Let’s start by considering a statute that, for certain sorts of crimes, imposes a criminal sentence to be followed by a period of detention aimed only at protecting society from this sort of offender.¹ The first part, the sentence, will be intended as retribution for what he did; the second period of detention will be intended to prevent future crimes. Because the measure begins with a retributive criminal sentence, and because retribution depends upon criminal responsibility, we must assume that the detainee must be found criminally responsible for what he did.

This sort of measure exists both in the United States and in Europe. In a number of American jurisdictions there is sex predator legislation that makes it possible for a sex offender, after he has served his criminal sentence, to be given a hearing on the question of dangerousness and if he is found dangerous to be committed to indefinite detention, to be released only when he is no longer dangerous to society. In cases where the offender is found to be legally insane there is no criminal sentence and the offender will go directly to preventive detention. In other cases, however, the criminal sentence attests to the fact that the offender has been found criminally responsible for his actions.

In Germany and in a number of other countries in Europe we find the “double track” system of crime control. Offenders may be punished with a imprisonment for a limited period of time, and that punishment may be followed by a period of detention considered to be preventive. The European Court of Human Rights, speaking of the member-states of the Council of Europe,

¹ Cf. M. v. Germany, paragraph 70: Eight Convention States have provisions for “preventive detention in respect of convicted offenders who are not considered to be of unsound mind, in other words, who acted with full criminal responsibility when committing their offence(s), and who are considered dangerous to the public as they are liable to re-offend, … generally executed after the persons concerned have served their prison sentences.”
describes the situation in this way: “Apart from Germany, at least seven other Convention States have adopted systems of preventive detention in respect of convicted offenders who are not considered to be of unsound mind, in other words, who acted with full criminal responsibility when committing their offence(s), and who are considered dangerous to the public as they are liable to re-offend.”²

About the second part of these measures, the preventive period, there is an interesting difference between the attitude we have in the United States and the attitude that I believe exists in Europe. I would describe the *legal* position in the United States like this:

> Such a period of preventive detention of the dangerous is legally permissible, but only if it is *not* punishment, and only if there is “something more.”

I have two qualifications I want to make here. The first has to do with my reason for referring to this as the “legal” position. The academic position, if I make call it that, is mixed on this point, but there is a strong tendency among academics, myself included, to deny that post-sentence detention is permissible under any circumstances; I have indicated some of the literature on this in the margin.³ The second has to do with the treatment of terrorism suspects. In the United States terrorism suspects may be held without bail and without a judicial hearing, at the discretion of the executive. This fact, confused as it is with the law of war and excluded somehow from the topic of criminal justice, has not received sufficient attention in the courts for its implications for the theoretical foundations of preventive detention. It has no direct bearing on the issue of *post-sentence* preventive detention, and so we can ignore it for the purposes of this paper.⁴

Periods of post-sentence preventive detention have been upheld by the United States

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² M. v. Germany, paragraph 79, ECHR.
³ Morse, Corrado, Slobogin, Ferzan, Walen.
⁴ See Corrado, Sex Offenders, Terrorists, etc.
Supreme Court, and in particular the sex predator legislation, with its post-sentence detention, was upheld in the *Hendricks*,\(^5\) *Crane*,\(^6\) and *Comstock*\(^7\) cases. The constitutionality of this detention depends upon its not being considered punishment but rather regulation, and the American courts have worked out a complex test to distinguish punishment from regulation.\(^8\) It also depends, in the ordinary criminal case, on there being “something more” to explain why this deprivation of liberty is permissible. One exception to that requirement is detention of terrorism suspects, which has now been taken out of the realm of criminal justice.

Europe is different, and you will have to forgive me first of all for presuming to understand what is going on in Europe, and secondly for speaking about Europe as if it were a monolith in this matter. I am sure that everyone will keep in mind that I come to this from the position of a common lawyer, and I expect my understanding of European law to receive some corrections during this conference. What you will be getting here are the views of one American lawyer looking at European law. When I speak of European law, I mainly have in mind the ongoing dialogue between Germany and the Strasbourg Court of Human Rights, but I do think the sentiments that I am going to be discussing are widespread.

In Europe, I would say, the *legal* position appears to be this:

Such preventive detention of the dangerous is legally permissible without more, *whether or not* it is punishment.

The European Court of Human Rights has recently examined a German law permitting the post-sentence indefinite detention of repeat violent offenders. The offender in the case before the Court was specifically found not to be mentally disabled; the basis for the detention appears to have been dangerousness and nothing more. Germany had considered the second period of

\(^5\) Cite.
\(^6\) Cite.
\(^7\) Cite.
\(^8\) Cite Artway v. Att’t Gen’l.
confinement to be preventive and not punitive, and there is no reason to think that the legislation would have violated the European Convention if in fact it had been merely preventive. But the Court held that it was punitive, a penalty, and while it found that as a penalty the imposition of the detention violated the non-retroactivity requirement, it did not find anything wrong with this post-sentence period of punitive detention.

There appears then to be at least two significant differences between the jurisprudence of the American courts on this question, and the jurisprudence of the European Court. First, the American courts have said that the period of detention after the completion of the standard sentence for the crime is not permissible if it is punishment, while the European Court apparently accepts the permissibility of a second period of punitive detention. The question is whether this is merely a matter of definition; that is, can a period of detention that is not retributive be considered punishment? Or is there something more fundamental at stake? Second, the American courts have said that dangerousness alone is not enough to justify preventive detention; the European Court apparently accepts dangerousness as enough to justify detention.

The question I would like to pursue in this paper is whether these are substantial differences, or whether the two positions can be harmonized.

A. European Case Law.

i. The European Court and the European Convention.

In 2010 the European Court of Human Rights handed down its decision in the case of M. v. Germany. The applicant, M., had been sentenced under German law to a period of punitive detention to be followed by a period of preventive detention. (He had been determined not to suffer from a mental disability or diminished responsibility that would have justified medical care; his detention was for prevention solely.) What permitted this sequential imposition of
punishment and prevention was the German institution known as “the double track,” an institution that is found in Italy and other European countries as well.

The double track was introduced into German law in 1933 as part of the National Socialist overhaul of the criminal justice system. It was the result of a struggle between classical criminal theory, which insisted upon retribution (an idea not unwelcome to the National Socialists), and positive criminal theory of the sort advocated by Enrico Ferri in Italy and Franz von Liszt in Germany, which appealed to the National Socialists because of the indefinite sentences it permitted. And the idea was not entirely new: The British Parliament had, in 1908, enacted an act which also provided for detention after the completion of a criminal sentence.

After World War II many things changed in Germany and in Europe. For one thing effective constitutional courts were introduced to enforce the human rights provisions of constitutions, and the European Court of Human Rights took on the job of enforcing the European Convention on Human Rights. But the double track did not disappear from German criminal law, or from Italian criminal law, or from the law of many other continental European countries. One thing that did change in Germany was the outside limit on the period of detention: Detention, which had been for an indefinite period in some cases, was given a ten-year limit.

It was not unusual, then, for M. to be subjected to preventive detention after his prison sentence. His complaint was that at the time at which he had been sentenced (his liability to preventive detention had to be determined by the same trial judge that imposed his prison sentence, and at the same time) post-sentence preventive detention had an outside limit of ten years.

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9 An Act Concerning Dangerous Habitual Criminals (24 November, 1933).
10 Prevention of Crime Act of 1908. About this Act Winston Churchill said: “There is a great danger of using smooth words for ugly things. Preventive detention is penal servitude in all its aspects.”
years. Some time before his release, however, the law was changed to permit indefinite
detention, and he had in fact been held beyond the original ten year limit, with no prospect of
release. This violated the German Basic Law, he claimed, and he complained to the German
Federal Constitutional Court using a procedure, the Constitutional Complaint, that permits
individuals who have exhausted their remedies in the ordinary courts to appeal directly to the
Constitutional Court.

M.’s complaint rested on the grounds that his extended detention under the revised Article
67d was retrospective punishment in violation of Article 103 of the Basic Law, which guaranteed
the principle of legality and the principle of proportionality, and was also in violation of the
right to liberty under Article 2, section 2 of the Basic Law. Among other things he claimed a
reliance interest in the original limitation on preventive detention, premised upon reliance
doctrine developed by the Constitutional Court. [Verify?] The prolonged detention also did not
provide any period of relaxed supervision during which he might prove he was no longer
dangerous, and so was in effect a life sentence. The Court dismissed the complaint; the revision
of the law, it held, was compatible with the Basic Law. The longer the detention, of course, the
greater the need for justification; this was accomplished by requiring at ten years a showing that
the detainee would probably still be dangerous to the public. Importantly, preventive detention
was not punishment: “preventive detention did not serve to avenge past offences but to prevent
future ones,”12 and so was not subject to the same constitutional limitations as punishment. To be
punishment, a measure had to express “sovereign censure” and be imposed “to compensate for
guilt.” According to the Constitutional Court, Article 103:

“applied only to State measures which expressed sovereign censure of illegal and

12 Paragraph 30 of the ECHR decision in M. v. Germany, attributing the proposition quoted to the German
Federal Constitutional Court.
culpable conduct and involved the imposition of a penalty to compensate for guilt. Having regard to the genesis of the Basic Law and the purpose of Article 103 § 2, it did not apply to other State measures interfering with a person's rights. In particular, Article 103 § 2 of the Basic Law did not extend to measures of correction and prevention, which had always been understood as differing from penalties under the Criminal Code's twin-track system of penalties and measures of correction and prevention. The fact that a measure was connected with unlawful conduct or entailed considerable interference with the right to liberty was not enough. Unlike a penalty, preventive detention was not aimed at punishing criminal guilt, but was a purely preventive measure aimed at protecting the public from a dangerous offender. Therefore, preventive detention was not covered by Article 103 § 2, even though it was directly connected with the qualifying offence.”

The Constitutional Court found there was no violation of legitimate expectations – a doctrine which apparently does apply to regulation, but is not the same as retroactivity of punitive measures. Because the possibility of extension of this period was always a possibility, and weighed against the duty to protect the public, the German Court found that the Basic Law was not violated, and that any interest M. had in reliance did not outweigh the public interest in safety; and that Article 1’s right to human dignity was not offended by preventive detention for an indeterminate period.

13 Paragraphs 32 and 33, M. v. Germany, ECHR.
14 From the ECHR’s discussion, para. 59: “A law may be retrospective in the sense that, while its legal effects are not produced until it is published, its definition covers events “set in motion” before it is published (so-called unechte Rückwirkung; see the decisions of the Federal Constitutional Court in the compendium of decisions of the Federal Constitutional Court (BVerfGE), vol. 72, pp. 200 et seq., 242, and vol. 105, pp. 17 et seq. and 37 et seq.). In respect of retrospective laws in that sense, the principles of legal certainty and protection of legitimate expectations are not given overall priority over the intention of the legislator to change the existing legal order in response to changing circumstances. The legislator may enact such retrospective laws if the importance of the purpose of the legislation for the common good outweighs the importance of the interest in protecting legitimate expectations (see the judgment of the Federal Constitutional Court in the instant case, pp. 70-73, with many references to its case-law).”
When the German constitutional court rejected his claim he took it to the European Court of Human Rights, claiming a deprivation of liberty in violation of the European Convention on Human Rights. On the question of liberty, Article Five of the Convention enumerates the sorts of cases in which the state may deprive an individual of liberty, beginning with conviction by a competent court. On the questions of convictions, criminal proceedings and punishment, the Convention has a great deal to say: the word “punishment” appears in four Articles of the Convention and its Protocols; “crime” appears in one Article of the Convention; and “criminal” appears in five Articles of the Convention and its Protocols. Article Three categorically prohibits torture and inhuman or degrading treatment or punishment. Article Six grants procedural rights in criminal proceedings, including the presumption of innocence and the right to a public hearing and the right to counsel. Article Seven guarantees the rights contained in the principle of legality, including the right against retrospective punishment and retrospective enhancement of penalties. Protection against double jeopardy and the rights of appeal and of compensation for wrongful conviction appear in the Protocols. M. claimed that his continued detention breached Article Five, Section One,\(^\text{15}\) of the Convention, and Article Seven, Section One.\(^\text{16}\)

\(^{15}\) Article Five, Section One reads as follows:

**Error! Main Document Only.** Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

* (a) the lawful detention of a person after conviction by a competent court;
* (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
* (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
* (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
* (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
* (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

\(^{16}\) Article Seven, Section One: **Error! Main Document Only.** “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”
The European Court found, first, that although the original period of detention for up to ten years was permissible under Article Five, Section One, the continued detention beyond ten years was in violation of Article Five because there was not a close enough connection between his original sentencing and the extended period of detention to make it acceptable under Section One, and because it was not justified under any of the other sections of Article Five. It is important to notice that this part of the holding had nothing to do with the question of whether or not the detention in question was considered punishment. It also had nothing to do with whether detention of this sort was in general permissible under the Convention, but only whether the period of detention not imposed by the sentencing judge was permissible.

We may cautiously draw the following conclusion from this part of the ECHR’s discussion: even if post-sentence detention is considered preventive and regulatory, any extension of it after the initial sentence will not satisfy Article 5 sec. 1 (a); it will not be “after conviction” in the causal sense required by the Convention, and it also will not fit under any of the other provisions permitting deprivations of liberty. It is not clear to what extent this holding depends upon the particularities of existing German law, but it is clear that this part of the holding applies only to the extension of the detention beyond what was available initially. Had the original court imposed the indefinite penalty, it would have fallen under Article 5 sec. 1 (a), and would not have been a violation of that provision. We may therefore set this part of the discussion aside for purposes of this paper.

The Court’s analysis under Article 7 of the Convention was another matter. The prisoner had argued that the German courts’ view that preventive detention was not a penalty should be given less weight because the measure had been introduced by the Nazi regime. The aims of preventive detention written into law, he argued, were exactly the same as the aims of a prison
sentence, and it was by its nature a penalty. “If one looked at the realities of detainees’ situation rather than the wording of the Criminal Code, there was therefore no substantial difference between the execution of prison sentences and of preventive detention orders.”

The Government of Germany, on the other hand, argued that Germany had a two track system, and that preventive detention and punishment had two different sets of aims. The latter were fixed in accord with guilt, the former with dangerousness. Preventive detention is therefore not a penalty. In an aside, the Government pointed out a significant benefit of the system: it made possible limited penalties overall, Germany being on the lower end of the member nations of the Council of Europe in this regard. Only the most dangerous were preventively detained and held for an extended period.

The European Court found that post-sentence preventive detention is in fact punitive. It prefaced its analysis this way:

“To render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of this provision. ... [T]he starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a “criminal offence”. Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making

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17 Paragraph 110, M. v. Germany, ECHR, summarizing the applicant’s argument.
18 One of the reasons why the Court did not feel justified in simply relying on domestic law was that the different States classified such detention differently. For example, France has only recently adopted a preventive detention provision. The French Constitutional Council, (no. 2008-562 DC, 21 February 2008) “found that such preventive detention, which was not based on the guilt of the person convicted but was designed to prevent persons from re-offending, could not be qualified as a penalty. To that extent, it thus took the same view as the German Federal Constitutional Court in respect of preventive detention under German law. Nevertheless, in view of its custodial nature, the time it may last, the fact that it is indefinitely renewable and the fact that it is ordered after conviction by a court, the French Constitutional Council considered that post-sentence preventive detention could not be ordered retrospectively against persons convicted of offences committed prior to the publication of the Act (§ 10 of the decision). In this respect, it came to a different conclusion than the German Federal Constitutional Court.”
and implementation, and its severity. ... The severity of the measure is not, however, in itself decisive, since, for instance, many non-penal measures of a preventive nature may have a substantial impact on the person concerned.”19

The Court then applied those factors to the German case: Post-sentence detention was imposed in this case “following conviction” for a criminal offense. It is not considered a penalty in domestic law,20 but of course it is up to the ECHR to determine what is and what is not a penalty for Article 7 purposes, especially given the divergence among the states on the question. Concerning the nature of the measure detainees, like those being punished, are deprived of liberty, and in fact kept in (separate wings of) ordinary prisons. The slight differences are not enough to make a difference here. There is also some overlap in function: Punitive measures are partly preventive; so-called preventive measures are partly punitive: It may be understood as retributive by the person detained, [find this claim] and it has a clear deterrent element. The nature of the measure seems punitive, being reserved for serious crimes and in that, in the actual circumstances, there is no attempt to offer treatment for the detainees, which would make them less likely to reoffend and thus making early release accessible to them. As to severity, this measure (being indefinite) is one of the most severe the German system can impose. The Court concluded that:

“. . . preventive detention under the German Criminal Code is to be qualified as a

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Paragraph 75, ECHR, M.v. Germany. Error! Main Document Only. The press release for the French decision says this:

“Thus, preventive detention, not being imposed by the trial court and not having a punitive purpose, does not meet either criterion of the jurisprudence of the Constitutional Council on the definition of punishment. Applying this jurisprudence, the Constitutional Council ruled that preventive detention is not punishment. Hence the complaints of breach of Article 8 of the Declaration of 1789 were ineffective.”

The protections that surround punishment do not apply. The Council did, however, declare that the measure could not be applied retroactively. Note that because of arts. 2 and 200, the Italian CP considers PD not to be punishment. 19 Para. 124.

20 “Unlike penalties, they are considered not to be aimed at punishing criminal guilt, but to be of a purely preventive nature aimed at protecting the public from a dangerous offender.” Para. 125.
‘penalty’ for the purposes of Article 7 § 1 of the Convention.”

Given that it is a penalty, the Court’s previous distinction between measures that constitute penalties and those that constitute execution of penalties comes into play. That means that there is a question about whether the change in the law abolishing the upper limits on detention is one or the other. If it is the latter, merely changing how the penalty is executed, retrospective application is permissible. If the former, it is not. The Court found that the change in the Code was not merely a measure of execution.

M. had therefore been subjected to the retroactive imposition of a penalty, in violation of Article 7. The Court awarded M. 50,000 euros.

We can draw the following lesson from the Court’s discussion of the Article 7 question: Post-sentence detention must be considered a penalty, at least under the conditions existing in Germany at the time. I stress the conditional nature of that statement: If conditions are as they were in Germany at this time, then post-sentence detention is a penalty. It is possible that if conditions for the detainees were better and more distinguishable from those of prisoners being punished, a different result would have been reached. [Note somewhere that the Court seems to accept the possibility of PSPD as punishment, which would make it non-retributive punishment.]

What it comes down to, then, is the actual nature of the detention. In this case, conditions of the detainees during this period were not easily distinguishable from conditions during the retributive phase. It was also relevant, according to the Court, that the second, preventive phase of confinement shared a punitive function with the retributive phase, but it is not easy to see what the Court means by this. The usual determinants of punitive function are retribution and deterrence, and the Court rather cursorily claims that (1) the measure might be felt by the detainee to be retributive, and (2) the measure is bound to have a deterrent effect. Neither of
those considerations ought to have much weight. Neither of them implies that the detention was in fact retributive or primarily deterrent. What the detainee feels should have no bearing at all, and the incidental deterrent effect is shared with any onerous measure.

What matters, in connection with retribution and deterrence, is whether the measure is intended to be retributive and whether it is primarily intended to be deterrent, and the Court nowhere says that either of those things is true. Instead it relies on the fact that the measure is reserved for repeat offenders and the most serious crimes, and that there are no special provisions for therapy. The final consideration is severity, and the Court finds that indefinite detention is possible the most severe possible in the German system. Aside from the last consideration, other features of the actual conditions of the detainees might be modified to result in a finding of preventive and not punitive measures. There is no indication how the Court would weigh and balance the various considerations.

I started with the claim that in the Court’s jurisprudence post-sentence detention was considered legally permissible without more, even if it constituted punishment. Let’s see how much of that is true. Neither the ECHR nor the German Court questioned the permissibility of post-sentence detention, as practiced in Germany. It is true that, under the interpretation in M. v. Germany, retroactive extension of the period of detention is not permissible under the Convention provisions governing deprivations of liberty. But those provisions say nothing, apparently, that would cause us to doubt the permissibility of such detention generally. Furthermore, there was a disagreement between the German Court and the ECHR as to whether such detention, as practiced in Germany, is punishment or prevention, but neither result would have entailed that the detention was not permissible. The ECHR found that it was punishment, and as punishment the non-retroactivity provisions of Article Seven applied. They would not
have applied if it had turned out to be merely a regulatory measure; but that would not have threatened the legality of the detention.

But one more observation is in order: The case had nothing to do with mental illness. M. himself was a bad actor and was said to suffer from a personality disorder [find exact words], but did not even qualify for the diminished responsibility provisions of the criminal code. [Verify.]

There is no reason to believe that the legal justification of preventive detention requires anything more than dangerousness. This point will become important when we consider the American position.

ii. The German Federal Constitutional Court.

The European Court’s decision had a number of implications for Germany. The first was the requirement that Germany resolve the issue of M. and of those in similar circumstances. All that the Court could insist on was the compensation of M, but compliance with the spirit of the ruling clearly called for his release as well. But there were much more significant and systemic implications. Although the European Court did not find post-sentence detention itself to be a violation of the Convention, it found that it was punishment, and therefore subject to all of the protections that surrounded punishment in both the Convention and in the Basic Law. That meant that to bring its laws into line with the Convention Germany would have to change the conditions during the second phase of confinement to make them sufficiently distinguishable from the conditions of punishment, or it would have to change those provisions of its law that denied to prospective detainees the protections that were to be available to those who would be punished. Germany could not be coerced by the Court to revise the conditions of confinement or its laws; it was free to ignore this ruling and to continue treating detention as non-punitive so long as it paid damages. It would have to continue to pay damages to detainees who in the future
were deprived of the right to non-retroactivity under the Convention, but once those in M.’s position were paid off that situation was unlikely to arise again. There were only so many detainees whose conviction was handed down before the detention statute was changed, and so only so many for whom retroactivity was an issue.

M. brought his case and the European ruling back to the German Constitutional Court for a reassessment, and the German Court changed its mind. It reversed the 2004 decision dismissing M.’s claims, and found the statute authorizing preventive detention to be unconstitutional. It did not, as far as I can tell, address the issue of punishment and regulation. Whereas the 2004 decision of the Constitutional Court had dismissed M.’s claim under Article 103 of the Basic Law\textsuperscript{21} which prohibits retroactive punishment and double punishment, the 2011 decision found the detention to be unconstitutional under Article 104, Section One,\textsuperscript{22} which guarantees due process and prohibits mental or physical mistreatment of those in custody.

The Court brought its jurisprudence more or less in line with that of the ECtHR by finding (1) that the retroactive extension of detention “infringe[s] the rule-of-law precept of the protection of legitimate expectations under Article 2.2 sentence 2 in conjunction with Article 20.3,”\textsuperscript{23} and by finding (2) that preventive detention, as it exists in Germany at the present time, is in violation of the Basic Law because “the provisions do not satisfy the constitutional requirement of establishing a distance between preventive detention and prison sentences.”\textsuperscript{24}

\textsuperscript{21} Article 103 [Hearing in accordance with law; ban on retroactive criminal laws and on multiple punishment]
   (1) In the courts every person shall be entitled to a hearing in accordance with law.
   (2) An act may be punished only if it was defined by a law as a criminal offense before the act was committed.
   (3) No person may be punished for the same act more than once under the general criminal laws.

\textsuperscript{22} Article 104 [Legal guarantees in the event of detention]
   (1) Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.

\textsuperscript{23} Press release 31/2011, German Federal Constitutional Court, 4 May 2011, page 1.

\textsuperscript{24} Id.
The German Court however never seemed to draw the conclusion that the Strasbourg Court drew, that under conditions as they exist in Germany the second phase of confinement constitutes punishment, so that the retroactivity provision of Article 103 of the Basic Law would apply. Instead it held that the second phase was in fact preventive, but that as preventive detention it failed the constitutional test of “distance:” it was not sufficiently different from punishment, and therefore unconstitutional. The Court gave the legislature a deadline for changing the conditions under which detainees were kept. It also found the retroactive imposition of the extended period of detention in the case of M. and those in his position to be unconstitutional, but not because of Article 103. Instead it found that that imposition was a denial of legitimate expectations under Article 104.

Since I only have access to commentary and to press releases concerning the German decision, any conclusion I can draw will have to be tentative pending an English translation of the full decision. But I gather that the German Court would agree with American jurisprudence that the second phase of confinement is permissible only if it is not punishment. It clearly agrees with the ECHR, though, that post-sentence detention of the dangerous is permissible without more.

B. Post-Sentence Detention in American Case Law.

The United States Constitution places certain limits upon the use of force to control crime. As far as I can tell, all of these limits, except for the requirement of due process, apply only to criminal proceedings and punishment. The word “punishment” itself appears in Article One, in Article Three, and in the Eighth Amendment. In only one of its appearances, the Eighth Amendment prohibition on cruel and unusual punishment, is it used to limit the power of the state and to protect the rights of defendants or convicts. All other limits are imposed in
connection with the words “crime” and “criminal,” which appear in Articles Two, Three, and Four, in the Fifth and Sixth Amendments, and in the Civil Rights Amendments. The protections that the Constitution applies to criminal proceedings include the right to jury trial, to indictment or presentment for felonies, to silence, to counsel, and to a speedy trial, and the prohibition against double jeopardy. The right to appear before a judge and to be informed of the charges against you appears in Article One, without mentioning either punishment or crimes. These restrictions are not imposed explicitly upon the states, but only upon the federal government. Retroactive punishment is prohibited explicitly both to the states and to the federal government in the ex post facto provisions of Article One, again without mentioning either punishment or crimes. All of the other protections are extended to those accused or convicted of crimes in state courts by incorporation into the Fourteenth Amendment.

Someone subject to a measure of regulation intended to control crime has two sorts of constitutional objection available to him. He may argue first that the measure constitutes punishment and is prohibited under one of the explicit constitutional limits upon punishment or upon criminal proceedings. Or he may argue that even if the measure does not constitute punishment or does not involve a criminal proceeding, it nevertheless violates the due process or equal protection clauses of the Constitution. 25

Detention of an individual to prevent him from committing crimes in the future is a deprivation of liberty. Someone so detained may object that he is being punished and that his punishment violates the Constitution in one way or another; if the detention does not constitute punishment, if instead it counts as regulation, he is left with the claim that his detention violates due process or equal protection in one way or another.

25 He may also argue against the imposition of the measure on separation of powers grounds: For example, he may argue that a federal criminal law is unconstitutional as exceeding the powers granted to Congress. That sort of argument raises none of the issues at stake in this paper.
In a series of three cases the Supreme Court has considered state and federal cases in which a prisoner, convicted for a sexual offense, was subjected to indefinite detention upon his release from prison on the ground that he was likely to commit the same offense or similar offenses in the future, and thus was too dangerous to allow to go free. The Court held that the detention was not punishment but regulation. As regulation it was subject to the rational relation test – a regulation is constitutionally acceptable if it bears a rational relation to the purpose the detention was to serve -- and that it passed that test.26

Supreme Court jurisprudence on the question of what constitutes punishment and what does not is complex. The series of cases culminating in the sex predator cases begins with the Salerno case, which involved pretrial detention. For the first time the federal legislature had made dangerousness a basis for the denial of bail, and defendants being held without bail protests that this was punishment before conviction. That protest produced different results in the different federal courts of appeal.27

When the issue reached the Supreme Court in Salerno, the Court held that such detention was not punishment because (1) it was not intended as punishment; and (2) being limited in duration it was not excessive in relation to the purpose for which it was intended. Instead of punishment, it was regulation. The only limit upon regulation that the Court considered was excessiveness in relation to the “legitimate regulatory goal” of “preventing danger to the community”: If it was excessive it was punishment and was subject to the limitations upon punishment; if it was not excessive, it was constitutionally permissible. Whether it was excessive depended upon whether the government's legitimate interest in preventing crime outweighed the individual's strong

26 On the rational or reasonable relationship test, see Salerno and Foucha.
27 The Salerno case itself was heard by the Second Circuit Court of Appeals, which found pretrial detention on grounds of dangerousness a due process violation: “[A]uthorization of pretrial detention [on the ground of future dangerousness is] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes.”
interest in liberty. The Court said, “When the Government proves by clear and convincing
evidence that an arrestee presents an identified and articulable threat to an individual or the
community, we believe that, consistent with the Due Process Clause, a court may disable the
arrestee from executing that threat.” Thus, where punishment is not involved, the test is a simple
matter of balancing the legitimate interests of the state against the interest in individual liberty.
How those two interests are to be weighed was not made clear.

The Salerno decision naturally raised concerns about indefinite preventive detention: could
the Court’s reasoning justify indefinite detention of dangerous individuals simply to prevent
future crimes? Shortly after Salerno the Court handed down a decision that seemed to put that
concern to rest. In Foucha the issue was state legislation which permitted the continued detention
of insanity acquittees after they regained their sanity – so long as they remained dangerous. In
other words a defendant might be acquitted of a crime by reason of insanity and committed to a
mental hospital, and upon regaining his sanity he would be denied release on the ground that he
remained dangerous: the perfect test on the question of indefinite detention of sane but dangerous
individuals. The Court decided that this was not permissible. Without determining whether such
detention was punishment or not, the Court found no justification for the detention: Having been
acquitted by reason of insanity, Foucha was not convicted and hence could not be punished.
Having recovered his sanity, he was not subject to civil commitment. And though short term
pretrial detention on grounds of dangerousness had been approved in Salerno, one of the
arguments for the permissibility of such detention was precisely that it was short-term, unlike the
detention contemplated in the case before the Court.

At this point it seemed as though long-term detention could not be constitutionally justified
for offenders who were not legally insane unless it was punishment. There appeared to be no
basis for long-term regulatory detention of those who did not qualify as seriously mentally ill. And if such detention did constitute punishment, it would of course be subject to retroactivity and double punishment limitations, as well as the “cruel and unusual limitation.”

Where does that leave us with respect to the sex predator legislation? Here we have indefinite detention imposed after sentence upon an offender who does not qualify for an insanity defense, and who, as the state concedes, does not qualify for civil commitment. Is this punishment or not? In its first sex predator case, which arrived at the Court some years after Foucha, the Supreme Court discussed the question of punishment. Hendricks had been sentenced to prison for a sexual offense, and while he was in prison the sex predator legislation was passed.

28 The preamble to the Kansas legislation reads as follows:

“[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute].... In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure ... is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute].” Kan. Stat. Ann. § 59-29a01 (1994).

29 In Artway v. Att'y Gen'l the federal court of appeals for the Third Circuit pulled together Supreme Court cases on this question and announced a three part test to distinguish punishment from regulation: (1) actual purpose; (2) objective purpose; and (3) effect. The purpose requirements are obvious enough: If the state explicitly intends harsh treatment to be retributive, it is punishment.

If the measure is not punishment under the purpose tests, it may nevertheless be punishment by effect. “If the negative repercussions—regardless of how they are justified—are great enough, the measure must be considered punishment.

30 Cite
At the end of his prison term he was giving a hearing and found to be sufficiently dangerous under the Act to require his indefinite detention – that is, detention for so long as he was likely to engage in sexual offenses of the sort he had been convicted of. One of his claims was that his detention was punishment, so that its imposition under a statute passed after he committed his crime violated the *ex post facto* provision of the Constitution.

The Court upheld the statute and the application of it to Hendricks. There were two broad parts to the Court’s analysis. One part was to reject the label of punishment. According to the Court, whether or not a measure is punishment depends upon purpose and effect. The state did not explicitly intend punishment, as evidenced in its labeling the detention a civil measure. And it was not implicitly intended as retribution for a number of reasons, including the fact that it could also be applied to insanity acquittees without convicting them of a crime. As to effect, the Court found that indefinite detention was not excessive given the state’s interest in protecting the public: “Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.”

The Court conceded –what from our point of view is an important point – that the Court had never found dangerousness alone to be sufficient to justify detention. But the statute required a showing of “mental abnormality” or “personality disorder,” and that, the Court held, was sufficient when combined with dangerousness to justify detention. It is important to keep in mind that the conditions that might justify detention were not sufficient to relieve him of responsibility for his crime.

The two subsequent cases, *Crane* and *Comstock*, add little to our stock of information about preventive detention, but what they do add is important. In *Crane* the Court took the significant
step of reading the requirement of a serious volitional or emotional impairment into the words of the Act. The state would thus have to demonstrate that the prospective detainee had significant control issues, all the more remarkable because many of the states had rejected even the coherence of the notion of control difficulties. In Comstock the Court permitted detention under a federal statute upon a showing of dangerousness by clear and convincing evidence, instead of the reasonable-doubt statute required by the Kansas statute. If the detention had been punishment, then any evidence of prior bad acts, one of the criteria for imposition of detention, would presumably have had to be by proof beyond a reasonable doubt.

At the outset I made the claim that in the United States the legal position is that a period of post-sentence preventive detention is legally permissible, but only if it is not punishment, and only if there is “something more.” It seems to me that under the current interpretation of the United States Constitution by the Supreme Court, all three parts of that claim are true: We see in the sex predator legislation that post-sentence preventive detention is legally permissible, which is to say that preventive detention of persons who are capable of being held criminally responsible – and who have been held criminally responsible – is permissible. If it were punishment, on the other hand, it would not be permissible, and could constitute double punishment, impermissible under the Fifth Amendment. It would also seem to violate any requirement of proportionality that might exist under the Constitution, since the length of detention bears no relation whatever to the particular crime committed. It is not clear, however, that there is any such requirement of proportionality in the Constitution. And finally the Court insisted that the statute was only constitutional because of the “something more:” the requirement that the detainee suffer from an inability to control his behavior.

31 See Corrado,
32 Cite to Scalia quotes.
C. Punishment or Regulation?

To summarize the conclusions of the three courts, then: According to the ECtHR,

-- PSPD is punishment, under existing law and conditions in Germany, because it is not sufficiently different from punishment.

-- Because it is punishment, it cannot be applied retrospectively under the principle of legality (Article 7).

-- But even if it were not punishment, it could not be applied retrospectively under the principles that limit the conditions under which an individual might be deprived of freedom.

The ECtHR did not deny the possibility of PSPD as punishment; it appeared to accept that possibility, noting that in Belgium, in fact, it was treated as punishment.

According to the German FCC,

-- PSPD as punishment is not permissible under the Basic Law.33

-- PSPD as preventive is permissible under the Basic Law only if there is sufficient “distance” from punishment (Article 104, Basic Law).

-- Existing law does not provide sufficient distance from punishment.

-- Even as mere regulation, the period of preventive detention may not be extended retrospectively because it defeats the legitimate expectations of the detainee (Article 2, Basic Law).

And finally, according to the United States Supreme Court,

-- PSPD is permissible under the Constitution only if it is not punishment.

-- PSPD is permissible under the Constitution only if there is “something more:” in the circumstances, only if there is an inability to control behavior.

These three positions, differing slightly one from the other, reveal a number of different ways of dealing with what is essentially a logical puzzle. The puzzle is this: All of the following three propositions have a certain amount of intuitive appeal; and yet all three cannot be true. Our position on post-sentence preventive detention will depend on which of the three we choose to

33 See M. v. Germany, paragraph 116 (describing Germany’s argument).
1. Principles of justice limit punishment to retribution, that is, to what is deserved.

2. Detention post-sentence is permissible.

3. Detention post-sentence is punishment.

First of all, we may choose to abandon 1.: That is, we may accept as constitutional and just the idea of non-retributive punishment. This is Belgium’s way out, and the European Court seems prepared to accept this option, as I have already noted. Among other things, it guarantees to the individual detained the constitutional protections that surround punishment. Moreover it would seem to be the cheapest option for a state that insists on post-sentence detention, because the other option is to grant special treatment to the detainee at greater cost.

But the idea of non-retributive punishment flies in the face of common sense and of deeply rooted intuitions about justice. Retribution is the very heart of the meaning of punishment. Germany insisted upon this point before the ECtHR, arguing that

“the principle enshrined in the Basic Law that punishment should not exceed a person’s guilt prevented German criminal courts from imposing longer prison sentences instead of ordering preventive detention to serve the preventive aim of the protection of society.”34

Furthermore, if punishment is not limited to retribution, what limits does it have? The constitutional limits on punishment, almost universally shared, make no sense when applied to non-retributive punishment. Proportionality cannot mean proportionality to guilt or desert,35 and there is no reason why retroactivity and double jeopardy are not possible, since the only justification for this period of detention is to prevent future crimes. Indeed, there seems little

34 M. v. Germany, paragraph 116.
35 See Press Release [German case], arguing that detention must be in proportion to future crimes.
reason why punishment has to follow conviction at all.

Therefore I don’t think it is open to us to abandon the idea that punishment is limited to the retributive -- though by the reasoning of the German FCC, the three-strike laws that exist in the United States impose non-retributive punishment.

The second option is to abandon 3., the claim that PSPD is punishment. A significant argument for it is that it enables the state to keep sentences of punishment to a minimum (Germany boasted before the European Court that its punishment sentences were among the lowest in Europe) and to do it without threatening public safety by selectively detaining only the most dangerous – another cost saving measure that also has benefits for the ordinary offender.

This appears to be the most popular way out, in spite of the fact that the claim that this is not punishment seems to contradict the ordinary intuitions of the man in the street. The reaction of students year after year and the reaction of non-lawyers I have discussed the matter with is the same: putting someone away indefinitely because they have committed a crime is the gravest sort of punishment and ought to be acknowledged as such.

Nevertheless it is the option adopted by a majority of western countries that have PSPD, and it is the option adopted by Germany and the United States. Although the ECHR labeled PSPD under conditions as they existed in Germany punishment, and appeared to accept it as punishment on condition that constitutional limits on punishment would apply, it also seemed to countenance the possibility that it might not be punishment under other conditions.

One problem is that if it is something other than punishment, there is no principled way to limit its reach. In the United States, we insist on “something more.” It is hard to discuss this requirement with a straight face. The “something more” in the U.S. picks out a vanishingly small class of criminals very likely to continue to commit violent crimes if released, but not
suffering from a “mental abnormality” or “personality disorder” that makes them very likely to commit violent crimes if released. Since the detainee has already been adjudged to be capable of full responsibility by reason of his criminal conviction, the requirement of “something more” is little more than a charade. And even this delicate tissue separating preventive detention and punishment is not likely to last. For one thing, if American courts continue their rightward trend, there will soon be a fifth vote in the Supreme Court for eliminating the requirement entirely. For another thing, the National Defense Authorization Act of 2012, which requires nothing more for detention than suspicion of being a terrorist, will eventually come before the Court, and I do not foresee the slightest chance that it will be struck down. So it comes to little and in the near future will come to nothing at all.

In Germany and under the Convention, the difference lies in “distance”: the difference in treatment between those who are punished and those who are preventively detained. Thus the difference between non-retributive punishment (which would allow shabby treatment on the basis of dangerousness) and preventive detention (which does not) comes down to the question, How much better must the detainee be treated in order for the period of confinement not to amount to punishment?

It seems to me that this is a terrible way out of our dilemma, making the difference between the acceptability of PSPD depend upon a gradation of conditions: a little more money, a bit longer visiting hours and it will be acceptable regulation under German law; a bit less and it will be unacceptable punishment.

The double track is an unstable compromise, and has been so since its inception. Taken from the competing arguments of the Classical School of jurisprudence and the Sociological School of Franz von Lizst and Enrico Ferri, and supported by National Socialism’s conflicting desires to
punish in retribution, on one hand, and to keep the criminal off the streets, on the other, it has a contradiction at its core. It depends for its justification upon the notion that, among people who are legally sane, only one who has committed a crime may be deprived of his liberty solely on grounds of dangerousness. But there is no principled way to defend that distinction. The justification for punishment is that the offender is guilty of a crime and may be punished only so far as the crime deserves. The justification for preventive detention is that the dangerous person is dangerous to the public and needs to be detained for as long as he remains dangerous. The two sorts of justification lead to two different sorts of remedies. The Classical School settled the dispute in favor of punishment. The Sociological School would have settled the dispute in favor of detention. The fascist regimes had it both ways: an irrational solution for an insane period.

A second problem is to make this look like more than a word-game. In the U.S. and under the European Convention the test for the difference is very nearly identical, and what it comes down to is this: Is this measure appropriately tailored to accomplish the end of prevention rather than punishment? But the question that goes unanswered in both systems is this: Why should individuals being confined to protect the public from their dangerousness be granted fewer constitutional protections than those being confined to pay them back for crimes committed? Why do they fall outside the range of protections the various constitutions grant to those being punished? And the only answer that can be given is the circular one: Because it’s not punishment. For example, for preventive purposes the detainee’s period of confinement must be proportional under the German constitution not to his guilt but to his dangerousness. Why is that permissible when it’s not permissible for punishment? Because it’s not punishment. For preventive purposes the dangerous individual may be kept longer than he deserves to be kept as punishment: Why? Because it is not punishment.
Coming, as it does, only after conviction for a crime, it is hard to escape the intuition that the only justification for denying it the title of punishment is to escape the very limitations that we ourselves have placed upon punishment.

But if we cannot reject 1. or 3., it seems equally undesirable to reject 2. Given the temper of the times, we are not prepared to permit the slightest risk of certain crimes being committed, if they can be avoided by detention of dangerous persons. These crimes include most obviously sexual offenses. In Germany is 2005, according to the ECtHR, the courts sentenced __ to preventive detention, of whom __ were sex offenders.

Once upon a time in the United States, and not that long ago, conviction for the crime of rape brought with it the death penalty.36 Today the death penalty is not available in rape cases, though in many jurisdictions indefinite confinement is. On the other hand, the death penalty is available in many jurisdictions for the crime of murder, but to my knowledge there is no state that provides for indefinite detention – detention for as long as dangerous -- of murderers. For some sorts of murder the offender is typically released after a limited time in prison; and in some places that is a possibility for every sort of murder. We seem to fear the sex offender more than the murderer.

Underlying this difference between murder and sexual offenses are two beliefs, if I am not mistaken. The first is that sex is different. The sex crime is by its nature perpetrated upon the most vulnerable members of society, and it leaves – or at least so we seem to feel – a deeper mark than even death. The second difference is that unlike the murderer, the sex offender acts upon a drive which, while it may have different objects and may employ different means, is one that we all share, and which we know to be ineliminable. If he is willing to act upon that drive in

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36 Cite to cases in North Carolina and elsewhere. In 1977, in Coker v. Georgia, the Supreme Court finally barred the death penalty for rape of an adult woman.
a criminal way, it is not clear how he can be deterred.

Unwilling to allow predation on the most vulnerable members, we have chosen to elevate prevention to a place alongside punishment as an interest capable of overriding the individual right to the freedom from confinement.

So I do not see any way out of the puzzle, unless we find a substitute for PSPD. There is, perhaps, a rational alternative, one that would not require us to give up our present categories, and it would go like this:

1. Return to a system of “either/or”: a person might be punishment, or might be preventively detained, but not both.

2. Create a special category like that suggested by Alex Walen, for those who cannot be controlled by the threat of punishment. This would include those who will be outside the reach of the state, and would include certain criminals now treated as terrorist suspects. (This category can also be seen to include those who for one reason or another are adjudged insane.)

3. Broaden the insanity defense to capture more cases. We could do this by rehabilitating the control defense. The current “something more” used to justify PSPD in the United States was long ago discredited as a ground for a claim of legal insanity. Were we to reinstate it, it could be used in sex offense cases to lead to pure commitment, without punishment. Granted the urge for retribution would be denied; but the release of particular offenders, namely those determined not to be able to help themselves, would be conditional on a clear change in the tendency of the drive motivating their actions.

4. But what of those persistent offenders who are of perfectly sound mind, and who are in control of their behavior? This depends upon the type of crime, and here is the most radical suggestion that I will make. The sort of crime that seems most frightening to the general public
appears to be the violent sexual crime. There is an almost universal plea to have the persistent, violent sex offender removed. To prevent the complete collapse of the line between punishment and regulation, I suggest this compromise: That violent sexual crimes be admitted as prima facie evidence of a lack of control, just as delusions have been taken to be prima facie evidence of a lack of rationality. If an actor has committed a sexual crime, even a violent one, that is more likely than not a one-time occurrence, not likely to be repeated, then he is a candidate for punishment. But if there appears to be a pattern, or if there are other indications that such behavior is likely to reoccur, then he should not be punished but should be committed for treatment, perhaps with a presumptive minimum period of treatment.

How does this last suggestion differ from PSPD in Germany and in the United States? The answer would seem to be that it differs very little, and to the extent it does differ, it is an improvement. It is different from what is possible now in the United States only in that it does not permit of punishment for the offender who will be detained; the grounds for commitment are practically the same as those now in place for determinations of detention after sentence. It differs from what is now possible in Germany only in that it does not permit punishment of the offender who will be obtained, and it requires a finding of lack of control.

The great advantage is that it appears to eliminate the contradiction at the heart of PSPD, and to preserve the distinction between the retributive and the preventive.