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THE DIFFERENT INTERDEPENDENCIES AND CONNECTIONS IN CRIMINAL PROCEDURE LAW, SPECIFICALLY BETWEEN PRETRIAL DETENTION AND BAIL FROM A CIVIL AND A COMMON LAW POINT OF VIEW: A SWISS AND AMERICAN COMPARATIVE LAW ANALYSIS

*Nathalie Gadola-Duerler**
*Jennifer E. Payne***

I. INTRODUCTION

A common goal among civilized societies is to curb criminal activity. Along with curbing criminal activity, societies hope to protect their citizens. These goals can be met through pretrial detention, which involves holding an individual pending his or her trial.

The reason that accused individuals are held prior to their trials is to protect society from further criminal activity. By holding certain individuals, the government protects its citizens from any criminal activity in which the accused could engage. This gives the government a valid reason to curtail the rights and liberties of the individual, while furthering the protection of the many.¹ With increasing criminal activ-

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1. *Schall v. Martin*, 467 U.S. 253, 264, 274, 281 (1984) (holding that preventing crime

ity in today's society,² there is a growing need for pretrial detention. If pretrial detention is properly used, it could also become a further deterrent to some who consider criminal activity.

A. *Criminal Procedure in Switzerland and the United States*

1. Switzerland

The various criminal procedure provisions in Switzerland come under the province of the cantons.³ A canton is the equivalent of a state in the United States.⁴ The statutes that define criminal procedure are different in the various cantons. However, there are limitations established by the Swiss Constitution,⁵ such as due process and civil rights. An individual's procedural rights are guaranteed by the uniform minimum standard created by these limitations.⁶ Further, articles 5 and 6 of the 1950 European Convention on Human Rights,⁷ which deal with criminal procedure, have priority over any canton's legislation.⁸

Swiss criminal procedure is typically divided into three phases: the

is a legitimate state interest that is regulatory in nature and will justify a deprivation of someone's liberty).

2. "In 1990, 2.3 million Americans were victims of 'violent crime,' . . ." LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 451 (1993).

3. The cantons include: Zurich, Berne, Lucerne, Uri, Schwyz, Unterwald (Upper and Lower), Glarus, Zug, Fribourg, Solcure, Basel (City and Rural), Schaffhausen, Appenzell (both Rhodes), St. Gall, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchatel, Geneva, Jura. BUNDESVERFASSUNG [CONSTITUTION] art. 1 (Switz.), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1994) [hereinafter SWISS CONST.].

4. Like states in the United States, the cantons have their own constitution. Article 3 of the Swiss Constitution states:

The Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution and, as such exercise all rights which are not entrusted to the federal powers.

SWISS CONST., *supra* note 3, art. 3.

"Canton" will be used in relation to Switzerland and its "state" system, and "state" will be used to refer to the U.S. "state" system.

5. Article 5 of the Swiss Constitution provides:

The Confederation shall guarantee the cantons their sovereignty within the limits set forth in article 3, their constitutions, the freedom and the rights of the people, the constitutional rights of the citizens as well as the rights and prerogatives conferred upon the authorities by the people.

SWISS CONST., *supra* note 3, art. 5.

6. Under these limitations, an individual's liberty rights are guaranteed by the Constitution. *See* SWISS CONST., *supra* note 3, art. 4. Some of these rights, however, remain unwritten.

7. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Human Rights Convention].

8. MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.4(B)(1) (Kenneth R. Redden et al. eds., 4th ed. 1989).

investigation stage,⁹ the inquisition and accusation stage,¹⁰ and the trial stage.¹¹ The legal principles imposed by the Swiss Constitution require that the canton prosecute the individual as soon as there is sufficient evidence to support a suspicion that a criminal offense occurred. The prosecutor cannot plea bargain with the accused.¹² "The trial must be based exclusively on the indictment and must end either in a conviction or in a clear and unconditional acquittal."¹³ As in the United States, the individual is presumed innocent. Although not codified, this presumption is considered as part of the law. Similar to the U.S. exclusionary rule, Swiss procedural laws require that any evidence seized illegally must be excluded from the trial.¹⁴

The government must provide the accused with all the details of the pending charges.¹⁵ Along with providing detailed information, the government must also give the accused open access to all records compiled during the investigation. As in the U.S. system, the one charged with a crime can choose his or her own counsel.¹⁶ If the accused cannot pay for a defender, or if the individual chooses not to

9. This stage is conducted by the police. They investigate the crime to establish if charges need to be brought. *Id.* § 1.4(B)(2).

10. This stage is conducted by the public prosecutor. The public prosecutor is also called the district attorney and has a similar function to the district attorney as found in the United States. *Id.*

11. The trial system in Switzerland differs from that in the United States. In many European countries, the judge has a fact-finder role. For instance, a European judge will ask more questions of the witnesses and will examine the evidence in greater detail. Abraham C. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 242 n.7 (1977). See also GLANVILLE WILLIAMS, *THE PROOF OF GUILT* 16 (2d ed. 1958); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978). Whereas, in the United States, "[t]he judge functions as an impartial arbiter." Christopher L. Blakesley & R. Craig Curtis, *Criminal Procedure*, in *INTRODUCTION TO THE LAW OF THE UNITED STATES* 336 (David S. Clark & Tugrul Ansary eds., 1992).

In addition, because "most courts in Switzerland are composed of professional as well as of lay judges, the idea of jury trials has never prevailed. Only ten of the 26 Cantons have jury trials, which usually are reserved for major felonies." MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 8, § 1.4(B)(2). This lack of a jury system is, of course, different in the United States. In the United States, the requirement of a jury trial is found in the Constitution. U.S. CONST. amend. VI.

12. MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 8, § 1.4(B)(2). The fact that the Swiss system does not allow plea bargaining supports the authors' contentions that the Swiss system does more to protect society as a whole. Plea bargaining is heavily relied upon by the U.S. system, sometimes to the detriment of society. DONALD L. CARPER ET AL., *UNDERSTANDING THE LAW* 131-32 (1991).

13. MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 8, § 1.4(B)(2).

14. *Id.*

15. *Id.*

16. *Id.*

hire one, the court must provide a lawyer in certain situations involving a penalty of at least one year in prison, or if the defendant is deaf, mute, or mentally incompetent. Additionally, the Swiss system provides that the accused cannot be forced to give evidence that might incriminate him or herself.¹⁷

The courts' jurisdiction depends upon the gravity of the indicted offense. An individual judge will deal with cases involving slight infractions and minor misdemeanors.¹⁸ For greater offenses, the county court hears the case. This court "sits in panels of three or five judges."¹⁹ The cantonal courts, in addition to acting as a court of appeal, hear the most serious of all cases. There are various provisions allowing for appeal from these different courts.²⁰ However, the details of these provisions are not necessary for a comparison of pretrial detention.

2. The United States

Many of the criminal procedure laws in the United States are the same as in Switzerland. In the United States, accused individuals must be afforded due process²¹ and civil rights.²² Like the Swiss system, these rights stem from the Constitution.²³ In both countries, "penal law and constitutional law are so intertwined . . . that one cannot understand criminal procedure without understanding certain aspects of constitutional and penal law."²⁴

The United States also has three phases in the criminal process. These phases include the investigation, the accusation, and the trial.²⁵ Additionally, as in Switzerland, the individual is presumed innocent.²⁶

17. *Id.* This concept of protection from self incrimination is also found in the U.S. Constitution. The Fifth Amendment provides that no one "shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

18. MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 8, § 1.4(B)(2).

19. *Id.*

20. *Id.*

21. U.S. CONST. amends. V & XIV.

22. "The principal guarantees for individual rights in the U.S. Constitution are, . . . , those contained in the Bill of Rights - the first ten amendments ratified in 1791. . . . [T]he Bill of Rights, as such is binding only upon the Federal Government" not the states. NORMAN REDLICH ET AL., CONSTITUTIONAL LAW 321-22 (2d ed. 1989). After the Civil War, with the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, "the federal Constitution began to protect individuals against the states." ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION 16 (1991).

23. See *supra* notes 5-6 and accompanying text.

24. Blakesley & Curtis, *supra* note 11, at 334.

25. RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE 1001-1121 (7th ed. 1989). See also *supra* notes 9-11 and accompanying text.

26. Taylor v. Kentucky, 436 U.S. 478 (1978); Coffin v. United States, 156 U.S. 432, 453 (1894). See also *supra* note 14 and accompanying text.

Both countries utilize the exclusionary rule to prevent illegally obtained evidence from being used at trial.²⁷ Also, a common element between the countries is that counsel must be provided in most situations.²⁸

A common understanding in both countries is that the state has a greater advantage over the individual.²⁹ To protect the individual from over reaching by the government, both systems have developed protections that are necessary to give the individual a fair chance.³⁰ The preventive detention statutes further this fair chance, as seen in detailed provisions that must first be met before someone accused of a crime is detained.

B. Why Compare the Criminal Procedure Law of These Two Countries?

The knowledge and comprehension of foreign laws is necessary and useful from different points of view. International relations and countries' growing interdependencies have become very important in the last few decades.³¹ Knowing that there are similarities, while having the understanding to recognize the differences, can aid foreign relations.

No legal order is completely autonomous.³² This is especially true for Western Europe and Switzerland.³³ Although the increasing num-

27. *Boyd v. United States*, 116 U.S. 616 (1886); *Weeks v. United States*, 232 U.S. 383 (1914). See also *supra* note 14 and accompanying text.

28. U.S. CONST. amend. VI. See also *supra* note 16 and accompanying text.

29. Blakesley & Curtis, *supra* note 11, at 336.

30. *Id.* at 335.

31. Karel van Wolferen, *Will the New World Trade Organization Work? No Chance-East and West Trade Won't Meet*, WASH. POST, June 26, 1994, at C3.

32. The Permanent Court of International Justice stated that:

[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

S.S. "Lotus" (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 27). This statement shows that countries must be concerned with international law in order to achieve desired results in their relations with other countries.

33. One example of how Switzerland affects the countries of the European Union (EU) in Western Europe is in regard to its insider-trading laws. The effects of possible insider trading occurring unchecked within Switzerland led Germany to establish insider-trading laws. Stephen J. Leacock, *In Search of a Giant Leap: Curtailing Insider Trading in International Securities Markets by the Reform of Insider Trading Laws under European Union Council Directive 89/592*, 3 TULSA J. COMP. & INT'L L. 51, 54 (1995). Likewise, Switzerland has amended its insider-trading laws in response to concerns and criticisms voiced by other countries. *Id.* at 53 n.13. This provides an example of how countries are affected by the legal orders of surrounding countries and, thus, are not entirely autonomous.

bers of international relationships look for an adjustment of all legal orders, standardization is not possible.³⁴ Due to a lack of overall standardization, basic understanding of foreign legal orders is often necessary. From an economic point of view, another fruitful advantage of comparison is that it makes sense to observe the various legislations of different countries.³⁵ By understanding a foreign system and its legislation, one can develop new ideas and concepts that will strengthen one's own.

In criminal law, the mobility of the population,³⁶ coupled with the development of international relations,³⁷ has played an important role in demonstrating that there is a need to understand and compare the laws of nations. Today's internationalized world requires that criminal lawyers deal more and more with frontier-crossing facts,³⁸ since so many different situations can arise from not knowing the differences between legal systems.

Legal systems reflect the social, economical, and cultural order of a country and must adjust to the changing circumstances.³⁹ In criminal law, the population is more sensitive to those changes than in any other area of the law. Some crimes that were severely punished in the past have become less important today and vice versa.⁴⁰ The evolutionary tendencies in criminal law are an indicator of the cultural level of the

34. One example of an adjusting legal order is the EU. The laws of the EU member states are often aimed at the same goal, but are structured differently. *See generally* Leacock, *supra* note 33, at 57 nn.33-34 (discussing, in general, the differences between the insider-trading laws of Great Britain and France, two countries that are part of the EU).

35. One example of taking advantage of various beneficial laws of other countries is seen in Switzerland. Its laws protect banks and banking clients, making it a desirable place to keep money.

36. The mobility of the population can be seen in tourism and in other countries' reliance on foreign workers.

37. The development of international relations is seen through the growth of world trade, multinational companies, and economic communities. One example of growth in world trade is seen in the General Agreement on Tariffs and Trade and the emerging World Trade Organization. *See generally* John H. Barton & Barry E. Carter, *International Law & Institutions for a New Age*, 81 GEO. L.J. 535 (1993); BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 424-25 (2d ed. 1995).

38. ANDREAS F. LOWENFELD, *CONFLICT OF LAWS* 853-985 (1992).

39. NIKLAUS SCHMID, *STRAFVERFAHREN UND STRAFRECHT IN DEN VEREINIGTEN STAATEN: EINE EINFUEHRUNG [CRIMINAL PROCEDURE LAW AND CRIMINAL LAW IN THE UNITED STATES]* 3-4 (2d ed. 1993).

40. For example, under the Eighteenth Amendment, it was once illegal to consume or possess alcohol in the United States. U.S. CONST. amend. XVIII (repealed 1933). This amendment was repealed by U.S. CONST. amend. XXI, and today, it is common for Americans to consume alcohol.

An example of a crime that is no longer important in Switzerland is adultery. Furthermore, actions that were not once crimes, but now are, include *Wirtschaftskriminalitaet*, a so-called business delinquency. SCHMID, *supra* note 39, at 4.

people.

A comparative analysis can help in reviewing one's own legal system and adopting different approaches to achieve a better system. Due to growing international relations, there is a movement for change. This evolution would involve progress towards a greater similarity between foreign laws, both in the substantive and criminal procedural law area.

There are many different reasons why we should try to compare a continental civil law country like Switzerland with a common law country like the United States: similarities in social, economical, and constitutional structure. The United States, like Switzerland, has a federal system and a state system. Both countries are liberal and constitutional. It is well known that the first Swiss Constitution, written in 1848, was influenced by the U.S. Constitution of 1787.⁴¹ Economic standards show that both countries are among the most industrialized, developed, and richest in the world.

There are differences to keep in mind. First, the United States belongs to the Anglo-American common law system. Switzerland belongs to the civil law system that has its roots in the Roman tradition.⁴² Even if both countries are comparable in their constitutional system, the fact that the United States has 258 million people, with fifty states,⁴³ while Switzerland has 6.5 million people and twenty-six cantons⁴⁴ makes a huge difference in the social structure. Additionally, the United States is much more independent than Switzerland, due to the fact that Switzerland is surrounded by the rest of Europe. If we generalize, Europe is also attempting to intensify human rights,⁴⁵ whereas the United States has protected many of these rights for years through the U.S. Constitution and the development of constitutional law.

C. Seizure of Persons: Arrest and Pretrial Detention

The goal of this paper is to demonstrate how both countries approach one of the most important topics in criminal procedure law. Specifically, the pretrial detention will be discussed, with a comparison

41. JOSEPH BOESCH, VON DER AUFLKAERUND BIS ZUR GEGENWART [FROM THE ENLIGHTENMENT TO THE MODERN ERA] 27 (1977).

42. JOHN H. MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 5 (1994).

43. Carl Haub & Martha F. Riche, *Population by the Numbers: Trends in Population Growth and Structure*, in BEYOND THE NUMBERS: A READER ON POPULATION, CONSUMPTION, AND THE ENVIRONMENT 107 (Laurie A. Mazur ed., 1994).

44. DAS GROSSE FISCHER LEXIKON IN FARBE [FISCHER'S ENCYCLOPEDIA] 186 (1994). See generally *supra* note 3.

45. See generally European Human Rights Convention, *supra* note 7.

as to which system meets the purported goal of protecting society. The first step in this comparison is the above discussion, providing a rough idea of criminal procedure in both countries. Following this understanding is an analysis of the different procedures that allow the accused to be held before any finding of guilt is made.

II. THE APPLICATION OF CRIMINAL PROCEDURE AS A STATE AND A FEDERAL ISSUE AS IT RELATES TO PRETRIAL DETENTION IN BOTH COUNTRIES

Criminal procedure law is primarily regulated by the laws of the cantons in Switzerland, and is also regulated by the laws of the states in the United States. In Switzerland, there are numerous different cantonal criminal procedure law codes⁴⁶ and only two federal codes,⁴⁷ compared to fifty state provisions and the federal Bail Reform Act⁴⁸ in the United States. Like the United States, constitutional limitations play a significant role in the legal regulations of the criminal justice process in the cantons. The constitutional limitations supplement the cantonal criminal procedure law, as is true of certain aspects of state and federal constitutions in the United States. The various cantonal constitutions and the Swiss Federal Constitution⁴⁹ provide important individual guarantees such as the freedom of liberty, legal equality, and prohibition of arbitrariness.⁵⁰

A. Switzerland

1. Compulsory Process Measures

To imagine Swiss criminal procedure law without any compulsory measures would be impossible. These actions by the government force the individual to have a certain behavior, procure and conserve pure evidence, and guarantee the later execution of the judgment.⁵¹ The goal of criminal procedure law is to find the substantive truth and to punish the culpable, while freeing the innocent.⁵² To achieve these

46. See generally *supra* note 3 (listing the cantons of Switzerland).

47. See generally BUNDESGESETZ UEBER DIE BUNDESRECHTSPFLEGE [CODE OF THE CRIMINAL PROCEDURE OF THE FEDERATION] (Switz.); MILITAERSTRAF-GERICHTSORDNUNG [THE MILITARY CRIMINAL COURT ORGANIZATION LAW] (Switz.).

48. The Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156 (1988).

49. The Swiss legislature (*Legislative*) is revising the federal constitution in 1996. *Vergassungsreform [Revision of the Constitution]*, BASLER ZEITUNG [BASEL JOURNAL] (Basel, Switzerland), Dec. 30, 1995, at 1.

50. Many of the rights found in the cantonal constitutions are "unwritten." This is similar to the penumbra of rights that are found in the United States Constitution as developed by the case law in this country. See generally *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

51. NIKLAUS OBERHOLZER, GRUNDZUEGE DES STRAFPROZESSRECHTS [ESSENTIAL ASPECTS OF CRIMINAL PROCEDURE LAW] 306 (1994).

52. *Id.*

goals, compulsory measures are necessary and unavoidable to secure all the evidence. One example of these compulsory measures is the pretrial detention known as the investigation detention.⁵³

2. Pretrial Detention⁵⁴

One of the most important compulsory measures⁵⁵ in Switzerland is the pretrial or preventative detention. The accused is deprived of his or her liberty to assure the enforcement and execution of the later judgement.⁵⁶ There are two different kinds of pretrial detentions. The first is a detention to secure the accused or detainee during the time he or she is arrested until the time the trial starts. This is the so-called investigation detention,⁵⁷ which takes place before the accused is found guilty or innocent. The purpose is to secure the enforcement of the punishment after the individual has been found guilty.

The other kind of detention is the security detention, which operates to detain the accused after the trial until the judgment is finalized.⁵⁸ We will only focus on the investigation detention because the legal status is the same for both kinds of detention.⁵⁹ Furthermore, we are limiting our discussion to investigation detention because the goal of this work is to compare the pretrial measures of both countries.

3. Investigation Detention

The accused suffers a loss of liberty as soon as he or she is held in the so-called pretrial investigation detention. The disposition of this detention constitutes one of the most important interventions into the personal freedom that is protected by the constitution.⁶⁰ For this reason, several requirements must be fulfilled. The measure must be based on a legal statute;⁶¹ it must be for the public interest; and it must be proportional.⁶² One further requirement for the detention is that there must be a reason, either general or special. One such general reason is

53. F. CLERC, LA DETENTION AVANT JUDGEMENT [THE DETENTION BEFORE THE JUDGEMENT] 391 (1970); OBERHOLZER, *supra* note 51, at 306.

54. Because criminal procedure in Switzerland largely stems from cantonal law, our discussion utilizes the laws of four different cantons: Zurich, St. Gall, Basel City, and Aargau.

55. Judgment of 1962, 61 *Blaetter fuer Zuercherische Rechtsprechung* [ZR] 174 (Switz.); Judgment of 1960, 59 *Blaetter fuer Zuercherische Rechtsprechung* [ZR] 77 (Switz.).

56. OBERHOLZER, *supra* note 51, at 307.

57. *Id.*

58. *Id.*

59. PETER NOLL, STRAFPROZESSRECHT [CRIMINAL PROCEDURE LAW] 73 (1977).

60. As discussed earlier, these are unwritten constitutional rights. See *supra* note 6.

61. MARTIN SCHUBARTH, DIE RECHTE DES BESCHULDIGTEN IM UNTERSUCHUNGSVERFAHREN, BESONDERS BEI UNTERSUCHUNGSHAFT [THE RIGHTS OF THE ACCUSED IN THE PROCEDURE OF INVESTIGATION, SPECIFICALLY IN THE PRETRIAL DETENTION] 33 (1973).

62. *Id.* at 34.

suspicion,⁶³ while special reasons include collusion, danger of escape, or danger of repeated criminal activity.⁶⁴ Both general and special reasons must be fulfilled cumulatively to justify the detention.⁶⁵

a. The general reason: suspicion

There must exist concrete clues or indications that show the accused perpetrated a precise punishable act or crime.⁶⁶ The simple possibility or vague presumption of such an act is insufficient. There must exist enough evidence to justify condemnation.⁶⁷ At the beginning, concrete indications are sufficient. However, during the investigation detention, these indications must rise to the standard of "beyond a reasonable doubt." If this is not the case, and if the investigation does not uncover enough circumstantial evidence for finding the accused guilty, the suspicion loses its foundation. The accused must then be set free.⁶⁸

b. The special reasons

In addition to the general reason, there are also special reasons for pretrial detention. Swiss criminal procedure requires not only a general reason of an urgent suspicion, but also some special reasons. Examples of special reasons include a danger of collusion, a danger of escape, or a risk of continuation or repetition of crime. The goal of this requirement is to protect the accused.

i. Danger of collusion

Collusion is any action in which the accused tries to endanger the investigation.⁶⁹ In other words, if the accused were free, he or she may attempt to thwart or hamper the goal of finding the true and clear facts of the case. Typical acts of collusion are: covering one's traces, influencing witnesses, and destruction or falsification of evidence.⁷⁰ To find that collusion is possible, the accused must demonstrate some equivalent action or give some indication that would imply such actions.⁷¹ Simple lies about the criminal act or denial of information do

63. OBERHOLZER, *supra* note 51, at 306.

64. *Id.*

65. *Id.*

66. *Id.*

67. Judgment of 1990, 116 Ia Entscheidungen des Schweizerischen Bundesgerichts [BGE] 147f (Switz.).

68. Judgment of 1986, Gerichtsverwaltungs Praxis [GVP] 60 (Switz.).

69. OBERHOLZER, *supra* note 51, at 308.

70. *Id.*

71. Judgment of 1991, 117 Ia Entscheidungen des Schweizerischen Bundesgerichts [BGE] 261 (Switz.).

not amount to collusion.⁷² Once the government has gathered enough evidence against the accused, the investigation can no longer be endangered by collusion.⁷³

ii. Danger of escape

This special detention reason operates when there is a risk that the accused could escape from the criminal proceedings. However, not every risk is sufficient to detain a person.⁷⁴ The probability of escape must be demonstrated. Risk of escape can occur if the accused has no domicile, no relatives, and no job in Switzerland.⁷⁵

iii. Risk of continuation or repetition of crime

Continuation of criminal activity can also be a detention reason. It is necessary to balance whether the possibility of repeated crime has heavier consequence on society than the suspension of a person's liberty during the detention.⁷⁶ The risk of continuation must be obvious,⁷⁷ such as when the accused commits another, similar criminal act soon after the investigation begins.⁷⁸

B. *The United States*

The United States has begun to swing toward a greater utilization of pretrial detention.⁷⁹ However, the prevalent system in the United States is still the bail system. As such, the U.S. pretrial detention provisions will be discussed in greater detail below.

C. *Execution of the Detention*

In the United States, a criminal proceeding starts with the arrest of the accused. While under arrest, the accused will be held by the police. But who, really, is allowed to detain someone? Why can a person be detained at the cost of his or her personal liberty?

Early English law defined who could detain alleged criminals. In England, compulsory measures like detention were defined as search and seizure. These were only allowed upon meeting two requirements.

72. Judgment of 1981, *Gerichtsverwaltungs Praxis* [GVP] 34 (Switz.).

73. OBERHOLZER, *supra* note 51, at 309.

74. Judgment of 1977, *Gerichtsverwaltungs Praxis* [GVP] 33 (Switz.).

75. Judgment of 1969, 95 I Entscheidungen des Schweizerischen Bundesgerichts [BGE] 206 (Switz.).

76. OBERHOLZER, *supra* note 51, at 310.

77. Judgment of 1982, *Gerichtsverwaltungs Praxis* [GVP] 53 (Switz.); Judgment of 1983, *Gerichtsverwaltungs Praxis* [GVP] 68 (Switz.).

78. Judgment of 1990, 116 Ia Entscheidungen des Schweizerischen Bundesgerichts [BGE] 420 (Switz.); *accord* Judgment of 1991, 80 Praxis des Bundesgerichts (Basel) 197 (Switz.).

79. Blakesley & Curtis, *supra* note 11, at 355.

The first condition was a warrant issued by a magistrate and supported by an oath or affirmation. The second requirement was probable cause⁸⁰ that the accused committed the crime.⁸¹ It is quite evident that these two conditions are still important today in the United States because they protect the citizen against unjust, compulsory measures.⁸² In Switzerland, the arrest ensues with a written and established warrant.⁸³ The accused must know of what crime he or she is suspected and which detention reasons are applicable.⁸⁴

In both countries, private citizens are allowed to detain the accused until the police arrive, if he or she were caught in the commission of a crime.⁸⁵ However, in the United States, you must have what constitutes a general probable cause, while Switzerland allows a weaker form of suspicion.⁸⁶ But one needs to consider that the level of suspicion for both countries is very similar and is hardly definable.

III. THE BAIL SYSTEM OF THE UNITED STATES AND SWITZERLAND

As discussed above, proceedings start with an arrest. Originally, to secure attendance at the criminal proceeding, there were two possibilities.⁸⁷ The accused had to be either detained or offered bail to secure his or her attendance at the trial.⁸⁸ This second possibility was very important in historic England.⁸⁹ As we will see in the discussion below, in the United States, this bail possibility is still greatly utilized.

A. *The United States*

The bail system in the United States is aimed at protecting society.⁹⁰ There are both federal and state provisions, depending on whether it is a federal or state crime. The federal Bail Reform Act of 1984 (federal Act)⁹¹ provides the relevant terms for the granting of

80. "Probable cause exists where the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." *Draper v. United States*, 358 U.S. 307, 333 (1959).

81. SCHMID, *supra* note 39, at 100-04.

82. See generally WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* §§ 3.3, 3.4 (1985); YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 267-71, 293-303 (1980).

83. Judgment of 1981, *Gerichtsverwaltungs Praxis [GVP]* 33 (Switz.).

84. SCHMID, *supra* note 39, at 104.

85. OBERHOLZER, *supra* note 51, at 320.

86. *Id.* at 306.

87. SCHMID, *supra* note 39, at 108.

88. *Id.*

89. *Id.*

90. S. REP. NO. 225, 98th Cong., 1st Sess. 3 (1983).

91. 18 U.S.C. §§ 3141-3156 (1994).

bail for federal crimes. State bail provisions vary from this federal statute, and further vary among the different states. In some states, such as Texas and California, the bail provisions are found in the state constitution.⁹² In other states, bail is provided for by statute.⁹³ One common element among these provisions is that bail may be denied. The reasons and terms for denying bail vary from charges such as murder⁹⁴ to instances of repeated offenses.⁹⁵

1. The Federal Bail Reform Act of 1984

The goal of bail is to protect an individual's freedom while protecting society's right to be free from crime. The individual's rights and protections found in the U.S. Constitution often collide with the interests of society in being protected from those persons committing crimes.⁹⁶ One provision that has withstood scrutiny by the U.S. Supreme Court is the federal Act.⁹⁷ The landmark case that evaluated the constitutionality of this provision is *United States v. Salerno*.⁹⁸ There, the Court reviewed the Bail Reform Act and scrutinized whether it violated the Fifth and Eighth Amendments.⁹⁹

The provisions of the federal Act allow a judicial officer to order the detention of a person before trial.¹⁰⁰ The judicial officer, who must be "authorized to order the arrest of a person[,] . . ."¹⁰¹ must consider various factors to determine if detention is appropriate.¹⁰²

92. TEX. CONST. of 1876, art. I, § 11a (West Supp. 1996); CAL. CONST. of 1879, art. I, § 12 (West Supp. 1996).

93. See generally D.C. CODE ANN. § 23-1321 (Supp. 1995); WIS. STAT. ANN. § 969.035 (West 1985 & Supp. 1995).

94. See, e.g., CAL. CONST. of 1879, art. I, § 12(b) (West Supp. 1996). A recent example of denial of bail for an individual charged with two counts of first degree murder is the detention of O.J. Simpson. Paul Pringle & Shante Morgan, *O.J. in Custody, At Last: Bizarre Chase Ends in Standoff at Estate*, SAN DIEGO UNION-TRIB., June 18, 1994, at A1. Mr. Simpson was held for sixteen months during his trial. David L. Lewis et al., *O.J.'s Released and Back Home: He Telephones Nicole's Parents*, DAILY NEWS (New York), Oct. 4, 1995, at 2. He was eventually acquitted of all charges. *Id.* Mr. Simpson received no compensation from the state for his incarceration after he was found innocent. See generally *infra* part IV, A-B.

95. See generally *supra* note 3.

96. See Mark Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 339 (1990).

97. The Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156 (1994).

98. 481 U.S. 739 (1987).

99. *Id.*

100. 18 U.S.C. § 3141(a).

101. *Id.*

102. This role is the same as the judicial official's role in Switzerland. In both countries, it is the judicial official who makes the final determination whether an individual should be held in pretrial detention. Rudolf Tschumper, *Haft und Haftueberpruefung im aargauischen Strafprozess [Detention and Review of the Detention in the Criminal Procedure of the Canton*

A rebuttable presumption that detention is necessary may arise when certain elements are present.¹⁰³ The judicial officer presiding over the case will review three broad elements to determine if a rebuttable presumption has arisen. The first element to be reviewed, before a rebuttable presumption may arise, involves the nature of the crime and the extent of the sentence imposed for that crime. To determine if the first element is met, the judicial officer will review such criteria as: (1) whether the accused "had been convicted of a Federal offense"¹⁰⁴ that involves "a crime of violence[;]"¹⁰⁵ (2) whether the accused had been convicted of a crime that carried a life sentence or capital sentence;¹⁰⁶ (3) whether the accused had been convicted of a crime that carried at least a ten year sentence;¹⁰⁷ (4) whether the accused had previously been convicted of two or more crimes described above, provided the new charge is a felony;¹⁰⁸ and (5) whether the accused had been convicted of state charges that meet the above criteria. The second element that must be present is that the new offense "was committed while the person was on release pending trial for a Federal, State, or local offense[.]"¹⁰⁹ The final element that must be present before a finding of the rebuttable presumption in favor of detention can be made is that less than "five years ha[d] elapsed since the date of [a] conviction, or the release of a person from imprisonment" for the type of offense described in the first element, above.¹¹⁰

Not only may a rebuttable presumption arise, but the judicial officer may also order detention if there is "no condition or combination of conditions [that] will reasonably assure the appearance of the person . . . and the safety of any other person and the community"¹¹¹ is not assured. The factors that must be considered include: (1) "[t]he nature and circumstances of the offense charged[;]"¹¹² (2) "the weight of the evidence against the person;"¹¹³ (3) "the history and characteristics of the person[;]"¹¹⁴ and (4) "the nature and seriousness of the

Aargau], in Festschrift fuer Dr. Kurt Eichenberger Alt Bundesrichter, Band 42 [42 A Commemorative Publication for Dr. Kurt Eichenberger, Former Supreme Court Judge] 223 (1990).

103. 18 U.S.C. § 3142(e).

104. *Id.* § 3142(e)(1).

105. *Id.* § 3142(f)(1)(A).

106. *Id.* § 3142(f)(1)(B).

107. *Id.* § 3142(f)(1)(C).

108. *Id.* § 3142(f)(1)(D).

109. *Id.* § 3142(e)(2).

110. *Id.* § 3142(e)(3).

111. *Id.* § 3142(e).

112. *Id.* § 3142(g)(1).

113. *Id.* § 3142(g)(2).

114. *Id.* § 3142(g)(3).

danger to any person or the community that would be posed by the person's release."¹¹⁵ Thus, the federal Act is aimed at not only detaining, prior to trial, possible dangerous criminals, but also protecting society.¹¹⁶ This element of protecting society allows the government to curtail an individual's freedom and liberty.¹¹⁷ The government can also seek to detain a person prior to their trial if there is "a serious risk that such person will flee;"¹¹⁸ or "a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to [do the like to] a prospective witness or juror."¹¹⁹ If the judicial officer finds evidence of these potential situations, detention can be ordered.

To protect the rights of the individual accused of a crime, the federal Act requires that a hearing be held.¹²⁰ This hearing must be "held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance."¹²¹ If a continuance is sought, it can only be granted for five days or less and the accused must be detained during that time.¹²² At the hearing, the accused: (1) must be represented by counsel; (2) has the right to call witnesses and to cross-examine the government's witnesses; and (3) may "present information by proffer or otherwise."¹²³ During this pretrial detention hearing, the normal rules of evidence regarding the admissibility at trial do not govern.¹²⁴ A clear and convincing standard, not a "beyond a reasonable doubt standard", is required to determine if the accused must be detained.¹²⁵

In *United States v. Salerno*,¹²⁶ the U.S. Supreme Court upheld the federal Act in light of the constitutional right of substantive due process¹²⁷ and the right that bail not be excessive.¹²⁸ In a six to three decision, the Court concluded that the federal Act was not violative of a persons substantive due process rights.¹²⁹ Additionally, the Court determined that the federal Act did not amount to excessive

115. *Id.* § 3142(g)(4).

116. S. REP. NO. 225, *supra* note 90.

117. *See generally infra* notes 126-35 and the discussion of the *Salerno* case.

118. 18 U.S.C. § 3142(f)(2)(A).

119. *Id.* § 3142(f)(2)(B).

120. *Id.* § 3142(f).

121. *Id.* § 3142(f)(2).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. 481 U.S. 739 (1987).

127. U.S. CONST. amends. V & XIV.

128. U.S. CONST. amend. VIII.

129. *Salerno*, 481 U.S. at 751-52.

bail.¹³⁰

In evaluating a person's right to substantive due process, the Court first noted that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience.'"¹³¹ Further, by evaluating whether or not the federal Act could withstand a constitutional challenge, the Court applied a balancing test to determine if the individual's liberty interest was outweighed by the government's interest in protecting society.¹³² Noting that "the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest[.]"¹³³ the Court determined that the federal Act was established as a regulatory provision. This regulatory scheme was set up to prevent harm to the community, not to punish individuals charged with a crime.¹³⁴ Because the federal Act was regulatory in nature, the individual's liberty interest could be curtailed.¹³⁵ Clearly, the federal government may further its goal of protecting society by allowing certain individuals to be detained.

2. Selection of State Provisions

As mentioned above, the various bail provisions differ between the states. In numerous states, a hearing must be held to determine if denial of bail is appropriate.¹³⁶ "A pretrial detention hearing is a hearing before a court for the purpose of determining if the continued detention of the defendant is justified."¹³⁷ This pretrial hearing is designed to protect the individual's rights while furthering the goal of protecting society from dangerous individuals.

a. Washington, D.C.

The laws of Washington, D.C., are somewhat unique. These laws are passed by the federal Congress and have applicability only in

130. *Id.* at 752. The Court stated that the Eighth Amendment "says nothing about whether bail shall be available at all." *Id.*

131. *Id.* at 746 (citing *Rochin v. California*, 342 U.S. 165 (1952)).

132. *Id.* at 740. *See also* Miller & Guggenheim, *supra* note 96, at 351.

133. *Salerno*, 481 U.S. at 748.

134. *Id.* at 746.

135. *See generally id.* at 749. The Court noted that "as our cases hold, [an individual's liberty] right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *Id.* at 750-51.

136. "By the end of 1984, thirty-four states had express statutory provisions justifying detention based on a defendant's alleged dangerousness." Miller & Guggenheim, *supra* note 96, at 344.

137. WIS. STAT. ANN. § 969.035(5) (West 1985 & Supp. 1995).

Washington, D.C.¹³⁸ Many times, laws are passed for this area and are then incorporated into the federal system. One such law following this evolutionary process was the Federal Bail Reform Act of 1984.¹³⁹ The 1970 statute governing the District of Columbia and the application of bail was Congress' first "express use of predictions of dangerousness as the basis of detention"¹⁴⁰

Like the federal Act, the relevant statute governing Washington, D.C., allows a rebuttable presumption that detention is necessary in certain circumstances. This presumption will arise if there is a "substantial probability that the [accused]: (1) [c]ommitted a dangerous crime or a crime of violence[;] . . . (2) [h]as threatened, injured, intimidated, or attempted to threaten, injure or intimidate a law enforcement officer, an officer of the court, or a prospective witness or juror[;] . . . (3) [c]ommitted a dangerous crime or a crime of violence, . . . , and has previously been convicted of a dangerous crime or crime of violence which was committed while on release pending trial . . . ; or (4) [c]ommitted a dangerous crime or crime of violence while on release pending trial"¹⁴¹ Here, Congress chose to write the statute using "or", implying that for the Washington, D.C. statute, not all of the listed elements must be present.¹⁴² This is different from the federal Act, which uses the word "and", implying that all elements must exist.¹⁴³ The requirement difference giving rise to a rebuttable presumption shows that the federal government is, in a sense, more limited in its ability to curtail an individual's freedom.

b. Texas

The provision that deals with the granting or denying of bail in Texas is found in the Texas Constitution. This provision allows the denial of bail in certain situations when a person is accused of: (1) a felony less than capital after conviction of two or more felonies; (2) a felony less than capital and the new offense was committed while on bail for a prior, indicted felony; (3) a felony less than capital after a prior felony conviction and the new offense involves the use of a deadly weapon; or (4) "a violent or sexual offense committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony,"¹⁴⁴ A hearing must

138. U.S. CONST. art. I, § 8, cl. 17.

139. Miller & Guggenheim, *supra* note 96, at 346.

140. *Id.*

141. D.C. CODE ANN. § 23-1322(c)(1)-(4) (Supp. 1995).

142. See D.C. CODE ANN. § 23-1322(c)(3) (Supp. 1995).

143. 18 U.S.C. § 3142(e)(2).

144. TEX. CONST. of 1876, art. I, § 11a (West Supp. 1996).

be had to determine whether denial of bail is appropriate.¹⁴⁵ Additionally, the order denying bail must be made within seven calendar days from the time of incarceration.¹⁴⁶

c. Wisconsin

Different from Texas, Wisconsin's bail provisions are located within its statutory compilation. Specifically, the Wisconsin statute provides that a person may be denied release if they meet certain criteria. These criteria include: (1) that the individual is accused of committing certain types of offenses, specifically first degree murder or first degree sexual assault;¹⁴⁷ or (2) that the individual is "accused of committing or attempting to commit a violent crime and the person has a previous conviction for committing or attempting to commit a violent crime."¹⁴⁸ The Wisconsin criteria for detaining an individual are minimal compared to the elements that are required in the above discussed jurisdictions.¹⁴⁹

In Wisconsin, the district attorney can also request denial of release if there are no available conditions that will "adequately protect members of the community from serious bodily harm"¹⁵⁰ Again, the state government is utilizing the bail provisions to protect society from possible dangerous criminals. However, the rights of the accused must also be protected. To this end, a pretrial detention hearing must be held. This hearing can either take place at the preliminary hearing or must be held "within [ten] days from the date the defendant is detained or brought before the court"¹⁵¹ The government appears to be balancing the rights of the accused against the rights of society. In certain situations, the rights of society will outweigh those of the individual.

B. Switzerland

To deprive someone of liberty by putting him or her into pretrial detention is a huge intervention into the fundamental rights of a human being. This can only be ordered as an *ultima ratio*.¹⁵² Only if the purpose of the detention cannot be achieved in any other way, will the

145. *Id.*

146. *Id.*

147. WIS. STAT. ANN. § 969.035(2)(a) (West 1985 & Supp. 1995).

148. *Id.* § 969.035(2)(b).

149. See generally *supra* notes 101-25, 138-46 and accompanying text.

150. WIS. STAT. ANN. § 969.035(3)(c) (West 1985 & Supp. 1995).

151. *Id.* § 969.035(5).

152. OBERHOLZER, *supra* note 51, at 349.

conditions or requirements for the order of detention be given. There are cases where the same purpose can be achieved with a milder replacement measure¹⁵³ instead of a compulsory measure, and where it would not be in proportion to keeping the accused in detention.¹⁵⁴ Those replacement measures only represent a liberty restriction. One important replacement measure is the Swiss *Kaution*,¹⁵⁵ similar to bail in the United States. It is a so-called *Kann-Vorschrift*. This means that it is the judges discretionary decision.¹⁵⁶

An accused may ask for bail if there is only one detention reason — risk of escape.¹⁵⁷ If there exist other reasons to detain that individual, bail is not possible. This establishes that the bail system in Switzerland has another purpose and another level of importance than does the system in the United States. By paying the bail, the accused guarantees that he or she will not escape.¹⁵⁸ The amount of bail depends on the seriousness of the crime¹⁵⁹ and must be set high enough to prevent the accused from escaping.¹⁶⁰ The bail payment becomes the property of the canton if the accused escapes.

The only goal for the bail system in Switzerland is that the accused assures, through the payment, that he or she will assume all responsibilities and submit to the criminal procedure. The bail does not secure

153. Article 104 of the criminal procedure code of the canton St. Gall provides that the replacement measures include *Schriftensperre* (to impose a ban on certain documents), *Regelmaessige persoenliche Meldung bei einer Amtsstelle* (similar to probation in the United States, but occurs pre-conviction), and *Nichtverlassen eines bestimmten Ortes* (house arrest). GESETZ UEBER DIE STRAFRECHTSPFLEGE [CRIMINAL PROCEDURE LAW] art. 104 (1983) (Switz.).

154. Judgment of 1986, *Gerichtsverwaltungs Praxis* [GVP] 61 (Switz.).

155. The discussion on the *Kaution* is based on the relevant provisions found in the Zurich and St. Gall cantons.

156. Tschumper, *supra* note 102, at 21.

157. As criminal procedure is largely based on cantonal law, the exact reasons for granting bail will differ between cantons. Additionally, some cantons do not provide bail as a replacement measure and do not even consider bail as an option or item for discussion. NIKLAUS SCHMID, STRAFPROZESSRECHT: EINE EINFUEHRUNG AUF DER GRUNDLAGE DES STRAFPROZESSRECHTES DES KANTONS ZUERICH UND DES BUNDES [AN INTRODUCTION INTO THE BASICS OF THE CRIMINAL PROCEDURES IN THE CANTONS ZURICH AND IN THE SWISS FEDERAL LAW] 212 (2d ed. 1993). *See also* Judgment of 1962, 61 *Blaetter fuer Zuercherische Rechtsprechung* [ZR] 174 (Switz.); Judgment of 1960, 59 *Blaetter fuer Zuercherische Rechtsprechung* [ZR] 77 (Switz.); *but see* Judgment of 1983, *Verwaltungspraxis der Bundesbehoerden* [VPB] 105, 106 (Switz.).

158. OBERHOLZER, *supra* note 51, at 350.

159. GESETZ UEBER DIE STRAFRECHTSPFLEGE, *supra* note 153, arts. 100, 104. *See also* ZUERCHER STRAFPROZESSORDNUNG [CRIMINAL PROCEDURE LAW CODE OF THE CANTON OF ZURICH] §§ 78-79 (1981).

160. Judgment of 1979, 105 *Ia Entscheidungen des Schweizerischen Bundesgerichts* [BGE] 187 (Switz.).

the execution of the sentence. It is simply a warranty against escape.¹⁶¹

IV. CAN AN ACCUSED RECOVER COMPENSATION IN BOTH COUNTRIES?

A. *Switzerland*

Depriving someone of his or her liberty is a huge intervention into human life. For this reason, Swiss law requires three very important factors. First, there must be a statute that allows state action. Second, the action must be in the public interest. Last, but not least, the state action must be proportional. All three of these factors, including the necessary reasons for detention, must be fulfilled to put someone in pretrial detention.¹⁶²

There have been cases where it was unjustified or wrongful to deprive someone of his or her liberty. In these cases, the legal requirements, such as detention reasons were given, but the accused was later found innocent and the verdict was not guilty. As soon as the proceedings are quashed and the accused set free, we must determine whether the accused can ask for compensation and even for reparation. Basically, the accused has the right to ask for compensation for all of the damages caused to him or her during the detention.¹⁶³ For unjustified detentions, most of the criminal procedure codes that allow bail as a replacement measure offer compensation.¹⁶⁴ The courts that have competent jurisdiction to hear cases where compensation is requested depend on the different cantonal criminal procedure laws.¹⁶⁵

Not only are there cases in which pretrial detention is unjustified, but there are also cases where the detention was wrongful. A detention is wrongful if it is not based upon legal requirements, for example if there are no detention reasons.¹⁶⁶ A detention is also wrongful if there has been a procedural mistake such as not issuing a written warrant.¹⁶⁷

161. SCHMID, *supra* note 39, at 212.

162. *Id.* at 200.

163. *Id.* at 359.

164. One exception is the canton of Obwalden. Judgment of 1984, 110 Ia Entscheidungen des Schweizerischen Bundesgerichts [BGE] 140 (Switz.); Judgment of 1992, 118 Ia Entscheidungen des Schweizerischen Bundesgerichts [BGE] 338 (Switz.).

165. Judgment of 1993, 119 Ia Entscheidungen des Schweizerischen Bundesgerichts [BGE] 229 (Switz.).

166. STEPHAN TRECHSEL, DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, IHR SCHUTZ DER PERSÖNLICHEN FREIHEIT UND DIE SCHWEIZERISCHEN STRAFPROZESSRECHTE [THE EUROPEAN HUMAN RIGHTS CONVENTION, ITS PROTECTION OF THE PERSONAL FREEDOM AND THE SWISS CRIMINAL PROCEDURE RIGHTS] 373 (1974).

167. *Id.*

Whereas it is possible to obtain compensation for unjustified detention through most of the cantonal criminal procedure laws, there is only one way to obtain compensation for wrongful detention. This is through Article 5, Paragraph 5 of the European Human Rights Convention.¹⁶⁸ This article states that "[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."¹⁶⁹

The compensation is only paid for all major expenses of the accused; minor expenses are not included. Compensation will be given for loss of salary, loss of job, or attorney fees.¹⁷⁰ However, the items that the accused will be compensated for are not limited to this list. Reparation is also an option.¹⁷¹ No culpability of the state is required.

B. *The United States*

Typically, when pretrial detention is later discovered to be wrong, compensation in the United States is not an available remedy to correct the imposition on a person's liberty. However, certain states do allow compensation when an individual is wrongly convicted and later found innocent.¹⁷² The provisions that allow this type of compensation are often strictly construed and the accused must be pardoned in such a way that his or her innocence is found.¹⁷³

V. CONCLUSION

Diversity, as opposed to uniformity — this dualism is a never ending dichotomy in confederations like Switzerland and the United States. The question now is how much diversity do we have to maintain and how much unity is necessary.

In Switzerland, uniformity was accomplished, in a great part, with some substantial laws.¹⁷⁴ For procedural law, cantonal diversity is still the order. Standardization in procedural law simply was not possible until today because of political and psychological reasons, as well as the courts' historical organization.¹⁷⁵ If we want a unified criminal law, we would not need to reinvent the wheel. One possibility for achieving stronger unity is to analyze where the cantonal procedural

168. European Human Rights Convention, *supra* note 7, art. 5, ¶ 5.

169. *Id.*

170. SCHMID, *supra* note 39, at 360.

171. *Id.*

172. See generally 60 AM. JUR. 2D *Penal and Correctional Institutions* §§ 209-10 (1987).

173. *Id.*

174. See generally the Swiss federal codes concerning civil law and penal law.

175. Juerg Aeschlimann, *Die Zukunft des Schweizerischen Strafprozessrechts* [The Future of the Swiss Criminal Procedure Law], in SCHWEIZERISCHE ZEITSCHRIFT FUER STRAFRECHT BAND 109 [109 REVIEW OF SWISS PENAL LAW] 355 (1992).

laws are similar and identify their differences when trying to compile a uniform criminal procedural law. This would make one result out of many possibilities. Many of the recent Swiss supreme court cases are moving towards uniformity of the criminal procedural law. Additionally, the possibility of expanding human rights, thanks to the European Human Rights Convention,¹⁷⁶ is also a good tool to help adjust and develop uniform procedural laws.

The United States is somewhat concerned with the same kind of issues. However, these are not as obvious because the United States still does not institute as much legislation as in civil law countries. An alternative measure for the United States, as it is for Switzerland, is to solve many of these problems through case law. This method helps society by dealing with different factual situations, while often providing generalized rules that will help curtail the problems that seem to arise with vast diversity. We will see in the near future if it will be possible to transform diversity into unity and to see if this is the wish of the citizens.

Let us finish this analysis with a few words about the different pretrial detention systems in both countries. In Continental Europe, a typical pretrial detention starts with the classic detention reasons. The current trend is that these classical detention reasons are being cited more and more to justify detention in the United States. Originally, in the United States, one had to either be released after posting a bail bond or be released on a recognizance.¹⁷⁷ Due to the bail reform movement, other possibilities have evolved in different states. Today, the judge can decide what measures, compulsory or replacement, will secure the attendance of the accused at the trial.

The United States has realized that individuals who were released on bail often commit additional crimes before the trial. To protect society, it is now possible to keep certain individuals in pretrial detention because of their dangerousness.¹⁷⁸ The federal legislatures made efforts in 1982, 1984, and 1986. Thanks to the federal Bail Reform

176. See generally European Human Rights Convention, *supra* note 7.

177. BOYCE & PERKINS, *supra* note 25, at 1076.

A recognizance, at common law, was an obligation acknowledged by the obligor in open court and entered upon the order book. . . . [W]hen used in lieu of a bail bond, [it] acknowledged an obligation to pay a specified sum of money if the accused failed to appear. . . . Recognizance today often means release on the defendant's promise to appear.

Id.

178. See generally CAL. CONST. of 1879, art. 1, § 12(b) (West Supp. 1996); D.C. CODE ANN. § 23-1322(a)(2) (Supp. 1995); WIS. STAT. ANN. § 969.035(3)(c) (West 1985 & Supp. 1995); and Schall v. Martin, 467 U.S. 253 (1984).

Act¹⁷⁹ a release on bail can be denied if the attendance of the accused cannot be guaranteed and if the security of other people is in danger.¹⁸⁰

The bail system is not widely accepted in Switzerland, although there are situations where it is possible to obtain bail. Bail has to be affordable¹⁸¹ and should not be set too high because then it would only be a privilege for rich people. Additionally, bail bonds do not exist. This is certainly due to the unpopularity of bail. But Switzerland is making positive inroads with the bail system and it is becoming a more positive replacement measure instead of the pretrial detention.

This analysis has discussed many aspects of pretrial detention and the bail system in both countries. While the systems do differ, there are many common elements. It appears to the authors that the different systems in Switzerland and in the United States are, in fact, moving towards one another.

179. 18 U.S.C. §§ 3141-3156 (1994).

180. *United States v. Salerno*, 481 U.S. 739, 751 (1987).

181. The various amounts of bail in Switzerland are limited to \$8,000, \$20,000 or \$50,000 U.S. Tschumper, *supra* note 102, at 219.

