Presumed Dangerous

Punishment, Responsibility, and Preventive Detention in American Jurisprudence

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Author's Preface

> While the country has made mistakes in the past, the widespread abuse of human rights over the last decade has been a dramatic change.… Recent legislation has made legal the president's right to detain a person indefinitely on suspicion of affiliation with terrorist organizations or "associated forces," a broad, vague power that can be abused without meaningful oversight from the courts or Congress (the law is currently being blocked by a federal judge). This law violates the right to freedom of expression and to be presumed innocent until proved guilty, two other rights enshrined in the [Universal Declaration of Human Rights].
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> – Jimmy Carter, "A Cruel and Unusual Record," *New York Times*, June 25, 2012

One of the pressing issues of our time is the issue of the state's use of purely preventive measures to contain crime. Purely preventive measures (as opposed to measures that are punitive or retributive in nature) have traditionally been limited to short term detentions on one hand and to commitment of those who are mentally ill and dangerous on the other. In recent years, however, the use of preventive detention has grown rapidly, largely without any accompanying justification that might set limits for the expansion. Thus we see post-sentence indefinite detention of sexual offenders and those found "guilty but mentally ill," and detention without trial of those suspected of terrorist affiliation. Whereas detention as punishment is limited by the restraints imposed by the requirement of desert and by the constitutional limits upon the criminal law, there is no such basis in theory or in constitutional jurisprudence for limits upon these preventive measures. There is therefore no reason in theory or in current jurisprudence why purely preventive detention might not be extended to all offenders deemed sufficiently dangerous.

The chapters in this book are based upon lectures given at the University of Trento in Italy in May of 2012. The book was originally published by the University of Trento. I am grateful to the University of Trento for permission to republish the lectures here, and to Professor Marcello Busetto for his preface.

Preface to the Italian Edition[1]

Marcello Busetto
The University of Trento

I first met Michael Louis Corrado over twenty years ago. He had been invited by the University of Bologna to speak at an international conference and, as a young Ph.D. candidate, I could immediately appreciate the breadth of his studies and research.

Born in Pennsylvania into a family of Italian origins, Professor Corrado earned his Ph.D. in philosophy at Brown University in 1970. He then taught for over ten years at Ohio University where he became a tenured professor in Philosophy, while also developing scientific and educational relationships with several other universities, including Penn State and the University of Michigan. His interest in legal issues, which had already emerged in works such as his 1975 monograph *The Analytic Tradition in Philosophy*, led him to the University of Chicago Law School, where he was, *inter alia*, student editor of the University Law Review.

After achieving his J.D. in 1984, Corrado worked as judicial clerk at the 7th Circuit Federal Court of Appeals, and then as an attorney in a Chicago law firm. After several years, he left the practice of law and resumed teaching at the University of North Carolina as a law and philosophy professor in 1988. As a member of the Chapel Hill Law faculty, he continues to teach a large number of different subjects: tort law, comparative law, philosophy of law and, of course, criminal law.

It is actually in the area of criminal law, and in the philosophy of criminal law, that he has published his most significant legal works, beginning with his first book, *Justification and Excuse in the Criminal Law* (New York, 1994), a considerable collection of essays which was widely circulated in Italy. Professor Corrado continued his inquiry into the same subject, with particular at-

1. Translated from the Italian of the original edition by Marcello Busetto, Federica Iovene, and Ryland Bowman.

tention to the relationship between punishment, responsibility and free will, in several subsequent articles, including "The Abolition of Punishment" (*Suffolk University Law Review*, 2001) and the recent "Why Do We Resist Hard Incompatibilism?" (in *The Future of Rehabilitation and Punishment*, Oxford University Press, 2013). The richest (and best-known) part of his bibliography regards two more specific topics: the responsibility of the drug addict and preventive detention as an alternative to punishment. A considerable number of his essays deal with these items; I list just a few of the most outstanding here: "Incapacitation and Self-Defense" (*European Journal of Law, Philosophy and Computer Science*, 1995), "Punishment and the Wild Beast of Prey: The Problem of Preventive Detention" (*Journal of Criminal Law and Criminology*, 1996), "Addiction and Causation" (*San Diego Law Review*, 2000), "Sex Offenders, Unlawful Combatants, and Preventive Detention" (*North Carolina Law Review*, 2005), "Responsibility and Control" (*Hofstra Law Review*, 2005), "Addiction and the Theory of Action" (*Quinnipiac Law Review*, 2006), "A Purely Volitional Theory of Insanity" (*Texas Tech Law Review*, 2009), and "Detention as Punishment and Detention as Regulation" (in *Preventing Danger: New Paradigms in Criminal Justice*, Carolina Academic Press, 2013). The present publication is both a step forward in the discussion and a synthesis of previous works in the same field.

Before introducing this volume, it must be emphasized that Corrado's interests also cover comparative law. In addition to his earliest engagement in criminal and philosophical law reviews (*Law and Philosophy*, *The Philosophy of Criminal Law*), he is now General Editor of the *Carolina Series in Comparative Law* and author of the *Comparative Constitutional Review* (2004), the second edition of which is forthcoming. As a scholar in Italian criminal procedure, I am especially pleased to point out the organization of a cycle of conferences specifically focusing on criminal procedure, entitled *The Future of Adversarial Systems*. The conferences, supported by the Law School and the Center for European Studies of the University of North Carolina, were first held in Chapel Hill from 2009–2011; lately, the organization has been shared by the Faculty of Law of Bologna University and by the University of Warwick. Accordingly, the most recent meeting, in 2012, took place at the Ravenna campus of the University of Bologna, which will also host the upcoming conference.

The relationship between Professor Corrado and Italian universities has always been excellent (as it has with other major European universities, such as Lund and Nice). The Faculty of Law of Bologna University was honored to host him as Distinguished Visiting Professor in May 2004. Based on his experiences that semester, he applied, a few years later, for the Fulbright Chair at the University of Trento. I am thankful to Professor Giulio Illuminati for pro-

moting such an initiative, which was warmly welcomed by the Faculty of Law of the University of Trento and which has resulted in a fruitful collaboration. The first academic year (2010–2011) spent by Michael Corrado at the University of Trento as Fulbright Distinguished Chair was followed by a second one (2011–2012) as Visiting Professor, and that same assignment has recently been renewed. The ideas that Professor Corrado pursued and researched in that context are the genesis for this work.

More precisely, this volume takes its origins from a series of lessons held during the last two academic years for the students of the Doctoral School of Comparative and European Legal Studies (*Scuola di Dottorato in Studi Giuridici Europei e Comparati*) of the University of Trento. The special interest with which the Ph.D. candidates welcomed such an initiative, along the enthusiasm of the Dean of the Law Faculty of Trento, strengthened my commitment to keeping a written record of those lessons. With this project, Michael Corrado has gone beyond my expectations, writing a text which contains much more than a mere transcription of that teaching experience. It is, in fact, a compendium of the author's considerations in one of his most active fields of research.

The title itself displays a wide array of perspectives. These perspectives become even more compelling when we understand their specific object and purpose. This book, Corrado writes, contains the history of a change: until very recently, according to U.S. law, no one who was of sound mind could be detained in order to prevent [him] from committing crimes in the future; such so-called preventive detention was allowed only for those who are dangerous for a lack of general responsibility. Now all of that has changed in the United States, and the author intends to describe how that change has taken place.[2]

Throughout Italy in recent years, frequent analysis points out similar trends: all Western systems are experiencing several different evolutions which run along a parallel path; criminal justice as a whole (criminal law, criminal proceeding, enforcement of judgments) is acquiring the character of prevention, of security criminal law, of a normative, judicial, police apparatus, aiming not only at crime prosecution, but also at the prevention of crime.[3] Writing from the particular perspective of preventive detention and with special reference

2. Preface, pp. vii and viii.

3. For its outstanding considerations and perspectives, see the conference proceedings of the meeting organized in Modena in March 2009 by the *Associazione Franco Bricola*: *Sicurezza e diritto penale*, Bologna University Press (Bologna, 2011).

to the United States, Professor Corrado's work confirms and, at the same time, updates the reader on the real scale of the phenomenon.

But the inquiry goes beyond a useful overview of the regulatory framework of that particular country. The volume offers sharp critical tools that transcend the specific field on which the research is focused (the American criminal justice system). With his comparativist background, Professor Corrado is able to pursue his research and analysis without being influenced by his reference system or by the possibly "misleading labels" one frequently encounters. For example, the very concept of preventive detention is identified and used as a wide concept, and includes several phenomena which present similar characteristics and pose similar questions. In other words, the author confronts himself not only with a "system," but also with specific problems, which are likely to be discussed and taken as a model in other countries, beyond the different *nomina juris* given to the single institutions by the various laws. Professor Corrado has pursued this concept throughout his comparative works:[4] comparison not only as a measure of concordances and differences between legal systems, but also as a powerful critical-practical instrument, meant to assume essential roles at the level of political reforms and justice renewal.[5]

This book offers several important perspectives. First of all, the work constantly invites the reader to maintain a critical approach and to uncover the risks that the new tendencies carry. We find, starting from the initial pages, a sort of manifesto of ideas that connects with the liberal tradition in criminal law. The ancient principle forbidding preventive detention "against those who are responsible for what they do" is losing its popularity; but we cannot "deny [its] importance," because it is still "part of our law" and "lie[s] close to the hearth of American criminal jurisprudence."[6] In these words, we can perceive a clear invitation to bear in mind that the changes of criminal law systems, despite their circulation and inevitability, have an exceptional and, in some way, pathological dimension. I would like to note here an echo of the debate which has arisen in the last twenty or thirty years, with regard to more general changes (the so-called crisis of the legality principle). It is essential to be able to distinguish

4. M.L. Corrado, *Comparative Constitutional Review: A Casebook*, Durham, North Carolina, 2004.

5. Italian criminal procedure scholars shared this approach, especially in the crucial moment of the reform of the code of criminal procedure (1988–1989): E. Amodio, *Miti e realtà della giustizia nordamericana. Il modello statunitense e il codice di procedura penale del 1989* (1988), now in E. Amodio, *Processo penale, diritto europeo e common law. Dal rito inquisitorio al giusto processo*, Milano, 2003, p. 179 f.

6. Introduction, p. 4.

such due "acknowledgment" of the changes from what would be an unacceptable drift that could ultimately consider fundamental principles as useless old-fashioned things.[7]

On this basis, the author focuses on several features of the American experience which can be found in many other systems as well, including security measures for the dangerous offender (not responsible, or also mentally sound). At this point, Corrado's work evokes, for the Italian reader, old debates: the Positive legal school, the authoritarian compromise of the "double track." It is worthwhile to take up these topics again, both from the domestic point of view, where the reform projects aiming at abandoning *misure di sicurezza*, for those who are responsible for what they do, are still unaccomplished, and from the European perspective, where such measures are being extended and strengthened (like *Sicherungsverwahrung* in Germany), thus creating problems of compatibility with the principles set forth by the European Convention for the Protection of Human Rights. The debate (which has recently been enriched by important contributions of Italian scholars[8]) might take advantage of the ideas and the caustic remarks that we find in the following pages, about the growth of solutions not far from that old "double track." It is "an unstable compromise," that has "a contradiction at its core," and brings the mark of the political and ideological climate that delivered it: "an irrational solution for an insane period."[9]

But the overview does not focus only on those aspects which are more familiar to Italian scholars. Preventive detention strongly tends to run along new, protean paths; the Italian system itself gives indeed a significant example of this tendency. The more traditional channel (*misure di sicurezza*), although still existing (with all the usual problems), is nowadays nothing more than a "dead track": the limited use of such measures allows us to consider them a "dry branch" of the Italian punishing system.[10] However, we cannot claim that prevention of social dangerousness does not belong to our criminal law system; and this is due to several "instruments" which, on the contrary, often have a significant empirical impact.

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7. For some good examples of such despicable tendency to treat legality principle as "*anticaglia ormai inservibile,*" see M. Nobili, *Nuovi modelli e connessioni: processo—teoria dello stato—epistemologia*, in Aa. Vv., *Studi in ricordo di Giandomenico Pisapia*, vol. II, Milano, 2000, p. 497–498.

8. M. Pellissero, *Pericolosità sociale e doppio binario. Vecchi e nuovi modelli di incapacitazione*, Torino, 2008.

9. Part Three, 69.

10. M. Pellissero, cited at footnote 7.

Professor Corrado's work proceeds from the most "tested" instruments, such as pre-trial measures, including custody, applied to the purpose of protecting society (*cf.* art. 274, par. 1-c Italian Code of Criminal Procedure). In this respect, the following pages again recall usual debates, but some considerations are particularly striking. The idea that pre-trial detention might be applied for reasons of prevention in the United States is relatively recent (Bail Reform Act of 1984). But the first step from which every consequence stemmed was the decision of the U.S. Supreme Court which held such legislation to be constitutional. This decision, Corrado writes, was "the 'entering wedge' for the introducing in the United States of preventive detention of persons who are mentally competent but dangerous."[11] In other words, this was the starting point of the well-known path which resulted, after September 11th, in the various kinds of detention without a crime, without a charge and without a trial, based on different "types of author": undesirable aliens, terrorists, unlawful combatants. Actually, once we have admitted that the detention for preventive purposes does not contrast with the presumption of innocence, because its aims are different from those of punishment, we also need to acknowledge that it is hard to find "a principle that would limit the justification of detention to just those cases" (pre-trial detention for "those indicted for […] serious crimes") and would prohibit its application to "those who are innocent, if they are found to be dangerous."[12]

The conclusion reached by the Supreme Court is now almost unquestioned also in Italy, with regard to the relations between the purposes of pre-trial measures described in art. 274, par. 1-c of our Code of Criminal Procedure and the presumption of innocence.[13] It is important to remember that many implications and problems are tied to this root. In the last decades we have tried to sharpen the features of the "preventive pre-trial detention," pointing out requirements and peculiarities, in order to distinguish it from an early punishment.[14] But these rightful purposes present a corollary: once it has been distinguished from punishment in order to "safeguard" its compatibility with article 27, par. 2 of the Italian Constitution (presumption of innocence), pre-

11. Introduction, 8.

12. Part One, p. 14.

13. Previous debates and critical remarks (G. Illuminati, *La presunzione di innocenza dell'imputato*, Bologna, 1979) belong more to the past than to the present of Italian criminal procedure.

14. To tell the truth, this aim is still far to be completely fulfilled, both in the rules of law and in everyday practice. See, on this topic, the instructive and updated report of G. Illuminati, *Carcere e custodia cautelare*, in *Cass. pen.*, 2012, p. 2370.

ventive detention is positioned to get rid not only of crime, but also of the criminal proceeding, thus leading to borderline zones, close to "administrative areas," where the traditional guarantees do not apply. Preventive detention in itself tends to break free from many limits: detention "without crime" and, therefore, "without trial." On the whole, the suggestion we can draw from Corrado's work is that it is presently unavoidable to accept this expanding solution, as it regards all legal systems and the pre-trial detention of the defendant used for purposes of prevention. Nonetheless, in accepting it and considering it compatible with the presumption of innocence, we take a sort of "leap into the unknown," when we consider its possible implications.

Such observations form the central focus of the last part of the book, where the above mentioned tendencies are more closely examined, including solutions which differ considerably from the traditional ones and which seem to put preventive detention in "another arena within which the State may deal with those who threaten harm to society […] outside the rules of criminal law."[15] In this respect, the overview offered on U.S. legislation is illuminating. We knew in which directions the policies aiming at addressing Islamic terrorism were leading, but we missed the last steps of the path followed by the United States: the proposal to renew immigration law in order to allow forms of indefinite administrative detention of the undesirable aliens and the National Defense Authorization Act (2012), which further extends the power of military forces to capture and detain, without trial and without hearing, those suspected of being terrorists (apparently, not only foreigners).

These developments and achievements are striking, especially when, as already mentioned, European legislatures are not so far from similar choices. In Italy, for example, from the old root of "measures of prevention" (*misure di prevenzione "praeter delictum"*) in the field of organized crime, new "measures," under the aegis of art. 13 of the Constitution, have been put forth and applied to different areas. To this end, the recent immigration legislation is emblematic: nowhere is this more evident than in the sad experience of the so-called "Identification and Expulsion Centers" (*Centri di identificazione ed espulsione)*.

Another sign that times are changing can be seen in the strong attention given, throughout Europe, to the so-called "criminal law of the enemy." The ensuing debate has been so intense that Professor Corrado can't avoid discussing it, and does so with a well-justified criticism. He claims that the very idea of a distinction (between a criminal law "of the enemy" and an ordinary criminal law, a criminal law "of the citizens") "is not founded on coherent princi-

15. Part Five, p. 81.

ple" and gives rise to the risk of "abandoning the traditional structure of criminal law entirely."[16] It is noteworthy to find here a point of convergence with the critical opinions expressed about this same *Feindstrafrecht* in an important conference convened a few years ago by the Law Faculty of Trento.[17]

In the light of these changes and debates, the author's positions are even more significant. He does not isolate himself in the "ivory tower" of principles, insensitive to the paths followed by the Western legislations; on the contrary, he struggles to identify limits and guarantees which should still apply to the different hypotheses of preventive detention. To this end, the work also contains several proposals, stemming from previous works, about post-trial preventive detention.[18]

At the same time, the author engages another task that the criminal law scholar must carry out in the face of such changes: to safeguard a threshold which cannot possibly be crossed without intolerable security drifts. At this point, it is worthwhile to invoke this work's concluding words: discontinuities between "the criminal law of the past [and] the criminal law of the future" are unavoidable, but "if we do not change directions we will find ourselves adrift without an anchor, without any mooring in sight."[19]

Although directly concerning the recent trends of American legislation, this warning, for reasons previously given, cannot leave Italian and European scholars indifferent, illustrating once more the importance of the present work. At the same time, to use Professor Corrado's metaphor, it helps the reader to understand various phenomena while not losing the compass in the stormy ocean of contemporary criminal justice.

16. Part Five, p. 109, and p. 82.

17. The meeting, organized by the *Associazione Franco Bricola*, was held in Trento on March 10–11, 2006; the conference proceedings are published in A. Gamberini, R. Orlandi (*a cura di*), *Delitto politico e diritto penale del nemico. Nuovo revisionismo penale*, Bologna, 2007.

18. Part Three, p. 70–71.

19. Conclusions, p. 109.