

Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process

DESMOND MANDERSON* AND NAOMI SHARP†

Though any one sin, and deeply foredo himself, let the correction be regulated so that it be becoming before God and tolerable before the world. ... And we command that Christian men be not on any account for altogether too little condemned to death; but rather let gentle punishments be decreed for the benefit of the people; and let not be destroyed for little God's handiwork

—LAWS OF KING CANUTE (REG. 1017–1035)¹

The first principle of law and order is: Territorians have the right to be protected from those who would do them harm. And the second principle is: if you choose to abuse the first principle you will pay the price ... It seems to me that the emphasis in justice matters has for too long concentrated on rights of the offender, the criminal, the person who has said: to hell with your laws, to hell with your rights, to hell with you, I want and I am going to have whether you like it or not [sic]. This government says that if that is their attitude then we say to hell with them.

—MINISTERIAL STATEMENT BY ATTORNEY-GENERAL DENNIS BURKE (1996)²

1. Introduction

On the damp shores of Britain, deep in the long-forgotten past, the disparate elements of Saxon, Danish, and later Norman law began to shape themselves into a form that was all and none of these. Through a remarkable alchemy the common law was forged, a wonderfully resilient collection of principles and processes which allows space for the possibility of justice through the recognition of an independent judicial power. Already by the time of great Canute the outlines of

* Desmond Manderson, BA (Hons) LLB (Hons) (ANU), DCL (McGill) is Associate Professor in the Faculty of Law at The University of Sydney and Director of the Julius Stone Institute of Jurisprudence.

† Naomi Sharp, BA (Hons) LLB (UNSW), LLM (McGill) is a solicitor and a part-time lecturer in the Faculty of Law at the University of New South Wales. Special thanks to those who attended the Sydney University Faculty of Law Seminar Series for their comments, and to Robert Shelly for his extensive and thoughtful comments on a draft.

1 Quoted in J F Stephen, *A History of the Criminal Law of England*, Vol. 1 (1883) at 58–59.

2 Ministerial Statement to the Northern Territory Legislative Assembly on 'The Criminal Justice System and Victims of Crime', 20 August 1996.

these principles could be discerned. In the above quote, Canute emphasises several elements central to any legal system which would secure the respect of the rebellious tribes he claimed to command and sought to lead. These include the conceptual severability of correction from conviction, and the fundamental importance of discretion in the twin senses of both individual judgment and moderation. For Canute, as for almost all the thinkers on law who have followed him for a thousand years, the only punishment which can be legitimately imposed is the minimum necessary.

To this history and to these propositions, the Northern Territory government³ now demurs. The broad outline of its mandatory sentencing provisions are well known. Under amendments to the *Sentencing Act 1995* (NT), a wide range of property offences including theft, criminal damage, assault with intent to steal, and unlawful use of a motor vehicle, now provide for mandatory terms of imprisonment.⁴ For the first offence, there is a minimum term of imprisonment of 14 days, although in certain 'exceptional circumstances' the courts are not required to impose this mandatory sentence.⁵ Thereafter, the minimum term of imprisonment increases regardless of the circumstances: for a second offence, 90 days, and for a third or subsequent offence, the court must record a conviction and impose a term of imprisonment of not less than 12 months.⁶ Moreover, a similar scheme of detention for 'second' or 'third strikes' applies to a range of juvenile offences.⁷

The results speak for themselves. In a case which reached the High Court, a young Aboriginal mother of a two year old child was sentenced to 14 days of imprisonment because she stole a can of beer valued at around \$2.50.⁸ The magistrate said he would not have imposed a custodial sentence in the absence of section 78A. In another case, a 17 year old schoolboy with no prior convictions was convicted of the theft of yo-yos and computer games from a Darwin toy store. He was sentenced to 14 days imprisonment. An 18 year old was sentenced to 90 days jail after being found guilty of stealing 90 cents from a car, and a 20 year old man with no prior convictions was convicted of stealing \$9.00 worth of petrol, and

3 Similar provisions, of less sweep and range, enacted in Western Australia, are not the subject of this analysis, though our arguments may prove relevant.

4 *Sentencing Act* s78A. The *Sentencing Act* entered into force on 1 July 1996. Shortly thereafter, the principal Act was amended by the *Sentencing Act (No 2) 1996* (NT) which introduced Division 6 into the principal Act. Division 6 is headed 'Minimum Mandatory Imprisonment for Property Offenders' and contains s78A. Division 6 came into force on 8 March 1997.

5 *Sentencing Act* ss78A(1), 78A(6B) and (6C).

6 *Sentencing Act* ss78A(2) and (3).

7 *Juvenile Justice Act* 1996 (NT) s53AE.

8 *Wynbyne v Marshall* (HCA, Gaudron & Hayne JJ, 21 May 1998, special leave to appeal refused): <<http://www.austlii.edu.au/au/other/hca/transcripts/1997/D174/1.html>> (19 September 2000).

was sentenced to 14 days imprisonment.⁹ The human costs of section 78A are yet to be counted but are steadily mounting.

On Wednesday 9 February 2000, a 15 year-old Aboriginal boy was found in his room at the Northern Territory's Don Dale Juvenile Detention Centre in Darwin following what is believed to have been a suicide attempt. He died in Royal Darwin Hospital early on the morning of Thursday 10 February. The boy, from Groote Eylandt, was serving his second detention term under mandatory sentencing and was due to be released on the following Monday.¹⁰

Many aspects of section 78A have been trenchantly criticised.¹¹ The treatment of juveniles under these laws has in particular drawn fire as a breach of Australia's obligations under the Convention on the Rights of the Child.¹² Consequent upon the introduction of the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill, which would have overridden the Northern Territory legislation against the policy of the Federal Government, the Senate Legal and Constitutional References Committee undertook a comprehensive inquiry which brought down a highly critical report on the legislation. In addition to what it characterised as the extremism of the *Sentencing Act* and its impact on the human rights of young people,¹³ the Committee examined the racial implications of legislation that disproportionately affects aboriginal people in the Territory.¹⁴ And it now seems that the individual communication procedure to the United Nations Human Rights Committee will be invoked to argue that section 78A of the *Sentencing Act* violates the International Covenant on Civil and Political Rights.

Yet throughout these discussions, the fundamental constitutional position has been ill-considered. Indeed, the Senate inquiry concentrated solely on the Commonwealth's capacity, under sections 122 and 51(xxix) of the Constitution, to override Territory legislation if it so desired.¹⁵ Rather, we would argue that Northern Territory's mandatory sentencing laws are themselves unconstitutional

9 The last three case studies were cited in L Schetzer, 'A Year of Bad Policy' (1998) 23 *Alt LJ* 117 at 118 and were drawn from case studies obtained from Central Australian Aboriginal Legal Aid Service, Katherine Regional Aboriginal Legal Aid Service, Northern Australian Aboriginal Legal Aid Service and the Northern Territory Legal Aid Commission.

10 Senate Select Committee on Mandatory Sentencing, *Report* (2000) at ¶1.5 (hereinafter 'Senate Select Committee on Mandatory Sentencing').

11 *Id* at ¶5.13.

12 UN Convention on the Rights of the Child, 1989; see OHCHR and UNICEF, *Reference Paper setting out the International Standards on Mandatory Sentencing of Juveniles* (2000). See further, J Blokland, 'International Law Issues and the New Northern Territory Sentencing Regime', Criminal Lawyers Association of the Northern Territory, Sixth Biennial Conference, Bali, Indonesia (22–26 June 1997).

13 See especially, above n10 at chs5, 6.

14 *Id* at ch7. The United Nation's Committee on the Elimination of Racial Discrimination has also criticised the Northern Territory's (and Western Australia's) mandatory sentencing laws, recording its 'grave concern' over the 'discriminatory approach to law enforcement' in the Northern Territory and Western Australia. See D Lague & M Seccombe, 'Australia thumbs nose at UN' *Sydney Morning Herald* (31 March 2000) at 1.

15 Above n10 at ch4.

and therefore void. These arguments have been less well developed, and where they have been discussed the argument has been either of a more general character, or where directly focused on mandatory sentencing provisions, helpful but allusive.¹⁶ At the same time there has been a tendency to conflate these particular laws with other legislative or judicial attempts to confine or guide judicial discretion in the punishment of offenders — such as the enactment of minimum penalties or the issuance of guideline judgments. It is our argument that the Northern Territory legislation is remarkable, and its specific content needs to be examined in the light of constitutional and jurisprudential principle.

Undoubtedly considerable constitutional barriers await such an argument. Indeed, we are often told that the High Court has already ruled that mandatory sentencing legislation is constitutionally valid. In *Palling v Corfield*, the High Court, in the widest possible terms, authorised a legislative capacity to require courts to impose a certain minimum sentence, including a term of imprisonment, for an offence.¹⁷ Yet *Palling* is entirely distinguishable, as we argue further below. In that case, the challenge was based solely on an argument that power taken *from* the courts by executive action. The Court was not asked to consider any challenges based on an impermissible interference with the judicial power which may have taken place by assigning *to* the judiciary functions incompatible with the judicial process. Indeed, it is our view that the constitutional challenge most likely to succeed is one based on an argument of incompatibility with the judicial process. This is an argument which has only been clarified since the High Court's decision in *Kable v DPP (NSW)*,¹⁸ itself decided long after *Palling*.

Wynbyne v Marshall is more precisely on point. In 1998 the High Court refused to grant special leave to appeal on just such an argument of constitutional invalidity.¹⁹ Further, in a series of questions, Hayne J indicated precisely the argument that must be made out in order to persuade the court otherwise:

Does your contention amount to a proposition that a legislature may not, one, fix a minimum penalty for an offence; two, may not, for example, as it did until 10 years or so ago, fix life as the mandatory punishment for murder; [three,] may not, as historically was the case, fix capital punishment as the punishment for all felony?

Leave aside then whatever might be said about the wisdom or social utility of such a rule, what is it that brings it into conflict with the elements of judicial power?

What is it about the court applying the law prescribed by Parliament that brings the court into disrepute?²⁰

16 See, for instance, P Johnston & R Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Syd LR* 216; M Flynn, 'Fixing a Sentence: Are there any Constitutional Limits' (1999) 22 *UNSWLJ* 280; G Zdenkowski, 'Mandatory Imprisonment of Property Offenders In the Northern Territory' (1999) 22 *UNSWLJ* 302; and G F K Santow, 'Mandatory Sentencing: A Matter for the High Court?' (2000) 74 *ALJ* 298.

17 *Palling v Corfield* (1970) 123 CLR 52.

18 *Kable v DPP (NSW)* (1996) 189 CLR 51 (hereinafter *Kable*).

19 *Wynbyne v Marshall*, above n8.

20 *Ibid.*

The response to these questions was, in that particular case, and as Gaudron J hinted, too vague.²¹ The applicants' argument was that under the *Sentencing Act*, a court is 'required to impose sentences that are inappropriate ... and the oppressive punishment brings the court into disrepute'; or again that 'the tendency to undermine the confidence in the administration of justice will inevitably be greatest where the regime is in its substance manifestly excessive'.²²

With respect, the answer to the Court's questions cannot be found simply by reference to the practical severity of the law. That would involve the Court in an evaluation of the merits of a piece of legislation, contrary to Australian notions of parliamentary sovereignty. The Northern Territory's mandatory sentencing legislation, we will argue, should not be compared with a regime of minimum penalties, no matter how harsh, nor even with the mandatory sentence of imprisonment considered in *Palling v Corfield*. The harshness of the law is not the point.

Neither is the issue one of executive discretion. In practice, of course, prosecution under section 78A is likely to be highly selective, and subject to the unfettered discretion of the Northern Territory police. There is strong evidence that race is the main determining factor.²³ Yet the attempt to raise prosecutorial discretion to the level of constitutional prohibition has been tried before, and failed before. In the United States, evidence for the racial component of death penalty sentencing, no matter how persuasive, has never commanded a majority of the Supreme Court.²⁴ In Australia, the main focus of *Palling v Corfield* was on section 49(2) of the *National Service Act 1951* (Cth), under which power to require the imposition by the judge of a mandatory seven day jail term was vested exclusively in the prosecution.²⁵ But, in various guises, prosecutorial discretion is endemic to the legal system: police officers, bureaucrats, and the Director of Public Prosecutions constantly make decisions that significantly determine who is to be charged, for what, and with what consequences. Neither in *Palling v Corfield* nor in *Wynbyne v Marshall* could the discretion provided or allowed for be seen in any sense as unusual.

The real issue is not the existence of prosecutorial discretion but the striking absence of any *countervailing* discretion vested in the judiciary. This balancing discretion is central to the idea of judicial process as we understand it. In the normal course of events, if a prosecutor decides to use his or her discretion to pursue an essentially trivial matter, the court may refuse to impose a fine, or suspend the sentence, or discharge the matter. Undoubtedly there are limits to these powers in some legislation, but these limits can not completely eliminate judicial discretion although they may constrain it. These arguments were never put in *Palling v Corfield* or in *Wynbyne v Marshall*.

21 Ibid.

22 Ibid.

23 See the evidence presented by the Northern Territory Aboriginal Legal Aid Service, discussed in Senate Select Committee on Mandatory Sentencing, above n10 at ch5.

24 *McCleskey v Kemp, Superintendent, Georgia Diagnostic and Classification Centre* 481 US 279 (1987).

25 *Palling v Corfield*, above n17 at 67 (Owen J). McTiernan J held that the prosecution, in initiating the judicial action of imposing a seven day sentence, did not exercise judicial power: id at 62-63.

An analysis of the practice or extent or severity of the Northern Territory's mandatory sentencing regime cannot without more found a constitutional argument. Rather what is required is an analysis of the precise structure of the legislation as it impacts on the judicial process. A more specific argument can adequately answer the questions posed in *Wynbyne v Marshall* and it is to this task that we address ourselves in this article.

In Part 2, we consider the form a constitutional challenge could take. We take as our starting point the High Court's landmark decision in *Kable*. We emphasise at the outset that our argument does not depend upon the High Court finding that a separation of powers exists in the Northern Territory. Rather, our argument depends upon the High Court finding that the Northern Territory courts are 'other courts' capable of exercising the federal judicial power within the meaning of section 71 of the Constitution. We examine the doctrinal basis of *Kable* and seek to make clear the distinction between laws which 'usurp' judicial power by conferring judicial power to non-judicial officers; and laws which 'impermissibly interfere' with the exercise of judicial power by requiring judicial officers to engage in inherently non-judicial processes.²⁶ We argue that section 78A of the *Sentencing Act* falls into the latter category. More specifically, we argue that section 78A confers a power upon the Northern Territory courts which requires them to act in a way which is incompatible with the judicial process, or, as it is sometimes described, the obligation to act judicially. We examine the evolution of what we call the 'doctrine of incompatibility' in an effort to give more concrete meaning to the idea of acting in accordance with the judicial process.

Our purpose in this article is not to comprehensively define what constitutes the judicial process. Rather, our approach is adjectival. We argue that the judicial process at least requires that those who preside over the process act *judicially*, and we seek to explore what it means to act judicially. We contend that the act of judgment must have integrity and independence, secured at the very least by procedural fairness, and arguably, by equal justice. Crucially, the act of judgment must involve some degree of independent judicial discretion in determining sentence.

In Part 3, we consider the effects of section 78A's complete elimination of judicial discretion in sentencing. Section 78A not only removes any countervailing judicial discretion which operates to balance the inevitable executive discretion involved in choosing to arrest and prosecute particular individuals; it also runs counter to both any theory of sentencing and punishment, and to the very nature of judicial decision-making that the judicial process requires. In Part 3, we examine the jurisprudential literature which, almost without exception, recognises the need for some element of judicial discretion in determining punishment. We also look at how the courts have applied these ideas in common sentencing practice. We then argue that some element of genuine judicial discretion is necessary in legitimating the judicial role, and thus in maintaining public confidence in the courts. Lastly, we show that the history of the English, and later the Australian, common law

²⁶ *Nicholas v The Queen* (1998) 193 CLR 173 at 220 (McHugh J).

cannot be read as suggesting that the legislature enjoys unlimited power to completely eliminate judicial discretion in the imposition of punishment. Indeed, this ahistorical and incorrect assumption appears to have been crucial to the reasoning in *Wynbyne v Marshall*.

We conclude that mandatory sentencing legislation demonstrates that the Northern Territory legislature has fundamentally misunderstood what is involved in the process of judging, and thus, what at a minimum is required to ensure the continued integrity of the judicial process and continued public confidence in the judiciary.

It may seem distasteful to ask the judiciary thus to rule on its own authority in the context of an intense political controversy. Certainly, the step ought to be taken only with great reluctance. But the judiciary itself is the guardian of the judicial process, and it has an irrecusable responsibility to articulate and defend it, come what may. Ever since the days of King Canute, the integrity of the judicial process has been the heart of the legitimacy of and public confidence in the law. It still is. And the High Court is duty-bound to maintain this integrity, no matter the opposition from those whose interests lie in other directions.

2. *The Constitutional Framework*

There is no point in examining the possibility of the Commonwealth exercising its legislative power under section 122 to override the Northern Territory *Sentencing Act*. Such an inquiry is futile in light of what can at best be described as the Commonwealth's lukewarm commitment to finding a political solution to the mandatory sentencing controversy.²⁷ And we do not propose to concentrate on an argument which takes as its starting point the proposition that section 122 must be subjected entirely to Chapter III of the Constitution. On this approach, the *Sentencing Act* would arguably constitute an impermissible legislative usurpation of judicial power. While the High Court has tended towards the reintegration of section 122 with the rest of the Constitution, significant barriers remain to be

27 In response to community outcry regarding the *Sentencing Act*'s impact on juveniles and in particular, Aboriginal juveniles, the Prime Minister and the Northern Territory Chief Minister MLA released a Joint Statement on 10 April 2000. The Joint Statement said that the 'common objective was to prevent juveniles entering the criminal justice system'. It then advised that the Prime Minister and Chief Minister had 'agreed on a number of initiatives designed to achieve this goal and which address particular Commonwealth concerns while continuing to respect the role of the Northern Territory Parliament'. The Joint Statement informed us that the *Sentencing Act* will be amended so that a person will be treated as an adult from 18 years of age rather than 17 years at present. 'Apart from this, the mandatory sentencing provisions of the existing law will remain unchanged.' For this slight concession, the Commonwealth has agreed to make \$5 million per annum available for a number of measures including diversionary programs for juveniles in the Northern Territory. Under the diversionary program, police are required to divert at the pre-charge stage in the case of minor offences, and in more serious cases, the police have a discretion to divert offenders and on successful completion of a program not to pursue charges. To date, however, there is little evidence that the diversionary programs supported by the Commonwealth government are being proceeded with, and recently, the Commonwealth government has indicated that it will withhold this money until the Northern Territory manifests compliance with the Joint Statement.

overcome before such an argument could feasibly be mounted.²⁸ In our view, the constitutional challenge which has the greatest prospect of success starts with *Kable*.

A. *Kable*

Gregory Wayne Kable had been convicted of the manslaughter of his wife. During his term in prison, he made threats to various members of his deceased wife's family and there was concern that when released he would act on those threats. To avoid such a consequence, the NSW legislature enacted the *Community Protection Act 1994* (NSW) which aimed at keeping Kable in prison through 'preventive detention' once he had completed the prison term for which he was originally sentenced.

Section 3 of that Act targeted Kable exclusively. Section 5 empowered the New South Wales Supreme Court, upon application in accordance with the Act, to make an order specifying that Kable was to be detained for a six month period. To make the order, the Court had only to be satisfied on the balance of probabilities that Kable was 'more likely than not' to commit a serious act of violence, and that it was appropriate to hold him in custody in order to protect particular people or the community more generally. More than one application could be made under section 5. In effect, Kable could be re-sentenced by the Court every six months.

By majority, the *Community Protection Act 1994* was declared invalid. The majority judgments in *Kable* took as their starting point what we call the 'doctrine of incompatibility', according to which the very nature of a power vested in a court may in certain circumstances prove incompatible with the exercise of the judicial power, and for that reason, infringe Chapter III of the Constitution.

Of course, the critical point of departure from previous cases on the doctrine of incompatibility lay in the fact that a state legislature and state judiciary were concerned. It had long been accepted as axiomatic that the Constitution did not establish a separation of powers at the state level.²⁹ For the majority, however, this

28 In *Spratt v Hermes* (1965) 114 CLR 226, the High Court held that s122 was not subject to s72 of the Constitution. This aside, three of the judges said that this conclusion did not mean that s122 was entirely free of Chapter III: see 243–245 (Barwick CJ); 270 (Menzies J); 277 (Windeyer J). But see also 250–251 (Kitto J), 260 (Taylor J). There can be no doubt that the tendency of the High Court case law has been towards the reintegration of s122 with the rest of the Constitution. See, for instance, *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 where the High Court held that s122 was subject to s90; and *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 where the High Court held that s122 was subject to s51(xxxi) of the Constitution. And some judges have expressed the view that there is force in the submission that s122 should be read as subject to Chapter III: see *Kruger v Commonwealth* (1997) 190 CLR 1 84 (Toohey J) at 108–109 (Gaudron J), 162, 176 (Gummow J); *Gould v Brown* (1998) 193 CLR 346 at 402 (Gaudron J), 439 (McHugh J); and *Northern Territory v GPAO* (1999) 196 CLR 126 at 602–603 (Gaudron J). However, in *Ex parte Eastman* (1999) 165 ALR 171, a majority of the High Court confirmed *Spratt v Hermes* in holding that a territory court, when created or sustained by an exercise of legislative power conferred by a law made under s122 of the Constitution, is not a court 'created by the Parliament' within the meaning of s72 of the Constitution: at 175 (Gleeson CJ, McHugh & Callinan JJ), 178–182 (Gaudron J).

29 For example, see *Building Construction Employees' and Builders Labourers' Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372.

was beside the point. The important consideration was that state courts are courts *capable* of exercising federal jurisdiction, and for that reason, must conduct themselves in a manner which renders them fit to exercise the federal judicial power. Consequently, they cannot be vested by either the state or federal government with powers incompatible with the exercise or potential exercise of federal judicial power.³⁰

In reaching this conclusion, Toohey, Gaudron, McHugh and Gummow JJ each insisted that Chapter III created an integrated Australian judicial system.³¹ Their focus in reaching this conclusion, however, differed. McHugh J, for instance, focused on section 77(iii) which empowers the federal parliament to vest federal jurisdiction in state courts and section 73, which to his mind, meant that state courts cannot be abolished because of the rights of appeal that lie to the High Court. Gummow J concentrated exclusively on appeal rights to the High Court. Toohey J, whose judgment represents the narrowest of the majority judgments, also relied on section 77(iii).³²

Perhaps Justice Gaudron's judgment best illustrates the reasoning process that lay behind the majority judgments. Her Honour starts by observing that covering clause 5 and section 106 of the Constitution operate to make each state and state court subject to the Constitution.³³ Her Honour then sets out the three factors which indicate that the Constitution provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth. First, the states must maintain at least one court which can exercise the judicial power of the Commonwealth.³⁴ Second, state courts are equally worthy recipients of federal jurisdiction as federal courts:

there is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the parliament.³⁵

Third, when state courts do exercise federal jurisdiction (as for example in convicting and sentencing federal offenders), they are part of the Australian judicial system created by Chapter III. For that reason, they 'have a role and existence which transcends their status as courts of the states'.³⁶

30 Toohey J held that the State court was exercising federal jurisdiction and it is unclear whether he would have applied the doctrine of incompatibility if the State court were not actually exercising the federal judicial power: above n18 at 94.

31 *Id* at 114 (McHugh J).

32 *Id* at 94 (Toohey J).

33 Covering clause 5 provides that the Constitution is 'binding on the courts, judges, and people of every State and every part of the Commonwealth, notwithstanding anything in the laws of any State'. Section 106 provides that each state is subject to the Commonwealth Constitution.

34 As McHugh and Gummow JJ pointed out in their judgments, this is a necessary implication of s77(iii) which empowers the Parliament to vest a state court with federal jurisdiction: above n18 at 110–111 (McHugh J), 140 (Gummow J).

35 *Id* at 104 (Gaudron J).

Through the vehicle of an integrated Australian judicial system, the High Court introduced the principle that state courts are constitutionally prohibited from acting in a manner which is incompatible with the exercise or potential exercise of the federal judicial power. The majority went on to hold that the powers the *Community Protection Act* 1994 vested in the Supreme Court of New South Wales were indeed incompatible in this way. Toohey J identified the essence of the incompatibility by explaining that under that statute:

the Supreme Court may order the imprisonment of a person although that person has not been adjudged guilty of any criminal offence. The Supreme Court is thereby required to participate in a process designed to bring about the detention of a person by reason of the court's assessment of what that person might do, not what that person has done.³⁷

B. Territories, States, and the Federal Judicial Power

The *Kable* extension of the doctrine of incompatibility is enlivened only once we find ourselves dealing with a court capable of exercising the federal judicial power within the meaning of section 71 of the Constitution. Does this include courts of the Northern Territory? They are not federal courts, and are clearly not state courts, but to our minds, an argument is open that they are 'other courts' within section 71.

The Supreme Court of the Northern Territory is constituted by the *Supreme Court Act* 1979 (NT), which in turn, was enacted by the Northern Territory Legislative Assembly pursuant to section 6 of the *Northern Territory (Self Government Act)* 1978 (Cth)³⁸ passed by the Commonwealth pursuant to section 122. Ultimately, then, the Supreme Court of the Northern Territory is created by the operation of section 122. The Northern Territory legislature has established other courts in the same way.

In *Ex parte Eastman*, Gaudron, Gummow and Hayne JJ each took the view that a territory court created under section 122 may be an 'other court' which the Commonwealth 'invests with federal jurisdiction' within the terms of section 71 of the Constitution. Gaudron J expressly raised the possibility that this conclusion would render the Northern Territory courts liable to an application of the principles articulated in *Kable*, commenting that:

[o]ne other matter should be noted with respect to the vesting of federal jurisdiction in a court created under s122 or the existence of which is sustained by a law under that section. If it is not necessary for a court of that kind to conform to the requirements of s72 of the Constitution, a question could arise as to

36 Ibid. Gaudron J made the same observation in her dissenting judgment in *Leeth v Commonwealth* (1992) 174 CLR 455: 'When exercising [federal] jurisdiction, State courts are part of the Australian judicial system created by Ch. III of the Constitution and, in that sense and on that account, they have a role and existence which transcends their status as courts of the States.'

37 Above n18 at 96.

38 Section 6 of the *Northern Territory (Self Government) Act* 1978 (Cth) empowers the Northern Territory Legislative Assembly to 'make laws for the peace order and good government of the Territory.'

whether, in accordance with the principles recognised in *Kable v Director of Public Prosecutions (NSW)* there is not some implicit requirement in Ch III with respect to the nature of the matters that may be dealt with by it and perhaps, also, with respect to the manner in which it is constituted before federal jurisdiction can be vested in it.³⁹

In a footnote to their judgment in *Eastman*, Gummow and Hayne JJ left open the possibility that the reasoning of *Kable* may be applicable to Territory courts since they were courts capable of being vested with the federal judicial power.⁴⁰

Given these judicial comments and the trend, moreover, towards reintegrating section 122 with the rest of the Constitution, it is likely that when the matter comes before the Court, a majority will determine that a Northern Territory court can be vested with federal jurisdiction pursuant to section 71.

C. *The Challenges of Kable*

Some commentators have already foreshadowed the possibility of a constitutional challenge to section 78A of the *Sentencing Act* based on the principles enunciated in *Kable*.⁴¹ *Kable*, however, is not without problems; problems that are yet to be fully addressed in the commentaries and arguments that have emerged.

Indeed, the difficulties of *Kable* are at least threefold. First, there has been a counter-productive tendency to conflate arguments based on the legislative *usurpation* of judicial power with those of legislative *interference* with the exercise of judicial power. Second, there is uncertainty regarding the precise doctrinal basis of *Kable*. Perhaps most concerning of all, however, there has been an almost complete absence of meaningful normative content in the idea of judicial process which the doctrine of incompatibility was designed to protect. We address the first and second issues in the remainder of this Part. The third issue is the subject of Part 3.

(i) *Usurpation and Interference*

Kable is often described as having introduced a limited separation of powers into the states. Undoubtedly, the doctrine of incompatibility finds its genesis in the Commonwealth separation of powers — a point which we explore in more detail below. We would submit that the revolution of *Kable* was not that it introduced a separation of powers into the states through the ‘back door’, but that it cut the doctrine of incompatibility free from its separation of powers moorings.

McHugh J made this very point in *Kable*. The principle espoused in that case does not import a separation of powers into the States:

39 *Ex parte Eastman*, above n28 at 181 (Gaudron J).

40 While holding that it was not necessary to decide whether s122 authorises laws creating territory courts upon which the Commonwealth Parliament may vest federal jurisdiction, Gummow and Hayne JJ observed that, ‘[i]f the Parliament may do so, a question arises with respect to the application to such territory courts of the reasoning in *Kable*’: id at 192, n80.

41 See Flynn; Zdenkowski; Santow, above n16.

Although New South Wales has no entrenched doctrine of separation of powers and although the Commonwealth doctrine of separation of powers cannot apply in the State, in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts.⁴²

If *Kable* is to be properly understood, cause and effect must be distinguished. And this point can be made simply. The doctrine of incompatibility does not mean that a state law could be challenged on the ground that it amounts to a legislative usurpation of judicial power. It cannot be said that a separation of powers applies in the states for there is nothing to prevent State legislatures from exercising judicial powers. The doctrine of incompatibility, on the other hand, considers not what powers may be exercised by a legislature, but rather on what powers may be exercised by the courts. The focus of the two arguments is quite distinct. One looks at Parliament; the other looks at courts. The doctrinal confusion which has attached to *Kable* stems from the tendency to conflate arguments based on the legislative usurpation of judicial power with arguments which centre on the legislative interference with judicial power.

To understand *Kable* it is crucial to distinguish between the legislative (or executive) usurpation of judicial power on the one hand,⁴³ and the legislature's impermissible interference with a court's own exercise of judicial power on the other. An impermissible interference with the judicial power occurs when the legislature vests in a court capable of exercising the federal judicial power, a power which is incompatible with the judicial process. The distinction between usurpation and interference was acknowledged by McHugh J in *Nicholas v The Queen*:

Speaking generally, an infringement occurs when the legislature has interfered with the exercise of judicial power by the courts and a usurpation occurs when the legislature has exercised judicial power on its own behalf. Legislation that removes from the courts their exclusive function "of the judgment and punishment of criminal guilt under a law of the Commonwealth"⁴⁴ will be invalidated as a usurpation of judicial power.⁴⁵

The logic can be traced back as far as *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*. Dixon J (as he then was) observed that,

42 Above n18 at 118 (McHugh J).

43 In Australia, a constitutional challenge based on the legislative usurpation of legislative power has succeeded only once. See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

44 *Id* at 27.

45 Above n26 at 220 (McHugh J).

because of the distribution of the functions of government and the manner in which the Constitution describes the tribunals to be invested with the judicial power of the Commonwealth, and defines the judicial power to be invested in them, the Parliament is restrained both from reposing any power essentially judicial in any other organ or body, *and* from reposing any other than that judicial power in such tribunals.⁴⁶

In the *Boilermakers'* cases, the High Court and then the Privy Council held that the Arbitration Court had acted unconstitutionally in attempting to enforce its award by fining the Boilermakers' Society for a contempt of court.⁴⁷ *Boilermakers'* was a critical moment because it showed us that the separation of powers 'cut both ways'. It supplied us with the logical corollary of the *Wheat Case*, which held that a non-Chapter III court could not be vested with the federal judicial power.⁴⁸ *Boilermakers'* closed the loop, holding that only Chapter III courts could exercise the federal judicial power. The High Court has in effect developed two distinct principles. First, the federal judicial power can only be exercised by Chapter III courts. Second, non-judicial powers cannot be vested in Chapter III courts. Arguments based on the legislative usurpation of judicial power proceed from the first principle, while arguments based on legislative interference with the judicial power proceed from the second.

Both arguments lead to the same result, that is, constitutional invalidity, but they apply a very different analytical approach to reach the result. The key distinction between these two approaches is that the first focuses on the actions of the legislature (or the executive). The question we ask is what powers has the legislature (or executive) exercised itself. The second approach focuses on the courts and asks 'what powers has the court been asked to exercise?' This is the question which *Kable* addressed. For present purposes, the first approach is available only if the High Court is prepared to find that a separation of powers applies in the Northern Territory, and more specifically, that section 122 of the Constitution is completely subject to Chapter III. The second approach, on the other hand, is available so long as the court in which the powers are vested is one *capable* of exercising federal judicial power. As we have previously indicated, it seems likely that Territory courts are so capable.

(ii) *Origins of the Doctrine of Incompatibility*

What does it mean to impermissibly interfere with or to act incompatibly with the judicial process? In order to begin to answer this question, it is necessary to trace the doctrine of incompatibility back to its roots. The origins of the doctrine are at

46 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97–98.

47 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HCA) and *Attorney-General (Cth) v R; Ex parte the Boilermakers' Society of Australia* (1957) 95 CLR 529 (PC).

48 In *New South Wales v Commonwealth* (1915) 20 CLR 54, the High Court held that the federal judicial power cannot be conferred on a non-Chapter III court, and struck down an Act which purported to constitute the Inter-State Commission as a court with judicial powers.

once disparate and complex, and it is only recently that the Court has begun to pull together the strands in order to weave what is now approaching a coherent doctrine.

The doctrine of incompatibility can be traced back to at least four distinct doctrines, each of which further refines the distinction between judicial power on the one hand, and legislative and executive power on the other. First of all, it finds roots in the principle of judicial independence and the perception of the judiciary as the ‘bulwark of freedom’. Second, in giving further meaning to the nature of judicial power, the requirement has emerged that judicial power must be exercised in accordance with the judicial process. If the courts cannot act in accordance with the ‘judicial process’, then the power is not, in substance, judicial. Third, incompatibility with the obligation to act judicially has played a key role in demarcating the legitimate delegation of Commonwealth judicial power. Finally, notions of incompatibility are used to delimit the types of powers judges can exercise in their personal capacity — an aspect we will not pursue in any detail here. The doctrine of incompatibility is driven by all of these ideas. We examine each of them now.

(a) *Judicial Independence*

In its earliest manifestations, the doctrine of incompatibility was identified in terms of judicial independence. Judicial independence is both a driving force and a logical implication of the doctrine of separation of powers. Indeed, many commentators have identified one of the central purposes of the doctrine of separation of powers as the protection of an independent judiciary, which in turn protects the rights of individuals. Sir Anthony Mason, writing extra-curially, has identified his own “functionalist-purposive” approach to the doctrine of separation of powers in Australia in the following terms:

The doctrine should operate to maintain and enhance the system of representative and responsible government brought into existence by the Constitution and to ensure the maintenance of the rule of law by an independent judiciary whose responsibility it is to determine justiciable controversies.⁴⁹

This point was made by Jacobs J in *R v Quinn; Ex parte Consolidated Foods Corporation*, where His Honour explained that the system of law and government recognised by the Constitution has ‘traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of Parliament and the Executive’. Later he said, ‘an independent judiciary ... is the bulwark of freedom.’⁵⁰ The idea emerged that the legislature’s impermissible interference with the exercise of judicial power could compromise this freedom.

This concern has been reiterated in the High Court in more recent times. In *Nicholas v The Queen*, McHugh J repeated what he said in *Kable*:

49 A Mason, ‘A New Perspective on Separation of Powers’ (1996) 82 *Canberra Bulletin of Public Administration* 1 at 3.

50 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11.

A basic principle which underlies the distinction between judicial and legislative or executive power and the doctrine of separation of powers premised on that distinction “is that the judges of the Federal Courts must be, and must be perceived to be, independent of the legislature and the executive government ...

... As a result, legislation that is properly characterised as an interference with or infringement of judicial power, as well as legislation that purports to usurp judicial power, contravenes the constitution’s mandate of a separation of judicial from legislative and executive power.⁵¹

(b) A Hallmark of Judicial Power

Judicial power remains an elusive concept.⁵² However, several High Court judges have, in recent years, expressed the view that one of the defining features of judicial power is that it must be exercised in accordance with judicial process.⁵³ In *Leeth v Commonwealth*, Gaudron J explained the matter thus:

[i]t is an essential feature of the judicial power that it should be exercised in accordance with the judicial process. A legislative direction which would require a power vested in a court to be exercised other than in accordance with that process is necessarily invalid. Its effect would be to take the power outside the concept of “judicial power”.⁵⁴

In the same case, Deane and Toohey JJ (in dissent) made a similar statement:

[I]n Ch. III’s exclusive vesting of the judicial power of the Commonwealth in the “courts” which it designates, there is implicit a requirement that those “courts” exhibit the essential attributes of a court and observe, in the exercise of the judicial power, the essential requirements of the curial process, including the obligation to act judicially.⁵⁵

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- 51 Above n26 at 220 (McHugh J). See also P Hanks, *Constitutional Law in Australia* (2nd ed, 1996) at 468: ‘If the judiciary is to provide an effective protection for the individual against the power of the state, then some limits may need to be established on the power of the Parliament to interfere, through its legislation, with the judicial process.’
- 52 See *R v Davison* (1954) 90 CLR 353 at 366 (Dixon CJ & McTiernan J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 (Windeyer J); *Harris v Caladine* (1991) 172 CLR 84 at 93 (Mason CJ & Deane J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 161 at 189; *Leeth v Commonwealth*, above n36 at 501 (Gaudron J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257 (Mason CJ, Brennan & Toohey JJ), 267 (Deane, Dawson, Gaudron & McHugh JJ); and *Nicholas v The Queen*, above n26 at 207 (Gaudron J), 233 (Gummow J), 238 (Kirby J).
- 53 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, id at 374 (Kitto J); *Harris v Caladine*, id at 150–152 (Gaudron J); *Re Nolan: Ex parte Young* (1991) 172 CLR 460 at 496 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 689 (Toohey J), 703–704 (Gaudron J); *Leeth v Commonwealth*, above n36 at 502 (Gaudron J); *Nicholas v The Queen*, above n26 at 207 (Gaudron J); and *Sue v Hill* (1999) 163 ALR 648 at 685 (Gaudron J).
- 54 Above n36 at 502 (footnotes omitted). In *Sue v Hill*, id at 684–685, Gaudron J explained the matter further saying that judicial power ‘has two aspects: the first is concerned with the nature or purpose of the power, and the second with the manner of its exercise.’
- 55 Above n36 at 487.

If the courts are called upon to act in a way which is incompatible with the judicial process, the power they are exercising can no longer properly be seen as judicial. By vesting this kind of incompatible power in the courts, the legislature has impermissibly interfered with it.

(c) *Limits to the Delegation of Judicial Power*

Notions of incompatibility with judicial power have also been used to circumscribe the delegation of federal judicial power. In *Harris v Caladine*,⁵⁶ the power of a Family Court Registrar to make certain orders was challenged on the basis that the Registrar was not a Chapter III judge, and accordingly, could not exercise federal judicial power. The High Court rejected this argument, relying on the proposition established in *Commonwealth v Hospital Contribution Fund of Australia* that federal judicial power is vested in the court as an entity rather than in the persons who compose its membership.⁵⁷ On this basis, the Court concluded that the Parliament could authorise the Family Court to delegate some part of its jurisdiction, powers and functions.⁵⁸ However, the Court held that two circumstances limit the power to delegate. Relevantly for present purposes,

The delegation must not be inconsistent with the obligation of the court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court.⁵⁹

(d) *Limits to the Persona Designata Rule*

In *Hilton v Wells*, the High Court established what some consider to be the most significant qualification to the doctrine of separation of powers in Australia, the doctrine of *persona designata*, which allows the vesting of non-judicial functions in Chapter III judges provided that they exercise such powers in their personal capacity.⁶⁰ The doctrine was further developed in *Grollo v Palmer* where the High Court confirmed the doctrine but added the qualification that the conferral of power was valid only so far as it did not require the judge to act in a way which was incompatible with the performance of his or her functions or with the proper discharge by the judiciary of the responsibility of exercising the judicial power.⁶¹

56 Above n52.

57 *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 90–93 (Mason CJ & Deane J).

58 The Court was empowered to delegate by s123 of the *Family Law Act 1975* (Cth).

59 Above n57 at 94 (Mason CJ & Deane J).

60 *Hilton v Wells* (1985) 157 CLR 57. In this case, s20 of the *Telecommunications (Interception) Act 1979* (Cth) was challenged on the basis that in conferring a power on federal court judges to issue a interception warrant, it had breached the separation of powers by conferring an executive power on a Chapter III court. A majority of the High Court upheld the validity of s20 by distinguishing between powers conferred on Chapter III judges in their judicial capacity, and powers conferred on them in their personal capacity. The conferral of power by s20 was an incident of the second kind and may be described as the '*persona designata* rule'.

61 *Grollo v Palmer* (1995) 184 CLR 348. The factual situation in *Grollo v Palmer* was similar to that in *Hilton v Wells*. In *Grollo v Palmer*, ss45 and 46 of the *Telecommunications (Interception) Act 1979* (Cth) conferred a power on federal court judges to issue an interception warrant.

Brennan CJ, Deane, Dawson, Toohey and Gummow J said that the vesting of certain functions in Chapter III judges as *persona designata* would breach the separation of powers in certain circumstances:

Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual judge or of the judiciary as a institution to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth.⁶²

Certain functions exercised by a Chapter III judge in their personal capacity could nevertheless prejudice their judicial capacity. This would violate the doctrine of separation of powers.⁶³

(iii) *Compatibility with the Judicial Process*

In sum, the obligation to act in accordance with the judicial process, or as is sometimes said, the obligation to act judicially (which we describe in shorthand as the requirement of compatibility) is driven by a number of separate, but intimately related concerns. Notions of compatibility with the judicial process are invoked to preserve the independence of the judiciary, to further articulate the nature of judicial power, to impose limits on the ability to delegate judicial power, and to delimit the types of powers that can be vested in Chapter III judges in their personal capacity.

But what does it mean to act ‘judicially’, to act ‘in accordance with the judicial process’, or to act in a way that is not ‘incompatible’ with the exercise of the judicial power of the Commonwealth? In other words, how will we know if the legislature has impermissibly interfered with the exercise, or potential exercise, of Commonwealth judicial power? An understanding of the origins of the doctrine of incompatibility only begins to answer these questions.

Compatibility with the judicial process requires that the court and the individual judges who comprise it, must be capable of protecting the integrity and independence of the processes of the courts. This is necessary to maintain public confidence in the courts and to ensure their continued legitimacy. On this point, the observations of Kirby J in *Nicholas v The Queen* are instructive:

Recent decisions of this Court illustrate the extent to which the Court will go to uphold and safeguard the independence and integrity of the Federal and State courts so that they may continue to perform their judicial functions as the Constitution encourages and thereby to maintain public confidence for their

62 Id at 365.

63 This idea was further developed in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, where the majority held that the appointment of a Chapter III judge as a reporter under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was incompatible with the Federal Court’s responsibility in exercising the federal judicial power. In the course of judgment, Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ said that the exercise of non-judicial powers by a Chapter III judge in *persona designata* was permissible only to the extent that it was ‘compatible’ with the exercise of the Commonwealth judicial power.

impartiality. Such performance and such confidence would be lost if courts were seen to be no more than subservient agents bending to the will either of the Executive or the Parliament. Maintaining public confidence in the independence of the courts is a common theme running through the majority opinion in *Wilson v The Minister, Kable v Director of Public Prosecutions (NSW)* and many other cases, recent and long in the past.⁶⁴

Indeed, the notion of public confidence is a key argument which underlies the court's jurisprudence. The common theme running through the judgments in *Leeth* and *Kable*, and those of McHugh and Kirby JJ in *Nicholas* is that public confidence in the courts is integral to the continued constitutional legitimacy of the courts. That confidence in turn depends on the perception that judges have conducted an independent assessment of the facts of the particular case before proceeding to make a binding determination.

Compatibility with the judicial process likewise requires conformity with the rules of natural justice. In *Re Nolan; Ex parte Young*, Gaudron J said that the judicial process included:

open and public inquiry (subject to limited exceptions), the application of rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.⁶⁵

So too Mason CJ, Dawson and McHugh JJ commented in *Leeth v Commonwealth*:

It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case*, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.⁶⁶

In *Leeth v Commonwealth*, Gaudron J also suggested that a provision that requires the courts to act in a way that is contrary to precepts of either procedural and formal equality would require judges to act in a manner incompatible with the judicial process:

⁶⁴ Above n26 at 256–257.

⁶⁵ Above n53 at 496 (Gaudron J). See also *Grollo v Palmer*, above n61 at 379 where McHugh J said, '[o]pen justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power.' In *Sue v Hill*, above n53 at 687–688, Gaudron J provided a more detailed explanation: 'for present purposes, it is sufficient to note that, in general terms, the judicial process is one that involves the independent and impartial application of the law to facts found on evidence which is probative of those facts and the observance of procedures that enable the parties to put their case and to answer the case made against them.'

⁶⁶ Above n36 at 470 (Mason CJ, Dawson & McHugh JJ). See also F Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Mon LR* 248 at 256–263 where Wheeler identifies what she describes as some 'basic features' of the 'natural justice obligation'.

All are equal before the law, and the concept of equal justice — a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such — is fundamental to the judicial process.⁶⁷

Again, in all these cases, the theme of public confidence in the judicial process was inherent and considered to be neither ‘remote from’ nor identical to the theory of separation of powers.

The limited judicial elaboration of the nature of the judicial process to date, tells us at least the following. Acting in a way which is compatible with the judicial process requires at a minimum that the courts be always capable of protecting the integrity of the judicial process and their independence in the eyes of the public. The judicial process, in order to preserve public confidence, is about both doing justice and being seen to do justice. In particular, the act of judgment must have integrity and independence, secured at the very least by procedural fairness and arguably, by equal treatment.

Yet regrettably, the case law surrounding the doctrine of incompatibility and the language of ‘public confidence’ has rarely moved beyond these broad platitudes. This may be a consequence of the haphazard evolution of the doctrine which did not really cohere until the decision in *Kable*. Nevertheless, the requirement of compatibility with the judicial process, or as some would say, the obligation to ‘act judicially’, requires further illumination than mere reference to these cases can provide. We have to better understand the *normative* forces which inform the doctrine and which clarify the constitutional obligation. In Part 3, we turn ourselves to this task. Our purpose is not to comprehensively define what would constitute an impermissible interference with judicial process. Rather, we would ask what is it that ensures that the process remains *judicial*? And our answer is: a *judicial* process must include an element of discretion. It is only thus that the process can be protected and public confidence ensured.

3. *Discretion and Punishment*

The imposition of punishment lies at the heart of the judicial process. In the words of Mason CJ, Dawson and McHugh JJ in *Leeth v Commonwealth*,

[t]he sentencing of offenders, including in modern times the fixing of a minimum term of imprisonment, is as clear an example of the exercise of judicial power as is possible.⁶⁸

67 Above n52 at 502. Compare Wheeler, *id* at 280, setting out why she considers that Gaudron J’s view in this regard is ‘problematic in a number of respects’.

68 Above n52 at 470. See also *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 (Deane J); *Harris v Caladine*, above n52 at 147 (Gaudron J); *Gould v Brown*, above n28 at 404 (Gaudron J). There are certain historical exceptions, including Parliament’s power to punish for contempt, and the jurisdiction of courts martial: *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 1 and *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452.

The idea that only a judge can authorise punishment is central to our idea of the rule of law. A judge and not a parliament or the police, must intervene before the fixing of a fine or a term of imprisonment or, in days gone by, the passing of a death sentence. Like *habeus corpus*, this is an essential moment of review and an affirmation of a process that will profoundly alter lives. The judicial process gives to the application of punishment a moral imprimatur and a constitutional legitimacy.

There is a paradox here. In the categorical words of Barwick CJ in *Palling v Corfield*,

It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offence is which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty.⁶⁹

Indeed at times, the High Court would appear to have intimated that penalty is a question of parliamentary sovereignty and not judicial process. Chief Justice Latham said as much in *Fraser Henleins v Cody*:

The whole matter of the guilt of the accused is determined by a court. The nature and quality of the penalty which may be inflicted depends upon a statute. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law.⁷⁰

One solution to this inconsistency would be to make the Court's role in inflicting a penalty purely formal. That solution was adopted by Barwick CJ and his fellow judges in *Palling v Corfield*:

The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute.⁷¹

On this analysis, the independence of the judicial process is upheld as a mere protocol. The Court is required to do an act without any choice or decision open to it. In *Palling v Corfield*, the contrary argument was not pursued, counsel unfortunately preferring to focus on the presence of prosecutorial discretion rather than the absence of judicial discretion. Our argument, on the contrary, is that while some extra-judicial discretion in the administration of criminal justice is

⁶⁹ *Palling v Corfield*, above n17 at 58 (Barwick CJ).

⁷⁰ *Fraser Henleins v Cody* (1945) 70 CLR 100 at 119–120.

⁷¹ *Palling v Corfield*, above n17 at 58 (Barwick CJ); see also at 64–65 (Menziez J).

inevitable, some countervailing judicial discretion is necessary — it is not the presence of the former (as was unsuccessfully argued in *Palling*) but the absence of the latter which is decisive.

Further, and as we have previously indicated, counsel challenged the legislation in *Palling v Corfield* on the basis that it constituted a usurpation of judicial power by this executive discretion, and did *not* argue that the legislation impermissibly interfered with the judicial power itself, the substance of our present argument. The jurisprudence since *Palling*, and most especially as articulated in *Kable*, has foregrounded this distinction in a way which necessarily opens up the decision in *Palling* to reappraisal.

Finally, the broader statements to be found in *Palling v Corfield* are merely *obiter*, and in our opinion go demonstrably too far. The wholesale elimination of the element of punishment from the realm of judicial process is inconsistent with the clear statements in *Leeth v Commonwealth* and *Nicholas v The Queen*. Sentencing is a clear ‘example of the exercise of judicial power’, and as such it must be ‘exercised in accordance with the judicial process’.⁷² It is crucial to our argument to now demonstrate that to render this process judicial in relation to the infliction of punishment requires some element of discretion. The argument has three aspects. (A.) The need for some judicial discretion in the sentencing process has been recognised, almost without exception, in the jurisprudential literature. (B.) The morality of judging requires a choice — in other words, some element of genuine decision is bound up in the *legitimacy* of the judicial role and thus, the public confidence in the courts. (C.) The history of English law cannot be read as suggesting that the legislature has unlimited freedom to eliminate judicial discretion in the application of penalties.

Our central thesis is that mandatory sentencing laws, such as those currently operating in the Northern Territory, are not simply laws which prescribe a minimum or maximum penalty — a distinction not adequately drawn in *Palling v Corfield* nor in *Fraser Henleins v Cody*. Indeed, they are so fundamentally different in character as to make a mockery of the courts’ judicial role in the sentencing of offenders. It is not the severity of the laws, but their complete and structural abrogation of a meaningful judicial role in the infliction of a penalty that subverts the rule of law and is thereby an instance of the legislature requiring the courts to act in a manner which is incompatible with the judicial process.

72 *Nicholas v The Queen*, above n26 at 209 (Gaudron J) and *Leeth v Commonwealth*, above n36 at 470 (Mason CJ, Dawson & McHugh JJ).

A. *The Jurisprudence of Sentencing*

(i) *The Sentencing Role*

The need for some judicial discretion, most especially in the matter of sentencing, has been recognised almost without exception in the jurisprudential literature. One senses here a fundamental misapprehension by the Northern Territory legislature as to the nature of judgment and therefore of the judicial process. It is a misapprehension dating back at least to James I.

When I bid you doe Justice boldly, yet I bid you doe it fearefully; fearefully in this, to utter your owne conceites, and not the trew meaning of the Law: And remember you are no makers of Law, but Interpretours of Law, according to the trew sense thereof ... For I will never trust any Interpretation, that agreeth not with my common sense and reason, and trew Logicke: *for Ratio est anima Legis* in all human Lawes, without exception; it must not by Sophistrie or straines of wit that must interpretate but either cleare Law, or solide reason.⁷³

On such a reading, the role of judges is simply to apply the self-evident meaning of parliamentary words, and thus to create certainty in the administration of law. Pursuant to such a tradition, it is clearly the view of the Northern Territory that in taking judicial discretion away from judges, they are holding them more sternly to a duty of which they have, in their conceit, lost sight. As Northern Territory Attorney-General Burke explained,

The government believes that the proposal for compulsory imprisonment will: send a clear and strong message to offenders that these offences will not be treated lightly; force sentencing courts to adopt a tougher policy on sentencing property offenders; deal with present community concerns that penalties imposed are too light; and encourage law enforcement agencies that their efforts in apprehending villains will not be wasted.⁷⁴

Until recently this was a common perception as to the nature of Western legal thought. Perhaps its strongest advocate was Beccaria, for whom any subjectivity was a blot on the image of law as some kind of purely mechanical process. But the extremism of his view did not commend itself even to his intellectual successors. No less a commentator than Max Weber satirised it as 'a slot machine into which one just drops the facts (plus the fee) in order to have it spew out the decision (plus opinion).'⁷⁵ Even Beccaria's most famous protégé, Jeremy Bentham, conceded that 'inflexible rules in fact considerably increase the scope for arbitrariness of decision'.⁷⁶ And HLA Hart, as influential a defender of legal positivism in the twentieth century as was Bentham in the nineteenth, explicitly distinguished the judge's role in passing sentence from their role in parsing sentences. Hart argued

73 James I's Speech in Star Chamber, 20 June 1616, in N Kenyon, *The Stuart Constitution* (1975).

74 Northern Territory Parliamentary Record, *Seventh Assembly First Session, No 27* (17 October 1996) at 9688.

75 M Weber (trans. M. Rheinstein), *Law in Economy and Society* (1954).

76 Quoted in K Stith & J A Cabranes, *Fear of Judging* (1998) at 13.

that by and large legal rules have an objective semantic content and that therefore judges ought to 'apply the law' without regard to their own morality or sense of justice. Yet even he acknowledged that the judicial process of *sentencing* an offender required the exercise of discretion which, by its nature, was irreducible to a rule:

To a judge striking the balance among these claims, with all the discretion and perplexities involved, his task seems as plain an example of the exercise of moral judgment as could be; and it seems to be the polar opposite of some mechanical application of a tariff of penalties fixing a sentence careless of the moral claims which in our system have to be weighed.⁷⁷

At least in relation to the infliction of a death penalty, the United States Supreme Court has held mandatory sentences unconstitutional,⁷⁸ and in *Penry v Lynagh*, the Court insisted that some moment of discretionary judgment must be preserved as part of the process.⁷⁹ It was precisely this point which ultimately led the late Justice Harry Blackmun to the conclusion that death penalty jurisprudence in the United States had, by nevertheless insisting on the application of uniform criteria, undermined its own claims to legitimacy. In *Callins v Collins*, he said:

Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness — individualized sentencing.⁸⁰

The Supreme Court's struggle on this issue demonstrates the importance of individual assessment in asserting the very legitimacy of the Court's process of punishment, a question of heightened importance in dealing with the power to kill.

In *Postiglione v The Queen*, Kirby J emphasised the 'discretionary character of the sentencing function'.⁸¹ And as Archbishop Goodhew remarked,

Australians expect a system of justice that balances the strict application of the law with a consideration of the circumstances for each case. Mandatory sentencing amounts to an abuse of our justice system.⁸²

So too Spigelman CJ of the Supreme Court of New South Wales has justified the introduction of guideline judgments *not* because it abolishes judicial discretion in the sentencing of offenders, but on the contrary, because it helps maintain the balance between consistency and discretion:

Guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the

77 H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harv LR* 593.

78 *Woodson v North Carolina* 428 US 280 (1976).

79 *Penry v Lynagh* 492 US 302 (1989) at 359–360 (Scalia J).

80 *Callins v Collins* 114 S Ct 1127 (1994) at 1129 (Blackmun J) (citations omitted).

81 *Postiglione v The Queen* (1997) 189 CLR 295 at 336.

82 'Archbishop attacks mandatory sentencing' *Sydney Morning Herald* (19 April 2000).

*broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.*⁸³

The constant refrain here is that sentencing is an intrinsically subjective and discretionary process which requires the exercise of balance and judgment.⁸⁴ Yet this act of judgment is banished by the *Sentencing Act*. It clings to a vision of 'algorithmic justice'⁸⁵ which not even the most ardent positivists defend.

(ii) *The Goals of Sentencing*

We do not intend to keep to vague assertions about justice. Our argument at this juncture, along with that of HLA Hart, focuses on the specific characteristics intrinsic to sentencing. Let us not trivialise this process or shirk from its implications. Judges, says the great American legal philosopher Robert Cover, authorise the State's application of violence. Indeed, it is this relationship between the authority to interpret and the power to compel that defines the unique position of the judge in modern society.⁸⁶ Sentencing, and the imposition of a term of imprisonment is its archetypical manifestation, necessarily involves compulsion. The question is — on what terms can this be justified? Without such a justification, sentencing ceases to be a *judicial* process at all, because the adjective 'judicial' implies a legitimacy which grounds the coercive aspects of the process. The absence of any justification for the use of force in sentencing is incompatible with the central requirements of the judicial process.

The punishment of offenders, and in particular their imprisonment, is legitimately undertaken in pursuit of a variety of social goals including deterrence and rehabilitation. Lest we be misunderstood, the balance and form of those goals is exclusively a matter for legislative determination. But in employing a judicial process in order to secure the punishment of an offender, the legislature cannot *altogether* ignore the goals which justify the power. It cannot act as though punishment had no purpose at all, for that would be to corrupt the judicial process for a non-judicial end. Parliament cannot cloak itself in the mantle of the courts while acting out of mere spite or whimsy or caprice.

Yet it is not coherent to attempt to give meaning to the legitimate social goals of punishment *without* attending to the individual offender's life circumstances. Rehabilitation cannot be assessed in the abstract: it requires the court to specifically address the needs and problems of the person before it. No such response is possible under a mandatory sentencing regime. Deterrence requires us to evaluate what level of punishment will appropriately discourage the offender,

83 *R v Jurisic* (1998) 45 NSWLR 209 at 220 (emphasis added).

84 K Lutgen, 'Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal' (1996) 10 *Notre Dame Journal of Law, Ethics and Public Policy* 389.

85 A Wolfe, 'Algorithmic Justice' (1990) 11 *Cardozo Law Review* 1409.

86 R Cover, 'Foreword — 1982 Term, *Nomos* and Narrative' (1983) 97 *Harv LR* 4. See also R Cover, 'Violence and the Word' (1986) 95 *Yale LJ* 1601; J Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 *Cardozo Law Review* 919.

or offenders similarly placed, from engaging in wrongful conduct in the future.⁸⁷ But deterrence requires us to follow the Kantian sentencing principle of parsimony. Parsimony is the principle of frugality in punishment and forbids the imposition of punishment in excess of that required to achieve defined social purposes. In *Webb v O'Sullivan*, Napier CJ expressed the principle in the following way: '[w]e ought not to award the maximum [punishment] which the offence will warrant, but rather the minimum which is consistent with a due regard to the public interest.'⁸⁸ In *R v Moyse*, Jacobs J said it is a 'cardinal principle of sentencing, that the court, whenever it can properly do so, should temper justice with mercy by imposing the lowest, rather than the highest, sentence of imprisonment that can be justified'.⁸⁹ In *R v Valentini*, the Full Federal Court said, '[t]he judge must ensure that he imposes the minimum term consistent with the attainment of the relevant purposes of sentencing taking care that he punishes only for the crimes before him.'⁹⁰ The principle of parsimony includes the fundamental principle of sentencing that imprisonment is a punishment of last resort, to be imposed only where a non-custodial punishment is inappropriate.⁹¹ Again it can be seen that these principles cannot be applied without regard to the *individual* before the court; a consideration which mandatory sentencing legislation prevents.

Under the *Sentencing Act* punishment is shorn of any relationship to the social goals that might justify it. In what way then might the force which the judge mandates yet be legitimate? One might answer by recourse to a philosophy of retribution. Imprisonment under the legislation, it might be argued, is justified solely as an appropriate social response to the wrongness of the act *qua* act, regardless of its efficacy in advancing — and indeed even if it impedes — the instrumental goals of deterrence or rehabilitation. Let the punishment fit the crime, says the law; or, to put it somewhat differently, retribution is the *lex talionis* — eye for an eye and a tooth for a tooth.

But there are certain sentencing principles embedded in this argument. First, parsimony which we have already canvassed. Second, proportionality. Proportionality is the common law sentencing principle that prohibits judges from imposing sentences which exceed that which is commensurate with the gravity of the offence for which an offender has been convicted.⁹² In *Hoare v The Queen*, the High Court said in a joint judgment that, a 'basic principle of sentencing law is that

87 We have not elaborated on the distinction between specific and general deterrence here. The argument is apposite to an analysis of specific deterrence, but the reference to 'offenders similarly placed' is intended to suggest that the argument may be extended to apply to issues of general deterrence as well.

88 *Webb v O'Sullivan* [1952] SASR 65 at 66.

89 *R v Moyse* (1988) 38 A Crim R 169 at 172–173.

90 *R v Valentini* (1980) 48 FLR 416 at 420.

91 See *R v James* (1985) 14 A Crim R 364 (FC WA) at 364 (Burt CJ); *Weetra v Beshara* (1987) 46 SASR 484 (FC) at 485 (Jacobs ACJ), 493 (Prior J); *Stewart v Collins* (1992) 58 SASR 291 at 293 (Bollen J); *Parker v DPP (NSW)* (1992) 28 NSWLR 282 at 296 (Kirby P) and *English v The Queen* (1995) 82 A Crim R 586 (CCA WA) at 596–598 (Walsh J).

92 See also *Veen v The Queen (No 1)* (1979) 143 CLR 458 and *Veen v The Queen (No 2)* (1988) 164 CLR 465 where the High Court held that a sentence cannot be imposed that exceeds the gravity of the current offence.

a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of crime considered in the light of its *objective* circumstances'.⁹³

Relevantly for present purposes, the principle of proportionality operates to prevent offenders being punished more seriously than the current offence warrants because of their prior convictions. One cannot demand retribution twice for the same offence.⁹⁴ Yet that is precisely the effect of the 'two' and 'three strikes' provisions of the legislation. This provision cannot be explained as a way of extracting *retribution* for the wrongdoer's offence, since the extent of punishment depends on other acts not before the courts.

Furthermore, it is our contention that the provisions of section 78A of the *Sentencing Act* runs dangerously close to the denial of *res judicata*. There is a fundamental common law principle against double jeopardy, of which the rules against *autrefois acquit* and *autrefois convict* are a singular but by no means exhaustive manifestation.⁹⁵ Under the terms of section 78A, a person convicted of a property offence is punished by a mandatory term of imprisonment of at least 14 days. Now the same offender, before the courts for a different act of similar nature, is to be punished by a term of imprisonment of at least 90 days. Why? Only because they have previously been convicted of an offence under section 78A. An eye for an eye: twice.

'Three strikes' legislation is a radical departure from prior legislative practice in Australia, and the nature of this departure must be clearly understood. This is not simply the legislative codification of normal sentencing practice. Courts invariably evaluate an offender's prior behaviour in deciding upon an appropriate sentence. At times they are even directed by legislation or guideline judgments to take such factors into account. But they do so in the exercise of their *discretion*, as part of the relevant history of the offender, along with many other relevant aspects of that history including their upbringing, present circumstances, and prospects. It makes complete sense to evaluate a person's prior conduct along with everything else relevant about them. This is the only way of fixing upon an appropriate sentence from the point of view of deterrence and rehabilitation. It is by *balancing* all these factors that an appropriate sentence can be determined by the magistrate. The *Sentencing Act* is profoundly different. It *prevents* the court from 'taking into account' the offender's prior offences in order to determine what is an appropriate penalty for this offence, just as it prevents the court from taking into account a wide range of other indisputably relevant factors. Instead, it *requires* the court to sentence an offender according to a pre-determined scheme, without any evaluation at all.⁹⁶

93 *Hoare v The Queen* (1989) 167 CLR 348 at 354 (emphasis included).

94 *Baumer v The Queen* (1988) 166 CLR 51; *Veen v The Queen (No. 1)* and *Veen v The Queen (No. 2)*, above n92.

95 See *The King v Wilkes* (1948) 77 CLR 511 at 518 (Dixon J); see also *Rogers v The Queen* (1994) 181 CLR 251 at ¶14, wherein Mason CJ speaks of *autrefois* as a 'manifestation of *res judicata*'.

The basic principle of proportionality, as we have previously pointed out, is that one cannot punish a person more seriously than the current offence warrants simply because of their criminal record.⁹⁷ Rather, in light of the defendant's criminal record, the court decides where along the *range* of appropriate penalties for *this* offence the current offence ought to be situated. In other words, the court might treat a repeat offender more harshly than someone with a previously unblemished record. But they are not entitled to treat them more harshly than the current offence itself warrants — the sentence handed down still and must always fall within the appropriate *range* of penalties for that particular offence.

But under the *Sentencing Act*, offenders may and have been sentenced to one year's imprisonment for the theft of biscuits or a towel — precisely the same offence that, according to section 78A(1) of the *Sentencing Act* itself, is only to be punished by a sentence ranging down to 14 days imprisonment. Such offenders are being sentenced to a term of imprisonment which is, according to the very legislative structure of the *Sentencing Act* itself, unjustifiable in relation to the offence before the court — solely because of the fact of their previous convictions. The *Sentencing Act* therefore seizes upon one relevant aspect of the individualised treatment of specific offences, and transforms it into the sole relevant feature of the uniform treatment of past offences. It violates all principles of individualised sentencing and of proportionality. It is not the exercise of a discretion, and it is not a punishment meted out in accordance with a range of penalties appropriate to the offence before the court.

The judicial process of applying fundamental sentencing principles to the individual circumstances of the particular case necessarily involves judicial discretion, as Kirby J clearly stated in *Postiglione v The Queen*.⁹⁸ And in the same case, Dawson and Gaudron JJ said, '[t]he parity principle is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them.'⁹⁹ The philosophy of retribution requires the Court to determine a level of punishment proportionate to the gravity of *this* particular crime — to consider whether what has been stolen is a car or a yo-yo. But this is precisely what the mandatory regime of the *Sentencing Act* strictly prevents.

96 Neither is the *Sentencing Act* comparable to a conditional discharge or a suspended sentence. In such a case, should the offender again come before the courts during the period of the bond, the court may choose to impose a custodial sentence in relation to the first offence. But this is precisely because the court did not, strictly speaking, proceed to a conviction or the imposition of a sentence in the first instance. In such cases, the offender was either not punished the first time, or the punishment appropriate to that offence was not implemented.

97 *Baumer v The Queen*, above n94; *Veen v The Queen (No. 1)* and *Veen v The Queen (No. 2)*, above n92.

98 *Postiglione v The Queen*, above n81 at 336 (Kirby J).

99 *Id* at 301 (Gaudron J). See also *Lowe v The Queen* (1984) 154 CLR 606.

(iii) *Judicial Legitimacy*

While Parliament is free to impose a framework within which judicial sentencing discretion should be exercised, it is another thing entirely to completely eliminate judicial sentencing discretion.¹⁰⁰ Judges are prohibited from considering both the particular circumstances of the case and the application of various sentencing principles to reach a decision which is just and appropriate in those particular circumstances. And without *reference* to those principles, the act of sentencing cannot be justified and cannot therefore be described as judicial.

Our argument therefore, is that mandatory sentencing is a process which cannot be described as judicial, since it lacks any form of justification which it is the purpose of the judicial involvement to bestow. It is not retribution. It is not deterrence. It is not rehabilitation. It bears no relationship to any sentencing principles outlined by the courts. But it is not parliament which is thus being required to behave in an arbitrary manner. It is the courts. And the courts' hard-won legitimacy and authority are therefore jeopardised by legislative fiat.

The incoherence and illegitimacy of mandatory sentencing will operate to undermine public confidence in the courts. As the New South Wales Law Reform Commission has argued, mandatory sentences are:

undesirable because they apply without regard to undoubtedly relevant circumstances of a case with consequent arbitrary and capricious results. Being in effect a sentence imposed by Parliament, mandatory minimum sentences remove judicial discretion and amount to an unwarranted intrusion on judicial independence.¹⁰¹

We wish to say most emphatically that our point is not that arguments about the purposes of sentencing are being used in a way that is bad, or poorly balanced, or misjudged. Those questions are indubitably for the legislative arm to resolve. The point is rather that such arguments are quite simply unavailable. The *Sentencing Act* requires the courts to exercise the coercive power of their office, a unique aspect of the judicial process, literally without justification. It is hard to imagine how this could fail to bring the courts into terminal disrepute. Further, unless one accedes to the proposition that sentencing is not part of the judicial process at all, that it is strictly speaking irrelevant whether sentence is pronounced by a judge or his tipstaff, then this constitutes an impermissible interference with judicial power.

B. *The Nature of Judgment*

The broader argument against a purely formal understanding of the judge's role in passing sentence is that the morality of judging inherently requires the exercise of a choice. To understand the High Court's ineluctable duty to protect the integrity

100 A J Ashworth, 'Sentencing Reform Structures' in M Tonry (ed), *Crime and Justice: A Review of Research* (vol 16, 1992) at 181.

101 New South Wales Law Reform Commission, *Sentencing*, Report No. 79 (1996) at 208.

of the judicial process, we must ask ourselves, what is it to cast legal judgment? What gives a judge this power and what allows the community, and indeed offenders themselves, to accept that judgment even if they disapprove of it?

Unlike the judges of the ancient Hebrews, it is not merely the charisma or wisdom of the office-holder which justifies judges' power. In part, the answer lies in the constraints and forms that guide and make transparent the judge's actions — that is the *process* aspect in that compound phrase 'judicial process'. But even more centrally, we would argue, the legitimacy of the *judicial* aspect comes from the responsibility the judge takes on and endeavours to fulfil. The obligation to act judicially entails the acceptance of a serious responsibility, and responsibility entails choice.

For Lon Fuller, the notion that judicial discretion could ever be eliminated was nonsensical. In a seminal article in the *Harvard Law Review*, HLA Hart had defended the position that law was about rules, and that rules had an objective or 'core content' divorced from any moral considerations (although we have already seen that even he did not believe this argument relevant to sentencing). The judge's interpretative role, argued Hart, was about determining 'what law is' not 'what law ought to be'.¹⁰² In response, Fuller insisted that the meaning of a law could *not* be determined without reference to its purposes, and therefore to the values of the society as understood by the judge. In any interpretative act, no matter how uncontentious, there will always be a normative content, now background, now foreground. Fuller provides a telling example. If a provision states 'All improvements are to be reported to ...' how, he asks, are we to determine even core instances of the word 'improvement' without reference to whom the report is to be made? — a nurse, a professor, an inspector. The *purpose* we attribute to this section will affect both its content, and its value (an 'improvement' to a heritage building may be illegal).¹⁰³ Since meaning and purpose always go together, we cannot interpret one without reference to the other. And an inquiry into the purpose of a law will necessarily take the judge into questions of social organisation and morality which are by no means always self-evident. The 'is' and the 'ought' come bound together.¹⁰⁴

The proposition that there can be no system of rules without some background discretion or judgment is widely accepted. Ronald Dworkin, successor to Hart's Chair at Oxford, would likewise agree that interpretation is only possible against a web of commonly held moral assumptions about the nature of law, the ends of a society, and so forth. When Dworkin defends the importance of 'integrity' in law, he means both the internal coherence of legal doctrine, and its external connection to the fundamental ethical principles operative in that society.¹⁰⁵ These complex understandings of social value allow us to give content to a word and to its relationship with other words. For Fuller (as for Dworkin) there is a yet more

102 Above n77.

103 L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harv LR* 630 at 661–669.

104 See also L Fuller, *The Morality of Law* (1969).

105 R Dworkin, *Law's Empire* (1986).

important implication here. Without some moral content, why would we have an obligation to obey the law at all?

[According to Professor Hart], we have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it . . . I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law. This obligation seems to be conceived as *sui generis*, wholly unrelated to any of the ordinary, extralegal ends of human life. The fundamental postulate of positivism — that law must be strictly severed from morality — seems to deny the possibility of any bridge between the obligation to obey law and other moral obligations. No mediating principle can measure their respective demands on conscience, for they exist in wholly separate worlds.¹⁰⁶

The moral dimension is therefore a necessary element of judging; it grounds, directs, and legitimates it. The point is of especial relevance in relation to the moment at which sentence is passed. The obligation to act judicially requires a decision, and decision can never be the rote application of a rule. That would be mere obedience, an unthinking application such as might be rendered by a machine. There is nothing judicial about such automatism.

A decision — any decision — requires some judgment or choice to be made, even if it is only the momentary choice that the relevant rule is worthy of application (in the broader scheme of things, and regardless of whether the judge actually agrees with it) and even if the choice is, in many circumstances, an easy one to make. This perspective has been developed in some of the recent work of the philosopher Jacques Derrida. In a difficult but thoughtful essay on ‘The Force of Law’, he argues that it is impossible to explain judgment exclusively within a framework of rules.¹⁰⁷ Derrida does not argue that rules or boundaries placed upon discretion are in themselves intolerable. Far from it. His argument is not that rules are unjust; only that a judgment must transcend the rules even as it affirms it. Neither of course, will the decision to follow a rule be governed simply by the judge’s own substantive judgment about whether the rule is a good one. On the contrary. The judge will also take significantly into account systematic considerations including the relative importance of certainty and the democratic source of the rule before him or her. Nevertheless, the decision to follow the rule *must still be made*. To be responsible requires at least a ‘confirmation’ of the appropriateness of the rule that is to be applied — including, of course, the appropriateness of having rules even if one sometimes disagrees with them — and a consideration of other options. If there are *no* other options before the judge, then there is no decision, no responsibility, and consequently no exercise of judgment at all.

In sum, the judicial process requires that the judge undertakes an onerous responsibility concerning the lives of those before him or her. But responsibility in the literal sense imports a duty to provide a *response* to the individual

¹⁰⁶ Above n103.

¹⁰⁷ Derrida, above n86 at 961.

circumstances before the judge. The explanation for our actions by simple reference to a rule or a process which applies regardless of circumstances is a necessary element of social relations but it is never sufficient.¹⁰⁸ If that was all that was relevant, there would be no decision to be made. But a judge is not an apprentice: responsibility and obedience are, strictly speaking, incommensurable.

This is precisely the criticism of mandatory sentencing regimes such as that set up in the Northern Territory. No one would suggest that judgment ought to be entirely at large, or that judges should hand down whatever sentence they think is right. But on the contrary, a sentence which is handed down exclusively in accordance with a predetermined schema — without, therefore, *any* responsibility for the consequences and without any decision at all — is not in keeping with the judicial process. The court is being required to give its imprimatur to a process but at the same time it is being prevented from exercising the responsibility or judgment that would legitimate that process. This is precisely what it means to ‘impermissibly interfere’ with the judicial process: the process, by abandoning any element of responsibility or decision, has ceased to be judicial at all.¹⁰⁹ As Justice Santow, speaking extra-curially, concluded,

Yet judges must pronounce the mandatory sentence as if their own and with no discretion, so lending the court’s odour of judicial sanctity to the legislature’s pre-ordained outcome as adjusted by the discretion of the prosecuting executive.¹¹⁰

The moral dimension captured by the word responsibility is relevant because it justifies the judicial process in a social sense. It also provides it with a legitimacy in the eyes of those involved. From the point of view of the judge, there is something very wrong in requiring him or her to exert force — again, let us emphasise that sentencing is the exercise of vicarious coercion — apart from their free will. There is an essential moral difference between giving a court a limited, perhaps a very limited, capacity to make choices, and taking away the possibility of choice altogether. The court is being placed in the compromising position of having to act as the puppet of the government in a matter in which the government finds itself unable to act directly. This is an abuse of the judicial process.

More importantly, from the point of view of the prisoner, the court’s irresponsibility must strip the experience of sentencing of any moral significance. Punishment is legitimate because it passes a moral judgment on a person. It speaks to that person, and demands of them that they take responsibility for their conduct as the court takes responsibility for its. But, as Kant insisted, only a person can judge. In a comprehensive survey of the implications of mandatory sentencing ‘grids’ introduced in the United States in the 1980s, Stith and Cabranes make a similar point:

108 See D Manderson, ‘Tales from the Crypt’ in D Manderson (ed), *Courting Death: The Law of Mortality* (1999) at 12.

109 Above n26 at 220 (McHugh J).

110 G F K Santow, ‘The High Court and Mandatory Sentencing’ *Sydney Morning Herald* (28 March 2000).

The judge's power — duty — to weigh *all* of the circumstances of the particular case, and *all* of the purposes of criminal punishment, represented an important acknowledgment of the moral personhood of the defendant and the moral dimension of crime and punishment ... By replacing the case-by-case exercise of human judgment with a mechanical calculus, we do not judge better or more objectively, nor do we judge worse. Instead, we cease to judge at all. We process individuals according to a variety of purportedly objective criteria. But genuine judgment, in the sense of moral reckoning, cannot be inscribed ...¹¹¹

If we wish to communicate the legitimacy of punishment to any person in the world, it must be to the person who has to undergo it. But by stripping the court of the *ability* to actually *decide* to impose a sentence on the offender, no matter how constrained that choice, the judge loses his or her capacity to speak to that person from a position of authority or indeed of humanity. If the court is not responsible for its actions, and it is not — if there is no moral dimension to its decision, and there is not — then why should the prisoner accept any responsibility for theirs? Why should they acknowledge their punishment as justified?

A legal system which demands of its citizens that they take responsibility for their actions cannot simultaneously take away all responsibility from the officials that punish them. The subjects of the *Sentencing Act* may, acting out of fear, obey the law in the future, but they will have lost any sense that they *ought* to do so. As HLA Hart clearly articulated, the difference between a community in which one is obliged to follow the law, and one in which one has an *obligation* to follow the law, marks the line between a legal system and a mafia.¹¹² For both the offender *and* the judge, and for the community as a whole, the Northern Territory's *Sentencing Act* reduces law and punishment from a legitimate moral process, to an offer that can't be refused.

During the second reading speech of the *Sentencing Act*, Attorney-General Burke attempted to respond to this kind of critique as follows:

The criminal, the person who has said: *to hell with your laws, to hell with your rights, to hell with you, I want and I am going to have whether you like it or not* [sic]. This government says that if that is their attitude then we say to hell with them.¹¹³

That is precisely what a judge cannot say — to anybody, above all to the prisoner before them — and still be said to be acting judicially. A judge cannot say, 'to hell with you'. In being made to say so, he or she is no longer participating in a *judicial* process at all.

111 Above n76 at 78–82.

112 H L A Hart, *Concept of Law* (1961) at 80. On the distinction between law and 'the commands of a gunman', see also O W Holmes, 'The Path of the Law' (1897) 10 *Harv LR* 457.

113 Above n2.

C. *Discretion and History*

The argument so far may be taken to imply that only the widest possible judicial discretion can be justified. That is not our intent. On the contrary, the paramount distinction to be drawn for the purposes of understanding the nature of the judicial process is between constrained discretion and none. Only the latter removes altogether the element of moral responsibility from sentencing and consequently denies the judge a judicial role. Although there are of course other examples of mandatory sentencing, they are normally in relation to regulatory offences, for example, by a mandatory license suspension on conviction of driving under the influence. But this is not a sound analogy. The withdrawal of a privilege is not at all to be compared with the deprivation of liberty, for example by the imposition of a term of imprisonment. In relation to the latter, we wish to argue that the claim that mandatory sentence provisions are well established in the history of English law is in fact false.

So too, a mandatory sentence is dramatically different from legislation which provides, typically, for a minimum or maximum penalty for an offence. No-one would argue that judges are entitled 'to set sentences free from standards that might constrain [the] exercise of discretion'.¹¹⁴ On the other hand, there is a strong 'presumption' in favour of a wide degree of judicial discretion in sentencing.¹¹⁵ But what the Northern Territory legislation does is remove a variety of *other* sentencing options which exist independently of provisions for a minimum penalty, including most importantly the power to discharge an offender conditionally or unconditionally, to impose a bond, or to suspend the sentence. When the only alternative is a custodial sentence, these are serious omissions indeed. Thus the *Sentencing Act* provides that in the normal case, a judge may:

- (a) without recording a conviction, order the dismissal of the charge for the offence;
- (b) without recording a conviction, order the release of the offender;
- (c) record a conviction and order the discharge of the offender;
- (d) record a conviction and order the release of the offender;
- (e) with or without recording a conviction, order the offender to pay a fine;
- (f) with or without recording a conviction, make a community service order in respect of the offender;
- (g) record a conviction and order that the offender serve a term of imprisonment that is suspended by it wholly or partly;
- (h) record a conviction and order that the offender serve a term of imprisonment that is suspended on the offender entering into a home detention order; ...¹¹⁶

The importance of these options is that they maintain a balance between prosecutorial discretion (in deciding who is to be charged and with what offences)

114 Ashworth, above n100 at 181.

115 Above n101 at 6.

116 *Sentencing Act* s7.

and legislative discretion (in deciding on a penalty regime for an offence) on the one hand, and a countervailing judicial discretion (in deciding particular cases before it), on the other. The *Sentencing Act* removes only the last.

Conceptually, the distinction between prescribed penalties and these other sentencing options can readily be appreciated. It makes perfect sense for the government to define in law the parameters of an appropriate custodial sentence, since it will have to administer and maintain these prisoners. The court by its sentence commits the executive arm to a significant and on-going involvement. Minimum and maximum penalties in fact tell the court what measures the government is prepared to undertake to enforce the court's order. It would be as inappropriate for a court to sentence an offender to a term of imprisonment shorter than is worth the government's while, as it would be to sentence them to a term longer than the government is prepared to sustain. So too, a fine is collected by and on behalf of government revenue, and again it is appropriate that the level of revenue be set by it. But with respect to discharge, bond, or suspension, the matter is otherwise. These are *judicial* acts that require virtually no additional or executive action.¹¹⁷ They are not commands that by their very nature require extra-judicial enforcement. Rather, they resolve the matter immediately it is before the court. The discretionary exercise of these options therefore stems from the integral powers of the judicial office itself.

One might imagine, as did Justice Hayne, that the legislature has always had the power to fix life as the mandatory punishment for murder, or capital punishment as the punishment for felony.¹¹⁸ The position in relation to murder is perhaps the most commonly put argument, but in truth it is the most easily refuted. In the Northern Territory, there is a mandatory life sentence for murder.¹¹⁹ But the trier of fact may always in its discretion bring in a finding of manslaughter on a prosecution of murder¹²⁰ — on grounds of provocation or diminished responsibility, if these matters have been raised, but in any event simply because the jury finds the requisite *mens rea* not proven. Clearly the reason for such a decision may relate to the greater range of sentencing options available on conviction of the lesser included offence.¹²¹ Indeed, historically, the purpose of the manslaughter verdict was precisely to ameliorate the rigours of the death penalty for murder; even here the legal system has recognised the need to provide some leeway in the sentencing of offenders. In effect, there *is* no mandatory punishment for murder since the lesser offence is always available *regardless* of how it is prosecuted. No analogy exists in relation to the crimes covered by the *Sentencing Act* — no lesser included offences are available.

117 There are of course some record-keeping requirements, and it is often the case that those subject to a bond or discharge order go through a period of parole. It does not seem to us that these aspects weaken the conceptual distinction.

118 *Wynbyne v Marshall*, above n8.

119 *Criminal Code Act* (NT) s164.

120 *Id.*, s316.

121 *Id.*, s167.

So too the historical position in regard to felonies was distinctly more complicated than is often supposed. Whilst it cannot be said that there have been no mandatory sentences required under the law of England, the position is often overstated. James Fitzjames Stephen's monumental *A History of the Criminal Law of England* indicates that in regard to the position early in the 19th century, punishment of felony was absolute in only a very few cases. Judges were given general and additional powers to set sentences of imprisonment or transportation below that prescribed by statute in 1846.¹²² By the time of the publication of Stephen's epic in 1883, the singular instance in which a minimum term was retained in England was for the punishment of 'unnatural offences'.¹²³ Hardly a propitious precedent.

Certainly, in the very early days of the common law, the punishment for felony was both harsh and limited. Under Saxon law, the penalty was either compensation by *were* or *wite*, or physical mutilation, or death.¹²⁴ But of course the reason was not principle but practical. Neither 'the courts' (meaning, historically, communities) nor 'the State' (meaning, historically, feudal lords) had the means to impose any sentence which was not immediate in its effect. The prison, like the police, is a relatively modern development that allows an infinite calibration of penalty from the slightest to the most severe.¹²⁵ But such a subtle range of punitive devices was quite impossible and indeed inconceivable in earlier times. Prior to the emergence of the modern State, the absolute nature of criminal punishment did not reflect any understanding of a constitutional entitlement, but rather the pragmatic deployment of very limited technologies of enforcement. The *Sentencing Act* is, on the one hand, therefore a throwback to a much earlier era and, on the other, and in stark contrast thereto, a choice, a conscious legislative strategy. This one element marks it out from all the earlier laws with which it is sometimes favourably compared.

Yet there have always been ways around the perceived inflexibility of penalties. Since ancient times, a great many offences were and over time became 'clergiable'. Originally a protection afforded only to those in religious orders, to plead 'benefit of clergy' allowed one to avoid the severity of punishment for almost all felonies including murder, replacing it with the relatively minor experience of being branded on the thumb.¹²⁶ As the centuries passed, however, the protection expanded to cover all the literate population of England, although for those not actually in orders the benefit could be claimed only once.

Benefit of clergy consisted in being excused from capital punishment, but the person who claimed it was, till 1779 (unless he was a peer or a clerk in orders), branded in the hand, and might be imprisoned for a term *not exceeding* one year. If his offence was larceny he might be transported for seven years.¹²⁷

122 Above n1 at 482; 9 & 10 VICT., c. 24, s. 1.

123 Ibid.

124 Id at 57. See also id at chXIII.

125 See M Foucault, *Discipline and Punish* (1975).

126 Above n1 at 462–463. Offences 'touching the king's person' were excluded, as was highway robbery and arson: id at 464.

127 Id at 463.

At the same time, 'clergy' was gradually but irregularly taken away from a number of offences including murder, burglary, rape, and stealing clothes off the rack.¹²⁸ Benefit of clergy was therefore a somewhat anomalous formality yet it served the invaluable purpose of ameliorating otherwise harsh and inflexible penalties, particularly in an era in which other judicial options were unavailable. Throughout the history of the English law, the system has always recognised the need for a safety valve in one form or another. The problem, of course, was that benefit of clergy was both antique in form and irregular in coverage.¹²⁹ It was finally abolished in the 19th century by 7 & 8 GEO. IV c. 28, s. 6¹³⁰ as a direct corollary to the dramatic diminution in the number of offences which called for the death penalty, and as judicial discretion to impose a punishment which fit the actual circumstances of the crime correspondingly increased.

The so-called *Black Act*¹³¹ and related legislation make an illuminating study. It would appear that by the end of the 18th century a wide range of felonies, ranging from the destruction of looms to sheep-stealing and much else besides, were subject to a 'mandatory' sentence of death. The Acts themselves were intensified and enforced as part of an aggressively reactionary response by the English government to the alarming events of the French Revolution, and of course to the disruptive consequences of industrial change.¹³² But in fact the Acts were anything but mandatory. A great many people were executed *sus. per. coll.* in the 18th and early 19th century, the hey-day of the death penalty; but a great many more were spared. Indeed, Douglas Hay's seminal study revealed how few of the 'mandatory' death sentences were actually carried out: the 'bloody code' was remarkably bloodless.¹³³ Several reasons may be advanced.

First, quite aside from benefit of clergy, in many cases the judge's inherent options to discharge or display leniency continued and indeed, as Hay argues, the existence of these options was absolutely central to the maintenance of the power of the legal system in the 19th century. According to Hay, it was the very fact of judicial as well as prosecutorial discretion that entrenched a structure of social relations in which industrial and farm workers were encouraged to display a lifetime of subservience in return for their dependence, within the legal system, on the good offices of their landlords and superiors.¹³⁴ In short, the *non*-mandatory nature of the penalty system, its very capacity to display flexibility and reward obedience, ensured the long-term stability of the social system by giving even its victims an incentive to display respect and obedience to their betters.

128 1 EDW. VI, c.12 s.10, 18 ELIZ., c. 7, 22 CHAS. II, c. 5: see id at 465-466.

129 Yet of undoubted significance: see id at 467-469.

130 Id at 462.

131 9 Geo. I, c. 27 (1722).

132 E P Thompson, *Whigs and Hunters* (1975).

133 D Hay, 'Property, Authority, and the Criminal Law' in D Hay, P Linebaugh, & E P Thompson (eds), *Albion's Fatal Tree: Crime and Society in 18th Century England* (1977). See also C Reid, 'Tyburn, *Thanatos*, and Marxist Historiography: The Case of the London Hanged' (1994) 80 *Cornell LR* 1158; D Hay, 'The Criminal Prosecution in England and its Historians' (1984) 47 *Mod LR* 1 and J Langbein, 'Albion's Fatal Flaw' (1983) *Past & Present* 96.

134 Hay, 'Property, Authority and the Criminal Law', *ibid*.

Second, and of course as a matter of great significance in Australian history, judges in practice routinely recommended commutation of the death penalty to a pardon 'conditional on their being transported'.¹³⁵ The statute 8 GEO. III, C. 15 explicitly gave a Judge of Assize power to order persons convicted of crimes without the benefit of clergy to be transported for any term they thought proper, or for 14 years if no term was specially mentioned, but the power was exercised on the recommendation of the judge long before its enactment. Here again the severity of a felonious sentence was in practice ameliorated by a well-recognised discretionary power exercised according to the good sense of the judge. In fact, so rarely was a sentence of death carried out that by 4 GEO. IV, c. 48 (1823), the court was authorised to abstain from actually passing sentence of death in cases in which there was no intention to execute it.¹³⁶

Third, especially in relation to death penalty crimes, the problem of jury nullification was endemic. There is a multitude of evidence that juries regularly brought in verdicts of not guilty when the facts were clearly against them, or alternatively found the value of the property stolen (for example) to be sixpence less than the amount required under the offence; simply in order to avoid the severity of the sentence. So serious was this problem, so greatly did it undermine the credibility of the rule of law, that it was one of the principal reasons for the wholesale abandonment of the bloody code and its replacement by a more discriminating and flexible approach to punishment. But one might argue that, at the time, jury nullification was yet another safety valve to allow some discretionary judgment to operate within the criminal justice system — if not officially, then unofficially. The situation now is somewhat different. Given that most of the offences governed by the *Sentencing Act* are to be heard by a magistrate sitting alone, it is hardly appropriate to argue that the discretion of jury nullification remains or even, since a magistrate's judgment is public and must be publicly justified, that it is possible within the terms of his appointment. Here too then the supposedly rigorous contours of the old laws turn out to be substantially less mandatory than the Northern Territory's own *Black Act*.

Jury nullification became of declining importance as legislatures realised during the nineteenth century that there were other, more legitimate and public, ways of permitting discretion in the sentencing of offenders. For by then legislatures throughout the common law world had come to appreciate something of the gravest importance. On the one hand, sentencing discretion is a *necessary* element in the criminal justice system and, like a bubble of air, it will find its way to the surface one way or another. On the other, if instead of concealment and denial, the exercise of that discretion is structured, guided, and made publicly accountable, the rule of law will actually be safeguarded. It is a lesson that was slowly but consistently learnt over the long course of English legal history.

135 Above n1 at 470–471.

136 Id at 472.

4. *Conclusion*

Our argument has been that the mandatory sentencing regime of the Northern Territory offends against basic constitutional principles of judicial process and undermines the rule of law. It does this because it fails to recognise the elemental nature of judgment in relation to the sentencing of offenders. This proposition would be sustained by a wide range of otherwise diverse legal theories. Neither does the history of the common law demonstrate a kind of blanket rule that Parliament may, in its wisdom, enact any penalty it likes in an absolute and unalterable form. The whole history of the law demonstrates on the contrary, a subtle appreciation of the need for discretionary judgment embedded in the coercive powers of the judge. Mandatory sentencing in its strictest sense has nothing to do with the guidance provided by minimum or maximum penalties. As a thorough-going denial of *all* the court's discretion on the one hand, and as a conscious legislative *choice* on the other, it is a radical recent innovation which has overturned 150 years or more of sentencing practice, and fundamental understandings which go back much further.

We have shown that the principles articulated by the majority in *Kable* can be used to successfully challenge the constitutionality of section 78A of the *Sentencing Act*. In particular, it seems almost certain that a majority of the High Court would be prepared to conclude that the Northern Territory courts are such 'other courts' as may be vested with the federal judicial power pursuant to section 71 of the Constitution. As such, the Northern Territory courts must not be vested with powers which would impermissibly interfere with the exercise or potential exercise of the federal judicial power.

The real challenge in our article has been to identify exactly what aspects of section 78A impermissibly interfere with the exercise or potential exercise of the federal judicial power. This has required us to consider the nature of the judicial process, and in particular, what we identify as one critical part of that process — the need for the person who presides over that process, the judge, to retain a certain quality of discretion.

Let us now return to the questions adumbrated by Justice Hayne and echoed by Justice Gaudron in refusing special leave to appeal in *Wynbyne v Marshall*:

[1]Does your contention amount to a proposition that a legislature may not, one, fix a minimum penalty for an offence; two, may not, for example, as it did until 10 years or so ago, fix life as the mandatory punishment for murder; [three,] may not, as historically was the case, fix capital punishment as the punishment for all felony?

[2]Leave aside then whatever might be said about the wisdom or social utility of such a rule, what is it that brings it into conflict with the elements of judicial power?

[3]What is it about the court applying the law prescribed by Parliament that brings the court into disrepute?¹³⁷

Our answers to these questions should by now be apparent. As to the first, there is a fundamental difference between the prescription of a minimum penalty on the one hand, and the imposition of a genuinely mandatory sentence on the other. So too, it is not entirely accurate to present the history of the English criminal law as providing typically for mandatory sentences, either in the case of murder or otherwise. A closer examination reveals several important aspects. Life was not the mandatory punishment for murder given the availability of manslaughter. Capital punishment was never the punishment for all felony. The English law has always recognised the importance of individualised sentencing. It has always provided subtle means by which an element of discretion was preserved in the sentencing process. And the history of punishment shows an ineluctable trajectory towards the increasing transparency and regularisation of that discretion. Against these several propositions, the Northern Territory's *Sentencing Act* stands resolutely opposed.

As to the second, judicial power is impermissibly compromised by legislation which removes the elements of discretion which have always allowed those who preside over the judicial process — judges — to exercise *judgment* in the imposition of force. We argue that the ability of the judge to actually *judge*, often channelled but never extinguished, legitimates the coercion of the judicial office and gives it a proper gravity and respect. On this view, discretion is essential to judgment — it is what makes the process judicial; perhaps this is nowhere more important than in the act of sentencing. By requiring of judges that they condone the custodial violence of the State (as only they can) in a manner which is unrelated to their office, the legislature impermissibly interferes with the judicial process.

As to the third, the court is brought into disrepute in several ways. First, the 'mandatory' element of the *Sentencing Act* requires the court to pass sentence when no theory of sentencing can justify it. This lack of justification must lessen the courts' repute in the wider community and, no less importantly, draw forth the contempt of those who are sentenced by it. Second, the court is being asked to behave in a way that is, literally speaking, irresponsible. We have argued that, ultimately, the legitimacy of law draws on a concept of responsibility without which the process is reduced to a sham and the courts forfeit their claim to be acting judicially.

Against this, the defenders of the government of the Northern Territory may seek to confer a *democratic* legitimacy on its deliberations, and demand of the courts mere obedience to the government's will. The High Court, in the exercise of *its* responsibility, must resist this populist appeal. Parliament cannot, by the use of such an argument, cloak elements integral to the judicial process in some vicarious legitimacy, as if the judicial deficit could somehow be made up from elsewhere. The court is not a sorcerer's apprentice, born to servitude, whose feeble attempts to go beyond the imprecations of its master will go horribly awry. Because courts and parliaments are different, different theories justify them: elements of the judicial process, of which the punishment of offenders is integral,

stem from a concept of judicial authority which has its *own* ancient sources. The courts' integrity and independence and the independent sources of its legitimacy are crucial to the Australian legal system. These principles are recognised by virtually every philosopher of the law, have been refined throughout our legal history, and are specifically defined according to the constitutional doctrine of incompatibility as developed in *Kable*. These constitutional principles are not just about the separation of powers but about the inherent normative content of the judicial process. Alas, the *Sentencing Act* attempts to hold back these tides of jurisprudence, which have rolled for many centuries. As King Canute himself discovered, that can't be done.