NON-PUNITIVE DETENTION: A COMPARATIVE STUDY

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The authors examine the different types of non-punitive detention and the reasons for which these are permitted in the common-law and civil-law jurisdictions. The main area of investigation deals with pre-trial and preventive detention. Having compared various common-law legal provisions with those of foreign jurisdictions representing the civil-law system, the authors suggest which are preferable, pointing out that the theoretically preferable provisions have not always proven better in practice. In conclusion, they affirm the basic concept of the rule of law that a man is innocent until proven guilty and that only when proven guilty should he be subject to punitive detention for the purposes of rehabilitation.

I. PUNITIVE V. NON-PUNITIVE DETENTION: THE GENERAL PROBLEM

A. *Punitive Detention of Convicts*

The detention of a person found guilty of the commission of a crime has been traditionally justified by the need to punish such a perpetrator for his wrongdoing, or, on a more rational plane, to detain him for as long as it may take to restore him to normalcy. Thus, the offender's presumed dangerousness is a weighty reason for detaining him as a consequence of having committed a crime. Yet, neither the legislature in devising the definitions of crimes and the scopes of punishment, nor a sentencing judge in imposing the "appropriate" sentence, are seriously and genuinely concerned with the real dangerousness of the offenders. The dangerousness remains implied, presumed, posited, but not proven. In a world striving for even greater humaneness, it is not hazardous to predict that proof of actual dan-

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gerousness will some day become a condition precedent for the imposition of any sentence of detention, as contrasted with less onerous detriments falling short of detention such as probation, attending courses at attendance centers, therapy sessions, restrictions on activities, and so forth. Thus, detention or imprisonment of persons on the basis of having been found guilty of crime, which so far rests only on an assumed dangerousness of the convict, will some day turn into a practice of detaining only dangerous convicts who cannot be restored to social normalcy by lesser means. For the time being, however, the system is one which provides for the confinement of convicts merely on the basis of presumed dangerousness.

With this system we must contrast the system which seeks to confine persons whose dangerousness is actually proven though this may have little or nothing to do with charges of crime. Examples of this sort are either medical or juridical.

B. *Non-Punitive Detention of Dangerous Persons: Medical Type*

The medical examples first concern the quarantine of persons as to whom there is proof that they are likely to be afflicted with a serious communicable disease, usually of a sort capable of producing an epidemic. Second, the commitment of persons because they are dangerous to themselves or others is another well-established, medically-oriented situation type of detaining persons whose continued liberty would be dangerous. This study is not concerned with detention for medical reasons. In all nations such detention is a matter for civil proceedings, the general propriety of which is not controversial as long as procedural-constitutional rights are preserved during the commitment proceedings. [1] The matter is no different when a convict with an expiring term of imprisonment is sought to be detained for medical reasons in a psychiatric facility as a dangerous person. Here, too, the matter is one of concern to civil procedure, subject to the constitutional due process and equal protection guarantees. As the Supreme Court of the United States put it recently: "For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." [2]

C. *Non-Punitive Detention of Dangerous Persons: Juridical Type: Dangerous Ex-Convicts*

The second class of detentions, which we have labelled juridical, differs radically from the medical type of detention simply because no medical grounds for detention can be detected, or because no medical purposes are

[1] Baxstrom v. Herold, 383 U.S. 107 (1966). *Compare* DUTCH PEN. CODE art. 37.
[2] 383 U.S. at 111-12.

being served thereby. Two situation types of such juridical detention are imaginable. First, a prisoner who has served his sentence is regarded as still a potential danger, *i.e.*, rehabilitative efforts have failed on him. This problem is not regarded as acute because the terms of imprisonment in the United States and Canada are generally long enough for rehabilitation efforts. If, nevertheless, it could be established that an appreciable number of prisoners are returned to the community while still dangerous, the fault would lie with the administration of our existing system, or with implementation of correctional ideals, rather than with the structure of the system. Moreover, indeterminate sentence laws are largely available, permitting detention beyond the normal period in the case of offender types in which continued danger may be a problem. If, then, our system nevertheless produces the result—at the expense of procedural legality and restrictive retribution—of discharging an occasional convict who is still dangerous, though psychologically normal, it is suggested that such may well be the price of our system of ordered liberty. Nevertheless, such a potential danger could be minimized by tactical police surveillance, for it must be conceded that the police must keep under surveillance—without infringement of constitutionally protected rights [3]—all persons from whom a danger emanates, for the protection of the community. We will not concentrate on this first possible situation type which may be deemed to call for the imposition of non-punitive judicial detention. In view of the just-stated considerations, it is our considered judgment, that for constitutional and cultural reasons, non-punitive detention should not be provided in the case of still-dangerous convicts who have served their sentences. It must be noted, however, that such detention is available in a number of foreign countries in different forms. Thus, under German law, if a defendant has been charged with, and convicted of, being a habitual criminal, [4] the court will impose protective custody, if the public safety requires it, [5] besides the regular term of imprisonment imposable for the offense in question. Protective custody is indeterminate, but it must be terminated when the public danger no longer exists. [6] This law has its counterparts in the habitual offender laws in several states of the United States, *e.g.*, New York, except that American statutes often carry a mandatory life sentence for the habitual criminal, which may not be terminated when the public danger emanating from the offender has ceased. [7]

It is suggested that the comparable German law is more utilitarian and humane than the New York statute.

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[3] *See* Giancana v. Hoover, 322 F.2d 789 (7th Cir. 1963).

[4] StGB. § 20a.

[5] StGB. § 42e.

[6] StGB. § 42f.

[7] N.Y. PEN. L. § 1942 (the Baumes Law); People v. Gowasky, 244 N.Y. 451, 155 N.E. 737 (1927), *aff'g* 219 App. Div. 19, 219 N.Y.S. 373 (1st Dep't 1926).

D. *Non-Punitive Detention: Juridical Type: Non-Convicts, Not Charged with Crime*

The far more important and controversial question is that of the detention of persons deemed or proven dangerous who have not been convicted of any crime, and who are not mentally abnormal. Again, two situation types are imaginable: A person may have committed a sufficient act to be chargeable with crime, and it may now be alleged that he is dangerous. In the alternative, he may be deemed dangerous without having taken steps toward the commission of crime. We shall first deal with the second situation type.

There is something shocking about the mere thought of depriving a mentally normal person of his liberty, who has not yet taken steps toward the commission of a crime. An uninitiated observer may well expect that continental law would permit such an interference with liberty, and that the Anglo-American legal system would forbid it. Yet, the opposite is true. In continental law we know of no instance of permissible deprivation of liberty, for non-medical reasons or purposes, of one who is alleged to be dangerous and has not yet evidenced this dangerousness by at least an attempted crime. The common law, *per contra*, has provision for dealing with persons who merely threaten to commit a wrong. Such a person, threatening a wrong, may be brought before a justice where, upon examination, he may be required to provide sureties to keep the peace.[8] Detention is ordered if the defendant fails to provide the sureties to keep the peace. While this procedure, for practical purposes, is outmoded in most states of the United States, it is still to be found in the various procedural codes in North America.[9] Moreover, these peace bond proceedings are of doubtful constitutionality. It is hoped that in the sweep of procedural revision in the various states of the United States, such ancient proceedings will be removed from the statute books.

Next, persons accused of crime, and found to be incriminated by evidence showing them to be *probably guilty*, may be confined for want of bail, either because the defendant could not afford to post a bond in the required amount, or because he was not entitled to bail. While it is the official purpose of bail to simply secure the presence of the defendant at his next official proceeding, it has long been an open secret that, in fact, the method of bail is used to secure the confinement of arrested persons thought to be dangerous.

E. *Non-punitive Detention: Juridical Type: Administrative Convenience*

It must be admitted that for purposes of administering an organized society, every state has the right to impose certain burdens on its members,

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[8] 4 BLACKSTONE, COMMENTARIES *251; W. CLARK, CRIMINAL PROCEDURE 2 (2d ed. W. Mikell 1918).

[9] *E.g.*, N.Y. CODE CRIM. PROC. §§ 89-90. The Canadian rule is contained in CRIM. CODE § 717.

e.g., taxation, registration for certain purposes, and so on. Thus, when a considerable amount of suspicion of having committed a crime falls on a certain person, it is recognized everywhere that such person may be detained for registration (booking) and for purposes of securing his presence for the establishment of the facts in question. Moreover, the state has the right or duty to detain such a person for the ultimate benefit of society. In this group we encounter legal provisions for the detention of minors pending inquiries into custody and educational supervision, or of aliens pending deportation and extradition determinations. But in this category we find, particularly, the detention of persons charged with or reasonably suspected of having committed a crime, for purposes of establishing their identity and personality and securing their presence at an inquiry into the controversial facts. The category is well-established in all legal systems of the world. In the United States, it is the typical case of arrest—with or without a warrant—on probable cause that a crime has been committed and that the defendant has committed it. [10] Similarly, all continental legal systems provide for the taking into custody for processing and securing, a person gravely suspected of having committed a crime. [11] Such a preliminary detention, at least in the law of the United States, has nothing to do with the dangerousness of a given suspect. The question is solely one of securing the person of the defendant for subsequent proceedings. Not even the question of bail arises at this stage, since bail is deemed to be solely an incentive device for securing the defendant's subsequent presence. Hence, determination of personal data and other booking practices are relatively non-controversial detention practices in all parts of the world. It should be added, however, that current inquiries in the United States into the extent to which summons proceedings may be substituted for arrest proceedings for purposes of initiating a criminal case, are quite commendable from a utilitarian and humanitarian point of view. After all, if the personality of a given defendant is well known, it can hardly be contended that an arrest and detention—however brief—is necessary to establish his personal identity. Continental law does, on the whole, contain provisions preferring summons proceedings over arrest proceedings whenever possible. [12]

F. *Non-Punitive Detention: Juridical Type: Danger to the Public and to Law Enforcement*

After the personality of a suspect has been determined, and it has been established judicially that such a person is a likely suspect—under whatever standard a nation may impose (*e.g.*, probable cause in the United States)—the question will then arise as to whether this person should be left at large

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[10] Henry v. United States, 361 U.S. 98 (1959); *See* 18 U.S.C. § 3052 (1948). *See* Giordenello v. United States, 357 U.S. 480 (1958).

[11] C. PRO. PEN. arts. 62-63; STPO §§ 112-14.

[12] STPO § 133.

or kept in custody pending the trial determination of his criminal liability. It is at this point that we encounter the major differences between the common-law and the civil-law systems. In the common-law system of the United States of America, there is only one relevant question before the court regarding a person against whom there is evidence that he has probably committed a crime : Is it necessary to commit such a person to prison or will a financial incentive suffice to induce his presence for trial if he were kept at large? [13] We will not consider this question of bail. Rather, we shall analyze the problem as follows : If a committing magistrate is convinced that a person charged with a crime will not appear for his trial, it must be conceded—and there is nothing in the United States Constitution to the contrary—that he has the power to commit him to jail pending trial. If, on the other hand, there is little or no doubt that he will appear for his trial, may there nevertheless be some ground for detaining him, such as the danger that he will frustrate the administration of justice, or the danger that he will commit further unknown crimes?

This is a question which the common law does not officially recognize, although every experienced magistrate can attest to the fact that the danger of collusion or other tampering with evidence, or the danger of repetition of the offence, materially influences his discretion in setting bail, or in fixing the amount of bail. Thus, American law achieves—*sub rosa*, or by indirection— what a mature penal system should specifically provide for, in the interest of procedural legality, or the rule of law concept. It is at this point that comparison with the continental legal system becomes fruitful.

II. Pre-Trial Detention of Dangerous Persons: So-Called Preventive Detention

A. *Constitutional Limitations*

The preventive pre-trial detention of persons charged with crime is subject to constitutional provisions in most continental countries, and even subject to one supra-constitutional provision. The classical example is art. 7 of the French Declaration of the Rights of Man and the Citizen, reaffirmed by the Preamble of the Constitution of 1958 : "No one shall be accused, arrested, or imprisoned, save in the cases determined by law, and according to the forms which it has prescribed." [14] Only judicial officers are authorized to order such detention. [15]

On the supra-national level, [16] the 1950 European Convention on

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[13] Stack v. Boyle, 342 U.S. 1 (1951).

[14] *Compare* Irish Const. art. 20(4)(1); Norwegian Const. art. 99; Grundgesetz art. 2 (Ger.).

[15] *See, e.g.*, Dutch Const. art. 171; Italian Const. art. 13.

[16] All 17 members of the Council of Europe, with the exception of France and Switzerland. *Compare* [1963] Eur. Conv. on Human Rights Y.B. 34 (1965).

Human Rights is applicable. This Convention recognizes the presumption of innocence [17] as well as the "right to liberty and security of person," [18] but concedes that encroachments of the right to liberty are justifiable, and expressly authorizes the following cases of *preventive* detention :

> (*c*) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on *reasonable suspicion* of having committed an offense or when it is *reasonably considered necessary to prevent his committing an offense or fleeing after having done so.*
>
> (*d*) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.
>
> (*e*) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.
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> (*f*) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. [19]

B. *Requirements for Pre-Trial Detention*

Within the framework of the Convention and the various constitutions, continental European codes have placed further limits on the use of preventive detention. As regards substantive requirements, a distinction may be made between the French and the German-Scandinavian systems. [20] Under the former, the judge is basically free to order detention when he sees fit. The latter system limits the judicial discretion by listing specific criteria for the permissibility of preventive detention. The French Code of Criminal Procedure merely states that preventive detention is "an exceptional measure." [21] But in practice the grounds for detention are fairly identical in both systems. [22] Thus, it may be said that continental European law, whether expressly or implicitly, imposes three kinds of conditions for the permissibility of preventive detention :

(1) "*Probable Cause*"

Generally, preventive detention may only be ordered in cases where a *strong suspicion* exists that the suspect has indeed committed the offense in

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[17] *See* EUR. CONV. OF HUMAN RIGHTS art. 6(2). Reservation with regard to this article has been made by Austria.

[18] *See* EUR. CONV. OF HUMAN RIGHTS art. 5(1). Reservation with regard to this article has been made by Austria.

[19] EUR. CONV. OF HUMAN RIGHTS art. 5(c)-(f).

[20] *See* Mulder & Moons, *De Rechten van de mens in het strafrechtelijk vooronderzoek*, 71 TIJDSCHRIFT VOOR STRAFRECHT [hereinafter TvSr] 8 (1962).

[21] C. PRO. PEN. art. 137.

[22] *Compare* art. C. 274 of General Instruction on the application of the CODE DE PROCÉDURE PÉNAL, as quoted by Vouin, *Provisional Release in French Penal Law*, 108 U. PA. L. REV. 355, at 359 (1960).

question. [23] This standard is comparable to the American "probable cause" requirement. [24]

(2) *Danger to be Averted by the Detention*

Unlike in the United States, where only danger of flight is relevant for a decision to release on bail, three grounds for detention are generally recognized in civil-law countries : [25]

(a) danger of flight

(b) danger of collusion

(c) danger of committing an offense pending trial. [26]

The existence of any of these grounds ordinarily has to be established on the basis of "definite facts," *i.e.*, evidence stronger than "probable cause." [27] Thus, to establish "danger of flight," factors to be taken into account are, according to the German Code of Criminal Procedure, [28] "the circumstances of the individual case, especially the situation of the accused and the factors speaking against a flight." [29]

The "danger of committing offenses" is generally qualified. Thus, under German law, when the charge concerns a major sex crime, there exists a ground of arrest "when definite facts support the danger that the accused, before final conviction, will commit a further [*sic*] major crime of the designated kind, and that the preliminary detention is necessary to avert the threatening danger." [30] Generally speaking, detention for this reason is frequently limited by the requirement that the offense which is likely to be committed in case the defendant would remain at large, be of the same kind as the one charged. [31] But the offense charged need not always be of such serious nature as those mentioned in the German code. Thus, in the Netherlands, an "important reason of public security" justifying pre-trial detention was deemed to exist in the case of a person charged with

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[23] *See* StPO § 112; DUTCH CODE CRIM. PROC. art. 64 [hereinafter WvSv]. The same requirement prevails in Scandinavian countries; *see* A. BRATHOLM, PAGRIPELSE OG VARETEKTSFENGSEL at 380 (1957). In France, this requirement is not posed expressly but it probably follows from C. PRO. PEN. art. 137.

[24] *See* G. Mueller, Lessons of Comparative Criminal Procedure at 16 (Mimeographed ed. of a lecture delivered at American University, Washington, D.C., April 23, 1965).

[25] *See* pp. 428-29 *supra.*

[26] *See* U.N. DEP'T OF ECONOMIC & SOCIAL AFFAIRS, STUDY OF THE RIGHT OF EVERYONE TO BE FREE FROM ARBITRARY ARREST, DETENTION, AND EXILE at 28 (1964). *See* also StPO § 112; WvSv art. 64; NORWEGIAN CRIM. PROC. ACT § 228. *Compare* A. MINKENHOE, NEDERLANDSE STRAFVORDERING 82 (2d ed. 1948); Bratholm, *Arrest and Detention in Norway*, 108 U. PA. L. REV. 336 (1960); G. STÉFANI & G. LEVASSEUR, PROCÉDURE PÉNALE 362 (1964); 2 P. BOUZAT, TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE 987 (1963).

[27] *See, e.g.*, StPO § 112; WvSv art. 64.

[28] StPO § 112(II)(2).

[29] Such a groping for variable yet typical factors determinative of a given case may be detected in the study of the Manhattan Bail Project. *See* D. FREED & P. WALD, BAIL IN THE UNITED STATES 57 (1964).

[30] StPO § 112(III).

[31] *Compare*, U.N. DEP'T OF ECONOMIC & SOCIAL AFFAIRS, *supra* note 26, at 30 (1964). *See, e.g.*, NORWEGIAN CODE OF CRIM. PROC. § 228(4), as quoted by Bratholm, *supra* note 26, at 338 (1960).

perjury who, pending further testimony, might perjure himself again. [32]

(3) *Gravity of the Offense Charged*

In Germany, the general rule applies that pre-trial detention may not be imposed if it is "disproportionate to the significance of the case or to the punishment or measure of prevention and reform likely to be imposed." [33] Besides, if the act is punishable only by imprisonment up to six months by confinement in a jail (which is the form of imprisonment to be imposed for less serious offenses) or by fine, pre-trial detention may not be imposed merely for danger of collusion. In such cases, it may be imposed for danger of flight only if the accused has previously avoided the proceedings against him, has made preparations for flight, has no fixed place of residence or abode, or cannot identify himself. In short, if the accused presents a special risk of possible flight, his detention may be ordered. [34]

Most countries, similarly, exclude or limit the permissibility of preventive detention, if the punishment that may be imposed for the act of which the accused is strongly suspected does not exceed a specified minimum. [35]

On the other hand, the gravity of the offense may widen the permissibility of pre-trial detention. [36] An example is section 112(IV) of the German Code of Criminal Procedure which provides that "As against accused persons strongly suspected of a major crime against life... preliminary detention may be ordered even if there is no ground of arrest under subsections II and III," *i.e.*, if none of the previously discussed grounds exist.

In some countries, preliminary detention is mandatory if a very serious offense is involved. [37] It is suggested that such provisions are non-utilitarian and non-humanitarian.

Apart from the material requirements discussed, pre-trial detention is subject to a number of *limitations of a more formal nature*. The most important provision on this point is that preliminary detention shall be ordered by a judicial officer [38] who must first examine the person charged. [39] In his decision, the judge generally states the definite facts on which his decision is based. [40] An appeal lies against all decisions concerning pre-trial

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[32] Court of First Instance Almelo May 25, 1934 (Published in Weekblad voor het Recht 12863). *See* G. VAN BEMMELEN, STRAFVORDERING 191-194 (1957).

[33] STPO § 112(I).

[34] STPO § 113.

[35] *See, e.g.*, WvSv art. 64; C. PRO. PEN. arts. 131, 135. *Compare* Bratholm, *supra* note 26, at 336.

[36] *See* U.N. DEP'T OF ECONOMIC & SOCIAL AFFAIRS, *supra* note 26, at 31.

[37] *See, e.g.*, ITALIAN CODE OF CRIM. PROC. art. 253.

[38] STPO § 114; NORWEGIAN CRIM. PROC. ACT § 231; WvSv arts. 63, 66; C. PRO. PEN. art. 122. *Compare* G. STÉFANI & G. LEVASSEUR, *supra* note 26, at 356.

[39] STPO § 115; WvSv arts. 63, 77; C. PRO. PEN. arts. 133, 135.

[40] WvSv art. 78; C. PRO. PEN. art. 186; STPO § 117(I), (II); NORWEGIAN CRIM. PROC. ACT § 407.

detention. [41]

C. *Mandatory or Discretionary Release*

Pre-trial detention in any country has the character of an "exceptional measure." [42] It may be imposed only if absolutely required, and release should be ordered as soon as detention ceases to be absolutely necessary.

The competent judge may at any time order the release of the defendant. [43] Under French law, release is mandatory after five days in cases involving misdemeanors, provided that (a) the maximum penalty provided by law is less than two years of jailing; (b) the accused is domiciled in France; (c) he has not already been convicted of a felony or sentenced to more than three months, without suspension, for a misdemeanor. [44] Moreover, the General Instructions for the French Code of Criminal Procedure provide that "when there are no substantial grounds for the belief that the accused may flee, exert pressure on witnesses, destroy evidence, commit new offenses, or disturb public order, *provisional release is a matter of right.*" [45]

In some countries, the accused may not be kept in detention if "less incisive measures" may be deemed sufficient protection for the interests of society. The German code mentions as such :

> 1. an order to report at designated times at the offices of the judge, the prosecution or a specific office to be designated by it,
> 2. an order not to leave the place of residence or abode, or a certain area, without permission of the judge or the prosecution,
> 3. an order not to leave the residence except under the supervision of a designated person,
> 4. the furnishing of security by the accused or another, [46]
> . . .

in case there is danger of flight. Other appropriate conditions may be imposed in case of danger of collusion, or of committing an offense. [47] Moreover, release may be on mere recognizance. [48] Release on bail is permitted in most countries, [49] but it is rarely resorted to because of its discriminatory effect, and because it is deemed to have little if any leverage effect in cases of danger of flight, collusion, or commission of another

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[41] WvSv arts. 69, 71; C. PRO. PEN. art. 186; StPO § 117(I), (II); NORWEGIAN CRIM. PROC. ACT § 407.

[42] *See* C. PRO. PEN. art. 137.

[43] C. PRO. PEN. art. 140; WvSv art. 80; StPO § 116.

[44] C. PRO. PEN. art. 138.

[45] See authority cited *supra* note 22, at 359.

[46] StPO § 116(I).

[47] StPO § 116(II), (III). *Compare* Bratholm, *supra* note 26, at 347 et seq.

[48] *See, e.g.*, C. PRO. PEN. art. 145; WvSv art. 80.

[49] *See, e.g.*, C. PRO. PEN. art. 145; WvSv art. 80; StPO § 116.

offense. In Sweden it is, for these very reasons, excluded entirely. [50]

If the accused is kept in detention, this decision is subject to periodical review, comparable to bail review as provided in the eastern district of Michigan and New York City. [51] If the accused does not move for such review himself, [52] the judge must conduct the review on his own motion after a set period of time. [53] In the Netherlands, detention ordered by the investigating magistrate cannot exceed a twelve-day period, [54] after which a decision has to be made by the court of first instance. This decision is subject to review every thirty days. [55] In France, review must take place every four months. [56] In Germany, a review *ex officio* shall be conducted after three months, unless the accused has counsel, or has lodged an appeal against the detention order. Subsequently, the accused may move for review every two months. [57]

Apart from the provisions for periodic review, there is hardly any limitation to the period over which the detention may be extended. The German code provides that :

> As long as no judgment has been entered imposing a punishment or a measure of prevention and reform entailing loss of liberty, the execution of preliminary detention for the same act may be extended beyond a six month period only if the peculiar difficulty or the peculiar extent of the investigations or some other important reason stand in the way of imposition of judgment and justify continued detention. [58]

Under the European Convention on Human Rights, the accused is "entitled to trial within a reasonable time." [59] Numerous petitions from individuals kept in pre-trial detention have been filed with the European Commission, without much success. The Commission has held :

> Reasonable or unreasonable nature of the delay between arrest and sentence must be considered not in abstracto, but in the light of specific circumstances, such as the complexity of the case and the procedure followed by the Applicant himself .... [W]hereas in the present case allowance must be made in particular for the very large number of offenses imputed to X, which could not fail to affect the time required to conduct a preliminary investigation of the case; whereas, moreover, between the date of his arrest and that of the sentence ... the Applicant made various appeals which, whilst they left

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[50] *See* Botein & Sturz, *Report on Pre-trial Release Practices in Sweden, Denmark, England and Italy to the National Conference on Bail and Criminal Justice*, 5 J. INT'L COMM'N OF JURISTS 206 (1964).

[51] *See* D. FREED & P. WALD, *supra* note 29, at 86.

[52] C. PRO. PEN. art. 141; WvSv art. 69; StPO § 117.

[53] C. PRO. PEN. art. 139; WvSv art. 67; StPO § 117.

[54] WvSv art. 65.

[55] WvSv art. 67.

[56] C. PRO. PEN. art. 139.

[57] StPO §§ 117, 118.

[58] StPO § 121(I).

[59] EUR. CONV. OF HUMAN RIGHTS art. 5(3).

> the reasons for his imprisonment under the constant control of the German judicial authorities, inevitably delayed the delivery of a verdict. [60]

Thus, we are forced to conclude that while continental law is ahead of American law regarding freedom pending trial, it has not yet advanced as far as American law regarding the right to a speedy trial.

D. *Evaluation of Pre-trial Detention Practices*

In practice, no country appears to handle the problem of pre-trial detention with as much restraint as might be expected in view of the constitutional and statutory law on the subject and the gravity of the measure. There is much evidence in the United States, that bail is set high for purposes other than securing the defendant's presence at the trial. [61] Likewise, European judges keep the accused in detention for reasons other than official ones. The most objectionable cases are those in which detention is ordered to obtain a confession, to anticipate retribution, [62] to benefit the accused by means of its "shock effect," to set an example, or, sometimes, to "protect" the accused. [63] It may be argued that there are cases where such shock effect or protection are in fact desirable. However, in most countries, only action by the legislature can make detention for these purposes lawful. Given the incisive nature of the measure, a strict abidance by the rules of law seems of the utmost importance.

It is hardly possible to compare data on the actual frequency of pre-trial detention in the various countries. From the few figures available, one cannot obtain more than a vague impression. The following figures are taken from a 1961 study and indicate the percentage of individuals in pre-trial detention among the total prison population in different countries. [64]

	First date of inquiry	Second date of inquiry
England	5.25	5.97
Belgium	14.16	13.87
Netherlands	35.03	36.89
Israel	19.30	20.75
Germany	23.11	
France	40.79	43.55

Regardless of conviction rates in the various countries, it strikes us as peculiar that from thirteen to forty-three per cent of the prison population could be pre-judged as probably guilty and dangerous. We cannot con-

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[60] X v. Federal Republic of Germany, [1961] EUR. CONV. ON HUMAN RIGHTS Y.B. at 240.

[61] *See* D. FREED & P. WALD, *supra* note 29, at 9.

[62] *See* Bratholm, *supra* note 26, at 345-347; Bouzat, *La protection de la liberté individuelle*, 25 REVUE INTERNATIONALE DE DROIT PÉNAL at 118, 119 (1953).

[63] *Id.*

[64] *See* Veringa & Geurts, *De tenuitvoerlegging van de preventieve hechtenis*, 72 TvSr 86, 87 (1963).

clude from these figures that preliminary detention is used more frequently in France than it is in neighboring Belgium. The conviction rates between the two countries may vary considerably. What we question is that such a significant proportion of prison inmates should be regarded as likely guilty of the crime charged and that they are dangerous and likely to tamper with the evidence or both.

In the United States, this percentage varies considerably among the different jurisdictions but seems generally higher than the European average. [65] Whatever may be the significance of these data, they seem to contradict the fact that the officially recognized grounds for detention have a wider scope in Europe than in the United States. One of the explanations may be that Europeans prefer a summons over an arrest. [66]

A serious disadvantage of the European system is the fact that there is no real safeguard against a prolonged period of detention, once such has been (exceptionally) ordered. The European preliminary investigation often takes a long time. This fact, in itself, would not be objectionable, if the accused could not be kept in detention for as long as the investigation continues. A Norwegian study in 1952 showed that the average periods of detention pending trial for male prisoners who were finally committed to the central prison had been 72 days in cases of larcenies and similar offenses; 101 days in cases of acts of violence; 175 days in cases of sex offenses; 75 days for other offenses. [67]

In theory, a person kept in pre-trial detention may not be subjected to "any other limitations other than those strictly required for the purpose of his detention or for reasons of discipline," as it is expressed by the Dutch code. [68] In practice, the person in pre-trial detention is subject to considerable handicaps. He is often in a worse position than the convicted prisoner.[69] It is of little consolation that the vast majority of those kept in pre-trial detention are ultimately convicted. [70]

A Belgian study in point found that during 1931-1940 and 1946-1950 an average of 7.1% of all persons in pre-trial detention had ultimately been acquitted. [71] In the Netherlands for the year 1963 this percentage was

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[65] *See* D. FREED & P. WALD, *supra* note 29, at 39.

[66] *See* Mueller, *supra* note 24, at 21; *see* also Ploscowe, *Measures of Constraint in European and Anglo-American Criminal Procedure*, 23 GEO. L.J. 762 (1935).

[67] *See* Bratholm, *supra* note 26, at 341, 342.

[68] WvSv arts. 62, 76; *compare* C. PRO. PEN. arts. 614-716, D. 53-64; STPO § 119.

[69] *See, e.g.*, Schootstra & van Hattum, *De rechtspositie van de preventief gedetineerde*, 44 MAANDBLAD VOOR BERECHTING EN RECLASSERING 54, (1965). *Compare* D. FREED & P. WALD, *supra* note 29, at 44.

[70] We will not go into the question of how far the fact that a person is detained makes him more likely to be convicted than one who has been at large pending trial.

[71] *See* Fettweis, *Y a-t-il lieu d'indemniser l'inculpé renvoyé des pursuites après avoir subi une détention préventive*, 25 REVUE INTERNATIONALE DE DROIT PÉNAL 157 (1953).

6.18%.[72] Moreover, in many European countries, innocent victims of pre-trial detention have an enforceable right to compensation against the state. This right, in fact, is included in both the European Convention on Human Rights[73] and in the United Nation's Draft Covenant on Civil and Political Rights.[74] Germany,[75] the Netherlands,[76] Portugal, Sweden, Norway, Denmark, Greece and Switzerland[77] are among the countries which have a provision to this effect. Such compensation is granted "if and to the extent the judge deems that to be fair"[78] which, of course, leaves every possibility for a not too frequent granting of compensation in practice.[79]

In case a subsequent conviction proves that the detention was justified, *i.e.*, in the vast majority of cases, the time which the convict has spent in pre-trial detention may be credited against the sentence.[80] This is a highly commendable provision. Yet, it has the drawback of depriving many persons who have been kept in pre-trial detention for a period equal to their sentence from the beneficial effect of possible treatment programs which may be available in correctional institutions to convicts, but not to detainees. It has been suggested that prisoners in pre-trial detention be committed to those programs, if they express the wish to participate.[81]

III. CONCLUSION

Proof of the commission of a crime is as little an indication of a convict's future danger as is the absence of a conviction an indication of a human being's harmlessness. Yet, upon conviction of a crime the state may validly order the convict's deprivation of liberty, without further proof that the convict's liberty would constitute a threat to members of the public. Conversely, it is often thought that the state may not, consistent with a system of constitutional rights, order the detention of a person who is dangerous, yet has not been convicted of a crime.

There is something inherently naive about a system of justice which

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[72] *See* [1963] Justitiële Statistiek (Judicial Statistics) (published by Centraal Bureau voor de Statistiek).

[73] EUR. CONV. OF HUMAN RIGHTS art. 5(5).

[74] *Id.* at art. 9, par. 5.

[75] Gesetz betreffend die Entschädigung für unschuldig erlittene Untersuchungshaft (Law concerning indemnification for unjustly suffered preliminary detention), Law of July 14, 1904, [1904] RGBL 321.

[76] WvSv art. 89.

[77] *See* Fettsweis, *supra* note 70, at 151.

[78] WvSv art. 90.

[79] *Compare* G. VAN BEMMELEN, *supra* note 32, at 206, 207.

[80] *See* DUTCH PEN. CODE art. 27; C. PEN. art. 24; STGB § 69 (Switz.); ITALIAN PEN. CODE art. 137. The present German Penal Code does not include a provision to this effect, but § 66 of the Draft Penal Code does. *Compare* also § 7.09(1) of the American Law Institute's 1962 official draft of the Model Penal Code.

[81] *See* Veringa & Geurts, *supra* note 64, at 90. *Compare* also Bratholm, *supra* note 26, at 357. Along similar lines, a pre-trial parole system to serve rehabilitative purposes—with consent—has been proposed. *See* Vouin, *supra* note 22, at 365.

rests on the presumption that all convicts are dangerous and may be neutralized by confinement, and that all non-convicts are harmless and may not be confined. No empirical study exists which would give credence to the belief that convicts as a group are more dangerous than non-convicts, although it seems to be true that there is a higher crime rate among former prisoners than there is among non-prisoners.

We are impressed by certain facets of the continental approach to the question of pre-trial detentions. Basically, a person charged with crime is entitled to liberty until proven guilty. He may be detained only if definite facts prove that he is likely to flee, to tamper with the evidence, or to commit dangerous acts. When such facts are established, he may be detained, and no amount of bail can procure his release. This is as it should be, for surely the money incentive of an insurance company bond is not likely to diminish the danger that emanates from him, especially as regards the propensity to commit another crime.

We recommend a similar statutory solution. However, we hope that special care is exercised in imposing upon the prosecution a severe standard of proving dangerous criminal propensities on the part of an arrested person sought to be preliminarily detained (*e.g.*, "clear, cogent and convincing evidence that he is likely to commit a felony").

We urge the adoption of the continental approach in still one other respect : if, for the convenience of the government, and for the sake of law enforcement, a preliminary detention has been imposed, and the defendant is subsequently acquitted, he ought to be compensated, as is the practice in continental law. Such compensation should be at least at the same rate as is provided for other citizens who render services for the good of the administration of justice, *e.g.*, jurors.

Lastly, we recommend that, following the practices in some continental countries, persons sentenced to imprisonment be given credit for time spent in detention pending trial, within the sound discretion of the sentencing judge, keeping the purposes to be served by imprisonment in mind.

APPENDIX A

Provisions on Material Requirements for Permissibility of Preliminary Detention

France's Code de Procédure Pénale :

Article 131

> If the accused is in flight or if he resides outside the territory of the Republic, the examining magistrate, after advice of the prosecuting attorney, may issue a warrant of arrest against him if the act charged will support a penalty of correctional imprisonment or a more serious punishment.

Article 135

The examining magistrate may issue a warrant of confinement only after interrogation and if the offense is subject to a punishment of correctional imprisonment or a more serious punishment.
The agent charged with the execution of the warrant for confinement shall deliver the accused to the superior in charge of the jail, who shall deliver to him a receipt for the delivery of the accused.

Article 137

Detention pending trial is an exceptional measure. When it is ordered, the following rules must be observed.

Germany's Strafprozessordnung :

§ 112. Permissibility of Preliminary Detention

I. Preliminary detention may be ordered against the accused if he is strongly suspected of the act and if there exists a ground of arrest (sub. II and III). It may not be ordered if it is disproportionate to the significance of the case or to the punishment or measures of prevention and reform likely to be imposed.

II. A ground of arrest exists if, on the basis of definite facts:

1. it is established that the accused has fled or is in hiding.

2. considering the circumstances of the individual case, especially the situation of the accused and the factors speaking against a flight, there is danger that the accused will avoid the proceedings against him (danger of flight), or

3. the accused's intention is discernible

(a) to destroy, alter, remove, suppress or falsify evidence,

(b) to improperly influence co-defendants, witnesses or experts, or

(c) to cause others to do so,

and if, therefore, there exists the danger that the ascertainment of the truth will be impeded (danger of obscuring the proofs).

III. As against accused persons strongly suspected of a major crime against morality and decency, in accordance with § 173, subs. I, or §§ 174, 175a, 176 or 177 of the Criminal Code, there also exists a ground of arrest when definite facts support the danger that the accused, before final conviction, will commit a further major crime of the designated kind, and that the preliminary detention is necessary to avert the threatening danger.

IV. As against accused persons strongly suspected of a major crime against life, in accordance with §§ 211, 212 or 220a, sub. I, no. 1, of the Criminal Code, preliminary detention may be ordered even if there is no ground of arrest under subs. II and III.

§ 113. Limitation of a Preliminary Detention

I. If the act is punishable only by imprisonment up to six months, by confinement in a jail or by fine, cumulatively or alternatively, preliminary detention may not be imposed by reason of danger of obscuring the proofs.

II. In such cases, preliminary detention may be imposed by reason of danger of flight only if the accused :

1. has previously avoided the proceedings against him or has made preparation for flight,
2. has no fixed place of residence or abode, or
3. cannot identify himself.

III. The limitations of subs. II are not applicable if the accused is being suspected of an act which may lead to the imposition of confinement in a workhouse.

Dutch Code of Criminal Procedure :

Article 64 :

An order to detain may be issued only if the accused is strongly suspected and if, moreover, definite facts show that there is a danger of flight, or that there is an important reason of public security requiring immediate detention. The order may be issued :

(a) in case of a felony or misdemeanor which belongs to the jurisdiction of the regular courts at first instance and which, under the relevant legal provision, is punishable by imprisonment, provided the accused does not have a fixed place of residence or abode within the country;

(b) in case of a felony or misdemeanor which, under the relevant legal provision, is punishable by four or more years of imprisonment; or in case of . . . .

[There follows a list of other crimes, strong suspicion of which may justify preliminary detention].

Main provisions of German Law concerning indemnification for unjustly suffered preliminary detention (Gesetz betreffend die Entschädigung für unschuldig erlittene Untersuchungshaft), Law of July 14, 1904, [1904] RGBL. 321 :

§ 1(1) Persons who have been acquitted or against whom charges have been dismissed by a judgment of a criminal court, may request indemnification from the treasury for preliminary detention actually served, when their innocence has been proven or when the proceedings show that no probable cause exists against them.

(2) Apart from the person detained, his legal dependents are entitled to indemnification.

(3) No claim for indemnification exists if the judgment has imposed commitment to an institution for cure and care.

(4) For the purposes of this statute, temporary commitment equals arrest and preliminary detention, the person temporarily committed equals the person detained, and the order of commitment equals the order to arrest. *Nevertheless, a claim for indemnification does not exist when the public interest, regardless of the nature of the offense, required temporary commitment.*

§ 2(2) No claim for indemnification exists, when the person detained has intentionally caused his preliminary detention or when the measure was due to his gross negligence.

(2) A claim for indemnification may be dismissed when the offense that was the subject of the investigation, committed by the person detained, showed considerable dishonesty or immorality or had been committed in a state of intoxication precluding criminal liability or when it appears from the circumstances of the offense that the person detained had prepared the perpetration of a felony or misdemeanor.

(3) The claim may also be dismissed when the person detained, at the time of his detention, had been dispossessed of his civil rights or was subject to police surveillance or when the person detained had been subject to an order of confinement in a workhouse in a period preceding the detention by not more than two years. The same applies when the person detained had been subject to a sentence of confinement in a penitentiary and it is less than three years ago that he served his sentence.

§ 3(1) Object of the damages to be awarded is the financial damage suffered by the preliminary detention.

§ 4(1) The court decides on the treasury's duty to pay damages at the same time it acquits the person detained, by separate ruling.