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George E. Glos

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A STUDY IN THE TREATMENT OF CRIME AND LAW ENFORCEMENT IN THE UNITED STATES AS COMPARED TO THE EUROPEAN COUNTRIES

GEORGE E. GLOS*

It is well known that crimes are being similarly treated all over the world and that the various systems differ only in details. Yet, it is equally well known that the crime rate in England and in the other European countries stands at a much lower level than that in the United States. The reasons for the high crime rate in the United States are varied and complex and they have not, to a large extent, been fully determined. They may be sociological, economic, or racial, but they may as well stem, at least in a limited way, from the difference in treatment accorded to the several crimes in the legal system of the United States as compared with that prevailing in England and the other European countries and from the difference in prosecution and treatment of offenders. The purpose of this article is to explore such differences as they exist today in the treatment of serious crimes in the leading systems of criminal law and law enforcement.

HOMICIDE

Differences in the treatment of homicide occur in the area of criminal homicide as distinguished from innocent homicide.[1] Criminal homicide is traditionally of two kinds, murder and manslaughter. The distinction between them consists in the presence or absence of malice aforethought.[2] Further, the concept of negligent homicide is becoming

* Professor of Law, St. Mary's University. B.A., Lycee College; LL.B., J.U.D., Charles University; LL.B., University of Melbourne; LL.M., J.S.D., Yale University Law School.

1 Innocent homicide is understood not to involve criminal guilt and is presented in two forms as justifiable and excusable homicide. It is not discussed in this article.

2 Malice aforethought has had different meanings at different times. It has been defined as an unjustifiable, inexcusable and unmitigated man-endangering state of mind, or as a freely

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well established.[3] This approach recognizes thus a threefold division of criminal homicide; namely, murder, manslaughter and negligent homicide.[4] Apart from this basic division, several degrees and shades of guilt may be statutorily recognized within murder, manslaughter and negligent homicide with a corresponding differentiation in punishment. Significant differences also occur throughout the law of criminal homicide, especially with respect to punishment of both completed crimes and attempts. As to punishment, the penalty for murder in the several states of the United States usually ranges from imprisonment for some two years to the death penalty,[5] that for manslaughter from a fine to imprisonment for some twenty-five years,[6] and that for negligent homicide from a fine to imprisonment for some fifteen years.[7] The punishment for attempted murder usually ranges from imprisonment for about one year to a term of some twenty-five years.[8]

In English law, the traditional division of criminal homicide into murder and manslaughter is retained so that the area of negligent homicide is fully covered by manslaughter. Murder may be defined as the unlawful killing of a human being with malice aforethought.[9] Malice is either express or implied. Constructive malice having been abolished,[10] a killing will not amount to murder unless it is done with the intent to kill or to do grievous bodily harm from which malice aforethought might be implied.[11] The punishment for murder is

formed intention of a man to pursue a course of conduct which he realizes will or may bring about the death of some person. It includes both an intention to kill, and an intention to hurt by means of an act which the actor realizes is likely to kill.

3 Negligent homicide is such homicide which would be excusable except that it results from criminal negligence. It necessarily encroaches on the area covered by manslaughter and extends to cases in which guilt is based on negligence. It usually deals with traffic accidents.

4 Even where manslaughter is statutorily abolished as e.g. in Texas, the same concept of criminal liability is covered in the statute under a different, more specialized heading.

5 *E.g.*, CAL. PENAL CODE ANN. § 190 (Deering 1971); ILL. STAT. ANN. ch. 38, § 9-1 (1964); N.Y. PENAL LAW § 125.30 (McKinney Supp. 1970); PA. STAT. ANN. tit. 18, § 4701 (1963); TEX. PENAL CODE ANN. art. 1257 (1961).

6 *E.g.*, CAL. PENAL CODE ANN. § 193 (Deering 1971); ILL. STAT. ANN. ch. 38, § 9-2 (1964); N.Y. PENAL LAW §§ 125.15, 125.20 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4703 (1963).

7 *E.g.*, CAL. PENAL CODE ANN. § 193 (Deering 1971); ILL. STAT. ANN. ch. 38, § 9-3 (1964); N.Y. PENAL LAW § 125.10 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4703 (1963); TEX. PENAL CODE ANN. arts. 1230-1243 (1961).

8 *E.g.*, CAL. PENAL CODE ANN. §§ 216-219.3 (Deering 1971); ILL. STAT. ANN. ch. 38, § 8-4 (Supp. 1971); N.Y. PENAL LAW § 110.05 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4711 (1963).

9 This is a modernized version of the definition given by Coke and later by Blackstone. According to them murder occurred "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied." 3 Co. Inst. 47; 4 Bl. Comm. 198.

10 Homicide Act, 5 & 6 Elis. II c. 11, § 1.

11 Malice aforethought may also be implied when the killing is done with knowledge that the act in question would probably cause death or grievous bodily harm.

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imprisonment for life.[12] Manslaughter is in effect any homicide which does not amount to murder. It covers both the concept of voluntary and involuntary manslaughter as well as negligent homicide.[13] The wide scope of criminal responsibility in manslaughter is fully reflected in punishment which may be assessed, namely, imprisonment for life or imprisonment for any shorter term.[14]

The French law makes a fundamental distinction between voluntary and involuntary homicide. Voluntary homicide is murder,[15] and murder committed with premeditation or while lying in wait is an assassination.[16] The punishment for assassination is death,[17] and that for murder is imprisonment for life.[18] The killing in the course of commission of a crime,[19] or in circumstances which have for their object to prepare, facilitate or carry out a crime, or to enable an escape, is also punishable by death.[20] A voluntary infliction of wounds without an intent to kill which, however, causes the victim's death, is punishable with imprisonment from ten to twenty years.[21] If there is premeditation or lying in wait, the penalty is imprisonment for life.[22] Involuntary homicide which is defined as killing by lack of skill, by imprudence, inattention, negligence or inobservance of rules, is punishable by imprisonment from three months to two years and with a fine.[23] Attempt is treated as a completed crime.[24]

[12] This is in consequence of the Murder (Abolition of Death Penalty) Act 1965, c. 71. Although the Act abolished the death penalty only for five years and was to expire on 31 July 1970, Parliament in accordance with the provisions of § 4 thereof resolved that the Act should not so expire. Resolution of the House of Commons of December 16, 1969. Votes and Proceedings of the House of Commons, 16th December 1969, No. 36, p. 163. Resolution of the House of Lords of December 18, 1969. House of Lords, Minutes of Proceedings, 18 December 1969, No. 26, p. 218. The Murder (Abolition of Death Penalty) Act 1965, c. 71, took thus permanent effect.

The life sentence is mandatory and no lesser sentence can be assessed. The statute abolishes the death penalty only with respect to murder, so that the death penalty is still in effect for treason, piracy with violence, and setting fire to Queen's ships, arsenals, etc.

[13] The definition of manslaughter is unsatisfactory. Voluntary manslaughter comprises only those killings which are reduced from murder to manslaughter due to provocation. Involuntary manslaughter covers all other cases. The English law recognizes, however, that homicide by pure inadvertence is not manslaughter but will involve the inadvertent person in civil and not in criminal liability.

[14] Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, § 5; Criminal Justice Act, 1948, 11 & 12 Geo. 6 c. 58, § 1 (1); Criminal Law Act 1967, c. 58, § 7 (3).

[15] All references are to the Code pénal, Paris, Journal officiel de la République française, 1965, and to the 69e éd. Petits Codes Dalloz 1971/72. C. Pén. art. 295.

[16] C. Pén. art. 296.

[17] C. Pén. art. 302. Article 302 lists also poisoning causing death as a separate crime which is also punishable by death.

[18] C. Pén. art. 304.

[19] I.e., preceding, in the course of, or following the commission of another crime.

[20] C. Pén. art. 304.

[21] C. Pén. art. 309.

[22] C. Pén. art. 310.

[23] C. Pén. art. 319.

[24] C. Pén. art. 2.

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The Italian law makes a distinction between homicide, homicide under aggravating circumstances, non-intentional homicide, homicide as a consequence of another crime, and negligent homicide. On homicide it basically states that whosoever shall bring about the death of a person will be punished with imprisonment for not less than twenty-one years.[25] Homicide under aggravating circumstances is punishable with imprisonment for life.[26] Aggravating circumstances are: To cover up the commission of another crime; when committed by an escapee to avoid arrest or to obtain provisions; in the course of committing rape; when committed against an ascendant or descendant; by poisoning or by other base means; with premeditation; with cruelty.[27] On non-intentional homicide it provides that whosoever with the intent to cause bodily harm brings about the death of a person shall be punished with imprisonment from ten to eighteen years.[28] The term of imprisonment will be increased by one-third and up to one-half when there are aggravating circumstances as enumerated above, and up to one-third when the crime was committed with arms or corrosives.[29] On homicide as a consequence of another crime it provides that whenever death is brought about as an unintended consequence of a crime, the punishment is as in negligent homicide, but the term of imprisonment there prescribed is increased.[30] Negligent homicide is punished by imprisonment from six months to five years. When more than one person is killed, or one is killed and another or more persons are injured as a consequence of negligent homicide, the term of imprisonment may be increased up to twelve years.[31] An attempt to kill is punishable with imprisonment for not less than twelve years, but if there are aggravating circumstances, with imprisonment from twenty-four to thirty years.[32]

The Spanish law differentiates between parricide, homicide under aggravating circumstances, simple homicide, and negligent homicide. Parricide is defined as the killing of the father, mother, child or any other ascendant or descendant whether legitimate or not, and is punishable with imprisonment for twenty years and one day as a minimum, and by death as a maximum.[33] The same punishment is prescribed for

[25] All references are to the Codice penale, Milano, U. Hoepli, 1970. C. Pen. art. 575.
[26] C. Pen. art. 22. The death penalty which formerly applied to this crime was abolished by Legislative Decree of August 10, 1944, No. 224. It is still applicable under the provisions of military law.
[27] C. Pen. arts. 576-577.
[28] C. Pen. art. 584.
[29] C. Pen. art. 585.
[30] C. Pen. art. 586.
[31] C. Pen. art. 589.
[32] C. Pen. art. 56.
[33] All references are to the Código penal. Ed. oficial. 3.ed. Madrid, Ministerio de Justicia, Boletín Oficial del Estado, 1967. C. Pen. art. 405.

homicide under aggravating circumstances. They are: Treacherous killing; for reward; by flooding, arson, poison or explosives; with premeditation; with cruelty.[34] Simple homicide is punishable with imprisonment from twelve years and one day to twenty years.[35] Negligent homicide may be caused by gross imprudence under such circumstances that had there been malice, it would have amounted to homicide. It is punishable by imprisonment from six months and one day to six years. When death is caused by simple imprudence or negligence in breach of regulations (usually safety rules), the punishment is imprisonment from one month and one day to six months.[36] An attempt to commit parricide or homicide under aggravating circumstances is punishable with imprisonment from six years and one day to thirty years. An attempt to commit simple homicide is punishable by imprisonment from six months and one day to twelve years.[37]

The German law distinguishes murder, simple homicide, homicide under attenuating circumstances, and negligent homicide. Intentional homicide under specially enumerated circumstances amounts to murder and is punishable with imprisonment for life. The circumstances are: Killing with a desire to kill; with a sexual motive; with a pecuniary motive; with any other base motive; treacherously; with cruelty; using life-endangering means; in order to facilitate or to cover up the commission of another crime.[38] Simple homicide is defined as an intentional killing under circumstances not amounting to murder. The penalty is imprisonment for five years as a minimum, but imprisonment for life may be assessed in cases of particular gravity.[39] Where there are attenuating circumstances as provocation and the homicide is committed in hot blood or under other attenuating circumstances, the punishment is imprisonment from six months to five years.[40] Negligent homicide is punishable with imprisonment from one day to five years.[41] Attempt to murder is punishable with imprisonment for not less than three years. In other types of homicide, the term may be reduced up to one-quarter of the lower limit stipulated for the completed crime.[42]

The Austrian law contains provisions for murder, homicide in the course of robbery, manslaughter, and negligent homicide. It provides

[34] C. Pen. art. 406.
[35] C. Pen. art. 407.
[36] C. Pen. art. 565.
[37] C. Pen. arts. 50-52, 73.
[38] All references are to the Strafgesetzbuch, München und Berlin, C. H. Beck, 1970, (W. Ger.). StGB § 211.
[39] StGB § 212.
[40] StGB §§ 213, 16.
[41] StGB §§ 222, 16.
[42] StGB § 44.

that whosoever with the intent to kill a person acts so as to bring about the death of that or any other person, is guilty of murder and is punishable with death.[43] Homicide in the course of robbery is also punishable with death.[44] Homicide brought about with the intent to cause bodily harm, but without an intent to kill, is manslaughter. The punishment is imprisonment from five to ten years, but where there is a close family or other relationship between the offender and the victim, the term ranges from ten to twenty years.[45] Negligent homicide is punishable by imprisonment from six months to one year, but the term is extended up to three years when the act was committed in the operation of railways, ships, mines, waterworks, and any other machinery; while intoxicated; or when the offender left the scene of the accident without giving assistance to the victim.[46] Attempted murder is punishable with imprisonment from five to ten years, but in case of an attempt to commit murder in furtherance of robbery; by poisoning or other treacherous means; for hire; on relatives by blood or on a spouse; the term is from ten to twenty years, and in cases of particular gravity it is punishable with imprisonment for life.[47]

The Swiss law provides for murder, simple homicide, manslaughter, and negligent homicide.[48] Murder is defined as premeditated homicide whereby the baseness or dangerous character of the offender is manifested. It is punished with imprisonment for life.[49] Simple homicide not amounting to murder is punishable with imprisonment for a minimum of five years.[50] Manslaughter is a homicide committed while the offender's mind was inflamed by passion and is punishable by imprisonment of up to ten years.[51] Negligent homicide is punishable by imprisonment from three days to three years or with a fine.[52] Attempted murder is punishable with imprisonment for ten years as a minimum, and attempt to commit simple homicide with imprisonment from one to twenty years.[53]

Compared with the provisions of the various states of the United States, the European provisions are somewhat simpler and carry some-

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43 All references are to the Strafgesetz, Wien, Manz, 1968-70. StG §§ 134-136.
44 StG § 141.
45 StG § 142.
46 StG §§ 335-337.
47 StG § 138.
48 All references are to the Strafgesetzbuch, Zürich, Orell Füssli, 1968. StGB art. 112.
49 There is no death penalty.
50 StGB art. 111.
51 StGB art. 113.
52 StGB arts. 117, 36.
53 StGB arts. 22, 35, 65.

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what stiffer penalties. This trend is quite pronounced especially in the area of attempt. It is also to be pointed out that the penalty of imprisonment in homicide in the European countries is not just imprisonment but penal servitude.[54] Although the death penalty for homicide has been abolished in a number of European countries carrying with it an obvious loss of deterrent, it has not been followed by a pronounced increase in the crime rate. In circumstances prevailing in Europe, where homicide is, percentagewise, a nearly nonexisting crime, the abolition of the death penalty can hardly effect a change in the mores, and the deterrent factor implicit in the death penalty may be abandoned. Such experiment is, however, not advisable for countries with a notoriously high rate of homicide such as the United States where the deterrent factor of the death penalty should not lightly be given away. Wherever the death penalty was abolished in the European countries, its place was taken by imprisonment for life, and the various European legal systems take it to mean life. Thus the other factor implicit in the death penalty, namely, to keep the offender out of circulation whereby society is protected against his dangerous propensities, is fully kept intact. Consequently, if the deterrent factor in the death penalty is regarded as not worthy of preservation, incarceration for life will suffice to protect society. Moreover, imprisonment for life embodies in it a considerable deterrent of its own, so that it is generally regarded as an adequate substitute for the death penalty. It must be clearly understood, however, that whenever this approach is adopted, it is imperative to see to it that the offender is actually kept behind bars for life, or for at least such a time as to give an assurance that due to his age and general disposition, there is no likelihood of his committing further crimes.

Another point worth noting is the treatment of cases where the offender's intent is of importance. The European system conclusively presumes an intent to kill in cases where the offender makes use of a weapon which is commonly known to be likely to produce a fatal result, and also, where the generally vicious character of the offender's conduct is manifested. Therefore, voluntary rather than involuntary homicide will be presumed where the offender used a firearm, an explosive, a poison, a knife, a heavy object, and virtually any means likely to cause death.

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54 This is so everywhere in the above mentioned countries with the exception of England where penal servitude was abolished by the Criminal Justice Act, 1948, 11 & 12 Geo. 6 c. 58, § 1(1).

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The human element in administering justice is also of importance, and it can be noted that the European courts show little or no sympathy to persons found guilty of homicide and assess the penalty accordingly, very close to the upper limit established by law, rather than to follow a medium course, or even to assess terms just above the permissible minimum.

AGGRAVATED ASSAULT

Only one type of aggravated assault is singled out for comparative evaluation, i.e., an assault involving wounding or violent injury short of homicide. The penalty prescribed for aggravated assault in the various states of the United States ranges from a fine to imprisonment of up to some ten or fifteen years.[55]

In English law, the matter is treated under the name of grievous bodily harm. The punishment is imprisonment for life.[56] The French law calls it wounding and voluntary assault. The punishment varies in conformity with the circumstances between five and twenty years of imprisonment.[57] In Italian law, it is dealt with under bodily harm with a range of imprisonment from six to twelve years.[58] In Spanish law, it is called serious bodily harm and is punishable with imprisonment from six years and one day to twelve years.[59] The German law treats the subject under the heading of bodily harm. The offense is punishable by imprisonment from two to ten years.[60] The Austrian law deals with the subject under the title of serious bodily harm. The punishment is imprisonment from five to ten years.[61] In Swiss law, the crime is termed serious bodily harm and is punishable by imprisonment from six months up to ten years.[62]

ROBBERY

Whatever the scope and wording of the offense in the statutes, robbery is essentially a larceny from the person by violence or intimida-

[55] *E.g.*, CAL. PENAL CODE ANN. § 221 (Deering 1971); ILL. STAT. ANN. ch. 38, § 12-2 (Supp. 1971); N.Y. PENAL LAW §§ 70.00, 120.10 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4709 (1963); TEX. PENAL CODE ANN. art. 1148 (1961).

[56] Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person . . . with intent . . . to do some . . . grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, . . . shall be liable to imprisonment for life. Offenses against the Person Act, 1861, 24 & 25 Vict. c. 100, § 18; Criminal Justice Act, 1948, 11 & 12 Geo. 6 c. 58, § 3; Criminal Law Act 1967, c. 58, § 1.

[57] C. Pén. arts. 309-313.

[58] C. Pen. art. 583.

[59] C. Pen. art. 420.

[60] StGB § 225.

[61] StG § 156.

[62] StGB art. 122.

tion. The punishment applicable in the several states of the United States is imprisonment for a term which generally ranges from a minimum of some six months to a maximum of some twenty years.[63]

In English law, robbery is punishable with imprisonment for life.[64] In French law, it is punishable with imprisonment from ten to twenty years, but with imprisonment for life if the victim suffers a physical injury.[65] If it is committed under certain enumerated circumstances it is punishable by death.[66] Italian law punishes robbery with imprisonment from three to ten years and with a fine, but the term is increased from one-third to one-half if the crime is committed with weapons, in disguise, or by two or more persons acting together.[67] Spanish law provides for imprisonment from six months and one day to thirty years in accordance with the gravity of the crime.[68] German law punishes robbery with imprisonment from one to fifteen years.[69] Under aggravated circumstances the minimum term is increased to five years,[70] and the offense is punishable with imprisonment from ten years to life if the victim suffers bodily harm.[71] Austrian law punishes robbery with imprisonment from ten to twenty years but when the victim suffers serious bodily harm, the punishment is imprisonment for life.[72] In Swiss law, robbery is punishable by imprisonment from six months to life in accordance with the gravity of the crime.[73]

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63 *E.g.*, N.Y. PENAL LAW §§ 70.00, 160.15 (McKinney 1967); PA. STAT. ANN. tit. 18, §§ 4704, 4705 (1963); TEX. PENAL CODE ANN. art. 1408 (1953).

64 Theft Act 1968, c. 60, § 8. (1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force. (2) A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.

65 C. Pén. art. 382.

66 C. Pén. art. 381 provides for the death penalty if the offender is armed irrespective whether the weapon is concealed or not, or actually displayed or not. The same applies if the weapon is in a motor vehicle used by the offender to take him to the place of the crime or to take him away from it.

67 C. Pen. art. 628.

68 C. Pen. arts. 500-502. In accordance with provisions of article 501, whenever death is caused in the course of robbery, the punishment ranges from imprisonment for twenty years and one day to death. Whenever bodily harm is caused, the term of imprisonment ranges in accordance with the gravity of the injury from six months and one day up to thirty years. The terms range, however, from four years, two months and one day up to thirty years whenever the offender uses a weapon.

69 StGB § 249.

70 StGB § 250. This is so in the case of an armed robbery; when the robbery is carried out by more than one person; when it is carried out in a public place; or at night in an inhabited building; or when the offender has previously been convicted of robbery.

71 StGB § 251.

72 StG §§ 190-195.

73 StGB art. 139. Simple robbery is punishable with imprisonment from six months to twenty years. If the victim is threatened with death; is injured; the crime is committed by a gang; or where the dangerous character of the offender is manifested; the term of imprisonment ranges from five years to twenty years. If the victim dies in consequence of the act and the offender could have foreseen it, or if the crime is carried out treacherously, the punishment is imprisonment for life.

BURGLARY

Burglary has been defined as the breaking and entering of the dwelling of another at night with intent to commit a felony. If committed during the day, it is usually termed housebreaking. Today, it is a statutory offense and the term burglary generally applies regardless of the time of commission. In the several states of the United States, burglary is punishable with imprisonment that ranges generally from one up to some twenty or twenty-five years.[74]

English law punishes burglary with imprisonment not exceeding fourteen years,[75] and an aggravated burglary with imprisonment for life.[76] French law provides for imprisonment ranging from five years to life.[77] In Italian law, burglary is punishable by imprisonment from one to six years and with a fine, and an aggravated burglary with imprison-

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[74] *E.g.*, CAL. PENAL CODE ANN. § 461 (Deering 1971); ILL. STAT. ANN. ch. 38, § 19-1 (1970) (in California and Illinois the penalty may range from one year to life imprisonment); N.Y. PENAL LAW §§ 70.00, 140.00-140.35 (McKinney 1967), *as amended*, N.Y. PENAL LAW §§ 140.00(2), 140.10, 140.17, 140.25(d), 140.30 (McKinney Supp. 1970); PA. STAT. ANN. tit. 18, § 4901 (1963); TEX. PENAL CODE ANN. arts. 1389-1402 (1953).

[75] Theft Act 1968, c. 60, § 9. (1) A person is guilty of burglary if—

(a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in section (2) below; or

(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm or raping any woman therein, and of doing unlawful damage to the building or anything therein.

(3) References in subsections (1) and (2) above to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.

(4) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years.

[76] Theft Act 1968, c. 60, § 10. (1) A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive; and for this purpose—

(a) "firearm" includes an airgun or air pistol, and "imitation firearm" means anything which has the appearance of being a firearm, whether capable of being discharged or not; and

(b) "weapon of offence" means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use; and

(c) "explosive" means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.

(2) A person guilty of aggravated burglary shall on conviction on indictment be liable to imprisonment for life.

[77] C. Pén. art. 381 provides for imprisonment for life for any offender who commits larceny under the concurrence of four of the following five elements: 1. When committed at night. 2. By two or more persons. 3. By breaking in a building used for habitation. 4. When committed by force. 5. With use of a motor vehicle. C. Pén. art. 384 provides for imprisonment from ten to twenty years for any offender who commits larceny by breaking in a building not used for habitation. C. Pén. art. 386 provides for imprisonment from five to ten years for any offender who commits larceny in a building used for habitation either at night or when the act is committed by two or more persons.

ment from three to ten years and with a fine.[78] Spanish law punishes burglary with imprisonment from one month and one day up to twelve years in accordance with the value of the property stolen.[79] When, however, the offender is armed, or the crime takes place in an inhabited building, or a public building, or a building dedicated to religious purposes, the term of imprisonment ranges from four months and one day to twelve years. When the offense is committed in the above enumerated buildings and the offender is armed, the term of imprisonment ranges from four months and one day up to twenty years.[80] German law prescribes as punishment for burglary a term of imprisonment from one to ten years;[81] in aggravated cases from five to ten years.[82] Austrian law punishes burglary with imprisonment from six months to ten years.[83] In Swiss law, the punishment for burglary lies between three months and ten years.[84]

Riot

Riot is defined as a disturbance of the peace by three or more persons acting together in the commission of a crime by open force, or in the execution of some enterprise, lawful or unlawful, in such a violent, turbulent and unauthorized manner as to create likelihood of public terror and alarm. In the various states of the United States, the punishment for rioting generally ranges from a fine to imprisonment for some ten years.[85]

In English law, riot is a common law misdemeanor punishable by fine and imprisonment. If an injury to buildings, machinery, etc., is caused by rioters, it is punishable by imprisonment not exceeding seven years,[86] and when such buildings, machinery, etc., are demolished,

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78 C. Pen. art. 625, punishes larceny with imprisonment from one to six years and with a fine, when committed by breaking in a building used for habitation. Where the offender used force or fraudulent means; or where he carried a weapon without using it; or where he acted by trick; or where he acted in conjunction with two or more persons; or where he pretended to be a public officer; or where the act was committed in a station or terminal on travelers' luggage; the punishment is increased to imprisonment from three to ten years and a fine.

79 C. Pen. arts. 504-505.

80 C. Pen. art. 506.

81 StGB § 243.

82 StGB § 250(4).

83 StG §§ 174 I(4), 178-180.

84 StGB art. 137.

85 *E.g.*, Cal. Penal Code Ann. § 405 (Deering 1971); Ill. Stat. Ann. ch. 38, § 25-1 (1970); N.Y. Penal Law §§ 240.05-240.08 (McKinney 1967); Pa. Stat. Ann. tit. 18, § 4401 (1963); Tex. Penal Code Ann. arts. 455-472 (1952), *as amended*, Tex. Penal Code Ann. arts. 466a, 472a (Supp. 1971).

86 Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, § 12.

each and every offender is liable to imprisonment for life.[87] In French law, a riot from which no damage to property is caused is punishable with imprisonment from three months to five years in accordance with its gravity.[88] When damage or loss of property occurs, the punishment ranges from imprisonment for ten years to death.[89] In Italian law, riot is punishable in accordance with the gravity of the offense with imprisonment from three years to life.[90] In Spanish law, penalties for rioting range from imprisonment for six months and one day to the death penalty.[91] German law punishes rioting with imprisonment from three months to ten years.[92] In Austrian law, riot is punished with imprisonment from one year up to the death penalty.[93] The penalty for rioting in Swiss law is imprisonment from three days to three years.[94]

Aggravated assault, robbery, burglary, and riot are, apart from homicide, perhaps the most serious crimes of violence known to the law. They are therefore similarly treated. The object of the protracted terms of imprisonment prescribed as punishment is not only to utilize the retribution and deterrent elements of the punishment but foremost to protect society from further crimes likely to be committed by the offender by keeping him in detention. And as in homicide, it can be noted that the terms prescribed by the various European penal codes are generally of longer duration than their counterparts in the United States. In addition, following their practice established in homicide, the European courts actually assess meaningful terms keeping closely to the upper limit prescribed by the codes. Experience has shown that persons who have already committed a violent crime are very likely to commit further crimes of that nature. This may well be attributable to their violent disposition. Naturally, attempts should be made to re-educate these offenders and also to provide medical treatment whenever medical science can offer a cure. Nonetheless, until definite results of re-education and medical treatment are shown, the offender should be isolated from contact with the general public. Experience has also established that it is especially a young and physically fit person who engages in the commission of these crimes. Quite naturally, a person of

87 Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, § 11. The Riot Act (1714) 1 Geo. I. st. 2, c. 5, has been repealed.
88 C. Pén. arts. 104-108.
89 C. Pén. arts. 93-99.
90 C. Pen. arts. 284-285.
91 C. Pen. arts. 218-224.
92 StGB §§ 115, 125.
93 StG §§ 68-75, 83-86.
94 StGB art. 260.

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more advanced age, of more mature mind, and consequently also of less fit physical attributes is less likely to commit a crime which in itself presupposes both mental and physical strain and an element which in lawful activity is rightfully called courage. If therefore a sufficiently extended term of imprisonment is assessed to keep the offender in detention for so long until he reaches a more mature age when he is both mentally and physically less fitted to engage in criminal adventures, there is a good chance that he will actually abstain from further unlawful activity. The observation can therefore be made that there is a definite likelihood that the European technique of assessing longer terms of imprisonment is conducive to keeping down the crime rate both as to first offenders and repeaters.[95]

INSANITY

For several centuries insanity has been regarded as absolving the offender of criminal responsibility.[96] Both the Anglo-American criminal law and that of the European countries are in full agreement with the proposition that when a person has committed a crime while suffering from insanity, he should not be punished for having committed the

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[95] As far as riot is concerned, if riots occur not as isolated events, but on a continuing basis, they are usually caused by organized groups of evildoers who conspire to incite them. The organizers generally rely on paid professional agitators whose task it is to surround themselves with gullible misguided enthusiasts whom they can incite to riot under the pretext of some seemingly legitimate grievances. Youth, due to its lack of experience, has traditionally been a favorite target for misuse by such unscrupulous elements. To bring the rioting to an end, the professional agitators must be placed in custody and vigorously prosecuted.

Whenever riots of continuing nature arose in Europe in recent years, they were designed along the above described pattern. Repeated police charges and attempts to disperse the crowds were exactly what the riot organizers desired, for it produced a new tie of attachment of the misguided persons being used to the professional agitators who directed the riot, and it enabled the professional agitators to make new recruits among the gullible, now made indignant because of alleged police brutality.

Whenever the proper technique to suppress such rioting was adopted, as e.g. in Italy in the late nineteen forties, the rioters were surrounded by concentrated police units, routes of escape were blocked by trucks and armored cars, and the rioters were arrested one by one, handcuffed, loaded in trucks and brought to barracks for questioning. There they were processed and properly prosecuted. Soon the gullible were separated from the professional agitators who in their great majority were out of town people. It appeared that they were in the tens, hundreds, and in large riots even in the thousands. They were paid not only for rioting, but had travel and living expenses paid. They traveled all over the country, sometimes in chartered vehicles, to stage riots and in the tumult were not readily recognized as out of town people. Once in custody, the rioting cycle was interrupted, the rioting decreased immediately as one group was already under arrest. As further groups were taken out of circulation, the whole rioting plan was summarily called off by the organizers because of shortage of agitators, and also because they realized that their remaining agitators faced certain arrest and prosecution.

[96] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 371 ff. (5th ed. 1942). What is meant and discussed here is insanity which relieves the offender of criminal responsibility, as contrasted with the so-called diminished responsibility which has the effect of e.g. reducing murder to manslaughter, and which is not discussed in this article.

act. The punishment would not do any good since the person was not aware that he was doing wrong, nor would the threat of punishment have any prospect of deterring such person from committing the act.

A distinction is always made between insanity existing at the time of commission of the crime and unfitness to plead due to supervening insanity. With respect to unfitness to plead, American law as well as the English and Continental law uniformly hold that if the offender was sane at the time of the commission of the offense but insane at the time of the criminal proceedings instituted against him, he should be committed to a proper institution for treatment and should stand trial upon regaining his mental faculties.[97]

A more serious problem arises in case of insanity existing at the time of commission of the crime. If a person accused of having committed a crime is found insane at the time of the criminal proceedings pending against him, it may also be assumed and should not prove impossible to establish that he was also insane at the time of commission of the crime. The converse would also seem logical, namely, if a person is found sane at trial, it does not seem likely that he was suffering from insanity at the time of commission of the crime. This is especially true when only a reasonably short time has elapsed between the commission of the act and the pronouncement on mental competency and where the accused did not have the benefit of medical treatment in the meantime. Consequently, the finding of insanity at the commission of the act together with a finding of no mental incapacity at trial is rare. The main distinction between the statutory provisions of the several states in the United States and those of England and the countries of Continental Europe in this respect lies in the fact that while such finding may be made under the statutes of the several states in the United States, it may either not be made under those of Europe or, even if it theoretically could be made, it is never so made and the offender is always committed to a proper institution.[98]

[97] *E.g.*, CAL. PENAL CODE ANN. §§ 1026, 1026a (Deering 1971); ILL. STAT. ANN. ch. 38, § 6-2 (1964), §§ 104-2, 104-3 (1970); N.Y. PENAL LAW § 30.05 (McKinney 1967); PA. STAT. ANN. tit. 19, § 1352 (1964); TEX. CODE CRIM. PROC. ANN. art. 4602 (Supp. 1971). English Criminal Procedure (Insanity) Act 1964, c. 84, § 4, 5. French C. Pro. Pén. art. 81. All references are to the Code de procédure pénale, Paris, Journal officiel de la République française, 1965, and to the 13e éd. Petits Codes Dalloz 1971/72. Italian C. Pro. Pen. art. 88. All references are to the Codice di procedura penale, Milano, Pirola, 1970. Spanish L.E. Criminal, art. 383. All references are to the Ley de enjuiciamiento criminal. Ed. oficial. 3.ed. Madrid, Ministerio de Justicia, Boletín Oficial del Estado, 1967. German StPO § 81. All references are to the Strafprozessordnung, München und Berlin, C.H. Beck, 1970, (W.Ger.). Austrian Krankenanstaltengesetz vom 18.12.1956, BGBl. Nr. 1/1957, § 50, and also StPO § 134. All references are to the Strafprozessordnung, Wien, Manz, 1968-70. Swiss, *e.g.* Kanton Zürich, StPO § 391. All references are to the Kanton Zürich, Strafprozessordnung, Zürich 1964.

[98] *Id.*

It is well known that extremely liberal provisions and practice concerning insanity lend themselves to abuses. It is not uncommon for an offender to plead insanity to a charge of having committed a serious crime, often homicide, and on the strength of a cooperative expert medical opinion, an equally cooperative jury finds him not guilty on the ground of insanity. He is thereupon committed to a proper institution; but a relatively short time thereafter (just one year or so), he is declared sane on the strength of another powerful medical opinion, and is released by another cooperative jury. In these circumstances it is quite evident that if the offender is actually sane at the time of his release, he most likely was also perfectly sane at the time of the commission of the offence and vice versa, i.e., if he actually was insane at the time of the commission of the offense, he would still in all likelihood be so insane at the time of his release.

In order to avoid these doubts and not to lend itself to abuses, the European theory and practice follows a somewhat different course. Where the defense of insanity has been accepted, the court orders the prisoner to be kept in custody during the pleasure of proper administrative authority at such place and manner as the authority may think fit. The confinement is understood to be prolonged and may well be lifelong. Consequently, the defense of insanity is rarely set up except in heinous crimes.

In English law, where the defense proves successful, the jury will return a special verdict that the accused is not guilty by reason of insanity[99] whereupon the court has the duty to make an order that the accused be admitted to such hospital as may be specified by the Secretary of State.[100] The accused is then detained in the hospital or hospitals in the discretion of the Secretary of State and may be discharged only at his direction.[101] The detention is of an extensive nature, possibly for life, and it is therefore not surprising that insanity is plead only in the most serious cases.

French law on the subject is closely similar to English law.[102] In Italian law, the penal code determines the minimum period of time the accused has to spend in a mental hospital for prisoners. Neither the court nor any other authority has power to shorten such period of confinement.[103] The term is ten years if the crime is punishable

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99 Criminal Procedure (Insanity) Act 1964, c. 84, § 1.
100 *Id.* § 5.
101 Mental Health Act 1959, 7 & 8 Eliz. 2 c. 72, § 71(2).
102 C. Pén. art. 64, C. Pro. Pén. arts. 81, D. 23-26.
103 C. Pen. arts. 85, 88, 215 (2).

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with imprisonment for life, five years if the crime is punishable with imprisonment for a minimum of ten years, and two years in all other cases.[104] Beyond that, the prisoner may be released only when he is declared sane and neither dangerous to himself nor to society, in special proceedings instituted for that purpose. A release may not easily be obtained under these circumstances and the confinement may extend for a long period of time, even for life. In Spanish law, when the defense of insanity is accepted by the court in prosecution for a crime, the court has to order the confinement of the accused to a proper institution for an undetermined time from which he cannot be released without a further order of the same court upon his recovery.[105] German law contains identical provisions but the release of the detained person may be ordered by any court having jurisdiction.[106] Austrian law contains similar provisions.[107] In Swiss law, the confinement of the accused in a proper institution designated by the cantonal department of justice is ordered by the court for an undetermined length of time. He is then held there in the discretion of the cantonal department of justice and can be released only at its direction. If so released, he may be recommitted by a simple order of the same authority.[108]

The element of concern for the victim of crime and for society at large is apparent from the foregoing approach. It matters little to the victim that he was injured or killed by an insane person. Since the insane cannot be punished for obvious reasons, the law owes it to the victim and to the public at large to make it absolutely certain that the insane offender is securely detained until he is declared fully in command of his faculties and will neither endanger himself nor society.

BAIL

Both federal and state laws uniformly provide that any person charged with other than a capital offense shall be entitled to bail.[109] Some state laws go even further and require "evident proof"[110] or "great presumption"[111] of guilt to make a capital offense not bailable. Prisoners are entitled to bail as a matter of right, and bail is usually continued even

104 C. Pen. art. 222.
105 C. Pen. art. 8.
106 StGB § 51, 42b, f. StPO § 429a-d.
107 StG § 2. StPO § 134.
108 StGB arts. 10, 14, 17. Kanton Zürich, StPO §§ 391, 393-394.
109 *E.g.*, 18 U.S.C. § 3141 (Supp. V 1970); ILL. STAT. ANN. ch. 38, § 110-4 (1970); N.Y. CODE CRIM. PROC. §§ 550, 552-554 (McKinney Supp. 1971).
110 TEX. CODE CRIM. PROC. ANN. art. 1.07 (1966).
111 CAL. PENAL CODE ANN. §§ 1268-1276 (Deering 1961), §§ 1269b, 1269c (Deering Supp. 1971).

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pending appeal. The present position constitutes a considerable relaxation of the rules in existence at the time of Blackstone when persons accused of murder, manslaughter (if clearly the slayer), and persons taken in the act of felony were not bailable,[112] and there was no bail pending appeal.

The entire idea of bail is predicated upon the principle that an accused is presumed innocent until convicted by a proper tribunal. As his guilt has not been established, there is no reason for his detention which would in fact be tantamount to punishment. If he is detained, it is only to secure his attendance at trial. Consequently, where the accused can be trusted to actually appear when required, he should not be detained. The purpose of bail is thus to secure attendance of the accused in the criminal proceedings instituted against him, and especially, his appearance at trial.

Bail should therefore not be excessive but commensurate with and in proportion to the penalty which could be assessed in case the accused is found guilty of the offense charged.[113] When, however, the penalty which could be assessed in a particular case is of a serious nature, such as imprisonment for a considerable time, for life, or the death penalty, then bail is not likely to serve its purpose, for then in the words of Blackstone, the accused has no other surety but the four walls of the prison.[114]

The justification for granting bail is also not present when the person was apprehended in the act or when although he was not so apprehended, the proof against him is evident. As it is unlikely that he would be acquitted at trial under these circumstances, the presumption of innocence cannot apply in all its force and the likelihood of his not appearing at trial if released on bail is greatly increased. In such cases, considerations for the rights of the victim of crime are also of special cogency. The right of a person not to be the victim of crime must be considered together with the right of the accused to a fair trial and to the presumption of his innocence. Due regard for fair treatment of the victim of crime demands that the ac-

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[112] Blackstone, Book IV. 298-9. This held true from the oldest times. Glanvil says: "In omnibus placitis de felonia solet accusatus per plegios dimitti, praeterquam in placito de homicidio, ubi ad terrorem aliter statutum est." (In all pleas of felony the accused is usually discharged upon bail, except in the plea of murder, where, to deter others, it is otherwise decreed.) Glanvil 1.14.c.1.; Blackstone, Book IV. 298.

[113] Bill of Rights, 1688, 1 Will. & Mary, st. 2, c. 2.

[114] Blackstone, Book IV. 298. Says Blackstone: ". . . in felonies and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life?" Book IV. 296-7.

cused be not granted bail in these circumstances. This is especially true when the victim suffers physical injury. It just does not make sense to let the reputed offender go free on bail while the victim lies in the hospital. To admit persons to bail under these circumstances makes a clear mockery of justice and subverts as well the element of deterrent implicit in punishment. The case for refusal of bail is even stronger if the victim is killed or dies as a consequence of the crime committed against him.

Bail should also not be granted to persons previously convicted of serious offenses because of the possibility of their committing further offenses while free. Similarly, persons previously found guilty of jumping bail should not be admitted to bail because they cannot be trusted to abide by the conditions thereof.

All the above principles are fully embodied in the criminal law in the countries of Continental Europe. These systems go even further and regard release on bail as an exceptional measure. As a general rule, bail is not granted and the accused is kept in custody until trial when further orders as to his release or custody are made. Bail is rarely granted in the case of a felony. It is purely discretionary and is in fact available only in prosecutions for minor offenses and in circumstances when it appears quite unlikely that the accused would not appear when required. As to the actual bail given, the money or value given must actually belong to the accused so that he would suffer a considerable financial loss if it were forfeited. No bonding companies exist. If the accused is penniless or if he has no steady place of abode, bail cannot be granted even in the case of a minor offense.

In England, bail is always discretionary. If it is refused or granted on terms unacceptable to the petitioner, he may petition the High Court which has the power to admit him to bail or vary the conditions on which bail was granted.[115] Although he may be admitted to bail even if he is accused of murder, bail is not readily granted where the petitioner is accused of a serious crime. Bail may, however, be continued pending the determination of an appeal from a conviction.[116]

In French law, the accused is entitled to bail only if he is accused of having committed a misdemeanor or an offense for which the maximum penalty is imprisonment for less than two years, and if he has not previously been convicted of a felony or sentenced to imprisonment for more than three months and the sentence has not been pro-

115 Criminal Justice Act 1967, c. 80, § 22.
116 Criminal Appeal Act 1968, c. 19, § 19.

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bated. He must still satisfy the judge that he will appear when required.[117] Beyond this rule, and always in the case of felony, bail is purely discretionary and is not readily obtainable.[118]

In Italian law, bail is not obtainable whenever the accused is charged with a crime the minimum penalty for which is imprisonment for five years, or when he is charged with dealing with or possession of narcotics, or counterfeiting of currency irrespective of penalty.[119] Apart from this rule, bail is purely discretionary and is granted only when the accused gives sufficient proof that he will appear when required. A person is entitled to bail when he is accused of an offense punishable with imprisonment for less than three years as a maximum, or for less than two years as a maximum if he has previously been convicted of an offense of a similar nature, or when he is accused of an offense committed negligently if it is punishable with imprisonment for less than five years. He must, however, give proof that he will appear when required, and if he is unsuccessful in doing so, he cannot be admitted to bail.[120]

In Spanish law, bail is not obtainable whenever the accused is charged with a felony carrying a minimum term of imprisonment of twelve years.[121] Beyond this rule, bail is discretionary but is likely to be granted only in cases involving minor offenses which carry a maximum term of imprisonment of six months and when there is no likelihood that the accused would absent himself.[122]

In German law, bail is purely discretionary. It may not be granted when the accused is charged with a felony and when evidence against him is overwhelming. It is also not granted, irrespective of the nature of the offense, when the accused is under suspicion that he would remove himself from the court's jurisdiction in order to escape prosecution, and also when there is danger that he would be tampering with the evidence or that he would influence witnesses.[123] Bail is usually granted only to persons accused of minor offenses which do not carry a penalty of imprisonment for more than six weeks and who are beyond suspicion of escaping to avoid prosecution.[124]

In Austrian law, a person accused of a felony punishable with im-

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117 C. Pro. Pén. art. 138.
118 C. Pro. Pén. arts. 139-149.
119 C. Pro. Pen. art. 253.
120 C. Pro. Pen. arts. 254-256.
121 C. Pen. art. 503.
122 C. Pen. art. 529.
123 StPO §§ 112-113.
124 StPO §§ 113, 117.

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prisonment for a minimum of ten years is not eligible for bail. He may be admitted to bail if the felony of which he is accused is punishable with imprisonment for a shorter term. He is entitled to bail when the felony with which he is charged is punishable with imprisonment for less than five years as a maximum. To be admitted to bail, however, the accused must in all cases establish that he will appear when required and he must give an adequate security for his appearance.[125]

In Swiss law, bail is always discretionary. It may not be granted when the accused is charged with a felony or misdemeanor and there is danger that he would be tampering with the evidence or that he would leave the court's jurisdiction in order to escape prosecution. If charged only with an offense, he should be admitted to bail unless he is likely to escape.[126]

PROBATION AND PAROLE

Probation is a device which makes it possible for the court to suspend the sentence in proper cases and let a convicted offender go free on condition that he shall conduct himself well for a stipulated time. Parole makes it possible for a proper administrative authority to release a convicted offender from serving the remainder of the sentence assessed against him after he had already served part of the term. Both probation and parole are predicated upon the idea of rehabilitation; namely, to offer the offender a helping hand in the hope that he will be thus induced to keep himself out of trouble. It follows that only persons who give reasonable promise of rehabilitation may be admitted to probation or released on parole, and also that certain crimes are excepted from probation.

PROBATION

In general, the law of the United States and that of the various states of the Union admits to probation offenders convicted of crimes not punishable with death or life imprisonment.[127] Some states do not admit to probation persons convicted of serious crimes like murder or attempted murder or robbery with a deadly weapon,[128] some other states admit to probation only such persons who are assessed a term of

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125 StPO §§ 190-197.
126 Kanton Zürich, StPO §§ 49-50, 339.
127 *E.g.*, 18 U.S.C. § 3651 (1964).
128 *E.g.*, CAL. PENAL CODE ANN. § 1203 (Deering Supp. 1971); PA. STAT. ANN. tit. 19, § 1051 (1964).

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imprisonment not longer than e.g., ten years, irrespective of the nature of the offense.[129] The provisions of some states are stricter than others, but in general, rules concerning probation are very liberal as compared with those existing in England and in the various countries of Continental Europe.

In the European system, persons convicted of more serious crimes are not eligible for probation. Probation is generally limited to offenders convicted of minor offenses only who have been assessed a term of imprisonment usually not longer than one year (five years as a maximum), and who have not previously been convicted. Also, offenders considered for probation must appear not to be likely to commit further offenses.

English law provides that where a person is convicted of an offense not carrying the sentence of death or life imprisonment and having regard to the circumstances, including the nature of the offense and the character of the offender, provided it is expedient to do so, the court may, instead of sentencing him, admit him to probation.[130] Although probation is thus available even to persons convicted of serious crimes, it is limited in practice to minor offenses only and to persons not previously convicted, for it would not be appropriate to admit a person to probation in more serious cases having regard to the nature of the offense and to the character of the offender.

French law provides that a person convicted of a misdemeanor or of an offense for which he could not be assessed a term of imprisonment exceeding five years, and who has not previously been convicted of a felony nor of a misdemeanor, may be admitted to probation.[131] In Italian law, only persons who have been assessed a term of imprisonment not exceeding one year and who have not previously been convicted of felony nor of a misdemeanor are eligible for probation.[132] In Spanish law, probation is available only in the case of a conviction to a term not longer than one year, and to a person not previously convicted of any offense.[133]

In German law, a person may be admitted to probation if he is assessed a term of imprisonment not exceeding nine months and if within the last five years before the conviction of the offense he has

[129] *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 42.12 (1966), *as amended*, TEX. CODE CRIM. PROC. ANN. art. 42.12 (Supp. 1971). (Only certain sections were amended and codified in the 1971 Supplement).
[130] Criminal Justice Act 1948, 11 & 12 Geo. 6 c. 58, § 3.
[131] C. Pro. Pén. arts. 734-747, C. Pén. art. 40.
[132] C. Pen. arts. 163-168.
[133] C. Pen. arts. 92-93.

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not been, upon conviction for any offense, assessed a term of imprisonment exceeding six months or admitted to probation.[134] In Austrian law, a person may be admitted to probation if the offense of which he was found guilty is punishable with imprisonment for less than five years, and where having regard to the nature of the offense and the character and age of the offender and to the fact that he has, whenever possible, made good the loss or damage caused, it appears to be preferable to admit him to probation rather than have him suffer the penalty of imprisonment.[135] In Swiss law, probation is available only to persons who have been assessed a term of imprisonment not exceeding one year, and who have not been convicted of a felony nor of a misdemeanor within the five years immediately preceding the commission of the offense. Such persons must also make good all the loss or damage caused, and must appear to be unlikely to commit further offenses.[136]

PAROLE

As a general rule, the law of the United States and that of the several states of the Union provides that a convicted offender may be paroled after having served one-fourth to one-third of his sentence of imprisonment, and in any case (i.e. life imprisonment), after having served seven to twenty years.[137] Similar to the rules governing probation, these provisions are very liberal indeed, as compared with those of the European countries.

The European provisions make a convicted offender eligible for parole after he has served one-half to three-fourths of the term of imprisonment. A person imprisoned for life may be paroled after he has served some fifteen to twenty-eight years. In each case, the prisoner must have merited parole by his good conduct in prison and must give promise of an honorable conduct after his discharge.

In English law, a prisoner serving a sentence of imprisonment for a term of more than one month may be granted remission of part of the sentence on the ground of his industry and good conduct. Such remission may not exceed one-third of the sentence.[138] Persons con-

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[134] StGB § 23.

[135] Gesetz über die bedingte Verurteilung 1949, BGBl. Nr. 277, I. § 1.

[136] StGB art. 41.

[137] *E.g.*, 18 U.S.C. § 4202 (1964); CAL. PENAL CODE ANN. §§ 3040-3065 (Deering 1961); ILL. STAT. ANN. ch. 38, § 123-2 (1964); N.Y. PENAL LAW § 70.40 (McKinney 1967); TEX. CODE CRIM. PROC. ANN. art. 42.12 (1966), *as amended*, TEX. CODE CRIM. PROC. ANN. art. 42.12 (Supp. 1971). (Only certain sections were amended and codified in the 1971 Supplement.)

[138] Prison Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2 c. 52, & 25, The Prison (Amendment)

victed to imprisonment for life may also be paroled but no rule exists as to their eligibility for parole except that they may be paroled in the discretion of the Secretary of State. This discretion is rarely exercised and only after the offender has served a very extensive term of imprisonment.[139]

In French law, parole may be granted after the prisoner has served one-half of his term but not less than three months. A prisoner who has previously been convicted of a felony or of a misdemeanor may become eligible after he has served two-thirds of his term but not less than six months. In the case of imprisonment for life, the prisoner may be paroled after he has served fifteen years of imprisonment.[140] In Italian law, a prisoner may be paroled after he has served one-half of his term. He must have served, however, at least thirty months, and no more than five years of his sentence may be remitted. In case of a prisoner previously convicted, he must serve at least three-fourths of the term but not less than four years. Prisoners convicted to life imprisonment are eligible for parole after having served twenty-eight years.[141] In Spanish law, the prisoner must serve three-fourths of his term before he is eligible for parole. Only those imprisoned for a term of one year or longer are eligible.[142]

In German law, parole may be obtained after the prisoner has served two-thirds of his term and three months as a minimum. A person sentenced to life is not eligible for parole; however, the prisoner may petition for remission and obtain pardon.[143] In Austrian law, a prisoner is eligible for parole after he has served two-thirds of his term and a minimum of eight months. A prisoner serving a life sentence may be paroled after twenty years.[144] In Swiss law, a prisoner may be paroled after he has served two-thirds of his term and three months as a minimum. In the case of imprisonment for life, the prisoner may be paroled after fifteen years.[145]

Rules 1968, Stat. Instr. 1968 No. 440, (Rule substituted for Rule 5 of the Principal Rules, The Prison Rules 1964, Stat. Instr. 1964 No. 388, r. 5.).

139 Criminal Justice Act 1967, c. 80, § 61. Section 61(1) provides: "The Secretary of State may, if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment for life . . . , but shall not do so in the case of a person sentenced to imprisonment for life or to detention during Her Majesty's pleasure or for life except after consultation with the Lord Chief Justice of England together with the trial judge if available." *See also* The Murder (Abolition of Death Penalty) Act 1965, c. 71, § 2.

140 C. Pro. Pén. art. 729.

141 C. Pen. art. 176.

142 C. Pen. art. 98. There is no life sentence in Spanish law, the maximum term of imprisonment being forty years. In such case, the prisoner is eligible for parole after having served thirty years.

143 StGB § 26.

144 Gesetz über die bedingte Verurteilung 1949, BGBl, Nr. 277, I. § 12.

145 StGB art. 38.

It is thus quite apparent that in the European countries the prisoner has to serve a much longer part of his term before he is eligible for parole. This is, however, subject to a further qualification that while in the United States a prisoner is usually paroled as soon as he becomes eligible for parole, such a rule does not obtain in the European countries. Since a prisoner must give promise of good conduct after his discharge, only very few prisoners are actually paroled as soon as they become eligible, some are paroled at a later date, and many are never paroled. Parole is purely discretionary and it is used with caution. It is interesting to note, in this connection, that many American juries are not in agreement with the liberal policy of granting parole and indicate their displeasure at a premature release of prisoners by assessing prolonged terms of imprisonment of sixty, one hundred, and even more years in the hope that the parole boards will take their advice in consideration and will not parole prisoners who do not deserve it.

HABITUAL CRIMINALS

The laws of the several states in the United States provide on the average that upon third conviction for misdemeanor or felony, the offender shall be sentenced to the maximum provided as penalty for the offense for which he is then convicted.[146] Some states are stricter and increase the penalty upon a second conviction,[147] or in the case of felonies, provide for imprisonment for life upon a third conviction.[148] Although these provisions appear reasonably strict, they are still quite lenient if considered in conjunction with the provisions for bail, probation and parole and the practice of granting the same. True, habitual offenders need not be granted bail, released on probation or paroled, but in practice they are being given these benefits.

The main difference between the provisions of the several states of the United States and those of England and the other European countries lies in the ineligibility of the habitual offender to bail, probation and parole.[149]

English law provides that where an offender who was previously convicted of an offense punishable with imprisonment for a term of two years or more, is convicted of an offense punishable with imprisonment for a term of two years or more, committed before the expiration

146 *E.g.*, MASS. ANN. LAWS ch. 279, § 25 (1968).
147 *E.g.*, TEX. PENAL CODE ANN. arts. 61, 62, 64 (1952).
148 *E.g.*, CAL. PENAL CODE ANN. § 644 (Deering 1971); N.Y. PENAL LAW § 70.10 (McKinney 1967); TEX. PENAL CODE ANN. art. 63 (1952).
149 *See* Bail, Probation and Parole, *supra*.

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of three years from his release from prison, the court may impose a term exceeding the maximum term authorized for the offense.[150]

French law directs the court to assess a term of imprisonment at the maximum provided for by the penal code in case of a second offense, and it gives the court authority to extend the term even further up to double punishment.[151] In Italian law, the term of imprisonment for a second offense is increased by one-sixth. It is, however, increased up to one-half if the offense is of the same type as the first offense, or if it is committed within five years from the first conviction.[152] Upon a third conviction, the offender may be declared to be a habitual criminal.[153] The effect of such a declaration is that the offender is, upon serving his term, further detained in a labor institution for a minimum of two to four years.[154] In Spanish law, conviction for a second offense is considered an aggravating circumstance and carries with it an increased term of imprisonment.[155]

In German law, a person who is convicted of a third offense and who has on both previous occasions been assessed a term of imprisonment of not less than six months, may be incarcerated for a term of up to five years if the third offense is a misdemeanor, and up to fifteen years if it is a felony.[156] In Austrian law, the fact of a second or further conviction amounts to an aggravating circumstance and exposes the offender to an increased term of imprisonment.[157] In Swiss law, a habitual criminal may be imprisoned indefinitely but for not less than three years. If the offense for which he is convicted carries a term longer than three years, he may not be released before that term has run.[158]

Devices That Simplify And Speed Up Criminal Proceedings

A typical criminal proceeding in the countries of Continental Europe in the case of more serious offenses is initiated by the office of the public

150 Criminal Justice Act 1967, c. 80, § 37. Section 37 provides that where an offender who was previously convicted of an offence punishable with imprisonment for a term of two years or more, is convicted of an offence punishable with imprisonment for a term of two years or more committed before the expiration of three years from his release from prison, and if the court is satisfied that it is expedient to protect the public from him, the court may impose a term exceeding the maximum term authorized for the offence if the maximum so authorized is less than ten years, but shall not exceed ten years if the maximum so authorized is less than ten years, or exceed five years if the maximum so authorized is less than five years.

151 C. Pén. arts. 56-58.

152 C. Pen. art. 99.

153 C. Pen. arts. 104-105.

154 C. Pen. arts. 216-217.

155 C. Pen. arts. 19 (14), 61.

156 StGB § 20a.

157 StG §§ 44, 176.

158 StGB art. 42.

prosecutor which files a charge against the reputed offender in the proper criminal court. The charge is based on information supplied by the victim, witnesses and the police. Acting on the charge, the court appoints a judge, known as an investigating judge, to take care of the matter and to carry out a thorough investigation. The judge hears the victim, the witnesses, the police, the prosecutor, the person charged and his attorney. He studies all possible leads, consults experts, makes his findings, and does all that is necessary to enable the court to reach a conclusion as to whether the person charged should stand trial or whether the case against him should be dropped. Having made his findings, the judge transmits the papers to the prosecutor for further action. The prosecutor can either abandon the matter if on the findings of the investigating judge the case appears not to be strong enough for conviction. If he requests trial, the court will rule on the request after having made a thorough study of the case. If it rules that the person should stand trial, trial will take place promptly. The trial court is composed either of a single judge or of three judges, in accordance with the seriousness of the offense charged; or in felonies, of three judges and usually of a jury of six, sitting together with the court as one unit. At trial, proof is offered by the prosecution, witnesses for prosecution and defense are examined, cross-examined and re-examined, and the accused is heard through his attorney and by himself. The trial court is required by law to study the case *ex officio* and not to rely only on the facts and law submitted by the parties. If the court is composed of three judges, or of three judges and a jury, a two-thirds majority of its members is usually required for conviction and a simple majority for the assessment of punishment. The final decision of the court is appealable as well as its intermediate rulings, usually within one week from the decision. If the appellate court disagrees with the trial court, it must render a new decision. It may remand the matter back to the trial court only when the judgment suffers from a defect (breach of the law) for which it should be quashed. In addition to an appeal, a judgment of the trial court may be quashed for breach of law by a proper cassation court. This remedy is, however, exceedingly rare.

It immediately appears that in the Continental proceeding there is no grand jury. The question whether the person charged should stand trial is answered by a court on the basis of a thorough, methodical investigation conducted by an independent investigating judge appointed for life. The proceedings of the grand jury are not only cumbersome, but in their result stand no comparison with the reasoned

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finding of the investigating judge and the ruling of a court. No wonder that grand juries were abolished even in England where they were originally set up.[159]

On the strength of a proper finding by the investigating judge, the public prosecutor is bound to prosecute the person charged with the offense appearing in the finding. Any agreement between prosecution and defense to drop a more serious charge in exchange for an undertaking to plead guilty to a lesser charge so familiar in some jurisdictions, is unheard of in both Continental Europe and in England. It would not only be unethical but in direct breach of the law and would expose all parties to prosecution. Since the circumstances of the case have been scientifically examined by the investigating judge laying thus the groundwork for trial, the trial can proceed smoothly and speedily. Also, since the investigating judge has screened the evidence and separated the admissible evidence from the inadmissible, no problems of admissibility of evidence are usually encountered at trial. Consequently, no dilatory tactics are available to the defense.

In rendering judgment, both judges and jurors vote on the facts of the case, there being no reason why the judges should not be allowed so to do, as they admittedly can form an opinion on the facts just like the jurors. And since the jury sits with the judges as one unit, no special instructions to the jury are necessary. The function of the jurors is thus of an increased importance as they are elevated to members of the court and sit as lay judges.

If the decision of the trial court is guilty, the only way open to the defense to contest it is an appeal. No motion of any kind (like a motion for a new trial) is entertainable. The appeal is disposed of speedily by the appellate court, and if the decision of the trial court is modified, the appellate court renders a new final judgment. Further appeal to the highest court in the country is available only in felonies and only for breach of the law.

The entire proceeding is therefore quite speedy, consonant with the well known principle of criminal law enforcement that speedy justice provides a considerable deterrent to crime, making it clear to prospective offenders that crime does not pay. Conversely, it is evident that

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159 Grand juries were abolished in England by the Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 1, and they were finally eliminated in the counties of London and Middlesex by the Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 31 (3). Commitment for trial is made in the magistrates' court after preliminary examination by justices. Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 2; Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86, §§ 12, 13, 14.

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if a system allows the criminal to engage the courts in a seemingly endless battle of motions, changes of site, new trials, etc., especially while the criminal is free on bail, it cannot be expected to produce a desirable deterrent to crime in the minds of likely offenders. In this connection it may safely be said that mere technicalities should not be allowed to fetter the system and give the criminal an undue advantage in criminal proceedings. Such technicalities should be discarded just as they were done away with in England and in the countries of Continental Europe. To discard these fetters on criminal procedure and to achieve suitable improvements, it is imperative to work toward such changes and modifications which would bring about a betterment of the existing system without surrendering any of the well established principles of liberty and personal freedom.

It should also be noted that any rights a person accused of having committed a crime might have with respect to fair treatment and fair trial, including the presumption of innocence until conviction, must be viewed in conjunction with the right of every person to his physical integrity and to that of his property. Also, the right of every person not to be the victim of crime should not be lost from sight. A fair and just criminal procedure must balance these interests and must pay due respect to the interests of the accused as well as to those of the victim and to those of society at large.

CONCLUSION

A comparison of some aspects of the American, English and Continental systems of criminal law and law enforcement reveals that the observations made by Roscoe Pound in his St. Paul address of 1906[160] have still not lost their persuasiveness. Granted that the judicial system and criminal procedure of the United States are derived from those of England, it may not be fruitless to have a look at the English and Continental systems as they stand today for possible suggestions. The English criminal law and procedure went through several periods of successful reforms both in the nineteenth and twentieth centuries which made it a modern, workable system. There are no grand juries; no excessive dilatory tactics are tolerated in the trial system; no repeated motions for a new trial or against the sentence are allowed; bail, probation and parole are confined to narrow limits; meaningful sentences are assessed; and habitual criminals are kept reasonably off the streets. A

160 Roscoe Pound's address at the twenty-ninth annual meeting of the American Bar Association held in St. Paul, Minnesota, on August 29, 1906.

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glance at the Continental system reveals suggestions for further innovations, like a vigorous system of crime investigation conducted by independent investigating judges, a system of smooth, speedy proceedings from arrest to conviction, juries only in felony cases of not more than six to nine jurors sitting usually with the court as lay judges.

It is inescapable that an improved judicial system would require a considerable increase in judicial personnel but it must be remembered that practically any meaningful improvement would have to begin with the appointment of additional judges to relieve the heavily overworked conditions presently prevailing in the administration of criminal law throughout the country. Although many aspects of the European system are clearly not readily transplantable, it is evident that some features of the English and Continental systems might be considered as suggestions for possible improvements.

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