

BAKER V THE QUEEN **&** ***FARDON V ATTORNEY GENERAL*** ***FOR THE STATE OF*** ***QUEENSLAND***

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[In 2004, the High Court of Australia had cause to revisit its 1996 decision in Kable, as well as to consider the nature of judicial power as it relates to the deprivation of liberty, outside of the parameters of conventional criminal sentencing. The resulting decisions of Fardon and Baker demonstrate the lack of constitutional protections afforded to people who become the focus of governmental campaigns to be “tough on crime”. The so-called “Kable principle”, as construed by the High Court in 2004, may prove to be the “constitutional watch dog that barks but once”.]

I INTRODUCTION

On 1 October 2004 the High Court of Australia handed down two cases with significant implications for civil liberties. In *Baker v The Queen*¹ the Court was called upon to decide the constitutionality of provisions of a NSW Act² which severely restricted the rights of certain prisoners who had been sentenced to life imprisonment to obtain a determination of their sentence by way of a fixed minimum term. In *Fardon v Attorney General for the State of Queensland*³ a Queensland prisoner, whose release on the expiration of his sentence was denied on the basis that he was an ‘unacceptable risk’ of committing a ‘serious sexual offence’, asked the Court to declare provisions of a Queensland Act⁴ which authorised his continued detention

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¹ *Baker v. The Queen*, (2004) 210 ALR 1 (High Court of Australia, 2004)

² Sentencing Act, 1989, (NSW.) *as amended* by Sentencing Legislation Further Amendment Act, 1997, (NSW.)

³ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50 (High Court of Australia, 2004)

⁴ Dangerous Prisoners (Sexual Offenders) Act, 2003, (Qld.)

unconstitutional. In both cases, a six to one majority of the Court (Kirby J dissenting) decided in favour of the validity of the relevant State legislation.

II FACTS

A *Baker v The Queen*

The appellant, Allan Baker, was a New South Wales prisoner who had been sentenced in 1974 along with his co offender⁵ to a sentence of life imprisonment on one count of murder and one count of conspiracy to murder. At the time of the imposition of his sentence, life imprisonment was mandatory on a conviction for murder, with no provision for minimum or non parole terms.⁶ There was, however, provision for executive discretion to allow for the supervised release of prisoners, including prisoners subject to such mandatory life sentences.⁷ In sentencing Mr Baker and his co offender, the trial judge, Taylor J, remarked, “I believe that you should spend the rest of your lives in gaol and there you should die. If ever there was a case where life imprisonment should mean what it says – the imprisonment for the whole of your lives – this is it”.⁸

This remark, which had “no normative legal operation”⁹ at the time it was uttered in 1974, was to come back to haunt Mr Baker almost 30 years later when he applied for a determination of the sentence passed on him in 1974.

The practice of exercising executive discretion to permit the supervised release of prisoners prior to the expiration of their sentence, known vernacularly as “tickets of leave”,¹⁰ was heavily criticised during the “truth in sentencing”¹¹ debate and was abolished in NSW in 1989.¹² It was replaced with a system of minimum terms and parole orders. Prisoners who had been sentenced prior to the 1989 reforms could apply to the NSW Supreme Court for the determination of their sentence by way of a declaration of a minimum non parole term and additional term for sentence.¹³ Mr Baker’s co offender did so successfully apply for a determination of his life sen-

⁵ Kevin Garry Crump: *see below* n 14.

⁶ Crimes Act, 1900, s 19 (NSW) (*section now repealed by* Crimes (Life Sentences) Amendment Act, 1989, (NSW)

⁷ Crimes Act, 1900, s 463 (NSW) (*section now repealed by* Prisons (Serious Offenders Review Board) Amendment Act, 1989 (NSW)

⁸ Baker v. The Queen, (2004) 210 ALR 1, 10 [26] (High Court of Australia, 2004)

⁹ Baker v. The Queen, (2004) 210 ALR 1, 31 [113] (High Court of Australia, 2004) (Kirby J); *see also* Baker v. The Queen, (2004) 210 ALR 1, 32 [114] (High Court of Australia, 2004): “the administrative authorities might take a sentencing judge’s ‘recommendation’ into account in performing their functions. They might not”.

¹⁰ Baker v. The Queen, (2004) 210 ALR 1, 10 [27] (High Court of Australia, 2004)

¹¹ Baker v. The Queen, (2004) 210 ALR 1, 6 [10] (High Court of Australia, 2004)

¹² *By the* Prisons (Serious Offenders Review Board) Amendment Act, 1989, s 5 (NSW.)

¹³ Sentencing Act, 1989, s 13A(2) (NSW.) (*now amended by* Sentencing Legislation Further Amendment Act 1997 (NSW.))

tence.¹⁴ In response, the NSW Parliament sought to restrict the ability of prisoners serving indefinite life sentences to avail themselves of the 1989 reforms and passed the *Sentencing Legislation Further Amendment Act 1997* (NSW) (“the 1997 NSW Act”). It was the amendments made by the 1997 NSW Act to the *Sentencing Act 1989* (NSW) which were the subject of constitutional challenge by Mr Baker.

Under the amendments introduced by the 1997 NSW Act, “a person who is the subject of a non release recommendation” could not apply for a minimum term and additional term until, inter alia, they could satisfy the Supreme Court of NSW that “special reasons exist that justify making the determination”.¹⁵

The 1997 NSW Act came into force on 9 May 1997. On 1 August 1997 Mr Baker applied to the Supreme Court of New South Wales for an order determining the minimum and additional terms of his life sentence. It was common ground between the parties that the remarks of Taylor J on sentencing Mr Baker in 1974 constituted a “non release recommendation” for the purposes of the 1997 NSW Act.¹⁶ Therefore, Mr Baker had to demonstrate that “special reasons existed” before he could apply for a minimum term, effectively his only hope for eventual release.

Despite the unchallenged evidence that since his incarceration at age 25¹⁷ Mr Baker had developed into an “exemplary” prisoner¹⁸ who presented as a “very good” prospect for rehabilitation,¹⁹ both the judge at first instance,²⁰ and the Court of Criminal Appeal,²¹ determined that he had not made out the existence of “special reasons” and was therefore ineligible for a determination of his life sentence.

B Fardon v Attorney General for the State of Queensland

In 2003 the Queensland Parliament passed the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (“the Queensland Act”). It conferred upon the Queensland Supreme Court the power to “provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community”²² and provided for the Attorney General to apply to the Queensland Supreme Court for the continued detention of prisoners who were nearing the end

¹⁴ Application of Kevin Garry Crump (Unreported, Supreme Court of NSW, McInerney J, 24 April 1997).

¹⁵ Sentencing Act, 1989, s 13A(3A) (NSW.) as amended by Sentencing Legislation Further Amendment Act, 1997, Sch 1, item 2 (NSW.)

¹⁶ Baker v. The Queen, (2004) 210 ALR 1, 10 [26] (High Court of Australia, 2004)

¹⁷ Mr. Baker was arrested on 13 November 1973 aged 25 and has remained in custody since his arrest: Baker v. The Queen, (2004) 210 ALR 1, 10 [25] (Gleeson CJ) (High Court of Australia, 2004)

¹⁸ R v. Baker, [2001] NSWSC 412 [109] (G R James J) (Supreme Court of New South Wales, 2001)

¹⁹ R v. Baker, [2001] NSWSC 412 [122] (Supreme Court of New South Wales, 2001)

²⁰ R v. Baker, [2001] NSWSC 412 (G R James J) (Supreme Court of New South Wales, 2001)

²¹ R v. Baker, (2002) 130 A Crim R 417 (New South Wales Court of Criminal Appeal, 2002)

²² Dangerous Prisoners (Sexual Offenders) Act, 2003, s 3, 8 (Qld.)

of their original sentence of imprisonment.²³ To fall under the purview of the Queensland Act the prisoner had to be serving a sentence with respect to a “serious sexual offence”,²⁴ defined in the Schedule to the Queensland Act as an “offence of a sexual nature involving violence or against children”.

One such prisoner was Robert John Fardon. Mr Fardon had been convicted on 30 June 1989 of offences of rape, sodomy and assault occasioning actual bodily harm for which he was sentenced to 14 years jail. Mr Fardon was due to be released on or about 30 June 2003. The Queensland Act came into force on 6 June 2003.

Prior to Mr Fardon’s scheduled release, under the terms of the Queensland Act, the Attorney General initially applied for an interim detention order²⁵ which was granted on 27 June 2003. The Attorney General ultimately applied for a final ‘indefinite detention’ order which was granted on 6 November 2003.²⁶ Mr Fardon was therefore never released, even though he had served out his sentence.

III THE *KABLE* PRINCIPLE & ITS APPLICATION IN *FARDON AND BAKER*

Both Mr Baker and Mr Fardon sought to invoke the ‘*Kable* principle’ to invalidate the relevant provisions of the NSW Act and the Queensland Act respectively.

The High Court’s 1996 decision in *Kable v DPP (NSW)*²⁷ determined that where a state legislature sought to confer powers upon a state court which was vested with Commonwealth jurisdiction pursuant to Chapter III of the Constitution, that state legislature could not confer those powers if they would have the effect of compromising the integrity of the judicial system brought into existence by Chapter III of the Constitution by being “repugnant to or incompatible with”²⁸ the exercise of federal judicial power. As put by one of the justices in the majority in *Kable*:

While nothing in Chapter III prevents a State from conferring non-judicial functions on a State Supreme Court in respect of non-federal matters, those non-judicial functions cannot be of a nature that might lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State.²⁹

²³ Dangerous Prisoners (Sexual Offenders) Act, 2003, s 8 (Qld.) (re an ‘interim detention order’) and Dangerous Prisoners (Sexual Offenders) Act, 2003, s 13 (Qld.) (re a ‘continuing detention order’)

²⁴ Dangerous Prisoners (Sexual Offenders) Act, 2003, s 5(6) (Qld.)

²⁵ Dangerous Prisoners (Sexual Offenders) Act, 2003, s 8 (Qld.)

²⁶ Attorney General for the State of Queensland v. Fardon, [2003] QSC 379 (Supreme Court of Queensland, 2003)

²⁷ *Kable v. DPP (NSW)*, (1996) 189 CLR 51 (High Court of Australia, 1996)

²⁸ *Kable v. DPP (NSW)*, (1996) 189 CLR 51, 103 (Gaudron J) (High Court of Australia, 1996); *see also* John Fairfax Publications Pty Ltd v. Attorney General (NSW.), (2000) 158 FLR 81, 88 (Speelman J)

²⁹ *Kable v. DPP (NSW)*, (1996) 189 CLR 51, 117 (McHugh J) (High Court of Australia, 1996)

The principle propounded in *Kable* represented a significant departure from the Court's previous approach that "the Commonwealth must take State Courts as it finds them".³⁰ In its immediate aftermath, *Kable* was identified by some commentators as a portal through which certain civil libertarian rights, for example a protection against retrospective punishment, could be protected under our present Constitution.³¹ In the more sombre light cast by *Fardon* and *Baker*, it appears now that those hopes were misplaced. As put by Kirby J in his dissenting judgement in *Baker*, *Kable* has so far proven to be the constitutional guard-dog that has barked but once.³²

A Baker & the Kable Principle

Mr Baker sought to invoke the *Kable* principle by arguing that the requirement of "special reasons" imposed on him by the 1997 NSW Act as a precondition for eligibility to apply for a determination of his life sentence was so "devoid of content and illusory"³³ that it was not a proper condition for the exercise of judicial power. His argument was roundly rejected by all the justices of the Court save Kirby J. In their joint majority judgement, McHugh, Gummow, Hayne and Heydon JJ refer to numerous examples where judicial power is validly exercised by reference to "imprecisely expressed criteria", akin to the qualification of "special reasons" found in the 1997 NSW Act.³⁴ In conclusion, McHugh, Gummow, Hayne and Heydon JJ expressly state that:

[i]f the provisions of the [1997 NSW Act] under challenge had been laws of the Commonwealth, they would have complied with the principles found in Chapter III of the Constitution for the exercise of federal jurisdiction by federal courts and by state courts invested pursuant to a law made under s 77(iii) of the Constitution.³⁵

Thus, Mr Baker failed the first hurdle of *Kable* invalidity as propounded in the 1998 decision of the Court in *H A Bachrach Pty Ltd v Queensland*³⁶: "[I]f the law in question ...had been a law of the Commonwealth and it would not offend have offended [the principle propounded in *Kable*], then an occasion for the application of *Kable* does not arise".³⁷

³⁰ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 63 [38] (McHugh J) (High Court of Australia, 2004)

³¹ See, e.g. Mirko Bagaric & Tanya Lalic, *Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation after Kable*, 23 CRIMINAL L. J. 145, 154-8 (1999); James Miller, *Criminal Cases in the High Court of Australia*, 21 CRIMINAL L. J. 92, 99-103 (1997)

³² *Baker v. The Queen*, (2004) 210 ALR 1,17 [54] (High Court of Australia, 2004)

³³ *Baker v. The Queen*, (2004) 210 ALR 1, 6 [11] (Gleeson CJ) (High Court of Australia, 2004)

³⁴ *Baker v. The Queen*, (2004) 210 ALR 1,14 [42] (High Court of Australia, 2004); see also, *Baker v. The Queen*, (2004) 210 ALR 1, 7 [13] (Gleeson CJ) (High Court of Australia, 2004)

³⁵ *Baker v. The Queen*, (2004) 210 ALR 1, 9-10 [24] (High Court of Australia, 2004)

³⁶ *H A Bachrach Pty Ltd v. Queensland*, (1998) 195 CLR 547 (High Court of Australia, 1998)

³⁷ *H A Bachrach Pty Ltd v. Queensland*, (1998) 195 CLR 547, 562 (High Court of Australia, 1998).

The other two majority justices, Gleeson CJ and Callinan J, whilst adopting similar reasoning to the joint majority judgement, reduce Mr Baker's argument to a necessary assertion that the determination of special reasons under the 1997 NSW Act must be impossible to fulfil and therefore a "charade"³⁸ or "a futility"³⁹ for the 1997 NSW Act to attract the possible operation of the *Kable* principle. They conclude that "[t]here is real content"⁴⁰ in the criteria of "special reasons" contained in the 1997 NSW Act.

B Fardon & the *Kable* principle

The majority justices, Callinan and Heydon JJ in a joint judgement and Gleeson CJ, Gummow and McHugh JJ in separate judgements, all find that there are substantial differences between the provisions of the Queensland Act and the legislation which was invalidated in *Kable*. In traversing the scheme established by the Queensland Act, they place particular emphasis on its provisions for the application of the laws of evidence and an adversarial system, with an onus upon the Attorney General to establish "by acceptable, cogent evidence to a high degree of probability"⁴¹ that the prisoner is a "serious danger to the community".⁴² The virtue of these provisions contrasts with the vice of the legislation invalidated in *Kable*. Thus:

[n]othing in the [Queensland] Act gives any ground for concluding that it impairs the institutional capacity of the Supreme Court to exercise federal jurisdiction...[n]othing in the [Queensland] Act might lead a reasonable person to conclude that the Supreme Court of Queensland, when exercising federal jurisdiction, might not be an impartial tribunal free of governmental or legislative influence or might not be capable of administering invested federal jurisdiction according to law.⁴³

Of all the majority judgements, the joint judgement of Callinan and Heydon JJ provides the most sweeping endorsement of the contested provisions of the Queensland Act. Their Honours characterise the Queensland Act as "protective" of the community rather than "punitive"⁴⁴ and conclude that the Act bears "the hallmarks of traditional judicial forms and procedure".⁴⁵ They maintain that the predictive

³⁸ Baker v. The Queen, (2004) 210 ALR 1, 6 [11], 9 [19] (Gleeson CJ) (High Court of Australia, 2004)

³⁹ Baker v. The Queen, (2004) 210 ALR 1, 49 [177] (Callinan J) (High Court of Australia, 2004)

⁴⁰ Baker v. The Queen, (2004) 210 ALR 1, 49 [177] (Callinan J) (High Court of Australia, 2004)

⁴¹ Dangerous Prisoners (Sexual Offenders) Act, 2003, s 13(3) (Qld.); see also s 30(2)(b) re 'annual reviews'.

⁴² Dangerous Prisoners (Sexual Offenders) Act, 2003, s 13(1) (Qld.)

⁴³ Fardon v. Attorney General for the State of Queensland, (2004) 210 ALR 50, 62 [35] (McHugh J) (High Court of Australia, 2004)

⁴⁴ Fardon v. Attorney General for the State of Queensland, (2004) 210 ALR 50, 109 [216], 110 [219] *cf* Hayne J who opines that 'no sharp line can be drawn between...detention that is punitive and detention that is not' (Fardon v. Attorney General for the State of Queensland, (2004) 210 ALR 50, 103 [195] (High Court of Australia, 2004)); see also Fardon v. Attorney General for the State of Queensland, (2004) 210 ALR 50, 74 [82] (Gummow J) (High Court of Australia, 2004)

⁴⁵ Fardon v. Attorney General for the State of Queensland, (2004) 210 ALR 50, 110 [220] (High Court of Australia, 2004)

process involved in the decision whether or not to make a preventive detention order is not, in itself, foreign to the judicial process: it is relevant to the legitimate sentencing objective of protection of the community⁴⁶ as well as akin to such established exercises of judicial power as an assessment of damages for future losses.⁴⁷ Although they caution that the Court should be “vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes”,⁴⁸ they do not make it clear exactly what might constitute “illegitimate purposes”, nor on what constitutional basis such forms of “non-punitive” detention could be invalidated.

During the course of the *Fardon* litigation, the Commonwealth Attorney General successfully sought leave to intervene to argue, pursuant to the Court’s 1998 decision in *Bachrach*,⁴⁹ that, even if the Commonwealth had passed legislation comparable to the Queensland Act, it would not be invalid as offending Chapter III of the Constitution. Gummow J is the only majority justice who expressly rejects this submission.⁵⁰ He does so on the basis that the powers conferred by the Queensland Act do not flow from the sentencing process, and that powers of involuntary detention of citizens conferred by the Commonwealth Parliament to Chapter III courts are only valid “ ‘exceptional cases’ aside...as a consequential step in the adjudication of criminal guilt of that citizen for past acts”.⁵¹

Gummow J observes that the notion of repugnancy expounded in *Kable* is “insusceptible of further definition in terms which necessarily dictate future outcomes”.⁵² He finds that the Queensland Act is not repugnant in the *Kable* sense because it does not confer on the Queensland Supreme Court functions which are closely connected with the legislature or executive of Queensland. He finds that the processes provided for in the Queensland Act “ameliorate what otherwise would be the sapping of the institutional integrity of the [Queensland] Supreme Court”⁵³: the Queensland Act utilises a legitimate factum for its operation, that factum being connected with an anterior finding of criminal guilt “by the usual judicial process” with respect to a serious sexual offence,⁵⁴ and adopts a judicial process in its opera-

⁴⁶ See, e.g. *Veen v. The Queen* [No 2], (1988) 164 CLR 465 (High Court of Australia, 1988)

⁴⁷ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 112 [226] (High Court of Australia, 2004)

⁴⁸ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 109 [217] (High Court of Australia, 2004)

⁴⁹ *H A Bachrach Pty Ltd v. Queensland*, (1998) 195 CLR 547 (High Court of Australia, 1998)

⁵⁰ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 71 [69] (High Court of Australia, 2004)

⁵¹ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 74 [80] (High Court of Australia, 2004)

⁵² *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 79 [104] (High Court of Australia, 2004)

⁵³ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 76 [90] (High Court of Australia, 2004)

⁵⁴ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 80 [108] (High Court of Australia, 2004)

tions, including an annual review of any extant order.⁵⁵ Significantly, he does warn that “a legislative choice of a factum of some other character may well have imperilled the validity of section 13 [of the Queensland Act]”.⁵⁶

C *The Dissenting Judgements Of Kirby J*

Kirby J’s lengthy dissenting judgements may be reduced to three central propositions: (i) that the *Kable* principle must be interpreted expansively (i.e. there is only a “limited field of difference” between Federal Courts and State Courts;⁵⁷ (ii) that the *Kable* principle must be interpreted consonant with ‘traditional’ notions of judicial power; and (iii) that in determining the constitutional validity of legislation by reference to the *Kable* principle, one must refer to the substance of the legislation rather than its form.

1 *Kirby J in Fardon*

Kirby J contends that the Queensland Act satisfies the *Kable* test for repugnancy because it provides for a form for civil commitment that is unknown to the law. He is not persuaded by the semblance of the Queensland Act which expressly posits the object of protection of the community, and instead looks at the substance of the orders provided for in the Act as being punitive in nature. Therefore, they offend against common law principles of double jeopardy and retrospective punishment.⁵⁸ He also argues that, although the legislation is not expressly *ad hominem*, it is highly selective in its application, which makes it “inconsistent with the traditional judicial process”.⁵⁹

2 *Kirby J in Baker*

Kirby J argues that once stripped of its semblance of orthodox judicial process, the NSW Act is clearly in substance *ad hominem* legislation that is directed at a tiny and specific class of approximately ten New South Wales prisoners remaining in the New South Wales prison system, who were subject to indeterminate life sentences passed prior to the 1989 reforms. In making this argument, he is assisted by some of the predictable rhetoric of the New South Wales politicians who debated

⁵⁵ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 80-1 [110]-[113] (High Court of Australia, 2004)

⁵⁶ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 80 [108] (High Court of Australia, 2004)

⁵⁷ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 88 [144] (High Court of Australia, 2004)

⁵⁸ And are also ‘contrary to the obligations assumed by Australia under the International Convention on Civil and Political Rights’: *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 101 [185] (High Court of Australia, 2004)

⁵⁹ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 98 [176] (High Court of Australia, 2004)

the legislation.⁶⁰ Most tellingly, he highlights the dubious nature of the NSW Act in his critique of the so called “non release recommendation,” which affords the factum for the restriction on Mr Baker’s eligibility to apply for a determination of his life sentence.⁶¹ As he notes, remarks, such as those made by Taylor J in 1974, were entirely arbitrary and subject to the idiosyncrasies of the individual judge.⁶²

IV CONCLUSION AND COMMENTARY

In commenting on the Court’s decisions in *Fardon* and *Baker* it is apposite to recall the Red Queen’s admonition to Alice in *Through the Looking Glass* that “it takes all the running you can do to keep in the same place”. For what is being authorised by the “conservative” majorities in their ostensible adherence to Constitutional literalism (by their timorous refusal to “run” at all with an expansive and generous interpretation of the *Kable* principle) is in fact radical new forms of detention, whether they be indeterminate life sentences with no prospect of release (*Baker*) or indefinite detention post the serving of a sentence with annual judicial review of that detention (*Fardon*), practices which were hitherto largely foreign to our legal system.⁶³ Gleeson CJ is quite correct when he observes that “[c]ourts do not operate in a politically sterile environment. They administer the law, and much law is the outcome of political action”.⁶⁴ However, in the absence of other protections, such as might be enshrined in a Bill of Rights, it is precisely in response to changes in the way governments choose to exercise power over their citizens that the High Court must be prepared to ‘run’ with principles such as that propounded in *Kable* if Australia is not to become a very different place from the nation it has been in the first hundred years since Federation. Thus it is Kirby J (commonly and mistakenly identified as a ‘radical’ judge by conservative commentators) who fights dissentiously for legal conservation, i.e. the preservation of traditional modes of the exercise of judicial power and the robust independence of the judiciary from the fervid aspirations of the various Houses of Parliaments.⁶⁵

⁶⁰ ‘Proposing legislation that is constitutionally sound is the Government’s primary objective so as not to give Crump and these nine other animals [i.e. including Mr Baker – see above, n 14] any hope for the future’: the NSW Minister for Police, quote extracted in *Baker v. The Queen*, (2004) 210 ALR 1, 19-20 [64] (Kirby J) (High Court of Australia, 2004)

⁶¹ *Baker v. The Queen*, (2004) 210 ALR 1, 31-3 [112]-[119] (High Court of Australia, 2004)

⁶² Indeed, there was some judicial authority discouraging judges from making such emotive remarks on sentence: *Baker v. The Queen*, (2004) 210 ALR 1, 32 [115] (High Court of Australia, 2004)

⁶³ *Cf. Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 75 [83] (Gummow J) (High Court of Australia, 2004)

⁶⁴ *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 57 [21] (High Court of Australia, 2004)

⁶⁵ *See, e.g.* the extracts from the NSW Parliamentary Debates in *Baker v. The Queen*, (2004) 210 ALR 1, 18-20 [59]-[66], 45 [165] (High Court of Australia, 2004)

In interpreting the predicament of Mr Fardon one is reminded of the insights of Michel Foucault.⁶⁶ The finality of a one-off judicial sentence made with respect to past criminal guilt, an immaculate articulation of centralised “monarchical” or “classical” power,⁶⁷ has been supplanted in Mr Fardon’s case by a flexible “dif-fused” detention regime which relies on the predictions of a cabal of the usual suspects - psychiatrists and social workers - as to the likelihood of his recidivism. In a more florid, Foucaudian moment, one might even describe the latter as a nas-cent exercise in judicial “bio power”.⁶⁸ Given the commonly expressed reserva-tions as to the accuracy of professional predications of recidivism and danger,⁶⁹ one senses that Mr Fardon’s fictitious crime (as opposed to his real crime for which he has already “done his time”) is his “failure ... to participate to completion in ...courses of therapy ... [h]e has for the most part, chosen not to take some respon-sibility for his own rehabilitation and engage in appropriate treatment”.⁷⁰ He has therefore failed to display all the (post) modern indicia of remorse.⁷¹ Like Meur-sault, the antihero of Camus’ *Outsider*, Mr Fardon is being punished not for what he has done, but his public refusal to adopt social norms or expectations of how an offender should behave in the face of his crimes.

It is difficult to argue against the logic of the system of “indefinite detention” con-doned by the majority in *Fardon*; indeed it would be extraordinary if the system which was so closely aligned with the implementation of state power did not have an almost *irresistible* logic. Given that risk of recidivism is a relevant factor at the time of sentence under the rubric of the legitimate sentencing objective of protec-tion of the community, surely it makes sense to consider the risk of recidivism at the time of prospect release, as such assessments (notoriously unreliable as they

⁶⁶ A philosopher now so securely part of the mainstream that he is cited in High Court judgements. See *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 70 [63] (Gummow J) (High Court of Australia, 2004)

⁶⁷ For a discussion of Foucault’s theories on this mode of power see ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW* 43-6 (1996).

⁶⁸ See, e.g. I MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 135-45 (1978): ‘the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory’ (I MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 144 (1978)).

⁶⁹ See *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 55 [12] (Gleeson CJ); 83 [124]-[125], 96 [169] (Kirby J) (High Court of Australia, 2004); see also *Kable v. DPP(NSW)*, (1996) 189 CLR 51, 122-3 (McHugh J) (High Court of Australia, 1996)

⁷⁰ White J, the judge who determined the application for a final indefinite detention order as extracted by Gleeson CJ in *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 53 [4] (High Court of Australia, 2004)

⁷¹ Kirby J of course does not accord much weight to the new fashioned prognostications of psychologists and social workers – those ‘who do not have the gift of prophesy’: *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 103 [192] (High Court of Australia, 2004). Instead, he ultimately reposes his faith in terms redolent of Scripture – ‘the human capacity for redemption’: *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 101 [185] (High Court of Australia, 2004). Conservatives of the Christian ilk must be reassured to know that it is Kirby J, the only ‘openly’ gay man to have sat as a justice on our highest court, who, of all the current justices, has the most frequent recourse to the words of the Holy Bible: see, e.g. *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50, 100 [180] (High Court of Australia, 2004) and *Pearce v R*, [1998] 194 CLR 610, 630-1 (High Court of Australia, 1998).

are⁷²) are likely to be more accurate at this later stage? Similarly, it is difficult to argue against the notion of “flexibility” in detention: after all, “flexibility” is one of the mantras of our restructured, globalised economy/society. Why should we not replace the anachronistic practice of “once and for all” sentencing with a more modern flexible approach of indefinite detention, judicially “managed” by way of annualised review? Whilst such seductive and modish arguments conveniently ignore the gross inadequacies of supports for offenders both with and outside of prison (and leave uncriticised the normative judgments of those who provide those supports), their latent vice is their exposure of the most abject members of our community – sex offenders, murderers and their like [“animals” in the words of the Honourable NSW State Minister for Police (Labor)⁷³] – to arbitrary, wilful and inhumane treatment.

What then of Mr Baker, one member of the NSW Minister’s class of “animals”? In 1989 Mr Baker became the beneficiary of one of the few palatable fruits that has fallen from the poison tree of the perennial “Tough on Crime/Law & Order” *putsch*, that of the replacement of the old “tickets of leave” system, replete with all its opaque, Byzantine uncertainties, with the rational, transparent, juridical process of minimum sentences and parole orders. That right to seek a determination of his sentence was effectively taken away from him in 1997. It is deeply disturbing that it was done so by reference to a legally superfluous comment from a sentencing judge in 1974, a fundamentally flawed foundational “factum” upon which to erect a legal apparatus designed to thwart a prospect of liberty. In addition to the violation of rights which Mr Baker would have in many other civilised jurisdictions around the world,⁷⁴ he has, in effect, retroactively been denied natural justice and procedural fairness. At the time of his sentencing, there would have been no purpose in making a plea in mitigation, given that he was facing a mandatory sentencing regime. One can reasonably speculate that he would have had no notice that Taylor J was about to make the remark that he did, nor would he have had the opportunity prior to the making of it to provide material to the court which may have persuaded Taylor J to temper his remark, or indeed to refrain from making it.⁷⁵

Putting to one side the dissents of Kirby J, only Gummow J’s judgement in *Fardon* provides any succour to those of us concerned about our vulnerability to state sponsored incursions upon our civil liberties under our current constitutional arrangements. Gummow J’s preparedness to contemplate the invalidation of Commonwealth legislation, which purports to authorise involuntary detention disconnected from the adjudication of criminal guilt, may be useful (if picked up by other justices) in the struggle against the predicable domestic and imported excesses of the “war on terror”, given that much of the legislation bellicosely passed in the name of that nominal war has been, and will continue to be, Commonwealth legislation. Our best aspirations for the decisions of *Fardon* and *Baker* may be their

⁷² See above n 69.

⁷³ Baker v. The Queen, (2004) 210 ALR 1, 20 [64] (Kirby J) (High Court of Australia, 2004)

⁷⁴ See, e.g. Baker v. The Queen, (2004) 210 ALR 1, 30-1 [109] (Kirby J) (High Court of Australia, 2004)

⁷⁵ *Contra* Baker v. The Queen, (2004) 210 ALR 1, 46-7 [169] (Callinan J) (High Court of Australia, 2004)

unintentional reinvigoration of the campaign for the formal adoption of a Bill of Rights; such a Bill of Rights could provide recourse for our citizens, such as Mr Fardon and Mr Baker, who are subject to the persecutorial whims of our various governments in their insatiable quest (to be seen) to be “tough on crime”.