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On the Hook: Venue, Vicinage, and Double Jeopardy's Relationship with Modern Data Crimes

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NOTE

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Smith v. United States, 599 U.S. 236 (2023).

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I. INTRODUCTION

Every fisherman has a place he holds dear. Whether it be a mountain creek small enough to hop across or a reef in the Gulf of Mexico, we *all* have a place where "the big one" defeated us. Conversely, we *all* have a spot in which we emerged victorious, spurring feelings of elation. We *all* have memories so compelling that we feel the need to share our stories around the dinner table and remind friends how much they missed out on that day. Ingrained in my memory is the flash of a twenty-inch brown trout sipping a fly from the surface of the Fraser River, jumping out of the water, and snapping my line. I can recall almost every detail of the experience: the strength of the current, the speckled moss on the pesky rock the fish used for cover, and the size sixteen elk hair caddis fly that I lost in the process. For reference, I saved the GPS coordinates so I can revisit the exact spot to flip the script. GPS coordinates provide a quick and easy means to return to a favorite place or to explore somewhere new without undue wandering. Timothy Smith understood the value of this technical knowledge, as indicated by his efforts to steal coordinates generated by others.

In *Smith v. United States*, Timothy Smith was a fisherman like many others, but his search for a good fishing spot differed from most anglers

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when his pursuit entrenched him in a legal battle that turned on core rights the Framers stood to protect.[1] That battle presented the Supreme Court with the question of whether the proper remedy for a trial conducted in an incorrect venue is a bar of reprosecution, or a brand new trial in the correct venue.[2] Accordingly, this Note focuses on core rights implicated by the question in *Smith*, including those found in the Venue, Vicinage, and Double Jeopardy Clauses in the United States Constitution, and their relationship to modern data crimes. Part II describes the facts and holding of *Smith v. United States*. Part III details the legal doctrines involved, including foundational principles dictating where a defendant should be tried, who can compose the jury, protection from being tried twice for the same offense, and remedies for violations of those principles. Part IV explains the Supreme Court's decision in *Smith*: when a defendant is tried in an improper venue, the Constitution does not require an outcome other than retrial. Lastly, Part V comments on how the Supreme Court's ruling aligns with precedent, but Congress could solve venue problems associated with modern data crimes by statutorily defining where a defendant should be tried.

II. FACTS AND HOLDING

As a software engineer from Mobile, Alabama, Timothy Smith primarily spent his free time sailing, diving, and fishing in the Gulf of Mexico.[3] StrikeLines, owned by Travis Griggs and Tristan Harper, is a website aimed at helping fishermen such as Smith by using sonar equipment to identify underwater, artificial reefs constructed to create optimal fish habitats.[4] After identifying reefs, StrikeLines maps the geographic coordinates of the locations and sells them to interested parties so that the new coordinate owner can target the specific fishing spot.[5] After understanding the technology, Smith took issue with the StrikeLines model, as he felt that StrikeLines was "unfairly profiting from the work of private reef builders."[6]

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[1] Smith v. United States, 599 U.S. 236 (2023).

[2] *Id.* at 239.

[3] *Id.*

[4] STRIKELINES, http://www.strikelines.com [https://perma.cc/J3AF-T8XS] (last visited Oct. 14, 2023); United States v. Smith, 469 F. Supp. 3d 1249, 1252 (N.D. Fla. 2020); *Smith*, 599 U.S. at 239; Fish are known to congregate near underwater structures such as reefs, shipwrecks, and oil rigs. *See generally The MeatEater Podcast: Ep. 350: Sharks In The Oreos*, MEATEATER, INC. (Jul. 18, 2022), https://www.themeateater.com/listen/meateater/ep-350-sharks-in-the-oreos [https://perma.cc/WX53-4S8J].

[5] *Smith*, 599 U.S. at 239.

[6] *Id.* at 239–40.

In May 2018, an acquaintance of Griggs and Harper informed them that Timothy Smith hacked into the StrikeLines database after discovering a vulnerability in its computer system.[7] Smith used a web application to obtain "tranches of coordinates" from StrikeLines without permission.[8] Harper contacted Smith, who admitted that he obtained private coordinates and information from the site without consent.[9] In June 2018, StrikeLines customers informed Griggs and Harper of Smith's post on Facebook that stated StrikeLines "had given him all of its coordinate data."[10] When confronted, Smith offered to remove his public posts discussing StrikeLines's coordinates if Griggs provided him with the location coordinates, or "deep grouper spots," to specifically target grouper, a species of fish local to the Gulf of Mexico.[11] Smith further offered to fix StrikeLines's security issues in confidence.[12] Griggs accepted the deal in exchange for Smith deleting his Facebook posts, but Smith rescinded the offer the following day.[13] Once negotiations failed, StrikeLines contacted law-enforcement.[14]

A federal grand jury indicted Smith in the Northern District of Florida for violation of the federal Computer Fraud and Abuse Act, theft of trade secrets, and transmitting a threat through interstate commerce with the intent to extort.[15] Smith moved for dismissal of all counts for lack of venue before the trial began.[16] He argued that he accessed StrikeLines's servers while he was in Mobile, Alabama, located in the Southern District of Alabama, while the servers storing StrikeLines's coordinates were in Orlando, Florida, located in the Middle District of Florida.[17] Smith's motion was denied without prejudice by the Northern District of Florida on grounds that StrikeLines "felt the effects of the crime at its headquarters in the Northern District of Florida."[18]

At trial, Smith renewed his motion challenging venue and, specifically, he cited the sufficiency of the evidence to establish venue in

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[7] *Smith*, 469 F. Supp. 3d at 1253.

[8] *Smith*, 599 U.S. at 240.

[9] *Smith*, 469 F. Supp. 3d at 1253.

[10] *Id.* at 1254.

[11] *Smith*, 599 U.S. at 240. Grouper is a sought-after game fish for which Smith wanted the coordinates, or "numbers", that he was unable to extract from the website. *Id.*

[12] *Smith*, 469 F. Supp. 3d at 1254.

[13] *Id.*

[14] *Smith*, 599 U.S. at 240.

[15] *Smith*, 469 F. Supp. 3d at 1252; 18 U.S.C. § 1030(a)(2)(C), (c)(2)(B)(iii); *id.* § 1832(a)(1); *id.* § 875(d); United States v. Smith, 22 F.4th 1236, 1240 (11th Cir. 2022).

[16] *Smith*, 22 F. 4th at 1240.

[17] *Smith*, 599 U.S. at 240.

[18] *Id.*

the Northern District of Florida.[19] The district court denied the motion and submitted the case to the jury with instructions to determine if the government proved venue by a preponderance of the evidence.[20] Smith was found guilty of theft of trade secrets and extortion but not guilty of computer fraud.[21] Smith moved for acquittal and a new trial.[22] A key component of his argument for acquittal was, once again, that the government failed to establish proper venue for the theft of trade secrets charge.[23]

On appeal to the United States Court of Appeals for the Eleventh Circuit, the theft of trade secrets charge became the focus of the case.[24] Since the essential elements of the trade secrets charge occurred where Smith allegedly received the data in the Southern District of Alabama, the Eleventh Circuit vacated Smith's conviction based on lack of venue.[25] The appellate court reasoned that because the essential conduct elements were not in the same location as the trial, venue was improper.[26] The Eleventh Circuit held that the remedy for improper venue is vacatur of the conviction rather than acquittal or dismissal with prejudice.[27] The court further held that the Double Jeopardy Clause had no bearing on the disposition, because the clause is not implicated when a defendant is retried in the proper venue after a conviction from an improper venue is vacated.[28]

The Supreme Court subsequently granted certiorari to determine whether the "Constitution permits the retrial of a defendant following a trial in an improper venue and before a jury drawn from the wrong district."[29] The Supreme Court held that when a defendant is tried in an improper venue before a jury that is drawn from the wrong district, the Constitution does not require an outcome other than retrial, and the Double Jeopardy Clause is not implicated.[30]

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[19] *Smith*, 22 F.4th at 1240.

[20] *Id.* at 1241.

[21] United States v. Smith, 469 F. Supp. 3d 1249, 1252 (N.D. Fla. 2020).

[22] *Id.*

[23] *Id.* at 1255.

[24] *Smith*, 22 F.4th at 1242 (holding that venue was proper for the extortion count, but not for the theft of trade secrets count).

[25] *Id.* at 1238.

[26] *Id.* at 1242.

[27] *Id.* at 1244.

[28] *Id.*

[29] Smith v. United States, 599 U.S. 236, 241 (2023).

[30] *Id.* at 239.

III. LEGAL BACKGROUND

Smith v. United States sits at the intersection of three foundational legal principles: (1) the right to a trial by jury "in the State where the said Crimes shall have been committed," otherwise known as venue;[31] (2) the right to a jury selected "of the State and district wherein the crime shall have been committed," or vicinage;[32] and (3) the protection from being "twice put in jeopardy of life or limb" for the same offense, commonly known as double jeopardy.[33] This Part discusses the history and purpose of each of these constitutional principles, explains their interactions with modern charges for the theft of trade secrets, and provides federal appellate court interpretations and applications of these concepts.

A. Common Law Roots: Venue and Vicinage

The rights to venue and vicinage are both rooted in English common law. The vicinage right is closely tied to fundamental notions of jury trials, for which common law courts historically found that defendants were entitled to a jury of the "neighbourhood."[34] Those in the community who "had suffered a crime" were placed on the jury as representatives to execute the sentiment of a wronged community towards a defendant.[35] While the immediate purpose of the vicinage right was to define *who* comprised the jury, this concept essentially incorporated a venue requirement.[36] In an age where travel was much less common, it was important for trials to be held where the fact at issue allegedly occurred, thus tying the jury pool to a specific location.[37] The historic union of these rights is different in today's world and is reflected in modern procedure that first establishes venue before addressing vicinage concerns.

This foundational principle of venue is a key underpinning of our justice system, "highly prized" by the Framers, and was codified in Article III of the Constitution.[38] Prior to the Declaration of Independence, the Framers were acutely concerned with extradition—the practice of transporting offenders from the colonies back to England where English

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[31] U.S. CONST. art. III, §2, cl. 3.

[32] U.S. CONST. amend. VI.

[33] U.S. CONST. amend. V.

[34] 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 344 (1769).

[35] Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1674 (2000).

[36] Smith v. United States, 599 U.S. 236, 246 (2023).

[37] *Id.* (citing E. Coke, 1 INSTITUTES OF THE LAWS OF ENGLAND § 193 at 125 (1628)).

[38] U.S. CONST. art. III, §2, cl. 3; *Smith*, 599 U.S. at 248.

courts subsequently tried them.[39] This practice pushed the Framers to ensure adequate protection for colonists from the risk of trial in England.[40] Similarly, the Framers also wanted to ensure that British soldiers who murdered American colonists were given a fair trial in the colonies rather than a moot court in England.[41] Thus, the vicinage right directs *whom* is most appropriate to determine innocence or guilt.

Venue—though closely related to vicinage—directs *where* a trial is most appropriately held. Today, venue is defined by the *locus delecti* of a crime.[42] The *locus delecti* of a crime is determined by "identify[ing] the conduct constituting the offense (the nature of the crime) and then discern[ing] the location of the commission of the criminal acts."[43] Thus, the government must determine the essential conduct elements of the crime to establish what conduct ties the actions to the location,[44] and it must prove that venue is proper by a preponderance of the evidence.[45] Courts typically use two steps in their venue inquiry.[46] The inquiry begins by evaluating the essential conduct elements of the crime.[47] Next, the factfinder must discern where the essential conduct elements occurred and "whether the location of their commission is the same as the location of the trial."[48] The effects of criminal conduct may also be used to define venue in the district in which the effects are felt.[49] This provides an alternative means to establish venue specifically in cases regarding statutes that define an essential conduct element in terms of its effects, such as failure to pay child support or obstruction of justice.[50]

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[39] Lisa E. Alexander, *Vicinage, Venue and Community Cross-Section: Obstacles to a State Defendant's Right to a Trial by a Representative Jury*, 19 HASTINGS CONST. L. Q. 261, 265 (1991).

[40] *Id.* at 265–66.

[41] *Smith*, 599 U.S. at 246–47. Parliament circumvented local trials before colonial juries for soldiers charged with murdering colonists and for colonists charged with treason. *Id.* These trials were authorized for transfer to England rather than a jury of peers from the colonies. *Id.*

[42] United States v. Smith, 469 F. Supp. 3d 1249, 1255 (N.D. Fla. 2020) (quoting United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999)).

[43] *Id.* (quoting *Rodriguez-Moreno*, 526 U.S. at 279).

[44] *Id.*

[45] United States v. Smith, 22 F.4th 1236, 1242 (11th Cir. 2022).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1242–43 (quoting *Rodriguez-Moreno*, 526 U.S. at 279).

[49] *Smith*, 469 F. Supp. 3d at 1256 (citing United States v. Bowens, 224 F.3d 302, 311 (4th Cir. 2000) ("Venue may nevertheless be proper where the effects of criminal conduct are felt, but only when an essential conduct element is itself defined in terms of its effects.")).

[50] United States v. Muench, 153 F.3d 1298, 1301 (11th Cir. 1998) (holding that a child's residence in a child support repayment case can be used as venue since this place suffers the effects of the crime); United States v. Barham, 666 F.2d 521, 524

Because complex offenses present unique challenges for determining venue, Congress established certain rules for prosecuting offenses where the defendant's conduct begins in one district and is completed in another.[51] "Any offense . . . 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."[52] The government is provided with clarification on its ability to prosecute crimes of a larger, interstate nature in 18 U.S.C. § 3237.[53] For example, conspiracy, which fundamentally requires multiple offenders and often occurs across multiple districts, may be prosecuted in any county in which a conspirator commits an overt act in furtherance of the crime.[54]

Once venue is determined, vicinage then becomes relevant. The vicinage right provides for "inhabitants whereof" the crime occurred to serve on the jury.[55] English common law preferred residents of the community that were familiar with the parties and the dispute—a concept that lies contrary to the modern desire for a neutral and uninformed fact-finder.[56] The vicinage right also sought to allow an aggrieved community to participate in a trial through its jury representatives.[57] *Arundel's Case* laid an early foundation for vicinage issues resulting in retrial.[58] In that case, John Arundel was found guilty of murder.[59] Afterwards, it was determined that the jury should have been comprised of people "out of the parish, and not out of the city."[60] To remediate this error, the defendant was awarded a new jury to "try the issue again, for his life was never in jeopardy."[61]

While the venue right was codified initially in Article III of the Constitution, the lack of a vicinage provision promptly became a topic of debate for the Framers, as some parties sought an additional bill of rights.[62] Certain Framers were opposed to the vicinage right, fearing that an unlawful leader could find safe harbor in a sympathetic district.[63] Ultimately, the Framers settled on the concept that jurors should be drawn

(11th Cir. 1982) (holding that the nature of obstruction of justice is to affect the due administration of justice, so venue can be defined by the location of the court affected).

[51] 18 U.S.C. § 3237.

[52] *Id.*

[53] United States v. Gillette, 189 F.2d 449, 451–52 (2d Cir. 1951).

[54] Hyde v. United States, 225 U.S. 347, 365 (1912).

[55] E. Coke, 1 INSTITUTES OF THE LAWS OF ENGLAND § 193, at 125 (1628).

[56] Alexander, *supra* note 39, at 263.

[57] Engel, *supra* note 35, at 1661.

[58] Arundel's Case, 6 Co Rep. 14a, 77 Eng. Rep. 273 (K.B. 1593).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Alexander, *supra* note 39, at 265.

[63] *Id.*

from the district and state in which the alleged crime occurred, and the Vicinage Clause was subsequently included in the language of the Sixth Amendment.[64]

B. Double Jeopardy

Similar to venue and vicinage, protection against double jeopardy has well-established roots in English common law.[65] The first reference to the fact of a prior prosecution barring a subsequent prosecution for the same event occurred in a decision in 1201.[66] Double jeopardy concepts were further formalized in the pleas of "autrefoits acquit (a former acquittal), autrefoits convict (a former conviction), and pardon."[67] The Massachusetts Bay Colony enacted the Body of Liberties which was a forerunner to the Bill of Rights.[68] The Body of Liberties established that "[n]o man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse."[69] Other colonies also recognized the right against double jeopardy in their own statutes, constitutions, and bodies of common law.[70]

The fact that multiple states recognized a right against double jeopardy, yet it was not addressed in the Constitution, was one of the reasons that President George Washington, Thomas Jefferson, and other Framers called for amendments in the form of a bill of rights.[71] Their requests were answered with the proposal of the Fifth Amendment to protect against double jeopardy in 1789.[72] When the Fifth Amendment was first suggested, its application was simple: most criminal prosecutions proceeded to final judgment and neither the government nor the defendant had any right to appeal an adverse verdict.[73] Keeping the fear of an overbearing, tyrannical executive such as King George III in mind, the

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[64] *Id.* at 266.

[65] The Talmud contains several references to principles associated with double jeopardy. David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 202–03 (2005).

[66] 2 PLEAS BEFORE THE KING OR HIS JUSTICES 1198–1202, pl. 737 (Doris Mary Stenton ed., 68 Selden Soc'y 1952 (Sumerset 1201))

[67] Rudstein, *supra* note 65, at 204.

[68] BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 69 (1971).

[69] Rudstein, *supra* note 65, at 222 n.252.

[70] *Id.* at 223.

[71] *Id.* at 226–27.

[72] *Id.* at 227.

[73] United States v. Scott, 437 U.S. 82, 88 (1978). It was not until 1889 that Congress allowed criminal defendants in capital cases to pursue a writ of error in the Supreme Court to call into question the finality of an adverse judgment, complicating application of the Fifth Amendment. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656.

Founders extended the Fifth Amendment to prevent the State from making repeated attempts to convict an individual. In doing so, the Fifth Amendment safeguards against prolonged anxiety and the potential for an accused party to be found guilty.[74]

C. Trade Secret Law

Compared to the longstanding history of constitutional trial protections like venue, vicinage, and double jeopardy, federal trade secret law is in its infancy. Roots of trade secret law trace back to the mid-nineteenth century and the rise of corporate industrialism.[75] Trade secret protection "promotes the sharing of knowledge, and the efficient operation of industry" by offering protection for technological developments within companies and encouraging inventors that approach larger corporations to exploit new technology.[76] Without trade secret protection, employees could leave a company and take valuable intellectual property with them. The risk of insufficient protection discourages technological advancement since research and development could walk out the door with little resistance.

One example of a notorious trade secret is the Coca-Cola recipe.[77] If the recipe was patented, it would be publicly disclosed through the patent system.[78] Upon expiration of the Coca-Cola patent, the recipe would be free for the public to use; however, a trade secret can be protected forever.[79] Businesses with tightly held recipes or those that sell the intellectual property itself demonstrate the need for trade secret protection: once their information is accessible to the public, there is no longer any incentive to pay the provider.[80] Occupying a quasi-tort and quasi-contract area of law, trade secret disputes often arise between employers, employees, and their competitors over secret manufacturing processes.[81] Over time, common law concepts have been codified in acts such as the

[74] Green v. United States, 355 U.S. 184, 187–88 (1957).

[75] Kenneth Shurtz, *Has the CUTSA Furthered or Frustrated Underlying Theories of Trade Secrets Law?*, 50 IDEA 501, 503 (2010).

[76] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 493 (1974).

[77] *See* Camilla A. Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, 73 STAN. L. REV. 1, 54 (2021).

[78] *Id.* at 10–11.

[79] *Id.* at 12.

[80] *See* Stephen T. Black, *Where Does Data Live?*, 72 DEPAUL L. REV. 793, 796 (2023).

[81] Amy Kapczynski, *The Public History of Trade Secrets*, 55 U. CAL. DAVIS L. REV. 1367, 1384 (2022); *see also* Peabody v. Norfolk, 98 Mass. 452 (1868).

Uniform Trade Secrets Act ("UTSA") and adopted at both the state and federal levels.[82,]

To establish guilt for theft of trade secrets, the government must demonstrate beyond a reasonable doubt: (1) intention to convert proprietary information for economic benefit; (2) the proprietary information was a trade secret; (3) the defendant knowingly stole trade secret information; (4) the defendant intended to injure the trade secret owner; and (5) the trade secret was included in a product of interstate commerce.[83] The first and fourth elements speak only to the defendant's *mens rea*; the second and fifth elements are not dependent on the defendant's conduct, but turn on the characteristics of the proprietary information itself.[84] The essential conduct element necessary to determine venue is the third element of knowingly stealing trade secret information.[85] It is difficult to determine venue for theft of trade secrets, because the owner of the trade secret's location, place of creation of the trade secret, place of injury, and place of registration are all considered potential venues.[86] The government must wade through these options to determine where to prosecute the crime.[87]

D. Remedy for Venue Issues

Because determining venue for complex offenses—such as theft of trade secrets—proves challenging, it is not uncommon that a defendant is mistakenly tried in an improper venue. Questions often arise regarding these defendants' rights and determinations of guilt after a trial with a flawed venue. Does a guilty verdict from the wrong venue have staying power? Can the case be reheard in the proper venue or should it be dismissed with prejudice? The Supreme Court addressed a similar issue in *U.S. v. Jackalow*, where the Court set aside the verdict and ordered a retrial due to an error in venue.[88] Federal appellate courts were previously split on resolution of issues involving improper venue. The Fifth and Eighth Circuits held that the proper remedy for failure to establish venue

[82] Scholars developed a uniform code in the 1970s which was approved by the National Conference of Commissioners on Uniform State Laws. Shurtz, *supra* note 75, at 504; 18 U.S.C. §1832.

[83] United States v. Smith, 469 F. Supp. 3d 1249, 1255–56 (N.D. Fla. 2020) (citing United States v. Wen Chyu Liu, 716 F.3d 159, 169–70 (5th Cir. 2013)).

[84] United States v. Smith, 22 F.4th 1236, 1243 (11th Cir. 2022).

[85] *Id.*

[86] Black, *supra* note 80, at 795.

[87] *See id.* at 814.

[88] United States v. Jackalow, 66 U.S. 484, 487–88 (1861).

is a bar of reprosecution in the form of an acquittal.[89] Conversely, the Sixth,[90] Ninth,[91] Tenth,[92] and Eleventh Circuits held that reprosecution was proper if venue was not established.[93] The Supreme Court addressed and resolved this circuit split in *Smith*.[94]

IV. INSTANT DECISION

In *Smith*, the Supreme Court held that retrial is the proper remedy for a case prosecuted in the wrong venue and before a jury drawn from the wrong location.[95] The digitally-stored nature of the intellectual property and the manner in which it was stolen posed a problem for the Court in its determination of venue, as it struggled to define the correct place and community to try the defendant.[96] When evaluating whether a defendant should be acquitted or retried, the Supreme Court arrived at a solution for venue errors that seems imprecise and generates its own set of issues.

In a unanimous opinion authored by Justice Alito, the Court first addressed the issues associated with improper venue.[97] Smith argued that the Venue Clause aimed to prevent hardship on the defendant based on the trial's location, which the Court found unpersuasive since all trials and retrials impose some sort of burden.[98] The Court noted its position that the venue right was not intended to minimize trial hardship on a defendant but, rather, to connect a trial to the locality of the alleged crime.[99]

The Court then followed a line of cases that showed a particular rigidity regarding venue for criminal defendants that were haled into court for crimes committed in faraway states.[100] The Court cited hypothetical examples as well as historic cases where venue was significant. With respect to the elements of a hypothetical crime, the Court noted that a resident of New York that committed a crime while visiting Hawaii may be tried in Hawaii under the Venue Clause even though the trial may be

[89] United States v. Strain, 396 F.3d 689 (5th Cir. 2005) (holding that venue was improper and defendant was entitled to an acquittal); United States v. Greene, 995 F.2d 793, 794–95 (8th Cir. 1993).

[90] United States v. Petlechkov, 922 F.3d 762, 771 (6th Cir. 2019) (holding that dismissal on venue grounds is not an acquittal or double jeopardy purposes because venue is not an element of the underlying criminal offense).

[91] United States v. Kaytso, 868 F.2d 1020, 1022 (9th Cir. 1988).

[92] Wilkett v. United States, 655 F.2d 1007, 1015 (10th Cir. 1981).

[93] United States v. Smith, 22 F.4th 1236, 1246 (11th Cir. 2022).

[94] Smith v. United States, 599 U.S. 236, 240 (2023).

[95] *Id.*

[96] *Id.*

[97] *Smith*, 599 U.S. at 242.

[98] *Id.* at 243.

[99] *Id.* at 243–44.

[100] *Id.* at 244.

very inconvenient.[101] The Court then relied on cases such as *Travis v. United States* (beginning in Colorado) and *United States v. Lombardo* (beginning in Washington State) that held that defendants should be tried in a foreign venue—Washington, D.C.—instead of their home states.[102] The *Travis* case considered a defendant who mailed false non-Communist affidavits from Colorado to be filed in Washington, D.C., while the *Lombardo* case involved a Washington citizen's failure to file a statement detailing the immigration status of alien prostitutes.[103] The facts of both cases presented scenarios in which the crimes of filing, or failure to do so, occurred in Washington, D.C., and the Court determined that the trials should occur in Washington, D.C., far away from where each defendant's conduct occurred.[104]

The Court then turned to the vicinage components of Smith's argument.[105] Since the Vicinage Clause concerns jury composition, the Court reasoned that modern errors in its application should be amended similarly to other cases with jury-related issues such as non-unanimous verdicts and racially biased or partial juries.[106] The Court stated that in each of these scenarios the remedy is retrial, and an error in vicinage should be no different.[107] Smith argued that the Constitution elevates the vicinage right to "an even higher stature in American law,"[108] which the Court found unconvincing in its historical review of the right.[109] The Court walked through the history of the vicinage right, particularly noting that the right was well-established before the country's founding,[110] yet nothing in the Constitution altered the common law remedy of retrial for violations of the vicinage right.[111]

The Court then evaluated common law remedies for venue flaws.[112] The Court reasoned that, since indictments historically hold a local nature, a defendant's acquittal in an improper county would not bar a subsequent indictment in the proper one.[113] For this proposition, the Court relied on

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[101] *Id.*

[102] Travis v. United States, 364 U.S. 631, 633–34, 637 (1961); United States v. Lombardo, 241 U.S. 73, 77 (1916).

[103] *Travis*, 364 U.S. at 633–34; *Lombardo*, 241 U.S. at 77.

[104] *Travis*, 364 U.S. at 633–34; *Lombardo*, 241 U.S. at 77.

[105] Smith v. United States, 599 U.S. 239, 244 (2023).

[106] *Id.* at 245.

[107] *Id.*

[108] Brief for Petitioner at *21, Smith v. United States, 599 U.S. 239, 244 (2023) (No. 21-1576).

[109] *Smith*, 599 U.S. at 246.

[110] *Id.*

[111] *Id*. at 249.

[112] *Id.*

[113] *Id.* at 249–50 (quoting 2 W. HAWKINS, PLEAS OF THE CROWN 526 (6th ed. 1788)).

United States v. Jackalow.[114] *Jackalow* turned on a jury's special verdict that did not establish venue and instead relied on a judge to determine venue, and the Supreme Court in that case ruled that the lower court should grant a new trial in which the jury should decide whether that venue is proper.[115] The *Smith* Court stated that *Jackalow* and other historical precedents did not justify an exemption from the retrial rule that Smith sought.[116]

Finally, the Court discussed the strictures of the Double Jeopardy Clause, differentiating between the weight of a judicial decision regarding venue and a jury's general verdict of acquittal.[117] According to the Court, culpability is the touchstone for determining whether retrial is permitted under the Double Jeopardy Clause,[118] and there is an inherent difference between criminal trials that establish culpability and trials that are undermined due to procedural issues. The Court dictated that the Double Jeopardy Clause is implicated when a court makes some sort of determination, such as a "resolution, correct or not, of some or all of the factual elements of the offense charged," that bears on culpability of the defendant.[119] Conversely, the Court clarified that when a trial "terminates 'on a basis unrelated to factual guilt or innocence of the offence of which [the defendant] is accused,'" retrial is permitted.[120]

The Court placed the present case into the latter category of termination on a basis other than guilt.[121] Criminal culpability is not resolved when a reviewing court determines that the Government's case must fail even if the factfinder determines that the defendant was guilty beyond a reasonable doubt.[122] The reversal of Smith's conviction on the basis of a Venue or Vicinage Clause violation had no bearing on his factual guilt, according to the Court.[123] Since the Eleventh Circuit's decision that venue was improper in the Northern District of Florida ultimately did not bear on Smith's culpability, the Court believed the Double Jeopardy Clause was not implicated, and Smith could be retried in the proper venue in front of a proper jury.[124]

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[114] 66 U.S. 484 (1861).

[115] *Id.* at 488.

[116] *Smith*, 599 U.S. at 251.

[117] *Id.* at 252.

[118] Evans v. Michigan, 568 U.S. 313, 324 (2013).

[119] *Smith*, 599 U.S. at 253 (quoting Smith v. Massachusetts, 543 U.S. 462, 468 (2005)).

[120] *Id.* (quoting *Smith*, 543 U.S. at 468).

[121] *Id.* (quoting United States v. Scott, 437 U.S. 82, 99 (1978)).

[122] *Id.* at 254 (quoting *Scott*, 437 U.S. at 96).

[123] *Id.* at 253.

[124] *Id.* at 254.

V. COMMENT

Smith illustrates the difficulty in clearly defining where a defendant should be tried when accused of a data crime, and the potential costs to both taxpayers and the defendant resulting from this lack of clarity. While precedent and historical bases requires the Supreme Court to look backwards to solve the issue, Congress should take a forward-facing approach to precisely clarify venue for data-related offenses such as hacking or theft of trade secrets via the web with the goal of defining venue correctly the first time.

Although the Court sided with most lower courts and historical common law precedent on the question of retrial, the Supreme Court's solution breeds inefficiency. The ruling in *Smith* suggests that a trial can go the distance, yet still subject the defendant to a second trial if parties do not properly establish venue. It is no secret that trials are time consuming, inherently complicated, expensive, and prolonged through the appeals process.[125] Data crimes add to the complexity since the offenses are intangible. Timothy Smith's case was originally docketed on April 2, 2019.[126] His judgment at the trial level was entered on July 9, 2020, over fifteen months after the case began.[127] Accordingly, in a future case in which venue is determined to be improper *after the trial has gone the distance*, the defendant should be prepared to saddle up for at least another fifteen months of trial proceedings before receiving a proper, final judgment. This subjects the defendant to another fifteen months' worth of legal fees, as well as time lost at no fault of his own and with no guarantee that the government will get the venue correct the second time.

A defendant might find relief in the Supreme Court's recognized reprosecution bar if a trial error runs afoul of the Speedy Trial Clause.[128] However, the Court previously stated that the right to a speedy trial is "relative" and it is "impossible to determine when the right has been

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[125] The average time to disposition is 256 days for a felony case and 193 days for a misdemeanor. BRIAN J. OSTROM ET AL., TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US, NAT'L CTR. FOR STATE CTS. 6 (2020). The median time interval for criminal appeals across Federal Circuit Courts from filing of notice of appeal to last opinion or final order is 10.3 months. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, TABLE B-4A, U.S. COURTS OF APPEALS–MEDIAN TIME INTERVALS IN MONTHS FOR CIVIL AND CRIMINAL APPEALS TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2023 (2023), https://www.uscourts.gov/statistics/table/b-4a/judicial-business/2023/09/30 [https://perma.cc/B4KN-XDWJ].

[126] *See* United States v. Smith, 3:19-CR-00032 (Apr. 2, 2019) (Westlaw).

[127] *See* Docket Entry #108, United States v. Smith, 3:19-CR-00032 (July 9, 2020) (Westlaw).

[128] *Smith*, 599 U.S. at 242.

denied."[129] Though not directly addressed in *Smith*, this raises additional questions of when the delay caused by a retrial for prosecutorial error crosses the threshold for a violation of the speedy trial right, and how such a vague standard can even be fairly evaluated. This Comment addresses the financial, procedural, and prudential consequences of *Smith*, compares risk mitigation in other industries to the legal field, discusses the relation between data crimes and venue, and suggests a potential statutory solution.

A. Financial, Procedural, and Prudential Consequences of Smith

The Supreme Court's ruling has a damaging financial impact on the government. In 2019 alone, the government spent $254 billion on the justice system.[130] While trial proceedings in which venue is contested are likely a drop in the bucket, these additional costs are not insignificant, especially when the remedy is a completely new trial.[131] Attorney's fees also add to the defendant's costs when venue is contested, as defense attorneys must prepare for an entirely new trial, new judge, and new jury.[132] The United States is one of the most litigious countries in the world,[133] and procedural issues such as venue result in seemingly avoidable costs.

The ability to retry a defendant based on improper venue gives prosecutors a second at bat. Accordingly, the Supreme Court's ruling in *Smith* may have profound ramifications such as disincentivizing prosecutors to diligently focus on properly establishing venue. While the Supreme Court found retrial in this scenario is not repugnant to the Fifth

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[129] Barker v. Wingo, 407 U.S. 514, 521–22 (1972).

[130] *Justice Expenditure and Employment Tool*, BUREAU OF JUSTICE STATISTICS, https://bjs.ojp.gov/jeet [https://perma.cc/8H9D-E6FS] (last visited Apr. 1, 2024).

[131] In 2023, U.S. Courts of Appeals terminated a total of 40,836 cases, of which criminal appeals terminated on procedural grounds only accounted for 2,162. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, TABLE B-1, U.S. COURTS OF APPEALS–CASES COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT AND NATURE OF PROCEEDING, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2023, (2023), https://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2023/12/31 [https://perma.cc/V6CH-G8NV].

[132] Cost estimates to taxpayers are as follows: $22,000–$44,000 (homicide), $2000–$5000 (rape and sexual assault), $600–$1300 (robbery), $800–$2100 (aggravated assault), $200–$600 (burglary), $300–$600 (larceny/theft), and $200–$400 (motor vehicle theft). Priscillia Hunt, James Anderson, & Jessica Saunders, *The Price of Justice: New National and State-Level Estimates of the Judicial and Legal Costs of Crime to Taxpayers*, AM. J. CRIM. JUST. 42, 231–54 (2017).

[133] Maura Freiwald, *Legal System Abuse is Rampant*, MUNICH RE (Nov. 11, 2022), https://www.munichre.com/en/insights/economy/legal-system-abuse-is-rampant-what-insurers-can-do-and-how-reinsurers-can-help.html [https://perma.cc/P5DS-N9ZF].

Amendment,[134] the concept is unsettling because in an adversarial justice system, this result seems to give a clear advantage to the State, with less pressure on the prosecution to get it right the first time. If the defendant makes a strategic misstep on his first swing, he goes to jail and potentially pays for an appeal. If the prosecutor gets venue wrong on his first swing, the government foots the bill and gets another appearance at the plate.

The decision in *Smith* ultimately disincentivizes precision when defining venue. However, the judicial system is not the only high-risk industry that stands to gain from accuracy and efficiency the first time around. Surgeons are required to take a "visit to the mound" before cutting into a patient and implementing life-changing results.[135] Before each takeoff, pilots walk passengers and crew through a safety check to ensure all aboard are aware of conditions and protocols in an emergency. The engineering and construction industry is often on strict time and budget constraints and employs multiple rounds of drawing revision and approval under the purview of licensed engineers. These industries mitigate risk and disasters (that may sometimes result in multiple deaths) by employing checks and hold points to prevent disastrous results, yet the legal industry takes a more lax approach with venue. Is an accused party not worth the time and assurance that a trial is proceeding correctly before progressing further? Are core liberties that the Framers sought to protect not worth a "time-out"?

While errors can always occur throughout trial, a clear-cut method for establishing venue could provide precision for interstate parties acting through the web. With a convoluted set of facts and locations, cases like Timothy Smith's are more likely to go the distance, find that venue is improper, and then transfer to the proper venue for retrial. This new trial equips a new prosecutor with either a blueprint for securing a guilty verdict or knowledge of where the previous prosecutor went wrong. Agonizing days pass by as defendants patiently or impatiently wait upon a verdict that could drastically impact their future at the hands of a prosecutor who can hopefully correctly establish venue. If Smith did not appeal on venue grounds, there is a possibility that he would have accepted his guilty verdict in a trial that was later deemed to not even adjudicate his criminal culpability.[136] The potential for repeatability or conviction in an improper venue further supports the prudent goal of getting it right the first time. Surely Leon Moisseiff, one of the engineers behind the 1940 Tacoma

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[134] Smith v. United States, 599 U.S. 236, 251 (2023).

[135] *Not That Leg! New Rules to Fight Surgery Errors*, ASSOCIATED PRESS (June 29, 2004, 8:58 AM), https://www.nbcnews.com/health/health-news/not-leg-new-rules-fight-surgery-errors-flna1c9447232 [https://perma.cc/93XT-B8XM].

[136] Smith, 599 U.S. at 254.

Narrows bridge, would like a second chance to check over his design after watching "Galloping Gertie" crumble into Puget Sound.[137]

B. Venue and Data Crimes

The nebulous nature of data crimes is also of concern. At the time the Framers constructed today's legal framework, it was much easier to determine the venue of a theft since nearly all property was tangible. Today's increasingly connected and digitized world continuously challenges the application of traditional property-based concepts. Communication is instant and worldwide. Phishing email attempts and malware attacks occur on a rolling basis and present similar issues as those found in the present case when it comes to tracking down and trying a perpetrator. Hackers and security breaches are far too common, and the Court understandably struggled to determine the proper venue when it was first presented with the task.[138] Wrestling with venue in the digitalized age ultimately begs the question: Is venue serving its original purpose in a web-based case like *Smith*?

The key components of the venue and vicinage rights are to give a defendant a fair trial among a jury of the community while simultaneously providing a form of vindication to the aggrieved community. With all due respect to the "Florida man" and his home state, it seems unfathomable that there is an appreciable difference between a jury comprised of citizens of the Middle District of Florida (where the effects of the crime were felt), the Northern District of Florida (where Smith was improperly tried), or the Southern District of Alabama (where Smith hacked into StrikeLines from his computer).[139] The reception of frequent emails describing one's "password was found in another security breach" spurs hatred for, and annoyance with, hackers in any district. Unless StrikeLines has a broader contingent of supporters on its home turf in Orlando, or Smith has a set of sympathizers in Mobile, the choice of venue seems arbitrary and potentially archaic. The Framers sought to provide an opportunity for justice to an aggrieved community when considering colonial-era crimes. When viewing this opportunity for justice through the lens of a modern, web-based crime, the concept of "community" takes a dispersed form that frustrates the purpose of a jury tied to the location of the crime.

The interests of StrikeLines and other companies with proprietary, digital trade secrets are still protected regardless of the location of the trial. Again, Enlightenment era concepts of property simply don't seem to align

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[137] *Tacoma Narrows Bridge History–Stories–The 1940 Narrows Bridge*, WASH. STATE DEP'T. OF TRANSP., https://www.wsdot.wa.gov/TNBHistory/stories-1940-bridge.htm#2 [https://perma.cc/W5T9-ESL2] (last visited Oct. 14, 2023).

[138] United States v. Smith, 22 F.4th 1236, 1238 (11th Cir. 2022).

[139] *Smith*, 599 U.S. at 240.

with how companies and entire industries function in the modern era. The Framers did not envision that one could convert the trade secret of a company in a different state from his own living room. If a trial can take place where any part of a crime can be proved to have been committed,[140] then why not analogize fiber networks, radio signals, and servers to highways, horses, and bank vaults? The data still travels (albeit instantly) along established digital pathways that would allow prosecution in multiple districts.[141] However, large companies with (seemingly) protected online information can be injured from virtually anywhere. Our modern and connected world shifts the focus from a "neighbourhood" seeking retribution to a reassurance that criminals are simply brought to justice *somewhere*.

C. Statutory Solution

Congressional intervention could offer one solution to this problem. As venue is a constitutional and statutory right, it is not out of the question to pass a statute dictating where venue lies for theft of trade secrets or digital crime cases. Congress establishes where to hold trials for capital cases,[142] offenses not committed in any district,[143] espionage,[144] and even crimes committed by Native Americans on reservations.[145] Data crimes could be handled similarly, and the *Smith* case highlights such a need. If a statute clearly defined data crimes to be tried where the effects are felt or where the data is stored, a straightforward path for venue would ensue. This would be more efficient than trying to locate where the crime took place since hackers do not typically broadcast their location to the general public. The broader venue and vicinage rights would still be protected, while defining the means to determine venue for the difficult subset of data crimes.

Even though a statutory definition would provide the government with the benefit of a location to prosecute an alleged perpetrator, it would also provide the benefit of clarity for defendants. The Court's stance in *Smith* leaves an impression that perpetrators of crimes in faraway venues made their bed and are now required to lie in it.[146] While a statute could clearly define the venue, it could also maintain the Court's insistence that venue is established by the location of the crime and does not include considerations for inconvenience on a defendant for a faraway offense. It

[140] United States v. Lombardo, 241 U.S. 73, 77 (1916).
[141] *See* 18 U.S.C. § 3237.
[142] *See id.* § 3235.
[143] *See id.* § 3238.
[144] *See id.* § 3239.
[145] *See id.* § 3242.
[146] Smith v. United States, 599 U.S. 236, 244 (2023).

is not particularly likely that this inconvenience serves as a deterrent for a data crime since geographical location of a business is not typically a forefront concern when stealing digital intellectual property—although, interestingly, geographical information is the exact reason why Smith hacked into the StrikeLines database.[147] Moreover, this aligns with existing precedent. A defendant on trial is surely in an anxious and wary mental state. Knowing that a trial could go the distance, only to be repeated strictly for a mistake in venue, seems to be one area that our criminal justice system could reform, especially with data crimes that are difficult to connect to a physical location in the first place. The judicial, brute-force approach of retrial until venue is correctly proven could yield to a much more exacting statutory solution.

VI. CONCLUSION

Smith v. United States is a case laden with irony.[148] The antique hobby of fishing and age-old legal concepts of venue, vicinage, and double jeopardy squarely contrast with the twenty-first century method of hacking for trade secrets in the form of GPS coordinates. While a unanimous Supreme Court showed that retrial is the doctrinally correct answer to a venue issue that does not violate the Double Jeopardy Clause,[149] the ruling sets up unjustifiably costly legal proceedings. Our world is increasingly digitized, and trying to adjudicate new age issues with ancient concepts is sometimes reminiscent of fitting a square peg in a round hole. ChatGPT and artificial intelligence models are further evidence of a new wave of technology that is quickly advancing and will require judicial wrangling via established concepts or statutory regulation.

Ultimately, *Smith* demonstrates that a legal right or concept's age does not always reflect its logic and validity, particularly as applied to more modern issues. At their heart, the Venue, Vicinage, and Double Jeopardy Clauses still serve to protect our core liberties. While many of the rights established by the Framers continue to have straightforward application to modern activities, some quickly evolving areas appear to call into question the Clauses' applications. Application of these principles must continue to adapt to new challenges as technology changes. The hacker of today may injure companies differently, but he is no less culpable than the Jesse James Gang of yesteryear. The *Smith* case demonstrates the procedural hiccups and headaches in bringing modern crimes to justice and the need for clearly defined statutory intervention.

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[147] *Id.* at 240.

[148] *See generally id.*

[149] *See supra* Part IV.