American University Washington College of Law

THE CRIMINAL LAW PRACTITIONER

Volume XV, Issue II **Summer 2025**

Articles


THE CRIMINAL LAW PRACTITIONER
EST. 2009

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

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Letter from the Editor

Davis Hayman, The Criminal Law Practitioner

Dear Readers,

Thank you for your interest in The Criminal Law Practitioner. This marks my first publication as the Editor-in-Chief for the 2025-2026 academic year. I am thrilled to leave this remarkable team as we continue to solicit, write, and publish issues in criminal law. This issue continues this trend by highlighting topics including evolving interpretation of the 8th Amendment and a discussion on Constitutional venue issues related to internet crimes. Our authors provide some intriguing, unique insights that I invite you to dig into.

In "The Continuing Unevolving Model of Decency, Kennedy v. Louisiana in Peril", Professor Patrick S. Metze discusses 8th Amendment discourse through the lens of the Supreme Court's ruling in *Kennedy v. Louisiana*, and how application of such ruling shapes modern 8th Amendment understandings. Professor Metze then provides his prosecutive outlook on the future of 8th Amendment developments. Give it a peruse to stay up to date on the future of this Constitutional discourse.

Next, WCL alum Harrison Grant details Constitutional Venue issues relating to internet-based cybercrimes in "Where Does A Hack Happen? Computer Intrusion Crimes and Constitutional Venue". Here, Grant discusses existing precedent related to venue for crimes which take place nearly simultaneously across jurisdiction via the internet. This discussion is presented via the lens of the hacking case, *United States v. Klyishin*. After discussing these issues, Grant provides various points to show how venue in this case was improper, highlighting the courts' current understanding of internet crimes are not up to date when it comes to venue.

I also want to take a moment to recognize the executive board for the previous 2024-25 academic year. They were an amazing team of dedicated students, advocates, mentors, and friends. This issue could not have come to fruition without their tireless efforts. Likewise, I am excited to formally welcome our incoming executive board. We are putting together an amazing team to both carry the torch, and to blaze a new path into criminal legal scholarship and professional community.

I look forward to presenting to you, as the larger legal community, our upcoming Volume XVI including scholarly articles, associated student publications, practitioner profiles, and other important updates. As always, please keep in touch with us at our website, and reach out to us directly via email.

Very Respectfully,

Davis Hayman

Davis Hayman
Editor-in-Chief

THE CONTINUING UNEVOLVING MODEL OF DECENCY, KENNEDY V. LOUISIANA IN PERIL

BY PATRICK S. METZE[1]

"PROGRESS IS A NICE WORD. BUT CHANGE IS ITS MOTIVATOR AND CHANGE HAS ITS ENEMIES." --ROBERT F. KENNEDY (1925 - 1968)

ABSTRACT

Professor Metze reflects on Kennedy v. Louisiana in its part in the development of Eighth Amendment jurisprudence and how the Supreme Court initially used Kennedy to further our understanding of the limits of the Eighth Amendment. The Court recently avoided a meaningful discussion of how our society is maturing and evolving by acknowledging a purposeful effort of some to reflect modern beliefs in opposition to those who would interpret everything through an 18th Century prism. After a case-by-case analysis of how the Court has used Kennedy, it is apparent the conservative majority now on the Court has decided there is no longer any reason to continue to use the evolving standards of decency that mark the progress of a maturing society when understanding the limitations of the Eighth Amendment. Soon the Court will continue to set aside a generation or two of Supreme Court precedent to satisfy the political demands of those that secured that conservative majority for their own purposes.

[1] Professor of Law, Director of the Criminal Defense Clinic, the Capital Punishment Clinic, the Innocence Clinic, and the Caprock Public Defender Office and Clinic, all at Texas Tech University School of Law. B.A. Texas Tech University 1970; J.D. The University of Houston 1973. Thank you to my research assistant, Megan Gower, who just completed her J.D. and is preparing to enter the practice of law after she aces the Bar this summer. I have had the good fortune to mentor Ms. Gower from her days as an undergraduate Honor College student until now maturing in the law as a woman of immeasurable talent and ability. Her dream is to be a death penalty litigator, and she has armed herself with all the tools necessary for that fight. An expert in legal research and analysis, she has inspired me to be critical of the Supreme Court in anticipating our return as a society to darker days when the advances of the Eighth Amendment during my lifetime will be gradually erased. Thank you, Megan, for your intellect and patience. All my best. I leave the fight to you.

I. Introduction

In my paper in the Nebraska Law Review (2011), I discussed Section 19.03 of the Texas Penal Code, which provides a list of offenses in Texas that carry the possibility of the death penalty upon conviction.[2] The Texas statute has changed little since 2011.[3] At that time, I argued the statute was unconstitutional as it had devolved from its original approved language by growing the list of aggravating offenses to over 146.[4] My belief that the Texas death penalty statute is unconstitutional has not changed since 2011. As of 2011, 130 souls have been executed in Texas, placing Texas as number one in the performance of this barbaric practice.[5]

As part of my discussion, I had a section entitled "Capital Murder for Non-Murder Crimes."[6] Therein, I outlined how Section 12.42(c)(3) of the Texas Penal Code makes it a capital offense to commit aggravated sexual assault of a child as a repeat offender.[7]

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2 Patrick S. Metze, *Death and Texas: The Unevolved Model of Decency*, 90 NEB. L. REV. 240, 246–7 (2011); TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010).

3 Texas Penal Code Section 19.03(a)(8) was amended in 2011. *See* Act of Sept. 1, 2011, 82nd Leg. R.S., ch. 1209, § 1, sec. 19.08, 2011 Tex. Gen. Laws 3235, 3236 (current version at TEX. PENAL CODE ANN. § 19.03(a)(8). Prior to the amendment Section 19.03(a)(8) provided the murder of an individual under 6 years of age was capital murder. *See* Act of Sept. 1, 2005, 79th Leg., R.S., ch. 428, § 1, sec. 19.03, 2005 Tex. Gen. Laws 1129 (current version at TEX. PENAL CODE § 19.03(a)). In 2011 the Texas Legislature raised the age to 10, so that the murder of an individual under 10 years of age is now a capital murder under that Section. In 2019, Section 19.03(a)(9), making the murder of a judge in retaliation for their service or status a capital murder, was renumbered to Section 19.03(a)(10), and a new offense was created for Section 19.03(a)(9) making it a capital murder to murder an individual 10 years of age or older but younger than 15 years of age. *See* Act of Sept. 1, 2019, 86th Leg., R.S., ch.1214, § 2, sec. 19.03, 2019 Tex. Gen. Laws 3446, 3446 (current version at TEX. PENAL CODE § 19.03(a)). The Code of Criminal Procedure Art. 37.071(1)(b) was also amended in 2019 limiting punishment of those found guilty of an offense under the new Section 19.03(a)(9) to life imprisonment or to life imprisonment without parole as required by Section 12.31 of the Texas Penal Code. *See* Act of Sept. 1, 2019, 86th Leg., ch. 1214, § 3, sec. 37.071, 2019 Tex. Gen. Laws 3446, 3447 (codified at TEX. CODE CRIM. PROC. ANN. art. 37.07(1)(b)).

4 Metze, *supra* note 2, at 309-10. Originally the Supreme Court approved the Texas Capital Punishment procedure in *Jurek v. Texas*, 428 U.S. 262 (1976). "The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee." *Id.* at 268.

5 *See* Execution Database, DEATH PENALTY INFO. CTR. https://deathpenaltyinfo.org/database/executions?state=Texas&federal=No&page=12 (last visited Mar. 19, 2025).

6 Metze, *supra* note 2, at 306.

7 TEX. PENAL PENAL CODE ANN. § 12.42(c)(3). Specifically, *"a defendant shall be punished for a capital felony if it is shown on the trial of an offense under Section 22.021* (Aggravated Sexual Assault) *otherwise punishable under*

Further, Article 37.072 of the Texas Code of Criminal Procedure sets out the procedures to be followed in such repeat sex offender capital cases.[8] Both these provisions remain in the Texas Statutes.[9]

In 2008, the United States Supreme Court in *Kennedy v. Louisiana*[10] declared a similar Louisiana statute to the Texas Penal Code provision unconstitutional.[11] Therein, Patrick Kennedy had been convicted and sentenced to death for raping his eight-year-old

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Subsection (f) [minimum term of imprisonment is 25 years] *of that section that the defendant has previously been finally convicted of:*

"(A) an offense under Section 22.021 [Aggravated Sexual Assault] that was committed against a victim described by Section 22.021(f)(1) [victim younger than 6 years old] or was committed against a victim described by Section 22.021(f)(2) [victim younger than 14] and in a manner described by Section 22.021(a)(2)(A) [(i)serious bodily injury (SBI) or attempts death, (ii) puts victim in fear of death, SBI, kidnapping, (iii) threatens death, SBI or kidnapping to any person (iv) uses or exhibits deadly weapon, (v) acts with another, or (vi) uses roofies or drugs]; or

"(B) an offense that was committed under the laws of another state that: (i) contains elements that are substantially similar to the elements of an offense under Section 22.021; and (ii) was committed against a victim described by Section 22.021(f)(1) or was committed against a victim described by Section 22.021(f)(2) and in a manner substantially similar to a manner described by Section 22.021(a)(2)(A)."

TEX. PENAL CODE ANN. § 12.42(c)(3); *see also* Act of Sept. 1, 2007, 80th Leg., ch. 593, § 1.15, sec. 12.42, 2007 Tex. Gen. Laws 1120, 1126 (current version at TEX. PENAL CODE ANN. § 12.42(c)(3)) (section (c) of Texas Penal Code § 12.42 was added by the Texas 80th Legislative Session in 2007 to become effective September 1, 2007.).

8 Selected portions of Texas Code of Criminal Procedure, Art. 37.072:

". . . Sec. 2. (a)(1) If a defendant is tried for an offense punishable under Section 12.42(c)(3), Penal Code, in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole. . .

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually engaged in the conduct prohibited by Section 22.021, Penal Code, or did not actually engage in the conduct prohibited by Section 22.021, Penal Code, but intended that the offense be committed against the victim or another intended victim....

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue: Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed...."

CODE CRIM. PRO. ANN. art 37.072; *see also* CODE CRIM. PRO. ANN. art. 37.071 (procedure in a capital murder case); CODE CRIM. PRO. ANN. art. 38.36(a) (procedure for offenses committed before September 1, 1991).

9 *See* TEX. PENAL CODE § 12.42(c)(3); TEX. CODE CRIM. PRO. art. 37.072.

10 Kennedy v. Louisiana, 554 U.S. 407, 446-47 (2008).

11 *Id.* at 416 ("A. Aggravated rape is a rape committed . . . where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances: . . .(4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense. . . . D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. (2) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section: (a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury." LA. STAT. ANN. § 14:42 (1995)); *see generally Kennedy*.

stepdaughter.[12]

Using the balancing test set out in *Atkins*[13] and *Roper*,[14] the Louisiana Supreme Court examined whether the death penalty was excessive and whether there was a national consensus on capital punishment for crimes less than death.[15] Kennedy's conviction and death sentence were ultimately affirmed by the Louisiana Supreme Court, which found that "the death penalty for the rape of a child under twelve is not disproportionate."[16] On the issue of whether there was a national consensus approving the death penalty for crimes less than death, the Louisiana Supreme Court believed that similar laws in five other states showed a trend towards the adoption of such statutes, and consequently found that this justified the death penalty in *Kennedy*.[17]

Interestingly, the U.S. Supreme Court found that applying the death penalty to someone who committed such a crime without anticipating the death of their victim would be "cruel and unusual punishment" in violation of the very national consensus the Louisiana Supreme Court used to justify Kennedy's punishment.[18] How the Supreme Court has used Kennedy since 2008 in interpreting our society's evolving standards of decency is the initial focus of this paper.[19] These evolving standards of decency presume "respect for the individual and thus moderation or restraint in the application of capital punishment."[20] Whether the Supreme Court will continue to recognize this test in evaluating the Eighth Amendment is the question. In this new era, which began with the *Dobbs*[21] decision, will the Supreme Court once again ignore precedent, leaving *stare decisis* at the doorstep of political considerations? What should be done about it is the focus of this paper.

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12 *Kennedy*, 554 U.S. at 418.

13 Atkins v. Virginia, 536 U.S. 304, 321 (2002) (executing a prisoner with an intellectual disability offends contemporary standards of decency).

14 Roper v. Simmons, 543 U.S. 551, 578-79 (2005) (executing a person who was under eighteen when capital crime was committed is cruel and unusual).

15 State v. Kennedy, 957 So. 2d 757, 782 (La. 2007).

16 *Id.* at 789.

17 *Id.* at 786. The five states adopting similar statutes to Louisiana were Georgia, Montana, Oklahoma, South Carolina, and Texas. *See* GA. CODE ANN. § 16-6-1(a)(2)–(b) (1999) (permitting capital punishment when a defendant is convicted of the rape of a child under ten); MONT. CODE ANN. § 45-5-503(3)(c)(i) (1997) (permitting capital punishment for the rape of a child); OKLA. STAT. tit. 10 § 7115(I) (2006) (permitting capital punishment upon a conviction of sodomy, rape, or lewd molestation of a child under fourteen); S.C. CODE ANN. 1976, § 16-3-655(C)(1) (2006) (permitting capital punishment if the defendant is convicted of first-degree criminal sexual conduct with a minor); *see* Act of Sept. 1, 2007, 80th Leg., ch. 593, § 1.15, sec. 12.42, 2007 Tex. Gen. Laws 1120, 1125-26 (current version at TEX. PENAL CODE ANN. § 12.42(c)(3)) (permitting capital punishment for aggravated sexual assault of a child). Justice Kennedy, writing for the majority of the Court, noted that all but Louisiana had "narrowed" their statute in that only those that have been previously convicted of a sexual assault crime would be eligible for the death penalty. *Kennedy*, 554 U.S. at 423. This language should not be taken lightly and could be a sign the Court was open to more "narrow" statutes in capital felonies, when death of the victim does not occur and is not intended, that satisfy *Furman, Gregg, Profitt,* and *Jurek*. Now that six of the Justices on the Court are conservative, the language in *Kennedy*'s dissent will likely become the majority rationale.

18 *See Kennedy*, 554 U.S. at 413 (in a 5-4 decision, Justice Kennedy in delivering the opinion for the majority, joined by Justices Stevens, Souter, Ginsburg, and Breyer, held the Eighth Amendment bars states from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the child's death).

19 *See infra* Part II.

20 *Kennedy*, 554 U.S. at 435; *see* Trop v. Dulles, 356 U.S. 86, 100-01 (1958) ("[T]he words of the [Eighth] Amendment are not precise and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

21 *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

None of the justices in the majority in *Kennedy* are still on the Court. Three of the five in the majority were replaced by liberal jurists who have proven themselves to adhere to the precedent of the Court and would not be expected to change the Court's continued interpretations toward more progressive standards of decency.[22] When the remaining two in the majority in *Kennedy* left the Court, they were replaced with much more conservative voices. Brett Kavanaugh[23] replaced Justice Kennedy, who retired in 2018.[24] Then, after Justice Ginsberg died in 2020,[25] Amy Coney Barrett[26] was appointed to the Court.

Incredibly, the minority in *Kennedy* opposed the majority's application of a "blanket condemnation"[27] barring the death penalty in child rape cases. The minority agreed with the Louisiana Supreme Court that the facts of the case, including the age of the child, the child's physical or psychological trauma, the prior record of the rapist, the sadistic nature of the crime, and the number of times the child was raped, should be considered as a factor in applying the death penalty in these circumstances.[28] The minority believed there was no national consensus on prohibiting the death penalty of child rapists but believed the trend was toward its use.[29]

Chief Justice Roberts and Justices Scalia, Thomas, and Alito voted in the minority.[30] Justice Scalia died in 2016, and President Trump replaced him with a philosophical equivalent, Neil Gorsuch.[31] Few would disagree that with the addition of Justices Gorsuch, Kavanaugh and Barrett on the Court the previous minority is suddenly the majority.[32] This

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22 *See* Allison Keyes, *Kagan Sworn In As Supreme Court Justice*, NPR (Aug. 7, 2010, at 2:16 PM), https://www.npr.org/2010/08/07/129050599/kagan-sworn-in-as-supreme-court-justice (stating Justice Kagan replaced Justice Stevens when he retired in 2010); Susan Crabtree, *Sotomayor sworn in as Supreme Court justice*, THE HILL (Aug. 8, 2009, at 12:04 PM), https://thehill.com/homenews/administration/48080-sotomayor-sworn-in-as-supreme- court-justice/ (stating Justice Sotomayor replaced Justice Souter when he retired in 2009); Dareh Gregorian, *Ketanji Brown Jackson sworn in as first Black woman on the Supreme Court*, NBC NEWS (June 30, 2022, at 11:12 AM), https://www.nbcnews.com/politics/supreme- court/ketanji-brown-jackson-sworn-supreme-court-justice-rcna36115 (stating Justice Jackson replaced Justice Breyer when he retired in 2022).

23 *See* Rebecca Shebad, *Kavanaugh sworn in as associate justice to the U.S. Supreme Court*, NBC NEWS (Oct. 6, 2018, at 9:38 AM), https://www.nbcnews.com/politics/congress/senate-readies-final-vote-kavanaugh-supreme-court-nomination-n917216; *see* Bill Hutchinson & Stephanie Ebbs, *Anthony Kennedy, crucial Supreme Court swing vote, retiring after 3 decades*, ABC NEWS (June 27, 2018), https://abcnews.go.com/US/supreme-court-justice-anthony-kennedy- retiring/story?id=55052718.

24 *See* Bill Hutchinson & Stephanie Ebbs, *Anthony Kennedy, crucial Supreme Court swing vote, retiring after 3 decades*, ABC NEWS (June 27, 2018, at 3:17 PM), https://abcnews.go.com/US/supreme-court-justice-anthony-kennedy-retiring/story?id=55052718; *see* Rebecca Shebad, *Kavanaugh sworn in as associate justice to the U.S. Supreme Court*, NBC NEWS (Oct. 6, 2018), https://www.nbcnews.com/politics/congress/senate- readies-final-vote-kavanaugh-supreme-court-nomination-n917216.

25 *See* Joan Biskupic & Arianee de Vogue, *Justice Ruth Bader Ginsburg dead at 87*, CNN (Sept. 19, 2020, at 9:19 AM), https://www.cnn.com/2020/09/18/politics/ruth-bader-ginsburg-dead/index.html.

26 *See* Maegan Vazquez, *White House holds swearing-in ceremony for Amy Coney Barrett*, CNN (Oct. 26, 2020, 9:50 PM), https://www.cnn.com/2020/10/26/politics/white-house-amy-coney-barrett- swearing-in/index.html.

27 *Kennedy*, 554 U.S. at 464.

28 *Id.* at 447.

29 *Id.* at 448.

30 *Id.* at 447 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting).

31 *See* Vivian Salama & Sam Hananel, *Gorsuch sworn into Supreme Court, restores conservative tilt*, AP NEWS (Apr. 10, 2017, at 9:34 PM), https://apnews.com/article/e7db3b3479de425e803b2e9d35e4cab5.

32 *See* Ron Elving, *How the Supreme Court's conservative majority came to be*, NPR (July 1, 2023, at 10:00 AM), https://www.npr.org/2023/07/13/1185496055/supreme-court- conservative-majority-thomas-trump-bush.; Vincent M. Bonventure, *6 to 3: The Impact of the Supreme Court's Conservative Super-Majority*, N.Y. STATE BAR AS-

could hardly be more apparent than by the Court's ruling in *Dobbs v. Jackson Women's Health Organization*, in which the Court showed its disdain for *stare decisis* when political philosophies and obligations serve political agendas.[33]

The conservative policy makers in Texas are sure of their eventual success in regard to the use of the death penalty in child rape cases. When the Texas Legislature met for its 81st Legislative Session during 2009, immediately following *Kennedy*, the legislature failed to repeal or remove Section 12.42(c)(3) of the Penal Code or Article 37.072 of the Code of Criminal Procedure from Texas statutory provisions.[34] In fact, in every legislative session since, these provisions remain codified.[35] Although they continue to fail to repeal these statutes after *Kennedy*, conservatives in control of the state legislature in Texas have not always been totally confident that the use of the death penalty for non-murder crimes will be upheld.[36] With the new conservative make-up of the Supreme Court, this should no longer be a concern. This Supreme Court will not extend *Kennedy* to find the Texas statute unconstitutional and will most likely find *Kennedy* wrongfully decided in the near future, once again ignoring *stare decisis* to satisfy the Court's political bosses. In fact, conservative politicians continue to propose the expanding use of the death penalty for other non-murder crimes[37] and the behavior of the Texas Legislature and others in failing to repeal Section 12.42(c)(3) of the Texas Penal Code or Article 37.072 of the Code of Criminal Procedure since the *Kennedy* decision or in ignoring *Kennedy* confirms these suspicions.[38] This is

SOC. (Oct. 31, 2023), https://nysba.org/6-to-3-the-impact-of-the-supreme-courts-conservative-super-majority/?srsltid=AfmBOorKdxc9VJW0YtWkNeZVuAYhsXAUi8oA-GCiAvgA8G4PGGdWP7x2.

33 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 293 (2022); *see* Nina Totenberg & Sarah McCammon, *Supreme Court overturns Roe v. Wade, ending right to abortion upheld for decades*, NPR (June 24, 2022, at 10:43 AM), https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade- decision-overturn.

34 *See* Act of Sept. 1, 2007, 80th Leg., ch. 593, § 1.15, sec. 12.42, 2007 Tex. Gen. Laws 1120, 1126 (current version at TEX. PENAL CODE ANN. § 12.42(c)(3)); *see* TEX. CODE CRIM. PROC. ANN. art. 37.072.

35 *See Bill/Chapter Cross Reference for the 88th Regular Session*, LEGIS. REFERENCE LIBR. OF TEX., https://lrl.texas.gov/legis/billsearch/searchchapter.cfm?legSession=88- 0&chapter=&submitbutton=Search (last visited May 20, 2024) (demonstrating no change to Section 12.42 of the Penal Code or article 37.072 of the Code of Criminal Procedure as of the most recent legislative session).

36 TEX. CODE CRIM. PRO. ANN. art 44.251(d) ("The court of criminal appeals shall reform a sentence of death imposed under Section 12.42(c)(3), Penal Code, to a sentence of imprisonment in the Texas Department of Criminal Justice for life without parole if the United States Supreme Court: (1) finds that the imposition of the death penalty under Section 12.42(c)(3), Penal Code, violates the United States Constitution; and (2) issues an order that is not inconsistent with this article.").

37 *See* Austin Sarat, *This Should Be a Wake-Up Call to the Biden Administration on the Death Penalty*, SLATE (May 14, 2024, at 10:00 AM), https://slate.com/news-and- politics/2024/05/project-2025-death-penalty-trump-biden-wake-up-call.html (stating that Donald Trump proposes to expand the federal death penalty, applying it, for example, to those convicted of human trafficking); *see also* Ben Jacobs, *Donald Trump advocates death penalty for drug dealers in rambling speech*, THE GUARDIAN (Mar. 10, 2018, at 10:11 PM), https://www.theguardian.com/us- news/2018/mar/11/donald-trump-advocates-death-penalty-for-drug-dealers-in-rambling- speech (Former President Trump advocates for the death penalty for drug trafficking); Eric Garcia, *Trump calls for 'quick' death penalty for drug dealers as he describes U.S. 'going to hell very fast"*, YAHOO NEWS (July 26, 2022, at 4:58 PM), https://www.yahoo.com/news/trump-calls-quick-death- penalty-205826248.html. *Cf.* Shannon Najmabadi, *Another Texas GOP lawmaker is attempting to make abortion punishable by death*, TEX. TRIB. (Mar. 9, 2021, at 2:00 PM), https://www.texastribune.org/2021/03/09/texas-legislature-abortion-criminalize-death- penalty/ (Texas lawmakers introduced a bill in 2021 to make abortion a capital crime); 18 U.S.C. § 3591(b) (federal death penalty statute that includes the death penalty for specified drug crimes).

38 *See* Kimberlee Kruesi, *Tennessee governor OKs bill allowing death penalty for child rape convictions*, AP NEWS (May 14, 2024, at 3:34 PM), https://apnews.com/article/child-rape-death- penalty-tennessee-6edde756a71b0ae26ee-

concerning.

First, analyzing the cases that have cited Kennedy since 2008 will assist in predicting how the Court will interpret the evolving standards of decency of a maturing society in the future. There are nine cases that have cited Kennedy. Discussed below, in the order of their publication, the first four cases are not capital cases. The first two are juvenile cases addressing life without parole for juveniles committing homicides in which Kennedy is discussed at length (Graham v. Florida (2010) and Miller v. Alabama (2012)). The third case is United States v. Comstock (2010) about the indefinite civil commitment of mentally ill and sexually dangerous federal inmates, and finally United States v. Kebodeauxa (2012) about the registration requirements for sex offenders under the Sex Offender Registration and Notification Act. In both Comstock and Kebodeauxa, the dissent cites Kennedy only in passing. The final five cases are death penalty cases – (1) Hall v. Florida (2014) (discussing Florida's method of determining intellectual disability), (2) Glossip v. Gross (2015), (denying relief to the condemned challenging the proposed method of his execution), (3) Arthur v. Dunn (2017), (denying the condemned writ challenging the proposed method of his execution), (4) Bucklew v. Precythe (2019), (again preventing the condemned from challenging the proposed method of his execution), and (5) United States v. Briggs (2020), (finding no statute of limitations for rape under the Uniform Code of Military Justice (UCMJ)). At the time of writing this paper no published cases in the previous four Supreme Court terms have included a reference to Kennedy or further interpretation of the evolving standards of decency of a maturing society within the Supreme Court's Eighth Amendment jurisprudence.

II. *KENNEDY V. LOUISIANA* AS INTERPRETED

A. *GRAHAM V. FLORIDA*[39]

This is the first case to cite *Kennedy v. Louisiana*.[40] *Graham* stands for the concept of using a categorical approach in analyzing a sentencing practice—here, life

a703d1f69b572 (reacting to Dobbs, Tennessee has passed new legislation permitting the death penalty for child rape convictions); Khaleda Rahman, *Child Rapists to Face the Death Penalty*, UP NEXT (May 15, 2024), https://www.newsweek.com/tennessee-death-penalty-child-rape-1900842. *See also* Kit Maher, *DeSantis signs bill making child rapists eligible for the death penalty at odds with U.S. Supreme Court ruling*, CNN (May 1, 2023, at 6:36 PM), https://www.cnn.com/2023/05/01/politics/desantis-child-rapists-death-penalty-bill-scotus/index.html (showing Florida passed a similar bill to Tennessee since *Kennedy*); Kyle Pfannenstiel, *Certain sex crimes against children could carry the death penalty under bill approved by Idaho House*, IDAHO CAP. SUN (Feb. 13, 2024, at 5:44 PM), https://idahocapitalsun.com/2025/03/13/death-penalty-bill-for-certain-sex-crimes-against-children-heads-to-idaho-house/ (discussing that the Idaho House of Representatives passed a bill permitting the death penalty for child rapists); Clara Bates, *Missouri bill would expand the death penalty to certain sex crimes against children*, MO. INDEP. (Mar. 11, 2014, at 3:27 PM), https://missouriindependent.com/2024/03/11/missouri-bill-would-expand-death-penalty-to-certain-sex-crimes-against-children/ (similar legislation under consideration in Missouri). *See generally Florida prosecutor announces first death penalty case under new child rape law*, TALLAHASEE DEMOCRAT (Dec. 15, 2023, at 11:51 AM), https://www.tallahassee.com/story/news/local/state/2023/12/15/florida-man-first-death-penalty-indicted-child-rape-test-case-new-law/71930977007/ (showing prosecutors are taking advantage of these new statutes, despite being currently unconstitutional).

39 *See generally* Graham v. Florida, 560 U.S. 48 (2010).

40 *Id.* at 58.

without parole for a juvenile convicted of a non-homicide offense—and determining if such practice is in violation of the Eighth Amendment by looking beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society[,]"[41] requiring an analysis of whether there is a national consensus against its use.[42] The majority finds this categorial approach, used in *Atkins* and *Roper*, is the appropriate analysis to determine whether this sentencing practice is unconstitutional.[43]

The Court rejected the state's argument that most jurisdictions (thirty- seven states and the District of Columbia) statutorily permit life without parole for non-homicide juvenile offenses showing no national consensus against the use of this sentencing practice.[44] The Court called this argument "incomplete and unavailing" as "[t]here are measures of consensus other than legislation."[45] The Court noted that *Kennedy* requires courts to also look at the frequency of those actually sentenced with those practices, not just whether a sentence is allowed under statute.[46] Further, when discussing penological justifications for punishment, the Court relied on *Kennedy* for the notion that non-homicide offenses, while potentially morally depraved and devastatingly harmful, are categorically less deserving of the most serious forms of punishment than are murderers.[47] The majority is clear in their use of a categorical rule which does not use gross disproportionality as a measure but rather creates a class of offenders protected from this unconstitutional statutory method of punishment.[48]

There were two concurrences[49] and two dissents.[50] Justice Alito added his own short dissent, disagreeing with Justice Thomas and Chief Justice Roberts on the issue of

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41 *Id.* at 58, 60-61 (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).

42 *Graham*, 560 U.S. at 60-61.

43 *Id.* at 61 ("[T]he Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, or whose intellectual functioning is in a low range); *see* Roper v. Simmons, 543 U.S. 551, 575 (2005) (prohibiting the death penalty for offenses committed while the defendant is a juvenile); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (prohibiting the death penalty for defendants with intellectual disabilities).

44 *Graham*, 560 U.S. at 62.

45 *Id.*; Kennedy v. Louisiana, 554 U.S. 407, 433 (2008).

46 *Graham*, 560 U.S. at 62-63 (citing *Kennedy*, 554 U.S. at 432-34); *see* Enmund v. Florida, 458 U.S. 782, 794-96 (1982); Thompson v. Oklahoma, 487 U.S. 815, 831-32 (1988); Atkins v. Virginia, 536 U.S. 304, 316 (2002); Roper v. Simmons, 543 U.S. 551, 572 (2005).

47 *Graham*, 560 U.S. at 69; *see Kennedy*, 554 U.S. at 438.

48 *Graham*, 560 U.S. at 61.

49 Justice Stevens, who was joined by Ginsburg and Sotomayor, JJ, took Justice Thomas to task for his dissent, reminding Thomas that "'evolving standards of decency' have played a central role in our Eighth Amendment jurisprudence for at least a century, . . . Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete. . ." *Id.* at 85 (Stevens, J., concurring) (internal citations omitted).

The second concurring opinion is from Chief Justice Roberts who, although agreeing with the result of the majority, accused the majority of inventing a new constitutional rule basing his analysis on a proportionality argument using Supreme Court precedent requiring "'narrow proportionality' review of noncapital sentences and … [the] conclusion in *Roper v. Simmons* that juvenile offenders are generally less culpable than adults who commit the same crimes." *Id.* at 86 (Roberts, C.J., concurring) (internal citations omitted). As Roberts opinion does not substantially address his view on either a "national consensus" or "evolving standards of decency" addressed in this paper, further analysis is neither necessary nor instructive for the purposes of this discussion.

50 *Id.* at 97 (Thomas, J., dissenting).

proportionality and oddly suggesting that a term of years sentence without the possibility of parole might be constitutional.[51]

Justice Thomas, joined by Scalia and Alito (partly), provided a twenty- eight page dissent of his own which apparently irritated Justices Stevens, Ginsburg, and Sotomayor to the point that they issued a concurrence calling Thomas' argument a rigid interpretation of the Eighth Amendment while doubting the accuracy of his description of the current state of the law in this regard.[52]

As this is the first opportunity Justices Thomas, Scalia and Alito have had to be critical of *Kennedy*, and because the majority used *Kennedy* herein, a short summary of Thomas' argument will follow. Understanding how these three founding fathers of the conservative political activism which has overtaken the Supreme Court in the current era will be instructive in predicting how far they will go to "correct" the errors of the past as they see it.

Justice Thomas begins by complaining of the "grossly disproportionate" test of cruel and unusual punishment which he says is totally the Court's creation as there is no indication the Framers intended to require proportionality in sentencing.[53] As to capital punishment, Justice Thomas argues the Court uses proportionality in several specific circumstances to limit punishment in certain types of crimes and offenders, citing the limitation in *Kennedy* as an example of such, forbidding the application of the death penalty in "rape of a child" situations.[54] By doing so, the Court "intrudes upon" other "organs" of government.[55] Justice Thomas cites the Eighth Amendment prohibition of cruel and unusual punishment, the provisions of the Constitution providing for "fair process," the prosecutors who seek the punishment, the judges and juries that impose the punishment, and the legislatures that authorize the punishment as apparently sufficient.[56] He argues that nevertheless, the Court adopts categorical rules that protect certain categories of persons and crimes from the death penalty because "evolving standards of decency" measured by a national consensus require it.[57] However, he believes the Framers did not authorize a certain punishment "to turn on a 'snapshot of American public opinion' taken at a moment a case is decided."[58] This procedure prevents the inevitable swing in the evolution of standards and social attitudes preventing the people by their legislatures from creating new penal policy, citing *Kennedy*.[59] Justice Thomas

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[51] *Id.* at 124-25.

[52] *Id.* at 85 (Stevens, J., concurring).

[53] *Id.* at 99-100 (Thomas, J., dissenting). Originalists never give a sound reason why the framers definition of anything should control in a 21st century society. Their belief the framers could anticipate how this country has changed since the 18th Century is based upon unsubstantiated assumptions created through their own 20th Century experiences. We are fortunate the United States was not formed in the 5th century by the Anglo-Saxons that formed England. What fun we would have divining those beliefs to a modern world. Thomas and his conservative colleagues who believe they can channel the framers and to do so is to provide the proper basis for modern society interpretations of the law. I think they use it as a crutch to justify their adherence to reactionary conservative philosophy designed to subjugate the population for the primary purpose of growing their own power and influence.

[54] *Id.* at 100.

[55] *Id.* at 101.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 101-02.

says *Kennedy* stands for the proposition that these snapshots of community consensus are subject to being rejected when the Court's "independent judgment" points a "different direction."[60] Finally, as to *Graham*, Justice Thomas states the Court, for the first time, applies this "categorical proportionality review" used in limiting capital punishment to a category of noncapital offenders without a "principled foundation", leaving the door open for the Court to apply these same tests to other less serious categories of offenders.[61]

B. *UNITED STATES V. COMSTOCK*[62]

During the same year, the dissent in *United States v. Comstock*,[63] used the statistics gathered in Justice Alito's dissent in *Kennedy* to argue against the power of Congress to have unlimited authority to protect society from "every bad act that might befall it."[64]

The majority in *Comstock*[65] held the Necessary and Proper Clause to the United States Constitution[66] permits Congress to provide for the civil commitment of mentally ill and sexually dangerous federal inmates, even for an indefinite period of time, pursuant to the Adam Walsh Child Protection and Safety Act.[67]

As neither the majority nor the dissent considered "national consensus" or "standards of decency" as discussed in *Kennedy* when making their arguments, this case is not instructive for the purposes of this discussion.

C. *MILLER V. ALABAMA*[68]

Two years passed before *Kennedy* was once again cited by the Supreme Court. In *Miller v. Alabama*, two fourteen-year-old boys were convicted of murder and were automatically sentenced to life without parole.[69] Unlike *Graham*[70] and *Kennedy*,[71] Miller's offense was a homicide. Yet the Court relied heavily on the rationale in those non-murder situations and the case of *Roper v. Simmons*,[72] a juvenile capital murder case, in its holding that the use of automatic life without parole for juveniles violated the Eighth Amendment because it did not permit courts to consider factors such as the juvenile's

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60 *Id.*
61 *Id.*
62 *See generally* United States v. Comstock, 560 U.S. 126 (2010).
63 *Id.* at 165 (Thomas, J., dissenting), 177 n.15.
64 *Id.* at 165 (citing New York v. United States, 505 U.S. 144, 157 (1992)).
65 *Id.* at 130 (majority opinion).
66 *See* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").
67 *See* 18 U.S.C. § 4248.
68 *See generally* Miller v. Alabama, 567 U.S. 460 (2012).
69 *Id.* at 465.
70 Graham v. Florida, 560 U.S. 48, 53-54 (2010).
71 Kennedy v. Louisiana, 554 U.S. 407, 416, 417-18 (2008).
72 Roper v. Simmons, 543 U.S. 551, 578-79 (2005). The Court in *Miller* often relies on *Roper*, which prohibits the death penalty for those that commit capital murder before the age of 18. *See Miller*, 567 U.S. at 466-67. *Graham* and *Kennedy* provide precedential value as they address punishment of juveniles and adults in non-homicide cases while *Roper* defines the limit of punishment in juvenile capital cases. *See id.* at 470.

age, age-related characteristics, the circumstances of the offense, or mitigation.[73]

Miller confirms that the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions,"[74] and that punishment must be "graduated and proportioned" to both offender and offense,[75] as the Eighth Amendment requires proportionality[76] according to "the evolving standards of decency that mark the progress of a maturing society."[77]

Two lines of precedent support this idea. One line stands for a categorical ban on sentencing practices that are based on "mismatches between the culpability of a class of offenders and the severity of the penalty."[78] The second line of cases prohibits mandatory capital punishment, requiring consideration of the individual characteristics of each defendant.[79]

Chief Justice Roberts dissented, joined by Justices Thomas and Alito, who also each filed their own separate dissents. Justice Scalia joined all three dissents.

Chief Justice Roberts argues that automatic life without parole for murder committed by a child is not unusual and therefore not in violation of the Eighth Amendment.[80] He says the Court should use "objective indicia" of society's standards to ensure that the Court's subjective values or beliefs are not used.[81] Chief Justice Roberts acknowledges the Court should take guidance from "evolving standards of decency that mark the progress of a maturing society."[82] Mercy, the Chief Justice says, can be a form of decency, but decency is not leniency. He opines: "As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty."[83] Chief Justice Roberts makes the point that if a legislature mandates a sentence of automatic life without parole, and a juvenile receives such a punishment after committing murder, that this is not "unusual" and not a violation of the Eighth Amendment.[84] Roberts seems to explain away his vote in *Graham* with the majority by saying, "[i]n barring life without parole for juvenile nonhomicide offenders, *Graham* stated that '[t]here is a line 'between homicide and other serious violent offenses against the individual.'"[85] The Chief Justice apparently only considers the offenders youth when a non-homicide crime is committed. Otherwise, the Court should treat the juvenile without regard to those considerations. Roberts wrote in his concurrence in *Graham*:

> Roper's prohibition on the juvenile death penalty followed

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73 *Id.* at 489.
74 *Id.* at 469 (quoting *Roper*, 543 U.S. at 560).
75 *Id.* (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).
76 *Id.* at 469 (quoting *Graham*, 560 U.S. at 59).
77 *Id.* at 469 (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).
78 *Id.* at 470; *see Graham*, 560 U.S. at 60-61 (listing cases); *see also* Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Atkins v. Virginia, 536 U.S. 304, 318-19 (2002); Roper v. Simmons, 543 U.S. 551, 568 (2005).
79 *Miller*, 567 U.S. at 470; *see* Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 608-09 (1978).
80 *Miller*, 567 U.S. at 494 (Roberts, C.J., dissenting).
81 *Id.*
82 *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).
83 *Id.* at 495.
84 *Id.* at 494.
85 *Id.* at 499.

> from our conclusion that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." These differences are a lack of maturity and an underdeveloped sense of responsibility, a heightened susceptibility to negative influences and outside pressures, and the fact that the character of a juvenile is "more transitory" and "less fixed" than that of an adult. Together, these factors establish the "diminished culpability of juveniles," and "render suspect any conclusion" that juveniles are among "the worst offenders" for whom the death penalty is reserved.[86]

So, it follows, only juveniles who commit crimes that legislatures determine should be punished with a death sentence, and not juveniles who commit other homicides where legislature has assessed a punishment other than death, should receive the benefit of a court looking to their "diminished culpability," their "lack of maturity," "underdeveloped sense of responsibility," and "heightened susceptibility to negative influences" and "outside pressures" with a "more transitory" and "less fixed" character in assessing a mandatory punishment that removes them from society the rest of their life?[87] This is not leniency Mr. Chief Justice, this is indecency. If you justify your dissent by saying the legislatures should make the decision of available punishments, why would you ever agree, as you did in Graham, that juveniles convicted of non-homicide crimes should not receive the punishment the voice of the people dictate? As we understand brain science and human development, as our society matures, should we not apply this knowledge as a national consensus develops? The Framers had no idea the advances in science that would occur. We should not be shackled by their inability to see the future. With over 73 million children in the United States,[88] in 2020 there were around 32,000 juvenile arrests for violent crimes and only 930 of these arrests were for murder.[89] It is cruel and unusual punishment not to consider these aspects of childhood development in the creation of legislation meant to address misbehavior and law breaking in our youth. Any legislation otherwise drafted is unconstitutional and the Framers would agree.

Justice Thomas also issued a dissent, joined by Justice Scalia, that ignores the Chief Justice's arguments and discussion about evolving standards. Justice Thomas argued for a return to the pre-*Woodson* era, saying he believes *Woodson*, which prohibits the mandatory imposition of a death sentence, to be wrongfully decided in its holding that mandatory capital sentencing schemes failed "to allow the particularized consideration" of "relevant facets of the character and record of the individual offender

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86 Graham v. Florida, 560 U.S. 48, 89 (2010) (Roberts, C.J., concurring) (internal citations omitted).

87 *See id.*

88 Veera Korhonen, *Number of Children in the United States from 1950 to 2050*, STATISTA (June 2, 2023), https://www.statista.com/statistics/457760/number-of-children- in-the-us/.

89 *See* LIZ RYAN & NANCY LA VIGNE, U.S. DEPT. OF JUST., JUV. STATS.: NAT'L REP. SERIES 2 (2002), *available at* https://ojjdp.ojp.gov/publications/trends-in-youth-arrests.pdf.

or the circumstances of the particular offense."[90] Thomas fails to understand the necessity of "particularized consideration" in the long line of cases following our return to capital punishment in 1976. *Miller* provides instructional insight into how Justice Thomas might decide a similar case if the issue were brough before the Court again. Justice Thomas believes and once again states "the Cruel and Unusual Punishments Clause, as originally understood, prohibits [only] 'torturous methods of punishment.'"[91]

Finally, Justice Alito, joined by Justice Scalia, falls back in his dissent to complaining that the "Court long ago abandoned the original meaning of the Eighth Amendment, holding instead that the prohibition of 'cruel and unusual punishment' embodies the 'evolving standards of decency that mark the progress of a maturing society.'"[92] Justice Alito nostalgically remembers that "at least at the start, the Court insisted that these 'evolving standards' represented something other than the personal views of five Justices."[93] Justice Alito quotes *Rummel v. Estelle*, which upheld a life sentence for a third- time felon under Texas's recidivist statute, that "the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices."[94] Justice Alito finally laments, "[w]hat today's decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society's standards. Our Eighth Amendment case law is now entirely inward looking. After entirely disregarding objective indicia of our society's standards in *Graham*, the Court now extrapolates from *Graham*."[95]

So, in *Miller* we see the four conservatives, with Chief Justice Roberts now firmly on board, joining together and praying to the ghost of the Framers to resist the dictates of past courts and ignore precedent that the Eighth Amendment should be interpreted subject to "the evolving standards of decency that mark the progress of a maturing society."[96]

D. *UNITED STATES V. KEBODEAUX*[97]

The following year the Court considered *United States v. Kebodeaux*. The Court held the Necessary and Proper Clause of the United States Constitution grants Congress the power to enact registration requirements for sex offenders under the Sex Offender Registration and Notification Act.[98] The Court determined this included people subject to registration requirements prior to passage of the act because Kebodeaux was under federal registration requirements similar to SORNA at the time of his conviction and release.[99]

Kennedy is only cited once in *Kebodeaux* by Justice Thomas in his dissent, joined by Justice Scalia. Justice Thomas uses *Kennedy* to argue that protecting society from sex

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90 *Miller*, 567 U.S. at 505-06 (quoting Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976)).
91 *Id.* at 506 (citing *Graham*, 560 U.S. at 99 (Thomas, J., dissenting)).
92 *Miller*, 567 U.S. at 510 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
93 *Id.*
94 Rummel v. Estelle, 445 U.S. 263, 264-65, 275 (1980).
95 *Miller*, 567 U.S. at 514-15.
96 Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
97 *See generally* United States v. Kebodeaux, 570 U.S. 387 (2013).
98 *Id.* at 389.
99 *Id.*

offenders is an important and laudable endeavor which is nonetheless unconstitutional because he and Justice Scalia alone can channel the framers, and they told him so.[100] Justice Thomas, still smarting from his loss in *Comstock* in 2010, complains about his perceived inconsistency between the Court's finding in *Comstock* and its finding in *Kebodeaux*.[101] The dissent adds nothing to our consideration of "national consensus" or "evolving standards of decency" developed herein and is mentioned here only to complete the analysis of the Court's use of *Kennedy*.

E. *HALL V. FLORIDA*[102]

This case looked at whether Florida's method of determining intellectual deficiency violated the Eighth Amendment. Justice Kennedy wrote for the majority.[103] The Court held Florida's mandatory IQ test score cut off at 70 for intellectual disability violates the Eighth Amendment because it ignores standard medical practices by failing to account for the standard error of measurement (SEM) for IQ tests.[104] In the opinion, the only reference to *Kennedy* is a quote about the rationales for punishment and nothing further, to-wit: "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."[105] The Court ultimately finds that "no legitimate penological purpose is served by executing a person with intellectual disability."[106]

Authored by Justice Alito and joined again by Chief Justice Roberts and Justices Scalia and Thomas, the dissent believes the Court is taking a "new and most unwise" direction in its Eighth Amendment cases.[107] Seeming to adopt the Court's previous use of the "evolving standards" language and case history, Alito uses these standards as a cudgel. "In *Atkins* and other cases, the Court held that the prohibition of cruel and unusual punishment embodies the 'evolving standards of decency that mark the progress of a maturing society,' and the Court explained that 'those evolving standards should be informed by objective factors to the maximum possible extent.'"[108] So what standards are Alito willing to acknowledge evidence those of a maturing society? Complaining about the majority, Alito says, "I cannot follow the Court's logic. Under our modern Eighth Amendment cases, what counts are our society's standards—which is to say, the standards of the American people—not the standards of professional associations, which at best represent the views of a small professional elite."[109] His preference for the use of "the standards of the American people" in applying those "evolving standards of decency" appears to be the conservatives adopting and acknowledging prior findings of

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[100] *Id.* at 413.
[101] United States v. Comstock, 560 U.S. 126, 410-13 (2010) (Thomas, J. dissenting).
[102] *See generally* Hall v. Florida, 572 U.S. 701 (2014).
[103] *Id.* at 703 (delivered by Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan).
[104] *Id.* at 704; *see also id.* at 713-14 (explaining a SEM score reflects that a person's IQ score is more accurately calculated as a range rather than as one set number).
[105] Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).
[106] *Hall*, 572 U.S. at 708 (citing Atkins v. Virginia, 536 U.S. 317, 320-21 (2002)).
[107] *Id.* at 725 (Alito, J., dissenting).
[108] *Id.* (citing Atkins v. Virginia, 536 U.S. 304, 312 (2002) (internal quotation marks omitted)).
[109] *Id.* at 731.

the Court as precedent. Although inadvertent, this is an acceptance of the legitimacy of the Court's line of cases using this theory to define the Eighth Amendment. This is an application of *stare decisis* by the conservatives they later abandon in *Dobbs*.[110]

F. *GLOSSIP V. GROSS*[111]

The following year, in *Glossip v. Gross*, the Court rejected inmates' challenges to Oklahoma's lethal injection protocol in that it violated the Eighth Amendment by creating a risk of severe pain by using the sedative midazolam.[112] The Court held the inmates failed to identify an alternative, less painful method of execution or show a large dose of midazolam causes a risk of severe pain.[113]

Kennedy is not mentioned or cited in the majority opinion, however, Justice Thomas continues to complain in his concurrence that the Court has "misinterpreted the Eighth Amendment to grant relief in egregious cases," citing *Kennedy* and *Coker v. Georgia*, which held a defendant convicted of the rape of a child or an adult woman cannot be sentenced to capital punishment.[114] There is little doubt that Thomas would like to have another bite of that apple.

Justice Scalia, joined by Justice Thomas, complains in his concurrence of the delay in executions caused by the Court's "labyrinthine restrictions on capital punishment" attempting to divine the evolving standards of decency to which Scalia never subscribed.[115] Making a personal attack upon Justice Breyer's call for the abolition of the death penalty, Scalia certainly affirmed his misunderstanding that a society will, through its judiciary, correct mistakes the few such as Scalia profess as being the voice of "the people." Unlike Justice Thomas and Justice Alito, at least Scalia understood *stare decisis* and, despite his efforts, he failed during his lifetime to fully force his political opinions upon the country while claiming to carry the banner for the majority. With the new ideation of the Supreme Court, Justice Thomas, Justice Alito, Chief Justice Roberts and the three newest Trump Justices may finally see the corrections their conservative political overlords have begun with the Court's decision in *Dobbs*.

Justice Breyer's dissent cites *Kennedy* while arguing that capital punishment should be reserved for the worst of the worst offenders with the greatest culpability.[116] Ultimately, this discussion was related to an argument that the arbitrariness with which capital punishment is currently imposed violates Eighth Amendment protections.[117]

Justice Sotomayor, in her dissent,[118] accuses the Court of "reengineering" *Baze*[119]

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[110] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 387 (2022) (Breyer, Sotomayor, & Kagan, J., dissenting) ("By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*").

[111] *See generally* Glossip v. Gross, 576 U.S. 863 (2015).

[112] *Id.* at 867 (Alito, J., joined by Roberts, C.J., Scalia, J., Kennedy, J., and Thomas, J.).

[113] *Id.* at 877 (quoting Baze v. Rees, 553 U.S. 35, 52 (2008)).

[114] *Id.* at 906-07 (Thomas, J., concurring).

[115] *Id.* at 898 (Scalia, J., concurring).

[116] *Id.* at 917 (Breyer, J., dissenting).

[117] *Id.* at 945-46.

[118] *Id.* at 948 (Sotomayor, J., joined by Ginsburg, Breyer, & Kagan, J., dissenting).

[119] Baze v. Rees, 553 U.S. 35, 47 (2008).

to make the point that if the death penalty is constitutional an available means of carrying it out must be constitutional.[120] Justice Sotomayor argues though that the means of carrying out death must be consistent with evolving standards of decency, taking into consideration the degree of pain in the method of execution.[121] Justice Sotomayor noted that the method could be rendered unconstitutional[122] due to it being "barbarous"[123] or involving "torture or a lingering death."[124] Sotomayor quoted the inmates that the method used in Oklahoma was the "chemical equivalent of being burned alive."[125]

The majority failed to consider whether the method of execution proposed by Oklahoma was consistent with evolving standard of decency by placing the blame on the inmates for their failure to identify a known and available alternative method of execution that presented a substantially less severe risk of pain and failing to establish a likelihood of showing that the use of midazolam created a demonstrated risk of severe pain.[126] Certainly the Court's failure to even consider the evolving standard of decency test in its opinion is going down that "new evolutionary line" established by Alito in his dissent in *Kennedy*, ultimately devolving standards of decency previously established by the Court.[127]

G. *Arthur v. Dunn*[128]

Following Justice Scalia's death in February 2016, and during the delay in swearing in his replacement until April 2017, the Supreme Court had only eight members.[129] Alabama death row inmate Thomas D. Arthur filed a Writ of Certiorari during this time, which was denied in February 2017.[130] With four conservative and four liberal Justices on the Court, had the writ been granted, a resulting decision presumably would split with four voting to affirm and four to reverse, merely sustaining the finding of the lower court.[131] Consequently, the Order denying the Writ was one sentence.[132]

However, Justice Sotomayor, joined by Justice Breyer, prepared a dissent to the denial of the Writ.[133] Arthur was denied relief in the lower court, complaining that Alabama's lethal injection protocol would result in "intolerable and needless agony."[134]

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120 *Glossip*, 576 U.S. at 973-74.
121 *Id.* at 974.
122 *Id.* (citing *Baze*, 553 U.S. at 47).
123 *Id.* (citing Rhodes v. Chapman, 452 U.S. 337, 345 (1981)).
124 *Id.* (citing *In re* Kemmler, 136 U.S. 436, 447 (1890)).
125 *Id.*
126 *Id.* at 863.
127 Kennedy v. Louisiana, 554 U.S. 407, 455 (2008) (Alito, J., dissenting).
128 Arthur v. Dunn, 580 U.S. 1141 (2017) (mem. op.).
129 *See Supreme Court Timeline: After Justice Antonin Scalia's Death*, VOICE OF AMERICA (Jan. 31, 2017, at 9:32 PM), https://www.voanews.com/a/timeline-supreme-court-events-since-scalia-death/3701204.html.
130 *Arthur*, 580 U.S. at 1141 (Sotomayor, J., dissenting).
131 *Oaths Taken by the Supreme Court*, SUP. CT. U.S., https://www.supremecourt.gov/about/oath/oathsofthecurrent-court.aspx (last visited May 21, 2024) (demonstrating that Neil Gorsuch did not participate in the decision to grant or deny Arthur's writ of certiorari because he was not sworn in to replace Justice Scalia until April 10, 2017).
132 *Arthur*, 580 U.S. at 1141 (Sotomayor, J., dissenting).
133 *Id.*
134 *Id.*

As Glossip requires, Arthur proposed an alternative—death by firing squad.[135] "In order to successfully attack a State's method of execution as cruel and unusual under the Eighth Amendment, a condemned prisoner must not only prove that the State's chosen method risks severe pain but must also propose a 'known and available alternative method for his execution.'"[136]

The dissent complains that by not granting this Writ, the Court ends the discussion between legislators and courts on the constitutionality of execution methods.[137] Legislators can effectively bypass the requirements of *Glossip* by providing only one method of execution.[138] Justice Sotomayor restates *Kennedy* and *Trop* for the proposition that "[t]he meaning of the Eighth Amendment's prohibition on cruel and unusual punishments 'is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791' but instead derives from 'the evolving standards of decency that mark the progress of a maturing society.'"[139] If the courts are to evaluate execution methods for constitutionality, a review is essential as society evolves and new methods are devised—the Eighth Amendment requires this.[140]

H. *Bucklew v. Precythe*[141]

The death of Justice Scalia in 2016 and the retirement of Justice Kennedy in 2018 resulted in the appointment of conservative Neil Gorsuch in 2017 and conservative Brett Kavanaugh in 2018 to make both available to hear the next case citing *Kennedy*: *Bucklew v. Precythe*.[142] The conservative majority was set.[143]

Capital defendant, Russell Bucklew, challenged the constitutionality of Missouri's lethal injection method of execution, a single-drug protocol using the sedative pentobarbital.[144] Certiorari was granted and Justice Gorsuch, writing for the new conservative majority, denied relief affirming the district court's grant of summary judgment against Bucklew.[145] Joining Justice Gorsuch were Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh.[146] Justice Thomas and Justice Kavanaugh wrote

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135 *Id.*; *see* Glossip v. Gross, 576 U.S. 863, 877-78, 880 (2015).

136 *Arthur*, 580 U.S. at 1141 (Sotomayor, J., dissenting).

137 *Id.* at 1151.

138 *Id.* at 1142 ("[*Glossip*] permits States to immunize their methods of execution—no matter how cruel or how unusual—from judicial review and thus permits state law to subvert the Federal Constitution . . . .").

139 *Id.* at 1151 (citing Kennedy v. Louisiana, 554 U.S. 407 (2008) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).

140 *Id.*

141 *See generally* Bucklew v. Precythe, 587 U.S. 119 (2019).

142 *See* Salama & Hananel, *supra* note 31; *President nominates Judge Brett Kavanaugh to replace Justice Kennedy on the Supreme Court*, A.B.A., https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washington letter/july2018/scotuskavanaugh/ (last visited May 21, 2024).

143 *See* Nina Totenberg, *The Supreme Court is the most conservative in 90 years*, NPR (July 5, 2022, at 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative; Tessa Berenson, *Senate Confirms Amy Coney Barrett to the Supreme Court Just Over a Week Before Election Day*, TIME (Oct. 26, 2020, at 8:09 PM), https://time.com/5902166/amy-coney-barrett-confirmed-supreme-court/ (following Bucklew, in 2020, Justice Ginsburg died and Amy Coney Barrett was appointed as the sixth conservative on the Court).

144 *See generally Bucklew*.

145 *Id.* at 151 (Thomas, J., concurring).

146 *Id.* at 121.

separate concurring opinions.[147] Breyer wrote the dissent, of course, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan,[148] with Justice Sotomayor additionally dissenting.[149]

Bucklew's claim that he had an unusual medical condition which would cause a "prolonged and extremely painful execution" and created a substantial risk the defendant would hemorrhage, causing him to potentially choke on his own blood was ignored by the district court, 8th Circuit, and by the Supreme Court.[150] The Court rejected Bucklew's as applied challenge,[151] holding he failed to show there was a readily available alternative that would reduce the risk of substantial pain[152] and also held that the Eighth Amendment does not guarantee a painless death,[153] it just prohibits punishments that intensify a death sentence with a "cruel superaddition of terror, pain, or disgrace."[154]

Justice Sotomayor, in her dissent, argues Bucklew had demonstrated that there was an issue of material fact as to whether Missouri's lethal injection protocol would cause severe pain and suffering,[155] and cited *Kennedy* for the idea that executing the defendant by "forcing him to choke on his grossly enlarged uvula and suffocate on his blood would exceed 'the limits of civilized standards.'"[156] The Court, with its new conservative majority, armed with *Glossip*, can now turn its back on its obligation to review states' methods of execution.[157]

I. *UNITED STATES V. BRIGGS*[158]

The opinion of the Court in *United States v. Briggs* was authored by Justice Alito,

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147 *See id.* at 151 (Thomas, J., concurring); *id.* at 152 (Kavanaugh, J., concurring).
148 *Id.* at 154.
149 *Id.* at 170.
150 Bucklew v. Precythe, 883 F.3d 1087, 1090 (8th Cir. 2018); *see Bucklew*, 587 U.S. 154-58 (Breyer, J., dissenting).
151 *Bucklew*, 587 U.S. at 122.
152 *Id.* at 149 n.4.
153 *Id.* at 132.
154 *Id.* at 133 (quoting Baze v. Rees, 553 U.S. 35, 48 (2008)).
155 *Id.* at 154-55 (Sotomayor, J., dissenting).
156 *Id.* at 158 (quoting Kennedy v. Louisiana, 554 U.S. 407, 435 (2008)); *see also* Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion).
157 We have Justice Kennedy, the great centrist, to thank when he joined the conservatives in *Glossip* to forever move capital review of states' methods of execution away from any analysis of "evolving standards of decency" that mark a maturing society. *Glossip* condemned *Trop v. Dulles* and its progeny to *stare decisis* purgatory. *See* Glossip v. Gross, 576 U.S. 863, 898 (2015) (Scalia, J., concurring). Why would the Court now ever vote to hear another case of such nature? It is clear they heard the ghost of Antonin Scalia when he said in a separate concurrence in *Glossip*, ridiculing Justice Breyer's opposition to the death penalty, "If we were to travel down the path that Justice Breyer sets out for us and once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled. That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind. Justice Breyer's dissent is the living refutation of Trop's assumption that this Court has the capacity to recognize 'evolving standards of decency.' Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have 'changed radically,' and has sought to replace the judgments of the People with their own standards of decency." *Id.* at 899 (Scalia, J., concurring).
158 *See generally* United States v. Briggs, 592 U.S. 69 (2020).

in which all members joined except Justice Barrett.[159] The Court held there is no statute of limitations for rape under the Uniform Code of Military Justice (UCMJ), which provides rape is punishable by death and eliminates the statute of limitations for capital crimes, without regard to existing law interpreting the Court's Eighth Amendment decisions.[160]

The Court refused to apply its interpretations of the Eighth Amendment in *Coker* and *Kennedy* to the military and left the task to Congress and the President.[161] The Court acknowledged the Government's argument that "rape committed by a service member may cause special damage by critically undermining unit cohesion and discipline and that, in some circumstances, the crime may have serious international implications."[162]

In his analysis, Alito acknowledges *Kennedy* for the proposition that the Eighth Amendment incorporates "evolving standards of decency."[163] The Court pondered if it were to find there was no statute of limitations in these circumstances that the evolving standards of decency test could create confusion at a later date should the Court later find the Eighth Amendment applies to the military.[164]

Alito acknowledges the Court, in the past, "in deciding whether the Eighth Amendment permits a death sentence for a particular category of offenses or offenders . . . , has looked to evolving societal standards of decency and has also rendered its own independent judgment about whether a death sentence would aptly serve the recognized purposes of criminal punishment in certain categories of cases."[165]

However, paying homage to the conservatives on the Court, and serving no other particular purpose as this case was being decided, giving deference to the military and its needs as dictated by the military, Congress, and the President, Alito, applauding Thomas's dissent in *Graham* that rejects evolving standards of decency, avows "[s]ome Justices have eschewed aspects of those approaches and have looked instead to the original understanding of the Eighth Amendment."[166] The conservatives continue to argue against the evolving standards of decency test even when it is irrelevant to the discussion.

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[159] *See id.* at 70 (joining in the majority, Justice Gorsuch also filed his own concurring opinion).

[160] *See id.* at 71 (relying on *Coker v. Georgia*, which prohibits the death penalty for the rape of an adult woman, Briggs argued that the five-year statute of limitations that governs non-capital offenses should apply); Coker v. Georgia, 433 U.S. 584, 600 (1977).

[161] *Briggs*, 592 U.S. at 75.

[162] *Id.*

[163] *Id.* at 472-73; *see* Kennedy v. Louisiana, 554 U.S. 407, 419 (2008).

[164] *Briggs*, 592 U.S. at 472. Alito gives two examples of this "confusion" he references, one being when Atkins v. Virginia, 536 U.S. 304 (2002), held the Eighth Amendment prohibits death penalty for a defendant described as intellectually disabled, conflicting with Penry v. Lynaugh, 492 U.S. 302 (1989), which held otherwise, and another being Roper v. Simmons, 543 U.S. 551 (2005), which found the Eighth Amendment prohibits death penalty for crime committed by a person under 18 years of age, conflicting with Stanford v. Kentucky, 492 U.S. 361 (1989), holding otherwise. From my experience, there was no confusion. After *Atkins* and *Roper*, it was clear that two additional classifications of persons were no longer eligible for the death penalty as the evolving standards of decency of a maturing society changed the eligibility—simple enough.

[165] *Briggs*, 592 U.S. at 473; *see Kennedy*, 554 U.S. at 419-21, 441-46; *Roper*, 543 U.S. at 561, 571-75; *Atkins*, 536 U.S. at 318-21.

[166] *Briggs*, 592 U.S. at 473. Alito then cites the following: Graham v. Florida, 560 U.S. 48, 99-102, (2010) (Thomas, J., joined by Scalia & Alito, J., dissenting); *Atkins*, 536 U.S. at 348-49 (Scalia, J., dissenting); Thompson v. Oklahoma, 487 U.S. 815, 864, 872-73 (1988) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting); Glossip v. Gross, 576 U.S. 863, 894, 898-99 (2015) (Scalia, J., concurring) (majority opinion delivered by J., joined by Roberts, C.J., Scalia, J., Kennedy, J., and Thomas, J.).

They just can't let it go. The Court's Eighth Amendment jurisprudence is clearly stated by Alito, and since this case is not being decided on that analysis his reference to the conservatives' allegiance to their opinion of what the Framers intended is pathological.

Since *Briggs* in 2020, and Justice Barrett being appointed to fill Justice Ginsburg's seat due to Ginsburg's death in September of 2020, *Kennedy* has not been cited by the Court in either a majority opinion or dissent. The majority has remained strongly conservative, though the addition of Justice Jackson in 2022, following Justice Souter's retirement that September, will likely bring about impassioned dissents while the majority judicially abolishes Eighth Amendment protections.

III. The Future of Eighth Amendment Development

If the above death penalty cases in the Supreme Court are examined since Justice Kavanaugh joined the Court in October, 2018, when Kavanaugh's swearing-in created a solid conservative majority on the Court, one thing is clear: There will be no further consideration by the Court on such matters that led to *Kennedy v. Louisiana*,[167] (no death penalty for non-homicide cases) *Graham v. Florida*,[168] (no mandatory life without parole for juveniles in non-homicide cases) *Miller v. Alabama*,[169] (the use of automatic life without parole for juveniles violated the Eighth Amendment) *Hall v. Florida*,[170] (Florida's method of determining intellectual deficiency violated the Eighth Amendment) and previous death penalty cases such as *Atkins v. Virginia*,[171] (no death penalty for the intellectually disabled) and *Roper v. Simmons*,[172] (no death penalty for juveniles). The only sweeping changes in the death penalty this Court would likely implement would be to undo this line of cases.

Perhaps minor adjustments will occur, such as in *United States v. Briggs* (2020),[173] (allowing the military to adhere to their own rules as to statutes of limitations), but more likely, this new majority will deny relief to a condemned as it did above in *Bucklew v. Precythe* (2019),[174] (preventing the condemned from challenging the proposed method of his execution), *Arthur v. Dunn* (2017),[175] (denying the condemned's writ challenging the proposed method of his execution), and *Glossip v. Gross* (2015),[176] (denying relief to the condemned challenging the proposed method of his execution).

Since October 2018, when Kavanaugh gave the conservative majority of the Court, only eight cases have resulted in positive results for a condemned person—five occurring in 2019. In January 2019, in *Shoop v. Hill*,[177] the Court remanded on an *Atkins* claim, *per*

[167] *Kennedy*, 554 U.S. at 446-47.
[168] *Graham*, 560 U.S. at 80.
[169] *See* Miller v. Alabama, 567 U.S. 460, 489 (2012).
[170] *See* Hall v. Florida, 572 U.S. 701, 702 (2014).
[171] *See Atkins*, 536 U.S. at 321.
[172] *See* Roper v. Simmons, 543 U.S. 551, 575 (2005).
[173] *See* United States v. Briggs, 592 U.S. 69, 78 (2020).
[174] *See* Bucklew v. Precythe, 587 U.S. 119, 150-51 (2019).
[175] *See* Arthur v. Dunn, 580 U.S. 1141, 1141 (2017) (mem. op.).
[176] *See* Glossip v. Gross, 576 U.S. 863, 878 (2015).
[177] Shoop v. Hill, 586 U.S. 45, 52-53 (2019).

curiam with no dissent. February 2019, saw two cases—*Moore v. Texas*[178] reversed the Texas Court of Criminal Appeals in its finding Moore was not intellectually disabled in its continuing fight with Texas over its failure to define intellectual disability, and February 27, 2019, in *Madison v. Alabama*,[179] the Court reversed a case based on competency to be executed, with conservative Justice Roberts joining the four liberal Justices remaining on the Court for a bare majority. In March 2019, the Court in *Murphy v. Collier*[180] granted a stay of execution unless religious staff is made available to the condemned. In June 2019, in *Flowers v. Mississippi*,[181] the Court reversed a case based on *Batson* violations in which conservative Justices Kavanaugh, Roberts, and Alito joined the then four liberal Justices in the majority.

After a three-year drought, in March 2022, in *Ramirez v. Collier*,[182] the Court reversed a case on First Amendment grounds, granting a condemned man's request for special religious accommodations during his execution, with all the conservative Justices, except Thomas, joining the liberals. In June 2022, in *Nance v. Ward*,[183] conservatives Roberts and Kavanaugh joined the three remaining liberals, stating an action through Section 1983 is the proper method for challenging a method of execution and reversed for that purpose below. And finally, in February 2023, in *Cruz v. Arizona*,[184] the Court remanded a case to Arizona with once again Roberts and Kavanaugh joined by three liberal Justices, Kagan, Sotomayor and Jackson, in the majority. That is three cases granting affirmative relief to a condemned in five years—none making sweeping changes in the application of the death penalty, and no cases during the 2019 or 2020 terms.

IV. Conclusion

The current Supreme Court turned its back on its history of traditionally interpreting substantive due process to ensure the Constitution does not remain so stagnant that it becomes insufficient to protect modern society. The Court, as *Dobbs* suggests, is departing from this traditional view in favor of originalism.[185] As to death penalty jurisprudence, it is apparent that "all rights that have no history stretching back to the mid-19 century are insecure."[186] I would submit this includes the rights guaranteed by the Eighth Amendment. *Dobbs* was a marked shift in the Court's *stare decisis* analysis because it was the first time the Court had stripped citizens of a fundamental right with no legitimate justification for the change in course beyond a difference in the jurists

[178] Moore v. Texas, 586 U.S. 133, 142-43 (2019).
[179] Madison v. Alabama, 586 U.S. 265, 283 (2019).
[180] Murphy v. Collier, 139 S.Ct. 1475, 1476 (2019) (mem. op.).
[181] Flowers v. Mississippi, 588 U.S. 284, 315-16 (2019).
[182] Ramirez v. Collier, 595 U.S. 411, 436-37 (2022).
[183] Nance v. Ward, 597 U.S. 159, 163 (2022).
[184] Cruz v. Arizona, 598 U.S. 17, 32 (2023).
[185] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., dissenting) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell* . . . ."); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Lawrence v. Texas, 539 U.S. 558, 565 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).
[186] *See Dobbs*, 597 U.S. at 363 (Breyer, Sotomayor, and Kagan, J., dissenting) (joint opinion).

handing down the opinion.[187] *Dobbs* also purported that adherence to *stare decisis* was unnecessary because *Roe* and *Casey* did not implicate substantial reliance interests, claiming this was conceded in *Casey* despite *Casey*'s rejection of that exact argument—presenting concerns for the Court's ability to even accurately recite its own precedent.[188] If the Court can so easily cast aside a half-century of law claiming no necessity to adhere to *stare decisis* based on the majority's justification to satisfy their political philosophies, can those facing the death penalty, relying on the Court's developed interpretation of the Eighth Amendment, believe the Court will not cast aside previous guarantees of the Eighth Amendment to allow once again for the states to expand the death penalty to include such crimes and punishments as protected in *Coker*, *Kennedy*, *Atkins*, *Roper*, *Graham* and *Miller*?

Alito, in *Kennedy*, justifies his argument that state action increasing the passage of involuntary commitment statutes, creating residency requirements for sex offenders and, under a federal mandate, all fifty states requiring sex offender registration is somehow a rebuttal to the use of the evolving standard of decency test by the majority in *Kennedy*.[189] Alito asserts these statistics actually prove the creation of a "new evolutionary line."[190] Alito says the majority in *Kennedy* uses their own dislike for the death penalty as a measure for societal evolution of its standards of decency, justifying the prevention of future use of the ultimate penalty where death of the victim was not intended.[191] Alito points out that his statistics may be the beginning of a "strong new evolutionary line"—a new evolution of decency where the death penalty in non-homicide crimes reflects how society is evolving.[192] This is my fear with the Court's decision in *Dobbs*. Our conservative Supreme Court now sees its mandate to correct the failings of the past by turning *stare decisis* on its head. I see Alito's and the conservative's political agenda as an unevolving of society norms not maturing but digressing into reactionary, historical persecution of "the other" by using the implementation of the death penalty for crimes such as sexual abuse.

To prevent this inevitable expansion of the death penalty to satisfy the political

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187 *See* Maddy Cittadino, *Dobbs v. Jackson: The Overturning of Roe v. Wade and its Implications on Substantive Due Process*, SYRACUSE L. REV. (June 30, 2022), https://lawreview.syr.edu/dobbs-v-jackson-the-overturning-of-roe-v-wade-and-its- implications-on-substantive-due-process/.

188 *Compare Dobbs*, 597 U.S. at 287-88 ("In Casey, the controlling opinion conceded that . . . traditional reliance interests were not implicated") *with* Casey v. Planned Parenthood of Se. Pa., 505 U.S. 833 (1992) (rejecting a counter-argument that abortion does not invoke reliance interests "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion").

189 *See* Kennedy v. Louisiana, 554 U.S. 407, 455-56 (2008) (Alito, J., dissenting).

190 *Id.* at 461.

191 *Id.* at 461-62. ("The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's "own judgment" regarding "the acceptability of the death penalty.") (internal quotation marks omitted); *see also id.* at 462 ("Although the Court has much to say on this issue, most of the Court's discussion is not pertinent to the Eighth Amendment question at hand. And once all of the Court's irrelevant arguments are put aside, it is apparent that the Court has provided no coherent explanation for today's decision.").

192 *Id.* at 461.

agenda of the conservatives, the simple solution is to reform the Court.[193] With the current structure of Congress, this will not be simple and will only occur if the rules of the Senate are changed and liberals secure a solid majority in the House and the Senate with a President of the same party. At that time, Supreme Court reform should be everyone's first priority. It does not matter if the solution is to divide the court evenly by political affiliation,[194] expand the Court based on a lottery system to incorporate all the federal appeals courts in an assignment system,[195] reduce the size to eight members evenly divided,[196] or to use court packing to increase the size of the court to thirteen to neutralize the conservative majority.[197] The point being, the conservatives, for several decades through gerrymandering and their conservative political activism, have created a conservative majority in the House and Senate when the majority of the electorate is not conservative, all for the purpose of stacking the Supreme Court to further their political agenda.[198] And now, these "originalists" want to return all decision-making to their elected officials as the Framers intended to allow an artificial majority to turn the clock back on the progress of our maturing society. The current conservative members of the Court were more than agreeable to misrepresent and obfuscate their belief that *Roe* was settled law to get on the Court, so political maneuvers are no longer beneath the dignity of the judiciary, it is an essential element.[199]

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193 *See Final Report December 2021*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE UNITED STATES 1, 2 (Dec. 8, 2021), https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf (discussing the history of Supreme Court reform, proposals to expand or alter the current structure of the Court with arguments for and against such changes, including term limits, reducing the Court's jurisdiction and other topics including judicial ethics).

194 *See* David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 412 (2018) (arguing for a Supreme Court that functions on an ideologically balanced basis, allowing the Court to provide meaningful representation to all, defuse the politicization of judicial appointments, and make wiser decisions).

195 *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181, 193 (2019) (proposing a Supreme Court Lottery or a "Balanced Bench" approach).

196 *See* Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 554 (2018) (arguing for even division of 4-4 on the Supreme Court).

197 *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703, 1706 (2021) (arguing to change the make-up of the court politically by personnel reform either through court packing, partisan balance created through a panel system, or by changing the court's authority by removing its ability to decide cases of political division).

198 *See* Katilin Lewis, *Ketanji Brown Jackson Notes Key Question in Supreme Court Decision*, NEWSWEEK (May 16, 2024, at 7:55 PM), https://www.newsweek.com/ketanji-brown-jackson-notes-key-question-supreme-court-decision-1901217 (The conservatives continue to vote as a bloc to limit the citizens' access to representative democracy to maintain their conservative edge in government); Lydia Saad, *U.S. Political Ideology Steady; Conservatives, Moderates Tie*, GALLUP (Jan. 17, 2022), https://news.gallup.com/poll/388988/political-ideology- steady-conservatives-moderates-tie.aspx (confirming conservatives are not in the majority in the United States, even though they hold 66% of the Supreme Court—only 36% of Americans identify as conservative, 37% identify as moderate, and 24% identify as liberal). The electorate is quite diverse and a national consensus on any topic must include the large number of citizens that consider themselves moderate. No one would consider any of the conservatives on the Supreme Court as moderate.

199 Jane C. Timm, *What Supreme Court justices said about Roe and abortion in their confirmations*, NBC NEWS (June 24, 2022, at 3:13 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-justices-said-roe-abortion-confirmations-rcna35246 (discussing what Justices Barrett, Kavanaugh, Gorsuch, Alito, Thomas and Roberts said about *Roe* as precedent during their confirmation hearings).

WHERE DOES A HACK HAPPEN? COMPUTER INTRUSION CRIMES AND CONSTITUTIONAL VENUE

BY HARRISON PARKER BLANCHARD GRANT[1]

ABSTRACT

The United States Constitution guarantees the right to a criminal trial where the criminal offense was committed. This guarantee – the venue requirement – forces courts to analyze where criminal conduct occurred. Technology makes that locational analysis more complicated. For one computer hacker, that same analysis led to his trial and conviction in Massachusetts, despite the fact that he did not hack into anything in Massachusetts. This Article examines that hacker's case, exploring the technologies used to execute the hack and linking those technologies to the hacker's trial in Massachusetts.

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I. INTRODUCTION

When the government accuses individuals of crimes, the United States Constitution guarantees defendants the right to be tried wherever the crime was committed.[2] In the legal system, this guarantee is called the venue requirement. Venue has a long and storied history in the United States, with roots tracing back to outraged American colonists who were forced to return to England to be tried for crimes allegedly committed in the colonies.[3] The venue requirement, enshrined in Article III and in the Sixth Amendment of the Constitution, was drafted to safeguard against such unfair outcomes. Under the most recent Supreme Court framework, dating back to the end of the 20th century, courts determine venue by asking a seemingly simple question: where was the crime committed?[4] For one subset of crimes, answering this question is difficult. The cause of the difficulty? – technology. The subset of crimes? – computer hacking.

On February 14, 2023, a federal trial in Boston, Massachusetts brought this issue to a head. In February 2023, a jury in the District of Massachusetts convicted a prominent Russian national—Vladislav Klyushin—of securities fraud, wire fraud, hacking, and

[2] U.S. CONST. art. III, § 2, cl. 3, ("[t]he Trial of all Crimes...shall be held in the State where the said Crimes shall have been committed;" U.S. CONST. Amend. VI, "In all criminal prosecutions, the accused shall enjoy the right to a… trial…wherein the crime shall have been committed").

[3] *See, e.g.*, William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 63-65 (1944) (describing the Virginia Resolves, a legislative decree by the colonial government of Virginia to oppose efforts by the King of England to transport and try colonists in England accused of committing crimes against the crown in the colonies); United States v. Saavedra, 223 F.3d 85, 88 (2d Cir. 2000) ("The feeling of outrage was so strong that 'transporting us beyond Seas to be tried for pretended offenses' is listed as one of the causes of the Revolution and is set forth in the Declaration of Independence").

[4] *See* United States v. Cabrales, 524 U.S. 1, 6-7 (1998); United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999).

conspiracies to commit each.[5] All four counts traced back to one of the most lucrative hacking schemes in recent history, netting Klyushin and his co-conspirators over $90 million in profits.[6] Klyushin was sentenced to nine years in prison and was ordered to forfeit over $34 million.[7] Before sentencing, he filed a post-conviction motion for judgment of acquittal,[8] arguing that the District of Massachusetts was an improper venue for his trial.[9] In July 2023, District Court Judge Saris published a memorandum and order denying Klyushin's motion.[10] In just five pages from the middle of the memorandum, Judge Saris ratified a theory of venue never before accepted by a federal court in a computer hacking case: a hacker may be charged, tried, and convicted wherever the stolen information "passes through."[11]

The purpose of this Article is to examine the constitutionality of the venue finding in *United States v. Klyushin*. This Article argues that venue in *Klyushin* was improper, and that the theory underlying the finding is based on a flawed understanding of statutes and case law. This Article recommends solutions that decision-makers could craft to deal with this venue theory. To make these claims, this Article proceeds in four parts.

Part I provides a deep dive into the facts and legal analysis of *Klyushin*, describing Klyushin's crimes and the technologies he used to execute them. Understanding these technologies is critical because the *Klyushin* court latched onto one particular technology to make its venue finding.

Part II covers venue in three sections. Section A summarizes the history and purpose behind constitutional venue and provides the Supreme Court's framework for determining venue. Section B explains the concept of continuing offenses, codified in 18 U.S.C. § 3237,[12] which expands venue to allow defendants who commit multidistrict offenses to be tried in any district "in which such offense was begun, continued, or completed."[13] This statute is at the heart of *Klyushin*, and understanding continuing offense is critical for this Article's discussion of venue. Using A and B as a backdrop, Section C zooms in on venue

5 *See generally* United States v. Klyushin, 684 F. Supp. 3d 1 (D. Mass. 2023); U.S. Att'y's Off., Dist. of Mass., *Russian Businessman Sentenced to Nine Years in Prison in $93 Million Hack-to-Trade Conspiracy*, U.S. DEP'T OF JUST., U.S. ATT'Y'S OFF., DIST. OF MASS. (Sept. 7, 2023) [hereinafter Dist. of Mass., *Russian Businessman Sentenced to Nine Years in Prison in $93 Million Hack-to-Trade Conspiracy*], https://www.justice.gov/usao-ma/pr/russian-businessman-sentenced-nine-years-prison-93-million-hack-trade-conspiracy.

6 *Klyushin*, 684 F. Supp. 3d at 5.

7 Dist. of Mass., *Russian Businessman Sentenced to Nine Years in Prison in $93 Million Hack-to-Trade Conspiracy*, *supra* note 5.

8 *Klyushin*, 684 F. Supp. 3d at 1.

9 *Id.*

10 *Id.* at 20.

11 *Id.* at 15-20.

12 18 U.S.C. § 3237 (LexisNexis, Lexis Advance through Public Law 118-46, approved March 22, 2024, with a gap of Public Law 118-42). § 3237(a) provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

13 *Id.*

in federal computer hacking cases. Section C explains how traditional venue principles map onto computer hacking, with references to other scholarship on the intersection venue, cybercrimes, and continuing offenses.[14]

Using Parts I and II, Part III argues that venue in *Klyushin* was improper. Part III addresses the mismatch between the elements of the relevant computer hacking statute and the venue finding in Boston. It argues that, on *Klyushin*'s facts, the hack was not a continuing offense under § 3237. It also argues that trying Klyushin in Boston, which only served as a through-point for his hack, not its victim, offends constitutional principles of fairness.[15]

Klyushin was sentenced to over nine years of incarceration for his offenses and filed an appeal before the First Circuit Court of Appeals.[16] However, on July 26, 2024, he was granted clemency by then-President Biden as part of a larger United States-Russia prisoner exchange.[17] Although the appeal before the First Circuit Court of Appeals was dismissed on December 6, 2024, *Klyushin* established a new theory of venue that other prosecutions will involve.[18] With that reality in mind, this Article concludes by arguing that even though *Klyushin* establishes a new venue theory for computer hacking cases, courts must ensure that hackers, like any other criminals, are tried where they committed their crimes.

II. *UNITED STATES V. KLYUSHIN*

A. VLADISLAV KLYUSHIN'S HACK

Before his court case, Vladislav Klyushin was no stranger to technology. Klyushin was the owner of a Moscow-based information technology company called M-13.[19] According to the Department of Justice's press release, Klyushin's company primarily provided "penetration testing" services.[20] Penetration testing is a security service designed

[14] *See, e.g.*, Jacob Taka Wall, *Where to Prosecute Cybercrimes*, 17 DUKE L. & TECH. REV 147 (describing various approaches to the venue problem in computer hacking cases, including charging a defendant where the effects of their offense are felt); Kevin Coleman, *Justifying Effects-Based Venue in Fed. Crim. Cases*, 57 CRIM. L. BULLETIN (forthcoming Apr. 1, 2021) online at https://ssrn.com/abstract=3802150 or http://dx.doi.org/ 10.2139/ssrn.3802150 (describing the "substantial contacts test" that federal circuit courts, such as the Second and Seventh Circuits, have used to determine venue. Interestingly, this Article notes that the circuit which authored one of the seminal computer hacking cases that describes venue–the Third Circuit in *United States v. Auernheimer*–squarely rejected the substantial contacts test. Combined with the recency of *United States v. Klyushin*, the Third Circuit's rejection of the above test is part of the reason why this Article does not discuss effect-based venue and is instead narrowly focused on pass-through venue).

[15] *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed"); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

[16] *United States v. Klyushin* (1:21-cr-10104), COURTLISTENER (Jan. 24, 2025, at 7:35 AM), https://www.courtlistener.com/docket/61629108/united-states-v-klyushin/?page=2; *see* Dist. of Mass., *Russian Businessman Sentenced to Nine Years in Prison in $93 Million Hack-to-Trade Conspiracy*.

[17] *See Russian in prisoner swap ends US hack-and-trade conviction appeal*, REUTERS (Aug. 9, 2024, at 12:41 PM), https:// www.reuters.com/world/russian-prisoner-swap-ends-us-hack-and-trade-conviction-appeal-2024-08-09.

[18] COURTLISTENER, *supra* note 16; Mandate, *Klyushin*, 684 F. Supp. 3d (2023) (No. 23-1779).

[19] *See* United States v. Klyushin, 684 F. Supp. 3d 1, 5 (D. Mass. 2023).

[20] Dist. of Mass., *Russian Businessman Sentenced to Nine Years in Prison in $93 Million Hack-to-Trade Conspiracy*, *supra* note 5.

to expose the flaws in a client's security.[21] Clients can use the services of companies like M-13 to attempt to probe, hack, and steal information from their networks.[22] Allegedly, Klyushin was deeply connected to the Russian government, providing M-13's services to various government agencies at the federal and state levels.[23]

Together with two co-conspirators named Ivan Ermakov and Nikolai Rumiantcev, Klyushin began a multiphase operation to make highly lucrative trades in the U.S. stock market.[24] From Russia, he and the two co-defendants used "malicious infrastructure" to obtain the login credentials of employees at two filing agents: DFIN and Toppan Merrill.[25] Filing agents like DFIN and Toppan Merrill assist public companies with their filings to the Securities and Exchange Commission.[26] In particular, filing agents prepare quarterly reports of their clients' financial data.[27] These reports are incredibly valuable because investors use them to adjust their investments, which can impact the value of the companies' stocks.[28] Klyushin knew that.[29] He just needed a way to access the filing agents' networks and view the quarterly reports before they were publicly released.

Using "malicious infrastructure," Klyushin and his co-conspirators stole the login credentials of a DFIN employee.[30] With stolen credentials in hand, Klyushin and his co-conspirators logged into DFIN's network and acquired *unreleased* earnings reports for companies like Snap, Inc., Tesla, Capstead Mortgage Co., and others.[31] The data in these reports allowed Klyushin to take the first bite at the apple in the stock market. He could analyze the companies' financial performances from the previous quarter before anyone else. That kind of insider information would allow a savvy investor to make extremely lucrative trades. And trade Klyushin did.[32]

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21 *See, e.g.*, *What is penetration testing | What is pen testing?*, CLOUDFLARE, https://www. cloudflare.com/learning/security/glossary/what-is-penetration-testing; IBM, *What is penetration testing?*, IBM, https://www.ibm.com/topics/penetration-testing.

22 *See id.*

23 Dist. of Mass., *Russian Businessman Sentenced to Nine Years in Prison in $93 Million Hack-to-Trade Conspiracy* (alleging that M-13 provided its services to "[t]he Administration of the President of the Russian Federation, the Government of the Russian Federation, federal ministries and departments, regional state executive bodies, commercial companies and public organizations").

24 *Klyushin*, 684 F. Supp. at 5.

25 *Id.*

26 *Id.*; *see* Toppan Merrill, *IPO Filing Services*, TOPPAN MERRILL, https://www.toppanmerrill.com/ solutions/ipo/; *SEC Filings*, DFIN, https://investor.dfinsolutions.com/financials/sec-filings/default.aspx.

27 *Klyushin*, 684 F. Supp. at 5.

28 *See, e.g.*, Anna-Louise Jackson & Benjamin Curry, *Earnings Reports: What Do Quarterly Earnings Tell You?*, FORBES (July 18, 2023, at 4:13 AM), online at https://www.forbes.com/advisor/investing/earnings-reports/ ("Analysts on Wall Street make estimates about a company's financial performance in advance of earnings season. When the company discloses its quarterly results, investors compare analysts' estimates to the company's actual results . . . with major implications for stock performance").

29 *Klyushin*, 684 F. Supp. at 6.

30 *Id.* at 5.

31 *Id.* at 5-6; Dist. of Mass., *Russian Businessman Sentenced to Nine Years in Prison in $93 Million Hack-to-Trade Conspiracy*. The method that Klyushin and his co-conspirators used to acquire the login credentials of this employee is not detailed by this DOJ sentencing announcement. The announcement provides: "Specifically, Klyushin, and allegedly his co-conspirators, deployed malicious infrastructure capable of harvesting and stealing employees' login information and used proxy (or intermediary) computer networks outside of Russia to conceal the origins of the activities."

32 *Klyushin*, 684 F. Supp. at 6.

Klyushin purchased stock in companies whose positions, based on the earnings reports, he knew would increase when the earnings reports were released publicly.[33] He made his investments *before* the earnings reports were publicized.[34] Then, when the earnings were released, Klyushin sold off his shares to tremendous profit – over $90 million.[35]

Throughout his hacking and trading, Klyushin and his co-conspirators were physically in Russia.[36] Because of that, they needed a mechanism to mask their internet traffic.[37] From the perspective of DFIN and Toppan Merrill, which had servers located in Illinois, it would certainly look suspicious if an employee logged into their network with an IP address from Russia.[38] So, Klyushin used a VPN – a virtual private network – physically located in Boston, to change his IP address.[39] That VPN was the hook for eventual prosecution.[40] To Judge Saris, using the Boston VPN was enough to rule that Klyushin had violated the Computer Fraud and Abuse Act and committed his computer hack in Boston.[41]

B. How Information Moves on the Internet

To illustrate how the internet transmits information, imagine the following situation: suppose an individual in the United States wants to check the final score of a baseball game that they missed the night before. The fan opens their laptop, clicks on their browser, and types in the name of the website that will have the score: ESPN.com. When the individual accesses the internet and searches for ESPN.com, internet technologies have to identify the places to which and from which to send the website.[42] The identification is an Internet Protocol ("IP") address: a string of numbers that

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[33] *Id.*

[34] Dist. of Mass., *Russian Businessman Sentenced to Nine Years in Prison in $93 Million Hack-to-Trade Conspiracy* ("Armed with this information before it was disclosed to the public, Klyushin, and allegedly his co-conspirators, knew ahead of time, among other things, whether a company's financial performance would meet, exceed or fall short of market expectations[.]").

[35] *Klyushin*, 684 F. Supp. at 6.

[36] *Id.* at 5.

[37] *Id.*

[38] *See, e.g.*, Mamatha Srinath, *Catch IP Address threats in your logs to analyze and mitigate them*, ORACLE: OBSERVABILITY BLOG (Apr. 20, 2023), online at https://blogs.oracle.com/observability/post/catch-ip-address-threats-in-logs (describing a software service that flags threatening IP addresses); Monique Danao, *What Can Someone Do With Your IP Address?*, FORBES (Nov. 27, 2023, at 6:15 AM), https://www.forbes.com/advisor/in/business/what-can-someone-do-with-ip-address/ ("IP addresses can be used to determine the geographical location of a device or user").

[39] *Klyushin*, 684 F. Supp. at 5, 9.

[40] *Id.* at 12.

[41] *Id.*

[42] *See How to use your browser to find your IP address*, MICROSOFT EDGE LEARNING CTR. (Apr. 25, 2023), https://www.microsoft.com/en-us/edge/learning-center/how-to-use-your-browser-to-find-your-IP-address?form=MA13I2; *What Is An IP Address – Definition and Explanation*, KASPERSKY DEFINITIONS, https://usa.kaspersky.com/resource-center/definitions/what-is-an-ip-address; *HTTP Requests*, CODEACADEMY (Mar. 4, 2023), https://www.codecademy.com/article/http-requests (describing how internet protocols like HTTP and TCP create the channels that allow information on the internet to move between clients and servers); *What is DNS?*, AMAZON WEB SERVS., https://aws.amazon.com/route53/ what-is-dns/ ("All computers on the Internet, from your smart phone or laptop to the servers that serve content for massive retail websites, find and communicate with one another by using numbers. These numbers are known as IP addresses").

identifies the device and ensures that ESPN.com is sent back to the right laptop.[43] "ESPN.com" is a domain name, used in place of the website's IP address so that human users do not have to remember exact IP addresses for every website they want to visit.[44] The domain name, like the user's IP address, defines the place that the individual wants to access.[45]

When the individual clicks "enter" after typing in the domain name, their browser sends a request to their internet service provider to retrieve ESPN.com.[46] The request provides the laptop's IP address and other information to route ESPN.com to the right user.[47] The internet service provider communicates the request to the appropriate internet server which can provide ESPN.com.[48] When that final server is ready, it sends ESPN.com to the individual's IP address using the same communication path formed by the internet service provider.[49]

If the same individual were to use a VPN to access ESPN.com, the path of their information online would change. Using a VPN creates a protected "tunnel" through which information can flow without allowing internet service providers to access it.[50] Here, the request for ESPN.com would flow from the user's browser to the VPN, which encrypts the request and anonymizes the data within it, like the user's IP address.[51] The request then flows to the final server, which fulfills the request and sends ESPN.com back through the tunnel created by the VPN.[52]

Now, Klyushin and his co-conspirators enter. They used the Boston VPN to route

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43 *See How to use your browser to find your IP address*, *supra* note 42 ("Your IP address comes from your internet service provider, or ISP…. addresses help pinpoint where internet activity originates, and this can be important from everything from routine computer communication to tracing the source of a hack"); KASPERSKY DEFINITIONS, *supra* note 42 ("In essence, IP addresses are the identifier that allows information to be sent between devices on a network: they contain location information and make devices accessible for communication[.]").

44 *See What is DNS?*, CLOUDFLARE LEARNING CTR., https://www.cloudflare.com/ learning/dns/what-is-dns/ (The Domain Name System (DNS) "translates domain names to IP addresses so browsers can load Internet resources"); *What is DNS?*, AMAZON WEB SERVS., https://aws.amazon.com/route53/what-is-dns/ ("When you open a web browser and go to a website, you don't have to remember and enter a long number. Instead, you can enter a domain name like example.com and still end up in the right place.").

45 *What is DNS?*, *supra* note 44.

46 *See HTTP Requests*, *supra* note 42 (describing this three-step process from browser to service provider to server).

47 *See* Inga Valiaugaitė, *What is a VPN?*, CYBERNEWS (Jan. 19, 2024), https://cybernews.com/what-is-vpn/.

48 *Id.*; *HTTP Requests*, *supra* note 42 ("Once the TCP connection is established, the client sends a HTTP GET request to the server to retrieve the webpage it should display. After the server has sent the response, it closes the TCP connection").

49 *See* Valiaugaitė, *supra* note 47.

50 *Id.* (describing a VPN as "a middleman between your device and remote servers, and carries your data over existing networks without exposing it to the public Internet"); *What is a VPN?*, EXPRESS VPN, https://www.expressvpn.com/what-is-vpn#:~:text=As%20you%20connect%20to%20a,that%20might%20otherwise%20be%20restricted ("As you connect to a secure VPN server, your internet traffic goes through an encrypted tunnel that nobody can see into, including hackers, governments, and your internet service provider.").

51 *Id.*; *see also What is a VPN*, NORD VPN, https://nordvpn.com/what-is-a-vpn/#:~:text= A%20VPN%20works%20by%20creating,browsing%20safer%20and%20more%20private ("A VPN hides your real IP address and encrypts your internet connection to make your browsing safer and more private."); EXPRESS VPN, *supra* note 50 ("When you connect to the internet with a VPN… [y]our traffic still passes through your ISP, but your ISP can no longer read it or see its final destination. The websites you visit can no longer see your original IP address . . . .").

52 *See* Valiaugaitė, *supra* note 47 (describing how data moves from the client to the destination web server through the VPN).

their internet traffic to and from the victim filing agents.[53] When Klyushin logged into DFIN's network using stolen credentials, he did so using the Boston VPN.[54] When Klyushin located the quarterly financial reports stored on DFIN's servers, which were stored on servers physically located in Illinois, his access was enabled by the Boston VPN.[55] When Klyushin downloaded those financial reports from DFIN's servers in Illinois to his own devices in Russia, the financial reports passed back through the Boston VPN.[56] According to Judge Saris, the fact that the Boston VPN facilitated Klyushin's hack was enough to find constitutional venue in the District of Massachusetts.

III. VENUE

A. THE HISTORY OF THE VENUE REQUIREMENT

The Constitution and federal law establish and reinforce the venue requirement.[57] First, Article III, section II, clause two requires that "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."[58] Second, the Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . wherein the crime shall have been committed."[59] Finally, Federal Rule of Criminal Procedure 18 provides "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."[60] Together with the Vicinage Clause,[61] also codified in Article III and the Sixth Amendment, venue operates to ensure that defendants are tried in the same place where they committed their crimes so that a jury of the harmed community may sit in judgment.[62]

Scholars and courts describe the venue requirement as a reaction to unfair

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53 United States v. Klyushin, 684 F. Supp. 3d 1, 5 (D. Mass. 2023).
54 *Id.*
55 *Id.*
56 *Id.* at 12.
57 *See* U.S. CONST. art. III, §. II, cl. 2; U.S. CONST. amend. VI; FED. R. CRIM. P. 18; United States v. Rodriguez-Moreno, 526 U.S. 275, 278 (1999).
58 U.S. CONST. art. III, §. II, cl. 2.
59 U.S. CONST. amend. VI.
60 FED. R. CRIM. P. 18.
61 U.S. CONST. art. III, § 2, cl. 3 ("[S]uch Trial shall be held in the State where the said Crimes shall have been committed"); U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed* . . .) (emphasis added).
62 *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; Blume, *supra* note 3, at 65 (noting that the First Continental Congress of 1774 proclaimed "That the respective colonies are entitled to… the great and inestimable privilege of being tried by their peers of the vicinage…."); Smith v. United States, 599 U.S. 236, 143 S. Ct. 1594, 1603 (2023) (quoting *Rodriguez-Moreno*, 526 U.S. at 278 ("The Vicinage Clause… 'reinforce[s]' the coverage of the Venue Clause because, in protecting the right to a jury drawn from the place where a crime occurred, it functionally prescribes the place where a trial must be held"); United States v. Bennett, No. 6:22-cr-22-JDK, 2024 U.S. Dist. LEXIS 4403, at *19, n.4 (E.D. Tex. Jan. 9, 2024) (quoting *Smith*, 143 S. Ct. at 1606) (noting that venue and vicinage rights were "highly prized by the founding generation, which forcefully objected to trials in England before loyalist juries").

prosecutions of American colonists in England.[63] Venue in criminal cases "was a matter of concern to the Nation's founders."[64] Further, ". . . questions of venue are more than matters of mere procedure. They raise deep issues of public policy in the light of which legislation must be construed."[65] Therefore, law that requires defendants to be tried where they allegedly committed their crimes is "a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."[66] This kind of unfairness was ripe on the Founders' minds because of edicts by the British Crown that preceded the Revolutionary War.[67] In Massachusetts, American colonists who accused of treason against the king of England were forced to be tried in England, even though the alleged treason was committed in Massachusetts.[68] These kinds of fairness principles informed the Constitution's venue and vicinage requirements, which guarantee that defendants are tried wherever they commit their crimes and are judged by individuals in the same community.[69] The legal test forces courts to answer a fundamental question: where was the crime committed?

B. The Supreme Court's Venue Framework

Under the Supreme Court's precedents, courts determine venue using a two-step test.[70] First, the court examines the statutory elements of the crime to separate "essential conduct elements" from "circumstantial elements."[71] This determination requires a court to examine the conduct – the action or behavior – that the statute criminalizes, as distinct from the other, non-conduct elements.[72] For example, in a murder trial governed by 18 U.S.C. § 1111, the essential conduct element is killing another person.[73] Section 1111 has other elements as well, but the venue inquiry, which determines where the crime was *committed*, focuses on the criminal *action* in the statute. In a wire or mail fraud case, the essential conduct elements are misuse of wires and misuse of the mails, respectively.[74]

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63 *See, e.g.*, United States v. Cores, 356 U.S. 405, 407 (1958); United States v. Cabrales, 524 U.S. 1, 6 (1998); United States v. Saavedra, 223 F.3d 85, 88 (2d Cir. 2000); Blume, *supra* note 3, at 63-65.

64 *Cabrales*, 524 U.S. at 6.

65 United States v. Auernheimer, 748 F.3d 525, 540 (3d. Cir. 2014) (quoting Travis v. United States, 364 U.S. 631, 634 (1961)).

66 *Cores*, 356 U.S. at 407.

67 *Saavedra*, 223 F.3d at 88 (quoting Blume, *supra* note 3, at 64); *Cabrales*, 524 U.S. at 6 (noting that the Founders listed "transportation of colonists 'beyond Seas to be tried'" in the Declaration of Independence).

68 Blume, *supra* note 3, at 64; Coleman, *Justifying Effects-Based Venue in Fed. Crim. Cases* ("[t]hese English venue provisions proliferated, and their abuse led to the constitutional venue requirements we have today").

69 There are multiple fairness principles at play here. The first is the unfairness that came with forcing American colonists to sail all the way back to England to be tried for crimes committed in the colonies. *See supra* note 62. The second principle is that defendants ought to be tried by individuals in the community that was harmed by the crime. *See* Smith v. United States, 599 U.S. 236, 143 S. Ct. 1594, 1605 (2023) ("The Continental Congress and colonial legislatures forcefully objected to trials in England before loyalist juries . . . ").

70 *Cabrales*, 524 U.S. at 6-7; United States v. Rodriguez-Moreno, 526 U.S. 275, 278-79 (1999).

71 *Rodriguez-Moreno*, 526 U.S. at 280, n.4 (delineating "conduct elements" from "circumstance elements").

72 *Id.*

73 *See* United States v. Smith, 452 F.3d 323, 335 (4th Cir. 2006) (noting that in a drug conspiracy and murder case, the essential conduct elements are "a drug trafficking offense and an intentional killing").

74 *See* United States v. Jefferson, 674 F.3d 332, 366 (4th Cir. 2012); United States v. Wood, 364 F.3d 704, 713 (6th Cir. 2004).

The logic behind separating the elements is simple: to determine where an individual committed a crime, a court first must define the conduct that constituted the crime. Importantly, a court needs only to find that a defendant committed one essential conduct element in a location to find venue there.[75]

After defining the essential conduct elements, courts examine where that conduct was committed.[76] Cases refer to this inquiry as the *locus delicti*,[77] and it is the key step in distinguishing proper from improper venue. Two Supreme Court cases are instructive on this point.[78]

1. *UNITED STATES V. CABRALES*

In *United States v. Cabrales*, a money laundering case, the issue was whether Missouri was a proper venue for trial when the laundered funds were deposited in Florida.[79] The government alleged that the defendant was an accessory after the fact to cocaine sales in Missouri.[80] While the defendant was not charged with drug offenses, she was charged with depositing and withdrawing the proceeds from the cocaine sales in a bank account in Florida.[81] Both the district court and the Eighth Circuit Court of Appeals dismissed the charges for improper venue in Missouri.[82] Part of the lower courts' reasoning was that the defendant's money laundering did not constitute a continuing offense under 18 U.S.C. § 3237.[83] For purposes of this discussion, the key to understanding *Cabrales* lies in understanding that the defendant did not commit money laundering, as defined by the statute, in Missouri.[84]

The statutes at issue in *Cabrales* were 18 U.S.C. § 1956(a)(1)(B)(ii)[85] and 18 U.S.C. § 1957.[86] Both of these statutes criminalize "financial transactions," not the conduct involved to acquire the funds used in those transactions.[87] Therefore, proper

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75 *See* United States v. Calonge, 74 F.4th 31, 35 (2d Cir. 2023) (under the charged provision of the Computer Fraud and Abuse Act, venue is proper anywhere "where Calonge transmitted the program, obtained access, or caused damage to a protected computer."); United States v. Gonzalez, 683 F.3d 1221, 1224 (9th Cir. 2012) (in a drug conspiracy case, "It is by now well settled that venue on a conspiracy charge is proper where the conspiracy was formed or where any overt act committed in furtherance of the conspiracy occurred."); United States v. Lukashov, 694 F.3d 1107, 1122 (9th Cir. 2012) (in an aggravated sexual abuse charge, venue was proper where the defendant crossed state lines with illicit intent even though he did not sexually abuse the victim within that state).

76 *See, e.g.*, *Cabrales*, 524 U.S. at 7.

77 *Id.* at 6-7; *Rodriguez-Moreno*, 526 U.S. at 279 ("As we confirmed just last Term, the 'locus delicti [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it'") (quoting United States v. Anderson, 328 U.S. 699, 703 (1946)).

78 *See generally Cabrales*; *see generally Rodriguez-Moreno*.

79 *Cabrales*, 524 U.S. at 4.

80 *Id.*

81 *Id.*

82 *Id.* at 4-5.

83 *Id.* at 5.

84 *Id.* at 10.

85 *Id.* at 3-4. As the Court summarized, 18 U.S.C. § 1956(a)(1)(B)(ii) criminalizes "conducting a financial transaction to avoid a transaction-reporting requirement."

86 *Id.* at 3. As the Court summarized, 18 U.S.C. § 1957 criminalizes "engaging in a monetary transaction in criminally derived property of a value greater than $10,000."

87 *Id.* at 7 (these money laundering statutes "interdict only the financial transactions, not the anterior criminal conduct that yielded the funds allegedly laundered"); United States v. Castellini, 392 F.3d 35, 47 (1st Cir. 2004) (same).

venue lies wherever an "after the fact" actor performs these transactions, not where the original funds were acquired.[88] While the Court did not use the 'essential conduct element' language to determine proper venue, it did distinguish the *place* where conduct in the statutes – transactions that avoid a reporting requirement and transactions with criminally derived funds, respectively – occurs from the *place* where those funds were acquired.[89] The only connections between the defendant and Missouri were the original cocaine sales, but the government conceded that the defendant was not involved in any drug conspiracies or other drug offenses.[90] Her only role was to launder the proceeds, which she did in Florida.[91] Because the defendant did not do anything with the drug proceeds in Missouri, the Court ruled that trying her in Missouri was improper.[92]

Cabrales provides a key analytical principle, and one that will be instrumental to understanding the flaws in the venue analysis in *Klyushin*: determining venue requires a court to look to the statute. Individuals like the defendant in *Cabrales* may be involved in broader criminal schemes that stretch across states or countries.[93] However, *Cabrales* teaches that a defendant may only be tried where *they* played *their* role in such a broader scheme.[94] The Supreme Court affirmed that principle in its seminal venue case: *United States v. Rodriguez-Moreno*.[95]

2. *United States v. Rodriguez-Moreno*

Rodriguez-Moreno presented the Court with a much more complex venue problem than *Cabrales*. Rodriguez-Moreno was hired by a drug distributor in Texas after a drug deal went awry.[96] A dealer from New York came to Texas to buy thirty kilograms of cocaine from the Texas distributor, but instead of buying the cocaine, the dealer stole it and fled.[97] The defendant was hired to track down the thief and to hold the middleman in the transaction, who worked for the thief, hostage.[98] In pursuit of the thief, Rodriguez-Moreno drove the hostage from Texas to New Jersey, New York, and finally Maryland, where he stopped at a house.[99] Realizing that the thief had escaped, the defendant decided to kill the middleman.[100] Using a .357 magnum that he had acquired in Maryland, the

88 *Cabrales*, 524 U.S. at 7.
89 *Id.* at 2, 7. The United States attempted to dispute this distinction, arguing before the Supreme Court that the cocaine sales were essential to the defendant's crimes. The United States' position was that the sales produced the funds that the defendant laundered, so for purposes of the venue inquiry, the place of the cocaine sales should be considered. Using the statute and noting that the United States had not charged the defendant with crimes that involved those sales, the Court disagreed.
90 *Id.*
91 *Id.* at 3-4, 7.
92 *Id.* at 10.
93 *Id.* at 4.
94 *Id.* at 9-10.
95 United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999) ("In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts").
96 *Id.* at 276.
97 *Id.*
98 *Id.* at 276-77.
99 *Id.* at 277.
100 *Id.*

defendant held the middleman at gunpoint.[101] Somehow, the middleman escaped, which led to neighbors calling the police and arresting the defendant in Maryland.[102] He and his co-conspirators were charged, tried, and convicted in New Jersey on counts of conspiracy to commit kidnapping, kidnapping, and using a firearm during a crime of violence.[103]

The issue before the Court was whether venue was proper in New Jersey with respect to the firearm count.[104] That count, a sentencing enhancement under 18 U.S.C § 924(c)(1),[105] subjected the defendant to a harsher penalty for "using a firearm during or in relation to a crime of violence."[106] The Third Circuit had reversed the trial court on this count, finding that venue in New Jersey was improper because the defendant only had the firearm in Maryland, not New Jersey.[107]

At first glance, charging Rodriguez-Moreno with the firearm count in New Jersey presented the same danger as charging Cabrales with money laundering in Missouri. While both defendants were involved in broader criminal activities, the particular criminal conduct in the statutes did not occur in the jurisdictions where they were tried.[108] Rodriguez-Moreno did not use or possess the firearm until he arrived in Maryland.[109] Cabrales did not perform financial transactions to hide the drug proceeds until the drugs had been sold in Missouri.[110] However, a closer reading of § 924(c)(1) provided the *Rodriguez-Moreno* Court with a textual distinction between the case before it and *Cabrales*. Because of that distinction, the Court held that venue was proper in New Jersey.[111]

Interpreting the Constitution and Federal Rules of Criminal Procedure, the *Rodriguez-Moreno* Court established the two-part venue test.[112] First, "a court must initially identify the conduct constituting the offense (the nature of the crime)."[113] Second, a court must "discern the location of the commission of the criminal acts."[114] Because Rodriguez-Moreno had been charged with a sentencing enhancement that was contingent upon a crime of violence, the Court determined that the essential conduct elements of § 924(c)(1) were (1) using or carrying a firearm and (2) committing a crime of violence: the kidnapping.[115] Elements in hand, the Court proceeded to analyze where the defendant

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101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* at 276.
105 The full, operative text of 18 U.S.C. § 924(c)(1) for purposes of *Rodriguez-Moreno* criminalizes "any person who, during and in relation to any crime of violence… uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm."
106 *Rodriguez-Moreno*, 526 U.S at 278.
107 *Id.* The Third Circuit reasoned "…because the crime committed by Moreno -- carrying or using a firearm in relation to a crime of violence -- occurred only in Maryland, Moreno could only have been properly tried in Maryland." *See* United States v. Palma-Ruedas, 121 F.3d 841, 849 (3d Cir. 1997), *rev'd*, *Rodriguez-Moreno*, 526 U.S. at 282.
108 *Rodriguez-Moreno*, 526 U.S. at 277; United States v. Cabrales, 524 U.S. 1, 4-5 (1998).
109 *Rodriguez-Moreno*, 526 U.S. at 277.
110 *Cabrales*, 524 U.S. at 3-4, 7.
111 *Rodriguez-Moreno*, 526 U.S. at 282.
112 *Id.* at 278-79.
113 *Id.*
114 *Id.*
115 *Id.* at 280.

could be properly tried for the § 924(c)(1) offense.[116]

Beginning with the predicate offense, the Court determined that a kidnapping is a "unitary crime."[117] Consistent with the lower courts, the Court found that "a kidnapping, once begun, does not end until the victim is free."[118] That finding was critical to the venue inquiry because the kidnapping was the essential conduct element that § 924(c)(1)'s language – "during and in relation to a crime of violence" – modified.[119] Since the defendant had used a firearm *during* the kidnapping, the Court found that he could be tried in New Jersey.[120]

3. Core Venue Principles

Like *Cabrales*, *Rodriguez-Moreno* provides important principles with respect to venue. First and foremost, *Rodriguez-Moreno* created the two-step essential conduct element test.[121] That test has been applied with few exceptions[122] for the last 25 years.[123] Next, *Rodriguez-Moreno* reaffirmed the core principle from *Cabrales*: venue turns on the elements of the statute.[124] Finally, *Rodriguez-Moreno* reemphasizes an old lesson: Congress may legislate venue for specific crimes or kinds of crimes.[125] The Supreme

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[116] *Id.* at 280-81.

[117] *Id.* at 281 (citing United States v. Seals, 130 F.3d 451, 461-462 (D.C. Cir. 1997); United States v. Denny-Shaffer, 2 F.3d 999, 1018-19 (10th Cir. 1993); United States v. Godinez, 998 F.2d 471, 473 (7th Cir. 1993); United States v. Garcia, 854 F.2d 340, 343-44 (9th Cir. 1988)).

[118] *Rodriguez-Moreno*, 526 U.S. at 281.

[119] *Id.*

[120] *Id.* ("It does not matter that respondent used the .357 magnum revolver, as the Government concedes, only in Maryland because he did so 'during and in relation to' a kidnaping that was begun in Texas and continued in New York, New Jersey, and Maryland").

[121] *Id.* at 278-80. The Court rejected the Third Circuit's "verb test," which is how the Third Circuit had determined that *Rodriguez-Moreno* could only be tried for the § 924(c)(1) offense where he used or possessed the firearm. The Court said "While the 'verb test' certainly has value as an interpretative tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language. The test unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed."

[122] *See* United States. v. Muhammad, 502 F.3d 646, 653 (7th Cir. 2007); Coleman, *supra* note 68 (describing the "substantial contacts test" to determine venue in criminal cases that postdate *Rodriguez-Moreno*). The Seventh Circuit described the venue framework laid out by the Supreme Court's cases as "the basic inquiry that the lower courts must undertake in addressing the question of venue." *Muhammad*, 502 F.3d at 653. It proceeded to apply the 'substantial contacts test,' which uses the following four factors to determine venue: "the site of the defendant's acts, the elements and nature of the crime, the locus and effect of the criminal conduct, and the suitability of each district for suitable fact-finding." *Id.* Discussing the proper test for venue is not the subject of this Article, but it is important to note that even where the Supreme Court has provided an analytical framework to determine venue, some lower courts continue to apply their tests, albeit in ways that attempt to maintain consistency with *Cabrales* and *Rodriguez-Moreno*. *See* Coleman, *supra* note 68, at 1, 18-25.

[123] *See, e.g.*, United States v. Auernheimer, 748 F.3d 525, 533 (3d. Cir. 2014); United States v. Wood, 364 F.3d 704, 712 (6th Cir. 2004); United States v. Calonge, 74 F.4th 31, 35 (2d Cir. 2023).

[124] *Rodriguez-Moreno*, 526 U.S. at 279 (citing United States v. Cabrales, 524 U.S. 1, 6-7 (1998)).

[125] Congress' ability to legislate venue is crucial to understanding *Klyushin* as well. On Congress' ability, *Rodriguez-Moreno* provides:

> When we first announced this test in *United States v. Anderson*, 328 U.S. at 703, we were comparing § 11 of the Selective Training and Service Act of 1940, 54 Stat. 894, in which Congress did 'not indicate where [it] considered the place of committing the crime to be,' 328 U.S. at 703, with statutes where Congress was explicit with respect to venue. Title 18 U.S.C. § 924(c)(1), like the Selective Training and Service Act, does not contain an express venue provision.

Court referenced that specific Congressional power in *Cabrales*[126] and *Rodriguez-Moreno*,[127] and it was critical in *Klyushin* as well.[128] This power manifests in 18 U.S.C. § 3237.[129]

C. 18 U.S.C. § 3237: Continuing Offenses

1. Statutory Text and Legislative History

18 U.S.C § 3237 codifies venue for "continuing offenses," which the statute defines as "any offense… begun in one district and completed in another, or committed in more than one district, [or] any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person…."[130] For this broad category of crimes, § 3237(a) provides that proper venue lies "in any district in which such offense was begun, continued, or completed."[131] When *Rodriguez-Moreno* described kidnapping as a "unitary crime," one that "once begun, does not end until the victim is free," the Court was describing the continuing nature of a kidnapping.[132]

The legislative history of the second paragraph of § 3237(a) demonstrates Congress's intent to remove ambiguity from the venue inquiry in continuing offense cases.[133] The Supreme Court case that publicized that ambiguity – *United States v. Johnson* – involved a violation of the Federal Denture Act.[134] The *Johnson* Court held that the defendant who sent illegal dentures from Illinois to Delaware could not be tried in Delaware despite the continuing nature of the offense.[135] The Court focused on

Rodriguez-Moreno, 526 U.S. at 275 at n.1; *see also Auernheimer*, 748 F.3d at 532 ("Congress may prescribe specific venue requirements for particular crimes"); United States v. Khalupsky, 5 F.4th 279, 291 (2d Cir. 2021) (noting that Congress provided for venue in the Securities and Exchange Act with "criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred").

126 *Cabrales*, 524 U.S. at 5.

127 *Rodriguez-Moreno*, 526 U.S. at 282.

128 United States v. Klyushin, 684 F. Supp. 3d 1, 8 (D. Mass. 2023).

129 18 U.S.C. § 3237.

130 *Id.*

131 *Id.*

132 *Rodriguez-Moreno*, 526 U.S. at 275. Kidnapping is not the only continuing offense involving the illegal transportation of a person. *See also* United States v. Lukashov, 694 F.3d 1107, 1122 (9th Cir. 2012) (aggravated sexual abuse). *Lukashov*'s grisly facts involved the defendant driving the minor victim across the country, sexually abusing her along the way, before returning her home to Oregon. The Ninth Circuit ruled that venue in Oregon was proper because "Even if Lukashov did not physically abuse T.F. after crossing into Oregon, we conclude that at a minimum the significant element of the crime of illicit intent while crossing a state line continued in Oregon en route to her home. No evidence was presented on Lukashov's intent to support a finding to the contrary."

133 *See* 18 U.S.C. § 3237 note ("The last paragraph of the revised section was added to meet the situation created by the decision of the Supreme Court of the United States in *United States v. Johnson*, 1944, 65 S. Ct. 249, 89 L. Ed. 236, which turned on the absence of a special venue provision in the Dentures Act, section 1821 of this revision. The revised section removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts as in section 1073 of this revision").

134 United States v. Johnson, 65 S. Ct. 249, 274 (1944), *abrogated by statute on other grounds*. The Federal Denture Act prohibited "[the] use [of] the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into . . . a State or Territory any denture the cast of which was taken by a person not licensed to practice dentistry in the State into which the denture is sent[.]" *Id.*

135 *Id.* at 278.

the absence of the specific venue provision in the Federal Denture Act, stating "[i]t is significant that when Congress desires to give a choice of trial, it does so by specific venue provisions giving jurisdiction to prosecute in any criminal court of the United States through which a process of wrongdoing moves."[136] As a reaction to the holding in *Johnson*, Congress expanded the definition of continuing offenses to include offenses using the mails and interstate commerce.[137]

2. § 3237(a) in Klyushin

Turning back to *Klyushin*, the district court noted that the government relied on 18 U.S.C. § 3237(a) to make its venue argument.[138] In short, the government's argument was that, under the 18 U.S.C §§ 1030(a)(2) and (a)(4), with which the defendant was charged, the defendant accessed and obtained the stolen quarterly reports in Boston when those reports passed through the Boston VPN.[139] That argument is one of transmission; obviously the Boston VPN was not where the quarterly reports were stored.[140] Nonetheless, the government argued that the defendant committed the computer hack in Boston because the information that he stole moved through Boston before he received it in Russia.[141]

3. Transmission Offenses

Lower courts have determined that wire and mail fraud have a continuing nature.[142] With respect to wire fraud, courts have determined that the core essential conduct element in 18 U.S.C. § 1343 is the misuse of wires.[143] One example of misusing wires – a fraudulent phone call, as in *United States v. Jefferson* – led to a holding that venue was improper when the government failed to establish that the phone call was made, transmitted, or received in the charged venue.[144] Another example of misusing wires – illegally transferring funds, as in *United States v. Pace* – led to a holding that venue was

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136 *Id.* at 276.

137 18 U.S.C. § 3237(a).

138 United States v. Klyushin, 684 F. Supp. 3d 1, 8 (D. Mass. 2023).

139 *Id.* at 11.

140 *Id.* at 5.

141 *Id.* at 11. Without using the word 'transmission,' the District Court's recounting of the government's argument captures this idea: "IP addresses on the Boston server in Massachusetts were used in accessing confidential information -- downloading and transmitting the information to Russia." This understanding of 18 U.S.C. § 1030(a)(2) is fundamentally flawed, but that is a discussion for Part III.

142 *See e.g.*, Congressional Research Service, *Venue: A Legal Analysis of Where A Federal Crime May Be Tried*, 7 RL 33223 2018 [hereinafter Congressional Research Service, *Venue: A Legal Analysis of Where A Federal Crime May Be Tried*] at 7; United States v. Wood, 364 F.3d 704, 710 (6th Cir. 2004) (mail fraud); United States v. Jefferson, 674 F.3d 332, 369 (4th Cir. 2012) (wire fraud); United States v. Pace, 314 F.3d 344, 350 (9th Cir. 2002) (wire fraud).

143 *See Jefferson*, 674 F.3d at 366 (The Fourth Circuit also includes "The essential elements of a wire fraud offense are '(1) the existence of a scheme to defraud and (2) the use of . . . a wire communication in furtherance of the scheme" (quoting United States v. Curry, 461 F.3d 452, 457 (4th Cir. 2006)); *Pace*, 314 F.3d at 349 ("the 'gist and crux' of the wire fraud statute—18 U.S.C 1343—for venue purposes is the 'misuse of wires…as well as any acts that cause such misuse'").

144 *Jefferson*, 674 F.3d at 367, 369 ("It is the physical act of transmitting the wire communication for the purpose of executing the fraud scheme that creates a punishable offense, not merely "the existence of a scheme to defraud."). The

improper when the government could not demonstrate that the illegal transfers originated, passed through, or were deposited in the venue charged.[145]

Like the broad venue possibilities available in wire fraud cases, mail fraud may be prosecuted "where the mail is deposited, received, or moves through, even if the fraud's core was elsewhere."[146] *United States v. Wood* determined that the essential conduct in the mail fraud statute criminalized "making use of the mails."[147] Turning to the facts, which involved the defendant sending fraudulent checks to the victim in connection with a scheme to use victims' investments in the stock market, the *Wood* court determined that the defendant did not send or receive the fraudulent checks in the venue where he was charged: the Western District of Michigan.[148] Lacking any meaningful connection to that district with respect to misusing the mails, the *Wood* court vacated the defendant's convictions on the mail fraud counts.[149]

The venue analysis for transmission offenses offers a crucial takeaway. If the essential conduct elements in a statute necessarily involve a *pathway*–the misuse of *wires* or the misuse of *mails*, for example–then proper venue may lie anywhere that the pathway runs.[150] This is true when the mail system transports a bad check or when cell towers transmit the signals of a fraudulent phone call.[151] Because the statutes criminalize the misuse of these pathways, venue analysis deems all points along the pathway to be on equal footing.

D. Venue in Computer Hacking Cases

Using the principles set out by the Supreme Court and the circuits, three notable federal cases have examined venue in context of computer hacking.[152] Other scholarship in this area describes the complexities of determining venue in cybercrime cases.[153] There are other cybercrime cases, such as those involving child pornography, that take up the

Fourth Circuit vacated the defendant's conviction with respect to this wire fraud count because the defendant did not begin or complete the phone call in the Eastern District of Virginia where he was tried.

145 *Pace*, 314 F.3d at 349, 351 ("venue is established in those locations where the wire transmission at issue originated, passed through, or was received, or from which it was 'orchestrated'"). This interpretation mirrors the language of "begun, continued, or completed" in § 3237(a).

146 *Wood*, 364 F.3d at 713.

147 *Id.* at 711.

148 *Id.* at 714. Indeed, the government did not argue on appeal that the defendant had sent or received the checks from the Western District of Michigan. Instead, the government argued that proper venue lay in that district because "the offices of First Financial [(the defendant's company)], located in the Western District of Michigan, were used at every step of the scheme to defraud." *See id.* at 711.

149 *Id.* at 714.

150 *Id.*; *Pace*, 314 F.3d at 349-50; United States v. Jefferson, 674 F.3d 332, 367, 369 (4th Cir. 2012).

151 *See Wood*, 364 F.3d at 714; *Pace*, 314 F.3d at 349; *Jefferson*, 674 F.3d at 367, 369.

152 United States v. Calonge, 74 F.4th 31, 31-33 (2d Cir. 2023); United States v. Auernheimer, 748 F.3d 525, 531 (3d. Cir. 2014); United States v. Smith, 22 F.4th 1266, 1236, 1242 (11th Cir. 2022), *aff'd*, Smith v. United States, 143 S. Ct. 1594, 1609 (2023).

153 *See* Wall, *Where to Prosecute Computer Crimes* at 151 ("under the traditional inquiry, venue for cybercrime prosecutions may often be appropriate in seemingly arbitrary and unanticipated locations anyway, depending on the charges").

venue issue as well.[154] This Section does not review those cases, and instead focuses on cases like *Klyushin* that involve computer hacking offenses. It discusses how lower courts have applied the constitutional venue principles discussed in Part II-A and the contours of 18 U.S.C § 3237 in Part II-B.

1. *UNITED STATES V. AUERNHEIMER*

The lead computer hacking case on venue is *United States v. Auernheimer*.[155] The defendant was tried in New Jersey on charges of conspiracy to commit computer hacking under federal law, conspiracy to commit computer hacking in violation of state law, and identity theft.[156] The defendant and his co-conspirator, a man named Daniel Spitler, had developed an "account slurper"–a computer program designed to identify login credentials like email addresses–for AT&T customers who had purchased iPads.[157] Using the program, Spitler and Auernheimer stole the email addresses of 114,000 AT&T customers.[158] Not only that, but the defendant disclosed his exploit to Gawker, a news website, which published the theft under the title "Apple's Worst Security Breach: 114,000 iPad Owners Exposed."[159] The stolen email addresses were stored on servers in Texas and Georgia, while Spitler was physically located in California and the defendant in Arkansas.[160]

Auernheimer challenged the New Jersey venue on appeal.[161] Using *Rodriguez-Moreno* and *Cabrales*, the Third Circuit determined that 18 U.S.C. 1030(a)(2), with which Auernheimer was charged, has two essential conduct elements: accessing a protected computer and obtaining information.[162] Because the defendant was charged with conspiracy to violate § 1030(a)(2), the Third Circuit examined whether Auernheimer had either performed any of the essential conduct elements of § 1030(a)(2) or any overt acts in furtherance of his conspiracy in New Jersey.[163] With Auernheimer in Arkansas,

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[154] *See, e.g.*, United States v. Chin, No. 3:22-00087, 2023 U.S. Dist. LEXIS 144303, at *2 (S.D. W. Va. Aug. 17, 2023) (discussing venue with respect to where child pornography was produced and eventually moved); United States v. Kidd, No. 22-287-cr, 2023 U.S. App. LEXIS 29481, at *3-4 (2d Cir. Nov. 6, 2023) (among other things, discussing venue with respect to where the victim was "enticed or groomed").

[155] *See, e.g.*, United States v. Klyushin, 684 F. Supp. 3d 1, 11 (D. Mass. 2023) (citing *Auernheimer*); *Calonge*, 74 F.4th at 35 (same); United States v. Diab, No. 21-cr-10250-NMG-2, 2023 U.S. Dist. LEXIS 236726, at *22-23 (D. Mass. Dec. 30, 2023) (same). Wall, *supra* note 153 (using *Auernheimer* to frame the venue discussion in much the same way that this Article uses *Klyushin*).

[156] *See Auernheimer*, 748 F.3d at 531.

[157] *Id.* at 529-31.

[158] *Id.* at 531.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 529.

[162] *Id.* at 533. 18 U.S.C. § 1030(a)(2) provides, in relevant part, "[w]hoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer." At trial, the government in *Auernheimer* had to prove that the defendant "(1) intentionally (2) accessed without authorization (or exceeded authorized access to) a (3) protected computer and (4) thereby obtained information." *Id.*; *see also* United States v. Klyushin, 684 F. Supp. 3d 1, 13-14 (D. Mass. 2023) (citing the same interpretation of essential conduct elements that *Auernheimer* discusses).

[163] *See Auernheimer*, 748 F.3d at 533 ("Venue would be proper in any district where the CFAA violation occurred, or wherever any of the acts in furtherance of the conspiracy took place.").

Spitler in California, and the servers in Texas and Georgia, the court determined that Auernheimer had not accessed any computer or obtained any information in New Jersey.[164] Furthermore, the court held that the defendant had not performed any acts in furtherance of his conspiracy in New Jersey.[165] The same went for the government's charge that the defendant had conspired to violate state law.[166] The Third Circuit determined that the essential conduct elements of New Jersey's computer hacking statute were identical to the elements in § 1030(a)(2).[167] Accordingly, the court held that venue in New Jersey was improper.[168]

2. *United States v. Calonge*

In *United States v. Calonge*, the Second Circuit ruled on venue for a different provision of the Computer Fraud and Abuse Act: § 1030(a)(5)(A)-(B).[169] As opposed to accessing a protected computer and obtaining information, *Calonge* provides that § 1030(a)(5)(A)'s essential conduct elements are transmitting a computer program, obtaining access to a protected computer, and causing damage to a protected computer.[170] Calonge, a former employee of an online accounting service, deleted the service's database of available accountants for clients to hire.[171] The defendant was charged and convicted in the Southern District of New York after deleting the service's database from her device in Florida, even though the server storing the information was located in Virginia and California.[172]

The hook for the prosecution in the Southern District of New York was the defendant's former supervisor's computer.[173] The supervisor worked in Manhattan.[174] When the defendant deleted the database, she prevented her boss from accessing any of the information therein.[175] On appeal, Calonge argued that deleting the database did

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[164] *Id.* at 540-41.
[165] *Id.*
[166] *Id.* at 534-35. The government argued that the defendant had performed an overt act in New Jersey because he stole and disclosed the email addresses of New Jersey residents. *Auernheimer* reveals that even though that was true, the email addresses were not stolen *from* New Jersey. However, the fact that New Jersey residents were harmed is the reason why Wall's *Where to Prosecute Cybercrimes* argues for effect-based venue in cases like *Auernheimer*.
[167] *Id.* at 533.
[168] *See id.* at 535 (explaining the need to continue taking venue seriously in our increasing technological world); *id.* at 541 ("As we progress technologically, we must remain mindful that cybercrimes do not happen in some metaphysical location that justifies disregarding constitutional limits on venue. People and companies still exist in identifiable places in the physical world. When people commit crimes, we have the ability and obligation to ensure that they do not stand to account for those crimes in forums in which they performed no 'essential conduct element' of the crimes charged.").
[169] United States v. Calonge, 74 F.4th 31, 37 (2d Cir. 2023).
[170] *Id.* at 35; *see* 18 U.S.C. § 1030(a)(5)(A) (providing that "whoever knowingly caus[es] the transmission of a program, information, code, or command, and as a result of such conduct, intentionally caus[es] damage without authorization, to a protected computer."); 18 U.S.C. § 1030(a)(5)(B) (providing that "whoever intentionally access[es] a protected computer without authorization, and as a result of such conduct, recklessly caus[es] damage.").
[171] *Calonge*, 74 F.4th at 33.
[172] *Id.* at 33-35.
[173] *Id.* at 33, 36.
[174] *Id.* at 33.
[175] *Id.* at 33, 36.

not constitute "damage" under § 1030(a)(5)(A)-(B), so she did not commit any of the essential conduct elements in New York.[176] The Second Circuit disagreed, ruling that when Calonge deleted the database, her supervisor's computer was damaged under the Computer Fraud and Abuse Act's definition of 'damage.'[177] In so ruling, the Second Circuit affirmed the defendant's convictions.[178]

3. *UNITED STATES V. SMITH*

Neither *Auernheimer* nor *Calonge* took up the theory of 'pass-through' venue that *Klyushin* would examine. The closest computer hacking case that discusses that venue theory is *United States v. Smith*, which involved charges under the Computer Fraud and Abuse Act, theft of trade secrets, and extortion.[179] The defendant in *Smith*, a software engineer in Alabama and an avid fisherman, hacked into a company called StrikeLines with its office in Pensacola, Florida.[180] StrikeLines sold coordinates for prime fishing grounds in the Gulf of Mexico.[181] The defendant was charged in the Northern District of Florida, where Pensacola is, but StrikeLines' coordinates were stored on a server in Orlando, in the Middle District of Florida.[182] He was acquitted of the § 1030(a)(2) offense at trial, but was convicted for theft of trade secrets.[183]

On appeal, the Eleventh Circuit determined that the essential conduct element of the theft of trade secrets offense was to "steal, take without authorization, or obtain by fraud or deceptions trade-secret information."[184] Because the defendant stole the coordinates from a server in Orlando, the defendant argued that venue in the Northern District of Florida was improper.[185] In response, the government argued that the stolen data belonged to StrikeLines; the stolen was "produced in the Northern District of Florida and later transmitted to Orlando…."[186] Therefore, in the government's view, "the data was actually obtained by Smith from Pensacola."[187]

The Eleventh Circuit was not convinced.[188] It rejected the government's argument, ruling that the coordinates were stolen from the Middle District of Florida, not the Northern District.[189] It also rejected the government's attempt to use § 3237(a) to demonstrate that the offense continued in the Northern District of Florida.[190] The court said "the government does not dispute that when Smith took the coordinates from the

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176 *Id.* at 35-36.
177 *Id.* at 36; 18 U.S.C. § 1030(e)(8) (defining damage as "any impairment to the integrity or availability of data, a program, a system, or information.").
178 *Calonge*, 74 F.4th at 37.
179 United States v. Smith, 22 F.4th 1266, 1240 (11th Cir. 2022).
180 *Id.* at 1238.
181 *Id.*
182 *Id.*
183 *Id.* at 1241.
184 *Id.* at 1243.
185 *Id.* at 1244.
186 *Id.* at 1241.
187 *Id.*
188 *Id.* at 1246.
189 *Id.* at 1243.
190 *Id.* at 1244.

servers in Orlando he received possession of them in Mobile. The government points to no evidence that the trade secrets were taken from or transported through the Northern District of Florida."[191] This is a critical point for purposes of *Klyushin*. By indicating that the government did not present evidence that the stolen coordinates were transported through the Northern District of Florida, the Eleventh Circuit left the question of pass-through venue open.[192]

4. LESSONS FROM *AUERNHEIMER*, *CALONGE*, AND *SMITH*

Stepping back, these three hacking cases provide two lessons. First, *Auernheimer* and *Smith* demonstrate that courts think about the place where hacks and online thefts occur at the endpoints.[193] *Auernheimer* demonstrated this point because the opinion took note of the location of the servers, Spitler, and Auernheimer.[194] *Smith* outright says that "venue would be proper in the Southern District of Alabama, where Smith was located when he took the trade secrets," though the court did not reach the question of whether venue would have been proper in the Middle District of Florida.[195] Second, *Auernheimer* and *Calonge* demonstrate, just as with other cases, that venue may be proper wherever a defendant charged with computer hacking commits one essential conduct element.[196] With these principles in mind, this Article argues that venue in the District of Massachusetts in *Klyushin* was improper.

IV. VENUE IN *KLYUSHIN* WAS IMPROPER

This Part advances three arguments to show that the Boston venue in *Klyushin* was improper with respect to the hacking counts. First, this Part argues that under 18 U.S.C. §§ 1030(a)(2) and (a)(4), Klyushin did not access or obtain the information in Boston. Second, this Part argues that Klyushin's computer hacks were not continuing offenses under 18 U.S.C. § 3237. Third, this Part argues that trying Klyushin in Boston venue offended the foundational principles behind the venue requirement – to try a defendant where they committed their crime so that the harmed community may render judgment.

A. KLYUSHIN DID NOT ACCESS OR OBTAIN THE STOLEN REPORTS IN BOSTON

On the elements of the statute, *Klyushin* adopts *Auernheimer*'s interpretation of §

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191 *Id.*

192 *Id.* at 1243.

193 *Id.*; United States v. Auernheimer, 748 F.3d 525, 534 (3d. Cir. 2014).

194 *Auernheimer*, 748 F.3d at 534 ("The evidence at trial demonstrated that the accessed AT&T servers were located in Dallas, Texas, and Atlanta, Georgia. In addition, during the time that the conspiracy began, continued, and ended, Spitler was obtaining information in San Francisco, California [omitted], and Auernheimer was assisting him from Fayetteville, Arkansas [omitted]").

195 *Smith*, 22 F.4th at 1243.

196 United States v. Calonge, 74 F.4th 31, 35 (2d Cir. 2023) (noting that venue would be proper "where Calonge transmitted the program, obtained access, or [emphasis added] caused damage to a protected computer."); *Auernheimer*, 748 F.3d at 533 ("Venue would be proper in any district where the CFAA violation occurred, or wherever any of the acts in furtherance of the conspiracy took place.").

1030(a)(2): that the essential conduct elements are unauthorized accessing of a protected computer and obtaining information.[197] While some terms of art are defined in the Computer Fraud and Abuse Act, "accesses" and "obtains" are not.[198] An analogy helps to illustrate these concepts.

1. Computer Hacking as Digital Burglary

One way to think about accessing and obtaining in the hacking context is to compare a hack to another property crime: burglary. Suppose a burglar breaks into a clothing store in a mall by prying open the store's back door with a crowbar. He enters the store, takes expensive merchandise from the shelves, and flees. Consider the similarities between our burglar and Klyushin. The digital equivalent of prying open a door and entering a store is accessing a computer without authorization, which Klyushin did using stolen login credentials. The digital equivalent of taking merchandise and fleeing is obtaining information, which Klyushin did by viewing and sending the quarterly reports back to Russia. As Part II makes clear, a defendant may be charged wherever they commit a single essential conduct element.[199] With burglary as a reference point, though, Klyushin's venue findings on both elements are strained.

a. Access Requires Entry

For our burglar, accessing the store required him to pry open the backdoor with a crowbar. No one would suggest that he had access to the store when he stood outside its back door. He had not entered yet. Access in the computer hacking context works in a similar way.[200] To access information without authorization, a hacker's digital presence must enter the 'store,' whatever that store is. In *Klyushin*, the 'store' was the Illinois server, not the Boston VPN, which merely enabled his access.[201] The most straightforward application of venue principles to this element, therefore, would be to rule that a hacker accesses information wherever the information is stored. The only plausible exception is the other endpoint: the place where the hacker and their device are physically located.

Since the internet allows users to access information stored all over the world from their device, the location of the user's device is another access point.[202] This theory of access could also be applicable if a hacker discovers an encrypted file on a victim's network, downloads the file to the hacker's personal device, and decrypts the contents there. In that sense, the hacker accessed the file wherever the victim's network was and

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197 United States v. Klyushin, 684 F. Supp. 3d 1, 13-14 (D. Mass. 2023).

198 *See generally* 18 U.S.C. § 1030(e).

199 *See supra* Part II-B, at 30; note 176.

200 One could argue that the burglar had access to the store when he broke into the back door, even if he never entered. However, 18 U.S.C. § 1030(a)(2) criminalizes whoever "*accesses*" a computer. The active tense of that verb distinguishes between an individual who opens a digital door and an individual who walks inside.

201 *Klyushin*, 684 F. Supp. 3d at 5.

202 *See supra* Part II(B)(4) (noting that *Auernheimer* and *Smith* suggest that hackers may be charged at the endpoints of their hacks).

accessed the contents of the file wherever their personal device was.[203] Still, this theory of access only creates a basis for venue at the endpoints, not at a midpoint. The midpoint is precisely where Klyushin was tried.

Klyushin missteps when it equates an endpoint with a midpoint. The opinion noted the trial testimony of a government expert who described the role of the VPN in Klyushin's scheme, opining that the IP addresses assigned to that VPN "'obtained access to and downloaded' documents from DFIN."[204] In the same paragraph, the court cites testimony from a defense expert who described the VPN as an "'on-ramp to the Internet.'"[205] Based on this testimony, the court found that Klyushin "caused the crimes to be implemented in part in Massachusetts."[206] The Boston VPN was necessary to mask Klyushin's Russian IP address,[207] but for purposes of the venue analysis, a necessary step to commit a crime is distinct from actual commission.[208] Under *Klyushin*'s interpretation, the fact that a VPN is an on-ramp means that a motorist accesses a highway not when they reach the highway itself, but on the ramp leading to the highway.[209] That reading of access is strained, and *Klyushin*'s analysis of 'obtaining' fares no better.

B. Obtaining Either Requires Viewing or Controlling

In a lay sense, the burglar in the previous hypothetical obtains the merchandise when he takes possession of it. But what does it mean to 'take possession' of digital information? The hypothetical from Part I about the sports fan explains.

Recall the sports fan who wanted to check the score from last night's game. Imagine that the information pathway for this sports fan has three points. The sports fan's browser is the origination point; let us say the browser and the fan are located in Miami, Florida. ESPN's servers are the endpoint: those servers are in Los Angeles, California. To facilitate this cross-country connection, the request is routed through an intermediary server, which is in Dallas, Texas.

With respect to this conversation about venue, it is useful to think about the exchange of information in two phases: an outgoing request for information, and the incoming receipt of the requested information. To start with the outgoing phase, when the fan types ESPN.com into their browser's search bar and presses 'Enter,' part of the time that it takes for ESPN to load is consumed by the request reaching out to ESPN's servers.

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[203] *Klyushin* did not involve the kind of decryption that this theory of access describes. And even if the case did involve decrypting the financial reports, the United States could not prosecute Klyushin where he and his personal devices were at the time of decryption: Russia.

[204] *Klyushin*, 684 F. Supp. 3d at 5.

[205] *Id.*

[206] *Id.* at 12.

[207] *Supra* note 33.

[208] *Compare* United States v. Rodriguez-Moreno, 526 U.S. 275, 278 (1999) ("a court must initially identify the conduct constituting the offense (the nature of the crime)") *with* United States v. Auernheimer, 748 F.3d 525, 533 (3d. Cir. 2014) ("Venue would be proper … wherever any of the acts in furtherance of the conspiracy took place"). Klyushin was charged with conspiracies to violate 18 U.S.C. §§ 1030(a)(2) and (4), so the government likely argued that using the Boston VPN was an overt act in furtherance of his conspiracy. For venue purposes, using a VPN to enable a hack is different than committing the hack itself. This distinction highlights why charging decisions are so critical in the venue inquiry, which is further discussed at *infra*, note 220.

[209] *Klyushin*, 684 F. Supp. 3d at 5.

The request leaves the fan's browser in Miami, travels along fiberoptic cables to the server in Dallas, and continues its journey until it reaches ESPN's servers in Los Angeles. As the request is *outgoing*, even as it passes through the Dallas server or some other kind of infrastructure (like a VPN), no one would suggest that the individual has accessed ESPN's servers until the request reaches Los Angeles. By definition, the outgoing request has not reached ESPN yet. Once the request reaches Los Angeles, the fan accesses ESPN's servers. Therefore, if access occurs at the end of the outgoing phase, obtaining must either occur at the same time, or during the incoming phase of the exchange.

Once the request reaches ESPN's servers, the servers identify the requested content and begin to fulfill the request. The content is sent back to the individual's browser. This is the critical point: until the content reaches the browser, the individual has not seen, heard, or otherwise obtained any information from ESPN. To illustrate that, assume that ESPN's servers send the website back to the fan's browser when a major power outage hits Dallas. The outage knocks out the Dallas server, disrupting the flow of information. The individual never sees ESPN.com on their browser because the request was interrupted in transit. Even though the request has digitally left Los Angeles, no one would argue that the individual obtained the information if the information never made it back to their browser. The fundamental point here is that when information is in transit, it moves through physical locations. A sports fan, just as much as a hacker technologically cannot obtain information from a midpoint in the chain. That is what *Klyushin* misunderstands.

Just as with access, *Klyushin* equates midpoints and endpoints in the venue analysis for where Klyushin obtained the reports.[210] The opinion refers to the same testimony from internet experts–that IP addresses assigned to that VPN "'obtained access to and downloaded' documents from DFIN"[211] and that the VPN was an "'on-ramp to the Internet'"[212]–to analyze both accessing and obtaining.[213] By ruling that venue was proper in Boston, *Klyushin* indicates that once property is removed from its rightful location, it is obtained by the thief at every point thereafter. That reading misunderstands internet mechanics, but analyzing whether Klyushin committed the hack in Boston is only step one. Step two is to determine whether the hack was a continuing offense.

B. Klyushin's Hack Was Not A Continuing Offense

The government argued that Klyushin's hack was a continuing offense under § 3237(a).[214] In the government's view, the fact that the stolen quarterly reports passed through Boston on their way to Russia meant that the hack continued in Boston, creating a basis for venue under § 3237.[215] Because the stolen reports were transmitted across state lines and internationally, Klyushin's hack fits Congress's definition of a continuing

[210] *Id.* at 5, 8.
[211] *Id.* at 5.
[212] *Id.*
[213] *Id.* at 8.
[214] *Id.*
[215] *Id.*

offense in paragraph two of § 3237(a).[216] However, hacking under the Computer Fraud and Abuse Act is meaningfully different from all of the other continuing offenses that this Article discussed.

1. Hacking is Not a Transmission Offense

The continuing offenses that allow for venue at a pass-through point all share one critical fact: their essential conduct elements criminalize transmission. In *Johnson*, the case that spawned the 'mails and interstate commerce' paragraph of § 3237(a), the Court reasoned that Congress can legislate venue to capture the kinds of offenses "through which a process of wrongdoing moves."[217] *Johnson* held that because Congress did not legislate venue in the Federal Dentures Act, the illegal sender could not be prosecuted where the illegal product was received.[218] The crime in *Johnson* was also a transmission crime, like wire and mail fraud, because the offense focused on "us[ing] the mails or any instrumentality of interstate commerce…."[219] Congress amended § 3237(a) to ensure that transmission offenses like that in *Johnson* could be prosecuted everywhere "from, through, or into which" the object of the crime moves.[220] That is why mail and wire fraud cases like *Jefferson*, *Pace*, and *Wood* all demonstrate that defendants may be tried anywhere along the chain of their wire transmission.[221]

Beyond wire and mail fraud, § 3237(a) had successfully been applied to offenses including failure to pay child support, unlawful possession of a firearm, false statements, bank fraud, violent crimes in aid of racketeering, possession of controlled substances with the intent to distribute.[222] Each of these offenses is either (1) like kidnapping in *Rodriguez-Moreno*, where the offense is literally committed in more than one state,[223] or

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[216] The relevant language in this provision of the statute is "Any offense involving…transportation in interstate or foreign commerce…is a continuing offense and…may be inquired of and prosecuted in any district from, through, or into which such commerce…moves."

[217] United States v. Johnson, 65 S. Ct. 249, 276 (1944).

[218] *Id.* at 278.

[219] *Id.* at 274.

[220] 18 U.S.C. § 3237(a).

[221] United States v. Jefferson, 674 F.3d 332, 366 (4th Cir. 2012); United States v. Pace, 314 F.3d 344, 349 (9th Cir. 2002) ("venue is established in those locations where the wire transmission at issue originated, passed through, or was received, or from which it was 'orchestrated'"); United States v. Wood, 364 F.3d 704, 713 (6th Cir. 2004) (mail fraud may be prosecuted "where the mail is deposited, received, or moves through, even if the fraud's core was elsewhere").

[222] *See* Cong. Rsch. Serv., *Venue: A Legal Analysis of Where A Federal Crime May Be Tried*, at 7-8.

[223] *See, e.g.*, United States v. Muench, 153 F.3d 1298, 1300-04 (11th Cir. 1998) (failure to pay child support is a continuing offense because the statute criminalizes "willful failure 'to pay a past due support obligation with respect to a child who resides in another state.'" If the child to whom child support is owed moves, the offense of failing to pay continues wherever the child next resides); United States v. Ellis, 622 F.3d 784, 793 (7th Cir. 2010) ("Possession of a firearm is a continuing offense which ceases only when the possession stops"); United States v. Smith, 641 F.3d 1200, 1208 (10th Cir. 2011) ("We have held that giving a false statement may be a continuing offense, where the statement is 'made' in more than one district"); United States v. Scott, 270 F.3d 30, 35-36 (1st Cir. 2001) (bank fraud is a continuing offense because the statute criminalizes executing or attempting to execute a scheme or artifice to defraud. If a defendant takes multiple steps in the scheme to defraud, each at a different location, the scheme continues from location to location); United States v. Saavedra, 223 F.3d 85, 91-92 (2d Cir. 2000) (Racketeering is a continuous offense because the of essential conduct elements of acting "for the purpose of . . . maintaining or increasing position in an enterprise engaged in racketeering activity." Therefore, an assault committed in furtherance of racketeering may be tried anywhere that the racketeering offense continued); United States v. Solis, 299 F.3d 420, 444-45 (5th Cir.

(2) a transmission offense like wire and mail fraud.[224] All of these offenses are different from hacking.

In each of the above cases, the defendants committed an essential conduct element of the offense in more than one district. Klyushin did not. The Court in *Klyushin* even quotes language from the Department of Justice's Manual, which demonstrates the difficulty in squaring the hacking with pass-through venue.[225] That manual suggests that transmission offenses create stronger cases for pass-through venue than other offenses.[226] Shortly after citing this language, the district court compared Klyushin's hack to transporting illegal goods and making false claims.[227] In making that analogy, the Court in *Klyushin* overlooked the fundamental distinction in the statutory language that distinguishes transmission offenses, which can be tried anywhere along the chain of the transmission, from non-transmission offenses.[228] There is a constitutional difference between an endpoint and a midpoint.[229]

There are at least two arguments in response to this distinction. First, describing a computer hack as a non-transmission offense is impractical. The internet facilitated Klyushin's hack of the filing agents in the same way that phone wires and mail systems facilitate wire and mail fraud, respectively.[230] That much is true, but a critical difference remains. Unlike the wire and mail fraud statutes, 18 USC §§ 1030(a)(2) and (a)(4) do not criminalize misuse of the internet.[231] Courts must give effect to the conduct that Congress proscribed, and under §§ 1030(a)(2) and (a)(4), that conduct is accessing a protected computer and obtaining information.[232] Furthermore, Congress did not fail to proscribe transmission by accident. It did proscribe transmission in the very same statute with § 1030(a)(5)(A), which criminalizes "knowingly caus[ing] the *transmission* [emphasis added] of a program, information, code, or command, and as a result of such conduct,

2002) (possession with intent to distribute is a continuing offense because a defendant or his co-conspirators, under a *Pinkerton* theory, may possess the controlled substance in multiple locations).

[224] *See, e.g.*, *Wood*, 364 F.3d at 713 ("venue in a mail fraud case is limited to districts where the mail is deposited, received, or moves through…"); *Pace*, 314 F.3d at 349 (venue is established in those locations where the wire transmission at issue originated, passed through, or was received, or from which it was 'orchestrated'").

[225] *See* United States v. Klyushin, 684 F. Supp. 3d 1, 10 (D. Mass. 2023) (quoting Comput. Crime & Intell. Prop. Section, Office of Legal Education, *Prosecuting Computer Crimes*, at 118-20, https://www.justice.gov/criminal/file/442156/dl?inline= ("The case for "pass through" venue may be stronger where transmission of the communications themselves constitutes the criminal offense (e.g., when a threatening email is sent in violation of 18 U.S.C. § 1030(a)(7)) and the path of transmission is certain (e.g., when an employee's email is sent through a company mail server in a particular state) . . . .By contrast, in cases where the path of transmission is unpredictable, a court may find it difficult to conclude that a crime was committed in a district merely because packets of information happened to travel through that district . . . .").

[226] Comput. Crime & Intell. Prop. Section, *supra* note 225, at 119.

[227] *See Klyushin*, 684 F. Supp. 3d at 12.

[228] *See id.*

[229] This distinction between endpoints and midpoints is specific to computer hacking. The argument against Boston in *Klyushin* is not meant to hamper federal prosecutors from bringing other charges. The argument is made to show that charging a computer hack at a midpoint is wrong, but charging other offenses at a midpoint is permissible. Klyushin himself was charged and convicted of wire fraud in Boston (*supra* note 5), and because wire fraud is a transmission offense, Boston was an appropriate venue with respect to that charge. This is an area ripe for prosecutorial strategy.

[230] *See* United States v. Jefferson, 674 F.3d 332, 367, 369 (4th Cir. 2012); United States v. Pace, 314 F.3d 344, 349 (9th Cir. 2002); United States v. Wood, 364 F.3d 704, 714 (6th Cir. 2004).

[231] 18 U.S.C. §§ 1030(a)(2), (4).

[232] *Id.*; *see* United States v. Auernheimer, 748 F.3d 525, 533-34 (3d. Cir. 2014).

intentionally caus[ing] damage without authorization, to a protected computer."[233] If Congress wanted to add transmission language to Klyushin's offenses, it could have. The fact that hacking requires use of the internet, like the way that wire fraud requires using wires, does not allow a court to determine that hacking is a transmission offense when such language is absent from §§ 1030(a)(2) and (a)(4).[234]

The other argument in response to this distinction is that even if these provisions do not include transmission language, Congress swept in offenses like Klyushin's with § 3237(a).[235]

As a textual matter, this § 3237(a) argument defeats the venue challenges that this Article poses. The second paragraph of § 3237(a) authorizes pass-through venue for any offense which involves transportation in interstate or foreign commerce.[236] When Klyushin took the quarterly reports from DFIN's servers in Illinois, the reports traveled through the Boston VPN before Klyushin received them in Russia.[237] That fits § 3237(a). The problem remains, however, that Klyushin technically did not access the quarterly reports until he digitally infiltrated DFIN's network in Illinois. Klyushin technically did not obtain the quarterly reports until he viewed them while they were stored on the Illinois servers, or until he received them back in Russia. Those distinctions are not to suggest that a hacker could *never* access or obtain information in a continuing way, though.

2. Hacking Could Be a Continuing Offense, But Klyushin's Was Not

The fact that DFIN stored the quarterly reports on one server in Illinois is important. Klyushin accessed and obtained the reports from one place, like the burglar who steals merchandise from one place: the store. Cloud technology could have expanded the venue possibilities in *Klyushin* even more.[238] Cloud storage, for example, allows an individual to store information off their device, in more than one place.[239] Imagine, for instance, that DFIN employed a cloud storage provider for their clients' quarterly reports. The storage provider may have, out of security, broken down DFIN's files into "chunks," storing each at a different server.[240] Some of the chunks containing quarterly reports could have been stored on servers in Illinois, but others could have been stored in cities all over

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233 18 U.S.C. § 1030(a)(5)(A).

234 Another way to think about this distinction is to consider that wire and mail fraud are crimes that involve any misuse of wires or the mail system. Hacking, by contrast, is not the misuse of a pathway. It is the use of a pathway to access a restricted device and obtain something that the hacker is not entitled to.

235 18 U.S.C. § 3237(a) ("[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.").

236 *Id.*

237 United States v. Klyushin, 684 F. Supp. 3d 1, 12 (D. Mass. 2023).

238 *See generally* Dropbox, *What is cloud computing?*, DROPBOX RES., https://experience.dropbox.com/resources/what-is-thecloud#:~:text=Software%20as%20a%20Service%20(SaaS)%20refers%20to%20any%20software%20that,of%20using%20pen%20and%20paper; *see also* Medium, *How Does Google Drive Work?*, DAILY KNOW MORE (Feb. 17, 2022), https://medium.com/@VeganLover/how-does-google-drive-work-2cda31c58ce8.

239 *See How Does Google Drive Work?*, *supra* note 238.

240 *See* Google, *Data Centers Data and Security*, GOOGLE DATA CTRS., https://www.google.com/ about/datacenters/data-security/ (chunking is a security process that prevents an entire file from being accessed in one place).

the country. If Klyushin broke into DFIN's network, located the files with the quarterly reports, and transmitted the files to Russia, his crime continued to every physical server where a chunk was housed. He would have both accessed and obtained information in more than one place. Computer hacking could be a continuing offense with those facts, just as with other offenses[241] that are not necessarily continuing in nature but have that potential. *Klyushin* lacks those facts. Because of that, charging and trying Klyushin in Boston violated 18 USC § 3237(a).

3. Klyushin Did Not Harm Boston

One could argue that § 3237(a) is unconstitutional as applied to Klyushin's hack, but that argument is beyond the scope of this Article. However, *Klyushin* does present the Founding Era concerns about defendants who were hauled across oceans and judged by foreigners.[242] Klyushin stole valuable reports from Illinois, using them to generate millions of dollars in illegal profits.[243] Charging him in Illinois, the site of his hack, would have provided Illinois residents with the opportunity to seek justice on their community's behalf. Boston, by contrast, was nothing more than a through-point for Klyushin.[244] Boston jurors likely had less of a connection to his offense that Illinois jurors would have because Klyushin did not steal from Boston.[245] Congress may legislate venue,[246] but Congress may not end-run around the Constitution and its foundational principles to legislatively permit defendants to be tried somewhere that they did not commit a crime. That is what happened to Klyushin, and with his appeal dismissed, other courts will determine how much stock to put into *Klyushin*'s reasoning.

V. Conclusion

Klyushin tees up the challenge of mapping computer crimes onto geographical locations. This Article has argued that Klyushin's hack was not committed and did not continue into Boston just because of a VPN. In the venue analysis, an on ramp is not the same as the destination. We could have a world that respects that distinction. Or, we could have a world that blurs the line, using supposed Congressional intent to find that any hack that uses the internet, regardless of all other facts, may be prosecuted at a pass-through point. Regardless of how *Klyushin* will impact venue caselaw, courts must consider the fundamental goal that *Auernheimer* captured:

> As we progress technologically, we must remain mindful that cybercrimes do not happen in some metaphysical location that justifies disregarding constitutional limits

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241 United States v. Cabrales, 524 U.S. 1, 8 (1998) (noting that the money laundering could have been a continuing offense if there was evidence that the defendant transported the drug proceeds from Missouri to Florida); United States v. Smith, 641 F.3d 1200, 1208 (10th Cir. 2011) ("that does not mean that all violations of § 1001(a)(2) are continuing violations").

242 *Supra* Part II-A, at 28-30.

243 United States v. Klyushin, 684 F. Supp. 3d 1, 5 (D. Mass. 2023).

244 *Id.*

245 *Id.*

246 United States v. Rodriguez-Moreno, 526 U.S. 275, 280 (1999).

> on venue. People and companies still exist in identifiable places in the physical world. When people commit crimes, we have the ability and obligation to ensure that they do not stand to account for those crimes in forums in which they performed no "essential conduct element" of the crimes charged.[247]

[247] United States v. Auernheimer, 748 F.3d 525, 541 (3d. Cir. 2014).


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