

CAN CHARTERS OF RIGHTS LIMIT PENAL POPULISM?: THE CASE OF PREVENTIVE DETENTION

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I INTRODUCTION

The question of whether charters of rights are desirable is a controversial one.¹ Those who support such instruments often point to the capacity of governments — and those who elected them — to behave tyrannically.² The implication is that charters can improve the position of minorities targeted by state action of this kind. Those who oppose human rights charters sometimes concede that governments can ‘move ... from forcefulness to tyranny’.³ But, if they do accept this, such commentators do *not* accept that such charters are effective to protect disfavoured groups against such majoritarian excesses. Indeed, the former High Court Justice, Dyson Heydon, has recently claimed that ‘[t]here are other techniques for [human rights] protection, some of which can be developed more intensely than they have been’,⁴ which are likely better to achieve their object than are instruments such as the *Human Rights Act 1998* (UK) c 42 (*‘HRA’*) and the *European Convention on Human Rights* (*‘ECHR’*).⁵

Despite these competing arguments, there is surprisingly little literature concerning whether, in jurisdictions where they have been enacted, charters of rights actually have defended despised groups against ‘the tyranny of the majority’. And so the question arises: do such charters have utility,⁶ or are they an exercise in futility?⁷ I have argued elsewhere that a comparison between UK and

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1 See, eg, Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *Yale Law Journal* 1346; Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996) ch 1; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) chs 12–13. For a recent Australian contribution, see Jeffrey Goldsworthy, ‘Losing Faith in Democracy: Why Judicial Supremacy Is Rising, and What to Do about It’ (2015) 59(5) *Quadrant* 9.

2 See, eg, Aileen Kavanagh, ‘Participation and Judicial Review: A Reply to Jeremy Waldron’ (2003) 22 *Law and Philosophy* 451, 471–2.

3 J D Heydon, ‘Are Bills of Rights Necessary in Common Law Systems?’ (2014) 130 *Law Quarterly Review* 392, 392.

4 *Ibid* 407.

5 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (*‘ECHR’*). Heydon regards both the *HRA* and the *ECHR* as being a ‘bill of rights’: Heydon, ‘Are Bills of Rights Necessary in Common Law Systems?’, above n 3, 393.

6 See Anthony Lester, ‘The Utility of the *Human Rights Act*: A Reply to Keith Ewing’ [2005] *Public Law* 249; Conor Gearty, ‘The *Human Rights Act*: An Academic Sceptic Changes His Mind but Not His Heart’ (2010) 6 *European Human Rights Law Review* 582.

7 See K D Ewing, ‘The Futility of the *Human Rights Act*’ [2004] *Public Law* 829; K D Ewing and Joo-Cheong Tham, ‘The Continuing Futility of the *Human Rights Act*’ [2008] *Public Law* 668; Joo-Cheong Tham and K D Ewing, ‘Limitations of a Charter of Rights in the Age of Counter-Terrorism’ (2007) 31 *Melbourne University Law Review* 462.

Australian law concerning irreducible life sentences⁸ and grossly disproportionate sentences⁹ indicates that human rights charters can improve protections for offenders targeted by draconian, penal populist¹⁰ legislation (legislation, that is, that treats such offenders not as ‘agent[s] capable of moral deliberation’,¹¹ but ‘as a different species of threatening, violent individuals’,¹² who have forfeited their right ‘to be treated as citizens entitled to equitable treatment’).¹³ Here, I consider laws authorising the preventive detention of offenders considered to be dangerous. Of course, the *HRA* has been in force in the UK since 2000,¹⁴ and even before then, the UK’s membership of the *ECHR* meant that its citizens’ rights were protected by a charter of rights.¹⁵ This is not so in most Australian jurisdictions. There is no constitutional or statutory charter of rights at the Commonwealth level; most states lack such a measure;¹⁶ and the Australian government often

- 8 Andrew Dyer, ‘Irreducible Life Sentences: What Difference Have the *European Convention on Human Rights* and the United Kingdom *Human Rights Act* Made?’ (2016) 16 *Human Rights Law Review* 541.
- 9 Andrew Dyer, ‘(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?’ (2016) 43 *Monash University Law Review* 195.
- 10 For some leading analyses of penal populism, see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 131–7; Nicola Lacey, *The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008); John Pratt, *Penal Populism* (Routledge, 2007); Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003).
- 11 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 17.
- 12 Garland, above n 10, 136.
- 13 Von Hirsch and Ashworth, above n 11, 86.
- 14 *HRA; Human Rights Act 1998 (Commencement No 2) Order 2000* (UK) SI 2000/1851.
- 15 As the Equality and Human Rights Commission has recorded, the UK government accepted in 1966 its citizens’ right of individual petition to Strasbourg and has a ‘generally exemplary record ... in implementing judgments of the European Court’: Alice Donald, Jane Gordon and Philip Leach, ‘The UK and the European Court of Human Rights’ (Research Report No 83, Equality and Human Rights Commission, 2012) 152 <https://www.equalityhumanrights.com/sites/default/files/83_european_court_of_human_rights.pdf>.
- 16 There is a human rights charter in only one Territory, the Australian Capital Territory (‘ACT’), and two States, Victoria and Queensland: *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘*Charter*’); *Human Rights Act 2019* (Qld); *Human Rights Act 2004* (ACT). Because of the absence in the ACT of laws authorising preventive detention, the courts in that jurisdiction have not been called upon to determine whether such legislation is compatible with the rights protected by the *Human Rights Act 2004* (ACT): Australian National University, *Human Rights Cases of the ACT* (14 February 2017) ACT Human Rights Act Portal <<https://acthra.anu.edu.au/cases/>>. Because the Queensland Act has not yet come into force, there is no relevant case law in that jurisdiction either. In *DPP (Vic) v JPH [No 2]* (2014) 239 A Crim R 543, 571–2 [130]–[131], a Victorian Supreme Court judge (T Forrest J) held that preventive detention under s 36(3) of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), as repealed by *Serious Offenders Act 2018* (Vic) s 350, did not amount to arbitrary detention contrary to s 21(2) of the *Charter*. Moreover, his Honour appeared to accept that, in some circumstances, it would be permissible for the Corrections Authorities to detain those in preventive detention alongside convicted prisoners: *DPP (Vic) v JPH [No 2]* (2014) 239 A Crim R 543, 572 [134]. In other words, he seemed to indicate that s 115(3) of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), which allowed for detention in such conditions if — among other things — this is necessary for ‘the security or good order of the prison’, was compatible with *Charter* rights. It follows from the below analysis of the UK and European case law that it is open to the Victorian courts to take a more assertive approach than this. But whether this will happen is another matter entirely: see, eg, Jeremy Gans, ‘The Charter of Law and Order’ in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017).

ignores¹⁷ United Nations Human Rights Committee ('UNHRC') findings that it has breached the *International Covenant on Civil and Political Rights* ('ICCPR').¹⁸ Have the *ECHR* and the *HRA* caused the UK law concerning preventive detention to differ in a desirable manner from that in the various Australian jurisdictions? That is what is at issue here.

This article is structured as follows. In Part II, I consider whether preventive detention is ever compatible with human rights. There is a concern that such detention is always offensive to a detainee's human dignity in that, rather than reasoning with him/her, it treats him/her both as an object to be dominated and 'an enemy to be excluded'.¹⁹ Indeed, a conception of punishment 'as moral communication'²⁰ underlies the United States ('US') Supreme Court's insistence that, 'with only narrow exceptions and aside from permissible confinements for mental illness, [our system] incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law'.²¹ That is, whereas it is respectful of a person's autonomy to detain him/her for harms that he/she has chosen to inflict, can the same be said when we detain those who are capable of choosing, but have not yet decided to offend?

We must consider, however, the responsible offender who it can be proved will commit a very serious offence if released. As argued below, *if* such proof can be supplied, and *if* no less restrictive alternative than detention would adequately deal with the threat, preventive detention seems justifiable. Nevertheless, the human dignity concerns just noted mean that such detainees must be provided with certain protections. If they are to be treated not as 'human waste',²² but as rights-bearing members of the community, then their detention must be focused on reintegration, not exclusion. This will only be so if the conditions of detention are as non-punitive as possible and opportunities are presented to detainees to achieve resocialisation. And there must be regular *judicial* review of

17 Attorney-General's Department (Cth), *Human Rights Communications* <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/HumanRightsCommunications.aspx>>; Remedy Australia, 'Follow-Up Report on Violations by Australia of ICERD, ICCPR & CAT in Individual Communications (1994–2014)' (Report, 11 April 2014).

18 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

19 John Pratt, 'Sex Crimes and the New Punitiveness' (2000) 18 *Behavioral Sciences and the Law* 135, 140. See also Robert S Gerstein, 'Capital Punishment — "Cruel and Unusual"?: A Retributivist Response' (1974) 85 *Ethics* 75, 77.

20 Von Hirsch and Ashworth, above n 11, 17.

21 *Foucha v Louisiana*, 504 US 71, 83 (1992) ('*Foucha*'). Note the similarity to the principle stated by three High Court justices in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 ('*Lim*'), namely, that 'the exceptional cases [aside] ... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'. Note also, however, that subsequent case law in both countries has demonstrated that the exceptions are in reality not as narrow or limited as claimed: see, eg, *Kansas v Hendricks*, 521 US 346 (1997) ('*Hendricks*'); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 613 [83], 633–4 [154], 653 [214] ('*Fardon*').

22 *Murray v Netherlands* (2017) 64 EHRR 3, [21] (Judge Pinto de Albuquerque) ('*Murray*'), quoting *Léger v France* (European Court of Human Rights, Second Section, Application No 19324/02, 11 April 2006) 35–6 [13] (Judge Costa).

the continuing need for detention. A system that did not provide detainees with review rights would not have a reintegrative character. Likewise, a system that did not leave such review with the judiciary would be exposing detainees to the prospect of exclusionary detention based purely on executive animus.²³

In Part III, I consider how compatible with human rights the Australian preventive detention schemes are. As with similar UK,²⁴ US,²⁵ and German²⁶ legislation, many of the Australian laws that create these schemes are classic penal populist responses. This is particularly true of reasonably recent laws²⁷ that allow courts, *while an offender is serving a sentence for a serious offence*, to order that he/she remain in prison beyond the expiry of his/her sentence. Accordingly, there has been no proper attempt to protect detainees' rights. The relevant parliamentary debates contain many 'poorly articulated claim[s] that the general public has a right to protection';²⁸ contentions that this must take precedence over offenders' rights;²⁹ and assertions that, nevertheless, an appropriate balance has been struck between the competing interests.³⁰

Immediately after contending that courts have techniques available to them that are more effective than human rights charters in protecting human rights, Dyson Heydon stated that, '[t]he separation of powers is an underrated safeguard for human rights'.³¹ But it is noteworthy that, while every challenge to Australian preventive detention has been based on Chapter III of the *Commonwealth Constitution*, only two — the attack on the truly extraordinary legislation considered in *Kable v Director of Public Prosecutions (NSW)*³² and *Attorney-General v Lawrence*³³

23 See *Fardon* (2004) 223 CLR 575, 586 [2] (Gleeson CJ), quoting *R v Moffatt* [1998] 2 VR 229, 260 (Charles JA) ('*Moffatt*'); *R v England* (2004) 89 SASR 316, 330–1, [56] (Doyle CJ) ('*England*'). Cf *McGarry v Western Australia* (2005) 31 WAR 69, 78–80 [32]–[39] (Wheeler JA) ('*McGarry*').

24 Harry Anison, *Dangerous Politics: Risk, Political Vulnerability, and Penal Policy* (Oxford University Press, 2015) 186–96.

25 See, eg, Eric S Janus, 'Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence' (2004) 34 *Seton Hall Law Review* 1233, 1234.

26 See, eg, Hans-Jörg Albrecht, 'Security Gaps: Responding to Dangerous Sex Offenders in the Federal Republic of Germany' (2004) 16 *Federal Sentencing Reporter* 200, 203; Christopher Michaelsen, "'From Strasbourg, with Love' — Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 148, 150–2.

27 See, eg, *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

28 Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 146. See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 2563 (Dianne Reilly); New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 21 735 (Chris Hartcher); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2016, 5157–8 (Michael Sukkar).

29 See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 2577 (Cate Molloy); Western Australia, *Parliamentary Debates*, Legislative Council, 14 March 2006, 274 (Sue Ellery); New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 21 732 (Andrew Humpherson).

30 See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 2576 (Carryn Sullivan); Western Australia, *Parliamentary Debates*, Legislative Council, 14 March 2006, 274 (Sue Ellery); New South Wales, *Parliamentary Debates*, Legislative Council, 30 March 2006, 21 805 (David Clarke).

31 Heydon, 'Are Bills of Rights Necessary in Common Law Systems?', above n 3, 407.

32 (1996) 189 CLR 51 ('*Kable*').

33 [2014] 2 Qd R 504 ('*Lawrence*').

— succeeded. This is unsurprising. Even where they have technically been able to do so, the Australian courts have consistently been reluctant to use Chapter III to achieve outcomes that enhance human rights protection.³⁴ Nor have their Honours been unduly timorous here. Ashworth and Zedner observe that the most high-profile of the preventive detention decisions, *Fardon*,³⁵ was ‘controversial in Australia’.³⁶ But it would have been much more so had the Court struck down the impugned law. It is understandable that, without a charter that authorises them to assess legislation’s compatibility with human rights, their Honours have been anxious to avoid creating the perception that they are willing undemocratically to substitute their views about the wisdom of such laws for those of Parliament.

To argue that the Australian courts have acted properly, however, is not to defend the legislation that they have upheld; and, in Part IV, I consider whether the English and Strasbourg courts — armed with charters that, as Lord Mance has reminded us, explicitly empower them to ‘constrain ... the activities of majorities’³⁷ — have provided greater protection to offenders against such draconian laws. The conclusion reached here is that they have. In *M v Germany*³⁸ and *Haidn v Germany*,³⁹ the European Court of Human Rights (‘ECtHR’) considered German legislation that — like the *Fardon* law — provided for preventive detention orders to be made against individuals *while they were serving sentences of imprisonment*. The Court unanimously held that this legislation breached the *ECHR*. Certainly, subsequent jurisprudence has undermined this blanket rejection of such detention.⁴⁰ Moreover, the position is more complex concerning preventive detention ordered *at the time of sentence*. Nevertheless, the European and English courts have now agreed⁴¹ that this latter type of detention will breach art 5(1) unless the state provides the offender with ‘a real opportunity for rehabilitation’⁴² once the punitive part of the sentence has expired.

In Part V, I conclude that human rights cannot be protected better in jurisdictions that lack a charter of rights than in jurisdictions where such an instrument is in force. To use Lord Bingham’s language, the ‘majoritarian’⁴³ judicial view in the former type of jurisdiction is that judges will only develop the law consistently

34 Dyer, ‘Irreducible Life Sentences: What Difference Have the *European Convention on Human Rights* and the United Kingdom *Human Rights Act* Made?’, above n 8, 559–65, 569–70; Dyer, ‘(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?’, above n 9, 211–17.

35 (2004) 223 CLR 575.

36 Ashworth and Zedner, above n 28, 167.

37 Lord Mance, ‘Destruction or Metamorphosis of the Legal Order?’ (Speech delivered at the World Policy Conference, Monaco, 14 December 2013).

38 [2009] VI Eur Court HR 169 (‘*M*’).

39 (European Court of Human Rights, Chamber, Application No 6587/04, 13 January 2011) (‘*Haidn*’).

40 See, eg, *Ilseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12, 27505/14, 4 December 2018) (‘*Ilseher*’); *Bergmann v Germany* (2016) 63 EHRR 21 (‘*Bergmann*’).

41 *Brown v Parole Board for Scotland* [2018] AC 1, 24 [44] (‘*Brown*’); *James v United Kingdom* (2013) 56 EHRR 12, [218] (‘*James*’).

42 *Brown* [2018] AC 1, 11 [8].

43 Tom Bingham, ‘The Judge as Lawmaker: An English Perspective’ in Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) 31.

with ‘public opinion’.⁴⁴ This view is reflected in the preventive detention case law, just as it is in the Australian decisions concerning irreducible life sentences and mandatory sentencing. In the latter type of jurisdiction, however, as Lord Neuberger has recently implied, the ‘boundary’⁴⁵ between legitimate and illegitimate judicial action, is different.⁴⁶ ‘[T]he values of ... society’⁴⁷ can sometimes be thwarted, if those values, however widely they are held, have resulted in legislation that tyrannises an unpopular minority. Accordingly, in the UK, unlike in Australia, preventive detention must be focused on resocialisation; and it is also clear that *the executive* has no place in reviewing the continuing need for the detention.⁴⁸

II IS PREVENTIVE DETENTION EVER COMPATIBLE WITH HUMAN RIGHTS?

Before considering whether ‘preventive detention’ is ever compatible with human rights, it is necessary to define this term. Husak’s definition — ‘any state practice of confining individuals ... to prevent them from committing future harms’⁴⁹ — is broad enough to encompass practices such as pre-trial detention; but this article’s focus is more limited than this. It is concerned solely with what a well-known Report describes as ‘indefinite detention’⁵⁰ and ‘post-sentence preventive detention’.⁵¹ In fact, though these practices are often seen as differing from one another,⁵² they are ‘[f]unctionally’⁵³ and in substance almost exactly the same thing.⁵⁴ With both, an offender is detained indefinitely beyond the period that is proportionate to the seriousness of his/her offending, because he/she is considered to be dangerous.

44 Lord Reid, ‘The Judge as Law Maker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 23.

45 *R (Nicklinson) v Ministry of Justice* [2015] 1 AC 657, 789 [101].

46 The same point is made more explicitly by Lord Dyson, ‘Are the Judges Too Powerful?’ (Speech delivered at the Bentham Association, London, 12 March 2014).

47 Justice Virginia Bell, ‘Keeping the Criminal Law in “Serviceable Condition”: A Task for the Courts or the Parliament?’ (2016) 27 *Current Issues in Criminal Justice* 335, 339.

48 Compare *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, 459–62 [47]–[49] (*‘Van Droogenbroeck’*) with *Pollentine v Bleijie* (2014) 253 CLR 629, 651 [50]–[51] (*‘Pollentine’*) and *McGarry* (2005) 31 WAR 69, 80 [39].

49 Douglas Husak, ‘Lifting the Cloak: Preventive Detention as Punishment’ (2011) 48 *San Diego Law Review* 1173, 1175.

50 Bernadette McSherry, Patrick Keyzer and Arie Freiberg, ‘Preventive Detention for “Dangerous” Offenders in Australia: A Critical Analysis and Proposals for Policy Development’ (Report to the Criminology Research Council, December 2006) 10.

51 *Ibid* 11.

52 See, eg, Christopher Slobogin, ‘A Jurisprudence of Dangerousness’ (2003) 98 *Northwestern University Law Review* 1, 33–4; Michelle Edgely, ‘Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia’ (2007) 33 *University of Western Australia Law Review* 351, 362; *A-G (Qld) v Fardon* [2003] QCA 416 (23 September 2003) [78]–[80] (McMurdo P) (*‘Fardon QCA’*).

53 Slobogin, ‘A Jurisprudence of Dangerousness’, above n 52, 33.

54 As was implied by Gleeson CJ in *Fardon* (2004) 223 CLR 575, 586 [2]. See also *Carolan v The Queen* (2015) 48 VR 87, 118 [96]–[97] (*‘Carolan’*); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 378 [66].

The only difference is that indefinite detention is ordered at sentencing, whereas post-sentence preventive detention is ordered once the offender is serving his/her sentence. So, while some regard post-sentence preventive detention as even more normatively undesirable than indefinite detention,⁵⁵ others suggest that the contrary is true because the relevant prediction's temporal proximity to the expiry of the offender's sentence might increase its accuracy.⁵⁶

When determining whether preventive detention can ever be fully consistent with human rights, it is helpful to consider why precisely irreducible life sentences and disproportionate⁵⁷ sentences are morally impermissible. For, as Judge Spano has recently suggested, just as '[t]he dignitarian conception of the human person' lies at the heart of the objectionableness of these two types of detention,⁵⁸ it also explains the offensiveness of certain forms of preventive detention.

As I have argued elsewhere,⁵⁹ irreducible life sentences treat offenders not as *persons* who are 'capable of moral understanding'⁶⁰ — and who are therefore to be reasoned with — but, rather, as *things* to be dominated.⁶¹ Similarly,⁶² the state that imposes a disproportionate sentence on an offender treats him/her not 'as a responsible agent',⁶³ but as a wild animal that lacks self-control and is therefore to 'be intimidated ... into compliance with the law'.⁶⁴

On one view, indefinite detention in prison *is* a disproportionate sentence and post-sentence preventive detention in such an environment amounts to double punishment (and so is contrary to an offender's human dignity for analogous reasons). In *Chester v The Queen*,⁶⁵ for example, the High Court treated a

55 Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Federation Press, 2009) 52.

56 *Fardon* (2004) 223 CLR 575, 586 [2] (Gleeson CJ); *Carolan* (2015) 48 VR 87, 118 [97].

57 I refer to 'disproportionate', rather than 'grossly disproportionate' sentences, because, contrary to what various courts have held, but consistently with the analysis in Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?', above n 9, 200–3, all disproportionate sentences are human rights breaches.

58 Robert Spano, 'Deprivation of Liberty and Human Dignity in the Case-Law of the European Court of Human Rights' (2016) 4 *Bergen Journal of Criminal Law and Criminal Justice* 150, 157.

59 Dyer, 'Irreducible Life Sentences: What Difference Have the *European Convention on Human Rights* and the United Kingdom *Human Rights Act* Made?', above n 8, 551–4.

60 Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993) 11.

61 Note that, as Mavranicola has pointed out, it is the state's objective treatment of such an offender that means that his/her human dignity has been attacked: Natasa Mavranicola, 'Bouyid v Belgium: The "Minimum Level of Severity" and Human Dignity's Role in Article 3 ECHR' (2017) *Cyprus Human Rights Law Review* (forthcoming); Natasa Mavranicola, 'Bouyid and Dignity's Role in Article 3 ECHR' on *Strasbourg Observers* (8 October 2015) <<https://strasbourgobservers.com/2015/10/08/bouyid-and-dignitys-role-in-article-3-echr/>>. Cf Richard L Lippke, 'Irreducible Life Sentences and Human Dignity: Some Neglected and Difficult Issues' (2017) 17 *Human Rights Law Review* 383, 384, 389–92, who seems to think that the opponents of irreducible life sentences are primarily concerned with the way in which the prisoner subjectively experiences the sentence.

62 Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?', above n 9, 201–3.

63 Ashworth and Zedner, above n 28, 19.

64 Von Hirsch, above n 60, 5.

65 (1988) 165 CLR 611, 618 ('*Chester*'). See also *Thompson v The Queen* (1999) 165 ALR 219, 220–1 (Kirby J); *McGarry v The Queen* (2001) 207 CLR 121, 141–2 [60]–[61] (Kirby J); *Buckley v The Queen* (2006) 80 ALJR 605, 607 [6] ('*Buckley*').

Western Australian (WA) provision⁶⁶ that empowered sentencing judges to direct that certain offenders be detained during the Governor's Pleasure upon the expiry of their sentences as a departure from the common law rule that a sentence not be extended, for community protection reasons, beyond what is proportionate to the seriousness of the offence.⁶⁷ And while English⁶⁸ and Canadian⁶⁹ courts have denied that an indefinite sentence is necessarily a disproportionate sentence, their reasons are unpersuasive: even if indefinite detention is proportionate to the aim of protecting the community, that would not settle the real question, which is whether it reflects the gravity of the offender's crime.

Nevertheless, the better view is that, with both indefinite detention and post-sentence preventive detention, no disproportionate sentence has been imposed. This is because the further period of detention is imposed not for past offending, but because of feared *future* wrongdoing.⁷⁰ In *Kable*, Toohey J noted that, while the relevant post-sentence preventive detention order was imposed on Mr Kable when he was serving a sentence for an offence, 'the order for his detention was not made by reason of his commission of that offence'.⁷¹ The only significance of the appellant's prior conduct was that it constituted *evidence* bearing on the real question, namely, whether he was 'more likely than not to commit a serious act of violence'.⁷² The preventive period of a sentence of indefinite detention should be characterised in the same way. It is of no moment that an order for such detention is made at sentencing.⁷³ What *is* important is that the person is placed in detention beyond the expiry of his/her 'nominal sentence'⁷⁴ not by virtue of his/her past behaviour, but because he/she 'is a serious danger to the community'.⁷⁵

It follows that the true human rights objection to both indefinite detention and post-sentence preventive detention, where the relevant period of detention is served in prison, is that the detention is arbitrary.⁷⁶ *Imprisonment* can never be proportionate to the legitimate aim of protecting the community.⁷⁷ A less intrusive measure (at least, detention in non-punitive conditions) is always available. The question arising, however, is whether, *even when it is served in non-punitive conditions*, preventive detention can ever be compatible with human rights.

66 *Criminal Code 1913* (WA) s 662(a), as repealed by *Sentencing (Consequential Provisions) Act 1995* (WA) s 26.

67 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 ('*Veen*'); *Baumer v The Queen* (1988) 166 CLR 51, 57–8.

68 *R v Offen* [2001] 2 All ER 154, 175–76 [95]–[97] ('*Offen*'); *R v Pedley* [2009] 1 WLR 2517, 2523–4 [22]–[23].

69 *Lyons v The Queen* [1987] 2 SCR 309, 341–5.

70 This does not prevent the detention from amounting to *punishment*, because there can be punishment for something other than what a person has actually or supposedly done in the past: H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2009) 5–6.

71 (1996) 189 CLR 51, 97.

72 *Ibid.*

73 Cf, eg, *Fardon* (2004) 223 CLR 575, 609–610 [70]–[74] (Gummow J), 637–8 [163]–[166] (Kirby J).

74 See, eg, *Sentencing Act 1991* (Vic) s 18A(3).

75 *Ibid* s 18B(1); *Penalties and Sentences Act 1992* (Qld) s 163(3)(b); *Sentencing Act 1995* (NT) s 65(8).

76 *ICCPR* art 9(1).

77 Assuming that that is a legitimate aim: cf *ECHR* art 5(1); *A v United Kingdom* [2009] II Eur Court HR 137, 218 [171] ('*A*').

Theorists,⁷⁸ and the US courts,⁷⁹ have traditionally returned a negative answer to this question. Their objections are founded on the disrespect for detainees' autonomy that preventive detention evinces. As Smilansky explains, 'we are not showing the respect due to the moral personality of the agent, who is ... as yet innocent, and who we must *respect as capable of not committing the offence*'.⁸⁰ The idea that emerges is that preventive detention, whether served in prison or not, attacks the detainee's human dignity, because it treats him/her not as a responsible agent, but as *something* that is unable to control itself.⁸¹

It is because of such concerns that the criminal law has generally relied on reason, not restraint. The prospective offender is addressed by the law's commands; and that is all. However likely it is that he/she will ignore those commands, he/she cannot be incarcerated until he/she does.⁸² And the person who does proceed to offend has a right to (proportionate) punishment: a failure to accord him/her this right would be to treat him/her as being beyond the reach of the reasons thus supplied for future desistance from crime.⁸³ Under this approach, the state may 'give up on deterrence'⁸⁴ — it may abandon reasoning with potential wrongdoers — only where an individual has a mental illness that makes him/her non-responsible and dangerous.⁸⁵ In *that* case, '[b]oth punishment and the threat of punishment are ineffective'⁸⁶ and the state need not act as though the person can be reasoned with, in defiance of the truth.

But what if it is proved that a mentally competent offender, if released, will commit a very serious offence? If we detain him/her before he/she is able to engage in this malign exercise of autonomy, are we really treating him/her as an object? As we have just seen, if a person *cannot* be reasoned with, we do not have to treat him/her as though he/she can. Why should the position be any different regarding the person who *will* not be reasoned with? Such an individual *is* an autonomous actor. But he/she is someone who will remain impervious to the criminal law's persuasions,⁸⁷ and surely we need not naively persist with moral appeals here — especially given that the state also has an obligation to respect potential victims' autonomy.⁸⁸

78 See, eg, Stephen J Schulhofer, 'Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws' (1996) 7 *Journal of Contemporary Legal Issues* 69, 90–6.

79 *Foucha*, 504 US 71, 83 (1992).

80 Saul Smilansky, 'The Time to Punish' (1994) 54 *Analysis* 50, 52 (emphasis in original).

81 See Carol S Steiker, 'Foreword: The Limits of the Preventive State' (1998) 88 *Journal of Criminal Law and Criminology* 771, 785.

82 Stephen J Morse, 'Preventive Confinement of Dangerous Offenders' (2004) 32 *Journal of Law, Medicine and Ethics* 56, 58.

83 Slobogin, 'A Jurisprudence of Dangerousness', above n 52, 29–30.

84 Michael Louis Corrado, 'Sex Offenders, Unlawful Combatants, and Preventive Detention' (2005) 84 *North Carolina Law Review* 77, 101.

85 *Ibid*; Morse, 'Preventive Confinement of Dangerous Offenders', above n 82, 58.

86 Corrado, 'Sex Offenders, Unlawful Combatants, and Preventive Detention', above n 84, 101.

87 Cf Slobogin's 'undeterrable' offender, to whom the criminal law does not speak: Slobogin, 'A Jurisprudence of Dangerousness', above n 52, 48.

88 Ashworth and Zedner, above n 28, 150.

Such an approach is consistent with Morse's suggestion that preventive detention of responsible agents might be acceptable as 'a limited form of self defense: The usual right to be left alone yields when the anticipated harm is very serious and we can be quite sure that the harm will occur unless preventive action is taken'.⁸⁹

Certainly, one problem is that predictions of future dangerousness are notoriously unreliable.⁹⁰ This leads Morse to contend that, at the moment, preventive detention of the merely dangerous cannot be justified.⁹¹ But other commentators suggest that at least some offenders' dangerousness can reliably be established⁹² and, if this is so, preventive detention seems justifiable — subject to two matters.

The first concerns the standard of proof. As just argued, if the state can prove that a mentally competent person will commit a very serious offence, detention might be permissible. But should the state have to prove this beyond reasonable doubt? Or is some lesser standard acceptable? Speaking in favour of the former standard is that a detention order carries grave consequences for the detainee. As Meyerson asks,⁹³ if this standard of proof must be met at a criminal trial, why would a lesser standard be warranted before a person can be detained because of his/her dangerousness? But there are at least two answers to this. First, if the preventive detention is not served in prison, the consequences are not quite as serious as they are for a convicted offender.⁹⁴ Secondly, unlike at a criminal trial, it is not just the potential detainee's liberty interest that is implicated. Rather, as suggested above, that interest must be balanced against the autonomy interest of that person's potential victims.⁹⁵ In these circumstances, it might be enough to prove that it is very likely that the person will re-offend seriously if he/she is

89 Morse, 'Preventive Confinement of Dangerous Offenders', above n 82, 69.

90 On this point, see, eg, Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) 34–52.

91 Morse, 'Preventive Confinement of Dangerous Offenders', above n 82, 69; Stephen J Morse, 'Neither Desert nor Disease' (1999) 5 *Legal Theory* 265, 302.

92 See, eg, C R Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 *Monash University Law Review* 161, 181, who refers to 'human time bombs waiting for the opportunity of exploding upon release'. See also Kjetil Mujezinović Larsen, 'Detention for Protection: Searching for a "Fair Balance" between the Restrictions on Preventive Detention and the Obligation to Protect Individuals' (2015) 1 *Oslo Law Review* 1, 14–22.

93 Denise Meyerson, 'Risks, Rights, Statistics and Compulsory Measures' (2009) 31 *Sydney Law Review* 507, 523–4.

94 *Addington v Texas*, 441 US 418, 428 (1979) (*Addington*). But note that some scholars have expressed scepticism about whether it is possible to create preventive detention conditions that are significantly different from those in prison: Richard L Lippke, 'No Easy Way Out: Dangerous Offenders and Preventive Detention' (2008) 27 *Law and Philosophy* 383, 409–413; Johannes Kaspar, 'Preventive Detention in German Criminal Law' (2016) 4 *Peking University Law Journal* 79, 95.

95 Kimberly Kessler Ferzan, 'Preventive Justice and the Presumption of Innocence' (2014) 8 *Criminal Law and Philosophy* 505, 522; Michael Louis Corrado, 'Punishment and the Wild Beast of Prey: The Problem of Preventive Detention' (1996) 86 *Journal of Criminal Law and Criminology* 778, 793–4. Meyerson argues that there is no balancing of individual and societal interests at a criminal trial because 'we do not think that the mistaken acquittal of a guilty person does ... an injustice ... even [to] those who may be harmed by that person's subsequent conduct': Meyerson, above n 93, 523. But the real reason is that the criminal trial solely tests the Crown's allegation that the accused committed an offence in the past. There is no allegation that the offender will be dangerous in the future, and therefore no weight can be attached to such a factor when determining what the standard of proof should be.

not detained.⁹⁶ If that is proved, could it not be said that the detention is an act of societal self-defence?⁹⁷ Or, to use the ECtHR's language, might there not be a known 'real and immediate risk' to life,⁹⁸ or of ill-treatment,⁹⁹ such as to oblige the state to do all that it reasonably can to avoid it?

If so, then, as suggested above, such detention would seemingly not treat the detainee as an object. Mavronicola has shown that, when state force against an individual is self-defensive, there is no affront to that individual's human dignity.¹⁰⁰ This is because, like a proportionate sentence, it is a tailored response to his/her conduct. The same seems true here. The detention *does* treat the person as being someone who will not be deterred. But, in so doing, it is only acting consistently with what has been proved by clear and convincing evidence, and thus in a manner that has 'been made strictly necessary by ... [the person's] own' established propensities.¹⁰¹

The second matter is even more fundamental. It concerns the availability of less restrictive alternatives than detention. If it is proved that it is very likely that, upon their release, certain offenders will offend very seriously if they are not *detained*, preventive detention would seem justified. But if supervision of dangerous offenders in the community would adequately protect that community against the threat, the contrary is of course true. Accordingly, the UNHRC seems right to have insisted in its *Fardon* and *Tillman* communications that post-sentence preventive detention amounts to arbitrary detention, contrary to *ICCPR* art 9(1), unless the state can demonstrate 'that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment *or even detention*'.¹⁰²

But, *if* dangerousness can be established sufficiently reliably, and *if* there are certain dangerous individuals whose supervision in the community would leave that community inadequately protected, preventive detention seems permissible. Such a practice will only be compatible with human rights, however, if certain limitations are placed on it.

As suggested above, a person should only be subject to such detention if it is proved that he/she is very likely to perpetrate a *very serious harm* if he/she is not

96 This is largely in accord with what Meyerson ultimately concludes: Meyerson, above n 93, 533.

97 The analogy that Morse draws between such a case and the case of the battered partner who kills, seems valid: Morse, 'Neither Desert nor Disease', above n 91, 303–9.

98 *Mastromatteo v Italy* (European Court of Human Rights, Grand Chamber, Application No 37703/97, 24 October 2002) 13–14 [74], citing *Osman v United Kingdom* [1998] VIII Eur Court HR 3124, 3159 [16].

99 *Milanović v Serbia* (2014) 58 EHRR 33, [84].

100 Natasa Mavronicola, 'Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer' (2017) 17 *Human Rights Law Review* 479, 486–7.

101 *Bouyid v Belgium* (2016) 62 EHRR 32, [88].

102 Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) 9 [7.4] ('*Fardon v Australia*') (emphasis added); Human Rights Committee, *Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) 11 [7.4] ('*Tillman v Australia*') (emphasis added).

detained.¹⁰³ Moreover, in practice, this is only likely to be proved if the offence for which he/she stands to be, or has been, sentenced, was itself a very grave one.¹⁰⁴ And, crucially, the detainee must be placed in non-punitive conditions (again, as noted above) and given every opportunity to achieve reintegration into the community. Thus, it is essential that his/her detention be regularly reviewed,¹⁰⁵ and it is equally essential that the review be judicial in character. Dangerous offenders are notoriously unpopular with the community. Pressure can be placed on the executive to ensure that particular offenders are never released, whatever rehabilitative gains they have made.¹⁰⁶ Executive governments will not always withstand this pressure.¹⁰⁷ Judges are better able to do so.

But it is not enough that such review rights are accorded to the detainee. For, as the ECtHR suggested in *James v United Kingdom* (*'James'*)¹⁰⁸ and observed in *Murray v Netherlands* (*'Murray'*),¹⁰⁹ a review will be meaningless unless the detainee has been given access to the rehabilitative programmes and treatment that he/she requires if he/she is to be able to establish that he/she can safely be released. As is suggested by this reference to *James* (a preventive detention case) and *Murray* (an irreducible life sentence case), when the state fails to present reasonable rehabilitative opportunities to a person in preventive detention, it attacks his/her human dignity — thus breaching his/her human rights — in the same way as it does when it imposes an irreducible life sentence on an offender.¹¹⁰ By denying the possibility of rehabilitation — whether because there are no reviews, or only empty ones — the irreducible life sentence treats the offender not as a person who is potentially to be restored to the community, but as an object that must be excluded and contained. The same treatment is accorded to the person in preventive detention whose incarceration lacks the reintegrative

103 See, eg, Ashworth and Zedner, above n 28, 168–9; Morse, 'Preventive Confinement of Dangerous Offenders', above n 82, 69; Slobogin, 'A Jurisprudence of Dangerousness', above n 52, 20.

104 Morse, 'Neither Desert nor Disease', above n 91, 298.

105 Review rights have also been said to provide regular opportunities for 'erroneous commitment[s]' to be corrected: *Addington*, 441 US 418, 428–9 (1979); and to ensure that the 'least drastic means' are used to achieve the government's goals: Christopher Slobogin, 'Legal Limitations on the Scope of Preventive Detention' in Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011) 37, 46.

106 For example, over the last few years, a media campaign has been conducted in Western Australia against the release of sex offenders detained under that State's post-sentence preventive detention scheme: see, eg, Tracy Vo, 'Why Are Sex Offenders Free to Live among Us?' *Daily Telegraph* (online), 8 December 2015 <<https://www.dailytelegraph.com.au/rendezview/why-are-sex-offenders-free-to-live-among-us/news-story/11830f1fbc7585db7255117c61b8b74e>>. The Western Australian government has reacted by tightening the regime (see, eg, Dangerous Sexual Offenders Legislation Amendment Bill 2017 (WA)). During the relevant debates, various parliamentarians have informed Parliament of their conviction that, consistently with community sentiment, such offenders should never be released: see, eg, Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 September 2017, 4098 (P A Katsambanis). See also below nn 217–35 and accompanying text.

107 See, eg, Hogg's discussion of the Queensland government's determined campaign to ensure that Robert Fardon remained in detention: Russell Hogg, "'Only a Pawn in Their Game': Crime, Risk and Politics in the Preventive Detention of Robert Fardon" (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 55.

108 (2013) 56 EHRR 12, [218], [220].

109 (2017) 64 EHRR 3, [125].

110 See Spano, above n 58, 157.

focus that is necessary if it is to ‘be genuinely capable of leading to ... [his/her] release’.¹¹¹ This is demonstrated by the operation of US civil commitment schemes for sex offenders. While the ‘sexually violent predator’ (‘SVP’) laws in many US jurisdictions are predicated on the idea that there are certain sexual offenders who must be held for treatment beyond the expiry of their sentences because they have ‘a mental abnormality or personality disorder’¹¹² that makes them dangerous, the state’s failure to provide such treatment means that ‘there are several thousand people confined to institutions with little chance of eventual freedom’.¹¹³

One final point must be made before we consider the extent to which Australian courts have required preventive detention schemes to correspond with the normative criteria just identified. The US experiment with SVP laws demonstrates that, if there is to be preventive detention of the merely dangerous, the state should be open about what it is doing. Robinson shows that, in the US, preventive detention has often been presented as being punishment for past guilt, due to the state’s reluctance to be seen as detaining mentally competent individuals before proved wrongdoing.¹¹⁴ An Australian example of this appears to be the High Court majority’s finding in *Veen v The Queen [No 2]*¹¹⁵ that a life sentence could be regarded as proportionate to the seriousness of the applicant’s manslaughter offence. The offence, their Honours remarked, ‘was particularly horrible in the manner and violence of its execution’,¹¹⁶ and closely resembled a previous crime that Veen had committed.¹¹⁷ But, as Deane J pointed out in dissent, the offender’s culpability was significantly reduced by his mental condition, which led to his successfully raising the partial defence of diminished responsibility.¹¹⁸ For this reason, his Honour seems right to have held that this did ‘not even approach the rare case in which a sentence of life imprisonment for a single offence of manslaughter could conceivably be justified’¹¹⁹ and — subject to the above — to recommend

the introduction of some acceptable statutory system of preventive restraint to deal with ... person[s] who [have] ... been convicted of violent crime and who, while

111 *Murray* (2017) 64 EHRR 3, [104].

112 *Hendricks*, 521 US 346, 352 (1997), quoting *Sexually Violent Predator Act*, Kan Stat Ann § 59-29a02(a) (1994).

113 John Petrila, ‘Sexually Violent Predator Laws: Going Back to a Time Better Forgotten’ in Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011) 63, 71. See also, eg, John Q La Fond, ‘Sexual Offender Commitment Laws in the USA: The Inevitable Failure of Misusing Civil Commitment to Prevent Future Sex Crimes’ in Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011) 51, 60; Janus, above n 25, 1237.

114 Paul H Robinson, ‘Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice’ (2001) 114 *Harvard Law Review* 1429. See also Paul H Robinson, ‘The Criminal-Civil Distinction and the Utility of Desert’ (1996) 76 *Boston University Law Review* 201.

115 (1988) 164 CLR 465, 478.

116 *Ibid.*

117 *Ibid* 468.

118 *Ibid* 494.

119 *Ibid.* The maximum sentence for manslaughter in NSW is now 25 years’ imprisonment: *Crimes Act 1900* (NSW) s 24.

not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if ... [they] were to be released ... at the end of ... a proper punitive sentence.¹²⁰

As his Honour proceeded to note,¹²¹ under such an openly preventive system, protections demanded by the preventive character of the confinement (for example, periodic review of the continuing need for detention and non-punitive conditions of detention) can be extended to detainees. This will not be so when the state claims that it is punishing.

So, Robinson seems to have been right about the undesirability of presenting preventive detention as punishment. But perhaps he was wrong about the SVP laws, which he regarded as an instance of legislatures candidly acknowledging that they were detaining the merely dangerous.¹²² In reality, such legislation appears to propagate as much dishonesty as the practices that Robinson deplors. Rather than cloaking preventive detention of the dangerous as punishment, the state cloaks it as mental illness detention¹²³ — again, so as to ensure that no perception arises that it is detaining the mentally competent without trial. As has been noted repeatedly,¹²⁴ the SVP laws are based on a contradiction. Because the relevant individuals were responsible when they offended, they were punished for such offending. But they are confined after the expiry of their sentence on the basis that they are *non*-responsible and dangerous. In fact, the person who has ‘serious difficulty in controlling behavior’¹²⁵ because of his/her psychopathy¹²⁶ or personality disorder¹²⁷ is mentally competent.¹²⁸ If he/she is dealt with as though he/she is mentally ill, he/she is at danger of being placed in an unsuitable therapeutic environment. Alternatively, if the US example is anything to go by, he/she might be denied much treatment at all in a system that, despite claiming to have a therapeutic orientation, is ruthlessly focused on incapacitation and exclusion.¹²⁹

120 *Veen* (1988) 164 CLR 465, 495.

121 *Ibid.* See also Robinson, ‘Punishing Dangerousness’, above n 114, 1446–7.

122 Paul H Robinson, ‘Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders’ (1993) 83 *Journal of Criminal Law and Criminology* 693, 715.

123 See, eg, Morse, ‘Preventive Confinement of Dangerous Offenders’, above n 82, 61, who regards as ‘a transparent failure’ the state’s claim that SVP detention is detention of the non-responsible.

124 See, eg, Stephen J Morse, ‘Fear of Danger, Flight from Culpability’ (1998) 4 *Psychology, Public Policy, and Law* 250, 258–9; John Q La Fond, ‘Sexually Violent Predator Laws and the Liberal State: An Ominous Threat to Individual Liberty’ (2008) 31 *International Journal of Law and Psychiatry* 158, 164–5; Kimberly Kessler Ferzan, ‘Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible’ (2011) 96 *Minnesota Law Review* 141, 154.

125 *Kansas v Crane*, 534 US 407, 413 (2002) (‘Crane’).

126 *Ibid.* 412.

127 *Ibid.* 413, 421; cf at 415; *Hendricks*, 521 US 346, 358 (1997).

128 As suggested by, eg, Morse, ‘Preventive Confinement of Dangerous Offenders’, above n 82, 61–2.

129 See, eg, La Fond, ‘Sexually Violent Predator Laws and the Liberal State: An Ominous Threat to Individual Liberty’, above n 124, 166–71; Petrila, above n 113, 66–72.

III THE AUSTRALIAN POSITION

A Australian Preventive Detention Laws

Australian laws that provide for preventive detention fall into three categories. First, there are laws in two states that facilitate the preventive detention of sex offenders who are either ‘incapable of ... control[ling]’,¹³⁰ or ‘incapable of controlling, or unwilling to control’,¹³¹ their sexual instincts. Such detention can be ordered either at sentencing or while the offender is serving a sentence for a qualifying offence.¹³² As with the US laws just discussed, the idea underlying this legislation is — or was¹³³ — that the sex offenders whom it targets are caused to offend by a mental illness, and therefore require therapy. Consistently with the above analysis, six High Court justices in *Pollentine v Bleijie*¹³⁴ rather understated the matter when they observed that these ideas ‘may now be disputed’. Secondly, there are laws in five Australian jurisdictions that authorise judges *at sentencing* to order the indefinite detention of those who have been convicted of certain violent or sexual offences, and who have been proved to be ‘a serious danger to the community’,¹³⁵ ‘a danger to society, or a part of it’¹³⁶ or sufficiently dangerous for their detention to be ‘warranted for the protection of the public’.¹³⁷ Thirdly, there are laws in six¹³⁸ Australian jurisdictions that allow courts, *while an offender is serving a sentence for a serious*¹³⁹ *offence* — and upon proof that he/she ‘is a

130 *Criminal Law Amendment Act 1945* (Qld) s 18(1)(a).

131 *Sentencing Act 2017* (SA) s 57(6).

132 *Criminal Law Amendment Act 1945* (Qld) ss 18(1), (3)–(4); *ibid* ss 57(2)–(3), (7).

133 Since 2005, the South Australian scheme has applied also to those who are *unwilling* to control their sexual instincts: *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA). See also the relevant second reading speech: South Australia, *Parliamentary Debates*, House of Assembly, 11 April 2005, 2274–7 (M J Atkinson, Attorney-General).

134 (2014) 253 CLR 629, 646 [29].

135 *Sentencing Act 1991* (Vic) s 18B(1); *Penalties and Sentences Act 1992* (Qld) s 163(3)(b); *Sentencing Act 1995* (NT) s 65(8).

136 *Sentencing Act 1995* (WA) s 98(2).

137 *Sentencing Act 1997* (Tas) s 19(1)(d).

138 Continuing detention orders can be imposed on ‘high risk’ sexual and violent offenders in South Australia, too, but only where the relevant offender has first been subject to a supervision order and has breached a condition of that order: *Criminal Law (High Risk Offenders) Act 2015* (SA) s 18(2).

139 In NSW, continuing detention orders can be made not only against sexual offenders, but also ‘high risk violent offenders’: *Crimes (High Risk Offenders) Act 2006* (NSW) ss 3, 4, 5C. At the Commonwealth level, such orders can be made against certain terrorist offenders: *Criminal Code Act 1995* (Cth) sch 1 s 105A.7(1). There is some doubt as to the constitutional validity of this Commonwealth legislation: *Fardon* (2004) 223 CLR 575, 608 [68] (Gummow J), 631 [145] (Kirby J); cf at 596–7 [34] (McHugh J). That is, is the detention that it authorises constitutionally permissible though it is not consequent on a finding of criminal guilt? See at 612 [80] (Gummow J); *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). See also the discussion in Andrew Lynch and Alexander Reilly, ‘The Constitutional Validity of Terrorism Orders of Control and Preventative Detention’ (2007) 10 *Flinders Journal of Law Reform* 105, 113–18, 122–3.

serious danger to the community¹⁴⁰ — to order that he/she remain in detention after the expiry of his/her sentence.¹⁴¹

B Post-Sentence Preventive Detention

Turning first to this last category of preventive detention laws, these post-sentence schemes were preceded by similar ad hominem regimes.¹⁴² In 1990, the Victorian government enacted the *Community Protection Act 1990* (Vic), which authorised the Supreme Court to order the preventive detention of one named prisoner, Gary David, who was due soon to be released.¹⁴³ Several years later, the NSW government passed its own *Community Protection Act*, which allowed for the preventive detention of Gregory Wayne Kable if the Crown could prove that, upon his release from prison, he was ‘more likely than not to commit a serious act of violence’ and it was ‘appropriate’ for the protection of the community or part of it that he remain in custody.¹⁴⁴ Both Acts were a reaction to what Fairall described as the ‘hysterical demands for action by some sections of the media and other pressure groups’.¹⁴⁵ Mr David was an unpredictable violent offender who had engaged in acts of self-mutilation while imprisoned, had a personality disorder and had threatened to perpetrate a massacre.¹⁴⁶ Mr Kable had written a number of letters while imprisoned for his wife’s manslaughter, in which he had threatened violence against those with custody of his children.¹⁴⁷ In both cases, there was public concern about what the prisoner might do if released. The NSW legislation was passed about five months before an election.¹⁴⁸

As is well-known, in *Kable*,¹⁴⁹ a High Court majority struck down the NSW Act. Contrary to what had hitherto been assumed,¹⁵⁰ it was held not to be enough that state courts remained ‘courts’ within the meaning of s 77(iii) of the *Constitution*; additionally, no function could be conferred on them, by a state Parliament, that was ‘repugnant to or inconsistent with [their] exercise ... of the judicial power

140 To cite the formulation that has been used in some jurisdictions: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(1); *Dangerous Sexual Offenders Act 2006* (WA) s 7(1); *Serious Sex Offenders Act 2013* (NT) s 6(1).

141 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(5)(a); *Dangerous Sexual Offenders Act 2006* (WA) s 17(1)(a); *Crimes (High Risk Offenders) Act 2006* (NSW) s 5C; *Serious Sex Offenders Act 2013* (NT) s 31(1); *Serious Offenders Act 2018* (Vic) s 62(1); *Criminal Code Act 1995* (Cth) sch 1 s 105A.7(1).

142 See, eg, Bernadette McSherry, ‘Indefinite and Preventive Detention Legislation: From Caution to an Open Door’ (2005) 29 *Criminal Law Journal* 94, 99–100.

143 Williams, above n 92, 162.

144 *Kable* (1996) 189 CLR 51, 62 (Brennan CJ), quoting *Community Protection Act 1994* (NSW) s 5(1), as repealed by *Statute Law (Miscellaneous Provisions) Act 2015* (NSW) sch 6 item 1.

145 Paul Ames Fairall, ‘Violent Offenders and Community Protection in Victoria — The Gary David Experience’ (1993) 17 *Criminal Law Journal* 40, 54.

146 Williams, above n 92, 162.

147 George Zdenkowski, ‘Community Protection through Imprisonment without Conviction: Pragmatism versus Justice’ (1997) 3(2) *Australian Journal of Human Rights* 8, 11.

148 *Ibid.*

149 (1996) 189 CLR 51.

150 *Ibid* 83 (Dawson J).

of the Commonwealth'.¹⁵¹ In finding that such an incompatible non-judicial function had been conferred on the NSW Supreme Court here, the majority emphasised that that court had been authorised to punish Mr Kable 'by way of imprisonment'¹⁵² without guilt¹⁵³ and by a process that was 'the antithesis of the judicial process'.¹⁵⁴ Their Honours noted the ad hominem character of the scheme,¹⁵⁵ the relaxed standard of proof (on the balance of probabilities)¹⁵⁶ and the potential use in proceedings under the Act of evidence that would normally be inadmissible.¹⁵⁷ For McHugh J, the conclusion to be drawn was that the Supreme Court had been made 'the instrument of a legislative plan ... to imprison the appellant'.¹⁵⁸ Similarly, Gummow J thought that, if it were to perform the relevant function, the judiciary would be 'apt to be seen as but an arm of the executive which implements the will of the legislature',¹⁵⁹ and public confidence in it would be sapped.¹⁶⁰

At first blush, *Kable* appears to call into question the argument presented here, namely, that in jurisdictions without charters of rights, the judiciary will develop the law only where they can be fairly sure that the press and public will support, or at least be indifferent to, the change.¹⁶¹ Here, after all, was a Court using implausible¹⁶² — or, at best, 'barely plausible'¹⁶³ — reasoning, not to avoid reaching a human rights-protective outcome,¹⁶⁴ but to promote the appellant's human rights. But this decision was controversial¹⁶⁵ — and it was around this time that the High Court's legitimacy came under threat. The 'Mason Court' had been criticised for its occasional willingness to develop the law in a manner not obviously compatible with community values.¹⁶⁶ The slightly later decision in *Wik Peoples v Queensland*¹⁶⁷ also led to claims that their Honours were willing to resolve

151 Ibid 106 (Gaudron J).

152 Ibid 122 (McHugh J). See also at 97–8 (Toohey J), 131 (Gummow J).

153 Ibid 98 (Toohey J), 107 (Gaudron J), 122 (McHugh J), 132 (Gummow J).

154 Ibid 106 (Gaudron J). See also at 98 (Toohey J), 122 (McHugh J), 134 (Gummow J).

155 Ibid 98 (Toohey J), 121 (McHugh J), 131 (Gummow J).

156 Ibid 106–7 (Gaudron J), 120, 122 (McHugh J), 131 (Gummow J).

157 Ibid 106–7 (Gaudron J), 120, 122 (McHugh J).

158 Ibid 122.

159 Ibid 134.

160 Ibid. See also at 98 (Toohey J), 107–8 (Gaudron J), 124 (McHugh J).

161 Lord Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1, 9–10.

162 Jeffrey Goldsworthy, '*Kable*, *Kirk* and Judicial Statesmanship' (2014) 40 *Monash University Law Review* 75, 75; Greg Taylor, 'Conceived in Sin, Shaped in Iniquity — The *Kable* Principle as Breach of the Rule of Law' (2015) 34 *University of Queensland Law Journal* 265, 266.

163 George Winterton, 'Justice Kirby's Coda in *Durham*' (2002) 13 *Public Law Review* 165, 168.

164 As I have noted elsewhere, the Australian courts have been known to use dubious and formalistic reasoning to ensure that a controversial, human rights-promoting outcome is not reached: Dyer, 'Irreducible Life Sentences: What Difference have the *European Convention on Human Rights* and the United Kingdom *Human Rights Act* Made?', above n 8, 569–70; Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?', above n 9, 211–15.

165 Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30 *Sydney Law Review* 100, 108.

166 See, eg, Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10 *Otago Law Review* 493.

167 (1996) 187 CLR 1.

questions that ‘ought to ... [have been] resolved politically’,¹⁶⁸ and to demands that ‘a capital C Conservative’ be appointed to the Court.¹⁶⁹ Accordingly, from at least 1998, the Court appears to have been anxious to restore the perception¹⁷⁰ that it was willing only to adjudicate and never to legislate.¹⁷¹ How was this achieved? The answer is not that the Court abandoned its lawmaking role. The law certainly did not stand still while Gleeson CJ was Chief Justice.¹⁷² Rather, when the Court developed the law, it ensured that it never did so inconsistently with ‘contemporary values’.¹⁷³ As senior judges have noted,¹⁷⁴ when judges make the law in such circumstances, no one will accuse them of activism.

*Fardon*¹⁷⁵ exemplifies the ‘Gleeson Court’s’ concern to avoid accusations that it was willing undemocratically to substitute its views about the desirability of legislation for those of Parliament. In that case, the appellant challenged the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (‘DPSOA’), which authorises the post-sentence preventive detention¹⁷⁶ of those serving a sentence for, or partly for, ‘a serious sexual offence’,¹⁷⁷ provided that it has been proved to a high degree of probability¹⁷⁸ that ‘there is an unacceptable risk that [they] ... will commit a serious sexual offence’ if released¹⁷⁹ (even under supervision).¹⁸⁰ Like the Victorian and NSW legislation just discussed, this law was enacted as an urgent response to public concern about particular prisoners; the notorious offender, Dennis Raymond Ferguson, had recently been released, and Robert Fardon’s release was imminent.¹⁸¹ Unlike that earlier legislation, however, it speaks generally, not ad hominem. Nevertheless, as Gleeson CJ noted, it raises ‘[s]ubstantial questions of civil liberty’.¹⁸² First, detention under the Act is served

168 To use Lord Sumption’s language: Lord Sumption, ‘The Limits of Law’ (Speech delivered at the 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013).

169 Fiona Wheeler and John Williams, ‘“Restrained Activism” in the High Court of Australia’ in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 19, 44.

170 As Lord Devlin noted over 40 years ago, it is even more important that judges appear to be impartial than that they are so: Devlin, above n 161, 3.

171 See, eg, Chief Justice Murray Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4.

172 Anne Twomey, ‘Book Review: *Inside the Mason Court Revolution: The High Court of Australia Transformed* by Jason L Pierce (Durham: Carolina Academic Press, 2006)’ (2007) 31 *Melbourne University Law Review* 1174, 1183–4.

173 *Dietrich v The Queen* (1992) 177 CLR 292, 319 (Brennan J).

174 Justice M H McHugh, ‘The Judicial Method’ (1999) 73 *Australian Law Journal* 37, 42–3; Acting Justice of Appeal Ronald Sackville, ‘Bills of Rights: Chapter III of the *Constitution* and State Charters’ (2011) 18 *Australian Journal of Administrative Law* 67, 77.

175 (2004) 223 CLR 575.

176 DPSOA s 13(5)(a).

177 *Ibid* s 5(6).

178 *Ibid* s 13(3)(b).

179 *Ibid* s 13(2).

180 *Ibid* s 13(5)(b), (6).

181 See, eg, Bernadette McSherry, ‘Sex, Drugs and “Evil” Souls: The Growing Reliance on Preventive Detention Regimes’ (2006) 32 *Monash University Law Review* 237, 241–2; Anthony Gray, ‘Standard of Proof, Unpredictable Behaviour and the High Court of Australia’s Verdict on Preventive Detention Laws’ (2005) 10 *Deakin Law Review* 177, 187.

182 *Fardon* (2004) 223 CLR 575, 586 [3].

in prison.¹⁸³ Secondly, this detention lacks a reintegrative focus. Although one of the Act's ostensible objects is 'to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation',¹⁸⁴ the absence of provisions concerning such care or treatment demonstrates that, really, the sole object of the scheme is to incapacitate.¹⁸⁵ Nor has the regime, *in its actual operation*, had a rehabilitative character.¹⁸⁶ Thirdly, the standard of proof is deceptively undemanding: consistently with Slobogin's observation,¹⁸⁷ a high probability of *an unacceptable risk* of sexual offending is not the same as a high probability of such future conduct.

When regard is had to the relevant parliamentary debates, it is unsurprising that these flaws exist. Some members felt that the targeted offenders had 'forfeit[ed] their rights'¹⁸⁸ and Mr Choi seemed to reflect the general mood when he said that, '[o]n balance, I will protect children rather than prisoners every time'.¹⁸⁹ Nevertheless, in *Fardon*, six justices accepted that the *DPSOA* was constitutionally valid. In so doing, their Honours emphasised the differences between this scheme and the one in *Kable*: the Act applied generally; the Court retained a discretion regarding whether to make an order and, if so, what kind of order to make; the Court had to be satisfied to a *high* degree of probability that an unacceptable risk existed; and the rules of evidence applied.¹⁹⁰ The differences between the *Fardon* and *Kable* laws were, however, not really particularly great:¹⁹¹ for example, the Court had a discretion in *Kable*, too;¹⁹² and as just noted, the standard of proof in the *DPSOA* is not very different from that in the *Community Protection Act*. Accordingly, had it wished to do so, the *Fardon* majority could have justified the opposite conclusion to that which it reached. It is submitted that a major reason why the majority Justices did not was that they wished to avoid controversy.

Indeed, one of the most interesting things about *Fardon* is the different approach taken by the majority on one hand, and Kirby J on the other. Justice Kirby presented a compelling argument against the *DPSOA* scheme, but his judgment does read like the judgment of a Court that has been empowered to interpret a charter of rights. Thus, in his opinion, the *Kable* principle should emphatically be concerned

183 *DPSOA* s 13(5)(a). See also *ibid* 640–1 [173] (Kirby J).

184 *DPSOA* s 3(b).

185 As pointed out by Kirby J: *Fardon* (2004) 223 CLR 575, 640–1 [173]. See also *ibid* s 3(a).

186 See, eg, Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface' (2013) 2 *International Journal of Criminology and Sociology* 296, 299.

187 Slobogin, 'Legal Limitations on the Scope of Preventive Detention', above n 105, 39.

188 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 2569 (Fiona Simpson).

189 *Ibid* 2573 (Michael Choi).

190 *Fardon* (2004) 223 CLR 575, 592 [19] (Gleeson CJ), 596–7 [34] (McHugh J), 656 [223], 657 [225], 657 [227], 658 [233] (Callinan and Heydon JJ).

191 See, eg, Dan Meagher, 'The Status of the *Kable* Principle in Australian Constitutional Law' (2005) 16 *Public Law Review* 182, 185; Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15, 26; Rebecca Ananian-Welsh, 'Preventive Detention Orders and the Separation of Judicial Power' (2015) 38 *University of New South Wales Law Journal* 756, 774; Gray, 'Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventive Detention Laws', above n 181, 184–8.

192 Indeed, Grove J had exercised this discretion in Mr *Kable*'s favour: *Kable* (1996) 189 CLR 51, 123.

with the protection of the ‘rights of unpopular minorities’.¹⁹³ Further, Kirby J thought that the *DPSOA*’s provision for judicial participation in (i) punishment for feared future offending,¹⁹⁴ and (ii) double and retrospective punishment for past offending,¹⁹⁵ was crucial to its invalidity.¹⁹⁶ On the other hand, Gleeson CJ was keen to emphasise that the point arising for decision was a ‘narrow’ one;¹⁹⁷ and both his Honour and McHugh J stressed that, without a charter of rights, the states retain a very significant amount of legislative freedom.¹⁹⁸ As the Chief Justice put it:

Plainly, the lawfulness of systems of preventive detention is considered in the light of the particular constitutional context ... In Australia, the *Constitution* does not contain any general statement of rights and freedoms. Subject to the *Constitution*, as a general rule it is for the federal Parliament, and the legislatures of the States and Territories, to consider the protection of the safety of citizens in the light of the rights and freedoms accepted as fundamental in our society.¹⁹⁹

Further, his Honour indicated why the constitutional limitation discovered in *Kable* must not apply broadly. If it did, he suggested, a perception might arise that the judiciary was ‘refus[ing] to implement the provisions of a statute upon the ground of an objection to legislative policy’.²⁰⁰ ‘[N]othing,’ he thought, ‘would be more likely to damage public confidence in the integrity and impartiality of courts’.²⁰¹

The decision in *Fardon* seems right. Judges are *understandably* anxious not to be seen to be deciding cases on personal or political, and not legal, grounds.²⁰² Once such a perception does arise, then, as Gleeson CJ observes, the judiciary’s reputation for impartiality suffers — and social stability is threatened.²⁰³ However, it is very formalistic to contend, as some judges in *Fardon* did, that detention under the *DPSOA* is non-punitive.²⁰⁴ In the Queensland Court of Appeal (‘QCA’),

193 *Fardon* (2004) 223 CLR 575, 626 [135].

194 *Ibid* 631 [148], 637–8 [163]–[166].

195 *Ibid* 632 [148], 643–5 [180]–[186].

196 *Ibid* 644–5 [184]–[186].

197 *Ibid* 586 [3].

198 *Ibid* 590 [14] (Gleeson CJ), 601 [41] (McHugh J).

199 *Ibid* 590 [14] (Gleeson CJ).

200 *Ibid* 593 [23].

201 *Ibid*. See also at 601 [42] (McHugh J).

202 A concern that has been expressed by a current member of the High Court: Justice Virginia Bell, ‘Judicial Activists or Champions of Self-Restraint: What Counts for Leadership in the Judiciary?’ (Speech delivered at the General Sir John Monash Leadership Oration, 4 August 2016); Justice Virginia Bell, ‘Examining the Judge’ (Speech delivered at the Launch of Issue 40(2) *UNSW Law Journal*, 29 May 2017).

203 Wheeler and Williams, above n 169, 44.

204 As has widely been noted: see, eg, Anthony Gray, ‘Executive Detention and the *Australian Constitution*’ (2014) 22 *Australian Journal of Administrative Law* 43, 50; Patrick Keyzer, ‘The International Human Rights Parameters for the Preventive Detention of Serious Sex Offenders’ in Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011) 25, 27–8; Patrick Keyzer, Cathy Pereira and Stephen Southwood, ‘Pre-Emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues’ (2004) 11 *Psychiatry, Psychology and Law* 244, 250; McSherry, ‘Indefinite and Preventive Detention Legislation: From Caution to an Open Door’, above n 142, 110.

the appellant had submitted that, the exceptional cases of non-punitive detention aside, *Kable* only allows a court to order detention after a finding of criminal guilt.²⁰⁵ But the majority noted that the exceptional categories are not closed²⁰⁶ and held that, because the detention here was for the legitimate non-punitive purpose of protecting the community, a new exception should be created.²⁰⁷ In the High Court, Callinan and Heydon JJ expressed their general agreement with such reasoning.²⁰⁸ After accepting that detention will only be non-punitive if it is ‘reasonably capable of being seen as necessary for a legitimate non-punitive objective’,²⁰⁹ their Honours suggested that this test was satisfied here.²¹⁰ In so holding, they, like the QCA majority, attached significance to the Act’s stated objects, namely, ‘to ensure protection of the community and to facilitate rehabilitation’.²¹¹

Certainly, punishment involves not only deprivation and stigma, but also an intention to inflict such ‘stigmatizing deprivation’.²¹² But, just as surely, when determining whether such an intention exists, it is necessary to consider what the state is doing and not just what it says it is doing. For this reason, it is easy to accept Kirby J’s conclusion that the placement of Mr Fardon in prison, and the state’s failure to do anything to meet the law’s alleged treatment objective, meant that the detention was ‘not proportional ... to a legitimate non-punitive objective’.²¹³

Perhaps the High Court’s reluctance to look very closely at the *effects* of detention when assessing whether that detention is punitive²¹⁴ has been due to its concern not to intervene in cases such as *Fardon* where to do so might provoke claims of ‘judicial activism’.²¹⁵ As we will see, one noticeable difference between the reasoning of the Australian and Strasbourg courts is that the latter has been willing to look beyond legislative labels when deciding the same question.²¹⁶

205 *Fardon QCA* [2003] QCA 416 (23 September 2003) [23]. See also *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

206 *Fardon QCA* [2003] QCA 416 (23 September 2003) [37] (de Jersey CJ), [99] (Williams JA). As much was accepted by the High Court: *Fardon* (2004) 223 CLR 575, 613 [83] (Gummow J), 633–4 [154] (Kirby J), 647 [196] (Hayne J), 653 [214] (Callinan and Heydon JJ). See also *Kruger v Commonwealth* (1997) 190 CLR 1, 162 (Gummow J).

207 *Fardon QCA* [2003] QCA 416 (23 September 2003) [42] (de Jersey CJ), [101] (Williams JA).

208 *Fardon* (2004) 223 CLR 575, 650 [207].

209 *Ibid* 653–4 [215], quoting *Kruger v Commonwealth* (1997) 190 CLR 1, 336 (Gummow J).

210 *Fardon* (2004) 223 CLR 575, 654 [216]–[217].

211 *Ibid* 654 [216]. For similar reasons, McHugh J thought that ‘the Act is not designed to punish the prisoner’: at 597 [34].

212 Husak, above n 49, 1189.

213 *Fardon* (2004) 223 CLR 575, 641 [175] (emphasis added). For similar reasoning, see *Hendricks*, 521 US 346, 390 (1997).

214 See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 15 [28] (Gleeson CJ), 35 [82] (McHugh J), 60 [165] (Gummow J), 85 [263] (Callinan J); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 499 [21] (Gleeson CJ), 507 [53] (McHugh, Gummow and Heydon JJ), 543 [176] (Hayne J), 559 [218] (Callinan J); cf at 528 [122]–[123] (Kirby J).

215 See Bell, ‘Judicial Activists’, above n 202; Bell, ‘Examining the Judge’, above n 202.

216 As noted by Lucia Zedner, ‘Penal Subversions: When Is a Punishment Not Punishment, Who Decides and on What Grounds?’ (2016) 20 *Theoretical Criminology* 3, 11–12.

In any case, whether all of the reasoning in *Fardon* was defensible, the *DPSOA* has of course been supplemented by similar legislation in five other Australian jurisdictions. Moreover, such laws are liable to be tightened to the extent that is constitutionally permissible, not because such changes will make the community safer, but because of virulent law and order campaigns organised by irresponsible media outlets. This has been demonstrated recently in WA, where community concern following the release under supervision of the notorious sex offender, TJD, in March 2014 — and his arrest later that month for allegedly breaching a condition of his supervision order²¹⁷ — led to a review of the *Dangerous Sexual Offenders Act 2006* (WA).²¹⁸ Although this review concluded that the scheme was working largely as intended,²¹⁹ and although no one had reoffended while subject to a supervision order,²²⁰ sections of the media continued to campaign ‘for dangerous sex offenders to remain in prison, to never be released under any circumstances’.²²¹ Concerns were expressed, in particular, about the release of Alwyn Wayne Brown,²²² Patrick Alfred Dennis Comeagain,²²³ and Warren John Ugle.²²⁴ One of Ugle’s victims had created a change.org petition, ‘Stop the Release of Dangerous Sex Offenders Now’, which had gained many thousands of signatures.²²⁵ Under pressure from the Labor opposition, which had rather cynically associated itself with the vociferous supporters of change,²²⁶ the government responded by making the Act slightly more draconian than it already was; now, apart from in exceptional circumstances,²²⁷ there was to be review of continuing detention orders not annually but every two years.²²⁸

217 ‘Release of Serial WA Sex Offender TJD Prompts Legislative Review’, *ABC News* (online), 20 March 2014 <<http://www.abc.net.au/news/2014-03-20/wa-sex-offender-tjd-release-prompts-call-for-law-changes/5333340>>.

218 Department of the Attorney-General, Government of Western Australia, ‘Review of the *Dangerous Sexual Offenders Act 2006*’ (2014).

219 *Ibid.*

220 Western Australia, *Parliamentary Debates*, Legislative Council, 2 December 2015, 9224 (Michael Mischin, Attorney-General).

221 *Vo*, above n 106.

222 ‘Dangerous Sex Offender Alwyn Brown Granted Release by Supreme Court Judge in Perth’, *ABC News* (online), 15 October 2015 <<http://www.abc.net.au/news/2015-10-15/dangerous-sex-offender-released-by-supreme-court-judge/6857054>>.

223 Louise Cheer, ‘Dance of the Devil: Serial Rapist Who Carried Out a Sickening Attack on a Nine-Year-Old Girl Is Filmed DANCING as He Walks Free from Prison’, *Daily Mail Australia* (online), 27 June 2014 <<http://www.dailymail.co.uk/news/article-2672118/The-shocking-moment-man-raped-NINE-year-old-girl-pictured-dancing-walks-free-prison.html>>.

224 ‘Dangerous Sex Offender Warren Ugle to Be Released on 10-Year Supervision Order’, *Perth Now Sunday Times* (online), 24 November 2015 <<https://www.perthnow.com.au/news/wa/dangerous-sex-offender-warren-ugle-to-be-released-on-10-year-supervision-order-ng-b6b4f2d33b0ad06538905867bbe7ad25>>.

225 *Vo*, above n 106.

226 See generally Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2016, 4170–215. See also Liam Bartlett, ‘Why WA’s Dangerous Sex Offender Laws Aren’t Working’, *Perth Now Sunday Times* (online), 4 July 2016 <<https://www.perthnow.com.au/news/wa/liam-bartlett-why-was-dangerous-sex-offender-laws-arent-working-ng-fd8ca9be598b81f875cbd922b5a78ce8>>.

227 *Dangerous Sexual Offenders Act 2006* (WA) s 30.

228 However, the first such review would continue to occur one year after the continuing detention order was made: Western Australia, *Parliamentary Debates*, Legislative Council, 2 December 2015, 9225 (Michael Mischin, Attorney-General). See also *Dangerous Sexual Offenders Act 2006* (WA) s 29(2).

As is typical in these kinds of debates, the opposition supported these changes, but claimed that they did not go far enough. One of its proposals was that an offender should not be released on supervision unless he/she could prove to a high degree of probability that he/she would comply with all of the conditions attached to the supervision order.²²⁹ When it was elected to government shortly afterwards, however, it was unwilling to go quite as far as this.

The triggering event for the latest round of legislative activity in this area was the release on supervision of DAL, whom the media described as ‘[a] 67-year-old paedophile who once re-offended while being driven away from prison’.²³⁰ Under the resulting changes, offenders, if they are to be released on supervision, must prove on the balance of probabilities that they will *substantially* comply with all of the *standard* supervision order conditions.²³¹ In the ensuing debate, one thing that both parties could agree on was that, as one Liberal member put it:

Attorney-General, ... when you and I go out into the community and people talk to me about these people, as they often do, particularly when the media highlight cases like DAL, the thing that ... the average member of the community ... says to me is that these people should rot not only in prison but also in hell ...²³²

and that it was necessary for parliamentarians to do what they could to reflect such concerns. Indeed, those who feel persuaded²³³ by Waldron’s argument that the 1966 UK parliamentary debates concerning abortion law reform demonstrate ‘how rich the reasoning is in legislative debates on important issues of rights in countries without judicial review’,²³⁴ might wish to consider the execrable WA dangerous offender debates in 2016 and 2017 — and many others like them, in various jurisdictions, regarding criminal justice policy. They might conclude that much of what is said amounts to a cynical attempt to out-manoeuvre the other side; that neither side of politics can afford to make sound or sensible policy in this area; and that the relevant reforms are both irrational²³⁵ and draconian. Shortly, we will consider whether charters have been more effective than Parliaments — and Chapter III — in limiting such legislative excesses. But first we must deal with indefinite detention laws. The case law concerning the constitutionality of such measures confirms that the Australian courts have placed few limits on the practice of preventive detention.

229 Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2016, 4205 (John Quigley). A further proposal was that there be mandatory imprisonment for any breach of a condition of a supervision order, however trivial: 4290 (John Quigley).

230 ‘Dangerous WA Paedophile Walks Free Despite Being Classed “High Risk”’, *WA Today* (online), 5 September 2017 <<http://www.watoday.com.au/wa-news/dangerous-wa-paedophile-walks-free-despite-being-classed-high-risk-20170905-gyavb8.html>>.

231 *Dangerous Sexual Offenders Act 2006* (WA) s 17(3).

232 Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 September 2017, 4098 (Peter Katsambanis).

233 See, eg, James Allan, ““Do the Right Thing” Judging? The High Court of Australia in *Al-Kateb*” (2005) 24 *University of Queensland Law Journal* 1, 31–2.

234 Waldron, above n 1, 1384.

235 For instance, the 2017 WA reforms probably would not have made any difference to DAL’s case: Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 September 2017, 4142 (Liza Harvey).

C Indefinite Detention

Various High Court justices have assumed that Australian Parliaments may validly provide for indefinite detention,²³⁶ and both intermediate courts of appeal²³⁷ and the High Court²³⁸ have now confirmed the constitutional validity of such schemes. The Victorian Court of Appeal's reasoning in *Moffatt*²³⁹ and that of the South Australian ('SA') Court of Criminal Appeal in *England*²⁴⁰ was in some ways similar to that deployed in *Fardon*. As in *Fardon*, their Honours in *Moffatt* emphasised the differences between the relevant Victorian provisions and the *Kable* legislation — pointing out, in particular, that the Victorian legislation applied generally, not ad hominem.²⁴¹ But they also considered indefinite detention orders made at sentencing to be qualitatively different from post-sentence preventive detention.²⁴² In *England*, too, the court was keen to stress this last point. Just as Hayne JA in *Moffatt* had observed that 'an indefinite sentence may be imposed only upon an offender found guilty of a particular offence',²⁴³ for Doyle CJ it was significant that '[t]he regime of s 23 is closely associated with the process of sentencing the defendant'.²⁴⁴

As argued above, it seems wrong to attach such importance to *when* preventive detention is ordered.²⁴⁵ An indefinite detention order is no more or less consequent on a finding of guilt than is a detention order made some years after such a finding. But, as we will see, the UK and European courts have adopted no different approach to *this* question. For now, however, it is instructive to focus on one further aspect of Doyle CJ's reasoning in *England*. Like Gleeson CJ in *Fardon*, his Honour noted the need for judicial restraint in the controversial area of sentencing law:

Changing circumstances may warrant or call for changed approaches to sentencing. So may changing community attitudes and social values. These are largely matters for Parliament. And, at least in relation to State courts, Parliament has considerable latitude, subject only to fundamental principles or limitations. *Kable* is an illustration of one important limitation ... traceable to the requirements of the *Australian Constitution*.

236 *Veen* (1988) 164 CLR 465, 495 (Deane J); *Kable* (1996) 189 CLR 51, 98 (Toohey J), 121 (McHugh J).

237 *Moffatt* [1998] 2 VR 229; *England* (2004) 89 SASR 316; *McGarry* (2005) 31 WAR 69.

238 *Fardon* (2004) 223 CLR 575, 586 [2], 592 [20] (Gleeson CJ), 613 [83] (Gummow J), 637–8 [165] (Kirby J), 647 [196] (Hayne J), 654 [217] (Callinan and Heydon JJ).

239 [1998] 2 VR 229.

240 (2004) 89 SASR 316.

241 *Moffatt* [1998] 2 VR 229, 237 (Winneke P), 251 (Hayne JA), 258–9 (Charles JA). See also *ibid* 332 [63] (Doyle CJ).

242 *Moffatt* [1998] 2 VR 229, 237–8 (Winneke P), 251–2 (Hayne JA).

243 *Ibid* 251.

244 *England* (2004) 89 SASR 316, 327 [36].

245 See above nn 52–6, 70–5 and accompanying text.

However, I emphasise ... that the sentencing process ... is not immutable by any means. Parliament is at liberty to change it. The wisdom and merit of those changes is a matter for Parliament.²⁴⁶

That is, while the *Kable* principle must be accepted, the role that it can legitimately play is limited. In particular, that principle cannot place significant checks on sentencing policy, however unwise such policy might be.²⁴⁷ Judges must be cognisant of the need not to be seen to be striking down legislation because of *their opinions* about its merit.

In *England*, Perry J observed that if a court were empowered to order indefinite detention where release hinged ‘solely upon the will of the executive, it may well be that there would be a breach of the *Kable* principle’.²⁴⁸ In *McGarry v Western Australia*,²⁴⁹ one argument put to the WA Court of Appeal (‘WACA’) was that, under the WA indefinite detention legislation — which, unlike the Victorian and SA laws, continues to place the review power in the executive’s hands²⁵⁰ — the executive was borrowing the courts’ reputation,²⁵¹ contrary to *Kable*, by involving them in a scheme that actually provided *the executive* with a power of indefinite detention.²⁵² But Wheeler JA dismissed this submission. Under the scheme, she insisted, the Court makes a real decision to impose an indefinite sentence, ‘after a hearing, based on defined criteria’.²⁵³ Once that decision is made, it is abundantly clear that it is for the executive to determine whether to release the offender.²⁵⁴ Accordingly, executive actions were not presented as having been performed by the courts.²⁵⁵ And ‘[i]n the end’, Wheeler JA thought, the appellant’s arguments were ‘no more than objections to the policy of the legislation’.²⁵⁶ The suggestion, again, is that the courts will not often use *Kable* to limit majoritarian democracy, as this might provoke claims that the judiciary is allowing its own distaste for certain laws to divert it from faithfully applying the law.

*Pollentine*²⁵⁷ confirms that there is no constitutional obstacle at state level to the *executive* review of the continuing need for indefinite or post-sentence preventive detention.²⁵⁸ The High Court did find, however, that, properly construed, the Queensland legislation authorising the detention of sexual offenders determined

246 *England* (2004) 89 SASR 316, 328 [43]–[44].

247 As suggested by Arie Freiberg and Sarah Murray, ‘Constitutional Perspectives on Sentencing: Some Challenging Issues’ (2012) 36 *Criminal Law Journal* 335, 355, Doyle CJ’s approach here is not heterodox.

248 *England* (2004) 89 SASR 316, 334 [76].

249 (2005) 31 WAR 69.

250 *Sentencing Act 1995* (WA) s 101; *Sentence Administration Act 2003* (WA) ss 12, 12A, 27, sch 3. See also *ibid* 73–4 [8]–[10].

251 *McGarry* (2005) 31 WAR 69, 78 [33].

252 *Ibid* 78 [32]–[33].

253 *Ibid* 78 [33].

254 *Ibid*.

255 That is, the executive was not ‘cloak[ing] its’ ... work in the neutral colors of judicial action’, to use the well-known statement from *Mistretta v United States*, 488 US 361, 407 (1989), quoted in *ibid*.

256 *McGarry* (2005) 31 WAR 69, 78 [32].

257 (2014) 253 CLR 629.

258 *Ibid* 651 [50]–[51]. As noted above, there is some doubt about whether post-sentence preventive detention can be ordered compatibly with Chapter III at Commonwealth level: see above n 139.

to be incapable of controlling their sexual instincts,²⁵⁹ did not provide the executive with an *unfettered* discretion concerning whether to release an offender²⁶⁰ (if it had, it is unclear whether there would have been a *Kable* breach).

The *Pollentine* plurality suggested that, if (a) the sentencing court had been *required*, upon the plaintiffs' conviction, to detain them indefinitely; and (b) the executive then had had an unconfined discretion to determine the detention's length, the plaintiffs might have been right to say that the function of fixing the measure of punishment had been delegated to the executive.²⁶¹ But the court was *not* bound to make such an order:²⁶² even once it was satisfied that s 18 of the *Criminal Law Amendment Act 1945* (Qld) was engaged, it had a discretion concerning whether to declare the offender to be incapable of controlling his/her sexual instincts and to direct that he/she be detained at Her Majesty's pleasure.²⁶³ And the requirement that the executive release the detainee 'upon demonstration by medical opinion of the abatement of the risk of offending', made it clear that it did not 'fi[x] ... the extent of *punishment*'.²⁶⁴ In other words, while s 18(5)(b) of the Act provides that a detainee not be released until the Governor in Council is satisfied that 'it is expedient to release' him/her, it also states that such satisfaction must be based on the report of two medical practitioners. For the plurality:

by identifying the report of the medical practitioners as the foundation for the decision about what is 'expedient', the provision should be read as confining the matters which the decision maker may lawfully take into account to the matter with which those reports should deal: whether the detainee remains a person whose mental condition is such that he is incapable of exercising proper control over his sexual instincts.²⁶⁵

Contrary to the plaintiffs' submission, the Governor in Council could not lawfully take into account either 'anticipated adverse community reaction' or 'public opinion' when exercising its s 18(5)(b) power.²⁶⁶ Therefore, the detention's continuance turned on questions of dangerousness, not retribution.²⁶⁷

For similar reasons, the plurality rejected the plaintiffs' argument that there was 'cloaking' in that the sentencing court's order was 'no more than the formal authority for what is in substance an unconstrained executive power of detention'.²⁶⁸ The executive's discretion was constrained in the manner just

259 *Criminal Law Amendment Act 1945* (Qld) s 18.

260 *Pollentine* (2014) 253 CLR 629, 646–8 [32]–[39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

261 *Ibid* 649–50 [43]–[45]. See also, eg, *Hinds v The Queen* [1977] AC 195, 225–7; *Browne v The Queen* [2000] 1 AC 45; *DPP (Jamaica) v Mollison* [2003] 2 AC 411, where the mandatory nature of the courts' function was crucial to the finding that there was outsourcing to the executive of the exclusively judicial function of punishing criminal guilt.

262 *Pollentine* (2014) 253 CLR 629, 649–50 [44].

263 *Criminal Law Amendment Act 1945* (Qld) s 18(3).

264 *Pollentine* (2014) 253 CLR 629, 650 [45] (emphasis in original).

265 *Ibid* 647 [34].

266 *Ibid* 647 [36].

267 *Ibid* 650 [45].

268 *Ibid* 657 [74] (Gageler J).

identified, and it was subject to judicial review.²⁶⁹ And the plurality also observed — in a manner reminiscent of *McGarry* — that no appearance was created that the release decision was made by a court.²⁷⁰

In *Lawrence*,²⁷¹ however, the QCA did strike down on *Kable* grounds legislation that purported to give the executive an unfettered and unreviewable²⁷² discretion to detain those who had originally been detained because of a judicial order under the *DPSOA*. But this legislation differed from the *McGarry* and *Pollentine* laws. Those earlier laws created a simple two-step process: a judge made an indefinite detention order, and then, at particular intervals,²⁷³ the executive reviewed the continuing need for it. Under the *Lawrence* legislation,²⁷⁴ the process was more complicated. Pursuant to the *DPSOA*, the Supreme Court would both make²⁷⁵ and review²⁷⁶ the continuing need for the relevant detention order. But if, upon the review, the court decided to discontinue the detention order,²⁷⁷ the new legislation gave the executive the power effectively to overrule the court's decision if it was satisfied that this was 'in the public interest'.²⁷⁸

This extraordinary law provides further evidence that parliaments are not always the calm deliberative bodies that some²⁷⁹ imagine them to be. Indeed, it is a classic example of penal populism: passed soon after a judicial decision to release Robert Fardon on supervision,²⁸⁰ the law, according to the Attorney-General, was aimed at reassuring the community 'that sex offenders, these predators who groom our young people, never see the light of day outside of a prison cell again'.²⁸¹

In finding that this was one of those 'exceptional' cases where legislation was invalid on *Kable* grounds, the QCA appeared to accept²⁸² the respondents' argument that the impugned law, by making the orders of the Supreme Court provisional²⁸³ — in that they were 'liable to be overruled at the whim of the executive'²⁸⁴ — damaged the appearance and reality of that Court's 'decisional independence'.²⁸⁵ To use the obscure language favoured by the High Court,²⁸⁶ the

269 Ibid 650 [47].

270 Ibid.

271 [2014] 2 Qd R 504.

272 Within the limits imposed by *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531. See *ibid* 521–2 [19].

273 *McGarry* (2005) 31 WAR 69, 73–4 [8]–[9]; *Criminal Law Amendment Act 1945* (Qld) s 18(8).

274 *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld).

275 *DPSOA* s 13(5)(a).

276 *Ibid* ss 27–8.

277 See *ibid* s 30.

278 *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) s 21(1).

279 See above nn 233–4 and accompanying text.

280 Hogg, above n 107, 67–8.

281 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 October 2013, 3536 (Jarrod Bleijie).

282 *Lawrence* [2014] 2 Qd R 504, 530 [41].

283 *Ibid* 523 [24], 530 [41].

284 *Ibid* 523 [24].

285 *Ibid*. Ananian-Welsh has recently observed that usually 'an unavoidable usurpation of a judge's decisional independence is required to establish invalidity' on *Kable* grounds: Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power', above n 191, 766.

286 See, eg, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 88–89 [123]–[124].

new Act's effect was that the powers vested in the Supreme Court by the *DPSOA* were 'repugnant to that [Court's] institutional integrity'.²⁸⁷

D Conclusions

Overall, however, Australian courts have been able to place very few of the limitations on preventive detention that should be placed on it. In those Australian jurisdictions without a charter of rights,²⁸⁸ indefinite detention and post-sentence preventive detention may be served *in prison* and need not have a reintegrative focus; and there is no constitutional barrier to executive review of the continuing need for such detention. So, while the 'principles ... in ... *Kable* and cases flowing from it'²⁸⁹ have sometimes been seen as carrying significant potential to check majoritarian democracy,²⁹⁰ *Kable* necessarily protects human rights far more subtly than a charter of rights does.²⁹¹ *Pollentine*, *McGarry*, and *Lawrence* illustrate the point. *Lawrence* establishes that, once a court has the power to review the continuing need for preventive detention, a further power to set aside the Court's decision cannot validly be given to the executive. But *Pollentine* and *McGarry* establish that it is unnecessary to give the review power to the court in the first place. It *might* be that, if the executive is given such a power, fetters of the type identified in *Pollentine* must be placed on the discretion thus conferred on it. If so, this is an instance²⁹² of *Kable*'s capacity quietly to insist on the existence of 'objective and reasonable safeguards'²⁹³ in legislation affecting human rights. But such a limitation might not exist. *Pollentine* does not state that legislation granting the executive an unfettered discretion would breach *Kable*; and in *McGarry* the WACA upheld legislation that did not restrict the executive to considering questions of dangerousness when deciding whether to release the detainee.²⁹⁴ And, in any case, the discretion that the Court in *Pollentine* found the executive to have is unlikely to cause it to release anyone where this might provoke an 'adverse community reaction'.²⁹⁵ As Hands argues:

287 *Lawrence* [2014] 2 Qd R 504, 530 [42].

288 With the possible exception of the Commonwealth: see above n 139.

289 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 593 [39] ('*NAAJA*').

290 Sackville, above n 174, 76–7; Mirko Bagaric, 'The Revived *Kable* Doctrine as a Constitutional Protector of Rights?' (2011) 35 *Criminal Law Journal* 197, 200–1. Both commentators did, however, accept that, as Justice Sackville put it, 'the Ch III bill of rights created by the High Court is not and can never be comprehensive': Sackville, above n 174, 79.

291 As noted by Rebecca Ananian-Welsh, '*Kuczborski v Queensland* and the Scope of the *Kable* Doctrine' (2015) 34 *University of Queensland Law Journal* 47, 62–3.

292 See also, eg, *NAAJA* (2015) 256 CLR 569, 605 [78], where five members of the majority gave the relevant legislation a 'strained' interpretation (as Gageler J put it), in justifying their conclusion that there was no *Kable* breach, thus making that legislation more compatible with human rights.

293 *International Finance Trust Co Ltd v Crime Commission (NSW)* (2009) 240 CLR 319, 379 [140] (Heydon J).

294 *Sentence Administration Act 2003* (WA) s 16, as repealed by *Parole and Sentencing Legislation Amendment Act 2006* (WA) s 14, empowered the executive to take into account a very broad range of factors when deciding to release a prisoner — including a person held under an indefinite sentence — on parole. These included the circumstances and seriousness of the offence for which the sentence had been imposed: at s 16(a), and, indeed, 'any other consideration that is or may be relevant to whether the prisoner should be released on parole': at s 16(i).

295 *Pollentine* (2014) 253 CLR 629, 647 [35]–[36].

the Executive often has a strong political incentive to prolong detention ... Acting on the advice of the Minister, the Governor is ... likely to capitalise on the indeterminate margins of risk assessment in favour of continuing detention. When consideration is also given to the fact that the Governor is not required to give reasons for [the] ... decision, it is clear how nominal and potentially ineffective the safeguards against executive abuse may be ...²⁹⁶

Furthermore, as noted above,²⁹⁷ it is open to state legislatures — in response to hysterical media campaigns — to tighten the already draconian Australian post-sentence preventive detention schemes.

In short, dehumanising preventive detention is constitutionally acceptable in Australian jurisdictions without a charter of rights. But have the *HRA* and *ECHR*'s presence in the UK resulted in greater protections for offenders against such measures?

Before answering this question, it must briefly be noted that the UNHRC's jurisprudence provides a firm indication that strong human rights guarantees *can* improve the position of such offenders. Following the dismissal of his High Court appeal, Robert Fardon argued before the UNHRC that the *DPSOA* breached arts 14(7) and 9(1) of the *ICCPR*, which, respectively, prohibit double punishment and arbitrary detention.²⁹⁸ Commenting on this claim, Keyzer and Blay made the following remarks about the differences between 19th century and 21st century attitudes to prisoners. 'Traditionally', they observed:

As a consequence of his crime, the prisoner ... 'not only forfeited his liberty, but all his personal rights ...' [But w]e have a [sic] come a long way since then. The modern view has been articulated by Justice Brennan of the US Supreme Court: '... A prisoner remains a member of the human family ...' Contemporary international human rights standards reinforce this view.²⁹⁹

The only qualification that might be made here is that it is only partly true that we have come a long way since the days when prisoners were treated as rights-less objects. The very point of penal populism is to return us to those times.³⁰⁰ But, certainly, '[c]ontemporary international human rights standards' challenge this view and can limit such irrational punitiveness.

296 Lily Hands, 'Constitutional Limitations on Detention "At Her Majesty's Pleasure": *Pollentine v Attorney-General (Qld)* [2014] HCA 30' (2015) 39(2) *University of Western Australia Law Review* 442, 447–8 (citations omitted).

297 See above nn 217–235 and accompanying text.

298 *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, 3 [1].

299 Patrick Keyzer and Sam Blay, 'Double Punishment? Preventive Detention Schemes under Australian Legislation and Their Consistency with International Law: The Fardon Communication' (2006) 7 *Melbourne Journal of International Law* 407, 423 (citations omitted).

300 A point made by Pratt, 'Sex Crimes and the New Punitiveness', above n 19, 137–40, 143–6. See also John Pratt, 'Emotive and Ostentatious Punishment: Its Decline and Resurgence in Modern Society' (2000) 2 *Punishment and Society* 417.

Indeed, as just suggested, as much is demonstrated by the UNHRC's communications in both *Fardon v Australia*³⁰¹ and *Tillman v Australia*.³⁰² In finding that the authors' detention was arbitrary, the Committee — in contrast to the opinions expressed by the QCA majority and some High Court justices in *Fardon*³⁰³ — declared flatly that '[i]mprisonment is penal in character'.³⁰⁴ Moreover, as noted above,³⁰⁵ the Committee held that even post-sentence preventive detention in a *non-punitive* environment would be arbitrary unless a State Party could demonstrate that less intrusive means would fail to achieve the legislation's treatment objective.³⁰⁶

As we will see, the UK and Strasbourg Courts have been similarly willing to find that punitive post-sentence preventive detention schemes breach human rights norms — although, like the UNHRC,³⁰⁷ they have not placed quite as many limits on indefinite detention.

IV THE EUROPEAN AND UK POSITION

A Indefinite Detention

There is a long line of Strasbourg authority that establishes that indefinite detention is compatible with art 5(1) of the *ECHR*.³⁰⁸ In *Van Droogenbroeck*,³⁰⁹ the Court explained that there is 'lawful detention of a person *after* conviction by a competent court',³¹⁰ within the meaning of art 5(1)(a), if the detention

301 UN Doc CCPR/C/98/D/1629/2007.

302 UN Doc CCPR/C/98/D/1635/2007. In this matter, Kenneth Davidson Tillman claimed that his preventive detention under the *Crimes (Serious Sex Offenders) Act 2006* (NSW) breached arts 9(1) and 14(7) of the *ICCPR*. For commentary on the *Fardon* and *Tillman* communications, see, eg, Patrick Keyzer, 'The United Nations Human Rights Committee's Views about the Legitimate Parameters of the Preventive Detention of Serious Sex Offenders' (2010) 34 *Criminal Law Journal* 283; Ian Freckleton and Patrick Keyzer, 'Indefinite Detention of Sex Offenders and Human Rights: The Intervention of the Human Rights Committee of the United Nations' (2010) 17 *Psychiatry, Psychology and Law* 345; Bernadette McSherry, 'Post-Sentence Incapacitation of Sex-Offenders and the Ethics of Risk Assessment' in Marijke Malsch and Marius Duker (eds), *Incapacitation: Trends and New Perspectives* (Ashgate, 2012) 77, 81–4.

303 See above nn 204–11 and accompanying text.

304 *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, 8 [7.4]; *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007, 10 [7.4].

305 See above n 102 and accompanying text.

306 *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, 9 [7.4]; *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007 11 [7.4].

307 Human Rights Committee, *Views: Communication No 1090/2002*, 79th sess, UN Doc CCPR/C/79/D/1090/2002 (6 November 2003) ('*Rameka v New Zealand*'). In *Rameka v New Zealand*, the majority of the Committee held that indefinite detention imposed at the time of sentence was not arbitrary: at [7.2], though four members (Mr Bhagwati, Ms Chanet, Mr Ahanhanzo and Mr Yrigoyen), correctly in my view, thought that there *had* been a breach of art 9(1), because, as with post-sentence preventive detention in prison, a penalty had been imposed because of what the authors might do, and not on the basis of what they had done.

308 See, eg, *Van Droogenbroeck* (1982) 4 EHRR 443, 454–58 [34]–[42]; *Weeks v United Kingdom* (1988) 10 EHRR 293, 308–13 [41]–[53] ('*Weeks*'); *Eriksen v Norway* (2000) 29 EHRR 328, 348 [78]; *M* [2009] VI Eur Court HR 169, 202–3 [93]–[96]; *James* (2013) 56 EHRR 12, [197].

309 (1982) 4 EHRR 443.

310 *ECHR* art 5(1) (emphasis added).

‘result[s] from, “follow[s] and depend[s] upon” or occur[s] “by virtue of” the conviction’,³¹¹ and it has repeatedly been made clear that such a causal connection exists where an offender, due to his/her apparent dangerousness, is imprisoned either indefinitely or for longer than is proportionate to the seriousness of his/her offending, and then is held in prison after his/her proportionate sentence has expired because of the threat that he/she has been proved to pose.³¹² It should be clear by now that, in my opinion, however pragmatic such an approach is,³¹³ this analysis seems wrong. Again, it is *not* because of the conviction that the offender is detained after the expiry of the punitive part of his/her sentence. Rather, he/she is detained because of fears concerning future wrongdoing. The conviction merely forms part of the evidential basis for such fears.

One consequence of this acceptance that the preventive part of a sentence of indefinite detention comes ‘after’ a finding of guilt is that this part of the sentence can be served in *prison*. But, as stated in a series of European and UK decisions, such detention does have to have a reintegrative focus. The textual basis for this is the word ‘lawful’ in art 5(1)(a).³¹⁴ This requires not merely that the ‘detention of a person after conviction’ be in accordance with national law,³¹⁵ but also that there ‘be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention’.³¹⁶ Thus it is guaranteed that such detention is consistent with art 5’s purpose, which is to ‘protect ... the individual from arbitrariness’.³¹⁷ So, just as, for example, detention of a person as a psychiatric patient will only be ‘*lawful* detention of a person ... of unsound mind’ within art 5(1)(e) ‘if effected in a hospital, clinic or other appropriate institution authorised for that purpose’,³¹⁸ *James* establishes that, during the preventive part of an indefinite sentence, ‘regard must be had to the need to encourage the rehabilitation of ... offenders’³¹⁹ — and the UK Supreme Court has now accepted

311 *Van Droogenbroeck* (1982) 4 EHRR 443, 454 [35].

312 See, eg, *M* [2009] VI Eur Court HR 169, 202–3 [93]–[96]; *James* (2013) 56 EHRR 12, [197].

313 For instance, if another approach were taken, the preventive part of the English life and Her Majesty’s Pleasure sentences would not be covered by art 5(1)(a): cf *Weeks* (1988) 10 EHRR 293; *V v United Kingdom* [1999] IX Eur Court HR 111; *Stafford v United Kingdom* [2002] IV Eur Court HR 115 (*‘Stafford’*).

314 *ECHR* art 5(1)(a) provides that one circumstance where a person may be deprived of his/her liberty is where such detention is ‘the *lawful* detention of a person after conviction by a competent court’ (emphasis added).

315 *Saadi v United Kingdom* [2008] I Eur Court HR 31, 61 [67] (*‘Saadi’*).

316 *Ibid* 62 [69].

317 *Ibid* 61 [67].

318 *Ashingdane v United Kingdom* (1985) 7 EHRR 528, 543 [44] (emphasis added); *Aerts v Belgium* (2000) 29 EHRR 50, 71 [48].

319 (2013) 56 EHRR 12, [218].

that, unless ‘a real opportunity for rehabilitation’³²⁰ is provided then, the detention will be arbitrary and therefore unlawful.³²¹

James concerned the indeterminate sentence for public protection (‘IPP sentence’), which was provided for by s 225 of the *Criminal Justice Act 2003* (UK) c 44. Introduced by New Labour in response to media concern about dangerous offenders — and under pressure to appear to be ‘tough on crime’³²² — this sentence ‘radically altered’³²³ the way in which such offenders were treated. Upon a person’s conviction for a ‘serious offence’, the sentencing court was required³²⁴ to impose an indefinite sentence on him/her if it found that there was ‘a significant risk to members of the public of serious harm occasioned by the commission by him/[her] of further specified offences’.³²⁵ The problem was that, partly because an IPP sentence was mandatory if the statutory criteria were satisfied,³²⁶ many such sentences were awarded, sometimes with short tariffs, and the Secretary of State failed to provide detainees with access to courses that they needed to complete if (a) the causes of their offending behaviour were to be addressed; and (b) they were to persuade the Parole Board that they were no longer dangerous.³²⁷ ‘The undoubted consequence’ was that

a number of short tariff IPP prisoners, once their tariff dates expired, even assuming that they were then safe to release, would have been unable to demonstrate this to the Board ... and that a further number remained unsafe because they had not had the opportunity to undergo courses to eliminate or at least reduce the risk they posed.³²⁸

320 *Brown* [2018] AC 1, 11 [8].

321 *Ibid* 24 [45]. Until *Brown*, the Supreme Court had disputed the Strasbourg Court’s analysis insofar as, under it, the obligation to provide real rehabilitative opportunities during the post-tariff period of the sentence *arises from art 5(1)(a)*. If this were so, their Lordships reasoned, a failure to provide the detainee with such opportunities would render the detention unlawful, and *ECHR* art 5(4) contemplates that anybody who is unlawfully detained must be released, however dangerous he/she might be: *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344, 1363–4 [22]–[23], 1367–9 [30]–[35] (‘*Kaiyam*’). See also *Re Corey* [2014] AC 516, 534–6 [62]–[69]. Their Lordships in *Kaiyam* did, however, accept ‘that the state is under a duty to provide an opportunity reasonable in all the circumstances for such a prisoner to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public’: *Kaiyam* [2015] AC 1344, 1369 [36]. But they found that such a duty should ‘be implied as part of the overall scheme of article 5, read as a whole’ and, if breached, should sound in damages rather than affecting the lawfulness of the detention: at 1369 [38].

322 See, eg, the discussion in *Annisson*, above n 24, 41–9.

323 *R (Walker) v Secretary of State for Justice* [2010] 1 AC 553, 615 [92] (Lord Judge CJ) (‘*Walker*’).

324 *Criminal Justice Act 2003* (UK) c 44, s 225(3), as repealed by *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) c 10, s 123(a).

325 *Criminal Justice Act 2003* (UK) c 44, s 225(1). See also *Walker* [2010] 1 AC 553, 615 [92]–[93] (Lord Judge CJ).

326 *R v Docherty* [2017] 1 WLR 181, 187 [11].

327 Jessica Jacobson and Mike Hough, ‘Unjust Deserts: Imprisonment for Public Protection’ (Report, Prison Reform Trust, 2010) 9.

328 *Walker* [2010] 1 AC 553, 597 [26] (Lord Brown).

When the matter reached it,³²⁹ the ECtHR insisted that, once detention is based purely on the danger to the community that the detainee is thought to pose, ‘a concern may arise ... if there are no special measures, instruments or institutions in place — other than those available to long-term prisoners — aimed at reducing the danger they present and at limiting the duration of their detention to what is strictly necessary’.³³⁰ This did not mean that the state was required to give the applicants ‘immediate access to’ the necessary courses; but they did have ‘to be provided with reasonable opportunities to undertake [such] courses’.³³¹ Likewise, any delays caused by a lack of resources had to be ‘reasonable in all the circumstances of the case’.³³²

This is consistent with the ECtHR’s constant recent emphasis on the importance of ensuring ‘that all detention ... [is] managed so as to facilitate the reintegration’³³³ of detainees into the community;³³⁴ and its emphatic rejection of the notion that prisoners forfeit their Convention rights simply because they have been detained following a criminal conviction.³³⁵ The Court has repeatedly insisted that detention must be compatible with prisoners’ human dignity. It has thus challenged, and sought to undermine, penal populism’s claim that, to use Judge Pinto de Albuquerque’s language in *Öcalan v Turkey [No 2]*, the criminal offender is ‘an animal ... [that is] “ ... beyond rehabilitation”’.³³⁶

This is shown by *Murray*,³³⁷ which involves closely analogous issues to those in *James*, and reinforces the point that prisoners detained because of their apparent dangerousness must be granted real opportunities to achieve resocialisation.³³⁸

329 In *Walker* [2010] 1 AC 553, the House of Lords had unanimously held that there had been no breach of Convention rights. The Strasbourg Court’s willingness to find that there *had* been a breach of art 5(1) is surely another instance of that Court’s willingness to push the UK courts beyond an excessively narrow view of the scope of Convention rights: see in this regard *Mance*, above n 37. That is — especially in light of the UK Supreme Court’s reversal, in *Kaiyam* [2015] AC 1344 and *Brown* [2018] AC 1, of its stance in *Walker* — *James* cannot be dismissed as just another case where Strasbourg ‘has misapplied the Convention’: Heydon, ‘Are Bills of Rights Necessary in Common Law Systems?’, above n 3, 404.

330 *James* (2013) 56 EHRR 12, [194].

331 *Ibid* [218].

332 *Ibid*.

333 *Vinter v United Kingdom* [2013] III Eur Court HR 317, 347 [115] (‘*Vinter*’), quoting *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules* (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies) r 6. As Van Zyl Smit and Snacken have observed, the Committee of Ministers, the Committee for the Prevention of Torture and the ECtHR have worked in tandem to require states’ penal policies to be aimed at resocialising prisoners: Dirk Van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press, 2009) 375–6.

334 See, eg, *Khoroshenko v Russia* [2015] IV Eur Court HR 391, 373–4 [121]–[122], 379–80 [144]–[145]; *Harackiev and Tolumov v Bulgaria* [2014] III Eur Court HR 391, 445–6 [264]–[265]; *Vinter* [2013] III Eur Court HR 317, 346–7 [112]–[115]; *Dickson v United Kingdom* [2007] V Eur Court HR 99, 127 [75]. See also Sonja Snacken, ‘Resisting Punitiveness in Europe?’ (2010) 14 *Theoretical Criminology* 273, 283–5.

335 See, eg, *Hirst [No 2] v United Kingdom* [2005] IX Eur Court HR 187, 211–12 [69]–[70].

336 (European Court of Human Rights, Chamber, Application Nos 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014) [8].

337 (2017) 64 EHRR 3.

338 *Ibid* [102].

In *Murray*, the Grand Chamber held that a life sentence will only be de facto reducible, as required by *Vinter*,³³⁹ if reviews of the continuing need for detention are ‘genuinely capable of’ leading to the prisoner’s release.³⁴⁰ That, in turn, will only be so where states detain life sentence prisoners under such conditions and provide them with such treatment as to give them ‘a realistic opportunity to rehabilitate themselves in order to have a hope of release’.³⁴¹ In the applicant’s case, the state had not fulfilled its obligations. Like the applicants in *James*, he had been left in a position where it was impossible for him to show ‘that he had made such significant progress towards rehabilitation that his continued detention would no longer serve any penological purpose’.³⁴²

So, although the European and UK courts have insisted that ‘it will be rare’³⁴³ that a state will breach art 5(1) because of its delay in providing prisoners with access to rehabilitative opportunities, *James* and *Murray* do provide some evidence that charters of rights can improve the position of those affected by penal populist measures. Certainly, detention under legislation such as the *DPSOA* lacks the sort of reintegrative focus that Strasbourg has insisted upon.³⁴⁴

Furthermore, in contrast to the Australian position, art 5(4) of the *ECHR* requires *judicial* review of the continuing need for the detention once the punitive part of an indeterminate sentence has expired. Article 5(4) provides that those deprived of their liberty are ‘entitled to take proceedings by which the lawfulness of [their] ... detention shall be decided speedily by a court and ... [their] release ordered if the detention is not lawful’. As was explained in *De Wilde v Belgium [No 1]*,³⁴⁵ when a court pronounces a sentence of imprisonment after entering a conviction, the curial supervision required by art 5(4) is incorporated in the court’s decision. But once the punitive term of an indefinite³⁴⁶ sentence ends, the position is different. Any further detention is based on the detainee’s dangerousness to society.³⁴⁷ By its nature, the risk that he/she poses is ‘susceptible ... to change with the passage of time’.³⁴⁸ Accordingly, at this stage, and at reasonable intervals thereafter,³⁴⁹ a court must consider whether this justification for the detention still exists. If it does not, any further detention would be unlawful³⁵⁰ and he/she must be released.

Nevertheless, we do have to acknowledge one thing. In *Chester*, the High Court of Australia insisted that indefinite detention be ordered only in ‘very exceptional

339 [2013] III Eur Court HR 317, 345–6 [108], 346 [110].

340 *Murray* (2017) 64 EHRR 3, [104].

341 *Ibid* [112].

342 *Ibid* [125].

343 *Brown* [2018] AC 1, 24 [45]; *Kaiyam v United Kingdom* (2016) 62 EHRR SE13, [70].

344 See generally Hogg, above n 107.

345 (1979–80) 1 EHRR 373, 407 [76].

346 For the position of those serving *determinate* sentences, see *R (Whiston) v Secretary of State for Justice* [2015] AC 176.

347 *Stafford* [2002] IV Eur Court HR 115, 136–7 [65].

348 *Ibid*.

349 *Van Droogenbroeck* (1982) 4 EHRR 443, 461 [48].

350 *Ibid*.

cases ... in which the sentencing judge is satisfied ... that the convicted person is ... so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community'.³⁵¹ While this statement was directed at judges, not Parliaments — and while there might be nothing in the *Commonwealth Constitution* preventing a state or territory from creating an indefinite detention scheme that operates much more broadly than this — it appears that indefinite detention *has* only sparingly been ordered in Australia.³⁵² On the other hand, as Van Zyl Smit and Appleton have noted, ‘the range of offences for which an IPP [sentence] could be imposed was astonishingly wide’³⁵³ and, remarkably, in *Grosskopf v Germany*,³⁵⁴ the ECtHR held that the preventive detention of an habitual *burglar* was covered by art 5(1)(a), as the relevant preventive detention order was made when the applicant’s guilt was established and thus resulted from that conviction. Commentators³⁵⁵ have rightly criticised this decision,³⁵⁶ and it seems hard to reconcile with *R v Offen*, where it was held that the indefinite detention of an offender who does ‘not constitute a serious risk to the public’³⁵⁷ ‘may well be arbitrary and disproportionate and contravene art 5’.³⁵⁸ Fortunately, there is a simple solution to the problem. Certainly, the view that the preventive part of a sentence of indefinite detention comes ‘after’ a conviction³⁵⁹ is too entrenched now to be overturned in the case of a *violent* offender. But the same is not true of the view that art 5(1)(a) also covers the indefinite detention of those who pose a danger only of committing *non-violent* offences if released. The ECtHR can and should depart from *Grosskopf* at the earliest opportunity.

351 (1988) 165 CLR 611, 618–9. See also, eg, *Buckley* (2006) 80 ALJR 605, 612 [40]; *Lowndes v The Queen* (1999) 195 CLR 665, 673 [24], 679 [39]; *Moffatt* [1998] 2 VR 229, 255 (Hayne JA).

352 The Victorian Court of Appeal recently recorded that, apparently, only three indefinite sentences have been awarded in that jurisdiction: *Carolán* (2015) 48 VR 87, 108 [60]. See also Patrick Keyzer and Bernadette McSherry, ‘The Preventive Detention of Sex Offenders: Law and Practice’ (2015) 38 *University of New South Wales Law Journal* 792, 800. Having said that, the post-sentence preventive detention schemes in various Australian jurisdictions operate much more broadly than that: see, eg, McSherry and Keyzer, above n 55, 68–9.

353 Catherine Appleton and Dirk Van Zyl Smit, ‘The Paradox of Reform: Life Imprisonment in England and Wales’ in Dirk Van Zyl Smit and Catherine Appleton (eds), *Life Imprisonment and Human Rights* (Hart Publishing, 2016) 217, 222.

354 (2011) 53 EHRR 7, [46].

355 See, eg, Ashworth and Zedner, above n 28, 166; Liz Campbell, ‘Preventive Detention, Risk and the ECHR’ on *Human Rights in Ireland* (28 October 2010) <<http://humanrights.ie/civil-liberties/preventive-detention-and-the-echr/>>.

356 See also the similar cases of *Reiner v Germany* (European Court of Human Rights, Chamber, Application No 28527/08, 19 January 2012) and *Rangelov v Germany* (European Court of Human Rights, Chamber, Application No 5123/07, 22 March 2012) — though note that the applicant in the latter case was convicted in Austria of two counts of murder, one count of attempted murder and one count of robbery with firearms when he was eventually released from preventive detention: at [38].

357 *Offen* [2001] 2 All ER 154, 175 [97].

358 *Ibid* 175 [95].

359 See above nn 309–11 and accompanying text.

B Post-Sentence Preventive Detention

1 The Strasbourg Court's Decisions in *M v Germany and Haidn v Germany*

The Strasbourg Court has repeatedly stated that art 5 of the *ECHR* 'enshrines a fundamental human right'³⁶⁰ and that '[s]ub-paragraphs (a) to (f) of art 5 § 1 contain an *exhaustive* list of permissible grounds on which persons may be deprived of their liberty'.³⁶¹ One of those grounds is *not* the protection of the community.³⁶² As noted below, the Court has recently shown a willingness sometimes to circumvent this principle. For now, however, it is enough to observe that it was because of its existence that the German system of post-sentence preventive detention was held to breach art 5(1).

By the early 1990s, preventive detention was used reasonably infrequently in Germany, but after a number of highly publicised sexual offences there and elsewhere in western Europe, the German government enacted laws that allowed for its more widespread use.³⁶³ Before 1998, an offender who was being sentenced to preventive detention for the first time could be placed in such detention for a maximum of 10 years.³⁶⁴ Legislation passed that year — which operated retrospectively — enabled such an offender to be detained indefinitely.³⁶⁵ In 2004, the federal legislature authorised post-sentence preventive detention where sexual and violent offenders' dangerousness was discovered only after they began serving their sentences.³⁶⁶

Upon convicting *M* in 1986 of various violent offences, the sentencing court ordered that he serve five years' imprisonment and then be placed in preventive detention.³⁶⁷ At the time, the maximum term of such detention was of course 10 years; but by the time when that period had expired in 2001, the 1998 amendments were in force, and his detention was continued.³⁶⁸ In the ECtHR, *M* claimed that his continued preventive detention beyond the maximum period of 10 years that applied at the time of his offence, breached art 5(1). He also claimed that the retrospective extension of his preventive detention from a maximum period of

360 See, eg, *Al-Jedda v United Kingdom* [2011] IV Eur Court HR 305, 372 [99] (*'Al-Jedda'*); *A v United Kingdom* [2009] II Eur Court HR 137, 215 [161]–[162]; *Saadi* [2008] I Eur Court HR 31, 60 [63].

361 *Al-Jedda* [2011] IV Eur Court HR 305, 372 [99]; see also *A* [2009] II Eur Court HR 137 [162]; *Saadi* [2008] I Eur Court HR 31, 52 [43] (emphasis added).

362 *Austin v Commissioner of Police of the Metropolis* [2009] 1 AC 564, 580 [34] (Lord Hope).

363 See, eg, Frieder Dünkel and Dirk Van Zyl Smit, 'Preventive Detention of Dangerous Offenders Re-Examined: A Comment on Two Decisions of the German Federal Constitutional Court (BVerfG — 2 BvR 2029/01 of 5 February 2004 and BVerfG — 2 BvR 834/02 — 2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004' (2004) 5 *German Law Journal* 619, 619–20, 632.

364 *M* [2009] VI Eur Court HR 169, 187 [52].

365 *Ibid* 187–8 [53]–[54].

366 See, eg, Dünkel and Van Zyl Smit, above n 363, 632; Michael Pösl and Andreas Dürr, 'Germany's System of Preventive Detention Considered through the European Court of Human Rights and the German Federal Constitutional Court' (2012) 2 *European Criminal Law Review* 158, 159.

367 *M* [2009] VI Eur Court HR 169, 177–8 [12].

368 *Ibid* 179 [19].

10 years to an indefinite period of time violated his art 7(1) right not to have a ‘heavier penalty ... imposed [on him] than the one that was applicable at the time the criminal offence was committed’.

The Court rejected the German government’s claim that the relevant detention was covered by art 5(1)(a), (c) or (e).

Consistently with its longstanding approach,³⁶⁹ the Court accepted that the initial period of 10 years’ preventive detention did result from his conviction, and so was covered by art 5(1)(a).³⁷⁰ But it held that the continuation of the preventive detention was not ‘after’ his conviction.³⁷¹ Such detention was not, and could not have been, ordered by the sentencing court;³⁷² rather, it ‘was made possible only by the subsequent change in the law in 1998’.³⁷³ Concerning art 5(1)(c), the Court adhered to its well-established view³⁷⁴ that the second part of that sub-paragraph, which authorises detention ‘reasonably considered necessary to prevent ... [a person from] committing an offence’, applies only where a *concrete and specific* offence is in prospect.³⁷⁵ Finally, it held that the detention was not covered by art 5(1)(e). This was mainly due to the way in which the domestic authorities had dealt with the applicant: the German courts had detained M after the expiry of

369 See above nn 309–11 and accompanying text.

370 *M* [2009] VI Eur Court HR 169, 203 [96].

371 *Ibid* 204–5 [100].

372 *Ibid* 205 [101].

373 *Ibid* 205 [100].

374 See, eg, *Guzzardi v Italy* (1981) 3 EHRR 333, 367–8 [102] (*‘Guzzardi’*).

375 *M* [2009] VI Eur Court HR 169, 205–6 [102]. Macken has argued that, properly construed, this second part of art 5(1)(c) grants a general power of preventive detention: Claire Macken, ‘Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR’ (2006) 10 *International Journal of Human Rights* 195. See also Larsen, above n 92, 12–14, 21. But the ECtHR has surely been right to regard the use of the singular in art 5(1)(c) (‘an offence’) to be a powerful indication that this is not so: *Guzzardi* (1981) 3 EHRR 333, 367–8 [102]; *M* [2009] VI Eur Court HR 169, 205–6 [102]. Moreover, Macken’s contention that this second part of art 5(1)(c) is a dead letter for so long as Strasbourg persists with its interpretation: Claire Macken, ‘Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR’ (2006) 10 *International Journal of Human Rights* 195, 199, is disproved by the facts of *Ostendorf v Germany* (European Court of Human Rights, Chamber, 7 June 2013) [79]–[80] (*‘Ostendorf’*). The applicant’s conduct in that case merely put the authorities on notice that he intended shortly to participate in acts of hooliganism; it did not itself amount to a criminal offence so as to allow him to be detained under the first part of art 5(1)(c) (which provides that a person may lawfully be detained ‘on reasonable suspicion of having committed an offence’). It is true that the majority of the ECtHR in *Ostendorf* considered the applicant’s detention not to have been covered by art 5(1)(c), on the basis that that sub-paragraph only applies when criminal proceedings are in prospect (see in this regard art 5(3), which provides that everybody detained under art 5(1)(c) must be brought promptly before a judge): *Ostendorf* (European Court of Human Rights, Chamber, 7 June 2013) [85]. But the better view is surely that expressed by the minority — and also by the UK Supreme Court in *R (Hicks) v Commissioner of Police of the Metropolis* [2017] AC 256 (*‘Hicks’*) — namely, that art 5(1)(c) does not merely cover detention of a person reasonably suspected of already having committed an offence so as he/she can be brought before a court. That would give the second part of art 5(1)(c) no work to do: at 271 [35]. See also *R (Hicks) v Commissioner of Police of the Metropolis* [2014] 1 WLR 2152, 2172 [66]. Rather, a person may be detained under that second part to prevent him/her from committing a specific offence and in the absence of any reasonable suspicion of past offending; and need only be taken before a judge if the detention continues for long enough for that to happen: *Hicks* [2017] AC 256, 271 [38]. Indeed, the Grand Chamber has now accepted the correctness of this approach: *S v Denmark* (European Court of Human Rights, Grand Chamber, Application Nos 35553/12, 36678/12, 36711/12, 22 October 2018) [114]–[126].

the initial 10 years of preventive detention not because they considered him to be mentally ill, but because they believed him simply to be dangerous.³⁷⁶ But, importantly, the ECtHR refrained from holding that preventive detention would never fall within art 5(1)(e).³⁷⁷ It will be necessary to return to this point.

The Court also accepted that there had been a breach of art 7(1). Its reasoning here — like the UNHCR's reasoning in *Fardon and Tillman*³⁷⁸ — contrasted noticeably with that of the QCA majority and Callinan and Heydon JJ in *Fardon*. Specifically, rather than treating as determinative the German legislature's characterisation of the applicant's detention as non-punitive,³⁷⁹ the Court went 'behind appearances', assessing for itself whether this detention was *in substance* a 'penalty' within the meaning of art 7(1).³⁸⁰ Crucial to the Court's finding that it *was*, was its rejection of the German government's submission that the 'detention served a purely preventive, and no punitive, purpose'.³⁸¹ Importantly, this rejection was based on similar reasoning to Kirby J's in *Fardon*. '[I]t is striking', the Court observed, 'that persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings'.³⁸² Moreover, it attached importance to the state's failure to direct rehabilitative resources at those subject to preventive detention, beyond those available to other long-term prisoners.³⁸³

I have noted elsewhere that Australian judges sometimes use formalistic reasoning to obstruct results that, if they were reached, might lead to claims of judicial self-aggrandisement.³⁸⁴ Is this why the proposition that imprisonment is not necessarily punishment carried such appeal for some judges in *Fardon*?³⁸⁵ On the other hand, the ECtHR's and the UK courts' greater focus on questions of substance appears to be due to the explicit mandate that they have been given to stigmatise measures that contravene human rights.

Below, there is further discussion of the constraints that art 7 places on post-sentence preventive detention. First, however, it is necessary to note that, in *Haidn*,³⁸⁶ the ECtHR used similar reasoning to that in *M*, to find an art 5(1) breach

376 See, eg, *Guzzardi* (1981) 3 EHRR 333, 367–8 [102]; *M* [2009] VI Eur Court HR 169, 206 [103]. See also at 178–9 [18], 180 [23].

377 *M* [2009] VI Eur Court HR 169, 206 [103].

378 See above nn 301–6 and accompanying text.

379 Although this is a relevant consideration when determining whether a measure is a penalty: *M* [2009] VI Eur Court HR 169, 213 [125]; *Welch v United Kingdom* (1995) 20 EHRR 247, [28] ('*Welch*').

380 *M* [2009] VI Eur Court HR 169, 211–12 [120]. See also *Welch* (1995) 20 EHRR 247, [27].

381 *M* [2009] VI Eur Court HR 169, 214 [128].

382 *Ibid* 214 [127].

383 *Ibid* 214 [128].

384 Dyer, 'Irreducible Life Sentences: What Difference Have the *European Convention on Human Rights* and the United Kingdom *Human Rights Act* Made?', above n 8, 569–70; Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?', above n 9, 211–15.

385 Note that, when it suits them, Australian judges are much less willing to accept that imprisonment is non-punitive: *Muldrock v The Queen* (2011) 244 CLR 120, 140 [57].

386 (European Court of Human Rights, Chamber, Application No 6587/04, 13 January 2011). For commentary concerning *Haidn*, see Grischa Merkel, 'Case Note — Retrospective Preventive Detention in Germany: A Comment on the ECHR Decision *Haidn v Germany* of 13 January 2011' (2011) 12 *German Law Journal* 968.

in circumstances where the applicant's preventive detention had only been ordered *when he was serving a sentence of imprisonment*.³⁸⁷ Given that this detention 'had not been provided for and was not even possible' at the time of sentencing, it did not result from the applicant's conviction, and therefore was not covered by art 5(1)(a).³⁸⁸ Nor did it fall within art 5(1)(c) or 5(1)(e).³⁸⁹ Regarding art 5(1)(e), the Court, as in *M*, attached much weight to the way in which the domestic authorities had dealt with the applicant. Those authorities had not treated him as a mentally ill person.³⁹⁰ Instead, they had sought his further detention purely on the basis of his alleged dangerousness. Accordingly, while the Court did not doubt that the applicant had a personality disorder,³⁹¹ it was not satisfied that it had 'been established before a "competent legal authority"' or that he was suffering from a 'true mental disorder'.³⁹²

2 The Strasbourg Court's Use of Art 5(1)(e) ECHR to Undermine *M* and *Haidn*

The combined effect of *M* and *Haidn*, then, is that post-sentence preventive detention breaches the *ECHR*.³⁹³ But does this leave a gap? Consider the case where there is a real risk that an offender who had no preventive detention order made against him/her at sentencing will commit a very serious offence if released. If post-sentence preventive detention is impermissible, is the community adequately protected against such an individual? In *Jendrowiak v Germany*,³⁹⁴ the German government argued that, unless it were allowed retrospectively to extend the applicant's preventive detention beyond the old 10-year maximum period for such detention, it would breach its obligation to take measures to prevent persons within its jurisdiction from suffering treatment contrary to art 3 of the *ECHR*.³⁹⁵ The Court dismissed this argument, noting that

387 This detention had been ordered on the authority of Bavarian legislation that, like the later federal legislation to which reference has been made above (see above n 366 and accompanying text), allowed for preventive detention orders in cases where the prisoner's dangerousness had only been established once he/she was serving a sentence of imprisonment: *Haidn* (European Court of Human Rights, Chamber, Application No 6587/04, 13 January 2011) [11], [43]–[45].

388 *Ibid* [88].

389 *Ibid* [90], [95]. The Court's reasoning on these points was similar to that which it deployed in *M*.

390 *Ibid* [92].

391 *Ibid* [91].

392 *Ibid* [93]. In *Winterwerp v The Netherlands* (1979–80) 2 EHRR 387, 402–3 [39] ('*Winterwerp*'), the Court held that detention will be covered by art 5(1)(e) only if a true mental disorder is established before a competent national authority and that mental disorder is 'of a kind or degree warranting compulsory confinement'.

393 See also *Kallweit v Germany* (European Court of Human Rights, Chamber, Application No 17792/07, 13 January 2011) [47]–[58]; *Schummer v Germany* (European Court of Human Rights, Chamber, Application Nos 27360/04 and 42225/07, 13 January 2011) [52]–[58]; *Mauter v Germany* (European Court of Human Rights, Chamber, Application No 20008/07, 13 January 2011) [38]–[46].

394 (2015) 61 EHRR 32 (*Jendrowiak*).

395 *Ibid* [36]. *ECHR* art 3 provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The applicant in *Jendrowiak* had been convicted in the past of a number of sexual offences and had been diagnosed as having a personality disorder: *Jendrowiak* (2015) 61 EHRR 32, [6]–[7], [11].

the Convention obliges state authorities to take reasonable steps within the scope of their powers to prevent ill-treatment of which they had or ought to have had knowledge, but it does not permit a state to protect individuals from criminal acts of a person by measures which are in breach of that person's Convention rights, in particular the right to liberty as guaranteed by art.5(1).³⁹⁶

In other words, it adhered to the principle, stated above,³⁹⁷ that a deprivation of liberty will be lawful only if it fits within arts 5(1)(a)–(f).³⁹⁸

In *Austin v United Kingdom*,³⁹⁹ however, a Grand Chamber majority held to be compatible with art 5(1) detention that, in truth, clearly did not fit within the 'exhaustive' art 5(1) grounds.⁴⁰⁰ Certainly, this was not done openly; rather, the Court found that persons held for up to seven hours in 'an absolute [police] cordon'⁴⁰¹ had not been deprived of their liberty so as to engage art 5 in the first place.⁴⁰² But such a conclusion is so obviously contrary to common sense as to raise questions about what motivated the majority to reach it; and the judges' insistence that 'Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public'⁴⁰³ makes it clear what that motivation was.⁴⁰⁴

Similar community protection concerns⁴⁰⁵ have now led the Court to squeeze within art 5(1)(e) the detention of certain offenders who, however dangerous they are, are not mentally ill. By employing this fiction,⁴⁰⁶ it is in danger of facilitating the emergence in Europe of exclusionary preventive detention schemes of the type that exist in the US.⁴⁰⁷ It is essential that the Court now ensures that this does not happen.

We have seen that the Court in both *M* and *Haidn* found that the relevant detention was not covered by art 5(1)(e), because the *domestic authorities* failed to treat the offenders as suffering from 'a true mental disorder'.⁴⁰⁸ But what about where those authorities do place an offender *in a psychiatric hospital* on the basis that he/she has a personality disorder that makes him/her dangerous? As noted above,⁴⁰⁹ the

396 *Jendrowiak* (2015) 61 EHRR 32, [37].

397 See above n 361 and accompanying text.

398 See also *Schwabe v Germany* (2014) 59 EHRR 28, [85]; *OH v Germany* (2012) 54 EHRR 29, [93]–[94] ('OH'); *Kronfeldner v Germany* (European Court of Human Rights, Chamber, Application No 21906/09, 19 January 2012) [86]–[87] ('Kronfeldner'); *B v Germany* (European Court of Human Rights, Chamber, Application No 61272/09, 19 April 2012) [87] ('B').

399 (2012) 55 EHRR 14 ('Austin').

400 See also the House of Lords' similar approach in *Austin v Commissioner of Police of the Metropolis* [2009] 1 AC 564.

401 *Austin* (2012) 55 EHRR 14, [66].

402 *Ibid* [67].

403 *Ibid* [56].

404 See in this regard the minority's remarks: *ibid* [3]–[8] (Tulkens, Spielman and Garlicki JJ).

405 See, eg, Kirstin Drenkhahn, 'Secure Preventive Detention in Germany: Incapacitation or Treatment Intervention?' (2013) 31 *Behavioral Sciences and the Law* 312, 326.

406 See above n 123 and accompanying text.

407 See above nn 112–13, 123–9 and accompanying text.

408 *Winterwerp* (1979–80) 2 EHRR 387, 402–3 [39]. See also above n 392.

409 See above n 377 and accompanying text.

Court in *M* implied that, in certain circumstances, the preventive detention of particular offenders simply because of their dangerousness, might be justified under art 5(1)(e); and the Court in *Haidn* was non-committal, merely finding that it was ‘not convinced’ that a personality disorder was a ‘true mental disorder’.⁴¹⁰

In *Hutchison Reid v United Kingdom*,⁴¹¹ a Chamber had accepted that an offender with a psychopathic personality disorder suffered from a ‘true mental disorder’. In reaching this conclusion, the Court pointed to the way in which the matter had been dealt with domestically: the applicant had been placed in a ‘mental hospital’⁴¹² on the basis of ‘unanimous medical evidence’⁴¹³ that he was psychopathic. Further, the Court dismissed the applicant’s argument that his detention was arbitrary⁴¹⁴ because his condition was not amenable to medical treatment.⁴¹⁵ The upshot seems to be that states may detain the dangerous but non-mentally ill as psychiatric patients, either at the time of sentencing or while the person is serving a sentence of imprisonment, thus circumventing *M*’s and *Haidn*’s prohibition of post-sentence preventive detention.

After some vacillation, the ECtHR has now at least partly confirmed that this is so.⁴¹⁶ In so doing, it has demonstrated the wisdom of Alexander, Graf and Janus’s statement, commenting on *M*, ‘that we ought to be cautious of what ... appears to be the Court’s limitation on the use of preventive detention’⁴¹⁷ given that it failed properly to explain when a person will have a ‘true mental disorder’ for the purposes of art 5(1)(e).⁴¹⁸

In *OH*, the applicant apparently had anti-social personality disorder.⁴¹⁹ The German courts had ordered that he serve a term of preventive detention in prison, finding that his detention in a psychiatric hospital would be unlikely to assist him. Once the matter reached Strasbourg, the majority held that, assuming that the domestic courts had found that the applicant had ‘a true mental disorder warranting his compulsory confinement’,⁴²⁰ his detention was nonetheless not covered by art 5(1)(e), because he had not been placed in ‘the therapeutic environment

410 *Haidn* (European Court of Human Rights, Chamber, Application No 6587/04, 13 January 2011) [93].

411 [2003] IV Eur Court HR 1 (*Hutchison Reid*).

412 *Ibid* 19 [51].

413 *Ibid* 19 [53].

414 And therefore contrary to art 5(1).

415 *Hutchison Reid* [2003] IV Eur Court HR 1, 19 [52].

416 *Inseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12, 27505/14, 4 December 2018).

417 Shawn Alexander, Leah Graf and Eric Janus, ‘*M v Germany*: The European Court of Human Rights Takes a Critical Look at Preventive Detention’ (2012) 29 *Arizona Journal of International and Comparative Law* 605, 617.

418 On this point, see also Kirstin Drenkhahn et al, ‘What Is in a Name? Preventive Detention in Germany in the Shadow of European Human Rights Law’ [2012] *Criminal Law Review* 167, 181–2.

419 *OH* (2012) 54 EHRR 29, [20]–[21].

420 *Ibid* [87].

appropriate for a person detained as being of unsound mind'.⁴²¹ As Judge Zupančič pointed out in dissent, the implication is that it might be permissible for states to place 'psychopaths [in] ... psychiatric hospitals ... [so as they can be] offered ... (non-existent) treatment for their personality disorders'.⁴²² Accordingly, while two dissenting judges⁴²³ in *Radu v Germany* argued that the term "'unsound mind" ... has an autonomous meaning and the Court is not bound [by] interpretations given in domestic legal orders',⁴²⁴ they proceeded to base their finding that the applicant's detention was not covered by art 5(1)(e) on the domestic courts' lack of satisfaction that he had a 'true mental disorder'.⁴²⁵ The suggestion was seemingly that, if the domestic authorities had come to the contrary conclusion and placed the applicant in a psychiatric institution — as had happened in *Hutchison Reid* — these judges might have accepted that this was art 5(1)(e) detention.

Glien v Germany,⁴²⁶ however, introduced some uncertainty about this matter. The Court explicitly doubted whether the applicant's dissociative personality disorder by itself was a "'true" mental disorder'.⁴²⁷ It also refrained from expressing a final view about whether this personality disorder combined with non-pathological paedophilia meant that he was of 'unsound mind' within the meaning of art 5(1)(e).⁴²⁸ Because the applicant had not been placed in an appropriate institution for a mental health patient,⁴²⁹ it was unnecessary to consider whether, if he had been, his detention would have been covered by art 5(1)(e).

But in *Bergmann v Germany*,⁴³⁰ the Court accepted that sexual sadism amounts to a 'true mental disorder' for the purposes of art 5(1)(e). Certainly, in so doing, it observed that the domestic courts had found that this disorder, when combined with the consumption of alcohol, had diminished the applicant's criminal responsibility.⁴³¹ Nevertheless, despite the Court's insistence that post-sentence preventive detention is only compatible with art 5 — and art 7⁴³² — if it is served in a therapeutic environment after a 'true mental disorder' is established,⁴³³ it did seem to countenance a definition of this last term that was wide enough to catch some individuals who had made an autonomous decision to offend.

421 Ibid [88]. See also *Kronfeldner* (European Court of Human Rights, Chamber, Application No 21906/09, 19 January 2012) [78]–[85]; *B* (European Court of Human Rights, Chamber, Application No 61272/09, 19 April 2012) [77]–[84]; *S v Germany* (European Court of Human Rights, Chamber, Application No 3300/10) [92]–[100].

422 *OH* (2012) 54 EHRR 29, 1054–5 [6].

423 The majority did not address the art 5(1)(e) point.

424 *Radu v Germany* (European Court of Human Rights, Chamber, Application No 20084/07, 16 May 2013) [8] (Villiger and Power-Forde JJ).

425 Ibid [10] (Villiger and Power-Forde JJ).

426 (European Court of Human Rights, Chamber, Application No 7345/12, 28 November 2013).

427 Ibid [88].

428 Ibid [89]–[90].

429 Ibid [95].

430 (2016) 63 EHRR 21.

431 Ibid [114].

432 See below nn 453–464 and accompanying text.

433 *Bergmann* (2016) 63 EHRR 21, [113].

*Petschulies v Germany*⁴³⁴ constituted a further movement in this direction. In that case, the applicant's dissociative personality disorder with marked psychopathic elements did *not* cause the domestic courts to find that he had acted with diminished criminal responsibility.⁴³⁵ But, even so, the ECtHR concluded 'that there were sufficient elements to show that th[is] ... mental disorder ... was so serious that it could be considered as a true mental disorder for the purposes of Article 5(1)(e)'.⁴³⁶ The Court noted that the applicant's abuse of alcohol 'rendered [his] ... personality disorder and its effects more serious'.⁴³⁷ It also attached 'considerable importance' to the fact that, several years before the impugned domestic proceedings, the domestic authorities had ordered the applicant's preventive detention in a psychiatric hospital.⁴³⁸ But, of course, neither of these factors bears very much on whether his personality disorder was a 'true mental disorder'. Rather, the Court was keen to incapacitate a dangerous person. Thus, its focus on the seriousness of *the effects* of the applicant's personality disorder when he had been drinking, and thus its observation that '[o]wing to ... [his personality] disorder and the resulting lack of empathy, he had hardly any inhibitions with regard to injuring others'.⁴³⁹

In short, despite reminding states of its supervisory role in this area,⁴⁴⁰ the Court in *Petschulies* opened the way to the detention in psychiatric institutions of those who are merely dangerous. Such an approach was confirmed by *WP v Germany*,⁴⁴¹ *Ilmseher v Germany*,⁴⁴² and *Becht v Germany*.⁴⁴³ Moreover, and crucially, the Grand Chamber has now accepted the correctness of such a view.⁴⁴⁴ For, when the case of *Ilmseher* reached it, that Court upheld the Fifth Section's finding⁴⁴⁵ that the applicant's 'sexual sadism' was a 'true mental disorder' for the purposes of art 5(1)(e).⁴⁴⁶

Nor has art 7 been found always to prevent states from making post-sentence preventive detention orders against the merely dangerous. In *Bergmann*, the applicant was sentenced to 15 years' imprisonment in 1986 for various violent

434 (European Court of Human Rights, Chamber, Application No 6281/13, 2 June 2016) (*Petschulies*).

435 *Ibid* [72].

436 *Ibid* [78].

437 *Ibid*.

438 *Ibid* [79].

439 *Ibid* [73].

440 *Ibid* [74].

441 There, the Court held that the detention of an offender with 'narcissistic personality disorder with emotionally unstable and sadistic elements' fell within art 5(1)(e): (European Court of Human Rights, Chamber, Application No 55594/13, 6 October 2016) [51], [61].

442 (European Court of Human Rights, Chamber, Application Nos 10211/12 and 27505/14, 2 February 2017) [66].

443 There, the applicant's dissociative and schizoid personality disorder was held to qualify: (European Court of Human Rights, Committee, Application No 79457/13, 6 July 2017) [31].

444 *Ilmseher* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12, 27505/14, 4 December 2018).

445 (European Court of Human Rights, Chamber, Application Nos 10211/12, 27505/14, 2 February 2017) [66].

446 *Ilmseher* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12, 27505/14, 4 December 2018) [151].

offences, and made subject to a preventive detention order.⁴⁴⁷ At this time, the maximum period of preventive detention that could be ordered was of course 10 years;⁴⁴⁸ but upon the expiry of that period in 2011, he was not released. In the proceedings at issue before the ECtHR, a German court in 2013 ordered the continuation of the applicant's preventive detention on the basis that he was suffering from a mental disorder that made him dangerous.⁴⁴⁹ As noted above, the ECtHR accepted that his condition (sexual sadism) is a 'true mental disorder'.⁴⁵⁰ Moreover, it held that, because his detention was served in an appropriate institution for a mental health patient, that detention was covered by art 5(1)(e).⁴⁵¹ In this connection, the applicant was detained in a preventive detention centre that the domestic authorities had constructed in response to decisions of the German Federal Constitutional Court⁴⁵² that broadly accepted the ECtHR's conclusions in *M* about the shortcomings of the previous German system of preventive detention. In holding that this was a suitable place of detention for the mentally ill,⁴⁵³ the Strasbourg Court noted that the centre was well-staffed, including with psychiatrists and psychologists;⁴⁵⁴ the applicant 'had regularly and repeatedly been offered' libido-reducing treatment;⁴⁵⁵ and the authorities had (successfully) urged him to participate in group and individual therapy.⁴⁵⁶

But did this detention nevertheless amount to a 'penalty' within the meaning of art 7(1)? While the Court thought that detention in the new German preventive detention centres generally constituted a 'penalty',⁴⁵⁷ it held that this was not so where, as here, 'preventive detention is extended because of, and with a view to the need to treat ... [a detainee's] mental disorder'.⁴⁵⁸ The Court found that the new mental disorder precondition for the retrospective prolongation of preventive detention in Germany meant that the focus of the measure was now on the detainee's 'medical and therapeutic treatment'.⁴⁵⁹ In this regard, emphasis was again placed on the treatment that the applicant had been offered⁴⁶⁰ and the psychiatric care and psychotherapy that was now provided.⁴⁶¹ For similar reasons, the Court found that the *purpose* of the applicant's detention was preventive.⁴⁶² It will be recalled that the Strasbourg judges in *M* rejected the German government's argument that

447 (2016) 63 EHRR 21, [7].

448 Ibid [16].

449 Ibid [14]–[15], [53].

450 Ibid [114].

451 Ibid [128].

452 *Sicherungsverwahrung*, Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 571/10, 4 May 2011 reported in (2011) 128 BVerfGE 326.

453 *Bergmann* (2016) 63 EHRR 21, [128].

454 Ibid [125].

455 Ibid [126].

456 Ibid [127].

457 Ibid [181].

458 Ibid [182].

459 Ibid [167].

460 Ibid [169].

461 Ibid [168].

462 Ibid [176].

that applicant's preventive detention served no punitive purpose.⁴⁶³ It will also be recalled that this finding was based on the state's failure to direct additional rehabilitative resources at detainees in his position.⁴⁶⁴ In *Bergmann*, the Court noted that, since *M*, the German legislature had implemented changes, so that 'adequate treatment of persons in preventive detention with a view to reducing their dangerousness is now at the heart of preventive detention'.⁴⁶⁵ For the Court, the decisive consideration in its acceptance that the purpose of the applicant's detention was non-punitive was the new mental disorder precondition;⁴⁶⁶ and it again focused on the treatment and rehabilitative opportunities provided to detainees,⁴⁶⁷ which far exceeded those offered to ordinary prisoners.⁴⁶⁸

In *Inlseher*, the Grand Chamber lent its approval to such reasoning.⁴⁶⁹ Unlike the applicant in *Bergmann*, Mr Inlseher's preventive detention had not been prolonged beyond the maximum period at the time that he was originally sentenced. Rather, it had been ordered only once he was already serving a sentence for the relevant offence.⁴⁷⁰ But the Court held that that was irrelevant.⁴⁷¹ More relevant, it thought, were the applicant's 'considerably improved material conditions compared to ordinary prison conditions'⁴⁷² and 'the individualised medical and therapeutic treatment'⁴⁷³ that was being made available to him. Indeed, as in *Bergmann*, the Court held that this focus on 'medical and therapeutic treatment of the person concerned'⁴⁷⁴ differentiated the applicant's detention from the punitive detention in *M*.⁴⁷⁵ It could not be said to be a 'penalty' within the meaning of art 7(1).⁴⁷⁶

3 Conclusions about the ECtHR's Approach to Post-Sentence Preventive Detention

The conclusions to be drawn from this are as follows. Following *M* and *Haidn*, the position was seemingly that post-sentence preventive detention was contrary to the *ECHR*. But in subsequent cases, the Strasbourg Court has effectively accepted that the detention of those who are merely dangerous, and not mentally ill, can be covered by art 5(1)(e) and will not necessarily breach art 7. I referred above⁴⁷⁷ to the danger that Europe will now follow the US example, authorising

463 See above n 381 and accompanying text.

464 See above n 383 and accompanying text.

465 (2016) 63 EHRR 21, [174].

466 Ibid [176].

467 Ibid [176]–[177].

468 Ibid [176].

469 (European Court of Human Rights, Grand Chamber, Application Nos 10211/12, 27505/14, 4 December 2018).

470 Ibid [12], [14].

471 Ibid [238].

472 Ibid [220].

473 Ibid [221].

474 Ibid [227].

475 Ibid [219]–[223].

476 Ibid [236].

477 See above nn 406–7 and accompanying text.

the widespread non-therapeutic detention in ‘psychiatric institutions’ of those thought to be dangerous. How real is this danger?

The answer to this question is that the ECtHR is seemingly aware of the need to prevent US-style ‘warehouses’ from developing in Europe. Admittedly, in *Hutchison Reid*,⁴⁷⁸ the Court stated that detention may be covered by art 5(1)(e) even if no treatment can be provided to the detainee. But more recently, in *Inseher*⁴⁷⁹ and *Bergmann*,⁴⁸⁰ the Court emphasised that a Convention-compatible system of post-sentence preventive detention must have a therapeutic orientation. Further, even though that Court also accepted the dubious proposition that the detention at issue fell within art 5(1)(e), the ‘individualised care’⁴⁸¹ offered to detainees in the new German preventive detention facilities is really directed far more at reducing those detainees’ dangerousness than it is at treating their non-existent mental illnesses.⁴⁸² In short, at this stage, the ECtHR has shown no readiness to approve the sorts of practices that prevail in the US. Relatedly, the European position concerning post-sentence preventive detention is preferable to the position in Australia. Such detention is not served in prison. Moreover, detainees have the same judicial review rights under art 5(4) as do those detained under indefinite detention schemes.⁴⁸³

V CONCLUSION

This article has sought to demonstrate that charters of rights *are* capable of providing offenders with increased protections against penal populism. Or, to return to the competing arguments with which we began, it seems that those who have claimed — or implied — that such instruments can improve the position of tyrannised minorities, have been correct to do so. Accordingly, in Europe, unlike in those Australian jurisdictions without a charter of rights, preventive detention must have a reintegrative focus (indeed, as just noted, post-sentence preventive detention cannot be served in prison); and the executive plays no role in reviewing the continuing need for such detention.

This article has also sought to demonstrate *why* it is that the Strasbourg and UK judges have felt more able to uphold challenges to penal populist laws than have their Australian counterparts. It has long been the case that judges have openly acknowledged that they make law and do not just declare it.⁴⁸⁴ But, even so, there are widely-accepted limits to the judicial law-making function. In particular,

478 [2003] IV Eur Court HR 1, 19 [51]–[53].

479 (European Court of Human Rights, Grand Chamber, Application Nos 10211/12, 27505/14, 4 December 2018) [227]–[228].

480 (2016) 63 EHRR 21, [174].

481 *Ibid* [177].

482 The conditions of such detention are described in *ibid* [34]–[41].

483 See above nn 345–50 and accompanying text.

484 This has been so at least since Lord Reid made his well-known remarks about ‘fairy tales’ and ‘Aladdin’s cave’: Reid, above n 44, 22.

many judges have stated, emphatically, that courts that have not been empowered to interpret a charter of rights must only develop the law in a manner that is consistent with community values.⁴⁸⁵ For, once these courts impose changes that are controversial, the judges are apt to be seen as ‘rapacious’⁴⁸⁶ ‘judicial activists’ who are deciding cases not on ‘legal merit’ but because of their own ‘political or ideological sympathies’.⁴⁸⁷ It is apparently because of their keenness to avoid creating such perceptions that Australian judges have found Chapter III of the *Commonwealth Constitution* to impose very few limitations on state and territory preventive detention schemes.⁴⁸⁸

In jurisdictions with a human rights charter, however, the position is different. In such jurisdictions, as Lord Dyson has recently explained, judges are not restricted to ‘making changes incrementally only where these are considered to be necessary to respond to changing social conditions, values and ideas’.⁴⁸⁹ They need not — and should not — always act compatibly with public opinion. For, as Lord Bingham pointed out in *Reyes v The Queen*,⁴⁹⁰ if they were always to decide cases in accordance with such opinion, they would be ignoring the fact that ‘[t]he very reason’ for implementing a charter of rights is ‘to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process’.⁴⁹¹ They would be acting in the same way as courts that lack the powers granted by such charters must act. They would be rendering their charter nugatory and inefficacious. Certainly, such courts do not have a *complete* freedom to protect the rights of tyrannised minorities. But as the Strasbourg and UK preventive detention case law shows, they do have a greater ability to do so than they would in the absence of a charter of rights.

Of course, just because charters are effective to limit the excesses of majoritarian democracy does not necessarily mean that they should be introduced in those Australian jurisdictions that lack such measures. There might be reasons why giving the judiciary such powers should not be countenanced — even if the consequence might be to improve the position of unpopular groups. But the capacity of charters to provide greater protections for these groups does strengthen the argument that such charters are desirable.

485 See, eg, Bingham, above n 43, 31; Justice Michael McHugh, ‘The Law-Making Function of the Judicial Process’ (Pt 2) (1988) 62 *Australian Law Journal* 116, 122; Devlin, above n 161, 9; Bell, ‘Keeping the Criminal Law in “Serviceable Condition”: A Task for the Courts or the Parliament?’, above n 47, 340; Bell, ‘Judicial Activists’, above n 202; Bell, ‘Examining the Judge’, above n 202.

486 Bell, ‘Keeping the Criminal Law in “Serviceable Condition”: A Task for the Courts or the Parliament?’, above n 47, 342.

487 Bell, ‘Examining the Judge’, above n 202, 6.

488 See above nn 191–203, 246–7, 256 and accompanying text.

489 Dyson, above n 46, 11.

490 [2002] 2 AC 235.

491 *Ibid* 246–7 [26], quoting *S v Makwanyane* [1995] 3 SA 391, 431 [88] (Chaskalson P). See also Mance, above n 37.