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May 2010

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PRECAUTIONARY DETENTION
THROUGH THE EYES OF AMANDA KNOX

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ARRESTED ABROAD: ITALIAN PRECAUTIONARY DETENTION THROUGH THE EYES
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Benjamin M. Sayagh

INTRODUCTION

Studying abroad has become an increasingly popular option for American college students. The Institute of International Education (“IIE”), a non-profit organization that publishes government-funded reports on international studies, states that during the 2005-2006 academic year, 223,534 students received academic credit through a study abroad program.¹ A variety of government and educator-initiated programs encourage studying abroad to foster cross-cultural understanding and a means of enhancing the university experience.²

There’s that of course, but also the partying – sometimes, mostly the partying. Study abroad programs in foreign countries offer American students the opportunity to spend a relatively un-demanding college semester in a beautiful foreign city and take advantage of accessible liquor and drugs.³ Perhaps not surprisingly, sometimes these students also get into trouble with local law enforcement. Every year, more than 2,500 American citizens are arrested abroad – about half for possession of narcotics, even for small amounts that would not be punished as harshly domestically.⁴ Although the Department of State does not release official data on arrests abroad, officials comment anecdotally that many of those arrested are students charged with being intoxicated in public areas, drunk driving or underage drinking.⁵ These sorts of arrests can lead to lengthy and expensive trials and even prolonged incarcerations.⁶

¹ Inst. of Int’l Educ., American Students Studying Abroad At Record Levels: Up 8.5%, (2007), <http://opendoors.iienetwork.org/?p=113744>.

² See, e.g. the Fulbright Program, U.S. Department of State Bureau of Educational and Cultural Affairs, <http://exchanges.state.gov/index.html>; National Association of International Education, <http://www.nafsa.org/>; The Rotary Foundation, <http://www.rotary.org>.

³ See, e.g., Greg Winter, *Colleges Tell Students the Overseas Party is Over*, N.Y. TIMES, Aug. 23, 2004, at A1. See also Andrea Petersen, *Youths Studying Overseas at Risk More From Drugs Than Terrorists*, CHICAGO SUN-TIMES, Aug. 1, 2003, at 15; Anne Kim, *Window of Opportunity: American Students Abroad Often Abuse the Privilege by Partying too Hard and Contributing Too Little*, SEATTLE TIMES, Jan. 16, 2005, at D4.

⁴ *International Travel Safety Information for American Students*, Regulatory Intelligence Data, Feb. 20, 2008.

⁵ *Id.*

⁶ See, e.g., Alfred Borcover, *How to Ruin Your Life in a Flash*, STAR-LEDGER, June 21, 1998, at Travel 1; Matthew Hay Brown, *Russians Decide Not to Pursue Spy Probe, But Fulbright Scholar May Face More Serious Drug*

The Department of State reminds students that their Constitutional freedoms do not apply to them in a foreign country.⁷ Indeed, they are subject to that country's laws and regulations and there is little the U.S. Government can or is willing to do to bail out an imprisoned citizen⁸, other than make sure he or she has access to a local attorney and is treated fairly under domestic laws⁹. This can sometimes lead to legal trouble for the violation of laws which would be unimaginable in the United States, even in western European democracies.¹⁰

But what if the charges are much more serious? How about the case of an American student accused of killing her roommate after a sexual tryst and imprisoned without charges for an entire year? For Amanda Knox ("Amanda") that was the case.¹¹ Three months into Amanda's junior year of college abroad in Perugia, Italy, police found her roommate, Meredith Kercher ("Meredith") stabbed to death in her own bedroom.¹² The details of the murder were so gruesome, and the motives put forth by Italian authorities so enticing, that the case has been tabloid fodder since Meredith's body was found on November 2, 2007.¹³ Despite no murder weapon, witnesses or clear motive, Amanda was arrested on November 6, 2007 and held in prison for nearly a year without charges until her indictment for murder and sexual assault on

Charges, HARTFORD COURANT, March 1, 2001, at A1; *One Way Ticket To Jail: Overseas Officials Don't Take Drug Wars Lightly*, CHICAGO TRIBUNE, May 12, 1996, at C2;

⁷ Department of State: Assistance to U.S. Citizens Arrested Abroad, http://travel.state.gov/law/info/info_639.html (last visited Apr. 8, 2009).

⁸ See, e.g., Jennifer Liebrum, *U.S. Can Do Little to Help Jailed Houston Woman*, HOUSTON CHRON., at A17.

⁹ Department of State: Assistance to U.S. Citizens Arrested Abroad, http://travel.state.gov/law/info/info_639.html (last visited Apr. 8, 2009).

¹⁰ See, e.g. Jay Baris, *Personal Finance: Running Afoul of the Law Abroad*, N.Y. TIMES, July 13, 1986, at § 3, page. 15 (describing Greek law criminalizing the attempt to exceed one's credit card limit).

¹¹ Judy Bachrach, *Perugia's Prime Suspect*, VANITY FAIR, May 2008, available at: <http://www.vanityfair.com/culture/features/2008/06/perugia200806?printable=true¤tPage=all> [hereinafter *Bachrach*].

¹² *Id.*

¹³ See, e.g. Tom Kington, *Student's Father Rejects Police Murder Theory*, GUARDIAN, Nov. 6, 2007, at 13; Bridgett Morris, *Hunt Intensifies for Killer of Student in Italy*, SUNDAY HERALD, Nov. 4, 2007, at 21.

October 29, 2008.¹⁴ Amanda was found guilty of murder and sexual assault on December 4, 2009 and sentenced to 26 years in prison.¹⁵

Most relevant to this note, is the period that Amanda was detained in prison prior to being charged with a crime under Italian precautionary detention laws (“*custodia cautelare*”). Such laws, alternatively called precautionary or preventive detention, exist in many permutations where governments have suspended civil rights and invoked a state of emergency.¹⁶ In other cases, these laws are used as a part of ordinary criminal procedure either as an investigative tool, or to neutralize potentially dangerous criminal suspects.¹⁷ These laws compromise civil liberties otherwise guaranteed by domestic or international law, in order to grant law enforcement agents needed security tools. However, if not implemented appropriately, these laws run into conflict with international legal norms, such as the right to freedom.¹⁸

The Italian Constitution guarantees the right of personal freedom¹⁹ and the principle of “innocent until proven guilty.”²⁰ However, it permits precautionary detention where there are “grave indications of guilt” and a danger that, if released, the suspect might (1) counterfeit or destroy evidence; (2) escape; or (3) commit more crimes of the same kind.²¹ While it is arguable that any of those elements apply to Amanda (the laws were initially passed in response to a wave of terrorism and mafia-related crimes²²), the law, as applied, also appears to violate human rights

¹⁴ Andrea Vogt, *Knox Will Stand Trial for Murder*, SEATTLE POST-INTELLIGENCER, October 29, 2008, at A1.

¹⁵ Rachel Donadio, *Verdict in Italy, But the Case Doesn't End*, N.Y. TIMES, Dec. 6, 2009, at A10.

¹⁶ See Derek Jinks, *Article: The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 Mich. J. Int'l L. 311, 362, n.254 (Winter, 2001) (listing countries which have enacted emergency legislation providing for preventive detention, including: Syria, Egypt, Malaysia, Israel).

¹⁷ *Id.* (listing countries that have enacted legislation providing for preventive detention, including: India, China, Kenya, Singapore, Nepal, Tanzania, as well as South Africa and the United Kingdom up until the 1980s).

¹⁸ See, e.g. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, no. 2889 [hereinafter *European Convention*]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁹ COST. art. 13.

²⁰ *Id.*, art. 27.

²¹ C.P.P. Libro 4, Titolo 1, Art. 274.

²² FREDERIC SPOTTS & THEODOR WIESER, ITALY: A DIFFICULT DEMOCRACY 164-165 (1986).

protections embodied in international law.²³ In particular, Italy is a signatory of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”),²⁴ which guarantees the right to liberty and allows detention only after conviction by a competent court²⁵.

This Note contends that Italy’s precautionary detention laws should not apply to Amanda, and that if Amanda’s experience is indicative of how Italian authorities apply this law, Italy has violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”).²⁶

Part II of this note explains Amanda’s experience in greater detail and how Amanda came to be held under precautionary detention. Part III(A) of this Note will examine the applicability of Italian precautionary detention laws to Amanda. Part III(B) focuses on the legitimacy of these precautionary detention laws in relation to Article 5 of the European Convention.

I. LEGALLY RELEVANT FACTS

Amanda’s story begins with the death of her roommate, Meredith, on November 2, 2007. Once Meredith’s body was found by the Italian police, the mystery of her murder attracted a lot of tabloid and media attention, as well as scrutiny of the investigation.²⁷ On November 6, 2007, Amanda was called into the police station for questioning because she and her boyfriend,

²³ See, e.g., *European Convention*, *supra* note 18; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *supra* note 18.

²⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, no. 2889.

²⁵ *European Convention*, *supra* note 18, art. 5(1)(a).

²⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, no. 2889.

²⁷ See, e.g., Tom Kington, *Student’s Father Rejects Police Murder Theory*, GUARDIAN, Nov. 6, 2007, at 13; Bridgett Morris, *Hunt Intensifies for Killer of Student in Italy*, SUNDAY HERALD, Nov. 4, 2007, at 21;

Raffaele Sollecito (“Sollecito”), exhibited odd behavior.²⁸ The next morning, after lengthy and sometimes abusive interrogations, Italian police arrested Amanda, Sollecito and a third man, Patrick Diya Lamumba (“Lamumba”), whom Amanda had accused of being involved in the murder.²⁹ The Italian police claimed that the crime was solved and propounded the theory that Meredith had been murdered during a sexual tryst turned violent.³⁰

A. Amanda’s Arrival in Italy and the Behavior that Led to her Arrest

To examine whether Amanda was deserving of precautionary detention, it is important to discuss the circumstances leading to her arrest. Amanda arrived in Perugia, Italy, in September 2007.³¹ A 20-year old University of Washington linguistics major from Seattle, she wrote to friends that she was having the “time of her life”³² and was at one of her “most happiest places.”³³

Upon arriving in Perugia, Amanda settled into a house with three roommates: two Italian girls and Meredith, an attractive 22-year old British student studying in Perugia on an exchange program.³⁴ Numerous reports demonstrate that Amanda, who had attended a private Jesuit high school, clearly enjoyed the freedoms offered by a European college town, including the easy access to alcohol and marijuana.³⁵ Perugia, in particular, seems to have been a haven for those diversions – an Italian newspaper would later describe the town as “*L’Ibiza degli studenti*

²⁸ Bachrach, *supra* note 11

²⁹ *Id.*

³⁰ See, e.g., Tom Kington, *Student’s Father Rejects Police Murder Theory*, GUARDIAN, Nov. 6, 2007, at 13; Bridgett Morris, *Hunt Intensifies for Killer of Student in Italy*, SUNDAY HERALD, Nov. 4, 2007, at 21;

³¹ Bachrach, *supra* note 11.

³² *Good Morning America: Italian Murder Mystery: Friends Say American Student is Innocent* (ABC News broadcast Dec. 14, 2007).

³³ *48 Hours: A Long Way From Home: Amanda Knox Suspected of Murder of Meredith Kercher in Italy* (CBS News broadcast Apr. 12, 2008).

³⁴ Bachrach, *supra* note 11.

³⁵ Marta Falconi, *Sex, Drugs and Death in Italy*, , Nov. 30, 2007, at 8.

stranieri” (the Ibiza for foreign students), due to the widespread use and access to hashish and vodka.³⁶

Meredith and Amanda reportedly did not hit it off in those first few months, despite both being enrolled at the same Università per Stranieri (“University for Foreigners”).³⁷ Meredith complained to her father that Amanda was messy, partied too much and had numerous romantic partners whom the roommates were not exactly pleased with running into unexpectedly at breakfast.³⁸ Indeed, it seems that Amanda relished what reports describe as “new-found beauty”, having grown slimmer and more attractive over the summer (a high school teacher later described Amanda as “short” with “mousy brown hair” and “not a dazzler” as a teenager).³⁹ Around mid-October, Amanda began dating Sollecito, a handsome 23-year old computer science student, whom she met at a classical music concert.⁴⁰

Amanda’s independence was soon lost dramatically. On November 2, 2007, Italian police found Meredith dead with her throat slashed in her locked bedroom, and possibly the victim of sexual assault.⁴¹ Initial forensics suggested that Meredith was killed by more than one assailant and had sex the night in question, but because there were doubts as to whether there had been forcible intercourse, Italian police initially speculated that Meredith may have been involved in a consensual sexual tryst gone haywire.⁴² Speculation of a wild orgy, the brutality of the murder (investigators stated that Meredith’s body was found surrounded by *un lago di*

³⁶ Fabrizio Roncone, *Perugia, L’Ibiza degli Studenti Stranieri*, IL CORRIERE DELLA SERA, Nov. 8, 2007, available at: http://www.corriere.it/cronache/07_novembre_08/perugia_ibiza.shtml.

³⁷ Bachrach, *supra* note 11.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *In Small Italian City, An American College Student is Implicated in the Brutal Murder of her Roommate*, PEOPLE MAGAZINE

⁴² Tom Kington, *Student’s Father Rejects Police Murder Theory*, GUARDIAN, Nov. 6, 2007 at 13.

sangue – a lake of blood) occurring in an otherwise crime-free Italian college town, along with Meredith’s profile, captured the Italian press⁴³ and British tabloids⁴⁴.

Amanda’s odd and seemingly callous behavior led Perugia’s public prosecutor, Giuliano Mignini (“Mignini”) to suspect that she and Sollecito knew more about the events than they had told the police.⁴⁵ Amanda first stated to police that she had come home that morning, having spent the night at Sollecito’s house, to find her front door open and an alarming amount of blood in the bathroom she shared with Meredith.⁴⁶ The door to Meredith’s bedroom was locked and there was a broken window in another room.⁴⁷ Surprisingly, this did not prompt Amanda to call the police – she went back to Sollecito’s for breakfast and they later called the cops together.⁴⁸ Only a day after Meredith’s body was found, Amanda and Sollecito were shown buying lingerie and discussing plans of “wild sex” on a video from a store security camera, played repeatedly on *YouTube*.⁴⁹ Although this behavior appears callous, people who know Amanda believe she was simply oblivious to the severity of the situation. Judy Bachrach, a journalist who wrote an article on Amanda, visited Perugia and spoke with a number of Amanda and Meredith’s friends. Ms. Bachrach found that Amanda had a reputation as something of an odd girl – she would sometimes sing at the top of her lungs to herself in the presence of others, laugh at inappropriate times and showed a general lack of self-awareness.⁵⁰ At the same time, few would describe her as violent, or even aggressive towards others.⁵¹

⁴³ See, e.g. *supra* note 36.

⁴⁴ See, e.g. Malcolm Moore, Richard Alleyne, *Meredith ‘was killed in extreme sex game’*, DAILY TELEGRAPH, Nov. 10, 2007 at 10.

⁴⁵ Bachrach, *supra* note 11.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ I interviewed Ms. Bachrach via telephone for this note on February 10, 2009. Telephone Interview with Judy Bachrach, Contributing Editor, *Vanity Fair* (Feb. 10, 2009).

⁵¹ *Id.*

There are other reasons to doubt some of the theories and motives of the law enforcement officers, beginning with the prosecutor, Mignini. Mignini has a history of sensational investigations and the use of questionable tactics. In 2004, Mignini had a very public run-in with an Italian journalist, Mario Spezi (“Spezi”), and an American crime novelist, Douglas Preston (“Preston”), over their criticism of his investigation of “the Monster of Florence,” a serial killer who murdered fourteen people between 1974 and 1985.⁵² Spezi and Preston were collaborating on a book which ridiculed Mignini’s theory that the “Monster of Florence” murders were committed by a Satanic cult from the middle ages who used female body parts as offerings to the devil.⁵³ In response, Mignini harassed both Spezi and Preston – tapping their phones, placing them under suspicion for the murders themselves, searching their homes, and charging them with secret crimes that remained under seal.⁵⁴ At one point, Mignini ordered Spezi arrested under precautionary detention without informing him of his charges, and interrogated him for six straight days without access to legal counsel.⁵⁵ Preston, who had to flee from Italy to avoid charges for criminal libel and perjury (for refusing to finger Spezi as the Monster of Florence), raised enough awareness and political pressure with American freedom of press organizations and through his Senator, Susan Collins of Maine, that Mignini released Spezi.⁵⁶ These events were a rebuke to Mignini’s reputation and led to an internal investigation of his methods for alleged abuse of office.⁵⁷ According to Ms. Bachrach, he harbors resentment against Americans for the attention Preston brought upon him.⁵⁸

⁵² Jessica Keener, *Trapped In His Own Thriller*, BOSTON GLOBE, Mar. 18, 2006.

⁵³ *Id.*

⁵⁴ Alix Kirsta, “*I Thought – I’m in Serious Trouble Here*”, GUARDIAN at G2, Dec. 6, 2006.

⁵⁵ *Id.*

⁵⁶ Jessica Keener, *Trapped In His Own Thriller*, BOSTON GLOBE, Mar. 18, 2006.; *See also* Posting of Douglas Preston to http://www.crimefictionblog.com/2006/03/douglas_preston.html (Mar. 6, 2006).

⁵⁷ Jessica Keener, *Trapped In His Own Thriller*, BOSTON GLOBE, Mar. 18, 2006.

⁵⁸ Telephone Interview with Judy Bachrach, Contributing Editor, Vanity Fair (Feb. 10, 2009).

On November 4, Mignini summoned Amanda and Sollecito to the police station for questioning about Meredith’s murder.⁵⁹ The questioning lasted up to six hours at a time and fourteen hours total, without the presence of an attorney or interpreter.⁶⁰ Her version of the story kept changing – she said she had smoked marijuana that day and was unable to recall many of her steps.⁶¹ She first stated that she had been at Sollecito’s the entire night the murder happened.⁶² Amanda later said she was in her apartment’s kitchen and heard screams from Meredith’s bedroom, where Meredith was with a third man, Lamumba, a local bar owner where Amanda worked.⁶³ Police claimed to have solved the crime, paraded Amanda in front of the press, and arrested Sollecito and Lamumba.⁶⁴ From this point forward, Amanda’s life, including the above-mentioned *YouTube* video, her *Facebook* and *MySpace* pages, were heavily scrutinized in the press⁶⁵ – she was characterized in the media as a “*cacciatrice di uomini*” – a man-hunter⁶⁶, “*luciferina*, with the face of an angel,⁶⁷” and a “drugged-up Tart”⁶⁸.

On November 12, Amanda retracted the statements she had made to Italian police, saying they were the result of exhaustion and intimidation.⁶⁹ The information obtained from those interrogations would later be excluded from evidence by an Italian court of appeal for obvious

⁵⁹ Bachrach, *supra* note 11.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Meo Ponte, *Perugia, Carcere Confermato, il Coltello era di Sollecito*, LA REPUBBLICA, Nov. 10, 2007, at 2.

⁶⁵ See, e.g., Neil Syson, *Orgy of Death*, SUN, Nov. 7, 2007.

⁶⁶ Francesco Tortora, *Amanda Voleva Solo Sesso*, IL CORRIERE DELLA SERA, Nov. 25, 2007, available at : http://www.corriere.it/cronache/07_novembre_25/amanda_cacciatrice_uomini_00229488-9b60-11dc-8d30-0003ba99c53b.shtml.

⁶⁷ *The Girl Italians are Calling ‘Luciferina’ – with the Face of an Angel*, FINANCIAL TIMES, Dec. 8, 2007.

⁶⁸ Richard Owen, *Meredith Kercher “said Amanda was a drugged-up tart”*, TIMES, Dec. 17, 2007, at available at: <http://www.timesonline.co.uk/tol/news/world/europe/article3047497.ece>.

⁶⁹ Marta Falconi, *Report: Suspect Says Police Hit Her on Head*, SEATTLE TIMES, Nov. 23, 2007, at B1.

procedural irregularities.⁷⁰ Lamumba was subsequently cleared of any wrongdoing, having been at his bar the entire night of the murder.⁷¹ Nothing in this changed the Italian police's theory of how Meredith was killed. A third man, Rudy Herman Guede ("Guede"), a local Perugia resident originally from the Ivory Coast, simply replaced Lamumba's role in the melodrama and was charged with murder and sexual assault.⁷² Guede's fingerprints and DNA were found all over Meredith's body.⁷³ He had left Perugia for Germany two days after the murder⁷⁴, but was caught and extradited back to Italy in a cross-border police operation.⁷⁵

Guede had lived in Perugia since age five, and was known to party with exchange students.⁷⁶ He had met Meredith at a small get-together in the apartment beneath Amanda and Meredith's.⁷⁷ It is unclear what relationship, if any, Amanda had with Guede prior to their being linked for Meredith's murder.⁷⁸ According to Judy Bachrach, they had met one night at a party and Rudy didn't like Amanda very much.⁷⁹ He also stated to Italian police at first that he didn't know Amanda or Sollecito – a story he later recanted when accusing both of them of murdering Meredith.⁸⁰ Guede was convicted of Kercher's murder on October 28, 2008 and sentenced to thirty years in prison.⁸¹

⁷⁰ Rachel Donadio, *Murder Trial of Student in Italy Only Gets Murkier; Death of Housemate is Grist for Tabloids*, INT'L HERALD TRIBUNE, Oct. 1, 2008, at 5 (finding that the statements made with an attorney or interpreter were inadmissible in court).

⁷¹ Eric Lyman, *New Arrest in Italy Slaying, Suspect Apprehended in Germany – Bar Owner Who Was Held is Released*, SEATTLE TIMES, Nov. 21, 2007, at B1.

⁷² *Id.*

⁷³ Rachel Donadio, *Man Guilty In Killing Briton In Italy*, N.Y. TIMES, Oct. 29, 2008, at A9.

⁷⁴ Bachrach, *supra* note 11.

⁷⁵ *Perugia, Catturato Rudy*, IL CORRIERE DELLA SERA, Nov. 20, 2007, *available at*:

http://www.corriere.it/cronache/07_novembre_20/rudy_dd005dda-9751-11dc-9cff-0003ba99c53b.shtml.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Telephone Interview with Judy Bachrach, Contributing Editor, VANITY FAIR (Feb. 10, 2009).

⁷⁹ *Id.*

⁸⁰ *Rudy all'attacco: "In Casa con me c'erano Amanda e Raffaele"*, IL CORRIERE DELLA SERA, Mar. 26, 2008, *available at*: http://www.corriere.it/cronache/08_marzo_26/delitto_perugia_rudy_accusa_dd984604-fb65-11dc-be4d-00144f486ba6.shtml.

⁸¹ Donadio, *supra* note 73.

Aside from Amanda's odd behavior, and changing story about the night of the murder, police also found a knife in Sollecito's apartment with traces of Amanda's DNA on the handle and Meredith's DNA on the tip of the blade.⁸² According to Amanda's attorneys and in some reports, even the Italian police, Meredith's wounds were not consistent with this knife's blade, although it was heavily-touted by prosecutors.⁸³ The amount of DNA found on the knife could also be consistent with any utensil shared by both girls.⁸⁴ Amanda, however, cannot explain how the knife itself got to Sollecito's apartment.⁸⁵

Amanda's was thereafter detained under Italian precautionary detention laws. The length of permissible detention is calculated based on the severity of the crime of which a suspect is accused of committing.⁸⁶ Because Amanda was suspected of murder, aggravated for cruelty shown to the victim,⁸⁷ she could be detained for up to one year prior to any charges being brought against her⁸⁸. A judge in charge of preliminary investigations authorized Amanda's precautionary detention for the full year dating back to her original arrest on November 6, 2007.⁸⁹ A three judge panel on an Italian intermediate appeals court upheld the preliminary judge's detention order on November 30, 2007, but excluded information obtained by police officers during Amanda's interrogations without an attorney, although her confession and

⁸² Rachel Donadio, *Murder Trial of Student in Italy Only Gets Murkier; Death of Housemate is Grist for Tabloids*, INT'L HERALD TRIBUNE, Oct. 1, 2008, at 5.

⁸³ See, e.g. Richard Owen, *'Group attack' led to death of Meredith, says Italian judge*, Times, Dec. 20, 2007; Perugia, *parlano i legali di Amanda: "Meredith uccisa da un solo killer"*, IL CORRIERE DELLA SERA, Oct. 21, 2008, available at: http://www.corriere.it/cronache/08_ottobre_21/perugia_amanda_difensori_7744c43e-9f7c-11dd-b0d4-00144f02aabc.shtml.

⁸⁴ Bachrach, *supra* note 11.

⁸⁵ Jerry Lawton, *Foxy Knoxy: I've Been Framed!*, Daily Star, Dec. 3, 2007; Kate Mansey, *Raffaele Did It*, SUNDAY MIRROR, Dec. 2, 2007.

⁸⁶ C.P.P. Libro 4, Titolo 1, Art. 303(1)(a).

⁸⁷ Rachel Donadio, *Murder Trial of Student in Italy Only Gets Murkier; Death of Housemate is Grist for Tabloids*, INT'L HERALD TRIBUNE, Oct. 1, 2008, at 5.

⁸⁸ C.P.P. Libro 4, Titolo 1, Art. 303(1)(a)(3).

⁸⁹ *Delitto di Meredith, Amanda et Raffaele... e la voglia di «sensazioni nuove»*, CORRIERE DELLA SERA, Nov. 9, 2007, available at: http://www.corriere.it/cronache/07_novembre_09/perugia_sensazioni_nuove.shtml.

statements made during those interrogations were already highly publicized.⁹⁰ The intermediate court's opinion appears heavily-influenced by Amanda's behavior after Meredith's death, public opinion of Amanda's lifestyle and the judge's own moral approbation.⁹¹ It calls Amanda "histrionic", states that she had never displayed grief at the murder of her roommate, and is a "restless person who does not disdain multiple frequentations" – i.e. she sleeps around.⁹² Most importantly, the court also found the requisite "grave indications" necessary under precautionary detention laws that Amanda, Sollecito and Guede had committed a "group homicide" and that she was a danger to the public to commit more violence.⁹³ The court found that because there was no forced entry, the murderer must have either entered the house with Meredith, or used a key.⁹⁴ This implicated Amanda, since the other two women living in the apartment were away for the weekend.⁹⁵ The knife found in Sollecito's house was also found compatible with the murder, and Amanda's alibi of having spent the night at Sollecito's was suspicious because the Harry Potter book she claimed to have read there turned up in her own bedroom.⁹⁶ The Court also found Amanda to be a danger to the public, finding that Amanda was "completely without inhibition" and "disposed to follow any impulse, even when those lead to violent and uncontrollable conduct."⁹⁷ The intermediate appeals court also found that Amanda represented a threat to the ongoing investigation into Meredith's murder upon release because she could

⁹⁰ Marta Falconi, *Knox Must Remain in Italian Jail*, SEATTLE TIMES, Dec. 1, 2007, at B4.

⁹¹ See Bachrach, *supra* note 11.

⁹² *Id.*

⁹³ «Amanda é priva di freni inibitori e può tornare a colpire», PADOVA NEWS, Dec. 5, 2007, available at : <http://www.padovanews.it/content/view/23281/101/>.

⁹⁴ *Le Motivazioni del Riesame: Carcere Legittimo per Raffaele e Amanda*, IL CORRIERE DELLA SERA, Dec. 5, 2007, available at: http://www.corriere.it/cronache/07_dicembre_05/Meredith_riesame_motivazioni_6fb9c36c-a325-11dc-8831-0003ba99c53b.shtml.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

collude to an alibi with co-conspirators and speak with potential witnesses.⁹⁸ For the court, these factors pointed to the need for “maximum caution” and the maximum allowable precautionary detention was justified.⁹⁹ The Italian Court of Cassation, the final Italian court of appeals in matters of penal and civil law, confirmed that ruling on April 1, 2008.¹⁰⁰

II. DISCUSSION

In reviewing the relevant provisions of Italian law it appears that precautionary detention laws, through the lens of Amanda Knox’s experience, have not been applied faithfully to their original understanding and do not comport with the European Convention. I will first analyze how Italian precautionary detention has been improperly applied to Amanda Knox. In the same section, I will demonstrate how her experience may be extremely common, and that if so, Italian authorities are improperly implementing precautionary detention laws. Secondly, I will demonstrate that this permutation of precautionary detention is inconsistent with the European Convention and the European Court’s interpretation of Article 5’s right to liberty.

A. Italian Precautionary Detention Law Was Improperly Applied to Amanda Knox

i. Italian Precautionary Detention Law

Italy’s precautionary or preventive detention laws - *carcerazione cautelare* – justified Amanda’s detention between November 6, 2007 and October 28, 2008.¹⁰¹ In 1979, following a wave of political terrorism in Italy, anti-terrorism laws were passed to grant law enforcement

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Omicidio di Mez, La Cassazione : « I tre indagati devono restare in carcere »*, IL CORRIERE DELLA SERA, Apr. 1, 2008, available at: http://www.corriere.it/cronache/08_aprile_01/sollecito_cassazione_carcere_25cddb6c-ffd8-11dc-be96-00144f486ba6.shtml.

¹⁰¹ *Id.*

officials the ability to detain suspects for prolonged periods without charges.¹⁰² Despite being enacted to address terrorism, precautionary detention laws, as written, give prosecutors and judges wide discretion in applying the law.¹⁰³ The law was amended in 1995 because it was being used reflexively by Italian law enforcement to obtain confessions or information on an investigation.¹⁰⁴ The 1995 amendments required all interrogations made by police during precautionary detention to be recorded to ensure that confessions were not coerced, and prisoners were informed of their right to remain silent without incriminating themselves.¹⁰⁵

Under the current Italian *Codice di Procedura Penale* – the criminal procedure code – an Italian prosecutor can request that the Judge for the Preliminary Investigation – *Giudice per le Indagini Preliminari* (the “G.I.P.”), who is similar to a U.S. Magistrate Judge – to order precautionary measures during the preliminary investigation phase, prior to charging a suspect of a crime.¹⁰⁶ Public prosecutors are completely autonomous and do not require approval from a central authority or court in their decisions to initiate arrests and investigations.¹⁰⁷ Their role and degree of discretion has received a lot of criticism from commentators, who also dislike the perceived “structural collusion” between public prosecutors and judges, who are trained through the same system and often switch roles during the course of their careers.¹⁰⁸

The judge must make certain findings prior to ordering precautionary measures. First, no person can be subject to precautionary measures absent “grave indications” of that person’s

¹⁰² FREDERIC SPOTTS & THEODOR WIESER, ITALY: A DIFFICULT DEMOCRACY 164-165 (1986).

¹⁰³ *Id.* at 165-166.

¹⁰⁴ ADELMO MANNA & ENRICO INFANTE, CRIMINAL JUSTICE SYSTEMS IN EUROPE AND NORTH AMERICA: ITALY 22 (European Institute for Crime Prevention and Control 2000).

¹⁰⁵ COMM. AGAINST TORTURE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION, ITALY, para. 11 (1998) *available at*:

<http://daccessdds.un.org/doc/UNDOC/GEN/G98/050/28/PDF/G9805028.pdf?OpenElement>.

¹⁰⁶ C.P.P. Libro 4, Titolo, 1, Misure Cautelari; Note: Italy is a Civil Law country and, as such, courts are not bound by precedent.

¹⁰⁷ SONDRÁ KOFF & STEPHEN KOFF, ITALY: FROM FIRST TO THE SECOND REPUBLIC, 167 (Routledge 2000).

¹⁰⁸ *Id.*

guilt.¹⁰⁹ Permitted precautionary measures include: a prohibition on leaving the country¹¹⁰; an obligation to present oneself before a police officer on a specified schedule¹¹¹; ordering the suspect to stay away from his or her family home¹¹² or other specified residence¹¹³ unless given permission to return by a judge; house arrest¹¹⁴; detention in a mental facility¹¹⁵; and lastly, detention in prison¹¹⁶. In choosing which measure is appropriate, the judge is given discretion and makes a determination on an individualized basis.¹¹⁷ The judge can only order detention in prison in “exceptional circumstances” and only then, when all other possibilities are deemed inadequate.¹¹⁸ To justify imprisonment, the judge must find that there is a danger that the suspect will (1) counterfeit or destroy evidence; (2) escape; or (3) commit more crimes of the same kind.¹¹⁹ A finding that the accused might tamper with evidence or escape must be based on “specific facts” validating such fears.¹²⁰ A finding that the accused may commit further offences must be based on “specific conduct” or a history of criminal behavior.¹²¹

The period of permissible precautionary detention in prison depends on the crime the suspected is thought to have committed.¹²² The order of precautionary detention can be revoked or modified upon request by the defendant or public prosecutor, if the circumstances for

¹⁰⁹ C.P.P. Libro 4, Titolo 1, Art. 273(1).

¹¹⁰ C.P.P. Libro 4, Titolo 1, Art. 281.

¹¹¹ *Id.* at Art. 282.

¹¹² *Id.* at Art. 282-bis.

¹¹³ *Id.* at Art. 283.

¹¹⁴ *Id.* at Art. 284.

¹¹⁵ *Id.* at Art. 286.

¹¹⁶ *Id.* at Art. 285.

¹¹⁷ *See id.* at Art. 275.

¹¹⁸ *Id.* at Art. 275(3); *See also supra* note 104.

¹¹⁹ *Id.* at Art. 274(1)(a)-(c).

¹²⁰ Corte cost. 7 July 1994, Sentenza 419, Racc. uff. corte cost., para. 3.2.

¹²¹ *Id.*

¹²² C.P.P. Libro 4, Titolo 1, Art. 303(1)(a)(1)-(2).

detention have changed.¹²³ Suspects may appeal the judge’s precautionary order to an intermediary appeals court.¹²⁴

These measures find support within the Italian Constitution (“Constitution”). The Constitution guarantees certain relevant rights: “personal liberty is inviolable¹²⁵,” the right to a legitimate defense from accusations¹²⁶, and the presumption that a suspect is “innocent until proven guilty¹²⁷.” The Constitution also qualifies those rights: Article 13 states that “The law establishes the maximum duration of precautionary detention” and; Article 25 provides that “no-one can be subject to security measures unless provided by law”¹²⁸. These clauses permit precautionary security laws under specific circumstances, provided they are proportional to the crime one is suspected of committing.¹²⁹ Italy has no law establishing habeas corpus, and there is no system for release on bail for persons charged with a crime.¹³⁰

Despite measures taken in 1995 to restrain the use of precautionary detention laws, it is still used very frequently. The United Nations Working Group on Arbitrary Detention (“Working Group”) issued a report on Italy’s criminal justice system in 2009.¹³¹ Although the Working Group found that the criminal procedure code contained “abundant language aimed at ensuring” that precautionary detention was “not ordered lightly”, it noted with concern complaints by representatives from Italy’s Criminal Bar Association who told the Working Group that precautionary detention was used routinely as an investigative tool by police to obtain

¹²³ *Supra* note 104.

¹²⁴ *Id.*

¹²⁵ COST. Art. 13.

¹²⁶ *Id.*, Art. 24.

¹²⁷ *Id.*, Art. 27.

¹²⁸ *Id.* Art. 25/3.

¹²⁹ *Id.*

¹³⁰ Spotts, *supra* note 102.

¹³¹ WORKING GROUP ON ARBITRARY DET., UN SECURITY COUNCIL, PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT (2009) [hereinafter *Working Group*] available at <http://www.unhcr.org/refworld/docid/49a5437f2.html>.

confessions or force suspects to incriminate others, and that the principal of its use as a last resort was “systematically violated.”¹³² The Working Group also noted that nearly 60% of Italy’s prisoners, amounting to nearly 26,000 people, were either in pre-trial or precautionary detention, a much higher rate than any medium or large Western European country and comparable only to Turkey in broader Europe.¹³³

In 1998, a United Nations Human Rights Committee Report (“Committee Report”) criticized Italy’s practice of determining the length of precautionary detention based on the crimes the suspects were thought to have committed.¹³⁴ The Committee Report suggested that this practice could constitute an infringement of the “presumption of innocence” contained in the International Covenant on Civil and Political Rights, a United Nations treaty that Italy is a party to.¹³⁵

ii. Analysis: Italian Precautionary Detention Law: Amanda Knox’s Not-Common Experience

Amanda was held under precautionary detention from November 6, 2007 until October 28, 2008, when she was charged with murder aggravated for cruelty and sexual assault.¹³⁶ Following formal charges, she was held in pre-trial detention until her conviction for murder and sexual assault on December 4, 2009.¹³⁷ To justify Amanda’s detention, the G.I.P. and subsequent appellate courts found the pre-requisite “grave indications” of Amanda’s guilt.¹³⁸

¹³² *Id.* at para. 29.

¹³³ *Id.* at para. 30; *See also* ROY WALMSLEY, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST (International Centre for Prison Studies, King’s College 2008).

¹³⁴ Comm. against Torture, *supra* note 105.

¹³⁵ *Id.*

¹³⁶ Andrea Vogt, *Knox Will Stand Trial for Murder*, SEATTLE POST-INTELLIGENCER, October 29, 2008, at A1.

¹³⁷ Rachel Donadio, *Verdict in Italy, But the Case Doesn’t End*, N.Y. TIMES, Dec. 6, 2009, at A10.

¹³⁸ *See, e.g. Le Motivazioni del Riesame: Carcere Legittimo per Raffaele e Amanda*, IL CORRIERE DELLA SERA, Dec. 5, 2007, available at: http://www.corriere.it/cronache/07_dicembre_05/Meredith_riesame_motivazioni_6fb9c36c-a325-11dc-8831-0003ba99c53b.shtml.

1. Lack of Any Grave Indications of Guilt

Taking a closer look at the basis for the judge's order of precautionary detention, it appears that the protections embodied within the precautionary detention laws were not followed. At the time precautionary detention was ordered, the evidence against Amanda was not considered strong enough to bring formal charges.¹³⁹ There was no forensic evidence to link Amanda to the crime-scene; she had no prior history of violent criminal behavior; and no apparent motive to kill her roommate, Meredith.¹⁴⁰ Despite the lack of evidence, Amanda became a suspect to the prosecutor Mignini because of her seemingly strange behavior.¹⁴¹

Under pressure from police, she confessed to being in her apartment and hearing Meredith scream – a statement she would later retract.¹⁴² In light of the circumstances of her interrogation and arrest, the confession should not have been part of the judge's consideration when determining whether to order precautionary detention.

On the basis of these facts, Mignini asked and received from the G.I.P. the strongest precautionary measures possible.¹⁴³ By the time the highest appellate court affirmed the detention, the available information was not much more incriminating: police had found a knife that did not match the wounds suffered by Meredith.¹⁴⁴ The Court also found relevant that there had been no forced entry into the apartment and Amanda was the only other person with a key.¹⁴⁵

That there had been no forced entry into the apartment is not immediately incriminating for

¹³⁹ See *Delitto di Meredith, Amanda et Raffaele... e la voglia di «sensazioni nuove»*, IL CORRIERE DELLA SERA, Nov. 9, 2007, available at : http://www.corriere.it/cronache/07_novembre_09/perugia_sensazioni_nuove.shtml.

¹⁴⁰ See Bachrach, *supra* note 11.

¹⁴¹ *Id.*

¹⁴² Marta Falconi, *Report: Suspect Says Police Hit Her on Head*, SEATTLE TIMES, Nov. 23, 2007, at B1.

¹⁴³ *Delitto di Meredith, Amanda et Raffaele... e la voglia di «sensazioni nuove»*, IL CORRIERE DELLA SERA, Nov. 9, 2007, available at : http://www.corriere.it/cronache/07_novembre_09/perugia_sensazioni_nuove.shtml.

¹⁴⁴ *Perugia, parlano i legali di Amanda: "Meredith uccisa da un solo killer"*, IL CORRIERE DELLA SERA, Oct. 21, 2008, available at: http://www.corriere.it/cronache/08_ottobre_21/perugia_amanda_difensori_7744c43e-9f7c-11dd-b0d4-00144f02aabc.shtml.

¹⁴⁵ *Le Motivazioni del Riesame: Carcere Legittimo per Raffaele e Amanda*, IL CORRIERE DELLA SERA, Dec. 5, 2007, available at: http://www.corriere.it/cronache/07_dicembre_05/Meredith_riesame_motivazioni_6fb9c36c-a325-11dc-8831-0003ba99c53b.shtml.

Amanda. The police believed that Meredith had consensual sex prior to the murder¹⁴⁶ – it doesn't appear likely that her killer would have had to break into the apartment in that scenario.

More troubling still is the moral reprobation found in the appellate body opinion.¹⁴⁷

Amanda's flirtatious behavior and alleged promiscuity are simply not a "grave" indication of her potential guilt. That the appellate court even discussed her behavior with men¹⁴⁸ suggests they were influenced by her characterization in the press, and may not have evaluated the evidence objectively. It is worth noting that at the time the appellate court was reviewing this information, some five months after Meredith's murder, Italian police still did not have enough information to formally charge Amanda with a crime.¹⁴⁹ All told, an Italian court had three opportunities to review Amanda's detention: at the time of her arrest in November¹⁵⁰, in December before the intermediate appellate court,¹⁵¹ and later in April¹⁵². At no point was Mignini ready to charge Amanda with a crime as she was not charged until October 29, 2008, almost the last possible date before her precautionary detention would expire.¹⁵³

¹⁴⁶ Tom Kington, *Student's Father Rejects Police Murder Theory*, GUARDIAN, Nov. 6, 2007 at 13.

¹⁴⁷ Corriere, *supra* note 93.

¹⁴⁸ *Id.*

¹⁴⁹ *Omicidio di Mez, La Cassazione : « I tre indagati devono restare in carcere »*, IL CORRIERE DELLA SERA, Apr. 1, 2008, available at: http://www.corriere.it/cronache/08_aprile_01/solecito_cassazione_carcere_25cddb6c-ffd8-11dc-be96-00144f486ba6.shtml.

¹⁵⁰ *Delitto di Meredith, Amanda et Raffaele... e la voglia di «sensazioni nuove»*, IL CORRIERE DELLA SERA, Nov. 9, 2007, available at: http://www.corriere.it/cronache/07_novembre_09/perugia_sensazioni_nuove.shtml.

¹⁵¹ *Le Motivazioni del Riesame: Carcere Legittimo per Raffaele e Amanda*, IL CORRIERE DELLA SERA, Dec. 5, 2007, available at: http://www.corriere.it/cronache/07_dicembre_05/Meredith_riesame_motivazioni_6fb9c36c-a325-11dc-8831-0003ba99c53b.shtml.

¹⁵² *Omicidio di Mez, La Cassazione : « I tre indagati devono restare in carcere »*, IL CORRIERE DELLA SERA, Apr. 1, 2008, available at: http://www.corriere.it/cronache/08_aprile_01/solecito_cassazione_carcere_25cddb6c-ffd8-11dc-be96-00144f486ba6.shtml.

¹⁵³ Andrea Vogt, *Knox Will Stand Trial for Murder*, SEATTLE POST-INTELLIGENCER, October 29, 2008, at A1.

2. Amanda's Detention in Prison was not Justified

Even assuming that grave indications of guilt were present, the court was not obligated to order detention in prison. As detailed above, the G.I.P. has other available options at this juncture and detention should only be ordered in the most extreme circumstances.¹⁵⁴

To justify detention in prison the judge had to find a risk that Amanda would (1) counterfeit or destroy evidence; (2) escape; or (3) commit more crimes of the same kind.¹⁵⁵ A finding that the accused might tamper with evidence or escape must be based on specific facts; allegations that the accused may commit further offences must be based on “specific conduct” or a history of criminal behavior.¹⁵⁶

In this case, the concrete evidence that Amanda would tamper with evidence is non-existent. Over the course of the investigation, it was the police that routinely misplaced crime-lab samples and made unfounded accusations against Amanda and others.¹⁵⁷ Despite all this, there has been nothing to suggest Amanda tampered with evidence in her own apartment before Meredith was found by police, nor any fingerprints of hers at the crime scene. Whatever concrete evidence requires, it would seem to at least require a showing that some attempt to tamper evidence in the past has occurred. If the police feared that Amanda would agree to an alibi with co-conspirators, they may have confined her to house arrest, or ordered her to stay away from key witnesses and given her a limited zone of movement. They could have tapped her phones, as they did prior to her arrest. Amanda is not, after-all, a criminal mastermind with unlimited resources – she's a 20 year old girl in a foreign country with few friends. Although

¹⁵⁴ C.P.P. Libro 4, Titolo 1, Art. 272 et. seq.

¹⁵⁵ *Id.* at Art. 274(1)(a)-(c).

¹⁵⁶ Corte cost. 7 July 1994, Sentenza 419, Racc. uff. corte cost., para. 3.2.

¹⁵⁷ *See, e.g.* Bachrach, *supra* note 11; *Seattle Lawyer Says Amanda Knox Case 'Not Fair'*, KIRO T.V., October 2, 2008, available at: <http://www.kirotv.com/news/17612073/detail.html>.

these options are restrictive to Amanda, none are as bad as the complete deprivation of her liberty without charges.

Similarly, Amanda was deemed a flight risk simply because she is an American citizen.¹⁵⁸ The court could easily have reduced the risk of actual flight by taking Amanda's passport away from her, and perhaps asking for extradition assurances from the American embassy. Furthermore, due to the publicity the case received, and that Amanda has maintained her innocence, it seems at least possible that she would want to clear her name rather than flee. Lastly, if the court were to use her profile as a metric in their decision: this is a college student who had never been far from home. It seems unlikely that she would "lamb it" to avoid potential charges. It is instructive to note that one of the suspects in this case, Rudy Guede had decided to flee before police were able to take his documents away from him, and they were still able to locate him within a matter of weeks and have him repatriated to Perugia.¹⁵⁹

Lastly, the Court of Cassation and G.I.P. found that Amanda was a public danger and that if released, there was a risk she would commit more violent crimes.¹⁶⁰ Under the precautionary detention laws, the Court is required to base such findings on a history of criminal behavior or specific conduct that makes future violence appear likely.¹⁶¹ The first requirement is easily dispensed with as Amanda has no criminal history and no-one in her past has suggested that she is a violent person.¹⁶² The second requirement is where the appellate court's logic failed most dramatically. The judges felt that Amanda's alleged promiscuity was indicative of a person unable to control her impulses and should those impulses be violent, that another death may

¹⁵⁸ Corriere, *supra* note 151.

¹⁵⁹ See *supra* note 75.

¹⁶⁰ *Supra* note 151.

¹⁶¹ Corte cost., *supra* note 156.

¹⁶² See Corriere, *supra* note 151

result.¹⁶³ This seems like a very tenuous link – that Amanda may be less inhibited in her romantic life than what a group of Italian judges deems appropriate does not lead to the conclusion that those impulses may ever be violent, nor that she may not be able to resist them if they ever did.

By ordering detention based on such questionable logic, the judges reduce the protections embodied within the precautionary detention law to a mere formality. Detention can be ordered by simply mentioning the key phrases embodied within the law and agreeing that they have been satisfied. This is not the intent behind the law, nor is it in accordance with international understandings.¹⁶⁴

3. Constitutionality and Original Meaning of Precautionary Detention

The Italian Constitution grants the accused the presumption of innocence¹⁶⁵ and the right to personal liberty¹⁶⁶. The presumption of innocence is qualified by the existence of precautionary detention under Article 13¹⁶⁷, and by detention for the purposes of national security under Article 25¹⁶⁸. If the right of personal liberty is to be taken seriously, precautionary detention should be given the strictest interpretation and allowed only where there is a proven threat to security. This is so because the law is a means to imprison persons who have not been charged with a crime. Precautionary detention may be a necessary tool for law-enforcement in situations where an obvious threat to security is present, such as with terrorist or mafia suspects. However, where it is used in circumstances such as those in Amanda Knox’s case, it becomes an

¹⁶³ *Id.*

¹⁶⁴ *See* Spotts, *supra* note 102.

¹⁶⁵ COST. Art. 27.

¹⁶⁶ *Id.* at Art. 27.

¹⁶⁷ *Id.* at Art. 13, sentence 5.

¹⁶⁸ *Id.* at Art. 25, sentence 3.

intolerable impingement on personal liberty that violates the Italian Constitution and the original purposes of the law. This is especially true in a system where the discretion of which precautionary measure to order is left to judges with close ties to the prosecutors who present them with suspects.¹⁶⁹

Fortunately, a narrower interpretation of the law would not even require the laws to be rewritten. They should simply be interpreted by prosecutors and judges in accordance with their original national-security purposes. Instead, Italy appears to have gone away from that original understanding. Statistically, in a country where no habeas rights exist (and thus the protection of judicial review over unlawful imprisonment), nearly 60% of Italian prisoners are awaiting trial.¹⁷⁰ If Amanda's case is representative of how precautionary detention law is applied, it is equally clear that a reason for these elevated imprisonment statistics is that the laws are implemented without sufficient regard for the civil liberties they violate.

4. International Attention on Italian Precautionary Detention

Ironically, Italy has been warned of this problem on two separate occasions by United Nations human rights groups following investigations of the Italian criminal justice system. In 2009 the United Nations' Working Group (the "Working Group") noted with concern complaints about precautionary detention from the Italian criminal bar association.¹⁷¹ Despite language embodied in the law to prevent liberal use of precautionary detention, the Working Group noted that it was being sought and applied reflexively by prosecutors and G.I.P.s.¹⁷²

The concerns raised by the Working Group's report are directly applicable to Amanda's case. The Working Group noted how precautionary detention is frequently used as an

¹⁶⁹ Koff, *supra* note 107, at 163.

¹⁷⁰ Working Group, *supra* note 131, para. 30.

¹⁷¹ *Id.* para. 29.

¹⁷² *Id.*, para. 29, 106.

investigative tool to obtain confessions¹⁷³, just as Amanda and Sollecito were imprisoned despite their repeated denials of guilt because Mignini believed they knew more than they told¹⁷⁴. In other countries, those suspicions would be satisfied through investigation, not precautionary imprisonment. Another principal concern to the working group, was that imprisonment was not being used as a remedy of last resort for G.I.P.s and prosecutors.¹⁷⁵ This appears to have been the case with the decision to use precautionary detention with Amanda Knox as well.

In 1998, the United Nations Human Rights Committee issued a report on Italy that criticized precautionary detention laws for linking periods of detention to the crimes the imprisoned persons were suspected of committing.¹⁷⁶ The Committee was concerned that such a linking would violate the “presumption of innocence” contained in the International Covenant on Civil and Political Rights.¹⁷⁷ Without delving into the specifics of the International Covenant on Civil and Political Rights, it is clear that the presumption of innocence clause within the Italian Constitution embodies a similar concept and the concerns raised by the Committee are applicable under Italian Constitutional law as well.¹⁷⁸

Accordingly, Italy should re-visit how precautionary detention law addresses periods of detention and recalibrate it to fit within the original meaning of protecting national security when faced with terrorism or mafia criminal threats. By categorizing suspects based on the severity of the underlying crime, the criminal justice system creates a hierarchy of suspicion with expressive value that undermines the presumption of innocence. Where law-enforcement officials need more time to investigate a potential crime and precautionary measures are deemed warranted, the

¹⁷³ *Id.* para. 29.

¹⁷⁴ Bachrach, *supra* note 11.

¹⁷⁵ Working Group, *supra* note 131, para. 29.

¹⁷⁶ Comm. Against Torture, *supra* note 105.

¹⁷⁷ *Id.*

¹⁷⁸ Compare International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; with La Costituzione della Repubblica Italiana.

detention should be based on actual and present dangers to security or to the investigation. Under the current system, the detention is instead based on the severity of possible past actions.¹⁷⁹ This effectively pronounces judgment on past behavior that does not correspond to any needs of the ongoing investigation, which should be the purpose of precautionary detention.

B. Italian Precautionary Detention Is In Violation of the European Convention and the European Court’s Interpretation of the Right to Freedom.

i. The European Convention on Human Rights, Amanda Knox, Italy and the Margin of Appreciation

Aside from the issue of whether Amanda’s case may not meet the threshold to justify her detention, there is also a question as to whether Italy’s precautionary detention laws are consistent with the European Convention, to which Italy is a party.¹⁸⁰ The European Convention guarantees that the right to freedom can only be abridged under narrow circumstances.¹⁸¹ The means used to apply precautionary detention in Italy may violate that guarantee. I will determine whether that is the case in this section by looking at how the European Court determines the existence of a violation of Article 5.

1. Jurisdiction and Standing Before the European Court

The jurisdiction of the Court is described in very broad terms under the European Convention.¹⁸² Article 19 establishes that the European Court’s purpose is to ensure that the terms of the European Convention are observed by the contracting parties.¹⁸³ Article 32 provides

¹⁷⁹ C.P.P. Libro 4, Titolo 1, Art. 303(1)(a)(1)-(2).

¹⁸⁰ See European Convention, *supra* note 18.

¹⁸¹ See *id.* Art 5.

¹⁸² See *id.*

¹⁸³ European Convention, *supra* note 18, Art. 19.

that the jurisdiction of the Court extends to all cases requiring the interpretation of the European Convention.¹⁸⁴

Article 34 provides that the Court may receive applications for judgments from individual applicants claiming to be a victim of a violation of the European Convention by one of the contracting parties.¹⁸⁵ The contracting parties are required to secure the European Convention's rights to all persons "within their jurisdiction,"¹⁸⁶ meaning that persons of any nationality or residence have standing to bring a case before the European Court so long as their rights were violated within the jurisdiction of a member state¹⁸⁷.

Because many of the rights set forth in the European Convention are broadly stated, contracting parties are left with the task of implementing those rights consistently with their domestic laws.¹⁸⁸ Member states are bound by a duty of good faith to implement those rights according to the ordinary meaning of the terms in their context and in light of the European Convention's overall purpose.¹⁸⁹ Member states are given a margin of discretion when interpreting and implementing the European Convention.¹⁹⁰ When complaints are brought to the European Court, however, the European Court has authority to review domestic legislation.¹⁹¹

The European Court is not formally bound to follow its own precedent, but has stated that it is in the interest of foreseeability and equal treatment before the court that it should not depart from precedent without "cogent reason."¹⁹²

¹⁸⁴ *Id.*, Art. 32.

¹⁸⁵ *Id.* Art. 34.

¹⁸⁶ *Id.* Art. 1.

¹⁸⁷ PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, 118 (2d Ed., 2005).

¹⁸⁸ STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14 (Council of Europe, 2000) [hereinafter *Greer*].

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE 10 (Stanislaw Frankowski & Dinah Shelton eds. 1992).

¹⁹² *Stafford v. United Kingdom*, 35 Eur. Ct. H.R. 32 (2002).

2. Amanda's Right to Liberty and Security

The human right applicable to precautionary detention laws, and guaranteed by the European Convention, is the Article 5 right to liberty and security of person.¹⁹³ The European Court asks five questions of each case when evaluating a potential violation of Article 5: (1) Has there been a deprivation of liberty for which a national authority can be held responsible?¹⁹⁴ (2) Was that deprivation of liberty arbitrary or in accordance with a procedure prescribed by law? (3) Does the Detention fall within one of the permissible categories listed in Article 5(1); (4) Has the detainee been granted his procedural guarantees; (5) Is there an enforceable right to compensation within the domestic legal system in question?¹⁹⁵

The right to liberty and security is given special consideration under the European Convention because of its importance in a democratic society.¹⁹⁶ The Court recognizes the need for member states to balance the national security and the protection of individual rights.¹⁹⁷ However any balancing cannot be taken so far as to impair the very essence of the rights guaranteed by Article 5.¹⁹⁸

a. Arbitrariness of the Detention

In answering the second question, whether Amanda's detention was arbitrary, the European Court reviews the following: (1) whether the procedures of domestic law have been

¹⁹³ See European Convention, *supra* note 18. Art. 5(1).

¹⁹⁴ It is clear that in this case, Amanda's arrest and placement in jail meets the definition of "deprivation of liberty" for which Italian authorities can be held responsible. For this reason, I will not address this element. See JIM MURDOCH, ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, 26-28 (2002).

¹⁹⁵ *Id.* at 15.

¹⁹⁶ See *id.* at 19.

¹⁹⁷ *Brogan v. United Kingdom*, 11 Eur. Ct. H.R. 117, para. 48 (1988) (taking notice of the growth of terrorism in modern society and the "particularly difficult circumstances" in Northern Ireland).

¹⁹⁸ *Id.* at para. 59.

followed before the deprivation of an individual's liberty; and (2) whether those procedures are within the spirit of the European Convention.¹⁹⁹

In the first element, the Court does not evaluate whether the detention is justified, but whether the authorities adhered to their own procedural safeguards as proscribed by law.²⁰⁰ Failure to adhere to procedural steps or safeguards within the national law constitutes a breach of Article 5.²⁰¹ Under the second element, the domestic procedures must be consistent with the "spirit" of the European Convention, namely to protect individuals from arbitrary detention.²⁰² In *Stafford*, the European Court found that the ability of the government to detain a person at its discretion based upon the likelihood that they would commit another crime was too arbitrary and not within the spirit of the European Convention.²⁰³

b. Permissible Categories of Detention Under Article 5(1)

The third question asked by the European Court when evaluating whether there has been a violation of Article 5, is whether the detention falls within the permissible categories detention identified in Article 5(1).²⁰⁴ Article 5(1) lists categories in which the deprivation of a person's liberty by the State is justified.²⁰⁵ Violations are found by negative implication in that they occur where the detention in question does not fit into one of these five categories. This list of exceptions is considered exhaustive, and the Court has stated that only a narrow interpretation of

¹⁹⁹ Murdoch, *supra* note 194, at 32.

²⁰⁰ *Id.*

²⁰¹ See *Koendjiharie v. Netherlands*, 13 Eur. Ct. H.R. 820, para. 29 (1990) (delay of four months of decision on whether to extend applicant's committal to a psychiatric institution did not meet the "speediness" requirement to make such decisions created by the Dutch legislature).

²⁰² *Stafford v. United Kingdom*, 35 Eur. Ct. H.R. 32, para. 82 (2002) (Ability of secretary of state to detain person after expiry of jail term based on likelihood that they may commit another offense was not within the spirit of the European Convention to protect against arbitrary detention and defend the rule of law); *Contra McKay v. United Kingdom*, 44 Eur. Ct. H.R. 41, para. 1 (2006) (it was within the spirit of the European Convention for a magistrate judge to deny a criminal suspect bail upon being charged with a crime).

²⁰³ *Id.* at para. 82.

²⁰⁴ MURDOCH, *supra* note 194, at 15.

²⁰⁵ See European Convention, *supra* note 18. Art. 5(1)(a)-(f).

their meaning will ensure that no person is arbitrarily deprived of their liberty.²⁰⁶ It is possible for the nature and classification of the detention to change over the course of time, and the European Court will consider periods of illegitimate detention separate from periods following or preceding some form of “legitimate” detention.²⁰⁷ The relevant exceptions to Amanda’s case are the following:

(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 of 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 so²⁰⁸;

Article 5(1)(a) permits the detention of a person found guilty of committing an offence, whether criminal, disciplinary or administrative.²⁰⁹ The detention must not only follow a conviction chronologically, but must be causally connected to that conviction ordered by the competent court.²¹⁰ This means that the court must make a finding that there has been a breach of a legal obligation by the detainee, and that the detention ordered is the result of that breach.²¹¹

Under Article 5(1)(c), competent authorities may arrest and detain a person only for the purpose of bringing the suspect before the competent judicial authority, and this applies both to the detention of persons suspected of having committed an offense and to detention which is

²⁰⁶ *Quinn v. France*, 21 Eur. Ct. H.R. 529, para. 42 (1996).

²⁰⁷ *See Guzzardi v. Italy*, 3 Eur. Ct. H. R. 333, para. 4, 52 (1980) (detention first fell within category 5(a), later upon transfer to a different location became a violation of Article 5, and upon further transfer to a different town was no longer considered a deprivation of liberty.)

²⁰⁸ European Convention, *supra* note 18, Art. 5(1); Note: the other exceptions are inapplicable to Amanda’s situation and are not discussed. *See id.*

²⁰⁹ *Engel v Netherlands*, 1 Eur. Ct. H.R. 647, para. 68, (1976).

²¹⁰ *Monnell v. United Kingdom*, 10. Eur. Ct. H.R. 205, para. 40 (1988).

²¹¹ *Guzzardi*, *supra* note 207, para. 100 (detention was not a punishment for a specific offense, but a precautionary measure based on applicant’s criminal propensity).

considered necessary to prevent another offense, or fleeing after having done so.²¹² The reasonableness of the suspicion is an important safeguard within this clause: the state must show that detention was ordered under circumstances which “presuppose the existence of facts . . . which would satisfy an objective observer that the person concerned may have committed the offense.”²¹³ Those facts do not need to rise to the level as those necessary to justify a conviction.²¹⁴

Detention for the prevention of an offense can only be used as a means to prevent a concrete and specific offense, and does not justify a policy of general prevention directed against an individual because of a supposed propensity to engage in crime.²¹⁵ In both *Guzzardi* and *Ciulla*, the European Court condemned an Italian court’s decision to put the plaintiffs, mafia suspects, in detention based solely on their reputations in order to prevent future unspecified crimes.²¹⁶

Detention to prevent a suspect from absconding must also be based upon objective evidence.²¹⁷ The Court has stated that a court ordering such detention must consider all possible alternatives before ordering detention²¹⁸ and that any detention must be based upon a number of factors such as: the ease of leaving the jurisdiction, the seriousness of the potential sentence, the lack of domestic ties, the character of the person involved, his home, his occupation, his assets

²¹² *Lawless v. Ireland*, 1 Eur. Ct. H.R. 15, para. 14 (1961).

²¹³ *Fox v. United Kingdom*, 13 Eur. Ct. H.R. 157, para. 32 (1991)(finding reasonableness of suspicion of engaging in terrorist act not met based solely on prior terrorist activity and questioning done by police officers during detention); *Contra K.F. v. Germany*, 26 Eur. Ct. H.R. 390, para. 62 (1997) (finding reasonableness of suspicion that plaintiff would abscond without paying her rent based upon landlady’s statement to police, prior history of fraud and fake home address provided by plaintiff).

²¹⁴ *K.F.*, 26 Eur. Ct. H.R. 390, para. 62.

²¹⁵ See, e.g. *Guzzardi*, *supra* note 207, para. 102; *Ciulla v. Italy*, 13 Eur. Ct. H.R. 346, para. 42 (1989)(detention to prevent unspecified future crime based on accusations of being a Mafia member is violation of Article 5(c)(1)); *Ječius v. Lithuania*, 35 Eur. Ct. H.R. 16, para. 52 (2002)(precautionary detention ordered without pending criminal proceeding or charges is violation of Convention).

²¹⁶ *Guzzardi*, *supra* note 207, para. 102, *Ciulla*, *supra* note 215, para. 42.

²¹⁷ *Sulaoja v. Estonia*, 43 Eur. Ct. H.R. 36, para. 64 (2005).

²¹⁸ *Wemhoff v. Germany*, 1 Eur. Ct. H.R. 55, para. 15 (1980).

and family ties²¹⁹. The court requires that these factors demonstrate circumstances “genuinely tending to establish the risk of absconding.”²²⁰ According to the Court, the danger of flight lessens as time passes by, as the time spent in detention will likely be deducted from any possible sentence.²²¹

3. The Margin of Appreciation Doctrine

The European Court reviews national laws with a “margin of appreciation” when determining whether they violate the European Convention. The doctrine of margin of appreciation is not embodied within the European Convention, nor in the *travaux préparatoires* (loosely - official negotiation records of the European Convention).²²² It is essentially a judge-made means of giving deference to contracting parties’ legislative, executive, judicial and administrative bodies before declaring that a violation of the European Convention has occurred.²²³ It has been defined as the line at which international supervision should give way to a member-state’s discretion in enacting or enforcing its laws.²²⁴ It was first used in cases where countries claimed a right to derogation from the European Convention under Article 15 during times of emergency,²²⁵ but has since been applied in non-emergency situations as well²²⁶.

²¹⁹ *Neumeister v. Austria*, 1 Eur. Ct. H.R. 91, para. 10 (1968).

²²⁰ See, e.g. *Civet v. France*, 31 Eur. Ct. H.R. 38, para. 48 (1999) (not present based solely on prior conviction, lack of employment and severity of the potential sentence where applicant was in prison on rape charges); *Sulaoja*, *supra* note 217 (not present based on formulaic conclusion that the lack of job, residence or family justify detention to prevent absconding).

²²¹ *Neumeister*, *supra* note 219.

²²² H.C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 14 (1996).

²²³ *Id.* at 13.

²²⁴ *Id.* (citing Wong, *The Sunday Times Case: Freedom of Expression Versus English Contempt-of-Court Law in the European Court of Human Rights*, 17 N.Y.U. J. of Int’l Law and Politics 35, 58 (1984).

²²⁵ See *Greece v. United Kingdom* (“Cyprus”), 2 Y.B. Eur. Conv. on H. R. 172, 192 (1958 - 1959) (permitting contracting governments discretion when determining how far to derogate from the terms of the European Convention when invoking Article 15); see also *Lawless*, *supra* note 212 (upholding Irish government’s decision to use precautionary detention on I.R.A. members where it was used in order to “maintain law and order in a time of war or any other public emergency threatening the life of a nation.”)

²²⁶ The Italian law in question is not enforced pursuant to any derogation for emergency purposes and this topic is not addressed by this note.

Although there is limited scope of application of a State’s margin of appreciation” under Article 5²²⁷, there may be stronger case to apply it more broadly for laws designed to prevent organized crime or terrorism²²⁸.

a. Derogation from Article 5 in Non-Emergency Circumstances

Italian precautionary detention is not enforced pursuant to any official or declared state of emergency. Therefore, we must determine whether it is within Italy’s margin of discretion in non-emergency circumstances. Recognition of a margin of discretion in non-emergency situations began in cases in which States defended their actions on the basis of national security without invoking Article 15.²²⁹ These actions are also reviewable by the European Court.²³⁰ In their analysis, the European Court will usually look to five core principles for interpreting whether a State may use the margin of appreciation doctrine for a given derogation from the European Convention.²³¹ First, the European Court will interpret the European Convention narrowly in deference to national sovereignty, looking only to whether the state has provided “effective protection” of human rights.²³² Second, the European Court looks to whether the state action is subject to effective, transparent and formal legal constraints to prevent the exercise of arbitrary executive or administrative power.²³³ Third, the Court has asked whether the right violated is central to a democratic society.²³⁴ Fourth, European Court emphasizes that its role is

²²⁷ See *infra* III(B)(ii)(3).

²²⁸ *Id.*

²²⁹ Yourow, *supra* note 222 at 21 (1996).

²³⁰ *Id.*

²³¹ See Greer, *supra* note 188 at 15.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 18

only to review the means taken by states to secure the rights under the European Convention and they will not formulate or suggest new legislation.²³⁵ Lastly, the European Court will also balance whether the interference with the right in question is proportionate with the State interest claimed.²³⁶ In this analysis, the court looks at the impact upon the right in question, the grounds for interference, the effects upon the applicant and the context in which it has taken place.²³⁷ In *Observer v. United Kingdom*²³⁸, for example, the court found that a newspaper's right to freedom of expression outweighed the United Kingdom's broadly-stated national security interests where the applicant had published excerpts of a memoir by a former British spy who had written the book in violation of his confidentiality agreement with the U.K. government.

Because of the significant interest in Article 5's right to personal freedom, any deprivation of liberty is generally interpreted against the State and the right to personal liberty is repeatedly referred to as one integral to a free society.²³⁹ In practice, the European Court has granted very little discretion to member States under article 5, by either paying only lip service to the doctrine²⁴⁰ or expressly refusing to apply it, such as in *Guzzardi*²⁴¹.

ii. Analysis: Italian Precautionary Detention Under the Microscope of the European Convention on Human Rights

As they are applied, Italian precautionary detention laws are in violation of the European Convention Article 5. The terms of Amanda's arrest are beyond the European Convention's reasonable standard for detention when investigating an individual's possible involvement in a

²³⁵ *Id.* at 19.

²³⁶ *Id.* at 20.

²³⁷ *Id.*

²³⁸ *Observer v. United Kingdom*, 14 Eur. Ct. H.R. 153, para. 74 (1992).

²³⁹ Yourow, *supra* note 222 at 176; *see also* *Guzzardi*, *supra* note 207; *De Wilde v. Belgium*, 1 Eur. Ct. H.R. 373 (1971).

²⁴⁰ *Luberti v. Italy*, 6 Eur. Ct. H.R. 440, para. 27 (1984) (acknowledging margin of discretion given to states, but proceeding to exclusively use its own interpretation of Article 5).

²⁴¹ *Guzzardi*, *supra* note 207 at para. 95.

crime. Italy cannot justify their application of precautionary detention laws in this way under the doctrine of margin of appreciation.

1. Jurisdiction and Standing Before the European Court

The European Convention states the European Court's jurisdiction very broadly. Under Article 19, the European Court is given the responsibility to ensure that the terms of the European Convention are observed by the contracting parties.²⁴² Italy is a contracting party and ratified the European Convention without any reservation to Article 5 in 1955.²⁴³ Article 32 provides that the jurisdiction of the Court extends to all cases involving the interpretation of the European Convention.²⁴⁴ In Amanda's case, she would be raising a violation of Article 5, concerning her right to liberty and security of person.²⁴⁵ She has a valid right to that protection as Italy has agreed to secure the rights embodied in the European Convention to all persons found within their jurisdiction.²⁴⁶ As such, she is allowed to bring a claim to the European Court as an individual Party.²⁴⁷

The European Court has jurisdiction to review Amanda's detention and whether Italian precautionary detention laws are compatible with Article 5. Article 44 requires Italy to accept the judgments of the European Court as final²⁴⁸, and under Article 46, undertake to abide by those judgments²⁴⁹. The European Court has the authority to review Italian precautionary

²⁴² European Convention, *supra* note 18, Art. 19.

²⁴³ *See id.*

²⁴⁴ *Id.*, Art. 32.

²⁴⁵ *Id.* Art. 5.

²⁴⁶ *Id.* Art. 1.

²⁴⁷ *Id.* Art. 34. Note: The United States Government, as a non-contracting party to the European Convention has no right to bring an action against Italy before the European Court.

²⁴⁸ *Id.* Art. 44

²⁴⁹ *Id.* Art. 46.

detention laws and determine whether Italy has implemented Article 5, within some margin of discretion and in good faith.²⁵⁰

2. Amanda's Right to Liberty and Security

In accordance with Article 5 jurisprudence, I will review whether there has been a violation of the Right to Liberty and Security by asking the following questions: (1) Was that deprivation of liberty arbitrary or in accordance with a procedure prescribed by law?; (2) Does the Detention fall within one of the permissible categories listed in Article 5(1)?; (3) Has the detainee been granted his procedural guarantees?; and (4) Is there an enforceable right to compensation within the domestic legal system in question?.²⁵¹

It is important to note at the outset that Article 5 rights are held to be ones necessary to a true democratic society, and therefore its provisions are interpreted strictly.²⁵² While the court will take note in its analysis of the special circumstances of every country, it has repeatedly emphasized the need to protect these rights.²⁵³ In *Brogan v. United Kingdom* for example, the European Court recognized the United Kingdom's need to protect national security from the threat of organized terrorism in Northern Ireland. However, the European Court nonetheless interpreted Article 5(3) strictly because Article 5 "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty."²⁵⁴

a. Amanda's Detention Was Arbitrary

²⁵⁰ Greer, *supra* note 188, at 14.

²⁵¹ Murdoch at 15, *supra* note 194. As stated in footnote 194, it is clear that Italy is responsible for Amanda's deprivation of liberty, and I will not address this question.

²⁵² *Id.* at 19.

²⁵³ *Brogan*, para. 48, *supra* note 197.

²⁵⁴ *Id.*, para. 59.

There are two elements followed by the European Court under this prong: (1) Whether the procedures of domestic law have been followed; and (2) whether those procedures themselves are within the spirit of the European Convention.

1. The procedures of domestic law were not followed

Under the first prong, the European Court asks whether the procedures of domestic law have been followed. The same arguments about whether Amanda's detention is justified under Italian precautionary detention laws are applicable to the first prong of this analysis.²⁵⁵ Having found above that Italy has deviated from the original intent behind precautionary detention laws, and that the G.I.P. in this case should adhere to the letter of the law, it follows that the procedures of domestic law have not been followed.²⁵⁶ If this argument were accepted by the European Court, they would be able to immediately find that Amanda's detention between November 6, 2007 until October 29, 2008 was arbitrary.²⁵⁷

2. Precautionary detention, as it is applied, is not within the spirit of the European Convention

Under the second prong, the European Court evaluates whether the law itself is within the spirit of the European Convention and protects persons from arbitrary detention.²⁵⁸ It seems this question is easily answered as well. Under precautionary detention, a judge has the right to detain the suspect of a crime based upon the recommendation of a prosecutor.²⁵⁹ In *Stafford*, the court found that a law allowing the secretary of state to detain a person at the end of their jail-term for longer, based on the likelihood that they may commit another offense was not within the

²⁵⁵ See *supra* section III(A)(ii).

²⁵⁶ See *id.*

²⁵⁷ See, e.g. *Wassink v. Netherlands*, [1990] ECHR 12535/86 (finding violation of Article 5 where procedures set forth by domestic law were ignored).

²⁵⁸ *Murdoch*,

²⁵⁹ C.P.P. Libro 4, Titolo, 1, Art. 272 et. seq.

spirit of the European Convention.²⁶⁰ The European Court found particularly troubling that the executive branch would have the power to detain the applicant on the basis on perceived fears of future conduct unrelated to his prior conviction.²⁶¹

Similarly here, the Italian prosecutor had insufficient information to bring a charge against Amanda and Italian precautionary detention laws allow an agent of the executive branch to ask a judge to detain her based on fear of Amanda's future conduct.²⁶² This, combined with the structural collusion between prosecutors and judges in the Italian criminal justice system, such requests from a prosecutor become, in effect, a judgment for detention.

Moreover, two concurring judges in *Stafford* noted in dicta that the same power entrusted to the judiciary would be similarly contrary to the spirit of the European Convention if detention could be ordered based on vague and discretionary criteria.²⁶³ In this case, the Italian law permits deprivation of liberty based on whether a judge deems there to exist "grave indications" of a persons' guilt, whether they are a threat to the public, a flight risk and to interfere with the investigation.²⁶⁴ Judging from Amanda's case it is clear that these factors can be manipulated by a judge to satisfy the requirements for ordering precautionary detention. Because of the wide latitude afforded to judges²⁶⁵, and that Italy is a civil law country with no requirement to follow precedent, these factors are in reality only false protections from arbitrary detention. If it appeared that the laws were applied more strictly in accordance with their intent, there may be a stronger argument that the law is in accordance with the spirit of the European Convention. However, in this case precautionary detention laws fall short. Judging from the United Nations

²⁶⁰ *Stafford*, 35 Eur. Ct. H.R. 32, para. 82 (2002).

²⁶¹ *Id.*

²⁶² See C.P.P., Libro 4, Titolo 1, Art. 285.

²⁶³ *Stafford*, *supra* note 260 (concurrence).

²⁶⁴ C.P.P., Libro 4, Titolo 1, Art. 274(1)(a)-(c).

²⁶⁵ Koff, *supra* note 107 at 167.

reports cited above, it appears that Amanda’s case is representative of a pattern of arbitrary detention.

b. Amanda’s Detention Does Not Fall Within Any of the Permissible Categories of Detention in Article 5(1)

The first possible category under which precautionary detention may apply is Article 5(1)(a): the lawful detention of a person after conviction by a competent court.²⁶⁶ There is no argument that the court in question is competent within the meaning of the European Convention, as this definition can be applied to any criminal, disciplinary or administrative court.²⁶⁷ The question is whether the order for precautionary detention can rightly be called a “conviction.” To do so, the Court must have found the breach of a legal obligation, and that the detention was ordered as a result of that breach.²⁶⁸ In this case, there has clearly been no breach of legal obligation, nor is one required by law to order precautionary detention. The law simply requires a finding of “grave” indications of guilt.²⁶⁹ Freedom from suspicion is not a legal obligation under Italian law. Therefore, precautionary detention does not fall within the first permissible category for detention.

The second permissible category of detention is found under Article 5(1)(c):

. . . . (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.²⁷⁰

Italy may argue that the purpose of precautionary detention is for the purpose of bringing a person before a competent legal authority. This category establishes three permissible

²⁶⁶ See European Convention, Art 5, *supra* note 18.

²⁶⁷ *Engel*, 1 Eur. Ct. H.R. 647, para. 68, (1976).

²⁶⁸ *Guzzardi*, *supra* note 207, para. 100

²⁶⁹ C.P.P., Libro 4, Titolo 1, Art. 274.

²⁷⁰ European Convention, *supra* note 18, Art. 5(1); Note: the other exceptions are inapplicable to Amanda’s situation and are not discussed. *See id.*

justifications for detention: (1) where there is reasonable suspicion that the suspect committed a crime; (2) when it is reasonably necessary to prevent the suspect from committing an offence; and (3) when it is reasonably necessary to prevent a suspect from fleeing after committing an offense.

Under the first justification, the European Court has held that domestic courts must establish that a “reasonable suspicion” exists prior to ordering detention²⁷¹. The European Court has found “reasonable suspicion” where a witness provided concrete evidence of fraud, and where the criminal suspect had a history of fraud and acted evasively.²⁷²

In this case, the Italian law allows detention upon grave indications of guilt.²⁷³ If interpreted narrowly, this provision may satisfy the European Court requirements. However, as applied in this case and likely in others, precautionary detention once again fails to meet the proper threshold. The court detained Amanda where only one of the above three factors was allegedly present (evasive behavior). Furthermore, the court relied on a number of character witnesses in determining that she was “histrionic”, but no-one who could link Amanda to the crime.²⁷⁴

In *Fox*, the European Court found that no reasonable suspicion existed based solely upon past criminal behavior and inconclusive interrogations by the suspect with the police.²⁷⁵ In this case, the Italian Court had even less to rest upon. Amanda has no criminal history and her interrogation with police should not have been considered a part of the Court’s evaluation

²⁷¹ *See id.*

²⁷² *See K.F.*, 26 Eur. Ct. H.R. 390, para. 62.

²⁷³ C.P.P., Libro 4, Titolo 1, Art. 274.

²⁷⁴ Corriere, *supra* note 94.

²⁷⁵ *Fox v. United Kingdom*, 13 Eur. Ct. H.R. 157, para. 32 (1991)

because of the way it was conducted.²⁷⁶ Amanda’s precautionary detention was not justified based upon any reasonable suspicion that she committed an offense.

Under the second justification, where the detention is ordered to prevent the commission of an offence, there must be evidence of a concrete and specific crime that may be committed.²⁷⁷ In *Ciulla v. Italy*, the court found that the requirement of finding “concrete and specific” evidence was not satisfied where an Italian judge had ordered the detention of the applicant simply because others had accused him of being a member of the Mafia.²⁷⁸ Similarly here, Amanda is simply a suspect, and there has been no showing of a specific crime Amanda’s imprisonment seeks to prevent.²⁷⁹ Although precautionary detention itself requires a court to make such findings²⁸⁰, it is clear that it has not been followed in Amanda’s case. Therefore, Amanda’s detention cannot be justified upon the grounds that it is necessary to prevent the commission of a crime.

Under the third justification, to prevent a suspect from fleeing, a court must make concrete findings that Amanda is a flight risk prior to ordering her detention.²⁸¹ These can be based on a number of factors, including: the ease of leaving the jurisdiction, the seriousness of the potential sentence, the lack of domestic ties, the character of the person involved, his or her home, occupation, assets and family ties.²⁸² The court requires that these factors demonstrate circumstances “genuinely tending to establish the risk of absconding.”²⁸³ In *Civet v. France*, the

²⁷⁶ *Id.*

²⁷⁷ *See Ciulla v. Italy*, 13 Eur. Ct. H.R. 346, para. 42 (1989)(detention to prevent unspecified future crime based on accusations of being a Mafia member is violation of Article 5(c)(1)).

²⁷⁸ *Id.*

²⁷⁹ Bachrach, *supra* note 11.

²⁸⁰ C.P.P. Libro 4, Titolo 1, Art. 274(1)(c) (allowing precautionary detention to prevent the commission of other crimes of the same nature).

²⁸¹ European Convention, Art. 5(1)(c), *supra* note 18.

²⁸² *Neumeister v. Austria*, 1 Eur. Ct. H.R. 91, para. 10 (1968).

²⁸³ *See, e.g. Civet v. France*, 31 Eur. Ct. H.R. 38, para. 48 (1999) (not present based solely on prior conviction, lack of employment and severity of the potential sentence where applicant was in prison on rape charges); *Sulaoja, supra*

European Court found that there was no such risk where the detention was justified based on a prior conviction, lack of employment and the severity of the potential sentence where the applicant was in prison on rape charges.²⁸⁴ The Court demanded more concrete evidence tending to show intent to flee.²⁸⁵

In the instant case, the seriousness of the potential sentence, lack of domestic ties, home-country and occupation weigh heavily against Amanda. She is a student studying abroad in Italy, and likely has few possessions. However, the burden on establishing a flight risk is upon the state, and not Amanda.²⁸⁶ In this case, and similarly to *Civet*, Mignini failed to show any facts that Amanda had made any real plans to run away from Perugia. On the contrary, Amanda stayed in Perugia after the murder occurred, and nothing in her tapped telephone conversations indicated that she did not intend to finish her university year there.²⁸⁷ In addition, several less restrictive precautionary measures exist under Italian law which could have mitigated the risk of flight.²⁸⁸ The Italian Courts chose to use none of these and therefore cannot justify Amanda's detention on the grounds that it is reasonably necessary to prevent Amanda from fleeing.

It appears that as applied to Amanda, and in any case in which Italian judges do not follow the letter of law more strictly, precautionary detention does not meet the conditions for detention permissible under the European Convention.

note 217 (not present based on formulaic conclusion that the lack of job, residence or family justify detention to prevent absconding).

²⁸⁴ *Civet v. France*, 31 Eur. Ct. H.R. 38, para. 48 (1999).

²⁸⁵ *Id.*

²⁸⁶ See C.P.P. Libro 4, Titolo 1, Art. 274(1)(b) (prosecutor may request detention where he shows risk of flight).

²⁸⁷ Bachrach, *supra* note 11.

²⁸⁸ See *supra* III(A)(ii)(2).

3. The Margin of Appreciation Analysis

The European Court recognizes that it must give deference to the legislative choices made by member States when implementing the European Convention.²⁸⁹ The provisions of the European Convention must not be interpreted restrictively and the European court must give deference to national sovereignty.²⁹⁰ The question here is whether Italy's precautionary detention laws are within that permissible margin of discretion where there is no claimed state of emergency.

a. Derogation from Article 5 in Non-Emergency Circumstances

Italy enacted precautionary detention in response to a national security crisis,²⁹¹ but has used the laws in Amanda's case without citing any national security urgency²⁹². The European Court has been much less willing to afford states a wide margin of discretion where no national security threat exists, and especially not in cases of Article 5 derogation.²⁹³

The European Court reviews national legislation by looking at six core factors. The first is whether the state has provided "effective protection" for Article 5.²⁹⁴ Precautionary detention laws would appear to satisfy that obligation.²⁹⁵ The law includes a number of procedural guarantees, including alternatives to detention, review by a court, and the instruction that the law should be used only in the most extreme circumstances where there are grave indications of guilt and some valid societal need to detain a suspect.²⁹⁶

However, as implemented with Amanda, and seemingly in general, these protections are meaningless. In Amanda's case, there were a number of factors that counseled against the need

²⁸⁹ Yourow, *supra* note 222 at 13.

²⁹⁰ Greer, *supra* note 188 at 15.

²⁹¹ Spotts, *supra* note 102, at 164-165.

²⁹² Corriere, *supra* note 89.

²⁹³ Yourow, *supra* note 222, at 176.

²⁹⁴ *Id.* at 21.

²⁹⁵ See C.P.P. Libro 4, Titolo 1, Art. 274 et. seq.

²⁹⁶ *Id.*

for detention in prison.²⁹⁷ Based upon the United Nations' Working Group report, these laws are used reflexively by prosecutors and judges and the protections embodied within appear to be ignored.²⁹⁸ Where the very terms of the law that provide effective protection to arbitrary detention are not followed, those protections no longer exist.

Secondly, the European Court looks to whether the law provides effective, transparent and legal constraint to prevent arbitrary abuse of power.²⁹⁹ This law fails that prong as well. As discussed above, the structural collusion between Italian prosecutors and judges and the large discretionary powers left to the G.I.P. and prosecutor allow these laws to be applied arbitrarily.³⁰⁰ This evidence points to systemic arbitrary abuse of power.

Third, the European Court asks whether the right violated is one central to a democratic society.³⁰¹ This factor is without dispute. The European Court has stated directly that "the right to liberty is too important in a 'democratic society' within the meaning of the Convention."³⁰²

Fourth, the court emphasizes its role as only to review legislation and not to formulate or suggest any modification.³⁰³ However, when assessing a deprivation of liberty absent derogation for emergency circumstances the European Court has been much more proactive.³⁰⁴ Frequently in such cases, the European Court either does not invoke any margin of discretion analysis, or gives the doctrine only cursory review.³⁰⁵ In *Guzzardi* for example, the court found a violation of Article 5 where Italy had confined a mafia suspect to an island while awaiting charges.³⁰⁶ The Court stated outright that it did not recognize national discretion in the context of the right to

²⁹⁷ *Supra* III(A)(ii)(2).

²⁹⁸ *Supra* III(A)(i).

²⁹⁹ Yourow, *supra* note 222, at 21.

³⁰⁰ *See* Koff, *supra* note 107 at 67.

³⁰¹ Yourow, *supra* note 222, at 18.

³⁰² *De Wilde v. Belgium*, 1 Eur. Ct. H.R. 373, para. 65 (1971).

³⁰³ *Id.* at 19.

³⁰⁴ Yourow, *supra* note 222, at 12.

³⁰⁵ *Id.* at 57- 64.

³⁰⁶ *Guzzardi*, *supra* note 207, at 95.

arrest or detain individuals, and would only look to the express exceptions within the European Convention.³⁰⁷ In most cases, the European Court is less openly dismissive of the margin of appreciation doctrine, but has nonetheless applied its own interpretation of Article 5.³⁰⁸ That interpretation, discussed above³⁰⁹, would lead to a finding of a violation of Article 5 in Amanda's case.

Lastly, the European Court balances the state interest claimed against the interference with the individual's right.³¹⁰ In *Observer*, the European Court stated that the right to freedom of expression was an "essential foundation of a democratic society" and absent any "pressing social need," the United Kingdom's broadly stated national security interests could not justify impinging that right.³¹¹ Similarly here, Amanda's essential right to liberty has been impinged under a broadly stated security concern, that Amanda might commit further crimes of violence.³¹² Balanced against that justification for detention are Amanda's deprivation of liberty and the options that were otherwise available to the Italian Court to restrict Amanda's movements.³¹³ In light of the severity with which the European Court interprets Article 5, it appears that this balancing test would weigh heavily in favor of finding a violation of Article 5 with no permissible derogation.

In evaluating these factors together, Italy appears to be outside the boundaries of its discretion in using precautionary detention for Amanda. Additionally, based on the information provided by the two United Nations reports discussed above, it appears that the laws are frequently applied outside that permissible narrow margin of discretion.

³⁰⁷ *Id.*

³⁰⁸ See e.g. *Luberti*, *supra* note 240 at para. 27; see also *Yourrow*, *supra* note 222 at 61.

³⁰⁹ *Supra* III(B)(i)(2).

³¹⁰ *Greer*, *supra* note 188 at 20.

³¹¹ *Observer*, *supra* note 238, para. 74-80.

³¹² See *Corriere*, *supra* note 94.

³¹³ *Supra* III(A)(ii)(2).

CONCLUSION

Italian precautionary detention was enacted to be used sparingly as an emergency tool for law enforcement to prevent terrorist attacks or mafia interference. It is clear from Amanda Knox's case that the very terms of the law are not followed judiciously. In Amanda's case, there was little evidence to justify a finding of "grave indications" of Amanda's guilt. There was no clear motive for Amanda to kill her roommate, no history of violence, and no forensic evidence to place her at the crime scene. There was even less evidence that she presented the pre-requisite "grave" danger to the public, nor anything to suggest that any danger she might present cannot be mitigated by less restrictive means. Italian law-enforcement similarly had other options available to them to reduce any risk of flight.

It appears that precautionary detention has deviated significantly from its original purpose in many other cases as well. Its terms are applied loosely and prosecutors and judges enjoy too much discretion in its interpretation. Unfortunately for Amanda, she is the best example for how that discretion can be abused and that Italian investigators can detain persons who were never intended to be affected by these laws.

As they are applied, Italian precautionary detention laws are also in violation of the European Convention Article 5. The terms of Amanda's arrest are beyond the European Convention's reasonable standard for detention when investigating an individual's possible involvement in a crime. Nor is there any margin of appreciation available to Italy to justify their application of precautionary detention laws. For these reasons, Amanda has a cause of action against Italy for violating her human rights. It would appear that many similarly situated prisoners would also have a strong case for relief with the European Court.

Ultimately, it is incumbent upon Italy to either reform the language of precautionary detention laws to limit the instances in which precautionary detention may be used, or find a way to restrain the discretion of those who enforce these laws.