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Criminal Procedure and the Conflict of Laws

JOHN BERNARD CORR*

Criminal procedure and conflict of laws are two bodies of American jurisprudence that historically have had very little to do with one another.¹ Recent developments in criminal procedure, however, require those distant cousins to get to know one another a great deal better. *People v. Douglas*,² a case decided recently in the New York Supreme Court, demonstrates how even criminal law may now be forced to wrestle with some of the questions of conflicts law—or “choice of law,” as it is also called—that have for so long bedeviled civil litigation.

On the afternoon of October 8, 1981, Kenneth Douglas shot and gravely wounded a New York City police officer.³ Douglas then fled to Florida. Several months later, Florida police arrested him under a warrant that had been issued in New York. Immediately after they took Douglas into custody, the Florida police gave him notice of his *Miranda* rights,⁴ but Douglas waived his right to an attorney and made statements linking him to the New York crime. When the prosecution sought to use those inculpatory remarks at trial, the developing relationship between criminal procedure and conflict of laws came to the fore.

Under New York law, a criminal defendant in custody is entitled to more than the federally mandated *Miranda* warnings. He is also entitled to remain silent—and may not waive his right to silence—until he has had the opportunity to consult with an attorney. Inculpatory statements made before obtaining counsel are suppressed. In Florida, by contrast, criminal defendants are entitled only to basic *Miranda* protections, which do not require the presence of an attorney before waiving the right to remain silent. Because Douglas had been interrogated by Florida law enforcement officers after he received his *Miranda* warnings, but before he consulted with an attorney, the admissibility at trial of his inculpatory statements rested on the court's determination of whether New York

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1. Most of the prominent conflict-of-laws treatises do not even mention criminal matters. Professor Leflar is one of the very few conflicts scholars to accord any attention to criminal law, and his one-volume treatise disposes of the area in a short chapter. Leflar explains that no further attention is warranted because in criminal matters the forum will always apply its own law. R. LEFLAR, *AMERICAN CONFLICTS LAW* § 111, at 223-25 (3d ed. 1977).

2. 123 Misc. 2d 75, 472 N.Y.S.2d 815 (Sup. Ct. 1984).

3. The facts recited in this paragraph and the paragraph following may be found at 123 Misc. 2d at 76-78, 84-88, 472 N.Y.S.2d at 816-18, 821-23.

4. *Miranda v. Arizona*, 384 U.S. 436 (1966). Professor Whitebread summarized a defendant's right under *Miranda* in a standard fashion:

[A] person subjected to a custodial interrogation must be warned that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. A defendant may waive these rights, but only if the waiver is made voluntarily, knowingly, and intelligently will it render subsequent confessions admissible.

C. WHITEBREAD, *CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* § 15.04, at 293 (1980).

or Florida law governed the Florida interrogation.⁵

There would be no conflicts problem in cases like *Douglas* if all the states adopted uniform procedural protections for criminal defendants. All states must observe the constitutional protections the Supreme Court has said apply to police activity,⁶ but those rules are only a minimum. States are free to give criminal defendants additional protection.⁷ Because some states exercise their option, while others remain content with the constitutional floor the Supreme Court has established, there are bound to be differences among the laws of the various states. Even among states that have afforded defendants more protection, the amount of protection has varied.⁸ The trend towards disuniformity in the procedural protection allowed by states is therefore well established and apparently gathering momentum.⁹ As that trend continues, it is certain to produce an increasing number of choice-of-law problems when a defendant is prosecuted in one state on the strength of evidence obtained in another state.¹⁰ *Douglas* is probably only the tip of the iceberg.

This article will address two major issues raised in cases like *Douglas*. First, it will examine the different approaches courts have taken to the conflicts problems presented by disuniformity among the states in rules of criminal procedure. It will conclude that application of certain conflicts principles developed many years ago in civil litigation is the best way—probably the only way—to achieve consistent and just results in this surprisingly sticky area of criminal law. In short, criminal law will be enriched through a transfusion of conflicts law.

The benefit, however, will not flow just one way. Since choice-of-law problems in criminal procedure also afford an opportunity to reexamine the relative merits of the two major schools of conflict of laws, the second part of this article will make such a study. The article will show that the now-predominant school, "interest analysis,"¹¹ has not achieved consistent and just results in crim-

5. The *Douglas* court's answer is counterintuitive. Although the interrogation took place in Florida, and the police there presumably assumed their actions were governed by Florida law, the court held that New York law applied, resulting in the suppression of the inculpatory statements. 123 Misc. 2d at 84-88, 472 N.Y.S.2d at 821-23. As will be demonstrated later in this paper, courts faced with *Douglas*-like problems have shown a pronounced tendency to apply forum law. See *infra* notes 19 to 30 and accompanying text.

6. As already noted, *Miranda* establishes minimal protections for both state and federal custodial interrogations. Similarly, the line of cases beginning with *Mapp v. Ohio*, 367 U.S. 643 (1961), directs both state and federal authorities to observe the same minimum constitutional safeguards when conducting searches and seizures.

7. See *Cooper v. California*, 386 U.S. 58, 62 (1967) (states may establish standards higher than those mandated by Bill of Rights).

8. New York, for example, has established standards governing the admissibility of evidence obtained through interrogations that are in some respects higher than those applicable in Florida, but lower in other respects than those applicable in Texas. Compare *People v. Douglas*, 123 Misc. 2d 75, 472 N.Y.S.2d 815 (Sup. Ct. 1984) (New York law on waiver of presence of attorney more rigorous than that of Florida) with *People v. Benson*, 88 A.D.2d 229, 454 N.Y.S.2d 155 (1982) (New York law on electronic preservation of interrogation less rigorous than that of Texas).

9. C. WHITEBREAD, *supra* note 4, §§ 29.01-04, at 592-600.

10. There is, of course, no choice-of-law problem when the law of the state of prosecution is the same as the law of the state where evidence was obtained. See *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554, 560-61 (1984) (no conflicts problem where Hawaii and Virginia law would both admit evidence obtained in search conducted in Hawaii).

11. For the purpose of this article, "interest analysis" identifies a group of conflicts approaches that have come to the fore in civil law in the last quarter century. Under the interest analysis approach, a court faced with a choice-of-law problem should begin by identifying all the states with an interest in a

inal procedure matters. This failure is not a chance event, but is a product of deficiencies inherent in the operation of interest analysis as applied in criminal law. The article will offer an alternative to interest analysis that also holds greater promise in other areas of conflicts law in which interest analysis and its offspring¹² currently predominate. That recommended alternative is the application of the law of the state in which an event took place: the so-called "situs rule," accompanied by modifications under exceptional circumstances.

I. INTEREST ANALYSIS AT WORK IN CRIMINAL PROCEDURE

A. CIVIL LAW FOUNDATIONS OF INTEREST ANALYSIS

Interest analysis is a method of analyzing conflicts problems in civil law. In fact, interest analysis and its offspring have substantially supplanted older choice-of-law approaches in most of the states.¹³ As it evolved from the work of its most prominent early advocate, Brainerd Currie, interest analysis sought to establish rules for determining which state law to apply by identifying the state with the greatest interest in having its law applied. Interest analysis identifies several factors which indicate that a state might be interested in having its law applied. For example, interest analysis usually assumes that the state where parties are domiciled will have an interest in applying its law to ensure that the domiciliaries receive the benefit of home-state law. It assumes that states where transactions or events occur—so-called "situs" states—have an interest in having their law applied. Interest analysis may also take into account the interest of states based on factors other than domicile and situs, for example the interest of the forum in applying its own law.¹⁴ A simple tort hypothetical demonstrates how interest analysis usually operates.

Assume that two people from New York are riding in an automobile in another state. Through the driver's negligence the automobile skids off the road and hits a utility pole, injuring the passenger. No other people or vehicles are involved in the accident. If New York permits the injured passenger to recover from the driver on a showing of ordinary negligence, but the situs state has a law

particular issue. The state whose law should be applied is the state with the superior interest in the matter. See R. LEFLAR, *supra* note 1, § 92, at 185-86.

12. It should be noted that interest analysis has spawned a number of different subschools, some of which take issue with portions of the assumptions and techniques of interest analysis itself. While these disputes within the family may originate in some differences over matters of detail, it is fairly clear that interest analysis and its subsets agree far more often than they differ. Indeed, to those who do not adhere to the interest analysis creed, the differences do not seem to be that great. At least some advocates of interest analysis seem to agree. See R. LEFLAR, *supra* note 1, § 99, at 197-98 (judges applying interest analysis and its progeny do not seem to distinguish between them); E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 17.11, at 567-68 (1982):

The case law which employs interest analysis presents a confusing picture. Imprecise and over-zealous citations to sundry authorities often make it difficult to determine with any kind of certainty on what theory a case may be said to have been decided, *if indeed the theories are fully distinguishable*. (Emphasis added).

13. Cf. R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 6.17, at 308 (2d ed. 1980) (most jurisdictions addressing conflicts questions in tort cases have supplanted situs rules with interest analysis).

14. See Sedler, *Rules of Choice of Law Versus Choice of Law Rules: Judicial Method in Conflicts Tort Cases*, 44 TENN. L. REV. 975, 1032-41 (1977) (law of common domicile predominates, but where parties do not have common domicile, forum law—particularly if forum is domicile of one party—will often be applied).

prohibiting recovery from the driver except on a showing of gross negligence, there is a choice-of-law problem.

Using interest analysis, a court might conclude that the situs state had an interest in regulating the flow of traffic within its borders. Since that interest is not furthered by a law that allows a tortfeasor to escape liability, the situs state's interest in having its law applied is diminished. New York, by contrast, is the common domicile of the parties. It has an interest in assuring that injured passengers recover, if for no other reason than they not become welfare charges on the state where they live. New York also has an interest in protecting domiciliary defendants from excessive liability, but in this case New York law favors the plaintiff more than the defendant. Because New York, the state of common domicile, is the most intimately concerned with the parties' well being, it has the greater interest. Therefore, New York law should be applied. The situs state's interest does not prevail, in part because the situs state's law does not support its regulatory interest, and in part because the situs state is assumed to have little interest in the welfare of parties who are domiciled in some other state.¹⁵

An often unspoken feature of interest analysis is the inclination of many courts to favor application of their own law. This "forum bias," though not part of the formal analysis, can have a great impact on the choice-of-law result.

More complicated facts may produce more intricate analyses. Still, most jurisdictions that have converted to interest analysis, or to one of its subschools, have applied it to a variety of situations.¹⁶ It may seem natural, therefore, to let this dominant approach in civil situations flow over the barrier between civil law and criminal law. That in fact is what many courts have allowed it to do.¹⁷ How well it works in criminal law, however, is something this article will assess.

B. EXCLUSIONARY RULES AND INTEREST ANALYSIS

Conflicts assessments in criminal law have occurred most frequently in cases like *Douglas*, where the court is considering the applicability of an exclusionary rule to evidence obtained through a police search or interrogation of a suspect.¹⁸ Such cases can be divided into two categories: (1) those in which the forum state's law affords less protection to the defendant than would the law of the place where the search or interrogation occurred;¹⁹ and (2) those in which the

15. Professor Weintraub offers a more elaborate model of interest analysis in operation in his treatise on conflicts problems. See R. WEINTRAUB, *supra* note 13, §§ 6.9-13, at 278-93.

16. See, e.g., *Diamond Mining & Management, Inc. v. Globex Minerals, Inc.*, 421 F. Supp. 70, 73 (N.D. Cal. 1976) (California uses interest analysis in, *inter alia*, matters of tort, contract, and evidence).

17. For examples of cases in which interest analysis has been applied to *Douglas*-like situations, see *infra* notes 19 to 30 and accompanying text.

18. Conflicts problems may also arise in areas of criminal law unrelated to exclusionary rules. In *People v. Norton*, 80 Cal. App. 3d Supp. 14, 146 Cal. Rptr. 343 (1978), a defendant convicted of a felony in another state, and then pardoned in that state, was prosecuted in California under a law prohibiting convicted felons from possessing firearms. There would have been a conflicts issue if the first state had treated the pardon as restoring the defendant's right to possess firearms, because California law declared that even a pardoned felon is still subject to criminal sanctions for carrying a firearm. As it happened, the court was able to conclude that the pardon this particular defendant had received had not restored his right to carry a firearm even in the state which had granted the pardon, so there was no conflicts problem. Had there been a conflicts question, however, the court made clear that it would have been resolved through interest analysis. *Id.* at 19-21, 146 Cal. Rptr. 346-47.

19. E.g., *People v. Orlosky*, 40 Cal. App. 3d 935, 115 Cal. Rptr. 598 (1974); *People v. Saiken*, 49 Ill. 2d

forum state's law is more protective of defendants.²⁰ In both circumstances, the overwhelming tendency of courts using interest analysis has been to apply their own state's law and to reject the law of the state where the search or interrogation took place.

Apart from *Douglas*, the New York courts have spawned a line of decisions that represents the second category of cases. In *People v. Goodrich*,²¹ another New York defendant fled to Florida and was captured there. His later interrogation met the standards of federal and Florida law, but a motion to suppress was granted in New York because New York law controlled.²² In *People v. Couch*,²³ a New York defendant who fled to Virginia had the same good fortune. Once again, a New York court summarily suppressed the fruits of the interrogation that satisfied federal and Virginia law, but not New York law.²⁴ Each decision to apply forum law was based on the superior interest of the forum in matters relating to the underlying crime.²⁵

A California case typifies the operation of interest analysis in circumstances where the forum state's law affords a defendant less protection than the law of the place where the police activity occurred. In *People v. Orlosky*,²⁶ a valuable piece of equipment was stolen from the defendant's place of employment in California. The defendant soon left his job and apparently moved to Indiana. There he committed an unrelated crime, which led to his wounding and arrest after a shootout with police. Indiana authorities obtained permission from the defendant's wife to search his apartment and found the equipment that had been stolen in California.²⁷

In *Orlosky*, California would have treated the wife's consent as effective, while Indiana considered the search unlawful because the consent was ineffective.²⁸ The court's explanation for its decision to apply California law and admit the evidence was a prototype of the way interest analysis has operated in cases implicating the exclusionary rule:

Indiana can claim an interest in disciplining its own police officers by

504, 275 N.E.2d 381 (1971), *cert. denied*, 405 U.S. 1066 (1972); *People v. Graham*, 90 Misc. 2d 1019, 396 N.Y.S.2d 966 (Sullivan County Ct. 1977).

20. *E.g.*, *People v. Blair*, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); *People v. Benson*, 88 A.D.2d 229, 454 N.Y.S.2d 155 (1982); *People v. Douglas*, 123 Misc. 2d 75, 472 N.Y.S.2d 815 (Sup. Ct. 1984); *People v. Goodrich*, 108 Misc. 2d 326, 437 N.Y.S.2d 599 (St. Lawrence County Ct. 1981).

21. 108 Misc. 2d 326, 437 N.Y.S.2d 599 (St. Lawrence County Ct. 1981).

22. The court's explanation for the decision is rather terse, but it relies on some of the same precedent later cited in *Douglas*. *See id.* at 327-28, 437 N.Y.S.2d at 601.

23. 74 A.D.2d 582, 424 N.Y.S.2d 304 (1980).

24. *Id.* at 582-83, 424 N.Y.S.2d at 305-06.

25. A California court, suppressing evidence obtained lawfully under New Jersey law, used the same rationale to reach its holding:

In the case at bench, we know not whether New Jersey courts would accept our view of reasonable cause for a warrantless search and arrest under the circumstances of this case. This is immaterial, however, because California principles must govern since California's interest in the prosecution of a felony committed within its borders is entitled to the superior recognition.

People v. Rogers, 141 Cal. Rptr. 412, 416 (Ct. App. 1977), *vacated on other grounds*, 21 Cal. 3d 542, 579 P.2d 1048, 146 Cal. Rptr. 732 (1978). *Rogers* is a particularly interesting case that is examined in greater detail later. *See infra* notes 55 to 61 and accompanying text.

26. 40 Cal. App. 3d 935, 115 Cal. Rptr. 598 (1974).

27. *Id.* at 937, 115 Cal. Rptr. at 599.

28. *Id.* at 938, 115 Cal. Rptr. at 600.

withholding from them success in prosecutions no matter where brought. On the other hand, California has an interest in proceeding effectively to prosecute for a major crime committed within its boundaries. On balance, we conclude that the California interest is entitled to superior recognition. This state should not be impeded, in a local prosecution for a local crime, by barring evidence which California law regards as legitimately procured under a doctrine that recognizes modern concepts of the husband-wife relation, merely to add a wrist slap to a foreign police officer whose personal interest in a California prosecution must be relatively remote. Indiana can control its own officers adequately by applying its rules on consent in Indiana prosecution.²⁹

The New York decisions and *Orlosky* identify the two common denominators in almost all the decisions applying interest analysis to exclusionary rule situations. The first is a strong tendency to apply the forum state's law.³⁰ The second is the justification courts typically offer for applying that law: Since the forum is

29. *Id.* at 939, 115 Cal. Rptr. at 601.

30. See *supra* notes 19 to 29 and accompanying text. See also *People v. Saiken*, 49 Ill. 2d 504, 275 N.E.2d 381 (1971) (Illinois has superior interest because crime and related matters occurred there), *cert. denied*, 405 U.S. 1066 (1972); *People v. Benson*, 88 A.D.2d 229, 454 N.Y.S.2d 155 (1982) (New York law applies because New York has "paramount interest" in crime that occurred there).

Professor Theis is among the few scholars to have examined conflict of laws in criminal matters, and he might take issue with my assertion that forum law is almost always applied. See Theis, *Choice of Law and the Administration of the Exclusionary Rule in Criminal Cases*, 44 TENN. L. REV. 1043 (1977). Theis acknowledges that where the issue is the admissibility of a defendant's statements made while under arrest, and the forum provides greater protection for the defendant, the forum will apply its own law to ensure that the evidence is trustworthy. *Id.* at 1050. Theis argues, however, that when the issue is one of admitting evidence obtained in a search, the trustworthiness of the evidence is not at issue, so the forum will be inclined to defer to the law of the state where the search took place. *Id.* at 1046. Both of his positions are flawed.

Theis is correct that in interrogation cases, the forum is likely to apply its own law. See, e.g., *People v. Douglas*, 123 Misc. 2d 75, 472 N.Y.S.2d 815 (Sup. Ct. 1984) (interrogation in Florida but New York law applied). He is wrong, however, in concluding that forum law applies in order to ensure the accuracy of the evidence. Forum law applies because the forum deems itself more interested in the crime being prosecuted. A case in which nonforum law ensured the greater accuracy of the interrogation evidence demonstrates the distinction. In *People v. Benson*, 88 A.D.2d 229, 454 N.Y.S.2d 155 (1982), New York police interrogated a defendant in Texas without electronically recording the examination, as required by Texas law. Such a recording would have materially enhanced the accuracy of the statements obtained. Even so, the New York court refused to afford the defendant the benefit of Texas law, holding instead that New York law applied because "New York has a paramount interest in the application of its laws to this case." *Id.* at 230, 454 N.Y.S.2d at 157. In short, forum law was applied without regard to which state's law was more likely to ensure the reliability of the evidence obtained in the interrogation.

As to Theis' assertion that the forum state usually defers to the law of the jurisdiction where a search took place, his citation, which may be found at 44 TENN. L. REV. at 1046 n. 13, is primarily to federal decisions addressing fourth amendment issues, not to state decisions determining the applicability of state exclusionary rules. The federal cases Theis cites typically arise because a prosecutor seeks to introduce evidence obtained in a foreign country through searches that would be unlawful if the fourth amendment applied. As to such cases, federal—not state—conflicts rules apply.

Theis also cites seven state court decisions in support of his statement that the forum tends to defer to the law of the place of the search, but most of this authority is also off point. Of those seven decisions, four address only the extraterritorial application of the fourth amendment: *State v. Ford*, 108 Ariz. 404, 499 P.2d 699 (1972); *People v. Helfend*, 1 Cal. App. 3d 873, 82 Cal. Rptr. 295 (1969); *Commonwealth v. Wallace*, 356 Mass. 92, 248 N.E.2d 246 (1969); and *Johnson v. State*, 448 P.2d 266 (Okla. Crim. App. 1968). That issue has already been decided, see *Brulay v. United States*, 383 F.2d 345, 348 (9th Cir.) (fourth amendment does not apply to Mexican police acting in Mexico), *cert. denied*, 389 U.S. 986 (1967) and cases cited therein. Such discussions do not address the extraterritorial application of a state exclusionary rule. Those cases are therefore not authority for what state courts will or should do when the issue is one of the state, not federal, law. Moreover, research for this article turned up no cases in which

where the crime was committed,³¹ it seems to have the greatest interest in applying its law.³²

Reliance on forum law is consistent with the forum-favoring results often achieved in noncriminal cases.³³ That reliance, however, is also the major weakness in interest analysis as applied in the context of the exclusionary rule.

II. DEFICIENCIES IN THE USE OF FORUM LAW

The predilection of interest-analysis courts for forum law raises two distinct legal problems. If forum law is less protective of a defendant's interest than the law of the state where police acted, the use of forum law may be unconstitutional. If, on the other hand, forum law affords a defendant more protection than does the state where police acted, application of forum law may be constitutional, but it will often be foolish. Both of these weaknesses in the use of forum law will be explored further.

state courts applying state exclusionary rules felt bound by the precedent of state courts applying federal exclusionary rules.

The three remaining state decisions *Theis* cites should also be mentioned. *People v. Touhy*, 361 Ill. 332, 197 N.E. 849 (1935), was decided a quarter of a century before interest analysis was adopted in any state court. *See R. WEINTRAUB, supra* note 13, § 6.16, at 301 (interest analysis first adopted in 1957). *Touhy* is therefore no evidence of what the Illinois Supreme Court, using interest analysis, would do. Much more recently, the Illinois Supreme Court refused to defer to the law of the place of the search and used interest analysis to justify an application of forum law. *See People v. Saiken*, 49 Ill. 2d 504, 275 N.E.2d 381 (1971).

Moreover, *Touhy* seems to have been decided by a court that did not appreciate the choice-of-law implications of the issue before it. The defendants objected that a Wisconsin search by Wisconsin police was illegal under Illinois law. *Touhy* at 346-47, 197 N.E. at 856-57. The court's response was that the Illinois law was applicable only to Illinois police. Because Wisconsin police were, under Illinois law, no more than civilians, Illinois laws governing police behavior did not apply to them. *Id.* at 347, 197 N.E. at 857. Whether inadvertently or deliberately, the court sidestepped the choice-of-law problem.

In *State v. Wilson*, 199 Neb. 765, 261 N.W.2d 376 (1978), the Nebraska Supreme Court remarked that in the absence of federal constraints the legality of an arrest was determined by the law of the state where the arrest occurred. *Id.* at 768, 261 N.W.2d at 378. That is not the same, however, as saying that the forum will defer to the exclusionary rules of the state where a search took place, and nowhere in *Wilson* did the court suggest that it would so defer. In fact, the court probably considered the entire discussion dicta, for it held that the defendant had not established any differences between the law of the forum and of the place where the arrest occurred. *Id.*

Only the last case, *Commonwealth v. Bennett*, 245 Pa. Super. 457, 369 A.2d 493 (1976), supports *Theis'* statement that in matters involving a search the forum defers to the law of the state where the search took place. It is one of two such cases discovered and those cases will be addressed later. *See infra* notes 68 to 76 and accompanying text.

Two points should be made about *Theis'* article. The first is that he is careful to cite *Rogers* as contrary authority. *See Theis, supra*, at 1046-47 n. 13. The second is that in this developing area of law, some of the decisions contrary to his position were not reported until after his article was in print. Had *Theis* had access to, for example, *Benson*, he probably would have qualified his generalizations.

31. The forum is always the place where the crime was committed because courts take jurisdiction only of criminal matters that occur within their boundaries. *See R. LEFLAR, supra* note 1, § 111, at 223-25.

32. *See supra* notes 25 and 29 and accompanying text. *See also People v. Saiken*, 49 Ill. 2d 504, 275 N.E.2d 381, 385 (Illinois has superior interest because crime and related matters occurred there), *cert. denied*, 405 U.S. 1066 (1972); *People v. Benson*, 88 A.D.2d 229, 230, 454 N.Y.S.2d 155, 157 (1982) (New York law applies because New York has "paramount interest" in crime that occurred there).

33. *See Sedler, Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts*, 57 IOWA L. REV. 1229, 1234, 1237-38 (1972) (forum tends to apply its own law in matters of tort). Sedler's later work explaining the importance of domicile, *see supra* note 14, may be seen as a retreat from his forum-favoring assessment, but in fact the two conclusions support each other. While Sedler's comments in 1972 focus on the role of the forum as forum, he also assumes, quite reasonably, that in most tort actions the forum will also be the domicile of at least one of the parties. 57 IOWA L. REV. at 1234-38.

A. FULL FAITH AND CREDIT LIMITATIONS ON THE USE OF FORUM LAW

In most circumstances, the full faith and credit clause³⁴ is not a significant barrier to a forum court's decision to use forum law. In fact, from the way it has usually been applied over the last half century, it appears that the clause only requires a state whose law is to be applied to a particular issue to have some legitimate interest in the matter. That interest does not have to be superior to the interests of other jurisdictions. For constitutional purposes, it need only be something more than a *de minimis* relationship.

*Carroll v. Lanza*³⁵ demonstrates how easily a court may satisfy the full faith and credit requirements in many choice-of-law situations. Carroll was a Missouri resident who was hired in Missouri, by a Missouri subcontractor, to work on a project in Arkansas. While on the job in Arkansas, Carroll was injured. He filed for relief under the Missouri Compensation Act, which applied to injuries suffered anywhere as long as the employment contract was made in Missouri. The Missouri Act also provided that it was the exclusive remedy for such injuries, barring "all other rights and remedies . . . at common law or otherwise."³⁶

After receiving some compensation under Missouri's scheme, Carroll realized that he might also be entitled to relief under the Arkansas Compensation Act. That statute was more favorable, even though it also barred suit against his immediate employer because it allowed him to sue third parties, such as the project's general contractor. Carroll sued Lanza, the general contractor, in an Arkansas court.³⁷ Lanza argued that the Missouri Compensation Act, barring such a suit, was entitled to full faith and credit and that Arkansas courts were obligated to apply the Missouri law.

The Supreme Court disagreed. Writing for the majority, Justice Douglas concluded that courts in Arkansas could apply the Arkansas statute in lieu of the Missouri law because Arkansas had a significant interest in the case. Existing precedent, Justice Douglas explained,

teaches that in these personal injury cases the State where the injury occurs need not be a vassal to the home State and allow only that remedy which the home State has marked as the exclusive one. The State of the forum also has interests to serve and to protect The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these Arkansas therefore has a legitimate interest in opening her courts to suits of this nature, even though in this case Carroll's injury may have cast no burden on her or on her institutions.³⁸

34. U.S. CONST., art. IV, § 1, cl. 1. The clause states that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." *Id.*

35. 349 U.S. 408 (1955).

36. *Id.* at 409.

37. *Id.* at 409-10.

38. *Id.* at 412-13. Read in isolation, Justice Douglas' observation that "[t]he State of the forum also has interests to serve and to protect," *id.* at 412, could be misconstrued to indicate that a court's mere status as the forum confers an interest sufficient to justify application of forum law. The standard and better reading, however, seems to be that Justice Douglas meant that Arkansas, the forum, might reasonably apply its own law because it had actual or potential interests derived from the fact that the injury to

Cases like *Carroll* suggest that in interstate search or interrogation cases application of the law of the forum, where the crime must have occurred, is constitutional. The forum always has a significant interest in information relevant to a criminal prosecution, and under the standard analysis of cases like *Carroll*, this interest affords escape from the rarely invoked mandate to afford full faith and credit to a sister state's law. Closer examination, however, indicates that *Carroll* and similar cases may have little applicability to conflicts of law involving the exclusionary rule.

More important than the precedent of *Carroll* is the policy that is at the heart of the full faith and credit clause. The Supreme Court has said that

[t]he very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.³⁹

In a very real sense, therefore, the full faith and credit clause is a foundation of the federal system and is central to the operations of our society.

Binding the states together in a cooperative federal venture requires deference to one another's laws, even if that deference must stop short of subservience. On the one hand, the forum cannot always be expected to defer to the law of another state with an interest in the matter. Otherwise, it would invariably end up applying nonforum law, with "the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."⁴⁰ At the same time, however, there must be points at which the forum is compelled to respect the law of another state. If there are no such points, the full faith and credit clause loses vitality over one of the categories—"public acts"⁴¹—to which it is supposed to apply.

Consistent with that policy, cases like *Carroll* do not hold that full faith and

Carroll had occurred there. See R. WEINTRAUB, *supra* note 13, § 9.3A, at 523 (Arkansas' interest based on its status as site of injury to *Carroll*); cf. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (mere status as forum does not justify application of forum law).

39. *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-77 (1935). No one would quarrel seriously with Professor Weintraub's somewhat more expansive explanation of the purpose of the full faith and credit clause:

The purpose of the full faith and credit clause was and is to help forge a federal nation out of individual sovereign states. If the United States is to be more than just a loose alliance of independent sovereignties, if it is to be a nation, then the individual states must act as parts of a nation. In many crucial areas there is need for national uniformity of conduct. The full faith and credit clause articulates one respect in which national uniformity is required: one state is not free to ignore the public acts, records, or judicial proceedings of another, nor to subject them to the gauntlet of local "public policy", as it may the acts, records, and judicial proceedings of a sovereign with which it is not combined in a federation. In order to determine whether the full faith and credit clause places a further limitation on a state's choice of law than is imposed by the due process clause, the interest of the state that makes application of its law consistent with due process is to be weighed against the need for national uniformity of result under a public act, record, or judicial proceeding of a sister state.

R. WEINTRAUB, *supra* note 13, § 9.3A, at 527-28 (footnotes omitted).

40. *Alaska Packer's Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

41. U.S. CONST., art. IV, § 1, cl. 1. Of course, the full faith and credit clause remains a very powerful instrument of federalism when the issue is one of enforcing the judgment of a sister state. See R. WEIN-

credit will never command a forum to apply another state's law. Instead, *Carroll* and similar decisions reflect only a belief that in many areas of civil litigation, the federal system is not disturbed significantly by predispositions in favor of the law of an interested forum. As Justice Douglas remarked in *Carroll*, "Arkansas, the State of the forum, is not adopting any policy of hostility to the public Acts of Missouri. It is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders."⁴²

When the facts change, however, so that the need for national unity is greater—either because a matter at issue is especially sensitive to a state other than the forum, or because the application of forum law constitutes "hostility" to the laws of a sister state—the standard civil-litigation-oriented full faith and credit analysis exemplified by *Carroll* is simply not on point. In these circumstances, it is more important to give full faith and credit to the law of another state. Police searches and interrogations that are unlawful under the law of the state where they took place are such a special circumstance.

A just society will react with special sensitivity to police misconduct. As Justice Frankfurter explained in the context of the fourth amendment:

The Security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society . . . The knock at the door . . . without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.⁴³

Unlawful police activity is so sensitive because police, unlike most of the criminals they pursue, are endowed with special powers to command obedience from the general public. When individuals who have such power step out of line, they bring with them greater potential for harm than does the typical criminal. Attempts to control police misconduct therefore take on an importance that may be greater than the significance attached to catching ordinary criminals.

Deterrence of police misconduct, however, is apparently not a goal easily achieved through application of traditional civil, criminal, and administrative remedies alone.⁴⁴ Wisely or not, the belief persists that exclusionary rules are needed to regulate police.⁴⁵ For that reason, and given the special importance attached to minimizing police excesses, the state has a particularly great interest in enforcing its own prohibitions on searches and interrogations through the use of exclusionary rules.

Once an interest of such special sensitivity to another state is established, we

TRAUB, *supra* note 13, § 9.3B, at 534-37 (although there are exceptions, full faith and credit is a powerful force in favor of enforcing sister states' judgments).

42. 349 U.S. at 413.

43. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

44. Professor Whitebread's explanation of the problems in trying to control police through standard legal tools is typical of the arguments usually made on behalf of exclusionary rules. See C. WHITEBREAD, *supra* note 4, §§ 2.05-06, at 37-54.

45. See, e.g., *People v. Blair*, 25 Cal. 3d 640, 655, 602 P.2d 738, 748, 159 Cal. Rptr. 818, 828 (1979) (California uses exclusionary rules to deter police misconduct and to avoid judicial participation in unlawful activity); *People v. Benson*, 88 A.D.2d 229, 454 N.Y.S.2d 155 (1982) (purpose behind New York's exclusionary rules is deterrence of police misconduct).

can determine how a forum's disregard of it may be detrimental to the goal of national unity that underlies the full faith and credit clause. Consider a typical sequence of events in which an interstate criminal procedure problem arises. An individual will commit a crime in one state and flee to a second state. If the state where the crime was committed knows the identity of the suspect, it will issue an arrest warrant and seek the help of other jurisdictions to which the individual might have fled. When the suspect is arrested in the second state, a search or an interrogation will take place, and incriminating evidence will be obtained. The first state (the forum) will prosecute, using the evidence obtained in the situs state. Assuming the search or interrogation was unlawful in the situs state, but lawful in the forum, an issue of full faith and credit will arise if the forum state seeks to use its own law and to admit the evidence.

In those circumstances, the potential for damage to the policies behind the situs state's exclusionary rule is obvious. Police collecting evidence for use in another state will be free of the constraints normally imposed by their own jurisdiction. To the extent that the state's exclusionary rule deters police misbehavior, the absence of an effective rule increases the risk for damage to the larger societal interests Justice Frankfurter identified. Such costs are probably far greater than those imposed on a state by choice-of-law decisions in generic civil litigation typified by *Carroll v. Lanza*.⁴⁶

Carroll is not on point for another reason. In criminal procedure cases that implicate an exclusionary rule, there is an element of forum activism not found in the generic civil litigation like *Carroll*. In *Carroll*, the forum played a passive role in events leading up to the litigation. The parties had entered a contract there, but the forum government itself had no part in these negotiations. The forum also had no part in the circumstances that ultimately gave rise to the cause of action. Finally, the forum had entertained the suit, but it had not solicited the litigation. Indeed, all the forum conceivably did to give offense to the situs state was to refuse to apply the other state's law.

Where police searches or interrogations are at issue, however, the forum often intervenes earlier and more vigorously. Instead of waiting to adjudicate issues brought to its courts, the forum will often have initiated the police dragnet that ultimately obtained evidence in the situs state. Indeed, the forum police will sometimes go beyond merely requesting a search or interrogating. In *People v. DeMorrow*,⁴⁷ Illinois police traveled to Michigan and conducted a search that was illegal under Michigan law. In *People v. Benson*,⁴⁸ New York police traveled to Texas and conducted an interrogation illegal under Texas law. Yet, whether forum police themselves act unlawfully in another state or merely encourage the other state's police to disregard their own laws, one result stays the same. In both cases the forum is acting in an affirmatively hostile manner toward the law of a sister state.⁴⁹ To do so without violating the full faith and credit clause means that clause is now devoid of meaning as applied to public acts. A better

46. See *supra* notes 35 to 38 and accompanying text.

47. 17 Ill. App. 3d 901, 308 N.E.2d 659, *aff'd*, 59 Ill. 2d 352, 320 N.E.2d 1 (1974).

48. 88 A.D.2d 229, 454 N.Y.S.2d 155 (1982).

49. In *Carroll v. Lanza*, by contrast, Justice Douglas reasoned that the forum did not violate the full faith and credit clause in part because its forum-favoring choice-of-law decision evinced "no hostility" toward the public acts of the second state. 349 U.S. at 413.

result would be that full faith and credit still has some vitality, and that in the area of exclusionary rules, failure to apply the more defendant-protective law of the situs state violates the Constitution.

On the other hand, when it is forum law that is more defendant-protective, application of forum law offends no special need in the situs state to control police conduct,⁵⁰ so no constitutional question arises. Even so, as we shall now see, application of forum law is a remarkably foolish choice.

B. APPLICATION OF MORE DEFENDANT-PROTECTIVE FORUM LAW

As demonstrated earlier, the primary rationale courts use to justify application of their own law is that the forum is the jurisdiction with the greatest interest in having its own law applied. Interests of states where police activity took place may often be acknowledged, but they are treated as less important than the forum's interest in the crime.⁵¹ Such assessments are deficient for two reasons. First, they view the crime, the search or interrogation, and the prosecution as an entity rather than as a series of events which, though connected, may each give rise to separate interests. Second, forum-biased assessments usually give inadequate weight to the real-world considerations that govern police activity, particularly the not unreasonable police expectation that their work is subject to the law of their state. Both of those deficiencies will be considered in turn.

Failure to treat a police search or interrogation as analytically distinct from the original crime short-circuits the interest analysis that courts are supposed to undertake. By compressing the entire sequence of interstate events under the single level of "crime"—an event in which the forum is sure to have a superior interest—forum courts inevitably underplay a situs state's interest in police activity that takes place within its borders. The crime itself is undoubtedly of great interest to the forum, but unlawful police activity in a sister state is surely a matter of special sensitivity to the state within whose borders it occurs and whose residents are most likely to feel its adverse consequences. By deemphasizing or ignoring special sensitivities, however, the forum can ensure that interest analysis will operate to produce the "right" result in matters of criminal procedure, that is, application of forum law.⁵²

The other weakness of forum-biased interest analysis in criminal procedure is its failure to take into account the real-world problems of police who must cope with exclusionary rules. While courts that have adopted interest analysis direct their analyses to identification of the respective interests states may have in a matter, police must plug away at learning the law and conforming their behavior

50. The situs state has no special sensitivity to application of a forum's more defendant-protective law because application of such law results in suppression of evidence. The thesis underlying exclusionary rules is that only the *admission* of evidence may encourage police misconduct. See C. WHITEBREAD, *supra* note 4, § 2.01, at 14 (police misconduct deterred through suppression of illegally obtained evidence).

51. See, e.g., *People v. Orlosky*, 40 Cal. App. 3d 935, 939, 115 Cal. Rptr. 598, 601 (1974):

This state should not be impeded, in a local prosecution for a local crime, by barring evidence which California law regards as legitimately procured . . . merely to add a wrist slap to a foreign police officer whose personal interest in a California prosecution must be relatively remote. Indiana can control its own officers adequately by applying its rules on consent in Indiana prosecutions.

52. In so doing, forum courts also demonstrate the malleability of interest analysis generally; almost any result can be achieved simply by taking care to stress the interest likely to lead to the desired result.

to it. In the best circumstances, the police have a rather formidable task. Even when the only exclusionary rules they must learn are those of their own state plus applicable federal rules, it must be difficult for individuals with little formal legal training to track the twisting, confusing course of judicial decisions that regulate searches and interrogations.⁵³ The problems increase geometrically if police are also required to know the law of other potentially interested states.

Police knowledge of controlling law is, of course, central to the deterrent purpose behind exclusionary rules. Police who are unaware of applicable law will not be deterred from violating it. When forum-biased interest analysis imposes on the police of another state the additional burden of learning the law of the forum—or facing the consequences that evidence obtained will not be admitted in the forum—interest analysis merely causes suppression of probative evidence, without deterring police misconduct.

People v. Douglas,⁵⁴ the opinion with which this article began, demonstrates how forum-biased interest analysis may lead to suppression of credible evidence even though it achieves no significant deterrence. To review the facts, Douglas was a New York fugitive who fled to Florida and was arrested there on a New York warrant. While in the custody of Florida authorities, Douglas made statements linking him to the crime with which he had been charged. The Florida police collected that evidence properly under both Florida and federal law, but in a way that was inconsistent with New York law. Suppressing the evidence because New York was the most interested state, and whose law should therefore apply, was the same as telling the Florida police that they could obtain probative evidence only if they learned and obeyed the law of a sovereign not their own, and in whose territory they had not operated. Such a requirement imposed on Florida police could probably be discharged only if an attorney versed in New York law gave squadroom seminars before the police set out to enforce that day's collection of warrants.

Even the farfetched prospect of impromptu instruction in another state's law would not make forum-biased interest analysis more realistic. In some cases, police may have no opportunity to learn in advance which jurisdiction will receive the evidence they obtain.

*People v. Rogers*⁵⁵ demonstrates the problem. *Rogers* began when a New Jersey police officer on patrol stopped a light brown van with Georgia license plates. Earlier in the evening the officer had picked up a police broadcast indicating that the driver of a similar vehicle may have tried to molest some youngsters. In the end the driver of the van was arrested and the van searched. The

53. Chief Justice Burger's well-known dissent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) underscored this point.

Whatever educational effect the [exclusionary] rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not "reasonable" amply demonstrate.

Id. at 417 (Burger, C.J., dissenting).

54. 123 Misc. 2d 75, 472 N.Y.S.2d 815 (Sup. Ct. 1984).

55. 141 Cal Rptr. 412 (Ct. App. 1977), *vacated on other grounds*, 21 Cal. 3d 542, 579 P.2d 1048, 146 Cal. Rptr. 732 (1978).

search disclosed evidence that the driver, Rogers, had molested a child in California some time earlier. Until that evidence was uncovered, neither the child's parents nor California authorities had known that a crime had been committed.⁵⁶

The conduct of the New Jersey police apparently met the standards of both federal and New Jersey law. No information the police possessed before the search revealed any hint that California might be an interested state. Indeed, if a particularly sophisticated officer had contemplated application of the law of another state, Georgia would have been the state that came to mind.⁵⁷ Application of what the court said was California's differing standard on arrests and searches would have contributed nothing to the deterrent purpose behind exclusionary rules. Nevertheless, the court's standardized interest analysis mandated the application of a law that the New Jersey police could not possibly have been expected to observe: "California principles must govern since California's interest in the prosecution of a felony committed within its borders is entitled to the superior recognition."⁵⁸

By now, the reader should no longer be surprised to discover that a California interest analysis required suppression of the fruits of the New Jersey search. If there is any remaining question about interest analysis, it is whether the system invariably operates so poorly. In criminal procedure matters, the answer is likely to be "Yes."

It is not clear from the cases examined for this article whether *Rogers* is unique or whether a significant number of police searches or interrogations produce the sort of surprise information that came to light there.⁵⁹ Even if *Rogers* is the exception and *Douglas* the rule, however, the fact remains that police are unlikely to have the inclination or legal skills to assess the law of states other than the ones in which they work.⁶⁰ Interest analysis, so often touted as the process that takes account of "pragmatic" considerations in conflicts matters,⁶¹ has a demonstrated record of failure to adjust to the realities of both police work and the deterrent policies behind exclusionary rules.

C. THE DURABILITY OF INTEREST-ANALYSIS DEFECTS

At first glance, one feature of interest analysis may appear to account for nearly all of the criticism contained in this article. That feature is the predisposi-

56. The first indication the authorities had of the defendant's prior crimes in California appears to have come after the arrest and search. 141 Cal. Rptr. at 415.

57. Not only did the van have Georgia plates, but the defendant also apparently told the arresting officers that he was "from Georgia." *Id.*

58. *Id.* at 416.

59. In another California decision, *People v. Orlosky*, 40 Cal. App. 3d 935, 115 Cal. Rptr. 598 (1974), Indiana police investigating an unrelated crime came upon a piece of electronic equipment that defendant had stolen in California. The discovery was lucky, in that the police had no knowledge that the defendant had committed any crimes in California. *Id.* at 937, 115 Cal. Rptr. at 599.

60. There is one clear exception to this generalization. When police initiate activity in another state, either by asking the police of the other state for help or by going there themselves, they may then reasonably be expected to conduct themselves in accordance with the law of the second state. See *infra* notes 97 to 98 and accompanying text.

61. See, e.g., Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 754 (1963) (goal of interest analysis is "to formulate a different methodology, capable of yielding rational results in real cases").

tion of courts using interest analysis to apply their own law. One might reasonably ask whether, if such forum bias were eliminated, interest analysis would then become a useful tool for resolving interstate criminal procedure questions. Freed of forum bias, interest analysis might: (1) accord serious respect to the genuine interests of nonforum states;⁶² (2) take into account real-world police knowledge of laws relating to exclusionary rules;⁶³ and (3) avoid the potential constitutional problems that arise when a forum admits evidence suppressible under the law of the state where police obtained the evidence.⁶⁴

The prospect of applying a bias-free interest analysis to matters of criminal procedure, however, is less promising than it may appear. Forum bias and interest analysis are so strongly intertwined that separation is difficult, if not impossible. Moreover, if courts applying interest analysis could somehow be induced to open their vision to possibilities beyond the law of the forum, the result would not be a reformed interest analysis. Instead, the courts would have abandoned interest analysis for another, and probably better, approach to the conflict of laws in criminal procedure.

Whether applied in criminal or civil matters, interest analysis has always contained a strong forum bias. Brainerd Currie, its architect, candidly advocated the law of the forum whenever the interest of two or more states were in true conflict.⁶⁵ Since Currie, other interest analysts have looked less approvingly on the presence of forum bias, but they too have often acknowledged its influence. Professor Sedler, one of the most ardent of the remaining advocates of interest analysis, has reported that forum law stands alongside the law of parties' domicile as the law most likely to be selected in important categories of civil conflicts cases.⁶⁶ The experience of interest analysis in criminal procedure has been no different.⁶⁷ This data should prompt at least a suspicion that as interest analysis actually operates, it cannot separate itself easily from forum bias.

Even on those unusual occasions when courts using interest analysis in matters of criminal procedure free themselves of forum bias, the substituted analysis may also be unsound. *People v. Blair*,⁶⁸ one of two interest-analysis decisions identified in research for this article in which forum law was not applied,⁶⁹ sug-

62. See *supra* notes 50 to 52 and accompanying text (discussing interest of nonforum states).

63. See *supra* note 53 and accompanying text (discussing impracticability of requiring police compliance with laws of another state).

64. See *supra* notes 34 to 50 and accompanying text (discussing full faith and credit limitations on use of forum law).

65. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 119 (1963) ("The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law.").

66. See Sedler, *supra* note 33, at 1237-38 ("The point that I wish to emphasize is that in actual practice tort cases presenting true conflicts are almost invariably decided under the substantive law of the forum, as Professor Currie has advocated."); see also Sedler, *supra* note 14, at 1032-41 (law applied in most conflicts tort cases is law of either forum or domicile of at least one party).

67. See *supra* notes 19 to 30 and accompanying text.

68. 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979).

69. Strictly speaking, *Blair* is the only interest-analysis decision applying nonforum law. In *Commonwealth v. Bennett*, 245 Pa. Super. 457, 369 A.2d 493 (1976), the court admitted evidence obtained in a New Jersey telephone surveillance that would have been unlawful under the law of Pennsylvania. The court, however, identified no conflict-of-laws approach that it may have been using to justify its decision, and the case seems to be more nearly an ad hoc decision on the individual merits of the case than a principled approach to the development of rules controlling interstate criminal procedure problems.

For example, the court reasoned that it had "absolutely no power to control the activities of a sister

gests that interest analysis does not produce better reasoning when the law applied is that of some state other than the forum.

Blair addressed the admissibility of evidence obtained in Pennsylvania in a manner unlawful under California law. In its departure from the practice of applying forum law, the California Supreme Court offered two reasons for admitting the evidence. First, no deterrent purpose would have been served by excluding it.⁷⁰ Second, because the defendant was a resident of Pennsylvania, no injustice flowed from affording him only the benefits of Pennsylvania law.⁷¹ The first of those reasons, as we have already seen, is based on solid ground. The second reason, however, suggests that it is hard for interest analysis to find stable ground when it does not cling to the pole of forum law.

When the court reasoned that it was all right to apply Pennsylvania law because the defendant was a Pennsylvania resident, it fell into yet another trap for interest analysis: the unconstitutional denial of the benefits of one state's law to another state's citizens. Appreciation of this trap would begin with the court's precise language: "Defendant was a resident of the jurisdiction in which the seizure occurred. Since the seizure was legal there, his expectation of privacy was not impaired under the laws of the state in which he resided."⁷²

But what would have happened if the defendant had been a Californian? The court did not have to address that question, but the logic of its reasoning in *Blair* suggests the answer. If Pennsylvania police had conducted the same search of a Californian, they would have impaired the California citizen's expectation of pri-

state or to punish conduct occurring within that sister state." *Id.* at 460, 369 A.2d at 494. The court then argued that police agencies should be encouraged to exchange relevant information:

A conclusion that denies the exchange of information between law enforcement agencies of our Commonwealth and those of our sister states cannot be justified. The overriding public policy must be to allow such an exchange, for public policy, in the absence of legislative mandate, must favor the interest of the public by fostering its protection through the detection and apprehension of those who persist in defying our laws.

Id. at 460-61, 369 A.2d at 494.

The court went on to make two additional points. It held that the Pennsylvania legislature had not shown any intent to apply its restrictions on telephone surveillance outside the boundaries of Pennsylvania. *Id.* at 461, 369 A.2d at 494-95. The court also noted one consideration that might have gone into an interest analysis:

No useful purpose whatsoever would be served by denying the Commonwealth the use of this information when applying for a search warrant. We would not chastise errant law enforcement agencies or officers and we are not dealing with scoundrels who would use this information to the detriment of our citizens. We would not influence future wiretaps in New Jersey. Pennsylvania police officers did not participate in any manner in the securing of this wiretap or in the resulting New Jersey surveillance.

Id. at 462, 369 A.2d at 495.

Running through the court's comments are threads of what may be undeveloped interest analysis, but it is hard to call the decision a matter of interest analysis with much confidence. Beyond *Blair* and *Bennett*, no interest-analysis decisions were found employing nonforum law.

70. 25 Cal. 3d at 656, 602 P.2d at 748, 159 Cal. Rptr at 828. On this point the court got its analysis exactly right. In the court's words:

[N]o California law enforcement personnel participated in the seizure of the records from the telephone company in Philadelphia, and since the seizure was not illegal where it occurred, exclusion would serve no deterrent effect in either jurisdiction.

Id.

71. *Id.*

72. *Id.*

vacy "under the laws of the state in which he resided." In that circumstance, presumably, California courts would have had a reason to suppress the evidence to protect a California citizen's expectation of privacy under California law. The reasoning may seem sensible enough; California law exists to protect California citizens, Pennsylvania law exists to protect Pennsylvania citizens. Such reasoning is probably central to interest-analysis decisions based on parties' domicile,⁷³ but it also is probably unconstitutional.

As Dean Ely has argued,⁷⁴ the privileges and immunities clause⁷⁵ requires states to give their citizens and noncitizens the same protections. If California suggests that it might protect California citizens from the consequences of a Pennsylvania search, but will not protect a citizen of Pennsylvania, it is discriminating on the basis of state citizenship in precisely the manner that the privileges and immunities clause prohibits. *Blair's* attempt to identify state interests on the basis of parties' domicile—an approach employed commonly in civil matters, but not adopted in most criminal procedure interest analyses—rests on a dubious constitutional foundation. More important, interest analysis demonstrates poor legal reasoning.

III. THE ALTERNATIVE TO INTEREST ANALYSIS

If interest analysis does not work well when it concentrates on forum law, and if it offers no better promise when it concentrates on the law of the parties' domicile, it might be time to recognize that we need another solution to conflicts dilemmas in interstate criminal procedure matters. Fortunately, we can find this solution in *People v. Blair*,⁷⁶ one of the rare interest-analysis decisions uncovered in this study that rejects the law of the forum.

A. SITUS LAW

Apart from its misplaced reliance on the law of a party's domicile, *Blair* offers an important insight into one set of interstate criminal procedure facts: when the search is lawful in the situs, and forum police officers took no part, no deterrent purpose is served by suppressing evidence obtained in the search. As the

73. See *supra* note 14 and accompanying text (discussing use of domicile in civil matters).

74. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

75. U.S. CONST. art. IV, § 2, cl. 1. The clause provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." *Id.*

76. 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979). The California Supreme Court's decision in *Blair* to apply the law of the situs raises the possibility that the earlier California appellate decision in *People v. Rogers*, 74 Cal. App. 3d 242, 141 Cal. Rptr. 412 (1977), *vacated on other grounds*, 21 Cal. 3d 542, 579 P.2d 1048, 146 Cal. Rptr. 732 (1978) is overruled. But that does not appear to be so since the cases are factually distinguishable. The result in *Blair* was reached in large part because the defendant was a domiciliary of the situs state. See *supra* notes 72 to 73 and accompanying text. In *Rogers*, by contrast, the defendant was apparently a domiciliary of a third state, which was neither the forum nor the situs of the search. See *supra* note 57 and accompanying text.

Moreover, although the California Supreme Court vacated the appellate tribunal's decision, it did so because the high court thought the New Jersey search was lawful under the law of both states. *Rogers* at 548-50, 579 P.2d at 1052-53, 146 Cal. Rptr. at 736-37. That holding made the lower court's choice-of-law analysis unnecessary. See *supra* note 10. The California Supreme Court therefore expressly declined to decide the issue as it was presented by the peculiar facts of *Rogers*, 21 Cal. 3d at 548, 579 P.2d at 1052, 146 Cal. Rptr. at 736.

court pointed out, situs police will continue to conduct their investigations in accordance with their own law, so they will not be deterred. Because situs police are normally present at searches and interrogations conducted within their state, they can also deter conduct by forum police that is inconsistent with situs law.⁷⁷

Blair's insight, in turn, leads to a larger generalization. Instead of looking to forum law (or the law of a party's domicile) for the rule of decision in interstate criminal procedure cases, courts would do better simply to apply the law of the jurisdiction in which the police activity took place. That approach has a number of advantages.

First, and most important, it will bring a needed measure of predictability to police work. Police officers, like the rest of us, can be deterred only by laws and sanctions whose intricacies and applicability they comprehend. The practice of applying forum law, as discussed earlier, usually guarantees that the situs police, who undertake a search or interrogation, will not have such knowledge. Application of situs law, on the other hand, offers a greater prospect that police will know which state's law is applicable; it will be identified readily as the law of the state in which police activity is undertaken. And because that state's police often participate in the search or interrogation,⁷⁸ there will usually be someone on the scene who understands that law as well as any police officer is likely to understand it.⁷⁹

Second, application of situs law should quiet the constitutional questions raised by use of forum law. Use of situs law, regardless of the state citizenship of interested parties, avoids the privileges and immunities problem presented when interest analysis relies on the law of a party's domicile. It also avoids the full faith and credit issue that forum bias provokes when it results in rejection of situs law that is more protective toward a defendant.

Situs law is so obviously more attractive than the interest analysis bias toward the law of the forum that one may reasonably ask why courts have been so slow to adopt it. Part of the answer probably lies in forum bias itself; even if courts did not use interest analysis, they would probably be disposed in some measure toward their own, more familiar law.⁸⁰ The aversion to situs law may also exist because it is identified by many with older, mostly discredited, approaches to conflict of laws problems.

77. *Blair*, 25 Cal. 3d. at 656, 602 P.2d at 748, 159 Cal. Rptr. at 828. There are unusual cases where this generalization will not apply, but situs rules may be adjusted to take such cases into account. See *infra* notes 97 and 98 and accompanying text.

78. Admittedly, there are cases in which the forum's police unilaterally enter another state and conduct searches or interrogations. See, e.g., *People v. Benson*, 88 A.D.2d 229, 454 N.Y.S.2d 155 (1982) (New York police conducted unilateral interrogation in Texas). Those cases seem to be exceptions, however, and if they constitute abuse there is a way to handle them when they arise. See *infra* notes 97 and 98 and accompanying text (police initiating activity in another state may reasonably be expected to comply with law of that state).

79. Chief Justice Burger, however, has been openly skeptical about the prospect that even police with such familiarity will actually know their search-and-seizure law all that well. See *supra* note 53 and accompanying text.

80. See *infra* notes 92 to 95 and accompanying text (discussing predisposition of courts to apply own law even under the older situs law approach to choice of law embodied in the First Restatement of Conflict of Laws).

B. ESCAPING THE WEAKNESSES OF THE FIRST RESTATEMENT

The standard approach to choice-of-law questions before interest analysis was laid out in the First Restatement of Conflict of Laws. The First Restatement's approach rests heavily on application of situs law. In matters of contract, for example, the First Restatement directs the use of either the law of the place of contracting or the law of the place of performance.⁸¹ In tort cases the First Restatement usually applies the law of the place of the wrong.⁸²

Those territorial rules have never been well received by advocates of interest analysis. Professor Weintraub's attack on the traditional approach to conflict of laws in tort is typical: "It is inconceivable that a single, rigid, territorially-oriented choice-of-law rule could serve adequately over the vast range of tort problems The result of applying the place-of-wrong rule in so many different contexts has been irrational and worse, unjust, decisions."⁸³

Following Brainerd Currie, Weintraub and other scholar-advocates of interest analysis have been exceptionally successful in encouraging courts to abandon the territorial nature of the First Restatement in favor of interest analysis.⁸⁴ It should be no surprise that judges, who have borrowed so heavily from the scholarly sources of interest analysis, also have adopted the hostility to territorial rules. If that animosity has been transferred to the bench, it would help explain why judges who have been so thoroughly indoctrinated in interest analysis are unwilling to return to a simple situs rule.

If some judicial predispositions exist, however, they do so alongside some very good reasons why interest analysts (and almost everyone else interested in choice-of-law issues) dislike the First Restatement. Weintraub was certainly correct in describing the older territorial rules as "rigid."⁸⁵ Such rigidity meant that when factual circumstances arose that were not contemplated by the rules, and to which the rules could not give a just response, the traditional approach was to manipulate the rules so as to achieve a just result, or to accept an injustice.

Sometimes the outcome was the injustice Weintraub described.⁸⁶ Other times, the territorial approach manipulated its rules through the use of "escape devices." Escape devices are choice-of-law tools that allow judges to achieve justice by conforming not to the basic territorial rules of the First Restatement, but to designated exceptions with at least superficial plausibility. Judges could refuse to apply another state's law because it contradicted the forum's "public policy."⁸⁷ They could avoid using the place-of-wrong rule for tort claims by characterizing the action as one in contract, or family law, to which different

81. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 353, 385 (1934).

82. *Id.* § 418.

83. R. WEINTRAUB, *supra* note 13, § 6.1, at 266-67.

84. Legal scholarship appears to be more influential in conflict of laws than in most other legal specialties. For example, it is probably not an exaggeration to suggest that the Michigan Supreme Court began to abandon the rules of the First Restatement, and to adopt interest analysis, largely under the influence of one of the most zealous advocates of interest analysis, Robert Sedler. See *Saxton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 425-32, 320 N.W.2d 843, 850-54 (1982) (relying heavily on Professor Sedler's analysis of Michigan conflict-of-laws decisions).

85. Weintraub, *supra* note 13, § 6.1, at 266-67.

86. *Id.*

87. *M.I.I. v. E.F.I., Inc.*, 550 S.W.2d 401, 404 (Tex. Civ. App. 1977), *cert. denied*, 435 U.S. 1008 (1978).

territorial rules apply.⁸⁸ They could resist the application of another state's law by describing the issue at bar as "procedural" in nature, because in matters of procedure the forum was usually free to apply its own law;⁸⁹ and so on.⁹⁰ These devices allow judges to escape the strictures of territoriality and to fulfill their own notions of just results, but only at the cost of disrupting choice-of-law rules. When the First Restatement flourished, scholars tell us, it was difficult to predict whether a court would adhere to the territorial rule or circumvent it through an escape device.⁹¹

When traditional learning has been applied to interstate criminal procedure matters, the result seems to bear out the criticism of interest analysts. *Burge v. State*⁹² was decided before the Texas courts abandoned the First Restatement in favor of interest analysis.⁹³ *Burge* objected to the admission of evidence in a Texas court that had been obtained when Texas and Oklahoma police conducted a search in Oklahoma. The defendant's wife had consented to the search, which made it lawful under Texas law. Oklahoma, however, required that both spouses consent to a search.⁹⁴

The Texas court demonstrated the same forum-law orientation of interest analysis, even if the justifications were somewhat different:

We conclude . . . that in such instances the law of the forum (Texas in this case) governs as to procedure and rules of evidence Any other view would lead to endless perplexity.

We reach such conclusion despite the fact that appellant vigorously urges the issue is not one of conflicts of law where the law of the forum governs as to a rule of evidence but is one of constitutional law.⁹⁵

If *Burge* is followed in jurisdictions that still use the First Restatement, criminal procedure in these states is infected with some of the same deficiencies that have characterized interest analysis. Like the interest-analysis decisions, *Burge* shows that forum law will almost invariably be chosen. That selection probably raises the same full faith and credit issue present when an interest-analysis court

88. *Huamschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 131-37, 95 N.W.2d 814, 815-18 (1959).

89. *Grant v. McAuliffe*, 41 Cal. 2d 859, 862-66, 264 P.2d 944, 946-47 (1953).

90. The standard escape devices are surveyed in R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* 63-145 (3d ed. 1981).

91. Professor Leflar's observation about the procedural escape device could serve as a criticism of other escape devices, with only small adjustments.

When a . . . rule . . . is held to be procedural, so that a locally favored rule can be applied, it is apparent that the characterization technique is being used to achieve results that must be justified, if at all, by other real reasons. That other real reasons may exist cannot be doubted. The valid questions are as to what the real reasons are, and why a cover-up device should be manipulated to conceal them.

R. LEFLAR, *supra* note 1, § 88, at 178. See also R. WEINTRAUB, *supra* note 13, § 3.6, at 84 (public policy in traditional system leads to haphazard results); Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 WAYNE L. REV. 829, 843-44 (1978) (public policy manipulated to achieve desired results).

Currie was discussing escape devices when he commented that "[t]he uniformity and certainty promised by the system are . . . to a large extent illusory." B. CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICTS OF LAW* 159 (1963).

92. 443 S.W.2d 720 (Tex. Crim. App.), *cert. denied*, 396 U.S. 934 (1969).

93. The Texas Supreme Court adopted a species of modern interest analysis in *Gutierrez v. Collins*, 583 S.W.2d 312, 315-19 (Tex. 1979).

94. *Burge*, 443 S.W.2d at 722-23.

95. *Id.* at 723.

refuses to apply the more defendant-protective law of the situs state. Moreover, if the result in *Burge* would also apply in cases where the forum's law offered additional protections to a defendant—and the use of the procedural escape device offers no distinction in such circumstances—the decision is as insensitive to the realities of police work as any of the interest-analysis decisions. The unexpurgated First Restatement thus offers a poor model for choice-of-law rules in criminal procedure.

The problem of the First Restatement, however, is not with its inclination toward situs rules, but with the way it tries to provide escapes from those rules. Consider how *Burge* would be decided if no escape devices were employed. Situs law, meaning Oklahoma law, would apply. Under Oklahoma law the search was unlawful, and the Texas court would therefore suppress the evidence. The result is different from that actually reached in *Burge*, and the deficiencies of both *Burge* and interest analysis are avoided. First, application of situs law, without regard to whether the situs is also the forum, avoids the problem of forum bias. Second, application of situs law would mean the forum state had deferred to the situs state's interest in controlling police activity, so the requirements of full faith and credit would certainly be satisfied. Finally, application of situs law would satisfy the reasonable expectation of police officers that the law of the state in which they acted would apply, thereby making realistic the possibility of using exclusionary rules to deter police misbehavior in interstate cases. Taken as a whole, the First Restatement may deserve the criticisms interest analysts have made. When the situs rules of the First Restatement are not diluted by escape devices, however, good results based on sound reasoning may be achieved.

Interest analysts may argue, as Weintraub has, that without escape devices situs rules become tools for arbitrary, perhaps unjust, decisions. Critics of situs rules can point to cases in which just results were achieved only because judges abandoned situs rules through the use of escape devices. Such arguments, however, assume erroneously that situs principles can accommodate justice in exceptional cases only by relying on the sometimes capricious, usually unexplained use of escape-device labels like "procedure" or "public policy."⁹⁶ In fact, situs rules would accommodate unusual cases much better if escape devices were replaced by a requirement that judges deciding choice-of-law matters explain in a principled, coherent fashion why the normal rule of situs should not apply.

One set of possible facts suggests how the accommodation would work. Suppose that in *People v. Douglas*,⁹⁷ Douglas did not flee New York immediately. Suppose also that New York police had identified Douglas as the perpetrator,

96. This is probably as good a point as any to note that all of the escape devices start from a reasonable position. For example, no sensible person would object when a court required that litigants use paper of specified dimensions, regardless of what other courts may require. Such application of local practice occurs in the name of orderly procedure, and represents one of the starting points for the principle that in matters of procedure, courts routinely apply their own law. The problem with the procedural escape device in conflicts matters arises when two events occur: (1) courts expand their concepts of "procedure" beyond those matters in which application of local law is necessary to efficient judicial administration; and (2) the "procedure" is attached to such matters without principled explanation, doing violence to the notions of judicial precedent and principled decision making in order that short-term "good" results may be achieved. *Burge* is an example of both phenomena, except that one may take issue with the assertion that in *Burge* the results were "good."

97. 123 Misc. 2d 75, 472 N.Y.S.2d 815 (Sup. Ct. 1984).

knew where to find him, and knew that he was planning to leave New York for Florida. If Douglas' arrest was not ordered until he went to Florida, because New York police assumed that a situs rule would direct the application of the less defendant-protective law of Florida to evidence obtained in an intended post-arrest interrogation in Florida, a court would be justified in suspending the situs rule and applying New York law.

Justification for the decision would not require resorting to the arbitrariness of forum-biased interest analysis or the capriciousness of First Restatement escape devices. Instead, the court could simply explain two points: (1) suppressing evidence taken in Florida would not transgress any special concern Florida has in controlling its police officers, because suppression of evidence, unlike admission of evidence, has no potential for encouraging police lawlessness; and (2) reasonable police expectations that situs law will apply are not relevant to these facts. If New York police set out consciously to evade New York law, their expectations about the application of Florida law are not those of reasonable police trying to conform to applicable law, but rather of vigilantes with badges who seek to frustrate the purpose behind their own state's exclusionary rules. Situs law should not be used to reward such schemes.

The fact that trickery by forum police could be addressed, while the general predictability and utility of situs rules are maintained, indicates not only that situs rules can work in a principled and efficient manner, but also that they constitute a workable alternative to interest analysis. Situs rules can accommodate exceptional cases, without forcing courts to resort to the arbitrariness of escape devices. Moreover, a familiar engine drives us toward developing such principled exceptions: the discretion of trial judges, respectful of the general applicability of situs law and constrained by their obligation to write opinions explaining why, in unusual circumstances, situs law should not apply.⁹⁸

IV. CONCLUSION

The foregoing discussion indicates that situs law, stripped of discredited escape devices but accompanied by rationally defensible exceptions, is a preferable alternative to interest analysis in interstate criminal procedure matters. The discussion also suggests that situs rules may be preferable to interest analysis in the wide range of civil matters to which interest analysis has been attached. The discussion does not, however, demonstrate that imposition of a rationalized situs system will light the path to a choice-of-law nirvana in which every single conflicts problem will resolve itself predictably, justly, and easily through generous application of situs law. This is not going to happen. Instead, there will still be

98. It is intriguing to note that Currie may have had such confidence in our judges. Addressing a proposal to vest unfettered discretion in judges to make a "just decision," apparently free of the constraints any choice-of-law system might impose, Currie observed that the proposal

attributes to courts a freedom and a competence that they do not possess; for courts are committed to the administration of justice under law, and the constraint of that commitment is not lightly to be thrown off simply because the law in question may seem to the court old-fashioned, unwise, unjust, or misguided.

B. CURRIE, *supra* note 65, at 104-05. That implies that if the court's judgment were subject to some constraint, such as territorial rules would provide, Currie might not object to more controlled discretion.

unprovided-for choice-of-law problems, where neither situs rules nor their modifications will achieve principled and just results. The remaining question is not whether such unhappy cases will arise, because they will. The remaining question is how serious is the shortcoming of situs rules in such cases.

To interest analysts, such a shortcoming seems serious. Currie, for example, used unprovided-for cases as a vehicle for further criticism of a territorial approach. He said unprovided-for "[c]ases such as this do arise, and when they do they must be disposed of. Traditional choice-of-law rules provide a means of disposing of them without concerning ourselves about the result."⁹⁹ Currie's implication, of course, is that interest analysis would dispose of such cases in a more principled, just manner.¹⁰⁰

Time and experience, however, have demonstrated that interest analysis has fallen well short of the mark. In fact, more than merely the unprovided-for cases have been left inadequately resolved. In criminal procedure cases, interest analysis simply has not worked well, and growing dissatisfaction with the use of interest analysis in civil litigation generally¹⁰¹ reveals deficiencies that interest analysts have been unable to remedy.

A logical conclusion might be that interest analysis should be held to account for such shortcomings. As far as it goes, the conclusion is correct; inasmuch as interest analysis promised superior results, it is probably fair to criticize that system for failing to deliver what it promised. But more than that is wrong with interest analysis.

When interest analysts such as Currie suggested that their system, or any system, could achieve just and principled results in almost every case, they inadvertently did the profession a great disservice. They encouraged the belief not only that near perfection was practicable, but that any system of law (such as situs rules) that delivered something less need not be tolerated. For choice of law, the consequence has been a generation needlessly bogged down in interest analysis.

Perhaps two lessons can be drawn from the experience. For choice of law specifically, the lesson is that the measure of situs rules should not be whether they are perfect, but whether they can be made to work well most of the time through reasonable modification, and whether they work better than the alternatives. By that standard, and compared to interest analysis as it has actually evolved, situs rules may well be the better choice.

99. B. CURRIE, *supra* note 91, at 153. Weintraub, who is among the more moderate contemporary advocates of interest analysis, seemed to suggest that interest analysis could reduce unjust outcomes in unprovided-for cases to a de minimis level or, at least, that failure to reach such a happy outcome would not be attributable to interest analysis itself.

[T]he pattern of rational and just decisions that will emerge from application of a functional interest analysis, will provide reasonable certainty and predictability. Much of the alleged uncertainty of interest analysis has resulted from a misunderstanding and misapplication of this analysis.

R. WEINTRAUB, *supra* note 13, § 6.17, at 312.

100. B. CURRIE, *supra* note 91, at 153-59.

101. Perhaps the two most prominent new critics of interest analysis are Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); and Ely, *supra* note 74. Professor Kozyris believes that dissatisfaction with interest analysis is now pervasive. See Kozyris, Newsletter of the Association of American Law Schools, Section on Conflict of Laws, at 1, (Oct. 3, 1984) (copy on file at Georgetown Law Journal) ("interests [sic] analysis . . . woes so many courts and commentators [as] demonstrated by the increasing challenges to its very foundations.").

The second lesson is for students of law generally, and is one painfully relearned. In a complex society in an imperfect world, it is naive to believe something like perfection is attainable; and it is worse to throw away tools that can be made workable, simply because they cannot be made perfect. Perfection is a laudable goal, but a poor standard.