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Where Should We Land?: Flyover Districts as Proper Venue for Crimes Committed in Air on Domestic Flights

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WHERE SHOULD WE LAND?: FLYOVER DISTRICTS AS PROPER VENUE FOR CRIMES COMMITTED IN AIR ON DOMESTIC FLIGHTS

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This Essay explores the recently resolved circuit split between the Ninth, Tenth, and Eleventh Circuits regarding the proper venue for crimes committed on an airplane during flight. In 2019, the Ninth Circuit held that the proper venue for trying an assault that happened midflight was the district over which the airplane was flying when the assault occurred. While flyover districts may seem like a surprising and inconvenient choice for venue, flyover districts are the only constitutionally proper venue for point-in-time offenses that occur on airplanes during flight. Furthermore, using current aviation tracking protocols and GPS technology, courts can pinpoint the location of a plane easily and accurately at any point during flight. The main obstacle to prosecuting criminal cases in flyover districts is not technological but human. Flight attendants lack established standards and procedures for documenting and reporting incidents as they occur, especially incidents of sexual assault. This Essay provides recommendations for standardized form recording and reporting procedures to enable courts to accurately and constitutionally prosecute crimes that occur during flight. While flyover districts may be judicially uneconomical, until Congress steps in to provide a statutory basis for prosecuting crimes outside the district in which they occurred, flyover districts remain the proper venue for crimes committed on an airplane during flight.

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INTRODUCTION

In 2019, over eight hundred million passengers traveled domestically by plane across the United States on about eight million flights.[1] Traveling

[1] BUREAU OF TRANSPORTATION STATISTICS, U.S. DEP'T OF TRANSP., *Passengers All Carriers – All Airports*, https://www.transtats.bts.gov/Data_Elements.aspx?Data=1 [https://perma.cc/GE2R-BU6J]. In 2020, likely due to the onset of the COVD-19 pandemic, air travel significantly decreased but still amassed just over three hundred million domestic travelers. *Id.*

by air can be stressful, a bit uncomfortable, and sometimes violent. In October 2019, an intoxicated man began assaulting passengers on a Southwest Airlines plane flying from Texas to California, forcing an early landing in Arizona.[2] During the summer of 2019, a woman on an American Airlines flight from Florida to California assaulted her boyfriend by hitting him repeatedly with her laptop when she caught him looking at images of another woman.[3] In March 2019, a Hawaiian Airlines flight from Hawaii to California was forced to turn around after two male passengers began brawling after one allegedly bumped into the other.[4]

Incidents of sexual assaults during flight are increasing as well.[5] The Federal Bureau of Investigation (FBI) reported a 66% increase in reported sexual assaults on commercial flights over the past few years.[6] The true increase in assaults is likely higher as many cases go unreported.[7] Additionally, the FBI only tracks cases reported directly to the agency; reports made to the Department of Transportation are sent to the airline, not law enforcement.[8] In 2017, a survey by the Association of Flight Attendants reported that "[o]ne-fifth of flight attendants said they had received a report of passenger-on-passenger sexual assault while working on a flight," and "[l]aw enforcement officials were contacted or met the plane less than half

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[2] Associated Press, *Unruly Passenger Forces L.A.-Bound Flight to Divert to Tucson*, KTLA 5 (Oct. 9, 2019, 3:11 PM), https://ktla.com/2019/10/09/unruly-passenger-forces-l-a-bound-flight-to-divert-to-tucson/ [https://perma.cc/J8P5-C6R7].

[3] Lee Brown, *Plane Passenger Throws Laptop at Boyfriend for 'Looking at Other Women'*, N.Y. POST (July 23, 2019, 1:50 PM), https://nypost.com/2019/07/23/plane-passenger-throws-laptop-at-boyfriend-for-looking-at-other-women/ [https://perma.cc/6BXL-G8SB].

[4] Andrea Romano, *Unruly Passengers Force Hawaiian Airlines Flight to Turn Back 2 Hours Into Trip*, TRAVEL + LEISURE (Mar. 20, 2019), https://www.travelandleisure.com/travel-news/fight-causes-hawaiian-airlines-flight-turn-around [https://perma.cc/4HBN-WQFY].

[5] Javier De Diego, Omar Jimenez, Rene Marsh & Juana Summers, *FBI: Sexual Assaults On Flights Increasing 'At An Alarming Rate*,' CNN (June 20, 2018, 9:19 PM), https://www.cnn.com/2018/06/20/politics/fbi-airplane-sexual-assault/index.html [https://perma.cc/LU6D-9D9C].

[6] *Id.*

[7] *Id.*

[8] Christopher Mele, *Sexual Assault on Flights: Experts Recommend Ways to Stay Safe and Combat It*, N.Y. TIMES (Mar. 23, 2011), https://www.nytimes.com/2019/03/23/travel/airline-flights-sexual-assault.html [https://perma.cc/YP4X-4CL8].

the time."[9] Due to underreporting that is systemic in all sexually-based crimes, the true extent of the problem is unknown.[10]

In-flight violence is not a new phenomenon; it has been a reality of air travel for decades and has come to be known as "air rage."[11] Neither is in-flight violence simply an American phenomenon; the International Air Transport Association reported that there were 8,731 "unruly incidents" aboard airplane flights around the world in 2017.[12] These incidents ranged from verbal outbursts to both life- and flight-threatening behavior.[13] In many cases, air flight personnel are the victims of "air rage,"[14] but this Essay focuses only on inter-passenger violence on domestic U.S. flights because procedures for crimes committed against air flight personnel are more thoroughly and clearly governed.[15]

When law enforcement does respond to in-flight crime and an investigation results in charges, prosecuting the case presents a unique venue issue. Since the 1980s, circuit courts have characterized crimes that occur on a form of transportation as continuing crimes under 18 U.S.C. § 3237, which can then be prosecuted in multiple districts simply due to the circumstance

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[9] *Id.*

[10] *See generally* Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported [https://perma.cc/TVB7-356N]; *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/ZTB5-SFEU] (last visited Mar. 19, 2021).

[11] William Mann, *All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky*, 65 J. AIR L. & COM. 857, 857–59 (2000).

[12] INT'L AIR TRANSP. ASS'N, UNRULY AND DISRUPTIVE PASSENGER INCIDENTS AND WHY NO ONE LIKES THEM, https://www.iata.org/contentassets/b7efd7f114b44a30b9cf1ade59a02f06/unruly_pax_infographic_2017.pdf [perma.cc/HGY2-M8M2].

[13] *Id.*

[14] *Survey Reveals Widespread Harassment of Flight Attendants*, ASS'N OF FLIGHT ATTENDANTS-CWA (May 10, 2018), https://www.afacwa.org/survey_reveals_widespread_harassment_of_flight_attendants [https://perma.cc/B3EU-H736].

[15] 49 U.S.C. § 46504 (2001) states that

> [a]n individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, or attempts or conspires to do such an act, shall be fined under title 18, imprisoned for not more than 20 years, or both. However, if a dangerous weapon is used in assaulting or intimidating the member or attendant, the individual shall be imprisoned for any term of years or for life.

Federal Aviation Regulations 91.11, 121.580, and 135.120 state that "no person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated." 14 C.F.R. §§ 91.11, 121.580, 135.120 (1999).

element of being on a form of transportation.[16] Crimes that occur in a single location, such as assault, take on no new elements by occurring on a form of transportation. Nonetheless, courts have classified crimes as continuing offenses if they occur on planes, when they are otherwise point-in-time offenses on the ground.

Courts have unjustifiably broadened § 3237 to become a catch-all for any crime that occurs on a form of transportation.[17] When it was enacted, § 3237 was not intended to be a catch-all provision; it served a specific purpose.[18] Section 3237 is meant to govern crimes that are committed "in one district and completed in another, or committed in more than one district" and crimes that involve "the use of the mails, transportation in interstate or foreign commerce."[19] When prosecuting midflight crimes, courts have used § 3237 to justify venue in whatever district the flight lands.[20] By broadening § 3237, courts have created a jurisdictional loophole allowing crimes to be charged outside of the district in which they occurred, in direct violation of what the Constitution requires.[21]

This Essay discusses the legal foundation for restricting venue to the district over which an assault on an airplane occurred—the "flyover district"—and posits that such restriction is constitutional and practical. Both the Constitution and Declaration of Independence require that justice be administered in the same district in which the crime occurred.[22] With today's global positioning technology and a straightforward reporting procedure, determining where a crime occurred midflight is entirely possible.[23]

This Essay first discusses the historical background of venue and how restrictions measures are at the core of its creation. Part II examines the significance of classifying a crime as "continuing" or "point-in-time" in relation to § 3237 and asserts that assault is always a point-in-time offense, thus falling outside the scope of § 3237. Next, Part III analyzes the recent

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[16] *See, e.g.*, United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir. 2004); United States v. McCulley, 673 F.2d 346, 350 (11th Cir. 1982).

[17] *See Breitweiser*, 357 F.3d at 1253–54; *McCulley*, 673 F.2d at 350.

[18] *See infra* Part IV.C.1.

[19] 18 U.S.C. § 3237(a) (2012).

[20] *See* United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012); *Breitweiser*, 357 F.3d at 1253–54.

[21] The Constitution twice mentions restricting venue to the place where the crime occurs. U.S. CONST. art. III, § 2, cl. 3 (stating that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); U.S. CONST. amend. VI (stating "[i]n 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").

[22] U.S. CONST. amend. VI; *see* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

[23] *Infra* Part IV.

circuit split that attempts to further expand § 3237 to all crimes that occur on airplanes. Then, in Part IV, this Essay describes how airlines can assist with venue determinations for in-flight crimes by using current aviation technology and improving their crime reporting protocols. Lastly, Part V addresses counterarguments to restricting venue to flyover districts, such as using destination districts or applying the substantial contacts test, concluding that no counterargument has the constitutional backing of flyover districts.

I. BACKGROUND ON VENUE

Despite hundreds of years of social change, technological advancement, and government expansion, many principles set forth by the Framers remain unchanged. The procedure for deciding proper venue for criminal trials grew out of colonial resistance to British courts.[24] Today, venue provisions are standard in all American courts, and, at the federal level, the rules for determining venue are codified in the Federal Rules of Criminal Procedure.[25]

A. HISTORY AND PURPOSE OF VENUE

"Venue" is the geographic area "where a criminal action is brought to trial."[26] The principle requiring courts to limit venue to the location where the criminal act occurred is most clearly established in the Sixth Amendment guarantee that a defendant be tried "by an impartial jury of the State and district wherein the crime shall have been committed."[27] Like many principles of our nation's legal framework, the idea to limit venue was created in response to injustices inflicted by the British Empire.[28] In 1769, the British Parliament attempted to remove colonists from America to England for trial.[29] The Framers abhorred this practice and noted their disdain in the Declaration of Independence by condemning King George III "[f]or transporting us beyond Seas to be tried for pre-tended Offences."[30]

The Framers reiterated their intent to limit venue in criminal cases in the text of the original Constitution: "[t]he Trial of all Crimes . . . shall be held

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[24] *See* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

[25] FED. R. CRIM. P. 18.

[26] 22 C.J.S. CRIMINAL PROCEDURE AND RIGHTS OF ACCUSED § 158 (2021).

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

[28] *See* Paul Mogin, *"Fundamental Since Our Country's Founding":* United States v. Auernheimer *and the Sixth Amendment Right to Be Tried in the District in Which the Alleged Crime Was Committed,* 6 U. DENV. CRIM. L. REV. 37, 40–41 (2016).

[29] *Id.*

[30] THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

in the State where the said Crimes shall have been committed."[31] This provision was not restrictive enough for all of the Framers, some of whom were concerned that states were too large of an area to use.[32] The Framers further restricted venue to districts within each state in the Sixth Amendment.[33] At the time of ratification, there were thirteen districts; each state had a single district, except Massachusetts and Virginia which each had two districts.[34] Currently, there are ninety-four federal districts, with each state having at least one, as well as the territories of Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands each having one.[35]

Today, the restrictions on venue are codified in the Federal Rules of Criminal Procedure, which states that "the government must prosecute an offense in a district where the offense was committed."[36] The Supreme Court has repeatedly held that venue determinations are not mere technicalities or formalities but questions of great concern.[37] The Court has emphasized the repeated appearance of venue restrictions in the Constitution as the basis for their concern.[38]

B. HOW TO ESTABLISH VENUE IN FEDERAL CRIMINAL CASES

Federal Rule of Criminal Procedure 18 requires that the government determine where a crime was committed.[39] In order to determine where a crime was committed, the government must look to the elements of the

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[31] U.S. CONST. art. III, § 2, cl. 3.

[32] Mogin, *supra* note 28, at 42.

[33] U.S. CONST. amend. VI (stating "[i]n 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").

[34] Mogin, *supra* note 27, at 42.

[35] *Court Role and Structure*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/4S82-72GV].

[36] FED. R. CRIM. P. 18.

[37] *See, e.g.*, United States v. Cabrales, 524 U.S. 1, 6 (1998) (recognizing that "[p]roper venue in criminal proceedings was a matter of concern to the Nation's founders. . . . [t]he Constitution twice safeguards the defendant's venue right"); Travis v. United States, 364 U.S. 631, 634 (1961) (stating that "[w]e therefore begin our inquiry from the premise that questions of venue are more than matters of mere procedure"); United States v. Johnson, 323 U.S. 273, 276 (1944) (stating that "[t]hese are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests"); United States v. Dawson, 56 U.S. 467, 473 (1854) (stating that unrestricted venue "was a power dangerous and odious in the extreme. The sixth article of the amendments wisely took away this whole power, and provided that the trial of all criminal prosecutions should be by an impartial jury of the State and district wherein the crime should have been committed").

[38] *See Cabrales*, 524 U.S. at 6; *Travis*, 364 U.S. at 634; *Johnson*, 323 U.S. at 275; *Dawson*, 56 U.S. at 487–88.

[39] FED. R. CRIM. P. 18.

crime.[40] Venue is proper in the locations where the actions constituting the elements of the offense took place.[41] In some statutes, Congress explicitly states where venue is proper for that crime,[42] but Congress did not provide a venue statement for assault.

When analyzing the elements of a crime to establish venue, it is crucial "to separate 'essential conduct elements' from 'circumstance element[s].'"[43] Venue is "determined solely by the essential conduct elements."[44] The essential conduct elements are the actions an offender must take in order for a crime to be committed.[45] Circumstance elements are any other external or environmental factors.[46] Circumstance elements may affect the execution of essential conduct elements, may make the essential conduct elements possible, or may include actions taken by the offender after the fact.[47] For example, when an offender is charged with harboring a fugitive, the only essential conduct element is the act of harboring.[48] While it is also necessary for the fugitive to have a warrant issued against them, issuing a warrant would not be an essential conduct element for the crime, so the district where the warrant was issued would not be a district where an essential conduct element of the crime occurred.[49] Some crimes, such as harboring a fugitive or kidnapping, can happen over long periods of time and in more than one place, which further complicates a court's venue analysis.

II. IS ASSAULT A CONTINUING OFFENSE?

All criminal offenses can be classified as either a point-in-time offense or a continuing offense.[50] The term "continuing offense" is a term of art.[51] Continuing offenses have been described as a "series of acts set on foot by a

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[40] David Spears, *Venue in Federal Criminal Cases: A Strange Duck*, 43 CHAMPION 24, 25 (2019).

[41] United States v. Auernheimer, 748 F.3d 525, 532 (3d Cir. 2014).

[42] *See, e.g.*, 18 U.S.C. § 228(e) (1998) (providing venue for failure to pay child support); 18 U.S.C. § 1512(h) (2008) (providing venue for obstruction of justice).

[43] *Auernheimer*, 748 F.3d at 533 (quoting United States v. Rodriguez-Moreno, 526 U.S. 275, 276 (1999)).

[44] United States v. Bowens, 224 F.3d 302, 311 (4th Cir. 2000).

[45] *Id.* at 309.

[46] *Id.*

[47] *Id.*

[48] *See id.*

[49] *Id.*

[50] Emily C. Byrd, *When Does the Clock Stop? An Analysis of Point-in-Time and Continuing Offenses for Venue Purposes*, 11 LOY. MAR. L.J. 175, 176, 179–83 (2012).

[51] United States v. McGoff, 831 F.2d 1071, 1078 (D.C. Cir. 1987).

single impulse and operated by an unintermittent force,"[52] "indivisible, unlawful general practice that exists throughout the time span alleged,"[53] and "an offense which continues day by day . . . not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences."[54]

These descriptions all attempt to describe the idea that continuing offenses are fundamentally different from common crimes. Crimes such as fraud and forgery are characterized as single incident point-in-time offenses[55] that are complete "as soon as each element of the crime has occurred."[56] Crimes such as kidnapping and conspiracy are characterized as continuing offenses by the courts.[57] Courts describe fraud and forgery as "instantaneous events,"[58] that are completed as soon as the false information or product is proffered;[59] while kidnapping and conspiracy are "continuing process[es],"[60] where "each day's acts bring a renewed threat of the substantive evil Congress sought to prevent."[61] Each day that a kidnapping victim remains kidnapped, the criminal offense is continuing;[62] and each day that a conspiracy is being hatched, the criminal offense is continuing. Courts most often encounter disputes over the classification of a crime as point-in-time or continuing when defendants are charged with carrying a firearm during a crime of violence, conspiracy, or racketeering.[63]

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[52] State v. Williams, 319 N.W.2d 748, 751 (Neb. 1982) (quoting 22 C.J.S. CRIMINAL LAW § 1 at 6 (1961)).

[53] Commonwealth v. Megna, 797 N.E.2d 1, 3 (Mass. App. Ct. 2003).

[54] *Williams*, 319 N.W.2d at 751 (quoting 22 C.J.S. CRIMINAL LAW § 1 at 6 (1961)).

[55] United States v. Salinas, 373 F.3d 161, 165–66 (1st Cir. 2004); United States v. Rodriguez, 465 F.2d 5, 11 (2d Cir. 1972); United States v. Quirke, No. 1:12–MJ–261A, 2012 WL 4369304, at *2 (D.R.I. Sept. 24, 2012).

[56] *McGoff*, 831 F.2d at 1078.

[57] United States v. Yashar, 166 F.3d 873, 875 (7th Cir. 1999); *McGoff*, 831 F.2d at 1078; Toussie v. United States, 397 U.S. 112, 134–35 (1970) (White, J., dissenting); United States v. Garcia 854 F.2d 340, 343–44 (9th Cir. 1988).

[58] *Toussie*, 397 U.S. at 122 (distinguishing between offenses that occur as a "continuing process" and those that occur as "instantaneous events").

[59] *Quirke*, 2012 WL 4369304, at *2 (holding that "at the moment that an applicant makes a false statement with intent to procure a passport, the crime is complete" (citing *Salinas*, 373 F.3d at 168–69)). The district court further noted that § 3237(a) should not be applied to passport fraud cases. *Id.*

[60] *Toussie*, 397 U.S. at 122; United States v. Garcia 854 F.2d 340, 343–44 (9th Cir. 1988).

[61] *Toussie*, 397 U.S. at 122.

[62] *See generally Garcia*, 854 F.2d at 343.

[63] *See, e.g.*, United States v. Rodriguez-Moreno, 526 U.S. 275 (1999); United States v. Praddy, 725 F.3d 147, 150 (2d Cir. 2013); United States v. Saavedra, 223 F.3d 85 (2d Cir. 2000).

Federal courts often use a two-prong test to determine if the continuing offense doctrine should be applied. The test states that "[a]n offense is a continuing offense if: (1) the explicit language of the relevant statute compels such a conclusion, or (2) the nature of the offense charged is such that 'Congress must assuredly have intended' that the offense be treated as a continuing one."[64]

When looking at the explicit language of a statute, the Supreme Court has used a "verb test."[65] The verb test is a helpful "interpretative tool," but it is not treated as a dispositive test.[66] The test analyzes the verbs used in the statute to determine whether the crime occurs at once or whether the crime is ongoing.[67] All federal crimes are defined in statutes, so the verb test often comes down to a few verbs, if not a single verb.[68]

A. DEFINING ASSAULT: CONTINUING OR POINT-IN-TIME?

In order to determine whether assault is a continuing or point-in-time offense, courts need only look at the essential conduct elements of assault.[69] The Department of Justice identified the definition of common law assault provided in *Guarro v. United States* as the default definition of assault absent a statutory definition.[70] At common law, an assault is "an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person."[71] Follow-through can be irrelevant in the common law understanding of assault.[72] A person can be guilty of assault without ever actually landing a blow.[73]

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[64] United States v. Phan, 754 F. Supp. 2d 186, 188 (D. Mass. 2010); *see* United States v. Yashar, 166 F.3d 873, 875 (7th Cir. 1999); *Toussie*, 397 U.S. at 115.

[65] *Rodriguez-Moreno*, 526 U.S. at 278.

[66] *Id.* at 280.

[67] *Id.* at 278.

[68] Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 VA. L. REV. 287, 289 (1926).

[69] United States v. Stinson, 647 F.3d 1196, 1204 (9th Cir. 2011) (stating that an essential conduct element must be actioned in the charging district).

[70] U.S. DEP'T. OF JUST., CRIM. RESOURCE MANUAL, ASSAULT – 18 U.S.C. § 351(e) (2018) https://www.justice.gov/jm/criminal-resource-manual-1610-assault-18-usc-351e [https://perma.cc/E9RV-7UTK].

[71] Guarro v. United States, 237 F.2d 578, 580 (D.C. Cir. 1956) (quoting Patterson v. Pillans, 43 App. D.C. 505, 506–07 (1915)).

[72] Ladner v. United States, 358 U.S. 169, 177 (1958) (holding that a person can commit assault by "putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm").

[73] *Id.*

The essential conduct elements of common law assault are (1) an attempt with force or violence to do a corporal injury to another (2) accompanied with the intent to use violence against the person and (3) the present ability to use actual violence against the person.[74] The crime of assault is committed and completed when the attempt at injury is made. The last listed element of the common law definition of assault requires "present ability," emphasizing the point-in-time nature of the offense.[75] This element is the most significant as it is the clearest indication that assault was originally formulated as a point-in-time offense. The first element, an attempt, occurs immediately and is completed instantaneously. The element of intent latches on to the elements of attempt and present ability, which both focus on a specific moment. Therefore, assault is, and was historically intended to be, a point-in-time offense. Additionally, at least one U.S. District Court has stated that simple assault should be classified as a point-in-time offense.[76]

The verb test results in a point-in-time classification for assault as well. In the common law definition of assault, the action verbs in the essential conduct elements are "attempt," "use," and "do," which are all in the present tense. Exclusive use of present tense verbs in the conduct elements of the statute implies that these acts occur in a single moment.[77]

Because the essential conduct elements of assault do not compel the courts to characterize assault as a continuing offense nor do they give rise to the notion that assault was intended to be viewed as a continuing offense, the next step in the analysis is to determine whether or not the use of transportation is an essential conduct element.

In the common law definition of assault, no explicit or implicit reference to the use of transportation in the commission of an assault exists.[78] Some state statutes embody the principles of the common law definition of assault, and some combine the elements of assault and battery into one offense.[79] Regardless of the differing need for physical contact in assault statutes, all

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[74] *See generally Guarro*, 237 F.2d at 580.

[75] *Id.*

[76] United States v. Ashburn, No. 11-CR-3032014, 2014 WL 1800409, at *10 (E.D.N.Y. May 5, 2014) (distinguishing simple assault as a point-in-time offense from the assault in the case at bar, which was committed in furtherance of a racketeering enterprise, which is a continuing offense, and has now intertwined the elements of assault with the elements of racketeering as "essential element[s]" of the crime (quoting United States v. Saavedra, 223 F.3d 85, 90–92 (2d Cir. 2000))).

[77] *Guarro*, 237 F.2d at 580.

[78] *See supra* notes 70–73 and accompanying text.

[79] *See Assault and Battery Overview*, FINDLAW, https://criminal.findlaw.com/criminal-charges/assault-and-battery-overview.html [https://perma.cc/37UG-QRU3] (last visited Mar. 19, 2021).

state statutes lack a reference to the use of transportation in the commission of an assault.[80] Moreover, no legitimately conceivable list of assault elements would include the use of an airplane.

B. THE INTERACTION OF 18 U.S.C. § 3237 AND DIFFERENT CLASSIFICATIONS OF CRIME

The significance behind determining whether a criminal offense is a point-in-time or a continuing offense is that characterizing a crime as a continuing offense triggers 18 U.S.C. § 3237, which provides the government with the ability to prosecute the case "in any district in which such offense was begun, continued, or completed."[81] The interpretation and application of this statute is at the center of the cases composing the circuit split.[82] The relevant part of the statute at issue in this Essay and the circuit split states:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the *use* of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.[83]

The second paragraph mentions the use of "transportation" which at first glance appears to provide an easy statutory answer to the issue of venue for in-flight assaults.[84] As discussed in the previous Section, there is no mention of the use of transportation in any conceivable definition of assault.[85] Section 3237 is inapplicable to venue determinations for assault cases because the statute only applies to continuing crimes or crimes that include *using* transportation as a conduct element.

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[80] *See State Assault and Battery Laws*, FINDLAW, https://statelaws.findlaw.com/criminal-laws/assault-and-battery.html [https://perma.cc/2GWG-NQ27] (last visited Mar. 19, 2021).

[81] 18 U.S.C. § 3237(a).

[82] United States v. Lozoya, 920 F.3d 1231, 1239–41 (9th Cir. 2019); United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012); United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir. 2004).

[83] § 3237(a) (emphasis added).

[84] *Id.*

[85] *See supra* notes 78–80 and accompanying text.

III. CIRCUIT SPLIT CASES

In 2019, the Ninth Circuit explicitly split from the Eleventh and Tenth Circuits on the issue of venue extension for crimes that occur during airplane flights.[86] In 2004, the Eleventh Circuit held that it would be impossible for the government to deduce which district the plane was flying over when the assault was committed.[87] Furthermore, the Eleventh Circuit engaged in judicial activism to expand 18 U.S.C. § 3237 into a "catch-all" provision that provides venue for any offense that occurs onboard a form of public transportation.[88] The Tenth Circuit, in 2012, reaffirmed the holding of the Eleventh Circuit, but the offense committed in the Tenth Circuit's case was a continuing offense that included the operation of an aircraft as one of its essential elements.[89] While the Tenth Circuit reaffirmed the incorrect interpretation of § 3237, the application of § 3237 was correct for the offense at issue in that case. The Ninth Circuit recently reheard its venue case, and the en banc panel joined the Tenth and Eleventh Circuits.[90] While the circuits may no longer be split, the different analysis proffered in each case warrant review.

A. ANALYZING THE INITIAL MISAPPLICATION OF § 3237 IN UNITED STATES V. BREITWEISER

In 2001, two teenage sisters, one fourteen years old and one eighteen years old, traveled by plane from Houston, Texas to Atlanta, Georgia.[91] During the flight, a man sitting in the same aisle as them, Russell Breitweiser, imposed himself on the girls by uninvitedly joining their conversations and asking them personal questions.[92] His behavior grew stranger as he put one of the fourteen year old's crayon in his mouth and nose.[93] The criminal act in this case occurred when "Breitweiser put his hand on [fourteen-year-old] A.B.'s leg with his fingers spread out and rubbed it up and down her inner thigh."[94] The girls also suspected that at some point Breitweiser masturbated next to them underneath some pillows and a magazine.[95]

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[86] *See, e.g.*, *Lozoya*, 920 F.3d at 1240–41 (declining "to adopt the reasoning or holding of these opinions").

[87] *Breitweiser*, 357 F.3d at 1253. *But see infra* Part IV.A.

[88] *Breitweiser*, 357 F.3d at 1253.

[89] United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012).

[90] United States v. Lozoya, 982 F.3d 648, 653 (9th Cir. 2020).

[91] *Breitweiser*, 357 F.3d at 1251–52.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

When Breitweiser left his seat to use the restroom, a concerned passenger asked the girls if they knew Breitweiser.[96] The girls informed the passenger that they did not know him and that they were uncomfortable with him sitting next to them.[97] The passenger informed the flight crew of the situation.[98] When the plane was landing, the flight attendants brought the girls into the first-class cabin, and once everyone deplaned, the flight attendant escorted the girls to their connecting flight.[99]

Ultimately Breitweiser was charged with and convicted of abusive sexual contact with a minor and simple assault of a minor.[100] The abusive sexual contact charge resulted from Breitweiser rubbing the fourteen year old's thigh.[101] The simple assault charge was based on Breitweiser touching the fourteen-year-old girl's legs, hands, face, and hair.[102] The background provided in the opinion does not explain when Breitweiser touched the hands, face, and hair of the minor girl, so it is unclear whether it happened at the same time as the abusive sexual contact or at another time.

The case was tried in the United States District Court for the Northern District of Georgia, which is the district the plane landed in.[103] On appeal, Breitweiser raised improper venue as an issue, and the Eleventh Circuit Court of Appeals began its venue analysis by explaining the Sixth Amendment and Rule 18 guarantee "to be tried in the district in which the crime was committed," but the court quickly turned away from that idea for a mangled interpretation of 18 U.S.C. § 3237.[104] The court rightly stated that Congress intended § 3237 to apply to continuing crimes and crimes involving the use of transportation but then wrongly inflated that framework to include all crimes committed on a form of transportation.[105] The court claimed that the government met its venue burden simply by showing that Breitweiser committed these offenses on a plane that landed in the Northern District of Georgia.[106] This reasoning is incorrect.

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96 *Id.*
97 *Id.* at 1252.
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.* at 1251.
104 *Id.* at 1251, 1253.
105 *Id.* at 1253 (citing United States v. McCulley, 673 F.2d 346, 350 (11th Cir. 1982)).
106 *Id.*

As previously discussed, assault is not a continuing crime nor do the essential conduct elements of assault include the use of transportation.[107] The Eleventh Circuit erred significantly when it misconstrued the circumstantial element of being on an airplane during flight to be an essential conduct element of using an airplane in the commission of an assault. Although Breitweiser acted unconscionably for the entire flight—the assault happened at a specific moment in time. The proper venue is the district over which the assault occurred: the flyover district.[108] The one district the court knows this offense did not occur in is the Northern District of Georgia, as the minor girl was already well removed from Breitweiser when the plane entered into the navigable airspace above the Northern District of Georgia and when the plane landed on the ground.[109] The court justified its decision to prosecute the case in a district where the crime irrefutably did not occur due to its belief that "[i]t would be difficult if not impossible for the government to prove, even by a preponderance of the evidence, exactly which federal district was beneath the plane when Breitweiser committed the crimes."[110] It is unclear if airplane GPS technology seventeen years ago was so primitive that this determination would truly be impossible; but, it is certainly not so today.[111]

B. MISAPPLICATION RIGHTLY REAFFIRMED IN UNITED STATES V. COPE

The Tenth Circuit reaffirmed the Eleventh Circuit's reasoning that venue can be established under 18 U.S.C. § 3237 simply by proving that a "crime took place on a form of transportation in interstate commerce."[112] However, the facts in *United States v. Cope* are substantially different in a manner that affects venue analysis. While this case supported the legal theory promulgated by the Eleventh Circuit, the facts, crime charged, and basis for venue in *Cope* are significantly different to such a degree that it may stand on its own.

Cope was charged with and convicted of violating 18 U.S.C. § 342, which states that it is a criminal offense to operate a common carrier under

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[107] *See supra* notes 77–79 and accompanying text.

[108] *See generally* United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973) (holding that a district includes the navigable airspace above it).

[109] *See Breitweiser*, 357 F.3d at 1252.

[110] *Id.* at 1253.

[111] *See infra* Part V.A.

[112] United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012) (citing *Breitweiser*, 357 F.3d at 1253).

the influence of alcohol.[113] Cope was the copilot of a commercial flight from Texas to Colorado, and throughout the flight his copilot smelled alcohol inside the cockpit.[114] The copilot first assumed the alcohol smell arose from a spilt drink outside the cockpit door, but when he leaned over Cope, he realized that Cope was the source of the alcohol smell.[115] Cope's copilot delayed the departure of their connecting flight and contacted the airline's human resources department.[116] The copilot escorted Cope to a "breath testing facility in the Denver airport" where he was breathalyzed twice: once scoring a .094 and then a .084 twenty minutes later.[117]

The case was tried in the United States District Court for the District of Colorado, which is the district where the flight landed.[118] Venue was justified under 18 U.S.C. § 3237 because operating a common carrier under the influence of alcohol is a continuing crime.[119] The crime occurs for as long as the offender is intoxicated and in control of the carrier. In this case the essential conduct elements were committed in multiple districts, including the district where the flight landed.[120] This is proven by the results of the breathalyzer test showing alcohol still in Cope's system after landing.[121] Additionally, the offense of operating a common carrier while under the influence of alcohol involves the use of transportation. The foundation of the crime is the operation of a mode of transportation; without it, there is only intoxication. While the Tenth Circuit was incorrect to uphold the reasoning from *Breitweiser*, the court was correct to use § 3237 when determining proper venue because Cope committed a continuing offense and an offense involving the use of transportation.

C. RETURNING § 3237 TO ITS ORIGINAL PURPOSE IN UNITED STATES V. LOZOYA

In April 2019, the Ninth Circuit explicitly split from the Eleventh and Tenth Circuits on the issue of venue extension for crimes that occur during

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[113] *Id.* at 1221. A common carrier is defined as "a locomotive, a rail carrier, a sleeping car carrier, a bus transporting passengers in interstate commerce, a water common carrier, and an air common carrier." 18 U.S.C. § 341.

[114] *Cope*, 676 F.3d at 1221.

[115] *Id.*

[116] *Id.* at 1222.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 1225.

[120] *See id.* at 1221.

[121] *Id.* at 1222.

airplane flights.[122] In July 2015, Monique Lozoya traveled from Minneapolis, Minnesota to Los Angeles, California on a Delta Airlines flight.[123] Lozoya claimed that she was unable to sleep during the flight because the passengers behind her hit her seat repeatedly and generally caused a commotion by "wrestling around with their stuff . . . hitting the chairs, the tray up and down, up and down."[124] Lozoya's frustration led her to confront the couple in the row behind her later in the flight.[125]

Testimonies conflict about the nature of the confrontation and the surrounding conversation but not about when it happened.[126] Lozoya claimed that when the couple returned from the bathroom, she spoke to the male passenger from her seat while he was standing in the aisle and "politely asked him stop hitting her seat."[127] Lozoya alleged that the male passenger shouted "What?" aggressively and "quickly moved his hand to within a half-inch of her face."[128] Lozoya asserted that his reaction frightened her and led her to believe that he was going to hit her, so she pushed him away.[129]

The couple testified to a different dynamic.[130] The male passenger claimed that he was standing in the aisle with each hand resting on a seat-head, when Lozoya "yelled at him to stop tapping his TV screen and then hit him with the back of her hand, causing his nose to bleed."[131] Regardless of who instigated the confrontation, Lozoya struck another passenger midflight.[132] Two flight attendants responded, one to calm the parties involved and one to investigate what happened.[133] Eventually, Lozoya was charged with and convicted of simple assault in the United States District Court for the Central District of California.[134] One of the issues Lozoya raised on appeal was improper venue in the Central District of California because the confrontation occurred long before the flight entered airspace over the Central District of California.[135]

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[122] United States v. Lozoya, 920 F.3d 1231, 1240–41 (9th Cir. 2019) (declining "to adopt the reasoning or holding of these opinions").

[123] *Id.* at 1233.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 1233–34.

[127] *Id.* at 1233.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 1233–34.

[132] *Id.* at 1238.

[133] *Id.* at 1234.

[134] *Id.* at 1235.

[135] *See id.* at 1236.

At trial, the government argued that venue was proper in the Central District of California because Lozoya was on a flight that landed in Los Angeles.[136] This reasoning was also used in *Breitweiser* and *Cope*.[137] The Ninth Circuit intentionally rejected this argument.[138] Instead, the Ninth Circuit gave proper weight and authority to the venue restrictions required by the Constitution.[139]

Next, the Ninth Circuit utilized the standard two prong test to determine venue: (1) recognize the act(s) that make up the offense and (2) identify the location where those criminal acts were committed.[140] For the first prong, the circuit court correctly recognized that "[t]he only essential conduct element here is the assault" and that the assault happened in an instant.[141] For the second prong, even the government conceded that the assault occurred before Lozoya's flight reached the airspace over the Central District of California.[142] The government continued on to argue that it is "impossible" to verify the location of the plane at the time of the incident.[143] The Ninth Circuit rejected this excuse.[144] The Ninth Circuit rightly asserted that thorough investigation and flight data can lead the government to the exact location of the assault, at least to the degree of a preponderance of the evidence, which is the standard needed to establish venue. [145]

At trial, the district court held that venue in the Central District of California was proper under 18 U.S.C. § 3238 and 18 U.S.C. § 3237.[146] The Ninth Circuit quickly dismissed the applicability of § 3238, which governs crimes committed on the "high seas" or entirely outside the jurisdiction of the United States.[147] The government tried to argue that the "high skies" are outside the jurisdiction of any district; therefore, venue is proper in the

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[136] *Id.* at 1235.

[137] *See* United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004); United States v. Cope, 676 F.3d 1219, 1222 (10th Cir. 2012).

[138] *Lozoya*, 920 F.3d at 1240–41.

[139] *Id.* at 1238 (stating that "Article III of the Constitution requires that '[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed" (quoting U.S. CONST. art. III, § 2, cl. 3)).

[140] *Id.* at 1239.

[141] *Id.*

[142] *Id.* (holding that "the navigable airspace above [a] district is a part of [that] district" (quoting United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973))).

[143] *Id.* at 1241–42.

[144] *Id.* at 1242.

[145] *Id.*

[146] *Id.* at 1239.

[147] *Id.* at 1241.

district where the defendant is first apprehended on the ground.[148] The Ninth Circuit rejected this argument due to the binding circuit precedent holding that "the navigable airspace above [a] district is a part of the district."[149]

The Ninth Circuit discussed the inapplicability of 18 U.S.C. § 3237 at length.[150] First, the circuit court correctly held that assault is not a continuing offense.[151] The circuit court contrasted assault with drug trafficking to provide an example of a criminal offense where the essential conduct elements occur in multiple districts.[152] The circuit court held that the airplane was a mere circumstance and that § 3237 does not authorize extending venue to wherever a plane travels after the commission of a criminal act.[153] Venue can only be determined by essential conduct elements, and the circuit court correctly held that being on an airplane is not an essential conduct element of assault.[154] Furthermore, the circuit court held that an assault does not affect interstate commerce.[155]

Ultimately, the Ninth Circuit ruled "that the proper venue for Lozoya's prosecution is the district in whose airspace the assault occurred."[156] However, on December 20, 2019, it was "ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3" in March 2020,[157] but the COVID-19 pandemic delayed the proceeding until December 2020.[158] The en banc panel overturned the prior decision of the Ninth Circuit, which essentially resolved the circuit split.[159] Nonetheless, a new analysis emerged.

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[148] *Id.*

[149] *Id;* United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973).

[150] *Lozaya*, 920 F.3d at 1239–41.

[151] *Id.* at 1239.

[152] *Id.*

[153] *Id.* at 1239–40 ("Section 3237(a) does not provide a basis for extending venue into the Central District simply because Flight 2321 continued into its airspace after the offense was complete. Once the assault had concluded, any subsequent activity was incidental and therefore irrelevant for venue purposes.").

[154] *Id.*; *see supra* notes 40–45 and accompanying text.

[155] *Lozoya*, 920 F.3d at 1240 (holding that "the conduct constituting the offense was the assault, which had nothing to do with interstate commerce").

[156] *Id.* at 1243.

[157] United States v. Lozoya, No. 17-50336, 2019 U.S. App. LEXIS 38340, at *1 (9th Cir. Dec. 24, 2019).

[158] United States v. Lozoya, 982 F.3d 648 (9th Cir. 2020).

[159] *Id.* at 650.

D. REHEARING LOZOYA AND GETTING IT WRONG

A split en banc panel amended the Ninth Circuit's opinion to affirm the decision of the district court and join with the reasoning of the Tenth and Eleventh Circuits, but the en banc opinion provided a new twist on the venue analysis. At the beginning of its discussion, the en banc panel emphasized that Lozoya's crime of simple assault was federalized under 49 U.S.C. § 46506.[160] Section 46501(2) established the "special aircraft jurisdiction of the United States" and § 46506 federalized numerous crimes, including assault, when committed on board an airplane during flight.[161] The panel used § 46506 to justify its application of § 3237.[162] If Lozoya was not in an airplane when she slapped someone, then her crime would not fall under federal jurisdiction.[163] The majority of the panel felt that this was enough to hold that Lozoya's assault "involved" the *use* of an airplane.[164] The panel did not address that this jurisdictional statute did not change the essential conduct elements of assault. Venue analysis is still required under federal jurisdiction.

The panel also failed to engage in a meaningful analysis regarding the distinction between continuing offenses and point-in-time offenses. Instead, the panel dismissed that consideration as "of no import."[165] The panel did address the constitutional venue requirements, which resulted in the lackluster conclusion that "[t]he Constitution does not discuss the airspace over the several states."[166] While the Constitution does not address airspace jurisdiction, the Ninth Circuit did fifty years ago.[167]

In *United States v. Barnard*, the Ninth Circuit held that "the navigable airspace above [a] district is a part of [that] district."[168] The en banc opinion attempts to disregard *Barnard*'s precedent in a footnote.[169] The en banc opinion incorrectly claimed that the court in *Barnard* did not analyze Article III or the Sixth Amendment, so its holding should be ignored.[170] This is plainly untrue. In *Barnard*, the Ninth Circuit stated, "Article III, Section 3,

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160 *Id.* at 651.
161 *Id.* (quoting 49 U.S.C. § 46501(2)).
162 *Id.*
163 *Id.*
164 *Id.* at 653.
165 *Id.*
166 *Id.* at 651.
167 United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973).
168 *Id.*
169 *Lozoya*, 982 F.3d at 652 n.3.
170 *Id.*

of the Constitution and the Sixth Amendment fix venue in the State and district wherein the crime shall have been committed."[171]

The majority of the en banc panel blatantly ignored binding Ninth Circuit precedent, but then, in the same opinion, supported classifying airspace as part of a state's jurisdiction and discussed how "states routinely assert jurisdiction over crimes committed in airspace."[172] Then, when discussing the inapplicability of § 3238, the majority stated that "crimes committed in airspace are *within* the jurisdiction of the states."[173] The en banc opinion flip-flopped and cherry picked when airspace should and should not be included in a jurisdiction. The majority also conflated federal jurisdiction with the freedom to choose from any federal district with no regard for venue analysis.

The en banc panel did raise one valid concern with prosecuting Lozoya in the flyover district: the witnesses provided different estimates of the time of the assault.[174] While all the witnesses agreed that Lozoya slapped another passenger when he returned from the bathroom, the witnesses provided different guesses as to what time it was when that happened.[175] However, in the next Part, this Essay will explain how improved training and reporting procedures can alleviate this concern.

IV. RECOMMENDATIONS AND IMPLEMENTATION

While "common sense" may suggest that prosecuting crimes committed midflight in the district in which the plane lands is the obvious answer,[176] it is both unconstitutional and unnecessary. Prosecuting midflight crimes in the district over which they occurred is supported by fundamental principles of the Constitution[177] and is entirely possible with today's technology.[178] Although the reporting procedures of air flight personnel leave much to be desired, simple standardized documentation and reporting procedures will make proper venue determinations easy.[179] Lastly, given the significant increase of violence during air travel, prosecuting in-flight crimes in flyover

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171 *Barnard*, 490 F.2d at 910 (internal quotation marks omitted).

172 *Lozoya*, 982 F.3d at 656.

173 *Id.*

174 *Id.* at 654.

175 *Id.*

176 *Lozoya*, 920 F.3d at 1243 (discussing the dissenting opinion that believes using only common sense is enough foundation for a legal holding); *Lozoya*, 982 F.3d at 657 (justifying its holding as "consistent with common sense").

177 U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

178 *See infra* Part IV.A.

179 *See infra* Part IV.B.

districts could become a deterrent for those who act as though they are flying through a lawless place.[180]

A. AIRPLANE TECHNOLOGY PRECISION

One of the main justifications the Eleventh Circuit provided for its holding was that it would be impossible to pinpoint the location of a plane when a crime occurred.[181] The Global Positioning System (GPS) technology and electronic flight recording data that are used by airlines and air traffic control disprove the Eleventh Circuit's claim. Airlines that utilize a ground-based GPS can pinpoint a plane's location "within 25 feet 95 percent of the time."[182]

GPS technology in aviation performs the same core purposes across the board.[183] A receiver in the cockpit "pulls in signals from multiple satellites, determines how long the signals took to arrive, and uses that information to triangulate its own position."[184] At least three satellite signals are needed to determine a plane's location over the ground, and if there is a fourth signal the receiver can measure altitude.[185] Most GPS receivers used in the aviation industry measure "latitude, longitude, altitude, speed, and direction."[186]

In the United States, a new satellite-based system is being implemented that can pinpoint a plane's location within 10 feet.[187] The infrastructure for satellite-based radar for the United States was completed in 2014, which means that satellite-based radar exists everywhere that ground-based radar coverage exists, as well as in areas that previously lacked coverage, such as certain parts of the Gulf of Mexico and Alaska.[188]

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[180] *See infra* Part IV.D.

[181] United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004). The en banc Ninth Circuit panel similarly scoffed at the suggestion to use flight tracking technology. *Lozoya*, 982 F.3d at 654.

[182] FEDERAL AVIATION ADMINISTRATION, *Next Gen FAQs*, (Aug. 26, 2019, 10:31 AM), https://www.faa.gov/nextgen/faqs/#q1 [https://perma.cc/QEW8-27H8].

[183] BRIAN D. PETERSON, GPS FROM THE GROUND UP, 1–7 (2009), https://www.aopa.org/-/media/files/aopa/home/pilot-resources/asi/safety-advisors/sa01.pdf [https://perma.cc/AK9L-M9EU].

[184] *Id.* at 1.

[185] *Id.*

[186] *Id.* at 2.

[187] FEDERAL AVIATION ADMINISTRATION, *Administrator's Fact Book* 13 (2018), https://www.faa.gov/news/media/2018_administrators_fact_book.pdf [https://perma.cc/SB5C-GWMQ].

[188] *Id.*

This GPS technology is not exclusive to the government. There are many consumer websites that track flights in real time with precise detail.[189] Some websites even track airplanes on the ground at airports, and some track activity in remote places like Antarctica or Chernobyl, Ukraine.[190] Most flight tracking websites utilize a technology called Automatic Dependent Surveillance – Broadcast, which receives "vital position and movement data from an aircraft's transponder, such as altitude, speed, heading, and dozens of other attributes."[191]

Air traffic control officers monitor and record a plane's movement during flight from the ground.[192] Depending on the distance of a domestic commercial airline flight in the United States, the flight could travel through up to twenty-one airspace zones, which are further broken down into divisions, and each division is monitored by a controller.[193] A flight progress strip records and updates seventeen data points as the plane moves from one division to the next.[194] The flight progress strip records factors such as departure and destination points, altitude, ground speed, true air speed, past airspace zones, and the time the flight crossed through the previous airspace divisions.[195] The flight progress strip is updated and transferred from controller to controller.[196] Additionally, radar controllers provide instructions to pilots when they need to deviate from the scheduled flight plan, for reasons such as to reduce turbulence, avoid bad weather, or be placed in a holding pattern before landing.[197] There are always many eyes in the skies.

More information about the procedures of air traffic controller centers can be gathered through Freedom of Information Act (FOIA) requests,[198] but it is clear between available GPS technology and the publicly released procedures, that today's technology can accurately pinpoint the location of a

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[189] Jason Rabinowitz, *This Is How Flight Tracking Sites Work*, THE POINTS GUY (Sept. 23, 2017), https://thepointsguy.com/2017/09/how-flight-tracking-sites-work/ [https://perma.cc/8RQQ-RPMA].

[190] *Id.*

[191] *Id.*

[192] Craig Freudenrich, *How Air Traffic Control Works*, HOW STUFF WORKS (June 12, 2001), https://science.howstuffworks.com/transport/flight/modern/air-traffic-control1.html [https://perma.cc/C9G2-M5XY].

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *See* FED. AVIATION ADMIN., *Air Traffic Service Center Contact Information* (Sept. 12, 2019, 10:06 AM), https://www.faa.gov/foia/foia_coordinators/ato_service_centers/?section=ato_request [https://perma.cc/6NHK-QT4Y].

plane at any given time. The Eleventh and Tenth Circuit's claim that pinpointing the location of a plane over a judicial district is impossible is incorrect. A plane's location can be determined within ten to twenty-five feet of accuracy in real-time and afterwards from flight data records. The main issue is the lack of proper documentation and recordation by flight personnel on board when an issue arises.

B. ADDRESSING THE LACK OF REPORTING OF INFLIGHT INCIDENTS

The most significant impediment to prosecuting crimes that occur during flight is a lack of established standards and procedures for documenting and reporting incidents as they occur, especially incidents of sexual assault. While many may assume that Air Marshals are always onboard and always step in when incidents arise, that is not the case.[199] Air Marshals are present on less than half of U.S. flights and they often do not intervene unless the situation is life- or flight-threatening.[200]

Flight attendants who do intervene when an incident occurs during flight have no rules or guidelines to adhere to and often have not had adequate training.[201] Many flight attendants have reported that they do not know what to do if a passenger is harassed or assaulted during flight.[202] When a flight attendant does intervene in a passenger conflict, the most common technique used is to simply physically separate the passengers.[203] The pilot is responsible for notifying the air traffic controllers on the ground if law

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[199] *See* Everett Potter, *Five Myths About Air Marshals*, USA TODAY (Aug. 7, 2014, 10:10 AM), https://www.usatoday.com/story/travel/flights/2014/08/07/5-myths-about-air-marshals/13724331/ [https://perma.cc/8FBG-XXRG].

[200] *See id.*

[201] *See* Javier De Diego, Omar Jimenez, Rene Marsh & Juana Summers, *supra* note 5. The President of the Association of Flight Attendants-CWA stated that in over two decades of working as a flight attendant most "flight attendants are at a loss for what to do when confronting inappropriate-and sometimes criminal-behavior." *Id.*; David Schaper, *36,000 Feet in the Air, Flight Attendants and Passengers Say 'Me, Too,'* NPR (June 21, 2018, 4:34 PM), https://www.npr.org/2018/06/21/622361890/flight-attendants-say-they-havent-been-trained-on-how-to-deal-with-sexual-harass [https://perma.cc/5JJE-TNR8]. Flight attendants report that "inadequate training, support, and protocols" leaves them hanging midair when an incident occurs. *Id.*

[202] *See* Schaper, *supra* note 201.

[203] ASS'N OF FLIGHT ATTENDANTS-CWA, *#MeToo in the Air*, https://www.afacwa.org/metoo#a1; *see* David Slotnick, *Flight Attendants Discuss How They're Trained to Handle Out-of-Control Violent Incidents Aboard Flights*, BUS. INSIDER (July 29, 2019, 10:36 AM), https://www.businessinsider.com/flight-attendants-manage-in-flight-disturbances-assult-2019-7 [https://perma.cc/ZFY5-ZJB3].

enforcement intervention is necessary.[204] In many cases, flight attendants diffuse the situation and do not report it.[205] According to the Association of Flight Attendants-CWA, "[l]aw enforcement officials [were] contacted or met the plane less than half . . . the time" after an incident occurred during flight.[206] While many airlines claim that "[t]he safety and security of passengers is the priority," as of writing this Essay, no airlines report or publish their policies or provide any details on what mechanisms exist to protect passengers from being assaulted by other passengers.[207]

However, change may be on the horizon. In October 2018, the passage of the FAA Reauthorization Act created a national task force to address in-flight sexual misconduct, placed congressional focus on the issue of sexual misconduct on planes, and required the Department of Justice to establish reporting procedures for sexual misconduct.[208] Under the direction of the U.S. Department of Transportation, the National In-flight Sexual Misconduct Task Force is responsible for reviewing "current practices, protocols and requirements of U.S. airlines in responding to and reporting allegations of sexual misconduct by passengers on board aircraft."[209] Based on public statements made by flight attendants and media investigations, the Task Force is not likely to find much.[210] The Task Force is also responsible for providing recommendations on "training, reporting, and data collection" for in-flight passenger misconduct.[211] In March 2020, the Task Force provided its first report to the U.S. Department of Transportation's Aviation Consumer

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[204] Louis Cheslaw, *What Happens when a Law Is Broken on a Plane*, CONDE NAST TRAVELER (July 8, 2019), https://www.cntraveler.com/story/what-happens-when-a-law-is-broken-on-a-plane [https://perma.cc/9ZNZ-4MGH]; *see* Slotnick, *supra* note 203.

[205] *See* Harriet Baskas, *What One Flight Attendant Has to Say About Unruly Passengers*, NBC (Oct. 4, 2016, 12:58 PM), https://www.nbcnews.com/business/travel/what-one-flight-attendant-has-say-about-unruly-passengers-n657476 [https://perma.cc/38A9-XGK4]. When asked about addressing unruly passengers during flight, one flight attendant stated, "[i]f there's an issue on board most of the time it's easier to let it go instead of waiting on authorities to meet the flight. We put up with so much nonsense it's unbelievable." *Id.*

[206] ASS'N OF FLIGHT ATTENDANTS-CWA, *supra* note 203.

[207] *See* Rene Marsh & Juana Summers, *Women Detail Sexual Assaults and Harassment on Commercial Flights*, CNN (Dec. 28, 2017, 1:20 PM), https://www.cnn.com/2017/12/27/politics/women-sexual-assaults-harassment-commercial-flights/index.html [https://perma.cc/TF5J-VS6Y].

[208] FAA Reauthorization Act of 2018, P.L. No. 115-254, 132 Stat. 3186.

[209] U.S. DEP'T OF TRANSP., *U.S. Department of Transportation Announces Aviation Consumer Protection Advisory Committee and National In-Flight Sexual Misconduct Task Force* (Nov. 15, 2018), https://www.transportation.gov/briefing-room/dot7318 [https://perma.cc/9MVP-P6K3].

[210] *See supra* Part IV.B.

[211] U.S. DEP'T OF TRANSP., *supra* note 209.

Protection Advisory Committee (ACPAC),[212] but it is unclear what weight this report carries or if ACPAC has taken any action to further circulate the report for review by the U.S. Transportation Secretary, Department of Justice, or major commercial airlines. With the onset of the COVID-19 pandemic, recommendations on how to improve reporting procedures for passenger misconduct take on an unforeseen, renewed importance.

C. RECOMMENDATIONS FOR COURTS, CONGRESS, AND FLIGHT PERSONNEL

Courts should adhere to the plain meaning of 18 U.S.C. § 3237 and prosecute midflight crimes in the district over which they occur, unless and until Congress steps in and provides an appropriate statutory basis for finding venue outside the district over which the crime occurred. If prosecuting midflight crimes in flyover districts imposes substantial costs on the federal government, then Congress should step in and provide a clear statutory source for prosecuting crimes that occur in airspace outside the district in which they occurred. In the meantime, improved statutory regulations for flight attendants are needed for accurate venue determinations and for actual prosecutions to occur given the severe underreporting of midflight crimes.[213] Flight attendants should document and report all incidents that occur and allow law enforcement agencies to make final determinations on charges.

1. A Return to the Text of § 3237 by the Courts

The current circuit split over proper venue is a space where the legislature should step in and amend § 3237 or write a new statute entirely,[214] but ultimately the law, as it is right now, requires prosecuting midflight crimes in the district over which they occur.[215] This procedure is required by the Constitution,[216] although the Framers could not have imagined this scenario.

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[212] U.S. DEP'T OF TRANSP., *National In-Flight Sexual Misconduct Task Force Submits Report to USDOT's Aviation Consumer Protection Advisory Committee* (Mar. 16, 2020), https://www.transportation.gov/briefing-room/national-flight-sexual-misconduct-task-force-submits-report-usdots-aviation-consumer [https://perma.cc/N98K-DQQP].

[213] *See supra* notes 201–07 and accompanying text.

[214] *See* Byrd, *supra* note 50, at 182 (discussing the motivations behind limiting venue and putting the onus on Congress to "legislate accordingly to determine where proper venue should occur" in instances when normal venue jurisprudence should not apply).

[215] 18 U.S.C. § 3237 (governing continuing crimes and crimes committed using transportation not any crime that happens to occur on a mode of transportation).

[216] U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

The judicial principle of prosecuting defendants in the place where they committed a criminal offense is one of the most meaningful principles of the American judicial system.[217] The motivations for venue restriction grew out of unfair practices of the British Parliament and thus can be characterized as truly constitutional.[218] Although the Framers intended to prevent defendants from being hauled off to foreign courts, the restrictions are clear and advancements in travel and communication technology remove the burden that previously was placed on individual defendants in order to appear in distant courtrooms.[219] Venue restriction was further reinforced and codified for modern practice in the Federal Rules of Criminal Procedure.[220]

The case that spurred Congress's enactment of § 3237(a) also reinforces the argument that § 3237 should not apply to crimes that do not include the use of transportation, mail, or interstate commerce as an essential conduct element. Congress enacted § 3237 in response to the outcome of *United States v. Johnson*.[221] The Court in *Johnson* analyzed the proper venue for violations of the Federal Denture Act.[222] The Federal Denture Act outlawed using "the mails or any instrumentality of interstate commerce" to transport dentures to a state that the dentist was not licensed in.[223] The crime charged in *Johnson* included as one of its essential conduct elements the use of "the mails or any instrumentality of interstate commerce."[224] At this point in time, before § 3237(a), Congress had to specify in each criminal statute that an offense could be prosecuted in multiple districts.[225] If it did not do so, then normal venue rules applied. Congress had not provided any additional venue provisions in the Federal Denture Act, so the Court felt that the Constitution compelled a narrow venue analysis.[226] The Court found that venue was

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[217] The Constitution twice explicitly restricts venue to the place where the crime occurs. *See* U.S. CONST. art. III, § 2, cl. 3. (stating that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed"); U.S. CONST. amend. VI (stating "[i]n 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").

[218] *See* Todd Lloyd, Note, *Stretching Venue Beyond Constitutional Recognition*, 90 J. CRIM. L. & CRIMINOLOGY 951, 953–54 (2000).

[219] Spears, *supra* note 40, at 24–25.

[220] FED. R. CRIM. P. 32.

[221] United States v. Brennan, 183 F.3d 139, 147 (2d Cir. 1999); John F. Stone, Note, *Federal Venue of Offense Allegedly Begun in One District and Completed in Another*, 38 N.D. L. REV. 574, 581 (1962).

[222] United States v. Johnson, 323 U.S. 273, 273 (1944).

[223] *Id.* at 274.

[224] *Id.*

[225] *Id.* at 274–78 (engaging in a thorough discussion of Congress's ability to write specific or discretionary venue provisions in criminal statutes).

[226] *See id.* at 276–77.

proper only in the district where the dentures were actually placed in the mail.[227] In response to this holding, Congress enacted § 3237(a), which now allows for crimes that involve the use of mail, transportation, or interstate commerce to be "prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves."[228]

More recently in *Ashcroft v. ACLU*, Justice Kennedy's concurrence, which was joined by Justice Ginsburg and Justice Souter, also provides support for the argument that § 3237 only applies to crimes that include the use of transportation, mail, or interstate commerce as one of its essential conduct elements.[229] Quite different than the cases from the circuit split discussed in this Essay, *Ashcroft* addressed First Amendment concerns related to a provision of the Child Online Protection Act (COPA).[230] Nonetheless, Justice Kennedy engaged in a brief § 3237 venue analysis.[231] He justified the application of § 3237 to COPA prosecutions because COPA "includes an interstate commerce element, . . . and '[a]ny offense involving . . . interstate . . . commerce . . . may be inquired of and prosecuted in any district from, through, or into which such commerce . . . moves.'"[232] This venue analysis mirrors the analysis supported in this Essay. For § 3237 to apply in an assault case, assault would need to include the use of transportation, mail, or interstate commerce as one of its elements. In *Ashcroft*, Justice Kennedy found that COPA "includes an interstate commerce element,"[233] but neither the Ninth nor Eleventh Circuit found that assault includes the use of transportation, mail, or interstate commerce as one of its elements.[234]

Expanding venue beyond constitutional restrictions without statutory justification is unconstitutional. A plain reading of § 3237 provides no support for extending venue to districts where a flight lands if that is not the

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[227] *Id.* at 277–78.

[228] 18 U.S.C. § 3237(a).

[229] *See* Ashcroft v. Am. C.L. Union, 535 U.S. 564, 601–03 (2002) (Kennedy, J. concurring).

[230] *Id.* at 566 (majority opinion).

[231] *Id.* at 601–03 (Kennedy, J., concurring).

[232] *Id.* (internal citation omitted).

[233] *Id.*

[234] Lozoya was charged with assault under 18 U.S.C. § 113(a)(4). United States v. Lozoya, 920 F.3d 1231, 1234 (9th Cir.). Assault under § 113(a)(4) is "[a]ssault by striking, beating, or wounding," which makes no mention of the use of transportation, mail, or interstate commerce. 18 U.S.C. § 113(a)(4) (2013). Breitweiser was charged with simple assault under 18 U.S.C. § 113(a)(5) because the victim was under sixteen years old, and the statute similarly does not mention the use of transportation, mail, or interstate commerce. United States v. Breitweiser, 357 F.3d 1249, 1251 (11th Cir. 2004); § 113(a)(5).

district where the crime occurred.[235] The venue provisions are not ambiguous and do not require extensive interpretation.[236] While some may argue that this results in an absurd practice, the result is what the Constitution and Federal Rules require.[237] Furthermore, it is entirely possible with current aviation technology and improvements to reporting policies to pinpoint the exact districts over which inflight crimes occur.[238]

2. Congress Should Amend § 3237 or Enact a New Airspace Venue Statute

Prosecuting crimes in flyover districts requires courts to use more time and resources to make accurate and constitutional venue determinations. The tension between the practical considerations at issue and the honest answer that results from proper venue analysis of midflight crimes makes this an area that Congressmen across the aisle can agree needs correcting. Congress has two options: amend § 3237 to govern all offenses that occur on a common carrier or enact a new statute that governs offenses committed on a common carrier and specify that the destination district is an appropriate venue. A detailed statutory analysis of the language that should be employed is beyond the scope of this Essay, but it is worthwhile to emphasize that Congressional intervention is warranted and encouraged.

3. Flight Personnel Need More Regulatory Guidance from the FAA

Regardless of what the courts or Congress do on paper, flight personnel need more support in the real world. Under 49 U.S.C. § 44734 flight attendants are only required to receive training in four areas: "(1) serving alcohol to passengers; (2) recognizing intoxicated passengers; (3) dealing with disruptive passengers; and (4) recognizing and responding to potential human trafficking victims."[239] With the specific exception of human trafficking, none of the training requirements involve documentation or reporting of inter-passenger conflict.[240] In practice, flight attendants often diffuse situations and separate the involved passengers without taking formal action.[241]

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[235] 18 U.S.C. § 3237(a).

[236] *See id.*

[237] U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.; *see* United States v. Lozoya, 920 F.3d 1231, 1244 (9th Cir. 2019) (Owens, J. dissenting).

[238] *See supra* Part IV.A; *infra* Part IV.C.3.

[239] 49 U.S.C. § 44734 (2016).

[240] *See id.*

[241] *See supra* notes 203–206 and accompanying text.

Prosecution of midflight crimes requires standardized form recording and reporting procedures.[242] The International Air Transport Association (IATA) recommends that training on disruptive passengers include "categorizing of incidents" and "reporting of incidents," as well as "periodic re-training."[243] Standard forms should include blocks for date, time (multiple), flight number, flight leg, responding flight crew members, passenger names, passenger seat numbers, incident narrative description, injuries incurred, first aid administered, passenger witnesses, pilot notified, flight rerouted for landing, delivered to authorities, and the identification and contact information of law enforcement agency taking over.[244] All of the necessary information can be consolidated into a one-page form, but the IATA provides examples of extensive documentation that can be used, as well as sample warning cards that can be distributed to disruptive passengers.[245]

The FAA should amend its regulations governing flight attendant training and responsibilities to require trainings that provide clear and concise standardized procedures for documenting and reporting assaults, as well as other simple crimes, that occur during flight. A minimum of two flight attendants should respond to every disruption during a flight. One attendant will be responsible for documentation, and the other attendant(s) will be responsible for intervening, diffusing, and ensuring the safety of the flight and its passengers. All disruptions should be documented even if the incident does not warrant law enforcement involvement. Increased documentation of disruptions may lead to increased prosecution of crimes that do occur midflight. Passengers should be made aware of the consequences for disruptive behavior at the beginning of the flight during taxi with all other safety procedures. This information should also be provided in a leaflet in the seatback pocket with other safety and flight information.[246] These recommendations represent a baseline for the procedures necessary to provide accurate information to prosecutors in order to establish venue beyond a preponderance of the evidence.

D. USING FLYOVER DISTRICTS AS A DETERRENT

A criminological argument for restricting venue to flyover districts is that doing so may deter crime. One flight can cover many districts and being

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[242] *See* INTERNATIONAL AIR TRANSPORT ASSOCIATION, GUIDANCE ON UNRULY PASSENGER PREVENTION AND MANAGEMENT 37–38 (2015).

[243] *Id.* at 49.

[244] *Id.* at 44–46.

[245] *Id.* at 38–43.

[246] Sample leaflets are provided by the IATA. *Id.* at 68–69.

hauled states away for a crime you committed midflight can be quite the burden, but that burden can act as a deterrent to crime on planes. As previously suggested, passengers should be made aware at the beginning of a flight that criminal behavior will result in prosecutions located in the district over which the offense was committed.[247]

There are three main components to deterrence–severity, certainty, and celerity of punishment–and restricting proper venue to overflight districts can accomplish each.[248] Deterrence occurs when an individual weighs the costs and benefits of committing a crime and chooses not to commit a crime.[249] Passengers must be informed at the start of a flight that disruptive behavior will not be tolerated during flight and that criminal actions will be prosecuted in flyover districts. In order for any of the three main factors of deterrence to be effective, the existence of such venue requirements must be explained to the passengers. [250]

Severity, certainty, and celerity of punishment do not work alone, and the strength of one affects the other.[251] In this case, prosecuting midflight crimes in flyover districts can create a severe consequence depending on the distance covered by the flight. Although possibly quite severe, if a would-be perpetrator knows with utmost certainty that such prosecution is unlikely to happen, the severe consequence has less of an effect.[252] Furthermore, if the potential perpetrator knows that he will not be tracked down until the unforeseeable future, severe or certain consequences are less likely to have a deterrent effect.[253]

Having standardized procedures for reporting midflight crimes will increase the severity, certainty, and celerity factors of deterrence. Requiring that these crimes be prosecuted in flyover districts might be a severe enough consequence to deter some potential perpetrators from engaging in criminal behavior during flight. Requiring flight attendants to announce flyover venue provisions before take-off and equipping flight attendants with standardized forms and protocols increases the certainty that would-be perpetrators will be prosecuted. Lastly, having standard protocols in place for flight attendants

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[247] *See supra* Part IV.C.3.

[248] *See* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 205–06 (2013).

[249] *See id.* at 205.

[250] *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003). For deterrence to occur a "potential offender must know of the rule." *Id.*

[251] *See generally* Nagin, *supra* note 248, at 205–07.

[252] *See id.* at 206.

[253] *See id.* at 206–07.

to follow will increase celerity because flight attendants will not have to decide whether to intervene and what to do because they will be required to intervene in all conflicts and have standard procedures to follow when doing so.

V. ALTERNATIVE SOLUTIONS

Flyover districts are the proper venue for point-in-time offenses that occur on airplanes during flight according to the text of the Constitution and Federal Rules of Civil Procedure.[254] However, some argue that the district where the plane lands constitutes proper venue because holding otherwise would be absurd.[255] Others may argue that an application of the substantial contacts theory in criminal procedure presents a more palatable middle ground.[256]

A. "COMMON SENSE"

The Eleventh Circuit, Tenth Circuit, and, now, the Ninth Circuit claim that the district in which a flight lands after a crime was committed is the obvious choice for proper venue.[257] Their argument relies on the interpretation that subsection (a) in § 3237 provides a statutory foundation for venue being proper in the district in which the flight lands.[258] Subsection (a) provides venue for offenses that involve "the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States."[259] Their interpretation holds that if a person is simply on a form of transportation when a crime occurs, then the offense transforms into a continuing crime and can be prosecuted wherever the offender's trip may end.[260] The main issue with this interpretation is that it ignores the statute's intended purpose of classifying offenses and instead conflates the statute's application to offenders who may be using a form of transportation when they commit a crime regardless of whether that use of transportation is necessary to commit the crime.

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[254] *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; FED. R. CRIM. P. 18.

[255] *See Lozoya*, 920 F.3d at 1244 (Owens, J. dissenting).

[256] *See* United States v. Saavedra, 223 F.3d 85, 93–94 (2d Cir. 2000) (defining the four factors that compose the substantial contacts test).

[257] *See Lozoya*, 982 F.3d at 651; *Cope*, 676 F.3d at 1225; *Breitweiser*, 357 F.3d at 1253–54.

[258] *See* 18 U.S.C. § 3237(a).

[259] *Id.*

[260] *See Lozoya*, 982 F.3d at 651; *Cope*, 676 F.3d at 1225; *Breitweiser*, 357 F.3d at 1253–54.

The dissent in the Ninth Circuit's original *Lozoya* decision conceded that the statute does not clearly support this holding but held that the jurisprudence on statutory interpretation requires the court to refrain from interpretations that lead to absurd results.[261] The dissent provided an example of claimed absurdity in asking a child to pinpoint when an assault occurred in order to determine venue instead of defaulting to the district where the plane eventually lands.[262] While a child may not immediately be able to provide detailed testimony, this Essay suggests placing the onus on flight attendants to promptly and thoroughly record incidents when they happen.[263] Furthermore, investigating when a crime occurred is not an absurd requirement of law enforcement.

Determining where in the sky a crime occurred is not impossible either.[264] GPS technology and air traffic control procedures track the location of planes within a few feet.[265] Hobbyists on consumer websites can track the movements of airplanes with precise detail, so there is no practical reason for courts to hold that it is too difficult for law enforcement to determine where a plane was in flight at a given time.[266] While air travel may make venue determinations more difficult, a challenging circumstance is not enough to overpower the requirements of the Constitution.[267]

B. REVIVAL OF THE SUBSTANTIAL CONTACTS THEORY

Because the district where the flight lands and the district over which the crime occurred might both be arbitrary locations to the parties involved, others may suggest the substantial contacts theory is appropriate and apply it in cases such as these. Although the substantial contacts test has not been universally or uniformly accepted by courts, the Supreme Court hinted at its approval for the test in *Rodriguez-Moreno*.[268] After the Court refused to reject the substantial contacts test in *Rodriguez-Moreno*, the Second Circuit and

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[261] *See Lozoya*, 920 F.3d at 1244.

[262] *Id.*

[263] *See supra* Parts IV.B., C.3.

[264] *But see Breitweiser*, 357 F.3d at 1253–54 (holding that "[i]t would be difficult if not impossible for the government to prove, even by a preponderance of the evidence, exactly which federal district was beneath the plane when Breitweiser committed the crimes").

[265] *See supra* Part IV.A.

[266] *See supra* notes 189–91 and accompanying text.

[267] *See supra* Part IV. *But see Breitweiser*, 357 F.3d at 1253–54.

[268] *See* United States v. Rodriguez-Moreno, 526 U.S. 275, 279 n.2 ("The Government argues that venue also may permissibly be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense. . . . we express no opinion as to whether the Government's assertion is correct.").

other individual district courts have utilized the substantial contacts test in determining venue for continuing offenses.[269]

In 2000, immediately preceding *Rodriguez-Moreno*, the Second Circuit laid out the four factors of the substantial contacts test: "(1) the site of the crime, (2) its elements and nature, (3) the place where the effect of the criminal conduct occurs, and (4) suitability of the venue chosen for accurate factfinding."[270] The Second Circuit is the only court that regularly employs the substantial contacts test, dating back to the 1980s.[271]

The substantial contacts test has been employed in cases involving continuing offenses, such as racketeering, kidnapping, and conspiracy.[272] The substantial contacts test is inappropriate for blanket application to midflight crimes. Many crimes committed midflight, such as assault, are point-in-time offenses and thus do not warrant the extended analysis of the substantial contacts test. The fourth factor, "suitability of the venue chosen for accurate factfinding,"[273] is the only relevant factor for midflight offenses as many courts have cited the difficulty or absurdity in determining venue for crimes that occur midflight.

For example, if two individuals involved in an assault are flying from Maine to California, there are many districts over which this flight passes, and prosecution in any one of them may seem arbitrary and unfair. If this flight includes a layover, or a forced early landing, in Columbus, Ohio or Houston, Texas, prosecution in either of those districts where the flight lands is just as arbitrary as any flyover district to two individuals flying to a vacation in California from their homes in Maine.[274] If both individuals are residents of Maine, and a few witnesses onboard also happen to be residents of Maine, then the U.S. District Court for the District of Maine might be the most suitable venue for factfinding as the offender, victim, and witnesses all

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[269] *See, e.g.*, United States v. Lange, 834 F.3d 58, 71 (2d Cir. 2016); United States v. Saavedra, 223 F.3d 85, 93 (2d Cir. 2000); United States v. McIntosh, No. 02-938, 2007 U.S. Dist. LEXIS 104718104715, at *3–4 (C.D. Cal. Nov. 27, 2007).

[270] United States v. Saavedra, 223 F.3d 85, 93 (2d Cir. 2000).

[271] *See* United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985); *Saavedra*, 223 F.3d at 92–93.

[272] *See, e.g.*, United States v. Miller, 808 F.3d 607, 622 (2d Cir. 2015) (applying substantial contacts for venue in a kidnapping case); United States v. Coplan, 703 F.3d 46, 80 (2d Cir. 2012) (applying substantial contacts test for conspiracy, tax evasion, and false statements venue determinations); *Saavedra*, 223 F.3d at 92–95 (applying substantial contacts test for racketeering charges).

[273] *Saavedra*, 223 F.3d at 93.

[274] This hypothetical scenario is similar to a real midflight disruption discussed in the Introduction, where an intoxicated man began assaulting passengers on a flight from Texas to California, and the plane was forced into an early landing in Arizona due to the incident.

reside there. This would result in a venue not previously chosen by any court—venue in the district from where the flight departed.

The issue with the substantial contacts test is that it is unlikely that all of the parties, witnesses, and evidence involved will belong to a single judicial district, and thus any determination from the substantial contacts test might appear favorable to one side. Given the complexity of air travel, almost any district where a midflight crime is prosecuted will seem arbitrary to one of the parties involved, but only the flyover district has the backing of the Constitution.[275]

CONCLUSION

At first glance, flyover districts may seem like a surprising choice for venue, but flyover districts are the only constitutionally proper venue for point-in-time offenses that occur on airplanes during flight.[276] Section 3237 as it is currently written does not dictate venue for all crimes that occur on public transportation, only those that involve the use of transportation in the essential conduct elements.[277] Courts have expanded § 3237 far past what it was originally intended to govern in order to avoid dealing with the difficulties that air travel raises in criminal proceedings.[278]

While some may claim that venue in destination districts is the simple and obvious answer to a costly and complex problem, that is not the case. [279] Pinpointing where a point-in-time offense occurred is entirely possible with current aviation tracking protocol and GPS technology.[280] Implementing standardized documenting and reporting of inflight disruptions will make prosecutions more likely and venue determinations easier.[281]

Courts should refrain from following the reasoning created by the Eleventh Circuit as it has no constitutional or statutory basis. If midflight offenses are to be prosecuted in destination districts, then that is a decision to be made—and one that should be made—by legislators, not judges.[282] Unless Congress steps in and enacts a new statute or an amendment to

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[275] *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

[276] *See id.*

[277] *See* 18 U.S.C. § 3237.

[278] *See* United States v. Lozoya, 982 F.3d 648, 657 (9th Cir. 2020); United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012); United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir. 2004).

[279] *But see Breitweiser*, 357 F.3d at 1253-54.

[280] *Supra* Part IV.A.

[281] *Supra* Part IV.A.

[282] *See Lozoya*, 920 F.3d at 1241–43.

§ 3237, the only proper venue for point-in-time offenses that occur on an airplane during flight is the flyover district.[283]

[283] *See id.* at 1243.