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Crime and the Seaway

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THE ADMINISTRATION of criminal justice involves many challenges. Who exercises jurisdiction? What crimes are involved? How shall the prosecution proceed? The manner in which these questions are resolved determines the peace and order of any community of men. What answers will be forthcoming will be decided by that orderly procedure we term justice — a continuous process to adapt man's laws to meet man's needs. When the life of a community is radically altered the administration of justice will mirror the changes.

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HISTORICAL BACKGROUND

Seldom has a community of men, like the Great Lakes region, been able to consider for such an extended period of time the major changes which will accompany the dramatic opening of the Great Lakes to world sea commerce in 1959. The international atmosphere of this region began on December 24, 1814, with the Treaty of Ghent demarking the international boundary between Great Britain and the United States. The dedication of the Great Lakes to peaceful international commerce followed rapidly. In April 1817, an agreement between these two nations limited the naval forces to be bottomed on the lakes. Commerce was stimulated by the Treaty of Washington, signed in 1842, which provided for freedom of navigation. By May 1871, the principle of free navigation for British and American vessels in the new Welland canal had also been legally established by treaty.[1]

The Great Lakes-St. Lawrence Deep Waterway Treaty signed in July 1932, opened the final chapter in realizing the dreams of several generations of midwestern Americans and Canadians for a strategic position on the world's seas to promote peaceful commerce.[2] With the fruition of such planning and laboring it now remains for the people of the Great Lakes community to live in their new environment. Criminal law will be a part of that living. To understand the relationship of criminal law to the Seaway several subjects require study: jurisdiction, comparative analysis of federal and state crimes,

1. The above mentioned treaties are discussed in OGILVIE, INTERNATIONAL WATERWAYS 269-70 (1920).

2. HYDE, 1 INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES 575-77 (2d rev. ed. 1947).

federal crimes relating to commerce, narcotics, and problems of prosecution.

JURISDICTION

Original Sources

The touchstone of the jurisdiction issue in the Great Lakes-St. Lawrence Seaway community is the precise overlay of federal jurisdiction upon state jurisdictions. The international boundary roughly bisecting the great waterway also marks the state boundaries with the Canadian provinces. Geographically and jurisdictionally the Great Lakes are both federal and state. The problem is similar to the land area of the United States, but the waterway presents a more acute jurisdictional issue than the land area. Two express grants of authority to the federal government in the United States Constitution have sharpened this issue:

1. The Congress shall have power . . . to define and punish piracies and felonies on the high seas and offenses against the law of nations.[3]
2. The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.[4]

These powers have been interpreted to be independent without limitation. The clauses also represent the transfer of admiralty jurisdiction to the national government, which jurisdiction had reposed in the states and the Confederation prior to 1789.[5] Federal criminal jurisdiction is exercised generally to enforce laws enacted under the specific grants of authority in article I, section 8 of the Constitution. Specific authority for criminal legislation arises from the adoption of constitutional amendments such as amendment XIV. General crimes — homicide, burglary, robbery, arson, or rape — are introduced through congressional authority to define felonies on the high seas or to define crimes in the admiralty and maritime jurisdiction. The judicial authority of article III, section 2 has been the primary source of federal criminal laws for the Great Lakes.

Extension of Admiralty and Maritime Jurisdiction

Over a century ago Mr. Chief Justice Taney writing for the majority upheld congressional power to extend the maritime jurisdiction to all public navigable lakes and rivers where commerce occurs between different states or with a foreign nation. Specifically, in *The Genessee Chief*,[6] the Court upheld the constitutionality of an act of Congress

3. U.S. CONST. art. I, § 8.
4. U.S. CONST. art. III, § 2.
5. United States v. Flores, 289 U.S. 137 (1933).
6. 53 U.S. (12 How.) 443 (1851).

which extended the jurisdiction of the federal district courts to a civil case involving a collision between two vessels on Lake Ontario. Although English admiralty jurisdiction was restricted to tidewater, American admiralty jurisdiction was defined so that it could grow with the nation. Good reasons were expressed.

> These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and moving commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other.[7]

The broad sweep of this decision did not go unchallenged. Mr. Justice McLean in dissent observed:

> . . . for now it is insisted that any waters, however they may be within the body of a State or country, are the peculiar province of the admiralty power. . . . My opinions may be deemed to be contracted and antiquated, unsuited to the day in which we live; but they are founded upon deliberate conviction as to the nature and objects of limited government, and by myself at least cannot be disregarded . . . . I cannot construe the constitution either by mere geographical considerations; cannot stretch nor contract it in order to adapt it to such limits, but must interpret it by my solemn convictions of the meaning of its terms, and by what is believed to have been the understanding of those by whom it has been formed.[8]

Forty years later the full significance of the admiralty jurisdiction in criminal matters was unfolded in *United States v. Rodgers*.[9] A congressional act made assault with a dangerous weapon a federal crime when committed on the "high seas" outside the jurisdiction of a state. Rodgers was validly tried and convicted in the federal court for an act done while aboard a vessel in the Detroit River within the territorial limits of Canada. Mr. Justice Field added further reasons for including the Great Lakes waterway within federal maritime jurisdiction:

> The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debauch into the ocean. The fact that their waters are fresh and

7. *Id.* at 453-54.

8. *Id.* at 465.

9. 150 U.S. 249 (1893).

> not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.[10]

Two dissenting justices contended that "high seas" meant "open seas." Numerous prior court decisions and international law literature were cited in support of this doctrine.[11] One cannot deny that the majority made a long leap forward, especially since this was a criminal case where, traditionally, statutes are narrowly construed and doubts are resolved in the accused's favor. The leap appears to have been based upon practicality, not upon precedent.

Prior to *Rodgers,* it was held that federal criminal jurisdiction did not encompass a felony — assault committed aboard a United States excursion vessel — in the Detroit River on the American side.[12] The applicable statute was the same statute as in *Rodgers* by which jurisdiction was exercised over offenses committed on the high seas or a river within the admiralty jurisdiction "out of the jurisdiction of any particular state." Nevertheless, the court stated that the crime occurred within Michigan waters and that Michigan had exclusive criminal jurisdiction. The court did indicate, however, that:

> The truth is, an act of congress is greatly needed to extend our jurisdiction to crimes committed upon American vessels navigating the lakes and their connecting waters. A vessel bound from Buffalo to Chicago, touching at Cleveland, passes through the waters of six states, besides those of the province of Ontario, and in her transit through the Detroit and St. Clair rivers is crossing and recrossing the boundary line almost every hour. While it may be entirely clear that a crime has been committed during the voyage, it may be utterly impossible . . . to locate the time or place, and the offense goes unpunished, because there is no court having general jurisdiction of the voyage and of the vessel.[13]

In 1890, Congress responded to this appeal and granted federal criminal jurisdiction for crimes committed on United States vessels during voyages on the waters of the Great Lakes or connecting waterways.[14]

Federal criminal jurisdictional problems continued to plague American vessels voyaging upon the Great Lakes. The indictment had to be brought within the jurisdiction of the federal district court in which the shipboard crime was committed.[15] Furthermore, it was not always easy to determine whether an American vessel was voyaging on the Great Lakes. In *Ex parte O'Hare*[16] a steam vessel was being towed after winter anchorage for operational outfitting. The

10. *Id.* at 256.
11. *Id.* at 266-86.
12. *Ex parte* Byers, 32 Fed. 404 (E.D. Mich. 1887).
13. *Id.* at 410.
14. Act of Sept. 4, 1890, ch. 874, 26 Stat. 424.
15. United States v. Peterson, 64 Fed. 145 (E.D. Wis. 1894).
16. 179 Fed. 662 (2d Cir. 1910).

vessel anchored within the breakwater of the port of Buffalo. No crew was signed; no fires were in the boilers. The federal court refused to exercise jurisdiction over an assault with a dangerous weapon committed aboard the vessel. Since the vessel was not "on a voyage," federal jurisdiction under the 1890 Act could not be invoked. Another possible ground for jurisdiction would have been to construe the Great Lakes as "high seas" and the Buffalo breakwater area as a "haven" within the admiralty jurisdiction of the United States "out of the jurisdiction of any particular state." But *Rodgers,* seventeen years before, had intimated that "high seas" jurisdiction with the "haven" appendage was not applicable to the Great Lakes. The dissenting judge in the *O'Hare* case read the *Rodgers* opinion differently. He contended that the Great Lakes were within the "high seas" jurisdiction and that the sole question was whether the Buffalo breakwater converted the ship's anchorage into a haven exclusively within New York's jurisdiction. "Haven," the dissent continued, meant a natural, not a man-made, protectorate. If the breakwater be destroyed by a storm, no "haven" would be left. Federal jurisdiction should not so easily be granted or withheld.[17] Furthermore,

> the trend of decision in the federal courts has been steadily in favor of widening the jurisdiction in admiralty; if we uphold the petitioner's contention [no federal jurisdiction], it will, in my judgment, be a distinct step backwards. The facts in the present case illustrate how easy it will be to hamper the commerce of the Great Lakes by lawless acts if large sections of the high seas are to be removed from the jurisdiction of the national courts. If the doctrine contended for be universally adopted, it follows that not only on the Great Lakes, but on the ocean as well, the section, where ships may anchor between a protecting wall and the shore must be withdrawn from the jurisdiction of the federal courts, with constant clashing of authority which is sure to follow.
>
> The commerce of the Great Lakes is not only national, but international in character and should be under the jurisdiction and protection of the national courts.[18]

Current Rules

Today's federal statutory criminal jurisdiction remains basically the same as it was in 1890. It is clear that a United States vessel on voyage anywhere on the Great Lakes waterway outside United States territory comes within the federal jurisdiction.[19] Foreign vessels are not within the federal jurisdiction when voyaging within the Canadian waters of the Great Lakes waterway. Foreign and domestic vessels voyaging in American waters may well be considered on the "high seas" from earlier judicial descriptions of the legal and geographical

17. *Id.* at 667-68.
18. *Id.* at 669.
19. 18 U.S.C. § 7(2) (1952).

significance of the Great Lakes. All vessels within the breakwaters of United States lake ports appear to be within the jurisdiction of a particular state, and thereby outside federal criminal jurisdiction.[20] Congressional legislation may be necessary in order to cover with federal jurisdiction vessels specifically within breakwaters of lake ports. Perhaps the national legislature will not respond until a court decision excludes from federal jurisdiction vessels in foreign commerce.[21] The federal constitutional interest in protection of foreign sea commerce is obvious from the delegation of authority over foreign commerce in article I, section 8 and from the delegation of admiralty jurisdiction in article III, section 2.

States bordering on the Great Lakes have little to fear from this extension of federal criminal jurisdiction. Concurrent jurisdiction can remain. Federal criminal statutes, in general, punish the same antisocial acts as state statutes. Today, even if an act is not expressly made a crime by federal legislation, it may still be punished by the Federal Assimilative Crimes Act.[22] This statute provides that an act made a crime by a state will be punished by federal prosecution when committed within federal territory located within the state. Individual states thereby gain protection from antisocial acts even when committed in a federal jurisdiction within the state. For example, if a person aboard a United States vessel on voyage from Chicago, Illinois, to Michigan City, Indiana, committed an act of sodomy, the federal district court could apply the Indiana sodomy law for an act done on Indiana waters.[23] The constitutionality of the Assimilative Crimes Act, passed in 1948 to include state criminal laws enacted subsequent to 1948, appears settled.[24]

Even if later federal decisions should question the application of the Assimilative Crimes Act in the Great Lakes maritime jurisdiction, a state has concurrent jurisdiction and can enact laws to punish antisocial acts of its citizen within the federal maritime jurisdiction where the state law does not conflict with federal law. In *Skiriotes v. Florida*,[25] the state prohibited its citizens from using equipment to take commercial sponges from the Gulf of Mexico, Straits of Florida, and other state territorial waters. A federal law prohibited the taking of sponges under a certain size in waters outside the state territory. Defendant was lawfully convicted for violating the state law. The United States Supreme Court emphasized:

20. 18 U.S.C. § 7(1) (1952).

21. Compare the 1952 addition to the special maritime and territorial jurisdiction provisions, 18 U.S.C. § 7(5) (1952), to cover United States aircraft in flight over the high seas, passed after a judicial decision, United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950), had denied such jurisdiction.

22. 18 U.S.C. § 13 (1952).

23. United States v. Gill, 204 F.2d 740 (7th Cir. 1953), *cert. denied*, 346 U.S. 825 (1953).

24. United States v. Sharpnack, 355 U.S. 286 (1958).

25. 313 U.S. 69 (1941).

> If the United States may control the conduct of its citizens upon the high seas, we see no reasons why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. . . . There is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas.[26]

Foreign Vessels

If points of conflict between federal and state criminal jurisdiction can be deftly adjusted by the recognition of concurrent jurisdiction supplemented by the Assimilative Crimes Act and state authority over its own citizens, the matter of foreign vessels in local ports presents still more difficult challenges.

Once again, historical observations are worthy of note. In 1812, Mr. Chief Justice Marshall wrote:

> When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.[27]

For purposes of criminal jurisdiction, foreign flag vessels in Great Lakes ports are within state control primarily when serious felonies are involved. Disorders aboard such vessels likely to disturb the tranquility or public order on shore, or in the port, are concerns of the state. In a New Jersey port an act of felonious homicide aboard a Belgian vessel involving Belgian seamen gave rise to the proper exercise of state criminal jurisdiction.[28] Even though a treaty existed between the United States and Belgium granting full authority over Belgian vessels to the Belgian consul, such acts involving serious disturbances of the peace were interpreted not to fall within the treaty provisions.

Fine distinctions covering the criminal acts which are the subject

26. *Id.* at 77.

27. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 144 (1812).

28. Wildenhus's Case, 120 U.S. 1 (1887).

matter of local jurisdiction have been made. One court has held that possession of illicit opium aboard a foreign vessel in a local port was outside local jurisdiction, but a foreign seaman's smoking the opium on the foreign vessel in port was within local jurisdiction.[29] The opinion acknowledged two opposing international law rules covering such situations: the French rule, denying the exercise of local jurisdiction unless the peace and security of the local port is threatened; and the English rule, permitting the exercise of territorial jurisdiction over crimes aboard foreign vessels in port.

The extreme situation was undoubtedly reached in *Cunard S. S. Co. v. Mellon*[30] when the United States Supreme Court upheld, as constitutional, penalties against foreign vessels carrying liquor as sea stores within United States ports. The prohibition amendment and the Volstead Act had imposed this stringent rule. Mr. Justice Van Devanter left no doubt concerning the complete subjection of foreign vessels to local jurisdiction:

> A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of the place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.[31]

The opinion then reaffirmed the words of Mr. Chief Justice Marshall pronounced over a century before — words which adopt the ultimate in the territorial jurisdiction principle:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . .
>
> All exceptions, therefore, to the full and complete power of a nation within its territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.[32]

The Supreme Court in the *Cunard S. S. Co.* case did not speak with unanimity, however. In dissent, Mr. Justice Sutherland cautioned:

> The general rule of international law is that a foreign ship is so far identified with the country to which it belongs that its internal affairs, whose effect is confined to the ship, ordinarily are not subjected to interference at the hands of another state in whose ports it is temporarily present.[33]

29. People v. Wong Cheng, 46 P.I. 729 (1922).
30. 262 U.S. 100 (1923).
31. *Id.* at 124.
32. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).
33. 262 U.S. 100, 132 (1923) (dissent).

The dissent then urged that the Volstead Act should not be interpreted to violate the principles of international comity. Mere possession of liquor in sea stores on foreign vessels in American ports should be deemed outside the statutory regulations. To construe the statute to avoid conflict with international law, the dissent also applied the wisdom of Mr. Chief Justice Marshall who had urged:

> . . . an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .[34]

The United States has recognized the major interest the flag sovereign has over its vessel in a foreign port. Even in the most serious criminal incident the United States has acknowledged the subordinate jurisdiction of the foreign sovereign over criminal acts committed aboard the foreign vessel while in the port of the territorial sovereign. Within its discretion, the territorial sovereign may acquiesce and permit the exercise of the foreign sovereign's jurisdiction.

The United States exercised jurisdiction over the case of a murder of an American committed by an American aboard an American vessel located 250 miles up the Congo River.[35] The United States Supreme Court, speaking unanimously through Mr. Justice Stone, stated:

> There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both. . . . The position of the United States . . . has been that at least in the cases of major crimes, affecting the peace and tranquility of the port, the jurisdiction asserted by the sovereignty of the port must prevail over that of the vessel. . . . In the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law.[36]

The jurisdiction of a foreign sovereign over its vessels in Great Lakes ports is undoubtedly secondary to the territorial jurisdiction. Especially is this true for major crimes committed aboard foreign vessels in lake ports. An act not considered a breach of public order and tranquility in a coastal port might well be considered a breach in Buffalo, Cleveland, Detroit, or Chicago. Perhaps more important than the fact that the Great Lakes are considered seas, is the fact that they are *inland*. The waters are completely dominated by the territorial boundaries of both states and provinces as well as the Union and the Dominion. The test of practicality may well demand more territorial jurisdiction over crimes. Judicial decisions, aided by

34. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

35. United States v. Flores, 289 U.S. 137 (1933).

36. *Id.* at 158-59.

legislative enactments,[37] will undoubtedly adapt and mold such jurisdictional issues in the years to come as the common-law process seeks to meet the jurisdictional needs of the Great Lakes.

FEDERAL AND STATE CRIMES: A COMPARATIVE ANALYSIS

Once the thorny jurisdictional issue is resolved with the territorial sovereign — federal or state — authorized to prosecute, the selection of the prosecuting authority raises interesting problems. Even between two sovereignties with the same legal traditions, such as the United States and Ohio, important differences appear. Both sovereigns have declined to accept common-law crimes;[38] both are exclusively statutory crime jurisdictions. The traditional crimes are often defined quite differently when two different legislatures enact laws to punish the same crime. A comparative analysis of several of these crimes will accent the dissimilarities between the federal crime and the same Ohio crime. Significant differences are emphasized.

ARSON

United States Code[39]	*Ohio Revised Code*[40]
1. a. Willfully and maliciously set fire to or burn or *attempt to set fire to or burn.*	1. a. Willfully and maliciously *or with intent to defraud* set fire to or burn.
b. Any building, *vessel, machinery building supplies, military stores.*	b. Any building.
c. Not more than $1,000 fine nor more than 5 years imprisonment, or both.	c. 1-10 years imprisonment.
2. a. If a dwelling be set fire or burned or a *life be placed in jeopardy.*	2. a. Dwelling house or *parcel belonging thereto.*
b. Not more than $5,000 nor more than 20 years, or both.	b. 2-20 years.

Ohio has enacted additional arson crimes: burning personal property or aiding the burning of such property willfully and with the intent to defraud or injure the insurer (one to five years);[41] willfully and maliciously burning or aiding in burning personal property of another valued at $25 or more (one to three years).[42] While the federal arson statute includes attempts to burn, Ohio has enacted a special attempt provision (not more than $1,000 or one to two years).[43]

37. For example the 103d General Assembly of Ohio (1959) enacted Am. S.B. 350 extending the jurisdiction of the Cleveland and Euclid Municipal Courts three miles into Lake Erie. Gov. DiSalle signed this legislation.

38. United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812); Vanvalkenburg v. State, 11 Ohio 404 (1842).

39. 18 U.S.C. § 81 (1952).

40. OHIO REV. CODE §§ 2907.02 and .03.

41. OHIO REV. CODE § 2907.04.

42. OHIO REV. CODE § 2907.05.

43. OHIO REV. CODE § 2907.06.

The Ohio enactment also seeks to define an attempt: placing or distributing combustible materials or any device at any property in an arrangement or preparation with the intent eventually to willfully and maliciously set fire thereto.

ASSAULT

United States Code[44]	*Ohio Revised Code*
1. a. Assault with intent to commit murder or rape.	1. a. Assault with intent to kill, *rob* or rape.
b. Not more than 20 years imprisonment.	b. 1-15 years imprisonment.[45]
2. a. *Assault with dangerous weapon* with intent to do bodily harm *without just cause.*	2. a. *Maliciously shoot, stab, cut or shoot at another* with intent to kill, wound or maim.
b. Not more than $1,000 nor more than 5 years, or both.	b. 1-20 years.[46]
3. a. Assault by striking, beating or wounding.	3. a. Assault with dangerous weapon, instrument, other means or force likely to kill or to do great bodily harm.
b. Not more than $500 nor more than 6 months, or both.	b. 1-5 years.[47]
4. a. Simple assault.	4. a. Assault, strike, wound, threaten in menacing manner.
b. Not more than $300 nor more than 3 months, or both.	b. Not more than $200 nor more than 6 months.[48]

The federal code section set out above also provides for an assault with intent to commit a felony other than murder or rape (not more than $3,000 nor more than ten years, or both). Ohio covers this area only partially by including robbery within its felonious assault statute as indicated above. Both jurisdictions include maiming as a crime with surprisingly similar provisions.[49] The punishment differs greatly, however. The federal crime demands not more than $1,000 nor more than seven years, or both. The punishment in Ohio is three to thirty years and, if one throws acid to disfigure another, imprisonment for life is permissible.

FALSE PRETENSES

United States Code[50]	*Ohio Revised Code*[51]
1. a. By fraud or false pretense obtain anything of value, *or procure execution or delivery of conveyance of realty or personalty,* or signature of person on evidence of in-	1. a. By false pretense *and intent to defraud,* obtain anything of value, or procure signature of another on evidence of indebtedness, or sell or dispose of promissory in-

44. 18 U.S.C. § 113 (1952).
45. OHIO REV. CODE § 2901.24.
46. OHIO REV. CODE § 2901.23.
47. OHIO REV. CODE § 2901.241.
48. OHIO REV. CODE § 2901.25.
49. 18 U.S.C. § 114 (1952) and OHIO REV. CODE § 2901.19.
50. 18 U.S.C. § 1025 (1952).
51. OHIO REV. CODE § 2911.01.

debtedness, or sell or dispose of promissory instrument knowing it to be worthless or knowing signature of maker, endorser or guarantor obtained by false pretense.	strument knowing signature of maker, indorser or guarantor obtained by false pretense.
b. If value obtained more than *$100*, not more than $5,000 fine nor more than 5 years, or both; if *$100* or less, not more than $1,000 fine nor more than 1 year, or both.	b. If value obtained *$60* or more, 1-3 years; if less, not more than $300 nor more than 90 days, or both.

Ohio's larceny by trick statute[52] permits easier prosecutions in the twilight zone involving the issue of whether only possession passed or both title and possession passed as the result of misrepresentation. The federal code lacks this convenient traditional crime.

MURDER IN THE FIRST DEGREE

United States Code[53]	*Ohio Revised Code*[54]
1. a. Unlawful killing of a human being with malice aforethought; if perpetrated by poison, lying in wait, any other kind of willful, deliberate, malicious, and premeditated killing or in perpetrating or attempting arson, rape, burglary, robbery, or with premeditated design unlawfully to effect the death of another.	1. a. *Purposely* and either with deliberate and premeditated malice, or with poison, or in perpetrating or attempting rape, arson, robbery, burglary.
b. Death unless jury qualifies without capital punishment, then life imprisonment.	b. Death unless jury recommends mercy, then life imprisonment.

Ohio requires a purposeful killing, an intent to kill, in every first degree murder, *plus* premeditated malice or poison or the perpetration of one of the four serious felonies or their attempt.[55] The federal statute follows the common-law definition of murder which requires only malice aforethought, not an intent to kill.[56] Showing an intent to kill can be one independent means of proving such malice, as can the use of poison, lying in wait, or killing in the four serious felony incidents.[57] Even in a killing during the commission of one of the four serious felonies, Ohio requires an intent to kill; the federal law does not.

52. OHIO REV. CODE § 2907.21.

53. 18 U.S.C. § 1111 (1952).

54. OHIO REV. CODE § 2901.01.

55. Robbins v. State, 8 Ohio St. 131 (1857); Turk v. State, 48 Ohio App. 489, 194 N.E. 425 (1934), *aff'd*, 129 Ohio St. 245, 194 N.E. 453 (1935); State v. Salter, 149 Ohio St. 264, 78 N.E.2d 575 (1948); State v. Farmer, 156 Ohio St. 214, 102 N.E.2d 11 (1951).

56. United States v. Boyd, 45 Fed. 851 (C.C. Ark. 1890).

57. Ornelas v. United States, 236 F.2d 392 (9th Cir. 1956).

MURDER IN THE SECOND DEGREE

United States Code[58]	*Ohio Revised Code*[59]
1. a. Unlawful killing of a human being with malice aforethought by other than those means expressed as murder first degree.	1. a. *Purposely* and maliciously kill another.
b. Any term of years or life imprisonment.	b. Life imprisonment.

Once again Ohio demands an intent to kill but the federal statute requires only malice.[60]

MANSLAUGHTER

United States Code[61]	*Ohio Revised Code*[62]
1. a. Unlawfully killing without malice: Voluntary — upon sudden quarrel or heat of passion; Involuntary — while committing an unlawful act not a felony, or *committing a lawful act in an unlawful manner or without due caution which might produce death.*	1. a. Unlawfully kill another.
b. Voluntary — not more than 10 years; Involuntary — not more than $1,000 nor 3 years, or both.	b. 1-20 years.

Judicial decisions in Ohio have filled in the simple statutory definition. Killing in a sudden quarrel and heat of passion is manslaughter,[63] as it is in the federal jurisdiction. But contrary to the federal statute, a killing must be committed during an unlawful act which constitutes a violation of a state statute. An act considered a crime at common law but not by statute, or an act of gross or culpable negligence, does not give rise to manslaughter.[64] A violation of a city ordinance also satisfies the requirement of an unlawful act.[65] The federal statute's provision of causal relation must also be met in Ohio.[66]

RAPE

United States Code[67]	*Ohio Revised Code*[68]
1. a. Commit rape.	1. a. Carnal knowledge of any female forcibly and against her will.

58. 18 U.S.C. § 1111 (1952).
59. OHIO REV. CODE § 2901.05.
60. Ornelas v. United States, 236 F.2d 392 (9th Cir. 1956).
61. 18 U.S.C. § 1112 (1952).
62. OHIO REV. CODE § 2901.06.
63. State v. Laswell, 78 Ohio App. 202, 66 N.E.2d 555 (1946).
64. Johnson v. State, 66 Ohio St. 59, 63 N.E. 607 (1902).
65. State v. O'Mara, 105 Ohio St. 94, 136 N.E. 885 (1922).
66. State v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220 (1917).
67. 18 U.S.C. § 2031 (1952).
68. OHIO REV. CODE § 2905.01.

b. Death or imprisonment for any term of years or life.	b. 3-20 years.

The simplicity of the federal enactment requires much judicial interpretation. Common-law precedents have been the source of the needed definitions.[69] Ohio has expressly enacted the common-law crime with the exception that carnal knowledge is complete upon penetration without the common-law requisite of emission.[70]

STATUTORY RAPE

United States Code[71]	*Ohio Revised Code*[72]
1. a. Carnally know any female not one's wife under 16 years of age.	1. a. A *person 18 years or older* carnally knows a female under 16 *with her consent.*
b. First offense not more than 15 years imprisonment; subsequent offense not more than 30 years.	b. 1-20 years, or 6 months in county jail. Court may hear testimony in mitigation or aggravation of sentence.

The age limitation of the male assailant is a crucial difference between the Ohio and federal crimes. Ohio provides an additional crime of rape of a female under twelve forcibly and against her will. Life imprisonment is imposed.[73] This provision would appear to be more similar to the federal offense.

ROBBERY

United States Code[74]	*Ohio Revised Code*[75]
1. a. By force and violence, or intimidation take from the person or presence of another anything of value.	1. a. By force or violence or putting in fear steal from the person of another anything of value.
b. Not more than 15 years imprisonment.	b. 1-25 years.

Both Ohio and federal robbery statutes are practically identical, especially with Ohio judicial decisions interpreting "to steal from the person" to include not only his body but also his presence.[76] Ohio does provide additional protection to society with an armed robbery statute imposing ten to twenty-five years imprisonment when a pistol, knife, or dangerous weapon is used.[77]

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69. Oliver v. United States, 230 Fed. 971 (9th Cir. 1916), *cert. denied,* 241 U.S. 670 (1916).
70. OHIO REV. CODE § 2905.05.
71. 18 U.S.C. § 2032 (1952).
72. OHIO REV. CODE § 2905.03.
73. OHIO REV. CODE § 2905.02.
74. 18 U.S.C. § 2111 (1952).
75. OHIO REV. CODE § 2901.12.
76. Turner v. State, 1 Ohio St. 422 (1853).
77. OHIO REV. CODE § 2901.13.

THEFT OR LARCENY

United States Code[78]	*Ohio Revised Code*[79]
1. a. Take and carry away with intent to steal or purloin any personal property of another.	1. a. Steal anything of value.
b. If the value exceeds *$100* or *if taken from the person of another,* not more than $5,000 nor 5 years imprisonment, or both; all other cases not more than $1,000 nor 1 year, or both.	b. If the value is $60 or more, 1-7 years; if the value is less than $60, not more than $300 fine or 90 days, or both.

In both jurisdictions the judiciary has recognized these statutory crimes as enactments of the common-law offenses.[80] While the federal statute covers pocket picking in the punishment provision, Ohio has adopted a specific statute for this crime.[81] An evidence of debt or other written instrument containing a sum thereon shall be considered to be the value as represented by the sum, the federal act provides. Ohio incorporates the same rule in the definitions chapter of the Revised Code.[82]

RECEIVING STOLEN PROPERTY

United States Code[83]	*Ohio Revised Code*[84]
1. a. To buy, receive or conceal anything feloniously taken, stolen or embezzled from another knowing it to have been taken, stolen or embezzled.	1. a. Buy, receive or conceal anything stolen, taken by robbers, embezzled or obtained by false pretense, knowing it to have been stolen, taken by robbers, embezzled or obtained by false pretense.
b. Not more than $1,000 nor more than 3 years imprisonment, or both; if the value does not exceed *$100,* not more than $1,000 nor more than 1 year, or both.	b. If value is *$60* or more, 1-7 years; if value less than *$60,* not more than $300 nor more than 90 days, or both.

The gist of this offense is the personal knowledge of the accused that the goods received are stolen. A subjective test is demanded under Ohio and federal law.[85] It is interesting to note that the federal crime includes embezzled goods even though the federal criminal code does not include embezzlement as a crime when committed with-

78. 18 U.S.C. § 661 (1952).

79. OHIO REV. CODE § 2907.20.

80. Stanley v. State, 24 Ohio St. 166 (1873); see Dunaway v. United States, 170 F.2d 11 (10th Cir. 1948).

81. OHIO REV. CODE § 2907.29.

82. OHIO REV. CODE § 1.07.

83. 18 U.S.C. § 662 (1952).

84. OHIO REV. CODE § 2907.30.

85. Morris v. State, 8 Ohio App. 27 (1917); Peterson v. United States, 213 Fed. 920 (9th Cir. 1914).

in the special maritime and territorial jurisdiction. The federal crime of embezzlement covers only goods in interstate or foreign commerce.[86] Not the maritime jurisdiction under article III of the United States Constitution, but the subject matter of interstate and foreign commerce under article I, is the source of federal jurisdiction over the offense of embezzlement. Despite this fact, the maritime jurisdiction includes the use of the receiver's statute for embezzled property.

Another major difference between federal crimes and Ohio crimes lies in the conspiracy area. The federal code includes a general conspiracy statute:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy . . .

each is subjected to a maximum $10,000 fine or five years imprisonment, or both.[87] Ohio has no such general conspiracy statute.[88] However, the Ohio criminal code does include specific conspiracy provisions for the crimes of abducting and kidnaping (five to thirty years imprisonment).[89] For this crime the state definition of conspiracy is quite similar to the federal definition. The same holds true for Ohio's conspiracy to defraud the state (not less than one year nor more than two years imprisonment, nor more than $5,000 fine, or both).[90] However, the Ohio crime of convicts conspiring to kill a prison guard requires three or more participants and no express requirement exists that one or more do an act to achieve the objective of the conspiracy. This crime is punished by not less than one nor more than twenty years imprisonment in addition to the existing sentence.[91]

The federal general conspiracy statute eliminated the need for most specific conspiracy crimes. Retained in the United States Code, however, are several specific provisions: to injure the free exercise or enjoyment of a federal constitutional right;[92] to defraud the government with respect to claims;[93] to impede or injure a federal officer;[94] to procure the escape of a prisoner of war;[95] to gather or to

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86. 18 U.S.C. § 659 (1952).
87. 18 U.S.C. § 371 (1952).
88. H.B. 424 of the 103d General Assembly of Ohio (1959) was a general conspiracy proposal but it failed to pass.
89. OHIO REV. CODE § 2901.34.
90. OHIO REV. CODE § 2921.14 (Supp. 1958).
91. OHIO REV. CODE § 2901.03 (Supp. 1958).
92. 18 U.S.C. § 241 (1952).
93. 18 U.S.C. § 286 (1952).
94. 18 U.S.C. § 372 (1952).
95. 18 U.S.C. § 757 (1952).

deliver defense information to aid a foreign government;[96] to injure property of a foreign government;[97] to transport in interstate or foreign commerce a kidnaped person;[98] to destroy any vessel;[99] to overthrow the government of the United States by force;[100] and to make false reports to interfere with military and naval operations.[101]

The further impact of these several differences between federal and Ohio statutory crimes will be considered under the later subject of problems in prosecution.

Crimes Involving Sea Commerce

The federal constitution provides two sources of authority for protection of sea commerce: the jurisdictional grant of article III covering all admiralty and maritime cases and the legislative authority in article I to define felonies on high seas. Originally, the power to regulate commerce with foreign nations and among states was an unknown constitutional quantity.

Experience with admiralty and maritime cases, however, had existed in colonial days with the establishment of vice admiralty courts in the colonies followed by state admiralty courts between 1776-1789. In the later years of this period appeals could be taken from the state admiralty courts to a court of appeals set up by Congress under the Articles of Confederation.[102] The Continental Congress also had exclusive authority to define felonies committed on the high seas, a power inherited from the British Sovereign upon independence.[103]

The commerce clause authority, in contrast, was first introduced in the Constitutional Convention of 1787.[104] Its operation remained quiescent for several decades. Not until judicial decisions firmly grasped and molded this authority did it become what it is today. *Gibbons v. Ogden*,[105] decided in 1824, and *Brown v. Maryland*,[106] decided three years later, interpreting the scope of interstate and foreign commerce respectively, introduced this clause as the primary fountainhead of federal power in peacetime and a major authority to restrict state power in the balancing of federal-state relations.

96. 18 U.S.C. § 794 (Supp. V, 1952).
97. 18 U.S.C. § 956 (1952).
98. 18 U.S.C. § 1201 (1952).
99. 18 U.S.C. § 2271 (1952).
100. 18 U.S.C. § 2384 (Supp. V, 1952).
101. 18 U.S.C. § 2388 (1952).
102. Constitution of the United States of America 572-73 (Corwin ed., rev. and ann., 1952).
103. *Id.* at 277.
104. *Id.* at 118.
105. 22 U.S. (9 Wheat.) 1 (1824).
106. 25 U.S. (12 Wheat.) 419 (1827).

Protection of sea commerce from crimes has been achieved by utilizing the admiralty and maritime clause as well as the commerce clause.

The net of crimes within the special territorial and maritime jurisdiction includes, in addition to the traditional crimes discussed previously, certain other crimes oriented to sea commerce specifically. The owner of a vessel within the maritime jurisdiction who willfully destroys the vessel in whole or in part may be punished with life imprisonment or any term of years[107] if the act is accompanied by an intent to injure the underwriter, or any merchant with goods aboard, or any other owner of the vessel. A nonowner of a vessel willfully destroying or attempting to destroy the vessel to which he belongs, within the maritime jurisdiction, may be imprisoned for not more than ten years.[108]

Ohio's general statute prohibiting the malicious destruction or injury of property applies only to nonowners. If the value of the property destroyed is $100 or more, the penalty is one to seven years imprisonment; otherwise, a $500 fine or thirty days, or both, is the maximum.[109]

One further federal maritime crime of significance is the breaking and entering of a vessel with the intent to commit a felony, or the malicious destruction of any cable, rope, or fast fixed to the anchor or moorings belonging to any vessel.[110] A fine of not more than $1,000 or imprisonment for not more than five years, or both, can be imposed.

Ohio's statutes for breaking and entering refer to ships in only two instances: (1) nighttime breaking and entering a ship or watercraft in which a person resides to commit or attempt to commit personal violence, or armed with a dangerous weapon, indicating a violent intention,[111] and (2) daytime breaking and entering a similar vessel to commit or attempt to commit personal violence.[112] Both offenses are misdemeanors and the maximum penalty is $300 fine or thirty days in jail for the former, and $100 fine or twenty days for the latter. Of course, burglary of an uninhabited dwelling with one to fifteen years punishment, which includes railway cars, warehouses, or other buildings, will include dock terminals and enclosed wharves.[113] The possession of burglary tools with the intent to use them burglariously to force buildings or other places where goods are

107. 18 U.S.C. § 2272 (1952).
108. 18 U.S.C. § 2273 (1952).
109. OHIO REV. CODE § 2909.01.
110. 18 U.S.C. § 2276 (1952).
111. OHIO REV. CODE § 2907.16.
112. OHIO REV. CODE § 2907.17.
113. OHIO REV. CODE § 2907.10.

kept is also punishable by one to five years imprisonment. However, proof of specific intent is required.[114]

It is also a federal offense willfully to cause or to permit the destruction or injury of a foreign or domestic vessel, or knowingly to permit the use of such vessel as a place of "resort" for any person conspiring with another or preparing to commit any offense against the United States or its obligations, or to defraud the United States. The maximum penalty is $10,000 fine or ten years imprisonment, or both.[115] If the vessel is so used with the knowledge of the owner, master, or one in command, the vessel with all equipment is liable to seizure and forfeiture to the United States.

Criminal legislation grounded upon congressional authority to regulate interstate and foreign commerce emphasizes the protection of the goods which are the subjects of sea commerce and the vessels which are the means of sea commerce. To set fire to any vessel engaged in foreign commerce or to its cargo, or to tamper with the instruments of navigation or motive power, is punishable by a fine of not more than $10,000 or twenty years imprisonment, or both.[116] To transport goods in interstate or foreign commerce, or to receive, conceal, or dispose of goods which constitute interstate or foreign commerce, knowing them to have been stolen, converted, or taken by fraud, subjects one to a $10,000 maximum fine or not more than ten years imprisonment, or both.[117] In interpreting these valuable statutory provisions for protection of goods in sea commerce it is wise to remember that judicial decisions do not require that the statutes be interpreted strictly upon technical common-law definitions of larceny.[118]

One final public safety enactment worthy of mention covers the intentional interfering with, or attempting to interfere with the exportation to foreign countries of American articles. Injury to such articles by fire or explosives while in foreign commerce permits a maximum penalty of $10,000 or twenty years imprisonment, or both.[119]

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114. OHIO REV. CODE § 2907.11.

115. 18 U.S.C. § 2274 (1952).

116. 18 U.S.C. § 2275 (1952).

117. 18 U.S.C. §§ 2314 (Supp. V, 1952), 2315 (1952).

118. Bergman v. United States, 253 F.2d 933 (6th Cir. 1958). In United States v. Turley, 352 U.S. 407, 417 (1957), the Supreme Court, interpreted "stolen" in the National Motor Vehicle Theft Act, 18 U.S.C. § 2312 (1952), a companion enactment to the Interstate Transportation of Stolen Goods Act. "Stolen . . . includes all felonious takings of motor vehicles with intent to deprive the owner of rights and benefits of ownership, regardless of whether or not the theft constitutes common law larceny." An act considered embezzlement, not larceny, at common law is included within the word "stolen."

119. 18 U.S.C. § 1364 (1952).

In the specific protection of property involved in sea commerce, the federal authority carries the major share of responsibility.

Narcotic Traffic

To the average citizen the first thought stimulated by the subject, "crime and the seaway," focuses upon dope smuggling. Sinister adventure stories have emphasized seaports as gateways for the illicit traffic. In truth, there *is* a challenge to seaport communities to prevent increased narcotic traffic. The Middle East and Red China are primary sources of illegal drugs. Complete customs control over domestic and foreign crews and passengers is often difficult to achieve. A small package — four pounds — easily concealed on a member of a ship's crew can provide handsome profits. The narcotics traffic is business to many persons: the crew member, the importer who "cuts" the four pounds slightly, the wholesaler who buys two pounds and "cuts" it by 50 per cent, the distributor who procures twelve ounces and "cuts" again, and the peddler who buys a few ounces and "cuts" it heavily to sell to the addict. Obviously, the jugular vein of law enforcement is located at the docks and wharves. To protect this vein laws must be effectively applied. Because it is a business, the risks involved must be measured by the severity of punishment and the facility of conviction. Legislation is vital for the prevention of this criminal traffic.

Both the United States and Ohio have effective narcotics statutes. Interestingly, neither jurisdiction includes the drug traffic crimes under the criminal code. The federal provisions appear under the internal revenue and the food and drug codes. Ohio has placed its narcotics legislation under the title of health, safety, and morals.

United States Code	*Ohio Revised Code*
1. a. Tax on importers, manufacturers, producers, wholesale and retail dealers, physicians and other practitioners, persons engaged in research who handle narcotics.	1. a. Licensing of manufacturers, wholesalers, pharmacists with regulations for sale; regulations and records for dispensing by pharmacists and practitioners.
b. Registration of all persons handling narcotics.	b. No one other than licensed person shall possess or have under control narcotic drug unless obtained by prescription and still in original container; possession is presumptive evidence of violation.
c. Unlawful for person required to register to import, manufacture, produce, compound, sell, dispense, distribute, administer, or give away without registering or paying tax.	c. The penalties vary. For example, the penalty for (b) is: first offense, not more than $10,000 and 2-15 years imprisonment; second offense, not more than $10,000 and 5-20 years; third

	offense, not more than $10,000 and 10-30 years.[123]
d. Unlawful for any unregistered person to transport narcotic drugs from one state to another.	
e. Unlawful for any unregistered person to possess or control narcotic drugs; possession or control is presumptive evidence of violation.[120]	
f. First offense, not more than $20,000 and 2-10 years imprisonment; second offense, not more than $20,000 and 5-20 years; third and subsequent offenses, not more than $20,000 and 10-40 years. Suspended sentence or probation prohibited beginning with second offense.[121]	
2. a. Unlawful to import or bring into United States any narcotic drugs except as prescribed by Commissioner of Narcotics.	2. [No similar Ohio provision.]
b. Unlawful for any person fraudulently or knowingly to import or bring any narcotic drug into United States contrary to law, or to receive, conceal, buy, sell, or to facilitate transportation, concealment or sale of such narcotic drug after imported or brought in, knowing the same to have been imported or brought in, or conspire to commit any of such acts.	
c. First offense, 5-20 years imprisonment and in addition may be fined up to $20,000; second or subsequent offense, 10-40 years and in addition may be fined up to $20,000.	
d. Possession is sufficient evidence to authorize conviction unless defendant explains to satisfaction of jury.[122]	
3. a. Anyone 18 years or older knowingly sells, gives away, furnishes, or dispenses or facilitates the same, or conspires to do so, any	3. a. Unlawfully dispense or administer narcotic drug to minor.

120. INT. REV. CODE of 1954, §§ 4721, 4722, 4724.

121. INT. REV. CODE of 1954, § 7237(a).

122. 43 Stat. 657 (1936), 21 U.S.C. § 173 (1952); 70 Stat. 570 (1956), 21 U.S.C. § 174 (Supp. V, 1952).

123. OHIO REV. CODE §§ 3719.02, .04, .05, .06, .07, .09, .16; OHIO REV. CODE §§ 3719.021, .171, .99 (Supp. 1958).

heroin unlawfully imported or brought in, to anyone under 18 years.

b. Not more than $20,000 and life, or not less than 10 years, or death if the jury directs.

c. Possession of heroin is sufficient proof that it was unlawfully imported or brought in, unless defendant explains to jury's satisfaction.[124]

b. 30 years to life.[125]

c. Induce or attempt to induce another to use unlawfully a narcotic drug; use a minor to transport, carry or produce unlawfully a narcotic drug; induce or attempt to induce a minor to violate narcotic laws; induce or attempt to induce a minor to use narcotic drug except in accordance with prescription.

d. First offense, 10-25 years; second offense 25-50 years.[126]

4. a. Sell a narcotic drug except as prescribed by law.

b. 20-40 years.[127]

5. a. Knowingly permit use of building, vehicle, boat, aircraft, or any other place owned or controlled, for illegal keeping, dispensing or administering.

b. First offense, not more than $500 or 1-5 years; each subsequent offense $200-$1000 or 1-5 years.[128]

6. a. Possess for sale except as prescribed by law. Conspire with another person or persons: to induce another to use unlawfully, to dispense unlawfully to a minor, to employ a minor to carry unlawfully, to induce a minor to violate narcotics law, knowingly to use a building or vehicle to keep, dispense or administer narcotics illegally.

b. First offense, 10-20 years; second offense, 15-30 years; third offense, 20-40 years.[129]

7. Burden of proof for any exemption, excuse, proviso or exception rests on defendant; prosecution need not negative any of these issues.[130]

124. 70 Stat. 571 (1956), 21 U.S.C. § 176(b) (Supp. V, 1952).
125. OHIO REV. CODE §§ 3719.20(D), .99(G) (Supp. 1958).
126. OHIO REV. CODE §§ 3719.20(C), (E), (F), (G), .99(E) (Supp. 1958).
127. OHIO REV. CODE §§ 3719.20 (B), .99(F) (Supp. 1958).
128. OHIO REV. CODE § 3719.10; OHIO REV. CODE § 3719.99(B) (Supp. 1958).
129. OHIO REV. CODE §§ 3719.20(A), (H), .99(D) (Supp. 1958).
130. OHIO REV. CODE § 3719.22.

With the advanced legislation to control narcotic drugs enacted by Ohio in 1955, adequate statutory resources are available to prohibit illicit drug traffic. Moreover, the enforcement agencies of both the federal and Ohio governments have express legislative authority to cooperate with each other in law enforcement procedures against illegal narcotic drugs.[131]

Problems of Prosecution

Criminal law becomes viable upon prosecution. In the practical reality of a criminal trial the legal process will adjust to the needs of the community.

As an example, let us assume that the Cleveland police are alerted to a homicide aboard a freighter of a foreign flag. Upon investigation these facts are revealed: the deceased was killed five to eight hours prior to discovery of his body; the vessel had traveled from Canadian waters to Cleveland; it had crossed the international boundary about seven hours before this discovery; and it had entered port, Cleveland's harbor, five and a half hours before the body was found. The authority to investigate rests in either federal or local agents. The customary cooperation between two law enforcement agencies takes place. Facts are gathered indicating *K* committed the killing while robbing the deceased.

In the prosecution of *K* for murder, proof of the elements of the crime differ between the federal and Ohio statutes.[132] It has already been noted that Ohio demands proof of an intent to kill, even though a robbery was committed. Federal law defines murder as an unlawful killing while perpetrating robbery. Since federal law does not require proof of intent to kill, it would appear that a federal conviction could be obtained more easily than an Ohio conviction.

However, suppose that certain criminal evidence was obtained by an illegal search and seizure. Without it, conviction would be questionable. Federal judicial decisions decree that the fruits of such unconstitutional action cannot be introduced in criminal trials.[133] Ohio, however, permits the use of illegally seized evidence in criminal proceedings.[134] The United States Supreme Court condones the state rule even though it prohibits the use of illegally obtained evidence in federal trials.[135] However, the federal courts will not go so far as to allow a federal officer to be a witness in a state court to introduce illegally seized evidence. Federal courts will enjoin the federal offi-

131. 70 Stat. 575 (1956), 21 U.S.C. § 198 (Supp. V, 1952); Ohio Rev. Code § 3719.18.

132. See notes 53-57 *supra* and accompanying text.

133. Weeks v. United States, 232 U.S. 383 (1914).

134. State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936), overruling Nicholas v. City of Cleveland, 125 Ohio St. 474, 182 N.E. 26 (1932) and Browning v. City of Cleveland, 126 Ohio St. 285, 185 N.E. 55 (1933).

135. Wolf v. Colorado, 338 U.S. 25 (1949).

cer as a witness in a state criminal trial under such conditions.[136] The federal prosecutor is hindered by the more restrictive evidentiary rule applying to illegally seized evidence.

Or assume that when federal authorities arrested *K* for murder in the special admiralty and maritime jurisdiction, they failed to bring him promptly before a federal commissioner. The purpose of the delay was solely to obtain *K*'s confession. *K* provided the confession without duress, fraud, or promise. Under a recent United States Supreme Court decision, this confession is illegally obtained, and the use of it to convict *K* constitutes reversible error.[137] Ohio courts do not apply such a stringent rule. Confessions are barred only when not given voluntarily.[138] They are not rendered inadmissible in Ohio merely by reason of delay in the arraignment.[139] The confession is the quintessence of criminal evidence. To obtain an admissible confession is much more difficult under the federal rule than under the Ohio rule.

Similar differences between federal and Ohio criminal trials occur in the area of presumption of the accused's innocence and his right to remain silent. The crux of this issue revolves around the significance of the accused's refusal to take the stand in his defense. The federal court charges the jury that the accused is presumed innocent and no consideration can be given to his failure to take the stand.[140] The district attorney cannot comment on this unwillingness. Although Ohio courts emphasize the presumption of innocence, the constitution expressly states: "failure to testify may be considered by the court and jury and may be the subject of comment by counsel."[141] For practical purposes when the prosecutor, standing before the jury in final argument, points his accusing finger and says, "If this man be innocent, why doesn't he take the stand under oath and assert his innocence," the impact on the jury is obvious. And when the trial judge directs the jury to presume the accused's innocence but adds that his failure to testify may be considered by the jurors in determining guilt or innocence, the psychological effect on the decision-makers is strong.

State prosecutors in Ohio are often in a less favorable position than federal district attorneys, however, because federal judges may express an opinion on the weight of the evidence and the credibility

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136. Rea v. United States, 350 U.S. 214 (1956).

137. Mallory v. United States, 354 U.S. 449 (1957).

138. State v. Yeoman, 112 Ohio St. 214, 147 N.E. 3 (1925).

139. State v. Lowder, 79 Ohio App. 237, 72 N.E.2d 785 (1946). Appeal dismissed for want of a debatable constitutional question, 147 Ohio St. 530, 72 N.E.2d 102 (1947).

140. Kowalchuk v. United States, 176 F.2d 873 (6th Cir. 1949).

141. OHIO CONST. art. I, § 10.

of witnesses.[142] Federal judges are not merely moderators at the trial but governors of the trial; they may assist the jury in arriving at their conclusion.[143] Ohio trial judges are restricted from such comment. They are mere moderators and umpires, not governors.[144] In the trial of a criminal case, the words and conduct of a judge can be influential.[145]

Whether to prosecute *K*, an accused murderer, in the federal or Ohio courts must be decided in the light of these legal practicalities.

Recent developments in the area of double jeopardy ease the burden of both federal and state prosecuting officials in questionable areas involving who should initiate the prosecution. If an accused is convicted under state law he can be tried and convicted under federal law for the same incident without violating the double jeopardy clause of the fifth amendment.[146] Also, if an accused is acquitted in a federal trial, he can be tried and convicted under state law for the same incident without violating the fifth amendment or the due process clause of the fourteenth amendment.[147]

The Ohio Supreme Court has extended the doctrine of multiple prosecution to its ultimate. It is not unconstitutional under the Ohio constitution for the same act (illegal transportation of intoxicating liquors) to be punishable separately under federal, state, and municipal governments if each sovereign has a separate law punishing such offense.[148]

Different rules exist regarding the necessity for indictment by a grand jury. If the federal authorities arrest for a felony violation, the person charged may waive indictment by the grand jury and proceed directly to trial.[149] When Ohio authorities arrest a person for a felony, the state constitution requires an indictment by the grand jury before he can be tried.[150] Grand juries are one step where the citizen jurors reflect community attitudes toward crimes as well as law enforcement officers. Such juries can occasionally be strong protectors of persons charged erroneously or with weak evidence. This practical consideration cannot be ignored.

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142. Petro v. United States, 210 F.2d 49 (6th Cir. 1954), *cert. denied,* 347 U.S. 974 and 347 U.S. 978 (1954); United States v. Aaron, 190 F.2d 144 (2d Cir. 1951), *cert. denied,* 342 U.S. 827 (1951).

143. Lovely v. United States, 175 F.2d 312 (4th Cir. 1949), *cert. denied,* 338 U.S. 834 (1949).

144. For a comparison between the Ohio rule and federal rule see 39 OHIO JUR., *Trial* §§ 292-95 (1935).

145. See Logan v. Cleveland Ry., 107 Ohio St. 211, 218-19, 140 N.E. 652, 654 (1923); Hazen v. Morrison & Snodgrass Co., 14 Ohio C.C.R. (n.s.) 483 (1911).

146. Abbate v. United States, 359 U.S. 187 (1959) (conspiracy crime).

147. Bartkus v. Illinois, 359 U.S. 121 (1959) (bank robbery).

148. State v. Shimman, 122 Ohio St. 522, 172 N.E. 367 (1930).

149. FED. R. CRIM. P. 7(b).

150. Art. I, § 10. S.B. 51 of the 103d General Assembly of Ohio (1959) permitting waiver of indictment by an accused was passed. Gov. DiSalle signed this legislation.

Of more significance to an accused in federal or state prosecutions is representation by counsel. Both the federal[151] and Ohio[152] constitutions expressly require such representation. The judge must supply counsel for the indigent accused in both jurisdictions. But in the federal court no provision has been made to pay for legal services, while in Ohio courts the defense counsel receive legal fees at the state's expense. While the ethical responsibility of lawyers to respond to the judicial call for adequate criminal defense of the indigent is acknowledged and performed, the practical value of legal fees paid by the governmental authority or private charitable organizations should not be overlooked.[153]

In those areas of criminal jurisdiction where federal and state authority to prosecute is congruent, and thus may be exercised concurrently, the wisdom of a cautious approach to the question of which sovereign should prosecute is apparent. A high degree of cooperation between federal district attorneys and state prosecutors will inevitably be forthcoming to handle seaway crimes. Also, law enforcement agencies of both jurisdictions will discover the necessity of similar cooperation in this area of criminal law.

CONCLUSION

Criminal justice represents an endless process of human adjustment to society's needs. The goals of this process remain constant: to protect life, limb, and property by maintaining a peaceful and orderly community in which men can live, work, and create. The tools, however, change as man's community changes: jurisdictional rules, criminal laws, and prosecution practices will reflect the needs of a Great Lakes Seaway region. Seaway transportation with all its marketing assets, an abundant water supply so vital to industry, and a heavy concentration of productive and creative people will require unparalleled social and economic adjustments for this area. While the purposes of criminal law will remain the same, the tools will undoubtedly be altered. Jurists, lawyers, legislators, and police — at both the federal and state levels — will have an opportunity in the years to come to recast these legal tools.

With vision of the Great Lakes region which is to be, with faith in the common-law tradition of legal growth, and with dedication to the solution of today's challenges in criminal justice, this new chapter of human development shall be one of prosperity for the community and of peace for the individual.

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151. U.S. CONST. amend. VI; FED. R. CRIM. P. 44.

152. OHIO CONST. art. I, § 10; *In re* Motz, 100 Ohio App. 296, 136 N.E.2d 430 (1955).

153. Cross, *"The Assistance of Counsel for his Defence": Is This Becoming a Meaningless Guarantee,* 38 A.B.A.J. 995 (1952); BEANEY, THE RIGHT TO COUNSEL 212-21 (1955).