

1974

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Recommended Citation

Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 Case W. Rsrv. L. Rev. 44 (1974)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol25/iss1/8>

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Conflict of Laws: Choice of Law in Criminal Cases

Robert A. Leflar*

Noting the development of "the new choice of law" in modern civil litigation, the author demonstrates how this approach to conflicts problems applies in criminal cases. After considering constitutional limitations on choice of law in the criminal area, the author discusses the development of the techniques formerly used. He points out that statutes designed to govern choice of law in criminal cases are rare and that attempts to extract answers from penal statutes are misleading. Having explained the traditional "territorial" test, the author analyzes the fictions often used to avoid its results. He then investigates the English background and its impact on decisions in the United States. Finally, the author shows how the five fundamental choice-influencing considerations that contemporary courts look to in civil suits provide solutions to choice-of-law problems in criminal cases as well.

I. INTRODUCTION

MAURICE S. CULP is recognized throughout the United States as one of the little group of distinguished teachers in the field of Conflict of Laws. His scholarly contributions on the subject have been substantial. He has also taught Criminal Law and Procedure for many years and has done distinguished work in that field of the law as well. It seems fitting, therefore, that an article written in his honor and in recognition of the excellence of his work should deal with these two subjects as they come together when courts are faced with the increasingly common and complex problems presented by interstate and multistate criminal activity. Conflict of laws treatises and casebooks usually omit material on choice of law in the criminal law field almost altogether. They take up conflicts problems as though they arose only in civil litigation. An unfortunate gap in conflicts history and theory is a result. Anglo-American conflicts law

* Visiting Distinguished Professor of Law at the University of Oklahoma; Distinguished Professor and Dean Emeritus at the University of Arkansas Law School. B.A., University of Arkansas, 1922; LL.B., Harvard University, 1927; S.J.D., 1932. Director of Appellate Judges Seminars at New York University. Former Associate Justice of the Arkansas Supreme Court. Author of *American Conflicts Law* (1968). His teaching specialties are Conflict of Laws and Torts.

had many of its origins in criminal cases. Territorial principles and the idea of sovereignty as basic to choice of law found early expression in criminal decisions,¹ and it was from them that much of later choice-of-law thinking, first in torts cases and then in other substantive areas, developed. Well past the time of the first *Restatement of Conflict of Laws*² the notion of territoriality persisted (as it to some extent still persists today) as the basic test for choice of law in all sorts of cases. Yet the test was first firmly imbedded in the criminal decisions.

It is not the purpose of this article to trace the history of territorial theory. Modern conflicts learning, both academic and judicial, has moved away from the idea of rights and obligations vested permanently by automatic application of the law of the place where some key act or event occurred in the course of a transaction. Territorial contacts are still relevant, necessarily, but the old, supposedly hard-and-fast, rules based upon preselected territorial contacts are in most states no longer regarded as all-important. A variety of new approaches, susceptible it is believed to a sort of ecumenical coordination and combination which can be identified as "the new law of choice of law,"³ are being accepted today. These new approaches (or this new approach) appeared first in contract⁴ and torts⁵ cases, but has now been pretty well extended across the choice-of-law board in civil cases. The new *Restatement (Second) of Conflict of Laws*⁶

1. The argument would run in this fashion: Whatever occurs within the territorial limits of one state is of no concern to another state. If an offense is committed in New York that is not within the purview of the state of California. New York is able to take care of itself. It needs no assistance from California. It is not the business of the state of California to punish a person who breaks the law of New York. California is not the guardian of the safety of New Yorkers. Any attempt on the part of California to punish offenses committed in New York is an attempt to exercise sovereignty over events in New York. No foreign state should be given that power. An independent sovereignty can brook no control of its citizens by a foreign sovereign, nor allow what occurs within its territorial borders to be punished by another.

Levitt, *Jurisdiction over Crimes-II*, 16 J. CRIM. L. & CRIMINOLOGY 495, 509-10 (1925).

2. RESTATEMENT OF CONFLICT OF LAWS (1934).

3. See Leflar, *The "New" Choice of Law*, 21 AM. U.L. REV. 457 (1972).

4. *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970). See Coyne, *Contracts, Conflicts, and Choice-Influencing Considerations*, 1969 U. ILL. L.F. 323.

5. *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Cases cited in note 71 *infra*.

6. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Section 6 of the *Restatement*, which sets forth general choice-of-law principles, is referred

confers official blessing upon this development. It is submitted that essentially the same development, and the same justifications for the development, apply in the criminal law also.

II. LIMITATIONS UPON CHOICE OF LAW IN CRIMINAL CASES

It is of course true that there are limitations, especially state constitutional ones, that apply peculiarly to criminal cases. Concerns about sovereignty may in part underlie some of these limitations, though concerns about protection of the human rights of accused persons—the sort of protections that are assured by constitutional due process of law clauses—probably are more in point. Most of the state constitutions include Bill of Rights clauses to the effect that an accused must be tried by an impartial jury “in the county where the offense was committed” or “is alleged to have been committed,” “in the county or district of the offense,” or “by an impartial jury of the vicinage” or “a jury of the vicinity.”⁷ Though these clauses are on their face directed primarily to questions of jury fairness and venue⁸ within the state, they at the same time operate as limitations on the jurisdictional power of the state’s courts to hear extrastate cases. The limitations prescribed by them must be observed, but a considerable body of judicial interpretation has rendered them less restrictive than they might have been.

A related limitation, not constitutionally grounded but generally recognized, is that “[t]he Courts of no country [state] execute the penal laws of another.”⁹ The application of this exclusionary rule to civil claims having some aspect of penalty has in recent generations been much minimized,¹⁰ but its application in criminal cases

to as controlling the identification of “most significant relationships” in all the choice-of-law sections throughout the *Restatement*. “And who can doubt the ecumenicalism of the Second Restatement?” Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 DUQUESNE L. REV. 436, 441 n.30 (1971). See generally Reese, Peterson, Leflar, Sedler, Baade & Lowenfeld, *Symposium on the Restatement (Second) of Conflict of Laws*, 72 COLUM. L. REV. 219 (1972).

7. Fifteen phrasings of this state constitutional language are listed in Levitt, *Jurisdiction over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316, 331-32 n.46 (1925). Few if any of them have been changed since Professor Levitt’s time. Cf. *Commonwealth v. Simeone*, 222 Pa. Super. 376, 294 A.2d 921 (1972), noted in 77 DICK. L. REV. 561 (1973).

8. *Williams v. Turner*, 503 S.W.2d 901 (Ark. 1974); see Miller, *Constitutional Limitations on the Power of the Missouri Legislature to Provide for Venue in Criminal Cases*, 1958 WASH. U.L.Q. 35; Note, 25 HASTINGS L.J. 547 (1974).

9. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.).

10. See Leflar, *Extrastate Enforcement of Penal and Governmental*

is as rigorous as ever. Justifications for the rule have been summarized as follows:

. . . (1) historical reasons based on the intensely local character of early legal systems, including the fact of collective responsibility of the community for acts done within its borders and the notion of the trial body as a jury of neighbors personally acquainted with the facts in the case; (2) respect for the sovereign rights and pretensions of foreign states and nations, coupled with the idea that the diplomatic processes of extradition and interstate rendition would give adequate relief against absconding parties; (3) procedural difficulties, such as . . . the traditional procedure in criminal cases of action brought by the injured state as a plaintiff; (4) local public policy opposing the type of claim . . . ; (5) . . . practical inconveniences, particularly (a) the added expense to taxpayers of conducting trials and enforcing sentences . . . coupled with possible overcrowding of dockets by unnecessarily imported [prosecutions], (b) expense and hardship to the defendant from having to appear with witnesses at a distance from the place where the events in question occurred, (c) possibly increased difficulty of reliable proof of facts at a distance from the place of their occurrence, and (d) possible ignorance and difficulty of proof of foreign law as such; (6) American constitutional guaranties to criminal defendants of the right to trial by jury in the vicinity of the offense.¹¹

Whatever the reasons, no American state entertains criminal prosecutions brought by the authorities of another state. Even in prosecutions brought under interstate compacts or reciprocal statutes giving adjacent states concurrent jurisdiction over crimes committed on boundary streams, the theory is that the forum state is enforcing its own law, made applicable by mutual agreement to the entire area of the boundary stream.¹²

One effect of this localization of prosecutions, almost but not quite unique in conflicts law, is that the question of jurisdiction and that of governing substantive law always receive the same answer. The governing law is always that of the forum state, if the forum court has jurisdiction. Judicial jurisdiction and legislative jurisdic-

Claims, 46 HARV. L. REV. 193 (1932); Comment, *Extrastate Enforcement of Penal Laws*, 25 U. CHI. L. REV. 187 (1957).

11. Leflar, *supra* note 10, at 201-02. In reference to item (2), as listed above, cf. Collins, *Traffic in the Traffickers: Extradition and the Controlled Substances Import and Export Act of 1970*, 83 YALE L.J. 706 (1974).

12. Padgett v. State, 151 Ark. 290, 236 S.W. 603 (1922); State v. Moyers, 155 Iowa 678, 136 N.W. 896 (1912); State v. Cunningham, 102 Miss. 237, 59 So. 76 (1912); State v. Holden, 46 N.J. 361, 217 A.2d 132 (1966).

tion are identical. In this respect criminal cases are different, theoretically at least, from civil suits. The difference lies in the "transitory" (as distinguished from "local") character of most civil causes of action,¹³ because of which a cause of action that by vested-rights-territorial theory came into existence under one state's law may be sued upon in another state.

The point is that criminal claims are not "transitory." Perhaps the only sort of civil suit that is comparable to criminal cases in this respect is for divorce, an area in which it has traditionally been held, almost without question, that the controlling grounds for divorce are those prescribed by forum law, regardless of the law of the place where the grounds for divorce occurred or where the spouses were domiciled at the time they occurred.¹⁴ It may be that in theory divorce suits, like criminal prosecutions, were non-transitory, maintainable quasi in rem at the domicile only, so that the applicability in them of forum law only can be historically explained by the same territorialistic justifications as are employed in criminal law. That, however, is a speculation which, by reason of current changes in American divorce law¹⁵ and mores, is rapidly becoming obsolete.

The Federal Constitution, by its due process clause, sets the same outer limits on a state's power to apply its own law to extrastate facts in criminal cases as are set for civil cases. A state may not, under the clause, exercise legislative jurisdiction by applying its substantive law to a set of facts which has no substantial connection with the state. This limitation has been more fully developed by the United States Supreme Court in civil than in criminal litigation, but the rule is stated in general terms:

Where more than one state has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity.¹⁶

13. See *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914).

14. *Brickey v. Brickey*, 205 Ark. 373, 168 S.W.2d 845 (1943); *Torlonia v. Torlonia*, 108 Conn. 292, 142 A. 843 (1928); *Stewart v. Stewart*, 32 Idaho 180, 180 P. 165 (1919); *Rose v. Rose*, 132 Minn. 340, 156 N.W. 664 (1916).

15. "Nontransitory" is hardly a realistic description of divorce practice today. Cf. *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S. 2d 86 (1965), which recognized what was essentially in personam jurisdiction in a divorce case; D. Currie, *Suitcase Divorce in the Conflict of Laws*, 34 U. CHI. L. REV. 26 (1966).

16. *Richards v. United States*, 369 U.S. 1, 15 (1962). "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within

The due process clause precludes unrestricted application of spatially irrelevant law by a state court, to a set of facts.¹⁷ The full faith and credit clause,¹⁸ the equal protection clause,¹⁹ and possibly even the privileges and immunities clause of the fourteenth amendment,²⁰ may buttress this result. But, as the leading case of *Home Insurance Co. v. Dick* illustrates,²¹ the comprehensiveness of the due process requirement assures the result even in fact situations to which some of the other clauses could not apply. Generally speaking, the geographical locations of acts, and of the effects of acts, have been the tests of legislative jurisdiction, though the tests are today often expressed in terms of state interests affected by the geographically located acts or effects.²² Regardless of the language, the requirement is that the acts, and the effects thereof, to which a particular state's law is to be applied, must have some substantial connection with that state.

One aspect of this requirement which must not be overlooked has to do with proximate causation. It is obvious that an actor can be the legal cause of an effect within a state as a consequence of conduct outside the state. Firing a bullet in state *X* that kills a man in state *Y* is an easy example. But what are the outer limits of legal causation under which an actor in *X* may constitutionally be subjected to the law of *Y* when his acts in *X* had some causal relation to effects felt in *Y*? Presumably the answer is afforded by the common law of proximate causation, whatever that may be. The United States

it, justify a state in punishing the cause of the harm as if he had been present at the effect. . . ." *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). The districts in which federal criminal cases may be prosecuted is a matter governed by specific constitutional provisions. U.S. CONST. art. III, § 2, cl. 3; amend. VI.

17. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). This constitutional limitation is supported by a long line of cases, and, while its exact scope has shifted at times, the principle remains firm, from *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), up through *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964), and to the present time. See Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROBS. 706 (1963); Comment, *States' Rights in Conflict of Laws*, 19 ARK. L. REV. 142 (1965).

18. See Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449 (1959).

19. See B. Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960).

20. See B. Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

21. 281 U.S. 397 (1930).

22. See B. Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

Supreme Court has dealt with the problem, in *Young v. Masci*.²³ The facts were that *D* in State *X* lent his car to *B* to use for a few days. *B* drove it across the nearby state line into *Y*, where he negligently injured *P*. Suit was brought in state *X*. The Supreme Court's holding was that there was sufficient causal relation between *D*'s lending in *X* and *B*'s driving in nearby *Y* to permit liability to be imposed on *D* under *Y*'s bailor's liability law.²⁴ The usual proximate causation formula puts emphasis on probabilities, on whether *D*'s act creates an appreciable risk of the ultimate effect. This standard is an inexact test for constitutional purposes, but no better one has been established.

In addition to the geographical location of acts and their effects, citizenship has always been recognized as a possible basis, complying with due process, for legislative jurisdiction. For this, national citizenship is clearest, and there are authoritative cases in which an actor's citizenship has sustained imposition of sanctions, including criminal ones, upon him by his nation.²⁵ The cases are less clear when the basis asserted for legislative jurisdiction over a noncitizen actor for extranational acts is the citizenship of the actor's victim.²⁶ It is doubtful if due process is satisfied when the national forum's contacts are that thin, but circumstances alter cases, and a firm negative is impossible. A defendant actor's citizenship in a state of the United States, too, has served to sustain state legislative jurisdiction over him in a criminal case, when the act punished was done at a place where no other state's law was operative (on the high seas).²⁷ Probably forum state citizenship alone would be too little if the defendant citizen's act were done in a sister state, so that the sister state's law could be deemed to govern it. State citizenship (domicile) does suf-

23. 289 U.S. 253 (1933).

24. The result would have been different had *B*, after obtaining *D*'s permission to use the car within states *X* and *Y*, driven the car to state *Z*, 1000 miles away. See *Scheer v. Rockne Motors Co.*, 68 F.2d 942 (2d Cir. 1934).

25. *United States v. Bowman*, 260 U.S. 94 (1922); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). Cf. *Blackmer v. United States*, 284 U.S. 421 (1932) (judicial jurisdiction based upon national citizenship). See also Note, *Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act*, 20 VAND. L. REV. 1030 (1967); 13 HARV. INT'L L.J. 346 (1972) (extraterritorial reach of proposed federal criminal code).

26. See Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 266-67 (1931).

27. *Skiriotes v. Florida*, 313 U.S. 69 (1941) (prohibited fishing off coastal waters).

fice to sustain state judicial jurisdiction,²⁸ but the limits set by due process (fair play and substantial justice) for state exercise of judicial jurisdiction definitely do not coincide with those set for legislative jurisdiction, even though the two have been moving closer together in recent years.²⁹

Regardless of what details satisfy the requirements, it is certain that due process must be satisfied before any American court, state or federal, may constitutionally apply its law to impose criminal (or civil) sanctions upon any defendant for extrastate or extranational activities. Due process does not allow a state to apply its substantive law to a set of facts which involves no substantial contacts with that state. The remaining question, and the one to which this comment is principally directed, is: Assuming that it would not be unconstitutional for a forum state to apply its criminal law to a given set of facts having both in-state and out-of-state elements, when should it proceed to do so? In other words, what should be the choice-of-law tests, or approaches, to be employed by American courts in criminal cases?

III. TRADITIONAL CHOICE-OF-LAW TECHNIQUES EMPLOYED IN CRIMINAL CASES

To start with, it is clear that if any state has enacted choice-of-law statutes applicable to criminal cases, the statutes control. They supersede whatever common law rules the state might otherwise have laid down. But American choice-of-law statutes, on the whole, have tended to be vague and ambiguous, if not worse, and have often required considerable judicial interpretation.³⁰ A few states have enacted fairly comprehensive laws on criminal jurisdiction, but most states have not. California is one of the few.³¹ Its statutory sections overlap and repeat themselves, apparently for the purpose of making sure that every possible situation is covered. They include these provisions:

28. *Milliken v. Meyer*, 311 U.S. 457 (1940). Cf. *Blackmer v. United States*, 284 U.S. 421 (1932).

29. See Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282, 292 (1960).

30. See Danson, *Territorially Limited Statutes and the Choice-of-Law Process*, 1 HARV. J. LEGIS. 115 (1964); Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEXAS L. REV. 762, 770 (1960); Unger, *Use and Abuse of Statutes in the Conflict of Laws*, 83 L.Q. REV. 427 (1967).

31. CAL. PENAL CODE §§ 27777-95 (West 1970). A classified collection and citation of the state statutes appear in Berge, *supra* note 26, at 249-59. Very few of them have been changed since that article was written.

The following persons are liable to punishment under the laws of this state:

(1) All persons who commit, in whole or in part, any crime within this state. . . .³²

When the commission of a public offense, commenced without the State, is consummated within its boundaries by a defendant, himself outside the State, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable to punishment therefor in this State. . . .³³

Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state.³⁴

The Wisconsin statute,³⁵ more succinct but possibly just as comprehensive, provides that:

A person is subject to prosecution and punishment under the laws of this state if:

(a) He commits a crime, any of the constituent elements of which takes place in this state; or

(b) While out of this state, he aids and abets, conspires with, or advises, incites, commands, or solicits another to commit a crime in this state; or

(c) While out of this state, he does an act with intent that it cause in this state a consequence set forth in a section defining a crime; or

(d) While out of this state, he steals and subsequently brings any of the stolen property into this state.

Statutes in other states more often deal only with specific crimes, such as homicide. Thus, in addition to the common law rule, applicable to shots fired across a state line, that a killing is punishable by the law of the place of first harmful impact on the victim,³⁶ statutes have authorized prosecution and punishment also under the laws of two other states—the state from which the shot was fired³⁷ and

32. CAL. PENAL CODE § 27 (West 1970).

33. *Id.* § 778.

34. *Id.* § 778a.

35. WIS. STAT. ANN. § 939.03 (1958).

36. *Hyde v. United States*, 225 U.S. 347 (1912); *State v. Hall*, 114 N.C. 909, 19 S.E. 602 (1894); *Commonwealth v. Thomas*, 410 Pa. 160, 189 A.2d 255 (1963).

37. That would be the effect of the California and Wisconsin statutes quoted above. See *People v. Botkin*, 132 Cal. 231, 64 P. 286 (1901).

the state in which death occurred.³⁸ It can hardly be denied that there are contacts with each of the three states sufficiently substantial to satisfy the requirements of the due process clause. In fact, it could sensibly be urged that, in any state which has no statutes such as those just cited, and whose common law rules are not yet firmly fixed, the courts should carefully consider the approaches used in these statutes when they determine what their own common law is to be. Possibly prosecution should be permitted at any one, though at no more than one, of the three places.³⁹

A principal barrier to intelligent choice of law in criminal cases, and in other types of cases as well,⁴⁰ is the idea that choice-of-law rules applicable to statutory sanctions, such as those imposed by criminal statutes, should be derived from the language of the statute itself. On its face, this is a legitimate approach to the problem. However, when a statute is directed at the elements of a particular crime and is silent as to choice-of-law considerations, inquiry into legislative in-

38. GA. CODE ANN. § 27-1105 (1972); ME. REV. STAT. ANN. tit. 15, § 2 (1965) (covers both death in state and act in state causing death elsewhere); MASS. GEN. LAWS ANN. ch. 277, §§ 61-62 (1968) (similar to Maine) (for an application of this statute, see *Commonwealth v. Macloon*, 101 Mass. 1 (1869)); MINN. STAT. ANN. §§ 627.09-10 (1947); N.M. STAT. § 40A-1-15 (1953) (similar to Maine); cf. Comment, *Jurisdiction over Interstate Homicides*, 10 LA. L. REV. 87 (1949).

39. Though this would appear to be the fair result, it should be noted that the double jeopardy clause might not bar dual prosecutions by two states. Cf. *Bartkus v. Illinois*, 359 U.S. 121, 131-33 (1958), in which the Court upheld successive convictions by federal and state governments. The Court reasoned that each government, acting as a separate sovereign, was prosecuting a separate offense even though the offenses arose from the same evidence. *Id.* at 131-33. See also *Abbate v. United States*, 359 U.S. 187 (1959), which upheld successive convictions by the state and federal governments.

The Court subsequently applied the fifth amendment's double jeopardy clause to the states through the fourteenth amendment in *Benton v. Maryland*, 395 U.S. 784 (1969), but in *Waller v. Florida*, 397 U.S. 387, 392 (1970), the Court again reaffirmed the separate sovereignty rationales of *Bartkus* and *Abbate*.

40. The early cases used this sort of statutory construction to resolve conflicts problems under the statute of frauds. Thus a section of the statute worded "No action shall be brought" was deemed procedural, governed by forum law since it spoke in terms of remedy, whereas a section worded "No contract . . . shall be good unless. . ." being worded substantively, was deemed to be governed by the law governing the contract as such. *Leroux v. Brown*, 12 C.B. 801, 138 Eng. Rep. 1119 (C.P. 1852); *Houghtaling v. Ball*, 20 Mo. 563 (1855). That approach is generally rejected today, there being no reason to believe that the variant wordings of different sections of the statute of frauds were other than accidental. See Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 COLUM. L. REV. 874 (1959).

tent will almost certainly be misleading. This pseudo-interpretative process gives a territorial meaning to words that are without territorial meaning. It calls for analysis of a particular law's objectives in territorial terms, perhaps by searching for the presence or absence of state "governmental interests" or by tacitly applying other choice-influencing considerations, as a means of discovering unexpressed legislative intention concerning the territorial scope of the legislative enactment. "Statutory construction" is thus made the tool for solving conflicts problems.⁴¹ This would not do much harm if relevant choice-influencing considerations were always used as a basis for the statutory construction, artificial though this would be. The trouble is that many statutes include words which suggest some territorial identification, and the statutory construction approach is apt to seize on these words even when there is little or no reason for believing that the legislators had choice of law in mind or that anyone else would regard the word as significant, let alone decisive, if sound choice-influencing considerations were to resolve the problem.

That is what has happened in many of the criminal law cases. The word seized on is usually the active verb in the definition of the crime. Thus, with the crime of bigamy, the active verb is "marry," referring to the act of marrying while already married to another. By territorial concepts that crime can occur only at the place where the bigamous marriage is performed,⁴² so that it can be prosecuted and punished there and nowhere else. Correspondingly, the crime of illegal cohabitation occurs where the parties "cohabit."⁴³ When a statute makes it a crime to "sell," to "deliver," or to "offer" for sale certain articles, for example to minors or intoxicated persons, the crime is said to take place at the spot where the sale, delivery, or offer occurs,⁴⁴ and not elsewhere. A criminal libel may be punished only where the libelous matter is "published";⁴⁵ "obtaining" property by false pretenses, only where the things were obtained;⁴⁶ "receiv-

41. See B. CURRIE, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 761-62 (1963); Hancock, *Torts Problems in Conflict of Laws Resolved by Statutory Construction*, 18 U. TORONTO L.J. 331 (1968).

42. Walls v. State, 32 Ark. 565 (1877); Green v. State, 232 Ind. 596, 115 N.E.2d 211 (1953); Wilson v. State, 16 Okla. Crim. 471, 184 P. 603 (1919); Hopson v. State, 115 Tex. Crim. 260, 30 S.W.2d 311 (1930). But see Trial of Earl Russell, [1901] A.C. 446.

43. Williams v. North Carolina, 325 U.S. 226 (1945); Commonwealth v. Bradley, 56 Mass. (2 Cush.) 553 (1848); Finney v. State, 40 Tenn. 544 (1859).

44. Harper v. State, 91 Ark. 422, 121 S.W. 737 (1909).

45. Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825).

46. Sharpsteen v. State, 222 Ark. 519, 261 S.W.2d 537 (1953); Commonwealth v. Schmunk, 207 Pa. 544, 56 A. 1088 (1904).

ing" deposits in an insolvent bank, only at the place where the defendant "received" the money;⁴⁷ and the crime of wife or child abandonment or desertion, only where the husband and father actually "abandons" or "deserts" his family by departing from them.⁴⁸ In almost every definition of a crime, there is some active verb identifying the doing of an act which is a central feature of the crime, though it may not be the only significant or even the major feature of it. It is unfortunate for a state that has truly substantial contacts and genuine concern with a particular crime to conclude that the state's law cannot be applied to the crime merely because an active verb points to an extrastate act which was only one step in an extended sequence of criminality. Statutory construction has its place in conflicts law, as in all other areas of law, but it is too limited a technique to serve all the sociolegal purposes that the choice-of-law process needs to serve, whether in criminal cases, torts, contracts, property, family law or any of the other fields of law in which choice-of-law problems arise. Better answers than this technique affords are available.

The traditional "territorial" test for applicability of a state's criminal law has often not been as rigid as flat statements of it might indicate. As with all the rest of the law of choice of law, gimmicks were devised by facile courts to avoid unwanted limitations on applicable law and jurisdiction. Technicalities in the law have always bred new technicalities to ameliorate the rigidities and shortsightednesses of the old ones.

One of the most elementary of the evasive gimmicks was used in an early Georgia case, *Simpson v. State*.⁴⁹ The defendant was convicted of the crime of assault. He had stood on the South Carolina side of the Savannah River and there fired a pistol at *P* who was in a boat on the Georgia side of the river. His aim was bad and he missed *P*, the bullet striking the water near *P*. His defense was that he had done no act in Georgia nor caused any harmful impact there. Affirming the conviction, Justice Lumpkin said:

[I]f a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes. . . .

47. *Wilkin v. State*, 121 Ark. 219, 180 S.W. 512 (1915). See *Commonwealth v. Andrews*, 2 Mass. 13 (1806) (receiving stolen property).

48. Cf. *Commonwealth v. Lanoue*, 326 Mass. 559, 95 N.E.2d 925 (1950) ("begetting" illegitimate child).

49. 92 Ga. 41, 17 S.E. 984 (1893).

. . . He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was, therefore, in a legal sense, after the ball crossed the state line, up to the moment that it stopped, in Georgia. It is entirely immaterial that the object for which he crossed the line failed of accomplishment.⁵⁰

The concept of constructive presence has also been employed to sustain conviction when the defendant had been causally responsible for results in a second state.⁵¹

The concept of continuing trespass was another fiction which at times enabled courts to handle two-state cases more sensibly without discarding territorial theory. The idea was that if goods were stolen in a first state and then brought by the thief into a second state, his asportation of them into the second state was a continuing theft, so that he could be held for larceny in the second state.⁵² The same device has been used to sustain a conviction for obtaining property by false pretenses and later bringing it into the prosecuting state.⁵³

On the other hand, there are cases in which strict territorial theory, unrelieved by mitigating fictions, has been of material aid to defendants who were careful about their travel plans.⁵⁴ Not even the concept of continuing trespass was always accepted.⁵⁵ Some courts applied the notion of territorial sovereignty strictly, others ap-

50. *Id.* at 43, 46, 17 S.E. at 985, 986.

51. *E.g.*, *Hyde v. United States*, 225 U.S. 347 (1912). But see the dissenting opinion of Holmes, J., *id.* at 386, objecting to the "fiction" of constructive presence.

52. *Worthington v. State*, 58 Md. 403 (1882) (goods stolen in West Virginia, brought into Maryland); *State v. Underwood*, 49 Me. 181 (1858) (goods stolen in Canada brought into Maine); *Commonwealth v. Holden*, 75 Mass. (9 Gray) 7 (1857). See *Commonwealth v. White*, 358 Mass. 489, 265 N.E.2d 473 (1970) (auto stolen in Canada; same result, without reliance on fiction); *Annot.*, 156 A.L.R. 862 (1945).

53. *State v. Williams*, 35 Mo. 229 (1864); *Bivens v. State*, 6 Okla. Crim. 521, 120 Pac. 1033 (1912).

54. *United States v. Davis*, 25 F. Cas. 786 (No. 14,932) (C.C.D. Mass. 1837) (shooting across jurisdictional line); *State v. Chapin*, 17 Ark. 561 (1856) (out-of-state accessory); *Commonwealth v. Apkins*, 148 Ky. 207, 146 S.W. 431 (1912) (victim's death in state); *State v. Carter*, 27 N.J.L. 499 (1859) (death in state); *State v. Cutshall*, 110 N.C. 538, 15 S.E. 261 (1892) (bigamous marriage elsewhere followed by cohabitation in state); *State v. Knight*, 1 N.C. 44 (1799) (counterfeit bills made in Virginia, circulated in North Carolina).

55. *Strouther v. Commonwealth*, 92 Va. 789, 22 S.E. 852 (1895) (horse stolen in West Virginia, brought into Virginia); *Stanley v. State*, 24 Ohio St. 166 (1873) (original theft in Canada).

plied it loosely. Academic commentators often condemned it.⁵⁶

It is only fair to add that some courts, at some times, did not apply it at all. At least some commentators asserted that other theories than the territorial one were being followed in some decisions. Professor George, for example, in discussing international cases, lists six "principles"⁵⁷ which are said to have had some following:

1. The territorial principle.
2. The "floating territory" principle (applicable to ships and aircraft, on which the "law of the flag" governs—a kind of territoriality).
3. The protected interest principle (permitting punishment of foreign acts which impair locally protected interests).
4. Nationality of the offender (national citizenship giving jurisdiction over the citizen's acts wherever committed).
5. Nationality of the victim (a theory harder to support, as to extrastate acts by foreigners).
6. The "universality" principle (sometimes called "the cosmopolitan theory," under which such evil crimes as piracy on the high seas may be punished by any state that catches the offender, anywhere).

Similarly, Professor Perkins lists four theories applicable to both interstate and international facts:⁵⁸ (1) territorial, (2) Roman (the citizenship of the actor), (3) injured forum (essentially the same as George's "protected interest"), and (4) cosmopolitan. In sum, although courts were apt to be reluctant to deviate from the territorial theory, if that approach proved too constricting, there was authority available that looked to other factors in making the choice.

56. Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238 (1931); Cook, *The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction*, 40 W. VA. L.Q. 303 (1934); Levitt, *Jurisdiction over Crimes* (pts. 1 & 2), 16 J. CRIM. L. & CRIMINOLOGY, 316, 495 (1925).

57. George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613-14 (1966). There is some analysis of George's six "principles" as applied to interstate situations in Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32 (1967).

58. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155 (1971). This list is the same as George's, except that "floating territory" is not listed separately from the territorial theory but is included within it, and "nationality of the victim" is omitted. Cf. Fitzgerald, *The Territorial Principle in Penal Law: An Attempted Justification*, 1 GA. J. INT'L & COMP. L. 29 (1970).

IV. CONTEMPORARY TRENDS IN CHOICE OF LAW IN CRIMINAL CASES

Early English cases on the whole set the pattern for both the state and federal decisions in the United States. They started out with the territorial theory, then achieved variations from it, either by reinterpreting it more broadly or by developing other theories for special fact situations.⁵⁹ It is interesting that the Law Commission has recently suggested that:

It should be enacted that where any act or omission or any event constituting an element of an offence occurs in England or Wales, that offence shall be deemed to have been committed in England or Wales even if other elements of the offence take place outside England or Wales.⁶⁰

Such an enactment would stretch the territorial theory almost to its maximum breadth.

The English law is brought up to date by the decision of the House of Lords in *Regina v. Treacy*.⁶¹ In England, on the Isle of Wight, the defendant had posted a threatening letter to a woman in Germany, demanding money and directing that the money be sent to a London address. On receiving the letter the German woman notified the police, who picked up the blackmailer at the London mail drop. He was convicted of blackmail for making "an unwarranted demand with menaces." The House of Lords by 3-to-2 vote affirmed the conviction. Two of the majority based their view rather narrowly on an interpretation of the governing blackmail statute. The other opinion, by Lord Diplock, was more thorough and far more interesting. He agreed with his two brothers in the majority on the interpretation of the words of the statute, but he went considerably beyond that. He did not ask merely "Where was the crime committed?" Instead, he said:

There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than

59. Hall, "Territorial" Jurisdiction and the Criminal Law, 1972 CRIM. L. REV. (Eng.) 276; Williams, *Venue and the Ambit of Criminal Law* (pts. 1-3), 81 L.Q. REV. 276, 395, 518 (1965).

60. Hall, *supra* note 59, at 277.

61. [1971] A.C. 537.

comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state.

Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences upon victims in England. . . . Comity gives no right to a state to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another state.⁶²

In sum, English criminal law is applicable if either the defendant's act or its harmful consequences are located in England, unless Parliament declares otherwise. True, this is phrased in terms of Parliament's affirmative intent to that effect, which makes it a little like the "statutory construction" approach to conflicts problems,⁶³ but the interpretative process, if it be that, occurs in the complete absence of any choice-of-law words in the statute. Rather, it derives from an enlightened understanding of the concept of international comity, which Lord Diplock assumes that Parliament shares with him. At any rate, the common law rule proposed by Lord Diplock in *Treacy* is almost, but not quite, as comprehensive as the statute previously suggested by the Law Commission.⁶⁴

American writers, too, have suggested bases for criminal jurisdiction and applicability of the forum's substantive criminal law which have gone beyond the traditional theories, and beyond the territorial theory in particular. In recent years, following a popular approach to general choice-of-law theory, most of these theories have been expressed in terms of governmental interests.⁶⁵ The "protected inter-

62. *Id.* at 561-62. The Diplock opinion is discussed approvingly in *Regina v. Baxter*, [1972] 1 Q.B. 1, 11, 13 (C.A.) which involved the converse situation. An English conviction was affirmed against a defendant who mailed a fraudulent claim from Northern Ireland to a prospective victim in England.

63. See text accompanying notes 40-48 *supra*.

64. Note 60 *supra*. The Commission's suggestion was broader in that it would make English criminal law applicable if any "element of an offence occurs in England." Cf. Hall, "Territorial" Jurisdiction and the Criminal Law 1972 CRIM. L. REV. (Eng.) 276, 284.

65. See B. Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); B. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171; Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 RUTGERS L. REV. 523 (1959). For illustration of how interest analysis may be applied in a criminal case, see 6 STAN. L. REV. 709 (1954), discussing *State v. Tickle*, 238 N.C. 206, 77 S.E.2d 632 (1953), *cert. denied*, 346 U.S. 938 (1954) (con-

est" principle is one of those listed by Professor George.⁶⁶ Another commentator concludes that a state should be free to punish crimes whenever an out-of-state actor should anticipate that his conduct or resulting harm may affect the state's interests that are protected by its criminal law.⁶⁷ Section 1.03 of the Model Penal Code of the American Law Institute incorporates some of these ideas and would permit a state to apply its law in a variety of situations when an element of the offense (conduct or result) occurs in the state; in most cases of out-of-state attempts or conspiracies to commit crimes in the state or of in-state attempts, solicitations, or conspiracies to commit out-of-state crimes, in certain cases of omissions to perform legal duties imposed by the law of the state; and, finally, according to subsection (f), if "the offense is based on a statute of this State which expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest."⁶⁸ The Model Penal Code is not quite so broad as the 1670 Colony of New Plymouth law which declared that "whosoever having comitted uncleanes in another Collonie and shall come hither and have not satisfied the law where the fact was comitted they shalbe sent backe or heer punished according to the nature of the crime as if the acte had bine done heer."⁶⁹ Both are framed as statutes, however, and the Model Penal Code's subsection (f) assumes the existence of another statute, like the one in the Colony of New Plymouth, expressly making the out-of-state conduct punishable within the state. Such state statutes, though, are rare.

Practically and realistically, the choice-of-law problem in criminal cases is, as it is in civil cases, a common law problem. A comprehensive statute such as section 1.03 of the Model Penal Code could be enacted by any state, and if enacted would of course be binding on the courts in the state. However, such criminal-conflicts enactments are as uncommon in the states as are comparable enactments governing choice of law in torts, contracts, property, and other areas of civil

viction for nonsupport of North Carolina illegitimate child fathered by defendant's sexual act in Virginia).

66. Text accompanying note 57 *supra*. For further references to local interest as a proper basis for exercise of criminal jurisdiction, see George, *supra* note 57, at 618, 627, 628, 631.

67. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEXAS L. REV. 763, 785 (1960).

68. MODEL PENAL CODE, § 1.03(1)(f) (Proposed Official Draft 1962).

69. W. BRIGHAM, CHARTER AND LAWS OF NEW PLYMOUTH 162 (1836), quoted in Rotenberg, *supra* note 67, at 770 n.38.

litigation. It is even doubtful if it would be wise to enact such statutes today, at a time when choice-of-law doctrine is unsettled and the rules are in flux. If permanently operative conflicts statutes, civil or criminal, are to be enacted, it would be best for legislative action to await a time when sound principles are more generally agreed upon. The fact is that in most American states today, as in England, criminal choice-of-law statutes are helter-skelter and incomplete.

Where there are no governing statutes, the common law prevails. In both the civil and criminal areas, Anglo-American conflicts law had its beginnings in a theory of territoriality based on exaggerated notions of sovereignty. On the civil side territorial theory is well along on its way out. Currently recognizable choice-influencing considerations are taking the place of old ideas about vested rights based on abstractly identified key elements in multistate events. The criminal law lags behind the civil in this move toward common sense and rationality. It is time for criminal law to join the trend.

V. APPLICATION OF CHOICE-INFLUENCING CONSIDERATIONS TO CRIMINAL CASES

For choice of law generally, the choice-influencing considerations have been summarized under five major headings:⁷⁰

- A. Predictability of results;
- B. Maintenance of interstate and international order;
- C. Simplification of the judicial task;
- D. Advancement of the forum's governmental interests;
- E. Application of the better rule of law.

State courts have not found it difficult to give effect to these considerations in deciding conflicts questions in civil litigation.⁷¹ Giving effect to them in criminal cases should, if anything, be easier, since

70. R. LEFLAR, *AMERICAN CONFLICTS LAW* § 105, at 245 (1968). The summarization and application of the choice-influencing considerations to specific sets of facts is explained more fully in Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). This group of considerations, except for E., appears in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). This is the basic section that underlies all the choice-of-law provisions in the *Restatement*.

71. *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Pahmer v. Hertz Corp.*, 36 App. Div. 2d 252, 319 N.Y.S.2d 949 (1971); *Brown v. Church of Holy Name of Jesus*, 105 R.I. 322, 252 A.2d 176 (1969); *Hunker v. Royal Indem. Co.*, 57 Wis. 2d 588, 204 N.W.2d 897 (1973); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

the case will not be heard unless it is proposed to apply the forum's law to it. The question of jurisdiction and of choice of law combine as one question—is the forum's substantive criminal law properly applicable to the facts? A preliminary part of the question is whether federal due process requirements would be satisfied if forum law were applied. If not, the question is answered. But if due process would be satisfied, the common law part of the question remains. That is when the choice-influencing considerations should be taken into account.

The first of the considerations, predictability of results, is obviously relevant. The applicability of a criminal law to a given act must be so clear that a reasonable person may know that the act is covered by the law. Vagueness and ambiguity in criminal laws invalidate them.⁷² The old saw that the criminal law must be so clear that "he who runs may read" really means something in this context. The idea is that no one may be punished for an act unless he could have known when he acted that his act violated some specific law. That is why section 1.03 of the Model Penal Code includes, in addition to its provisions about acts in the state and results produced or contemplated within the state, the requirement that "the actor knows or should know that his conduct is likely to affect that [state's] interest."⁷³ If a defendant could not reasonably have anticipated, in the light of the foreseeable consequences of his conduct, that the legitimate concerns of the prosecuting state might be affected by it, this first consideration should bar the application of forum law and stop the prosecution. But if interference with the state's interests was reasonably foreseeable, and the state's law is otherwise valid, this consideration is satisfied, and the court can pass on to the others.

The second of the choice-influencing considerations, which calls for interstate and international orderliness in the law's administration, is equally relevant. Respect for the interests of sister states and nations, in their sovereign character, is the policy factor that has from the beginning been assigned as the major justification for the territorial theory.⁷⁴ It is a real reason for a state's self-restraint in prosecuting under its law crimes to which another state would affirmatively

72. This is the effect of the federal constitution's due process clause. *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Many state decisions similarly condemn indefiniteness in criminal law. *E.g.*, *State v. Hill*, 189 Kan. 403, 369 P.2d 365 (1962); *People v. Munoz*, 9 N.Y.2d 51, 172 N.E.2d 535, 211 N.Y.S.2d 146 (1961).

73. Note 68 *supra*.

74. See note 11 *supra* and accompanying text.

prefer to apply its own law, or its own non-law. This reason may be more important in international⁷⁵ than in interstate cases. A somewhat contradictory aspect of the same consideration however, is the common interest of nearly all states in stamping out crime. Crimes that are planned and executed across state and national boundaries can be especially frustrating to police authorities, and co-operation between the authorities of different states is not only useful in good criminal law administration but is regularly undertaken by the police and prosecuting authorities of most civilized states. It will often be true that the active prosecution by an interested state of a crime many of whose elements occurred elsewhere will be in furtherance of interstate and international order and will actually facilitate the other-state concerns that are identified with state and national sovereignty. This second choice-influencing consideration is decidedly pertinent, but it does not look automatically to jurisdictional exclusion to the extent that early cases seemed to indicate. Interstate cooperation rather than distrust and repugnance is appropriate today.

The third of the considerations—simplification of the judicial task—has little bearing on criminal cases. The forum court will apply the law with which it is most familiar, its own law, in any event. Evidence will have to be brought in from outside the state, but if it is an interstate crime, that will have to be done regardless of where the case is tried. It will be about as easy to try it in one state as in another, though if the facts are such that trial would be more convenient in one state than in another, this can be taken into account. The alternative least troublesome to the courts would be to try the case nowhere—a result reached too often in the past in dealing with interstate crimes.

Advancement of the forum's governmental interests, the fourth of the choice-influencing considerations, is very much in point. The

75. See, e.g., Berge, *The Case of the S.S. Lotus*, 26 MICH. L. REV. 361 (1928); Brierly, *The 'Lotus' Case*, 44 L.Q. REV. 154 (1928); Comment, *A Half Century of Jurisdictional Development: From Bananas to Watches*, 7 MIAMI L.Q. 400 (1953). On the somewhat related problems presented by crimes committed by United States servicemen in other countries, see Metzger & McMahon, *The Return of United States Servicemen for Offenses Committed Overseas*, 22 CASE W. RES. L. REV. 617 (1971); Note, *Jurisdiction over Ex-Servicemen for Crimes Committed Abroad: The Gap in the Law*, 22 CASE W. RES. L. REV. 279 (1971). Another area in which confusion still prevails is as to crimes committed on international air flights. See Lissitzyn, *In-Flight Crime and the United States Legislation*, 67 AM. J. INT'L L. 306 (1973). See generally, M. BASSIOUNI & V. NANDA, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* (1973), reviewed, Murphy, 4 DENVER J. INT'L L. & POLICY 153 (1974).

whole body of a state's criminal law exists for the express purpose of protecting interests with which the state is vitally concerned, whereas much of private law controls merely the interests of individuals between whom the state does not take sides except to the extent of affording them a fair system of law for the settlement of their disputes. In the criminal area, any given state has a true governmental interest in any conduct anywhere, in or out of the state, that has anti-social effects and harmful impact upon interests which that state is concerned with protecting. If a defendant's act produces an injury to a state's protectible interests, the state has an incentive for prosecuting him. The incentive alone may not be an adequate justification for prosecution, since the due process clause requires substantial contacts,⁷⁶ possibly exceeding the sources of incentives, and other choice-influencing considerations in addition to advancement of the forum state's governmental interests have to be taken into account. Nevertheless, this consideration will in many cases weigh heavily in favor of a state's proceeding to exercise criminal jurisdiction.

The last of the five considerations, the court's preference for what it regards as the better substantive law, is not likely to have much influence in criminal cases. The principal pressure for local prosecution in multistate crime cases will be a fear that the defendant cannot, or will not, be effectively prosecuted in the other states. More often than not this fear will grow out of a suspicion that the other states will not be much interested in prosecuting him vigorously, or will lack access to the evidence that would enable them to do so. Occasionally the pressure will come from an aroused public sentiment against the particular criminal or type of criminality. If the offensive act would not be adequately punished under the laws of other states, or would not be punished at all because of technical defenses available under the other states' laws, then a preference for the forum's "better law" might become significant. As between the states of the United States that would not often happen.

VI. CONCLUSION

If two-state and multistate criminal cases are to be dealt with intelligently on the basis of modern conflict of laws principles, and not mechanically as they have been too often in the past, it must be recognized that the new law of choice of law is a combination of the several approaches which various scholars have proposed in recent

76. See text accompanying notes 16-29 *supra*.

years.⁷⁷ The listed choice-influencing considerations underlie this new law, but courts sometimes apply the new law without mentioning the considerations as such. The considerations can stay in the background, even when they constitute the ultimate explanation of results reached. Regardless of the language used, however, it is time to realize that determination of what law governs in a criminal case is a true choice-of-law problem, just as it is in a torts or a contracts or a property case. The choice-influencing considerations operate somewhat differently in criminal cases, just as their operation in contracts or property cases is different from that in torts cases. But they are operative in all the newer civil choice-of-law decisions, including some that purport to reach automatic results under the old mechanical rules. To an increasing extent modern courts, believing in intellectual honesty, are openly and explicitly analyzing choice-of-law cases in terms of the real choice-influencing considerations. When the considerations are not mentioned in the opinions, they will usually have been taken into account, either tacitly or expressly, in the judges' preopinion analyses.

77. Leflar, *The "New" Choice of Law*, 21 AM. U.L. REV. 457 (1972). See notes 3-6 *supra* and accompanying text.