

Preventive Detention in Europe and the United States
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Introduction

In *M. v. Germany*,¹ decided in 2010, the European Court of Human Rights addressed the legality of indeterminate criminal dispositions based in whole or part on assessments of risk. In more general terms, the case examines the tension between the government’s desire to keep dangerous people off the streets and a convicted offender’s interest in avoiding prolonged confinement based solely on predictions of antisocial behavior. The decisions in this case—from the lower level German courts, through the Federal Constitutional Court in Germany, to the European Court of Human Rights—illustrate a range of approaches to this difficult issue. This paper provides both a discussion of *M. v. Germany* on its own terms and a comparison of the case with United States law on preventive detention, particularly as laid out in the U.S. Supreme Court’s decision in *Kansas v. Hendricks*,² and related sentencing jurisprudence.

Read narrowly, the European Court’s decision in *M.* is consistent with *Hendricks*. Both cases prohibit indeterminate incarceration based solely on a prediction of future conduct when the incarceration is punitive in nature. Both also appear to allow non-punitive preventive detention, particularly of people with serious mental disorder. Read broadly, however, *M.*’s definition of “punitive” appears to be different than *Hendricks*’. Further, the limitations that *M.* imposes on indefinite detention that occurs in connection with criminal sentencing may be more stringent than those required by American constitutional restrictions on punishment. The European Court’s treatment of preventive detention ends up being both more nuanced and less formalistic than American caselaw, but it stills leaves a number of questions unanswered.

The final part of the paper tries to make sense out of these legal conundrums. Despite decisions like *M.* and *Hendricks*, preventive detention following a criminal conviction is under-theorized in both Europe and the United States. The article suggests a more coherent approach, based on the author’s own work setting out a jurisprudence of dangerousness.

The Facts and Holdings of *M. v. Germany*

M. was born in 1957. His criminal history is extensive.³ Between the ages of 14 and 18 he was “repeatedly convicted” of theft and burglary. The record does not reveal how many times he was convicted during this period, but it does indicate that he escaped from prison four times in those years. In 1977, at the age of 20, he was convicted of attempted murder, robbery, aggravated battery and blackmail, for a series of acts committed approximately one week after he had been released from his

¹ European Court of Human Rights, Application No. 19359/04 (2010). All citations to this case will be to numbered paragraphs in the opinion. Descriptions of the lower court opinions in the case, as well as of other European Court opinions, are all taken from the opinion in *M. v. Germany* rather than the original sources.

² 521 U.S. 346 (1997).

³ *M. v. Germany*, ¶¶ 6-12 and 16.

previous incarceration. Although the court found that his responsibility for these crimes was diminished due to a “pathological mental disorder,” it sentenced M. to six years confinement. A year and a half later, while in prison, he was convicted of another aggravated assault, this time for throwing a heavy metal box at the head of a prison guard and then stabbing him with a screwdriver after being reprimanded for the initial assault. Less than two years later, in 1979, he assaulted a disabled prisoner over an argument about whether a cell window should remain open. The latter two crimes resulted in a cumulative sentence of two and a half years tacked on to his original six-year sentence; in light of his continued diminished responsibility, the court directed that M. be placed in a mental hospital. In 1986, just as these sentences were about to end, he was convicted of attempted murder and robbery of a woman who had volunteered to supervise him on a furlough from the hospital. He received a sentence of five years, but this time with an additional order that, if necessary due to his continued dangerousness, he be preventively detained after that sentence terminated.

Under authority of the latter order, in 1991—the year his sentence for his latest crime ended—a German regional court ordered his continued incarceration, based on an expert report concluding that he “was likely to commit offences”.⁴ Over the next six years he escaped at least once, became involved with a group of skinheads, assaulted and broke the nose of a fellow prisoner, and “grossly insulted” the warden of the prison. In 2005 he punched a fellow prisoner in the face in a dispute over a baking tin.⁵ However, the record suggests that from the mid-1990s through the time his case came before the European Court in 2008 (a time period which saw M. reach the age of 51) the number and intensity of his antisocial incidents decreased significantly.

M. challenged his prevention detention initially in 1992 as well as at the periodic review hearings, required every two years by statute, that were held in 1994, 1996, 1998 and 2001. The German regional courts consistently rejected his challenges and continued to authorize his detention on prevention grounds. At the 2001 hearing M. argued not only that he was no longer dangerous but also that Article 67 of the German Criminal Code—which at the time he was sentenced in 1986 limited preventive detention to ten years⁶—required that he be released in 2001 (ten years after completion of his last, five-year sentence). However, the regional court noted that Article 67 had been amended in 1998 to allow extension of preventive detention beyond ten years if “there is . . . danger that the detainee will, owing to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims.”⁷ The court then expressly authorized preventive detention beyond the ten-year period because such detention “was not disproportionate” to “the gravity of the applicant’s criminal past and possible future offences.”⁸

The Frankfurt am Main Court of Appeal affirmed the regional court’s holding in October, 2001, and further held that M. could not challenge his detention again until another two-year period elapsed.⁹

⁴ ¶ 14.

⁵ ¶ 44.

⁶ ¶ 48.

⁷ ¶ 53 (describing amended provision 67d).

⁸ ¶ 19.

⁹ ¶ 21.

The latter holding was based in part on the Court of Appeal’s conclusion that M. no longer suffered from a pathological disorder that might be amenable to treatment and thus could result in earlier release.¹⁰ The Court of Appeal also held that continued preventive detention under the amended 1998 statute did not violate Germany’s Basic Law prohibiting “retrospective criminal provisions” (analogous to ex post facto laws in American jurisprudence) because the law prescribed “preventive measures,” not “penalties.” In such cases, the Court of Appeal reasoned, retrospective application is permissible if “weighty public-interest grounds,” such as the protection of the public from dangerous offenders, exist.

Although M. immediately filed a petition with the German Federal Constitutional Court, that Court did not hand down a decision in his case until 2004.¹¹ After a hearing in which it not only heard arguments from both sides but also consulted psychiatric experts and prison wardens, a panel of eight judges on the Constitutional Court upheld the Court of Appeal in an 84-page opinion. It considered M.’s case in light of four guarantees found in Germany’s Basic Law—the right to liberty, protection from retrospective criminal laws, respect for the rule of law, and respect for human dignity.¹² The Constitutional Court began by acknowledging the serious deprivation of liberty preventive detention imposes. It stressed that, given the content of Article 67 at the time M. was sentenced, extension of preventive detention beyond ten years should be the exception rather than the rule and require significant proof of danger.¹³ Further, prison authorities implementing such detention should work to “relax” detention conditions to facilitate prognosis regarding possible release and should also make sure that detention conditions are “improved to the full extent compatible with prison requirements.”¹⁴ However, the Court continued, if these requirements are met an extension of preventive detention beyond the ten-year period such as occurred in M.’s case did not violate the ex post facto prohibition against criminal punishment, because the detention was focused on prevention, not punishment.¹⁵ Nor did the detention violate the rule of law guarantee. According to the Court, “the legislator’s duty to protect members of the public against interference with their life, health and sexual integrity outweighs the detainee’s reliance on the continued application of the ten-year limit;”¹⁶ in any event, the Court implied that the detainee should have known the detention might be prolonged given its preventive nature.¹⁷ Finally, if a detainee continues to pose a high level of danger, the Court held, his dignity is not violated even by long periods of preventive detention as long as the government’s goal is to rehabilitate the detainee and programs exist that give him “real prospects of regaining [his] freedom.”¹⁸

Thus, by the time M.’s case came before the European Court of Human Rights a number of German courts, including the country’s highest, had affirmed his detention on prevention grounds

¹⁰ ¶ 22 (concluding, according to the European Court, that “it was clear that M. no longer suffered from a serious mental disorder which should be qualified as pathological.”).

¹¹ ¶ 27.

¹² These guarantees are found, respectively, in Article 2, § 2 of the Basic Law; Article 103, § 2; Article 20, § 3; and Article 1, § 1.

¹³ ¶ 29.

¹⁴ ¶s 29, 30.

¹⁵ ¶ 33.

¹⁶ ¶ 37.

¹⁷ ¶ 36.

¹⁸ ¶ 38.

beyond the ten-year period German law originally imposed as a limit on that detention. The European Court nonetheless decided that M. had been unlawfully detained since 2001 and was entitled to damages.¹⁹ While not disputing the German courts' interpretation of German law, the Court concluded that the disposition in M.'s case violated both Article 5 and Article 7 of the European Convention on Human Rights.

Article 5, section 1 of the Convention provides, *inter alia*, that

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; . . .
- (c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority . . . or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; . . .
- (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; . . .²⁰

The Court quickly ruled out the possibility that either paragraph (c) or (e) applied to M.'s case. The prevention language in §1(c), the Court stated, refers not to sentencing but to pretrial detention after prompt arraignment before a judge, based on a finding that the arrested individual would otherwise commit a "concrete and specific offense."²¹ And the preventive detention of persons with unsound mind referenced in §1(e) did not apply to M.'s case, given the German courts' finding that he no longer suffered from serious mental disorder.²²

That left only §1(a) of Article 5—"detention after conviction by a competent court"—as a possible legitimate ground for M.'s continued confinement. The European Court found that M.'s initial preventive detention after his conviction in 1991 was justified under this provision. However, the Court held that his detention beyond the ten-year period violated §1(a) because "there was not a sufficient causal connection" between the conviction and the extension of his sentence.²³ More specifically, the Court held, "the courts responsible for the execution of sentences were competent only to fix the duration of the applicant's preventive detention within the framework established by the order of the sentencing court, read in the light of the law applicable at the relevant time."²⁴ Since the sentencing court's preventive detention sentence was limited to ten years by the law extant at the time of sentencing, German courts had no jurisdiction to detain M. beyond that period. The European Court distinguished M.'s case both from *Van Droogenbroeck v. Belgium*,²⁵ where it had upheld a preventive

¹⁹ This was the only relief described in the European Court's opinion. ¶ 141. It may be that M. had been released at the time the Court's opinion was issued.

²⁰ European Convention on Human Rights, Article 5, § 1.

²¹ ¶ 102.

²² ¶ 103.

²³ ¶ 100.

²⁴ ¶ 99.

²⁵ 24 June 1982, Series A no. 50.

sentence enhancement imposed on a habitual offender at the time of sentencing rather than some later point in time,²⁶ and from *Kafkaris v. Cyprus*,²⁷ where it sanctioned extension of a sentence beyond the twenty-year term authorized by prison regulations because the sentencing court had authorized a sentence of life imprisonment.²⁸

The European Court also held that M.'s disposition violated Article 7's prohibition against imposing a "heavier penalty . . . than the one that was applicable at the time the criminal offence was committed."²⁹ The key question here was whether M.'s confinement beyond 1991 was a "penalty." M. emphasized that, with the extension, he had been incarcerated for "considerably longer" than most offenders who commit *murder*, and that the incarceration took place in a prison, without any significant effort to prepare him for release.³⁰ The government countered that people subjected to preventive detention in Germany received several privileges not accorded those being punished, including the ability to wear their own clothes, receive longer visits, obtain more pocket money and mail, and experience more time outside the cell within the prison as well as short periods of leave under escort.³¹ The European Court agreed with the government's contention—and indeed called it "clear"—that as a matter of theory confinement "of a purely preventive nature aimed at protecting the public from a dangerous offender" is not a penalty.³² But it went on to hold that the detention in M.'s case was not purely preventive in nature.

The Court reached this conclusion relying on several factors, here organized somewhat differently than in the Court's opinion. First, the Court stated, preventive detention is a deprivation of liberty that, given its unlimited nature in cases like M.'s, "appears to be among the most severe—if not the most severe—which may be imposed under the German Criminal Code."³³ Second, the Court noted that preventive detention orders enhance the typical sentence and are issued by criminal courts against persons who have repeatedly been found guilty of serious offenses, all of which suggests that the detention is additional punishment as much as it is preventive in orientation.³⁴ Finally, the Court found "striking" the fact that preventive detention in Germany takes place in "ordinary prisons, albeit in separate wings," and characterized the privileges accorded those who are preventively detained as so "minor" that "there is no substantial difference between the execution of a prison sentence and that of a preventive detention order."³⁵ More specifically, the Court concluded that, contrary to the government's submissions, those subject to such orders received no special programs designed to limit the duration of their detention and that "treatment" staff was often absent and lacked the necessary expertise. Here it referred to part of a report prepared by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment that had found that, while the physical

²⁶ ¶ 94.

²⁷ No. 21906/04, ECHR 2008.

²⁸ ¶ 101.

²⁹ European Convention on Human Rights, Article 7, § 1.

³⁰ ¶s 110-111.

³¹ ¶s 114, 116.

³² ¶ 125.

³³ ¶ 132.

³⁴ ¶s 124, 128.

³⁵ ¶ 127.

facilities in which people like M. are housed are of “a good or even very good standard,” the vast majority of inmates “were completely demotivated” and their “psychological care and support appeared to be seriously inadequate.”³⁶ The Court quoted with approval the conclusion of the Committee’s report that achieving the objective of crime prevention requires “a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis, within a coherent framework for progression towards release, which should be a real option.”³⁷

Having found that preventive detention as implemented in Germany is a “penalty,” the Court then had to decide whether the extension of M.’s preventive detention was part of the original penalty applicable at the time of the conviction—and therefore legitimate—or was instead an additional, subsequently imposed penalty—and therefore in violation of Article 7. While the sentencing court had ordered M.’s preventive detention without stating a time-limit, the European Court held that, given the law applicable at the time, the detention could not lawfully exceed ten years.³⁸ Therefore, any confinement beyond ten years was a retrospectively applied penalty in violation of Article 7.

Germany’s reaction to the holding in *M. v. Germany* has been dramatic. In 2010 the German legislature passed the Violent Offenders (Custodial Therapy) Act which transferred jurisdiction over dangerous offenders who require post-sentence incapacitation from the criminal courts to the civil courts, apparently in the hopes this move would evade M.’s strictures.³⁹ But in 2011 the German high court declared all post-sentence incapacitation orders of the German Code unconstitutional, on the ground, highlighted in *M. v. Germany*, that dispositions under those orders were not sufficiently therapeutic and distinct from prison conditions.⁴⁰ Directing the legislature to reform the law accordingly by May, 2013, it held that in the interim only those who pose an extreme likelihood of committing serious violent and sexual offenses and who suffer from a serious mental disorder may be confined.⁴¹ The German court also reduced the review period from two years to one.⁴²

The European Court’s decision in *M. v. Germany* leaves two important aspects of preventive detention law under the European Human Rights Convention unresolved, or at least murky. First, if the government provides the type of individualized treatment described by the Court, does preventive detention lose its punitive nature, or does the fact that such detention takes place after conviction of a serious offense, is unlimited and potentially prolonged, and takes place in prison-like setting still require the conclusion that it is a penalty? Second, whether or not preventive detention after conviction is a penalty, if the state has already authorized indeterminate sentencing (thus mooting the retrospective application problem), and the sentencing court explicitly states that the sentence shall be indeterminate with no fixed endpoint, is there a sufficient “causal connection” between the conviction and the sentence to satisfy Article 5? If these questions are answered in the affirmative, then Germany can

³⁶ The findings of the Committee are summarized at ¶ 77.

³⁷ ¶ 129.

³⁸ ¶ 135.

³⁹ Michael Bohlander, *Principles of German Criminal Procedure* 235 (2012).

⁴⁰ BVerfG, Docket No. 2BvR 2365/09 (May 4, 2011), described in Bohlander, *supra* note 39, at 238.

⁴¹ *Id.*

⁴² *Id.* at 239.

avoid the impact of *M. v. Germany* in future cases either by providing meaningful treatment to those who are preventively detained or by assuring that the 1998 amendment to Article 67 of its Code is applied only prospectively. The answers to these questions are also important for a number of other countries. France, the United Kingdom, Italy, Austria and at least five other European nations permit post-sentence preventive detention, although some limit it to ten years, as Germany did prior to 1998.⁴³ At this point, a look at how American law answers these and similar questions might be fruitful.

United States Law on Preventive Detention

In *Kansas v. Hendricks*,⁴⁴ the United States Supreme Court upheld a statute that explicitly permitted preventive detention of an individual who has just completed his sentence, if the person is shown to be dangerous as a result of a “mental abnormality.” This aspect of *Hendricks* could be interpreted merely as an application of the traditional rule permitting long-term preventive detention of those with mental disorder, recognized by provisions such as those found in Article 5, §1(e) of the European Convention on Human Rights. But the Supreme Court made clear that the mental abnormality underlying a post-sentence commitment need not be a psychosis or a similarly serious disorder. Rather, it can consist of a less-serious disorder, so long as it makes the person “dangerous beyond [his] control.”⁴⁵ According to the Court, a “lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes [those who may be preventively detained] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”⁴⁶ In a later decision, the Court emphasized that “lack of control” is not meant to have “a particularly narrow or technical meaning,” but merely requires “proof of serious difficulty in controlling behavior.”⁴⁷ On authority of *Hendricks*, lower courts have routinely permitted post-sentence preventive of sex offenders who merely have personality disorders, including disorders that are primarily manifested through repeated antisocial conduct.⁴⁸ Because M., no longer considered “pathologically” mentally ill but with a history of impulsive acting out, would seem to fit in this latter category, incarceration functionally equivalent to the post-sentence preventive confinement struck down in *M. v. Germany* appears to be permissible in the U.S. In the constitutional terms *Hendricks* used, such confinement does not violate the clause in the Fourteenth Amendment to the U.S. Constitution prohibiting deprivations of liberty “without due process of law.”⁴⁹

The potential conflict between *M. v. Germany* and *Hendricks* does not end there. As in *M.*, the statute under which *Hendricks* was confined when his sentence expired was passed after his sentence was imposed. Thus, like M., *Hendricks* argued that even if preventive detention of dangerous and

⁴³ The relevant laws are described in ¶¶ 69-73.

⁴⁴ 521 U.S. 346 (1997).

⁴⁵ *Id.* at 358.

⁴⁶ *Id.* at 360.

⁴⁷ *Kansas v. Crane*, 534 U.S. 407 (2002).

⁴⁸ See W. Lawrence Fitch, *Sex Offender Commitment in the United States: Legislative and Policy Concerns*, 99 *Annals of New York Academy of Science* 489, 494 (2003) (stating that only 12% of individuals committed under *Hendricks*-type laws have “serious mental illness,” with the rest diagnosed with paraphilia or antisocial personality disorder).

⁴⁹ *Hendricks*, 521 U.S. at 356.

volitionally impaired individuals is generally permissible, his particular preventive confinement occurred under an ex post facto law (which is explicitly prohibited by the American Constitution⁵⁰). Further, like *M.*, *Hendricks* argued that, since treatment was minimal, the nature of his post-sentence confinement was no different than the imprisonment he had just completed.⁵¹ The U.S. Supreme Court rejected both of these arguments on the ground that *Hendricks*' confinement did not constitute punishment, a conclusion that stands in interesting contrast to the holding in *M. v. Germany*. According to the Supreme Court, the purpose of the statute at issue was not to exact retribution or to implement general deterrence—typical objectives of punishment—but rather to assure incapacitation of a dangerous individual, a “civil” regulatory goal. Evidence of past conduct proffered in the proceedings authorized by the statute is introduced only to predict future conduct, not punish past behavior, and did not inquire into “scienter” (subjective culpability).⁵² The Court strongly implied that, to ensure the regulatory nature of the detention, the state must try to provide treatment to committed individuals.⁵³ But it also stated that treatment need only be “an ancillary purpose” and need not be successful in order for the confinement to avoid the punitive label.⁵⁴ The Court ended: “[w]here the State has disavowed any punitive intent; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.”⁵⁵

This latter aspect of *Hendricks* could be said to be similar in content to the decision in *M.*, in the sense that both decisions require a treatment regimen in order for preventive detention to avoid the punitive label. But the tone of the European Court’s decision, as well as of the German federal Constitutional Court decision that followed it, is decidedly more demanding in this regard. In a later decision, the U.S. Supreme Court repeated the conclusion that, at least where state law provides that one purpose of preventive detention is treatment, it must attempt to provide treatment.⁵⁶ But it has yet to state that proposition in the strong terms used by the European courts.

Even if a post-conviction disposition is explicitly criminal rather than regulatory or civil, the U.S. Supreme Court has granted the government considerable leeway in fashioning sentences. As far back as 1937 the Supreme Court made clear that sentences may be based largely or entirely on assessments of risk: “The government may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes . . . [The offender’s] past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of

⁵⁰ U.S. Const. Art. 1, § 9, cl. 3.

⁵¹ However, rather than frame this claim in liberty interest terms as *M.* did, he argued that his continued detention was a second punishment prohibited under the double jeopardy clause found in the Fifth Amendment to the U.S. Constitution.

⁵² *Hendricks*, 521 U.S. at 361-63.

⁵³ However, the Court also made clear that an untreatable individual may still be confined preventively. *Id.* at 366.

⁵⁴ *Id.* at 367.

⁵⁵ *Id.* at 368-69.

⁵⁶ *Seling v. Young*, 541 U.S. 250, 265 (2001).

discipline that ought to be imposed upon him.”⁵⁷ If there were any doubt about the issue, it was removed 40 years later in *Jurek v. Texas*,⁵⁸ in which the Supreme Court held that even a death sentence can be based solely on a determination of dangerousness.

Indefinite sentences—that is, sentences with no fixed endpoint—also appear to be constitutionally permissible in the United States. Although the trend in recent years has been toward determinate sentencing,⁵⁹ the Supreme Court has never held or intimated that indeterminate sentencing, whereby the maximum sentence is either not stated or is quite lengthy, is unconstitutional. Until the 1970s most state systems imposed open-ended sentences, often ranging from one year to life, with the ultimate release decision made by a parole board.⁶⁰ Today, roughly half the states retain similarly indeterminate sentencing systems.⁶¹

Furthermore, the Supreme Court has refused to find prolonged or indefinite sentences a violation of the ban, found in the Eighth Amendment’s to the U.S. Constitution, on cruel and unusual punishment, even when the underlying offenses are relatively minor. For instance, in *Ewing v. California* the Court affirmed over an Eighth Amendment challenge a sentence of 25 years to life, imposed under a “three-strikes law,” for an offender who had three prior lesser felony convictions and whose most recent conviction was for stealing a set of golf clubs.⁶² Analogous to the European Court’s holding in *Van Droogenbroeck*, the Court stated that “nothing in the Eighth Amendment prohibits California from choosing to incapacitate criminals who have already been convicted of at least one serious or violent crime. Recidivism has long been recognized as a legitimate basis for increased punishment and is a serious public safety concern . . .”⁶³

Finally, the Court has apparently also rejected the rule of law concern addressed by the German Federal Constitutional Court in *M. v. Germany*. In *United States v. DiFrancesco*,⁶⁴ the offender argued that the prosecution should not be able to appeal a sentence imposed under a dangerous offender statute because, if it prevailed, his sentence would be enhanced beyond the term imposed by the sentencing court, an argument very similar to that made by M. However, consistent with the German Federal Constitutional Court’s determination, the Supreme Court concluded that “the argument that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and

⁵⁷ Penn ex rel. Sullivan v. Ashe, 302 U.S. 51, 61 (1937).

⁵⁸ 428 U.S. 262 (1976).

⁵⁹ See Douglas A. Berman, Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process, 95 J. Crim. L. & Criminology 653, 654-55 (2005); see also, *Tapia v. U.S.*, 131 S.Ct. 2382 (2011) (holding that, under federal statutory law, which establishes a determinate sentencing system in federal courts, sentences may not be lengthened solely for rehabilitative purposes).

⁶⁰ For instance, until 1977, in California courts imposed open-ended sentences (often one-year to life) with release dependent on a decision by the parole board. *Cunningham v. California*, 549 U.S. 270, 276-277 (2007).

⁶¹ See Richard Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 Colum. L. Rev. 1190, 1196-1197 (2005) (noting that 18 states plus the federal government have adopted sentencing guidelines that tend in the direction of determinate sentencing but that a number of states have rejected the guidelines approach).

⁶² 538 U.S. 11 (2003).

⁶³ *Id.* at 25.

⁶⁴ 449 U.S. 117 (1980).

that the trial judge should be prohibited from thereafter increasing the sentence, has no force where, as in the dangerous special offender statutes, Congress has specifically provided that the sentence is subject to appeal.”⁶⁵ *DiFrancesco* appears to stand for the proposition that, as long as the authorizing statute in existence at the time of sentencing permits changes in sentence, a lack-of-notice or rule of law claim against a sentence that is prolonged at some later point in time will not succeed.

These various holdings by the United States Supreme Court suggest the following answers to the two questions posed at the end of the last section (here answered in reverse order). If the legislature has authorized indeterminate, open-ended sentences the length of which depends solely upon back-end assessments of risk, the Constitution does not prohibit a criminal court from imposing such an indeterminate disposition. If instead, the government retains a determinate sentencing regime but authorizes post-sentence commitment, it may do so as long as the individual is shown to be dangerous beyond his control and the state makes some attempt to treat the individual.

It may be that, in practice, the same legal regime is permissible in Europe. That is, *M. v. Germany* may still permit post-sentence confinement of people with any broadly defined mental disorder, as well as preventive detention that occurs in connection with a sentence so long as that sentence is imposed at the front-end.⁶⁶ However, the European Court’s decision in *M.* appears to be considerably more hostile than *Hendricks* and its progeny toward post-conviction dispositions based solely on assessments of risk, and a subsequent decision from that Court signaled that post-sentence preventive detention of offenders on mental disorder grounds must be restricted.⁶⁷ Furthermore, an expansive reading of *M.* supports the argument that a sentence based on an assessment of risk must be time-limited in some way, and must also be authorized by a court in a “separate proceeding” focused specifically on risk issue, as was the case with the ten-year enhancement in *M.* itself.⁶⁸ In an effort to sort out where the law in both the Europe and the United States might go from here, the next section of this paper lays out a possible analytical framework.

Principles that Might Govern the State’s Use of Preventive Detention

In other work,⁶⁹ I have developed seven principles, derived from both American and international law, that might govern the state’s exercise of preventive intervention authority, whether

⁶⁵ *Id.* at 139.

⁶⁶ See *supra* text accompanying notes 24-28 (describing European Court’s apparent endorsement of indeterminate sentencing).

⁶⁷ *Haidn v. Germany*, Application No. 6587/04 (Jan. 13, 2011)(holding that where an offender is found to suffer from an “organic personality disorder” (as distinguished, apparently, from a psychosis) and was housed in a prison rather than a psychiatric hospital, he does not have a “true mental disorder” for purposes of Article 5, § 1(e) of the Convention).

⁶⁸ See ¶ 131 (stressing that the ten-year prevention-oriented addition to *M.*’s sentence was imposed after “a separate procedure”). Cf. *Specht v. Patterson*, 386 U.S. 605 (1967) (holding that to the extent an indeterminate sentence imposed on a sex offender is based on a finding of dangerousness, it must be preceded by a formal hearing, with the right to counsel, cross-examine witnesses, etc.)

⁶⁹ The most recent iteration of this work is found in Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indetermination Dispositions in Criminal Cases*, 48 *San Diego L. Rev.* 1127 (2011). For essentially the same argument from an international perspective see Christopher Slobogin, *Legal*

exercised in the sentencing context or elsewhere: (1) the principle of legality, which requires commission of a crime or imminently risky conduct before preventive detention takes place; (2) the risk-proportionality principle, which requires that government prove a probability and magnitude of risk proportionate to the duration and nature of the contemplated intervention; (3) the related least drastic means principle, which requires the government to adopt the least invasive means of accomplishing its preventive goals, and thus may well preclude confinement in many cases as well as require treatment; (4) the principle of criminal justice primacy, which requires that systems of preventive detention separate from criminal justice be limited to detention of those whose subsequent behavior is unlikely to be affected even by a significant prospect of serious criminal punishment; (5) the evidentiary rule that, when government seeks preventive confinement, it may only prove its case using actuarial-based probability estimates or, in their absence, previous antisocial conduct; (6) the evidentiary rule that the subject of preventive detention may rebut the government's case concerning risk with clinical risk assessments, even if they are not as provably reliable as actuarial prediction; (7) the procedural principle that a subject's risk and risk management plans must periodically be reviewed using procedures that assure voice for the subject and avoid executive branch domination of the decision making process.

Applied to sentences that are in whole or part focused on prevention, these principles play out along the following lines. First, conviction of an offense satisfies principle one (the principle of legality), and would render moot principle four (the principle of criminal justice primacy), since preventive detention would take place within the criminal system (in contrast to post-sentence commitment, about which more below). Second, the nature and duration of any part of the sentence that is not based on retributive considerations would depend, under principles two and three, upon the probability and magnitude of the risk posed by the offender and the means available to diminish the risk. Relying on this risk-proportionality reasoning—alluded to and apparently endorsed in all of the German court decisions in *M. v. Germany*⁷⁰—the initial confinement on preventive grounds might be limited to situations where the state can prove the offender poses a greater than 50% risk of committing a serious offense, and even then only if no less restrictive means (ankle monitors, intensive probation; registration requirements) can achieve the state's prevention aim.⁷¹ A lower probability or lower magnitude risk would at most permit monitoring in the community, and even if confinement is initially authorized, risk-proportionality reasoning would dictate that it could continue only if increasingly greater risk is demonstrated.

Regardless of the setting, principle three also requires that, for any portion of the sentence meant to accomplish preventive goals, the state provide treatment that can reduce risk of further offending and thus render less restrictive the preventive intervention. The strong language of the European Court's decision in *M. v. Germany* best captures how this principle would operate. Specifically, trained personnel, individualized treatment plans, increasing opportunities for conditional

Limitations on the Scope of Preventive Detention, in *Dangerous People: Policy, Prediction, and Practice* 37 (Bernadette McSherry & Patrick Keyzer, eds., 2011).

⁷⁰ See German Criminal Code art. 62 (requiring that all preventive measures be proportionate to the offender's dangerousness)

⁷¹ The 50% figure comes from the American rule that arrest requires probable cause, which is often quantified around the 50% level. See Wayne R. LaFare et al., *Criminal Procedure* 167 (5th ed. 2009).

release of confined individuals who adhere to these plans, and continual updating of the rehabilitation regimen are essential aspects of such a regime.

Principles five and six work in tandem in structuring how the government can meet the all-important proof requirements outlined above. Principle five states that the government’s case-in-chief in cases seeking incarceration must rely on actuarial risk assessment instruments in proving the probability and magnitude of risk, primarily because other means of proving risk, such as unstructured and unstructured clinical judgment, do not provide numerical probability estimates and tend to be both less accurate and more likely to mislead the fact finder.⁷² However, in recognition of the fact that actuarial instruments are based on group characteristics, principle six permits the offender to contest the actuarial probability estimate with an individualized clinical risk assessment, with the caveat that the government may respond in kind.

Finally, principle seven requires that the proof process at sentencing be consistent with due process requirements, which at a minimum should probably include the rights to a neutral fact finder, counsel, and confrontation of the state’s evidence, as well as an explanation of the ultimate decision and the right to appeal that decision, at least when there is no consensus during the initial review.⁷³ Principle seven further requires that a similar process take place at regular intervals to ensure adherence to the risk-proportionality and least drastic means principles. These periodic hearings presumably would often result in changes in the nature and duration of the intervention, including conditional and outright release.

The type of *post*-sentence commitment explicitly involved in *Hendricks* and implicitly at issue in *M. v. Germany* would have to abide by all of these principles as well. Of particular interest for present purposes is the stipulation under principle four that preventive detention outside the criminal justice system (including *post*-sentence commitment) must be limited to those individuals whose subsequent behavior is unlikely to be affected by a significant prospect of serious criminal punishment. This principle is meant to address those situations—ranging from civil commitment of people with mental disorder to quarantine and prisoner-of-war camps—that involve preventive detention in the absence of a criminal conviction.

As applied to people with mental disorder this principle needs to be contrasted with the doctrine—endorsed in both Article 5, §1(e) of the European Convention on Human Rights and in *Hendricks*—that people with mental disorder may be subject to preventive detention in a system separate from the criminal justice system. In a case decided one year after *M. v. Germany*, alluded to earlier, the European Court of Human Rights emphasized that the mental disorder referred to in §1(e)

⁷² For a detailed description of these instruments and the way principles five and six interact, see Christopher Slobogin, *Proving the Unprovable: The Role of Law, Science and Speculation in Adjudicating Culpability and Dangerousness* 101-108, 115-129 (2007).

⁷³ The relevant Supreme Court decisions are *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972), which set out due process rights in probation and parole revocation proceedings. Both cases emphasized that the complexity of the proceedings is a significant determinant of whether these rights should be extended to a particular proceeding. Risk assessments probably fall in the “complex” category.

must be a serious one, necessitating treatment in a psychiatric hospital.⁷⁴ *Hendricks* does not require hospitalization but does require that confinement take place in a facility separate from prison and a “mental abnormality” that renders the person “dangerous beyond [his] control.”⁷⁵ However, neither European courts nor courts in the United States have provided a satisfactory explanation of why people with mental disorder are singled out in this way or have attempted to delineate the types of mental disorder or the specific functional impairments that will justify preventive detention. Nor have these courts done a very good job reconciling their apparent acceptance of other types of long-term preventive detention with their stance that people with serious mental disorder, whatever that turns out to be, may be preventively detained while unconvicted people who do not have a mental disorder—including released prisoners—may not be.

The usual justification advanced by scholars for long-term preventive detention of people with mental disorder is that, while government should generally not be able to deprive people of liberty until they have acted on a rational choice, it may detain persons who are *incapable* of acting rationally before they act.⁷⁶ But this rationale does not provide a justification for the preventive detention of autonomous actors, including enemy combatants (detainable under international law⁷⁷) and people with infectious diseases (a second category of people, along with “alcoholics,” “drug addicts,” and “vagrants”(!), that is detainable under §1(e)). A more expansive rationale is that preventive detention is permissible in those situations in which conviction of dangerous people is not possible—people with mental illness will be excused because of their disability; people with contagious diseases likewise are blameless; and wartime does not permit criminal trials.⁷⁸ But if this “gap-filler” rationale is taken seriously, then any dangerous person released from prison should be subject to preventive detention; after all, until that person commits another crime conviction is not possible.

The better rationale for these types of preventive detention—encapsulated in criminal justice primacy principle I am advancing—is that they are justified because the criminal justice system cannot work in these situations. People who are so mentally ill that they misperceive reality, people who suffer from diseases that will inevitably infect others if quarantine is not maintained, and people who are under orders to kill or be killed may be preventively detained because the harm they pose is unaffected by the prospect of serious criminal punishment. In other words, the danger represented by these

⁷⁴ *Haidn v. Germany*, Application No. 6587/04 (Jan. 13, 2011).

⁷⁵ 521 U.S. at 358.

⁷⁶ See, e.g., Eric S. Janus, *Hendricks and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCHOL. PUB. POL’Y & L. 297, 298 (1998) (“Properly understood, the *Hendricks* decision will limit civil commitment to those who are ‘too sick to deserve punishment.’” (quoting *Millard v. Harris*, 406 F.2d 964, 969 (D.C. Cir. 1968))); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1025–27, 1077 (2002) (arguing that sexual predator commitment should be limited to those who are “nonresponsible”).

⁷⁷ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–21 (2004) (The detention of enemy combatants to prevent their return to the battlefield is “a fundamental incident of waging war” and consistent with “longstanding law of war principles.”).

⁷⁸ Cf. Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator laws*, 7 *Journal of Contemporary Legal Issues* 69 (1996) (preventive detention outside the criminal justice system is permissible “when the state has a compelling interest that cannot be met through the criminal process.”).

people is *undeterrable* through the criminal sanction; even if the proverbial cop were standing at their elbow, they would be willing to engage in behavior that will harm others.⁷⁹ The undeterrability rationale also clarifies that the state's interest in protecting its citizens, while always significant, nonetheless only outweighs the un-convicted individual's liberty interest sufficiently to permit confinement when the criminal justice system can have no impact. In other words, the undeterrability rationale better explains from both the individual's and the state's perspective why many nonautonomous actors may be preventively detained—their undeterrability, not their lack of autonomy or unconvictability—and also explains why some autonomous actors may be so detained.

Applying this principle to a case of post-sentence commitment such as M.'s, the state would have to show that the individual was impervious to serious criminal sanction before preventive detention could take place. If the individual is suffering from psychosis, such a showing might easily be made. People with psychosis who commit crimes often do not know they are doing so or think they are acting in self-defense.⁸⁰ Fear of the criminal law can have no impact on their actions. On this view, a separate preventive detention system for individuals who have served their sentence or for people acquitted by reason of insanity is justifiable, as is the separate system for involuntary civil hospitalization of people with psychosis that exists in most countries (assuming principle one's overt act requirement is met).

The absence of a psychotic disorder would not necessarily mean that post-sentence preventive detention or preventive detention in lieu of sentence is impermissible, however. Some offenders with severe impulse control problems, although not as compromised as people with psychosis, might also be said to be undeterrable at the time of their crime. However, the degree of undeterrability necessary to justify preventive intervention must be significant or this reasoning could easily end up justifying preventive detention of ordinary recidivists as well. As the Minnesota Supreme Court held in a case involving preventive detention of a sex offender, such commitment requires proof not only of risk but also of "an utter lack of power to control their sexual impulses."⁸¹ Other people who might fall into this category are those at the extreme end of the psychopathy spectrum—those who evidence complete disregard for the law—and people with severe addictions who could be said to have disorders of desire.⁸² Whether M. fits into this category is difficult to tell from the record in the case. However,

⁷⁹ The "policeman-at-the-elbow" test is one way in which the irresistible impulse prong of the insanity test has been operationalized in the United States. See Gary B. Melton et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 216 (3d ed. 2007).

⁸⁰ See Christopher Slobogin, *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty*, 23-28 (2006).

⁸¹ *In re Blodgett*, 510 N.W.2d 910, 913 (Minn. 1994) (quoting *State ex rel. Pearson v. Probate Court*, 287 N.W. 297, 302 (1939), *aff'd*, 309 U.S. 270 (1940)) (internal quotation marks omitted); see also *Thomas v. State*, 74 S.W.3d 789, 791-92 (Mo. 2002) (holding that commitment requires proof of "serious difficulty in controlling . . . behavior"); *In re Commitment of W.Z.*, 801 A.2d 205, 216-18 (N.J. 2002) (holding that commitment requires proof of an "inability to control one's sexually violent behavior").

⁸² Cf. Stephen Morse, *Preventive Detention of Psychopaths and Dangerous Offenders*, 48 *San Diego L. Rev.* 1077, 1116 (2011) (arguing that psychopaths "cannot grasp or be guided by the good reasons not to offend," an incapacity that could be expressed "either as a cognitive or control defect," and also concluding that "internal duress" or "disorders of desire" might explain some crimes committed by addicts).

Leroy Hendricks—who declared shortly before the end of his prison sentence (for his eighth and ninth acts of child molestation) that he couldn’t “control the urge” to molest children and that the only sure way he could keep from sexually abusing them was “to die”⁸³—probably did meet this criterion.

Conclusion

If preventive detention adheres to the foregoing principles it should be permitted, whether tacked on to the end of a sentence or designed as a substitute for it. Continued resistance to this authority in Europe might stem in part from the fact that Nazi Germany enthusiastically endorsed the idea of habitual offender laws, thus associating preventive detention with the worst sort of authoritarianism.⁸⁴ But the European Court of Human Rights rightly concluded in *M.* that this fact did not undermine the conclusion that a post-sentence preventive disposition, properly limited, is not a penalty.⁸⁵

This conclusion only stands, however, if all of the principles described above are followed. Detention for preventive purposes must be the least drastic means of achieving the government’s public safety goals, and even then may occur only if a significant probability of serious harm is proven through the best possible scientific evidence and meaningful correctional efforts are made. Frequent periodic review is also essential. If these principles are followed, a system of liberty deprivation that permits preventive detention can be more humane than one that does not, not only because preventive measures will be strictly cabined and oriented toward treatment but also because governments will know that their most dangerous offenders will be sequestered and thus that the vast majority of offenders can be given short sentences.⁸⁶

⁸³ Hendricks, 521 U.S. at 355.

⁸⁴ ¶108.

⁸⁵ ¶125

⁸⁶ Cf. ¶ 116 (where the German government made a similar argument).