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Territorial Jurisdiction in Ohio Post-*Wogenstahl*

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— Comment —

TERRITORIAL JURISDICTION IN OHIO POST-*WOGENSTAHL*

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INTRODUCTION

"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 . . . ."[1]

In 1991, ten-year old Amber Garrett disappeared from her home in Harrison, Ohio, a town lying on the Ohio-Indiana border.[2] Authorities would later find Amber's body near Bright, Indiana, not far from the Ohio border.[3] Her cause of death was multiple stab wounds and blunt force trauma to the head—injuries that did not occur in the area where authorities found her body.[4] An investigation implicated Jefferey Wogenstahl, an acquaintance of Amber's mother.[5] The State of Ohio subsequently indicted Wogenstahl for Amber's murder.[6] Wogenstahl

1. U.S. CONST. amend. VI.
2. State v. Wogenstahl, 84 N.E.3d 1008, 1009–10 (Ohio 2017).
3. *Id.* at 1011.
4. *Id.* at 1011–12.
5. *Id.* at 1009.
6. *Id.* at 1012.

was convicted of aggravated murder in the Ohio Court of Common Pleas and was sentenced to death.[7]

Wogenstahl's case made its way to the Supreme Court of Ohio, where he challenged Ohio's jurisdiction over his case.[8] Wogenstahl asserted that the evidence presented at his trial proved Amber's murder occurred in Indiana because an eyewitness observed Amber alive in a car heading in the direction of Indiana.[9] The State of Ohio, for its part, suggested that the death occurred in Ohio because evidence showed that Wogenstahl had taken Amber to his Ohio apartment.[10] The majority opinion written by Justice Sharon L. Kennedy found neither of these arguments persuasive and concluded that the location of Amber's murder could not be conclusively determined.[11]

Without any conclusive determination of where the murder took place, the majority relied on Subsection (D) of Ohio's criminal law jurisdiction statute.[12] Subsection (D) provides:

> When an offense is committed under the laws of this state, and it appears beyond a reasonable doubt that the offense or any element of the offense took place either in this state or in another jurisdiction or jurisdictions, but it cannot reasonably be deter–mined in which it took place, the offense or element is conclusively presumed to have taken place in this state for purposes of this section.[13]

Relying on this provision, the court presumed that Amber's murder took place in Ohio and jurisdiction was therefore proper in the state for Wogenstahl's aggravated murder prosecution.[14]

The *Wogenstahl* majority ended its analysis there, finding a conclusive, statutory grant of jurisdiction to the Ohio courts.[15] Justice Judith L. French, however, raised in her concurring opinion a potential problem with this conclusion: "there is a reasonable question as to the constitutionality" of Subsection (D).[16] Although declining to make a conclusion on the constitutionality of the statute, Justice French

7. *Id.*
8. *Id.*
9. *Id.* at 1015.
10. *Id.* at 1013.
11. *Id.* at 1016.
12. *Id.*
13. OHIO REV. CODE § 2901.11(D) (2005).
14. *Wogenstahl*, 84 N.E.3d at 1016.
15. *Id.*
16. *Id.* at 1016–17 (French, J., concurring).

highlighted decisions from the Supreme Court of the United States which hold that mandatory presumptions that remove the burden of proof from the prosecution violate the Due Process Clause of the Fourteenth Amendment.[17] Because, "by its plain terms," Subsection (D) creates a mandatory presumption of jurisdiction, Justice French wrote that "it appears, then, that [Subsection (D)] violates the rule [from the Supreme Court of the United States] *if* jurisdiction is an element of the offense that the state bears the burden of proving."[18]

This comment seeks to answer the question left unanswered by Justice French's concurring opinion: whether Subsection (D) of Ohio's criminal jurisdiction statute is constitutional under the Due Process Clause of the Fourteenth Amendment. Part I will provide background on territorial jurisdiction in the United States. This section will address both the common-law development of territorial jurisdiction and the typical state statutes that define a state's territorial jurisdiction. This part will conclude that territorial jurisdiction is fundamentally about sovereign power and as such is generally confined by a state legislature's willingness to enforce its laws. Despite this, states tend to restrict their jurisdiction to cases where there is a sufficient territorial connection between the criminal conduct and the state. Part II will then address the due process limits associated with creating evidentiary presumptions. This section will ultimately conclude that territorial-scope statutes that create mandatory presumptions violate due process because territorial jurisdiction is a necessary fact that the prosecution must prove to ensure a fair, non-arbitrary prosecution. Part III will then look at two specific territorial-scope provisions that create evidentiary presumptions: (1) a presumption of jurisdiction when a body is found in the state; and (2) the presumption in Subsection (D) of Ohio's statute that creates a presumption whenever the jurisdiction cannot be reasonably determined. Part III will conclude that while the first type of presumption is constitutional because it provides for a permissive inference with a reasonable connection to the state, the one in Subsection (D) does not survive constitutional muster because it creates a mandatory presumption. Part IV will present some potential

17. *Id.* at 1017 (citing Francis v. Franklin, 471 U.S. 307, 314 n.2, 325 (1985) and Sandstorm v. Montana, 442 U.S. 510, 523–24 (1979)).

18. *Id.* Chief Justice Maureen O'Connor, joined by Justice William M. O'Neill, filed a dissenting opinion, in which she argued that the evidence conclusively showed that the murder took in Indiana. *Id.* at 1018 (O'Connor, C.J., dissenting). In the Chief Justice's view, the evidence showed that Amber was still alive in Wogenstahl's car as it headed down a road that would not reenter Ohio, but instead could only lead to Indiana. *Id.* at 1019. The Chief Justice refuted the majority's view that Wogenstahl may have inflicted the fatal injuries before the witness saw Amber in the vehicle as lacking any evidence. *Id.* Therefore, the Chief Justice would have held that Wogenstahl should have been prosecuted in Indiana, not in Ohio. *Id.* at 1021.

solutions to address the problems with Subsection (D), including whether Wogenstahl can be re-prosecuted in Indiana.

I. BACKGROUND OF TERRITORIAL JURISDICTION

A. Common Law Background

Jurisdiction refers to a variety of limitations on a court's authority to try a particular action or charge.[19] The subject of this comment deals exclusively with territorial jurisdiction, those limits on authority stemming from "the permissible geographic scope of penal legislation."[20] The authority of a state to enforce its laws has historically been limited by its territorial boundaries.[21] At common law, this "territorial principle" was the exclusive grounding for jurisdiction; a government could enforce its laws over a criminal defendant only if the offense conduct took place, or the result of the criminal conduct happened, within its territorial limits.[22] The territorial principle has its roots in the concept of sovereignty.[23] Because the criminal breached the King's (or Queen's) peace, the monarch was entitled under the law to remedy the damage to his or her dignity by punishing the offender.[24] This naturally limited jurisdiction only to the extent where there could be an affront to the monarch's dignity, i.e. within the monarch's realm.[25]

19. 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 16.1(a) (4th ed. 2015 & Supp. 2020).

20. *See* 4 LAFAVE ET AL., *supra* note 19, § 16.4(a). In addition to territorial jurisdiction, the term jurisdiction also refers to "(1) the authority of a particular court to try a certain level of offense . . . ; (2) the authority of a particular court to adjudicate a particular type of action . . . ; [and] (3) the court's authority to try the particular person . . . ." *Id.* § 16.4(a) n.1; *see also* State v. Rimmer, 877 N.W.2d 652, 661 (Iowa 2016).

21. *See* The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction."). *See also* Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 238 (1931) ("The authority of legislatures and courts in criminal matters is supposed to be circumscribed by the territorial boundaries of the state.").

22. 4 LAFAVE ET AL, *supra* note 19, at § 16.4(c).

23. Albert Levitt, *Jurisdiction over Crimes*, 16 J. AM. CRIM. L. & CRIMINOLOGY 316, 328 (1925).

24. *Id.*

25. *Id.*

The location of the prosecution in medieval England was further restricted by the right to a trial by a "jury of the vicinage," a jury made up of citizens of the county in which the crime took place.[26] A defendant could *only* be tried under the common law in the county where he or she committed the offense and nowhere else.[27] The reasoning for this being that only a jury of the vicinage could fully understand the facts of the case to effectively adjudicate the crime.[28] Common-law courts were therefore required to select a single jurisdiction where the defendant could be tried.[29] Courts would choose this jurisdiction by selecting a single locus where the "gist of the offense" occurred, which would then be the sole forum where the government could prosecute the defendant.[30] In the case of murder, for example, the offense occurred in the jurisdiction where the fatal force "struck" the victim because the gist of the homicide offense was causing the death, not the death itself.[31]

At the time of the Founding, the place of a criminal prosecution was a concern to the Framers.[32] Their complaints against King George III, after all, included one "[f]or transporting [colonists] beyond Seas to

26. Williams v. Florida, 399 U.S. 78, 93 n.35 (1970). Although the word "vicinage" technically means neighborhood, English courts could empanel juries of the county, rather than strictly a jury of the neighborhood. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *350–51).

27. 3 EDWARDO COKE, INSTITUTES OF THE LAWS OF ENGLAND 48 (1797). *See also* State v. Smith, 421 N.W.2d 315, 318 (Minn. 1988) (stating common law did not recognize concurrent jurisdiction over offenses); State v. Hall, 19 S.E. 602, 605 (N.C. 1894) (same).

28. *See* 3 COKE, *supra* note 27, at 48.

29. *See* 4 LAFAVE ET AL., *supra* note 19, at § 16.4(c).

30. Larry Kramer, *Jurisdiction over Interstate Felony Murder*, 50 U. CHI. L. REV. 1431, 1434 (1983).

31. 3 COKE, *supra* note 27, at 48. For a discussion of common law "loci" for different offenses besides murder, see text accompanying 4 LAFAVE ET AL., *supra* note 19, at § 16.4(c) n.48–55. It is worth noting that the concept of "jury of the vicinage" sounds more like venue, the location of the prosecution, rather than territorial jurisdiction, the court with authority to try the defendant. Most courts do treat vicinage as being non-jurisdictional, *see, e.g.*, State v. Bowman, 588 A.2d 728, 730 (Me. 1991), while others discuss it in the same breath as territorial jurisdiction, *see* State v. Rimmer, 877 N.W.2d 652, 664–65 (Iowa 2016). Yet the common law vicinage analysis is the same as the one used by state courts to decide whether the state has territorial jurisdiction. *See* Commonwealth v. Apkins, 146 S.W. 431, 434 (Ky. 1912) (determining jurisdiction proper in Ohio, not Kentucky, because defendant was "struck" in Ohio). *See also* 4 LAFAVE ET AL., *supra* note 19, at § 16.4(a) ("The issues which [territorial jurisdiction] presents are often roughly analogous to those considered in determining venue.").

32. United States v. Cabrales, 524 U.S. 1, 6 (1998).

be tried for pretended offences."[33] Consequently, two provisions of the Constitution preserve a right to be tried in the state where the crime shall have been committed: Article III[34] and the Sixth Amendment.[35] Concerns about Article III not adequately guaranteeing the common-law right to a "jury of the vicinage" indeed formed part of the impetus for drafting the Sixth Amendment in the first place.[36]

The applicability of these provisions on the states, however, is dubious. Most obviously, the Supreme Court[37] and state supreme courts[38] have ruled that the specific provision in Article III applies only to criminal proceedings in federal courts. On the other hand, the so-called "vicinage clause" in the Sixth Amendment, the portion of the amendment requiring a trial by a jury in the judicial district where the crime was committed, has not been incorporated along with the rest of the Sixth Amendment's "jury clause."[39] The United States Senate, at the time the Sixth Amendment was being drafted, opposed the original wording of the Amendment, which included an explicit requirement that juries be drawn from the "vicinage."[40] In a letter to Edmund Pendleton discussing the Senate's debates on the amendment, James Madison indicated that the Senate did not consider a constitutional amendment preserving the right to a jury of the "vicinage" necessary because the then-pending Judiciary Act of 1789 would adequately preserve that right.[41] Because the Judiciary Act applied to the federal court system and not the states, the Framers likely viewed this

33. THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).

34. U.S. CONST. art. III, § 2, cl. 3 ("[S]uch [criminal] Trial shall be held in the State where the said Crimes shall have been committed . . . .").

35. *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

36. Williams v. Florida, 399 U.S. 78, 93–94 (1970); *see also* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 105 (1924).

37. Nashville, Chattanooga & St. Louis Ry. Co. v. Alabama, 128 U.S. 96, 101 (1888).

38. *See, e.g.*, *Ex parte* McNeely, 14 S.E. 436, 440 (W. Va. 1892).

39. *See, e.g.*, Price v. Superior Ct., 25 P.3d 618, 625–56 (Cal. 2001) (holding the Sixth Amendment's vicinage clause not incorporated to the states); Schmutz v. State, 440 S.W.3d 29, 36 (Tex. Crim. App. 2014) (same); Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004) (collecting cases holding the same). *See also* 4 LAFAVE ET AL., *supra* note 19, at text accompanying § 2.6(b) nn.48–52.

40. *Williams*, 399 U.S. at 95.

41. Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), https://founders.archives.gov/documents/Madison/01-12-02-0268 [https://perma.cc/H7YW-THX4].

provision as restricting the federal government from prosecuting citizens in any judicial district, rather than codifying a right to be tried within the territory where a crime was committed in every criminal proceeding.

Although the Constitution does not explicitly guarantee to the defendant the right to be tried where the crime was committed, the concept of territorial jurisdiction nonetheless serves an important role in our system of federalism. Chief Justice John Marshall in *Schooner Exchange v. McFaddon*,[42] wrote that every sovereign has "[a] full and absolute territorial jurisdiction" that is "incapable of conferring extra-territorial power."[43] The Constitution preserved for the state governments "certain exclusive and very important portions of sovereign power,"[44] including the power to enforce a criminal code.[45] The states, in other words, have a "historic right and obligation . . . to maintain peace and order within their confines."[46] A state's interest in vindicating violations of its own laws could never be satisfied by the prosecution of that crime in another state.[47]

Because of this sovereign right, state courts in the nineteenth century and early twentieth century tended not to assert jurisdiction over a defendant accused of homicide when, per the common-law rule, the defendant struck the victim in another state.[48] But then the rigidity of this rule gave way to the realities of administering justice in an increasingly mobile and interconnected world.[49] Even at an early stage, courts started breaking away from the rigid definitions set out in the common law, finding flexibilities that allowed for multiple jurisdictions

42. 11 U.S. (7 Cranch) 116 (1812).

43. *Id.* at 137.

44. Heath v. Alabama, 474 U.S. 82, 93 (1985) (quoting THE FEDERALIST NO. 9 (Alexander Hamilton)).

45. *Id.* (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601 (1982)).

46. *Id.* (quoting Bartkus v. Illinois, 359 U.S. 121, 137 (1959)).

47. *Id.*

48. *See, e.g.*, Commonwealth v. Apkins, 146 S.W. 431, 432, 434 (Ky. 1912) (holding jurisdiction proper in Ohio when victim ingested poison in Ohio but died in Kentucky); State v. Gessert, 21 Minn. 369, 370 (1875) (holding jurisdiction proper in Minnesota when defendant stabbed victim in Minnesota but victim died in Wisconsin); State v. Carter, 27 N.J.L. 499, 502–03 (N.J. 1859) (holding jurisdiction proper in New York when defendant fatally injured victim in New York but victim later died in New Jersey). *See also* United States v. Guiteau, 12 D.C. (1 Mackey) 498, 499, 536–37 (D.C. 1882) (holding defendant who shot President James A. Garfield in the District of Columbia had to be prosecuted in the District even though President Garfield died in New Jersey).

49. Levitt, *supra* note 23, at 334.

to exist over certain crimes in certain contexts.[50] The Supreme Judicial Court of Massachusetts, for instance, recognized that at common law a Massachusetts court could exercise jurisdiction over a homicide prosecution when the victim died in the state but was struck on the high seas because the death was the result of the "continuing operation of the [defendant's] mortal blow."[51] Although Massachusetts was willing to recognize this flexibility in the common law when the crime occurred on the high seas, other states were less willing to do so when it involved challenging the jurisdiction of another state.[52]

The Supreme Court's 1911 decision in *Strassheim v. Daily*[53] was the first time that the Court endorsed the expansion of territorial jurisdiction beyond the narrow confines of the strict common-law rule. In *Strassheim*, the Court considered whether a fraud perpetrated in a state violated state law, despite the fact that the defendant never entered the state.[54] Justice Holmes, writing for the Court, held that such actions violated the laws of the state where the harm of the crime took place, stating:

> Acts done outside a jurisdiction, but intended to produce and producing *detrimental effects* within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.[55]

From the statement "detrimental effects," many state courts and legislatures concluded that a state could extend its jurisdiction to prosecutions beyond the previously narrow confines of the common law.[56]

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50. Commonwealth v. Adair, 89 S.W. 1130, 1131 (Ky. 1906) ("The [common] law is generally elastic enough to defeat tricks, without enabling statutes for the purpose."). For a detailed description of these common-law exceptions, see Kramer, *supra* note 30, at 1435–36.

51. Commonwealth v. Macloon, 101 Mass. 1, 4–5, 10 (1869).

52. *See Ex parte* McNeely, 14 S.E. 436, 439 (W. Va. 1892) (disagreeing with *Macloon* that common law created jurisdiction over defendant when a person was struck in another state and died in the forum state).

53. 221 U.S. 280 (1911).

54. *Id.* at 281–82, 284–85.

55. *Id.* at 285 (emphasis added).

56. *See, e.g.*, State v. Stepansky, 761 So. 2d 1027, 1035–36 (Fla. 2000); *In re* Vasquez, 705 N.E.2d 606, 610–11 (Mass. 1999); State v. Wootten, 756 A.2d 1222, 1225 (Vt. 2000); *see also* 4 LAFAVE ET AL., *supra* note 19, at § 16.4(c); *infra* text accompanying notes 76–77; discussion of statutes expanding jurisdiction *infra* Part II.

The Court affirmed in *United States v. Bowman*[57] that the extraterritorial application of a government's laws did not need to be explicitly stated in a statute.[58] Rather, a government could extraterritorially enforce its laws by criminalizing conduct that could logically occur outside the jurisdiction.[59] The Court cited as examples federal statutes that criminalized interfering with the operation of American naval and consular officers.[60] In the Court's view, because these statutes criminalized conduct that would likely occur outside the territorial borders of the United States, the statutes would be useless if their application was limited to United States territory.[61]

The Supreme Court in *Skiriotes v. Florida*[62] appears to have removed an explicit requirement that any criminal conduct occur within a state as long as the defendant is a citizen of the forum state. In *Skiriotes*, Florida prosecuted a Florida fisherman for illegally fishing for sponges on the high seas.[63] The Court framed the discussion as the extent of state power in prosecuting defendants accused of violating state statutes beyond the territorial boundaries of the state.[64] The Court unanimously held that Florida could exercise jurisdiction over the defendant because the state retained a degree of sovereignty, shared with the federal government, that allowed it to assert jurisdiction over its citizens on the high seas.[65] In the Court's view, a state may "govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress."[66] Some commentators have advocated that *Skiriotes* allows for citizenship jurisdiction rather than a strictly

57. 260 U.S. 94 (1922).

58. *See id.* at 98.

59. *Id.*

60. *Id.* at 99.

61. *Id.* at 99–100.

62. 313 U.S. 69 (1941).

63. *Id.* at 69–70. Florida actually claimed that the defendant was within its territorial waters, which was three leagues (nine nautical miles) from the shore, according to the state's 1885 constitution. *Id.* at 70. This claim was more than what the federal government claimed in international treaties with Spain and in diplomatic correspondence discussing the territorial waters of the United States around Florida. *Id.* at 71. The defendant primarily argued that the state did not have jurisdiction because the state could not constitutionally assert jurisdiction beyond waters claimed by the federal government. *Id.* The Court assumed this was true. *Id.* at 74.

64. *Id.* at 74–75.

65. *Id.* at 77.

66. *Id.*

territorial-based jurisdiction.[67] There is also some early case precedent from state courts that suggest this is possible.[68] Most state courts now, however, limit the holding in *Skiriotes* to state citizens on the high seas, not on land in other states.[69]

B. Territorial-Scope Statutes

Most states today have codified their criminal jurisdictional rules in the form of territorial-scope statutes.[70] The earliest versions of these statutes addressed specific crimes rather than broadly granting authority to prosecute any crime with conduct occurring outside the state.[71] In the case of homicide, these statutes generally provided for jurisdiction in the state where the victim died, not just where the injury occurred as allowed by the common law.[72] Rather than trying to assert jurisdiction over crimes committed outside the state, instead these statutes "pull[ed] the crime into the state where the death occurred."[73] State supreme courts, hearing challenges to these statutes, accepted their constitutionality, citing legislatures' sovereign power to declare certain acts offenses against the state.[74] This included courts that otherwise believed in upholding the strict territorial rule from the common law.[75]

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67. *See* 4 LAFAVE ET AL., *supra* note 19, at § 16.4(c); *infra* text accompanying notes 116–117; Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1163–64 (1971).

68. *See, e.g.*, Commonwealth v. Gaines, 4 Va. 172, 181 (1819) (upholding statute creating jurisdiction over Virginia defendants who committed larceny in the District of Columbia); State *ex rel* Chandler v. Main, 16 Wis. 398, 400–01 (1863) (upholding statute that criminalized voter fraud committed by Wisconsin soldiers fighting in the Civil War).

69. *See* 4 LAFAVE ET AL., *supra* note 19, at § 16.4(c) n.118 (collecting cases).

70. *Id.* at § 16.4(c).

71. *See* Berge, *supra* note 21, at 249, 251.

72. *See, e.g.*, MASS. GEN. LAWS. ch. 171, § 19 (1862); THE CODE OF WEST VIRGINIA 896 (John A. Warth ed., 3d ed. 1891) (reporting W. VA. CODE ch. 144, § 6). The English parliament also passed a statute allowing homicide trials to occur both in the place where the victim was struck and where the victim died. 3 COKE, *supra* note 27, at 48.

73. Berge, *supra* note 21, at 251.

74. *See* Hunter v. State, 40 N.J.L. 495, 510 (N.J. 1878) (holding that state legis–lature had authority to pass territorial-scope statute under its unrestricted plenary powers granted by the state constitution); State v. Hall, 19 S.E. 602, 603 (N.C. 1894) ("Statutes of this character 'are founded upon the general power of the legislature . . . to declare any willful or negligent act which causes an injury to person or property within its territory to be a crime.'" (citation omitted)).

75. *See ex parte* McNeely, 14 S.E. 436, 439–40 (W. Va. 1892) (upholding territorial-scope statute that conferred jurisdiction over homicide prose–

The real transformation in territorial-scope statutes came after *Strassheim*. Emboldened by the language in *Strassheim*, state legislatures passed the first generation of territorial-scope statutes that expanded their state's territorial jurisdiction to prosecute crimes generally.[76] These early statutes generally provided jurisdiction in four contexts—for prosecutions of: (1) crimes that began outside the forum state but were consummated within the forum state; (2) crimes that began within the forum state but were consummated outside; (3) crimes committed in whole or in part within the forum state; and (4) accessories to crimes committed in the forum state physically located outside the forum state.[77]

Courts, while generally upholding these statutes, were still hesitant to assert jurisdiction when the connection between the criminal conduct and the forum state was minimal. When interpreting provisions providing jurisdiction for acts within the forum state, courts often applied Justice Cardozo's interpretation in *People v. Werblow*,[78] that these provisions provide jurisdiction only when the in-state conduct was significant enough to "amount to an attempt" to commit that crime within the state.[79] As an example, courts applying this attempt rule do not consider jurisdiction proper over a homicide prosecution when the plan was formulated in the state but the defendant's plan was to travel outside of the state to commit the murder.[80] Similarly, courts generally required that the defendant be aware that the consequence of his or her criminal conduct would occur in the state seeking prosecution.[81]

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cutions when victim died in the state despite believing common law did not allow for it).

76. 4 LAFAVE ET AL., *supra* note 19, § 16.4(c); Kramer, *supra* note 30, at 1436–37. This is not to say that every state expanded their jurisdiction through statutes. Some states adopted the "detrimental effects" doctrine from *Strassheim* through judicial rulings rather than through statutes. *See, e.g.*, State v. Butler, 724 A.2d 657, 663 n.5 (Md. 1999) (stating Maryland legislature has not expanded state's jurisdiction through statute).

77. *See, e.g.*, Berge, *supra* note 21, at 254 n.40 (collecting statutes).

78. 148 N.E. 786 (N.Y. 1925).

79. *Id.* at 789; People v. Buffum, 256 P.2d 317, 320 (Cal. 1953); People v. Holt, 440 N.E.2d 102, 106 (Ill. 1982); State v. Harrington, 260 A.2d 692, 697 (Vt. 1969); State v. Lane, 771 P.2d 1150, 1156–57 (Wash. 1989) (Utter, J., concurring). *See also* 4 LAFAVE ET AL., *supra* note 19, § 16.4(c).

80. *See* People v. Garton, 412 P.3d 315, 336 (Cal. 2018). California still uses a territorial-scope statute based on the first generation of such statutes. *See* CAL. PENAL CODE § 27 (West 2014); *see also* 4 LAFAVE ET AL., *supra* note 19, § 16.4(c) n.90.

81. *See, e.g.*, Commonwealth v. Fafone, 621 N.E.2d 1178, 1179 (Mass. 1993) (holding jurisdiction not proper in Massachusetts over defendant who sold drugs in Florida to a distributor in Massachusetts because defendant did not know distributor was located in Massachusetts); Moreno v. Baskerville,

Most states now have territorial-scope statutes that are modelled after the Model Penal Code.[82] Model Penal Code Section 1.03 provides jurisdiction over a broader range of conduct occurring within and without the state than the earlier territorial-scope statutes. Like many of the early statutes, however, these statutes still require actual proof that some criminal conduct occurred within the state.[83] Furthermore, like the early statutes as well, the Model Penal Code provides for jurisdiction when either the defendant commits acts within the state in furtherance of a crime or intends to cause harm in the state.[84] States, in other words, have been reluctant to adopt statutes that vitiate the territorial principle. Despite some endorsement from the Supreme Court to broaden jurisdiction, territorial-scope statutes still require some sort of nexus between the crime and the territory of the state.

II. DUE PROCESS AND EVIDENTIARY PRESUMPTIONS

Considering that state governments have broad discretion to establish jurisdiction through the use of presumptions, it is important to consider what limits there are in creating an evidentiary presumption in a criminal case. The 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."[85] The basic principle of fairness inherent in the Due Process Clause prevents the prosecution from relying on evidentiary presumptions that remove its burden to prove its case beyond a reasonable doubt.[86] Mandatory presumptions—presumptions that require a jury to reach a certain conclusion if the prosecution proves certain predicate facts—are not allowed in criminal cases when the presumption transfers the prosecution's burden of persuasion to the defendant.[87] On the other

452 S.E.2d 653, 655 (Va. 1995) (holding jurisdiction not proper in Virginia over defendant who sold drugs to distributor in Arizona who then distributed it in Virginia because defendant did not sell drugs knowing they would be distributed in Virginia).

82. 4 LAFAVE ET AL., *supra* note 19, § 16.4(c).

83. *See* MODEL PENAL CODE § 1.03(1) (AM. L. INST. 1985). For examples of territorial-scope statutes modelled on the Model Penal Code that have actually been implemented, see HAW. REV. STAT. § 701-106 (2017); ARIZ. REV. STAT. § 13-108 (2021) (providing for jurisdiction over an offense if "conduct outside this state constitutes an attempt or conspiracy to commit an offense within this state *and* an act in furtherance of the attempt or conspiracy occurs *within this state*") (emphasis added).

84. *See* MODEL PENAL CODE § 1.03(1) (AM. L. INST. 1985).

85. *In re* Winship, 397 U.S. 358, 364 (1970).

86. Francis v. Franklin, 471 U.S. 307, 313 (1985).

87. *Id.* at 314 (citing Patterson v. New York, 432 U.S. 197, 215 (1977)).

hand, permissive inferences, which allow the jury to decide whether to reach a certain conclusion or not, are allowed in criminal cases as long as the "suggested conclusion" is one "that reason and common sense justify in light of proven facts before the jury."[88]

The restriction against mandatory presumptions, however, is limited to when the presumption relieves the prosecution from having to prove an *element* of the offense.[89] This therefore necessitates a discussion on whether territorial jurisdiction is an element of a criminal offense. The sole consensus among state courts is that the prosecution bears the burden to prove jurisdiction; there is no consensus on whether it is an element of the offense.[90] Some state courts hold that jurisdiction is an element of the offense[91] while others do not.[92] Courts holding that jurisdiction is an element of the offense generally do so because the fact that the crime occurred against the laws of the forum state is necessary for there to be a crime in that state in the first place.[93]

There is a considerable degree of consensus, however, that jurisdiction must be proven beyond a reasonable doubt. A large majority of state courts require that the prosecution prove jurisdiction beyond a reasonable doubt to a jury, at least when the fact of

88. *Id.* at 314–15.

89. *Id.* at 314.

90. 4 LAFAVE, *supra* note 19, § 16.4(d).

91. *See, e.g.*, Alkhalidi v. State, 753 N.E.2d 625, 627 (Ind. 2001); State v. Casilla, 829 A.2d 1095, 1099 (N.J. 2003); State v. Liggins, 524 N.W.2d 181, 184 (Iowa 1994). The Model Penal Code defines jurisdiction as being an element of an offense. MODEL PENAL CODE § 1.13(9)(e) (AM. L. INST. 1985). Some states adopted this provision into their statutory law. *See, e.g.*, HAW. REV. STAT. § 701-114(1)(c) (2017); N.H. REV. STAT. ANN. § 625:11(III)(e) (2016). Many, however, have not done so despite adopting other portions of the Model Penal Code. *See, e.g.*, State v. Willoughby, 892 P.2d 1319, 1327 (Ariz. 1995).

92. *See, e.g.*, Calton v. State, 176 S.W.3d 231, 234–35 (Tex. Crim. App. 2005); *Willoughby*, 892 P.2d at 1327; State v. Butler, 724 A.2d 657, 663 n.5 (Md. 1999).

93. *See* Sundling v. State, 679 N.E.2d 988, 991 (Ind. Ct. App. 1997). The court in *Sundling* explained:

> Territorial jurisdiction is not necessarily thought of as an element of a crime. Nevertheless, the territorial jurisdiction is a fact that must be established. Indiana Statutes do not define jurisdiction as an element of the offense; however, where the law has established the necessity of a certain fact for an existence of that fact is treated much like an element of the offense. In this case then territorial jurisdiction is an element of the offense that must be proved by the state.

Id. (quoting McKinney v. State, 553 N.E.2d 860, 862 (Ind. Ct. App. 1990)).

jurisdiction is disputed.[94] The states that treat jurisdiction as an element naturally require proof beyond a reasonable doubt because it is part of the government's case.[95] The states that do not consider jurisdiction as an element, on the other hand, require proof beyond a reasonable doubt for policy reasons.[96] States often justify this more stringent standard of proof because of the gravity of a court erroneously exercising its jurisdiction over a defendant.[97] Ohio, for its part, requires the prosecution to prove *venue* beyond a reasonable doubt to sustain a conviction under Ohio law but has not addressed jurisdiction.[98]

Even if it is not entirely clear whether jurisdiction is always an element of an offense, there are some considerations that suggest that courts should treat jurisdiction as an element at least when jurisdiction is in dispute. One such consideration is the fairness of the prosecution. It is self-evident that defendants challenging the overreach of a state statute will rely on due process when challenging it.[99] Several courts, in fact, explicitly require a due process fairness analysis when determining the legality of a state's territorial jurisdiction.[100] The American Law Institute, when promulgating the Model Penal Code, recognized that some restrictions on a state's ability to exercise jurisdiction is necessary to ensure "the state's assertion of jurisdiction does not result in

94. *See Willoughby*, 892 P.2d at 1325–26 (collecting cases). *See also* 4 LAFAVE ET AL., *supra* note 19, § 16.4(d). A few states only require proof of jurisdiction by a preponderance of the evidence rather than beyond a reasonable doubt. *See* People v. Cavanaugh, 282 P.2d 53, 59 (Cal. 1955); UTAH CODE ANN. § 76-1-501(3) (2017).

95. *See Liggins*, 524 N.W.2d at 184–85 (collecting cases). *See also* 4 LAFAVE ET AL., *supra* note 19, § 16.4(d).

96. *See* 4 LAFAVE ET AL., *supra* note 19, § 16.4(d).

97. *See, e.g.*, State v. Baldwin, 305 A.2d 555, 559 (Me. 1973); Lane v. State, 388 So. 2d 1022, 1028–29 (Fla. 1980); *see also* 4 LAFAVE ET AL., *supra* note 19, at § 16.4(d) n. 137.

98. State v. Hampton, 983 N.E.2d 324, 328 (Ohio 2012); State v. Wogenstahl, 84 N.E.3d 1008, 1017 (Ohio 2017) (French, J., concurring).

99. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742 (2010) (challenging constitutionality of city ordinance barring handguns in the city through Due Process Clause of the Fourteenth Amendment). *See also* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1219 (1992) ("[W]hen faced with state legislative overreaching, defendants tend to fall back on . . . the Due Process Clause of the Fourteenth Amendment.").

100. *See* State v. Rimmer, 877 N.W.2d 652, 665–66 (Iowa 2016) (quoting State v. Sumulikoski, 110 A.3d 856, 866 (N.J. 2015)); People v. Gayheart, 776 N.W.2d 330, 344–45 (Mich. Ct. App. 2009) (citing United States v. Hague, 449 U.S. 302, 313 (1981)). *See also* State v. Randle, 647 N.W.2d 324, 329 n.4 (Wis. Ct. App. 2002); United States v. Zakharov, 468 F.3d 1171, 1177 (9th Cir. 2006).

unfairness to the defendant."[101] The commentary to the Code also recognized certain advantages in having jurisdiction based on the location of the offense, including the availability of witnesses and the concept that the community should dictate the condemnation of the conduct.[102]

This makes sense considering the purpose of the criminal law in the first place: the right of a government to prohibit behavior it considers against its interests.[103] Jurisdiction is, after all, "the very power of the state to exert influence over a criminal defendant [that] cannot be waived."[104] It is therefore necessary to know which state's laws were violated to vindicate the purposes of those laws. This would be especially important when one state criminalizes certain conduct that is not criminal elsewhere. This would explain why prosecutors, as agents of a government, always have the burden to prove that they have the authority to prosecute the defendant by offering proof of jurisdiction.[105] Even if in most circumstances this burden is easily met, it would be unreasonable to then discard that burden when there is an actual dispute.

III. Territorial-Scope Statutes with Evidentiary Presumption Provisions

Considering that territorial-scope statutes cannot include manda–tory presumptions, this section will address whether Subsection (D) is permissible by comparing it to another common presumption: the location-of-the-body presumption. Many states contain a statutory provision that allows for a presumption of jurisdiction in a homicide prosecution if the body of the victim was discovered in the forum state.[106] The mechanics of this presumption are simple: if the prose–

101. Model Penal Code § 1.03 explanatory note, at 35 (Am. L. Inst. 1985).

102. *Id.* at § 1.03 cmt. 1, at 38.

103. *See* Heath v. Alabama, 474 U.S. 82, 93 (1985).

104. Lane v. State, 388 So. 2d 1022, 1026 (Fla. 1980).

105. *See* 4 LaFave et al., *supra* note 19, at § 16.4(d) n. 120–21.

106. *See, e.g.*, Ohio Rev. Code § 2901.11(B) ("If any part of the body of a homicide victim is found in this state, the death is presumed to have occurred in this state."); Ariz. Rev. Stat. Ann. § 13-108(B) (2021); Fla. Stat. § 910.005(2) (2020); Ga. Code Ann. § 17-2-1(c) (2020); Haw. Rev. Stat. § 701-106(4) (2017); 38 Ill. Comp. Stat. 5/1–5(b) (2012); Ind. Code § 35-41-1-1(c) (2018); Iowa Code Ann. § 803.1(2) (2021); Ky. Rev. Stat. Ann. § 500.060(3) (West 2021); Me. Rev. Stat. Ann. tit. 17-A, § 7(3) (2021); Mo. Rev. Stat. § 541.191(2) (2021); Mont. Code Ann. § 46-2-101(2) (2021); N.H. Rev. Stat. Ann. § 625:4(III) (2020); N.J. Stat. Ann. § 2C:1-3(d) (West 2021); N.Y. Crim. Proc. Law § 20.20(2)(a) (McKinney 2021); Or. Rev. Stat. § 131.235(2) (2019); 18 Pa. Cons. Stat. § 102(c) (2019); Tex. Penal Code Ann. § 1.04(b)

cution proves beyond a reasonable doubt the fact that the body of the victim was discovered in the forum state, the law allows for the presumption that the death occurred in that state.[107] Because death is an element of the homicide offense, presuming that the death occurred in the state establishes jurisdiction under statutory provisions allowing jurisdiction for homicide prosecutions in the state where the death occurred. The rationale behind this presumption is rather simple: "to prevent abortion of the prosecution in cases where the body of the victim is found within the state but it is unclear where the death, injury, or conduct occurred."[108] By 1985, when the Model Penal Code was promulgated, twenty-eight states had adopted some form of provision that created this specific presumption.[109] Courts considering the permissibility of these provisions generally uphold them as long as the jury is allowed to assume jurisdiction, and not required to do so.[110]

Far less common are provisions like Subsection (D).[111] Subsection (D) allows for a presumption of jurisdiction when there is evidence beyond a reasonable doubt that a crime occurred *either* in Ohio or another jurisdiction but the actual jurisdiction cannot "reasonably be determined."[112] The mechanics of this presumption in practice are somewhat muddled. While some Ohio courts seem to require some evidence that unknown conduct occurred as part of a pattern of criminal conduct that could be established in Ohio,[113] others invoke Subsection (D) as establishing jurisdiction in Ohio by the simple act of an Ohio grand jury indicting the defendant under the laws of Ohio.[114]

(West 2021); UTAH CODE ANN. § 76-1-201(3)(a) (West 2021). *See also* Model Penal Code § 1.03(4) (AM. L. INST. 1985).

107. For specific examples of this presumption in action see, for example, McKinney v. State, 553 N.E.2d 860, 863 (Ind. Ct. App. 1990); People v. Rodriguez, 159 A.D.3d 646, 647 (N.Y. App. Div. 2018).

108. MODEL PENAL CODE § 1.03 cmt. 8, at 63 (AM. L. INST. 1985).

109. *Id.* at 65.

110. *See, e.g.*, *McKinney*, 553 N.E.2d at 863; State v. Butler, 724 A.2d 657, 663 n.4 (Md. 1999). *See also* MODEL PENAL CODE § 1.03 cmt. 8, at 64 (AM. L. INST. 1985) ("[The presumption] does not dispense with a jury finding beyond a reasonable doubt of the ultimate jurisdictional fact but it permits such a finding upon proof of the location of the body.").

111. Only one other state, Maine, contains a similarly worded provision. *See* ME. REV. STAT. ANN. tit. 17-A, § 7(4) (2021).

112. OHIO REV. CODE § 2901.11(D) (2005).

113. *See* Leyman v. Bradshaw, 59 N.E.3d 1236, 1239 (Ohio 2016); State v. Hall, No. 90365, 2009 WL 270524, at *13 (Ohio Ct. App. Feb. 5, 2009).

114. *See* State v. Williams, 557 N.E.2d 818, 822 (Ohio Ct. App. 1988); State v. Hamilton, No. 13CA93, 2014 WL 3556460, at *2 (Ohio Ct. App. July 17,

Despite the ambiguity on how the presumption operates, it is obvious from the plain language of Subsection (D), however, that it creates a conclusory presumption.[115] On that basis, Subsection (D) is unconstitutional.

IV. PROPOSED SOLUTIONS

Because it creates a mandatory presumption that vitiates the prosecution's burden to prove a necessary fact, Subsection (D) is unconstitutional under the Due Process Clause. In the interests of justice, it is important to now consider solutions this problem.

A. Prosecution in Indiana

The simplest solution would be to prosecute Wogenstahl in Indiana. Indiana's territorial-scope statute includes a provision creating a presumption of jurisdiction when a body is discovered in the state.[116] This presumption is a permissive inference in Indiana,[117] therefore surviving constitutional muster. It would not be difficult for an Indiana prosecutor to prove beyond a reasonable doubt that Amber Garrett's body was found in Indiana because there is no dispute that her body was discovered in Bright, Indiana.[118] Conducting a second prosecution in Indiana naturally creates problems. Despite the obvious logistical problems of conducting a second prosecution, the issue of double jeopardy comes to mind. However, because his aggravated murder conviction in Ohio would be void for lack of jurisdiction and not a lack of evidence, double jeopardy would not bar his prosecution.[119]

B. Permissive Inference

Another possible solution would be to rewrite Subsection (D) to create a permissive inference rather than a conclusive presumption. Instead of requiring the trier of fact to presume jurisdiction, a rewritten Subsection (D) would allow the trier of fact to decide whether it wants to infer jurisdiction in Ohio or not. There is, however, still a defect in

2014); State v. Smith, No. 14 CA 15, 2014 WL 4536269, at *2 (Ohio Ct. App. Sep. 12, 2014).

115. OHIO REV. CODE § 2901.11(D) (2005); State v. Wogenstahl, 84 N.E.3d 1008, 1018 (Ohio 2017) (French, J., concurring).

116. IND. CODE § 35-41-1-1(c) (2018).

117. McKinney v. State, 553 N.E.2d 860, 863 (Ind. Ct. App. 1999).

118. *See Wogenstahl*, 94 N.E.3d at 1012.

119. *See* Montana v. Hall, 481 U.S. 400, 402 (1987) ("It is a 'venerable principl[e] of double jeopardy jurisprudence' that '[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict poses no bar to further prosecution on the same charge." (quoting United States v. Scott, 437 U.S. 82, 90–91 (1978) (internal citations omitted))).

this presumption even as a permissive inference—the lack of any proof beyond a reasonable doubt. This presumption is only invoked when the trier of fact cannot reasonably determine where the proper jurisdiction is located. In other words, even if the jury had the option to choose whether to presume jurisdiction in Ohio, it invoked that presumption because the prosecution failed to meet a burden to prove a fact beyond a reasonable doubt.

Conclusion

Although states have broad authority to define its jurisdiction, that authority is not unfettered. Fairness dictates the scope in which the government may assert its jurisdiction. Creating a presumption that requires a trier of fact to presume jurisdiction violates that fairness.

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