INVOLUNTARY DETENTION AND THE SEPARATION OF JUDICIAL POWER

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I INTRODUCTION

The power of the Commonwealth Parliament to authorise involuntary detention (that is, detention without the consent of the detainee) by the executive government has fallen for consideration by the High Court in a series of recent cases.[1] The Court has also examined the circumstances in which courts may make orders for detention.[2] The aim of this article is to discuss some of the issues which have arisen in these cases, including those over which there has been apparent disagreement between the Justices of the High Court. It argues for a conceptually coherent approach to detention, which favours substance over form while giving effect to the strict separation of judicial power from legislative and executive power required by the *Commonwealth Constitution*.

Part II of the article considers the nature of the power to order involuntary detention in the context of the separation of powers. Because the function of punishment for criminal guilt is seen as exclusively judicial, the imposition of detention which in substance amounts to punishment cannot be imposed by the Parliament or the executive in a system operating under a strict separation of powers. Detention orders for purposes other than punishment, on the other hand, generally involve no adjudication or settling of disputes, and are regarded as an executive act.

In Part III, it is argued that where the nature of the power to detain depends upon the purpose or object of the detention, some form of proportionality test is necessary to determine whether detention can really be said to be for its asserted purpose. The kind of inquiry which is appropriate, including the relevance of possible alternative measures, is discussed.

Part IV of the article explores the limits of detention by the executive. Consideration is given to areas of disagreement which emerge from recent cases, including whether segregation from the community and deterrence can ever be legitimate non-punitive

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1 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ('*Behrooz*'); *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 ('*Al-Khafaji*'); *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1 ('*Re Woolley*'); *Vasiljkovic v Commonwealth* (2006) 80 ALJR 1399 ('*Vasiljkovic*').

2 *Fardon v A-G (Qld)* (2004) 223 CLR 575 ('*Fardon*'); *Baker v The Queen* (2004) 223 CLR 513.

objects. The possible consequences for traditional forms of punishment other than incarceration are also explored.

Part V considers the potential scope for investing the courts with powers to order detention. The limitations on federal courts imposed by the separation of powers are reviewed, and it is argued that certain instances of detention — those which may be described as arbitrary in a strict sense — can *never* be imposed by either the Commonwealth Parliament or executive government on the one hand, or by the federal judiciary on the other. The possible limits of detention imposed by federal judges acting *persona designata* and by State courts is also examined, with reference to the incompatibility doctrines applied in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[3] and *Kable v Director of Public Prosecutions (NSW)*.[4]

II THE SEPARATION OF POWERS AND THE POWER TO ORDER DETENTION

Imposition of detention by a court in the exercise of the judicial power

It is well established that '[n]o part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Ch III'.[5] Only the courts identified in s 71 of the *Constitution*, namely, the High Court of Australia, the other courts created by the Parliament and the courts of the States (and territories) invested with federal jurisdiction, may exercise 'the judicial power of the Commonwealth'.

Although 'it has never been found possible to frame a definition [of judicial power] that is at once exclusive and exhaustive',[6] there are certain functions which may fairly be identified as 'exclusive and inalienable exercises of judicial power'.[7] The central conception of the judicial power is the settlement of a legal controversy between parties through 'an authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found.'[8]

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3 (1996) 189 CLR 1 ('*Wilson*').

4 (1996) 189 CLR 53 ('*Kable*').

5 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*'), 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); aff'd *A-G (Cth) v The Queen* (1957) 95 CLR 529; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Chu Kheng Lim*'), 26-7 (Brennan, Deane and Dawson JJ).

6 *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J).

7 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ('*Brandy*'), 258 (Mason CJ).

8 Ibid. See also *R v Davison* (1954) 90 CLR 353, 356–9, 368–70 (Dixon CJ and McTiernan J); *Huddart Parker & Co Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 ('*Tasmanian Breweries*'), 374 (Kitto J); *R v Local Government Board* [1902] 2 IR 349, 373 (Palles CB); *Precision Data Holdings Pty Ltd v Wills* (1991) 173 CLR 167, 188–90 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

It has long been recognised that the 'adjudgment and punishment of criminal guilt' is an exclusively judicial function.[9] The adjudgment of guilt, and the determination of the punishment to be imposed as a consequence, fall within the central conception of judicial power. A criminal trial represents a controversy or dispute between the community (or the state or sovereign) and an accused person. The power exercised by the court (whether by judge alone or split between judge and jury) is a power to conclusively determine the guilt or innocence of the accused by applying the principles of law to the facts as found, and, upon a finding of guilt, to impose punishment — the consequence imposed by law for breach of the criminal law. The conclusiveness of the power is reflected in the doctrines of autrefois acquit, autrefois convict and res judicata.[10] The effect of the exercise of the power is to establish a 'new charter' by which the accused and the community are bound unless and until the decision is set aside.[11]

Although the exclusively judicial function of determining criminal cases is frequently described simply as the imposition of 'punishment', that term can be ambiguous. 'Punishment' is capable of bearing several possible meanings. For example, in *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)*,[12] Gleeson CJ said:

> The proposition that, ordinarily, the involuntary detention of a citizen by the State is penal or punitive in character was not based upon the idea that all hardship or distress inflicted upon a citizen by the State constitutes a form of punishment, although colloquially that is how it may sometimes be described. Taxes are sometimes said, in political rhetoric, to be punitive. That is a loose use of the term. Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function.[13]

In *Re Nolan; Ex parte Young*,[14] Gaudron J referred to the exclusively judicial power to punish for criminal guilt in the following terms:

> [I]t is beyond dispute that the power to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make a binding and enforceable declaration as to the consequences which the law imposes by reason of that conduct lies at the heart of exclusive judicial power.[15]

Gummow J referred to that definition with approval in *Fardon v Attorney-General (Qld)*.[16] By focusing on the essential character of the court's function in sentencing, this formulation deflects arguments as to whether the judgment of guilt to which the consequences relate is 'criminal' or 'civil' in character: it does not matter provided the

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9 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J); *Brandy* (1995) 183 CLR 245, 258 (Mason CJ); *Chu Kheng Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Re Woolley* (2004) 225 CLR 1, 23 [53] (McHugh J).

10 For discussion of these doctrines, see, eg, *R v Carroll* (2002) 213 CLR 635; *Pearce v The Queen* (1998) 194 CLR 610; *Rogers v The Queen* (1994) 181 CLR 251.

11 *Tasmanian Breweries* (1970) 123 CLR 361, 374 (Kitto J).

12 (2004) 225 CLR 1.

13 Ibid 12 [17].

14 (1991) 172 CLR 460.

15 Ibid 497.

16 (2004) 223 CLR 575, 611 [76].

power exercised by the court involves the declaration of consequences imposed by the law for engagement in past conduct.[17]

The critical attribute of this exclusively judicial function is the adjudgment of guilt, adjudgment of a breach of a legal norm of conduct, and the fact that the consequences are imposed *by reason of* that conduct. Such consequences imposed for breach of the law may quite appropriately be referred to as 'punishment', even where part of the justification for their imposition may be described in terms of, for example, 'prevention', 'protection' or 'rehabilitation'. Thus, although protection of the community is a legitimate consideration in sentencing an offender to imprisonment for breach of the criminal law,[18] it is the fact that the imprisonment is imposed *as a response to*, or *by reason of*, the offender's guilt which makes the imposition of the sentence an exercise of judicial power. As Hayne J said in *Al-Kateb v Godwin*,[19] generally '[p]unishment exacted in the exercise of judicial power is punishment *for* identified and articulated wrongdoing'.[20]

This description of the essential judicial function of adjudging criminal guilt provides a reasonable degree of certainty and identifies as judicial power any power which bears the essential attributes of the imposition of punishment for criminal guilt. References in this article to 'punishment' (or 'punitive') should be understood as corresponding with this definition.

Once it is accepted that the essential feature of the exclusively judicial function of adjudging and punishing criminal guilt is the conclusive declaration of the consequences imposed by law for engagement in past conduct, it becomes clear that a strict dichotomy between detention for 'punishment' and detention for 'protection' cannot be maintained. The fact that the consequences for a contravention of the law imposed might be completely justified or explained in terms of prevention, protection or rehabilitation, so that no recourse to objects that might be described as 'purely punitive' — such as retribution or deterrence[21] — is necessary, will not deny the power to impose that consequence the status of judicial power. This was recognised in the joint judgment in *Rich v Australian Securities and Investments Commission*, in the context of the privilege against exposure to penalties:[22]

> [T]he supposed distinction between 'punitive' and 'protective' proceedings or orders suffers the same difficulties as attempting to classify all proceedings as either civil or criminal.[23] At best, the distinction between 'punitive' and 'protective' is elusive. That point is readily illustrated when it is recalled that … account must be taken in sentencing a criminal offender of the need to protect society, deter both the offender and others, to exact retribution and to promote reform.[24]

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17 See also *Vasiljkovic* (2006) 80 ALJR 1399, 1421 [107] (Gummow and Hayne JJ, Heydon J agreeing), 1435 [193] (Kirby J).

18 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476.

19 (2004) 219 CLR 562.

20 (2004) 219 CLR 562, 650 [265] (emphasis in original), referring to H L A Hart, *Punishment and Responsibility* (1968) 4. See also J Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3, 5.

21 See text accompanying below nn 205–8.

22 (2004) 220 CLR 129, 145 [32] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

23 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

24 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

It is inappropriate to treat the concepts of punishment and protection — 'punitive' and 'protective' proceedings or orders — as being mutually exclusive because the term 'punishment', when used in the relevant constitutional sense already identified, may include, *inter alia*, consequences imposed with community protection in mind.[25] Similarly, another reason for imposing detention as a consequence of a determination of guilt might be to make an alien available for deportation.[26]

There is an obvious inherent logical dichotomy between 'punitive' and its logical negation, 'non-punitive'. However, if 'punitive' is used to encapsulate the concept of a declaration as to the consequences imposed by law for engagement in past conduct, the term 'non-punitive', as used in the cases, is not simply its negation. Rather, in this area of discourse 'non-punitive' is generally used to mean non-retributive, or designed to achieve some object other than retribution or 'dessert'. Thus 'protection of the community',[27] 'segregation from the community',[28] reform or rehabilitation of offenders and the prevention of crime — each of which may quite naturally be a legitimate consideration in the fixing of detention for engagement in past conduct — may all be regarded as relevantly 'non-punitive' objects. In this article, references to 'non-punitive' objects or purposes should be understood in this sense.

Although the features of criminal judgment of guilt and punishment which have been identified will generally be sufficient to identify a power as exclusively judicial in nature, absence of those features may not necessarily deny a function the character of judicial power. Historically, there are instances of detention following a judicial order which do not fall within the paradigm of punishment for breach of the law. These are considered in greater detail in Part V.

Deprivation of liberty that is not referable to a finding of engagement in past acts will not generally fall within the exclusively judicial power. However, it is now appropriate to consider detention by order of the Parliament and the executive. That consideration will be informed by the nature of the exclusively judicial function discussed above.

Detention by the Parliament or by the executive government

The High Court has recognised that the enactment of an Act of Attainder or Act of Pains and Penalties is beyond the capacity of the Commonwealth Parliament.[29] (These may be referred to generally as 'bills of attainder'.) The fundamental basis for this conclusion is the fact that the imposition of consequences upon a determination of engagement in past conduct is an exclusively judicial power.

In *Polyukhovich v Commonwealth*,[30] Mason CJ argued that, in order to be characterised as a bill of attainder, a statute must itself make a declaration of guilt.[31]

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25 *Power v The Queen* (1974) 131 CLR 623, 628 (Barwick CJ, Menzies, Stephen and Mason JJ).

26 *Chu Shao Hung v The Queen* (1953) 87 CLR 575 ('*Chu Shao Hung*'), 585 (Fullagar J).

27 *Fardon* (2004) 223 CLR 575, 588–90 [7]–[14] (Gleeson CJ). See also *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ), 495 (Deane J).

28 *Al-Kateb* (2004) 219 CLR 562, 648 [255], 650–1 [266]–[267] (Hayne J), cf 613 [140] (Gummow J). See text accompanying below nn 185–204.

29 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ('*Polyukhovich*'), 535–6, 539 (Mason CJ), 686 (Toohey J), 721 (McHugh J); *Chu Kheng Lim* (1992) 176 CLR 1, 70 (McHugh J); *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 ('*APLA*'), 364 [77] (McHugh J).

30 (1991) 172 CLR 501.

However, if the constitutional concept of a bill of attainder were so confined, the prohibition on such bills could easily be circumvented by the Parliament: it could simply pass a law imposing, for example, a period of imprisonment on a specified person or group of persons, but without identifying and declaring guilt for any crime. Members of the Parliament might even announce publicly the guilt of persons so detained, and explain that the legislative detention is intended as punishment for specified wrongdoing, without enacting that declaration of guilt into the legislation itself. The guarantee against bills of attainder would be overly formalistic, and easily avoidable.[32]

Dawson J appears to have accepted a slightly broader conception of a bill of attainder than that recognised by Mason CJ. Dawson J said:

> Legislation will amount to a bill of attainder only where *it is apparent* that the legislature intended the conviction of specific persons for conduct engaged in in the past. The law may do that by penalizing specific persons by name *or by means of specific characteristics which, in the circumstances, identify particular persons*. A court in applying such a law is in effect confined in its enquiry to the issue of whether or not an accused is one of the persons identified by the law. If he is, his guilt follows.[33]

Later he said:

> It is when the legislature itself, expressly *or impliedly*, determines the guilt or innocence of an individual that there is an interference with the process of the court.[34]

Toohey J also accepted that consequences imposed upon all members of a group, by virtue of their membership of that group, could amount to a bill of attainder.[35] The reasoning adopted by Deane and Gaudron JJ tends to suggest that they, too, would have rejected the power of the Parliament to enact a law having that effect.[36]

Even where legislation did not explicitly declare a specified person guilty of any offence, it might be apparent that the legislature intended the conviction or punishment of that person for their engagement in past conduct. Substantive effect must be given to the separation of judicial power which the *Constitution* requires. If it is apparent that the Parliament has in fact, by legislation, provided for the punishment of a particular person or class of persons, it cannot matter that the punishment imposed is not *expressed* to follow from a finding of guilt by the legislature.

In the federal constitutional context it is of no consequence whether all exercises of judicial power by the Parliament (ie, 'legislative judgments')[37] are to be referred to as 'bills of attainder'.[38] What is important is the recognition that the imposition of

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31 Ibid 537–8 (Mason CJ), citing *Kariapper v Wijesinha* [1968] AC 717, 721; *United States v Lovett*, 328 US 303 (1946).

32 See generally the discussion and conclusions in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 35–6, 206–10.

33 *Polyukhovich* (1991) 172 CLR 501, 647 (emphasis added).

34 Ibid 649 (emphasis added).

35 Ibid 686.

36 Deane and Gaudron JJ held that any retrospective criminal law would amount to an exercise or 'usurpation' of judicial power by the Parliament: (1991) 172 CLR 501, 606–16 (Deane J), 703–8 (Gaudron J).

37 *Calder v Bull*, 3 US 386, 389 (Chase J) (1798), cited in *Polyukhovich* (1991) 172 CLR 501, 535–6 (Mason CJ), 617 (Deane J); see also 646–7 (Dawson J), 685–6 (Toohey J), 721 (McHugh J).

38 This may be contrasted with the United States, where the federal Constitution does not impose upon State legislatures the general principle of the separation of powers, but,

punishment is an exclusively judicial function and that, if the Parliament purports itself to impose punishment, whether by means described as a 'bill of attainder' or otherwise, that usurpation of the judicial function will contravene the separation of judicial power.

Similarly, it follows, from the separation of judicial power from *executive* power, that the Parliament is not competent to pass legislation the effect of which would be to confer upon an officer of the executive, or on an administrative tribunal, functions which are judicial in character.[39] Because the imposition of punishment for engagement in past conduct is exclusively judicial, the Parliament may not enact a law authorising the executive to exercise a power to impose punishment.

If substance is to prevail over form, it must be accepted that a finding of guilt, or determination of engagement in past conduct, is implicit in the making or execution of a law or decision which has an effect that cannot be rationally explained otherwise than as consequences flowing from a finding of guilt or determination of engagement in past conduct. This is the central idea behind, and the first step in explaining, the principle which was recognised by the majority in *Chu Kheng Lim*.[40] This first step was expressed by Brennan, Deane and Dawson JJ in the following terms:

> In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the *Constitution*'s concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.[41]

The reference in this passage to 'arbitrary power' encapsulates the idea emphasised above, namely, a power which is not rationally referable to any other non-punitive object.[42] In *Re Woolley*, McHugh J, although critical of the conclusions reached in the joint judgment in *Chu Kheng Lim*, recognised that a law authorising detention, even if not expressed in terms of guilt and punishment, could, in substance, impose punishment and thus involve an exercise of exclusively judicial power.[43]

It may be accepted, then, that detention (and also perhaps other forms of deprivation of liberty)[44] is to be regarded as having been imposed as punishment, unless it can be demonstrated that the detention serves another object. In order to be effective, it is necessary to express the test in this negative way, focusing on whether the detention is justifiable as being for another object, because of the ease with which a true object of punishment could be concealed.

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through the XIVth Amendment, does extend the prohibition on the enactment of bills of attainder to State legislatures.

39 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*S157*'), 484 [9] (Gleeson CJ), 505 [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Boilermakers* (1956) 94 CLR 254; *A-G (Cth) v The Queen* (1957) 95 CLR 529; *Alexander* (1918) 25 CLR 434, 442 (Griffith CJ), 450 (Barton J).

40 (1992) 176 CLR 1.

41 Ibid 27.

42 Note that 'arbitrary' can also be used in a wider sense: see below n 231.

43 (2004) 225 CLR 1, 24 [57], 25 [60].

44 See text accompanying below nn 213–18.

It is possible that a law authorising detention might have dual purposes, one punitive (ie, it imposes consequences for past conduct) and one non-punitive (ie, it serves a purpose which does not *necessarily* involve a response to past conduct). It is suggested that the only objects or purposes which can be relevant to constitutional validity are those which can be described as 'dominant purposes' or 'operative purposes': those purposes to which reference is necessary to justify the enactment of the law. Accordingly, the question is whether the law could rationally have been enacted 'but for' any impermissible purposes.[45] Another way of expressing this idea is that a law imposing or authorising detention by the executive, if it is to be constitutionally valid, must be entirely rationally explicable by reference to purposes or objects not including impermissible objects.[46]

The possibility of dual purposes was recognised by McHugh J in *Al-Kateb*. He said:

> Nor does the continued detention of a person who cannot be deported immediately infringe Ch III of the *Constitution*. Chapter III is always infringed where the detention of a person other than by a curial order — whatever the purpose of the detention — is authorised by a law of the Commonwealth *and* imposes punishment. However, a law authorising detention will not be characterised as imposing punishment if its object is purely protective. *Ex hypothesi*, a law whose object is purely[47] protective will not have a punitive purpose. That does not mean, however, that a law authorising detention in the absence of a curial order, but whose object is purely protective, cannot infringe Ch III of the *Constitution*. Even a law whose object is purely protective will infringe Ch III if it prevents the Ch III courts from determining some matter that is a condition precedent to authorising detention.[48]

It follows that a power of detention for certain purposes or objects which might be described in a general way as 'non-punitive', such as 'protection of the community', may be either a judicial power or an executive power. However, if the detention does not serve a non-punitive purpose or object, the 'substance over form' requirement dictates that it must be presumed to have been imposed as punishment, and therefore cannot be imposed in the exercise of executive power.

A principled approach to the 'exceptional cases'

In *Chu Kheng Lim*, Brennan, Deane and Dawson JJ identified the following principle:

> [P]utting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character

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45 See, by analogy, *Esso Australia Resources Ltd v Federal Commissioner for Taxation* (1999) 201 CLR 49, holding that a 'but for' test is applicable in determining whether documents have been brought into existence for the dominant purpose of litigation.

46 Cf *Gerhardy v Brown* (1985) 159 CLR 70, 148–9 (Deane J).

47 See also *Re Woolley* (2004) 225 CLR 1, 26 [61], where McHugh J spoke of a 'solely protective' or 'purely protective' purpose.

48 (2004) 219 CLR 562, 584 [44]. It should be noted that the last two sentences of the quoted passage are unrelated to the question of whether the law imposes punishment. They refer to the conclusiveness of the judicial power and recognise that the Parliament could not, consistently with the separation of judicial power, invest an executive officer or tribunal with a power to determine, conclusively, the limits of its own jurisdiction: see *S157* (2003) 211 CLR 476, 484 [9] (Gleeson CJ), 505 [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

> and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. [49]

Two of the 'exceptional cases' which were recognised by Brennan, Deane and Dawson JJ — the power of the Commonwealth Parliament to punish for contempt[50] and the power of courts martial to punish for breach of military discipline[51] — are really 'exceptions' to the doctrine of the separation of judicial power, rather than exceptions to the proposition that 'detention of a citizen in custody by the State is penal or punitive in character'.

The comments of Brennan, Deane and Dawson JJ that 'committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power' and that '[i]nvoluntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power'[52] acknowledge that it is the 'non-punitive' character of that detention which takes it outside the realm of judicial power. If that is so, it would seem that any power to detain only for a non-punitive object, whether historically exercised by the executive or not, should be able to be validly entrusted to the executive without infringing the separation of judicial power.

In *Chu Kheng Lim*, McHugh J expressed the test for whether detention involved the exercise of judicial power more generally, identifying the relevant question as whether detention was punitive in character.[53] Although detention would 'ordinarily' be characterised as punitive, that would not be so where its object was non-punitive. In describing the constitutional rule in this way, McHugh J was able to incorporate each of the 'exceptional cases'[54] identified by Brennan, Deane and Dawson JJ within a more general test which operated simply by determining whether the law had a 'non-punitive object'. In *Kruger v Commonwealth*,[55] Gummow J also accepted and applied this more general form of the test. He said:

> The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed.[56]

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49 *Chu Kheng Lim* (1992) 176 CLR 1, 27.

50 See *Constitution* s 49; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157; *Re Woolley* (2004) 225 CLR 1, 22 [50] (McHugh J), describing this exception as 'more apparent than real'.

51 See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308.

52 *Chu Kheng Lim* (1992) 176 CLR 1, 28. To the examples given in *Chu Kheng Lim*, one might also add the 'power to impose such restrictions on the liberty of movement of the suspect as are necessary to effect [a] search' or investigation: see *Gibson v Ellis* (1992) 59 SASR 420, 424 (King CJ); *R v McKay* (1998) 135 ACTR 29, 32–3 [11]–[15] (Crispin J).

53 (1992) 176 CLR 1, 71.

54 Leaving aside the two exceptions to the separation of powers which I have identified, namely the power of the Parliament to punish for contempt and the power of military courts martial to punish for a breach of military discipline.

55 *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*').

56 (1997) 190 CLR 1, 162. In support of this proposition, Gummow J cited passages from *Chu Kheng Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ), 46 (Toohey J), 55, 58

The recognition by Brennan, Deane and Dawson JJ in *Chu Kheng Lim* of 'exceptional cases' of detention by the executive, which do not infringe Ch III, can easily be reconciled with the general form of the test expressed by McHugh J, once it is accepted that those exceptional cases are simply particular identifiable and traditional instances of detention to achieve 'non-punitive' objects. It appears to be accepted that the 'exceptional cases' may be extended by analogy[57] and, as has been pointed out in other contexts, '[e]ven to proceed by way of analogy from case to case, it is necessary to have some concept of the principle by which the analogy is to be discovered'.[58] Once it is accepted that the categories of possible 'exceptions' are not closed, there would seem to be little difference between, on the one hand, asking whether an instance of detention is for a non-punitive object and, on the other hand, asking whether it is analogous to one of the established exceptions to the general rule that detention is punitive, the common theme among those exceptions being that they involve detention for objects which are relevantly 'non-punitive'. Furthermore, if a novel power of detention was clearly to be exercised for the achievement of some non-punitive object, it would be incongruous to hold that it could not validly be conferred upon the executive, given that the underlying basis for the Ch III limitation is that it is the imposition of *punishment* which is exclusively judicial.

In *Kruger*, Toohey J accepted that detention for a 'welfare purpose' was at odds with the power to detain being characterised as 'punitive' and thus exclusively judicial.[59] Dawson J, who had participated in the joint judgment in *Chu Kheng Lim*, also cited that case for the proposition that actions of the executive government which 'may legitimately be seen as non-punitive' would not involve the exercise of judicial power.[60] Gaudron J rejected altogether an approach which identified involuntary detention, subject only to exceptional cases, as exclusively judicial in nature.[61]

In *Al-Kateb*,[62] the High Court appears to have accepted that the question of whether detention by the executive government is constitutionally permissible requires a consideration of the object or purpose of the detention. Gleeson CJ spoke of the

(Gaudron J), 65, 71 (McHugh J). See also *R v McKay* (1998) 135 ACTR 29, 32–3 [11]–[15] (Crispin J).

57 It has repeatedly been said that the categories of allowable detention by the executive government are 'not closed'. See *Chu Kheng Lim* (1992) 172 CLR 1, 55 (Gaudron J); *Kruger* (1997) 190 CLR 1, 162 (Gummow J); *Behrooz* (2004) 219 CLR 486, 527–8 [121] (Kirby J).

58 Bradley Selway, 'The Principle behind Common Law Judicial Review of Administrative Action — the Search Continues' (2002) 30 *Federal Law Review* 217, 217, citing *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 397 (Kirby J); Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303. Although it is perfectly legitimate for a legislature or policy maker to create rules with exceptions designed to protect both civil liberties and historical anomalies, judicial development of constitutional principle cannot easily accommodate rules that admit of arbitrary exceptions with no textual basis; rather, judicially recognised 'exceptions' must be by reference to a class or classes the relevant features of which are identifiable. Cf Matthew Zagor, 'Uncertainty and Exclusion: Detention of Aliens and the High Court' (2006) 34 *Federal Law Review* 127, 153.

59 (1997) 190 CLR 1, 85.

60 Ibid 62.

61 Ibid 110–11. The approach suggested by Gaudron J is considered in greater detail in text accompanying below nn 70–9.

62 (2004) 219 CLR 562.

'purposive nature of the power (and duty) of administrative detention.'[63] McHugh J stated that '[a] law requiring the detention of the alien takes its character from the purpose of the detention'.[64] Although rejecting a strict dichotomy between punitive and non-punitive purposes or objects, Gummow J also appears to have accepted that the purpose or object of the detention provided the criterion upon which its constitutional validity is to be assessed.[65] Hayne J, with whom Heydon J agreed, stated that the identification of qualifications to the immunity from executive detention 'must be done by reference to the purpose of the detention',[66] and for Callinan J, that the purpose of the detention was to effect deportation was sufficient to show that it was not punitive.[67] Kirby J, although not specifically referring in *Al-Kateb* to the purpose or object of detention, did refer with approval to the joint judgment in *Chu Kheng Lim* and, in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,[68] which was heard and decided together with *Al-Kateb*, Kirby J appears to have accepted that the purpose of the detention was relevant (although not the only consideration).[69]

Rejection of an alternative approach based solely on the scope of Commonwealth heads of power

In *Chu Kheng Lim*, Gaudron J did not accept that, subject to exceptional cases, the power to authorise detention in custody was exclusively judicial.[70] This view was expanded upon in *Kruger*, where she said:

> Once exceptions are expressed in terms involving the welfare of the individual or that of the community, it is not possible to say that they are clear or fall within precise and confined categories. More to the point, it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely, that a law authorising detention in custody is not, of itself, offensive to Ch III. [71]

Instead, Gaudron J would have interpreted the scope of most heads of Commonwealth legislative power in s 51 so as not to authorise the making of a law authorising detention by the executive 'divorced from criminal guilt'.[72] (Of course, since s 51 is expressed to be 'subject to [the] *Constitution*', no head of power extends to authorise laws effecting a breach of the separation of powers imposed by the *Constitution*, but that does not appear to be what Gaudron J had in mind.) She continued:

> I do not doubt that there is a broad immunity similar to, but not precisely identical with that enunciated by Brennan, Deane and Dawson JJ in *Lim*. In my view, however, *it does*

63 Ibid 576 [17].
64 Ibid 584 [45]; see also *Re Woolley* (2004) 225 CLR 1, 35 [82] (McHugh J).
65 *Al-Kateb* (2004) 219 CLR 562, 609–10 [128]–[132]; cf 612–13 [136]–[139]; *Fardon* (2004) 223 CLR 575, 612–13 [81].
66 Ibid 650–1 [267].
67 Ibid 659 [291]; see also 657 [287].
68 (2004) 219 CLR 486.
69 Ibid 527 [119]–[120].
70 (1992) 176 CLR 1, 57.
71 *Kruger* (1997) 190 CLR 1, 110.
72 Ibid 111. The phrase 'criminal guilt' here must be understood as referring to a determination of criminal guilt by a Ch III Court.

> *not derive from Ch III*. Rather, I am of the view that the true constitutional position is that, subject to certain exceptions, a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power. The defence power may be an exception to that proposition. And the proposition does not extend to laws with respect to quarantine or laws with respect to aliens and the influx of criminals. It may be that an exception should also be acknowledged with respect to the race power. It is however arguable that that power only authorises laws for the benefit of 'the people of [a] race for whom it is deemed necessary to make special laws'.[73]

Although Gaudron J stated that her approach did not derive from Ch III of the *Constitution*, it is suggested that the common theme among the heads of power mentioned by Gaudron J is that it is possible to envisage laws on those subject-matters which impose detention for 'non-punitive' purposes. It may be that, in practice, valid federal laws that authorise detention for non-punitive purposes will tend to be laws with respect to those heads of power identified.

However, it is possible to imagine a law authorising detention by the executive, divorced from any breach of the law, which would seem naturally to fall within other heads of power. For example, a law authorising the detention of the directors of a trading corporation for questioning about the trading activities of that corporation (in the investigation of a breach of trade practices legislation, for example) would seem, on its face, to be a law with respect to trading corporations formed within the limits of the Commonwealth.[74] Likewise, a preventative detention regime based upon the likelihood that a person will obstruct interstate trade would, on its face, be a law with respect to trade and commerce between the States.[75] It is not clear why or how those heads of power would be read more narrowly so as not to authorise such laws.

Furthermore, it is also possible to imagine laws apparently with respect to the subject matters of the heads of power identified by Gaudron J which do not serve any apparent non-punitive purpose and yet do not explicitly involve punishment for any breach of the law. For example, a law authorising detention of members of the Australian armed forces for any reason might be a law with respect to the military defence of the Commonwealth or control of the armed forces. If the 'immunity' flowed from the scope of heads of power rather than from Ch III of the *Constitution*, such a power could be exercised for the purpose of punishing members for alleged breaches of the general criminal law or for engagement in other undesirable conduct, notwithstanding that they had not received a judicial trial.[76] Even in the case of the aliens power, a law authorising the executive to detain aliens *as punishment* for (say) breaching the conditions of a visa would plainly be a law with respect to aliens,[77] but would infringe the separation of judicial power.

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73 Ibid 110–11 (footnotes omitted; emphasis added).

74 *Constitution* s 51(xx).

75 *Constitution* s 51(i).

76 Cf *Re Tracey; Ex parte Ryan* (1988) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

77 That is so whether one views as valid all laws taking 'aliens' as their 'object of command', or whether the aliens power is restricted to the regulation of 'aliens as aliens'. See *Al-Kateb* (2004) 219 CLR 562, 610 [132] (Gummow J); *New South Wales v Commonwealth* (2006) 81 ALJR 34, 91 [198] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); cf *Huddart Parker & Co Ltd v Moorehead* (1909) 8 CLR 330, 412 (Higgins J); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 507–8 (Menzies J); *Actors and Announcers Equity Association v*

There are some statements in the judgments of Hayne J (with whom Heydon J agreed) in *Al-Kateb*[78] and McHugh J in *Re Woolley*,[79] which can be taken as endorsing the approach of Gaudron J. However, both judges accepted that the relevant inquiry was whether the purpose of the detention was 'punitive'. It is not apparent why that question would be at all relevant to characterisation under s 51(xix), the power to legislate with respect to aliens. It may be that the agreement with Gaudron J's approach extended only so far as her rejection of the proposition that 'the power to authorise detention in custody is necessarily and exclusively judicial power', and was not intended to embrace the proposition that the 'immunity' does not derive from Ch III of the *Constitution*.[80]

The better view is that that immunity does derive from Ch III of the *Constitution*. For the reasons explained above, that approach is justified by reference to the accepted principles that the adjudgment and punishment of criminal guilt is an exclusively judicial function, and that the *Constitution* is concerned with substance rather than mere form. I have thus argued that the immunity derived from Ch III *is* 'similar to, but not precisely identical with that enunciated by Brennan, Deane and Dawson JJ in *Lim*',[81] because it should be expressed as an immunity from detention *imposed as punishment* by the executive, rather than an immunity from detention by the executive generally. If the immunity did not derive from Ch III at all, it would be difficult to see why a head of power should be interpreted as extending to the prohibition of conduct, to the creation of offences and to their trial by the judiciary, but not to the imprisonment of persons found by the executive to have engaged in the same conduct. One would expect that, if the former were laws 'with respect to' the relevant head of power, the latter also would bear that character.

Detention by the executive which appears to follow a determination of guilt

There are several traditional instances of detention by the executive which may appear to follow from a finding of guilt. For example, the functions of a parole board (an executive body, at least in Australia)[82] may include the cancellation of parole, resulting

Fontana Films Pty Ltd (1981) 150 CLR 169, 181–2 (Gibbs J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 316 (Brennan J).

78 (2004) 219 CLR 562, 689–90 [258]–[259] (Hayne J, Heydon J agreeing). In contrast, Gummow J expressly stated at 610–11 [131]–[132] that he preferred the reasons for invalidity given in *Chu Kheng Lim* (1992) 176 CLR 1 by Brennan, Deane and Dawson JJ, and by McHugh J, to those of Gaudron J. See also *Re Woolley* (2004) 225 CLR 1, 11 [14] (Gleeson CJ), treating the approach of Mason CJ, Brennan, Deane and Dawson JJ as binding.

79 (2004) 225 CLR 1, 25 [59] (McHugh J).

80 Professor Zines, writing after the decision in *Chu Kheng Lim* (1992) 176 CLR 1 but before Gaudron J expanded upon her views in *Kruger* (1997) 190 CLR 1, appears to have interpreted her remarks in this way: Zines, above n 32, 208.

81 *Kruger* (1997) 190 CLR 1, 110–11 (footnotes omitted).

82 Cf *R (Giles) v Parole Board* [2004] 1 AC 1, 21 [10] (Lord Bingham of Cornhill), 27 [33] (Lord Hope of Craighead), 42 [72] (Lord Hutton), where it was held that the English parole board was 'a judicial body' and not part of the 'executive'. It is suggested that this was not a reference to the exercise of judicial power *strictu sensu*, but rather that what was meant was that board was required to exercise its power 'judicially', in the sense of according procedural fairness, and that it was independent from the political executive. As to the distinction, see *Grollo v Palmer* (1995) 184 CLR 348, 356 (Brennan CJ, Deane, Dawson and Toohey JJ).

in the detention of the parolee. However, in such a situation the order for detention is the original judicial order imposing punishment. As was pointed out in *Power v The Queen*:

> To interfere with that sentence is not within the authority of the paroling authority. Its authority is to release the prisoner conditionally from confinement in accordance with the sentence imposed upon him. The sentence stands and during its term the prisoner is simply released upon conditional parole.[83]

Although the 're-imprisonment' of a parolee is usually dependent upon a finding by the parole board that the conditions of the parole have been breached, the parolee is not liable by reason of that breach to detention over and above that authorised by the original judicial sentence. Rather, the cancellation of parole is part of the executive function of enforcing the sentence already imposed in the exercise of judicial power.[84] The position may be contrasted with a breach of conditions of bail or of a bond or recognisance, where imprisonment is ordinarily imposed by a court as punishment for the breach. It is possible that detention associated with breaches of parole is one of those functions which might be performed by either an executive body or a court, and could equally be imposed in the exercise of judicial power as incidental to the judicial function of imposing the initial sentence.

Another example, involving forfeiture of money rather than detention, is a criminal injuries compensation scheme, under which the payment of compensation by an accused person might depend upon a finding of guilt. Assuming that such a scheme was purely compensatory in its effect (that is, the amount payable was wholly justifiable as compensation and not as 'retribution' or 'dessert'), it might be permissible for such a scheme to be administered by an executive tribunal. On the other hand, this can be regarded as closely analogous to a claim in tort, the determination of which may be an exclusively judicial power in any event.[85]

In the case of a power of 'preventative' or 'protective' detention, a finding of guilt of any crime or of a crime of a particular kind (for example, sexual offences or offences involving violence) may be made a precondition to the exercise of the power. In such a case it may still be possible to conclude that the detention serves a legitimate non-punitive object and therefore involves an exercise of executive power.[86]

The above discussion indicates general agreement that the constitutional validity of detention by the executive government, in the absence of any judicial order, will depend primarily upon the object or purpose of the detention. In Part III, it will be argued that some form of proportionality test is necessary in order to determine the 'true' object or purpose of detention.

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83 (1974) 131 CLR 623, 628 (Barwick CJ, Menzies, Stephen and Mason JJ).

84 Cf *Baker v The Queen* (2004) 223 CLR 513.

85 See *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 238 [126]–[127] (Spigelman CJ), 241 [147] (Mason P).

86 See *Fardon* (2004) 223 CLR 575, 610 [73], 614 [85] (Gummow J), 658 [234] (Callinan and Heydon JJ); cf 619 [108] (Gummow J). The case considered the validity of s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). See further discussion in text accompanying below nn 300–3.

III USING PROPORTIONALITY TO TEST PURPOSE

Proportionality, characterisation under purposive grants of power, and purposive limitations on power

The concept of proportionality in public law, and in constitutional law in particular, has been the subject of analysis by a number of commentators.[87] References in this article to a test of 'proportionality' are intended to include each of the various tests that have been identified by the High Court. These include asking whether a law is 'proportionate' or 'proportional' to, 'reasonably and appropriately adapted', 'reasonably appropriate and adapted', 'reasonably capable of being seen as appropriate and adapted', 'reasonably necessary', or 'reasonably capable of being seen as necessary' for the achievement of a legitimate object, purpose or end, or whether a law 'is a reasonable implementation of a legitimate legislative objective'. It may be accepted that the inclusion of each of these formulations involves a loose use of the term 'proportionality',[88] but that term is intended to convey the objective test of purpose which is encompassed in each of the above formulations, as used by the High Court.

The introduction of reasonable proportionality into Australian public law has been traced[89] to the judgment of Dixon J in *Williams v Melbourne Corporation*.[90] That case involved the interpretation of legislation granting a local council a power to make by-laws. Dixon J said:

> The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power. [91]

Of course, questions about the validity of delegated legislation involve statutory interpretation. The fundamental inquiry is 'whether the delegated legislation is within the scope of what the Parliament intended when enacting the empowering statute'.[92] The invalidation of a by-law on the ground that it could not reasonably have been adopted as a means of attaining the ends of the power depends upon a characterisation of the by-law making power as purposive. That is, before the proportionality test

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87 See, eg, Brian Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12 *University of Tasmania Law Review* 263; H P Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 126; Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 266–7 [247]–[251] (Kirby J) ('*Mulholland*').

88 See the critique in Kirk, above n 87, 24–7, 29, 34–5.

89 Selway, above n 87, 213–14. See also Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, 2002) 527.

90 (1933) 49 CLR 142.

91 Ibid 155–6. See also *South Australia v Tanner* (1989) 166 CLR 161, 165 (Wilson, Dawson, Toohey and Gaudron JJ), 178 (Brennan J).

92 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (2nd ed, 1999) 239.

becomes relevant, the Parliament must be understood, as a matter of statutory construction, to have granted a power to be exercised for the attainment of a particular purpose, object or end. Having ascertained that intention, the application of the presumption of statutory interpretation that the Parliament does not intend to authorise unreasonable exercises of a granted power results in the need for a test of proportionality (such as asking whether the by-law 'could not reasonably have been adopted as a means of attaining the ends of the power').

A similar approach is appropriate when dealing with constitutional grants of power that are said to be purposive, that is, legislative powers which are defined by reference to a purpose rather than a subject matter.[93] The waxing and waning of the scope of the defence power,[94] depending upon what can be justified as being necessary for the purpose of defence from time to time is consistent with an analysis which invokes a proportionality test.[95] The external affairs power[96] has also been held to have a 'purposive aspect' where it is relied upon to enact laws fulfilling Australia's treaty and other international obligations. A proportionality test is essential to determining whether legislation can truly be said to have been enacted for the purpose of fulfilling such obligations.[97]

Questions of proportionality are also relevant when determining whether a law infringes a limitation on legislative power or constitutional guarantee which depends upon purpose. For example, s 116 of the *Constitution* prohibits the Commonwealth passing any law 'for prohibiting the free exercise of any religion'. The inclusion of the word 'for' indicates that the restriction on legislative power is purposive.[98] In order for the guarantee of freedom of religion to be infringed, it must be shown that the purpose of an impugned law is the prohibition of the free exercise of any religion.[99] In *Kruger*, Gaudron J suggested that, where a legitimate purpose for the law was asserted (ie, a purpose other than the prohibition of the free exercise of any religion), the relevant test

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93 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 322–3 (Brennan J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 484 (Brennan and Toohey JJ); *Polyukhovich* (1991) 172 CLR 501, 593 (Brennan J), 604–5 (Deane J), 697 (Gaudron J); *Re Tracey; Ex parte Ryan* (1988) 166 CLR 518, 567 (Brennan and Toohey JJ), 583 (Deane J), 597 (Gaudron J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 138–9, 142–3 (Mason J), 259–61 (Deane J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 289, 291 (Mason CJ and Brennan J), 300–1, 303 (Wilson J), 312, 314 (Deane J), 336 (Toohey J), 344–6 (Gaudron J); *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 86 (Barwick CJ).

94 *Constitution* s 51(vi).

95 *Re Tracey; Ex parte Ryan* (1988) 166 CLR 518, 597 (Gaudron J). For applications of a proportionality test in the context of characterisation under the defence power, see *Re Tyler; Ex parte Foley* (1993) 181 CLR 18, 30 (Brennan and Toohey JJ); *Re Tracey; Ex parte Ryan* (1988) 166 CLR 518, 567–9 (Brennan and Toohey JJ), 583 (Deane J), 600–3 (Gaudron J). See also Kirk, above n 87, 22.

96 *Constitution* s 51 (xxix).

97 Kirk, above n 87, 22. See generally the cases cited in n 93, above.

98 *Kruger* (1997) 190 CLR 1, 132.

99 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132 (Latham CJ); *A-G (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 579 (Barwick CJ), 615–16 (Mason J), 653 (Wilson J); *Kruger* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J), 132 (Gaudron J), 160 (Gummow J).

was whether the interference with religious freedom was 'appropriate and adapted or, which is the same thing, proportionate to' the legitimate purpose.[100]

In *Nationwide News Pty Ltd v Wills*,[101] Brennan J considered the requirement of freedom of interstate intercourse,[102] imposed by s 92 of the *Constitution*. He said:

> The general criterion of invalidity of a law which places a burden on interstate intercourse is that the law is enacted for the purpose of burdening interstate intercourse. If the law is enacted for some other purpose then, provided the law is appropriate and adapted to the fulfilment of that other purpose, an incidental burdening of interstate intercourse may not be held to invalidate the law. A law may be found to be enacted for the prohibited purpose by reference to its meaning or by reference to its effect. [103]

That passage illustrates the way in which a test of proportionality (expressed in the words 'appropriate and adapted') is applied to determine the validity of a law which burdens interstate intercourse. A law which, although supposedly enacted for some purpose other than burdening interstate intercourse, is not 'appropriate and adapted' to the fulfilment of that other purpose is invalid because the law cannot objectively be said to be *for* that other purpose. If the relevant inquiry was merely whether the Parliament, in enacting the law, sought (subjectively) to pursue the asserted purpose, the disproportion of the law to the fulfilment of that purpose could at best create a rebuttable presumption of constitutional invalidity, not a conclusive test.[104]

Another restriction on legislative power in relation to which the 'appropriate and adapted' test has been applied is the implied guarantee of freedom of political communication. On one view, this guarantee is a prohibition against laws which are aimed at (that is, which have as one of their purposes, objectively ascertained) the impairment of the system of representative or responsible government created by the *Constitution*,[105] or the restriction of communication about government and political matters which is necessary for the functioning of that system. On the other hand, it is

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100 *Kruger* (1997) 190 CLR 1, 134.

101 (1992) 177 CLR 1. See also James Stellios, 'The Intercourse Limb of Section 92 and the High Court's Decision in *APLA Ltd v Legal Services Commissioner (NSW)*' (2006) 17 *Public Law Review* 10, 13–15.

102 Similar considerations apply to the freedom of trade and commerce protected by s 92, although it is complicated by the fact that the prohibition is limited to discriminatory laws which are 'protectionist'. See *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 472–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); Amelia Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone' (2005) 33 *Federal Law Review* 445.

103 *Nationwide News v Wills* (1992) 177 CLR 1, 57. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 194 (Deane J), 144 (Dawson J); *AMS v AIF* (1999) 199 CLR 160, 178–9 [43]–[45] (Gleeson CJ, McHugh and Gummow JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 366–7 (Dawson J); *APLA* (2005) 224 CLR 322, 392–4 [173]–[179] (Gummow J).

104 See text accompanying below nn 110–17.

105 In particular, ss 7, 24, 64, 128: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557–61 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); see also *Coleman v Power* (2004) 220 CLR 1, 120 [320] (Heydon J), referring to ss 1, 6, 7, 8 , 13, 24, 25, 28, 30, 49, 62, 64, 83, 128.

arguable that the application of the test in the context of the implied guarantee of freedom of political communication goes beyond merely testing objective purpose.[106]

The prohibition on Commonwealth legislation discriminating against the States, which was recognised in *Melbourne Corporation v Commonwealth*,[107] is also defensible on the basis that laws which discriminate against the States have the impermissible purpose or object of destroying the capacities of, or curtailing the continued existence of, the States.[108] The test of 'discrimination' can again be seen as a purposive prohibition on legislative power.

'Objective' or 'subjective' purpose?[109]

Dr Kirk has stated that '[i]t is the actual or subjective purpose of the legislator which is in issue'.[110] However, it is suggested that, when it comes to both statutory construction and constitutional interpretation and characterisation, the relevant purpose is actually the objective 'purpose' of the law, rather than the subjective purpose or 'intention' of the legislator.[111] The following arguments are made in support of this view.

The best indication of the Parliament's actual intention is often to be found in the terms of legislation itself. However, even where an intention to enact a law under a particular grant of power is manifested in the legislation itself, the law may still be valid under an alternative grant of power. As Starke J said in *Ex parte Walsh and Johnson; In re Yates*, '[a] law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, from whatever source derived.'[112]

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106 See, eg, Dan Meagher, 'The Protection of Political Communication under the Australian Constitution' (2005) 28 *University of New South Wales Law Journal* 30, 36–8; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 681–4.

107 (1947) 74 CLR 31. See also *Austin v Commonwealth* (2003) 215 CLR 185.

108 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79–81 (Dixon J): a discriminatory tax 'is aimed at the States and is an attempt to use federal power to burden or, may be, to control State action'.

109 For a recent discussion of this issue, see Simpson, above n 102, 465–70.

110 Kirk, above n 87, 6, referring to *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 335 (Dickson CJ).

111 See, eg, *APLA* (2005) 224 CLR 322, 394 [178]–[179] (Gummow J), 462 [423]–[424] (Hayne J); *Al-Kateb* (2004) 219 CLR 562, 576 [17] (Gleeson CJ), 622 [167] (Kirby J); *Coleman v Power* (2004) 220 CLR 1, 95 [245] (Kirby J); *Singh v Commonwealth* (2004) 222 CLR 322, 335–6 [19]–[20] (Gleeson CJ), 348 [52] (McHugh J), 385 [159] (Gummow, Hayne and Heydon JJ), 413 [247] (Kirby J); cf 424–5 [295] (Callinan J); *Commonwealth v Yarmirr* (2001) 208 CLR 1, 117–18 [262] (Kirby J); *Eastman v The Queen* (2000) 203 CLR 1, 46 [146]–[147], fn 175 (McHugh J); *Byrnes v The Queen* (1999) 199 CLR 1, 34 [80] (Kirby J); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 321–2 (Brennan J), 339–40 (Gaudron J), 346 (McHugh J); *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J). Another way of expressing the idea of objective intention or purpose is by reference to the 'mischief' which a law addresses: see *Kruger* (1997) 190 CLR 1, 160 (Gummow J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 311 (Deane J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*'), 273 (Kitto J).

112 (1925) 37 CLR 36, 135, cited with approval in *Communist Party Case* (1951) 83 CLR 1, 269 (Fullagar J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 443–4 [157] (Gummow and Hayne JJ); *Johns v Australian Securities Commission* (1993) 178 CLR 408, 469 (McHugh J); *R v Hughes* (2000) 202 CLR 535, 548 [15] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

When applied to a purposive power, that statement of principle does not by itself conclusively indicate that it is objective purpose that is relevant, because those who consider the Parliament's subjective purpose relevant would presumably accept that the anterior question of the scope of the granted power is dependent upon the Parliament's holding that subjective intention.

The absurdity of constitutional validity depending upon the subjective purpose of the Parliament can be illustrated in three ways. First, if the subjective intention of Parliament were the relevant purpose, it would follow that a badly-informed or irrational legislature granted a 'purposive power' would be more powerful than a rational and well-informed legislature granted the same power, since the former could subjectively believe that a wider range of laws were capable of fulfilling the purpose of its power.

Secondly, if the relevant purpose were subjective rather than objective purpose, the law would become indeterminate, with the validity of statutes depending not upon their terms or effect, but upon virtually unknowable intentions. For example, if a law had been enacted by a legislature subjectively possessing an impermissible purpose, it would be invalid, but the legislature could re-enact a law in exactly the same terms, but with a different subjective purpose, and it would be valid.

Thirdly, the idea that a composite body of lawmakers necessarily possesses a single, subjective purpose is 'an obvious fiction'.[113] It has long been recognised in statutory interpretation that what must be done is to ascertain (objectively) the purpose of a *law*, having regard to the whole Act of which it forms a part.[114] If a purposive power were relied upon to support a particular law, how would the Court determine the subjective purpose of the legislature if, for example, the Member of Parliament introducing the bill had asserted that it was for one purpose, and another who spoke in support of the bill had praised its capacity to fulfill a different (prohibited) purpose? The answer is that the Court would determine the purpose of the law *objectively*, by considering whether the law was capable of achieving a purpose within constitutional power.[115]

Furthermore, the suggestion that it is the Parliament's subjective intention which is relevant for characterisation under a head of power is inconsistent with the decisions and reasoning in the cases on the purposive defence and external affairs powers to which reference was made above. For example, in the *Communist Party Case*,[116] the validity of the law under the defence power could not have been established by calling evidence from each member of Parliament who voted for the bill, to the effect that they actually believed that the law was necessary for the naval or military defence of the Commonwealth. The decision in the *Communist Party Case* did not involve an assessment of the credibility or bona fides of the members of the Commonwealth Parliament: it was an objective judgment as to whether the law could be characterised as one for the defence of the Commonwealth. As Fullagar J said in that case:

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113 W D Popkin, *Statutes in Court – The History and Theory of Statutory Interpretation* (1999) 211, cited in *Eastman v The Queen* (2000) 203 CLR 1, 46 (McHugh J).

114 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ). Indeed the 'purpose' of the law so identified might conceivably be quite different from the subjective purpose of those, or some of those, who enacted it.

115 *Gerhardy v Brown* (1985) 159 CLR 70, 148–9 (Deane J).

116 (1951) 83 CLR 1.

> The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorise the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse. [117]

In keeping with that fundamental principle, the validity of a law enacted pursuant to a purposive power cannot be made to depend solely upon the subjective belief of the law-maker that the law was enacted for that purpose.

At the very least, those who argue that subjective purpose is relevant must accept that the Parliament may enact a law only when it in fact harbours that purpose *and* where the court concludes that the law could reasonably have been enacted in pursuance of the asserted purpose or, put another way, that the constitutional grant of power is required to be exercised reasonably. And, once it is accepted that the outer limit of a purposive power must be defined objectively, there is no reason to limit the power by reference to the fiction of the actual subjective purpose of the legislature. Constitutional validity must be assessed as a matter of power rather than intention.

The arguments presented in relation to purposive grants of power are equally applicable to purposive limitations on power. Having argued that the relevant purpose for constitutional purposes is 'objective purpose', it should be acknowledged that, in practice, the Court tends to determine the validity of a law upon the arguments presented by the parties to the case in which it is raised. Thus, in practice, and particularly in the case of purposive limitations on power, it is the purposes asserted by counsel for the Commonwealth, and those supporting the validity of the law, against which an impugned law must be compared.

The relevance of proportionality in testing whether detention is punitive

In the above discussion, I have sought to demonstrate that the concept of proportionality first entered Australian public law as an objective test of purpose, and that it has generally been accepted that some form of proportionality test is appropriate whenever questions of purpose arise in the public law context. There remains some debate as to exactly how the proportionality test should be formulated in particular contexts. Also, at least since the decisions in *Al-Kateb*[118] and *Re Woolley*,[119] it appears that there is some disagreement as to whether it is *ever* appropriate to apply a test of proportionality where the constitutional question to be answered is whether the law infringes the separation of powers by bestowing judicial power on the executive.

Unless an instance of detention is reasonably capable of being seen as necessary for a legitimate non-punitive object, it cannot be said, as a matter of substance, to be 'non-punitive'. It cannot, objectively and as a matter of substance, be said to be *for* a non-punitive object. Because orders for detention for 'purely punitive' objects may be made only in exercise of the judicial power, the application of some version of the proportionality test is essential to the determination of whether the law infringes Ch III.

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117 Ibid 258 (Fullagar J).
118 (2004) 219 CLR 562.
119 (2004) 225 CLR 1.

If this argument is to be accepted, it is necessary to comment on some passages in the judgments in recent cases decided by the High Court which may suggest the contrary. In *Al-Kateb*, Hayne J said:

> For my part, I would not identify the relevant power in quite so confined a manner as is implicit in the joint reasons in *Chu Kheng Lim*. The relevant heads of power are 'aliens' and 'immigration'. The power with respect to both heads extends to preventing aliens entering or remaining in Australia except by executive permission. But if the heads of power extend so far, they extend to permitting exclusion from the Australian community — by prevention of entry, by removal from Australia, and by segregation from the community by detention in the meantime.
>
> That is why I do not consider that the Ch III question which is said now to arise can be answered by asking whether the law in question is 'appropriate and adapted' or 'reasonably necessary' or 'reasonably capable of being seen as necessary' to the purpose of processing and removal of an unlawful non-citizen. Those are questions which it is useful to ask in considering a law's connection with a particular head of power.[120]

The second paragraph quoted could be understood in two different ways. First, if the emphasis in the second-last sentence is placed on the words '"appropriate and adapted" or "reasonably necessary" or "reasonably capable of being seen as necessary"', then the paragraph may be understood to mean that a consideration of proportionality is not appropriate in answering 'the Ch III question'. (I will return to this interpretation of Hayne J's remarks presently.) If, on the other hand, the emphasis in the second-last sentence is placed on the phrase 'the purpose of processing and removal of an unlawful non-citizen', then the last sentence may be understood simply as stating that the purposes to be considered are not confined to processing and removal, because the possible purposes are broader than those which were recognised in the joint judgment in *Chu Kheng Lim*. Given the focus of the preceding paragraph, and the use of the phrase '[t]hat is why', it is suggested that this is the way in which the passage should be understood. Hayne J should not, therefore, be understood as abandoning altogether the need for proportionality to purpose. Rather, his judgment should be read as accepting that the objects which may be legitimate include the segregation of aliens from the 'Australian community',[121] and there really could be no question that the law, the validity of which was under consideration in *Al-Kateb,* did not go beyond what was reasonably necessary for *that* purpose.

If Hayne J's observation is properly to be understood as meaning that questions of proportionality are inappropriate in answering 'the Ch III question', then that proposition is to be disputed. As has been explained already,[122] because of the nature of the Ch III limitation, the relevant question is whether the law is *for* a non-punitive object or purpose. That question must be answered by applying a test of proportionality, by asking whether the law is proportionate to the non-punitive object (identified by Hayne J in *Al-Kateb* as segregation from the community).

Hayne J also said that 'to ask whether the law is limited to what is reasonably capable of being seen as necessary for particular purposes may be thought to be a test more apposite to the identification of whether the law is a law with respect to aliens or with respect to immigration';[123] a statement which is echoed in the last sentence of the

120 (2004) 219 CLR 562, 648 [255]–[256].
121 Ibid 648 [255]. See text accompanying nn 185–204.
122 See text accompanying above nn 14–20.
123 *Al-Kateb* (2004) 219 CLR 562, 647 [253].

passage quoted above. This is a somewhat curious comment, as it has generally been accepted that questions of proportionality play no part in the process of characterisation in so far as it relates to the 'subject-matter' (that is, 'non-purposive') heads of power.[124]

The comments of McHugh J in *Al-Kateb* may be taken as indicating a view that it is the purpose of a law alone, and not also whether the law is appropriate and adapted, or reasonably necessary, for the fulfilment of that purpose, which will determine whether detention authorised by the law is punitive or non-punitive: 'as long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive.'[125]

Taken alone, that sentence might have been understood as explaining the principle only (ie, that the validity of executive detention depends upon the object of the detention), rather than the test for whether the principle had been infringed. However, in *Re Woolley*,[126] McHugh J expanded upon his comments in *Al-Kateb*. He cited passages in the judgments of Hayne J[127] (with whom Heydon J agreed) and Callinan J[128] in *Al-Kateb*, in support of the view that no test of proportionality was involved in the determination of purpose. He then said:

> The reasoning in *Al-Kateb* is therefore inconsistent with the applicants' argument that the issue of punitive purpose must be determined by reference to whether the law itself is 'reasonably necessary' or 'reasonably capable of being seen as necessary' for the achievement of a non-punitive purpose. A law that authorises detention will not offend the separation of powers doctrine as long as its *purpose* is non-punitive.[129]

McHugh J then cited the following passage from his own judgment in *Chu Kheng Lim*:

> [T]he lawful imprisonment of an alien while that person's application for entry is being determined is not punitive in character because the purpose of the imprisonment is to prevent the alien from entering into the community until the determination is made. *But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.*[130]

He said of that passage:

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124 See *Leask v Commonwealth* (1996) 187 CLR 579, 591 (Brennan CJ), 600–4 (Dawson J), 613–16 (Toohey J, Gaudron J agreeing), 616–17 (McHugh J), 624 (Gummow J); cf 634–5 (Kirby J); *Theophanous v Commonwealth* (2006) 225 CLR 101, 128 [69]–[70] (Gummow, Kirby, Hayne, Heydon and Crennan JJ). At least that is so where no question of 'incidental power' characterisation arises. See also *New South Wales v Commonwealth* (2006) 81 ALJR 34, 80–81 [144]–[145], 88 [183], 91 [198] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), holding that the same test is to be applied in respect of a power which takes as its subject matter a class of persons.

125 *Al-Kateb* (2004) 219 CLR 562, 584 [45].

126 (2004) 225 CLR 1.

127 *Al-Kateb* (2004) 219 CLR 562, 647–8 [253]–[256], 650–1 [267]. See text accompanying above nn 120–3.

128 *Al-Kateb* (2004) 219 CLR 562, 658–9 [290]–[291], 660–1 [294]–[295]. See text accompanying below nn 142–47.

129 *Re Woolley* (2004) 225 CLR 1, 32 [77]

130 (1992) 176 CLR 1, 71 (McHugh J) (emphasis added).

> Thus, if a law that authorises the imprisonment of an asylum seeker also has the purpose of keeping the detainee in solitary confinement without justification or otherwise has a purpose of subjecting the detainee to cruel and unusual punishment, *it would go beyond what was necessary to achieve its non-punitive object*. It would have a punitive purpose. *It would go beyond what is necessary to prevent the detainee from entering the Australian community while his or her application for a visa is being determined*.[131]

Puzzlingly, he concluded:

> As questions of proportionality do not arise in the Ch III context, tests such as whether the impugned law is 'reasonably necessary' for or 'reasonably capable of being seen as necessary' for the achievement of a non-punitive purpose have no application when assessing whether the law infringes Ch III.[132]

The italicised statements in the above passages would seem to be irreconcilable with the conclusion McHugh J expressed in the last sentence quoted. If that is so, the italicised statements are to be preferred. A later passage from the judgment of McHugh J provides an insight into why he considered that proportionality could not be relevant to the question of whether a law infringed the separation of judicial power:

> The separation of judicial power and the prohibition on the legislature conferring judicial power on any body other than a Ch III court are constitutional limitations on legislative power. But questions of proportionality cannot arise in the context of Ch III. A law that confers judicial power on a person or body that is not authorised by or otherwise infringes Ch III cannot be saved by asserting that its operation is proportionate to an object that is compatible with Ch III. The judicial power of the Commonwealth can be exercised only by courts that conform with the requirements of Ch III. It cannot be invested in non-judicial tribunals even if such investiture would be a reasonable and appropriate or proportionate means of achieving an end that is compatible with Ch III.[133]

It is of course correct to say that, if a law authorises the exercise of a judicial power by an institution other than a court referred to in Ch III of the *Constitution*, and thus infringes the separation of judicial power, then the fact that it may be shown to be proportionate to some 'legitimate end' will not save it. That cannot be disputed: under a written constitution imposing a strict separation of judicial power, a law which purports to authorise the executive government to exercise a judicial power is, *ideo*, invalid. But that does not prevent the consideration of proportionality in determining the anterior question of whether the law *does* purport to authorise the executive to exercise judicial power. In answering that question, it *will* sometimes be appropriate to have regard to proportionality. It must be remembered that there are several characteristics which may indicate that a particular power is properly characterised as a judicial power. It is true that, in many cases where the question is whether legislation purports to confer a judicial power upon an officer of the executive government, proportionality will have no legitimate role to play in that consideration. For example, if a law purported to confer a power on an officer of the executive to determine conclusively the limits of his or her own jurisdiction, that law would confer judicial power[134] and would, for that reason alone, be invalid: no question of proportionality

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131 *Re Woolley* (2004) 225 CLR 1, 33 [78] (emphasis added).
132 Ibid 33 [78].
133 Ibid 34 [80]. Cf *Vasiljkovic* (2006) 80 ALJR 1399, 1412 [41] (Gleeson CJ).
134 See *S157 (*2003) 211 CLR 476, 484 [9] (Gleeson CJ), 505 [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

would arise. However, when the determination of whether the power is a judicial power depends upon purpose, some consideration of proportionality is indispensable to that determination.

Those comments quoted above may be contrasted with what McHugh J, quoting passages from *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)*,[135] said in *APLA*:

> [I]n determining whether legislation infringes a constitutional principle or prohibition, '[o]ne must look for the burden or restriction not only in the language of the legislation but in the operation of the legislation'. … To ignore the practical effect of the legislation would be 'to reduce the constitutional prohibition to a legal formulation which may be readily circumvented'.[136]

The implication which McHugh J would have recognised in that case, and in the context of which those comments were made, was also said to arise from the provisions of Ch III of the *Constitution*. The reason for applying a proportionality test when the validity of executive detention is in question is precisely to avoid the reduction of a constitutional prohibition to a formula which may be readily circumvented.

The effect of deciding that no test of proportionality is to be used in determining whether a law is for a non-punitive purpose or object is, effectively, to defer to the assertion of the executive government that it is non-punitive. In *Al-Kateb*, McHugh J denied the relevance of the *Communist Party Case*:

> Nor does the *Communist Party Case*[137] … assist Mr Al-Kateb. In that case, this Court held that the law in question was not supported by s 51(xxxix) (the incidental power) in conjunction with s 61 (the executive power) of the Constitution or s 51(vi) (the defence power) of the Constitution. The *Communist Party Case* had nothing to do with aliens, and no Justice found that the law infringed Ch III of the Constitution.[138] Latham CJ, who dissented and upheld the validity of the law, expressly held that it did not contravene Ch III of the Constitution.[139]

Plainly the relevance of the *Communist Party Case* lay in the principle that, where the validity of a law depends upon the existence of a constitutional fact, the judgment or assertion of the Parliament or the executive that such a fact exists cannot conclusively determine the validity of the law.[140] Just as the question of the validity of the *Communist Party Dissolution Act 1950* (Cth) could not depend upon the Parliament's or Governor-General's judgment that the dissolution of the Communist Party or other organisations was for the purpose of the defence of the Commonwealth, nor could the Parliament conclusively determine that the purpose of detention was non-punitive.

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135 (1975) 134 CLR 559, 622 (Jacobs J), 607 (Mason J).

136 (2005) 224 CLR 322, 366 [80]. Cf *Re Woolley* (2004) 225 CLR 1, 66 [184] (Kirby J).

137 *Communist Party Case (*1951) 83 CLR 1.

138 But cf *Communist Party Case* (1951) 83 CLR 1, 240 (Webb J): 'If this Act is to be held valid it is because it is only preventative. If the measures taken by this act were punitive they would call for the exercise of judicial power.'

139 (2004) 219 CLR 562, 586 [50] (footnotes added). Gummow and Kirby JJ, who referred to the *Communist Party Case* in *Al-Kateb* did not suggest that it had any specific relevance to aliens or to Ch III of the *Constitution*. See *Al-Kateb* (2004) 219 CLR 562, 599 [88], 613 [140] (Gummow J), 616 [149], 618 [155] (Kirby J).

140 *Communist Party Case* (1951) 83 CLR 1, 193 (Dixon J), 222 (Williams J), 243 (Webb J), 258 (Fullagar J), 272–5 (Kitto J).

In *Al-Kateb*, in a passage to which McHugh J referred in *Re Woolley*,[141] Callinan J stated:

> Detention of aliens, certainly for the purposes of deportation, clearly falls within the exception traditionally and rightly recognised as being detention otherwise than of a punitive kind. It would only be if the respondents [ie, the Commonwealth] formally and unequivocally abandoned that purpose that the detention could be regarded as being no longer for that purpose.[142]

That passage could be understood in two ways. First, it could be read as meaning that, in the particular case concerning the continuing detention of an alien the removal of whom was presently impracticable but which might become achievable in the future, the detention was constitutionally permissible because it was still for the purpose of removal, since it could be seen as reasonably necessary for removal.[143] Alternatively, it could mean that, in *any* case where the executive sought to detain an alien, it could assert that the detention was for the purpose of effecting deportation and, unless that purpose were 'formally abandoned', the courts could inquire no further into the legality of the detention. It is submitted that the former interpretation is what was intended. Other statements in the judgment of Callinan J indicate that his decision was influenced by the fact that it might, in the future, become possible to remove an alien whose removal had been unachievable for a long time.[144] But such a future possibility would have been entirely irrelevant if the validity of continuing detention depended solely upon the assertion of the executive that it continued to harbour the purpose of removal. Furthermore, Callinan J acknowledged that in *Chu Kheng Lim* it had been accepted 'that the Parliament might make laws reasonably capable of being seen as necessary for the purposes of deportation'.[145] Although stating in *Al-Kateb* that the 'yardstick, and with respect rightly so, was purpose',[146] Callinan J did not discuss, and certainly did not reject, the 'reasonably capable of being seen as necessary' test.[147] This is perfectly understandable when it is borne in mind that that test is recognised as an objective test *of purpose*.

Callinan J's judgment in *Re Woolley*[148] itself confirms that he did not intend, in *Al-Kateb*, to abandon the test of 'reasonably capable of being seen as necessary'. He referred with approval to a submission that the provisions in question 'clearly

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141 (2004) 225 CLR 1, 32 [75]–[76].

142 (2004) 219 CLR 562, 659 [291]; see also 661 [298].

143 On this interpretation, the 'formal and unequivocal abandon[ment]' of that purpose might be interpreted as an indication that, in the event that the legislation were supportable only because the detention could be said to be for the purpose of deportation, then it was the intention of the Parliament that it should have no operation at all.

144 *Al-Kateb* (2004) 219 CLR 562, 660–1 [295], 662 [299].

145 Ibid 660 [294].

146 Ibid.

147 Cf the analysis of Callinan J's judgment in *Re Woolley* (2004) 225 CLR 1, 32 [75] (McHugh J):

> Callinan J referred to the joint judgment in *Lim*. But nothing in his Honour's judgment suggests that he took the view that the validity of a law that authorises detention depends on whether the law is 'reasonably capable of being seen as necessary' to achieve a legitimate non-punitive end.

(One might have thought that Callinan J would have positively indicated if he had intended to depart from a previous decision of the Court.)

148 (2004) 225 CLR 1.

serve[d]'[149] a legitimate non-punitive purpose — not just that they were asserted to be for such a purpose. Furthermore, he said:

> A purpose will be a valid purpose if the relevant provisions are reasonably capable of being seen as necessary for a non-punitive constitutional purpose, here, of regulating the entry and presence of aliens, and immigration under s 51(xix) and (xxvii) of the *Constitution*.[150]

It is suggested, with respect, that the sentence would have been clearer if the opening words had been 'A law will be a valid law' or 'Detention will be valid'. Nevertheless, Callinan J clearly accepted as applicable the test laid down in *Chu Kheng Lim*. It is therefore incorrect to suggest that the basic rationale for the decision in *Chu Kheng Lim* has been rejected or that the decision or reasoning in *Al-Kateb* is inconsistent with the application of a test of proportionality.

The appropriate expression of the test, and the relevance of the availability of alternative measures

Drawing on the jurisprudence of Germany, Canada and the European Union, Dr Kirk has identified three different aspects or 'levels' of proportionality test.[151] The first level asks whether the measure is 'suitable' to achieve the legitimate end or object in question. Essentially the question is whether the means are rationally capable of achieving the end. The second level of proportionality test asks whether the law is 'necessary' for the achievement of the purpose, that is, are there 'alternative practicable means available to achieve the end which are less restrictive of the protected interest'?[152] The third level identified by Kirk involves the 'balancing' of competing interests and the determination of how much weight ought to be assigned to a particular interest which is regarded as legitimate.

It is apparent that the 'suitability' level of proportionality test — asking whether a law is appropriate and adapted, apt or reasonably capable of achieving a legitimate end — is useful in objectively testing whether the purpose of the law is to achieve that end. But the second level of proportionality, 'necessity', is also capable of testing whether a law is really enacted in pursuance of its asserted purpose.[153] That will be so where 'the disproportionality can be said to be "of such significance that the law cannot fairly be described as one with respect to" the legitimate purpose'.[154] For example, where there are a number of alternative practical measures available to achieve an object, a measure which is clearly or overwhelmingly more restrictive of relevant interests (primarily, in the case of detention, personal liberty), but which is not rationally capable of achieving the claimed object any better than the less restrictive alternative, cannot be justified wholly by reference to that object. In such a case, the claimed purpose could not be said to *really* be the purpose of the imposition of the additional restriction.

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149 Ibid 84 [256].
150 Ibid.
151 Kirk, above n 87, 5–9.
152 Ibid 7.
153 Ibid 7, 29.
154 Ibid 41, citing *Actors and Announcers Equity v Fontana Films Pty Ltd* (1982) 150 CLR 169, 192 (Stephen J).

Despite the frequent use by the High Court of the expression 'appropriate and adapted', which might be thought to describe the 'suitability' level of proportionality, it must be accepted that that application of the test usually entails an assessment of 'necessity' as well, although there is some disagreement about the rigour with which a law should be scrutinised.[155] It appears that even those who favour a significant degree of deference would accept that *some* consideration of alternative measures is relevant. To take an example derived from the decision in *Coleman v Power*,[156] it could not be denied that a law prohibiting all communication whatsoever would be invalid. Yet such a law would self-evidently be apt to prevent communications which are likely to occasion a breach of the peace. The vice of such a law would lie not in its inability to achieve the end, but in its going too far, given that less restrictive measures could be taken which could attain the same goal.[157] The excessive nature of the law (an inquiry as to 'necessity') would demonstrate that its true purpose, objectively assessed, was not just to prevent communications likely to occasion a breach of the peace.

In *Coleman v Power*, Kirby J argued against the use of the phrase 'appropriate and adapted', expressing a preference for the term 'proportional'.[158] The phrase 'appropriate and adapted' involved, he said, 'a ritual incantation, devoid of clear meaning'.[159] Callinan J also expressed dissatisfaction with the formula, suggesting that it might be preferable to ask whether a law was 'a reasonable implementation of a legitimate object'.[160]

In *Chu Kheng Lim* the test for whether involuntary detention constituted punishment was said to be whether the detention was 'reasonably capable of being seen as *necessary* for the purposes of deportation or *necessary* to enable an application for an entry permit to be made and considered'.[161] The reason for the choice of 'necessary' rather than 'appropriate and adapted' as the relevant test in this context was not discussed at all in *Chu Kheng Lim*. It does not appear from the decision itself that the test was necessarily intended to involve a higher level of scrutiny than that implied by the 'appropriate and adapted' test. If it be accepted that, in applying the

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155 See *Coleman v Power* (2004) 220 CLR 1, 31 [31] (Gleeson CJ), 51 [98], 53 [100] (McHugh J). Some degree of deference to the judgment of the Parliament is in keeping with the High Court's longstanding insistence that the policy of a law is a matter for the Parliament: see *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 344–5 (Barton J); *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 256 (Fullagar J); *Herald and Weekly Times v Commonwealth* (1966) 115 CLR 418, 437 (Kitto J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 310 (Deane J). See also Stone, above n 106.

156 (2004) 220 CLR 1.

157 Cf the example of killing all sheep to prevent the spread of sheep disease: *Commonwealth v Tasmania* (1983) 158 CLR 1, 260–1 (Deane J).

158 (2004) 220 CLR 1, 82 [210], 86 [222], 90–1 [234]–[236]; cf 32 [33] (Gleeson CJ), pointing out that the argument had proceeded on the basis that 'appropriate and adapted' was the accepted form of the test, and that it had been assumed that the application of a test of 'proportionality' would not have produced a different result in that case; *Mulholland* (2004) 220 CLR 181, 199–200 [39] (Gleeson CJ).

159 *Coleman v Power* (2004) 220 CLR 1, 82 [210], 86 [222], 90–1 [234]–[236].

160 Ibid 110 [292].

161 (1992) 176 CLR 1, 33, 34 (Brennan, Deane and Dawson JJ) (emphasis added); cf 71 (McHugh J), where he used the expression 'reasonably necessary', 58 (Gaudron J), where she appears to have used 'capable of being seen as appropriate and adapted' and 'reasonably necessary' interchangeably.

'appropriate and adapted' formula to test 'objective purpose', the court may have regard to the availability of alternative measures, then there would appear to be little difference between a test of 'reasonably appropriate and adapted' and 'reasonably capable of being seen as necessary'.[162]

There is one other aspect of the formulation of the proportionality test which deserves mention. That is whether the question to be asked is whether the law is 'reasonably capable of being seen as' appropriate and adapted or necessary, or simply whether the law is 'reasonably' appropriate and adapted or necessary.

At least as far as the implied guarantee of freedom of political communication is concerned, the law now appears to be settled. The test was expressed as 'reasonably appropriate and adapted' in the unanimous judgment of the court in *Lange v Australian Broadcasting Corporation*,[163] and that formula appears to have found favour with a clear majority of the High Court in *Coleman v Power*.[164]

It appears that those judges who discussed the issue regarded the 'reasonably appropriate and adapted' test as involving a higher level of scrutiny by the courts than the 'reasonably capable of being seen' test. Kirby J went so far as to state that the 'reasonably capable of being seen' formulation 'would involve a surrender to the legislature of part of the judicial power that belongs under the *Constitution* to [the High] Court'.[165]

In practice there is likely to be very little difference in outcome between the two formulations. In both cases, 'reasonably' must be understood to mean 'rationally' (as opposed to, for example, 'quite' or 'somewhat'). If that is so, it is difficult to imagine a law that is 'rationally capable of being seen as appropriate and adapted' to the achievement of a given purpose but which is not also 'rationally appropriate and adapted' to the same purpose.[166] If anything does turn on the choice between 'reasonably' and 'reasonably capable of being seen as', it would seem surprising that the apparently stricter test should be applied to the implied guarantee of freedom of political communication, while the less strict formulation is applied to a prohibition on certain laws involving the deprivation of personal liberty.

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162 Cf *Mulholland* (2004) 220 CLR 181, 199–200 [39] (Gleeson CJ).

163 (1997) 189 CLR 520, 567. But cf *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ) (defining the Court's role as asking 'whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose'), 615 (Toohey J).

164 (2004) 220 CLR 1, 31 [31] (Gleeson CJ), 48 [87] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [212] (Kirby J); *Mulholland* (2004) 220 CLR 181, 251–2 [203], 266 [248] (Kirby J). Cf discussion in *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523, 534 [31] (Black CJ, Weinberg and Selway JJ).

165 (2004) 220 CLR 1, 82 [212].

166 Obviously the same could not be said if the word 'reasonably' were omitted. Cf *Richardson v Forestry Commission* (1988) 164 CLR 261, 312 (Deane J):

> In my view, it is not necessary for this Court to be persuaded that the particular provisions are, in fact, appropriate and adapted to the designated purpose or object. That is a matter for the Parliament. Obviously, the relevant requirement will be satisfied if the Court is so persuaded. As I have indicated however, it will, in my view, suffice if it appears to the Court that the relevant provisions are capable of being reasonably considered to be so appropriate and adapted.

See also *Gerhardy v Brown* (1985) 159 CLR 70, 149 (Deane J).

IV THE LIMITS OF LEGITIMATE EXECUTIVE DETENTION

How are legitimate non-punitive objects to be discerned?

So far it has been argued that the power of the Parliament to make laws authorising the detention of persons, even aliens, is neither unlimited nor inscrutable. Where it can be demonstrated that detention is not reasonably capable of being seen as necessary, appropriate or proportionate to the fulfilment of a legitimate end unconnected with punishment, the law will, in substance even if not in form, effectively impose consequences for engagement in past conduct and thus infringe Ch III. It remains to be considered how these principles should be applied to particular examples of detention by the executive.

The formulation 'legitimate non-punitive object' suggests that it is insufficient to show merely that the object of a law is 'non-punitive': it must also be 'legitimate'.[167] But how is the legitimacy of a given object or purpose to be assessed? In *Al-Kateb*, Hayne J said:

> [B]ecause *the purposes must be gleaned from the content of the heads of power which support the law*, it is critical to recognise that those heads of power would support a law directed to excluding a non-citizen from the Australian community, by preventing entry to Australia or, after entry, by segregating that person from the community.[168]

Callinan J also appears to have considered that the relevant purpose is to be determined by reference to the heads of Commonwealth legislative power.[169]

The assessment of whether a purpose is legitimate by reference to the head of power under which a law is enacted is attended by difficulties, at least in the case of 'subject-matter' heads of power. It may be accepted that the object of a law which coincides with the purpose of a purposive power, such as 'the naval and military defence of the Commonwealth' will be legitimate.[170] However, even in the case of laws enacted pursuant to purposive heads of power, one would ordinarily expect that the purpose of the law could be defined at a greater level of specificity than the purpose in the head of power.

Generally, it would seem undesirable to require a link between the object of a law and a head of Commonwealth legislative power, because the question of whether a particular function involves an exercise of judicial power can arise in the State sphere as well as at the Commonwealth level. That is so, notwithstanding the lack of any strict separation of powers in the constitutions of the States. For example, it might be necessary to determine whether an order for the detention of a person, made by a State

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167 The question of which objects are 'legitimate' is not confined to this area of constitutional law. A similar question has arisen in the context of the freedom of political communication, particularly in relation to whether 'civility of discourse' is a legitimate object: cf *Coleman v Power* (2004) 220 CLR 1, 79 [199] (Gummow and Hayne JJ); see also 24 [9] (Gleeson CJ), 54 [104]–[105] (McHugh J), 112 [297] (Callinan J), 121–2 [322]–[325] (Heydon J).

168 *Al-Kateb* (2004) 219 CLR 562, 651 [267] (emphasis added).

169 Ibid 659 [291], where Callinan J spoke of 'some other purpose under the aliens or indeed the immigration power'.

170 *Leask v Commonwealth* (1996) 187 CLR 579, 591 (Brennan CJ).

court, is administrative or judicial in nature, so as to determine whether an appeal lies to the High Court pursuant to s 73 of the *Constitution*.[171]

Once it is recognised (putting aside purposive powers) that it is the law itself, rather than the purpose of the law, which is to be characterised as being with respect to a head of power, it becomes impossible to state that certain purposes 'fall within' or are 'under' particular heads of power.

The additional limitation of 'legitimacy' may therefore do little more than preclude reliance by the Commonwealth on extremely generally expressed purposes or objects, such as 'to provide for the detention of persons otherwise than to punish them'. For example, the detention of the directors of a trading corporation might be a law with respect to trading corporations within the meaning of s 51(xx), and a law authorising the detention of a married couple for a week following a marriage ceremony might be a law with respect to marriage. However, a purpose of 'preventing communication with directors of trading corporations' or 'segregation of newly married couples from the community' would be unlikely to be recognised as a legitimate object. The laws would, in substance, effect punishment for some act committed as a director of a corporation, or for engaging in the act of marriage.

The effect of 'alien' status on the power to detain

Although it will generally be unhelpful to link potential legitimate purposes to heads of Commonwealth legislative power, the *status* of a potential detainee may affect whether detention can be regarded as being for a legitimate non-punitive purpose.[172] Thus in *Chu Kheng Lim*, Brennan, Deane and Dawson JJ stated that, had the immigration detention regime purported to apply to Australian citizens, it would have been beyond the legislative competence of Parliament.[173] One reason for that must be simply that the Commonwealth Parliament has no power with respect to 'citizens' that is comparable to its legislative power with respect to 'aliens'.

However, there is a further, more important reason. The relation of aliens to the Australian political community is different from the relation of Australian citizens (or subjects) to that community. Citizens are members of the community, whereas aliens are members of another nation's community (or in some cases, of no nation's community).[174] As such, aliens are inherently susceptible to exclusion from the community, and such exclusion represents a choice by the members of the community as to who may enter and remain in that community, rather than punishment of the

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171 See *Consolidated Press Ltd v Australian Journalists' Association* (1947) 73 CLR 549, 559–60 (Latham CJ and McTiernan J), 561 (Rich and Williams JJ), 564 (Starke J); *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), 312 (Brennan J).

172 When Hayne J spoke of gleaning legitimate objects from the head of power, he should perhaps be understood as meaning that objects are to be assessed having regard to the peculiar features attendant upon the status of the persons affected; in *Al-Kateb* (2004) 219 CLR 562, the appellant's status as an alien.

173 (1992) 176 CLR 1, 29.

174 *Singh v Commonwealth* (2004) 222 CLR 322, 395 [190] (Gummow, Hayne and Heydon JJ); *Koroitamana (an Infant by her next friend Naikelekele) v Commonwealth* (2006) 80 ALJR 1146, 1150 [15] (Gleeson CJ and Heydon J), 1152 [31], [34] (Gummow, Hayne and Crennan JJ). The applicant in *Al-Kateb* (2004) 219 CLR 562 was a stateless person but was nevertheless regarded as an 'alien' for the purposes of s 51(xix).

alien.[175] In contrast, the exclusion of a citizen from his or her own community would seem necessarily to be punitive: detention of a citizen for the purpose of removal, deportation or exclusion from the Australian community therefore would not be detention for a non-punitive purpose.

Furthermore, as has been argued above,[176] it is not correct to say that involuntary detention of citizens is always penal or punitive in character. Whether it is must depend upon the purpose or object of the detention, objectively assessed.

The Commonwealth Parliament's power to make laws with respect to 'aliens' is as much 'subject to [the] *Constitution*' as the other legislative powers conferred by s 51. That includes, obviously, being subject to the separation of judicial power. Apart from the expanded 'legitimate non-punitive purposes' associated with alien status, the nature of the Ch III limitation is identical in respect of aliens and citizens alike. For example, if the Commonwealth Parliament were to enact a law which purported to adjudge an alien guilty of a crime and to impose punishment for that crime, the law would be a bill of attainder and would be invalid, notwithstanding that its object was an alien.[177]

This analysis accords with the conclusion reached by Gummow J in *Fardon*. After identifying the principle, derived from the judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim*, that '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',[178] Gummow J said:

> It must be said that the expression of a constitutional principle in this form has certain indeterminacies. The first is the identification of the beneficiary of the principle as 'a citizen'. That may readily be understood given the context in *Lim* of the detention of aliens with no title to enter or remain in Australia and their liability to deportation processes. But in other respects aliens are not outlaws;[179] many will have a statutory right or title to remain in Australia for a determinate or indeterminate period and at least for that period they have the protection afforded by the *Constitution* and the laws of Australia. There is no reason why the constitutional principle stated above should not

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175 *Chu Kheng Lim* (1992) 176 CLR 1, 29–31 (Brennan, Deane and Dawson JJ); *Behrooz* (2004) 219 CLR 446, 492–3 [20]–[21] (Gleeson CJ); *Re Woolley* (2004) 225 CLR 1, 12–13 [18], 14 [24], 15 [28] (Gleeson CJ); *Robtelmes v Brenan* (1906) 4 CLR 395; *Ah Yin v Christie* (1907) 4 CLR 1428, 1431 (Griffith CJ), 1433 (Barton J); *Ferrando v Pearce* (1918) 25 CLR 241, 253 (Barton J); *R v Governor of Brixton Prison; Ex parte Soblen* [1963] 2 QB 243, 300–1 (Lord Denning MR), referring to Sir William Blackstone, *Commentaries on the Laws of England, Vol 1* (1765), 259–60. Incidentally, it will be noticed that the legislative classification of certain aliens as 'unlawful' is of no constitutional significance.

176 See text accompanying above nn 49–69.

177 See text accompanying above nn 29–38.

178 (1992) 176 CLR 1, 27.

179 *R v Secretary of State for the Home Department, Ex parte Khawaja* [1984] AC 74, 111–12; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 298–9, 327–8, 335–6; *Behrooz* (2004) 219 CLR 486, 500–1 [51]–[53]. See also the Opinion of the Supreme Court of the United States in *Rasul v Bush* 542 US 466 (2004).

> apply to them outside the particular area of immigration detention with which *Lim* was concerned. [180]

While aliens, unlike citizens, are liable to deportation or removal, Australian citizens enjoy no general constitutional immunity from deportation or removal from Australia.[181] It follows that, where there is a reason, *other than punishment*, to expel or remove a citizen from Australia,[182] the Commonwealth Parliament might authorise the detention of that citizen for such period of time as was reasonably necessary to achieve that object. In most (if not all) such cases, the removal of a citizen will follow a request from another country,[183] so that naturally there will be no difficulty in effecting removal, and the period of time in detention for the purpose of effecting removal is likely to be relatively short.[184]

Segregation from the 'Australian community' as a non-punitive object, and consideration of factors said to affect validity in *Chu Kheng Lim*

In *Al-Kateb*[185] and *Minister for Immigration, Multicultural and Indigenous Affairs v Al Khafaji*,[186] the High Court considered whether it was permissible for the executive to continue to detain aliens in circumstances where their applications for entry permits had been denied, and where it would not be possible to effect their removal from

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180 (2004) 223 CLR 575, 611–12 [78] (footnote in original; citations altered). This passage has since been referred to with approval in *Vasiljkovic* (2006) 80 ALJR 1399, 1418 [83]–[84] (Gummow and Hayne JJ, Heydon J agreeing).

181 *DJL v The Central Authority* (2001) 201 CLR 226, 277–80 [134]–[138] (Kirby J), 240 [21] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Vasiljkovic* (2006) 80 ALJR 1399, 1410–11 [35] (Gleeson CJ), 1413 [48] (Gummow and Hayne JJ, Heydon J agreeing).

182 Perhaps the most obvious example is the extradition of a citizen to face charges in the court of a foreign country: see *Barton v Commonwealth* (1974) 131 CLR 477, 503 (Mason J) ('Detention inevitably is an incident in the process of extradition'); *Vasiljkovic* (2006) 80 ALJR 1399, 1411 [37] (Gleeson CJ).

183 For example, *Extradition Act 1988* (Cth) ss 12 and 29 provide for the issue of a provisional arrest warrant following an application on behalf of an extradition country for the extradition of an extraditable person. Sections 15 and 33 provide for the remand in custody of persons awaiting extradition. See *R v Governor of Brixton Prison; Ex parte Soblen* [1963] 2 QB 243, 299–300 (Lord Denning MR).

184 However, the time taken for relevant decisions to be made in connection with an extradition request may still result in detention for substantial periods, as was the case in *Vasiljkovic* (2006) 80 ALJR 1399: see 1415 [62] (Gummow and Hayne JJ), 1425 [133]–[135] (Kirby J). Nevertheless, the situation may be contrasted with the legislation in issue in *Al-Kateb* (2004) 219 CLR 562, *Al Khafaji* (2004) 219 CLR 664 and *Minister for Immigration, Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, which authorised continuing detention for an indefinite term pending an event which was found to have 'no real likelihood or prospect' of occurring 'in the reasonably foreseeable future'.

185 (2004) 219 CLR 562. For more detailed discussion of the circumstances giving rise to this case and closer analyses of the statutory construction argument, see Zagor, above n 58; James Allan, 'Do the Right Thing Judging? The High Court of Australia in *Al-Kateb*' (2005) 24 *University of Queensland Law Journal* 1; Dan Meagher, 'The "Tragic" High Court Decisions in *Al-Kateb* and *Al Khafaji*: Triumph of the "Plain Fact" Interpretive Approach and Constitutional Form Over Substance' (2005) 7 *Constitutional Law and Policy Review* 69; Dennis Rose, 'The High Court Decisions in *Al Kateb* and *Al Khafaji* — a Different Perspective' (2005) 8 *Constitutional Law and Policy Review* 58.

186 (2004) 219 CLR 664.

Australia in the foreseeable future. McHugh, Hayne, Callinan and Heydon JJ held that such continued detention was authorised by the *Migration Act 1958* (Cth) ('the *Migration Act*') and was constitutionally permissible. Gleeson CJ, Gummow and Kirby JJ dissented, holding that, as a matter of statutory construction, the *Migration Act* did not authorise the continuing detention of an alien once it became apparent that it was not reasonably possible to effect their removal.

In his judgment in *Al-Kateb*, Hayne J (with whom Heydon J agreed) indicated that he considered that, where removal of an alien was not practical in the foreseeable future, the segregation by executive detention of that alien from the Australian community until such time as it became practical to remove them would be permissible.[187] Segregation from the community was a legitimate non-punitive end. Passages in the judgments of Gleeson CJ, McHugh and Callinan JJ are also consistent with that view.[188]

Gummow J, on the other hand, expressed his disagreement with that proposition.[189] In *Re Woolley*[190] he reasserted that position, and expanded upon the reasons for his objection. In summary, he appears to have relied upon the following reasons for rejecting the object of 'segregation from the community' as a legitimate non-punitive object: (1) the phrase 'membership of the community' 'has multiple references';[191] (2) the division of the British Empire into 'autonomous Communities' is a 'political idea whose time has come and gone';[192] (3) the notion of 'absorption' into the 'community', used to establish the limits of the immigration power, s 51(xxvii), has 'no part to play by its translation to a conceptually (and textually) distinct head of legislative power', the aliens power.[193]

First, it should be noted that the last point might be thought to assume that the consideration of segregation from the community arises under the aliens power. Although it is the status of alienage which renders the segregation of a person a legitimate end, the relevant limitation on power derives from the separation of powers and Ch III of the *Constitution*, and is applicable to laws enacted pursuant to any head of power. The notion of 'segregation from the community' arises in considering whether detention is capable of serving a 'legitimate non-punitive object'. It does not involve any attempt to transplant the test for characterisation under s 51(xxvii) to laws purportedly enacted under s 51(xix).[194]

Secondly, the basis for these objections may be largely semantic (although it is apparent that Gummow J did not view them as such). The fact that a word may bear a range of possible meanings (or may 'have multiple references') plainly does not have the consequence that the word must be understood as bearing every one of those

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187 (2004) 219 CLR 562, 645 [247], 648 [255], 649 [259]. See also *Behrooz* (2004) 219 CLR 486, 542 [171] (Hayne J); *Re Woolley* (2004) 225 CLR 1, 36 [222] (Hayne J). See also Rose, above n 185, 62.

188 (2004) 219 CLR 562, 576 [17] (Gleeson CJ), 584–5 [45]–[46], 586 [49], 595 [74] (McHugh J), 658 [289] (Callinan J). See also *Behrooz* (2004) 219 CLR 486, 498–9 [20] (Gleeson CJ).

189 *Al-Kateb* (2004) 219 CLR 562, 600 [92], 609 [126]–[127], 613–14 [140].

190 (2004) 225 CLR 1.

191 Ibid 52 [137].

192 Ibid 54 [146].

193 Ibid 54–5 [147]–[148].

194 Ibid 75–6 [223] (Hayne J).

meanings (or invoking every one of those references) in every instance in which it is used. The notion of 'community' invoked in describing the end of involuntary detention under the *Migration Act* as 'segregation from the community' should not be understood as intending to refer to the self-governing communities of the British Empire.[195] Nor is the concept necessarily identical with the concept of 'community' developed in connection with the immigration power. Because of the range of meanings which the term may encompass, there is no contradiction in stating, on the one hand, that the immigration power ceases to have application to aliens who have been 'absorbed into the community', meaning that they are no longer involved in the process of 'immigration' and, on the other hand, that the same person is not a full member of the Australian community enjoying all of the associated rights (and duties) of citizens, and is thus liable to exclusion from it, unless and until naturalised as an Australian citizen or subject.

Even if it were accepted that segregation from the community were a legitimate object only when applied to persons who had not become 'absorbed into the community' in the sense in which that phrase is used in relation to the immigration power (perhaps because the segregation of a person who had been so absorbed was seen as necessarily punitive, as it would be for a citizen), it would appear that most of the persons likely to be detained under the *Migration Act* , including the applicants in *Al-Kateb*[196] and *Al Khafaji*,[197] would not have been so absorbed.

It may be that, because of its use in these other contexts, it would have been preferable to describe the object of the detention of aliens whose immediate removal from Australia was not reasonably practicable, without resort to the word 'community'. A term such as 'Australian society'[198] might have been used as an alternative, although it might be thought that it fails to entirely encapsulate the meaning of 'community' and is not obviously any more definite.

In any event, it is strongly arguable that the decision in *Chu Kheng Lim* itself depended upon acceptance that the segregation of aliens from the community, however denoted, is a legitimate non-punitive end. In *Re Woolley*, Gleeson CJ analysed the joint judgment in *Chu Kheng Lim* as follows:

> Brennan, Deane and Dawson JJ referred to detention that was 'necessary to enable an application for an entry permit to be made and considered'. Plainly they did not contemplate that it is essential for a person to be in custody in order to make an application for an entry permit, or that it is only possible for the Executive to consider such an application while the applicant is in custody. They were referring to the time necessarily involved in receiving, investigating and determining an application for an entry permit. In a particular case, that time may be brief, or, depending upon the procedures of review and appeal that are invoked, it may be substantial. If a non-citizen enters Australia without permission, then the power to exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for permission to remain, and to hold the non-citizen in detention for the time necessary to follow the required procedures of decision-making. The non-citizen is not being detained as a form

195 Ibid [222] (Hayne J).
196 (2004) 219 CLR 562, 597–8 [85] (Gummow J).
197 (2004) 219 CLR 664.
198 Cf *Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 212 [183] (Kirby J); *Robtelmes v Brenan* (1906) 4 CLR 395, 413 (Barton J), quoting from *Fong Yue Ting v United States* 149 US 698 (1893).

> of punishment, but as an incident of the process of deciding whether to give the non-citizen permission to enter the Australian community. Without such permission, the non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature. [199]

Gleeson CJ in that passage starkly demonstrated that the involuntary detention considered in *Chu Kheng Lim* could not literally have been justified simply as necessary for the purposes of assessing applications for entry permits and for the removal of persons whose applications were not granted. To justify the detention which was upheld in *Chu Kheng Lim*, it is necessary to identify the object of the detention as preventing non-citizens from entering the Australian community either until such time as it is determined that they should be allowed to enter, or until they can be removed from Australia: 'The power of exclusion was held to extend to keeping them [aliens] separate from the community, in administrative detention, while their visa applications were being investigated and considered.' [200] So much was expressly stated by McHugh J in *Chu Kheng Lim*.[201] Once it is accepted that the decision in *Chu Kheng Lim* itself necessarily entails acceptance that segregation of aliens from the Australian community is a legitimate non-punitive object, it is difficult to explain why, where an alien cannot be physically removed from Australia, they cannot constitutionally be detained in order to achieve their segregation from the community.

In their judgment in *Chu Kheng Lim*,[202] Brennan, Deane and Dawson JJ referred to two particular features of the legislative scheme under consideration which they considered important in showing that the detention which it authorised did not go beyond what was necessary for the identified purpose. The first was that the legislation limited the period of detention pending deportation to a maximum of 273 days (in addition to any period caused by events beyond the control of the Department of Immigration). The second was that detainees were said to have the capacity to bring their detention to an end by requesting that they be removed from Australia.

It is difficult to see how the 273 day limitation could affect the constitutional validity of the section (although there are obvious policy reasons for capping the length of time for which a person is to be detained administratively). If detention was for a non-punitive purpose, it could not become punitive simply because of the elapse of a certain period of time. Similarly, if the law authorised detention by the executive which was *not* for a non-punitive purpose, it would be invalid, and the fact that the period of detention was limited by an arbitrary maximum would not save it.[203]

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199 (2004) 225 CLR 1, 14 [26].

200 Ibid, 27 [27] (Gleeson CJ); see also 34–5 [81] (McHugh J).

201 (1992) 176 CLR 1, 71:

> [I]mprisonment of a person who is the subject of a deportation order is not ordinarily punitive in nature because the purpose of the imprisonment is *to ensure that the deportee is excluded from the community* pending his or her removal from the country. Likewise, the lawful imprisonment of an alien while that person's application for entry is being determined is not punitive in character because the purpose of the imprisonment is *to prevent the alien from entering into the community* until the determination is made. (Emphasis added.)

202 Ibid 33–4.

203 Cf, div 105 of the Schedule to the *Criminal Code Act 1995* (Cth), which authorises a senior member of the Australian Federal Police to make an 'initial preventative detention order' which lasts for a maximum of 24 hours. The period of detention may be extended up to a

Furthermore, it is not obvious why the setting of an apparently arbitrary limit should lead one to conclude that the purpose of the detention was less likely to be punitive, especially as punitive sentences of imprisonment are almost always subject to a legislative maximum.

The capacity of aliens to bring their detention to an end might be important in assessing whether their detention were necessary for the purpose of excluding them from the Australian community; that is, it might be an important consideration in the application of the proportionality test. It would seem spurious to argue, in circumstances where an alien had asked to be removed, and where removal was reasonably practical,[204] that the alien was being indefinitely detained for the purpose of excluding them from the Australian community. Such detention would seem to go beyond what was reasonably necessary for that purpose, since the alien could be effectively excluded by removal. Alternatively, the legitimate end might be defined more narrowly, as exclusion from the community by segregation until physical removal was reasonably practicable.

Deterrence as a non-punitive object

Can deterrence be regarded as a legitimate non-punitive object? In *Al-Kateb*, Callinan J said:

> It may be that legislation for detention to deter entry by persons without any valid claims to entry either as punishment or a deterrent would be permissible, bearing in mind that a penalty imposed as a deterrent or as a disciplinary measure is not always to be regarded as punishment imposable only by a court. Deterrence may be an end in itself unrelated to a criminal sanction or a punishment. Deterrence can, for example, be an end of the law of tort. [205]

At least two points may be made in response to that final observation. First, with the exception of 'exemplary' or 'punitive' damages,[206] damages in the law of tort are awarded only to compensate the plaintiff for the damage caused by the defendant's tort.[207] Although one effect of awarding compensatory damages for tort is no doubt to deter prospective tortfeasors, and in that sense deterrence is an end of the law of tort, an award of compensatory damages can be completely justified without resort to deterrence. Secondly, it is arguable that the administration of the law of tort is a purely judicial function in any event.[208] That argument is a fortiori where damages are awarded purely to punish the tortfeasor, as with exemplary and punitive damages.

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total of 48 hours by a 'continued preventative detention order', issued by a consenting Judge, Federal Magistrate, AAT member or retired Judge. Complementary State legislation permits the further extension of detention by State Supreme Courts, up to a total of 14 days: see, eg, *Terrorism (Police Powers) Act 2002* (NSW) pt 2A.

204 Additional considerations, such as the risk to the alien of returning to another country that was prepared to accept them, might also be relevant factors to be considered.

205 *Al-Kateb* (2004) 219 CLR 562, 659 [291] (Callinan J).

206 As to the availability of exemplary or punitive damages under the common law of tort in Australia, see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 and *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185. In contrast, 'aggravated' damages are theoretically compensatory, and are awarded for indignity suffered by the plaintiff.

207 *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522, 527.

208 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562 [15]; *Brandy* (1995) 183 CLR 245, 258 (Mason CJ, Brennan and Toohey JJ); *Federal Commissioner of Taxation v Munro* (1926) 38

As to the question whether deterrence itself could ever be a non-punitive object, it is suggested that, except for one particular kind of deterrence (discussed below), it cannot. First, deterrence — both general and specific or personal — is traditionally a central factor to which courts engaged in criminal sentencing must have regard. Obviously that consideration is not decisive. Secondly, a law authorising the involuntary detention of a person solely for the purpose of deterring that person from engaging in certain conduct, or of deterring others from engaging in like conduct, falls within the paradigm case of punishment, namely, 'the consequences imposed by law for engagement in past conduct'. With two exceptions, involuntary detention imposed as a deterrent, in order to be rationally effective, must follow from a finding of engagement in past conduct or contravention of the law.

The exceptions are these: first, detention could be imposed upon a person known by the detainer to be innocent of any wrongdoing, for the purpose of deterring others who wrongly believe that the person is guilty;[209] secondly, detention could be imposed on a person who has not engaged in prohibited conduct but might do so in the future, in order to demonstrate to that person (and others) the unpleasantness that would result should they engage in prohibited conduct in the future.

For the first of those exceptions to be effective, the targets of the general deterrence would have to believe that the person was being detained as a consequence of engagement in past conduct. If only persons who were known to be innocent were detained, the detention could have no deterrent value at all. But to be constitutionally valid the regime would need to ensure that detention was never imposed, non-judicially, as a consequence of engagement in past conduct (ie, that everyone so detained was innocent). Thus the law could never rationally be capable of achieving its asserted non-punitive object and would be constitutionally invalid in any event.

The second exception avoids this logical difficulty, and may provide an example of deterrence which is truly non-punitive in character. Of course, a law imposing detention to show members of the public what to expect should they commit an offence is unlikely to be politically popular, but one could imagine less drastic laws with similar aims, such as a law making it compulsory for all school children to visit a prison or watch a video about the effects of drug use. Although such laws have a deterrent object, they can be regarded as non-punitive and therefore (assuming a head of Commonwealth legislative power) valid.

This argument does not deny that deterrence may be 'an end in itself'; rather, it shows that the end of deterrence (over and above that level of deterrence which naturally follows from detention that is entirely justifiable on non-punitive grounds) must always be regarded, for constitutional purposes, as a 'punitive' object. Similarly, retribution or revenge for victims or those affected by conduct would have to be regarded as punitive objects.

In *Re Woolley*, McHugh J said:

> A power will not be regarded as purely protective … if one of its principal objects or purposes is punitive. … Protective laws, for example, may also have some deterrent

CLR 153, 175 (Isaacs J); *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 238 [126]–[127] (Spigelman CJ), 241 [147] (Mason P).

209 For a philosophical critique of such an institution ('telishment'), see Rawls, above n 20, 9–11.

> aspect which the legislature intended. However, the law will not be characterised as punitive in nature unless deterrence is one of the principal objects of the law and the detention can be regarded as punishment to deter others. Deterrence that is an intended consequence of an otherwise protective law will not make the law punitive in nature unless the deterrent aspect itself is intended to be punitive. [210]

It should immediately be said that, although McHugh J referred to 'punishment to deter *others*', there is no obvious reason why 'personal' deterrence (ie, deterrence of the particular person himself or herself) as well as 'general' deterrence should not be seen as punitive.

Deterrence is a natural consequence of the imposition of unpleasant conditions, including detention, wherever that detention is referable, even indirectly, to conduct. As such, deterrence is likely to be envisaged by legislators who contemplate the imposition of involuntary detention. Some or all of the members of the legislature may even pass the law with the subjective purpose of deterring those who engage in the conduct. However, as has been argued above,[211] it is the objective purpose, not the subjective purpose of the members of the legislature, that is relevant in assessing whether a law is within constitutional power. It is suggested that a concept similar to 'dominant purpose'[212] must be what McHugh J had in mind when he spoke of the 'principal objects' of the law.

The imposition by the executive of other consequences commonly imposed as punishment by courts

In each of the cases which has been discussed,[213] the High Court was considering a power to detain in custody. However, it is arguable that the principle should be extended beyond detention, so as to include any deprivation of liberty or harsh treatment imposed upon a person as a consequence of a determination that that person has engaged in past conduct.[214] As Gummow J pointed out in *Fardon*, essentially 'what is involved here is the loss of liberty of the individual by reason of adjudication of a breach of the law'.[215] To restrict this exclusively judicial function to orders resulting in detention seems somewhat arbitrary, when it is considered that, historically, courts have ordered, as 'the consequences which the law imposes by reason of [past] conduct',[216] other unpleasant consequences, such as the banishment or

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210 (2004) 225 CLR 1, 26 [61].

211 See text accompanying above nn 110–17.

212 See text accompanying above n 45.

213 *Chu Kheng Lim* (1992) 176 CLR 1; *Al-Kateb* (2004) 219 CLR 562; *Al Khafaji* (2004) 219 CLR 664; (2004) 219 CLR 486; *Fardon* (2004) 223 CLR 575; *Re Woolley* (2004) 225 CLR 1.

214 Cf submissions by David Bennett QC, Solicitor-General for the Commonwealth in *Behrooz v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* [2003] HCATrans 456, 30 and *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)* [2004] HCATrans 2, 62; cf *Victorian Chamber of Manufacturers v Commonwealth (Industrial Lighting Regulations Case)* (1943) 67 CLR 413, 416 (Latham CJ), 422 (Starke J), suggesting that a power to close a business which had failed to comply with industrial lighting standards was a judicial power.

215 (2004) 223 CLR 575, 612 [79].

216 *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497 (Gaudron J).

'transportation'[217] of citizens or subjects, corporal and capital punishment, and the exaction of fines.

Orders for periodic detention or home detention are readily seen as bearing the same character as imprisonment. Clearly enough, capital punishment may serve a protective object. The infliction of death on a citizen by the state generally cannot be said to be an exclusively judicial function: it may be carried out by the executive (eg the police) in circumstances where the causing of death is necessary for the fulfilment of some immediate non-punitive object, for example, to avert imminent danger to other members of the community. However, the infliction of death by the State following conviction for a crime is unlikely to ever be completely justified by reference to any protective object which it may serve: in modern times, there will almost always be less severe methods available to protect the community from even the most dangerous criminals. Thus, the killing by the state of a convicted criminal, in circumstances not requiring immediate action to prevent harm to others, is unlikely ever to be appropriate and adapted to any non-punitive object.[218] It can be imposed (if it is to be imposed at all) only in the exercise of judicial power.[219] Likewise, causing injury to a person can be justified as being for non-punitive purposes in some circumstances, and can be treated in the same way as involuntary detention and deprivation of life.

Other consequences commonly imposed by courts are more readily seen as serving non-punitive objects. For example, community service orders are plainly adapted to serve legitimate non-punitive ends. Likewise, the imposition of fines is obviously capable of serving the dual purposes of punishment and the raising of revenue for government.

Because forms of punishment such as fines and community service orders are of their very nature capable of achieving non-punitive purposes (eg, fines raising revenue for government, or military conscription for defence purposes), there is little utility in

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217 See *Robtelmes v Brenan* (1906) 4 CLR 395, 407 (Barton J).

218 It may be possible to formulate legislation authorising the killing of a person which could be regarded as appropriate and adapted to a non-punitive purpose although the threat is not immediate: cf Schedule 4, Part 1 of the *Anti-Terrorism Bill 2005* (Cth) as first introduced, which provided for the insertion of the following provision into the Schedule to the *Criminal Code Act 1995* (Cth):

> An AFP member must not, in the course of taking a person into custody or detaining a person under a preventative detention order:
>
> (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the AFP member believes on reasonable grounds that the thing is necessary to protect life or to prevent serious injury to another person (including the AFP member); or
>
> (b) if the person is attempting to escape being taken into custody by fleeing—do such a thing unless:
>
> (i) the AFP member believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the AFP member); and
>
> (ii) the person has, if practicable, been called on to surrender and the AFP member believes on reasonable grounds that the person cannot be apprehended in any other manner.

219 Incidentally, this is consistent with the requirement of Article 6.2 of the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), which requires judicial control of the death penalty.

asking whether they are reasonably necessary to achieve legitimate non-punitive purposes. In determining whether exactions of money or compulsory community service amount to punishment, the only method available is to consider directly whether they are imposed as punishment for engagement in particular conduct.

When it comes to the exaction of money, the process of characterisation as punitive or non-punitive is difficult. It is plain that taxation may have a regulatory purpose and effect as well as a revenue-raising purpose.[220] But ordinarily taxes, even those with a strong regulatory purpose, are not regarded as punitive in the relevant sense.[221] It is suggested that this conforms with the approach to other forms of punishment, because a tax with a regulatory purpose can be completely explained or justified by reference solely to the non-punitive purpose of raising revenue. The very concept of taxation requires the Parliament to select some criterion by which the tax is to be assessed,[222] and an exaction of money is no less a tax because it fastens upon a criterion that might be regarded as undesirable (for example, the purchase of cigarettes) rather than one which might be regarded as desirable (for example, the earning of income).

In *R v Barger*; *Commonwealth v McKay*,[223] Isaacs J identified 'the fundamental distinction between taxation and regulation':

> The true test as to whether an Act is a taxing Act, and so within the federal power, or an Act merely regulating the rates of wages in internal trade, and so within the exclusive power of the State, is this: Is the money demanded as a contribution to revenue irrespective of any legality or illegality in the circumstances upon which the liability depends, or is it claimed as solely a penalty for an unlawful act or omission, other than non-payment[224] of or incidental to a tax? [225]

Whether an exaction of money for public purposes is to be regarded as a tax or as a penalty may thus depend in large part upon the form which the legislation takes, whether it purports to make illegal the conduct which it regulates and whether the liability to pay arises from a failure to discharge antecedent obligations. A similar analysis can be employed in respect of orders for compulsory community service.

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220 *Osborne v Commonwealth* (1911) 12 CLR 321; *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170; *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

221 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 569 (Mason CJ, Deane, Toohey and Gaudron JJ).

222 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640–1 (Gibbs CJ, Wilson, Deane and Dawson JJ).

223 (1908) 6 CLR 41.

224 Cf Divisions 284, 286 and 288 of Schedule 1 of the *Taxation Administration Act 1953* (Cth), which has effect by reason of s 3AA of that Act. The reference to taxation imposed under these sections as 'penalty tax' might lend support to the view that the imposition of such tax should be characterised as exclusively judicial punishment.

225 (1908) 6 CLR 41, 99 (dissenting) (footnote added). See also *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 202 (Dawson and Toohey JJ); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 571 (Mason CJ, Deane, Toohey and Gaudron JJ), 588 (Dawson J, McHugh J agreeing); *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639 (Gibbs CJ, Wilson, Deane and Dawson JJ); Zines, above n 32, 35–6, 209.

V THE LIMITS OF LEGITIMATE JUDICIAL DETENTION

The principles to be applied in determining when courts may order detention

Having considered the circumstances in which detention may be imposed by the executive in the absence of any judicial order, it is now appropriate to consider the limits of the power to detain which may be invested in courts. First, consideration will be given to the power of the Commonwealth Parliament to invest federal courts with powers of involuntary detention. Later, it will be appropriate to consider the extent to which those limitations apply to the Parliaments of the States investing their courts with powers to detain.

It has been argued above that the essential character of criminal proceedings, and criminal punishment in particular, is the declaration of the consequences which the law imposes for engagement in past conduct. The finding of guilt, and declaration of consequences which the law imposes, conclusively settle the dispute between the state, sovereign or community and the accused. However, it has also been argued that, when considering detention by the executive in the absence of a judicial order, the requirement of substance over form necessitates a consideration of the question whether detention is reasonably capable of being seen as necessary for the achievement of some legitimate non-punitive purpose, object or end. The reason for holding that executive detention which is not referable to a non-punitive object is invalid is that it involves a breach of the separation of powers: detention which is not referable to a non-punitive object is presumed to be imposed as punishment, and therefore involves the exercise of a judicial power.

It does not follow, however, that all detention which could not, for constitutional reasons, be imposed by the executive, may be ordered by the judiciary. Although in one sense, all detention as punishment involves an exercise of judicial power, the judicial power exercisable by courts is more restricted.

As Gaudron J said in *Harris v Caladine*:[226]

> Judicial power is usually defined in terms of its subject matter, but it is a power that, for complete definition, requires description of its dominant and essential characteristic, namely, that it is exercised in accordance with that process which is referred to as 'the judicial process'. Thus, in general terms, it is a power which cannot be exercised until the 'tribunal which has power … is called upon to take action'[227] … which (subject to limited exceptions) proceeds by way of open and public inquiry, which involves the application of the rules of natural justice and which is directed to ascertaining 'the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined'.[228]

Whether one defines those attributes of 'the judicial process' as forming part of the judicial power itself, or merely as implied requirements for the manner of its exercise by a court operating in the context of a separation of powers, it is plain that Ch III imports some requirements of this kind.[229]

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226 (1991) 172 CLR 84, 150. See also *Nicholas v The Queen* (1998) 193 CLR 173, 208–9 [74] (Gaudron J).

227 *Huddart Parker & Co Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

228 *Tasmanian Breweries* (1970) 123 CLR 361, 374 (Kitto J).

229 See, eg, Justice Michael McHugh, 'Does Chapter III of the Constitution protect substantive as well as procedural rights?' (2001) 21 *Australian Bar Review* 235; Fiona Wheeler, 'Due

Thus, a law authorising or requiring a federal court to detain any person as punishment, but without identifying the wrongdoing to which the punishment relates, or the findings of fact giving rise to the conclusion of guilt, would be invalid.[230] The judicial function of imposing punishment for engagement in past conduct necessarily entails the identification of a standard or rule, and the application of that rule to the facts as found. It follows that there are some instances of detention — primarily detention which is apparently arbitrary in the strict sense,[231] that is, detention for no reason, or for which the reason cannot be ascertained — which cannot, under the separation of powers, be imposed by any branch of government.[232]

The effect of the separation of powers, then, is that, generally, courts may order the involuntary detention of a person only where that detention forms part of the settlement of a dispute between parties (including a dispute giving rise to a criminal prosecution). The assessment of whether a particular instance of detention is part of the exclusively judicial power of imposing consequences for engagement in past conduct therefore involves a characterisation of the process to be engaged in by the court.

The imposition of non-punitive detention by federal courts

It is suggested that the preventative detention of a person in circumstances unconnected with the judgment and punishment of guilt generally is an administrative, rather than a judicial, act. *Fardon*[233] involved a challenge to the validity of State legislation. It was argued that the legislation purported to confer upon the Supreme Court of Queensland a function which was incompatible with its exercise of the judicial power of the Commonwealth.[234] The Attorney-General for the Commonwealth, intervening, had submitted that the power to detain a person for the protection of the community, and not following a determination of guilt, could be given to the High Court or a federal court created by the Commonwealth Parliament under s 71 of the *Constitution*. Gummow J rejected this submission, holding that the making of an order for preventative detention, divorced from any judgment of guilt, was a non-judicial function, which could not be exercised by a court established under Ch III of the *Constitution*. He stated that such detention 'is of a different character and is at odds with the central constitutional conception of detention as a consequence of

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Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; *Chu Kheng Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

230 Cf *Kable* (1996) 189 CLR 51, 134 (Gummow J):

> The Act requires the Supreme Court to inflict punishment without any anterior finding of criminal guilt by application of the law to past events, being the facts as found. Such an activity is said to be repugnant to the judicial process. I agree.

231 The concept of 'arbitrary detention' at international law, and particularly under Art 9.1 of the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), may be significantly broader: see Tania Penovic, 'Immigration Detention of Children: Arbitrary Deprivation of Liberty' (2003–04) 7 *Newcastle Law Review* 56.

232 Cf *Thomas v Mowbray* [2007] HCATrans 078, 371–2 [16543]–[16569], where Gummow J suggested that '[i]t is not an absence of power. It is a question of location of power.'

233 (2004) 223 CLR 575.

234 The argument sought to evoke the principle established in *Kable* (1996) 189 CLR 51. The principle is discussed in text accompanying below nn 289–306.

judicial determination of engagement in past conduct.'[235] He concluded that '[t]he vice for a Ch III court and for the federal laws postulated in submissions would be in the *nature of the outcome*, not the means by which it was obtained'.[236] That is, the function involved an exercise of non-judicial power. Kirby J expressly agreed with the reasoning of Gummow J on this point.[237]

The conclusion of Callinan and Heydon JJ, that the Act was 'designed to achieve a legitimate, preventative, non-punitive purpose in the public interest'[238] suggests that they did not regard the function given to the Supreme Court under the Act as an exercise of *exclusively* judicial power, given that the existence of a 'legitimate non-punitive object' had previously been identified as a criterion for determining whether a power was properly characterised as an executive power.[239] However, it is not possible to discern from their judgment whether they considered that such detention could be imposed in the exercise of executive power only, or in the exercise of either judicial or executive power.[240]

Hayne J agreed generally with the judgment of Gummow J, but expressly reserved his judgment on the question of whether a power to order preventative detention, imposed otherwise than as a consequence of a determination of engagement in past conduct, was or was not a judicial power which could be conferred upon a Ch III court. However, in so doing, he does appear to have accepted that 'detention as a consequence of judicial determination of engagement in past conduct' is 'the central constitutional conception'.[241] Gleeson CJ also declined to express any view as to whether a function of the kind under consideration in *Fardon* could have been exercised by a federal court.[242]

McHugh J disagreed with the view taken by Gummow J:[243]

> [W]hen determining an application under the Act, the Supreme Court is exercising judicial power. … It is true that in form the Act does not require the Court to determine 'an actual or potential controversy as to existing rights or obligations.'[244] But that does not mean that the Court is not exercising judicial power. The exercise of judicial power

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235 *Fardon* (2004) 223 CLR 575, 613 [84].

236 Ibid 614 [85] (emphasis added).

237 Ibid 631 [145]; see also 637–8 [164]–[165].

238 Ibid 658 [234].

239 *Kruger* (1997) 190 CLR 1, 162 (Gummow J); *Chu Kheng Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ), 46 (Toohey J), 55, 58 (Gaudron J), 65, 71 (McHugh J).

240 See also *Fardon* (2004) 223 CLR 575, 657 [225] (Callinan and Heydon JJ):

> The yardstick to which the Court is to have regard, of an unacceptable risk to the community, relevantly a risk established according to a high degree of probability, that the prisoner will commit another sexual offence if released, established on and by acceptable and cogent evidence, adduced according to the rules of evidence, is one which courts historically have had regard to in many areas of the law. The process of reaching a predictive conclusion about risk is not a novel one.

It is suggested that this passage was not intended to suggest that the court was exercising judicial *power*, but merely that the manner of the exercise of the power, and the steps involved in it, were not foreign to the judicial *process*.

241 Ibid 648 [197]. This seems to be consistent with Hayne J's discussion of punishment in *Al-Kateb* (2004) 219 CLR 562, 650 [265].

242 *Fardon* (2004) 223 CLR 575, 591 [18].

243 Ibid 596–7 [34] (footnotes in original).

244 *Tasmanian Breweries* (1970) 123 CLR 361, 375 (Kitto J).

> often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under this Act are of the same jurisprudential character as in those cases. The Court must first determine whether there is 'an unacceptable risk that the prisoner will commit a serious sexual offence'. That is a standard sufficiently precise to engage the exercise of State judicial power.[245] Indeed, it would seem sufficiently precise to constitute a 'matter' that could be conferred on or invested in a court exercising federal jurisdiction.[246]

While the standard to be applied may be sufficiently precise to constitute a 'matter', the determination of proceedings in which a preventative detention order is sought may not constitute an exercise of judicial power because, prior to an application for such an order, there would be no controversy as to the existence of any right, duty or liability to be established.[247] Rather, the function of the court in making a preventative detention order would appear to involve only the creation of new duties and liabilities.

Passages in other judgments of the High Court can be read as supporting the view that a Ch III court may exercise a power to create new rights and liabilities. For example, in *Re Dingjan; Ex parte Wagner*,[248] Gaudron J said:

> A power to adjudicate 'a dispute about rights and obligations arising solely from the operation of the law on past events or conduct' is one that is essentially and exclusively judicial. On the other hand, a power to bring a new set of rights and obligations into existence is generally non-judicial, although it may take its character from the tribunal involved. Thus, a power to create new rights and obligations, if it is conferred on a court and 'is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to [unspecified] policy considerations', will be characterised as judicial power involving the determination of rights and obligations for which the law provides. At least that is so if the subject matter and prescribed procedures are consistent with the nature and functions of a court.[249]

Likewise, in *Precision Data Holdings Pty Ltd v Wills*,[250] the Court said:

> Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power.[251]

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245 *M v M* (1988) 166 CLR 69, 78.

246 As to the need for issues to be defined with sufficient precision to involve an exercise of federal judicial power, see *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312, 319 (Dixon CJ, Williams, Kitto and Taylor JJ).

247 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan and Deane JJ): a matter involves 'a justiciable controversy, *identifiable independently of the proceedings which are brought for its determination*' (emphasis added).

248 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 ('*Re Dingjan*').

249 Ibid 360 (citations omitted).

250 (1991) 173 CLR 167.

251 Ibid 191 (citations omitted).

In that case, the Court was actually concerned with a function given to an administrative tribunal. It is suggested that the quoted passage should not be understood as stating that *every* power to create rights or impose liabilities, when invested in a court, should be considered an exercise of judicial power. The Court in *Precision Data Holdings v Wills* referred to the judgment of Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[252] with approval. Kitto J there concluded that a power which does not involve adjudication in a *lis inter partes* and result in a decision settling for the future the rights and obligations between those parties 'needs to possess *some special compelling feature* if its inclusion in the category of judicial power is to be justified'.[253]

The passages from *Precision Data Holdings* and *Re Dingjan* are best understood as referring only to the established categories of actions in which the courts have traditionally made decisions about status, where there are 'traditional concepts to be applied'.[254] These include the administration of assets and trusts, orders relating to the maintenance and guardianship of infants, consent to marriage of a ward of the court, the administration of the property of enemy aliens, the winding up of companies and the granting of probate or letters of administration.[255] Those categories may be capable of extension by analogy, but there would generally appear to be nothing about preventative detention, or other potential categories of administrative detention, which is readily seen as analogous to those functions historically exercised by courts although not falling within the ordinary definition of judicial power. The common theme amongst the examples given might be thought to be that the court in each case would be dealing with the discretionary adjustment or creation of rights following from the possession of a particular legal status which inheres in the subject (eg, infancy, lunacy), or the coming to an end of a legal personality or relationship (eg, probate, dissolution of a marriage, winding up of a company). Although it might be possible to characterise a preventative detention regime as involving matters of legal status (ie, the status of being a person who meets the legislative description by virtue of, for example, their freedom creating an 'unacceptable risk'), it would seem that almost any administrative power could be so characterised.

In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*,[256] Dixon J explained that legislation apparently conferring jurisdiction on a court to create new rights and liabilities could perform a 'double function', namely the legislative creation of a duty and the conferral upon a court of jurisdiction to enforce compliance with that duty.[257] In *Barrett* itself, the duty of a member to comply with the rules of an organisation was implicit in the grant to the Court of the power to make orders for

252 (1970) 123 CLR 361.
253 Ibid 375 (emphasis added).
254 Ibid 373 (Kitto J).
255 *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J); *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 314–15 (Brennan J); *Peacock v Newtown Marrickville and General Cooperative Building Society No 4 Ltd* (1943) 67 CLR 25, 35 (Latham CJ).
256 (1945) 70 CLR 141 ('*Barrett*').
257 Ibid 165–6.

their enforcement.[258] Thus the Court's power could be seen as the enforcement of pre-existing rights and liabilities rather than the creation of new rights and liabilities.

A similar analysis can be employed in cases of judicial detention: legislation ostensibly conferring upon a court a power to create a new liability to detention, but where engagement in past conduct is a precondition to the exercise of the power, may be construed as imposing, implicitly, a duty not to engage in that conduct, breach of which enlivens the court's jurisdiction.[259] Where the liability to detention depends upon status, or upon conduct which pre-dates the creation of the liability (logically equivalent to the status of being a person who engaged in conduct which was not criminal when done), the 'double function' approach seems more contrived, but nevertheless still might be accepted as applicable.[260] If this analysis and approach to construction were to be adopted, it would seem that virtually every administrative power could also be considered judicial power if given to a court. The only limits would be those relating to the *process* to be engaged in, not to the *nature of the outcome* of that process.[261] For example, courts would still be prevented from making orders for detention based on the exercise of broad policy discretions.[262]

The function exercised by courts which is most closely analogous to the making of orders for preventative detention might be the issuing of 'restraining orders', for example, to protect the potential victims of those who are likely to engage in domestic violence or paedophilia.[263] Two things may be said about such a purported analogy. First, such orders may in some cases be premised on a finding that a person has

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258 Ibid 159–60 (Starke J); see also 162–3 (Dixon J): 'The section thus provides for two separate and distinct proceedings. The first results in the imposition of a duty, breach of which is punishable. The second deals with the penal consequences.'

259 See the example from 9 Geo I, c 19, given in *Barrett* (1945) 70 CLR 141, 166 (Dixon J). See also *Criminal Code Act 1995* sch 1 s 104.4(1) and particularly s 104.4(1)(c)(ii), which might be defended on this basis: *Thomas v Mowbray* [2006] HCA Trans 660; [2006] HCA Trans 661; [2007] HCATrans 076; [2007] HCATrans 078. The legislation considered in *Chu Shao Hung* (1953) 87 CLR 575 illustrates the point: it provided for a penalty of '[i]mprisonment for six months and, in addition to or in substitution for such imprisonment, deportation from the Commonwealth pursuant to an order made in that behalf by the Minister'. It would have been possible to express, as separate powers, the judicial imposition of a penalty for breach of the criminal law, and the deportation to be imposed at the discretion of the Minister but on the precondition of a judicial finding of guilt.

260 Cf *Polyukhovich* (1991) 172 CLR 501. The implicit duty might be defined as a duty not to *have* engaged in particular conduct (ie, a *perfect* obligation). Cf the duty imposed by the legislation considered in *Chu Shao Hung* (1953) 87 CLR 575, not to be a 'prohibited immigrant', which status was in turn dependent upon failure to pass a test.

261 Cf *Fardon* (2004) 223 CLR 575, 614 [85] (Gummow J).

262 See text accompanying below nn 283–306.

263 See, eg, *Domestic Violence Act 1994* (SA); *Summary Procedure Act 1921* (SA) pt 4 div 7; *Restraining Orders Act 1997* (WA); *Domestic Violence Act 1992* (NT) pt 2. Such powers are usually treated as quasi-criminal, proceedings being initiated by complaint. Note that the constitutional character of such orders may differ if they form part of the sentencing process following a judicial finding of guilt: see, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 23; *Sentencing Act 1991* (Vic) s 18B; *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act 1995* (WA) s 98; *Sentencing Act 1997* (Tas) s 19.

committed an act of domestic violence or paedophilia-related crime in the past,[264] and therefore might be seen as an exercise of the traditional judicial function of declaring consequences for engagement in past conduct. Secondly, such orders have generally been exercised by State courts as an adjunct to their criminal jurisdiction. It may be that, to the extent that such orders are not to be viewed as punitive or remedial, they actually involve an exercise of an administrative function by the courts of the States,[265] and that such a function could not be conferred on a Ch III court operating under a strict separation of powers.

It is difficult to state dogmatically that a Ch III court could *never* impose detention otherwise than as a consequence of engagement in past conduct, or which cannot be seen as incidental to the exercise of some other admittedly judicial power, because of the range of potential circumstances in which such a power of detention might be conferred. However, detention for the purpose of investigating breaches of the criminal law, for example, can be seen as closely analogous to the issue of warrants for that purpose. The functions of issuing search warrants and telephone interception warrants in connection with the investigation of criminal offences have been regarded as administrative acts.[266] Generally, a power to order detention otherwise than as a consequence of engagement in past conduct would seem to lack any 'special compelling feature' necessary to transform it into an exercise of judicial power.

These conclusions would not preclude the review by a Ch III court of a decision, made by an officer of the executive government, to detain a person (whether the detention is mandatory or at the discretion of the executive). Indeed, under s 75(v) of the *Constitution*, the jurisdictional limits or 'inviolable limitations or restraints'[267] on the executive power to detain — which limits will necessarily include that the detention be for a legitimate non-punitive purpose[268] — are always subject to review upon the application of a detainee. If such a review were made mandatory, however, a Ch III court might be prevented from undertaking the review where the detainee did not challenge the legality of his or her detention, because there would be no dispute to be decided by the exercise of judicial power.[269]

It appears from the foregoing analysis that there are some instances of detention which could be imposed by the executive in the exercise of administrative power *or* by

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264 See, eg, *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A (definition of 'registrable person') and *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW).

265 Under the *Domestic Violence Act 1992* (NT), a restraining order may be made by the Court, the Clerk of the Court, a Magistrate or police officer: see ss 4–6B.

266 *Grollo v Palmer* (1995) 184 CLR 348, 359–60 (Brennan CJ, Deane, Dawson and Toohey JJ), 389 (Gummow J); *Coco v The Queen* (1994) 179 CLR 427, 444 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Love v A-G (NSW)* (1990) 169 CLR 307, 320–1 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *Ousley v The Queen* (1997) 192 CLR 69, 84–5 (Toohey J), 87 (Gaudron J), 99–100 (McHugh J), 121, 124, 130 (Gummow J), 140, 145–6 (Kirby J).

267 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J); *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J). See also *S157* (2003) 211 CLR 476, 489 [21], 493 [34] (Gleeson CJ), 503 [66], 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

268 That is so because the Parliament cannot grant to an administrative officer a jurisdiction inconsistent with the *Constitution*, including the separation of judicial power.

269 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

a court in the exercise of judicial power. These will be instances of detention following a finding of engagement in past conduct but which are proportionate to legitimate non-punitive ends.

As seen in the above discussion, the form which legislation takes may sometimes obscure the nature of the power to be exercised. A finding of engagement in past conduct may be expressed as a precondition to the exercise of a power to detain for non-punitive reasons. When given to a court, such a power might be viewed as the imposition of consequences for engagement in past conduct, while a power expressed in identical terms but vested in an executive decision-maker or tribunal might be appropriately regarded as an instance of legitimate executive detention.[270] Perhaps less commonly, a power of detention by the executive which in form appears to involve the imposition of punishment for past conduct might be limited to what is necessary for the achievement of a particular non-punitive object, and thus valid.

On the other hand, a law might provide that, in determining the appropriate sentence for a certain offence, a court was to have regard only to objects of community protection and not to retribution or deterrence. A sentencing power of that kind would seem to fall within the ordinary judicial function, notwithstanding that the detention could be said to be proportionate to a non-punitive object.

Historical instances of judicial detention otherwise than following a determination of guilt

Although the features which were identified in Part II generally will be sufficient to identify a power as exclusively judicial in nature, it is also clear that 'a function which, considered independently, might seem of its own nature to belong to another division of power, yet, in the place it takes in connection with the judicature, falls within the judicial power'.[271] There have, historically, been some instances of detention following a judicial order that do not fall within the paradigm of punishment for a criminal offence. However, many, if not all, of these instances of detention are explicable on the basis that the detention is incidental to the exercise of a power which is indisputably judicial power.

The most obvious is probably the power of a court to remand a prisoner in custody pending trial for a criminal offence.[272] The 'connection with the judicature' and with the exercise of judicial power borne by such a power is clear: although the detention is non-punitive, it is reasonably incidental to the exercise of judicial powers of determining guilt or innocence, and sentencing. Interlocutory injunctions in civil cases are readily seen as bearing a similar character, although imposing restrictions on liberty falling short of detention.

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270 See *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 309 [66] (Tamberlin, Sackville and Stone JJ).

271 *Boilermakers* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *New South Wales v Commonwealth* (1915) 20 CLR 54, 90 (Isaacs J); *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ).

272 Historically, it may be more accurate to identify the court's power as a power to admit to bail a prisoner detained by the executive: see *Chu Kheng Lim* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ), citing Sir William Blackstone, *Commentaries on the Laws of England, Vol 4* (17th ed, 1830) [298]. However, nothing turns on this formal difference, and it is clear that courts now exercise the power to remand a prisoner in custody.

The detention of the mentally ill following an acquittal on grounds of insanity[273] or automatism[274] can also be seen as incidental to the judicial function of trying criminal cases, which obviously encompasses their resolution in favour of innocence as well as guilt. The detention of those posing a danger to the community, and who would otherwise be released in consequence of the court's decision, can be regarded as incidental to the decision to acquit that person, made in the exercise of judicial power. Further, such detention follows a finding of engagement in past conduct (although not 'guilt') and may be imposed by a court notwithstanding that it serves purely non-punitive objects.

The powers of justices of the peace to bind over persons to prevent a breach of the peace ('preventive justice')[275] may be best understood historically as administrative powers held by justices by reason of their office, rather than powers given to a court as part of the judicial power.[276] From time to time such powers have, however, been invested in courts of summary jurisdiction as such.[277] In any event it is arguable that these functions, at least when exercised by a court, did engage the judicial power as they were exercisable only where a breach of the peace had been occasioned or to prevent the commission of an apprehended offence against the peace (ie, the enforcement of a prior duty).[278]

One further instance of detention which might be considered 'non-punitive' is imprisonment as a remedy for a civil contempt of court. Traditionally, a distinction has been drawn between disobedience of a court order or breach of an undertaking in civil proceedings simpliciter (civil contempt) on the one hand, and contempt in the face of the court, interference with the course of justice, contumacious disobedience of a court

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273 Cf *Re Woolley* (2004) 225 CLR 1, 24 [58] (McHugh J). For examples of legislation authorising the detention of the mentally impaired following trial, see *Criminal Code 1899* (Qld) s 647; *Mental Health Act 2000* (Qld) ch 3 pt 7; *Criminal Law Consolidation Act 1935* (SA) pt 8A; *Mental Health (Criminal Procedure) Act 1990* (NSW) ss 23–4, 27; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) pts 4, 5; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) pt 5; *Criminal Justice (Mental Impairment) Act 1999* (Tas) pt 4. The mandatory detention of defendants acquitted on grounds of insanity was first provided for by the *Criminal Lunatics Act 1800* (UK), 39 & 40 Geo 3, c 94 (enacted following the acquittal of James Hatfield for the attempted murder of King George III). Prior to 1800, trial courts appear to have assumed a discretionary power to imprison mentally ill defendants who were acquitted: see J M Beattie, *Crime and the Courts in England 1660–1800* (1986) 84.

274 Cf *R v Parks* [1992] 2 SCR 871.

275 See Sir William Blackstone, *Commentaries on the Laws of England, Vol 4* (1769) 251–2; *Justices of the Peace Act 1361* (UK), 34 Edw 3, c 1; *Lansbury v Riley* [1914] 3 KB 229; *R v County of London Quarter Sessions Appeals Committee; Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670.

276 Blackstone, above n 275, 252; *R v County of London Quarter Sessions Appeals Committee; Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670, 676–7 (Lord Goddard CJ).

277 See, eg, *Justices of the Peace Act 1883–4* (SA), 46 & 47 Vic, ss 16, 2, 29; *Justices Act 1921* (SA), *Magistrates Court Act 1989* (Vic) s 126A; *Justices Act 1928* (NT) s 99. The *Crimes (Sentencing Procedure) Act 1999* (NSW) s 101 appears to assume that such a power resides in the court rather than justices personally.

278 *R v County of London Quarter Sessions Appeals Committee; Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670, 674–6 (Lord Goddard CJ); *R v Sandbach; Ex parte Williams* [1935] 2 KB 192, 197 (Humphreys J); *Chu Shao Hung v The Queen* (1953) 87 CLR 575, 589–90 (Kitto J).

order or breach of an order in certain other circumstances (criminal contempt) on the other.[279] Following a finding of either civil or criminal contempt, a court may order the imprisonment of the contemnor. In the case of a criminal contempt, this is readily seen as punishment for engagement in past conduct. It may be that imprisonment for civil contempt is also properly to be seen as punishment imposed in proceedings which are 'essentially criminal in nature'.[280] On another view, such detention should not be considered 'punishment', because its purpose is said to be to compel compliance with an order or undertaking, rather than to punish non-compliance.[281] However, this distinction now appears to have been rejected.[282] Even if imprisonment for civil contempt were properly regarded as non-punitive, it is plain that such detention is imposed as a remedy in a traditional judicial proceeding for the settlement and enforcement of rights and obligations. It is thus within the ambit of judicial power, whether punishment or not.

The application of the principles to the courts of the States and Territories, and to federal judges acting *persona designata*

In *Hilton v Wells*,[283] the High Court confirmed that it is permissible for the Parliament to confer upon a judge of a federal court, as a designated person, powers and functions which could not have been conferred upon the federal court itself. That is so, even where the necessary qualification for the conferral of a function is that the recipient hold office as a federal judge. In *Grollo v Palmer*,[284] the Court recognised two limitations on the Parliament's power to invest non-judicial functions in the judges of federal courts.[285] The first was that such a function cannot be conferred without the judge's consent.[286] The second was that:

> no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power ('the incompatibility condition').[287]

It was recognised that such incompatibility might arise where the non-judicial functions conferred were of such a kind that their performance by a judge would tend to diminish public confidence in the integrity of the judiciary as an institution. In *Wilson*, it was held that the appointment of a judge of the Federal Court to provide a

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279 *Witham v Holloway* (1995) 183 CLR 525, 530 (Brennan, Deane, Toohey and Gaudron JJ), citing *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 107–8 (Gibbs CJ, Mason, Wilson and Deane JJ); *In re Freston* (1883) LR 11 QBD 545; *In re Grantham Wholesale Fruit, Vegetable and Potato Merchants Ltd* [1972] 1 WLR 559.

280 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 49 (Deane J); *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ).

281 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483, 498–9 (Windeyer J).

282 *Witham v Holloway* (1995) 183 CLR 525, 530, 532–4 (Brennan, Deane, Toohey and Gaudron JJ).

283 (1985) 157 CLR 57; confirmed in *Jones v Commonwealth* (1987) 61 ALJR 348.

284 (1995) 184 CLR 348.

285 Ibid 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ), referring to *Mistretta v United States*, 488 US 361, 404 (1989).

286 *Grollo v Palmer* (1995) 184 CLR 348, 364–5 (Brennan, Deane, Dawson and Toohey JJ); *Hilton v Wells* (1985) 157 CLR 57, 83 (Mason and Deane JJ).

287 *Grollo v Palmer* (1995) 184 CLR 348, 365; see also *Hilton v Wells* (1985) 157 CLR 57, 73–4 (Gibbs CJ, Wilson and Dawson JJ), 83 (Mason and Deane JJ).

report to a Minister, assessing the 'essentially political' questions relating to the protection of an area of significance to aboriginal people, was incompatible with the holding of office as a Ch III judge.[288]

In *Kable*,[289] a majority of the High Court recognised that Ch III of the *Constitution* prevented the legislatures of the States from investing the courts of the States with certain functions which were incompatible with the exercise of the judicial power of the Commonwealth. It now appears clear that this doctrine also applies to the courts of the territories, which may also be vested with federal jurisdiction.[290] The basis for the implication was said to be that Ch III, and in particular s 77(iii), required that the courts of the States be maintained as appropriate receptacles for the investment of federal jurisdiction by the Commonwealth Parliament.[291]

The test of incompatibility applicable to State courts is similar to, though perhaps not identical with,[292] the incompatibility doctrine applied in *Grollo v Palmer*[293] and applied in *Wilson*,[294] in relation to federal judges acting *persona designata*. (The applicability of the incompatibility doctrine to the judges of State courts acting *persona designata* has received little attention.[295]) Institutional integrity, impartiality and independence of the court concerned, or of the judiciary generally, have been identified as the guiding principles in the application of both doctrines.[296] Although

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288 (1996) 189 CLR 1, 17–20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

289 (1996) 198 CLR 51.

290 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 518–19 [18]–[19], 529–31 [51]–[54], 532 [58] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [28] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Putland v The Queen* (2004) 218 CLR 174, 178 [4] (Gleeson CJ), 187–8 [33] (Gummow and Heydon JJ, Callinan J agreeing), 199 [73] (Kirby J).

291 *Kable* (1996) 189 CLR 53, 103 (Gaudron J). The capacity of State courts to determine exactly the same matters in the exercise of their non-federal jurisdiction (a power which they would retain, had the power in s 77(ii) not been exercised with respect to those matters) may present a difficulty for this justification of the *Kable* principle. Cf 142 (Gummow J):

> decisions of the State courts, *whether or not given in the exercise of invested jurisdiction*, yield 'matters' which found appeals to this Court under s 73(ii). By this means, the judicial power of the Commonwealth is engaged, at least prospectively, across the range of litigation pursued in the courts of the States. (emphasis added).

292 *Fardon* (2004) 223 CLR 575, 618 [103] (Gummow J); cf *Kable* (1996) 189 CLR 51, 98 (Toohey J), 103–4 (Gaudron J), 127 (Gummow J).

293 (1995) 184 CLR 348.

294 (1996) 189 CLR 1.

295 But see *Kable* (1996) 189 CLR 51, 117–18 (McHugh J).

296 *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ), 390 (Gummow J); *Kable* (1996) 189 CLR 51, 98 (Toohey J), 121 (McHugh J), 128, 143 (Gummow J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 373 [116] (Kirby J); *Silbert v DPP (WA)* (2004) 217 CLR 181, 197 [49] (Kirby J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 172 [65] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Baker v The Queen* (2004) 223 CLR 513, 519 (Gleeson CJ), 534 [51] (McHugh, Gummow, Hayne and Heydon JJ), *Fardon* (2004) 223 CLR 575, 591 [15] (Gleeson CJ), 598 [37], 601 [43] (McHugh J), 617–618 [101]–[102] (Gummow J), 628 [141] (Kirby J), 648 [198] (Hayne J); *APLA* (2005) 224 CLR 322, 365 [78] (McHugh J); *Forge v Australian Securities and Investments Commission* (2006) 80 ALJR 1606, 1618 [41] (Gleeson CJ, Callinan J agreeing), 1623 [63] (Gummow, Hayne and Crennan JJ), 1634 [125], 1653 [195] (Kirby J), 1663 [244] (Heydon J).

the question of whether a function given to a State court is incompatible with the exercise of federal jurisdiction by that court might occasionally yield a different answer to the question of whether the same function could be given to a federal judge acting *persona designata*, it is convenient to consider the operation of these two doctrines together.

As the decisions in *Hilton v Wells*[297] and *Grollo v Palmer*[298] illustrate, there can be no objection simply to judges in their personal capacity exercising powers which are administrative rather than judicial. Similarly, the lack of entrenchment of any strict separation of powers in State constitutions[299] precludes an argument that the investment of non-judicial powers in State courts is constitutionally impermissible per se.

The decision in *Fardon*[300] has already been mentioned. The High Court upheld the validity of a regime empowering the Supreme Court of Queensland to order the continuing and indefinite detention, subject to periodic review, of a prisoner where it was satisfied that 'the prisoner is a serious danger to the community' and there was 'an unacceptable risk that the prisoner will commit a serious sexual offence'.[301] In explaining why he considered that the legislation under challenge did not infringe the *Kable* principle, Gummow J (with whom Hayne J agreed) commented that one '[matter] of significance, which taken together with others' supported the validity of the legislation, was that:

> the factum upon which the attraction of the Act turns is the status of the appellant to an application by the Attorney-General as a 'prisoner' … who is presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be an unacceptable risk of commission if the appellant be released from custody. To this degree there remains a connection between the operation of the Act and anterior conviction by the usual judicial processes. A legislative choice of a factum of some other character may well have imperilled the validity of s 13.[302]

With respect, it is not clear why that is so. Obviously a detention regime applicable to all persons, whether previously convicted of sexual offences or not, would lack any connection with the traditional judicial function of adjudging and punishing criminal guilt. However, given that, *ex hypothesi*, non-judicial detention is to be imposed for non-punitive reasons, it is not clear why the fact that it retains a link to an earlier judgment of criminal guilt should make it any less objectionable. In fact, the choice of 'prisoner' status as the factum or condition which enlivens liability to detention might sometimes tend to suggest that the purpose of the detention was actually to impose additional punishment for the past conduct of which the prisoner had previously been convicted.[303] Usually, however, such a limitation would readily be seen as a concession to civil liberties; a (somewhat arbitrary) decision by the legislature to expose to potential indefinite preventative detention only those who have already

297 (1985) 157 CLR 57.
298 (1995) 184 CLR 348.
299 *Kable* (1996) 189 CLR 51, 65 (Brennan CJ), 77–80 (Dawson J), 92–4 (Toohey J), 109 (McHugh J), 142 (Gummow J). See also the cases cited in argument: 57, fn 28.
300 *Fardon* (2004) 223 CLR 575.
301 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13.
302 *Fardon* (2004) 223 CLR 575, 619 [108].
303 Cf *Fardon* (2004) 223 CLR 575, 643–4 [182] (Kirby J).

demonstrated their unwillingness or incapacity to refrain from engaging in the conduct from which the community is to be protected.

There is no reason to suppose that all powers to make orders for involuntary detention are necessarily incompatible with the exercise of the judicial power of the Commonwealth in the relevant sense, or that, *because they involve detention*, there should be any presumption in favour of incompatibility. After all, courts regularly make orders authorising detention in the exercise of judicial power.

Rather, the question of compatibility with the exercise of the judicial power of the Commonwealth is more likely to depend on the *manner* of the exercise of the power in question, whether it be a power to impose detention or any other executive power. Thus many of the traditional features of the judicial process have been identified as relevant to the validity of impugned legislation:[304] the court, in exercising the function, must act rationally and reasonably; it must act by applying standards the content of which is reasonably ascertainable and confined, expressly or impliedly, by law; it must not exercise a 'political discretion'; it must ordinarily proceed by way of open *inter partes* hearing (perhaps unless there is a special reason not to do so); material upon which the court is asked to make a decision must be disclosed to persons affected by the decision, at least unless there is some cogent reason for non-disclosure; it must perform its functions independently of any influence or instruction of the legislature or executive; it must comply with the rules of natural justice. Put shortly, the court must, in a broad sense, 'act judicially'. Where each of those procedural requirements is met, it seems likely that the exercise of a power or function by a court would actually tend to increase public confidence in the *exercise of the function* rather than decreasing public confidence in the judiciary.[305]

It is unlikely in the extreme that a federal court judge acting *persona designata* could exercise any power to order detention which was not reasonably capable of being seen as necessary for some non-punitive purpose or object. That is because such a judge, in his or her capacity as a designated individual, would not constitute a 'court' within the meaning of s 71 of the *Constitution*. The judge would be treated as any other officer of the executive government, and could not exercise the judicial power involved in detention which is not objectively referable to a non-punitive object.

It also seems very unlikely that a State court could validly be given a power which was neither connected with any declaration of the punishment imposed by law for engagement in conduct, nor reasonably capable of being seen as necessary for the achievement of a non-punitive object. Such detention would arguably involve the exercise of judicial power since, as a matter of substance, it would impose punishment. However, that punishment would be imposed arbitrarily, without reference to any standard or rule. It would be impossible to exercise such a power 'judicially'. Thus it is likely that the function would be regarded as 'repugnant to the judicial process in a fundamental degree':[306] its purported conferral on a court would be invalid.

304 *Wilson* (1996) 189 CLR 1, 17–18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
305 *R v Moffat* [1998] 2 VR 229, 260 (Charles JA), referred to in *Fardon* (2004) 223 CLR 575, 586 [2] (Gleeson CJ).
306 *Kable* (1996) 189 CLR 51, 132 (Gummow J).

VI CONCLUSION

The foregoing analysis suggests that the following principles should be regarded as applicable when considering the validity of a law of the Commonwealth that purports to authorise involuntary detention. First, if the law purports to authorise detention as a consequence of engagement in past conduct and the detention is not referable to purely non-punitive objects, such detention may be imposed only following a judicial finding of guilt and order for detention. The imposition of consequences *for* engagement in past conduct is an exclusively judicial power.

Secondly, if the law purports to authorise detention with a non-punitive object, it must be possible to demonstrate that the detention does not go beyond what is reasonably capable of being seen as necessary to fulfil that purpose. Deterrence from, or retribution for, past conduct generally should not be considered legitimate non-punitive purposes as they inherently involve the imposition of consequences for engagement in past conduct which is at the heart of the exclusively judicial function.

Thirdly, although the law purporting to authorise detention may not expressly indicate that the detention is to be imposed as a consequence of engagement in past conduct, it will be presumed that detention is imposed for that reason, and is thus in substance punitive, unless the detention can be shown to be reasonably capable of being seen as necessary for an identified non-punitive object.

Fourthly, the imposition of detention divorced from any finding that the subject of the detention has engaged in particular past conduct may be vested in a court only if it is incidental to the exercise of judicial power. In such cases, the function, being essentially administrative in nature but incidental to the exercise of judicial power, could be given to either a court or an administrative officer. Alternatively, the decision could be made by an administrative officer in the first instance, but subject to review by a court.[307]

Fifthly, a law which purported to require a court to order the detention of a person for engagement in past conduct, but which prevented the court itself determining whether the person did in fact engage in that conduct, would involve a usurpation of part of the judicial power by the legislature. The Parliament itself would have exercised part of the judicial power and the law therefore would be invalid.

Sixthly, it follows that detention for some purposes, in certain circumstances, might be imposed in the exercise of either judicial or executive power. For example, detention of a mentally ill (but not legally 'insane') and dangerous criminal for the purpose of community protection could be imposed by a court as a sentence upon a finding of guilt for an offence. Alternatively, an executive officer could be given a power to order the detention of such a person for the protection of the community, even if a precondition of the exercise of the power was that the person had been found guilty of a criminal offence.[308]

At the State level, where the strict separation of judicial power derived from Ch III and the structure of the *Constitution* does not apply, the possible powers of detention

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307 *Pasini v United Mexican States* (2002) 209 CLR 246, 253–4 [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ).

308 As was the case under the State legislation considered in *Fardon* (2004) 223 CLR 575. See also *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 309 [66] (Tamberlin, Sackville and Stone JJ).

which may be given to courts are broader. It is arguable that, provided State courts are required to exercise their functions transparently and judicially, any power of detention which is to be exercised non-arbitrarily and without regard to political considerations might be invested in them. The same may be true of federal judges acting *persona designata*.

Although some of the above analysis appears to have been doubted in recent cases, particularly by McHugh J in *Re Woolley*,[309] the results, and reasoning of the majorities, in those cases do not preclude the adoption of this approach. To the relatively minor extent that the suggested approach involves a departure from the views expressed by Mason CJ, Brennan, Deane and Dawson JJ in *Chu Kheng Lim*,[310] it is argued that it provides a more principled basis to determine the validity of laws authorising the imposition of detention by the executive.

309 (2004) 225 CLR 1.
310 (1992) 176 CLR 1.