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Criminal Venue in West Virginia

WILLARD D. LORENSEN*

West Virginia labors under the narrowest type of criminal venue provision to be found in the state constitutions in the United States today. A sizeable number of states have no constitutional provision at all relating to this problem, but most do. These venue provisions vary considerably. Some are quite general and broad, such as that found in the present Maryland constitution which asserts that it is important that a trial be held where the facts occurred,1 or the Vermont provision that a defendant is entitled to a trial by a jury of the “country” (not “county”).2 Some provisions use relatively flexible and plastic terms such as the Virginia reference to “vicinage” and otherwise popular standard of “county or district previously defined by law.”3 Legislatures, in vicinage or district style states, usually have some discretion in delineating the geographical boundaries of a venue locale.4 A dozen or so states are more tightly bound up by the most restrictive type of state constitutional criminal venue provision which limits criminal venue to the county where the crime was committed.5 This is the substance of the West Virginia provision.6 Reviewing the matter about two decades ago, Professor Blume of Michigan complained with regard to the West Virginia type of provision that: “Taken all together . . . the states having these narrow vicinage and venue provisions in their constitutions do not have satisfactory venue statutes, and cannot have them until this

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1 MD. CONST. art. 20.

2 VT. CONST. ch I, art. 10. See discussion of the provision in State v. Brown, 103 Vt. 312, 154 A. 579 (1931).

3 VA. CONST. art. I, §8.

4 E.g., COLO. CONST. art. II, §16; ILL. CONST. art. II, §9; KAN. CONST. Bill of Rights §10; Wis. CONST. art. I, §7.

5 State v. Robinson, 14 Minn. 447 (1889); State ex rel. Braun v. Stewart, 60 Wis. 587, 19 N.W. 429 (1884). But see Weyrich v. People, 89 Ill. 90 (1878) (indicating a district must be a division within a county.).


7 W. VA. CONST. art. III, §14: “Trial of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. . . .”

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unfortunate constitutional limitation is removed.9 Certainly the existing statutory venue provisions of the West Virginia Code deserve the dismal description proffered by Professor Blume. They are, to be generous, “not satisfactory.” But then that complaint would apply to much of the Code. Certainly, the criminal provisions of West Virginia’s statutes are on the whole miserably disjointed, obsolete, and some are just plain silly.9 The more significant question is, can anything be done about it, short of constitutional change.10 Does the constitution compel this unhappy state of affairs with regard to venue. Professor Blume’s pessimistic prognostication suggests that the problem is a constitutional one. I would disagree. Certainly the constitutional provision is unfortunately and unnecessarily narrow, but there is adequate authority left to the legislature to provide sensible and fair venue provisions. To be sure, West Virginia suffers presently from a dismal set of venue principles, but the suffering is needless.

The thesis of this paper is that venue provisions which are both fair and practical could be adopted by the West Virginia legislature without offending the present constitutional provision. A general venue statute that would permit criminal trials in any county where any substantial element of an offense properly charged has occurred would provide such a standard. Such a provision would be fair to the criminal defendant in that it would require some significant and real connection between the place of the crime and the place of trial. The standard would be fair to the demands of efficient administration of criminal justice in that it would not make the validity of a criminal trial hinge upon the identification of some crucial venue fixing element after trial.11 Such a standard could be linked with procedural techniques which would require the venue issue to be identified and contested before trial, thus avoiding the potential for wastefulness that exists under present law.

9 E.g., W. Va. Code, ch. 61, art. 6, §16 (Michie 1966) (forbidding the wearing of large hats by women in theatres.)
10 The West Virginia Commission on Constitutional Revision, created by West Virginia Senate Concurrent Resolution No. 5, 1957, recommended some changes in the venue provision of the present State Constitution in the course of its study. See Appendix 2A, 1963 W. Va. House of Delegates Journal. The suggested changes were not submitted by the legislature to the people for ratification.
11 See State v. Pietranton, 140 W. Va. 444, 84 S.E.2d 774 (1954) for an example of how after-the-fact venue determinations seem to make a game of the administration of criminal justice.
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The breadth of the legislative power to prescribe where criminal trials may be held is the question. The range of permissible choice is obviously limited by the constitution. And the constitution is in turn related to the common law doctrines of criminal venue which in turn bear some kinship with common law concepts of subject matter jurisdiction. The uncertain nature of these relationships has evoked a doctrinal lineage of dubious ancestry. The ease with which constitutional and common law issues may be confused beclouds choices that are both important and subtle. What is common law and what is constitutional law is quite different, but it is a difference oftentimes overlooked. This misconception of the nature of the issue in some instances has lead the court unwittingly to encumber the range of legislative choice. The problem at this late date is to sort out the venue issue so that it may be weighed and measured on its own merits and to ascertain what is left of the legislative prerogative.

What prompts the present discussion is the recent decision of the Supreme Court of Appeals in Willis v. O'Brien.\(^{12}\) That case involved a prosecution for murder in one county, where the death occurred, based upon an allegation that the death resulted from a criminal abortion performed in another country. The labored efforts of the court to justify this rather unstartling result seemed curious. But the more provocative aspect of Willis v. O'Brien is not that it is an anomaly, but rather its exorbitant shadow boxing is commonplace. The venue issue need not be so uncommonly difficult. No doubt it will take legislative action to clear up the present state of affairs. And thus, the legislature's prerogatives must be measured with some care.

The history of how venue came to have constitutional importance provides an important starting point. The connection between the venue issue and the American Revolution discloses not only how that issue became a matter of fundamental importance worthy of constitutional concern, but it also suggests the underlying rationale important to present day problems of interpretation. The words employed in the various state constitutions are different and necessarily produce some differences in venue doctrine from state to state. But all are built on more or less a common central theme that can be gleaned from the common starting point. Informed application of today's constitutional venue provision must proceed upon a clear understanding of the central historic rationale of the right.

\(^{12}\) 153 S.E.2d 178 (W. Va. 1967).
The jury's connection with the place of the crime originated as a natural necessity. The jury was first a fact-knowing—not a fact-finding body. The jury had to come from the place of the crime in order to bring forth the necessary knowledge of the criminal event. The transition of the jury from a fact-knowing to a fact-finding body probably occurred in the 12th century. In 1538 Parliament first moved to free the administration of criminal justice from some of the limitations that still lingered from the tradition of the jury as a fact-knowing body. This limitation was that the jury could take cognizance of no facts occurring outside of the county where it was sitting. Under such constraint, an indictment for murder could not be returned where a mortal wound was inflicted in one county and the death occurred in another, since a single jury in one county could not acknowledge the occurrence of both of these essential facts. The evolution of the common law fiction of continuing trespass which allowed a thief to be prosecuted in any county into which he carried stolen goods, mixed with other early statutes of narrow application, overcame most of the early common law venue problems. It is important to note that the early common law doctrines of venue were evolving in such a way as to permit practical accommodations.

Problems of more serious dimension arose in the decade and a half that preceded the Declaration of Independence. During this period of time the English government struggled with the increasingly difficult problems of colonial administration. Yankee trading with

13 See generally 1 Holdsworth, History of English Law, 312-37 (7th ed. 1956).
14 1 Wigmore, Evidence §8 (3rd ed. 1940).
15 2 & 3 Edw. VI, c. 24.
16 See 4 Blackstone, Commentaries *304.
17 1 Hale, Please to the Crown, *507-08 (Wilson ed. 1778). The effect of the continuing trespass doctrine has had different effects. In Worthington v. State, 58 Md. 403 (1882) the court held that the theft of a horse in West Virginia could be prosecuted in Maryland where the stolen horse was taken. In Strouther v. Commonwealth, 92 Va. 789, 22 S.E. 852 (1895) just the opposite was held, though the court said that a theft in any county in Virginia could be prosecuted in any other county in Virginia where the stolen goods were taken.
18 There is considerable parliamentary activity in the venue area. See various acts collected and briefed in Blume, The Place of Trial of Criminal Cases, 43 Mich. L. Rev. 59, 62-63 (1945). See also 1 Stephen, History of the Criminal Law of England 276-80 (1883).
the French violated British law and made more difficult the British struggle to establish its colonial authority in North America. The cost of these struggles led the British government to seek revenues in the colonies that would help to pay the cost of colonial defense.\textsuperscript{20} Illegal commerce vexed the royal government because it both escaped taxation and gave succor to the French. Near the center of the storm that arose around the attempts of the British government to maintain control over the administration of law in the colonies was the problem of the colonial jury. Colonial juries, not surprisingly, tended to be sympathetic to colonial interests. Two chief methods were resorted to by the crown to avoid the nullification by jury sympathy of unpopular royal law. One of these was to shift the burden of administering tax laws to the admiralty courts which sat without juries. The first Stamp Act Congress of 1765 reacted to the use of the admiralty proceedings by insisting on the right of trial by jury.\textsuperscript{21} More drastic steps followed. In December 1768, the House of Lords adopted resolutions calling upon the King to issue a special commission to inquire of offenses within the realm "pursuant to the provisions of the statute of the thirty-fifth year of the reign of King Henry VIII."\textsuperscript{22} The ancient statute referred to provided for the trial of treason before a commission \textit{wherever} the King might direct. And, in 1772, an act to protect His Majesty's dockyards also provided that persons charged with violations could be tried either within the realm or where the offense might have been committed.\textsuperscript{23} Increasingly, there was threat of transportation to England for trial. Reflecting this growing concern about the threat to the right of the protection of the colonial jury, the First Continental Congress meeting in 1774 asserted:

\begin{quote}
That the respective colonies are entitled to the common law of England, and more specifically to the great and inestimable
\end{quote}

\textsuperscript{20} See Sosin, \textit{A Post-Script to the Stamp Act}, 64 Am. Hist. Rev. 918 (1958) expressing the view that the essential aim of the Stamp Act was to raise in America some of the funds needed to maintain British troops in America for the defense of the Colonists.

\textsuperscript{21} \textit{Resolutions of the Stamp Act Congress}, Par. 7 (Oct. 19, 1765) in Perry & Cooper, \textit{Sources of Our Liberties} 270 (1959). Note also the statement of John Adams in "Instructions to the town of Braintree, Massachusetts on the Stamp Act, October 14, 1765," at 268 in Perry & Cooper.


\textsuperscript{23} 12 Geo. III, c. 24.
privilege of being tried by their peers of the vicinage, according to the course of that law.\textsuperscript{24}

When the final and dramatic break came and the colonists declared their independence on July 4, 1776, there was woven into the fabric of the protest against the mother country a vigorous complaint about attempts to deny the jury trial and venue privileges accorded by the common law. Thus, the Declaration of Independence, asserts:

He [the King] has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws: giving his assent to their acts of pretended legislation; * * *

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas to be tried for pretended offenses; * * *

Thus it was that the claim for the privilege of venue came to occupy a position of fundamental importance in the American legal order. While the tampering with venue privileges was justly a matter of considerable concern in the Revolutionary movement, the treatment accorded that matter in the first constitutions of the original states was surprisingly moderate.\textsuperscript{25} In six of the original state constitutions there was no mention at all of criminal venue. Three others provided generally that the trial of facts where they occurred was an important right. In only two of the original states, South Carolina and Georgia, did first constitutions expressly limit the trial of crimes to the counties where they were committed. Virginia from the start limited the trial of crimes to a "vicinage" requirement. Pennsylvania adopted this terminology in 1790 after its original constitution of 1776 briefly provided for a trial by jury of the "country." In contrast, an increasing proportion of later-joining states adopted the more restrictive types of constitutional venue provisions relating to criminal trials. Reflecting on this phenomena Professor Blume has speculated:

In the states which had . . . [a colonial background] the constitution writers were fully aware of the English venue statutes,


\textsuperscript{25} See Blume, The Place of Trial of Criminal Cases, 43 Mich. L. Rev. 59, 67-78 (1945), where these provisions are collected and analyzed.
some of which were in force in the colonies; they took into account colonial statutes which had authorized in certain situations the trial of crimes in counties other than where committed; they were alert to the dangers which would result from transportation out of the state or to some distant place for trial. The same was true of the judges who interpreted the constitutions in later years.

The problem of the early constitution writers was to guard against the dangers of transportation without taking from the legislatures the power to regulate venue within a state. . . .

But lauding the foresight of the draftsmen of the original state constitutions while lamenting the lack of it in the drafters of the latter versions is an unproductive enterprise that concedes too much. There are more plausible explanations for the more predominate use of restrictive venue provisions which would not compel extension of the worst of these restrictions, but would allow the constraining influences of these language choices to be moderated. The language of the federal constitution, identifying state and district as specific political entities to which venue limitations could be tied no doubt exercised a considerable influence on the approach to drafting similar provisions in state constitutions. In some instances, states copied literally the distinct terminology, though district had no particular meaning as a political subdivision within the state concerned. In other instances, the pattern was probably influential in a more subtle way; the use of a specified political subdivision in connection with the drafting of a venue provision seems naturally to promote precision and clarity. Drafting in those days, as now, no doubt appeared to many as a task of adapting rather than creating. Moreover, the nineteenth century, during which many of the present day state constitutions were drafted, was marked by an increasing concern for detail and elaboration. Thoroughness and precision were looked

26 Id. at 78.

27 The state and district terminology comes from Amendment 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, which district shall have been previously ascertained by law. . . ." Another venue provision also appears in art. III, §2, par. 3: "The trial of crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

28 See Armstrong v. State, 41 Tenn. (1 Caldwell) 338 (1860) holding that "district" was a term of no meaning in Tennessee, having been copied heedlessly from an earlier constitution.
upon as marks of refinement in drafting. The failure to draft state constitutions in broad and flexible terms expressing principles rather than minute rules provokes much frustration in state government today. The movement toward state constitutional reform of the present era is directed at tearing down artificial barriers that are the legacy of overwritten constitutions of the last century. It could well be that the significant number of states that wrote into their constitutions a criminal venue provision which limits criminal trials to "the county" in which the crime was committed is a reflection of these influences in the drafting of constitutions generally. If these factors furnish an explanation, then speculation about underlying intent changes. It becomes specious to argue that the choice of seemingly narrow terminology imposes forever an obligation to rigorously restrain the legislature on the venue issue. It becomes fair to argue that the narrow language on its face imposes certain restraints, but it does not command adherence to perpetual policy of constraint.

When West Virginia separated from Virginia, the old Virginia constitutional provision related to venue employed the term "vicinage." This standard was abandoned in favor of the narrower term "county." That this change narrows the legislative choice in fixing venue is obvious. The problem is how much has it been narrowed. There is no indication in the historical record surrounding the adoption of the West Virginia venue provision that the delegates or framers were especially concerned with possible legislative abuse of venue prerogatives that might have been otherwise available under the vicinage provision.29 Quite the contrary, the Virginia code was carried forward as the basic statutory law of West Virginia and it contained some venue provisions which could be justified only under the more liberal vicinage requirement of the old Virginia constitution. It would be quite implausible to suggest that the constitutional draftsmen of West Virginia had views in regard to criminal venue that were considerably opposed to those of the initial legislators of this state. Again more reasonable explanation for the change lies elsewhere. It is more likely that the shift in terminology was motivated by something other than a conscious desire to place significantly narrower restraints upon the legislature in regard to its power to determine proper venue for criminal cases. A political structure that

29 A search of Debates and Proceedings of the First Constitutional Convention of West Virginia, 1861-63 (Ambler Ed.) reveals no discussion on the content of the venue provision. The county based venue concept was not changed in the 1873 Constitution.
focused upon a county based organization, a court and jury selection system that operated under a county basis, a general common law concept of county as the proper venue unit for criminal trials, the apparent lure of precision and refinement that comes with resort to definite terms such as "county" as opposed to general terms such as "vicinage"—all these influences no doubt contributed to a state of mind that viewed a constitutional venue provision tied to county as quite natural, convenient, and appropriate. To argue that the shift from vicinage to county should carry broad policy implications asks too much. Quite the contrary, while the denotative differences in the terms demand different results in particular instances in Virginia and in West Virginia, it would be unwise to read broad connotative differences into the term that would today discourage a liberal attitude toward legislative authority in this area.

Venue came to be a matter of fundamental concern and thus found its way into constitutional expression because of the serious threat to the jury as a democratizing institution. The attempts of the royal government to manipulate the jury threatened to remove its power to act as a body that could legitimate or nullify laws in accord with popular feeling. The threat of transportation to England for trial of an offense committed wholly within the colonies posed a challenge for the first time in history, to the jury as a buffer between "harsh law," as Blackstone put it, and the "liberties of the people." The potential loss of this kind of democratic protection provoked the great demand of the Revolutionary Era for the privilege of trial by a jury of the vicinage. This central historic rationale may be preserved today whether the specific state constitutional provisions perpetuating it are generously or grudgingly interpreted so long as the defendant is not deprived of the right to a trial by a jury drawn from a community that has some actual connection with the crime involved. There is no value to be served by exaggerating restrictions that may be extrapolated from the happenstance differences in the wording of present state constitutions. The essential role of the jury as a democratizing institution is not threatened by recognizing in the West Virginia legislature the power to fix venue in any county where a substantial element of an offense has occurred. Such a standard would on the contrary be faithful to the central historic rationale.

Existing West Virginia case doctrine would not deny such legislative authority. But, it does not positively support such authority

30 4 BLACKSTONE, COM. 350.
either. In fact, present West Virginia case law is not even neutral on the matter. In sum, there really is no doctrine of venue in the constitutional sense in West Virginia. It’s not that there are no decisions. Decisions are plentiful, and rules, specific rules, abound. It’s the connecting principle that is absent. The idea of a general principle underlying the constitutional venue provision is apparently not repugnant or objectionable. It’s just that it doesn’t seem to have been discovered yet.

The causes for this ad hoc-ish, scattergun pattern of case decisions are essentially twofold. First, and most important, the close connection between the constitutional issue of venue and the common law concept of venue has just about overwhelmed the court in its approach to the venue issue. The problem is persistently viewed from the particulars of the crime involved, not from the generalities of the constitutional concerns for venue. The fact that there may be some general constitutional issue present is lost in the fascinating common law methodology of dissecting a crime to ferret out a venue giving element. A second and contributing cause is the legislative lethargy. Statutory intrusion into the area has been sporadic. More exercise of the legislative power might have forced some respect for legislative prerogative. The constitutional potential has atrophied instead.

31 The following provisions are found in Ch. 61 of the W. VA. Code dealing with venue: art. 2, §14(b) (kidnapping); art. 2, §14(d) (aiders and abettors in kidnapping); art. 2, §§18-22 (offenses related to duel ing); art. 3, §19 (possession of stolen property); art. 8, §8 (procuring a female for prostitution); art. 9, §4 (enjoining maintenance of a house of prostitution); art. 11, §7 (general accessory provision); art. 11, §10 (offenses committed wholly or in part without the state but made punishable within); art. 11, §11 (crimes committed on the boundary line between counties); art. 11, §12 (homicide cases where injury and death occur in different counties). In Ch. 62, one provision bears directly on venue. That is found in art. 8, §3 and deals with prisoners.

The legislature has provided liberal rules for the prosecution of non-support cases. W. VA. Code ch. 48, art. 8, §6 (Michie 1966). State v. Kessinger, 144 W. Va. 209, 107 S.E.2d 367 (1959) held that while the prosecution was criminal, defendant could not complain about the venue in county to which his children moved after leaving the paternal home in another county. "An offense of nonsupport can be tried in any county in which the accused or the wife, child or children may be at the time such offense, or any part thereof, took place, or where the offender may be at the time such complaint is made. See Code, 48-8-6."

Id., at 212, 107 S.E.2d at 370. While determinations of paternity are deemed civil and need be proved only by a preponderance of the evidence, the issue of nonsupport must be proved as a crime. In Kessinger, the conviction was reversed for not applying the reasonable doubt burden of proof. The cursory treatment of the venue objection, the court didn't even note the constitutional provision applicable, leaves some doubt as to whether the constitutional implications of the decision were fully appreciated by the court at the time the ruling was made.
Three statutes have fallen before the constitutional venue provision. The cases dealing with these have given rise to instances which have forced the court to come to grips with the constitutional dimension of the venue issue. In general terms, these cases are the most productive of the lot in providing meaning for the constitutional issue here involved. Other occasions where the court has considered constitutional challenges to statutory venue provisions in which it found the legislation valid are, on the other hand, quite disappointing in terms of developing the constitutional doctrine. The cases, as a result, are biased toward the negative. They are better at saying why the legislature cannot act, but not very informative as to why the legislature can act. This condition is not the product of conscientiously developed policy. It is more an accident.

The first statutory provision to fall before the constitutional venue provision was a statute carried over from the Virginia code. It attempted to provide for venue in either county when an offense was committed within 100 yards of the county line. The case was State v. Lowe. Judge Green's opinion holding the statute invalid puts forth a productive and sound analysis of the problem involved. While boundary line venue provisions were fairly common, Judge Green was alert to the fact that variances in constitutional language occurring among the states made the constitutional status of such provisions different from state to state. Noting especially the shift from "vicinage" to "county" in the change from the Virginia to the West Virginia constitution, Judge Green concluded that the boundary line provision absorbed from Virginia was invalid in West Virginia. The decision is quite sound. The statute no doubt sought to resolve a venue problem when the evidence is quivocals to whether a crime was committed in one county or another. However, the solution would allow trial in a county where no part of the crime was committed. This too obviously runs afoul of the West Virginia constitutional provision. It should be noted however that while the term county is inflexible, the term crime is not. In the course of reaching his conclusion, Judge Green ventured an opinion as to the rationale of the constitution venue provision:

The object of the constitutional provision is to protect the accused against a spirit of oppression and tyranny on the part

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32 W. Va. Code of 1868, ch. 52, §12 (now W. Va. Code ch. 61, art. 11, §11 (Michie 1966)).
33 21 W. Va. 782 (1883).
of the government, and against a spirit of violence and vindictiveness on the part of the people; and also to secure the accused from being dragged to a trial at a distant part of the State, away from his friends, witnesses and neighborhood, and thus be subjected to the verdict of mere strangers, who may feel no sympathy, or who may cherish against him animosity or prejudice, and also to protect the accused from injustice arising from his inability to procure proper witnesses, and to save him from great expense. See State of Minnesota v. Robinson, 14 Minn. 454, and 2 Story on Con. sections 1780-81.34

The boundary line statute, in spite of Judge Greene’s ruling, remained unchanged for nearly half a century before it was amended in the general revision of the code in 1931.35 Then it was changed so as to provide for venue in either county when an offense is committed on a boundary line between two counties. The problem resolved by this statute seems more specious than serious but the ingenious solution survives today as section 11, article 11 of chapter 62 of the West Virginia Code. Unfortunately this effort fairly exemplifies the quality and intensity of legislative concern for the problem.

The prisoner venue statute was the second to fall under the constitutional provision. This statute sought to provide exclusive jurisdiction in Marshall County for any crime committed by a convict anywhere.36 It took two cases to bring this statute down. The first was State v. Griffin37 which raised the question of whether the statute could cut off the venue of a court in the county where the convict actually committed an offense when this occurred outside Marshall County. The court ruled in that case that the convict could be tried in the county where the crime actually occurred, but skirted the exclusiveness feature of the statute by suggesting that once a convict had escaped there could be some question as to whether his status as a convict continued, and thus, some question as to the applicability of the statute. Griffin ruled in essence that a county other than Marshall could provide venue when the crime was committed in that county. But, Griffin did not resolve the question of whether the state could effectively claim venue in Marshall County if the crime were committed in some other county. That issue came

34 Id. at 787.
36 W. VA. CODE ch. 62, art. 8, §3 (Michie 1986).
37 88 W. Va. 582, 107 S.E. 302 (1921).
squarely before the court in *State v. Dignan*\(^{38}\) when the state sought to prosecute a prisoner in Marshall County for an escape that was alleged to have occurred in Braxton County while the prisoner was there in custody working on a road gang. The court turned aside the suggestion that the prisoner could be constructively deemed present in Marshall County at the time of his criminal escape because of his status as a prisoner. The court emphasized that conviction for a felony did not alter in the slightest the convict’s right to demand the protection of the constitutional venue provision. Manifesting some irritation for the rather artificial reasoning employed to escape the constitutional issue in *Griffin*, the court laid down this rationale in denying venue in Marshall County:

There is no room under the West Virginia Constitution to interpret any statute as creating constructive venue of crime. The crime itself or some act or element entering into it must actually have taken place in the county where venue is laid and the trial had. It is true that certain crimes, may take place and be committed in more than one locality, in which case venue may be laid in all or any one of such places. This, however, is based upon actuality and not upon a legal fiction such as a constructive venue. There is no room for such theorizing under the West Virginia Constitution.\(^{39}\)

It is anomalous that the court expresses such disdain for theorizing at the very point where it makes the most significant contribution to venue theory ever pronounced by the Supreme Court of Appeals. No doubt the court was using the term theorizing in a pejorative sense, seeking to condemn the artificiality and thinly verbal reasoning that it had found disturbing in the *Griffin* opinion. Theorizing in the sense that it is the art of articulating rules and principles that explain the relationship between past appellate opinions, statutes, and constitutional provisions is not to be criticized. Indeed it is the essence of the appellate judicial function. No apology need be offered. The unfortunate thing about the theorizing advanced by the court in the *Dignan* decision is that it has gone so completely unnoticed in West Virginia.

The third and only other instance in which a venue statute has been nullified on constitutional grounds occurred in *State v. Over-________

\(^{38}\) 114 W. Va. 275, 171 S.E. 527 (1933).
\(^{39}\) *Id.* at 278, 117 S.E. at 528.
holt. As Dignan responded to Griffin, the opinion in Overholt was also shaped to a considerable degree as a reaction to an earlier case. In this instance, however, the result exaggerated rather than compensated for the inadequacies of the opinion that preceded it. Overholt was prosecuted in Greenbrier County as an accessory after the fact for rendering assistance to one Cook who had allegedly committed a robbery in Greenbrier County. According to the indictment Overholt's acts of aid and assistance occurred not in Greenbrier County but in neighboring Pocahontas County. Venue in Greenbrier County was founded upon the statutory provisions dealing with accessories generally which clearly said that accessories, either before or after the fact, might be prosecuted where the principal crime was committed. In two previous decisions, the West Virginia court had held valid the provision for the trial of an accessory before the fact in the county of the principal crime. The reasoning involved in the first of these, State v. Ellison, mesmerized the court in Overholt. The consequences were most unfortunate. In Ellison, the court had reasoned that the crime of accessory before the fact did not occur until the principal crime was committed. Thus, the crime of accessoryship must occur if at all at the very place where the crime was accomplished, the court reasoned. With this bit of time-space legerdemain, the court concluded that the venue statute was quite sound so far as accessories before the fact were concerned. Uncritically adopting this approach, the court in Overholt said:

The offense of accessory after the fact, however, being subsequent to, cannot in any sense be said to have occurred at the time and place of, the principal crime. One does not become an accessory after the fact by reason of any connection with the crime itself, but because of his connection with the principal, and an accessory after the fact is not regarded as a partaker in the guilt of the principal, but his offense is considered as

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41 W. Va. Code ch. 81, art. 11, §7 (Michie 1966): "An accessory . . . after the fact may . . . be indicted, convicted and punished in the county in which he became accessory, or in which the principal felon may be indicted . . . ."
42 State v. Ellison, 39 W. Va. 70, 38 S.E. 574 (1904); Weil v. Black, 76 W. Va. 685, 86 S.E. 666 (1915).
43 49 W. Va. 70, 38 S.E. 574 (1904).
44 "Ellison's crime was committed in Braxton County in the larceny of the horse by the parties whom he counseled, aided and abetted in the crime. All the counselling and directing he could have done would not have made him liable to prosecution without the taking of the horse. . . ." Id. at 74, 38 S.E. at 576.
separate and independent of the main crime. 1 Brill, Cyc. Cr. Law, 439; 1 Bishop, Cr. Law, (9th), 497: *Yoe v. The People*, 49 Ill. 410; *Reynolds v. The People*, 83 Ill. 479; *People v. Galbo*, 112 N.E. 1041; *Strong v. State*, 105 S. W. 785; *People v. Chadwick*, 25 P. 737. Consequently, we are of opinion that the statute insofar as it authorizes the indictment and trial of an accessory after the fact in a county other than that in which the accessorial acts are committed is in violation of the constitutional provision.\(^5\)

The exorbitant concern for the nature of the crime of accessory after the fact lead the court to produce an opinion that is a classic example of how to discover irrelevant answers by asking the wrong question. The court approached the issue as though it were seeking to resolve a simple common law question, viz., *absent legislation* on the matter where might an accessory after the fact be tried? This quite clearly was *not* the issue before the court. The problem was one of constitutional importance, not common law routineness. The court was challenged to measure the power of the legislature to declare by expressly worded statute that the offense of accessory after the fact had sufficient contact with the county of the principal offense to justify providing for venue there. By failing to perceive the nature of this issue, the court unwittingly elevated contemporary common law\(^6\) to constitutional status in West Virginia. Taken literally, this view means that the dubious rules expressed with such ardent ambiguity in the commercial encyclopedia cannot be changed by deliberate act of the legislature. This is absurd. The court in

\(^{5}\) 111 W. Va. at 419, 162 S.E. at 317. The court cites five cases dealing with the *nature of the crime* of accessory after the fact in other jurisdictions. None of these cases deal with the issue of venue or whether a legislature can provide for trial in the venue district of the principal crime. *Yoe v. People*, 39 Ill. 410 (1888) stated one charged with the principle offense could not be convicted as an accessory after the fact under such an indictment; *Reynolds v. People*, 83 Ill. 479 (1876) holds to the same effect; *People v. Galbo*, 218 N.Y. 283, 112 N.E. 1031 (1916) is a carefully reasoned opinion by Judge Cardozo holding evidence insufficient to sustain a murder conviction though the evidence may have shown defendant was guilty as an accessory after the fact by helping to conceal a body after the victim of the crime had been killed; *Strong v. State*, 52 Tex. Crim. 133, 105 S.W. 785 (1907) stresses that under Texas statutes the term accessory was used exclusively to refer to one who assisted after the crime; *Chadwick v. People*, 7 Utah 134, 25 P. 737 (1891) rules testimony by an accessory after the fact need not be corroborated since such an accessory is not an accomplice. Likewise, Brill and Bishop in the portions cited by the court deal only with the common law conception of the nature of the offense only.

\(^{6}\) See text at notes 68, 69 *infra* for discussion of contemporary common law.
Overholt did not bother to explain why present common law doctrine bound the legislature, but simply found something inherent in the common law concept of the crime that put venue decisions with regard to it beyond the range of legislative change. The court was lured into this folly by the pattern of the Ellison decision. But Ellison is quite different in that it justified a legislative venue choice by constructing a common law result that was in accord. Following the analysis of Ellison was folly because the reasoning in Ellison is incomplete. The court there failed to explain why the statutory venue rule was constitutional because it found the common law result to be the same. A simple explanation for this exists and it is reasonably sound. Since the constitution incorporates a kind of common law concept of venue, a statute that fixes venue as it would have been at common law cannot contravene the general spirit of the constitutional provision. This does not mean, however, that a statute fixing venue differently than the common law is by virtue of that fact unconstitutional. The court committed a simple logical error. To establish that all dogs are mammals does not prove that all species other than dogs are not mammals. To establish that a common law venue rule enacted into statute is constitutional does not prove that a venue rule differing with the common law is thus unconstitutional. But that was the effect that the court gave the Ellison decision in Overholt.

Before pushing on to issues raised by Willis v. O'Brien,47 one case upholding a statute with venue provisions deserves serious consideration. This case is Ex parte McNeely.48 While its primary concern is subject matter jurisdiction, it sheds important light upon venue. The case involved a challenge to the West Virginia statute which provides for trial in a county in this state where a death occurs even where the mortal blow causing that death was inflicted outside the state.49 McNeely was indicted for inflicting a mortal blow in Kentucky which resulted in the death of his victim just inside the West Virginia border. The crucial issue in the case was the power of the state of West Virginia to exercise jurisdiction over this criminal event. Which county within the state could claim venue posed a matter of lesser magnitude. The opinion was written by Judge Brannon, certainly one of the most forceful and articulate judges ever to occupy the bench of the West Virginia Supreme Court of Appeals.50 A peculiar timidity and uncertainty however marked his

48 36 W. Va. 84, 14 S.E. 496 (1892).
opinion in *McNeely*. He cited the state constitutional venue provision, then admitted the case might really involve a question of international law, as he called it, and eventually resolved the case by reference to the rule that legislative acts are presumed valid. "A court must be slow and cautious to overthrow [the legislature's] action. . . . To doubt only is to affirm the validity of its action. I resolve my doubt this way."\(^{51}\) Despite its uncertainty, in fact because of it, the opinion is important. *McNeely* demonstrates the parallel mode of thinking that predominates traditional approaches to issues of venue and subject matter jurisdiction. But venue and jurisdiction protect significantly different underlying values. The failure to note the distinction operates much to the disadvantage of the venue concept. Underlying jurisdictional concerns promote the view that there is something inherently right, natural and necessary in the assumption that each crime has but one right and proper place where it may be tried. Pinpointing the single place in time and space that a crime occurs responds to a strongly entrenched tradition of common law concept of territorial jurisdiction. This view insists that the laws of the state may operate only within the geographical area occupied by that sovereign. To allow the substantive law of a state to escape its boundaries could raise difficulties with due process concerns of fair notice, with the possibility of multiple punishment and provoke a foreboding mass of conflict of criminal law issues. The lure of the territorial jurisdiction concept grows from its promise to provide a means of avoiding such onerous problems. But the territorial jurisdiction theory exacts a price for the security it offers. As a jurisdictional theory it forces a strained and artificial mode of thought by insisting that a criminal event which may in reality touch upon several locales must be viewed as having occurred in but one place.\(^{52}\) That it is plainly unsatisfactory in certain instances is demonstrated by the very statute before the court—and approved by the court—in *McNeely*. Considered in the context of its own concerns, the territorial jurisdiction principle is open to considerable doubt. When this one-crime, one-place way of thinking is unwittingly accepted as obligatory in the approach to venue issues, its disadvant-

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\(^{51}\) 26 W. Va. at 95, 14 S.E. at 439.

ages are magnified. It is patently unnecessary to constrict venue to avoid problems of fair notice, multiple punishment, or conflict of laws concerns. Assuming jurisdiction exists—that is a separate matter—venue deals with only the problem of where within a given jurisdiction trial may be held. Nonetheless, the single-place mode of thought persists as a significant influence in the venue area. Perplexed by this habit of thought—and influenced by the constitutional venue provisions—Judge Brannon in McNeely was clearly troubled and uncertain as to how to resolve the case. He literally capitulated to the legislative choice. The case is important for what it illustrates—a strong judge rather bewildered by a powerful influence of the common law narrow territorial jurisdiction concept, a pragmatic legislative change of that view, and the uncertain thrust of the constitutional venue provision.

We turn now to Willis v. O’Brien to find that bewilderment and confusion still surround the basic issues of venue. The issue in the case was simply posed. Willis was charged with performing a criminal abortion in Brooke County that resulted in the death of the woman involved in Ohio County. Prosecution for murder was started in Ohio County and Willis sought to prohibit the proceeding there on grounds that venue was not proper in Ohio County. Affirming the ruling of the court below, the West Virginia Supreme Court of Appeals ruled that venue was proper in Ohio County. There are three facets of the opinion that are of interest which will be examined here. First, there is an assertion made in regard to the nature of the venue issue that insists that it raises a problem different than subject matter jurisdiction. Second, there are three distinct reasons advanced by the court to support its conclusion that venue in Ohio County is proper. Third, there is a fascinating interplay that evolves from the marshalling of constitutional, common law, and statutory sources of authority that reflects the persistence of the curiously puzzling nature of the venue issue generally in West Virginia.

The court starts its analysis of the case by asserting that venue and subject matter jurisdiction are not one in the same. "Jurisdiction is the constitutional endowment of power to hear and determine a cause . . . . Venue, on the other hand, is merely the place of trial."\(^5\) It is rare in the annals of West Virginia venue decisions that the court overtly addresses itself to the nature of the venue issue. Rather than place the problem into the general scheme of things in the legal order,

\(^5\) 153 S.E.2d at 180.
the court has traditionally sprinted ahead to the substance of the
venue issue as it conceived it. But here, the court first sought to put
the nature of the issue in perspective. The suggestion of the court
is sound, but it is all together too lightly made. Many important
implications that necessarily flow from this statement are left hanging
in a most ambiguous state. The only authority noted by the court
to support its position is a reference to Michie's Jurisprudence. Even
when relevant, that tepid collection of cliches is something less than
convincing. But here, a wholly irrelevant portion is cited. The
section refered to deals with venue in civil actions. Since there is
no constitutional provision bearing upon venue in civil litigation,
statements pertaining to the very status of civil venue are quite
unpersuasive when applied to the constitutionally encumbered matter
of criminal venue. Moreover, to give credence to the court's assertion,
prior West Virginia case law which appears to be contrary ought
to be distinguished or acknowledged in some way. The earliest
West Virginia decisions involving venue used the language of juris-
diction in speaking of the issue. Failure to establish venue meant the
case was "not within the jurisdiction" of the court, these opinions
said. These cases might be put aside as reflecting merely inapt
choice of language and it could be plausibly argued that they do not
reflect conscious determinations of policy that are essentially contrary
to what is asserted in Willis. Additionally, there is something of a
contrary implication emanating from the recent case of Pyles v.
Bowles. In that case, the court dealt on the merits with a venue
complaint in a habeas corpus proceeding. In light of the West
Virginia Supreme Court's rigid policy toward confining state habeas
corpus remedies to purely jurisdictional matters, and not considering
"mere errors of law" in such collateral proceedings, it seems fair to
imply that in some respects the venue issue has been treated as juris-
dictional in some sense in very recent years. The status of the
venue issue is a matter deserving of careful consideration. It has
not received it yet by the West Virginia Supreme Court of Appeals.

54 The cite is to 19 Michie's Jurisprudence of Va. & W. Va. §2 (1952).
55 See State v. Mills, 33 W. Va. 455, 10 S.E. 808 (1890) (homicide
conviction reversed where the court found no evidence in the record that the
killing occurred "within the jurisdiction of the court"). Accord Hoover v.
Stoke, 1 W. Va. 335 (1866) (larceny).
57 See Note, Habeas Corpus in West Virginia, 69 W. Va. L. Rev. 293
(1967). State post conviction relief has been broadened considerably by the
The earliest cases seem to have required that the venue be pleaded upon the face of the indictment; intervening cases have indicated that any shred of evidence supporting such an allegation will suffice if the jury finds the defendant guilty; Pyles supports the view that venue matters may be raised in collateral proceedings at least where the issue is obvious on the face of the indictment; and finally, Willis states generally that the issue of venue is of a lesser magnitude than that of subject matter jurisdiction. There would seem to be two matters that ought to be resolved with respect to the nature of the venue issue and how it is handled procedurally. First, should failure to press a legal issue concerning venue prior to trial constitute a waiver of any complaint. Second, should the judge or the jury determine fact issues bearing upon venue. The first matter raises the problem of whether a defendant should be allowed to wait until the outcome of the trial is known and still have the option of raising the venue issue. The readiness of the court to consider the venue issue in habeas proceedings in Pyles v. Boles indicates the West Virginia Supreme Court of Appeals may deem this fair game for the defendant. The statement in Willis is suggestive of an opposite conclusion. Since the early cases developed the rule that venue must be pleaded in the indictment, the defendant should always be forewarned of the basis of the venue theory of the prosecution. A bill of particulars and pre-trial motion challenging venue should seem to provide adequate opportunity both to clarify any doubts as to the prosecution theory of venue and resolve any question of law pertaining to venue prior to trial. The resolution of fact issues—that is, did the venue giving element occur within the county of trial—has traditionally been left to the jury. It's doubtful that this is the proper way to resolve such issues, though the matter has rarely been raised. The matter of whether the crime was

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58 See Hicks v. Commonwealth, 157 Va. 939, 161 S.E. 919 (1932). (Question of venue cannot be raised for the first time on appeal.)

59 See State v. Bragg, 140 W. Va. 585, 87 S.E.2d 669 (1955) (evidence generally supporting view that death occurred in county of homicide prosecution, court holds issue of venue was properly determined by jury); State v. Hobbs, 37 W. Va. 812, 17 S.E. 380 (1893) (jury could presume murder occurred within county of trial because justice of the peace who acted as coroner was a justice of that county and was presumed to act in official capacity only within the county.) Some cases have held that instructions in regard to venue need not be given the jury where there is no material issue in regard to that issue. See, e.g., State v. Bostich, 243 S.C. 14, 131 S.E.2d 841 (1963); People v. Anderson, 355 Ill. 289, 189 N.E. 338 (1934).

60 See discussion of the issue in People v. Megladery, 40 Cal. App. 2d 748, 106 P.2d 84 (1940), which held that the venue issue must go to the jury until the legislature chooses to make a change in that practice. But see State v.
mitted within the county does not go to the guilt or innocence of the accused, but only to the propriety of holding trial in that particular county. There is a rather close analogy here to the Supreme Court's doctrine in *Jackson v. Denno*\(^1\) that a jury concerned with determining guilt or innocence cannot be employed as the final determiner of the admissibility of a confession when its admissibility is challenged on constitutional grounds. A technical objection, such as venue, is probably similarly susceptible to being prejudiced by concerns for guilt-innocence determinations to be properly left to the regular trial jury.\(^2\) The issue has not been pressed in the West Virginia cases, but it would seem entirely proper that common practice of placing fact determination of venue issues in the jury's hands is the product of mere habit and not the result of considered choice.

We turn now to the three arguments advanced by the court in *Willis* to sustain its conclusion. We will savor the brew that results from this blend in a moment, but first the ingredients merit separate examination. The first of the arguments advanced by the court follows the "crucial event" or "gist of the offense" analysis. This proceeds along the traditional path of drawing and quartering the crime so as to lay bare its elements and disclose that single happening which gives the crime its unique locus.\(^3\) Quite understandably this mode of analysis in a homicide prosecution focuses attention upon the event of death and the court identifies this occurrence as the all important one. The insistence upon the extraordinary importance of this one event in relation to the entire crime seems to raise unnecessarily some doubt as to the capacity of the court to convict for a lesser included offense where the elements of that lesser offense occurred without the county. The distorted emphasis which the crucial event test provokes suggests that there is perhaps something wrong with the test itself. It would be patently ludicrous

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Moore, 140 La. 281, 72 So. 965 (1916) holding venue is an issue for the judge since it bears upon the place of trial and has nothing to do with the issue of guilt. See Hubert, *History of Jurisdiction and Venue in Criminal Cases in Louisiana*, 34 Tul. L. Rev. 255 (1960).

\(^1\) 378 U.S. 368 (1964).

\(^2\) A reading of West Virginia decisions bearing upon confessions prior to the *Jackson v. Denno* decision, supra note 61, shows some blurring of the issues of confession admissibility and guilt. The opinions suggest that the confession must have been reliable since the jury found the defendant guilty. See *State v. Vance*, 146 W. Va. 925, 124 S.E.2d 262 (1962); *State v. Brady*, 104 W. Va. 523, 140 S.E. 546 (1927); *State v. Mayle*, 103 W. Va. 681, 152 S.E. 633 (1930).

to suggest that a jury in Ohio County could not find the defendant Willis guilty of abortion if it found the death of the woman involved was not casually related to a proven act of abortion performed in Brooke County. The artificial nature of the crucial event test becomes embarrassingly obvious at this point. Nonetheless, the second argument advanced by the court is even more troublesome. This position is supported by an agency theory that seems uniquely hostile to the most important underlying values of the venue doctrine. Indeed, the employment of the agency argument shows how terribly easy it is to confuse subject matter jurisdiction with venue. The anomaly of confusing the two issues is particularly poignant here in view of the express disclaimer stated by the court at the very outset of its opinion regarding the clear distinction between issues of venue and subject matter jurisdiction. The agency fiction has been employed to avoid undesirable limitations that would otherwise have arisen from a strict application of the territorial notions of subject matter jurisdiction. The classic case arose in Georgia where that state claimed jurisdiction over an attempted murder when the intended fatal shot was fired outside the state towards a victim within the state. 64 Fortunately the shot missed, but the court rested its jurisdiction over the attempt on the fiction that the defendant constructively followed his missile into the state and thus, in contemplation of law, was present in Georgia committing the attempt. The question arises, why should the state not have jurisdiction over the attempt if it had been ineffectual because of a misfire rather than a misaim? This little dilemma tempts us to drift further away into arguments about the merits of the territorial jurisdiction, but it is precisely because we are so easily diverted from the true issues involved that the employment of the agency concept is so utterly inappropriate as a vehicle to resolve venue problems. To say that the defendant Willis was constructively present in Ohio County because he "put in force an agency which, . . . could result in the crime," 65 is to resort to a fiction that only serves to mask the real nature of the problem confronting the court. 66 Employment of such a fiction also incidentally runs directly counter to the thoroughly sound statement of State v. Dignan that there is no room under the West Virginia con-

64 153 S.E.2d 178, 181 (W. Va. 1967).
66 Compare Hodge v. Sands Mfg. Co., 150 S.E.2d 793 (W. Va. 1966) where the court goes to some pains to insist that mere harm within the state caused by misconduct outside the state is necessary in order for West Virginia to claim jurisdiction over the non-resident defendant in civil litigation.
stitution for constructive venue.\textsuperscript{67} The third argument advanced by the court is statutory. The statute is one patterned after parliament's first remedial venture in the venue field enacted in 1548. It reads as follows:

If a mortal wound or other violence or injury be inflicted, or poisoned administered, in one county, and death ensue therefrom in another county, the offense may be prosecuted in either.\textsuperscript{68}

The usual two stage argument is here involved: The statute does not apply and if it does, it is unconstitutional. First the court characterizes the statute as remedial. This is at best a dubious classification,\textsuperscript{69} but be that as it may, it would help resolve the reach of the statute for, by tradition, remedial statutes are interpreted broadly, and thus doubts as to the applicability of the statute ought to be resolved by holding that it does apply to the case before the court. But this is not the use made of the remedial characterization. Rather, the court said the statute ought to be deemed constitutional because it is remedial. It is quite novel to suggest that remedial statutes enjoy a special state of constitutional grace. But there is still another argument advanced on the constitutionality issue. The court insisted on relying upon the rule that holds where two interpretations of a statute are available, that which preserves the constitutionality ought to be employed. This canon of construction would urge a strict and narrow interpretation of statutes to avoid constitutional pitfalls, and quite obviously pulls in the opposite direction from the remedial statute argument. Though this advice as to interpretation had been ignored and the statute had been applied broadly, the court went ahead to insist that this rule of construction supported the constitutionality of the broad interpretation. That's rather like having your cake and eating it. At any rate, the statute was held constitutional.

Considered separately, each of the three arguments advanced by the court to sustain its conclusion in \textit{Willis} is interesting. But the relationship between the three is even more fascinating. Why, if there is a valid statute fixing venue in Ohio County, must the court resort to the strain of the crucial event test and drag in the agency

\textsuperscript{67} 114 W. Va. 275, 278, 171 S.E. 527, 528 (1933).
\textsuperscript{68} W. Va. Code ch. 61, art. 11, § 12 (Michie 1986).
\textsuperscript{69} The common law was changed by act of Parliament in 1548. Such an early act would normally be deemed a part of the common law absorbed in America, see note 73 infra. If the statute merely restates the common law, it hardly can be deemed a remedial statute since the law would be the same without such a statute on the books.
fiction? If these arguments are necessary at all, why are they given first attention in the opinion and the statutory argument added at the end as a kind of makeweight? The puzzling and disjointed admixture of these various arguments suggests that we still approach venue issues as though we were seeking to measure the temperature of a legal proposition by adding so many miles of common law, with so many gallons of statutes, with the square root of a yet to be discovered constitutional proposition. This unhappy state of affairs persists because we still must grope for the beginnings of a theory that will explain the relationship between common law and the constitutional provision. The peculiar blend of arguments advanced in the Willis opinion demonstrates this very important threshold problem continues to escape unresolved.

There are two broad ways in which this crucial relationship between the common law and the constitutional provision might be explained. A much clearer understanding of the nature of the venue concept in this state would evolve if a knowing choice were made. First, we might assert that the constitutional provision simply incorporates the common law of venue. At first blush this appears alluringly simple, and this view seems to underlie some of the decisions. But a more thorough consideration raises some serious, indeed, I suggest insurmountable, problems. Second, the constitutional provision can be viewed as preserving only the essential underlying principle of common law venue but not compelling any express common law rules be given constitutional status per se. This rule would leave more flexibility with the legislature and would not condemn legislative choice of venue merely by showing a common law choice would provide a different result.

If the common law were a "brooding omnipresence in the sky," to borrow Justice Holmes' immortal phrase, the incorporation theory would be easier to accept. That is not the way the common law is, and consequently the incorporation theory gives rise to some extraordinarily difficult problems. Since there is no super-national, trans-sovereign body of common law that will produce "true rules" for the judges to "discover," the intelligent adoption of the incorporation theory demands that a specific body of controlling common law rules must be identified with some degree of precision. And if this choice is made we must follow with the troublesome subsequent

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question, why this particular set of common law rules? Could the incorporation here adopt the rules of common law as they existed before any parliamentary change took place; that is, to the pure, legislatively unblemished, case developed common law? Such a body of doctrine would forbid, you will recall, the prosecution of a murder if the mortal blow and the death occurred in different counties. This concept is so universally rejected that it is plainly implausible that the common law doctrine incorporated by the constitution should force such a ludicrous view. Another incorporation theory could embrace the common law rules which existed at the time of the American Revolution. This would include the older parliamentary changes. But if these statutes were a part of the common law adopted as the constitutional standard, how does it happen then that we seem to insist upon statutes to provide this kind of venue choice in this country. It is arguable of course that many common law rules were repeated in statutes simply to resolve doubts, or out of a kind of parroting habit in code making. But even if this affords an explanation, we still must resolve the dilemma of crimes created anew after the common law book of crimes was closed. The natural response is to suggest as to new crimes—such radical inventions as embezzlement and false pretense for example—could be accorded venue by analogy to their common law forebears. This general incorporation theory never seems to have been consciously adopted by the West Virginia courts. The court to this date has simply not embraced this view. When faced with venue issues regarding embezzlement, the court turned not to the analogy of larceny, its common law predecessor, but rather to the present common law consensus of other states. 71 When challenged on the venue provided by modern-day kidnapping, this court dismissed venue objections out of hand, showing no concern for common law venue rules with regard to kidnapping. 72 And in the Willis case, the court referred to the commonplace two-county murder rule as remedial. How could the statute be remedial if the same rule existed by virtue of absorbed common law? 73 Though it is not entirely free of problems, an incorporation theory adopting common law rules at the time of separation from England could be embraced. The major reasons for suggesting that it should not now be embraced are practical. To

clearly identify this body of common law rules as those which are crystallized in the West Virginia constitution would be an innovation. Though provided with numerous opportunities to do so in a century of litigation, the Supreme Court of Appeals of West Virginia simply has not specifically adopted any set of common law rules as constitutionally controlling.⁷⁴ Admittedly, clear and conscious adoption of any precisely defined position now would be an innovation, and innovation might just as well be done for the best available policy consequences. There is of course a final incorporation theory to be considered. This would refer the court, for a constitutional standard, to the contemporary consensus of common law venue rules for a particular crime. This was the result of the court’s action in Overhold²⁶ and it seems patently inappropriate. The primary flaw with this view is that there is no such thing as a general common law of the United States. There are generalizations that can be made, to be sure, about the trend, or consensus, of rules in the various legal systems which make up the United States, but these do not in any meaningful sense produce a common law of the United States. After all, the basic advantage of the incorporation theory would arise from the fact that it incorporates specific rules, not that it would refer to generalities or indefinite guides. To suggest that the incorporation theory would point the court to a consensus of decisions from other states influenced by many unknown and undiscovered statutory and constitutional provisions in those states simply has nothing to commend it.⁷⁶ It is reasonable for the Supreme Court of Appeals in seeking to fix venue for an embezzlement charge to look

⁷⁴ It is important to note that though the West Virginia Supreme Court of Appeals has frequently employed common law methodology in analyzing venue issues, it has not at any time articulated what specifics of common law rules might be deemed controlling.


²⁶ A major problem here is that the underlying influences of decisions in other states, peculiarities of statutes and constitutional provisions, bear upon the consensus of these decisions and obviously are inappropriate to influence the constitutional doctrines of West Virginia. The citation of cases in Willis is revealing. In connection with the application of the agency theory, the court noted two decisions, one from Michigan and one from Indiana. The Michigan case, People v. Southwick, 272 Mich. 258, 261 N.W. 320 (1935), dealt with an abortion situation identical to that in Willis. The court held that the Michigan statute which provides for a homicide in the county of death when death results from a wound inflicted in another county was “broad enough to cover the case” and considered the constitutionality of the statute as clearly established. Unlike West Virginia, Michigan recognizes the constitutional validity of venue based upon an event proximate to a boundary line of a county and also allows change of venue by prosecuting officers. West Virginia is opposite on both these points. See State v. Lowe, 21 W. Va.
to the consensus of American decisions on that matter so long as the legislature of West Virginia has not spoken upon the issue. But if the legislature has spoken, it is quite inappropriate to assume that the consensus of case decisions around the United States fixes the constitutional standard for this state which the legislature may not change. Such a view would imply that any legislative intrusion into the venue area would either be superfluous or unconstitutional. That patently is ridiculous. Since the so-called common law of venue extant at the time the West Virginia constitutions were adopted included a good bid of legislative therapy, it is difficult to accept the principle that the constitutional provision was intended to forever forbid any legislative intervention in the area at all.

The shift to the view that the constitutional provision carries forward not the specifics of any set of common law rules but only the essential underlying principles produces a much sounder position. Differences between rules of different times and places fade in importance. What remains significant is the more important general underlying principles of venue. These are not difficult to identify. The revolutionary background insists that the locale of a trial may not be so manipulated as to deprive a defendant of a jury drawn from a community which has some actual connection with the criminal activity. The use of county as a venue district in West Virginia

782 (1883); State ex rel. Cosner v. See, 129 W. Va. 722, 42 S.E.2d 31 (1947). The general thrust of the Michigan venue provision seems quite different than that in West Virginia and simple case by case comparisons ought to be undertaken without considerable caution. The Indiana case Hauk v. State, 148 Ind. 293, 40 N.E. 127, 47 N.E. 465 (1897) again parallels the Willis case on the facts but the legal doctrine of venue in Indiana has a considerably different background. Venue in the Indiana abortion case was grounded upon a statute unlike any in West Virginia which provides "where a public offense has been committed partly in one county and partly in another, or the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." This statute was held to be adequate to afford abortion-homicide venue in the county where the death occurred. The statute had previously been held constitutional in Archer v. State, 106 Ind. 426, 7 N.E. 225 (1886), where the court observed that there was no substantial diversity of opinion as to the power of the legislature to provide such venue, citing decisions from other states but ignoring the constitutional provision in Indiana.

"It must be admitted that there is some ambivalence in the statement of historic rationale concerning venue. It is sometimes advanced in the opinions that venue is intended to insure a defendant a trial near his home. "The Constitution of our State guarantees every man a right to be tried at his home, in his county, where the alleged offense was committed. Many men had been denied this right, and had been dragged from their homes to be tried by strangers for alleged offenses, thus denying to them the influence of a good life upon the men who were to try them. . . ." State v. Greer, 22 W. Va. 800, 804 (1883). (The statements were volunteered by Judge
further demands that the criminal activity must have some connection with the county where the trial is sought and venue districts may not be determined by judicial circuits or any other geographical or political subdivisions of the state. But, it should also be noted that the common law did not insist that there be but one place (be it county, district, or however the venue district be identified) where the crime occurred. A crime might touch several venue districts and when this occurred, trial could be in any. The habit of viewing each crime as having but one place where it may be tried is not a common law venue principle, but at most a by-product of a related, but independent, concept of subject matter jurisdiction.

What follows is the conclusion that the legislature in West Virginia can validly adopt a venue statute that would provide for trial in any county where a substantial element of a crime occurred. There should be no objection further to requiring issues of law pertaining to the venue question to be raised prior to trial or deemed waived. Moreover, issues of fact pertaining to venue should be tried by the court and not by the jury. The law question could be resolved by requiring a pin-pointing of the venue-giving element or elements prior to trial and by requiring before trial a determination of whether the proof of these elements within the county would support venue. The fact issues pertaining to these elements could be resolved by the judge either prior to trial or at the trial as his discretion would direct. Such a scheme would insure the defendant his fundamental venue privilege of having his trial before a jury drawn from a proper community but would also insist that the question with regard to venue could not be held in reserve to upset an otherwise fair trial on the merits.

Johnson as he approached the question of the trial court’s refusal to change venue at the defendant’s request.) See also Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871) where the court in part justified trial in the county where the prison was located for an offense committed by a prisoner while on a work gang in another county on the ground that “if he can be said to have a vicinage at all, that vicinage as to him is within the laws of the penitentiary, which (if not literally and actually) yet in the eye of the law surrounds him wherever he may go, until he is lawfully discharged.” Id. at 799. Literally taken, the Virginia provision does refer to trial by a jury of “his vicinage.” And would seem to demand trial at a man’s home rather than at the locale of the crime. The common interpretation is quite to the contrary however.

78 W. Va. Code ch. 61, art. 11, §12 (Michie 1966) (Codifying the common law rule in regard to mortal blow and death in different counties, venue in either); W. Va. Code ch. 61, art. 3, §19 (Michie 1966) (broad venue for receiving stolen property offense perpetuating the common law concept of continuing trespass which broadened venue considerably. See note 17 supra.
This paper has wandered rather far and wide. To bring it to a close, let me capsulize the broader arguments I have advanced. First, the history behind state constitutional venue provisions does not demand narrow or stringent interpretations of those provisions with regard to general legislative authority, but it does insist that the basic principle to be preserved is one of demanding some kind of connection between the place of a crime and the place of its trial; second, the West Virginia constitutional provision clearly fixed the county as the venue unit for this state, but it does not follow that the adoption of a narrow geographical unit for venue locale compels a narrow limit on legislative powers to determine in which county or counties a crime is deemed to be committed. Third, the relationship between common law and constitution in regard to venue should properly be viewed as one in which the constitution carries forward general common law principles and not specific common law rules. Finally, the unstated assumption that most crimes must be viewed as having occurred in but one place, no matter how much they may have touched a variety of counties, is not a component part of the common law principles of venue but is product of a habitual way of looking at the problem which is provoked by irrelevant concerns of an obsolescent view of subject matter jurisdiction. If these views are correct, then West Virginia venue law suffers needlessly and the legislature ought to move to correct the situation.