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LAW SUMMARY

Does the Punishment Fit the Crime?: A Comparative Note on Sentencing Laws for Murder in England and Wales vs. the United States of America

MEGAN ELIZABETH TONGUE*

I. INTRODUCTION

Since the time Cain first raised his hand against Abel,¹ punishment for murder was considered necessary for any culture to justly function.² Any structured society needs retributive justice and deterrent action to serve as a consequence to murder, for murder is not just a crime against the one killed, but also a crime against the state and mankind.³ Citizens look to the state to take action against the murderer, not only to impose upon him what he justly deserves, but also to keep others from following in his footsteps. Different jurisdictions handle punishment in accordance with their own cultural views and societal norms, but what about those jurisdictions that share a singular history or have evolved from the same starting point? The United States and United Kingdom are two such jurisdictions. Many American laws evolved from British law, as it was the British who founded the colonies that would later constitute the United States. In light of those common roots, how did these two nations turn away from one another with regard to punishment for the basic crime of murder?

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1. *Genesis* 4:8.

2. DEREK ROEBUCK, *THE BACKGROUND OF THE COMMON LAW* 19 (2d ed. 1990).

3. John Donne, *Meditation XVII*, LITERATURE NETWORK, <http://www.online-literature.com/donne/409/> (last visited Nov. 14, 2015) (“[A]ny man’s death diminishes me, because I am involved in mankind. And therefore never send to know for whom the bell tolls; it tolls for thee.”).

In England and Wales,⁴ there are no divisions of murder into first and second degrees like Americans are accustomed to; there is only one definition of murder, with varying degrees of sentencing if the defendant is under eighteen years of age, between the ages of eighteen and twenty-one, or over twenty-one.⁵ American attorneys will debate in court – or in private sentencing negotiations with the prosecutor – about whether the defendant committed first- or second-degree murder because those degrees have an enormous impact on the defendant’s punishment.⁶ Murder is very state-centric in the United States. The federal system only prosecutes 100-150 homicides per year, whereas some states prosecute more than ten times that amount.⁷

For the purposes of this Note, the state of Missouri and its laws will be used as a representative of the American criminal justice system, because Missouri criminal laws are similar to those in many other states.⁸ In the state of Missouri, a defendant commits first-degree murder “if he knowingly causes the death of another person after deliberation upon the matter.”⁹ The punishment for first-degree murder is death or life imprisonment without the possibility of parole.¹⁰ In Missouri, a person commits murder in the second-degree if he: (1) “[k]nowingly causes the death of another person, or with the purpose of causing serious physical injury to another person, causes the death

4. The United Kingdom is made up of England, Wales, Scotland, and Northern Ireland. Sarah Carter, *UPDATE: A Guide to the UK Legal System*, HAUSER GLOBAL L. SCH. PROGRAM (Jan./Feb. 2015), http://www.nyulawglobal.org/globalx/United_Kingdom1.html. England and Wales share a judicial system, whereas Scotland and Northern Ireland have their own. *Id.* England and Wales use common law, whereas Scotland uses a combination of civil and common law. *Id.* Northern Ireland’s court structure is similar to that of England and Wales, but they are not judicially attached. *Id.*

5. *Murder*, CROWN PROSECUTION SERV. (Jan. 2012), http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/murder/. If the defendant committed the crime after he was eighteen, but was convicted before he was twenty-one, his sentence would be custody for life. *Id.* If the defendant is under eighteen at the time of the crime (regardless of his age at conviction), he is sentenced to “detention during Her Majesty’s pleasure.” *Id.*

6. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005). If the defendant was under eighteen at the time of the offense, different considerations are taken. *Id.* at 551. For example, a defendant must be at least eighteen to receive the death penalty. *See id.*

7. *Sentence Length in Each Primary Offense Category*, U.S. SENT’G COMMISSION (2014) <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table13.pdf>. In 2014, the Federal government prosecuted seventy-five murder cases and forty-nine manslaughter cases. *Id.*

8. PAUL H. ROBINSON & MARKUS DIRK DUBBER, *AN INTRODUCTION TO THE MODEL PENAL CODE 5* (2015), <https://www.law.upenn.edu/fac/phrobins/intromodpen code.pdf>.

9. MO. REV. STAT. § 565.020.1 (2000).

10. *Id.* § 565.020.2.

of another person”); or (2) a person is killed in the attempt or execution of another felony.¹¹ The punishment for second-degree murder is ten to thirty years in prison or life in prison.¹²

In England and Wales, much of the discretion for varying sentences was taken away with mandatory sentencing for murder, in part due to England and Wales not implementing varying degrees of murder.¹³ In contrast, the British are perturbed by the United States’ use of prosecutors, specifically the way in which American prosecutors negotiate plea bargains with a defendant and agree to seek specific sentences with defense counsel without the discretion of the judge.¹⁴

This Note explores the differences between the American legal system’s sentencing procedures for murder with the procedures of England and Wales. This Note attempts to determine how this divide occurred and whether the two countries chose the appropriate way to sentence their murderers. In particular, this Note focuses on England’s and Wales’s lack of degrees of murder and the United States’ practice of plea bargaining.

Part II discusses the history of American and English criminal law and how these countries similarly evolved from their origins to the late nineteenth century. Part III explores modern criminal law theory progressing from the early twentieth century to present time. Part IV studies the manner in which modern procedures, government structure, and politics have influenced sentencing for murder. Part V offers suggestions on how each country can attempt to incorporate a part of the other’s criminal punishment scheme to make for more effective systems with regard to the punishment for murder.

II. HISTORY OF CRIMINAL LAW IN COLONIAL AMERICA, THE UNITED STATES, AND ENGLAND

This Part divulges the historical context of the discussion, beginning with how British law came to be the foundation of American law, followed by a discussion of the sentencing procedures for murder in the Colonial Era, and concluding with a discussion of how sentencing procedures have evolved over the eighteenth and nineteenth centuries.

11. *Id.* § 565.021.

12. *Missouri Second-Degree Murder*, FINDLAW, <http://statelaws.findlaw.com/missouri-law/missouri-second-degree-murder.html> (last visited Oct. 25, 2015). If the murder occurred while committing or attempting another felony, the punishment for that felony can run in addition to the sentence for second-degree murder, which can equate to life imprisonment. *Id.*

13. *See generally Homicide: Murder & Manslaughter*, CROWN PROSECUTION SERV., http://www.cps.gov.uk/legal/h_to_k/homicide_murder_and_manslaughter/ (last visited Oct. 25, 2015).

14. *How Court Works: Steps in a Trial*, ABA, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.html (last visited Oct. 25, 2015).

A. *The Birth of American Jurisprudence*

The law of colonial America was British law.¹⁵ As examined in *American Legal History*, “We have become the people that we are today because of the laws that we adopted in the early English settlements.”¹⁶ Even though colonial America attempted to distance itself from its mother country, the adoption of the English legal system was not only a necessary step as a colony under the Crown, but also a practical one since the British legal system was so well-established and evolved.¹⁷ Most Americans associate the beginning of the American Revolution with the Boston Tea Party, but colonial lawyers associated the beginning of the Revolution with Blackstone’s *Commentaries on the Laws of England*.¹⁸

In Blackstone’s writings, he attempted to codify English law to not only include the *Magna Carta*,¹⁹ the *Petition of Rights*,²⁰ and the *Habeas Corpus Act*,²¹ but also the *Bill of Rights of the Glorious Revolution*.²² As discussed below, the English Bill of Rights is similar to the current American Bill of

15. KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 3 (1996) (“[Colonial Americans] regarded themselves as heirs to the English constitutional tradition . . .”).

16. *Id.*

17. See generally *The Colonial Experience*, AM. GOV’T, <http://www.us.history.org/gov/2a.asp> (last visited Oct. 25, 2015).

18. BEVERLY ZWEIBEN, *HOW BLACKSTONE LOST THE COLONIES: ENGLISH LAW, COLONIAL LAWYERS, AND THE AMERICAN REVOLUTION* (1990) 117.

19. The *Magna Carta* is most famously known for this clause:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement [sic] of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.

Magna Carta: An Introduction, BRIT. LIBR. (2015), <http://www.bl.uk/magna-carta/articles/magna-carta-an-introduction>.

20. The *Petition of Rights* (also known as “The *Petition of Right*”) is an agreement between King Charles I and Parliament, whereby King Charles I agreed not to pass any new taxes without Parliament’s consent. *Charles I and the Petition of Right*, PARLIAMENT (2015), <http://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/petition-of-right/>.

21. The *Habeas Corpus Act* “was originally a device to bring a prisoner into court, but it became used to fight against arbitrary detention by the authorities.” *Habeas Corpus Act*, BRIT. LIBR. (2015), <http://www.bl.uk/onlinegallery/takingliberties/staritems/25habeascorpussact.html>.

22. ZWEIBEN, *supra* note 18, at 116–17. The *Bill of Rights of the Glorious Revolution* not only determined Parliament’s authority over the monarchy, but also ordains the English people with certain civil and political rights. *British Bill of Rights 1869*, EMERSONKENT (2015), http://www.emersonkent.com/historic_documents/bill_of_rights_british_1689.htm.

Rights.²³ Blackstone wrote that the American colonies were not granted the rights ordained in the Bill of Rights because their colonies were “conquered” and made up of “inferior” peoples.²⁴

After the American Revolution, Americans chose to forgo a monarchy system and instead embraced a republican form of government.²⁵ One hundred years before the American Revolution, the British experienced their own internal revolution, where Parliament became the governing body of law, and the monarchy took on a more symbolic, executive role.²⁶ These historical differences played a large part in the evolution of the countries’ laws. Understanding the origin of those structures is essential to properly contextualizing their modern forms.

First, the United States, along with England and Wales, chose to retain many of the same fundamental principles, including the spirit of the *Magna Carta*, which is the “source of modern procedural and substantive due process.”²⁷ Additionally, the United States adopted much of the English Bill of Rights of 1689 into its own Bill of Rights nearly one century later.²⁸ But, the most important similarity is the use of the common law system, which is only implemented by a minority of countries.²⁹ Few countries today use the common law system and those that do were likely colonized by Britain at some point.³⁰

Countries that observe common law practices, such as the United States, England, and Wales, have legislative statutes, and additional law is established through precedent from appellate courts and judicial interpretation of those statutes.³¹ This precedent influences and controls future courts to take similar holdings to promote consistency within the law of that country when interpreting legislation.³²

23. See HALL ET AL., *supra* note 15, at 7.

24. ZWEIBEN, *supra* note 18, at 118–99.

25. See Jack Lynch, *An Accidental Republic?*, COLONIAL WILLIAMSBURG J. (2008), <http://www.history.org/foundation/journal/summer08/republican.cfm>.

26. HALL ET AL., *supra* note 15, at 7.

27. *Id.* at 5.

28. *Id.* at 7.

29. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 20 (1993).

30. *Id.* Anguilla, Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Dominica, Fiji, Grenada, Guam, Jamaica, Montserrat, Niue, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Singapore, Tonga, United States of America (except Louisiana), Virgin Islands, and Wake Islands are the countries that currently utilize common law, based on the British common law system. *The World Factbook: Legal System*, CIA (2015), <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>. There are numerous other countries that also use the British common law but also incorporate other various forms of law. *Id.*

31. *Common Law*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Common+law> (last visited Nov. 14, 2015).

32. *Id.*

A key difference between the United Kingdom and the United States is the interaction between the judiciary and legislative branches of government. In the United States, the Supreme Court of the United States can question the constitutionality of a statute implemented by Congress,³³ but in the United Kingdom, courts are forced to accept the laws provided to them by Parliament.³⁴ This means that the Supreme Court is allowed to overturn legislation, while states' highest courts interpret and overrule state legislation, but the courts in the United Kingdom can only interpret Parliament's legislation and do not have the authority to overturn statutes.³⁵ Criminal law in the United Kingdom is promulgated in statutory form, and there is sparse use of judicial law.³⁶ Despite similarities between the statutory layouts of these countries' criminal laws, there are still many variations that take into account the cultural differences and customs of each nation. One such variation is sentencing for murder.

B. Early Criminal Laws in England and Colonial America

The word "murder" derives from the Norman word "murdrum," which was a fine that had to be paid to the Crown for causing the unnatural death of another.³⁷ "Murdrum" originated before the twelfth century, indicating that the concept of a defendant being liable to the state for this crime has been a long-held tradition.³⁸

In 1256, the English began to make distinctions within the definition of murder, such as allowing killings caused by accidental death and self-defense, which were offenses pardoned by the Crown.³⁹ Formerly, there was just murder, and regardless of the circumstances resulting in the death, execution of the murderer would ensue.⁴⁰ Later, in statutes formed in 1390 and

33. See *Marbury v. Madison*, 5 U.S. 137, 138 (1803).

34. *Frequently Asked Questions*, U.K. SUP. CT., <https://www.supremecourt.uk/faqs.html> (last visited Oct. 25, 2015) ("Unlike some Supreme Courts in other parts of the world, the UK Supreme Court does not have the power to 'strike down' legislation passed by the UK Parliament. It is the Court's role to interpret the law and develop it where necessary, rather than formulate public policy.").

35. See *Judges and Parliament*, CT. & TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/judges-and-parliament/> (last visited Oct. 25, 2015).

36. Legal Info. Inst., *Criminal Law*, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/criminal_law (last visited Oct. 25, 2015).

37. ROEBUCK, *supra* note 2, at 26–27.

38. *Murder*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/murder> (last visited Nov. 14, 2015).

39. ROEBUCK, *supra* note 2, at 27. For example, in 1256 a jury found an eight-year-old boy guilty of murder, but he was granted a royal pardon because the man he shot with a bow and arrow was carelessly walking in front of the target. *Id.*

40. *Id.*

1497, pardons were not given if there was “malice aforethought.”⁴¹ And, “provocation”⁴² became a mitigating factor that could reduce a murder charge to manslaughter.⁴³ Until the past two centuries, no punishment other than death was considered for these crimes.⁴⁴

In colonial America, criminal law was essential to “economic regulation” and “maintenance of order” for the purposes of “economic growth[], policing morality, and . . . social control.”⁴⁵ Many of the early criminal laws in colonial America were spurred by mass hysteria due to the coalescing of different peoples and cultures, such as the Native Americans.⁴⁶ The British immigrants were, for the first time, faced with what they believed to be a relatively primitive culture, and the interaction of the two peoples caused prejudicial trends to form within the colonial criminal justice system.⁴⁷ Racial biases aside, criminal laws were also brought about because of strongly held religious beliefs, where punishing sinners and other religious felons⁴⁸

41. For example, “Malice aforethought . . . may be inferred from circumstances which show ‘a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences.’” *United States v. Celestine*, 510 F.2d 457, 459 (9th Cir. 1975) (citing *Gov’t of Virgin Islands v. Lake*, 362 F.2d 770 (3d Cir. 1966); *United States v. Hinkle*, 487 F.2d 1205 (D.C. Cir. 1973)).

42. For example, “provocation” may be “[a]n insult to a person, either by accusing him or a member of his immediate family of some infamous act, opprobrious words, or indecent gestures, which convey imputations of criminal baseness against a person or his family, sufficient to arouse in a man of ordinary pride and self-respect a high state of passion and a spirit of resentment.” *State v. Eaton*, 154 S.W.2d 767, 769 (Mo. 1941).

43. ROEBUCK, *supra* note 2, at 27.

44. *Id.* at 28.

45. HALL ET AL., *supra* note 15, at 29.

46. *Id.* at 50.

47. See *Crime and Punishment in Plymouth Colony*, MAYFLOWER HISTORY, <http://mayflowerhistory.com/crime/> (last visited Oct. 25, 2015). For example, it was considered “unclean” to lie with a Native American, which accompanied the punishment of whipping and public shaming. *Id.*

48. PHILIP SCHAFF, HISTORY OF THE CHRISTIAN CHURCH, vol. 5, pt. 2, at 375 (1910). “The criminal pope was to be released after a brief confinement and elevated to an exalted dignity; the other was to be condemned as a religious felon and burnt as an expiation to orthodox theology.” *Id.* The “criminal pope” is more commonly known today as Antipope John XXIII: he opposed the rightful pope and committed a series of crimes that were not necessarily crimes against the church – piracy, rape, incest, murder, and sodomy. *Id.* at 158 & n.1, 375. The “other” man referenced in the above quote was John Huss – he was one of the original reformers of the Catholic Church and was burned at the stake for heresy against Catholic doctrines. *Id.* at 152, 375. Huss’s crimes were his teachings of those things that were in contradiction to Catholic doctrine, such as his teachings about Christianity’s origination and the meaning of the Eucharist. *Id.* at 206–07. He was deemed a “religious felon,” because his crimes were against church law. *Id.* at 375.

had been the law for centuries.⁴⁹ The newest “religious felons” were the Native American tribes, who were persecuted for their polytheistic beliefs.⁵⁰

Even though the foundation of the criminal legal system for the colonies was the English legal system, much of English criminal law did not work for the colonists who were experiencing the novelty of living in small, isolated villages, while in fear of Native tribes.⁵¹ There were new ideologies in the colonies to take into account. There was no longer room in the legal system for the historic traditions of “the landed gentry of England” – the peer structure of dukes, barons, etc.⁵² The theme that remained consistent between colonial America and England was religious fervor in influencing the law.⁵³ Even though the colonists were supposedly considered a religiously tolerant people, their tolerance was for the several Christian denominations, as opposed to England’s single denomination that varied until the firm establishment of the Anglican Church.⁵⁴ This religious zeal greatly shaped criminal law in both countries, because what was considered a criminal act was based upon sins forbidden in the Bible.⁵⁵ Murder was not just a crime against the state, it was a crime against God.⁵⁶

C. *The Evolution of Sentencing Procedures*

The “Bloody Code” was a name later given to the statutory enactments in the United Kingdom that prescribed the death penalty for a wide range of offenses between the late seventeenth century and early nineteenth century.⁵⁷ Like the United States, almost every crime in the United Kingdom was punishable by death in the 1800s.⁵⁸ Between 1688 and 1815, the number of crimes that imposed a death sentence in the United Kingdom rose from fifty to 215.⁵⁹ These executions were supposed to promote deterrence, and as a

49. HALL ET AL., *supra* note 15, at 51.

50. See Lindsey Landis, *Religious Toleration of Indians in New World*, OPPOSING VIEWS, <http://people.opposingviews.com/religious-toleration-indians-new-world-8851.html> (last visited Oct. 25, 2015).

51. FRIEDMAN, *supra* note 29, at 23.

52. *Id.*

53. *Id.*

54. See *Religion in Colonial America: Trends, Regulations, and Beliefs*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/nobigotry/religion-colonial-america-trends-regulations-and-beliefs> (last visited Oct. 25, 2015).

55. See generally James A. Cox, *Bilboes, Brands, and Branks: Colonial Crimes and Punishments*, COLONIAL WILLIAMSBURG J. (2003), <http://www.history.org/Foundation/journal/spring03/branks.cfm>.

56. See *id.*

57. *Prison and Penal Reform in the 1800s: Bloody Code – What Was This?*, MY LEARNING, <http://www.mylearning.org/prison-and-penal-reform-in-the-1800s/p-3272/> (last visited Nov. 11, 2015).

58. *Id.*

59. *Id.*

result, all executions were performed publicly until the 1860s.⁶⁰ To be hanged in the 1800s, one need not have committed the crime of murder; a person could be hanged merely for cutting down a tree or appearing at night with a blackened face.⁶¹ In comparison, the United States still had a mandatory death sentence for many crimes, but, unlike its mother country, the list of crimes punishable by death was quite fractional in comparison.⁶²

Between 1820 and 1870, around the time of urbanization and industrialization in the United States, “serious” crime dramatically decreased.⁶³ Foremen were strict with their workers, and public schools provided discipline for children; these institutions provided much-needed structure in a burgeoning society.⁶⁴ It was around this time that professional police were established, which could have been a potential factor in the sharp decline in serious crimes.⁶⁵ The vigilantism and the cowboy, gun-slinging mentality of the wide-open frontier slowly diminished as people moved toward cities for industrial employment.⁶⁶ Additionally, more cases were appearing before a court as the country became more sophisticated.⁶⁷ Even though people were discouraged from plea bargaining in colonial times, because it was considered disadvantageous for the defendant, courts soon became overcrowded with the

60. *Id.*

61. *Prison and Penal Reform in the 1800s: Crimes Punishable by Hanging in the 1800s*, MY LEARNING, <http://www.mylearning.org/prison-and-penal-reform-in-the-1800s/p-3276/> (last visited Nov. 11, 2015). Once England faced the problem with over-crowding in its prisons, it began shipping off convicted criminals to Australia. *Prison and Penal Reform in the 1800s: What Was It Like on Board a Prison Ship Bound for Australia?*, MY LEARNING, <http://www.mylearning.org/prison-and-penal-reform-in-the-1800s/p-3287/> (last visited Nov. 11, 2015).

62. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976).

63. HALL ET AL., *supra* note 15, at 284. “[T]he rate of serious crime dropped during the nineteenth century, a decline hat continued well into the twentieth century.” *Id.*

64. Fox Butterfield, *Historical Study of Homicide and Cities Surprises the Experts*, N.Y. TIMES (Oct. 23, 1994), <http://www.nytimes.com/1994/10/23/us/historical-study-of-homicide-and-cities-surprises-the-experts.html>. See also *Juvenile Justice History*, CTR. JUV. & CRIM. JUST., <http://www.cjcj.org/education1/juvenile-justice-history.html> (last visited Oct. 25, 2015) (discussing the convergence of juvenile correctional facilities and mandatory public school education in the nineteenth century).

65. HALL ET AL., *supra* note 15, at 284. See CESARE BECCARIA, ON CRIMES AND PUNISHMENT (Henry Paolucci trans., 1963) (“It is better to prevent crimes than to punish them.”). There is much debate that the first police were of little to no help, because they were so poorly trained and hired because they knew the right people within the dominant political party. Megan Sasinowski, *Homicide Trends in America: 1850–1900*, CARNEGIE MELLON U. 4 (2011), <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1137&context=hsshonors>.

66. HALL ET AL., *supra* note 15, at 284.

67. *Plea-Bargaining*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Plea+Bargaining> (last visited Nov. 14, 2015).

increased presence of over-populated cities.⁶⁸ Hearing every trial became impossible, and many cases were resolved without a trial due to guilty pleas.⁶⁹

As the legal system evolved, the American people struggled with the penological⁷⁰ aspect of punishing criminal defendants.⁷¹ As quickly as factories were being built, so were asylums, madhouses, and penitentiaries.⁷² It was thought that criminals were creatures of their environments, and if the criminal was taken out of his chaotic environment and placed into one with structure and order, he could rehabilitate himself.⁷³ Even though rehabilitation was the ultimate goal of these institutions, the American people were still deeply committed to their religious tendencies and insisted on a system that intertwined rehabilitation with retribution.⁷⁴

D. Whether Death Is on the Table

A major divide between American and English criminal law occurred in the twentieth century when both countries contemplated dissolving the death penalty as a punishment for murder.⁷⁵ Even though public opinion favored the death penalty in England, Parliament enacted the Murder Act of 1965, which officially abolished the death penalty in 1969.⁷⁶

In 1966, American opinion polls showed that Americans still favored the death penalty, but the Supreme Court of the United States, under no obligation to consider public opinion, effectively halted the death penalty in 1972 but eventually reinstated it in 1976.⁷⁷ Frederick C. Millett, a death penalty scholar, suggested that the reason the United States reinstated the death penalty and the United Kingdom did not is the sheer size of the countries.⁷⁸ In

68. *Id.*

69. *Id.*

70. Penology is the “branch of criminology dealing with prison management and the treatment of offenders.” *Penology*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/penology> (last visited Jan. 10, 2016).

71. HALL ET AL., *supra* note 15, at 285.

72. *Id.*

73. *Id.* “[T]he purpose of punishment was to return the individual to society.” *Id.* at 290. See also Michael Zuckerman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* By David J. Rothman, 121 U. PA. L. REV. 398, 401 (1982) (book review). The asylum would “demand the deference and obedience of the traditional family Inmates were . . . subjected to precise schedules and rigid work routines” *Id.*

74. HALL ET AL., *supra* note 15, at 285.

75. Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 614 (2008).

76. *Id.* at 615.

77. *Id.* See *Gregg v. Georgia*, 428 U.S. 153 (1976) (effectively reinstating the death penalty); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (effectively halting the death penalty).

78. Millett, *supra* note 75, at 615.

many ways, “England is much like a single state” in the United States because a single American state is similar in size to the United Kingdom’s land mass, and its population is similar to one of the more populated American states.⁷⁹ Another key difference is that the United Kingdom was able to abolish the death penalty legislatively, while the United States attempted to do so judicially. In *Furman v. Georgia*, Chief Justice Burger wrote, “The complete and unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend and foreclosed further inquiry on many as yet unanswered questions in this area.”⁸⁰ Chief Justice Burger made the argument that the death penalty is a factual issue, not a legal issue; therefore, the legislature should make the ultimate decision as to its abolishment, not the judiciary.⁸¹ The only way Congress could abolish the death penalty would be to amend the Constitution, which is highly unlikely since the Constitution implicitly permits the death penalty.⁸²

In 1833, England executed its last juvenile offender.⁸³ The United States did not abolish the execution of juveniles until 2005, in *Roper v. Simmons*.⁸⁴ In *Simmons*, the Supreme Court looked to international standards, specifically those of the United Kingdom, to determine whether juveniles should still be executed.⁸⁵ In his dissent in *Simmons*, Justice Scalia argued that looking to what the United Kingdom has done in regard to criminal reform is irresponsible due to the United Kingdom’s “recent submission to the jurisprudence of European courts.”⁸⁶ Of course, what Justice Scalia was referring to was the United Kingdom joining the European Union, and therefore being required to structure their laws within the European Union’s parameters, which includes doing away with the death penalty.⁸⁷ This point should be considered moot, because the United Kingdom abolished the death penalty in 1965, which was years before it joined the European Union.⁸⁸

Even though the United States did not abolish the death penalty like the United Kingdom, the United States took similar steps by first restricting the death penalty to the most heinous murders, then further restricting the differ-

79. *Id.*

80. *Furman*, 408 U.S. at 404 (Burger, C.J., dissenting).

81. Millett, *supra* note 75, at 616.

82. *Id.* The Fifth Amendment of the U.S. Constitution reads: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .” U.S. CONT. amend V. A “capital” crime is one that is punishable by death. See *Capital Crime*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Capital+crime> (last visited Jan. 10, 2016).

83. Millett, *supra* note 75, at 616.

84. *Roper v. Simmons*, 543 U.S. 551 (2005).

85. Millett, *supra* note 75, at 614. See *Simmons*, 543 U.S. 551.

86. *Roper*, 543 U.S. at 626 (Scalia, J., dissenting).

87. Millett, *supra* note 75, at 614–15.

88. *Id.* at 615.

ent classes of offenders who are eligible.⁸⁹ But, the problem with the United States' restrictions on the use of the death penalty is that these restrictions are reversible because they are primarily judicial limitations and are not imposed by a constitutional amendment or legislation. The United Kingdom will probably never repeal their abolition of the death penalty because to do so would violate the European Convention on Human Rights, which could lead to sanctions and potential withdrawal from the European Union.⁹⁰

Even though the death penalty is just one form of punishment, it is a huge dividing line between the two countries with regard to criminal sentencing. A potential reason these two countries took such different perspectives on the death penalty was the cumulative effect of World War II.⁹¹

By the time World War II ended, "England and the rest of Europe were in need of a change — social reform for a more humane society."⁹² All of Europe saw the death penalty first-hand with the Holocaust, and as a result, many countries, like England, sought reform.⁹³ Justice Marshall wrote in *Furman* that the reason social reform did not catch on in the United States at the same pace as Europe was because "[t]he manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public."⁹⁴ Many Americans did not personally witness the destruction of the war and the Holocaust with the great oceanic divide between them, and they were therefore quick to forget the damage mass "legal" executions could cause. The United States needed the varying degrees of murder since it still implemented the death penalty, which would have to be reserved for the most heinous crimes. The United Kingdom had no need for such a system, since it does not impose an irreversible punishment.

III. SENTENCING PROCEDURES IN MODERN TIMES

This Part discusses two key differences between American and English and Welsh criminal sentencing for homicide: degrees of murder, as well as plea bargaining and sentencing negotiations. Prosecutors in the United States have the ability to negotiate a defendant's sentence with defense counsel by agreeing to seek a specific sentence, which is a strictly forbidden practice by English and Welsh barristers.⁹⁵ There are many American jurisdictions that

89. *Id.* at 617.

90. *Id.* at 617–18.

91. *Id.* at 619.

92. *Id.*

93. *Id.* at 619–20.

94. *Furman v. Georgia*, 408 U.S. 238, 340 (1972) (Marshall, J., concurring) (per curiam).

95. Christopher Sallon & Anthony Burton, *Law: Please, M'lud, I'll Have that Sentence: Plea Bargaining Looks Attractive: It Can Cut Costs and Shorten Cases. But It Has Dangers. Christopher Sallon and Anthony Burton Argue For A Tighter Form of Courtroom Deal*, INDEP. (Dec. 11, 1992), <http://www.independent.co.uk/news/>

have a mandatory sentence for first-degree murder – usually life without parole – and an alternate sentence for second-degree murder, but English law continues to have a singular mandatory sentence for murder.⁹⁶ These two fundamental differences evolved due to each country's history, as discussed above.

A. Mandatory Sentencing: Judicial Discretion Limited by Law

When England and Wales implemented the death penalty, they did so under a mandatory sentencing scheme, whereas in the United States, the Supreme Court disallowed a mandatory sentence of death in 1976.⁹⁷ Now that the United Kingdom no longer implements the death penalty, England's and Wales's sentence for murder is still a mandatory sentence, namely life on license, which is comparable to the United States' life without parole.⁹⁸

The Supreme Court of the United States forbids mandatory sentencing with regard to juveniles convicted of first-degree murder and adults facing the death penalty, as displayed in the cases of *Woodson v. North Carolina*⁹⁹ and *Miller v. Alabama*.¹⁰⁰ In *Woodson*, the Court determined that a mandatory death sentence for murder had to be eliminated, because “[j]uries continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime.”¹⁰¹ This

uk/law-please-mlud-ill-have-that-sentence-plea-bargaining-looks-attractive-it-can-cut-costs-and-shorten-cases-but-it-has-dangers-christopher-sallon-and-anthony-burton-argue-for-a-tighter-form-of-courtroom-deal-1562887.html.

96. Kate Fitz-Gibbon, *Abolishing the Mandatory Life Sentence for Murder*, CRIM. L. & JUST. WKLY. (Mar. 9, 2013), <http://www.criminallawandjustice.co.uk/features/Abolishing-Mandatory-Life-Sentence-Murder>.

97. *Woodson v. North Carolina*, 428 U.S. 280 (1976). When referring to mandatory sentencing in this Note, I am referring to when a defendant was convicted of a crime that does not have a range of punishment, but one singular punishment. For example, many states used to have mandatory sentencing for first-degree murder. *Id.* at 289. In those states, if you were convicted of first-degree murder, your punishment was death. *Id.* Now states are required to have at least death and life without parole as potential punishments for first-degree murder, whereas the states that do not have the death penalty generally have life without parole or life with the possibility of parole for a first-degree murder conviction. Stuart Taylor, *Court Eliminates Mandatory Death Sentence*, N.Y. TIMES (June 23, 1987), <http://www.nytimes.com/1987/06/23/us/court-eliminates-mandatory-death-sentence.html>.

98. *Murder*, *supra* note 5.

99. 428 U.S. 280.

100. 132 S. Ct. 2455 (2012). For clarification, *Simmons*, as stated above, outlawed the death penalty for juveniles. *Roper v. Simmons*, 543 U.S. 551, 569 (2005). *Miller* outlawed a mandatory sentencing scheme for juveniles convicted of first-degree murder in states that only had life without the possibility of parole as an available punishment after the death penalty was removed as an option for those juveniles. *Miller*, 132 S. Ct. at 2464.

101. *Woodson*, 428 U.S. at 291.

meant that juries were unwilling to find a person guilty of first-degree murder because they felt that death was too harsh a punishment in comparison to the crime. In 2012, in *Miller v. Alabama*, the Court struck down mandatory sentencing when “a judge or jury . . . [is unable] to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”¹⁰² This is similar to the holding in *Woodson*, where special circumstances were taken into account when sentencing. Even though many states still have just one punishment for first-degree murder, the option of second-degree murder is available and carries a lesser sentence, whereas the only option for courts in England or Wales is a drastic leap from murder to manslaughter.

According to sentencing guidelines in England and Wales, “The Courts must impose a life sentence on any individual convicted of murder. This is the only sentence available for such a conviction.”¹⁰³ Some judges in England find this system hinders their ability to apply judicial discretion.¹⁰⁴ In 2003, under Tony Blair’s Parliament, Home Secretary David Blunkett formed a new Criminal Justice Bill that “gave Parliament the right to set minimum terms for murder and brought in a sentencing guide for judges.”¹⁰⁵ Even though murder had a mandatory sentence of life without parole after the abolishment of the death penalty, many reformers felt as though this was a temporary step to get anti-death penalty legislation passed by both houses.¹⁰⁶ However, it seems as though any reform leading away from this mandatory scheme is far in the future.¹⁰⁷

It has been strongly suggested that the move for the passage of this bill was politically motivated and came after a public poll that showed that people wanted harsher punishments for criminals.¹⁰⁸ According to the Lord Chief Justice,¹⁰⁹ a judge’s discretion was largely eliminated because the judge is no longer allowed to “make the just decision, in the light of the particular cir-

102. *Miller*, 132 S. Ct. at 2475.

103. *Life Sentenced Prisoners*, JUST., <https://www.justice.gov.uk/offenders/types-of-offender/life> (last visited Oct. 26, 2015).

104. Tom de Castella & Gerry Holt, *Prison Sentences: How Do Judges Decide Them?*, BBC NEWS (Dec. 6, 2012, 1:32 PM), <http://www.bbc.com/news/magazine-20608169>.

105. *Id.*

106. Wesley Johnson, *Mandatory Life Sentences are “Unjust and Outdated,”* INDEP. (Dec. 6, 2011), <http://www.independent.co.uk/news/uk/crime/mandatory-life-sentences-are-unjust-and-outdated-6272884.html>.

107. *Id.*

108. Castella & Holt, *supra* note 104.

109. The current Lord Chief Justice is the “Right Honourable” The Lord Thomas of Cwmagedd. *Lord Chief Justice*, CT. & TRIBUNALS JUDICIARY, <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/lord-chief-justice/> (last visited Nov. 14, 2015). He is also the Head of Criminal Justice and the President of the Courts of England and Wales. *Id.* He has many statutory responsibilities, including “[r]epresenting the views of the judiciary of England and Wales to Parliament and Government. *Id.*

cumstances of the cases, having heard argument from both sides.”¹¹⁰ The public is encouraging a more victim-centered system,¹¹¹ which sounds acceptable in theory, but could lead to potential issues, such as harsher punishments for those less deserving.¹¹² The Homicide Review Advisory Group, which is made up of judges, academics, and former members of the Queen’s Counsel,¹¹³ has found that “mandatory sentences . . . [do not] allow for sentences to match individual crimes.”¹¹⁴

Even though there are those who frown upon mandatory sentences, one judge argues that there is still much discretion for a judge in determining how long an inmate spends in prison.¹¹⁵ A judge may set a minimum term before an inmate is eligible for parole when he takes into account the nature of the crime, the age of the offender, whether the offender brought a knife to the scene of the crime, and any other aggravating or mitigating factors the judge finds important.¹¹⁶ However, this judge admitted that, although this term is set, the majority of inmates never make their parole and are denied release due to their conviction of murder.¹¹⁷

It is theorized that political motivations are behind the continuation of mandatory sentencing.¹¹⁸ If Parliament needs to maintain an image of being “tough on crime,”¹¹⁹ then mandatory sentencing is a sure way to lead the people to believe it is achieving that goal.

110. Castella & Holt, *supra* note 104.

111. *Id.*

112. *See infra* Part IV.

113. Queen’s Counsel, better known as “QC,” is an honor bestowed upon a barrister who has achieved excellence in the higher courts. QUEEN’S COUNSEL APPOINTMENTS (2015), <http://www.qcappointments.org>. A barrister applies for this appointment, and it is considered a great honor. *Id.*

114. Johnson, *supra* note 107.

115. Interview with Anonymous Judge, Old Bailey, in London, Eng. (Apr. 14, 2015). Due to some of the controversial statements this judge made to me in confidence, he would like to remain anonymous. This judge informed me that many of the lawyers working for the Crown Prosecution Services (“CPS”) are some of the least-skilled lawyers in the legal system and their poor work leads to bad cases. *Id.*

116. *Id.*

117. *Id.*

118. *See* Simon Creighton, *Give Judges Discretion in Murder Sentencing*, GUARDIAN (Dec. 7, 2011), <http://www.theguardian.com/commentisfree/2011/dec/07/judges-murder-sentencing>.

119. *See Prime Minister’s Speech on Criminal Justice Reform*, GUARDIAN (June 23, 2006), <http://www.theguardian.com/politics/2006/jun/23/immigrationpolicy.ukcrime1>.

B. *Negotiating a Sentence Without Judicial Approval*

In the United States, having a client plead guilty so that a prosecutor will seek a lesser sentence is oftentimes a common goal for both prosecutor and defense counsel.¹²⁰ The prosecutor is satisfied with this result because it saves tax dollars and time, while defense counsel is satisfied because her client may receive a lesser punishment than if the case had gone to trial.¹²¹ Plea bargaining occurs when a defendant agrees to plead guilty to a crime without a trial in return for something from the prosecutor, which is often a promise to seek a lesser sentence.¹²² The prosecutor can either “recommend to the court a particular sentence or agree not to oppose the defendant’s request for a particular sentence, or agree that a specific sentence is the appropriate disposition of the case.”¹²³

This “negotiated sentencing” could never happen in England or Wales.¹²⁴ This is because “prosecutors do not have the same powers . . . [and] they cannot recommend a sentencing range” to the sentencing judge.¹²⁵ In England and Wales, a sentencing judge must decide the punishment because there is the fear that innocent people will plead guilty if they think they can get a better deal or they fear losing at trial.¹²⁶ In the United States, defense attorneys often seek a deal in order to reduce their clients’ punishments from death to life with or without parole, or from first-degree to second-degree murder. Plea bargaining is an intergral part of an American defense attorney’s job, and this is largely achieved through negotiating with the prosecutor. Prosecutors also benefit, because they are often reelected based on their conviction rates, and a guilty plea is as good as prevailing at trial.¹²⁷

There are many who are against the American form of negotiated sentencing. Some contend that plea bargaining forces defendants to forfeit some of their legal rights because of ignorance of the system and fear of death or extended incarceration.¹²⁸ Defendants who were previously in the criminal

120. *Plea-Bargaining*, *supra* note 67.

121. *Id.*

122. *Id.*

123. *Id.*

124. PENNY DARBYSHIRE, *DARBYSHIRE ON THE ENGLISH LEGAL SYSTEM* 275 (11th ed. 2014). England and Wales do have a “plea-bargaining” system, but it is nothing compared to the United States’ system. *See id.* In England and Wales, “[T]he defendant agrees to plead guilty in exchange for a concession by the prosecutor, such as a reduced charge (charge-bargaining) or a concession that the facts of the crime were not so serious as originally alleged (fact-bargaining).” *Id.* But, it is prohibited for the trial judge to become “involved in the plea bargain to assure the defendant of a specific sentence discount.” *Id.*

125. *Id.*

126. *Id.*

127. *Plea-Bargaining*, *supra* note 67.

128. *See* Douglas Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 949 (1986).

justice system are able to actually negotiate better sentences because they are more familiar with the process.¹²⁹ Unfortunately, this means that experienced and inexperienced defendants are treated differently, which is just another layer of injustice in the American criminal justice system.¹³⁰

Meanwhile, more cases in England and Wales are being settled outside of court because defendants are no longer able to afford the services of the solicitors and barristers.¹³¹ This is occurring because of significant budget cuts to the legal aid system that prohibit many from being able to afford an attorney.¹³² The annual criminal legal aid budget has taken a hit of 215 million pounds, which is a little more than 325 million U.S. dollars.¹³³ Many fear that this will drive barristers and solicitors out of practice because they will not be able to afford the cost of living with their already miniscule paychecks.¹³⁴ Additionally, this is going to cause many defendants to be left without much-needed legal services because those few lawyers who remain, once the budget has been cut, will not be able to give the time and energy needed on each case.¹³⁵ Many lawyers will advocate for their clients to plead guilty in order to avoid the cost and time of trial.¹³⁶ This type of pleading is a hair's breadth away from the United States' negotiated sentencing that England finds so abhorrent.

Both mandatory sentencing for murder and plea bargaining can leave a sour taste in many people's mouths. They may be legally accepted methods of sentence determination in their respective countries, but whether justice is obtained through these methods is another question altogether.

129. *Id.*

130. See generally Sallon & Burton *supra* note 95. "Popular perception of the procedure is of an overworked, corner-cutting public defender inveigling an innocent client into striking a bargain with a politically motivated prosecutor, encouraged by an indolent judge bent on the quickest route to a conviction." *Id.*

131. Owen Bowcott, *Legal Watchdog Warns Budget Cuts Will Damage Justice*, GUARDIAN (May 19, 2013), <http://www.theguardian.com/law/2013/may/20/criminal-legal-aid-cuts-watchdog>. British citizens are forced to plead guilty because they cannot afford representation. Interview with Mark Wyeth, Visiting Professor of Law, London Law Consortium, Univ. of Iowa Sch. of Law, in London, Eng. (Feb. 20, 2015). After pleading guilty, the judge sentences the defendant according to the facts as the prosecution relays them. *Id.*

132. See generally *id.*

133. Owen Bowcott & Nicola Brown, *More than 1,000 Lawyers Protest Outside Parliament at Legal Aid Cuts*, GUARDIAN (Mar. 7, 2014), <http://www.theguardian.com/law/2014/mar/07/lawyers-protest-parliament-legal-aid-cuts>.

134. *Id.* In an interview with a solicitor, it was divulged that in some fields of law, especially criminal law, there is more and more work for solicitors because clients do not want to or can no longer afford to pay a barrister. Interview with Paul Allerston, Senior Solicitor, Hempsons, in London, Eng. (Apr. 30, 2015).

135. See Bowcott, *supra* note 131.

136. See generally *id.*

IV. DISCUSSION

This Part discusses whether mandatory sentencing for murder is an acceptable scheme for England and Wales to maintain and explores the ramifications of that scheme. Next, this Part examines whether the United States should continue to use plea bargaining as a means of sentence negotiation between the prosecutor and defendant.

A. Should England and Wales Do Away with Mandatory Sentencing for Murder?

A country's political agenda will always infect its laws. The political climate in England agrees with a mandatory sentencing scheme for murder because it gives the people a false sense of security that the most justice is doled out to those criminals who deserve it the most.¹³⁷ What many voting citizens may not realize is that by having this forced mandatory sentencing scheme, many defendants are being convicted of manslaughter instead of murder, even though their crimes may fit the definition of murder more aptly than manslaughter.¹³⁸ Manslaughter has a wide range of punishment that can be as little as probation to a life sentence.¹³⁹ This reserves the most heinous crimes to be considered for murder, which means that the sentencing scheme has unintentionally changed the definition of murder. Should England and Wales leave this sentencing scheme as is to appease politicians and uninformed citizens? Or should Parliament be forced to draw the line and cease twisting laws that fail to convict defendants of the crimes they commit and give voters a false sense of increased security?

According to Miles Bennett, a seasoned barrister, “[T]he mandatory life sentence for murder is outdated.”¹⁴⁰ He does not think that England and Wales should switch to the American system of having different degrees of murder, but he does believe that “a sentencing judge should be able to exercise discretion in the sentence on a murder conviction.”¹⁴¹ He also noted that if England and Wales were to do away with the mandatory sentencing schemes for murder, “[M]ore people, not less, would be convicted of murder, as legally defined, rather than manslaughter.”¹⁴²

137. *Murder: Life Sentence Unjust, Says Lawyers' Group*, BBC NEWS (Dec. 6, 2011), <http://www.bbc.com/news/uk-16044145>.

138. Interview with Sam Parsons, Barrister, Gray's Inn, in London, Eng. (Feb. 20, 2015).

139. *Manslaughter Provocation*, CROWN PROSECUTION SERV., http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/manslaughter_provocation/ (last visited Oct 26, 2015).

140. Interview with Miles Bennett, Barrister, Inner Temple, in London, Eng. (Mar. 2, 2015).

141. *Id.*

142. *Id.*

Is it unscrupulous that more persons are charged with manslaughter than murder in England and Wales? When examining this from a definitional standpoint, it is unjust that those who actually commit manslaughter, as defined,¹⁴³ are lumped together with those who have actually committed murder, as defined,¹⁴⁴ because of a sentencing judge's or jury's unwillingness to impose the most heinous sentence imaginable in light of mitigating circumstances. Beyond the definition, there appears to be little to no harm caused by the mandatory sentence because the implementation of manslaughter as the lesser charge is generally available.

Discretion should be a right, and not a privilege, that a judge and jury exercise. An injustice occurs when, for example, a jury objectively believes a defendant committed murder, and yet believes he is capable of reform; as a result, the jury finds the defendant guilty of the lesser crime of manslaughter as a means of allowing him the opportunity to rehabilitate. Mercy should be an integral part of any legal system, and mandatory sentencing schemes deny defendants mercy.¹⁴⁵

B. Should the United States Continue Bargaining for Justice?

Just as the United States is troubled with England's and Wales's continued use of a singular, mandatory punishment for murder, English barristers are troubled by the United States' continuous use of plea bargaining and sen-

143. *Homicide: Murder and Manslaughter*, *supra* note 13.

Manslaughter can be committed in one of three ways:

1. killing with the intent for murder but where a partial defence [sic] applies, namely loss of control, diminished responsibility or killing pursuant to a suicide pact[;]
2. conduct that was grossly negligent given the risk of death, and did kill, is manslaughter ("gross negligence manslaughter"); and
3. conduct taking the form of an unlawful act involving a danger of some harm, that resulted in death, is manslaughter ("unlawful and dangerous act manslaughter").

Id.

144. *Homicide: Murder & Manslaughter*, *supra* note 13. Murder is:

where a person:

- of sound mind and discretion . . . ;
- unlawfully kills . . . ;
- any reasonable creature (human being);
- in being . . . ;
- under the Queens' Peace;
- with intent to kill or cause grievous bodily harm

Id.

145. See generally LINDA ROSS MEYER, *THE JUSTICE OF MERCY* 4 (2013).

tence negotiation.¹⁴⁶ Barristers are “troubled when the prosecutors, who in [England’s and Wales’s] society are supposed to be independent, have a definitive say on what a sentence should or should not be.”¹⁴⁷ In England and Wales, barristers who specialize in criminal law can be called upon to prosecute or defend, interchangeably.¹⁴⁸ This is a foreign concept to American criminal attorneys, who are generally forced to pick one career over the other. If they do switch, it is seen as a major career change. Moreover, in the United States, many state prosecutors are elected and are considered part of the state government’s executive branch, whereas criminal defense attorneys are generally not considered a member of the government, even if working for a state’s public defenders’ office.¹⁴⁹ In the United States, special power is given to prosecutors as elected officials, not only elevating them as a member of the government, but also giving them a quasi-judicial position. Prosecutors can decide whether to bring a case, what charges to bring, and even have sentence-negotiating power.¹⁵⁰ In England and Wales, this is not at all the case.

England and Wales are somewhat similar to the United States in that that their prosecutors work with the police to bring a case to court, but this is done through a government organization called Crown Prosecution Services (“CPS”). To be a prosecutor with CPS, one must either be a barrister who has been called to the bar and completed pupillage,¹⁵¹ or a solicitor with a practicing certificate.¹⁵² These prosecutors receive files from the police and

146. Interview with Miles Bennett, *supra* note 140.

147. *Id.*

148. See, e.g., *Crime (Defense and Prosecution)*, 9 KING’S BENCH WALK, <http://www.9kbw.com/practice-groups/crime-defence-and-prosecution> (last visited Nov. 14, 2015).

149. A state public defender’s office is a government-funded organization that provides defense attorneys to those that have been accused of a crime and cannot afford legal services. See Office of the Pub. Defender, *FAQ*, HAW., <http://publicdefender.hawaii.gov/faq/> (last visited Oct. 26, 2015). Through my experience working as an intern for the public defender, I learned there are some defendants who distrust their public defender because the defender is still being paid by the government, but the relationship between the government and the public defender is a unique one that leaves the public defender short of any actual governmental authority.

150. Angela Davis, *Federal Prosecutors Have Way Too Much Power*, N.Y. TIMES (Jan. 14, 2015, 11:57 AM), <http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-prosecutors-have-way-too-much-power>.

151. This is the process of a barrister completing her training. *How to Become a Barrister*, B. COUNCIL, <http://www.barcouncil.org.uk/careers/how-to-become-a-barrister/> (last visited Nov. 14, 2015). Becoming a solicitor is more akin to becoming a lawyer in the United States, minus the extra years of law school. *Solicitor*, NAT’L CAREER SERV., <https://nationalcareersservice.direct.gov.uk/advice/planning/jobprofiles/Pages/solicitor.aspx>.

152. *Crown Prosecutors*, CROWN PROSECUTION SERV., http://www.cps.gov.uk/careers/legal_professional_careers/crown_prosecutors/ (last visited Oct. 25, 2015).

decide whether to bring a case to court.¹⁵³ But, at no point does the prosecutor suggest a sentence for the defendant.¹⁵⁴ There are some informal discussions that occur between the defense and prosecuting barristers and solicitors, but these are highly informal and have little to no bearing on the outcome of the case.¹⁵⁵ Any formal discussion of sentencing must occur in an open court before the defendant, counsel, and jury.¹⁵⁶ In the United States, “eighty to ninety percent of all criminal cases are pled” and generally “in exchange for a reduced sentence.”¹⁵⁷ An American prosecutor cannot promise a reduced sentence, but he or she can enter into agreements about what charges will be filed or can be pled to, and a defendant is allowed to withdraw his plea of guilty if the State does not act in accordance with its agreement.¹⁵⁸ In addition, the parties can enter into agreements about what sentence the prosecution will recommend.¹⁵⁹ Some American attorneys argue that this sentence negotiating forces the defendant to “giv[e] up more than he is getting.”¹⁶⁰ Many feel that reform is a necessary step to eliminate this procedure, which negates societal interests in proper justice.¹⁶¹

V. CONCLUSION

Mandatory sentencing for murder eliminates the possibility of judicial discretion in England and Wales. Even though there is some discretion about when a defendant can be eligible for parole, this is still little consolation to the defendant in comparison to the United States’ division of murder into two degrees that allows for a fuller range of sentencing. England and Wales need to modernize the sentencing for murder to encompass the possibility that not every person convicted of murder deserves a sentence of life on license.

In an interview, mentioned above, with a judge from the Old Bailey who wishes to remain anonymous, he informed me that the CPS is too cheap to hire outside, independent barristers or Queen’s Counsel, which attributes to the lack of quality cases the CPS produces. Interview with Anonymous Judge, *supra* note 115.

153. *Id.*

154. *The Role of the Prosecutor in Sentencing*, CROWN PROSECUTION SERV., http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a01 (last visited Oct. 25, 2015).

155. I witnessed this first-hand while shadowing a barrister focused on criminal law, Miles Bennett. He informed me that this is common practice. Interview with Miles Bennett, *supra* note 140.

156. *The Role of the Prosecutor in Sentencing*, *supra* note 154.

157. Ursula Odiaga, *The Ethics of Judicial Discretion in Plea Bargaining*, 2 GEO. J. LEGAL ETHICS 695, 695 (1989).

158. *Plea-Bargaining*, *supra* note 67.

159. Even though the prosecution has the ability to recommend a sentence, the judge still retains full authority to impose any sentence permitted by the law for the crime the defendant is convicted of. *Id.*

160. Odiaga, *supra* note 157, at 695.

161. *Id.*

Eliminating this mandatory scheme will not be an easy task, because it is one of the ways in which politicians promise voters that criminals will be dealt the harshest blows the judiciary can distribute. Even though there is room for two legal systems to take alternate paths of justice, the implementation of mandatory sentencing is a sentencing scheme that is outdated, unjust, and an irresponsible form of punishment.

As far as plea bargaining is concerned, the United States needs to take a step back and review its prosecutors' abilities to negotiate the sentencing of a defendant and ask whether true justice can be served with this method of obtaining a sentence. Judicial participation in plea bargaining should be mandatory in the United States, as it is in England and Wales. It is true that it may be cheaper for the state to avoid a trial and "justice" may be dealt with more swiftly, but is that the true heart of the American legal system? Should the United States turn a blind eye to the defendants' best interests because they are often looked upon as second-class citizens, even before conviction? Is the United States going to take the same approach as the United Kingdom and shift from a defendant- to a victim-centered criminal justice system that overlooks what is best for the defendant and instead turn to how much bloodshed the voters seek? Justice is not served when two lawyers sit in a room and negotiate the life of a man. The United States has always had a strong belief in the power of the trial, and it is time that the trial be allowed to decide the fate of a defendant, instead of an elected official who will be more than willing to advertise the number of convictions he has obtained in a future campaign.