

M. v. GERMANY: THE EUROPEAN COURT OF HUMAN RIGHTS TAKES A CRITICAL LOOK AT PREVENTIVE DETENTION

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I. INTRODUCTION

For the past two decades American courts have grappled with the constitutionality of a new generation of civil commitment laws that have dramatically expanded the use of preventive detention. Similar laws and resulting challenges have arisen in Europe, and a recent opinion by the European Court of Human Rights signals a new development in European law governing the scope of preventive detention—a new development that both mirrors and contradicts early developments in United States civil commitment jurisprudence.

The plaintiff in *M. v. Germany*, identified only by the initial “M.,” was a German citizen with a long history of criminal activity.¹ Throughout his life, M. struggled with mental illness and, as a result, his criminal activity led to not only incarceration but also years of preventive detention under Germany’s expanding preventive detention system.² After unsuccessfully challenging his preventive confinement in German courts, M. raised his claims in the European Court of Human Rights.³ Though it acknowledged M.’s dangerousness, the Court ruled in favor of M., emphasizing the narrowness of the grounds on which preventive detention may be predicated, and the high standards governing the treatment and conditions of confinement that preventive detention entails.⁴

To provide context for American readers, this article first looks briefly at the legal landscape for preventive detention in the United States and then examines the European Court’s decision in *M. v. Germany*. The article continues with a comparative analysis of American and European decisions, noting similar problems and contrasting divergent approaches as both Europe and the United States struggle to establish appropriate boundaries for the implementation of preventive detention, and concluding with a brief discussion of the recent developments in Germany, since the European Court of Human Rights decided *M. v. Germany*. The article then briefly examines a recent English case that adopted the analysis in *M. v. Germany*, in which the court refused to extradite an offender to an American jurisdiction on the grounds that the state’s civil commitment

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1. See *M. v. Germany*, No. 19359/04, paras. 7–12 (Eur. Ct. H.R. 2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860012&portal=hbk m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

2. *Id.* paras. 9–12, 14.

3. *Id.* paras. 17–40, 79.

4. See *id.* paras. 92–105, 122–37.

scheme constituted a “flagrant violation” of the European Convention on Human Rights.

II. CIVIL COMMITMENT LITIGATION IN THE UNITED STATES

Preventive detention of mentally ill individuals in the form of civil commitment has long been used in the United States as a means of protecting the public. Though the constitutional validity of the state power underlying these traditional mental health laws has never been seriously in doubt, the enactment of a new, more sweeping generation of commitment laws targeted at so-called “sexually violent predators” generated a slew of serious constitutional challenges.⁵ Arguments have centered on whether significantly broader civil commitment standards deprive individuals of substantive or procedural due process and whether these expanded civil commitment laws, directed generally against individuals whose dangerous acts were the predicates for lengthy prison sentences, are punitive measures violating constitutional prohibitions against double jeopardy and ex post facto punishment.⁶ The United States Supreme Court has addressed these constitutional issues in several key cases, producing decisions markedly sympathetic with a nationwide legislative trend toward civil commitment systems that allow for an expansive use of preventive detention.

A. Civil Commitment Standards and Due Process Concerns

The Supreme Court initially demonstrated a wariness of broadly framed civil commitment in requiring a showing of both mental illness and dangerousness to justify continued detention.⁷ Due process, the Court held, prohibited civil commitment based on dangerousness alone.⁸ However, just five years later the Supreme Court began to water down the *Foucha* standard in *Kansas v. Hendricks*.⁹ While commitment standards must include some type of mental abnormality requirement, the Constitution does not “require[] state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. . . . Rather [it leaves] to legislators the task of defining terms of a medical nature that have legal significance.”¹⁰

5. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997); *In re Linehan*, 594 N.W.2d 867 (Minn. 1999); *State v. Post*, 541 N.W.2d 115 (Wis. 1995); *In re Young*, 857 P.2d 989 (Wash. 1993).

6. E.g., *Hendricks*, 521 U.S. at 360–71; *In re Blodgett*, 510 N.W.2d 910, 912–16 (Minn. 1994); *Post*, 541 N.W.3d at 337–50.

7. *Foucha v. Louisiana*, 504 U.S. 71, 80–83 (1992).

8. *Id.* at 77–83.

9. 521 U.S. at 356.

10. *Id.* at 359.

After another five years, the Supreme Court made an effort to clarify and restrain its holding in *Hendricks*, emphasizing that state latitude in defining commitment-sufficient mental abnormality is not limitless: “there must be proof of serious difficulty in controlling behavior” that is “sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”¹¹

State courts grappled with these same issues, attempting to decipher the Supreme Court’s decisions in *Foucha*, *Hendricks*, and *Crane*.¹² The result has been civil commitment standards that have the outward appearance of rules of law, but are, in reality, so vague and uncertain that they provide little legal guidance to shape the application of preventive detention.¹³

B. Civil Commitment, Not Punishment

As mentioned, challenges to civil commitment in the United States have focused on whether commitment is actually punitive in nature, and thus invalid in light of constitutional prohibitions against double jeopardy and ex post facto laws.¹⁴ Litigants have cited the fact that civil commitment is often connected to criminal activity and results in indefinite detention as evidence of its punitive nature.¹⁵ Civilly committed individuals have also argued that commitment is punitive “because it fails to offer any legitimate ‘treatment,’”¹⁶ and that treatment “is merely a pretense and secondary in purpose to punishment.”¹⁷

These arguments characterizing civil commitment as punitive rather than preventive have been unsuccessful, as an American court will “reject the legislature’s manifest intent only where a party challenging the statute provides ‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”¹⁸ In finding that this high burden has not been met, courts rely on the legislature’s espousal of a “civil” or “remedial” purpose, focusing on the stated intent to provide treatment as

11. *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

12. See, e.g., *In re Detention of Barnes*, 658 N.W.2d 98 (Iowa 2003); *In re Linehan*, 594 N.W.2d 867 (Minn. 1999); *In re [sic] Matter of Linehan*, 518 N.W.2d 609 (Minn. 1994); *In re Commitment of Laxton*, 647 N.W.2d 784 (Wis. 2002).

13. See ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 40–41 (2006) (“The legal standards set by the courts for risk, mental disorder, and volitional impairment are exceedingly vague, offering little guidance to courts . . .”).

14. See U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. amend. V.

15. See *Kansas v. Hendricks*, 521 U.S. 346, 362–64 (1997); *State v. Carpenter*, 541 N.W.2d 105, 111–12 (Wis. 1995).

16. *Hendricks*, 521 U.S. at 365.

17. *Carpenter*, 541 N.W.2d at 110.

18. *Hendricks*, 521 U.S. at 361 (citing *United States v. Ward*, 448 U.S. 242, 248–49 (1980) (alterations in original)).

evidence of a civil purpose, without making an inquiry into the adequacy of the treatment being offered.¹⁹ In addition, while conceding that past criminal conduct may be used for evidentiary purposes or to narrow the class of individuals subject to commitment, courts have held that these connections to criminal conduct do not convert civil commitment into a criminal proceeding.²⁰ Courts have also held that the fact that civil commitment can result in indefinite confinement is not enough to make it punitive in nature, as length of confinement is ostensibly not linked to any punitive purpose but to the state's interest in treatment and public safety.²¹

At a broader level, U.S. courts have consistently held that civil commitment laws do not serve the predominant purposes of criminal law: deterrence and retribution. In *Kansas v. Hendricks*, the Supreme Court reasoned that those who are civilly committed "are, by definition, suffering from a 'mental abnormality' . . . that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement."²² The Supreme Court also held that the Kansas civil commitment statute was "not retributive because it d[id] not affix culpability for prior criminal conduct" and did not require any criminal intent.²³ Lower federal courts and state courts have reiterated the absence of a relationship between this form of preventive detention and the purposes of punishment.²⁴

III. M. v. GERMANY OVERVIEW

Since reaching the age of criminal responsibility, M. has spent most of his life in prison or confined by Germany's own preventive detention system.²⁵ In M.'s 1977 prosecution for robbery and attempted murder, a German court found M. suffered from a pathological mental disorder that rendered him incapable of appreciating the unlawfulness of his actions.²⁶ Under Section 20 of the German Criminal Code,²⁷ this mental status diminished M.'s criminal responsibility so that he was deemed to have acted "without guilt."²⁸ In 1979, in connection with his prosecution for an assault, M. was placed in a psychiatric hospital in accordance

19. See, e.g., *Hendricks*, 521 U.S. at 367; *Martin v. Reinstein*, 987 P.2d 779, 790–93 (Ariz. Ct. App. 1999) (finding "that the Arizona Act's focus on treatment rather than deterrence militates in favor of finding the Act civil in nature"); *People v. McKee*, 223 P.3d 566, 576–78 (Cal. 2010).

20. *Hendricks*, 521 U.S. at 361–62; *Carpenter*, 541 N.W.2d at 112.

21. E.g. *Hendricks*, 521 U.S. at 363–65.

22. *Id.* at 362–63.

23. *Id.* at 362.

24. See, e.g., *Woodard v. Mayberg*, 242 F. Supp. 2d 695, 702 (N.D. Cal. 2003); *Shivae v. Commonwealth*, 613 S.E.2d 570, 578 (Va. 2005).

25. See *M. v. Germany*, No. 19359/04, paras. 7–12 (Eur. Ct. H.R. 2009).

26. See *id.* para. 9.

27. STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I [BGBl. I], 3322, as last amended by Law of Oct. 2, 2009, § 20 (Ger.).

28. *Id.* See *M. v. Germany*, No. 19359/04, para. 9.

with Section 63 of the German Criminal Code, which allows for such placement when an offender commits an unlawful act in a state of insanity or with diminished criminal responsibility.²⁹

M.'s 1986 conviction and resulting sentence for robbery and attempted murder formed the predicate for the European Court's preventive detention ruling. His sentence consisted of two parts: first, five years imprisonment, and second, placement in preventive detention after his prison sentence expired.³⁰ At the time of conviction, the German trial court found that M. still suffered from a serious mental disorder, but found that the disorder could no longer be qualified as "pathological"; for that reason the court did not support a finding of diminished criminal responsibility, and did not mandate his placement in a psychiatric hospital under Section 63.³¹ However, the trial court found that M. had a strong propensity for committing acts of violence and predicted he would commit further violent acts.³² The court labeled M. a danger to the public and on that ground deemed preventive detention necessary.³³ At the time of sentencing, confinement via preventive detention was statutorily limited to a ten-year duration.³⁴

After the expiration of his five-year prison term in 1991, M. was placed in preventive detention pursuant to the second part of his sentence.³⁵ Seven years later, in 1998, an amendment to the Criminal Code expanded the ten-year durational limit, allowing preventive detention for an unlimited period of time.³⁶ In 2001, after being in preventive detention for ten years, M. requested that his detention be suspended on a probationary basis.³⁷ The trial court dismissed M.'s request, holding that "[i]n view of the gravity of the applicant's criminal past and possible future offences his continued preventive detention was not disproportionate."³⁸ On appeal, two German appellate courts agreed.³⁹ Holding that preventive detention was not a penalty, but rather a truly preventive measure, the courts held that the 1998 amendment was not prohibited as a retrospective application of criminal laws under the German Criminal Code.⁴⁰ M. remained in preventive detention.

M. brought his case before the European Court of Human Rights in 2004, alleging that his continued detention beyond the ten-year maximum applicable at the time of his conviction constituted an unjustified deprivation of his liberty and

29. STGB [PENAL CODE] § 63; *M. v. Germany*, No. 19359/04, para. 10.

30. *M. v. Germany*, No. 19359/04, para. 12.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* paras. 24, 26.

35. *M. v. Germany*, No. 19359/04, para. 13.

36. *Id.* para. 53 (by allowing termination of detention only "if there is no danger" that the detainee will commit serious offenses resulting in "considerable psychological or physical harm" to the victims).

37. *Id.* para. 17.

38. *Id.* para. 19.

39. *See id.* paras. 17–40.

40. *See M. v. Germany*, No. 19359/04, paras. 24–25, 31–37.

therefore a violation of Article 5 and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms.⁴¹ Article 5 § 1 of the Convention states:

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 fulfillment 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 on reasonable suspicion of having committed an 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 unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.⁴²

Article 5 § 1 provides protections analogous to those provided by the American concept of substantive due process as derived from the Fifth and Fourteenth Amendments to the U.S. Constitution.⁴³

41. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, C.E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter Convention], available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>; see also *M. v. Germany*, No. 19359/04, paras. 1–2.

42. Convention, *supra* note 41, art. 5 § 1.

43. Just as Article 5 § 1 of the Convention states that “[n]o one shall be deprived of his liberty” except under certain enumerated circumstances, so also the Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall “be deprived of life, liberty, or property without due process of law.” Compare Convention, *supra* note 41, art. 5 § 1, with U.S. CONST. amend. V, and U.S. CONST. amend. XIV, § 1.

M. also claimed that “the retrospective extension of his preventive detention to an unlimited period of time had breached his right under Article 7 § 1 of the Convention not to have a heavier penalty imposed on him than the one applicable at the time of his offence.”⁴⁴ Article 7 § 1 states:

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.⁴⁵

Article 7 § 1 parallels the prohibition against ex post facto laws found in the U.S. Constitution.⁴⁶

IV. THE COURT’S ANALYSIS OF THE ALLEGED ARTICLE 5 VIOLATION

The Court first addressed the alleged violation of Article 5 § 1 of the Convention. As set out above, Article 5 contains a list of six possible justifications for the deprivation of an individual’s liberty.⁴⁷ The list is exhaustive; the Court stated that “no deprivation of liberty will be lawful unless it falls within one of those grounds.”⁴⁸ The Court began its analysis by discussing whether any of the justifications permitted M.’s continued detention. The Court found sub-paragraphs (b), (d), and (f) of Article 5 § 1 were not relevant, but discussed at length the application of sub-paragraphs (a) and (c). The Court also briefly discussed sub-paragraph (e) before finding it also inapplicable.

A. Article 5 § 1(a)

Article 5, Section 1, sub-paragraph (a) of the Convention states that a person may be lawfully deprived of liberty “after conviction by a competent court.”⁴⁹ The Court found:

[T]he word “after” in sub-paragraph (a) does not simply mean that the “detention” must follow the “conviction” in point of time: in addition, the “detention” must result from, follow and

44. *M. v. Germany*, No. 19359/04, para. 2.

45. Convention, *supra* note 41, art. 7 § 1.

46. Compare U.S. CONST. art. I, § 9, cl. 3, with Convention, *supra* note 41, art. 7.

47. Convention, *supra* note 41, art. 5.

48. *M. v. Germany*, No. 19359/04, para. 86 (citations omitted).

49. Convention, *supra* note 41, art. 5 § 1(a).

depend upon or occur by virtue of the “conviction.” In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue.⁵⁰

In applying these principles to M.’s case, the Court noted that M.’s sentence consisted of two parts: five years in prison and subsequent placement in preventive detention.⁵¹ The Court also noted that the duration of M.’s preventive detention could only be as long as provided for by “law applicable at the relevant time.”⁵² When M. was sentenced in 1986, German law provided for an offender to be kept in preventive detention for a maximum of ten years.⁵³ Put another way, M.’s sentence consisted of two parts: five years in prison and placement in preventive detention for a maximum of ten years. The Court held that M.’s continued detention after his initial ten years in preventive detention was disconnected from his 1986 sentence.⁵⁴ Therefore, there was not a sufficient causal connection between M.’s conviction in 1986 and his continued detention beyond the initial ten years of preventive detention.⁵⁵

Furthermore, the Court observed (citing the German Criminal Code) that an order of preventive detention is always dependent on, and ordered together with, a court’s finding of guilt of a criminal offense.⁵⁶ For this reason, M.’s placement in preventive detention was initially justified by Article 5 § 1(a).⁵⁷ The German government argued that the 2001 judicial decision to retain M. in preventive detention was made “after conviction,” and thus satisfied Article 5 § 1(a).⁵⁸ The Court rejected the government’s argument because this retention decision no longer involved a finding of guilt for an offense.⁵⁹ In sum, the Court would allow a preventive component of a criminal sentence, but refused to allow the imposition of preventive detention in proceedings unconnected to a conviction, even though grounded on a finding of future dangerousness.

B. Article 5 § 1(c)

Sub-paragraph (c) of Article 5 § 1 provides that a person’s detention is justified “when it is reasonably considered necessary to prevent his committing an offence”⁶⁰ However, the Court noted, this ground for detention “is not

50. *Id.* para. 88 (citations omitted).

51. *Id.* para. 12.

52. *Id.* para. 99.

53. *See id.* paras. 24, 100.

54. *M. v. Germany*, No. 19359/04, para. 100 (Eur. Ct. H.R. 2009).

55. *Id.*

56. *Id.* para. 96.

57. *Id.*

58. *Id.* paras. 97–98.

59. *M. v. Germany*, No. 19359/04, para. 100.

60. Convention, *supra* note 41, art. 5 § 1(c).

adapted to a policy of general prevention directed against an individual or a category of individuals who present a danger on account of their continuing propensity to [commit] crime. It does no more than afford the Contracting States a means of preventing a *concrete and specific* offence.”⁶¹ M.’s continued detention was justified by the German sentencing court with reference to the risk that he could commit further serious crimes, similar to those he had already committed, if released but was not based on the need to stop M. from committing a particular offense.⁶² The Court noted that “the place and time of [the potential future crimes’] commission and their victims [were unknown], and do not, therefore, fall within the ambit of Article 5 § 1(c).”⁶³

C. Article 5 § 1(e)

The Court also examined Convention Article 5 § 1(e).⁶⁴ The Court noted that sub-paragraph (e) could potentially justify indefinite preventive detention of certain offenders if they meet the provision’s requirement of being “of unsound mind.”⁶⁵ However, it found that this sub-paragraph was inapplicable to M. because the German appellate court found that he “no longer suffered from a serious mental disorder.”⁶⁶ In this rather short and enigmatic way, the Court addressed and dismissed sub-paragraph (e), purportedly relying entirely on the finding of the German appellate court but misstating that court’s finding that M. “no longer suffered from a serious mental disorder *which should be qualified as pathological.*”⁶⁷ Despite this confusion, the Court’s explanation may suggest a distinction that is key to understanding what the Court believes justifies preventive detention, a topic to which we will return below.

Since sub-paragraphs (b), (d), and (f) were inapplicable, and sub-paragraphs (a), (c), and (e) did not justify M.’s continued detention, the Court found there had been a violation of Convention Article 5 § 1.⁶⁸

V. COURT’S ANALYSIS OF THE ALLEGED ARTICLE 7 VIOLATION

The second issue the Court addressed was M.’s allegation that his continued detention violated Article 7 § 1 of the Convention. The Court held that M.’s preventive detention beyond the ten-year maximum violated Article 7 § 1 because it constituted a harsher penalty than that imposed at the time of his

61. *M. v. Germany*, No. 19359/04, para. 89 (emphasis added).

62. *See id.* paras. 12, 102.

63. *Id.* para. 102.

64. *Id.* para. 103.

65. *Id.*

66. *M. v. Germany*, No. 19359/04, para. 103.

67. *Id.* paras. 22, 103 (emphasis added).

68. *Id.* para. 105.

conviction and was therefore an unjustified deprivation of his liberty.⁶⁹ To reach this conclusion, the Court was initially required to determine whether preventive detention under the German Criminal Code constituted a penalty or was merely a “preventive measure.” The Court first enumerated the factors considered in assessing the existence of a penalty, the first being “whether the measure in question is imposed following conviction for a ‘criminal offence.’”⁷⁰ The Court also noted as relevant factors “the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity.”⁷¹

The initial factor was satisfied in M.’s case, the Court pointed out, because his preventive detention was imposed as part of a sentence following his conviction for a criminal offense in 1986 (specifically, attempted murder and robbery).⁷² The role of the remaining factors in this analysis is less straightforward. The German Government argued that under its domestic law, preventive detention is not considered a penalty but is rather a measure of correction and prevention.⁷³ The government, describing the difference between the two, stated that “[p]enalties were of a punitive nature and were fixed with regard to the offender’s personal guilt. Measures of correction and prevention . . . were ordered because of the danger presented by the offender, irrespective of his or her guilt.”⁷⁴ The Court, in response, considered the government’s characterization of its preventive detention system but noted that the concept of “penalty” is independent in scope and that, not “being bound by” the measure’s definition under domestic law, it was for the Court to decide whether a measure qualified as a penalty.⁷⁵ The Court also noted that general preventive detention measures have often been qualified as a penalty in one state and as a preventive measure in another.⁷⁶ Therefore, a factual examination of the preventive detention system in Germany was necessary.

When describing how preventive detention orders are carried out in the German system, the Court noted “there is no substantial difference between the execution of a prison sentence and that of a preventive detention order.”⁷⁷ Offenders subject to preventive detention are housed in ordinary prisons yet in separate wings isolated from the general population.⁷⁸ These offenders have only a few extra privileges, such as more comfortable cells, extra recreational time, and the right to wear their own clothing.⁷⁹ The Court next reported a lack of

69. *Id.* paras. 135, 137.

70. *Id.* para. 120.

71. *M. v. Germany*, No. 19359/04, para. 120.

72. *See id.* para. 124.

73. *Id.* para. 113.

74. *Id.*

75. *Id.* para. 126.

76. *See M. v. Germany*, No. 19359/04, para. 126.

77. *Id.* para. 127.

78. *Id.*

79. *Id.* paras. 77 (sub-para. 95), 127.

meaningful treatment for offenders in preventive detention and stated that these offenders are in specific need of psychological care and support, especially when faced with the potentially indefinite duration of their detention.⁸⁰ The Court quoted a report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Report), which noted that “[p]sychological care and support appeared to be seriously inadequate”⁸¹ The Court noted that the majority of inmates do not take advantage of work programs or recreational activities and essentially idle away their time.⁸² Furthermore, staff members were often absent from the unit and gave the impression that they themselves were not clear as to how to work with these inmates.⁸³ Moreover, to be released from preventive detention on a probationary basis, a court must find that there is no danger that the offender will commit further serious offenses.⁸⁴ The Court noted this condition may be difficult to fulfill.⁸⁵ The Court, again citing the CPT Report, stated that to achieve the goal of crime prevention, a program of preventive detention would demand “a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option.”⁸⁶ The Court went on to hold that “persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible.”⁸⁷ The Court concluded its analysis by finding that preventive detention “appears to be among the most severe [measures]—if not the most severe—which may be imposed under the German Criminal Code.”⁸⁸

After considering all the applicable factors, the Court found that preventive detention under the German Criminal Code qualified as a penalty and held that M.’s continued detention beyond the ten-year maximum constituted an additional penalty and therefore a violation of Article 7 § 1 of the Convention.⁸⁹ The significance of each factor and whether one particular factor is more important than the others remains ambiguous from the Court’s discussion. It is not clear, for example, whether the provision of suitable treatment would have removed the detention from the penalty category. However, even if sufficient

80. *Id.* paras. 77 (sub-paras. 97, 99), 129.

81. *M. v. Germany*, No. 19359/04, para. 77.

82. *Id.* (sub-para. 96).

83. *Id.* (sub-paras. 97, 99).

84. *Id.* para. 132.

85. *Id.*

86. *M. v. Germany*, No. 19359/04, para. 129.

87. *Id.*

88. *Id.* para. 132.

89. *Id.* paras. 133, 137.

treatment were to cure the violation of Article 7, M.'s confinement would still have violated Article 5 as an unjustified deprivation of liberty.⁹⁰

VI. *M. v. GERMANY* IN CONTEXT

A. Article 5: A Familiar and Problematic Analysis

The European Court of Human Rights took steps in *M. v. Germany* to clarify when preventive detention can legitimately occur under Article 5 of the Convention, but a key question remains to be answered: How did the Court interpret the Convention's "unsound mind" language in Article 5 § 1(e)? Understanding this aspect of the Court's decision is critical because the interpretation of this language marks the boundary between permitted and unpermitted detention under this provision. The Court's decision suggests that the term "unsound mind" could be the equivalent of a lack of criminal responsibility.⁹¹ However, the ultimate holding remains unclear, in large part because, as noted above, the Court used language in its analysis that is inconsistent with its earlier discussions of relevant domestic court findings.

Article 5 § 1(e) of the Convention provides that detention may be justified when an individual is "of unsound mind." When dismissing the applicability of this provision to M.'s case the Court stated that "according to the decision of the Frankfurt am Main Court of Appeal in the instant case, the applicant no longer suffered from a serious mental disorder,"⁹² thus suggesting that "unsound mind" is the same as "serious mental disorder." But the German court had characterized M. as no longer suffering "from a serious mental disorder which should be qualified as pathological."⁹³ If, however, we assume the Court did not overlook the language used by the German court, perhaps what the European Court actually meant by "unsound mind" is "serious mental disorder, which is pathological." In that case, both the European Court and the German courts would only find the latter to support diminished criminal responsibility.

Thus, one way to interpret the Court's determination under section 1(e) is that it was attempting to draw a clear distinction: offenders who have diminished criminal responsibility, and are in that sense of "unsound mind," may be subject to

90. *See id.* paras. 102–105.

91. *See generally M. v. Germany*, No. 19359/04, para. 103 (considering whether M.'s continued detention could be permitted under Article 5 § 1(e) and ultimately holding that, while the detention of certain offenders may be permitted as being persons of "unsound mind," "according to the decision of the Frankfurt am Main Court of Appeal in the instant case, the applicant no longer suffered from a serious mental disorder In any event, the domestic courts did not base their decisions to further detain the applicant on the ground that he was of unsound mind. Therefore, his detention cannot be justified under Article 5 § 1(e) either.").

92. *Id.*

93. *Id.* para. 22 (emphasis added).

preventive detention, but those that remain criminally responsible can receive only criminal sanctions for their offenses.⁹⁴ But the Court's misstatement of M.'s mental status and its failure to discuss the rationale for the key distinction, leave substantial doubt about whether it has authoritatively interpreted the "unsound mind" limitation on preventive detention.

Such cursory discussions of the mental capacity standard that must be met before the state can civilly commit an individual indefinitely are not solely a phenomenon of European jurisprudence, but are also present in American decisions addressing the constitutionality of civil commitment. The lack of explanation of the term "unsound mind" in *M. v. Germany* mirrors the United States Supreme Court's discussion in *Foucha*, where the Supreme Court determined that civil commitment could not continue if an individual was no longer "mentally ill," but did so without any analysis of its newly articulated standard.⁹⁵ The failure to analyze this issue may be explained by another common feature of these two decisions. In both cases, the government sought to detain an offender based on what was essentially only a dangerousness factor. As a result, the litigation in both instances focused on whether the offender's dangerousness alone was enough to allow for preventive detention. Both courts apparently held that preventive detention requires a dangerousness-plus standard, but neither paid much attention to the contours of the mental status that generally provides the "plus" factor for civil confinement.

Therefore, just as *Foucha* did, *M. v. Germany* leaves in its wake an incomplete understanding of this important aspect of the preventive detention equation. This suggests that we ought to be cautious of what on the surface appears to be the Court's limitation on the use of preventive detention, as this limitation, like the limitation announced in *Foucha*, is not grounded in a substantive analysis and is not yet clearly defined. This caution should be heightened by the American experience that followed *Foucha*—an experience that involved a continuous struggle to establish appropriate limits on the use of civil commitment and that left room for arguments to broaden commitment standards. This experience can be seen in the Supreme Court's opinions in *Kansas v. Crane* and *Kansas v. Hendricks* and is further evidenced by the current state of civil commitment in the United States.⁹⁶ A cautious approach is warranted, perhaps more so in this context than in any other area of law, because the definition of what makes an individual of "unsound mind" or "mentally ill" has serious consequences. That is, the application of these standards dictates whether or not an individual will be subject to one of the most extreme deprivations of liberty— indefinite detention. However, a recent decision in England, which adopts the

94. It should be noted, however, that the Court's decision does not question the application of preventive detention imposed as part of a criminal conviction. In this case, M. was sentenced to (among other things) ten years in preventive detention. After the ten-year period expired, M. remained in preventive detention, at which point he brought suit. See *supra* text accompanying notes 32–39.

95. See *Foucha v. Louisiana*, 504 U.S. 71, 77–79 (1992).

96. See *supra* text accompanying notes 7–11.

Court's analysis in *M. v. Germany*, suggests that this reading of "unsound mind" is gaining support.⁹⁷

B. Article 7: A New Approach

While the Court in *M. v. Germany* seems to have responded in a manner similar to American courts with respect to the mental capacity issue raised under Article 5 of the Convention, it diverged from U.S. jurisprudence when determining the civil or punitive nature of Germany's preventive detention system in the context of Article 7. No American court assessing the constitutionality of preventive detention laws in this regard has examined facts in the same manner or reached the same conclusion that the Court did in *M. v. Germany*. In its analysis of Article 7 § 1 of the Convention, the European Court, unlike American courts in parallel circumstances,⁹⁸ rejected the notion that it had to give considerable weight to Germany's characterization and explanation of the preventive detention law.⁹⁹ Instead, after reviewing the German government's arguments, it stated that "[t]o 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."¹⁰⁰ The Court then noted that domestic law defined preventive detention "as a measure of correction and prevention" but went on to consider the "realities of the situation of persons in preventive detention" to determine its nature and purpose.¹⁰¹ These realities include prison-like conditions, indefinite duration of confinement, and the fact that under German law, only individuals that have repeatedly committed certain serious crimes are subject to preventive detention.¹⁰² As discussed above, in the context of parallel ex post facto analyses, U.S. courts have rejected the idea that these same realities are evidence of punitive intent.

The Court also looked critically at the quality of treatment provided to those preventively detained. The Court seemed to reason that inadequate treatment undermined the stated preventive purpose, because no "additional and substantial measures" had been put in place "to secure the prevention of offences by the persons concerned."¹⁰³ This line of reasoning is noticeably absent from American cases addressing the character of civil commitment, in which courts often rely on the mere existence of a treatment program and the government's stated intent to treat offenders.

In addition, the Court articulated a view of the relationship between preventive detention and the purposes of punishment in a way that differs

97. See *infra* text accompanying note 112.

98. See discussion *supra* Part II.B.

99. *M. v. Germany*, No. 19359/04, paras. 125–26 (Eur. Ct. H.R. 2009).

100. *Id.* para. 120.

101. *Id.* paras. 125, 128.

102. See *id.* paras. 127–28.

103. *Id.* para. 129.

significantly from the prevailing analysis in American jurisprudence. Both the European and American courts understand that “deterrence” is a hallmark of punishment. While the U.S. Supreme Court opined that individuals subject to preventive detention are, by definition, suffering from a mental abnormality or personality order that renders them unlikely to appreciate the consequence of indefinite confinement,¹⁰⁴ the European Court found that “given its unlimited duration, preventive detention may well be understood as an additional punishment for an offence by the persons concerned and entails a clear deterrent element.”¹⁰⁵

The Court’s conclusion that those subject to preventive detention can understand indefinite confinement as punitive may also help illuminate the Court’s holding under Article 5. As discussed, Article 5 § 1(e) justifies preventive detention where an offender is of “unsound mind.”¹⁰⁶ We have suggested that the Court probably meant to limit the reach of this term to offenders who suffer from diminished criminal responsibility.¹⁰⁷ Our suggestion is supported by the Court’s discussion of Article 7. When considering Article 7, the Court referred to the targets of preventive detention under the existing German scheme, and acknowledged their capacity to appreciate the punitive nature of potentially life-long liberty deprivation.¹⁰⁸ By definition, this capacity would be lacking in the diminished responsibility group, thus offering additional evidence that the Court intended to limit preventive detention to individuals whose dangerousness is supplemented by some sort of severe mental impairment. This reflects a more coherent line of reasoning than that followed by American courts, which have allowed for loosely defined mental disorder standards in the context of civil commitment, but have nonetheless held that those subject to civil commitment are incapable of being deterred.¹⁰⁹

Ultimately, the Court in *M. v. Germany* seems to have reasoned through the “punitive or preventive” inquiry in a manner that turns the reasoning employed by American courts on its head. However, one important difference between the American and German statutory schemes should be kept in mind. M.’s initial preventive detention was ordered by a criminal sentencing court as part of his sentence for a specific crime, but “in a separate procedure.”¹¹⁰ Perhaps this structure does not, in a practical sense, differ from many civil commitment systems in the United States, but the more clearly separated civil and criminal procedures established in the United States remain relevant. This is especially true in light of the fact that American courts, unlike the European Court of Human Rights, have resisted making a full inquiry into the practical realities of preventive

104. *Kansas v. Hendricks*, 521 U.S. 346, 362–63 (1997).

105. *M. v. Germany*, No. 19359/04, para. 130.

106. *See supra* Part IV.C.

107. *See supra* text accompanying notes 92–94.

108. *M. v. Germany*, No. 19359/04, para. 130.

109. *See Hendricks*, 521 U.S. at 359–60, 362–63.

110. *See M. v. Germany*, No. 19359/04, para. 131.

detention and have given little weight to such realities when they are raised in the context of ex post facto claims.

C. Europe's Response to the *M. v. Germany* Decision

The German Federal Constitutional Court took notice of the European Court of Human Rights' decision in *M. v. Germany* and in a recent case ruled that preventive detention, as currently implemented in Germany, is unconstitutional.¹¹¹ Responding to the Court's holding in *M. v. Germany* and its criticisms of Germany's preventive detention system, the Constitutional Court noted that preventive detention had begun to lack distinction from the execution of prison sentences and, that when retroactively applied to cases prolonging detention beyond the previous ten-year maximum, as was the case in *M. v. Germany*, violates fundamental liberty rights and the "principle of the protection of legitimate expectations" of those subject to detention.¹¹² The Constitutional Court required the legislature to enact new legislation by May 31, 2013 that will transform preventive detention into a program with real, attainable rehabilitative goals.¹¹³ Thus, Germany is now faced with the opportunity to create a preventive detention program that succeeds where it and so many other countries have failed in the past. Whether Germany will succeed at the lofty goals set out by its Constitutional Court remains to be seen, but with more intense scrutiny by the European Court of Human Rights looming, the stakes are likely higher for Germany than they have been for states in the United States.

It is also unclear if, given the minimal discussion of the mental health status requirement in *M. v. Germany*, the German courts and legislature will implement a clear diminished capacity-based rule as implied by the Court, or if, like courts and legislatures in the United States, they will have trouble determining the nature and type of mental disorders that make an individual subject to civil commitment. As Germany faces these challenges, it no doubt has the opportunity to provide a framework for many other countries seeking to implement meaningful limits on detention and more meaningful treatment of offenders.

The Court's decision in *M. v. Germany* recently gained support in England with the Queen's Bench Division Administrative Court's ruling in *Sullivan v. Gov't of the U.S.*¹¹⁴ In *Sullivan*, the United States government sought extradition of the defendant to prosecute him for three alleged sexual offenses.¹¹⁵ The alleged offenses took place in Minnesota, where "sexually dangerous

111. Press Release, Fed. Constitutional Court Press Office, Provisions on Preventive Detention Unconstitutional (May 4, 2011), available at <http://www.bundesverfassungsgericht.de/en/press/bvg11-031en.html>.

112. *Id.*

113. *See id.*

114. *Sullivan v. Gov't of U.S.*, [2012] EWHC (Admin) 1680 (Eng.).

115. *Id.* para. 1.

persons” are confined under a preventive detention system that is broad in scope.¹¹⁶ On appeal the defendant argued that, if extradited, there was a “real risk” that he would be civilly committed, which would constitute a “flagrant denial of his rights enshrined in Art. 5 of the European Convention on Human Rights.”¹¹⁷ The Court agreed and, citing *M. v. Germany*, specifically addressed the fact that civil commitment of the defendant in the United States could not be justified under Convention Article 5 § 1(e).¹¹⁸ The Court stated that “a clear distinction had to be drawn between dangerousness and unsound mind. Only in the case of a serious mental disorder would detention under sub-paragraph (e) of Art. 5 [§] 1 be justified.”¹¹⁹ After analyzing the applicable Minnesota Statute,¹²⁰ the Court held that “[i]n the instant appeal the evidence does not come close to establishing that orders for civil commitment are only made in respect of those suffering from an unsound mind within the meaning of Art. 5.1(e), let alone a serious mental disorder.”¹²¹ The Court noted that the defendant could be civilly committed in Minnesota even if he only possessed a “sexual dysfunction,”¹²² which does not require a finding that an individual is unable to control his sexual impulses.¹²³ Therefore, the Court found that the Minnesota criterion for civil commitment falls short of the requirement in Convention Article 5 § 1(e) of proving the defendant is of “unsound mind.”¹²⁴ The Court then held that if civil commitment were imposed under these circumstances, “it would be a flagrant denial of this appellant’s rights under Art. 5.1 because it fell outwith the provisions of Art. 5.1(e).”¹²⁵

The decision in *Sullivan* provides the first example of a court finding *M. v. Germany* to be persuasive authority to hold that preventive detention would amount to an unacceptable violation of a defendant’s rights where there is no requirement that he be of “unsound mind” or the equivalent. At a time when many countries continue to struggle with the delicate balance between protecting society from dangerous individuals and protecting the rights of those same dangerous individuals, *M. v. Germany* is an important benchmark. As the line of

116. *See id.* para. 6.

117. *Id.* para. 2.

118. *Id.* paras. 32–33.

119. *Sullivan v. Gov’t of U.S.*, [2012] EWHC (Admin) 1680 [para. 32] (Eng.) (citing *M. v. Germany*, No. 19359/04, para. 70 (Eur. Ct. H.R. 2009)).

120. MINN. STAT. § 253B.02 subdiv. 18c (West, Westlaw 2012) (“A ‘sexually dangerous person’ means a person who . . . has manifested a sexual, personality, or other mental disorder or dysfunction . . .”).

121. *Sullivan*, EWHC 1680 [para. 33] (Eng.).

122. *Id.*

123. MINN. STAT. § 253B.02 subdiv. 18c(b) (“For purposes of this provision, it is not necessary to prove that the person has an inability to control the person’s sexual impulses.”); *Sullivan*, EWHC 1680 [para. 33] (Eng.). *See also In re Linehan*, 594 N.W.2d 867, 884 (Minn. 1999) (holding that “[t]he [Sexually Dangerous Persons] Act’s language is free from ambiguity and cannot be read to include an inability to control requirement.”).

124. *Sullivan*, EWHC 1680 [para. 33] (Eng.).

125. *Id.*

analysis it sparked gains further support, it will likely stand at the forefront of future efforts to craft legislation that achieves that delicate balance.

