Preventing Danger

New Paradigms in Criminal Justice

Michele Caianiello

Michael Louis Corrado

Carolina Academic Press
Durham, North Carolina

Copyright © 2013
Carolina Academic Press
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Preventing danger : new paradigms in criminal justice / Michele Caianiello and Michael L. Corrado.
pages cm
Includes bibliographical references and index.
ISBN 978-1-61163-187-6 (alk. paper)
1. Criminal justice, Administration of--Congresses. I. Caianiello, Michele, editor of compilation. II. Corrado, Michael Louis, 1940- editor of compilation.

K5001.A6P74 2013
364--dc23

2013006351

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

To my grandchildren Zachary and Elena Goulet
and River, Jude, and Scout Corrado
MLC

To my wife Elena and my sons Marco, Stefano and Giovanni
MC

Contents

Preface **xiii**
Renzo Orlandi
Types of Preventive Detention xiv
Standard Minimum Guarantees xvi
A. The Principle of Legality xvii
B. The Principle of Proportionality xviii
C. Judicial Review xix

Acknowledgments **xxiii**

Introduction • Detention as Punishment and Detention as Regulation **xxv**
Michele Caianiello
I. Three Forms of Preventive Detention xxvi
Pretrial Detention xxvi
Post-Sentence Detention xxvi
Detention *Praeter Delictum* xxviii
II. The Danger xxix
III. Detention as Punishment and Detention as Regulation xxx

List of Contributors **xxxv**

Chapter One • Terrorists and Outlaws **3**
Michael Louis Corrado
I. Introduction 3
II. The Question Left Open 4
III. The National Defense Authorization Act (2012) 6
IV. Some History 7
A. Constitutional Provisions 7
1. Habeas Corpus 7
2. Treason 8
B. Cases before 2000 10

C. Domestic Terrorism and the AEDPA (1996) 12
D. September 11, 2001 and Its Aftermath 12
1. Events of September 11, 2001 12
2. Authorization for the Use of Military Force (AUMF) (2001) 13
3. Three Early Cases: Padilla, Rasul, and Hamdi 13
4. The Government's Response: Combatant Status Review Tribunals (CSRTs), the Detainee Treatment Act (2005), and the Military Commissions Act (2006) 20
5. Boumediene v. Bush (2008): A "Great Victory"? 20
V. The Most Recent Developments 22
A. The National Defense Authorization Act, the President, and the Virginia Legislature 22
B. *Hedges v. Obama* (2012) 24
Conclusion 26

Chapter Two • Exceptional Laws in Europe with Emphasis on "Enemies" **33**
Claire Saas
I. Classic Preventive Detention for Dangerous Offenders and the Retroactive Application of Harsher Laws 38
A. The (Failure of the) Distinction between Criminal Penalties and Security Measures 38
B. The End of the *Nullum Crimen, Nulla Poena Sine Lege* Principle? 41
II. Strict Safeguards 44
A. The Connection between Conviction and Preventive Detention — Substantive Safeguards 45
B. The Initial Decision by a Court and Judicial Review of Preventive Detention — Procedural Safeguards 47
III. Extension of Preventive Detention — Blurring the Frontiers 50
A. "Normalization" of Exceptional Laws 51
B. "Civilization" of Exceptional Laws 52
IV. Preventive Detention in the Light of Article 3 of the European Convention, an Outcome? 53
Comment on Saas 60
Jacqueline S. Hodgson
Comment on Saas 63
Stephen C. Thaman
Comment on Saas 68
Michel Massé

Chapter Three • The ECHR and the German System of Preventive Detention: An Overview of the Current Legal Situation in Germany **71**
Jörg Kinzig
I. Introduction: The Murder Case of *Jan O.* 71
II. The German Twin-Track System of Sanctions 72
III. Placement in a Psychiatric Hospital 73
IV. Placement in Preventive Detention 75
V. Empirical Information on the Use of Both Measures 78
VI. Recent Changes in the Law of Preventive Detention Due to the Jurisdiction of the European Court of Human Rights and the German Federal Constitutional Court 80
VII. The Most Urgent Challenges 83
Comment on Kinzig 96
Michiel van der Wolf
I. Introduction: *Jan O.* in Comparison to *Lucia de B.* 96
II. The Dutch Twin-Track System of Sanctions in Comparison to the German 97
III. The ECHR and the Dutch System of Preventive Detention 98
IV. Latest Developments and Conclusion: Best Boy in Class? 100
Comment on Kinzig 102
Emily Silverman

Chapter Four • The *Doppio Binario* in Italian Criminal Law **107**
Marco Pelissero
I. Purpose 107
II. The Logic of the Double Track and Its Crisis 108
III. Marginal Recourse to Security Measures: Statistical Confirmation 111
IV. The Rediscovery of the Possibilities of the Double Track in Other European Systems 112
V. The Regulation of the *Doppio Binario* in Italy in Light of the Jurisprudence of the Constitutional Court and of the European Court of Human Rights 114
VI. Changes in the Logic of Control of Dangerous Offenders: From the Double Track to a Multiplicity of Tracks 117
A. A Multiplicity of Tracks within the Penalty 117
B. A Multiplicity of Tracks before the Penalty 118
C. A Multiplicity of Tracks outside the Penalty 119
VII. The Dangerous Offender in the Preventive State 120

Comment on Pelissero 126
Giulio Illuminati
Comment on Pelissero 133
Maria Teresa Collica

Chapter Five • Preventive Detention in the United States and Europe 137
Christopher Slobogin
Introduction 137
The Facts and Holdings of M. v. Germany 138
United States Law on Preventive Detention 143
Principles that Might Govern the State's Use of Preventive Detention 147
Preventive Detention as Part of Sentencing 148
Preventive Detention Outside of the Criminal Justice System 149
Conclusion 152
Comment on Slobogin 158
Fredrick E. Vars
Comment on Slobogin 161
Alec Walen

Chapter Six • Extraordinary Rendition and Transnational Forced Disappearance under Criminal Law and the IHRL 167
John A. E. Vervaele
I. From Preventive to Security Detention: A Paradigm Change? 167
II. Extra-Ordinary Rendition: Cases and Figures 172
III. Political Oversight in Europe 175
IV. Extra-Ordinary Rendition and Applicable Human Rights Standards from the Perspective of the ECHR and the EU 176
A. Jurisdiction 177
1. ICCPR/The Human Rights Committee 177
2. The Inter-American Commission and Court on Human Rights 179
3. European Court of Human Rights 181
B. Security Detention under IHRL? 184
1. ICCPR/The Human Rights Committee 184
2. The Inter-American Commission and Court on Human Rights 186
3. European Court of Human Rights 187
C. IHRL Standards for Extradition or Rendition to Justice/Extra-Ordinary Rendition (Special Administrative Measures—SAMS) 189

1. ICCPR/The Human Rights Committee 189
2. Inter-American Court of Human Rights 190
3. European Court of Human Rights 192
V. Conclusion 197
A. Abduction and Security Detention: Negative and Positive Obligations 197
B. Extra-Ordinary Rendition: No Carte Blanche for the Executive Branch-Judicial Overview 199
C. Transnational Dimension of the Negative and Positive IHRL Obligations 201
Comment on Vervaele 207
Iain Cameron
Comment on Vervaele 213
Don E. Scheid
Comment on Vervaele 217
Michele Panzavolta

Chapter Seven • The Role of Social Science in the Discussion of a Tradeoff between Prison Sentence Length and Preventive Detention 223
Gail Corrado
I. What Is Meant by the Assertion that There Is a Tradeoff between Sentence Length and Preventive Detention? 224
II. Does Economic Theory Provide the Necessary Explanatory Power? 228
A. The Theory 228
B. The Explanatory Weakness of Economic Theory 230
III. System States and State Transitions 232
IV. Social Science to the Rescue 235
Comment on Corrado 245
John Scott
Comment on Corrado 248
Christopher Slobogin

Index 255

Preface[1]

Renzo Orlandi

This Fourth International Conference of the Future of Adversary Systems,[2] dedicated as it is to the question of preventive detention, gives us a valuable opportunity to confront a topical and delicate theme in modern criminal policy, a theme which puts freedom and security in direct competition. Over the last decade, Western society has become increasingly concerned about the problem of security threats (terrorism, immigration, organized crime). Almost every country has revised and adapted its police and judicial systems to address growing security concerns. This has been done with the utmost haste, and with the sort of underlying fear that channels social anguish towards the demands of security, giving politicians an occasion to manufacture consensus. The fight against crime is a traditional topic in election campaigns, but at the core of this debate lies the prevention of crimes rather than their repression, especially when it comes to particularly frightful forms of crimes, such as crimes committed by the *mafia* or by terrorists, two sorts of modern version of the ancient *delicta atrocissima*.[3]

A reflection on the legitimacy and opportunity of the multiple crime prevention strategies—both in civil and common law countries—is, therefore, useful. Different institutions, as we will see, can be gathered under the concept of preventive detention. Some civil law countries use similar words to describe this concept: for example, the *détention préventive* in the French speaking systems,[4] the *prisòn* (or *detenciòn) preventiva* in the Spanish ones,[5] or the *carcerazione preventiva* in the former Italian Code of Criminal Procedure.[6] In this context, we make reference to procedural categories and more precisely to precautionary measures limiting personal liberty. The label *preventivo* has sometimes been abandoned. For example, in France it was replaced by *détention provisoire* in 1970;[7] in Italy, after the reform of 1988, by *custodia cautelare in carcere.*[8] These lexical corrections are appropriate and aim at avoiding the idea of a precautionary measure as an alternative to the retributive judgment, which would

conflict with the presumption of innocence. In this context, therefore, "preventive" implies "temporary."

However, the meaning that Anglo-American legal practitioners give to this word is different and much broader. In the United States, preventive detention justifies the refusal of bail[9] and the pre-trial detention of the accused on the basis of his or her dangerousness. The preventive purpose here has the same *raison d'etre* as personal security measures, which are essentially aimed at preventing a second offence. In the Anglo-American vocabulary, "preventive" has a precise meaning: it hints at the need to neutralize the dangerousness of a person. This is the sense that I intend to assign to the term.

As a matter of fact, the preventive purpose (in the above-mentioned meaning) not only characterizes personal precautionary measures but also other institutions that are present in many criminal systems of civil and common law. One may think of some personal preventive measures *ante delictum,* or of the execution of the sentence with preventive modalities. And one may think of custodial security measures which are applicable, after the enforcement of the sentence, to people that are deemed particularly dangerous. Consequently, the notion of preventive detention can have a very broad sense, and can be used for all the measures limiting personal liberty for the purpose of neutralizing the dangerousness of the person concerned.

The idea is not new. P. Nuvolone, in a 1976 essay which deserves to be read again,[10] had already included, among preventive measures, both security measures and punishment (according to the re-definition imposed by art. 27 paragraph 3 of the Constitution).[11] One can appreciate the usefulness of this conceptual openness by observing that all kinds of preventive measures share a common feature, i.e., the aim at preventing future events, which poses similar problems for their legislative regulation. Different rules apply in the various stages of the proceedings, depending whether the measure is adopted *ante delictum*, during the proceedings, or during or after the enforcement of the sentence. However, the significant common features among the different situations and, most importantly, the fact that personal liberty is at stake, engage scholars in the elaboration of minimum standards of guarantees applicable to every case.

Types of Preventive Detention

Five types of preventive detention can be found in modern criminal systems—even though one could perhaps consider the fifth type controversial. The first (detention *ante delictum* or *praeter delictum*) has as its best known exam-

ple the initiatives to combat Islamic terrorism. In the United States, this led to the passing of the Military Commission Act (2006),[12] in which the "enemy combatant" takes the place of the accused. The privation of liberty does not occur on the basis of a charge, but on the basis of personal status, determined by a political decision labeling individuals as "socially dangerous." To this category also belongs the "detention of dangerous aliens" envisaged by the Community Protection Act (2006)[13] for controlling immigration in the United States. The same holds true for the numerous European regulations (including the Italian one[14]) that envisage fenced detention centers for illegal immigrants. Formally, they may speak of "restraint" (art. 14 d.lgs. 1998/286); however, what really matters besides the definition is the substance, the real condition of detained immigrants: nobody can deny that people held in this way are deprived of their liberty without being accused of a crime. One may think of the unfortunate experience of the Identification and Expulsion Centers (CIE) in Italy.[15] Other examples of detention *ante delictum* can be seen in those systems which allow police custody to last for many days (for instance, art. 17-20 of the *Polizeiaufgabengesetz* of the German state of Bavaria envisage a period of two weeks).

The second type of preventive detention consists of the pre-trial precautionary measures aimed at preventing the commission of future crimes. Nowadays, almost every judicial system recognizes this purpose as legitimate. With reference to this, explicit rules are contained in § 112*a* of the German *Strafprozessordnung*, in art. 503 of the Spanish *Ley de enjuiciamiento criminal*, in art. 144 n. 6 of the French Code of Criminal Procedure and in art. 274 co. 1 lett. *c* of the Italian Code of Criminal Procedure. As far as the United States is concerned, the topic is dealt with, on the federal level, by a section of the Federal Bail Reform Act of 1984 (18 U.S.C.A. §§ 3141 ss.), after the pioneering experience of the District of Columbia at the beginning of the '70s.[16] Even though the use of the precautionary custody for preventive functions shares the same aim as punishment and security measures, none of the legal systems have raised an issue of compatibility with the presumption of innocence.[17] It is believed that the accused may be considered socially dangerous—and, as such, has to be neutralized—even apart from the establishment of his or her guilt.

To the third type of preventive detention belong security measures imposed upon those who are not criminally responsible (usually because of lack of mental capacity), whose dangerousness is based on the commission of crimes in the past or who are found to be likely to harm themselves or others. In this regard, systems such as those in Italy, Germany, Austria, The Netherlands, Poland and Hungary[18] apply the theory of the "double track," preserving the retributive character of punishment and attaching to security measures the purpose of preventing social dangerousness.

The fourth type of preventive detention, similar to the previous one, consists in enforcing the sentence with particular modalities, justified by the need to prevent the commission of some crimes. For example, the application of the "rigorous imprisonment" under art. 41*bis* of the Italian penitentiary system belongs in this category,[19] as does the "maximum security imprisonment" envisaged in Norway by the Execution Sentences Act of March 2002.[20]

Finally, the fifth type is represented by the security measures imposed after imprisonment. In this case a person is convicted at trial for having committed a crime. The judge, in the sentencing phase, imposes both a punishment and a preventive detention measure, which will be served after the punishment: for example, taking into custody for safety reasons (*Sicherungsverwahrung)* under § 66*a* of the German StGB, according to which the judge can provide for extending the detention of the convicted persons after completion of their sentences, provided they remain dangerous at that time.[21]

Standard Minimum Guarantees

In terms of preventive detention, guarantees have to be based upon facts which have not yet occurred. The finding of such facts is difficult and speculative, but not as such impossible or unlawful. Every modern constitution allows for limitations of personal liberty for security reasons or public safety, limitations which must therefore be based on a prognosis: one may look, for example, at 13 paragraph 2, 14 paragraph 3, 16 paragraph 1, 17 paragraph 3 and 41 paragraph 2 of the Italian Constitution.[22] And in general the constitutions of continental Europe, born as a reaction to the totalitarian experience of the first half of the twentieth century, require formal conditions for the legitimacy of the measures limiting personal liberty. The conditions correspond, in large measure, to the conditions imposed by the United States Constitution under the rubric of due process.

That being said, we can identify a number of considerations regarding the fundamental principles to be respected in the regulation of the various forms of preventive detention; to be precise, the legality principle, the proportionality principle and the principle of judicial review must be respected. These are cornerstones of the legal tradition of civil law;[23] however, with the sole exception of the legality principle, they are also reflected in the thinking of common law jurists.

A. The Principle of Legality

The different forms of preventive detention, because of their aim of preventing future events, pose a unique challenge to the legislator: predicting the future. Dangerousness determinations must necessarily be drawn from facts and behaviors of the past, which are fraught with prognostic information. To this end, one has to use data of common experience validated by sociological, psychological and criminological theories. The notion of dangerousness does not necessarily have to be connected to the risk of the commission of a crime: modern constitutions allow for the limitation of individual liberty for reasons of security or public health even with respect to persons who have not been accused or convicted of a crime (for example, art. 11 *Grundgesetz* or art. 16 Italian Constitution).[24] What matters is the fact that safety (in its various declinations of social coexistence, environmental security, democratic security, and so on) must appear to be so seriously in danger as to justify the sacrifice of individual rights.

The task of the legislator is particularly difficult and potentially discriminatory when dangerousness ratings are derived from personal conditions (the *status* of illegal immigrant, the contiguity with a criminal environment, family relationships or friendships with people suspected of being part of *mafia* or terrorism associations). The use of general clauses such as "*for the purpose of assuring public order or safety*", which leave too much discretion to the interpreter, should also be avoided. The task is less problematic, but still challenging, when the measure aims at preventing specific crimes and dangerousness is inferred from the existence of significant indicators of criminal behaviors typically associated with the crime to be prevented. No matter how serious they are, these indicators obviously do not justify a deprivation of liberty on the same basis as punishment; this sort of assumption would be in conflict with the presumption of innocence, the cornerstone principle of every democratic constitutional system. The Italian experience shows that dangerousness cannot be inferred solely on the basis of the seriousness of the defendant's charges.[25] The fear that the defendant, if released, could jeopardize primary goods such as life, health or personal safety, justifies the coercive measure. This fear, however, must be founded on elements other than the indicators of guilt; otherwise, we would fall back into a presumption of guilt. The systems that apply the theory of the "double track" (like Italy and Germany), infer the dangerousness of people who are not criminally chargeable from findings (even if not final) of illicit conduct and from the outcomes of psychiatric examinations.[26]

In this respect, the serious and longstanding issue arises as to what is the most appropriate treatment for those persons who are not criminally chargeable and

who will serve their preventive detention time in special nursing homes or mental health facilities. On this point, the Italian experience with forensic psychiatric hospitals has been so negative that starting in February 2013 they will be replaced by treatment centers that will not have the features of prisons.[27] As for those who are condemned to rigorous imprisonment, the dangerousness ratings are inferred from the type of crime of which they have been convicted. Experience shows that some offenders (mostly those connected with the *mafia* or with terrorism) are still capable of committing crimes even in captivity. The enforcement of the sentence with the prospect of rehabilitation could leave room for communication between the inmates and the outside world that could be exploited for criminal purposes. Hence, there remains the need of a special vigilance that necessarily entails a further reduction of freedom and results in an increase of the afflictive character of the punishment for preventive reasons.[28]

If, according to modern constitutions, personal liberty can be restricted only in such cases and in such a manner as is provided by law, the same should apply to special restrictions that add to the ordinary penalty a *surplus* of sufferings. It is thus important that the law accurately envisage the dangerousness according to which security custody has to be applied. The same holds true for custodial security measures that follow the execution of the sentence, as, for example, the aforementioned *Sicherungsverwahrung* of the German system.

B. The Principle of Proportionality

Respecting the principle of legality is not enough. In order to be lawful in light of the criteria of practical rationality, which legislative choices that restrict individual rights must always satisfy, the forms of preventive detention must also abide by the principle of proportionality, seen in its three components of suitability, strict proportionality and adequacy.

Preventive measures must be capable of preventing the danger feared, in order to avoid their erroneous use. Moreover, they must be adopted with the sole aim of preventing particularly serious risks (i.e., acts of aggression against life and health), and not to avoid the commission of just any offense, nor for vague and unspecified security or public order reasons. In particular, however serious the danger faced may be and however solid the reasons justifying it are, preventive detention can never be executed in a manner that affects the irreducible core of human dignity. Even if detained, dangerous people must be granted the minimum margins of freedom and human relationships that are essential to their physical and mental health.[29]

Another aspect that falls within the principle of proportionality is the duration of preventive measures. Given the fact that they are related to future and uncertain events, determining their time limit in advance is impossible (unless the law imposes one), regardless of the duration of the danger faced. A periodic review by the public authority (even *ex officio*) of the persistence of the grounds for the adoption of the measure is always possible and, indeed, necessary. The provision of a maximum term should be the rule in cases of detention (precautionary or administrative), in order to balance the need for security with the respect for personal liberty. In other words, with regard to the accused (towards whom the presumption of innocence applies) and to the persons deemed dangerous even in the absence of evidence of a crime, preventive detention—if it ever could be justified on the basis of criminal policy—should be contained within a reasonably brief time period. And that time period should be decided not by the duration of the asserted danger, but rather by the possibility of providing solutions to deal with the danger itself, even after releasing the person.

C. Judicial Review

Preventive detention measures are sometimes adopted by administrative authorities. This is true not only for *ante delictum* measures, but also for those measures that are incorporated in punishment; this is the case, for example, for "rigorous imprisonment" in Italy, which is decided by the Minister of Justice. Still, these are measures that limit personal liberty and which, in the legal culture of modern constitutions, require the intervention of the judicial authority. In the Italian example, the power of imposing "rigorous imprisonment" granted to the administrative authority is justified by denying the fact that it is a *surplus* of sufferings imposed on some specific offenders that are proven to be dangerous. It is considered, instead, a modality of punishment common to all the convicted who are deemed socially dangerous.[30] This argument has its merit on a formal level but we know that, in practice, "rigorous imprisonment" is reserved, almost exclusively, for a particular type of offender (the mafioso) and lends itself to being used as a sort of modern *territio*[31] to lead the convicted to cooperate with the justice system.

Be that as it may, every measure of preventive detention which is not within the scope of a judge's power should be at least subject to judicial review.[32] To this end, the dangerousness determinations deemed to be present in the specific case must be accurately grounded, so that the measure can be appealed by whoever has been unjustly subjected to it.

Notes

1. Translated by Federica Iovene of the University of Trento.

2. Held in Ravenna, Italy, on May 11–12, 2012. For those who contributed to making it possible, in addition to the Center for European Studies at the University of North Carolina and the Faculty of Law at the University of Bologna at Ravenna, see the website at http://www.law.unc.edu/faculty/conferences/adversary/default.aspx.

3. See, in particular, Friedrich von Spee, criticizing the ancient dictum "in atrocissimis delictis iura transgredi licet et leviora indicia sufficiunt", in Cautio criminalis seu de processibus contra sagas (1631), Quaestio XVII and Quaestio XXXVII.

4. Articles 137–150 of the French Code of Criminal Procedure, enacted in 1959.

5. Articles 502–519 of the Spanish Code of Criminal Procedure, enacted in 1882.

6. Articles 269–276 of the Italian Code of Criminal Procedure, enacted in 1930.

7. Art. 1, l. 643/1970.

8. Art. 285 of the new Italian Code of Criminal Procedure enacted with d.P.R. 447/1988 and entered into force in 1989. See on the subject V. Grevi, *Misure cautelari*, in G. Conso, V. Grevi (eds.), *Compendio di procedura penale*, 5th Edition, 2010, p. 391; F. Cordero, *Procedura penale*, 9th Edition, 2012, p. 476; P. Spagnolo, *Il Tribunale della libertà. Tra normativa nazionale e internazionale*, 2008, p. 166; E. Valentini, *La domanda cautelare nel sistema delle cautele personali*, 2010, p. 139.

9. *Pre-trial custody of a defendant for the purpose of protecting some other person or the community at lare*: W. R. La Fave, J.H. Israel, N.J. King, *Criminal Procedure*, 3th Edition, 2000, p. 647. For the U.S., see the Bail Reform Act of 1984, 18 U.S.C. §§3141–3150, 3156.

10. P. Nuvolone, *Misure di prevenzione e misure di sicurezza*, voce in *Enc. Dir.*, Milano 1976, vol. XXVI, p. 632; E. Gallo, *Misure di prevenzione*, in *Enc. Giuridica Treccani*, Roma, 1996, p. 1.

11. Art. 27, par. 3 Italian Constitution states: "Punishment cannot consist in treatment contrary to human dignity and must aim at rehabilitating the offender."

12. Sec. 3, §948a of the Military Commission Act, enacted by the Congress of the United States of America on October 27, 2006.

13. Sec. 101 of the Community Protection Act, enacted by the Congress of the United States of America on September 21, 2006.

14. Article 14 d.lgs. 286/98 (so-called "Testo Unico Immigrazione"). The first legislative introduction of administrative detention centers for foreigners subject to expulsion took place with article 12 l. 40/98 (so-called "Turco—Napolitano"). Nevertheless, the previous article 7-quinquies, paragraph 5 d.l. 489/95 (so-called "Decreto Dini") had already considered a particular application of the precautionary measure established by article 283, paragraph 4 of the Italian Code of Criminal Procedure to the alien to be expelled.

15. The current name "Identification and Expulsion Center" (CIE) was introduced by l. 125/08 (so-called "Pacchetto sicurezza"), replacing the previous "Temporary Stay and Assistance Center" (CPTA).

16. Cfr. H.H. Jescheck-Th. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 5° ed., Berlin, 1996, p. 806.

17. But see the dissent of Justice Marshall in United States v. Salerno, 481 U.S. 739, 748, 755 (1987).

18. H.H. Jescheck-Th. Weigend, *loc. cit.*, p. 806.

19. Art. 41 bis L. 354/1975 ("Ordinamento penitenziario"). With regard to people convicted of serious crimes, such as terrorism, illicit drug trafficking, organized crime (especially *mafia* related crimes), the ordinary penitentiary conditions are suspended and more restrictive ones are applied. This so-called "rigorous imprisonment" aims at preventing people convicted of those crimes from maintaining, both outside and inside the prison, relations and contacts with people belonging to the same criminal association. The restrictions concern the reduced possibility to talk to relatives and other people in general, the maximum amount of money or other goods they can receive from outside, the censure over their correspondence, the limited time they can spend outside their cell.

20. Chapter 3 of the Execution Sentences Act enacted in Norway in March 2002.

21. Par. 66a StGB (German Code of Criminal Procedure).

22. Art. 13, par. 2 of the Italian Constitution states: "No form of detention, inspection or personal search is admitted, nor any other restrictions on personal freedom except by warrant that states the reasons from a judicial authority and only in cases and manner provided for by law"; art. 14, par. 3 of the Italian Constitution states: "Controls and inspections for reasons of public health and safety or for economic and fiscal purposes are regulated by special laws"; art. 16, par. 1 of the Italian Constitution states: "All citizens may travel or sojourn freely in any part of the national territory, subject to general limitations that the law establishes for reasons of health and safety. No restrictions may be imposed for political reasons"; art. 17, par. 3 of the Italian Constitution states: "For meetings in public places previous notice must be given to the authorities, who may forbid them only for proven risks to security and public safety"; art. 41, par. 2 of the Italian Constitution states: "It (private economic initiative) cannot be conducted in conflict with social utility or in a manner that could harm safety, liberty, and human dignity."

23. See on the point L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, 2nd Edition, 1990, p. 546 and *passim*.

24. Art. 11 of the German Constitution (Grund Gesetzt) states: "All Germans shall have the right to move freely throughout the federal territory. This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a Land, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime."

Art. 16 of the Italian Constitution states: "All citizens may travel or sojourn freely in any part of the national territory, subject to general limitations that the law establishes for reasons of health and safety. No restrictions may be imposed for political reasons. All citizens are free to leave and to re-enter the territory of the Republic, subject to legal duties."

25. The reference is to decisions of the Italian Constitutional Court no. 268 of 2010, 164, 231 and 331 of 2011, which reckon such a presumption reasonable only with regard to people accused of belonging to *mafia* associations.

26. Art. 203 of the Italian Code of Criminal Law and § 66 of the German Code of Criminal Law (see *supra* note 21).

27. Art. 3 ter d.l. 211/22, (converted with amendments into the L. 9/12).

28. As a matter of fact, the Italian Constitutional Court denies that the "rigorous imprisonment" affects the quality of punishment or the degree of personal liberty of the detainee (sent. 349/1993 e 376/1997). It would rather be an enforcement of the ordinary

sentence, whose modalities are devolved to the prison administration. All the detainees are exposed to it due to their potential dangerousness, in particular those involved in *mafia* crimes, who are suspected of maintaining connections with their organization. By virtue of this argument (not entirely convincing), the practice of "rigorous imprisonment," as such, is not objectionable from a constitutional perspective, since the further deprivation of liberty determined by preventive needs is already contained in the punishment imposed by the judge. To the contrary, the federal district court in Los Angeles, in a decision of September, 11th, 2007, denied the extradition of a convicted mafioso (Rosario Gambino), precisely in order to prevent him from being subject to the atypical punishment of "rigorous imprisonment": on this point see M. Pavarini, "Il 'carcere duro' tra efficacia e legittimità," in *Criminalia 2007*, 2008, p. 262-263.

29. There is a recurrent statement in the decisions of the Italian Constitutional Court in matters involving "rigorous imprisonment": "coercive measures that entail treatment which is contrary to human dignity or would completely frustrate the rehabilitative purpose of punishment are forbidden" (decisions nos. 376/1997; 351/1996; 349/1993).

30. See note 8.

31. As a matter of fact, if the defendant cooperates with the justice system, he/she can avoid the "rigorous imprisonment" (see *supra* note 19), which is applied to people convicted of *mafia*-related crimes.

32. The decision of the Minister that applies the "rigorous imprisonment" can be appealed before the surveillance court (art. 41*bis* comma 2*quinquies* ord. pen.).

Acknowledgments

We would like to thank Giles Rhodenhiser, Jennifer Cachon, Graham Ford, Nathan Schaal-Wilson, and Federica Iovene for their help.