

GOING OUT ON A *LIM*: RECONCEPTUALISING THE CONSTITUTIONAL LIMIT ON PREVENTATIVE DETENTION

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NZYQ did much to return the constitutionality of preventative detention to the principles worked out in *Chu Kheng Lim* ('*Lim*'). However, the High Court did not go far enough. The introduction of a unifying test of being reasonably necessary for a "legitimate" non-punitive purpose provokes questions about the work "legitimate" is to do. The Court has also persisted with the language of "punishment" — an unsatisfactory standard which is difficult to apply. There is a danger, in integrating the exceptions to the rule within the rule itself, with allowing the growth of an originally confined list of exceptions. This paper grounds *Lim* in the values which underpinned it: the uniqueness of detention in constitutional history, and the role of judicial process in mediating that interaction between the individual and the State. These values should be borne steadily in mind, lest *Lim*'s promise of a categorical prohibition on non-judicial detention be diluted.

I INTRODUCTION

Preventative detention — detention imposed without a criminal trial for anticipated acts — is "an increasingly prominent feature of lawmaking".¹ Measures once considered "exceptional" responses to serious criminal activity, such as terrorism or serious sexual offences, have extended to broader categories of risks.² In all but a few instances,³ the High Court has upheld

¹ Tamara Tulich, Sarah Murray and Natalie Skead, 'Antipodean Perspectives on Preventive Justice' (2021) 30 *Griffith Law Review* 211, 232.

² Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventative Detention* (Federation Press, 2009) 114.

³ Notably, *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*'), *SA v Totani* (2010) 242 CLR 1 ('*Totani*') and now *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 ('*NZYQ*').

those measures. This is not without danger. Predictions of risk, even if based on psychiatric evidence, are at best an educated guess.⁴ The “logic of risk reduction” may encourage “more intrusive ... incursions”⁵ on personal liberty. Where a key value underpinning the separation of judicial power in Ch III of the *Constitution* is the protection of liberty,⁶ it must be queried whether the constitutional framework is fit for purpose.

The starting point is *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (*‘Lim’*),⁷ where Brennan, Deane and Dawson JJ propounded the *Lim* principle:

“[P]utting to one side the exceptional cases ... 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.”

In 2012, Jeffrey Gordon wrote that *Lim* provokes “near-chaotic division” amongst judges.⁸ That remains true today. This article assesses the principle’s fitness for purpose as a constitutional marker for permissible detention across five topics of dispute.

First, does *Lim* only preclude preventative detention with a punitive purpose (i.e., the purpose of punishing a breach of law)? That view prevailed in early cases.⁹ In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (*‘NZYQ’*),¹⁰ the majority¹¹ adopted a hybrid position. The “default characterisation” of detention was penal, requiring a criminal trial.¹² However, that characterisation was only displaced where the law was “reasonably capable of

⁴ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [125] (Kirby J) (*‘Fardon’*),

⁵ Lucia Zedner, ‘Neither Safe Nor Sound? The Perils and Possibilities of Risk’ (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 423, 425.

⁶ *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

⁷ (1992) 176 CLR 1, 27.

⁸ ‘Imprisonment and the Separation of Judicial Power’ (2012) 36 *Melbourne University Law Review* 41, 43.

⁹ See below nn 34-38.

¹⁰ *NZYQ* (n 3).

¹¹ By “majority”, we mean Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beach-Jones JJ’s reasons.

¹² *NZYQ* (n 3) [39]-[40].

being seen as necessary” for a “legitimate *and* non-punitive” purpose; a legitimate purpose being one “compatible with the constitutionally prescribed system of government”.¹³ Consequently, detention for an illegitimate non-punitive purpose is nevertheless punitive: a proposition awkward at best, logically incoherent at worst. It also raises several indeterminacies. When is detention illegitimate? What are the constitutional foundations for the expanded prohibition?

In contrast, Edelman J adheres to the “punitive/non-punitive distinction”,¹⁴ assimilating a legitimate purpose with a non-punitive one.¹⁵ However, he defines punishment to include punishment for criminal guilt *and* “deemed” punishment where the means are disproportionate to the non-punitive purpose.¹⁶ The latter raises a second issue: is structured proportionality appropriate in the Ch III context?

In response to these first two issues, we contend the constitutional vice with preventive detention is the “deprivation of liberty” rather than “a punitive purpose”.¹⁷ Thus, characterising detention as punitive is to interpose an unnecessary intermediate step which distracts from the fundamental inquiry — is detention a function properly committed to a body other than a Ch III court, considering the values underpinning a federal separation of powers? Gummow J made a similar point in *Fardon v Attorney-General (Qld)* (*‘Fardon’*),¹⁸ when he proposed reformulating *Lim* to eschew the phrase “penal or punitive”. That has been criticised as introducing “a novel constitutional restraint”.¹⁹ Part II argues that it is supportable through two interlocking general propositions, which rest on orthodox separation-of-powers principles: that

¹³ *Ibid* [40].

¹⁴ Gordon (n 8) 44.

¹⁵ *ASF17 v Commonwealth* (2024) 98 ALJR 782, [66] (a “purpose will not be legitimate if it is punitive”).

¹⁶ *NZYQ* (n 3) [51]-[52].

¹⁷ *Fardon* (n 4) [80]-[81] (Gummow J).

¹⁸ *Ibid*.

¹⁹ Andrew Foster, ‘Assessing the Competing Rationales for the *Lim* Principle’ (2022) 33 *Public Law Review* 226, 238.

detention is a judicial power, regardless of its purpose; and that the nature of judicial power and the essential characteristics of a court require that detention is exercised as an incident of the adjudication and punishment of criminal guilt.

We label this the “Primary Separation Rule Approach” because it locates *Lim* in the Commonwealth’s incapacity to confer judicial power on non-courts²⁰ (and its concomitant incapacity to authorise non-judicial exercise of judicial power),²¹ rather than its incapacity to confer non-judicial power on a Ch III court (‘the *Boilermakers*’ doctrine’).²² There is a strong policy reason against characterising detention as non-judicial: the corollary would seem to be that the power should instead be conferred on the Executive. More fundamentally, there is a “constitutional conception of detention” under our inherited common law tradition “as a consequence of judicial determination of engagement in past conduct”,²³ with the exceptions limited to cases “fully justifiable for reasons of history or reasons of principle developed by analogy with the historical derogations from the norm”.²⁴ In Part III, we argue that structured proportionality is inconsistent with that tradition.

Part IV addresses a third battleground: how does *Lim* affect State and Territory legislatures? Contrary to the dismissive treatment of *Lim* in *Garlett v Western Australia* (‘*Garlett*’),²⁵ we contend it limits States and Territories via *Kable v DPP (NSW)* (‘*Kable*’)²⁶ and *Burns v Corbett* (‘*Burns*’).²⁷

Finally, Part V considers two issues threatening the government response to *NZYQ*: when does a deprivation of liberty constitute “detention”? And when is protection a legitimate purpose?

²⁰ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

²¹ *Lim* (n 7) 27.

²² *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

²³ *Fardon* (n 4) [81]-[84] (Gummow J).

²⁴ *Ibid* [140] (Kirby J).

²⁵ (2022) 277 CLR 1.

²⁶ *Kable* (n 3).

²⁷ (2018) 265 CLR 304.

II RECONCEPTUALISING *LIM*

In *NZYQ*, the majority’s recognition of illegitimate non-punitive purposes for detention supports that a focus on punishment in applying *Lim* is not fit for purpose. The Primary Separation Rule Approach offers a principled basis for understanding the constitutional limit.

A The Pitfalls of “Punishment”

In *NZYQ*, the High Court considered whether a Commonwealth law authorising detention of a non-citizen for the purpose of “separation from the Australian community pending removal”²⁸ was compatible with Ch III, even where there was no real prospect of removal becoming practicable in the reasonably foreseeable future. The Court stated that a Commonwealth law authorising detention:

“other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.”²⁹

This settles two contested aspects of *Lim*. First, exceptions aside, detention must not only be in the “exercise of judicial power”, but *also* in the adjudication and punishment of criminal guilt.³⁰ Second, whilst the test is directed to a single question of characterisation — whether the power is punitive — only *legitimate* purposes can displace detention’s ordinarily punitive character.³¹ The majority concluded the mooted purpose was non-punitive but illegitimate because it “conflate[d] detention with the purpose of detention”, rendering the inquiry “self-fulfilling”.³²

²⁸ *NZYQ* (n 3) [47].

²⁹ *Ibid* [39].

³⁰ *Ibid* [28].

³¹ *Ibid* [40]-[44].

³² *Ibid* [49].

The recognition of illegitimate purposes was the majority's "point of departure"³³ from *Al-Kateb v Godwin* ('*Al-Kateb*'),³⁴ where a non-punitive purpose was conclusive. In that case, Hayne J adopted Hart's "standard" definition of punishment as the infliction of hardship for an offence against legal rules through past conduct.³⁵ Segregation of aliens was non-punitive because it was "not detention for an offence" and had the same character as preventing aliens' entry, which was only punitive "in the most general sense".³⁶ Similarly, McHugh J found segregation protected the community and was "*not punishment for any offence*".³⁷ In *Re Woolley*,³⁸ he stated a punitive purpose must be identified from a law's terms, surrounding circumstances, the mischief at which it is aimed, and sometimes parliamentary debates preceding its enactment.

NZYQ's confirmation that not all non-punitive detention is constitutional should be embraced. Focusing on punishment begets "a literalist approach" easily circumvented by "form".³⁹ Indeed, non-punitive purposes are inherent features of detention: segregation from the community and the disruption of potential crime are examples. "Punishment" itself is a category of "indeterminate reference".⁴⁰ In *Veen v The Queen (No 2)*, deterrence was a "purpose[] of criminal punishment";⁴¹ but in *Al-Kateb*, Callinan J stated that "[d]eterrence may be an end in itself unrelated to ... punishment".⁴² More fundamentally, the plurality in *Lim* disclaimed punishment as a rationalisation of the rule: Parliament could not invest the Executive "with an arbitrary power to detain" notwithstanding that it was conferred in terms "divorce[d] ... from

³³ *Ibid* [42].

³⁴ (2004) 219 CLR 562.

³⁵ *Ibid* [265].

³⁶ *Ibid* [266].

³⁷ *Ibid* [45].

³⁸ (2004) 225 CLR 1, [60].

³⁹ Gordon (n 8) 65.

⁴⁰ *Fardon* (n 4) [82] (Gummow J).

⁴¹ (1988) 164 CLR 465, 476.

⁴² *Al-Kateb* (n 34) [291].

both punishment and criminal guilt”.⁴³ Thus, in *Benbrika v Minister for Home Affairs* (*Benbrika*), Kiefel CJ, Bell, Keane and Steward JJ described the submission that Parliament could authorise detention for any non-punitive purpose as “a radical reworking” of *Lim*.⁴⁴ It was necessary to analogise orders for the continuing detention of terrorist offenders to the historical detention of mentally ill persons for community safety.⁴⁵

In fixing upon a label, there is also the danger of losing sight of the reason the label was imposed. That invites the uncritical transplantation of ideas from other contexts based solely on commonality of label. So, in *Al-Kateb*, Hayne J moves from the starting point of “punitive” detention, to Hart’s philosophical conception of “punishment” presented to the Aristotelian Society in 1959,⁴⁶ to the conclusion that the detention is non-punitive under the *Constitution* because it does not meet that precise definition of “punishment”. So also we have the recent engrafting of American jurisprudence regarding “punishment” *under the Eighth Amendment* into our separation-of-powers context.⁴⁷

Despite decoupling *Lim* from punishment, *NZYQ* continues to funnel the rule through the judicial character of punishment.⁴⁸ That rationale is not fit for purpose. It is artificial to characterise detention imposed for a *non-punitive* but illegitimate purpose as nevertheless *punitive*. *NZYQ* was not a case of the type countenanced in *Falzon v Minister for Immigration and Border Protection*, where a punitive purpose could be “inferred” from the power going further than necessary to achieve its asserted non-punitive purpose.⁴⁹ There was no suggestion that segregation was imposed as disguised punishment for an offence.

⁴³ *Lim* (n 7) 28.

⁴⁴ (2021) 272 CLR 68, [27].

⁴⁵ *Ibid* [36].

⁴⁶ Gordon (n 8) 65.

⁴⁷ *Jones v Commonwealth* (2023) 97 ALJR 936, [46] (*‘Jones’*).

⁴⁸ *NZYQ* (n 3) [28].

⁴⁹ (2018) 262 CLR 333, [29].

Edelman J’s response is to focus on, but disaggregate, punishment. The core sense of punishment encompassed Hart’s standard definition and analogous instances of “protective punishment” (hardship imposed to enforce a norm on a purely forward-looking basis).⁵⁰ The secondary sense concerned detention “deemed” punitive because the means were disproportionate to the non-punitive purpose.⁵¹ That invited a structured-proportionality-type enquiry, even if the verbal formula used — whether the law “is reasonably capable of being seen as necessary for” a non-punitive purpose — did not demand reasoning as structured and transparent.⁵² The law in *NZYQ* was punitive in that second sense: “detention pending removal” was legitimate, but the law was disproportionate because the prospect of removal was insufficient.⁵³

This approach is unsatisfactory. The identification of a punitive purpose may be helpful as a sufficient, but not necessary, condition for judicial power. But there are fundamental rule-of-law considerations militating against structured proportionality and in favour of characterising detention *itself* as an exclusively judicial power exercisable only through the criminal process.

B The Constitutional Concern is the Deprivation of Liberty

Where a constitutional principle is described by the name of a case, there is a danger that it becomes viewed as its own free-standing implication.⁵⁴ *Lim* is one example. Whilst *Lim* recognises that detention is *sui generis* within our constitutional structure, it does so *within* the separation-of-powers framework. It is a question of the characterisation of powers. The *Constitution* “prescribes as a safeguard of individual liberty a distribution of the functions of government” based upon “the experience of democratic states”.⁵⁵ Characterisation thus

⁵⁰ *NZYQ* (n 3) [51].

⁵¹ *Ibid* [52].

⁵² *Jones* (n 47) [150]-[154].

⁵³ *NZYQ* (n 3) [53]-[54].

⁵⁴ *Benbrika* (n 44) [209] (Edelman J).

⁵⁵ *R v Davison* (1954) 90 CLR 353, 380-382 (Kitto J).

transcends any purely juristic analysis; “nothing that has a history can be defined”.⁵⁶ To treat history as decisive is to pull oneself up by one’s bootstraps, by reference to a constitutional system that had no separation of powers, and would overlook that, upon Federation, “everything adjusted”.⁵⁷ So characterisation necessarily involves a selective or normative element guided by a consideration of “the systemic values on which the framers can be taken to have drawn in isolating the judicial power of the Commonwealth”.⁵⁸

Nevertheless, that exercise is informed by history. The link has not often been made with Gageler J’s excursus on executive power in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (‘M68’).⁵⁹ There, Gageler J said that the *Habeas Corpus Act 1640* worked a fundamental shift in our conceptualisation of the relationship between the individual and the State, and it imposed a “constitutional incapacity” to detain without lawful justification, which inheres in “the Crown” as a constitutional concept. That is one example of a statute being accorded “constitutional” status by the common law, and then used as a factum for determining the essential characteristics of “the judicial power of the Commonwealth”. Hence Gummow J’s description of the availability of the writ as “an essential element in the legal system[]”.⁶⁰ The effect is that judicial process is interposed between the individual and the exercise of the State’s power to deprive liberty.

The full force of that proposition has been appreciated more in the United States than in Australia. It is also underappreciated that much of *Lim*, including the submissions,⁶¹ was premised on holdings in America, particularly in respect of the Due Process Clause. Before its transformation into a source of substantive rights, the Due Process Clause simply

⁵⁶ *Benbrika* (n 44) [66] (Gageler J).

⁵⁷ *Burns* (n 27) [72] (Gageler J).

⁵⁸ *Palmer v Ayres* (2017) 259 CLR 478, [69] (Gageler J).

⁵⁹ (2016) 257 CLR 42 (‘M68’).

⁶⁰ *Fardon* (n 4) [64].

⁶¹ Defendants, ‘Detention of Excludable Aliens Pending Determination of Asylum Applications – U.S. Law’, Submission in *Lim*, M23/1992, 5 August 1992.

constitutionalised existing common law values, including those incidental to the separation of powers. It entrenched the idea that “the Crown could deprive subjects of rights only through institutional coordination”,⁶² that “[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive”.⁶³ In *Wong Wing v United States*,⁶⁴ after a consideration of English constitutional history consisting of Magna Carta and habeas corpus, it was held that disaggregation of detention from criminal process and judicial supervision was constitutionally suspect, precisely because it is “not consistent with the theory of our government”. The same idea was applied, albeit in dissent, in *Shaughnessy v Mezei* when it was said, in quite a similar situation to *NZYQ*, that the historical relationship between curial process and detention made it “startling” to “find a person held indefinitely in executive custody without accusation of crime or judicial trial”.⁶⁵

That mode of reasoning does not stray too far from our separation-of-powers context. Indeed, the exclusively judicial character of the adjudication and punishment of criminal guilt is animated by a purpose that looks to the effect on the subject’s liberty. In *Alexander v Minister for Home Affairs* (*‘Alexander’*),⁶⁶ Kiefel CJ, Keane and Gleeson JJ observed:

“the fundamental value accorded to the liberty of the individual provides the rationale for the strict insistence in the authorities that the liberty of the individual may be forfeited for misconduct by that person only in accordance with the safeguards against injustice that accompany the exercise of the judicial power of the Commonwealth”.

⁶² Nathan Chapman and Michael McConnell, ‘Due Process as Separation of Powers’ (2012) 121 *Yale Law Journal* 1672, 1683.

⁶³ *Hamdi v Rumsfeld*, 542 US 507, 554-555 (Scalia J) (2004).

⁶⁴ 163 US 228, 237 (Shiras J for the Court) (1896).

⁶⁵ 345 US 206, 218 (Jackson J) (1953).

⁶⁶ 276 CLR 336, [73].

That characterisation establishes a relationship between the individual and State whereby the State’s “coercive power” over “life and liberty”⁶⁷ is exercised by an independent and impartial court acting according to the standard incidents of a criminal trial, which is ordinarily fair and open, and which involves the authoritative determination of “a controversy about an existing liability of an individual”⁶⁸ which is claimed by the Executive to arise because of “*a past act* [not an anticipated act] which constitute[s] a criminal contravention”.⁶⁹ Those incidents developed to reflect the concern that “an individual accused of a crime, with life and liberty at stake, could not match the power of the agents of the State responsible for the prosecution” and would be subject to “oppressive conduct”.⁷⁰

Those procedural protections are not equally applicable in civil proceedings.⁷¹ That does not reflect a formalistic distinction between civil and criminal proceedings — a distinction which is, “at best, unstable”.⁷² Rather, the incidents of the judicial process reflect the “nature of the proceedings and the rights and interests at stake”.⁷³ In *Witham v Holloway* (*‘Witham’*),⁷⁴ the appellant was imprisoned for civil contempt after failing to comply with court orders on the civil standard of proof. On appeal, the High Court held the criminal standard was appropriate. Brennan, Deane, Toohey and Gaudron JJ criticised the distinction between criminal and civil contempt (the former “used primarily” to “punish disobedience”, the latter to “compel obedience”) as “illusory” because the “purpose” of proceedings “cannot readily be disentangled from effect”, and in either case the individual was vulnerable to imprisonment or a fine.⁷⁵ *Witham* concerned the position at common law, but it illustrates how employing a

⁶⁷ *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [90]-[93] (Keane J) (*‘Inspectorate’*).

⁶⁸ *Benbrika* (n 44) [69] (Gageler J).

⁶⁹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [27] (Deane J) (emphasis added).

⁷⁰ *Inspectorate* (n 67) [92] (Keane J).

⁷¹ *Ibid* [90] (Keane J).

⁷² *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, [114] (Hayne J) (*‘Labrador’*).

⁷³ *SDCV v Director-General of Security* (2022) 96 ALJR 1002, [54] (Kiefel CJ, Keane and Gleeson JJ) (*‘SDCV’*).

⁷⁴ (1995) 183 CLR 525.

⁷⁵ *Ibid* [12], [19].

purpose-based rather than effects-based approach threatens to outflank the criminal justice process; a concern with greater constitutional significance where the Executive initiates proceedings.⁷⁶

Thus, our system of government dictates that detention by the State “is an order of the kind which, *in its effect upon personal liberty*, is ordinarily within the domain of judicial power”⁷⁷ exercised with “the protections and assurances that criminal proceedings provide”.⁷⁸ Whilst the joint judgment’s observation in *Alexander* is limited to detention forfeited “for misconduct”,⁷⁹ the need for strict insistence on criminal safeguards is, if anything, stronger where the State seeks to detain based on anticipated acts. As is well-documented,⁸⁰ the “preventative function of government” is “far more liable to be abused” than “the punitive function”,⁸¹ particularly where it serves to vindicate parochial fears of the “alien other”.⁸² Moreover, as *Fardon* illustrates,⁸³ the experience of preventative detention typically mirrors criminal incarceration: the detainee is “retained in a penal custodial institution” with the “normal incidents of punishment”, without special provision for care or rehabilitation.⁸⁴ To adapt the logic of *Witham*, the differences between punitive and non-punitive detention are illusory. The focus must be directed on the *effect* of detention, bearing steadily in mind that “the object of [the] separation [of powers] is the protection of individual liberty”.⁸⁵

C The Hazard of Characterising Detention as Non-Judicial

⁷⁶ In civil contempt proceedings, full criminal protections are not required because the State is not always the moving party: *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375, [44].

⁷⁷ *Totani* (n 3) [76] (French CJ) (emphasis added).

⁷⁸ *Labrador* (n 72) [56] (Kirby J).

⁷⁹ See above n 66.

⁸⁰ See above nn 1-5.

⁸¹ JS Mill, *On Liberty* (2nd ed, 1859) 172.

⁸² David Garland, ‘The Limits of the Sovereign State’ (1996) 36(4) *British Journal of Criminology* 445.

⁸³ *Fardon* (n 4) [173] (Kirby J).

⁸⁴ Andrew Dyer and Josh Pallas, ‘Why Div 105A of the *Criminal Code 1995* (Cth) is Incompatible with Human Rights’ (2022) 33 *Public Law Review* 61, 75.

⁸⁵ *M68* (n 59) [97] (Bell J).

The *Boilermakers*' doctrine alone is not fit for purpose as a rationalisation of *Lim* because of the danger of executive detention. In *Benbrika*, Gordon J, in dissent, held that the Commonwealth law was invalid because "some special or compelling feature" is required to characterise a power as judicial when it "settles no question as to the existence of any antecedent right or obligation".⁸⁶ This is questionable: whilst rights-creation undoubtedly bears upon whether a power is non-judicial,⁸⁷ that general rule has weakened, and the creation of obligations is now "an unremarkable consequence" of "many forms of judicial power."⁸⁸ More pertinently, it was left unexplained why the power, being non-judicial, could not be conferred on the Executive. The separation of powers is usually conceived of as a distribution, rather than denial, of power. Thus, in *Thomas v Mowbray* ('*Mowbray*'), Gleeson CJ observed that the characterisation of anti-terrorist control orders as non-judicial powers had the "corollary" that they may "be exercised by the executive branch".⁸⁹

That is a policy consideration weighing heavily in favour of our approach. An alternative, which Gabrielle Appleby and Stephen McDonald propose, is that illegitimate detention is a non-judicial power which, perhaps controversially, cannot be conferred on any branch.⁹⁰ They claim the vice with illegitimate detention is the *criteria* for detention, not a non-judicial process. Our difference is a difference in level of generality. The selection between levels of generality is a functional exercise; it "will depend on what constitutional doctrine is in play and ultimately on what constitutional value is at stake".⁹¹ The concern with liberty warrants characterising detention at a higher level as a total deprivation of liberty, regardless of criteria; a character rendering it, in general, exclusively judicial. Gummow and Toohey JJ's reasons in *Kable* are

⁸⁶ *Benbrika* (n 44) [150]-[151].

⁸⁷ *Brandy v HREOC* (1995) 183 CLR 245, 267-268.

⁸⁸ *Totani* (n 3) [219] (Hayne J).

⁸⁹ (2007) 233 CLR 307, [17].

⁹⁰ John Griffiths and James Stellios (eds) *Current Issues in Australian Constitutional Law* (Federation Press, 2020) 85-86.

⁹¹ *Alexander* (n 66) [104] (Gageler J).

instructive. The impugned order was judicial, in part *because* it required detention.⁹² However, invoking *Lim*, institutional integrity was impaired because, inter alia, punitive⁹³ imprisonment absent adjudication of criminal guilt was “repugnant to the judicial process in a fundamental degree”.⁹⁴ It would be to exercise the judicial power of detention in a manner “antithetical to the very conception of justice which it is the responsibility of courts to administer”.⁹⁵

III PROPORTIONALITY AND EXCEPTIONS

Some have advocated for the importation of structured proportionality. That is problematic. Structured proportionality presupposes the balancing of competing norms. For one, those norms may not be commensurate or of equal value.⁹⁶ Further, there are shades of grey. Some deprivations of liberty, such as detention, are “such core aspects of judicial power (that is, part of the nucleus of uniquely judicial activity)” that “a functional approach should not be adopted” lest they be diluted.⁹⁷ And that is to say nothing of the analytic complexity involved in ascribing a “purpose” to a statutory enactment and at the correct level of generality.⁹⁸

It is best to avoid asking questions of suitability, rationality and balance. Given the underlying basis of the *Lim* principle is the black-and-white question of the characterisation and allocation of a power, the premise of structured proportionality is not readily fit for purpose. The separation of powers does not admit of compromise and does not yield to conflicting values; its scope is not circumscribed by purpose in the same way that, say, section 92 and the implied freedom have become.⁹⁹ If anything, the question is more analogous to the limited proportionality inquiry posed in cases of *characterisation*, e.g. in *Leask v Commonwealth* –

⁹² *NSW v Kable* (2013) 252 CLR 118, [27].

⁹³ And, we say, non-punitive.

⁹⁴ *Kable* (n 3) 132 (Gummow J); see also 98 (Toohey J).

⁹⁵ *Garlett* (n 25) [135] (Gageler J).

⁹⁶ *Gordon* (n 8) 76.

⁹⁷ *Ibid* 56.

⁹⁸ See above n 91.

⁹⁹ *Farm Transparency International Ltd v NSW* (2022) 96 ALJR 655; *Palmer v WA* (2021) 246 CLR 182 (*Palmer*).

whether a law is, in its substance or effect, in fact directed to a particular object.¹⁰⁰ The rigid structured proportionality calculus also does not account for the history or values underpinning the ultimate constitutional question.¹⁰¹

But there is also much to be said for the view that proportionality to a legitimate non-punitive purpose strays far from the promise of *Lim*. The very reason for *Lim* was that deprivation of liberty by the State was historically so closely connected with the adjudication of criminal guilt that *any* disaggregation of detention from that criminal process is inherently suspect.¹⁰² Detention is *ipso facto* an incident of judicial power. The position is categorical. The interposition of “punitive detentions” was meant to exclude from the rule non-judicial detentions that had some historical pedigree, but that overlooks that the underlying idea is not whether the detention is punitive but rather whether there is detention, which is then subject only to certain categories/exceptions. Hence the minority position in *Al-Kateb*: “[i]t is primarily with the deprivation of liberty that the law is concerned, not with whether that deprivation is for a punitive purpose”.¹⁰³

Edelman J’s criticism that eschewing the punitive/non-punitive distinction would introduce exceptions “which are neither ‘clear nor within precise and confined categories’” thus misfires.¹⁰⁴ The “disparate”¹⁰⁵ examples which Edelman J offers are all administrative decisions acknowledged to be historical qualifications to *Lim*,¹⁰⁶ like the *Grollo v Palmer* exceptions to incompatibility.¹⁰⁷ Attempting to integrate the exceptions into some general rule, unified by Proportionality, has all the folly of one “Very Big Idea”.¹⁰⁸ It is not fit for purpose.

¹⁰⁰ (1996) 187 CLR 579.

¹⁰¹ *Palmer* (n 99) [198] (Gageler J).

¹⁰² Leslie Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 Sydney Law Review 166, 174

¹⁰³ *Al-Kateb* (n 34) [137] (Gummow J).

¹⁰⁴ *Benbrika* (n 44) [218].

¹⁰⁵ *Ibid* [218].

¹⁰⁶ *Ibid* [27].

¹⁰⁷ (1995) 184 CLR 348.

¹⁰⁸ *Mann v Paterson* (2019) 267 CLR 560, [80] (Gageler J).

The exceptions are better treated as particular instances sanctioned by continued history and custom,¹⁰⁹ which may be developed bottom-up, incrementally, by analogy, rather than by reasoning downward from a broad conception of what the exceptions illustrate. To do otherwise, would allow the tropical growth of exceptions by a process which Gageler J stigmatised as a “domino method of constitutional adjudication”.¹¹⁰

The language of “non-punitive purpose” and proportionality has led to questionable outcomes in America. In *United States v Lovett*,¹¹¹ an ad hominem law depriving communists of certain liberties was sanctioned as “a nonpunitive policy reflecting a concern for filling sensitive positions in the American government with members of subversive organisations”.¹¹² That decision has been subject to the trenchant criticism that, by balancing competing social interests, it diluted the promise of Due Process – that detention can only be effected “as punishment for a crime” by judicial process.¹¹³ In *Hamdi v Rumsfeld*,¹¹⁴ it was the Court’s recourse to a “balancing test” devised in *Mathews v Eldridge*¹¹⁵ regarding the deprivation of rights to welfare payments that led to a “mistaken” outcome.¹¹⁶ Rather, it should have been recognised, more categorically, that detention goes to “the heart of the liberty” protected by the separation of powers.¹¹⁷ As with recent treatment of the First Amendment, the question is not whether the interest in freedom from non-judicial detention survives “an ad hoc balancing of relative social costs and benefits”.¹¹⁸ The separation of powers itself reflects a categorical judgment in favour of freedom from non-judicial detention.

¹⁰⁹ E.g., the historical rationalisation of quarantine as a justification for detention following a writ of habeas corpus: *Opinion on the Writ of Habeas Corpus* (1758) Wilm 77.

¹¹⁰ *Garlett* (n 25) [154].

¹¹¹ 328 US 303 (1946).

¹¹² *Chapman and McConnell* (n 62) 1804-1805.

¹¹³ Ryan Williams, ‘The One and Only Substantive Due Process Clause’ (2010) 120 *Yale Law Journal* 408, 491.

¹¹⁴ Above n 63.

¹¹⁵ 424 US 319 (1976).

¹¹⁶ *Chapman and McConnell* (n 62) 1791-1792.

¹¹⁷ *Ibid.*

¹¹⁸ *U.S. v Stevens*, 559 US 460 (2010).

IV STATES AND TERRITORIES

Lim is conventionally discounted at State or Territory level. James Stellios has stated that “State Parliaments are not subject to the *Lim* detention principles”.¹¹⁹ In *Garlett*, the High Court upheld a Western Australian statute authorising the Supreme Court to order the indefinite continuing detention of persons imprisoned following conviction for a serious offence (defined to include robbery). The primary basis for the challenge was *Kable*. There was dispute as to whether *Lim* limited States’ legislative power.¹²⁰ Kiefel CJ, Keane and Steward JJ found *Lim* had “no application to establish ... invalidity”.¹²¹ Gleeson J cautioned that it would be “a significant step” to conclude that *Lim* forms “an additional constraint on State (and Territory) legislative power”.¹²²

Those statements are overbroad. First, suppose a power of detention is conferred on a non-court. Following *Burns*, State legislatures cannot confer jurisdiction to exercise judicial power with respect to matters listed in ss 75 and 76 of the *Constitution* on a non-court. Thus, a State executive agency cannot, for example, detain consular staff (s 75(ii)) or interstate residents (s 75(iv)), unless detention is non-judicial.

Territory legislatures are probably likewise constrained. The basis for *Burns* is Ch III’s “integrated national court system” where the s 73 appeal ensures federal matters are adjudicated “consistently and coherently throughout the federation”.¹²³ Whilst early authority held that Territories stand outside the federal system,¹²⁴ *Kable* extends to Territories because Territorial courts are potential repositories of federal jurisdiction required to maintain

¹¹⁹ John Griffiths and James Stellios (eds), *Issues in Australian Constitutional Law* (Federation Press, 2024) 45.

¹²⁰ *Garlett* (n 25) [293] (Gleeson J).

¹²¹ *Ibid* [40].

¹²² *Ibid* [293].

¹²³ *Burns* (n 27) [20], [49] (Kiefel CJ, Bell and Keane JJ).

¹²⁴ See *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 579 (*Falconer*’).

institutional integrity.¹²⁵ A non-court’s exercise of federal jurisdiction circumvents that protection, even if s 73 might not be frustrated.¹²⁶

Even where federal jurisdiction is not engaged, *Kable* might invalidate an attempt to *alienate* at least punitive detentions – an essential characteristic of a court – from State court process despite, or precisely *because* of, the fact that a court is not enlisted, although such an argument remains speculative.¹²⁷

Now suppose a detention function is conferred on a court. *Kable* and *Lim* cannot be separated. It is well-accepted that State courts may exercise functions which Federal courts may not.¹²⁸ However, *Kable* is an implication directed to the preservation of “the distinctive nature of the separated judicial power of the Commonwealth”.¹²⁹ An essential characteristic of that separated judicial power is that at least punitive detention is not imposed without criminal trial.¹³⁰ Thus, a State or Territory law authorising preventative detention by a Ch III court impairs institutional integrity through the potential that federal jurisdiction is exercised in a manner antithetical to the “very nature of judicial power”.¹³¹

It is not apparent why States or Territories should receive substantially greater latitude than the Commonwealth in this respect. Emily Hammond has argued that there is a distinction for the purposes of *Kable* between court functions which offend the primary separation rule, in the sense that they impair “those core features of judicial power that the exclusive vesting in courts seeks to protect”; and those which only offend the *Boilermakers*’ doctrine because they involve non-judicial power.¹³² The former is denied to Commonwealth, State and Territory legislatures

¹²⁵ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, [28]-[29].

¹²⁶ Section 73 does not encompass Territory courts: *Falconer* (n 124).

¹²⁷ *Totani* (n 3) [147]-[148] (Gummow J).

¹²⁸ *Garlett* (n 25) [121] (Gageler J).

¹²⁹ *Ibid* [119] (Gageler J).

¹³⁰ *Benbrika* (n 44) [28]; *NZYQ* (n 3) [28].

¹³¹ *Kable* (n 3) 95-96 (Toohey J).

¹³² ‘Impossibility of Non-Criminal Punishment by Courts’ (2024) 43 *University of Queensland Law Journal* 103, 134.

alike, consistently with our integrated court system not permitting “different grades or qualities of justice”;¹³³ the latter is denied only the Commonwealth, as an additional prophylactic given the Commonwealth’s paramount power over the venue for litigation of disputes.¹³⁴ Whilst that is not a distinction commonly drawn, her treatment of at least the former category of function is consonant with authority.¹³⁵ In *SDCV v Director-General*, Kiefel CJ, Keane and Gleeson JJ held, in the context of a Ch III challenge to secrecy provisions based on procedural unfairness, that there was “no principled basis to distinguish between State and federal courts...in relation to their institutional obligations”.¹³⁶ Our thesis has been that *Lim* connotes one such institutional obligation.

V THE GOVERNMENT RESPONSE TO *NZYQ*

The High Court pronounced its orders in *NZYQ* on 8 November 2023. The legislative response was swift: the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) (‘November Act’) was passed in November 2023, and the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) (‘December Act’) in December 2023.

The cruxes of the November Act, and the subject of a recent High Court challenge in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*,¹³⁷ are “curfew” and “monitoring” conditions. Those conditions, which respectively require the visa holder to remain at a specified location (by default, between 10pm and 6am) and to wear an electronic monitoring device, must be imposed on Bridging (Removal Pending) visas unless the Minister

¹³³ *Kable* (n 3) 103 (Gaudron J).

¹³⁴ The Commonwealth may make jurisdiction in federal matters exclusive to federal courts: *Constitution*, s 77. Thus, the emphasis on the federal compact in *Boilermakers*’: above n 22, 272-276.

¹³⁵ See *Condon v Pompano* (2013) 252 CLR 38, [194] (Gageler J); *Garlett* (n 25) [123] (Gageler J).

¹³⁶ *SDCV* (n 73) [58].

¹³⁷ S27/2024, commenced 22/02/2024.

is “satisfied that it is not reasonably necessary to impose [the condition] for the protection of any part of the Australian community”.¹³⁸

The December Act empowers a court to impose “community safety orders” — bifurcated into orders for detention in a prison and “supervision” orders involving lesser restrictions (e.g., curfews and electronic monitoring) — on a non-citizen who “has been convicted of a serious violent or sexual offence” and has “no reasonable prospect of their removal from Australia becoming practicable in the reasonably foreseeable future”.¹³⁹

Both statutes, especially when compared, highlight two contested borderlines where *Lim* may require further development to be fit for purpose: the breadth of “detention”; and when community safety is a “legitimate” purpose.

A “*Detention*”

To ask whether the curfew and monitoring conditions under both Acts amount to “detention” raises two issues. The first is geographical; does detention only occur in a facility? The second is temporal; does detention only occur where it subsists beyond a certain period?

The *Lim* principle, as originally formulated, fixes upon “detention *in custody*”. But *Lim* does not disclaim a conception of detention extending beyond detention in a facility. Quoting Blackstone, the plurality wrote:

“The confinement of the person, in any wise, is an imprisonment. So that the keeping [of] a man against his will ... is an imprisonment”.¹⁴⁰

¹³⁸ *Migration Regulations 1994* (Cth) sch 2, cl 070.612A(1).

¹³⁹ *Criminal Code Act 1995* (Cth) sch 1, s 395.5 (‘Criminal Code’).

¹⁴⁰ *Lim* (n 7) 28.

The understanding of *Lim* enunciated in *NZYQ* referred only to “detention”, unadorned by “in custody”.¹⁴¹ Those words, liable to “distract attention”,¹⁴² may in fact only be the product of the impugned statute in *Lim*. The relevant provisions authorised a non-citizen to be kept “in custody”, including “in [a] place ... approved by the Minister”.¹⁴³ To the extent the words “in custody” had meaning in *Lim*, they evidently meant something broader than confinement in a facility.

It stands to reason that *Mowbray* misconceived the scope of “detention” in *Lim*. The first condition of Mr Thomas’ interim control order required him to “remain at his residence”, or another nominated location, “between midnight and 5 am”. Gleeson CJ remarked that “we are not here concerned with detention in custody”.¹⁴⁴ But although the meaning of “in custody” was adverted to in oral argument,¹⁴⁵ *Lim* was only ever an “alternative” submission for Mr Thomas, and one focused on the “absolute proposition” that, “under our system of government, restraints on liberty, *whether or not involving detention in custody*, exist only as an incident of adjudging and punishing criminal guilt”.¹⁴⁶ This proposition, rather than a parsing of “detention in custody”, ultimately drew the Court’s attention. So it is unsurprising that Gleeson CJ readily dismissed the applicability of *Lim*. In those circumstances *Mowbray* ought not detract from the understanding, consistent with *NZYQ*, that “detention in custody” extends beyond detention in a facility.

How far, then, does it extend? There is strong reason to think perimeters should be drawn commensurate with those of the law of false imprisonment and habeas corpus. Indeed, in *M68*, Gageler J noted that the constitutional disability of the Executive to detain without lawful

¹⁴¹ *NZYQ* (n 3) [39].

¹⁴² *M68* (n 59) [356] (Gordon J).

¹⁴³ *Lim* (n 7) 19.

¹⁴⁴ *Mowbray* (n 90) [18].

¹⁴⁵ Transcript of Proceedings, *Mowbray* [2007] HCATrans 76, 274ff.

¹⁴⁶ *Ibid.*

authorisation is “commensurate with the availability” of “habeas corpus”.¹⁴⁷ Together, there is a triptych of liberty-protection: false imprisonment provides a remedy for injury to liberty; habeas corpus brings that injury to an end; and the *Lim* principle limits when the injury can be authorised. In line with the law of false imprisonment, then, an infringing restraint may be “in a man’s owne house ... so long as he hath not his liberty freely to goe”.¹⁴⁸ That readily encompasses a curfew; ankle-monitoring, however, does not necessarily have the requisite restrictive effect on movement. A practical judgment may be inescapable, but “[t]hat is the stuff of constitutional adjudication”.¹⁴⁹ One should not unduly “canalise it”¹⁵⁰ by focusing on detention in a facility.

As to the second, temporal dimension of “detention”, the *Lim* principle says nothing in its terms. But again, false imprisonment is an aide. The tort sounds for detention of “any period otherwise than in the exercise of lawful authority”.¹⁵¹ There is no temporal floor; that detention may only last eight hours,¹⁵² or even a matter of minutes, does not render it permissible.

B Protection and Legitimacy

The November Act has no express purpose. At most the negative criterion for the curfew and monitoring conditions suggests a purpose of “protect[ing] any part of the Australian community”. The December Act by contrast expresses its purpose as being “to protect the community from serious harm” by subjecting to a community safety order non-citizens who “pose an unacceptable risk of committing serious violent or sexual offences” and “have no real

¹⁴⁷ *M68* (n 59) [159].

¹⁴⁸ *Meering v Grahame-White Aviation* (1919) 122 LT 44, 51 (Duke LJ).

¹⁴⁹ *Vanderstock v Victoria* (2023) 98 ALJR 208, [154] (Kiefel CJ, Gageler and Gleeson JJ).

¹⁵⁰ *Palmer* (n 99) [147] (Gageler J).

¹⁵¹ *Lewis v ACT* (2020) 271 CLR 192, [24] (Gageler J).

¹⁵² As with November Act curfews.

prospect of their removal ... becoming practicable in the reasonably foreseeable future” (the ‘*NZYQ*-affected cohort’).¹⁵³

Protection is an “elastic” touchstone.¹⁵⁴ Whilst in *Benbrika* it was sufficient to save continuing detention orders for terrorist offenders, the Court did not give its imprimatur to an uncritical application. Rather, it relied on an analogy with the historical exception for detention of the mentally ill for community safety. That analogy cannot be drawn too far. Preventative detention will always be introduced to protect from *some* asserted harm. And mental illness is somewhat unique — it is the paradigm case where the criminal justice system cannot deter offending. Thus, in *Kansas v Hendricks*,¹⁵⁵ “[a] finding of dangerousness, standing alone” was inadequate for a continuing detention order against a child sex offender to satisfy due process; the statute needed to limit detention to those “suffer[ing] for a volitional impairment rendering them dangerous *beyond their control*”.

When, then, is protection sufficient to justify detention — i.e., “legitimate”? One example might be the case of Garry David, a Victorian man who, after release from imprisonment for a violent offence, murdered three people and assaulted 15 more upon reincarceration. Following an application for a continuing detention order, Fullagar J found that, if released, David’s antisocial personality disorder meant it was “very likely” he would promptly “caus[e] serious harm by violence”.¹⁵⁶ There was cogent evidence that he was effectively *undeterrable* through traditional criminal mechanisms. A limited analogy to protection of the community from terrorist offenders might be possible on the basis that the potential harm is serious and such actors are essentially irrational, although proof of these facts would be important.¹⁵⁷ But the

¹⁵³ Criminal Code (n 139) s 395.1.

¹⁵⁴ *Alexander* (n 66) [111] (Gageler J).

¹⁵⁵ 521 US 346, 358 (Thomas J) (1997) (emphasis added) (*‘Hendricks’*).

¹⁵⁶ CR Williams, ‘Issues Arising from the David Case’ (1990) 16 *Monash University Law Review* 161, 178.

¹⁵⁷ Research indicates terrorist and non-terrorist offenders are similarly responsive to traditional deterrence measures: Michael Wolfowicz & Esther Salama, ‘Do Arrests (And Killings) Deter Violent Extremism?’ (2024) *Behavioural Sciences of Terrorism and Political Aggression* 1.

conclusion in *Garlett* might stretch the analogy to breaking point: robbery is a crime of different gravity to sexual offences, murder, or terrorism. The line must be drawn *somewhere* to insulate the rule.

The November Act, adrift as even its implied protective purpose is from any identified offence or harm, falls short. By contrast, the December Act is limited to persons convicted of crimes punishable by at least 7 years' imprisonment which involved, inter alia, death, personal injury, or sexual assault.¹⁵⁸ The Court must be satisfied, to a "high degree of probability" (for detention orders) or on the balance of probabilities (for supervision orders), of an "unacceptable risk" of the non-citizen "seriously harming the community" by committing such an offence.¹⁵⁹ The attempts to align the legislation with that upheld in *Benbrika* are plain. A different problem, however, arises from the Act's application only to the *NZYQ*-affected cohort. In *Fardon*, the impugned law's general applicability was critical in distinguishing *Kable*.¹⁶⁰ Whilst the *NZYQ*-affected cohort is not static, and the mere discriminatory exercise of legislative power is unlikely to offend Ch III,¹⁶¹ at some point the status-based targeting of "a small number of identifiable persons"¹⁶² invites scrutiny as to whether the judiciary is being enlisted to implement an executive decision, particularly where the affected status is unrelated to risk of future offending.¹⁶³

VI CONCLUSION

Division about fundamental aspects of *Lim* risks "a reconsideration of the implication itself".¹⁶⁴

The Primary Separation Rule Approach offers a fit-for-purpose reconceptualisation of *Lim*

¹⁵⁸ Criminal Code (n 139) s 395.2.

¹⁵⁹ Ibid ss 395.12(1)(b), 395.13(1)(b).

¹⁶⁰ *Fardon* (n 18) [23], [33], [233].

¹⁶¹ *Kruger v Commonwealth* (1997) 190 CLR 1, 45, 68, 113-14, 142.

¹⁶² *Fardon* (n 18) [144(2)] (Kirby J).

¹⁶³ Compare continuing detention orders targeting incarcerated individuals, where prior criminal conduct indicates dangerousness: *Hendricks* (n 155) 362 (Thomas J).

¹⁶⁴ *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, [249] (Steward J).

which eschews the distorting prism of “punishment”. The constitutional concern with liberty is incompatible with non-judicial characterisation of detention or proportionality. Furthermore, the marginalisation of *Lim* at State and Territory level is untenable. Those principles expose avenues of challenge to the government’s response to *NZYQ*.

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