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## Off on a Technicality: The Proper Remedy for Improper Venue

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# OFF ON A TECHNICALITY: THE PROPER REMEDY FOR IMPROPER VENUE

Christopher Thomson\*

## ABSTRACT

*Since its introduction to the public discourse, lawyers have admonished the pejorative phrase, “off on a technicality”—and rightfully so. However, the phrase may rightfully find application to the law’s present treatment of criminal defendants who have been convicted in improper venues. Although venue is a constitutionally necessary component of all criminal prosecutions, it does not speak to the factual guilt or innocence of a defendant. Nevertheless, in the Fifth and Eighth Circuits, defendants whose convictions stem from improper venue may be acquitted despite a jury’s finding that they committed each substantive element of the underlying offense. By contrast, the Sixth and Ninth Circuits remedy these same improper venue convictions by dismissing cases without prejudice, allowing for a second prosecution of the accused. Under the Ninth Circuit’s approach, the government’s subsequent prosecution is uninhibited—allowing prosecutors the opportunity to prove venue in the same district where the initial prosecution failed.*

*This Comment seeks to resolve, through a balanced approach, the existing circuit split concerning the proper remedy for cases where venue is found improper post-conviction. It does so by proposing that dismissal without prejudice should be adopted as the uniform remedy for improper venue but argues that criminal collateral estoppel should be applied on retrial to prevent prosecutors from attempting to prove venue in the same district a second time. This method promotes the resolution of criminal cases on their merits while protecting defendants from an endless string of duplicitous litigation.*

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## I. INTRODUCTION

“**[W]**ONG must not win by technicalities.”<sup>1</sup> An “essential element of the concept of justice is the principle of treating like cases alike.”<sup>2</sup> This fundamental justice principle carries greater weight in the context of criminal prosecutions than in civil actions given the underlying “threat of official intervention into the private lives of citizens that is posed by the criminal law” as well as the severity of the penalties therein.<sup>3</sup> Therefore, a fundamental prerogative of the criminal justice system is to “ensure that rules are applied . . . at least to minimize the risks of inequalities.”<sup>4</sup> Today, federal law concerning criminal venue not only fails to minimize the risk of inequality—it virtually guarantees inequality.

In 2015, Monique Lozoya was involved in an altercation on a commercial airline flight where she admitted to striking another passenger across the face.<sup>5</sup> At the resulting bench trial, Lozoya’s self-defense arguments

1. 1 AESCHYLUS, *The Eumenides* (Richmond Lattimore trans.) (c. 458 B.C.E.), in *THE COMPLETE GREEK TRAGEDIES* 150 (David Grene & Richmond Lattimore eds., Univ. of Chi. Press 1959).

2. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 624 (1958).

3. Kenneth I. Winston, *On Treating Like Cases Alike*, 62 *CAL. L. REV.* 1, 38 (1974).

4. Hart, *supra* note 2, at 624.

5. *United States v. Lozoya*, 920 F.3d 1231, 1233 (9th Cir.), *reh’g granted*, 944 F.3d 1229 (9th Cir. 2019). Since the court’s original holding, Lozoya’s case has been ordered reheard en banc by the Ninth Circuit. See *United States v. Lozoya*, 944 F.3d 1229, 1229 (9th Cir. 2019). For a discussion of the merits of the Ninth Circuit’s original holding, see Chris-

failed, and she was convicted of simple assault.<sup>6</sup> On appeal in 2019, the Ninth Circuit found that venue was improper, reversed Lozoya's conviction, and remanded the case to the district court with instructions to dismiss the charges without prejudice—allowing the government the opportunity to retry Lozoya in the proper district.<sup>7</sup>

Lozoya's experience starkly contrasts with the experience of similarly situated defendants in the Fifth and Eighth Circuits, where courts are permitted to remedy defective venue with acquittal.<sup>8</sup> Defendants in these circuits—despite being under the same circumstances as Lozoya—are free from further prosecution of the matter.<sup>9</sup> These incongruous outcomes illustrate the injustice generated by the existing circuit conflict regarding the proper remedy for cases where, post-conviction, venue is found improper. The post-conviction remedy issue arises in two contexts: first, when a defendant is convicted by a jury at trial, but the district court then finds that the government failed to establish venue as a matter of law;<sup>10</sup> and second, when a defendant is convicted at the trial court level, but venue is found improper on appeal.<sup>11</sup>

“While the venue rule—trial in the district where the crime is committed—seems straightforward, the place of the crime can be difficult to determine.”<sup>12</sup> The modern increase in the popularity of cybercrimes<sup>13</sup> and the complex venue questions they create<sup>14</sup> only adds to the importance of prescribing a uniform remedy for defective-venue cases. Currently, the Fifth and Eighth Circuits permit acquittal as a remedy for these cases,<sup>15</sup> while the Sixth and Ninth Circuits adopt dismissal without prejudice as the appropriate remedy.<sup>16</sup>

As illustrated above, a circuit split concerning remedies in criminal law, especially when one side of the split endorses acquittal, cements an inconsistency in law where identically situated defendants tried in different federal circuits obtain radically different results. Put cynically, the liberty of

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topher Thomson, Note, *The Ninth Circuit's Left Hook: Criminal Venue in the Skies and Why Lozoya Hits the Mark*, 85 J. AIR L. & COM. (forthcoming 2020).

6. *Lozoya*, 920 F.3d at 1235–36.

7. *Id.* at 1243.

8. See *United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005) (per curiam); *United States v. Greene*, 995 F.2d 793, 801 (8th Cir. 1993).

9. See *Strain*, 407 F.3d at 380; *Greene*, 995 F.2d at 801.

10. See, e.g., *United States v. Cestoni*, 185 F. Supp. 3d 1184, 1189 (N.D. Cal. 2016).

11. See, e.g., *Lozoya*, 920 F.3d at 1231.

12. *United States v. Bowers*, 224 F.3d 302, 308 (4th Cir. 2000).

13. FED. BUREAU OF INVESTIGATION, 2018 INTERNET CRIME REPORT 5 (2018) (showing an annual increase in the rate of cybercrime complaints and reported losses from 2014 to 2018).

14. See *United States v. Auernheimer*, 748 F.3d 525, 541 (3d Cir. 2014) (referencing “[t]he ever-increasing ubiquity of the Internet” as amplifying venue concerns); U.S. DEP'T OF JUSTICE, PROSECUTING COMPUTER CRIMES 117–20 (2d ed. 2010) (discussing the unique issues of establishing venue in cybercrime cases).

15. See *United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005) (per curiam); *United States v. Greene*, 995 F.2d 793, 801 (8th Cir. 1993).

16. See *United States v. Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019); *Lozoya*, 920 F.3d at 1241.

criminal defendants in cases of improper venue is presently determined by which federal circuit they are tried in. Therefore, the Supreme Court must act swiftly to prescribe a uniform remedy for cases of improper venue to prevent further prosecution of criminal defendants under what has become a spatially discriminatory method of administering justice.

This Comment proceeds in three parts. Part II begins by describing the historical origins of criminal venue in the United States, as well as its constitutional and statutory backing. Next, it introduces the existing circuit split regarding the proper remedy for cases where venue is found to be improper post-conviction.

Part III argues for adoption of dismissal without prejudice as the proper remedy for improper venue. In doing so, it analyzes the fundamental characteristics of venue as supporting dismissal as a remedy and identifies the weaknesses of acquittal as a remedy. Finally, Part III offers an evaluation of the policy implications of adopting dismissal without prejudice as the proper remedy and suggests that remedying defective venue with acquittal is contrary to procedural and substantive interests underlying the justice system.

Part IV examines the due process concerns of relitigating criminal cases after dismissal—that is, how the second trial should look. It discusses the Ninth Circuit’s current procedure of allowing for uninhibited reprosecution of defendants and concludes this practice is fundamentally unfair. In its place, this Part proposes that criminal collateral estoppel should be applied in the succeeding trial to protect defendants, preventing the government from attempting to prove the same venue a second time.

## II. A BRIEF HISTORY OF CRIMINAL VENUE

Despite often being overshadowed by its constitutional brethren, venue remains a constitutional requirement of every criminal prosecution. As such, prosecutors who disregard their duty to establish venue at trial run the risk of losing cases on that ground.<sup>17</sup> Part II traces criminal venue from its historical roots, to its constitutional codification, to its present statutory framework. It then highlights Supreme Court cases interpreting venue-granting statutes and explains how these cases illustrate the need for a uniform remedy for improper venue.

### A. CRIMINAL VENUE’S HISTORICAL ORIGIN AND LEGAL EVOLUTION

“[Q]uestions of venue are more than matters of mere procedure.”<sup>18</sup> “The right to a trial before a jury of the vicinage is fundamental and such a trial ought to be held at the place of commission of the substantive

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17. See, e.g., *Charlottesville Protest Organizer’s Perjury Charge Dismissed*, AP NEWS (Mar. 21, 2018), <https://apnews.com/59ab5edcf5f0474f961c6526d4d62d78/Charlottesville-protest-organizer-s-perjury-charge-dismissed> [<https://perma.cc/QM5A-QWEJ>].

18. *Travis v. United States*, 364 U.S. 631, 634 (1961).

offense.”<sup>19</sup> Criminal venue’s place in the American criminal justice system may arguably be traced to the Magna Carta’s declaration that criminal punishments be decided “by the oath of honest men in the neighborhood.”<sup>20</sup> Indeed, in the years leading up to the American Revolution, colonists complaining of mistreatment by the British Crown “spoke candidly of disadvantages” resulting from London-based adjudication of crimes committed in the New World.<sup>21</sup> And when the time came to declare independence in 1776, revolutionaries ensured that venue would be included in their list of grievances.<sup>22</sup>

Mindful of the complaints that sparked their rebellion, the Framers ensured that a defendant’s right to be tried in the offending district was guaranteed in the Constitution.<sup>23</sup> Article III, Section 2 of the Constitution mandates that “[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.”<sup>24</sup> The Sixth Amendment further guarantees “the accused . . . the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”<sup>25</sup> Moreover, through statutory means, Federal Rule of Criminal Procedure 18 builds on this constitutional foundation:

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.<sup>26</sup>

Although criminal defendants enjoy a fundamental right to proper venue, that right remains subject to congressional action. In the same constitutional provision establishing a right to venue, the Framers empowered Congress to grant venue by statutorily defining its scope.<sup>27</sup> This power has not lain dormant. For example, Congress has passed legislation allowing for the prosecution of espionage in the District of Columbia so long as the offense “beg[a]n or [was] committed upon the high seas or elsewhere out of the jurisdiction of any particular State or district.”<sup>28</sup>

19. *United States v. Mikell*, 163 F. Supp. 2d 720, 732 (E.D. Mich. 2001) (quoting *United States v. Walden*, 464 F.2d 1015, 1020 (4th Cir. 1972)), *rev’d on other grounds*, 84 F. App’x 485 (6th Cir. 2003) (unpublished).

20. CHARLES DOYLE, CONG. RESEARCH SERV., RL33223, VENUE: A LEGAL ANALYSIS OF WHERE A FEDERAL CRIME MAY BE TRIED 21 (2005) (quoting clause 39 of the Magna Carta) (emphasis omitted).

21. *Id.* at 22.

22. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (listing as a grievance Britain’s “transporting us beyond Seas to be tried for pretended offences”).

23. *See* U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

24. *Id.* art. III, § 2, cl. 3.

25. *Id.* amend. VI.

26. FED. R. CRIM. P. 18.

27. *See* U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, . . . when not committed within any State, . . . shall be at such Place or Places as the Congress may by Law have directed.”).

28. 18 U.S.C. § 3239 (2018).

Similarly, Congress has acted to define offenses “involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States” as continuing offenses.<sup>29</sup> Under this classification, such offenses may be prosecuted “in any district from, through, or into which such commerce, mail matter, or imported object or person moves.”<sup>30</sup>

Notwithstanding its recognition of congressional power to define venue, the Supreme Court regularly interprets venue-granting statutes narrowly.<sup>31</sup> When a venue-granting statute allows for a clearly superior interpretation of the legislation, courts should not hesitate to apply it;<sup>32</sup> however, when “an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.”<sup>33</sup> In this respect, the Court has not been sheepish in requiring Congress to pass additional legislation to properly confer venue.<sup>34</sup>

#### B. THE CURRENT CIRCUIT SPLIT REGARDING THE REMEDY FOR DEFECTIVE VENUE

Despite adopting a policy of narrowly interpreting venue-granting statutes, the Supreme Court has yet to address a practically resulting question—What is the proper remedy for cases where narrowly construing a venue-granting statute causes the reversal of a conviction? When venue is deemed improper before trial, courts generally transfer the case or dismiss the indictment;<sup>35</sup> however, cases where venue is deemed improper post-conviction present unique questions of constitutional law and public policy.

The Supreme Court’s silence on this issue is best illustrated by *Travis v. United States*.<sup>36</sup> In *Travis*, the Court considered a defendant’s conviction for executing and filing false noncommunist affidavits stemming from trial in the United States District Court for the District of Colorado.<sup>37</sup> Finding that venue was not proper in Colorado, the Court reversed the Tenth Circuit’s contrary holding; however, in doing so, the Court failed to provide any specific instruction on how to dispose of the case:

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29. *Id.* § 3237(a).

30. *Id.*

31. See *United States v. Cabrales*, 524 U.S. 1, 7–10 (1998), *superseded by statute*, 18 U.S.C. § 1956(i) (2018); *United States v. Johnson*, 323 U.S. 273, 277–78 (1944), *superseded by statute*, 18 U.S.C. § 3237(a).

32. See *United States v. Canal Barge Co.*, 631 F.3d 347, 354 (6th Cir. 2011) (citing *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280–82 (1999)).

33. *Johnson*, 323 U.S. at 276; see also *United States v. Morgan*, 393 F.3d 192, 201 (D.C. Cir. 2004).

34. See *Cabrales*, 524 U.S. at 7; *Johnson*, 323 U.S. at 276.

35. See, e.g., *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1136–37 (9th Cir. 2004).

36. See *Travis v. United States*, 364 U.S. 631 (1961).

37. *Id.* at 632.

Petitioner also brought here two companion cases arising out of the same trial. In No. 3 he asked for a new trial on the ground of newly discovered evidence. In No. 71 he moved a second time for a new trial on the ground of newly discovered evidence. We granted the petitions in these cases as they were protective of petitioner's rights in the main litigation. But since our holding in the main case is that venue was improperly laid in Colorado, the judgment of conviction must be set aside. Accordingly[, ] the orders in Nos. 3 and 71 denying new trials have become moot and are vacated in the customary manner. In No. 10 the judgment is *Reversed*.<sup>38</sup>

The Court's vacation of the companion cases as moot can reasonably be read as either implicitly supportive of a ruling of acquittal or indicative of the Court's expectation that the defendant could be retried.<sup>39</sup> Because of this ambiguity, the question of whether the government could have reindicted the defendant was left unanswered.<sup>40</sup>

Consequently, circuit courts have been left without guidance and have reached conflicting conclusions as to the proper remedy for cases where venue is deemed improper post-conviction.<sup>41</sup> Presently, the Sixth and Ninth Circuits adopt dismissal without prejudice as the appropriate remedy,<sup>42</sup> while the Fifth and Eighth Circuits adopt acquittal.<sup>43</sup>

### 1. Circuits Prescribing Dismissal Without Prejudice

The Ninth Circuit was the first circuit to endorse dismissal without prejudice as the remedy for post-conviction defective venue.<sup>44</sup> Historically, the court first applied its dismissal policy to pre-trial motions for acquittal;<sup>45</sup> however, the court began to extend this remedy to post-conviction cases shortly thereafter. In *United States v. Ruelas-Arreguin*, the court affirmed a defendant's conviction for being found illegally in the United States, finding venue was proper.<sup>46</sup> In a footnote, the court specifically rejected the defendant's contention that acquittal is the proper remedy for improper venue: "When venue has been improperly laid in a

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38. *Id.* at 637 (citation omitted).

39. Standard treatment of vacated convictions may nevertheless lean in favor of the dismissal remedy. *See, e.g.,* *United States v. Williams*, 904 F.2d 7, 8 (7th Cir. 1990) (citing *United States v. Lawson*, 736 F.2d 835 (2d Cir. 1984)) (agreeing in dicta that "when a conviction is vacated, the effect is to nullify the judgment entirely and place the parties in the position of no trial having taken place at all").

40. The Supreme Court is not alone in its use of ambiguous language to effectuate reversals for improper venue. *See United States v. Morgan*, 393 F.3d 192, 201 (D.C. Cir. 2004).

41. *See United States v. Lozoya*, 920 F.3d 1231, 1241 n.5 (9th Cir.), *reh'g granted*, 944 F.3d 1229 (9th Cir. 2019).

42. *See United States v. Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019); *Lozoya*, 920 F.3d at 1241.

43. *United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005) (*per curiam*); *United States v. Greene*, 995 F.2d 793, 802 (8th Cir. 1993).

44. *See United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 n.1 (9th Cir. 2000) (citing *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1989)).

45. *See United States v. Hilger*, 867 F.2d 566, 568 (9th Cir. 1989) (citing 8A JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 21.02 (2d ed. 1987)).

46. *Ruelas-Arreguin*, 219 F.3d at 1059, 1062.



district, the district court should either transfer the case to the correct venue upon the defendant's request, or, in the absence of such a request, dismiss the indictment without prejudice."<sup>47</sup> The court buttressed this declaration by citing in-circuit precedent finding that improper venue retrials do not violate double jeopardy, but the court did not provide further explanation.<sup>48</sup> Since *Ruelas-Arreguin*, the court has reaffirmed (by direct holding) its longstanding commitment to this approach.<sup>49</sup>

The most recent federal circuit to consider the remedy for improper venue is the Sixth Circuit, which also used dismissal without prejudice.<sup>50</sup> In *Petlechkov*, the Sixth Circuit reversed in part a defendant's conviction for mail fraud on venue grounds; in considering the appropriate remedy, the court expressly centered its analysis around the Double Jeopardy Clause of the Fifth Amendment.<sup>51</sup> Citing sister circuit precedent, the court held that "[a] dismissal on venue grounds does not qualify as an 'acquittal' for double jeopardy purposes" and dismissed all counts related to the defective venue without prejudice.<sup>52</sup>

## 2. Circuits Permitting Acquittal

In contrast to the Sixth and Ninth Circuits, the Fifth and Eighth Circuits utilize acquittal as a remedy for improper venue.<sup>53</sup> In *Greene*, the Eighth Circuit reversed a defendant's conviction on venue grounds with instructions to enter a judgment of acquittal on remand.<sup>54</sup> However, the court did not discuss or address why it chose acquittal as the appropriate remedy.<sup>55</sup> Despite the lack of any subsequent case law consistent with *Greene*, sister circuits have considered *Greene* to endorse the acquittal remedy for improper venue.<sup>56</sup>

In *Strain*, the Fifth Circuit directly addressed defective-venue remedies while considering a petition for rehearing.<sup>57</sup> In that case, a defendant (Strain) was convicted of harboring or concealing a fugitive in violation of 18 U.S.C. § 1071.<sup>58</sup> During trial, Strain challenged venue in the Western

47. *Id.* at 1060 n.1 (citation omitted).

48. *See id.* (citing *Kaytso*, 868 F.2d at 1021).

49. *United States v. Lozoya*, 920 F.3d 1231, 1241 n.5 (9th Cir.) ("[W]e are bound by *Ruelas-Arreguin*, and will follow the remedy prescribed in that opinion."), *reh'g granted*, 944 F.3d 1229 (9th Cir. 2019).

50. *See United States v. Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019).

51. *Id.* ("This issue turns on the Double Jeopardy Clause of the Fifth Amendment.")

52. *Id.* In this respect, the Sixth Circuit's opinion expressly stated what the Ninth Circuit implied in *Ruelas-Arreguin*. *See Ruelas-Arreguin*, 219 F.3d at 1060 n.1 (citing *Kaytso*, 868 F.2d at 1021).

53. *See United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005) (per curiam); *United States v. Greene*, 995 F.2d 793, 802 (8th Cir. 1993).

54. *Greene*, 995 F.2d at 794–95.

55. *See id.*

56. *See United States v. Lozoya*, 920 F.3d 1231, 1241 n.5 (9th Cir.) (citing *Greene*, 995 F.2d at 801), *reh'g granted*, 944 F.3d 1229 (9th Cir. 2019); *Strain*, 407 F.3d at 379–80 (citing *Greene*, 995 F.2d at 802).

57. *Strain*, 407 F.3d at 380.

58. *United States v. Strain*, 396 F.3d 689, 691 (5th Cir.), *reh'g denied*, 407 F.3d 379 (5th Cir. 2005).

District of Texas through two motions for acquittal under Federal Rule of Criminal Procedure 29(a), both of which were denied by the trial judge.<sup>59</sup> In consequence, the jury found venue in the Western District of Texas was proper by special verdict and convicted Strain of the offense.<sup>60</sup> On appeal before the Fifth Circuit, the court concluded that the evidence was insufficient to support a finding that venue was proper, vacated Strain's conviction, and remanded to the district court with instructions to enter a judgment of acquittal.<sup>61</sup> Shortly thereafter, the government petitioned the Fifth Circuit to rehear the case, arguing that the proper remedy was to dismiss the case without prejudice.<sup>62</sup>

In considering the appropriate remedy, the court cited *Greene* and commented that “none of the circuits has held that dismissal is the sole appropriate remedy for lack of venue, or that remand for acquittal is inappropriate *per se*.”<sup>63</sup> Rather, the court framed the remedy issue as discretionary:

In support of its argument, the government cites five cases from various circuits. Four are simply instances in which an appeals court has decided to order some remedy other than acquittal. As such, they are largely irrelevant to the narrow question raised by the petition—i.e., whether acquittal *may* be the proper result where the government tries a case to jury verdict but fails to prove venue by a preponderance.<sup>64</sup>

The court then went on to de-emphasize what it viewed as the only case arguably in conflict with its holding, *United States v. Ruelas-Arreguin*, as dicta that “has never been cited with approval by the Ninth Circuit or any other court.”<sup>65</sup> Accordingly, the court denied the government's petition for rehearing, describing venue as a “constitutionally-imposed element of every crime” and emphasizing that reversal of a jury conviction on venue grounds “does not entitle the government to a second chance at prosecution.”<sup>66</sup>

### III. THE PROPER REMEDY: DISMISSAL WITHOUT PREJUDICE

Courts should follow Sixth and Ninth Circuit precedent to the extent that it prescribes dismissal without prejudice as the proper remedy for cases where venue is found improper post-conviction.<sup>67</sup> The Fifth Cir-

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59. *Id.* at 692.

60. *Id.*

61. *Id.* at 697.

62. *See Strain*, 407 F.3d at 379.

63. *Id.* at 379–380.

64. *Id.* at 380 (emphasis added) (footnote omitted).

65. *Id.* (citing *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 n.1 (9th Cir. 2000)).

66. *Id.*

67. However, Ninth Circuit precedent prohibiting application of collateral estoppel to retrials of defective-venue cases should not be followed, as discussed *infra* Part IV.

cuit's decision in *Strain* relied heavily on an incomplete<sup>68</sup> and outdated<sup>69</sup> precedential analysis concerned primarily with defending its decision to acquit—i.e., *can* a court remedy defective venue with acquittal. As such, it offers little substantive value in evaluating whether a court *should* elect acquittal as a remedy. However, despite reaching the correct conclusion, the Sixth and Ninth Circuits have not comprehensively explained why dismissal without prejudice is proper. Moreover, because federal circuit precedent discussing criminal venue is rife with vague language—often diverging as to whether venue constitutes an element of an offense and what significance (if any) that distinction holds—it is necessary to clearly establish a uniform classification for venue.<sup>70</sup>

Accordingly, this Part seeks to remedy the confusion surrounding this issue by proposing that venue should be considered a procedural element of an offense—that is, an element whose deficiency does not warrant a judgment of acquittal on appeal.<sup>71</sup> Classifying venue as a procedural element is not to deny that it is a constitutionally necessary component of every prosecution (either by proof at trial or by waiver); rather, it is to distinguish venue from substantive elements whose factual deficiency warrants acquittal of the accused. Interpreting venue as a procedural element, and thus applying dismissal as the proper remedy for improper venue, properly distinguishes venue from substantive elements for three principal reasons: (1) it does not violate double jeopardy to allow the retrial of a defendant who is convicted in an improper venue; (2) it recognizes venue's fundamental differences from substantive elements, namely

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68. Despite its contention that the *Strain* decision was “well within the mainstream of federal jurisprudence on venue,” *Strain*, 407 F.3d at 380, the Fifth Circuit's action was at odds with Ninth Circuit precedent at the time *Strain* was decided. See *United States v. Hernandez*, 189 F.3d 785, 792 n.5 (9th Cir. 1999) (citation omitted) (“We reject the contention . . . that a judgment of acquittal is the appropriate remedy in the case of improper venue.”).

69. The Fifth Circuit's claim that *Ruelas-Arreguin* lacked subsequent approval, although true at the time, has since been undermined. See, e.g., *United States v. Lozoya*, 920 F.3d 1231, 1241 n.5 (9th Cir.), *reh'g granted*, 944 F.3d 1229 (9th Cir. 2019); *United States v. Rosales-Hernandez*, No. 2:18-cr-00304-R CJ-VCF, 2018 U.S. Dist. LEXIS 192990, at \*1–2 (D. Nev. Nov. 13, 2018) (citing *Ruelas-Arreguin*, 219 F.3d at 1060 n.1); *United States v. Greenhut*, No. 2:15-cr-00466-CAS-1, 2016 U.S. Dist. LEXIS 156440, at \*27 (C.D. Cal. Nov. 8, 2016) (citing *Ruelas-Arreguin*, 219 F.3d at 1060 n.1).

70. See *United States v. Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019) (“Though venue is a factual issue that the government must prove, it is not an element of the underlying criminal offense.” (citation omitted)); *United States v. Lewis*, 768 F.3d 1086, 1089 (10th Cir. 2014) (describing venue as “a necessary, if often subtle, element of every criminal statute”); *United States v. Johnson*, 510 F.3d 521, 527 (4th Cir. 2007) (characterizing venue as “similar in nature to a jurisdictional element” (citation omitted)); *United States v. Massa*, 686 F.2d 526, 527–28 (7th Cir. 1982) (stating that “[p]roof of venue is an essential element of the Government's case,” but differentiating it from substantive elements (citations omitted)).

71. This term has already been introduced in state appellate courts considering venue rights of defendants under state constitutions. See, e.g., *State v. Holbron*, 895 P.2d 173, 177 (Haw. Ct. App. 1995) (classifying venue as a procedural element); see also, e.g., *People v. Gallegos*, 689 N.E.2d 223, 225 (Ill. App. Ct. 1997) (dividing venue into substantive and procedural components).

that it is waivable and is provable by a lower burden; and (3) it is in line with the policy interests underlying the criminal justice system.

#### A. RETRIAL DOES NOT VIOLATE DOUBLE JEOPARDY

It is a foundational principle of the American justice system that defendants may not be tried twice for the same crime.<sup>72</sup> Accordingly, if reprosecution of a defendant in cases of improper venue triggers double jeopardy protections, courts must order acquittal. Although circuits prescribing acquittal as the proper remedy do not rely on double jeopardy principles in their reasoning,<sup>73</sup> they have ignored the absence of such conflict as a factor favoring dismissal without prejudice.<sup>74</sup> Therefore, it is necessary to explore why dismissal of defective-venue cases should not be interpreted as violating the Double Jeopardy Clause.<sup>75</sup>

Like most legal principles, double jeopardy is not without exceptions. Under the dual sovereignty doctrine, defendants may be prosecuted by the federal government and state governments for the same action.<sup>76</sup> Likewise, purportedly final judgments made by courts without jurisdiction do not bar reprosecution.<sup>77</sup> In the same vein, double jeopardy protections should not be interpreted as applying to cases of defective venue.<sup>78</sup>

##### 1. Double Jeopardy is Not Triggered by Trial Error

Supreme Court Fifth Amendment jurisprudence signals the Court's likely aversion to applying double jeopardy protections to defective-

72. See U.S. CONST. amend. V. ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."); Walter T. Fisher, *Double Jeopardy, Two Sovereignities and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 592–94 (1961) (describing the reasons for double jeopardy protections).

73. See, e.g., *Strain*, 407 F.3d at 380 (framing the remedy question as discretionary by finding its decision to grant acquittal for defective venue was not at odds with circuits prescribing alternative remedies).

74. Still, this has not stopped practitioners from questioning whether double jeopardy applies in defective-venue cases. See, e.g., Appellant's Opening Brief at 48–49, *United States v. Lozoya*, 920 F.3d 1231 (9th Cir. 2019) (No. 17-50336), 2018 WL 1064506, at \*48–49 (citing Supreme Court double jeopardy jurisprudence in arguing that defective venue should be remedied by acquittal); Lloyd Snook, *Can Jason Kessler Be Retried? Or, a Primer on Double Jeopardy*, SNOOK & HAUGHEY, P.C. (Apr. 5, 2018), <https://www.snookandhaughey.com/criminal/can-jason-kessler-retried-double-jeopardy/> [https://perma.cc/4NBU-S8M5].

75. The Sixth Circuit's opinion in *Petlechkov* offers an analysis of the double jeopardy issue; however, the court did not discuss how its conclusion as to double jeopardy was supportive of its decision to elect dismissal without prejudice as a remedy. See *Petlechkov*, 922 F.3d at 762.

76. See *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); *Bartkus v. Illinois*, 359 U.S. 121, 130 (1958).

77. *United States v. Ball*, 163 U.S. 662, 669 (1896).

78. For more examples of double jeopardy exceptions, see *Wade v. Hunter*, 336 U.S. 684, 685–88 (1949) (holding that defendant servicemember reindicted by court-martial did not trigger double jeopardy when the original case was dismissed mid-trial for tactical reasons), and *Stroud v. United States*, 251 U.S. 15, 16–18 (1919) (finding that double jeopardy was not triggered when defendant was reindicted post-reversal of his conviction stemming from prosecutorial error).

venue cases.<sup>79</sup> In *United States v. Tateo*, a defendant charged with bank robbery was told by counsel that, if found guilty at trial, the judge had resolved to sentence him to life in prison.<sup>80</sup> Fearful of his counsel's advice that "the likelihood of conviction was great," Tateo pled guilty to the offenses.<sup>81</sup> After his conviction, Tateo challenged his plea as involuntary and moved for a new trial; Tateo's motion was granted by a new judge and his case was ultimately brought before a third judge.<sup>82</sup> However, upon defense motions at the retrial, all counts were dismissed by the court.<sup>83</sup> The court articulated that, "since neither genuine consent nor an 'exceptional circumstance' underlay the termination of the first trial and no 'waiver' of the double jeopardy claim had been made by Tateo, the Government was precluded from retrying him."<sup>84</sup>

After granting certiorari, the Supreme Court emphasized the "well-established part of our constitutional jurisprudence" that the Fifth Amendment's double jeopardy provision "does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction."<sup>85</sup> Relying on analogy to 28 U.S.C. § 2255,<sup>86</sup> the Court held that the prosecution was empowered to retry Tateo.<sup>87</sup> In doing so, the Court noted:

It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.<sup>88</sup>

The Court next addressed the double jeopardy implications of appellate reversal in *Burks*, ultimately setting up a framework through which the courts analyze double jeopardy.<sup>89</sup> There, the Court explicitly overruled some of its prior rulings<sup>90</sup> and found that reversals of convictions

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79. See *Burks v. United States*, 437 U.S. 1, 14 (1978); *United States v. Tateo*, 377 U.S. 463, 466 (1964).

80. *Tateo*, 377 U.S. at 464. In addition to bank robbery, the defendant was charged with kidnapping, taking and carrying away bank money, receiving and possessing stolen bank money, and conspiracy. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 464–65.

84. *Id.* at 465.

85. *Id.*

86. 28 U.S.C. § 2255(b) (2018) permits courts to grant new trials to federal prisoners whose sentences were imposed by a court without jurisdiction or otherwise violate federal or constitutional sentencing restrictions.

87. See *Tateo*, 377 U.S. at 466.

88. *Id.*

89. *Burks v. United States*, 437 U.S. 1, 14–15 (1978).

90. See *id.* at 12 (overruling *Forman v. United States*, 361 U.S. 416 (1960); *Yates v. United States*, 354 U.S. 298 (1957); *Sapir v. United States*, 348 U.S. 373 (1955); *Bryan v. United States*, 338 U.S. 552 (1950)).

resulting solely from evidentiary insufficiency mandate a judgment of acquittal.<sup>91</sup> The Court grounded its reasoning in a purposive analysis of the Double Jeopardy Clause:

The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow “the State . . . to make repeated attempts to convict an individual for an alleged offense,” since “[the] constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.”<sup>92</sup>

However, the Court stopped short of applying this policy of acquittal to all appellate reversals, instead distinguishing cases where reversals derive from trial error.<sup>93</sup> Reversals due to trial error, the Court reasoned, imply “nothing with respect to the guilt or innocence of the defendant.”<sup>94</sup> Thus, the societal risk of releasing a defendant into the public is higher for reversals deriving from trial error than for reversals deriving from insufficient evidence.<sup>95</sup> Accordingly, the Court held that reversals due to trial error do not bar further prosecution of defendants.<sup>96</sup>

The *Burks* decision affirmed a rule against applying double jeopardy protections to cases of trial error.<sup>97</sup> In its opinion, the Court gave few examples of what might constitute trial error in a double jeopardy analysis.<sup>98</sup> Instead, the Court commented that reversal for trial error is “a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.”<sup>99</sup>

## 2. Venue Defects Constitute Trial Error

Because the Court in *Burks* did not provide an exhaustive list of trial errors, its underlying purpose must be applied to ascertain whether defects of venue may be properly characterized as trial error for the double jeopardy inquiry. First, decisions predating *Burks* illustrate the Court’s

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91. *Id.* at 18.

92. *Id.* at 11 (alteration in original) (footnote omitted) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

93. *See id.* at 14–15 (noting that the Court’s previous failure to distinguish between reversals for trial error and those for evidentiary insufficiency “contributed substantially to . . . conceptual confusion existing in this area of the law”).

94. *Id.* at 15.

95. *Id.* at 15–16.

96. *Id.* at 14 (“We have no doubt that *Ball* was correct in allowing a new trial to rectify trial error.”).

97. *See id.*

98. *See id.* at 15.

99. *Id.*

focus on substantive justice in applying double jeopardy.<sup>100</sup> However, the best evidence of this purpose can be found in a case decided by the Court on the same day.<sup>101</sup> In *Scott*, the Court expanded on its *Burks* decision, explaining by footnote the distinction between evidentiary reversals and reversals based solely on constitutional grounds:

While an acquittal on the merits by the trier of fact “can never represent a determination that the criminal defendant is innocent in any absolute sense,” a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise.<sup>102</sup>

Thus, because the existence of venue does not implicate factual guilt, venue defects necessarily constitute trial error. Indeed, every circuit to address the question has found improper venue retrials do not trigger double jeopardy protection.<sup>103</sup>

The fact that a retrial is not barred by double jeopardy does not merely legalize dismissal of defective-venue cases; it actively endorses dismissal as the proper remedy. Indeed, this is a basis on which the Sixth and Ninth Circuits have adopted dismissal without prejudice as the appropriate remedy.<sup>104</sup> The Fifth Circuit’s proposed system of discretionary acquittal<sup>105</sup> is a breeding ground for discriminatory acquittal.<sup>106</sup> Moreover, the mere appearance of arbitrary exercise of judicial discretion to acquit is harmful; for example, despite framing the improper venue remedy as discretionary, the Fifth Circuit has consistently failed to explain why it elects specific remedies, instead concluding only that it could.<sup>107</sup>

100. See, e.g., *Lee v. United States*, 432 U.S. 23, 30 (1977) (finding that dismissal of a case due to the prosecutor’s failure to allege an element of the offense did not trigger double jeopardy, and commenting that “[t]he error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant”).

101. See *United States v. Scott*, 437 U.S. 82 (1978).

102. *Id.* at 98 n.11 (citation omitted).

103. See *United States v. Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019); *United States v. Miller*, 111 F.3d 747, 755 (10th Cir. 1997); *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988); *Haney v. Burgess*, 799 F.2d 661, 663 (11th Cir. 1986); see also *United States v. Brennan*, 183 F.3d 139, 149 (2d Cir. 1999) (reversing defendants’ convictions for improper venue, then discussing substantive issues in the prosecution’s case “in view of the possibility that a United States Attorney in a district where venue could properly be laid may consider undertaking a new prosecution”).

104. See *Petlechkov*, 922 F.3d at 771; *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1062–63 (9th Cir. 2000).

105. See *United States v. Strain*, 407 F.3d 379, 380 (5th Cir. 2005) (per curiam).

106. See generally *McCleskey v. Kemp*, 481 U.S. 279, 364 (1987) (Brennan, J., dissenting) (warning of the enhanced potential for discretionary authority to become discriminatory in criminal justice); Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 107–08 (2009) (arguing that discriminatory acquittals violate the Equal Protection Clause of the Constitution).

107. See *United States v. Niamatali*, 712 F. App’x 417, 422–23 (5th Cir. 2018) (per curiam) (declining to order acquittal after finding improper venue); *Strain*, 407 F.3d at 380 (ordering a judgment of acquittal).

This is not to say that discretionary leniency in the criminal justice system should be avoided. A system without discretionary leniency “would be totally alien to our notions of criminal justice.”<sup>108</sup> However, this discretion properly resides with the government in deciding whether to retry a case. Therefore, because double jeopardy does not mandate acquittal of defective-venue cases, courts should dismiss these cases without prejudice.

#### B. VENUE IS DISTINCT FROM SUBSTANTIVE ELEMENTS OF AN OFFENSE

Next, classifying venue as a procedural element of an offense properly distinguishes it from substantive elements of an offense. However, in classifying venue as a procedural element, practitioners should not conflate venue with jurisdiction. It is undisputed that “a court in an improper venue enjoys the judicial authority to proceed to conviction or acquittal, if the accused waives objection.”<sup>109</sup> The burden to satisfy jurisdiction is not waivable by inaction.<sup>110</sup> Further, because venue is not jurisdictional, defendants cannot challenge it at any time.<sup>111</sup> The Federal Rules of Criminal Procedure codify this distinction<sup>112</sup> and classify improper venue motions among motions alleging “a defect in instituting the prosecution.”<sup>113</sup> For these reasons, circuits describing venue as “similar in nature to a jurisdictional element”<sup>114</sup> likely inject unnecessary confusion into the venue discussion. Nevertheless, venue is materially distinct from substantive elements of an offense and should be treated as such when remedying improper venue.

Even the Fifth Circuit, which treats venue as a substantive element of every offense, concedes that venue does not operate like traditional substantive elements.<sup>115</sup> First, it is well established that a defendant’s right to venue may be waived.<sup>116</sup> Venue is unique in that, despite its constitutional origin, it can be waived through inaction.<sup>117</sup> Thus, a defendant may be constitutionally tried and convicted in a venue that is de facto incorrect so long as the defendant did not timely object to venue before trial.

108. *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976).

109. *Doyle*, *supra* note 20, at 2 (citations omitted).

110. FED. R. CRIM. P. 12 advisory committee’s note to subdivision (b)(1) and (2).

111. *United States v. Cordova*, 157 F.3d 587, 597 n.3 (8th Cir. 1998) (citing *United States v. Gaviria*, 116 F.3d 1498, 1517 (D.C. Cir. 1997)).

112. *Compare* FED. R. CRIM. P. 12(b)(2) (“A motion that the court lacks jurisdiction may be made at *any time* while the case is pending.” (emphasis added)), *with* FED. R. CRIM. P. 12(b)(3)(A)(i) (delineating improper venue as among objections that “must be raised by *pretrial motion* if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits” (emphasis added)).

113. FED. R. CRIM. P. 12(b)(3)(A).

114. *United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012) (quoting *United States v. Johnson*, 510 F.3d 521, 527 (4th Cir. 2007)); *see also* *United States v. Perez*, 280 F.3d 318, 330 (3d Cir. 2002)) (describing venue as “more akin to jurisdiction than to the substantive elements” (quoting *United States v. Massa*, 686 F.2d 526, 530 (7th Cir. 1982))).

115. *See* *United States v. White*, 611 F.2d 531, 536 (5th Cir. 1980).

116. *See, e.g.*, *United States v. Carreon-Palacio*, 267 F.3d 381, 391 (5th Cir. 2001).

117. *United States v. Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979).



By contrast, the burden to prove substantive elements of offenses is not removed from the prosecution merely because the defendant has failed to act.<sup>118</sup>

Venue's distinguishing characteristics are not limited to the waiver arena. The Supreme Court has expressed that when "the Constitution . . . require[s] the addition of an element or elements to the definition of a criminal offense," the beyond-a-reasonable-doubt standard applies.<sup>119</sup> However, it is settled law that venue must be proven by the government to meet only a preponderance-of-the-evidence burden.<sup>120</sup> Perplexingly, both the Fifth and Eighth Circuits' precedent adopting this standard can be traced to *Blair v. United States*.<sup>121</sup> In *Blair*, the court specifically expressed it was not deciding the issue:

By the great weight of the ruled cases, venue, even in a criminal case, need not be proved beyond a reasonable doubt. 13 Encyc. of Evidence 931, and cases cited from eleven states pro and two states contra. But the learned trial judge included venue, as among the things in the case, which should be proved beyond a reasonable doubt; so *the point is not before us here*.<sup>122</sup>

However, when the Eighth Circuit *did* address the question in *Dean v. United States*, it clarified its adoption of the preponderance standard and stated, "Venue is not an integral part of a criminal offense and . . . need not be proven beyond a reasonable doubt."<sup>123</sup> Putting aside the court's somewhat circular reasoning, it distinguished venue as a non-integral component of a criminal offense.<sup>124</sup> This distinction is identical to the procedural-element classification proposed by this Comment and adopted in principle by the Sixth and Ninth Circuits.<sup>125</sup> The difference is that the Eighth Circuit makes this "integral" distinction at the trial phase, whereas the Sixth and Ninth Circuits maintain an analogous distinction

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118. See *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (holding that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice"); see also *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978) (finding a trial court's refusal to give a jury instruction on the presumption of innocence violated a defendant's Fourteenth Amendment due process rights).

119. *Ring v. Arizona*, 536 U.S. 584, 602, 606–07 (2002).

120. In fact, every single circuit agrees on this point. See, e.g., *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1217 (11th Cir. 2010); *United States v. Mendoza*, 587 F.3d 682, 686 (5th Cir. 2009); *United States v. Johnson*, 462 F.3d 815, 819–20 (8th Cir. 2006); *United States v. N.*, 910 F.2d 843, 912 n.52 (D.C. Cir. 1990) ("[Defendant] also asserts . . . the District Court erred in instructing the jury to apply a preponderance-of-the-evidence standard, rather than a beyond-a-reasonable-doubt standard, to the question of venue. This assertion . . . is contrary to the unanimous holding of all circuits which have considered the question.").

121. *Blair v. United States*, 32 F.2d 130, 132 (8th Cir. 1929); see *Weaver v. United States*, 298 F.2d 496, 498 (5th Cir. 1962); *Dean v. United States*, 246 F.2d 335, 338 (8th Cir. 1957).

122. *Blair*, 32 F.2d at 132 (emphasis added).

123. *Dean*, 246 F.2d at 338 (citing *Blair*, 32 F.2d at 132) (although the court did not find venue integral, it did reiterate that venue is constitutionally necessary).

124. See *id.*

125. See *United States v. Lozoya*, 920 F.3d 1231, 1241 n.5 (9th Cir.), *reh'g granted*, 944 F.3d 1229 (9th Cir. 2019); *United States v. Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019).

post-conviction.<sup>126</sup>

The Fifth Circuit in *Strain* minimized the burden-of-proof distinction and instead placed the burden on the government to show why the lowered burden meant deficient venue should not produce an acquittal on appeal.<sup>127</sup> But in doing so, the court wrongfully shifted the burden. To the contrary, the logical burden was on the *defense* to show why venue should be treated as “non-integral” regarding its standard of proof at trial but should be treated like “integral” substantive elements when assigning a post-conviction remedy. The evidence of non-integral treatment of venue at the trial stage inherently warranted an explanation by the court for its integral treatment on appeal. The court’s failure to reconcile this inconsistency is emblematic of the conclusory reasoning that plagues the Fifth and Eighth Circuit’s remedy jurisprudence in this space.

Altogether, the longstanding, distinct legal treatment of venue and traditional substantive elements of an offense mandates that courts adopt dismissal without prejudice as the proper remedy for defective venue. Finding otherwise creates a logical paradox by which venue is somehow necessary but not integral during the entirety of the trial stage, but both necessary and integral on appeal. Classifying venue as a procedural element remedies this inconsistency by recognizing it as wholly distinct from substantive elements throughout the trial and post-conviction stages of litigation.

### C. POLICY IMPLICATIONS OF DISMISSAL WITHOUT PREJUDICE AS A REMEDY

“In trying to effect the will of Congress . . . [courts] . . . have the responsibility to consider the social context in which [their] decisions will have operational effect.”<sup>128</sup> Questions of criminal procedure are inherently intertwined with strong societal interests and courts regularly refer to social policy as a factor in decision-making.<sup>129</sup> Given this, and given the courts’ duty to minimize inequality in the criminal justice system<sup>130</sup> as discussed above, courts should also look to policy in determining an appropriate

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126. This Comment treats the Eighth Circuit as supportive of acquittal as a remedy because the Fifth and Ninth Circuits have done so. See *Lozoya*, 920 F.3d at 1241 n.5; *United States v. Strain*, 407 F.3d 379, 379–80 (5th Cir. 2005) (per curiam). However, this characterization may be outdated, given the Eighth Circuit’s evolved treatment of venue. See *United States v. Morrissey*, 895 F.3d 541, 552 (8th Cir. 2018) (holding that venue is not “an essential element of the offense” in finding a prosecutor’s comments on venue in his closing statements did not constitute constructive amendment of an indictment); *Becht v. United States*, 403 F.3d 541, 547 (8th Cir. 2005) (finding that failure to instruct on the essential elements of a crime is necessarily error, but that failure to instruct on venue is not).

127. *Strain*, 407 F.3d at 380.

128. *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968).

129. See Richard A. Daynard, *Use of Social Policy in Judicial Decision-Making*, 56 CORNELL L. REV. 919, 924, 947 (1971) (analyzing rates of decisions decided on the basis of social policy in the Second and D.C. Circuits); see also, e.g., *Warden v. Hayden*, 387 U.S. 294, 306–07 (1967).

130. See Hart, *supra* note 2, at 624.

uniform remedy for defective venue. Principally, the practice of using dismissal to remedy defective venue is supported by (1) the policies underlying the criminal justice system; (2) the proper alignment of the defendant's goals with those of the system; and (3) the lack of undue prejudice to the defendant.

*1. Dismissal is Supported by the Policies Underlying the Criminal Justice System*

The pursuit of substantive justice clashes with the tenants of procedural justice frequently. In finding the appropriate balance, courts are regularly implored to sacrifice investigative and legal methods that may enhance the truth-finding function of the system to protect the rights of defendants.<sup>131</sup> With this comes a social sacrifice—because law enforcement cannot kick in any door and prosecutors cannot admit any evidence, some perpetrators will never face consequences for their crimes. The reciprocal effects of this sacrifice are procedural protections that enhance the fairness of the prosecutorial process and promote public faith in the justice system.<sup>132</sup>

When considering criminal venue through the prism of the justice-balancing equation, it becomes evident that the policies favoring procedural limits are weak in cases of defective venue. First, public confidence in the justice system is not solely a product of procedural justice. Rather, public trust also derives from the ability of the system to perform its function as a truth-finder. Of course, many of the failures of the criminal justice system to arbitrate the truth have hedged in favor of overcriminalization; indeed, the risk that a trial will reach a result opposite the truth is ever-present and should not be overlooked. Reprosecution of defendants undermines the “social value of certainty” and embodies the risks giving rise to the doctrine of *res judicata*.<sup>133</sup> But to overemphasize this risk is to ignore the public good that derives from just convictions of perpetrators and the public detriment of failing to convict the guilty.

Next, whichever principles one believes the penal system to embody—deterrence of crime, punishment of offenders, protection of the public—the list undeniably includes acting as a public vehicle for providing justice to victims. While victims might also pursue justice in the civil court sys-

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131. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (establishing the *Miranda* warning requirement for the admissibility of defendant statements made during police interrogation); *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (prosecutors must reveal exculpatory evidence); *Nardone v. United States*, 308 U.S. 338, 340–41 (1939) (evidence procured through illegal means is inadmissible regardless of its probative value).

132. See Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT'L INST. JUST. J. 23, 28 (2002) (“[A] growing body of theory and evidence suggests that it is not the fairness or effectiveness of *decisions* criminal justice officials make that determines the public's level of trust. Changes in modern culture have made the *procedures* and manners of criminal justice officials far more important to public trust . . . .” (first emphasis added)); Jerold H. Israel, *Cornerstones of the Judicial Process*, 2 KAN. J.L. & PUB. POL'Y 5, 8 (1993) (“To gain the public's acceptance of the moral values of substantive criminal law, the process must demonstrate the legitimacy of the results of its enforcement.”).

133. Fisher, *supra* note 72, at 593.

tem, the nature of civil judgments often renders them wholly insufficient as vehicles of justice. Perpetrators may be bankrupt or otherwise “judgment proof.”<sup>134</sup> On the other end of the spectrum, perpetrators with significant financial means who are able to easily pay or avoid judgments may ultimately deprive victims of any symbolic justice.<sup>135</sup> Moreover, particular situations, such as when an offense causes the death of a single person with no living relatives, may have the effect of leaving no private individuals able to bring suit. The criminal law fills these gaps by ensuring that perpetrators are held accountable in a meaningful way.

Undoubtedly, courts carry a duty “to see that [defendants in a criminal case are] denied no necessary incident of a fair trial,”<sup>136</sup> but they also have a responsibility to oversee the administration of “complete justice.”<sup>137</sup> Hence, public confidence requires the system to not only acquit the innocent but also convict the guilty. Accordingly, where a defendant’s constitutional rights are not infringed, this analysis weighs in favor of the protection of the public.<sup>138</sup> Thus, because venue defects do not speak to factual guilt or innocence, retrial of these defendants is supported by the policies underlying the justice system.

## 2. *Dismissal Aligns Defendant’s Goals with Goals of the System*

Next, critically analyzing acquittal as a remedy for cases of improper venue elicits the glaring perverse incentives therein. One might wonder why a criminal defendant, aware of a potential defect in venue, would feel compelled to voice their objection prior to a conviction. Rather than litigate and remedy improper venue at the pretrial stage, the defendant is incentivized to see the trial through and voice venue objections only after failing to achieve acquittal at trial. Indeed, the Fifth Circuit, which adopts acquittal as the proper remedy for defective venue, has shown awareness of this strategy in the context of determining when a venue objection is waived:

A holding that Delgado did not waive his venue claim under these circumstances would create severe perverse incentives for criminal defendants in any case in which there are doubts over the legitimacy of venue. A defendant would be able to game the system and obtain a free second shot at an acquittal by waiting for his trial to conclude and then challenging venue in the event of a conviction. Even if—like Delgado—he was well aware of the potential defect in venue, he

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134. Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006); S. Shavell, *The Judgment Proof Problem*, 6 INT’L REV. L. & ECON. 45, 45 (1986).

135. See Gilles, *supra* note 134, at 635.

136. *United States v. Stein*, 452 F. Supp. 2d 230, 255 (S.D.N.Y. 2006) (alteration in original) (quoting *Powell v. Alabama*, 287 U.S. 45, 52 (1932)).

137. *Id.* (quoting *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006)).

138. See Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1202 n.57 (1994) (recognizing, in the sanction context, that “[f]airness in the distribution of protection to victims may lead to unfairness in the distribution of the costs of protection to the criminals” but that the distribution is nonetheless justified).

would have every incentive to forego an improper venue claim until after the trial is over.<sup>139</sup>

The Fifth Circuit's fear of allowing defendants to have their cake and eat it too is well founded, but its solution is incomplete. On its face, broadly interpreting waiver of venue objections is a simple solution that prevents any late, bad-faith objections by defendants; but interpreting venue objections broadly may be constitutionally problematic. Criminal defendants are entitled to proper venue under the Sixth Amendment,<sup>140</sup> and the Supreme Court has instructed that lower courts should "not presume acquiescence in the loss of fundamental rights."<sup>141</sup> In any event, the strategy of broadly interpreting venue waivers still allows defendants to circumvent the system so long as they can argue the venue defect was not "apparent on the face of the indictment."<sup>142</sup> Moreover, because the decision to interpret a defendant's action as waiving venue objections resides in each separate trial court, the risk of inconsistent adjudications is needlessly heightened.

Practically speaking, it is virtually impossible to remove all subjective treatment of criminal defendants as it pertains to waiver of venue objections. Regardless of the remedy for cases of improper venue, different judges will interpret the threshold for waivers in similar cases differently. However, acquittal as a remedy sharpens the injustice of inconsistent adjudications. For example, envision defendants *A* and *B* who have identical cases, heard in different districts, with identical venue objections made post-conviction. If *A*'s judge finds that *A* has waived their venue objection, *A*'s conviction will be sustained. If *B*'s judge finds *B*'s identical objection was not waived, and acquittal is used as the remedy for improper venue, *B* will be acquitted under the same circumstances that *A* was convicted under.

By contrast, where dismissal without prejudice is substituted as the remedy for improper venue, the same concerns surrounding acquittal dissipate. Because defendants could have their cases retried, courts are not pressured to violate defendants' constitutional rights through overbroad waiver findings, and defendants are not incentivized to abuse the system, because a successful ploy would only push them back to square one—a second, costly trial.<sup>143</sup>

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139. *United States v. Delgado-Nunez*, 295 F.3d 494, 497 (5th Cir. 2002).

140. U.S. CONST. amend. VI.

141. *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937); *see also* *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004) ("[B]ecause proper venue is a constitutional right, waivers of venue rights through failure to object should not readily be inferred." (quoting *United States v. Stewart*, 256 F.3d 231, 238 (4th Cir. 2001))).

142. *United States v. Ringer*, 300 F.3d 788, 790 (7th Cir. 2002); *see also* *United States v. Greer*, 440 F.3d 1267, 1271 (11th Cir. 2006); *United States v. Tateo*, 377 U.S. 463, 466 (1964) (referencing the potential chilling effect that mandatory acquittal remedies would have on appellate jurisprudence regarding trial errors).

143. *See generally* Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/> [<https://perma.cc/P6XX-LYNM>].

Dismissing cases without prejudice also promotes consistent adjudications across federal circuits by allowing prosecutors a vehicle for correcting improper venue. Revisiting the example introduced above: if *B*'s judge instead dismisses the case without prejudice, *B*'s prosecutors are allowed to try *B* again on the merits and convict *B*. Thus, the probability of unequal results in identical circumstances is lessened.

This is not to say, however, that consistent substantive results are guaranteed. Differences in the exercise of prosecutorial discretion to try *B*'s case again, differing trial strategies, and differing juries all inject variability into the process. Nevertheless, remedying improper venue with dismissal better promotes equal treatment of similarly situated defendants and reduces the effects of what is functionally a geographically discriminatory state of the law.

### 3. *Dismissal Does Not Unfairly Prejudice Defendants in Defective-Venue Cases*

Finally, continued prosecution of defendants whose first conviction was thrown out on venue grounds cannot be said to create unfairness in the process. The legal principle that cases ought to be decided on their merits holds particularly true in criminal adjudications.<sup>144</sup> Adopting dismissal without prejudice as the remedy for post-conviction venue defects respects this principle because it effectively treats defective-venue cases as mistrials.<sup>145</sup>

To an extent, defendants in improper venue retrials are better informed than defendants whose cases result in mistrials. Even in a mistrial resulting from a hung jury, the parties may be left guessing as to whether their strategy—effective with at least one juror—would be more effective merely by empaneling a new jury. By contrast, defective-venue defendants are aware that their defense strategy in the first trial resulted in a conviction on the substantive elements of the offense. This allows the defense to better prepare for a second trial and provides additional information to defendants in evaluating the potential benefits of any renewed plea offers.

Further, dismissal without prejudice does not undermine any traditional protections afforded defendants. Defendants who are acquitted on substantive grounds are not subject to retrial simply because venue is also defective.<sup>146</sup> Moreover, in addition to challenging venue on appeal, de-

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144. Emphasis of the importance of merit-based adjudication of criminal cases is implicit in both evidentiary and constitutional protections provided to criminal defendants. See, e.g., U.S. CONST. amend. V (right against self-incrimination); FED. R. EVID. 403 (allowing for exclusion of otherwise relevant evidence). For a discussion of procedural vehicles for deciding civil cases on the merits, see Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005).

145. See *Tateo*, 377 U.S. at 467 (“A defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all . . .”).

146. See *United States v. Ball*, 163 U.S. 662, 670 (1896) (citing *United States v. Sanges*, 144 U.S. 310 (1892)); see also *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (“Thus,

defendants may challenge the sufficiency of the evidence establishing a substantive element.<sup>147</sup> This argument, if accepted by the appellate court, will mandate a judgment of acquittal.<sup>148</sup> Therefore, dismissal without prejudice does not unfairly prejudice defendants.

#### IV. PROSECUTION UPON REINDICTMENT: CRIMINAL COLLATERAL ESTOPPEL

Accepting dismissal without prejudice as the proper remedy for post-conviction cases of improper venue, one must next determine the scope of retrial as it pertains to venue. Specifically, a determination must be made as to what extent, if at all, prosecutors may be limited in proving venue at the second trial. Under the doctrine of collateral estoppel or “issue preclusion,” “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.”<sup>149</sup> “Unlike its civil counterpart, criminal collateral estoppel is mutual; the defendant may only estop the government from relitigating a fact found against it if that defendant was a party in the first trial.”<sup>150</sup>

Criminal collateral estoppel was addressed in the defective-venue context by the Ninth Circuit in 1988.<sup>151</sup> In *Kaytso*, a defendant (Kaytso) was alleged to have committed assault in Arizona near the Arizona–Utah border.<sup>152</sup> At trial, “the victim could not recall with accuracy the exact location of the crime,” and the government consequently failed to prove venue.<sup>153</sup> As a result, the court dismissed the case without prejudice, and Kaytso was reindicted thereafter; notably, the second indictment again charged that the assault occurred in Arizona.<sup>154</sup> Kaytso then moved to dismiss on double jeopardy grounds, and his motion was denied by the trial court.<sup>155</sup>

On appeal, the Ninth Circuit first rejected Kaytso’s double jeopardy argument<sup>156</sup> and then considered his alternative argument that the government was collaterally estopped from attempting to establish venue in Arizona for a second time.<sup>157</sup> Despite finding that “the formal elements

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whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.”).

147. See *United States v. Hoskins*, No. 3:12cr238, 2020 WL 914302, at \*14 (D. Conn. Feb. 26, 2020).

148. See *Burks v. United States*, 437 U.S. 1, 17 (1978).

149. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); see also *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916) (early Supreme Court decision recognizing collateral estoppel in federal criminal law).

150. Joan E. Sutherland et al., *II. Preliminary Proceedings*, 78 *GEO. L.J.* 1027, 1066–67 (1990) (footnote omitted).

151. *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. The Ninth Circuit’s holding is sound for the reasons discussed *supra* Part III.A.

157. *Kaytso*, 868 F.2d at 1021.

of issue preclusion were established” and conceding that “[c]ollateral estoppel would normally apply in such a situation,” the court rejected applying collateral estoppel to Kaytso’s case.<sup>158</sup> In justifying its decision, the court cited its standard of review and refused to find the trial court abused its discretion.<sup>159</sup> Further, the court recognized the Supreme Court’s direction that “collateral estoppel is not to be applied so narrowly in criminal cases that it operates unfairly to the accused”;<sup>160</sup> however, the court found that declining to apply collateral estoppel to Kaytso’s venue issue did not create unfairness because “[t]he failure of proof at trial was not in regard to any element of the crime or any fact or issue going to the merits of guilt or innocence.”<sup>161</sup> Finally, the court qualified its ruling: “Our decision does not mean that the government is entitled to repeated attempts to establish venue in a series of trials. Requirements of fundamental fairness under the due process clause ultimately control. We do not believe that the limits of due process are exceeded by this single reindictment.”<sup>162</sup>

Contrary to the Ninth Circuit’s holding in *Kaytso*, courts should apply collateral estoppel when retrying improper venue cases. This action is necessary to ensure defendants’ rights to due process are respected. The *Kaytso* opinion is significant for two reasons. First, the Ninth Circuit is the only circuit to have addressed the question and thus acts as a starting point for other courts’ consideration of the question. Second, the Ninth Circuit’s conclusion is exemplary of the sort of unfairness that undermines the legitimacy of dismissal without prejudice as a remedy for improper venue. Indeed, the Ninth Circuit’s failure to apply collateral estoppel to Kaytso’s venue issue allowed the government an unfair “second bite at the apple.”<sup>163</sup>

In critiquing *Kaytso*, it should first be recognized that the Ninth Circuit’s ultimate opinion represented a change of pace from its original holding—that the elements of collateral estoppel were not met because the issue was not “‘litigated’ in the sense of being ‘necessarily decided.’”<sup>164</sup> In its superseding opinion, the court abandoned this argument and instead relied on carving out an entirely novel and narrow exception to collateral estoppel predicated on deferral to trial court discretion.<sup>165</sup> Most importantly, the court’s one-dimensional fairness analysis opens the door for prosecutors to relitigate venue questions that have already been decided.

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158. *Id.* at 1021–22.

159. *See id.* at 1022 (“Even when the elements of collateral estoppel are present, the decision whether to apply [collateral estoppel] is within the discretion of the trial court.”).

160. *Id.* (citing *Ashe v. Swenson*, 397 U.S. 436, 444 & n.9 (1970)).

161. *Id.*

162. *Id.*

163. *Burks v. United States*, 437 U.S. 1, 17 (1978).

164. *United States v. Kaytso*, 850 F.2d 601, 603 (9th Cir. 1988) (quoting *United States v. Webbe*, 755 F.2d 1387, 1388 (9th Cir. 1985), *superseded by* 868 F.2d 1020 (9th Cir. 1988)).

165. *Kaytso*, 868 F.2d at 1022. Thus, it is reasonable to assume that the court no longer felt comfortable with such a declaration.



The unfairness that *Kaytso*'s holding creates is revealed in its application at the district court level.<sup>166</sup> In *United States v. Cestoni*, the district court applying *Kaytso* indicated a creeping reluctance to follow the Ninth Circuit's lead:

Indeed, the government offers little explanation for why it could not have extracted the evidence it now intends to use to establish venue the first time around. Nevertheless, as in *Kaytso*, this order finds that the limits of due process will not be exceeded by allowing the government to prosecute this single reindictment with its purported additional evidence supporting venue.<sup>167</sup>

*Cestoni* could be read in two ways. First, as misunderstanding *Kaytso* to the extent that it may have interpreted the Ninth Circuit as proscribing the application of criminal collateral estoppel to retrials following improper venue reversals. Alternatively, *Cestoni* may be read as a district court bootstrapping its ruling to the collateral estoppel exception created by the Ninth Circuit.

Regardless of its reasoning, *Cestoni* is a prime example of how the Ninth Circuit's *Kaytso* fairness analysis fails. First, the Ninth Circuit's claim that the government's uninhibited retrial of an identical venue assertion is not unfair because venue does not speak to the "merits of guilt or innocence" is flawed.<sup>168</sup> While this is a persuasive argument for why the prosecution should be allowed to retry the defendant,<sup>169</sup> it is not an appropriate argument for allowing the government a second chance to prove venue in the same district. This is especially true considering the government's lowered burden (preponderance of the evidence) for proving venue.<sup>170</sup>

Moreover, the Ninth Circuit's assertion that unfairness is not created by a "single reindictment"<sup>171</sup> is facially perplexing. Because the court recognized that *Kaytso* does not give the government a free pass to "repeated attempts to establish venue,"<sup>172</sup> one might wonder why a single repeated attempt to prove a venue theory would not meet the threshold to constitute a due process violation for unfairness. Indeed, considering the court's arbitrary one-time pass in light of the purposes underlying criminal collateral estoppel shows that the two are fundamentally at odds:

As developed at common law, the doctrine of criminal collateral estoppel incorporated several concerns. First, it reduced the chance that relitigation of an acquitted act could result in the conviction of an innocent defendant. Second, it permitted an acquitted defendant

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166. See *United States v. Cestoni*, No. CR 15-0416 WHA, 2016 U.S. Dist. LEXIS 142828, at \*5-6 (N.D. Cal. Oct. 14, 2016).

167. *Id.* at \*6.

168. *Kaytso*, 868 F.2d at 1022.

169. See *supra* Part III.

170. See, e.g., *United States v. Cameron*, 699 F.3d 621, 636 (1st Cir. 2012); *United States v. Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012); *United States v. Ochoa*, 229 F.3d 631, 636 (7th Cir. 2000).

171. *Kaytso*, 868 F.2d at 1022.

172. *Id.*

to rely on the finality of a prior adjudication. Third, it improved judicial economy by barring relitigation of issues that had already been determined. Fourth, it reduced the possibility of prosecutorial harassment and denied the prosecution the opportunity to improve its case for a second trial.<sup>173</sup>

Permitting the government to prove venue within the originally charged district is hostile to each concern underlying the criminal collateral estoppel doctrine.<sup>174</sup> First, although a conviction overturned on venue grounds does not constitute an acquittal, it should be considered a binding determination that venue was improper within the originally charged district.<sup>175</sup> As such, relitigation of whether venue was proper in the original district directly increases the chance that a defendant may be convicted in what has already been determined to be an improper venue. Second, relitigation of the venue issue prevents the defendant from relying on the appellate court's finding that venue was improper in the original district. Carving out an exception for the venue question would make it the only fact issue *not* subject to criminal collateral estoppel.<sup>176</sup> Third, relitigation of a decided issue is facially disruptive to judicial economy. Although deficient venue cases naturally require relitigation of the substantive issues, as described above, this systemic cost is endured to ensure just adjudication of criminal cases; the same cannot be said of the venue issue because the government has already failed to prove venue in the original district. Fourth, the possibility of prosecutorial harassment is raised by allowing the prosecution the opportunity to improve its case for a second trial, as exemplified by *Cestoni*.<sup>177</sup>

To some degree, the application of collateral estoppel to the venue issue on retrial may result in acquittals by exhaustion of potential venues. If the government failed to put forth sufficient evidence that a noncontinuous offense occurred in a specific district, criminal collateral estoppel would prevent the prosecution from remedying this error at a retrial, resulting in an acquittal for want of venue. But this threat is pervasively applicable to any element of an offense. Moreover, the practical purpose for allowing retrial of defective-venue cases is primarily to permit prosecutors to remedy venue where it was not plainly evident (i.e., cases where a jury would find venue at trial despite legally insufficient evidence)—not to provide a safety net for prosecutorial incompetence. In any event, most

173. Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1732 (1996) (footnotes omitted).

174. Indeed, in *Kaytso*, the Ninth Circuit conceded that the elements of collateral estoppel were present. *Kaytso*, 868 F.2d at 1021–22.

175. Cf. *Kendall v. Overseas Dev. Corp.*, 572 F.2d 218, 220 (9th Cir. 1978) (applying civil collateral estoppel to the issue of personal jurisdiction).

176. See generally *Ferenc v. Dugger*, 867 F.2d 1301, 1303 (11th Cir. 1989) (applying collateral estoppel to prior finding of the lawfulness of a police search); *United States v. Kramer*, 289 F.2d 909, 917 (2d Cir. 1961) (applying collateral estoppel to prior acquittal); *Yawn v. United States*, 244 F.2d 235, 237 (5th Cir. 1957) (describing the purpose of criminal collateral estoppel as prohibiting the government from “establish[ing] [a] precise fact . . . [already] decided by another [c]ourt”).

177. See *United States v. Cestoni*, 185 F. Supp. 3d 1184, at \*6 (N.D. Cal. Oct. 14, 2016).

cases in the above hypothetical are extremely rare and would nevertheless result in acquittals by jury. Hence, the prospect of allowing for repeated litigation of venue in the original district is so hostile to the due process rights of criminal defendants as to shift the justice-balancing equation introduced in Part III.<sup>178</sup>

Criminal collateral estoppel has been described as “an important source of protections unavailable in the Double Jeopardy Clause.”<sup>179</sup> Its application to retrials for cases of defective venue follows this mold by respecting both the government’s right to retry a case and the defendant’s right to not relitigate the same venue issue endlessly. On its face, the Ninth Circuit’s *Kaytso* venue relitigation exception to collateral estoppel is a wooden, arbitrary rule that should not be followed. Instead, when retrying cases of improper venue, courts should apply the doctrine of collateral estoppel to prevent the government from attempting to prove venue in the same district it failed to prove in the original proceeding; in other words, a new trial should require prosecution in a new district.

## V. CONCLUSION

In summation, the Supreme Court should act swiftly to prescribe a uniform remedy for defective-venue cases. Maintaining the status quo perpetuates spatial discrimination within the criminal justice system. The current approaches that federal circuits have taken to remedy defective venue fail to properly balance the interests of defendants and the public at large. The Fifth and Eighth Circuits’ acquittal remedy provides for logically inconsistent legal treatment of venue, unnecessarily transfers discretionary acquittal power to the courts, and is hostile to the policies underlying the criminal justice system. The Ninth Circuit’s dismissal remedy, as applied, is overly broad to the extent it allows the government, on retrial, the opportunity to prove venue in the same district. Accordingly, a more nuanced approach is necessary. The author urges the Supreme Court to: (1) adopt dismissal without prejudice as the uniform remedy for post-conviction defective-venue cases, and (2) instruct that courts apply criminal collateral estoppel on retrial to protect defendants’ rights to a fundamentally fair process. Until it does so, the remedy for post-conviction defective venue will act as a functional legal loophole in some districts and a fundamentally unfair vehicle for endless reprosecution in others.

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178. See *Sanchez v. United States*, 341 F.2d 225, 228 (9th Cir. 1965) (describing repeated litigation of an issue as “fundamental[ly] unfair[.]”).

179. *The Due Process Roots of Criminal Collateral Estoppel*, *supra* note 173, at 1731.