supra note 28, at 1413-16 (suggesting that only argument of "joinder of related offenses may prevent application of issue preclusion in certain cases").

46. See Pelullo, 14 F.3d at 894 (noting that previous courts "did not conduct a constitutional analysis," but rather relied on their "perception of 'wise public policy and efficient judicial administration'"); see also Hargave, 976 F.2d at 636 n.2 (failing to reach constitutional issues because of reliance on judicial economy argument); United States v. Ping, 555 F.2d 1069, 1076 (2d Cir. 1977) (electing not to address "difficult question" of government's collateral estoppel of criminal defendants). Commentators, however, have refuted the holding in Pelullo. See Kennelly, supra note 28, at 1380 (1994) (concluding that courts, despite valid constitutional concerns, should limit application of collateral estoppel of accused rather than precluding it outright); see also Vestal, supra note 2, at 312-21 (suggesting that collateral estoppel of accused does not offend fundamental constitutional rights).

47. See Pelullo, 14 F.3d at 893-94 (examining Sixth Amendment right to jury at time of ratification of Bill of Rights); see also Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 374-87 (1981) (suggesting legitimacy of effectuating "original intent" of Constitution). The Third Circuit found only ambiguous evidence of the government's use of collateral estoppel against criminal defendants at the Bill of Rights' ratification. See Pelullo, 14 F.3d at 893-94 (finding no applications of collateral estoppel against accused before ratification of Bill of Rights); see also Marlyn E. Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 IOWA L. Rev. 317, 319 n.9 (1954) (stating that no plea of res judicata existed in criminal cases at early common law); Collateral Estoppel Against the Accused, supra note 20, at 523 (finding only ambiguous evidence of government's use of collateral estoppel against criminal defendants).
that the Sixth Amendment guarantee to a trial by jury extends to each judicial proceeding, not merely to every element at its initial adjudication.\textsuperscript{48} The \textit{Pelullo} court maintained that the right to a jury trial made collateral estoppel of criminal defendants more than a mere procedural matter, thereby precluding “procedural reforms” of the doctrine in criminal cases.\textsuperscript{49} Finally, the Third Circuit stated that the literal language of the Sixth and Seventh Amendments provides a “textual anchor” for precluding collateral estoppel of the accused.\textsuperscript{50} The salient differences between the two Amendments, it asserted, demonstrate that courts should allow mutuality of collateral estoppel in civil cases, while restricting the doctrine’s use to defensive collateral estoppel in criminal cases.\textsuperscript{51} Thus, the

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\item See \textit{Pelullo}, 14 F.3d at 893-96 (noting that Sixth Amendment guarantee to jury trial does not apply merely to first time factual issue is determined, but to each subsequent determination as well); see also \textit{Ingenito}, 432 A.2d at 916 (“[The] question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury.”); \textit{Collateral Estoppel in Criminal Cases}, supra note 12, at 276 (suggesting that due process rights guarantee that criminal defendants have trial as to each issue of fact in every prosecution). The \textit{Pelullo} court relied on \textit{Ingenito}, which held that, because withholding essential evidence compromises the “paramount deliberative and decisional responsibilities” of the jury, “the application of collateral estoppel against a criminal defendant constitutes an invasion of the . . . functions of the jury.” \textit{Ingenito}, 432 A.2d at 916. The \textit{Pelullo} court found this to be a “powerful elaboration” of the proposition that collateral estoppel of the accused violates the constitutional guarantee to a jury trial. See \textit{Pelullo}, 14 F.3d at 892 (citing favorably \textit{Ingenito} decision).

\item See \textit{Pelullo}, 14 F.3d at 894 n.7 (rejecting argument that prosecution could “reform” use of collateral estoppel against accused). The Third Circuit noted that the Supreme Court does not require adherence to the “procedural exactitudes” of the Seventh Amendment as they existed in 1791. See id. (citing \textit{Parklane Hosiery Co. v. Shore}, 439 U.S. 322, 333-38 (1979) (allowing “procedural reforms” of Seventh Amendment by permitting non-mutual offensive collateral estoppel in civil cases)). The court stated, however, that the more stringent Sixth Amendment guarantee to a trial by jury would not allow such flexibility in criminal cases. See id. (asserting that courts should not allow procedural reforms under Sixth Amendment); accord \textit{Parklane Hosiery}, 439 U.S. at 348 (Rehnquist, J., dissenting) (“It can scarcely be doubted, though, that such ‘procedural reforms’ would not survive constitutional scrutiny under the jury trial guarantee of the 6th Amendment.”). Furthermore, the \textit{Pelullo} court stated that collateral estoppel of criminal defendants is not a procedural matter at all, and therefore not subject to “procedural reform.” See \textit{Pelullo}, 14 F.3d at 894 n.7 (stating that collateral estoppel of accused is not procedural because it interferes with jury’s essential function).

\item See \textit{Pelullo}, 14 F.3d at 894-95 (stating that literal interpretation of Sixth and Seventh Amendments prohibits government’s use of collateral estoppel against accused); see also U.S. CONST. art. III, § 2 (“The trial of all Crimes, except in Cases of Impeachment, shall be by Jury); 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 . . . .”). The \textit{Pelullo} court reasoned that the use of compulsory language in both constitutional provisions demonstrates that the “absolute right to a jury trial in all, rather than in just one, criminal prosecution is obvious from the text. . . .” \textit{Pelullo}, 14 F.3d at 894-95.

\item See \textit{Pelullo}, 14 F.3d at 895 (comparing language of Seventh Amendment, which merely “preserved” right to jury trial, with language of Sixth Amendment, which guarantees right to impartial jury). Specifically, the \textit{Pelullo} court stated that
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Pelullo court concluded that the Sixth Amendment absolutely precludes collateral estoppel of the accused.52

C. The Narrow Issue: Guilty Pleas as Collateral Estoppel

Before Gallardo-Mendez, only the Eighth Circuit in Hernandez-Uribe had directly considered the narrower issue of whether a guilty plea may act as collateral estoppel of the accused.53 The Eighth Circuit recognized the Supreme Court's guidance 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."54 Consequently, the Hernandez-Uribe court, citing Brazzell v. Adams55 and Hyslop v. United States,56 found that a "general rule" accords guilty pleas the same

the differences between the two contemporaneous Amendments demonstrate that the Framers intended that they have different effects. See id. (noting that guarantee of rights is stronger than mere preservation of rights as they existed at time of ratification of Bill of Rights). Consequently, the Pelullo court reasoned that efficiency as a justification for collateral estoppel in civil cases, receives the constitutional sanction of the Seventh Amendment because this practice existed in 1791, but that such sanction is absent in the Sixth Amendment. See id. at 896 (stating that Sixth Amendment's language "can be given its full meaning and effect only by strict application").

52. See id. at 896 (holding that Sixth Amendment precludes application of offensive collateral estoppel against criminal defendants) (citing U.S. CONST. amend. VI, which guarantees right to trial by jury "in all criminal prosecutions"); see also Collateral Estoppel Against the Accused, supra note 20, at 521-24 (calling defendants' rights to jury trial "main problem" with collateral estoppel against criminal defendants, and demonstrating ambiguity of historical evidence of collateral estoppel of accused); Collateral Estoppel in Criminal Cases, supra note 12, at 277 (suggesting that criminal defendant's right to confront adverse witnesses might be violated by mutuality of estoppel in criminal cases).

53. See Hernandez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (holding that court may use collateral estoppel against defendant who previously pleaded guilty to same charge).


55. 493 F.2d 489 (5th Cir. 1974). The plaintiff in Brazzell, a state prisoner, brought a civil action under 42 U.S.C. § 1983 against the district attorney and other state agents that participated in his arrest. See id. at 489. The plaintiff sought damages because of police conduct he likened to entrapment. See id. The Brazzell court held that the government could collaterally estop the plaintiff in his subsequent civil action as to the facts admitted by his plea of guilty to the underlying criminal charge. See id. at 490.

56. 261 F.2d 786 (8th Cir. 1958). Hyslop involved a civil action brought by the United States for damages pursuant to 31 U.S.C. § 231 resulting from the defendant's intentional misbranding of eggs for sale to the United States Army. See id. at 787. The government won on summary judgment based on evidence of the defendant's earlier guilty plea to the related criminal charge. See id. at 790. Although the defendant admitted that "in an appropriate case the rule of collateral estoppel may be invoked," he appealed its application to his case. Id. The appellate court, reversing the grant of summary judgment, held that collateral estoppel does not apply where the previous guilty plea fails to either put the fact into issue or determine the essential elements to be collaterally estopped. See id. at 790-92.
The Eighth Circuit further maintained that Federal Rule of Criminal Procedure 11 ("Rule 11"),\(^{58}\) which requires courts to inquire whether a "factual basis" exists for a guilty plea, satisfactorily protects defendants from the collateral effects of their pleas.\(^{59}\) Finally, the Hernandez-Uribe court asserted that a guilty plea effectively waives the defendant's right to contest the alienage issue before a jury because the defendant failed to take advantage of the opportunity to do so before the first jury.\(^{60}\)

III. FACTS: UNITED STATES v. GALLARDO-MENDEZ

Prior to the federal indictment that precipitated this appeal, the Immigration and Naturalization Service (INS) had deported the defendant, Manuel Gallardo-Mendez, three separate times.\(^{61}\) On June 5, 1987, Utah

57. *See Hernandez-Uribe*, 515 F.2d at 22 (stating that Brazzell and Hyslop stand for general rule that collateral estoppel applies equally whether previous criminal conviction was based on jury verdict or guilty plea). Ninth Circuit dictum reached a similar result. *See United States v. Bejar-Matrecios*, 618 F.2d 81, 83-84 (9th Cir. 1980) (dictum) (noting general rule that collateral estoppel doctrine applies equally whether previous criminal conviction was based on jury verdict or guilty plea) (citing *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978) and *Brazzell*, 499 F.2d at 490). In *Bejar-Matrecios*, the defendant appealed a conviction for illegal reentry into the United States after a previous deportation. *See id.* at 82. The Ninth Circuit reversed the conviction, in part because the prejudice to the defendant outweighed the probative value of the prior conviction. *See id.* at 84-85.

*Ivers*, like *Brazzell* and *Hyslop*, involved the court's application of the collateral estoppel doctrine in a civil action subsequent to a guilty plea in a previous criminal proceeding. *See Ivers*, 581 F.2d at 1366-67 (applying collateral estoppel against civil defendant who pleaded guilty in prior criminal proceeding).

58. *Fed. R. Crim. P. 11* (1999) ("Rule 11"). Rule 11(d) states, "The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement . . . ." *Id.* 11(d). Rule 11(f) also provides, "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." 11(f).

59. *See Hernandez-Uribe*, 515 F.2d at 22 (claiming that Rule 11 sufficiently protects criminal defendants in instances of future collateral estoppel).

60. *See id.*; *see also* Collateral and Equitable Estoppel, *supra* note 10, at 1236 (suggesting that guilty plea "operates as a waiver of the . . . fundamental rights of the accused"). The *Hernandez-Uribe* court stated that the defendant had the opportunity in the earlier criminal proceeding to contest his alienage or request a jury trial, but that "[b]y his plea of guilty, defendant waived those constitutional rights here challenged which are guaranteed every criminal defendant." *Hernandez-Uribe*, 515 F.2d at 22. The *Hernandez-Uribe* court mitigated the implications of its holding by explaining that the defendant may still challenge the validity of his earlier guilty plea or introduce evidence that his alien status has changed since the earlier plea. *See id.* (suggesting that collateral estoppel of accused did not completely foreclose defense).

61. *See United States v. Gallardo-Mendez*, 150 F.3d 1240, 1241 (10th Cir. 1998) (noting defendant's three previous deportations); *see also* Answer Brief of Plaintiff/Appellee and Cross-Appeal at 2-11, United States v. Gallardo-Mendez, 150 F.3d 1240 (10th Cir. 1998) (No.97-4062) [hereinafter Government's Brief]. The defendant, Manuel Gallardo-Mendez, a/k/a Luis Lizarraga, a/k/a Oscar Berdeja,
state prosecutors charged the defendant with theft. After his conviction and subsequent state sentence, Utah state officials turned the defendant over to the INS for deportation proceedings. During an interview with an INS special agent on November 18, 1987, the defendant admitted that his parents, Mexican citizens, gave birth to him in Mexico, and that he had been smuggled into the United States in 1979. A federal immigration judge ordered the defendant deported to Mexico, for the first time, in December 1987.

Less than one year later, on August 26, 1988, authorities again found the defendant residing illegally in the United States. On September 6, 1988, the INS deported him a second time.

On March 28, 1989, Utah state prosecutors charged the defendant with a drug offense. After the defendant pleaded guilty and served his sentence, state authorities again turned him over to the INS for deportation proceedings. With that case pending on appeal, the INS again arrested the defendant in April of 1991 on a charge of illegal reentry of a deported alien. The defendant's brother identified him as Manuel Gallardo-Mendez, a citizen of Mexico. Subsequently, federal authorities indicted the defendant for violating 8 U.S.C. § 1326, which criminalizes reentry into the United States by an illegal alien, and 18 U.S.C. § 911, which criminalizes falsely claiming United States citizenship. The defendant pleaded guilty to the illegal reentry charge. After the defendant employed several aliases in order to evade arrest for violating immigration laws. See Gallardo-Mendez, 150 F.3d at 1241 n.1. For this reason, this Note refers to Mr. Gallardo-Mendez simply as "the defendant."

62. See Government's Brief, supra note 61, at 2-3 (detailing defendant's criminal history).
63. See id.
64. See id. at 3 (discussing defendant's interview with INS special agent).
65. See Gallardo-Mendez, 150 F.3d at 1241.
66. See Government's Brief, supra note 61, at 3 (noting circumstances of defendant's second deportation).
67. See Gallardo-Mendez, 150 F.3d at 1241.
68. See Government's Brief, supra note 61, at 3 (detailing defendant's drug charge in Utah state court).
69. See id.
70. See id. at 4.
71. See id.
72. See 8 U.S.C. § 1326 (1994) (providing that any previously deported alien that reenters United States shall be fined, imprisoned for not more than two years, or both). That section also provides that illegal immigrants originally deported for drug offenses or aggravated felonies may be imprisoned for ten or twenty years. See 8 U.S.C. § 1326(b) (requiring longer period of incarceration for aliens deported for drug offenses or violent crimes).
73. See 18 U.S.C. § 911 (1994) ("Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.").
74. See United States v. Gallardo-Mendez, 150 F.3d 1240, 1241 (10th Cir. 1998) (stating charges under which government indicted defendant).
75. See id.
completed his sentence, federal authorities turned him over to the INS, which, on February 7, 1992, deported him for a third time.\textsuperscript{76}

Most recently, on May 18, 1995, the Utah County Sheriff's Office informed the INS that they had charged the defendant with extortion.\textsuperscript{77} In September 1995, a Utah state court convicted the defendant and sentenced him to a state prison term.\textsuperscript{78} The INS indicted the defendant in August of 1996 on charges of illegal reentry of a deported alien in violation of 8 U.S.C. §1326, the same criminal statute to which he had already pleaded guilty in 1991.\textsuperscript{79}

The defendant then filed a motion with the United States District Court for the District of Utah, asking for a pretrial determination that would allow him to contest his illegal alien status.\textsuperscript{80} The government then filed a motion in limine requesting that the court use the defendant's previous guilty plea to collaterally estop him from contesting his alienage at trial.\textsuperscript{81} The district court granted the government's motion and used the defendant's 1991 plea to collaterally estop the defendant's alienage before 1991; it allowed, however, the defendant to introduce evidence that his illegal alien status had since changed.\textsuperscript{82} The district court instructed the jury that a prior judicial determination, the defendant's guilty plea, had determined that the defendant was an illegal alien prior to 1991.\textsuperscript{83} After his conviction and subsequent sentence to ninety-six months imprisonment, the defendant appealed his conviction to the United States Court of Appeals for the Tenth Circuit.\textsuperscript{84} The Tenth Circuit reversed, holding that the use of a guilty plea to collaterally estop a defendant from relitigating an issue in a subsequent criminal proceeding violates the Due Process Clause of the United States Constitution.\textsuperscript{85}

\textsuperscript{76} See Government's Brief, \textit{supra} note 61, at 4 (discussing defendant's prior deportations).

\textsuperscript{77} See id. at 4-5.

\textsuperscript{78} See Gallardo-Mendez, 150 F.3d at 1241 (detailing defendant's prior convictions).

\textsuperscript{79} See id. (noting defendant's prior guilty plea to identical charge).

\textsuperscript{80} See id.

\textsuperscript{81} See id.

\textsuperscript{82} See id. (discussing trial court's decision on collateral estoppel issue).

\textsuperscript{83} See id. at 1242, 1242 n.2 (including transcript of jury instructions). The jury instructions regarding the defendant's alienage stated: "There has been a judicial determination in litigation, to which the defendant was a party, that on and prior to July 26, 1991, defendant was an alien and not a citizen of the United States. The defendant is bound by that determination." \textit{Id}.

\textsuperscript{84} See id. (noting defendant's appeal and government's cross-appeal).

\textsuperscript{85} See id. at 1246 (holding that Due Process Clause protections prevent government's use of prior guilty pleas to collaterally estop criminal defendants from relitigating issues in subsequent criminal proceeding).
IV. ANALYSIS

A. Narrative Analysis

The Tenth Circuit began its review by noting the lack of precedential guidance from its own cases or those of its sister circuits, and then confined its discussion to whether a guilty plea may act as collateral estoppel of a criminal defendant. The *Gallardo-Mendes* court then criticized the holdings of the circuits that allow collateral estoppel of the accused. The Tenth Circuit rejected the judicial economy argument because it found that granting preclusive effect to guilty pleas might discourage defendants from entering into them. The court also noted that the complex tests used to determine whether to apply collateral estoppel would consternate district court judges, thereby hindering judicial economy. The Tenth Circuit next stated that judicial economy, which justifies the doctrine’s use in the civil arena, should not carry the same weight in the criminal arena. In this vein, the court also stated that the Supreme

86. See id. at 1242 n.3 (noting clear split among circuits that have ruled on whether government may collaterally estop criminal defendants from raising issues adjudicated in prior proceedings). The Tenth Circuit narrowed its analysis to the collateral effects of guilty pleas in subsequent criminal proceedings. See id. at 1243 (stating that facts of case *sub judice* made more general investigation of collateral estoppel of criminal defendants unnecessary).

87. See id. at 1243-44 (criticizing Eighth and Ninth Circuits’ reliance on public policy to justify collateral estoppel of accused).

88. See id. at 1243 (“The prospect of being collaterally estopped at some future date may discourage defendants from settling criminal charges by pleading guilty.”) (citing Kennelly, *supra* note 28, at 1421-22 (1994) (suggesting that giving pleas preclusive effect would create uncertain “plea bargain pricing” and make pleas less desirable to criminal defendants))).

89. See id. at 1243-44 (stating that Rule 11’s burden of ensuring that defendants enter into guilty pleas “knowingly,” combined with potentially complex collateral estoppel tests, would make federal judges’ jobs more difficult); accord United States v. Harnage, 976 F.2d 633, 634-36 (11th Cir. 1992) (rejecting use of collateral estoppel against criminal defendants on grounds of judicial economy); United States v. Colacurcio, 514 F.2d 1, 6-7 (9th Cir. 1975) (rejecting application of collateral estoppel against criminal defendant where monetary amounts were not directly determined as issue in prior proceeding).

90. See *Gallardo-Mendes*, 150 F.3d at 1244 (noting that, although idea of judicial economy provides sufficient justification in civil context, public policy and judicial economy “do not have the same weight and value in criminal cases”) (citing *Ash v. Swenson*, 397 U.S. 436, 464 (1970) (Burger, C.J., dissenting) (stating that conservation of judicial resources is lesser value in criminal cases than in civil litigation); *In re Winship*, 397 U.S. 358, 364 (1970) (differentiating criminal and civil contexts by noting that criminal defendant’s liberty interest is “interest of transcending value”)). The United States Court of Appeals for the Tenth Circuit listed several cases in which courts subordinate public policy concerns to the criminal defendant’s interest in vindication. See id. (citing *United States v. Nixon*, 418 U.S. 683, 703-16 (1974) (holding that accused’s interest in vindication trumps President’s general claim of absolute executive privilege); *Davis v. Alaska*, 415 U.S. 308, 318-21 (1974) (holding that accused’s interest in vindication trumps juvenile offenders’ interest in anonymity); *United States v. Lindstrom*, 698 F.2d 1154, 1166-67 (11th Cir. 1983) (holding that accused’s interest in vindication trumps patient’s privacy interest in confidentiality of medical records)).
Court made collateral estoppel available to criminal defendants not as a matter of judicial economy, but rather because of its relation to the Fifth Amendment guarantee against double jeopardy. Thus, the Tenth Circuit, guided by the Third Circuit's decision in *Pelullo*, declared that "the liberty interest of a criminal defendant takes priority over the usual concerns for efficient judicial administration so often found in civil proceedings."  

The Tenth Circuit then criticized the Eighth Circuit's failure to differentiate between the use of guilty pleas and verdicts as the basis of collateral estoppel in subsequent criminal proceedings. The court noted that each decision cited by the Eighth Circuit involved the use of collateral estoppel based on criminal guilty pleas in a subsequent civil case, not a criminal case. The Tenth Circuit, therefore, dismissed the "general rule" that guilty pleas may act to collaterally estop defendants in a subsequent criminal proceeding.

The *Gallardo-Mendez* court then questioned the Eighth Circuit's conclusion that courts need not conduct full adversary proceedings as a prerequisite to collateral estoppel of criminal defendants. The court stated:

91. See *Gallardo-Mendez*, 150 F.3d at 1244 (noting that Constitution, rather than judicial economy, justifies criminal defendants' use of collateral estoppel) (citing *Ashe*, 397 U.S. at 445 (holding that criminal defendant's use of collateral estoppel against state is "embodied in the Fifth Amendment guarantee against double jeopardy").

92. Id. (quoting *United States v. Petullo*, 14 F.3d 881, 893 (3d Cir. 1994) (noting different policy concerns in civil and criminal cases)).

93. See id. at 1244-45 (criticizing *Hernandez-Uribe* court's conclusion that "general rule" accords guilty pleas same preclusive effect as verdicts). The *Gallardo-Mendez* court questioned the pertinence of the cases cited by the Eighth and Ninth Circuits as demonstrating this general rule. See id. at 1244-45 n.6 (questioning whether *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978), *Brazzell v. Adams*, 493 F.2d 489 (5th Cir. 1974) and *Hyslop v. United States*, 261 F.2d 786 (8th Cir. 1958) stand for "general rule" that courts may apply collateral estoppel against criminal defendants regardless of whether court based earlier conviction on guilty plea or verdict).

94. See id. at 1244-45, 1245 n.6 (noting that facts of *Brazzell*, *Hyslop*, and *Ivers* all involved use of guilty plea as collateral estoppel in subsequent civil case, not criminal case).

95. See id. at 1245 (rejecting *Hernandez-Uribe* "general rule"). The *Gallardo-Mendez* court stated:

These cases neither support nor explain the jump from applying the collateral estoppel doctrine against a defendant in a civil proceeding related to the underlying criminal transaction to which the defendant pled guilty, to applying the doctrine against a defendant whose liberty interest is at stake in a successive criminal proceeding arising from a different criminal transaction.

Id. (emphasis added).

96. See id. (criticizing *Hernandez-Uribe* court's conclusion that "full adversary proceeding" was not prerequisite to collateral estoppel of accused) (citing *Hernandez-Uribe*, 515 F.2d at 22 (8th Cir. 1975) (stating that Rule 11's factual basis test adequately protects criminal defendants from improvident guilty pleas); *United States v. Bejar-Matrecios*, 618 F.2d 81, 83-84 (9th Cir. 1980) (concluding that court's
that Rule 11’s safeguards “are not tantamount to the full panoply of protections afforded by a jury trial” because the Rule’s “factual basis” requirement for guilty pleas falls short of the “beyond a reasonable doubt” standard that courts require the prosecution satisfy before entering a valid guilty verdict.\(^9\) Noting that differences between burdens of proof permit courts to reject collateral estoppel in civil cases, the Tenth Circuit reasoned that a difference between the burdens of proof in two criminal proceedings should also preclude the application of the doctrine.\(^9\) Thus, the Tenth Circuit reversed the district court’s holding and concluded that according guilty pleas preclusive effect in subsequent criminal proceedings violates the defendant’s constitutional right to due process.\(^9\)

B. Critical Analysis

The Tenth Circuit properly decided *Gallardo-Mendez* for several reasons.\(^1\) First, it remains unclear whether collateral estoppel of the accused would indeed serve the interest of judicial economy.\(^2\) Second, mutuality of estoppel offends the fundamental principles of criminal jurisprudence.\(^3\) Third, collateral estoppel of status issues such as alienage may create more problems than it would solve.\(^4\) Fourth, existing procedural safeguards do not adequately protect defendants from the unex-

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\(^9\) Id. The *Gallardo-Mendez* court stated that the “factual basis” burden is a lower burden of proof than the “beyond a reasonable doubt” burden. See id. (stating that Rule 11 requirements fall short of due process “beyond a reasonable doubt” requirement).

\(^9\) See id. at 1245-46 (noting that Supreme Court precedent has demonstrated that differences in proof requirements of subsequent proceedings may preclude application of collateral estoppel) (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (“It is clear that the difference in the relative burdens of proof in criminal and civil actions precludes the application of the doctrine of collateral estoppel.”); *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) (stating that differences in degree of burden of proof may preclude application of doctrine of res judicata in civil cases)).

\(^9\) See id. at 1246 (“[T]he government’s use of a guilty plea to collaterally estop a defendant from relitigating an issue in a subsequent criminal proceeding is contrary to the Due Process Clause.”).

\(^1\) See id. (holding that due process protections prevent government’s offensive collateral estoppel of criminal defendants based on prior guilty pleas). For a discussion of the propriety of the Tenth Circuit’s decision, see *infra* notes 106-65 and accompanying text.

\(^2\) For a discussion of collateral estoppel’s effects on judicial economy in criminal cases, see *infra* notes 106-18 and accompanying text.

\(^3\) For a discussion of the mutuality of estoppel theory in criminal cases, see *infra* notes 119-24 and accompanying text.

\(^4\) For a discussion of the inappropriateness of collateral estoppel of the accused based on alienage status, see *infra* notes 125-133 and accompanying text.
pected collateral effects of their guilty pleas.\textsuperscript{104} Finally, collateral estoppel of the accused cannot withstand constitutional scrutiny because the Sixth Amendment prohibits its use against the accused.\textsuperscript{105}

1. \textit{It Is Unclear Whether Collateral Estoppel of Criminal Defendants Would Serve Judicial Economy}

Courts that favor collateral estoppel of criminal defendants justify their holdings by invoking compelling policy interests.\textsuperscript{106} For example, illegal immigration increases the burden on federal courts by requiring the determination of immigrants’ alienage prior to deportation.\textsuperscript{107} This problem has caused much concern among commentators and politicians, and has led to extensive remedial legislation.\textsuperscript{108} Another often invoked policy concern, the federal docket backlog, has occasioned similar anxiety.\textsuperscript{109} Unfortunately, the Administrative Office of the United States

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    \item \textsuperscript{104} For a discussion of the inadequacy of present procedural safeguards in terms of collateral estoppel of criminal defendants, see \textit{infra} notes 154-55 and accompanying text.
    \item \textsuperscript{105} For a discussion of the Sixth Amendment’s prohibitive effect on collateral estoppel of the accused, see \textit{infra} notes 156-62 and accompanying text.
    \item \textsuperscript{106} See Hernandez-Uribe v. United States, 515 F.2d 20, 21-22 (8th Cir. 1975) (stating that relitigation of alienage issue undermines purposes of federal immigration laws); Pena-Cabanillas v. United States, 394 F.2d 785, 787-88 (9th Cir. 1968) (noting that absent threat of collateral estoppel of alienage, defendants would have added incentive to attempt illegal reentry). For a further discussion of the policy arguments offered by the Eighth and Ninth Circuits, see \textit{infra} notes 107-11 and accompanying text.
    \item \textsuperscript{109} See Richard D. Freer, \textit{Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit}, 50 U. Pitt. L. Rev. 809,
 Courts expects the backlog to continue growing.\textsuperscript{110} The severity of this backlog may deleteriously effect the quality of the federal bench.\textsuperscript{111}

At first blush it seems that the liberal application of the collateral estoppel doctrine against the accused would help federal courts address these growing problems.\textsuperscript{112} Several factors indicate, however, that collateral estoppel may have the opposite effect.\textsuperscript{113} The complex tests for determining whether to apply collateral estoppel in a particular criminal proceeding may undermine the doctrine’s benefits.\textsuperscript{114} Furthermore, using guilty pleas as a basis for collateral estoppel could actually hinder judi-

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811 (1989) (noting that duplicative litigation and resulting docket delays cause major problems in federal courts); Daniel E. Hinde, Note, \textit{Consensual Sentencing in the Magistrate Court}, 75 \textit{Tex. L. Rev.} 1161, 1162 (1997) (discussing growing concern over crowded federal dockets); Mechem, \textit{supra} note 107, at 1 (stating that data demonstrates increase in federal courts’ caseload that has reached record heights in appellate courts).


111. \textit{See Mechem, supra} note 107, at 1, 10, 12 (stating that no new Article III judgeships have been created since 1990, several federal judgeships remain vacant, federal judges' workloads have risen significantly over last five years, average time required to dispose of case has increased and federal courts have become reliant on senior judges); \textit{see also} Sara Sun Beale, \textit{Too Many and Yet Too Few: New Principles To Define the Proper Limits for Federal Criminal Jurisdiction}, 46 \textit{Hastings L.J.} 979, 991-93 (1995) (lamenting effects of judicial backlog on quality of federal bench); John B. Oakley, \textit{The Myth of Cost-Free Jurisdictional Reallocation}, 543 \textit{Annals Am. Acad. Pol. & Soc. Sci.} 52, 62 (1996) (suggesting that federal docket backlog may deleteriously effect quality of federal bench).


113. For a discussion of the factors that demonstrate according preclusive effect to guilty pleas would in fact hinder judicial economy, see infra notes 114-17 and accompanying text.

114. \textit{See} United States \textit{v. Gallardo-Mendez}, 150 F.3d 1240, 1244 (10th Cir. 1998) (noting that collateral estoppel of accused would increase judicial burden because federal judges, required to ensure that defendants enter into guilty pleas "knowingly," would need to apply complex estoppel tests); United States \textit{v. Harnage}, 976 F.2d 633, 635 (11th Cir. 1992) (deciding that applying five-prong collateral estoppel test would "create more problems than it was designed to solve"). Determining whether the defendant’s counsel had mounted an effective defense in the earlier proceeding might also require costly evidentiary hearings and review of records from prior proceedings, completely defeating the goal of judicial economy. \textit{See id. at} 636 ("The fact that this type of review process would be
cial economy by deterring defendants from entering into guilty pleas.\textsuperscript{115} For example, criminal proceedings arguably require a greater emphasis on judicial economy than civil cases.\textsuperscript{116} The need to prevent erroneous convictions, however, outweighs even this important policy because collateral estoppel of incorrect decisions would perpetuate previous mistakes.\textsuperscript{117} Thus, the putative benefits of allowing collateral estoppel of the accused appear dubious at best. Concluding that the doctrine is not justified on judicial economy grounds does not dispose of the analysis, however, because closer scrutiny further highlights the impropriety of collateral estoppel of the accused.\textsuperscript{118}

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\item\textsuperscript{115} For a discussion of the effect of allowing collateral estoppel of guilty pleas in subsequent criminal proceedings, see infra notes 134-45 and accompanying text.
\item\textsuperscript{116} See Robert E. Knowlton, Criminal Law and Procedure, 11 Rutgers L. Rev. 71, 94 (1956) (considering waste of judicial resources in criminal cases of great import); Murray, supra note 12, at 941-42 (noting that considerations unique to criminal law require preeminence of judicial economy). For example, delay in criminal cases constitutes a more significant burden because, although civil litigants lose only money, criminal defendants lose their freedom and employment, suffer anxiety and public opprobrium and experience curtailment of their rights to free speech and association. See id. at 941-42 (discussing preeminence of judicial economy in criminal cases). Delays in criminal cases can also hinder the deterrent effect of criminal sanctions. See id. at 942 (discussing modern psychological research that suggests deterrent efficacy of sanction varies inversely with length of time between criminal act and imposition of punishment). Therefore, collateral estoppel of criminal defendants could theoretically reduce delays and their attendant hardships on criminal defendants. See id. (concluding that expanded use of collateral estoppel in criminal context would promote policies integral to criminal jurisprudence). Federal legislation recognizes the preeminence of judicial economy in criminal cases. See 18 U.S.C. §§ 3161-3174 (1994) ("Speedy Trial Act") (granting priority to federal criminal cases).
\item\textsuperscript{117} See Ashe v. Swenson, 397 U.S. 346, 464 (1970) (Burger, C.J., dissenting) ("[I]n criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation."); In re Winship, 397 U.S. 358, 363-64 (1970) (stating that criminal cases, unlike civil cases, imperil interests of "transcending value" including loss of liberty and social stigmatization caused by conviction); Gallardo-Mendez, 150 F.3d at 1244 (stating that, in context of collateral estoppel, judicial efficiency in criminal cases does not have same weight and value as in civil cases); Pelullo v. United States, 14 F.3d 881, 893 (3d Cir. 1994) (declaring that criminal defendants' liberty interests take priority over usual concerns for efficient judicial administration so often found in civil proceedings); People v. Berkowitz, 406 N.E.2d 783, 789-90 (N.Y. 1980) (noting that preeminent need to ensure correctness of results in criminal cases makes collateral estoppel less relevant in criminal cases): see also Daniel K. Mayers & Fletcher L. Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 32 (1960) (stating that conservation of judicial resources is less important to criminal law); Austin W. Scott, Introduction, 39 Iowa L. Rev. 214, 216 (1954) (stating that criminal cases involve questions of policy quite different than civil cases).
\item\textsuperscript{118} Cf. Harnage, 976 F.2d at 636 n.2 (choosing not to address constitutional implications of issue because collateral estoppel of accused fails on judicial economy grounds).
\end{itemize}
2. Mutuality of Estoppel in Criminal Cases Conflicts with the Nature of Criminal Jurisprudence

The mutuality of estoppel theory, as applied to the estoppel of criminal defendants, seeks an appealing symmetry between civil and criminal cases. This symmetry, however, contradicts the constitutional foundation of our criminal jurisprudence. Mutuality of collateral estoppel in criminal cases ignores the inherent differences between civil and criminal procedures. For example, criminal prosecutors must satisfy a heightened burden of proof, receive no benefit of evidentiary presumptions and must prove every element of their case. Moreover, criminal cases do

119. See Pena-Cabanillas v. United States, 394 F.2d 785, 787 (9th Cir. 1968) (stating that collateral estoppel of criminal defendant is closely related to whether mutuality of estoppel applies equally in civil and criminal cases); United States v. Rangel-Perez, 179 F. Supp. 619, 625 (S.D. Cal. 1959) (stating that "wise public policy" and "common sense judicial administration" advocate same application of collateral estoppel in criminal as in civil cases); see also Kennelly, supra note 28, at 1399 (stating that Court holdings present "no serious obstacle" to allowing offensive use of collateral estoppel by prosecution in criminal cases). But see Brainerd Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281, 289 (1957) (warning that experience has demonstrated that extending "dangerous instrument" of collateral estoppel by "merely logical processes of manipulation may produce" results abhorrent to justice and order).

120. See, e.g., Ashe, 397 U.S. at 464-65 (Burger, C.J., dissenting) ("[C]ourts . . . would certainly not apply [collateral estoppel] to both parties, as is true in civil cases, i.e., here, if [the defendant] had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial"); Knapp v. Cardwell, 667 F.2d 1253, 1268 n.5 (9th Cir. 1982) (Adams, J., dissenting) (stating that mutuality doctrine should not apply to collateral estoppel in criminal proceedings because defendants, not prosecutors, enjoy protections of Double Jeopardy Clause); United States v. Bruno, 333 F. Supp. 570, 576 (E.D. Pa. 1971) ("Collateral estoppel is available as a defense even though it can never be raised offensively by the prosecution."); Collateral Estoppel in Criminal Cases, supra note 12, at 275-77, 282 (noting that defendant’s right to confront adverse witnesses, guaranteed by the Sixth Amendment, might be violated by retroapplication of collateral estoppel in criminal cases and concluding that different policy considerations in civil and criminal cases require abandonment of mutuality rule in criminal cases).

121. See, e.g., Mayers & Yarbrough, supra note 117, at 32-33 (suggesting that risk of harassment and erroneous resolution is increased in criminal cases because state has more urgent interest in securing punishment of criminal than in compensation of pecuniary loss); Collateral Estoppel in Criminal Cases, supra note 12, at 282 (noting that different policy considerations in criminal jurisprudence make certain characteristics of collateral estoppel inapplicable). But see Thau, supra note 112, at 1088 n.39 (stating that "[i]t is palpably unrealistic to view civil actions as fundamentally less important than all criminal actions" because some criminal acts affect few people, while some civil suits, such as antitrust or securities class actions, involve thousands of individuals).

122. See, e.g., Kennelly, supra note 28, at 1399 (noting elevated standard of proof, right to effective counsel, right to confront witnesses and favorable rules of evidence in criminal cases). It has also been suggested that, where the propriety of collateral estoppel is in doubt, the court should err in favor of the defendant. See Collateral Estoppel in Criminal Cases, supra note 12, at 295 (suggesting that doubt concerning application of collateral estoppel should operate to advantage of criminal defendant); see also 18 Moore et al., supra note 10, § 192.01[4][d] (describing...
not allow procedural mechanisms comparable to making a motion for directed verdict or summary judgment in civil cases. Finally, supporting mutuality of estoppel in criminal cases ignores the fact that the Constitution, not judicial economy, requires that courts allow criminal defendants to use the doctrine.

3. Alienage Is Not A "Status" That Should Be Estopped

Alienage proceedings implicate different rights than typical criminal proceedings. Most importantly, they involve only a risk of deportation, not incarceration. Thus, the idiosyncrasies of alienage proceedings arguably make them a more viable forum for collateral estoppel than common criminal proceedings. Alienage proceedings also involve the collateral estoppel, unlike res judicata, as "an equitable doctrine" that courts should apply only when issue and alignment of parties warrant its application.

125. See, e.g., United States v. Pelullo, 14 F.3d 881, 895 (3d Cir. 1994) (noting absence of mechanism available to government similar to civil procedures for making motion for directed verdict or summary judgment).

126. See Ashe, 397 U.S. at 445-46 (holding that Fifth Amendment requires availability of collateral estoppel to criminal defendant); see also Pelullo, 14 F.3d at 896 ("The value of efficiency that motivates the application of collateral against the defendant in civil cases, which existed in 1791, receives the constitutional sanction of the Seventh Amendment. Such sanction is absent in the Sixth Amendment.").


Aliens do, however, enjoy protection under the Due Process Clause. See 1 GORDON ET AL., supra, § 6.02 (stating that Fifth and Fourteenth Amendments shelter citizens, legal aliens and illegal aliens against arbitrary government action and assure procedural safeguards in criminal proceedings). For example, federal law also requires aliens be given a "reasonable opportunity to be present" at their deportation hearings. See INA, U.S.C. § 242(b); 6 GORDON ET AL., supra, § 72.04(12)[e] (summarizing federal alien notice requirement). Aliens also have a reasonable opportunity to present evidence on their behalf. See 6 GORDON ET AL., supra, § 72.04(12)[f] (noting that aliens may present evidence at deportation hearings). Finally, the Confrontation Clause permits aliens to confront adverse witnesses at deportation hearings under the Confrontation Clause. See 6 GORDON ET AL., supra, § 72.04(12)[g] (stating that right of person at deportation hearing to confront adverse witnesses is unquestioned).

128. See Kennelly, supra note 28, at 1383-84 (considering risk of deportation less substantial than risk of incarceration). But see Sung v. McGrath, 339 U.S. 33, 50 (1950) ("A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.").

129. See United States v. Rangel-Perez, 179 F. Supp. 619, 626-29 (S.D. Cal. 1959) (supporting propriety of collateral estoppel of alienage); Vestal, supra note 2, at 315 (stating that status of alienage should form basis of collateral estoppel of
determination of status issues that, because they do not directly indicate guilt, seemingly provide a better basis for collateral estoppel of the accused.128 Moreover, collateral estoppel of mere status issues may not improperly bias juries; using the doctrine would not inform jurors of criminal acts so similar to the instant charge that they would presume guilt.129

Creating an exception solely for alienage, however, might not survive scrutiny under the Equal Protection Clause.130 Moreover, creating an ex-

128. See Rangel-Perez, 179 F. Supp. at 626-29 (emphasizing propriety of applying collateral estoppel to status issues because conditions of status, once proved, should be presumed in absence of contrary evidence); Vestal, supra note 2, at 315 (stating that alienage is classic example of status being element of criminal conduct that can act as estoppel). But see Collateral Estoppel Against the Accused, supra note 20, at 518-19 (stating that Rangel-Perez court, despite limiting its holding to questions of status, broadened scope of earlier estoppel cases). That most of the collateral estoppel cases involve the status of alienage demonstrates that some courts consider it an appropriate status for estoppel purposes. Compare United States v. Gallardo-Mendez, 150 F.3d 1240, 1241 (10th Cir. 1998) (invoking reentry of illegal alien defendant), Hernandez-Uribe v. United States, 515 F.2d 20, 21 (8th Cir. 1975) (same), and Pena-Cabanillas v. United States, 394 F.2d 785, 786 (9th Cir. 1968) (same), with Petullo, 14 F.3d at 888 (involving wire fraud and other federal offenses) and United States v. Harnage, 976 F.2d 633, 633 (11th Cir. 1992) (involving prosecution of drug offenses).

129. See Collateral and Equitable Estoppel, supra note 10, at 1237-38, 1244-45 (accepting cautious collateral estoppel of status issues because doing so neither inappropriately informs jury of crimes similar to instant charge nor allows presumption that defendant committed crime). That one can distinguish the status of alienage from the act of illegal entry supports the conclusion that collateral estoppel of the former is appropriate but of the latter is not. See id. at 1244 (noting that status issues are not indicative of per se criminal activity, although actions are elements of crimes that often dispose jurors to finding of guilt). But see Plyer v. Doe, 457 U.S. 202, 219 n.19 (1982) (discussing claim that illegal aliens are "suspect class" and suggesting that entry into class of illegal aliens "is itself a crime").

130. See Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) (considering significant that statute "is directed at aliens and that only aliens are harmed by it"); Sugarman v. Dougall, 413 U.S. 634, 642-43, 656 (1973) (Rehnquist, J., dissenting) (requiring strict scrutiny of statutes effecting rights of aliens). It does not appear significant that aliens may remove themselves voluntarily from the protected class by naturalizing. See Nyquist, 432 U.S. at 18 (stating that Supreme Court has never construed protected class of aliens so narrowly as to include only aliens in country for less than five years). But see Sugarman, 413 U.S. at 638 (Rehnquist, J., dissenting) (stating that status of aliens is not immutable because aliens may take steps to alter this status). Illegal aliens, however, do not enjoy membership in a class protected by the "fetal in fact" strict scrutiny test. See Plyer, 457 U.S. at 219 n.19 (noting that membership in class of illegal aliens, unlike other classes, "is the product of voluntary action" and "[i]ndeed, entry into the class is itself a crime"). For a further discussion of aliens and the Equal Protection Clause, see 6 GORDON ET AL., supra note 125, § 71.02[3][c] (discussing equal protection challenges to federal immigration policies) and GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 748-55 (3d ed. 1996) (discussing implications of alienage on Equal Protection Clause analysis).
ception solely for alienage smacks of xenophobia. Finally, creating a broad exception for all status issues would necessitate much litigation directed at determining exactly which statuses fall within the exception. Therefore, the Tenth Circuit properly refused to carve out exceptions to the Sixth Amendment's protections for alienage adjudications or similar status determinations.

4. Guilty Pleas Do Not Justify Collateral Estoppel of the Accused

The Tenth Circuit in Gallardo-Mendez properly distinguished between guilty pleas and guilty verdicts. The position that voluntary guilty pleas should bind the defendant in future proceedings has an enticing simplic-

131. See, e.g., Arthur C. Baer, Latino Human Rights and the Global Economic Order, 18 CHICANO-LATINO L. REV. 80, 80-81 (1996) (stating that discriminatory policies communicate to alien groups that "you are subordinate, not a full partner in our society—you are outsiders whom we will control."); Tanya Kateri Hernandez, The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws, 76 OR. L. REV. 731, 731-32 (1997) (noting current anti-immigrant sentiment, and "national preoccupation with the maintenance of a 'White country'"); A.M. Rosenthal, Editorial, Dred Scott in San Diego, N.Y. TIMES, Aug. 9, 1996, at A27 ("[T]he stinkweed of anti-immigrant prejudice [has spread] across the country."); see also THOMAS BAILEY ALDRICH, THE POEMS OF THOMAS BAILEY ALDRICH 71-72 (1907) ("Wide open and unguarded stand our gates,/And through them presses a wild motley throng—/.../O liberty, white Goddess! is it well/To leave the gates unguarded?"); EXCEPTED IN IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 50-51 (Juan F. Perea ed., 1997). Antiquity provides the best examples of idealism in alienage policy. See EMMA LAZARUS, THE NEW COLOSSUS (1883) ("Give me your tired, your poor,/Your huddled masses yearning to breathe free,/The wretched of your teeming shore./Send these, the homeless, tempest-tost to me,/I lift my lamp beside the golden door."); REPRINTED IN EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 48 (Morris U. Schappes ed., 3d ed. 1967); DEUTERONOMY 10:19 ("Love ye therefore the stranger.").

132. See Rangel-Perez, 179 F. Supp. at 625-26 (approving of state court decisions allowing collateral estoppel of paternity status); 40 WORDS AND PHRASES, STATUS 128-32 (1964) (listing possible status issues, including alienage, citizenship, habitual criminal status, marriage, parenthood, infancy, legitimacy, master/servant relationship, ownership, seniority in employment and enlistment in armed services); VESTAL, supra note 2, at 315-17 (suggesting that alienage, paternity, method of operation and competency are prime examples of constant statuses that prosecution should not have to continually relitigate); COLLATERAL AND EQUITABLE ESTOPPEL, supra note 10, at 1222 n.12, 1244 (citing cases involving possible collateral estoppel of status issues such as paternity, self-defense and insanity, and suggesting propriety of estoppel of other status issues such as non-ownership of stolen goods).

133. Compare, e.g., Gallardo-Mendez, 150 F.3d at 1246 (refusing to use plea of guilty to illegal entry as collateral estoppel in subsequent criminal proceeding), with Rangel-Perez, 179 F. Supp. at 626-29 (supporting propriety of collateral estoppel of alienage). COLLATERAL AND EQUITABLE ESTOPPEL, supra note 10, at 1237-38, 1244 (suggesting propriety of collateral estoppel of status of alienage), and Kennelly, supra note 28, at 1383-84 (suggesting that collateral estoppel of alienage does not substantially conflict with constitutional protections).

134. See Gallardo-Mendez, 150 F.3d at 1244-46 (distinguishing between guilty pleas and verdicts for criminal collateral estoppel purposes).
Several factors nonetheless demonstrate that this simplicity robs criminal defendants of necessary procedural protections.\textsuperscript{136} First, “realism and rationality” do not advocate according guilty pleas preclusive effect.\textsuperscript{137} The \textit{Ashe} decision does not support estoppel of the accused, because, as then-Chief Justice Burger’s dissent makes clear, it anticipated only the defensive application of collateral estoppel against the state.\textsuperscript{138} Moreover, “realism and rationality” demonstrate that many criminal defendants enter guilty pleas for reasons unrelated to their guilt, making collateral estoppel of their pleas patently unfair.\textsuperscript{139} 

\textsuperscript{135} See United States v. Bejar-Matrecios, 618 F.2d 81, 84 (9th Cir. 1980) (“Because 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.”); Hernandez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (claiming that defendant, by voluntary plea, waived constitutional rights in subsequent criminal proceeding); Vestal, supra note 2, at 295 (“If the defendant in entering a plea of guilty really admits the truthfulness of the charge, then should not the admission be binding when it becomes a judgment?”); \textit{Collateral and Equitable Estoppel}, supra note 10, at 1236 (suggesting that knowing and voluntary plea constitutes admission of material facts in indictment and “operates as a waiver of the . . . fundamental rights of the accused”). 

\textsuperscript{136} For a discussion of the factors that combine to advocate not according preclusive effect to guilty pleas, see infra notes 137-55 and accompanying text. 

\textsuperscript{137} See Hernandez-Uribe, 515 F.2d at 22 (relying on notion that federal cases require application of collateral estoppel in criminal cases “with realism and rationality” (quoting \textit{Ashe} v. Swenson, 397 U.S. 436, 444 (1970))). 

\textsuperscript{138} See Ashe, 397 U.S. at 444 (stating that federal courts should use collateral estoppel “with realism and rationality”). The \textit{Ashe} decision defined “realism and rationality” in terms of defensive collateral estoppel only. See \textit{id.} (stating that court must inquire “whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration”) (emphasis added). Moreover, Chief Justice Burger’s dissent demonstrates that the Supreme Court did not intend for the decision to apply to offensive collateral estoppel of the accused. See \textit{id.} at 464-65 (Burger, C.J., dissenting) (“[C]ourts that have applied the collateral-estoppel concept to criminal actions would certainly not apply it to \textit{both} parties, as is true in civil cases . . . .”). 

\textsuperscript{139} See Plunkett v. Commissioner, 465 F.2d 299, 302 (7th Cir. 1972) (demonstrating that prosecutions threaten charges against family members to induce guilty plea); Michael O. Finkelstein, \textit{A Statistical Analysis of Guilty Plea Practices in the Federal Courts, 89 Harv. L. Rev.} 293, 309-11 (1975) (theorizing that one-third of defendants who plea bargain would have been acquitted or had cases dismissed had case gone to trial); Thau, supra note 112, at 1104-06 (stating that possibility of innocent defendants’ pleading guilty takes collateral estoppel based on guilty pleas to “the intellectual breaking point”); Vestal, supra note 2, at 341 (noting that “determinative factors” other than guilt may motivate plea bargaining); Arnold S. Jacobs, Note, \textit{Collateral Estoppel: Criminal Conviction Based on a Plea of Guilty Declared Conclusive of Issues in a Subsequent Civil Suit Between the Same Parties; O’Neill v. United States, 198 F. Supp. 367 (E.D.N.Y. 1961), 48 Cornell L.Q. 340, 344 (1963) (stating that innocent defendants may plead guilty because minor crimes are not worth defending); Kathleen H. Musslewhite, Comment, \textit{The Application of Collateral Estoppel in the Tax Fraud Context: Does It Meet the Requirement of Fairness and Equity?}, 33 Am. U. L. Rev. 643, 653, 662 nn.126-31 (1984) (suggesting that pressure on defendant to plea bargain makes negotiated pleas so unreliable that collateral estoppel of pleas becomes inappropriate). Judges also encourage guilty pleas by offering leni-
Second, guilty pleas do not waive defendants’ constitutional rights in subsequent unrelated criminal proceedings. Although a plea may effectively waive the defendant’s constitutional rights in the immediate proceeding, the plea for which the defendant “bargains” does not include subsequent proceedings. Thus, affording collateral effect to guilty pleas would undermine the very nature of the plea bargain process, because it is “contrary to the nature of a [plea] bargain to accord it preclusive effect beyond that specifically contained in the agreement.”

Third, to grant pleas such an unanticipated and far-reaching preclusive effect would hinder judicial economy by deterring guilty pleas.

ency to defendants. See Thau, supra note 112, at 1104-05 n.147 (citing United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960) (defending judges’ grants of leniency to defendants that plead guilty)). Many psychological factors also encourage guilty pleas. See id. at 1105-06 (suggesting that fears of reliving alleged crime, government’s coercive power, embarrassing cross-examination or involvement of family members can influence innocent defendants to plead guilty). In addition, defendants’ own counsel may sometimes prod them towards guilty pleas. See id. at 1107 (stating that underpaid defense attorneys may suggest plea as means of avoiding lengthy trials that “can monopolize a defense attorney’s time and foreclose other lucrative opportunities”).

140. Cf. Hernandez-Uribe, 515 F.2d at 22 (stating that defendant, in earlier proceeding, had right to trial by jury and opportunity to contest government’s determination of alienage, but that defendant’s guilty plea waived such constitutional right).

141. See McCarthy v. United States, 394 U.S. 459, 466 (1969) (stating that guilty plea waives rights to self-incrimination, confrontation of witnesses and right to jury trial); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (same). These cases, however, do not mention the waiver of constitutional rights in criminal proceedings after the guilty plea. See, e.g., Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) (failing to address collateral estoppel of accused and merely stating that court must examine with “utmost solicitude” knowledge of defendant entering plea); see also 24 MOORE ET AL., supra note 15, § 611.08[4][a] (stating that guilty plea waives all constitutional objections to [the instant] conviction); Musslewhite, supra note 139, at 645-46 (stating that guilty plea waivers in current proceeding but is not intended to forfeit rights in subsequent proceedings).

142. Kennelly, supra note 28, at 1421 (citing GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7.20, at 280 (2d ed. 1987) (noting significance of plea bargains’ consensual nature)). Kennelly noted that, because pleas constitute bargains, “if the defendant forgoes her right to a trial in exchange for a specific charge, it is unfair for the government unilaterally to exact a greater price from her at a later time.” Id. at 1421-22; see LILLY, supra, § 7.20, at 280 (suggesting that guilty pleas “represent negotiations, concessions, or admissions not intended to have a conclusive effect beyond the first trial”); 18 WRIGHT ET AL., supra note 12, § 4443, at 384 (noting that contractual nature of consent judgments mandates that preclusive effects should be measured by intent of parties) (emphasis added); Collateral and Equitable Estoppel, supra note 10, at 1236 n.101 (conceding that guilty plea made without knowledge of effects of application of collateral estoppel is not entered into knowingly).

143. See United States v. Gallardo-Mendez, 150 F.3d 1240, 1243 (10th Cir. 1998) (“The prospect of being collaterally estopped at some future date may discourage criminal defendants from settling criminal charges by pleading guilty.”); see also Jacobs, supra note 139, at 344-45 (stating that disincentive to enter into pleas resulting from application of collateral estoppel would hinder judicial economy); Kennelly, supra note 28, at 1421-22 (suggesting that affording guilty pleas
Collateral estoppel of criminal defendants would also require courts to satisfy complicated tests before applying the doctrine, thus undermining any beneficial effects accompanying its use.\(^{144}\) Additionally, federal rules of evidence that allow evidence of former pleas into evidence further mitigate the putative benefits that collateral estoppel would create.\(^{145}\)

Finally, the suggestion that a "general rule" affords guilty pleas the same preclusive effect as guilty verdicts in subsequent criminal proceedings has no foundation.\(^{146}\) No such general rule exists.\(^{147}\) Precedent does support a rule that guilty pleas and guilty verdicts have the same preclusive

preclusive effect will deter defendants from entering into them). Any action that would deter guilty pleas would deter judicial economy due to the resulting increased litigation. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, at 476 tbl. 5.27 (Kathleen Maguire & Anne L. Pastore eds., 1995) (showing that 92% of 46,773 federal criminal convictions came from pleas of guilty or nolo contendere).

144. See, e.g., Gallardo-Mendez, 150 F.3d at 1243-44 (stating that collateral estoppel of accused, compounded with Rule 11's requirement that guilty pleas be "knowing," would hinder judicial economy by complicating judicial inquiry into pleas); United States v. Harnage, 976 F.2d 633, 635 (11th Cir. 1992) (choosing not to adopt collateral estoppel test because it "would create more problems than it was designed to solve" and because "allowing the government to bar a defendant from relitigating an unfavorable determination of facts in a prior proceeding would [not] serve the original goal of collateral estoppel—judicial economy").

Allowing collateral estoppel of criminal defendants would also require a determination of whether the defendant's prior counsel had performed effectively. See Harnage, 976 F.2d at 636 (stating that evaluation of defendant's prior counsel would require costly evidentiary hearings as well as review of records from prior proceedings). But see Kennelly, supra note 28, at 1420 (suggesting that defendant would raise effectiveness of previous counsel had there "been a colorable claim of ineffective assistance" and that district court would not have to decide issue again at all).

145. See FED. R. EVID. 401 (1999) (considering only withdrawn pleas inadmissible into evidence in subsequent proceeding); FED. R. CRIM. P. 11(e)(6) (discussing inadmissibility of withdrawn pleas); see also LILLY, supra note 142, § 7.20, at 278-80 (explaining that federal courts admit into evidence transcript of prior proceedings containing guilty pleas); 24 MOORE ET AL., supra note 15, § 611.20[1] (stating that plea of guilty constitutes admission that may be used in evidence against defendant notwithstanding federal hearsay rules); Kennelly, supra note 28, at 1422 (arguing that federal hearsay rules undermine any benefits collateral estoppel of accused might create); Collateral and Equitable Estoppel, supra note 10, at 1234-35 (noting that because federal hearsay rules already accomplish similar result as collateral estoppel of guilty plea, doctrine's application would be redundant).

146. Cf. United States v. Bejar-Matrecios, 618 F.2d 81, 83-84 (9th Cir. 1980) (dictum) (noting general rule that pleas have same preclusive effect as verdicts); Hernandez-UrIBE v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (stating that general rule demonstrates that "collateral estoppel, where applicable, applies equally whether the previous criminal conviction was based on a jury verdict or a plea of guilty").

147. See, e.g., Gallardo-Mendez, 150 F.3d at 1245 (criticizing Hernandez-UrIBE court for relying on unpersuasive and irrelevant cases that neither support nor explain court's reasoning).
effect in subsequent civil proceedings. But, as the Gallardo-Mendez court properly noted, precedent does not “support application of the collateral estoppel doctrine based on a plea of guilty against the defendant in a subsequent, unrelated criminal proceeding.” Rather, the long recognized general rule in civil cases demonstrates that heightened burdens of proof in subsequent proceedings may preclude the application of the doctrine.

In criminal cases, the standards of proof required for guilty verdicts and guilty pleas markedly differ. Rule 11’s “factual basis” requirement does not adequately protect defendants from the far-reaching collateral effects of guilty pleas, in part because it does not require the judge to inform the defendant of these possible collateral effects. Although

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148. See Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978) (applying collateral estoppel in subsequent civil case based on guilty plea in criminal trial); Brazzel v. Adams, 493 F.2d 489, 490 (5th Cir. 1974) (applying collateral estoppel where appellant previously admitted selling heroin); Hyslop v. United States, 261 F.2d 786, 791 (8th Cir. 1959) (using guilty plea to charge of defrauding United States as proof of transactions in later trial).

149. Gallardo-Mendez, 150 F.3d at 1245 (emphasis added).

150. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (“[I]t is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.”); Helvering v. Mitchell, 303 U.S. 391, 397 (1938) (stating that differences in burden of proof may preclude application of doctrine of res judicata in civil cases); Gallardo-Mendez, 150 F.3d at 1245-46 (discussing courts’ refusal to use collateral estoppel in civil cases due to different burdens of proof); see also 18 Moore et al., supra note 10, §§ 132.04[4][a], 132.04[4][e] (stating that shifts in burden of persuasion, even between same parties, can render doctrine inapplicable and stating that collateral estoppel does not apply when party seeking to benefit from collateral estoppel has significantly heavier burden in subsequent action than in prior action).

151. Compare In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”), with Fed. R. Crim. P. 11(f) (requiring court to determine that defendant enters knowing plea), and Hernandez-Uribe, 515 F.2d at 22 (stating that court must satisfy itself that “factual basis” exists for guilty plea); see also United States v. Alber, 56 F.3d 1106, 1110 (9th Cir. 1995) (stating that courts accepting guilty pleas need not be convinced beyond reasonable doubt of defendant’s guilt); United States v. Tunning, 69 F.3d 107, 111-12 (6th Cir. 1995) (stating that strong evidence of guilt is not requisite for entering guilty plea); United States v. Marks, 38 F.3d 1009, 1012 (8th Cir. 1994) (stating that court need only be reasonably convinced defendant committed crime in order to enter guilty plea); United States v. Fountain, 777 F.2d 351, 357 (7th Cir. 1985) (stating that only some factual basis is required for entering guilty plea).

152. See 24 Moore et al., supra note 15, § 611.06[4][d] n.34 (noting that Rule 11 does not require judge to inform defendant of all collateral consequences of plea); Thau, supra note 112, at 1116 (stating that competent attorneys should “[a]t a minimum” warn clients of possible application of collateral estoppel because judges have no such obligation) (citing Gray v. United States, 663 F.2d 1071 (6th Cir. 1981) (holding that federal judge need not inform defendant proffering guilty plea of possible application of collateral estoppel in subsequent civil proceeding for fraud, because collateral estoppel is collateral rather than direct conse-
Rule 11 may protect the accused in the immediate proceeding, it does not justify according preclusive effect of that plea in an infinite number of subsequent proceedings.\(^\text{153}\) Moreover, a fact determined by a plea may not have been sufficiently “adjudicated” to support the application of collateral estoppel.\(^\text{154}\) The next logical step for the collateral estoppel doctrine, therefore, would preclude collateral estoppel of criminal defendants based on previous guilty pleas.\(^\text{155}\)

5. The Sixth Amendment Precludes Collateral Estoppel of the Accused

Perhaps recognizing the vulnerability of their rationale, those circuits that allow collateral estoppel of the accused ignore the constitutional implications of their holdings.\(^\text{156}\) Several arguments, however, demonstrate when the consequences of plea); Musslewhite, supra note 139, at 656 (“Neither the judge nor the prosecutor, however, is required to inform the defendant of possible collateral consequences of his plea.”); see also Gray v. Commissioner, 708 F.2d 243, 245 n.4 (6th Cir. 1983) (stating that “courts have held that the defendant need not be advised of collateral consequences of his plea”); United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972) (stating that court need not inform defendant of every consequence of entering plea); cf. Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964) (requiring defendant’s attorney to inform defendant of collateral consequences of guilty plea). See generally Musslewhite, supra note 139, at 655-58 (criticizing protections of Rule 11 that are intended to prevent prosecutorial abuse). In addition, some judges fail to satisfy the spirit of Rule 11. See Thau, supra note 112, at 1108 (noting that, due to federal docket congestion and valuation of judges based on turnover, few judges will probe merits of guilty pleas if neither prosecution nor defense does so).

153. See Gallardo-Mendez, 150 F.3d at 1245-46 (concluding that Rule 11’s “factual basis” requirement cannot satisfy due process requirement that government prove essential elements of charge “beyond a reasonable doubt” in successive, unrelated criminal proceeding); see also Murray, supra note 12, at 935 (stating that different burdens of proof make transportation of collateral estoppel from civil to criminal cases problematic).

154. See Gallardo-Mendez, 150 F.3d at 1246 (“We conclude [that Rule 11’s] ‘factual basis’ requirement cannot satisfy the due process requirement that the government prove the essential elements of the charge ‘beyond a reasonable doubt’ in a successive, unrelated criminal proceeding.”); see also RESTATEMENT, supra note 10, § 85 cmt. b (advocating precluding use of collateral estoppel when conviction is derived from guilty plea because issue has not been adjudicated); 18 MOORE ET AL., supra note 10, § 132.02[2][i][ii] (stating that facts determined by admission or stipulation in civil case are not entitled to preclusive effect because such facts have not been litigated); 1B JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 0.418[1] (2d ed. 1983) (analogizing to impropriety of giving preclusive effect to civil admissions and concluding that collateral estoppel is inapplicable to guilty pleas because issue has been neither litigated nor adjudicated).

155. Cf. Currie, supra note 119, at 289 (warning that extending “dangerous instrument” of collateral estoppel by “merely logical processes of manipulation” may produce results abhorrent to justice and order).

156. See generally Hernandez-Uribe, 515 F.2d at 22 (failing to address constitutional issues); Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968) (addressing whether judgment in criminal case may collaterally estop criminal defendant, but failing to consider constitutional issue). This failure has not gone unnoticed. See, e.g., United States v. Pelullo, 14 F.3d 881, 894 (3d Cir. 1994) (criticizing earlier courts’ failures to “conduct a constitutional analysis” by instead rely-
that their holdings conflict with basic due process guarantees. For example, collateral estoppel of the accused interferes with the defendant’s presumption of innocence and right to confront adverse witnesses.\footnote{See Pelullo, 14 F.3d at 892 (citing favorably line of cases holding that government’s use of offensive collateral estoppel against criminal defendants conflicts with presumption of innocence); Collateral Estoppel Against the Accused, supra note 20, at 521 n.50 (suggesting that collateral estoppel of accused may violate defendant’s right to presumption of innocence); Murray, supra note 12, at 936 (stating that estoppel of accused may “violate the presumption of his innocence and right to jury trial”). Collateral estoppel of criminal defendants also infringes on the right to confront adverse witnesses. See Collateral Estoppel Against the Accused, supra note 20, at 521-22 (noting that right to confront and cross-examine adverse witnesses casts doubt on constitutionality of collateral estoppel of accused).} Furthermore, the Framers would not approve of collateral estoppel of the accused because they guaranteed criminal defendants the right to a trial by jury, but merely “preserved” that right for civil litigants as it existed at the Bill of Rights’ ratification.\footnote{Compare U.S. Const. amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved . . . .”), with U.S. Const. art. III, § 2, cl. 3 (“The trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”), and 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 . . . .”). The differences in language between the two contemporaneous Amendments indicate that the Framers intended that they have different effects. See Pelullo, 14 F.3d at 894-95 (noting that Sixth Amendment’s guarantee of rights is stronger than Seventh Amendment’s mere preservation of rights as they existed at time of ratification of Bill of Rights). For example, the use of obligatory language in the Sixth Amendment and Article III demonstrates that the Framers intended to create an absolute right to a trial by jury in all criminal proceedings. See id. (stating that language of Sixth Amendment makes clear that right to jury trial is absolute in every criminal proceeding). Furthermore, although no case has yet to consider it, the different scopes of the Fifth and Sixth Amendments also indicate that the Constitution anticipates collateral estoppel of the prosecution but not of the accused. Compare U.S. Const. amend. V (extending right to trial by jury to “accused” only), with U.S. Const. amend. VI (guaranteeing right to trial by jury to both parties to “civil trials”).} Construing the Constitution as precluding collateral estoppel of the ac-

\footnote{157. See Pelullo, 14 F.3d at 892 (citing favorably line of cases holding that government’s use of offensive collateral estoppel against criminal defendants conflicts with presumption of innocence); Collateral Estoppel Against the Accused, supra note 20, at 521 n.50 (suggesting that collateral estoppel of accused may violate defendant’s right to presumption of innocence); Murray, supra note 12, at 936 (stating that estoppel of accused may “violate the presumption of his innocence and right to jury trial”). Collateral estoppel of criminal defendants also infringes on the right to confront adverse witnesses. See Collateral Estoppel Against the Accused, supra note 20, at 521-22 (noting that right to confront and cross-examine adverse witnesses casts doubt on constitutionality of collateral estoppel of accused).}

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\footnote{159. See Pelullo, 14 F.3d at 895 (noting that Seventh Amendment merely “preserved” right to jury trial as it existed at common law at Amendment’s ratification, but Sixth Amendment guaranteed “right” to trial by impartial jury); see also Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that fundamentality of Sixth Amendment requires its incorporation into Due Process Clause of Fourteenth Amendment); Singer v. United States, 380 U.S. 24, 34 (1965) (stating that defendant cannot waive jury trial without government’s consent); Pelullo, 14 F.3d at 895 (noting absence in criminal cases of mechanism similar to motion for directed verdict or summary judgment in civil cases).}
cused accords with the dicta of many federal courts. In addition, the chronology of the circuit court decisions demonstrates a trend to so hold. The Tenth Circuit, therefore, wisely rejected collateral estoppel of the accused in favor of an approach that does not offend fundamental policies of criminal jurisprudence.

6. Conclusion

The decision in Gallardo-Mendez achieves the necessary balance between policy concerns and constitutional requirements. The limited and dubious benefits of allowing collateral estoppel of the accused do not outweigh the certain constitutional conflicts that its use creates. Ultimately, the accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury’s independent finding with respect thereto.

160. See, e.g., United States v. DeAngelo, 138 F.2d 466, 468 (3d Cir. 1943) ("An accused is constitutionally entitled to a trial de novo of the facts alleged against and offered in support of each offense charged against him and to a jury’s independent finding with respect thereto."); United States v. Panetta, 436 F. Supp. 114, 122-23 (E.D. Pa. 1977) (dictum) (noting that collateral estoppel of accused resembles partially directed verdict of guilty), aff’d without op., 568 F.2d 771 (3d Cir. 1978); United States v. Bruno, 333 F. Supp. 570, 576 (E.D. Pa. 1971) (An accused is always constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him, and collateral estoppel is available as a defense even though it can never be raised offensively by the prosecution."); Gutierrez v. Superior Court, 29 Cal. Rptr. 2d 376, 386-87 (Cal. Ct. App. 1994) (holding that attempted murder conviction did not estop issues of intent and identity in subsequent trial for murder of same victim); State v. Stiefel, 256 So. 2d 581, 585 (Fla. Dist. Ct. App. 1972) (dictum) (suggesting that criminal defendants may have juries to try all elements of each charge); Rouse v. State, 97 A.2d 285, 289 (Md. 1953) (suggesting that collateral estoppel of accused interferes with states burden of proving elements beyond reasonable doubt); State v. Thomas, 276 A.2d 391, 597 (N.J. Super. Ct. Law Div. 1971) (dictum) (suggesting that government’s collateral estoppel of accused makes its burden to prove each element of offense nugatory).

161. Compare United States v. Gallardo-Mendez, 150 F.3d 1240, 1246 (10th Cir. 1998) (precluding collateral estoppel of accused), Peltulo, 14 F.3d at 896 ("[A] right to a jury trial necessitates that every jury empanelled for a prosecution considers evidence of guilt afresh . . .."); and United States v. Harnage, 976 F.2d 633, 636 (11th Cir. 1992) (refusing to use doctrine on grounds of judicial economy), with Hernandez-Urbe, 515 F.2d at 22 (allowing collateral estoppel of accused), and Penacabanillas, 394 F.2d at 787-88 (allowing collateral estoppel of accused).

162. See Mayers & Yarbrough, supra note 117, at 31 n.158 (suggesting that collateral estoppel of accused conflicts with jury-trial and confrontation clauses of Sixth Amendment); Collateral Estoppel Against the Accused, supra note 20, at 521-24 (stating that constitutional protections preclude governments collateral estoppel of accused); Collateral and Equitable Estoppel, supra note 10, at 1237-42 (same); Collateral Estoppel in Criminal Cases, supra note 12, at 276-77 ("[D]ue process requires that the defendant be guaranteed a trial as to each issue of fact in every prosecution."); Murray, supra note 12, at 935-36 (stating that transplanting collateral estoppel from civil to criminal arena would be impossible because of different burdens of proof and lack of mutuality in criminal cases).

163. For a discussion of the effects of collateral estoppel of the accused on judicial economy, see supra notes 106-18, 143-45 and accompanying text.

164. For a discussion of the constitutional argument in favor of collateral estoppel of the accused, as well as the judicial administration arguments in favor of it, see supra notes 106-118, 156-62 and accompanying text.
mately, wise public policy and common sense judicial administration do not combine to advocate a policy of ignoring the intemporal constitutional guarantees of the Sixth Amendment.\textsuperscript{165}

V. IMPACT: BEYOND \textit{United States v. Gallardo-Mendez}

The Gallardo-Mendez decision, although properly decided, does not resolve the split among the circuit courts.\textsuperscript{166} That the holdings of the Eighth and Ninth Circuits remain extant seriously threatens the constitutional rights of all criminal defendants within those circuits.\textsuperscript{167} Additionally, the growing need to reduce the federal docket backlog and expedite illegal immigrant proceedings will tempt other circuits to follow suit.\textsuperscript{168} This temptation will weigh heavily on courts that have traditionally considered collateral estoppel an acceptable means of achieving judicial economy.\textsuperscript{169}

Courts should not, despite urging to the contrary, capriciously construe criminal defendants' constitutional rights.\textsuperscript{170} The Supreme Court should resolve this split because any precedent that unnecessarily circumcises the Sixth Amendment may ultimately provide another court with precedental support for applying collateral estoppel against all criminal defendants.

\textsuperscript{165} For a discussion of the Sixth Amendment issues implicated by collateral estoppel of the accused, see supra notes 156-62 and accompanying text.

\textsuperscript{166} For a discussion of the circuit split, see supra note 16 and accompanying text.

\textsuperscript{167} See Hernandez-Urib v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (allowing government to collaterally estop criminal defendants based on guilty pleas in previous criminal adjudications); Pena-Cabanillas v. United States, 394 F.2d 785, 787-88 (9th Cir. 1968) (allowing government to collaterally estop criminal defendants). For a further discussion of how these decisions threaten the constitutional rights of criminal defendants within those circuits, see supra notes 34-52 and accompanying text.

\textsuperscript{168} See VESTAL, supra note 12, at 9-10 to 11 (noting that policy of promoting judicial economy has taken on added significance in modern courts that face docket congestion and overburdened judges); Vestal, supra note 2, at 281 (noting that overwhelming work loads give courts additional incentive to use collateral estoppel to foreclose repetitive litigation of issues). Federal courts will continue to confront this issue due to the particularity with which federal criminal statutes are written. See, e.g., United States v. Gallardo-Mendez, 150 F.3d 1240, 1242 n.2 (10th Cir. 1998) (demonstrating that statutory federal criminal laws facilitate determination of crimes' essential elements); Mayers & Yarbrough, supra note 117, at 29 (noting that tendency of legislatures towards specificity in drafting of statutory offenses has contributed to expansion of collateral estoppel in criminal law).

\textsuperscript{169} See, e.g., 18 \textit{WRIGHT ET AL.}, supra note 12, § 4403, at 11-22 (stating that collateral estoppel serves goals of promoting judicial and litigant economy). For a further discussion of judicial economy as a traditional goal of collateral estoppel, see supra note 12 and accompanying text.

\textsuperscript{170} See, e.g., Kennesly, supra note 28, at 1383-84, 1422 (stating that collateral estoppel of accused does not substantially conflict with constitutional protections in alienage proceedings). For a further discussion of the arguments in favor of collateral estoppel of the accused, see supra notes 18-33 and 53-60 and accompanying text.
defendants. Resolving this split on constitutional grounds would also create uniformity among state courts.\textsuperscript{171} Should the Supreme Court fail to rule on this issue, federal courts in at least two circuits will continue to encroach upon the constitutional rights of criminal defendants, tempting other circuits to follow their lead.\textsuperscript{172}

\textit{Michael P. Daly

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\textsuperscript{171} See Mayer & Yarbrough, \textit{supra} note 117, at 39 (stating that constitutional ruling on collateral estoppel of accused would be relevant only for holding's effect on previous cases or as block to legislative attempts); Vestal, \textit{supra} note 2, at 284 (stating that holdings based on due process or double jeopardy grounds are binding on state courts, while those based on mere administration of justice are not). Federal decisions based merely on the administration of justice within the court system, although persuasive, have no binding effect of state courts because states enjoy power to control their own administration in absence of overriding federal constitutional considerations. See Vestal, \textit{supra} note 2, at 284 n.32 (noting that federal rules of mutuality of estoppel, which are based on administrative rather than constitutional grounds, do not bind state courts). See generally Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that Court is supreme in constitutional interpretation because of need to provide uniform interpretation of federal questions).

\textsuperscript{172} See Hernandez-Urique, 515 F.2d at 22 (holding that prosecution may use guilty plea as collateral estoppel against accused); Pena-Cabanillas, 394 F.2d at 787 (same).