

Interstate Conflict and Cooperation in Criminal Cases: An American Perspective

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Over the last decade, the European Union has adopted legislation that calls for the mutual recognition of arrest warrants, investigation orders, and penal judgments. These laws have aimed to strengthen the Union's response to transnational crime, and EU policymakers are currently considering legislation to further harmonize law enforcement efforts. This Article compares these developments within the EU to the U. S. legal framework on mutual recognition in criminal matters. It examines the individual, state and systemic interests that U. S. state courts have considered in deciding whether to recognize other states' judgments, warrants, or investigative actions. These competing interests have produced relatively uniform rules on extradition, but much more diverse and fragmented laws concerning the gathering of evidence, the admissibility of evidence, and the recognition of foreign penal judgments.

The Article argues that three key factors explain the diversity of U. S. legal rules in many of these areas: 1) the tradition of federalism, which values local control over criminal matters; 2) the baseline harmonization of criminal procedures under the U. S. Constitution, which guarantees a high level of procedural fairness and strengthens mutual trust among states in criminal matters; and 3) the regular intervention by the U. S. federal government in investigations and prosecutions of cases with interstate elements, which reduces the pressure on states to devise a more uniform approach. The Article concludes by examining how these insights may be useful to ongoing debates within the European Union about the direction and scope of mutual recognition in criminal matters.

I. Introduction

Over the last decade, the European Union has embarked on an ambitious program to enhance cooperation among member states in criminal cases. It has adopted directives that call for the mutual recognition of arrest warrants, evidence warrants, and penal judgments, and it is considering a number of new initiatives that aim to strengthen the Union's response to transnational crime. In support of these efforts, Union legislators have argued that the freedom of movement guaranteed by EU law has allowed cross-border crime to flourish and that law enforcement agencies must cooperate across state lines in order to address the rise in transnational crime. While legislators have stressed the need for more effective coordination among judicial and law enforcement authorities, commentators have pointed out that criminal suspects, victims and witnesses have rights and interests that may in

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some cases justify limiting member state cooperation in criminal matters.¹ The scope of mutual recognition—and how it should be balanced against other legitimate interests—remains the subject of intense debate.

As EU policymakers continue to discuss these matters, it may be helpful to examine how the criminal justice system in the United States has handled conflicts of law and requests for cooperation among the fifty states and the federal government. Although states within the United States are, unlike EU member states, not fully sovereign, they retain primary authority over criminal justice. The federal structure established by the U.S. Constitution embraces the diversity of state approaches to criminal law and criminal procedure, while at the same time setting a threshold for individual rights protection below which no state system may fall.

This Article argues that the constitutional guarantee of a minimum level of procedural fairness across the United States is a key reason why U.S. states have proven more willing to trust one another in multi-jurisdictional cases. The relative similarity of substantive criminal laws has also helped facilitate mutual recognition. These influences are particularly evident in decisions to extradite suspects, but also in some decisions to allow the admission of evidence obtained in other states and to recognize the penal judgments of other U.S. states.

At the same time, U.S. states have not adopted an entirely uniform approach to conflicts of law in criminal cases because the American tradition of federalism has fostered a strong belief in the value of local control over criminal matters. Likewise, concern about the diminution of individual rights has kept some states from recognizing foreign penal judgments or admitting evidence obtained in another state. In such cases, we see states striving to balance three key interests: state sovereignty and local control over criminal policy; individual rights; and the broader stability of the U.S. legal system as a whole. In some circumstances, such as extradition, systemic interests are more prominent while concerns about state sovereignty and individual rights are abated. As a result, we see smoother cooperation and near-automatic recognition of warrants from sister states. By contrast, questions about admissibility of evidence and the recognition of penal judgments require state courts to apply other states' law as part of their judgment about the culpability of the defendant or the legality of law enforcement actions. This brings to the fore concerns about local control over criminal policy and about individual rights. Courts are therefore less likely to defer to the laws and judgments of sister states in these matters.

The tradition of federalism and the baseline harmonization of criminal laws and procedures are important explanations for why U.S. states have felt less pressure to develop uniform rules on choice of law in multi-jurisdictional cases. But another key reason for the lack of formalized rules on mutual recognition is that the U.S. federal government regularly assumes control over cases with interstate elements, saving states from having to resolve questions about which state law governs and why. The European Union lacks such a centralized enforcement mechanism and

¹ European Criminal Policy Initiative, *A Manifesto on European Criminal Procedure Law*, 11 ZIS 430, 433–36 (2013).

therefore has found it more pressing to develop rules that promote mutual recognition in cross-border criminal cases.

One can glean three main insights from the American experience that may be useful to ongoing debates within the European Union about mutual recognition. The first insight is that an effective system of mutual recognition requires trust in the criminal justice systems of other member states. This, in turn, requires a degree of legal harmonization in order to ensure a high minimum level of procedural fairness in all member states and to narrow stark differences in penal norms. The second insight is that a federal enforcement mechanism reduces the need for mutual recognition instruments (and conversely, that uniform rules on mutual recognition may be more important where a polity lacks such centralized enforcement). And lastly, the U. S. experience shows that mutual recognition may work more smoothly in some areas than in others, depending on the relevant individual, state, and system interests at stake.

II. The U. S. Constitution, Federalism, and Criminal Law

To understand interstate conflict and cooperation in criminal cases in the United States, it is necessary first to review the division of power between state and federal authorities in criminal justice matters. In the United States, police powers are generally reserved to the states. Each of the fifty states independently enacts and enforces its own criminal laws and has its own criminal procedure rules, subject to certain constraints set by the federal Constitution. While this federal structure produces criminal statutes that often vary from jurisdiction to jurisdiction, the level of dissimilarity is significantly smaller than within EU member states, for at least two reasons. First, the English common-law tradition has provided a common basis for the development of American state criminal law frameworks, so any variation occurs against the background of this shared tradition.² Second, the Model Penal Code, designed with the aim of streamlining state criminal codes, has significantly reduced diversity in these codes in the second half of the twentieth century.³

In addition to the various state statutes, federal criminal law also affects how multi-jurisdictional cases might be handled. It is therefore helpful to examine briefly the scope and place of federal criminal law. Under the Commerce Clause of the U. S. Constitution, Congress can pass criminal laws to regulate conduct that substantially affects interstate commerce.⁴ As a result of improvements in transportation and technology in the twentieth century, much of human interaction today can be said to substantially affect interstate commerce. It has therefore proven relatively easy for Congress to justify intervention in criminal matters, and federal criminal law-

² John J. Murphy, *Revising Domestic Extradition Law*, 131 U. Pa. L. Rev. 1063, 1071 (1983).

³ *Id.* at 1072.

⁴ *United States v. Lopez*, 514 U.S. 549 (1995). Congress also has the power to create criminal law under other provisions, but these are less frequently used. Norman Abrams & Sara Sun Beale, *Federal Criminal Law and Its Enforcement* 19-21 (2005).

making has burgeoned in the second half of the twentieth century.⁵ As of 2008, Congress had enacted statutes defining more than 4,450 federal crimes.⁶

Federal prosecutions over the last decade have focused primarily on drug crimes, immigration crimes, and white-collar crimes, as well as other crimes that are deemed to harm national interests or have interstate elements.⁷ At the same time, in more than 95 % of federal prosecutions, the same conduct could also be prosecuted under state criminal laws.⁸ A key reason for choosing federal over state prosecution is that federal statutes tend to provide for significantly longer sentences.⁹ A federal prosecution may also afford to prosecutors special procedural advantages in areas ranging from wiretapping and witness cooperation to the admissibility of evidence.¹⁰ Federal intervention is likewise preferred when criminal conduct spills over state borders and requires law enforcement operations in more than one jurisdiction.¹¹ Federal prosecutions remain critical in cases with interstate elements. That said, state criminal justice systems still handle the bulk of criminal law enforcement and prosecutions in the United States. More than 98 % of prosecutions in the country occur at the state level.¹²

Like prosecutions, law enforcement is also typically handled separately by federal and state authorities. State and local law enforcement officers¹³ enforce state law, and federal law enforcement officers enforce federal law. When a case has elements that reach beyond a single jurisdiction, however, law enforcement officials from different jurisdictions may cooperate with one another based on ad hoc arrangements and, occasionally, based on more formal interstate agreements. More commonly, federal authorities may entirely take over a case that spills over state borders,¹⁴ and increasingly, local and federal agencies may join together in “multi-jurisdictional task forces.” These task forces were first created to respond to drug crimes and organized crime, but they have expanded to cover more areas, such as white-collar crime, cybercrime, and terrorism.¹⁵

Federal-state cooperation in criminal cases may occur at the request of state authorities or on the initiative of the federal government. Under U. S. principles of

⁵ American Bar Association, Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law 7* (1998) (finding that “[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970”).

⁶ John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

⁷ Dep’t of Justice, U. S. Attorneys’ Annual Statistical Report: Fiscal Year 2012, at 10, *Criminal Chart 2.2* (2012), at http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf.

⁸ John Baker, *State Police Powers and the Federalization of Local Crime*, 72 *Temp. L. Rev.* 673, 678 (1999).

⁹ Rachel Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 *Mich. L. Rev.* 519, 573-77 (2011).

¹⁰ *Id.* at 531.

¹¹ Baker, *supra* note 9, at 701.

¹² Wayne R. LaFave et al., *Considering State and Federal Criminal Justice Processes*, 1 *Crim. Proc.* § 1.2(e) (3d ed. 2013).

¹³ Police officers and prosecutors are typically employees of city or county governments, not state governments.

¹⁴ See Barkow, *supra* note 10, at 572.

¹⁵ Sandra Guerra Thompson, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 *N. C. L. Rev.* 1159 (1995); Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 *Iowa L. Rev.* 293, 297, 321-22 (2013).

federalism, the federal government may not require state authorities to join its enforcement efforts.¹⁶ The government can, however, use financial incentives to induce state governments to do so. Multi-jurisdictional task forces are therefore typically initiated, funded and operated by the federal government, although they depend heavily on the manpower of local and state law enforcement agencies.¹⁷

Joint task forces—while extremely useful in interstate cases—have been criticized by some for expanding into areas where there is no proven need for them. An example might be federal prosecutions of violent crime committed with a gun that has traveled across state lines.¹⁸ This federalization of criminal justice is seen as problematic for several reasons. First, it is said to undermine state autonomy in determining law enforcement priorities.¹⁹ This is problematic because state and local authorities are presumed to be more attuned to the needs of local communities. Federalization is also seen as suboptimal because of its high cost. Federal prosecutions are typically at least three times as expensive as equivalent state prosecutions.²⁰

Finally, federal prosecutions of cases that can be handled locally may raise concerns from the perspective of protecting individual rights. At present, states often provide more generous procedural rights to criminal defendants than the federal government does. Defendants may therefore face significantly harsher penalties in federal court, yet have narrower procedural protections than they would in an equivalent state prosecution.²¹ Likewise, under the “dual sovereignty” exception to the Double Jeopardy Clause, the federal government can prosecute a defendant for the same conduct of which the defendant has been convicted or acquitted in state court, and a state government can do the same with a defendant finally adjudged in federal court. This loophole has been used by multijurisdictional task forces to get “two bites at the apple” by prosecuting the same defendant in federal court after a state prosecution has failed (or less frequently, in state court after an unsuccessful federal prosecution). As the federal and state authorities work jointly in such operations, scholars have questioned whether the “dual sovereignty” exception should apply and have criticized the erosion of double jeopardy protections.²²

This brief overview of the American federal system reveals an important difference between the institutions that enforce criminal laws in the United States and their counterparts in the European Union. While the EU still has to rely entirely on member state authorities to investigate, prosecute and adjudicate crime, even

¹⁶ *Printz v. United States*, 521 U.S. 898, 935 (1997).

¹⁷ Thompson, *supra* note 16, at 1182–83, 1187.

¹⁸ Baker, *supra* note 9, at 682.

¹⁹ *Id.* at 686; see also Thompson, *supra* note 16, at 1183–85.

²⁰ Baker, *supra* note 9, at 689 (noting that this occurs largely because lawyers and judges are paid more in federal prosecutions).

²¹ Baker, *supra* note 9; James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 Md. L. Rev. 223 (1996); see also Logan, *supra* note 16 (noting that joint task forces frequently allow state officers to benefit from more government friendly federal procedures and to evade more demanding state standards). An important counterpoint, however, is that the availability and quality of indigent defense at the federal level are generally better than in most state jurisdictions.

²² Thompson, *supra* note 16, at 1209–10.

when crime spills across state borders, the United States can call on well-established federal institutions to respond to interstate crime. The easy availability of federal prosecution offers a possible explanation for why the U.S. has been less attentive than the EU to the need to strengthen and harmonize interstate cooperation mechanisms.

III. Criminal Procedure and Federalism

American federalism principles have also affected criminal procedure in the United States. Each of the fifty states has its own criminal procedure system, governed by rules, statutes, and a state constitution.²³ Several factors have helped to harmonize state laws, though as discussed later, important differences remain. First, the U.S. Constitution sets a minimum threshold of procedural protections that all states and the federal government must provide in criminal cases. States must all honor the right to counsel, the privilege against self-incrimination, the prohibition against unreasonable searches and seizures, the right to confront adverse witnesses, the right to a jury trial, and the right to due process, among others. Likewise, the English legal tradition, and its preference for adversarial criminal procedure, provides a common starting point for criminal procedure rules across the United States.²⁴ The Federal Rules of Criminal Procedure and the American Bar Association Standards of Criminal Justice have also served as influential models for states to follow.²⁵

A review of the history of “incorporation”—the doctrine that applied federal constitutional rights provisions to the states—helps illustrate the sources of convergence and divergence in state criminal processes. Early in American history, the Supreme Court held that the U.S. Constitution’s Bill of Rights, which contains key protections of individual rights in criminal cases, applied only to the federal government.²⁶ As a result, states remained free to experiment with their own criminal procedures, and wide variation existed among them in this respect. Beginning in the late nineteenth century, however, the Supreme Court gradually began reviewing state criminal procedures for their consistency with the U.S. Constitution.²⁷ Relying on the Due Process Clause of the Fourteenth Amendment, the Court invalidated state procedures that violated “a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.”²⁸ The Court accordingly overturned state convictions for various procedural defects, including

²³ While states are bound by the federal Constitution, the federal government is not bound by state constitutions. Federal law enforcement agents operating in a particular state therefore need to follow only federal rules, federal statutes and the U.S. Constitution. Federal prosecutors, however, must comply with the ethical rules of states in which they “engage in ... attorney’s duties.” 28 U.S.C. § 530B(a).

²⁴ LaFave et al., *supra* note 13, § 1.3(d).

²⁵ *Id.* §§ 1.3(e), (f).

²⁶ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

²⁷ *Hurtado v. California*, 110 U.S. 516, 538 (1884). See generally Tracy Meares, *What’s Wrong with Gideon*, 70 U. Chi. L. Rev. 215, 217–19 (2003).

²⁸ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

race discrimination in jury selection, failure to ensure the impartiality of the court, and failure to appoint counsel in capital cases.²⁹

In the 1960s, the Supreme Court began applying U.S. constitutional principles even more firmly to state criminal procedures.³⁰ Based on the Fourteenth Amendment, the Court required states to comply with all provisions in the Bill of Rights that were found to be “fundamental and essential to a fair trial.”³¹ Once a provision was thus “incorporated”, it was applied to all states in the same manner, producing substantial procedural uniformity across the country.³² Incorporation effectively ensured that all fifty states and the federal government afford individuals the same broad set of robust procedural rights in criminal cases.³³

While incorporation helped harmonize state criminal procedure rules, other factors have provided a counterbalance to this trend. As the U.S. Constitution sets only a minimum standard for criminal procedures, states remain free to provide more generous protection of individual rights in criminal cases. Most have chosen to do so. Starting in the late 1970s, as the U.S. Supreme Court began backing away from its criminal procedure activism, a number of state courts began interpreting their own state constitutions to provide broader protections to criminal defendants than were available under the federal Constitution.³⁴

This “New Federalism” movement was in part a reaction to the Supreme Court’s increasingly conservative interpretation of the federal Constitution and in part the product of textual differences between state and federal Constitutions.³⁵ It also reflects the influence of federalism and democracy and of the notion that criminal procedures should reflect the preferences of local communities. On this view, diversity and experimentation are welcome because they help legal systems learn from one another and improve.

The “New Federalism” influence over criminal procedure has only grown over time, so that today, state constitutions often offer more generous protections to criminal defendants in a range of areas—from search and seizure, to interrogations, to the right to counsel, to double jeopardy.³⁶ To the extent that state law is more generous, its protections generally do not apply in prosecutions at the federal

²⁹ Meares, *supra* note 28, at 218–19 (citing cases).

³⁰ *Id.* at 221–24; *see also* *Duncan v. Louisiana*, 391 U.S. 145, 147–49 (1968) (briefly reviewing the history of incorporation).

³¹ *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

³² *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³³ These include: the right to be free from unreasonable search and seizure, *Wolf v. Colorado*, 338 U.S. 25 (1949); *Mapp v. Ohio*, 367 U.S. 643 (1961); the protection against double jeopardy, *Benton v. Maryland*, 395 U.S. 784 (1969); the privilege against self-incrimination, *Malloy v. Hogan*, 378 U.S. 1 (1964); the right to a speedy and public trial, *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *In re Oliver*, 333 U.S. 257 (1948); the right to a trial by impartial jury, *Duncan v. Louisiana*, 391 U.S. 145 (1968); the right to be “informed of the nature and cause of the accusation,” *In re Oliver*, 333 U.S. 257 (1948); the right to confront adverse witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965); the right “to have compulsory process for obtaining witnesses in [the defendant’s] favor,” *Washington v. Texas*, 388 U.S. 14 (1967); the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); and the ban on “cruel and unusual punishments,” *Robinson v. California*, 370 U.S. 660 (1962).

³⁴ *See, e.g.*, *Diehm, supra* note 22, at 235–38.

³⁵ *Id.*

³⁶ *Id.* at 238–42.

level.³⁷ Likewise, when investigative activity occurs in one state, but trial takes place in another, the forum court is not required to honor the rights provided under another state's law. As "New Federalism" diversified state criminal procedures, conflicts of law became more common in multi-jurisdictional cases. The effect that this diversification has had on interstate cooperation in criminal cases is discussed below in Part IV.

While American state criminal procedures can aptly be characterized as varied, one should not overestimate their dissimilarity, even after the rise of "New Federalism." State courts can be confident that other states' criminal justice systems will at least comply with baseline constitutional requirements. State courts can therefore more comfortably recognize the public acts and judgments of sister states.³⁸

Criminal procedures of EU member states are significantly more diverse, for several reasons. Some EU criminal procedures follow the inquisitorial, civil-law model, while others belong to the adversarial, common-law model. Within the civil-law model, too, differences are prominent. Given this heterogeneity, it is likely to be more difficult for EU member states to find a baseline of robust procedural protections on which all can agree and which all can smoothly integrate into their own domestic orders. It is true that EU member states are subject to the European Convention on Human Rights, and it establishes a threshold of procedural rights that all member states must provide. But as it stands, the Convention's protections are seen as insufficient to support mutual trust and mutual recognition among EU member states, in part because "compliance levels are far from uniform and enforcement mechanisms are weak."³⁹ For that reason, many commentators and policymakers have emphasized the need for EU legislation to harmonize national criminal procedures to a greater degree—a suggestion that remains, however, deeply controversial among EU legislators themselves.⁴⁰ The difficulty in reconciling procedures is compounded by significant diversity in the underlying criminal laws, which further challenges mutual recognition.⁴¹

³⁷ See, e.g., John B. Corr, *State Searches, Federal Cases, and Choice of Law: Just a Little Respect*, 23 Pepp. L. Rev. 31, 39–40 (1995) (noting that federal courts tend to apply federal, rather than state law when there is a conflict between the two).

³⁸ See, e.g., *Biddinger v. Commissioner of Police*, 245 U.S. 128, 133 (1917).

³⁹ Jacqueline Hodgson, *Safeguarding Suspects' Rights in Europe: A Comparative Perspective*, 14 New Crim. L. Rev. 611, 618 (2011); see also *Europäischer Haftbefehl*, 113 BVerfGE 273, para. 120 (2005) ("[T]he existence of an all-European standard of human rights protection established by the European Convention for the Protection of Human Rights and Fundamental Freedoms do not, however, justify the assumption that the rule-of-law structures are synchronised between the Member States of the European Union as regards substantive law and that a corresponding examination at the national level on a case-by-case basis is therefore superfluous.").

⁴⁰ See, e.g., Cian C. Murphy, *The European Evidence Warrant: Mutual Recognition and Mutual (Dis)Trust?*, in *Crime within the Area of Freedom, Security and Justice: A European Public Order 224, 239–48* (Christina Eckes & Theodore Konstadinides eds. 2011).

⁴¹ See, e.g., Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, 43 Common Mkt. L. Rev. 1277, 1278, 1287, 1309–10 (2006).

IV. Mutual Recognition and Conflicts of Law in Criminal Cases

The diversity that does exist in U.S. state criminal laws and procedures has two key advantages: 1) it allows for local control over criminal policy, enhancing its democratic legitimacy; and 2) it provides a useful testing ground for the effectiveness of different rules. But variation has a downside, too. In multi-jurisdictional cases, it produces friction and inefficiency. It breeds costly and time-consuming litigation about choice of law. In some cases, it leads states to refuse to cooperate altogether and frustrates efforts to bring criminal suspects to justice.

This part examines how state authorities in the United States have responded to conflicts of law in multi-jurisdictional cases—specifically, how they decide whether to honor public acts and judgments of sister states, in areas such as extradition, admissibility of evidence, and the use of prior convictions to enhance punishment. With respect to extradition, the Constitution, federal statutes, and uniform laws call for near-automatic mutual recognition of extradition warrants issued by other states.⁴² Yet in the other two areas—the admissibility of evidence obtained in another state and the use of convictions from another state to enhance punishment—no constitutional mandate obliges state courts to honor decisions of a sister state. Courts may balance concerns about comity, efficiency, and uniformity against respect for state sovereignty and individual rights on a case-by-case basis, or they may adopt a categorical approach to conflicts of law. As states are not bound by a constitutional provision or a uniform law, their approaches differ considerably.

1. Extradition and Conflicts of Law

Extradition, also known as interstate rendition, allows a state to obtain custody of a suspect who is found in a foreign state. The Extradition Clause of the U.S. Constitution governs the process and provides that:

*A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.*⁴³

While the Clause does not provide a specific procedure for extradition, in 1793, Congress passed the federal Extradition Act, which added several requirements to the process.⁴⁴

The text of the Clause suggests that extradition should be a mandatory and near-automatic process. Yet for much of U.S. history, this was not so. At least until the early twentieth century, state statutes on extradition were “in distressing variation.”⁴⁵ Extradition proceedings were often disjointed and cumbersome. Speaking of an

⁴² See *infra* Section IV.1.

⁴³ U.S. Constitution art. IV, § 2, cl. 2.

⁴⁴ 18 U. S. C. § 3182.

⁴⁵ Fred Somkin, *The Strange Career of Fugitivity in the History of Interstate Extradition*, 1984 Utah L. Rev. 511, 524 (citing Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the 32d Annual Meeting 365 (1922)).

extradition proceeding that involved “four writs of habeas corpus, ...a conflict of jurisdiction between state and federal officials, ...four extradition warrants, one injunction, one appeal, and one contempt proceeding,” Roscoe Pound argued in 1930 that “[n]othing could illustrate better the extreme decentralization, the want of organization or cooperation, the overgrowth of checks and hindrances, and the hypertrophy of procedure which embarrass the administration of criminal justice in the economically unified land of today.”⁴⁶

Several factors help explain the disjointed nature of extradition proceedings before the mid-twentieth century. First, crime was mainly local, so multi-jurisdictional cases rarely arose, and there was little pressure to streamline the process. Second, both criminal laws and criminal procedures varied significantly from state to state, making states less likely to trust one another in penal matters.⁴⁷ Before the incorporation doctrine made state criminal procedure subject to federal constitutional mandates, for example, governors and state courts refused to extradite in some cases on the grounds that the fugitive suspects would be subject to “discriminatory application of the trial process, threatened civil rights violations—including the ultimate violation of lynching—and poor prison conditions” in the demanding state.⁴⁸ This seeming defiance of the Extradition Clause occurred in part because the Supreme Court was slow to establish concrete and firm extradition requirements. Even when the Court did lay out extradition rules, it did not always provide meaningful enforcement mechanisms.⁴⁹

By the late twentieth century, however, the process of extradition was transformed, as a result of three key developments: 1) clearer and firmer interpretation of the Extradition Clause by the Supreme Court; 2) the adoption of the Uniform Criminal Extradition Act (UCEA) by the vast majority of states; and 3) the application of federal constitutional criminal procedural standards to all states.⁵⁰ The Supreme Court issued a number of decisions in which it interpreted the Extradition Clause expansively and limited the grounds on which states could resist extradition requests. The UCEA further clarified extradition requirements and streamlined the process. Finally, the convergence of state criminal laws and procedures eased extradition by building up mutual trust among states. As a result of these developments, extradition today has become a near-automatic proceeding in which legal challenges succeed only in the most extraordinary cases.

The first step in an extradition proceeding is for the demanding state to send a request to the governor of the state in which the suspect is found. For a long time, governors exercised a measure of discretion in deciding whether to approve the request for extradition. In 1861, the Supreme Court held that governors from asylum states had a “moral duty” to render fugitives to the demanding state,⁵¹ but

⁴⁶ Roscoe Pound, *Criminal Justice in America* 175 (1930), cited in Somkin, *supra* note 46, at 526-27.

⁴⁷ Murphy, *supra* note 3, at 1068-76.

⁴⁸ *Id.* at 1074.

⁴⁹ See *Kentucky v. Dennison*, 24 How. 66, 106 (1861); see also Somkin, *supra* note 46, at 514.

⁵⁰ Uniform Criminal Extradition Act, 11 U. L. A. 93.

⁵¹ *Kentucky v. Dennison*, 24 How. 66, 106 (1861).

the Court did not compel governors to comply with this duty until 1987.⁵² Therefore, until that time, governors occasionally used their discretion to deny extradition requests for a variety of reasons—for example, where the person sought had been a law-abiding citizen in the asylum state for a number of years; where the crime charged did not constitute an offense in the asylum state; where the motive for extradition was improper, such as the settlement of a private debt or political retaliation; where a fair trial could not be assured in the demanding state; or where the punishment to be imposed was seen as too draconian.⁵³

In *Puerto Rico v. Branstad*, the Supreme Court eliminated gubernatorial discretion over extradition requests for fugitives, holding that the demanding state may petition a court for mandamus to compel governors to render the fugitive.⁵⁴ Yet there remain two areas in which governors still exercise some discretion over rendition. The first is that of “nonfugitive” cases—where the wanted suspect was not present in the demanding state when the crime occurred (in other words, the suspect is wanted by the demanding state for a crime committed on the territory of another state, because the effects of the crime were felt on the territory of the demanding state). In those circumstances, extradition is not constitutionally mandated, but it is permitted under the Uniform Criminal Extradition Act. The second situation in which governors may still refuse extradition is when the accused is undergoing prosecution in the asylum state.⁵⁵ The Supreme Court has emphasized that states’ “duty to surrender is not absolute and unqualified” in these circumstances; if the asylum state wishes to enforce its laws against the suspect, “the demands of those laws may first be satisfied.”⁵⁶ Outside those two areas, however, neither governors nor courts of the asylum state have any meaningful discretion to refuse extradition.

Once the governor of the asylum state receives an extradition request from the demanding state and certifies that the formalities required under the UCEA are met, he or she issues a rendition warrant. At that point, a fugitive may petition the courts of the asylum state for a writ of habeas corpus to deny the extradition and to

⁵² *Puerto Rico v. Branstad*, 483 U.S. 219 (1987) (holding that the demanding state may petition for writ of mandamus to compel governor of asylum state to provide extradition). Until *Branstad*, “no demanding state ha[d] successfully sought to use mandamus to compel extradition, even when there was a refusal of a legally sufficient extradition request.” Leslie W. Abramson, *Extradition in America: Of Uniform Acts and Governmental Discretion*, 33 *Baylor L. Rev.* 793, 803 (1981).

⁵³ *State of S. Dakota v. Brown*, 20 Cal. 3d 765, 779 (1978) (“It would be a harsh rule that stripped the Governor of all power to deny extradition in a case in which, for example, the Governor is satisfied that a fugitive...has established himself as a worthy-law abiding citizen, or in which his physical safety or right to a fair trial cannot be assured in the demanding state, or the offense charged does not constitute a crime in California.”); *State ex rel. Nisbett v. Toole*, 72 N. W. 53 (Minn. 1897) (“We all know as a matter of fact that governors do exercise a discretion in such cases, and if they are satisfied that the demand is made for some ulterior and improper purpose—as, for example, the collection of a private debt—they refuse to issue a warrant”); see also *Kujala v. Headley*, 225 N. W.2d 25 (Neb. 1975). See generally *Motive or Ulterior Purpose of Officials Demanding or Granting Extradition as Proper Subject of Inquiry*, 94 A.L.R. 1493; Jay P. Dinan, *Puerto Rico v. Branstad: The End of Gubernatorial Discretion in Extradition Proceedings*, 19 U. Tol. L. Rev. 649, 673-74 (1988).

⁵⁴ 483 U.S. 219 (1987).

⁵⁵ National Association of Extradition Officials, *National Manual on Extradition and Interstate Rendition* 53 (2009) [hereinafter *Extradition Manual*].

⁵⁶ *Taylor v. Taintor*, 83 U.S. 366, 371 (1872).

release him. In *Michigan v. Doran*, the Supreme Court held that, under the Extradition Clause, the habeas court can only determine four narrow issues:

- (a) whether the extradition documents, on their face, are in order;
- (b) whether the petitioner has been charged with a crime in the demanding state;
- (c) whether the petitioner is the person named in the request for extradition; and
- (d) whether the petitioner is a fugitive.⁵⁷

These inquiries are supposed to be minimal and not to delve into the merits of the case or the procedures of the demanding state. To determine that the extradition documents are in order, the court will look at them in their totality “to determine if the essential contents are present” and will disregard minor clerical errors or inconsistencies.⁵⁸ In deciding the second issue—whether a person is “charged with a crime”—courts typically examine merely whether the substance of the criminal charges appears in the extradition documents (for example, in a copy of the complaint, indictment or information).⁵⁹ Next, to determine the identity of the petitioner, the court confirms, through photographs or fingerprints, that the petitioner is the person named in the extradition request.⁶⁰ Finally, to verify whether the person is a fugitive, the court considers whether the person was in the demanding state at the time the alleged offense was committed and at some point left the demanding state.⁶¹

Asylum state courts are not supposed to stray outside the four narrow issues during the habeas proceeding. Critically, they must not consider the question of the petitioner’s guilt or innocence or any legal defenses to the charges (e.g., alibi, insanity, or the expiration of the statute of limitations).⁶² Instead, these questions must be left for the courts of the demanding state to resolve. Asylum courts must also refrain from inquiring into the factual sufficiency of the evidence supporting the arrest warrant.⁶³ In *California v. Superior Court of California*, the Supreme Court noted that if one were to require courts to engage in such an inquiry, this would “be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the States and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and ... there is nothing in the letter or the spirit of that instrument which requires or permits its performance.”⁶⁴

While the majority of lower courts have read the Supreme Court’s recent decisions to preclude any review of the probable cause determination supporting the extradition warrant, a few courts and commentators have emphasized that the

⁵⁷ *Michigan v. Doran*, 439 U.S. 282, 289 (1978).

⁵⁸ Extradition Manual, *supra* note 56, at 64–65.

⁵⁹ *Id.* at 63–64.

⁶⁰ *Id.* at 62.

⁶¹ *Doran*, 439 U.S. at 286–87.

⁶² E.g., *Biddinger v. Police Comr.*, 245 U.S. 128, 135 (1917); *Pacileo v. Walker*, 449 U.S. 86, 87–88 (1980).

⁶³ The Supreme Court has emphasized the limited nature of the habeas inquiry even in cases where the evidence suggested a possible abuse of the criminal process against the petitioners. *California v. Superior Court*, 482 U.S. 400, 412 (1987) (“If the [habeas petitioners] are correct, they are not only innocent of the charges made against them, but also victims of a possible abuse of the criminal process. But, under the Extradition Act, it is for the Louisiana courts to do justice in this case, not the California courts.”).

⁶⁴ *Pierce v. Creecy*, 210 U.S. 387, 405 (1908), *quoted with approval in Superior Court*, 482 U.S. at 411.

Fourth Amendment requires an inquiry into whether the extradition warrant was the product of a neutral judicial determination of probable cause.⁶⁵ Under both of these interpretations, once it is established that a neutral magistrate from the demanding state has determined that probable cause exists, the Extradition Clause “bars independent inquiries in the asylum state regarding probable cause.”⁶⁶

Likewise, asylum states are not supposed to examine charges of constitutional violations that were allegedly committed⁶⁷ or are about to be committed⁶⁸ by the demanding state in the case. Such allegations are, again, the province of the courts in the demanding state.

In short, the claims that fugitives can make to challenge their extradition are sharply circumscribed, particularly since the Court’s decisions in *Doran* and *Bransted*. In a few states, fugitives have been able to contest extradition on the grounds that the extradition hearing itself violated constitutional standards—e.g., because the petitioner was mentally incompetent and could not understand the nature of the proceedings or because he was deprived of the assistance of counsel.⁶⁹ Challenges to the constitutionality or fairness of the demanding state’s laws, on the other hand, have repeatedly failed.

The justifications for the summary nature of extradition proceedings are several. First, the text of the Extradition Clause suggests that extradition is mandatory. Second, a nondiscretionary process is more efficient in capturing and prosecuting fugitives from justice, which is another goal of the Extradition Clause.⁷⁰ Third, the Clause aims to affirm states’ mutual respect for one another’s judicial acts and their commitment to the Union.⁷¹ As the Supreme Court has explained, the Clause was adopted to advance “important national objectives of a newly developing country

⁶⁵ Wayne R. LaFave, *The Exclusionary Rule and Other Remedies: Extradition Proceedings*, 1 Search & Seizure § 1.9(c) (discussing the case law and arguing that a more probing inquiry is consistent with the demands of the Fourth Amendment).

⁶⁶ *Michigan v. Doran*, 439 U.S. 282, 290 (1978); see also *In re Doucette*, 676 N.E.2d 1169, 1170 (Mass. App. Ct. 1997); *Quinones v. Commonwealth*, 671 N.E.2d 1225, 1226 (Mass. 1996) (no further judicial inquiry permitted once governor has acted on request for extradition based on judicial determination of probable cause by demanding state).

⁶⁷ *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 151-55 (1998) (reversing state court’s decision to deny extradition, even where state court had concluded that the petitioner was not a “fugitive” because he had fled under the belief that Ohio prison authorities would subject him to physical harm; holding that such determinations were outside the purview of asylum state courts); *Singleton v. Adams*, 298 N.W.2d 369, 370 (Neb. 1980) (“Generally, a claim by a petitioner that the demanding state has violated his constitutional right is a matter to be determined by the courts of the demanding state.”); *In re Gay*, 548 N.E.2d 879, 882-883 (Mass. 1990) (asylum state courts may not rule on violation of rendition procedures by demanding state); *Wise v. State*, 251 N.W.2d 373, 376 (Neb. 1977) (extradition proceedings are not to be “used as a vehicle to challenge acts undertaken by a sister state to enforce its criminal laws”); *State v. Cox*, 306 So.2d 156, 160 (Fla. Dist. Ct. App. 1974) (claims that speedy trial rights were violated may not be considered during extradition proceeding); *Hutson v. Stoner*, 257 S.E.2d 539, 540-541 (Ga. 1979) (due process questions were to be decided by courts in the demanding state); *Stelbacky v. State*, 22 S.W.3d 583, 587 (Tex. App. 2000) (question of whether double jeopardy operates to bar extradition is an issue to be determined by courts of the demanding state).

⁶⁸ See *Sweeney v. Woodall*, 344 U.S. 86 (1952).

⁶⁹ E.g., *State v. Patton*, 176 P.3d 151, 160 (Kan. 2008); *In re Hinnant*, 678 N.E.2d 1314, 1321 (Mass. 1997); *People ex rel. Fusco v. Sera*, 472 N.Y.S.2d 564, 567 (N.Y. Sup. Ct. 1984); *Welkes v. Brennan*, 433 N.Y.S.2d 817 (N.Y. App. Div. 1980); *Oliver v. Barrett*, 500 S.E. 2d 908, 910 (Ga. 1998); *Kostic v. Smedley*, 522 P.2d 535, 539 (Alaska 1974); *Ex parte Potter*, 21 S.W.3d 290, 294-95 (Tex. Crim. App. 2000).

⁷⁰ *Michigan v. Doran*, 439 U.S. 282, 287 (1978).

⁷¹ *Id.*

striving to foster national unity.”⁷² Courts in the asylum state are thus expected to trust the demanding state’s courts to address procedural challenges—particularly since all states must follow minimum standards of fairness under the U. S. Constitution. As the Supreme Court explained, asylum states can rest easy because “they are not sending [the fugitive] for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, *still under the protection of the Federal Constitution* but in the manner provided by the State against the laws of which it is charged that he has offended.”⁷³ For all these reasons, extradition has become a summary and almost wholly nondiscretionary process in the United States.

The EU legal framework on extradition has been moving in the same general direction: towards a more judicial, streamlined and nondiscretionary approach. In 2002, the European Union adopted legislation on the European Arrest Warrant (EAW) in an effort to simplify and speed up the process of extraditing suspects between member states.⁷⁴ The EAW eliminated political discretion over extradition decisions, abolished the dual criminality requirement for thirty-two serious offenses, sharply limited other grounds on which extradition could be refused, and set strict deadlines for steps in the process.⁷⁵

The grounds for refusal under the EAW framework nonetheless remain broader than those available under U.S. extradition law. Member states can refuse to surrender a fugitive in a number of circumstances that fall either outside the ambit of the EAW or under an exception inscribed in the EAW Framework Decision. For example, for most offenses (other than thirty-two specifically listed serious offenses), member states can still refuse to extradite on the grounds that the charged conduct does not constitute an offense under their own criminal law.⁷⁶ Member states may also refuse to surrender a person where the charged offense is minor and therefore not covered by the EAW.⁷⁷ The duty to surrender also does not apply if the offense is covered by an amnesty in the asylum state, if the person sought is below the age of criminal responsibility in that state, or if the person has already been convicted by another member state for the same acts.⁷⁸ Unlike in the United States, double jeopardy and the expiration of the statute of limitations are both permissible reasons for refusing extradition.⁷⁹ The legislation also allows the asylum state to refuse

⁷² *Id.* at 288.

⁷³ *Biddinger v. Commissioner of Police*, 245 U.S. 128, 133 (1917) (emphasis added).

⁷⁴ Framework Decision 2002/584/JHA, Article 2(4). Although conceived much earlier, the legislation became high priority after the 9/11 terrorist attacks. *E.g.*, Massimo Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, 15 *Eur. L. J.* 70, 72 (2009).

⁷⁵ Framework Decision 2002/584/JHA.

⁷⁶ *Id.* art. 2(4).

⁷⁷ *Id.* art. 2(1) (noting that the EAW applies only to acts punishable by a maximum period of at least 12 months). Penalties vary greatly from one state to another, however, so in some countries, a maximum penalty of one year is possible for offenses that would be considered minor in other countries. European Criminal Policy Initiative, *supra* note 2, at 438.

⁷⁸ Framework Decision 2002/584/JHA, art. 3.

⁷⁹ *Id.* arts. 3, 4(3), 4(5) (executing state must refuse extradition where the person was already convicted for the same act; it may furthermore refuse to surrender the person where it has chosen not to prosecute or has passed judgment on the requested person for the same act, or where a third state has done so); *id.* Art. 4(4) (executing state may refuse surrender where prosecution is time barred under the executing state’s law).

extradition where the wanted person was tried in absentia and was not adequately informed of the trial.⁸⁰

The Framework Decision does not expressly allow member states to deny execution of an EAW where they believe that surrender may risk violations of a person's fundamental rights in the demanding state. Despite the absence of an express provision to this effect, many member states have included a "human rights exception" in their implementing legislation, even though the legality of such legislation remains in dispute.⁸¹ In two recent cases, the Court of Justice of the European Union refused to resolve the issue of whether an asylum state could invoke fundamental human rights as a ground for refusing to enforce a European Arrest Warrant, deciding the cases on narrower grounds.⁸² The Court nonetheless appeared sceptical of a broad human rights exception and emphasized the importance of mutual trust and cooperation among member states.⁸³

In conclusion, while the EU framework still allows states to invoke an array of grounds for refusing an extradition request, the purpose of the European Arrest Warrant legislation is similar to that of the U.S. Extradition Clause—to foster unity and mutual trust among member states and to promote effective law enforcement in multijurisdictional cases.

2. Conflicts of Law in the Gathering and Admission of Evidence

When crime and law enforcement activity cross state or national borders, courts may also have to decide which law governs the admissibility of evidence obtained in another jurisdiction. In the United States, the likelihood that conflicts of law will arise in such situations is to some degree reduced by the application of the federal Constitution to state investigative activity. The Fourth, Fifth, Sixth, and Fourteenth Amendments of the Constitution require that both state and federal officers comply with certain rules in conducting searches and seizures and interrogations. When officers violate these requirements, courts may suppress the evidence obtained in order to deter police misconduct.⁸⁴ Thus if evidence is obtained in violation of the U.S. Constitution, its admissibility will be decided pursuant to federal constitutional rules, regardless of the state in which the evidence was gathered and regardless which officers—state or federal—gathered it.

As discussed in Part II, states often have criminal procedure rules that are more demanding than those of the federal Constitution. In some cases, exclusion might not be warranted under the U.S. Constitution, but it might nonetheless be required under stricter state provisions. A conflict of law may arise if one state's law requires exclusion in such situations, while another state's law does not. A state

⁸⁰ *Id.* art. 5(1), amended by Framework Decision 2009/299/JHA, art. 2.

⁸¹ See, e.g., Hodgson, *supra* note, at 625-26; Mitsilegas, *supra* note 42, at 1293.

⁸² Radu, Case C-396/11, Judgment of the Court (Grand Chamber) of 29 January 2013; Melloni, C-399/11, Judgment of the Court (Grand Chamber) of 26 February 2013.

⁸³ Radu, Case C-396/11; Melloni, Case C-399/11 (holding that states may not refuse to execute an EAW on the grounds that executing the warrant would violate their own Constitution).

⁸⁴ Mapp v. Ohio, 367 U.S. 643 (1961).

court would then have to decide whether to follow the standards of its own jurisdiction or of the jurisdiction where the evidence was gathered. In the process, the court would balance systemic interests, such as comity and legal predictability, against individual rights and state interests in setting and enforcing standards of police conduct.

The conflict-of-law problems involved in decisions about the admissibility of evidence may vary based on the location of the law enforcement activities (forum state or foreign state), the law allegedly violated by law enforcement officers (the law of the forum or the law of the foreign state), and the law enforcement personnel involved (forum state officers or foreign state officers⁸⁵). The different possible configurations are illustrated in Table 1 below. (The Table does not address situations in which officers from more than one jurisdiction work together in collecting the evidence, although this possibility is noted in the discussion). Conflicts Type E and F, where foreign officers, operating in a foreign state, violate either that state’s rules or the forum state’s rules, appear to be most common.

Table 1. Conflict-of-Law Evidence Admissibility Scenarios

	Forum State Conduct <i>Violation of Forum State Rules</i>	Forum State Conduct <i>Violation of Foreign State Rules</i>	Foreign State Conduct <i>Violation of Foreign State Rules</i>	Foreign State Conduct <i>Violation of Forum State Rules</i>
Forum Officers	No conflict Forum Law Applies	No conflict Forum Law Applies	Conflict Type A	Conflict Type B
Foreign Officers	Conflict Type C	Conflict Type D	Conflict Type E	Conflict Type F

The Constitution offers little guidance on how to resolve conflicts between state laws in such cases. At first glance, the Full Faith and Credit Clause may appear to require recognition of another state’s public acts—including acts by its law enforcement officers—and judicial proceedings. But courts have interpreted the Clause to mean that it “only requires a state whose law is to be applied to a particular issue to have some legitimate interest in the manner” and this interest need not be “superior to the interests of other jurisdictions.”⁸⁶

One commentator has argued that the Full Faith and Credit Clause may be relevant in certain conflicts of law cases, however, where applying forum law would reflect hostility toward the law of a sister state.⁸⁷ This could occur, for example, where officers from the forum state travel to another state and conduct an investigation in violation of that foreign state’s laws (Conflict Type A).⁸⁸ In that situation, the Full Faith and Credit Clause may require the forum state court to apply the law of

⁸⁵ Federal officers are typically treated as foreign state officers for purposes of conflicts analysis.

⁸⁶ John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 Geo. L.J. 1217, 1224 (1985). The Full Faith and Credit Clause provides that “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state ...” U.S. Const. art. IV § 1.

⁸⁷ *Id.* at 1227.

⁸⁸ *Id.*

the state where the investigation occurred.⁸⁹ The argument that the Full Faith and Credit Clause should encourage state courts to defer to another state's law in such cases emphasizes the importance of "binding the states together in a cooperative federal venture."⁹⁰ When forum state law enforcement officers deliberately disregard the laws of a sister state while operating on that state's territory, they undercut the idea of a cooperative federal venture. Judicial deference to the foreign law in the same case can help restore the balance in the relationship and reaffirm a state's commitment to interstate cooperation.

Other commentators have disagreed with this analysis of the Full Faith and Credit Clause. They have emphasized the benefits of diverse approaches to criminal procedure and conflicts of law.⁹¹ They have also expressed the concern that a more robust interpretation of the Full Faith and Credit Clause would lead states to apply foreign law in a near-automatic fashion, and this would discourage them from engaging constructively with the rationales behind the laws of other jurisdictions.⁹² This would in turn stunt the development of the law through experimentation and emulation.

Whatever the merits of these arguments concerning the reach of the Full Faith and Credit Clause, the Supreme Court has not addressed the question. Decisions by lower state and federal courts suggest that these courts do not regard themselves as bound by the Full Faith and Credit Clause in determining which law to apply with respect to evidence obtained in a foreign state. In the absence of a uniform rule mandated by the Constitution, state courts have used the common-law method to develop three approaches to decide whether evidence collected in another state, in violation of either forum or foreign state law, should be admitted.⁹³

Under the first and most straightforward approach, states follow what they claim is the "traditional" choice-of-law rule. This provides that the law of the forum state applies to procedural and evidentiary issues. In other words, these states apply their own law to evidence obtained in a foreign state.⁹⁴ It does not matter where or by whom the evidence is obtained. If the rule at issue is procedural or evidentiary, the law of the forum applies. The main advantage of this rule is its clarity.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1225.

⁹¹ Mary Jane Morrison, *Choice of Law for Unlawful Searches*, 41 Okla. L. Rev. 579, 601 ("The result would be a great deal of pressure for uniformity in exclusionary rules and policies, instead of an environment that encourages diversity by accommodating differing experiences and values within a sprawling nation.").

⁹² *See id.*

⁹³ For a somewhat different categorization of the approaches, see, for example, 1 Wayne R. LaFare, *Search and Seizure* § 1.5(c), at 175–186 (4th ed. 2004).

⁹⁴ *State v. Briggs*, 756 A.2d 731, 735–36 (R.I. 2000); *State v. Lynch*, 969 P.2d 920 (Mont. 1998); *Davidson v. State*, 25 S. W.3d 183 (Tex. Crim. App. 2000); *see also* *People v. Saiken*, 275 N.E.2d 381, 385 (Ill. 1971) (noting that under traditional conflict of law principles, evidentiary issues are resolved under the law of the forum; but even under interest analysis in the case at hand, the law of the forum would apply); *Commonwealth v. Miller*, 15 Mass. L. Rptr. 11 (Mass. Super. 2002) (holding that procedural rule of the forum applies, but noting that result would be the same under interest-based analysis or exclusionary rule analysis); *People v. Price*, 431 N.E.2d 267 (N.Y. 1981) (holding, without elaboration, that the law of the forum applies to legality of search warrant); *Stidham v. State*, 608 N.E.2d 699, 700 (Ind. 1993) (applying Indiana law because the central question was the admissibility of evidence in Indiana prosecution).

Yet the “law of the forum” rule has been rejected by a number of courts and commentators, for various reasons. Some courts have noted, for example, that the rule is not as clear as it might appear at first because the distinction between substantive and procedural rules is often blurry. For example, while the exclusionary rule may be considered evidentiary or procedural, the law that governs the underlying police conduct (the law on searches and seizures) may be regarded as substantive. Some courts therefore consider the question about excluding unlawfully obtained evidence to be a matter of “substantive law,” while others treat it as procedural.⁹⁵

In addition, some courts have found the “law of the forum” rule incompatible with the purposes behind the exclusion of evidence. Where foreign agents gather the evidence in a foreign state, they would have no reason to expect that they need to comply with the law of another jurisdiction and even less reason to know what the law of that jurisdiction requires. Some courts have therefore reasoned that because foreign officers cannot reasonably take steps to prevent the violation, they cannot be deterred.⁹⁶ Applying the law of the forum in such circumstances appears at odds with a key purpose of the exclusionary rule—detering official misconduct. More broadly, the “law of the forum” approach is criticized for being too rigid and too mechanical and for discouraging judges from reviewing the reasons behind the choice of one law over another.⁹⁷

In response to these concerns, one commentator has proposed that courts follow the “situs law” rule—in other words, that they apply the law of the state where the investigation occurred.⁹⁸ This approach would be clear and predictable, and it would be consistent with the concern behind the Full Faith and Credit Clause that states defer to one another’s laws in the spirit of a “cooperative federal venture.”⁹⁹ It would also be generally consistent with the deterrence rationale of the exclusionary rule. When a criminal investigation occurs in another state, and the only officers involved were from that state, they can only be reasonably expected to comply with their own state law and not with the forum law.¹⁰⁰ The situs law rule reflects this expectation. At the same time, the situs law approach has been criticized for being too mechanical and for ignoring legitimate interests that the forum may have in applying its own law—to discipline officers, to vindicate individual rights, to protect the coherence of its procedures, or to ensure effective prosecution of a crime committed on its territory.¹⁰¹

Whatever its merits, the situs law approach has not been adopted by state courts.¹⁰² Some courts have reached the same outcome and used a similar rationale

⁹⁵ See, e.g., *Vega v. State*, 84 S.W.3d 613, 616 (Tex. Crim. App. 2002) (en banc); *Gonzalez v. State*, 45 S.W.3d 101, 105–06 (Tex. Crim. App. 2001).

⁹⁶ E.g., *People v. Blair*, 602 P.2d 738, 748 (Cal. 1979).

⁹⁷ Morrison, *supra* note 92, at 585.

⁹⁸ Corr, *supra* note 87, at 1234.

⁹⁹ *Id.* at 1225, 1234.

¹⁰⁰ *Id.* at 1234.

¹⁰¹ See, e.g., Morrison, *supra* note 92, at 585.

¹⁰² Some federal courts have adopted the situs law approach when resolving conflicts resulting from different interpretations of federal laws by federal circuit courts. See *U. S. v. Ozuna*, 129 F. Supp.2d 1345, 1354 (S.D. Fla. 2001).

as the situs law approach, but they have done so under an exclusionary rule approach, as discussed later in the Section.¹⁰³ Other courts, concerned with vindicating individual rights under the law of the forum, have rejected the application of situs law in situations where forum law is more protective.¹⁰⁴

Given the drawbacks of the forum and situs rules, a number of states have opted for another approach—interest-based analysis—to decide which law applies.¹⁰⁵ Courts have thus examined a number of factors to determine which jurisdiction has the greater interest in applying its law. For example, courts may conclude that the state where the investigative activity occurs has the greater interest in regulating the conduct of its officers and that its rules should therefore govern the admissibility of the evidence.

An example is *Commonwealth v. Sanchez*, a case from Pennsylvania, in which information of illegal activity was originally obtained by a California police officer after a detection dog had sniffed a package about to be mailed from California.¹⁰⁶ Based on this information, Pennsylvania police obtained a search warrant, resulting in the arrest and conviction in Pennsylvania of the addressee of the package. Under California law (as under federal law), a dog sniff is not considered a search and therefore need not be supported by individualized suspicion. Pennsylvania law, however, provides greater privacy protections in this instance and requires that a dog sniff be supported by reasonable suspicion.¹⁰⁷ Although the warrantless dog sniff might have been illegal—and might have led to the suppression of the evidence—had it occurred in Pennsylvania, the Pennsylvania Supreme Court applied California law and concluded that the evidence was admissible.¹⁰⁸ The court reasoned that California possessed the greater interest in the validity of the dog sniff in question, since it took place there and involved California police officers. The court explained that, while Pennsylvania also has an interest in protecting its citizens from police misconduct, the courts of Pennsylvania have no power to control the activities of a sister state’s officers or to punish conduct that occurs within that sister state.¹⁰⁹ Since California had the greater interest in controlling the conduct of its own officers on its own territory, California law applied.¹¹⁰

Interest analysis, however, rests on a consideration of numerous intangible factors and is therefore quite malleable and unpredictable.¹¹¹ In *Sanchez*, for example, the dissenting judge reasoned that Pennsylvania had the stronger interest in the case—namely, the interest in ensuring that the authority of its own law, “especially that

¹⁰³ See, e.g., *People v. Porter*, 742 P.2d 922, 925 (Colo. 1987).

¹⁰⁴ See, e.g., *State v. Lynch*, 969 P.2d 920, 923 (Mont. 1998).

¹⁰⁵ *State v. Briggs*, 756 A.2d 731 (R.I. 2000); *People v. Blair*, 602 P.2d 738 (Cal. 1979); *People v. Orlosky*, 40 Cal. App. 3d 935 (Cal. Ct. App. 1974); *People v. Saiken*, 275 N. E.2d 381, 385 (Ill. 1971); *Echols v. State*, 484 So.2d 568 (Fla. 1968).

¹⁰⁶ *Commonwealth v. Sanchez*, 716 A.2d 1221 (Pa. 1998).

¹⁰⁷ *Id.* at 1223.

¹⁰⁸ *Id.* at 1224–25.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1224.

¹¹¹ See Morrison, *supra* note 92, at 585–86.

law that stands to safeguard individual rights, is not weakened or undermined in any way.”¹¹² By importing California law, the dissenting judge argued, the court had allowed prosecutors to circumvent constitutional safeguards to which Pennsylvania residents (such as the defendant) are entitled.¹¹³ Other states have also used interest-based analysis to hold that the forum state has a stronger interest to protect the privacy of its citizens and the integrity of its judicial system.¹¹⁴

Interest-based analysis is also unpredictable in a different situation, when courts of the forum state are deciding whether to admit evidence that was obtained in a foreign state, by foreign officers, and in violation of the foreign state’s law (Conflict Type E). Some decisions have reasoned that forum law applies when the crime was committed in the forum state because the forum state has a legitimate interest in ensuring that reliable evidence is admitted to help the court uncover the truth about the crime.¹¹⁵ Yet as the Pennsylvania Supreme Court and other courts have concluded, foreign states also have a strong interest in ensuring that their officers obey the rules of their own jurisdiction.¹¹⁶ If a court considers the interest in deterring police misconduct stronger than the interest in introducing reliable evidence (as courts deciding on exclusion often do), it would have to apply the foreign state’s law.

To reduce unpredictability in the analysis, most courts have chosen to narrow the interests that they consider to those directly relevant to exclusion.¹¹⁷ Applying an “exclusionary rule approach,” courts ask whether suppression under the facts of the case would further the purposes of excluding the evidence.¹¹⁸ While this approach clarifies the relevant interests to be considered, it still produces somewhat variable results, in part because different jurisdictions have adopted different rationales for their exclusionary rules. These rationales include: 1) deterring official misconduct; 2) promoting judicial integrity; and 3) vindicating individual rights.

Under a deterrence approach, exclusion rarely occurs in multi-jurisdictional cases, because courts typically do not expect law enforcement officers to follow the unfamiliar laws of another jurisdiction in their operations. For example, if officers from State A gather evidence in State A in compliance with State A’s law, but this conduct violates the rules of State B, where the prosecution occurs (Conflict Type F), courts are reluctant to exclude. This is because State A officers could not reasonably be expected to follow the rules of a foreign jurisdiction. They are not

¹¹² 716 A.2 d at 1227.

¹¹³ *Id.*

¹¹⁴ *E.g.*, State v. Curry, 532 A.2 d 721, 724 (N.J. 1987).

¹¹⁵ People v. Orlosky, 40 Cal. App. 3 d 935, 939 (Cal. Ct. App. 1974); *see also* People v. Saiken, 275 N.E.2 d 381, 385 (Ill. 1971); Commonwealth v. Miller, 15 Mass. L. Rptr. 11 (Mass. Super. 2002).

¹¹⁶ Commonwealth v. Sanchez, 716 A.2 d 1221 (Pa. 1998); *see also* Orlosky, 40 Cal. App. at 939 (acknowledging this competing interest).

¹¹⁷ *See* Commonwealth v. Banville, 931 N.E.2 d 457, 463 (Mass. 2010) (noting a trend toward the exclusionary rule approach); State v. Bridges, 925 P.2 d 357, 365 (Hawai’i 1996) (same).

¹¹⁸ *See, e.g.*, State v. Harvin, 547 S.E.2 d 497 (S.C. 2001); Pooley v. State, 705 P.2 d 1293 (Alaska Ct. App. 1985); People v. Blair, 602 P.2 d 738 (Cal. 1979); People v. Porter, 742 P.2 d 922 (Colo. 1987); State v. Torres, 262 P.3 d 1006 (Hawai’i 2011); State v. Grissom, 840 P.2 d 1142 (Kan. 1992); People v. Benson, 88 A.D.2 d 229 (N.Y. 1982).

likely to be aware that State B law applies to their conduct, and even if they know that it does, they are unlikely to be familiar with the requirements of State B law. Likewise, when officers of State A unknowingly violate the laws of State B while gathering evidence in State B (Conflict Type A), this rarely leads to exclusion, under the same rationale—while the officers are more than likely aware that State B law applies in State B, they could still not reasonably be expected to adapt their conduct to State B laws, which are alien to them.¹¹⁹

Even when officers of another state violate the rules of their own jurisdiction, which they are expected to know and to follow (Conflict Type E), a number of forum courts are again reluctant to exclude the evidence. In this case, the justification for admitting the evidence is that suppression in a foreign state is not likely to have any real deterrent effect on these officers.¹²⁰ Even if some marginal deterrence effect might exist, it is outweighed by the costs of excluding probative evidence.¹²¹ In short, in most cases, the deterrence approach tends to lead to the admissibility of evidence obtained in a foreign jurisdiction. An important exception to this rule is when agents of the forum state significantly cooperate with agents from another state and in the process evade rules of the forum state.¹²² Courts tend to demand a high level of participation by forum officers, however, before they would exclude evidence obtained in a foreign state by foreign officers.¹²³

If a state adopts a judicial integrity approach to the exclusionary rule, outcomes are less predictable. One interpretation of this approach is that the “state should not avail itself of illegal acts by its officers.”¹²⁴ Under this interpretation, if the evidence was obtained by foreign officers, in a foreign state, in violation of foreign rules (Conflict Type E), it would be admissible because the forum state “does not regard the police conduct as being improper.”¹²⁵ Evidence might be admissible even if foreign officers violate forum law (Conflict Type F), as long as they act independently of forum officers.¹²⁶ A number of state courts have held that, if they were to admit the evidence, they would not be taking advantage of illegal acts by their own state’s officers and there would be “no misuse or perversion of judicial process.”¹²⁷ Other interpretations of the judicial integrity approach, however, would call for exclusion in such cases. Under this view, judicial integrity is tainted if evidence has been obtained in violation of forum law, regardless by whom.¹²⁸

¹¹⁹ E.g., *Harvin*, 547 S. E.2 d 497; *Commonwealth v. Miller*, 15 Mass. L. Rptr. 11 (Mass. Super. 2002).

¹²⁰ *Harvin*, 547 S. E.2 d at 500; *People v. Porter*, 742 P.2 d 922, 926 (Colo. 1987); *People v. Orlosky*, 40 Cal. App. 3 d 935, 939 (Cal. Ct. App. 1974).

¹²¹ *Porter*, 742 P.2 d at 925.

¹²² Cf. *State v. Torres*, 262 P.3 d 1006, 1020 (Hawai’i 2011) (noting that exclusion in case is warranted to “deter any federal and state cooperation ‘to evade state law’”).

¹²³ *Logan*, *supra* note 16, at 322–24.

¹²⁴ *Orlosky*, 40 Cal. App. 3 d at 939.

¹²⁵ *Id.*

¹²⁶ *Pooley v. State*, 705 P.2 d 1293, 1302–03 (Alaska App.1985); *State v. Mollica*, 554 A.2 d 1315, 1328 (N.J. 1989). As under the deterrence approach, here, too, courts usually demand significant cooperation between authorities between the forum state and foreign state before they choose to exclude evidence obtained in violation of forum rules. *Logan*, *supra* note 16, at 322–24.

¹²⁷ *Mollica*, 554 A.2 d at 1328; see also *Pooley*, 705 P.2 d at 1303.

¹²⁸ *State v. Torres*, 262 P.3 d 1006, 1019 (Hawai’i 2011).

Under an individual rights approach, state courts apply their own more protective rules to defendants who appear before their courts, even if the conduct at issue occurred in a foreign jurisdiction, by foreign officers, and was in perfect compliance with the rules in that jurisdiction.¹²⁹ Courts reason that even if foreign officers may not be expected to know and apply the law of the forum, exclusion is necessary to vindicate the rights of individuals guaranteed under the forum state law. As explained by the Supreme Court of Montana:

*The rights and protections under Montana law enjoyed by persons accused of and prosecuted for crimes committed in this State would be significantly diminished if evidence, clearly inadmissible if obtained in Montana, could nevertheless be used against the defendant simply because it was fortuitously gathered in some other jurisdiction where Montana's evidentiary laws did not apply.*¹³⁰

Under this approach, therefore, courts will enforce the more stringent rules of the forum state, in order to ensure that individual rights are not diminished simply because an investigation crosses jurisdictional boundaries.

The above overview shows that American states have adopted diverse approaches to the admissibility of evidence obtained in a foreign state.¹³¹ The variation leads to unpredictability and may frustrate prosecution in some multi-jurisdictional cases. Yet states have not seen the need to harmonize their approaches to conflicts of law. This is so for two main reasons. First, while unpredictability in multijurisdictional cases is undesirable, the flip side of unpredictability—local control over laws concerning the admissibility of evidence—is a feature that states would like to retain. Second, conflicts of law in multi-jurisdictional cases occur relatively rarely. This is in part because, as noted earlier, U.S. state laws on the collection and admissibility of evidence are still relatively uniform (at least compared to the laws of EU member states) and in part because federal intervention in multi-jurisdictional cases tends to reduce conflicts about the admissibility of evidence.¹³² For all these reasons, states perceive no urgency to harmonize law in this area.

In the European Union, by contrast, laws regulating investigative actions and admissibility of evidence vary much more significantly from state to state.¹³³ As a

¹²⁹ *Torres*, 262 P.3 d at 1020; *State v. Lynch*, 969 P.2 d 920, 923–24 (Mont. 1998); *State v. Snyder*, 967 P.2 d 843 (N. M. Ct. App. 1998); *State v. Davis*, 834 P.2 d 1008, 1012 (Or. 1992).

¹³⁰ *Lynch*, 969 P.2 d at 924.

¹³¹ One may distinguish yet another approach—the “constitutional”—approach, which examines the text and structure of the relevant state constitution to determine if the constitution applies extraterritorially. This question is rarely considered by state courts, however, and when it is, it is often not dispositive and is merely added on to the conflicts analysis. *E.g.*, *People v. Nieto*, 746 N.Y.S.2 d 371 (N.Y. Sup. Ct. Bronx Cty., 2002). Moreover, just like conflicts analysis, it produces a range of results, depending on whether a court follows a “natural rights philosophy,” a “social contract theory,” or a positivist approach. Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 Mich. L. Rev. 939, 945 (1993). For the sake of brevity, I have not addressed the constitutional approach here. For further discussion of this approach, see Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 Rutgers L.J. 863, 878–883 (1991); Neuman, *supra*, at 946.

¹³² It does not entirely eliminate such conflicts, however. To the extent that federal intervention takes the form of federal-state cooperation in investigations, conflicts between federal and state law may occur. *See, e.g.*, Corr, *supra* note 38.

¹³³ *See, e.g.*, Exclusionary Rules in Comparative Law (Stephen C. Thaman ed. 2013); Hodgson, *supra* note 40, at 632–33.

result, conflicts in multi-jurisdictional cases occur with greater frequency and have caused the European Union to consider legislation to address them. In 2009, the European Commission published a Green Paper on Obtaining Evidence in Criminal Matters from One Member State to Another and Securing Its Admissibility. The paper solicited views on the desirability of establishing EU-wide rules in two areas: 1) mutual recognition of orders to collect evidence in a foreign state; and 2) “mutual admissibility of evidence.”¹³⁴ With respect to the second point, the European Union appeared interested in creating a rule of “free movement of evidence” whereby evidence gathered lawfully in one member state would automatically be admissible in the courts of another member state (the *situs law* approach).¹³⁵ This proposal was too controversial, however, and was abandoned in favor of an instrument focused on a different, but related issue: mutual recognition in the *gathering* of evidence.¹³⁶

Rules on the gathering of evidence in foreign states can reduce the likelihood of conflicts concerning the admissibility of evidence, particularly when the forum state can request the foreign state to gather the evidence in a manner that would be lawful under both the foreign state’s and the forum state’s laws. Before examining EU legislation on the collection of evidence in cross-border cases, it is worth considering what the U. S. legal framework on this issue looks like. The brief answer is that there is no formal legal framework. Instead, the gathering of evidence in multi-jurisdictional cases occurs informally and is only occasionally guided by soft legal instruments such as memoranda of understandings. Officers do rely on national databases containing outstanding arrest warrants, criminal records, and fingerprints, and on regional or national networks that allow them to exchange requests for investigation.¹³⁷ But other than in longer-term investigations where memoranda of understanding might be adopted to guide multi-jurisdictional efforts, departments generally cooperate informally when it comes to the gathering evidence across state lines.¹³⁸ Typically, an officer in one jurisdiction simply phones an officer in another jurisdiction that may contain evidence of the crime, and the two may agree to work

¹³⁴ European Commission, Green Paper on Obtaining Evidence in Criminal Matters from One Member State to Another and Securing Its Admissibility, COM(2009) 624 final.

¹³⁵ John R. Spencer, *The Green Paper on Obtaining Evidence from One Member State to Another and Securing Its Admissibility: The Reaction of One British Lawyer*, 9 ZIS 602, 605 (2010).

¹³⁶ *Id.* at 602.

¹³⁷ National or multi-state information systems and databases include, for example, the National Crime Information Center (NCIC), which is maintained by the FBI but accessible by local and state law enforcement agents. It contains outstanding arrest warrants and criminal records, among other information. Federal Bureau of Investigation, National Crime Information Center, at <http://www.fbi.gov/about-us/cjis/ncic>. The Integrated Automated Fingerprint Identification System (IAFIS) contains identification records such as fingerprint records, mug shots, and tattoo photos. Federal Bureau of Investigation, Integrated Automated Fingerprint Identification System, at http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis. The National Law Enforcement Telecommunications System (NLETS) is another law enforcement network that provides its members access to key databases in other states, including driver’s licenses, criminal histories, and sex offenders registries. David Carter, *Law Enforcement Intelligence: A Guide for State, Local, and Tribal Law Enforcement Agencies* 136–37 (2004).

¹³⁸ See, e.g., Gerard R. Murphy et al., *Managing a Multi-Jurisdictional Case: Identifying the Lessons Learned from the Sniper Investigation* 28 (2004).

together on the case.¹³⁹ In such cases, the officer located in the territory where the investigation occurs takes the lead and typically follows the rules of his own state, although under an informal agreement, he or she may agree to abide by higher standards to ensure that the evidence would be admissible in another jurisdiction. Alternatively, the federal government may (and frequently does) intervene in criminal cases with an interstate element, which minimizes the need to grapple with conflicting rules.¹⁴⁰

The transfer of evidence from one state to another is also not subject to any formal rules demanding cooperation. Officers simply have to keep a clear chain of custody documenting each step in the transfer and each individual who handled the evidence, in order to ensure that the items are admissible under standard rules of evidence. Officers who gathered the evidence in one state may have to testify later in another state about the way the evidence was gathered or passed along to the next link in the chain of custody. That said, the rules on authenticating evidence are relatively homogeneous across states, so interstate cooperation does not tend to pose a problem in this respect.

Compared to the existing and proposed EU legislation on gathering and transferring evidence across member state borders, the U.S. regime may appear surprisingly haphazard. One downside of the informal cooperation is that it may make it harder for courts to determine the extent to which officers in different jurisdictions participated in a particular investigative action; in joint operations, this muddles the conflicts of law analysis. Furthermore, in high-profile and quickly developing multi-jurisdictional cases, ad hoc cooperation practices can lead to chaotic and ineffective investigations.¹⁴¹

Despite these drawbacks, in most cases, informal cooperation works smoothly because police departments in different states share the same language and roughly similar professional culture. More significantly, the need to cooperate across state borders rarely arises because the federal government often assumes jurisdiction in these cases. Given the rarity of conflicts in practice, U.S. policymakers have not seen the need to develop a more robust legal framework to govern police cooperation in the gathering and transfer of evidence in cross-border cases.

By contrast, the European Union presents a system where language, legal, and cultural differences prevent effective police cooperation in transnational cases and where no federal police force or prosecutor exists to intervene and eliminate conflict. Accordingly, EU legislators have perceived the need to establish formal rules requiring cooperation in the gathering of evidence in transnational cases.

¹³⁹ Officers may also send such requests through secure communications network such as the Regional Information Sharing Systems Program (RISS), which allows state and local law enforcement agents to exchange requests for information and other investigative support. See Regional Information Sharing Systems (RISS) Program, Overview, at <http://www.riss.net/Default/Overview>.

¹⁴⁰ Murphy et al., *supra* note 139, at 35–36. Federal involvement does not entirely eliminate the possibility of conflicting rules, however. If federal authorities simply assist—but do not take over—the investigation and prosecution of a case, and the relevant state rules are more protective than federal rules, questions about the admissibility of evidence gathered by federal officers may arise in a subsequent state prosecution.

¹⁴¹ See *id.*

Under the first comprehensive EU instrument concerning this issue, the Framework Decision on the European Evidence Warrant (EEW),¹⁴² authorities in one member state could request another member state to provide them with specified “objects, documents, and data” for use in a criminal proceeding¹⁴³ and, if necessary, to conduct a search and seizure of private premises to obtain the items.¹⁴⁴ To ensure that these items could be introduced into evidence in the demanding state’s courts, the demanding state could lay out certain procedures to be followed in the gathering of evidence. The executing state was required to follow these procedures, unless doing so would be “contrary to the fundamental principles of law of the executing State.”¹⁴⁵ The executing state was generally required to comply with an Evidence Warrant and had only a few limited grounds for refusal.¹⁴⁶ For a number of specified serious offenses, a state could not refuse to comply even if the conduct investigated did not constitute a crime in its legal order.¹⁴⁷

As the European Evidence Warrant applied only to certain types of existing evidence, however, and did not cover other investigative measures, such as interrogations, undercover work, wiretapping, or the gathering of bodily evidence, some member states viewed it as insufficient to address the needs of law enforcement in multi-jurisdictional cases. These states proposed legislation for a European Investigation Order, which was adopted in March 2014. It replaced the Framework Decision on the Evidence Warrant, and it allows member states to request a broader array of investigative measures to be taken in other member states.¹⁴⁸

As under the Evidence Warrant framework, the state issuing an Investigation Order can lay out particular procedures to be followed during the investigation to ensure that evidence obtained can be used at trial in its courts.¹⁴⁹ The executing state is expected to follow these procedures as long as they do not contravene fundamental rules in its legal order.¹⁵⁰ The EIO even allows for the possibility that the authorities of the requesting state would assist in the investigation on the

¹⁴² As explained later in this Section, the Framework Decision has now been superseded by the Directive on the European Investigation Order.

¹⁴³ The request may include “objects, documents or data from a third party, from a search of premises including the private premises of the suspect, historical data on the use of any services including financial transactions, historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques.” Framework Decision 2008/978/JHA, pmbl. (7).

¹⁴⁴ The Warrant may not, however, be used to require the taking of statements or initiating other types of hearings involving suspects or witnesses; to carry out a bodily examination or obtain bodily material; to obtain information in real time such as through the interception of communications; to conduct analysis of data or objects; or to obtain communications data retained by providers. *Id.* art. 4(2).

¹⁴⁵ *Id.* art. 12.

¹⁴⁶ The executing state may refuse to comply with the request on limited grounds—for example, that doing so would violate double jeopardy protections, that an immunity or privilege under the law of the executing state makes it impossible to execute the EEW; or that providing the evidence would harm national security, jeopardize the source of the information, or require the use of classified intelligence material. *Id.* art. 13.

¹⁴⁷ *Id.* art. 14.

¹⁴⁸ Directive of the European Parliament and of the Council Regarding the European Investigation Order in Criminal Matters, 7.3.2014, PE-CONS 122/13.

¹⁴⁹ *Id.* art. 9(2).

¹⁵⁰ *Id.* In some situations, the executing state may adopt a different investigative method than that proposed by the issuing state. *Id.* art. 10.

territory of the executing state (presumably, at least in part in order to ensure the admissibility of the evidence).¹⁵¹

States can refuse to enforce an EIO on somewhat broader grounds than are available under either the EAW or the EEW. In addition to double jeopardy, privileges and immunities, and limited dual criminality exceptions, the EIO includes an express provision allowing states to refuse enforcement where the investigative measure envisioned would violate fundamental individual rights.¹⁵² Moreover, the executing state can refuse to execute an EIO if the investigative action would be unlawful under its own law.¹⁵³ The Directive protects individual rights in other ways as well, by requiring the protection of personal data in the process of executing an investigative order and by allowing the defense, as well as the prosecution, to avail itself of the EIO.¹⁵⁴

What we see, therefore, is that the European Union has advanced further than the United States in formally regulating the collection and transfer of evidence across jurisdictions. While the Union has not adopted a uniform approach to the admissibility of evidence, it has required member state authorities to assist one another in gathering and transferring certain kinds of evidence and to do so in a manner that would facilitate its admissibility in the requesting state (as long as this would not contravene fundamental principles in their legal order). In designing this regime, EU legislators took into consideration the competing interests of state sovereignty and individual rights, on the one hand, and systemic coherence, efficiency, and predictability, on the other. The long negotiations of the EIO—and the several amendments of the provisions laying out grounds of refusal—demonstrate the delicate balancing act that EU legislators performed. While individual rights and state interests are certainly prominent in the Directive, the final result may well favor systemic interests more than the regime currently in place in the United States, although it is too early to tell how the EIO will be implemented by member states in practice. As noted earlier, the United States relies on informal, ad hoc cooperation with respect to the collection of evidence across state borders, and this loosely regulated approach can be problematic in complex and quickly-developing cases. It has been tolerated so far primarily because federal involvement in most multi-state cases has reduced the instances in which interstate cooperation in the gathering of evidence is necessary.

Finally, the EU is also contemplating a regime of “free movement of evidence,” which would follow the *situs law* approach to admissibility of evidence obtained in a foreign state. If the EU does adopt legislation that establishes “free movement of evidence,” it will have a much more unified framework in this area as well, since U. S. states continue to rely on the common-law method to solve conflicts of law

¹⁵¹ *Id.* art. 9(4). Although the authorities of the requesting state will be “bound by the law of the executing State during the execution of the EIO,” by participating in the investigation, they may be able to ensure that the collection of evidence complies with both the laws of the executing state and the laws of their own state. *Id.* art 9(5).

¹⁵² *Id.* art. 11.

¹⁵³ *Id.*

¹⁵⁴ *Id.* arts. 1(3), 20.

pertaining to this subject. This has resulted in a broad range of approaches by American courts to admissibility of evidence in multi-jurisdictional cases. In some of these cases, individual rights come to the fore, while in others, questions about state sovereignty and the ability to control the state's criminal policy are preeminent. On the whole, however, the U.S. common-law, conflicts-of-law approach has tended to minimize the importance of systemic interests in efficiency, coherence, and predictability.

3. Conflicts of Law and the Recognition of Foreign Penal Judgments

Another question that tests the limits of mutual trust among states in criminal cases is whether and to what extent one state court should recognize the penal judgment of another state's court. This question may arise in a number of situations. For example, it may come up when a court is sentencing an offender with a prior conviction from another state. In deciding whether to enhance the current sentence based on the offender's earlier conviction, the court must decide whether to honor the penal judgment of the other state and whether to accept the foreign state's characterization of the prior offense as a misdemeanor or a felony. Similarly, a court may need to assess whether to recognize a foreign court's decision that sentences for separate crimes should be served consecutively or concurrently.¹⁵⁵ The status of a foreign penal judgment may also be relevant earlier on in the criminal process. Crimes that have as an element a prior felony conviction (e.g., the ban on possession of a firearm by a felon) may require the prosecution to prove that a conviction from another state was a felony rather than a misdemeanor.¹⁵⁶ And finally, courts may need to decide whether to recognize a foreign penal judgment for purposes of the imposition of collateral consequences, such as employment or licensing restrictions, sex offender registration, or deportation.¹⁵⁷

While the Full Faith and Credit Clause generally requires courts of one state to recognize judgments by courts of other states, its mandate does not apply to penal judgments.¹⁵⁸ As one court explained, “[t]he reason [for this exception to the Full Faith and Credit Clause] is that each sovereign is free to determine what conduct shall be proscribed within its jurisdiction, and the wrong committed by violating such prescription is local and does not transcend the sovereignty.”¹⁵⁹ If a state has jurisdiction in a criminal case, it can apply its own law and does not have to consider the application of foreign laws, even if the case has extraterritorial elements. As explained earlier, the dual sovereignty exception to the Double Jeopardy ensures

¹⁵⁵ *Santiago v. Pa. Board of Probation and Parole*, 937 A.2d 610 (2007); *Taylor v. Sawyer*, 284 F.3d 1143, 1153 n.11 (9th Cir. 2002).

¹⁵⁶ *State v. Menard*, 888 A.2d 57 (R.I. 2005).

¹⁵⁷ See, e.g., *Delehant v. Bd. on Police Standards and Training*, 839 P.2d 737 (Ct. App. Or. 1992) (denial of police officer certification); *Henrickson v. Commissioner of Public Safety*, 2009 WL 67417 (Minn. App. Jan 13, 2009) (driver's license revocation); *State v. Kuntz*, 100 P.3d 26 (Ariz. Ct. App. 2004) (sex offender registration); *Bui v. Ashcroft*, 2003 WL 251929 (N.D. Tex. 2003) (deportation).

¹⁵⁸ *Huntington v. Attrill*, 146 U.S. 657, 666, 672–73 (1892); *Nelson v. George*, 399 U.S. 224, 229 (1970) (holding that “the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment”).

¹⁵⁹ *Taylor v. Sawyer*, 284 F.3d 1143, 1153 n.11 (9th Cir. 2002).

that this can happen even if another state has already acquitted or convicted the defendant for the same conduct. The penal judgment exception to the Full Faith and Credit Clause, combined with the dual sovereignty rule, allows states to enforce their own criminal laws fully and without regard to the policy choices of other states. It reinforces a strong conception of state sovereignty in the field of criminal law.

The penal judgment exception to the Full Faith Credit Clause can also be seen as a variant of the well-established public policy exception.¹⁶⁰ A state need not enforce a sister state's criminal law with which it disagrees on policy grounds:

*A state cannot express its public policy more strongly than through its penal code. When a state defines conduct as criminal and sets the punishment for the offender, it is conveying in the clearest possible terms its view of public policy. Full faith and credit ordinarily should not require a state to abandon such fundamental policy in favor of the public policy of another jurisdiction.*¹⁶¹

Because states are free to honor or disregard the penal judgments of other states, we see variations in their approaches to this question, both historically and today. States have struggled to balance competing values in the process. On the one hand, concerns about comity, finality and efficiency favor deference to foreign judgments. On the other hand, respect for fundamental values of the domestic legal order, an interest in preserving the internal coherence of the domestic order, and a concern for the equal treatment of criminal defendants may push states to deny recognition of foreign penal judgments in some circumstances.

States have placed different weight on these values at different points in American history, and the trajectory of the law on recognition of foreign penal judgments tracks to some degree developments in extradition law. In the early days of the Republic, crime was largely local. Accordingly, state courts rarely encountered extradition cases or cases requiring the consideration of foreign judgments.¹⁶² It was not until the early twentieth century, when advances in transportation and technology increased the mobility of Americans, that states began to consider the problems created by "commuting criminal[s]."¹⁶³ States began to emphasize the importance of interstate cooperation in dealing with itinerant suspects, and they limited the grounds on which one state could refuse either extradition or the recognition of another state's penal judgment. For a while, therefore, both extradition law and the mutual recognition of judgments were on the same path, with states usually deferring to one another in the interests of efficiency and comity.

¹⁶⁰ *People v. Laino*, 87 P.3d 27, 32 (2004); *State v. Menard*, 888 A.2d 57, 62 (R.I. 2005); *Mitchell v. State*, 467 A.2d 522, 533 (Ct. Spec. App. 1983) ("Cutting cacti in California, uprooting the state flower (rhododendron) in West Virginia, or desecrating a Confederate cemetery in Mississippi may be felonies punishable by imprisonment by those states. We, however, would not consider such acts as proper bases for mandatory sentencing, no matter how they are viewed by the several jurisdictions.").

¹⁶¹ *State v. Edmondson*, 818 P.2d 855, 860-61 (N.M. Ct. App. 1991).

¹⁶² Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257, 266 (2005).

¹⁶³ *Id.* at 265 (citing *Interstate Comm'n on Crime, A Report of Activities for the Year Ending December 31, 1937*, at 3 (1937)).

Over time, however, the paths of these laws diverged somewhat. In extradition matters, the law continued to move steadily in the direction of near-automatic deference to other states' extradition requests. By contrast, with respect to the recognition of foreign judgments, the law in a number of states swung back in the opposite direction, as many state courts resumed the practice of inquiring carefully into foreign judgments before deciding what weight to accord them.¹⁶⁴

In deciding whether to honor a penal judgment of another state, courts take one of two approaches—"external" or "internal."¹⁶⁵ Under the internal approach, which is used by most states today, the court of the forum state will examine the foreign judgment closely to determine whether it should be accorded full recognition in the forum.¹⁶⁶ For example, in deciding whether to enhance a sentence for a prior conviction in a foreign state, the court will review the elements of the offense of the foreign conviction to determine whether they are "similar" or "substantially equivalent" to those warranting sentence enhancement in the forum; if so, the court will take into account the foreign conviction for purposes of enhancement.¹⁶⁷ The approach is "internal" because the effect of the conviction is determined by criteria of the forum state.¹⁶⁸

As a practical matter, this approach is difficult to administer. The forum court must consult conviction records of a foreign jurisdiction, which are often summary and difficult to locate, and it must interpret the foreign judgment to determine if the elements of the offense match up those of offenses warranting enhancement in the forum state.¹⁶⁹ But the advantage of the internal approach is that it generally treats similarly situated individuals equally, regardless of the origin of their previous convictions.¹⁷⁰ It also helps uphold the values of the forum with respect to punishable conduct and criminal procedure rights.¹⁷¹ When a foreign conviction conflicts with these values, courts following the internal approach will not honor it.

Under the external approach, states defer to the classification of the offense by the foreign state. For example, if the foreign state considered the previous offense a felony, then the forum state would also consider it a felony, regardless of how the crime would be categorized under forum law. The advantage of this approach is its clarity and efficiency. While the internal approach requires courts to pore over foreign statutes and documents supporting a foreign conviction, the external approach is quick and almost automatic. It simply defers to the foreign state's

¹⁶⁴ See *id.* at 269.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (noting that twenty-eight states use the internal approach when considering foreign judgments for purposes of sentencing enhancements); *id.* at 284 (noting that thirty-five states use the internal approach when considering foreign judgments for purposes of sex offender registration).

¹⁶⁷ Some courts based their determination on the length of the sentence accompanying the foreign conviction. *Id.* at 274.

¹⁶⁸ *Id.* at 275.

¹⁶⁹ For an example of this exercise, see *State v. Heaps*, 677 P.2d 1141, 1143-44 (Wash. Ct. App. 1984).

¹⁷⁰ See Logan, *supra* note 163, at 303-07.

¹⁷¹ *E.g.*, *State v. Menard*, 888 A.2d 57, 61 (R.I. 2005).

categorization of an offense. By deferring to the judgments of sister states, courts that follow the external approach also display comity and mutual trust.¹⁷²

Although the external approach is much more deferential and generally recognizes foreign penal judgments, it is not unconditional. Whether a state takes an internal or external approach, its courts will generally disregard foreign convictions secured without affording defendants certain fundamental constitutional rights, such as the right to counsel and the right to due process.¹⁷³ The U.S. Supreme Court has in fact required states to do so when the defendant can show a grave “jurisdictional defect” in the prior judgment.¹⁷⁴ The “failure to appoint counsel for an indigent defendant,” for example, is a “unique constitutional defect” that can always be used to attack a prior conviction collaterally.¹⁷⁵ But the Court has held that “lesser” violations of the U.S. Constitution (including ineffective assistance of counsel, entry of a plea that was not knowing and intelligent, or agreement to a stipulated facts trial without being adequately advised of trial rights) do not rise to the level of a jurisdictional defect and therefore do not require lower courts to permit challenges to prior convictions.¹⁷⁶

State courts have similarly distinguished between certain more serious constitutional defects, which permit defendants to attack prior convictions (whether domestic or foreign) and lesser procedural errors, which do not permit such collateral attacks. What counts as more serious or less serious procedural error varies from jurisdiction to jurisdiction.¹⁷⁷ Some courts examine the relative importance of the right violated compared to other rights within the state constitutional framework. Others entirely refuse to entertain challenges based on violations of their own state constitution and only entertain challenges based on the federal Constitution.¹⁷⁸ And some courts hold that, while a collateral attack on a foreign prior conviction might be appropriate, the proper venue for such an attack would be the courts of the state where the original conviction was imposed.¹⁷⁹

The reluctance by state courts to entertain procedural challenges to out-of-state convictions has sometimes been justified on the grounds of comity. But comity is

¹⁷² Logan, *supra* note 163, at 320.

¹⁷³ See, e.g., *State v. Lueder*, 376 A.2d 1169, 1173 (N.J. 1977).

¹⁷⁴ *Custis v. United States*, 511 U.S. 485, 496-97 (1994).

¹⁷⁵ *Id.* at 493-96; see also *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (holding that where the defendant’s prior Tennessee conviction was obtained in violation of his right to counsel, a Texas court may not use it for purposes of enhancing the defendant’s sentence, as this would again violate the defendant’s right to counsel).

¹⁷⁶ *Custis*, 511 U.S. at 496.

¹⁷⁷ See e.g., *State v. Schmidt*, 712 N.W.2d 530 (2006) (the right to counsel before a DWI test decision was not so fundamental as to require disregarding out-of-state convictions obtained without the benefit of such a right); *People v. Bradley*, 324 N.W.2d 499, 502 (Mich. Ct. App. 1982) (refusing to honor foreign state conviction where it was based on a guilty plea that was not intelligent); *State v. Heaps*, 677 P.2d 1141, 1144-45 (Wash. Ct. App. 1984) (honoring foreign state conviction despite allegations that it was obtained pursuant to jury instructions that unconstitutionally shifted the burden of proof and obscured the reasonable doubt standard); see also Logan, *supra* note, at 310.

¹⁷⁸ *People v. Johnson*, 285 Cal. Rptr. 394, 399 (1991) (as long as foreign conviction was valid under the laws of the foreign state and under the U.S. Constitution, California courts will not examine whether the procedures of the foreign state afforded the same protection as those in California); *State v. Graves*, 947 P.2d 209 (Or. Ct. App. 1997) (refusing to measure the constitutional validity of an out-of-state conviction by Oregon constitutional standards).

¹⁷⁹ These courts are therefore adopting a position similar to that commonly adopted in extradition cases. See *State v. Marshall*, 581 A.2d 538, 541 (1990); see also *St. John v. Sargent*, 569 F. Supp. 696, 697-98 (N.D. Cal. 1983).

not the only reason for this approach. Even courts that may otherwise place little value on comity and may disregard a foreign judgment for other reasons (for example, because the elements of the foreign offense are different from those required for enhancement under domestic law) often refuse to consider procedural defects as grounds for non-recognition of the foreign judgment.¹⁸⁰ Their reluctance to consider procedural challenges thus has less to do with deference to foreign states and more with an interest in efficiency and finality. These courts are concerned that if they open the door to a broad array of procedural challenges to prior convictions, defendants would file many frivolous claims, and sorting through these claims would impose an unbearable burden on the court's resources.¹⁸¹

In brief, when a court decides whether to honor a foreign penal judgment, it must address concerns similar to those arising in extradition proceedings and in decisions on the admissibility of evidence obtained in a foreign state. Comity and efficiency push states toward recognition foreign judgments, while concerns about the equal treatment of defendants and about respecting fundamental legal principles of the domestic order push against it. The clash between these values is much more pronounced in the decision on whether to recognize penal judgments and whether to admit evidence than it is in extradition decisions. In deciding extradition questions, asylum courts are not asked to apply foreign law in their judgments. By contrast, when a foreign judgment is recognized for purposes of sentence enhancement or indictment, or when foreign law is applied to determine the admissibility of evidence, that foreign law is steering the forum court's decision. Courts may perceive that deference to the foreign law puts the citizens of their state "at the mercy of another state's criminal policy."¹⁸² As a result, they are much less likely to give such deference in the context of recognizing judgments or admitting evidence than they are in the context of extradition.

The European Union has not yet developed legislation that specifically addresses the recognition of foreign judgments for purposes of determining elements of a crime, enhancing a sentence, or imposing collateral consequences on a recidivist. But it has adopted Framework Decisions on recognizing judgments for purposes of transferring prisoners to serve their sentences in another state and for purposes of transferring convicted offenders to serve out their sentences under supervised release in another state. The professed aim of this legislation is "to facilitate[e] the social rehabilitation of the sentenced person."¹⁸³ The real goal, however, appears to be efficiency—specifically, "to alleviate the burden of prisons in EU Member States by allowing for the transfer, without their consent, of sentenced persons to their country of nationality."¹⁸⁴

¹⁸⁰ *E.g.*, *State v. Heaps*, 677 P.2d 1141, 1144-45 (Wash. Ct. App. 1984).

¹⁸¹ *Id.* at 1145; *see also* *Custus v. United States*, 511 U.S. 485, 496-97 (1994) (noting that ease of administration and finality supports limiting challenges to prior convictions to those based on a "jurisdictional defect").

¹⁸² *Id.*

¹⁸³ Framework Decision 2008/909/JHA, pmb1. para.9.

¹⁸⁴ Valsamis Mitsilegas, *The Third Wave of Third Pillar Law*, 34 *Eur. L. Rev.* 523, 542 (2009).

The recognition of judgments in this context may have significant financial and practical implications for the executing state. These implications are more significant than in an extradition case, where the burden of enforcing the law against a person is essentially outsourced to another state. Therefore, it would not be surprising if EU member states invoke the grounds of refusal in these Framework Decisions more frequently than they do in extradition cases.

At the same time, these Framework Decisions are not asking national courts to directly apply foreign law in their own judgment about guilt or innocence (as when a prior foreign conviction is an element of the crime) or about punishment (as when a prior foreign conviction is used to enhance a sentence). No EU instruments currently regulate how domestic courts should treat foreign judgments for these purposes, leaving member states to rely on their own conflicts of law principles. States remain free to decide how they balance concerns about individual rights, equal treatment, and local control over criminal policy against the interests of efficiency, comity, and finality. In that respect, the EU, like the United States, has yet to adopt a uniform approach.

V. Conclusion

Like the European Union, the United States has had to grapple with complex questions about choice of law and mutual recognition in cases that spill across state borders. The American constitutional framework vests states with primary authority over criminal law and criminal procedure. Local control over criminal cases is valued for its democratic legitimacy and for providing a diversity of approaches that could help states identify best practices. These same features, however, can give rise to conflicts of law when states must address inter-state criminal activity and law enforcement. American states—like EU member states—have devised approaches to manage these conflicts and to encourage cooperation in the enforcement of criminal law, but in most cases, these approaches are surprisingly non-uniform.

In some areas, as in extradition, conflicts of law are less momentous and interstate cooperation is mandated by the federal Constitution. As a result, extradition has become a fairly streamlined and predictable process. In other areas, however, such as the admissibility of evidence obtained in another state or the recognition of foreign penal judgments, courts still rely on a variety of conflicts of law approaches to decide which law governs. In this process, states often strive to find a balance between, on the one hand, comity and efficiency, and on the other, upholding individual rights and local criminal policy preferences. This balancing approach is sensitive to the different interests at stake, but it is less predictable and less efficient than the uniform approach we see in extradition cases.

Despite the costs of the decentralized, case-by-case conflicts approach, neither courts nor policymakers in the United States appear to perceive a need to adopt more uniform rules to govern choice of law in multi-jurisdictional cases. This attitude is likely the result of two key factors, which distinguish the U.S. criminal

justice system from that of the EU. First, as result of their common English law origins and a long process of cross-fertilization, the criminal laws and procedures of the fifty states are less diverse than the criminal laws and procedures of the EU member states. In addition, the incorporation doctrine ensures that all U.S. states must provide a constitutionally mandated baseline of procedural protections in criminal cases. This minimum standard of procedural fairness (which is enforced by state and federal courts alike) strengthens mutual trust among state courts and enforcement authorities and thus helps to encourage deference and cooperation in multi-state cases. Finally, when a case has interstate elements, states can and often do involve the federal government, either through joint task forces or by transferring the case to the federal government entirely. This further decreases conflict in such cases and lessens the perceived need to harmonize rules for interstate cooperation.

The EU has faced similar dilemmas in deciding how broadly to grant mutual recognition in cross-border cases. As one commentator has noted, “the issues lying at the heart of the application of mutual recognition in criminal law at EU level [are] whether there is an adequate level of trust among Member States to cooperate on the basis of automaticity and to what extent are the latter ready to accept inroads in fundamental domestic principles of criminal and constitutional law.”¹⁸⁵ Compared to the United States, however, the EU comprises much more diverse criminal justice systems, and it lacks the machinery to enforce criminal law at the federal level. As a result, EU legislators have perceived a greater urgency to create uniform rules on cooperation in multi-jurisdictional criminal cases. The EU has thus passed measures on extradition, the gathering of evidence, and the transfer of prisoners, among other matters, and it seems poised to extend mutual recognition instruments even further. The American experience suggests, however, that mutual recognition operates more effectively when certain minimum standards of procedural fairness are achieved among the cooperating states. Harmonization of substantive criminal law also aids mutual recognition, but it does not appear to be as central to the process as harmonization of procedural safeguards. Therefore, commentators are correct to suggest that, for mutual recognition to be effective in the EU, Union legislators must focus on developing a set of shared procedural standards that would undergird and enhance mutual trust among the member states.¹⁸⁶

¹⁸⁵ *Id.* at 548.

¹⁸⁶ *Cf. id.*; Murphy, *supra* note 41, at 239–48; Hodgson, *supra* note 40.