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Can Counter-Terrorist Internment Ever be Legitimate?

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ABSTRACT

Counter-terrorist internment is generally rejected as illegitimate from a human rights perspective. However, while the *practice* of counter-terrorist internment has long resulted in the infringement of human rights, this article argues that the *concept* of internment holds some potential for legitimacy. This potential can only be realized if four legitimacy factors are fully embraced and complied with: public justificatory deliberation, non-discrimination, meaningful review, and effective temporal limitation. Outlining these factors, this article imagines a system of internment that is legitimate from a human rights perspective and can serve both real and pressing security needs, *and* rights-based legitimacy needs.

I. INTRODUCTION

Detention without trial, also termed "internment,"[1] has long been used by governments faced with what is perceived to be a grave threat to national

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1. It is now common to use the phrase "preventive detention" in place of "internment," perhaps because of the militaristic and intuitively negative connotations that the word "internment" conjures up. The term "internment" is used in this article in a deliberately provocative way in order to mount as firm a challenge as may be to the concept of marrying "legitimacy" with "internment." For a brief overview of terminology in this

security,[2] such as terrorism.[3] From Ireland and Northern Ireland, Turkey, Pakistan, and the United Kingdom to Guantánamo Bay and CIA "black sites" in Europe, internment has both been employed as a national defense mechanism and aroused enormous controversy. It is controversial not only because it deprives internees of liberty, but because that deprivation occurs in the absence of a charge, trial, or conviction for any criminal wrongdoing, reflecting the sharp end of the well-documented contemporary movement toward law and policy-making based on risk and uncertainty rather than guilt.[4] In addition, detention without trial is widely seen as strategically misguided—as a tactic that gives rise to "backlash" in the form of alienation, radicalization, and resultant increases in terrorist activity.[5] It holds, as David Lowry wrote, "the potentiality for moral corruption and arbitrariness" against which scholars and commentators must exercise caution.[6] Such criticisms are both accurate and deserved when directed toward the systems of detention without trial employed by the United States (and to a lesser degree, by the United Kingdom) in the War on Terrorism and, indeed, in other contexts such as "the Troubles" in Northern Ireland. The aim of this article, however,

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respect *see, e.g.*, Claire Macken, Counter-Terrorism And The Detention Of Suspected Terrorists: Preventive Detention And International Human Rights Law 5-6 (2011).

2. *See, e.g.*, The Internment of Aliens in Twentieth Century Britain (David Cesarani & Tony Kushner eds.,1993); 'Totally Un-English?' Britain's Internment of 'Enemy Aliens' in Two World Wars (Richard Dove ed., 2005); Natsu Taylor Saito, From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State (2007); Cate Elkner, Ilma Martinuzzi O'Brien, Gaetano Rando & Anthony Cappello, Enemy Aliens: The Internment of Italian Migrants in Australia During the Second World War (2005); Kieran McEvoy, Paramilitary Imprisonment in Northern Ireland: Resistance, Management and Release 204-226 (2001); Enemies Within: Italian and Other Internees in Canada and Abroad (Franca Iacovetta, Roberto Perin & Angelo Principe eds., 2000); Raphael Cohen-Almagor, *Administrative Detention in Israel and Its Employment as a Means of Combating Political Extremism*, 9 N.Y. Int'l L. Rev. 1 (1996).
3. Of course, "terrorism" is a contested term that has so far defied definition in international law. In this article, however, the term should be taken to mean non-state actor violence directed toward civilians and intended to bring about particular state responses. *See, e.g.*, Jack P. Gibbs, *Conceptualization of Terrorism*, 54 Am. Soc. Rev. 329 (1989), for a useful analysis of definitional quandaries in this respect.
4. Lucia Zedner, *Fixing the Future? The Pre-Emptive Turn in Criminal Justice*, *in* Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law 35 (Bernadette McSherry, Alan Norrie & Simon Bronnit, eds., 2009).
5. *See* Martha Crenshaw, *The Causes of Terrorism*, 13 Comp. Pol. 379 (1981); Clark McCauley, *Jujitsu Politics: Terrorism and Responses to Terrorism*, *in* Collateral Damage: The Psychological Consequences of America's War on Terrorism 45 (Paul Kimmel & Chris Stout eds., 2006); Fionnuala Ni Aoláin & Oren Gross, *A Skeptical View of Deference to the Executive in Times of Crisis*, 41 Isr. L. Rev. 545, 554–55 (2008); Gary Lafree, Laura Dugan & Raven Korte, *The Impact of British Counterterrorist Strategies on Political Violence in Northern Ireland: Comparing Deterrence and Backlash Models*, 47 Criminology 17 (2009).
6. David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 Hum. Rts. 261, 262 (1975). Adam Tomkins has described internment as "among the most serious measures emergency legislation can enact." Adam Tomkins, *Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001*, P. L., 2002, at 205, 213.

is to question whether these criticisms are justified in relation to detention without charge *per se* or whether, in contrast, the extent to which these criticisms can justifiably be levied depends on how a system of detention without charge or trial is designed and implemented. The article argues that, at least at the level of theory, it may be possible to design and implement a legitimate system of internment.

The aim of this article is not to question the proposition that such a system ought to be introduced only where there is, in fact, an emergency that threatens the life of the nation or that such an emergency and the need for detention without charge or trial ought to be made out as a factual case and subjected to scrutiny by both political and judicial bodies. This proposition, drawn quite explicitly from international human rights law,[7] is accepted as a prerequisite to the introduction of detention without trial. In fact, as further elaborated on below, limiting this tactic to such truly exceptional situations is an important factor in establishing legitimacy within the model being proposed. The elaboration of a proposed model within which internment might have some legitimacy, while discomforting, is motivated by a belief that as human rights scholars who aim to influence national defense policy from a rights-based perspective, we ought to extend our analysis beyond the *prima facie* objectionability of internment as a counter-terrorist strategy and consider whether it could be designed and implemented in a fashion that is legitimate and proportionate. Bearing this in mind, this article argues that detention without trial is not an illegitimate counter-terrorist tool *per se*; rather, a legitimate system of detention without trial might be possible if four legitimacy requirements are adhered to. This article identifies these "legitimacy factors" as: 1) public justificatory deliberation, 2) non-discrimination, 3) meaningful review, and 4) effective temporal limitation.

As an important starting point, a model of this kind requires us to reject the dichotomous presentation of security and human rights that has emerged in some literature in the wake of the attacks of 11 September 2001[8] and to

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7. This is based on the derogations regimes found within the International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 4, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, art. 15, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953). It should be noted, however, that the treaty enforcing bodies in international law, and especially the European Court of Human Rights, have not generally been particularly rigorous in their consideration of whether a state is actually experiencing a state of emergency and especially whether a detention without trial regime introduced on foot of a derogation is proportionate and compliant with the particular human rights regime. Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists*, 12 J. Conflict & Security L. 223, 247–55 (2007).

8. Eric Posner and Adrian Vermeule, for example, conceptualize liberty and security as existing on a Pareto Frontier within which a reduction in one results in an increase

recognize instead the capacity (and at times the need) for the proportionate and rights-compliant infringement of some individual liberties in the interests of security, although there are some liberties (such as the right to be free from torture) that can never be infringed upon in any circumstances. The human rights framework as it currently exists allows for states to take security-motivated action without disproportionately repressive violations of individual rights.[9] Indeed, international human rights law and its system of derogations in times of emergency are expressly designed to facilitate such an approach.[10] This is often referred to as a "balancing" approach to security and rights. The language of balancing is problematic because it does not fully capture this kind of co-existence between rights and security.[11] A balancing approach suggests that every thing and every right is "up for grabs," whereas recognizing co-existence between rights and security reminds us that there are limits to both individual rights *and* security-motivated state action. However, the language of balancing can be useful when employed within a framework that rejects dichotomous constructs and is used in that context in this piece. This article argues that a process-based approach to detention without trial that is built around the architecture of international human rights law and infused with principles of the rule of law and democracy is possible. An approach of this kind allows us to acknowledge that detaining people without charge or trial will sometimes be a necessary measure where there is a serious threat to the security of the state and where that threat is deeply embedded into civilian society (i.e. where there is no conventional situation of "armed conflict") *but* that this need not mean the rejection of individual rights or state engagement in illegitimate action.

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in the other. Eric Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty and the Courts 12 (2007).

9. This cannot be done, of course, in relation to absolute rights such as, for example, the right to be free from torture under Article 3 of the European Convention on Human Rights (Saadi v. Italy App. No. 37201/06, 49 Eur. H.R. Rep. 30 (2008)), but it can be done in relation to rights that are capable of limitation. This is possible even without derogation where the margin of appreciation, and the limitation clauses of rights themselves (including references to those actions "necessary in a democratic society" found throughout the European Convention on Human Rights) provided actions taken are themselves proportionate and objectively justifiable. For analysis *see* Stefan Kirchner, *Human Rights Guarantees during States of Emergency: The European Convention on Human Rights,* 3 Baltic J. L. & Pol. 1 (2010).
10. Joan Fitzpatrick, Human Rights in Crisis: The International System for Protecting Rights During States of Emergency 36 (1994).
11. *Id.* at 57–64. *See also* Oren Gross, *Security vs. Liberty: An Imbalanced Balancing* (Minn. Legal Studies Research Paper No. 09-42, 2009), *available at* http://ssrn.com/abstract=1471634 (exploring in depth the challenges of balancing as a judicial mechanism in counter-terrorist crises with particular attention on biases and heuristic devices that may skew the analysis in this context).

II. LEGITIMACY AND THE RULE OF LAW

Any model of a legitimate system of detention without trial must first of all grapple with the concept of legitimacy. This article argues that legitimacy is bound up with the rule of law in its broad sense—in other words, that a system derives its legitimacy from its compliance with the basic tenets of the rule of law. Thus, although the proposed model of detention without trial is very much a process-based one, this does not mean that it is based only on a narrow conception of the rule of law. Rather, because the processes that this article identifies as necessary for the establishment of legitimacy run across all of the main public functions of the state (executive, legislative, judicial, administrative, and law-enforcement), they are tightly tethered to broad conceptions of the rule of law. Thus, the model recognizes that for any internment to be legitimate, all of the elements of the state that are involved in the creation, implementation, and administration of a system of detention without trial must act in a manner that is compliant with the rule of law *and* that gives individual detainees the opportunity to launch an effective challenge to their detention. As Imelda Maher has expressed in a different context, it reflects the fact that compliance with the rule of law can both constrain and legitimate the exercise of public power.[12]

Over time our conceptions of the rule of law have broadened and deepened, largely due to increasing democratic participation, transnational and international cooperation and institution-building, the development of regional and international standard-setting organizations, and treaties and enforcement mechanisms (particularly in the context of human rights). Thus, rather than refer solely to the "rule of law" *simpliciter*, we now find ourselves concerned with the democratic rule of law,[13] the international rule of law,[14] broad rule of law,[15] narrow rule of law,[16] Asian perspectives on the rule of law,[17] and more.[18] To all of these conceptions of the rule of law, however, the concept of legitimacy is fundamental. For narrow rule of law scholars,

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12. Imelda Maher, *Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network*, 7 Comp. Eur. Pol. 414, 419 (2009).
13. Guillermo O'Donnell, *Why The Rule of Law Matters*, 4 J. Democracy 32 (2004).
14. Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 Va. J. Int'l. L. 19 (2003).
15. Ronald Dworkin, Law's Empire 93–94 (1986); Paul W. Kahn, The Reign of Law (1997).
16. F.A. Hayek, The Constitution of Liberty (1960); Joseph Raz, *The Rule of Law and its Virtue*, 93 Law Q. Rev. 195 (1977).
17. Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S. (Randall Peerenboom ed., 2004).
18. For an in-depth consideration of the rule of law, its history and its meaning, *see* Brian Z. Tamanaha, On The Rule of Law: History, Politics, Theory (2004). For a contemporary, reflective, and holistic perspective on judicial conceptualizations of the rule of law, including the role of rights-protection within it, *see* Tom Bingham, The Rule of Law (2010).

legitimacy is connected with the concept of lawfulness.[19] By contrast, broad rule of law scholars see legitimacy as a more textured concept.[20] Following this approach, in the context of this article the suggestion that legitimacy and lawfulness are coterminous is denied: there are too many examples of detention without trial and internment systems having been lawful but not legitimate.[21] Rather, any attempt to create a legitimate counter-terrorist strategy must engage the complex factors that feed into the notion of legitimacy. These factors ensure that we are governed by reference to constitutionalist conceptions of the rule *of* law, rather than rule *by* law.

To propound what this article terms a "process-based system of detention without trial" is perhaps to advocate a *prima facie* "narrow" model of the rule of law, but the depth and breadth of that process refutes this label. What Jonathan Rose calls a "narrow" rule of law[22] and George Fletcher describes as a "modest version" of the rule of law[23] is essentially based on the notion of governing by reference to rules and process without necessarily taking into account the legitimacy, justice, fairness, or rigor of those rules or processes. While proponents of the narrow rule of law argue that these rules and processes are generally to be focused on "on the prevention of arbitrary governmental action and the protection of individual rights,"[24] the narrow rule of law construct is not focused on whether or not—from the perspective of (the admittedly ambiguous notion) of justice—the law by which the state is to be ruled is "good."[25] In contrast, the "broad" conception of the rule of law (or what Fletcher describes as "a more lofty ideal that incorporates criteria of justice,"[26]) is concerned not only with ensuring that laws are created and administered by means of a legitimate process but also that their content is itself in keeping with fundamental principles of liberal democracy.[27] In other words, rather than claiming that adhering to proper

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19. *See, e.g.*, Robert Summers, *A Formal Theory of the Rule of Law*, 6 Ratio Juris 127-41 (1993).
20. *See, e.g,.* Paul Kahn, The Reign of Law 1-100 (1997).
21. By means of example, internment in Northern Ireland was created by legislation, (Civil Authorities (Special Powers) Act (Northern Ireland) 1922), as was internment in Ireland, (Offences against the State Act 1939 (Act No. 13/1939)), *available at* http://www.irishstatutebook.ie/1939/en/act/pub/0013/index.html. Detention in Guantánamo Bay was initially done under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), which led to a Presidential Order entitled "Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism," 66 F.R. 57833 (16 Nov. 2001). The detention was subsequently reconstituted by the Detainee Treatment Act of 2005, Pub. L. No. 109-163, 119 Stat. 3136, 3474 (2006).
22. Jonathan Rose, *The Rule of Law in the Western World: An Overview*, 35 J. Soc. Phil. 457, 459 (2004).
23. George P. Fletcher, Basic Concepts of Legal Thought 11 (1996).
24. Rose, *supra* note 22, at 459.
25. Rose, *supra* note 22, at 459–60.
26. Fletcher, *supra* note 23, at 11.
27. Dworkin, *supra* note 15, at 93–94.

processes in the creation and administration of laws will protect individual rights,[28] a broader conception of the rule of law requires us to ensure that both the formal processes and the substantive content of the law strike a balance between individual liberty and governmental power responsibly exercised. This view of the rule of law is perhaps most ambitiously expressed by Judith Shklar, who argues that conventional conceptions of the rule of law are insufficiently concerned with the content of the law and with the capacity of the rule of law as a foundational concept to control and limit governmental action, rather than as a means of providing a mandate to such action.[29] For Shklar, the rule of law retains its usefulness only if we commit ourselves to seeing it "as an essential element of constitutional government generally and of representative democracy particularly" bearing in mind that our starting point must be "the fear of violence, the insecurity of arbitrary government, and the discriminations of injustice."[30]

Thus, although process-based, the model of detention without trial that is mooted in this article does not fit well within the narrow conception of the rule of law. Rather its emphasis on legitimacy and non-arbitrary and non-discriminatory government action identifies it with a broader view of the rule of law. This is particularly so because of the focus on legitimacy within the model.

The role of process and procedure in bringing about legitimacy is widely recognized. Mark Thatcher and Alec Stone Sweet have turned their attention to procedural legitimacy in the context of delegated powers, where they argue that procedural legitimacy can be an effective alternative to the electoral accountability that we rely on in relation to non-delegated powers.[31] Their argument is focused on outputs, such as the legitimacy of the result of a dispute, and they argue that where the process leading to the output has been a legitimate one, involved actors are more likely to accept and abide by it even if it is not the output that they had hoped to achieve.[32] In contrast, Thomas Franck's groundbreaking works *The Power of Legitimacy Among Nations* and *Fairness in International Law and Institutions*[33] focused on input process legitimacy and on the methods of law and norm-creation. In the context of counter-terrorist action, legitimacy can perhaps be most usefully tethered to notions of constitutionalism in the Lockean sense of limit-

28. Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (8th ed. 1915).
29. Judith N. Shklar, Political Thought and Political Thinkers 21–37 (1998).
30. *Id.* at 36.
31. Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, *in* The Politics of Delegation 1 (Mark Thatcher & Alec Stone Sweet eds., 2003).
32. *Id.*
33. Thomas M. Franck, The Power of Legitimacy Among Nations (1990); Thomas M. Franck, Fairness in International Law and Institutions (1998).

ing a government in its exercise of powers.[34] The sources of those limitations are not only written and unwritten constitutions but also constitutionalist values including respect for individual rights and proportionality of security-motivated state action. These values, of course, are also embedded in broad rule of law theory. This means, to some extent at least, that legitimacy and the rule of law as understood within this piece have a connectivity (if not a circularity) that is important, for if a model of detention without trial can be designed that is legitimate, then its adherence to broad rule of law principles may be as closely assured as possible.

As an initial matter, however, it is important to address the "slippery slope" argument that might easily be made against the position advanced in this paper: namely, if internment can be made legitimate, so can other forms of rights infringement, such as torture, to which claims of necessity are made in times of terrorist emergency. The difference in essence lies in the nature of the right to liberty and the right to be free from torture. The law has long recognized that there is a difference between the natures of these rights.[35] The right to liberty represents freedom from arbitrary deprivation of liberty. This right has always been formulated in a manner that recognizes that some deprivations of liberty can be both necessary and justified although the liberty-depriver (i.e. the state) will be required to make out a justification for that limitation (by means, for example, of *habeas corpus* petitions). The right to be free from torture, on the other hand, is an absolute right. It is not a freedom from arbitrary torture, for example, but rather from all torturous actions, which are conceived of as actions that can *never* be justified, legitimated, or sanctioned in law. There is, therefore, a deontological difference in our conceptualizations of these freedoms and rights that acts as an insurmountable obstacle to legitimatization of torture, even if a system of internment were to acquire legitimacy by means of employing a legitimating model as proposed.

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34. The difficulty in associating Lockean thought (narrow rule of law) with values-based constitutionalism and broad rule of law is not unacknowledged in this context. Indeed, these difficulties have been considered at length elsewhere. *See, e.g.*, Lee Ward, *Locke on Executive Power and Liberal Constitutionalism*, 38 Can. J. Pol. Science 719 (2005). Notwithstanding these difficulties however, the concept of constitutionally limited power, which developed into constitutionalism, is connected with Lockean thought in its earlier stages, and it is in that context that this reference ought to be read.

35. In international law, for example, the right to be free from torture is a *jus cogens* norm and it is subject to no limitation in the major human rights treaties, all of which protect it. *See, e.g.* John T. Parry, Understanding Torture: Law, Violence, and Political Identity, 15-43 (2010). The right to liberty, on the other hand, is more accurately described as a right to be free from *arbitrary deprivation* of one's liberty. *See, e.g.,* Claire Macken, Counter-Terrorism And The Detention Of Suspected Terrorists: Preventive Detention And International Human Rights Law 34-78 (2011). Thus, liberty is not considered absolute whereas freedom from torture is.

III. THE LEGITIMACY FACTORS

Human rights law has long associated justifiable limitations on the right to liberty with a lack of arbitrariness. Thus, within the human rights paradigm there is no prohibition on detention *per se*; rather the prohibition is on arbitrary detention.[36] In order to avoid arbitrariness, two safeguards are required in all cases of detention (including detention that follows a criminal conviction): first, that someone must fall within a limited list of bases for detention before the state is permitted to deprive them of their liberty; and second, that those within the detention of the state must enjoy adequate procedural safeguards including the right to challenge the lawfulness of the detention.[37] When it comes to detention without charge or trial of suspected terrorists, the two basic bulwarks against arbitrariness need to be supplemented with two further safeguards. Thus, the model proposed comprises four "legitimacy factors": 1) public justificatory deliberation, 2) non-discrimination, 3) meaningful review of detention, and 4) temporal limitations. Where these legitimacy factors are fully embraced and applied it is likely that there would, in fact, be practically no cases of indefinite detention without charge or trial. Rather people would be released, charged, or tried within a timeframe that, while in all likelihood longer than that found in regular criminal processes, would be controlled and would result in the least infringement on individual liberty possible under the circumstances (with the level of that infringement being adjudicated upon as a general matter in the political system and as an individual matter in the judicial system).

Central to this article's argument is the contention that periods of internment that have been unsuccessful as counter-terrorism measures have failed not because internment can never be a legitimate choice within the counter-terrorism toolkit, but rather because internment was not done in a legitimate manner and therefore resulted in backlash—in the escalation of the terrorist threat, the broadening of the support base for those deemed terrorist, and the drastic reduction in good relations between marginalized groups and the state. This is not to suggest that the limitation on rights itself cannot also be a basis of illegitimacy—it can, but it is not necessarily

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36. Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Approaches 375 (2002).
37. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 7, at art. 5.; ICCPR, *supra* note 7, at art. 9; African Charter on Human and Peoples' Rights, *adopted* 27 June 1981, art. 6, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 1520 U.N.T.S. 217 (*entered into force* 21 Oct. 1986); American Declaration on the Rights and Duties of Man, arts. I, XXV, O.A.S. Res. XXX, *signed* 2 May 1948, O.A.S. Doc. OEA/Ser.L/V/II.71, at 17 (1988); Commonweath of Independent States Convention on Human Rights and Fundamental Freedoms, art. 10 (26 May 1995), *available at* http://www.unhcr.org/refworld/publisher,CIS,,,49997ae32c,0.html.

so. Where the limitation of rights takes place within a broader system that manifestly strives to ensure proportionality, limited infringements on rights, effective judicial review, even-handedness in the application of law, and so on, the limitation on rights can be legitimate because it takes place within a broader framework that is deeply concerned with and designed around rule of law principles. Where such limitation takes place without that surrounding framework, it lacks legitimacy and is seen as lacking legitimacy, thus resulting in backlash. This is especially the case where there is a (perceived or actual) victimization of a self-identified group of people within the broader community by the internment process. Internment in Northern Ireland provides us with an illustrative example of a case where internment might have been a justifiable national defense measure but was instead implemented in a manner that marked its illegitimacy and gave rise to counterproductive backlash and increased alienation of the Nationalist/Catholic population.

Although internment was used periodically on both sides of the border since the Partition of Ireland in 1921, internment in the 1970s is sufficient to illustrate the dangers of illegitimacy for our purposes.[38] "Operation Demetrius" (the program of internment in Northern Ireland between August of 1971 and February of 1975) was originally introduced by then-Prime Minister of Northern Ireland Brian Faulkner in August 1971 under the Special Powers Act 1922.[39] This followed the earlier decision by Faulkner to have the Royal Ulster Constabulary and Special Branch make up a list of those who ought to be interned.[40] British military intelligence formed the preliminary view that the list was unreliable and advised against enacting internment, but Faulkner proceeded nonetheless.[41] Although some civil rights leaders who were on the list received tip-offs in advance and were therefore not picked up in the initial sweep, 342 Catholic Nationalists and no Loyalists were picked up on the first morning of Operation Demetrius and taken to internment centers, including Crumlin Road Prison in Belfast and a makeshift internment camp in Long Kesh.[42] The initial sweep resulted in immense violence, with seventeen people being killed in the day that Operation Demetrius began, including ten Catholics killed by British soldiers.[43] The

38. On internment in Northern Ireland generally, *see* John McGuffin, Internment (1973), *available at* http://www.irishresistancebooks.com/internment/internment.htm; Brice Dickson, *The Detention of Suspected Terrorists in Northern Ireland and Great Britain,* 43 U. Richmond L. Rev. 927, 930–938 (2009).
39. Civil Authorities (Special Powers) Act (Northern Ireland) (1922), *available at* http://cain.ulst.ac.uk/hmso/spa1922.htm. For a concise account *see* David Bonner, Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed? 87-91 (2007).
40. *See* McGuffin, *supra* note 38, at chapter 7.
41. *See id.*
42. Martin Melaugh, *Internment—A Chronology of the Main Events*, CAIN Web Service, *available at* http://cain.ulst.ac.uk/events/intern/chron.htm.
43. *Id.*

process of internment also led to the increased identification of Catholics with the IRA, to the civil rights march in Derry at which 14 civil rights activists were shot dead (known as Bloody Sunday), and to an enormous backlash against the British government. As a result, the British government was forced to put a stop to devolved government in Stormont and found itself before the European Court of Human Rights in relation to internment and to the "five techniques" used when interrogating some detainees.[44] In the end, a total of 1,874 Catholics/Nationalists were interned, as were 107 Protestants/Loyalists, with the first Protestants/Loyalists not being arrested until 2 February 1973.[45]

There is little doubt that internment in Northern Ireland was an unmitigated disaster. In the words of Irish historian Tim Pat Coogan, it was "botched in practically every respect one can think of."[46] That does not mean that internment *as a counter-terrorist tool* was inevitably unjustifiable in the context of the Troubles. The difficulty was that it was designed, implemented, and administered in an apparently discriminatory,[47] seemingly endless, non-deliberative, and brutal manner.[48] Moreover, it was nearly impossible[49] to mount an effective challenge to one's detention.[50] Internment in Northern

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44. Case of Ireland v. The United Kingdom, App. No. 5310-71, 23 Eur. Ct. H.R. (ser. B) (1976).
45. Melaugh, *supra* note 42.
46. Tim Pat Coogan, The Troubles: Ireland's Ordeal 1966–1996 and the Search for Peace 149 (2002).
47. Although the power to detain without charge or trial was primarily applied to Catholic/Nationalists, the European Court of Human Rights found that it was not discriminatory in The Republic of Ireland v. The United Kingdom, 23 Eur. Ct. H.R. (ser. A) ¶ ¶ 225-232 (1978). The rigor of that decision has justifiably been questioned in the literature, however for the purposes of a legitimacy analysis perceptions of discrimination may well be as important as proof thereof. As a result, I do not engage in an analysis of that decision here. For excellent analysis focusing on the extent to which the margin of appreciation doctrine was used in that (and other) case(s) to avoid answering "hard questions" of this nature, *see* Oren Gross & Fionnuala Ni Aolain, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 Hum. Rts. Q. 625 (2001).
48. Many of those who were detained were subjected to what were known as "the five techniques" of interrogation. The European Court of Human Rights declined to characterize these as "torture" in The Republic of Ireland v. The United Kingdom, 23 Eur. Ct. H.R. (ser. A) ¶167 (1978) but did find them to be inhuman and degrading treatment and therefore a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 7, at art. 3.
49. Dickson, *supra* note 38, at 932.
50. Although at first glance it may appear that the challenge system put in place by the Detention of Terrorists (Northern Ireland) Order 1972 (involving an oral hearing before a Commissioner where a detention order (allowing for indefinite detention) was sought and permitting a detainee to request review of that order (when granted) by a Detention Appeals Commission) was quite rights-protecting, in reality it did not adhere to the basic tenets of international human rights law as we now understand them. Those international standards require that one can make a substantive challenge in adversarial hearings before a court or other court-like body with the power to order release within a reasonable time frame. Dickson, *supra* note 38 at 932–35.

Ireland fanned the flames of violence primarily because it was illegitimate and did not adhere to rule of law principles. Whether a legitimate system of internment could have been designed in Northern Ireland in any circumstances is a difficult question, bearing in mind the widespread discrimination exercised on official levels against Catholic/Nationalist communities, the disputed authority of the state by those who regarded themselves as living in an occupied territory, and the Royal Ulster Constabulary's abject lack of an even-handed and non-discriminatory approach to law enforcement.[51] All of these factors pointed towards a situation where, on a general level, a large portion of the population considered rule of law and legitimacy to be lacking, if not completely absent.[52] Broader considerations of this kind inevitably feed into assessments of legitimacy, necessity, and appropriateness of internment as a counter-terrorist tool in any particular situation, but the purpose of this article is a generalized consideration of internment *per se* through the prism of four legitimacy factors.

A. Legitimacy Factor 1: Public Justificatory Deliberation

The first legitimacy factor is a requirement of public justificatory deliberation. This would oblige governments to engage with opposition parties, international bodies, and civil society in order to justify the decision to bring in a system of detention without charge or trial. This builds on the idea that democracy and democratic governance require deliberation and that such deliberation ought to be public and as broad and inclusive as is plausible within a given set of circumstances. Deliberative democracy can be said to be organized around contestations of what constitutes the public good,[53] a framework of discourse that is particularly apt where democracies are attempting to confront terrorist crises without compromising their fundamental values. "Justificatory deliberation" simply means that the government, which is proposing a repressive measure such as internment, must engage in a deliberative process of justifying the measure by reference to its vision of the public good and what it requires. Because deliberation necessarily involves

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51. David Smith & Gerald Chambers, Inequality in Northern Ireland (1991). The scale of the actual discrimination against the Catholic/Nationalist community has sometimes been disputed, but the sense of grievance among the Catholic community that existed at the time was quite intense. *See, e.g.,* Christopher Hewitt, *Catholic Grievances, Catholic Nationalism and Violence in Northern Ireland During the Civil Rights Period: A Reconsideration*, 32 British J. Soc. 362 (1981).
52. For an overview of the differing degrees to which ideologically aligned members of the Northern Irish population (including Protestant/Unionist/Loyalist communities) considered the state to be legitimate in Northern Ireland, *see, e.g.,* Joseph Ruane & Jennifer Todd, The Dynamics of Conflict in Northern Ireland: Power, Conflict and Emancipation 84-115 (2003).
53. John Rawls, A Theory of Justice 360–61 (1971).

the possibility of being convinced by stronger arguments or viewpoints, justificatory deliberation cannot be merely an optical exercise but must instead be committed to and engaged in by a government that is willing to be convinced of a different pathway toward security.[54] In a party-political system, and especially one where the executive and legislature are fused, such as the United Kingdom, this may require a shaking off of normal parliamentary structures such as vote-whipping. In the United Kingdom and similar parliamentary systems such as that in Ireland, whipping refers not only to counting votes but also to enforcing an obligation to vote on party-political lines or to risk being expelled from the party.[55] The strongest form of whip—the "three-line whip"—can be imposed on votes relating to matters such as the introduction of internment. This means that a majority party or coalition in Parliament can essentially guarantee success of its proposed legislation regardless of the strength of the justification or the quality of deliberation that has taken place.[56] In order for justificatory deliberation to be effective from a legitimacy perspective, normal parliamentary processes may require some innovative system redesign such as giving over-weighted political power to minority parties in relation to such questions.[57] Even if one is skeptical of the capacity for political processes to be effective gatekeepers for human rights in times of terroristic crisis,[58] the process of deliberative justification in the political and popular arenas has a number of benefits that ought not to be discounted out of hand.

First, there is the benefit from a democratic and rule of law perspective of subjecting government proposals to opposition parliamentary scrutiny, to international scrutiny where appropriate, and to public debate. It would require a government to make out a case that some measures beyond the

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54. It is indisputable that, at present, Governments have a tendency toward what Lord Steyn has described as "playing politics in an area which cries out for an objective and non-partisan approach". Lord Steyn, *Civil Liberties in Modern Britain*, 2009 Pub. L. 228, 231.
55. Duncan Watts, A Glossary Of UK Government And Politics 283–284 (2007).
56. This is not to suggest that parliamentary dissent never happens; in fact, some political scientists argue that a new breed of independently minded voters may be creating an incentive towards dissent even in "Westminster" parliaments. Christopher Kam, Party Discipline And Parliamentary Politics (2009). However, in times of crisis dissent is less likely from backbenchers, majorities are more easily secured, and dissent can be countered by "bargaining" with opposition politicians for support on counter-terrorist proposals. Patterns of counter-terrorist parliamentary activity, and the impact thereon of the whip, are considered in Fiona de Londras & Fergal Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 Oxford J. Legal Stud. 19, 34–35 (2010).
57. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2368–70 (2006).
58. Fiona de Londras & Fergal Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 Oxford J. Legal Stud. 19, 34–38 (2010).

ordinary are required[59] and, moreover, that detention without charge or trial is necessary and justifiable. Then, the veracity of that case would be debated, dissected, and considered by politicians and commentators. It may not always change the end result and, in absence of systemic change to normal parliamentary processes in such votes, it may be that it would *never* do so. However, it might create an obligation on the government to engage in more than mere assertion and instead to commit to a process of persuasion and justification that, it is hoped, would catalyze reflection. Important also is the extent to which subjecting such proposals to a system of deliberative justification might have a positive design impact. In other words, flaws in the design as originally proposed, including flaws from a liberty and human rights perspective, might be "banged out," so to speak, through such processes. Indeed, in the United Kingdom we have seen parliament—and particularly the House of Lords sitting as a parliamentary organ—having a very important function in bringing original proposals more closely into line with human rights imperatives (even if they have not always gone far enough in this direction).[60] In summary, then, this first requirement—that of deliberative justification—brings benefits of democracy and design that are likely to result in a system that is more closely aligned to basic rule of law principles than would otherwise be the case. Therefore, deliberative justification accrues greater legitimacy than executive-design and imposition.

Some might argue, however, that insisting upon justificatory deliberation of counter-terrorist measures is simply inappropriate. Such an argument might take a number of forms. It could be said that such decisions are properly within the remit of the executive branch and ought not to be subject to parliamentary debate, discussion, design, or vote. This argument stands squarely within the "executive supremacy" school of thought of emergency powers and fails to take into account the tendency toward disproportionate repression and state aggrandizement that frequently arises in times of security-related emergencies.[61] Secondly it might be argued that engaging in a process of deliberative justification prior to the introduction of such a scheme would tip off those who are likely to be caught within the system and who might then flee. This argument certainly seems more persuasive but

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59. This is particularly significant because even as courts are becoming more willing to question whether measures introduced in an emergency are proportionate, there is still a high level of deference to executive determinations of the existence of an emergency itself. Fiona de Londras, *Guantánamo Bay: Towards Legality?*, 71 Mod. L. Rev. 36 (2007). This arises at both domestic and international levels. *See, e.g.*, the decision of the House of Lords in A & Others v. Secretary of State for the Home Department, (2004) UKHL 56 (H.L.) (*but c.f.* the judgment of Hoffman LJ in that case); A & Others v. United Kingdom, App. No. 3455/05, 49 Eur. H. R. Rep. 29 ¶ 109 (2009).
60. Gavin Phillipson, *Deference, Discretion, and Democracy in the Human Rights Act Era*, 60 Contemp. Legal Probs. 40 (2007).
61. de Londras & Davis, *supra* note 58, at 20–24.

it is not at all strong enough to overcome the democracy and design arguments in favor of deliberative justification, which are considered above. This is simply because there are ways to prevent potential targets from slipping through the net in advance of introducing such a system. For example, a list of potential detainees could be created and circulated to law enforcement and border patrol officers who might then be on the lookout for any suspicious movements and empowered to subject such individuals to close surveillance. This may of course lead to privacy concerns. However, a privacy violation by law enforcement is less dangerous from a liberty perspective than a protracted period of detention without trial. In addition, safeguards can be put in place: for example, an *in camera* court might be required to adjudge whether there was sufficient suspicion *prima facie* to place individuals on such a "watch list" while the potential for a detention without charge or trial system was being debated and deliberated upon (although it would be important to ensure that no negative inferences undermining the presumption of innocence are drawn from deciding that someone is eligible for inclusion on such a watch list should a person be faced with criminal charges). The point here is not to make out all of the details of such a plan—indeed, there may well be serious flaws in the few points already suggested. The intention is merely to show that the obstacles that arguably arise from a law enforcement and security perspective of engaging in a deliberate process are not insurmountable. The benefits, on the other hand, are potentially considerable.

B. Legitimacy Factor 2: Non-Discrimination

The second legitimacy factor is non-discrimination. Under this model, one ought not be subjected to detention without charge or trial on the basis of ascribed or acquired characteristics (such as race, religion, or nationality), and should only be detained after a thorough and non-prejudiced individual risk-assessment. Discriminatory internment is all too familiar in the counter-terrorist context.[62] It is important to note, however, that just because more people of a particular religion, race, or political affiliation are detained does not *a priori* make the detention regime discriminatory. It may well be that, in fact, more Nationalists than Loyalists posed a threat to security requiring internment in Northern Ireland and that this justifies the discrepancy in numbers detained. However, the record shows that there was simply little or no interest in using internment powers against the Unionist community,[63]

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62. Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 Brook. J. Int'l Law 495 (2006).
63. Coogan, *supra* note 46, at 150.

particularly prior to the dissolution of the Northern Ireland parliament in March of 1972.[64] Non-discrimination is not a numbers game; it reflects a much deeper and more fundamental commitment to equality and liberty than can be captured in a "counting" exercise.

As experience in the United Kingdom shows, discrimination will typically either be built into a system of detention without charge or trial at the design stage, or will "creep" into such a system at the point of application. Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) is an example of design-stage discrimination. This permitted the detention without charge or trial of those who were adjudged by the Home Secretary to be involved in or linked to terrorist activity.[65] The Act limited these provisions to non-UK-citizens,[66] and no matter how dangerous UK citizens might have been, they could not be subjected to such a system.[7] The House of Lords, in its important *Belmarsh Case*, found that this part of the ATCSA was incompatible with the Human Rights Act 1998 and the ECHR largely because it was discriminatory—there was no basis for believing that the threat emanated only from non-UK-citizens.[68] Indeed, as the tragic attack on the London transport system of July 2005 showed, there was in fact a serious threat from the United Kingdom's own citizenry.[69] Equally, even a system that is seemingly neutral[70] in its design can in fact be discriminatory in its application. Where risk assessments are colored by heuristic shortcuts such as racial profiling and assumptions of guilt-by-association, it is almost inevitable that security measures will be disproportionately applied to those who fit into

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64. Health and Personal Social Services Order, 1972 No. 1265 (N.I. 14).
65. Anti-Terrorism, Crime and Security Act 2001 [ATCSA], Part 4 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2001/24/pdfs/ukpga_20010024_en.pdf.
66. Part 4, which included the detention power under § 23 of the ATCSA, dealt expressly with "Immigration and Asylum," concerned "suspected international terrorists" (ATCSA, § 21), and "the application of existing detention powers under the Immigration Act 1971 (the "1971 Act") to cases where the Secretary of State is seeking to remove a suspected international terrorist but where such removal is not currently possible." Explanatory Notes, ¶ 72, *available at* http://www.legislation.gov.uk/ukpga/2001/24/notes/division/1/1/4/4.
67. *See id.*
68. A & Others v. Secretary of State for the Home Department (2006) 2 AC 221. This decision has not been without its critics. *See, e.g.*, David Campbell, *The Threat of Terror and the Plausibility of Positivism*, 2009 Pub. L. 501.
69. The perpetrators of these attacks were British citizens. *See* Assaf Moghadam, The Globalization Of Martyrdom: Al Qaeda, Salafi Jihan, And The Diffusion Of Suicide Attacks 193-194 (2008).
70. Of course, various strands of critical legal thinking have convincingly and for a long time argued that the concept of "neutral" law is a myth and in fact that even seemingly generally phrased laws can impact upon certain categories of people in a disproportionate manner either through their application or by targeting behaviors, dress codes, arrangements of familial responsibility, types of violence, etc. that tend to occur in particular communities more than others. In particular, these arguments have been made by critical race theorists, feminist legal scholars, and critical law and religion scholars.

the assumptive box; to the "Other." This reflects the fact that, in a time of terrorist crisis, "[t]he dominance of belonging, sameness and security form a potent mixture catalysing lawmaking that primarily impacts on the rights of those who, through their faith, appearance, culture or behaviour fall outside of our vision of 'us' and into the vision of 'the terrorist other.'"[71] Although not an internment power, the operation of "stop and search" powers in the United Kingdom demonstrates the ways in which seemingly neutral counter-terrorism laws can be operationalized in a discriminatory manner. Initially introduced in the early 1990s, but later amended and then contained in the Terrorism Act 2000, the police in the United Kingdom have long had the power to stop and search individuals at random in order to prevent acts of terrorism.[72] Section 44 of the Terrorism Act 2000 allows for areas to be placed under what is known as "s44" authorization if it is considered "expedient for the prevention of acts of terrorism" and, once such an authorization is in place, random stop and search operations can be done in that area without the need for a police officer to first have a reasonable suspicion that the person involved was engaged in terrorism.[73] These powers, ultimately deemed incompatible with the European Convention on Human Rights for a lack of effective safeguards,[74] were generally impugned as being applied in a highly discriminatory manner particularly after 11 September 2001 and the subsequent London Underground attacks of 7 July 2005.[75]

Discriminatory systems of detention without charge or trial (regardless of whether the discrimination manifests itself at the design or the application stage) are incredibly problematic from a legitimacy perspective. Not only do they severely undermine an important principle of the rule of law (equal application of the law), but they also erode a basic democratic commitment to equal treatment that causes a disintegration of relations between the source of power (the state) and the target of that power (the members of the discriminatorily targeted group). Discriminatory internment, therefore, suffers a crisis of legitimacy that exacerbates the potential for backlash. In that way, it becomes a noose by which the state can hang itself: it makes internment ineffective as a counter-terrorist tool *and* undermines the democratic polity that the measures are purportedly designed to protect. It must,

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71. de Londras & Davis, *supra* note 58, at 38.
72. Terrorism Act 2000 (UK), *available at* http://www.legislation.gov.uk/ukpga/2000/11/contents. On stop and search powers in the United Kingdom in overview, including but not limited to counter-terrorism stop and search, *see* Helen Fenwick, Civil Liberties and Human Rights 1111-1139 (4th ed. 2007).
73. Terrorism Act 2000, § 44 (UK).
74. Gillan & Quinton v. The United Kingdom, App. No. 4158/05, 50 Eur. H.R. Rep. 45 (2010).
75. Kiron Reid, *Race Issues and Stop and Search: Looking Behind the Statistics*, 73 J. Crim. Law 165 (2009).

however, also be acknowledged that the challenge of non-discrimination in counter-terrorism is a difficult one indeed, for even when a system is officially committed to non-discrimination, individual and collective police or security officers' own biases and assumptions about the profile of a "terrorist" can play important overt and implicit roles in their identification of individuals for surveillance or investigation.[76] This ultimately feeds into decisions about who is to be detained as a suspected terrorist especially in the relatively immediate aftermath of an attack when, as discussed in the next section, the burden for holding someone is likely to be lower. Thus, whether non-discrimination is, in fact, achievable is highly questionable and this legitimacy factor may well be the most difficult to achieve as a matter of practice.

C. Legitimacy Factor 3: Meaningful Review of Detention

The third requirement within this model is the meaningful review of decisions to detain individuals without charge or trial. Meaningful review of the lawfulness of one's detention plays an important role in a legitimacy analysis. It subjects the state to an oversight function that, if properly discharged, ought to effectively protect individual detainees from protracted and unjustifiable detention while also ensuring that the basic constitutionalist principle of limited state power is upheld. In this respect, it plays both a rights-enforcing and a constitutionalist role. As Justice Kennedy noted in *Boumediene v. Bush* in the US Supreme Court (holding that Guantánamo Bay detainees had a constitutional right to *habeas corpus*), "[t]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain."[77] Meaningful review of detention decentralizes power from the executive and a (usually) compliant legislature and injects a voice that can focus on rule of law considerations without having to have one eye on pragmatic concerns such as re-election.[78] In addition, ensuring that detainees have access to a meaningful review of the lawfulness of their detention may reduce the risk

76. On the effect of racial and religious bias on policing perceptions of terrorist threat *see* Deborah Newman & Nikki-Qui Brown, *Historical Overview and Perceptions of Racial and Terrorist Profiling in an Era of Homeland Security: A Research Note,* 20(3) Crim. Just. Pol'y Rev. 359 (2009).
77. Boumediene v. Bush, 553 U.S. 723, 765–66 (2008).
78. This is not to claim that judges are entirely non-political; merely that (usually) they do not have to worry about the impact their decisions would have on electoral popularity in the same way politicians may have to.

of torture or ill-treatment in detention, which could be reported to a court at that early review stage.[79]

This requirement could be met by ensuring that detainees have access to *habeas corpus* or to some system of review that fulfils the basic requirements recognized by international and domestic human rights law. In this respect we can identify four main elements: (a) access to a court, (b) access to information, (c) access to effective legal representation, and (d) a meaningful opportunity for release.[80] A court in this context need not be a court in the normal sense of the word, but it should be an independent adjudicatory body that has all of the hallmarks of a court. It is not inconceivable that something like the Combatant Status Review Tribunals operating in Guantánamo Bay until recently[81] could fulfill this requirement *provided* they abided by the principles of aforementioned court-focused liberty adjudications. That said, there do not seem to be compelling reasons why this function ought not to be carried out by a court in the conventional sense. Concerns about security could be met by holding the proceedings *in camera* and releasing judgments with sensitive parts redacted. Concerns about expertise or institutional competence largely ignore the fact that judges are expected to be experts in the application of legal principle, not in the core substantive matter to which those legal principles are to be applied.

The second element of meaningful review is a detainee's access to the information that is used to ground the decision to hold him in detention. It is very simply impossible for an applicant to make any kind of an effective argument against liberty deprivation when he is not privy to the evidence against him. Of course there will sometimes be security concerns around the disclosure of such evidence; that cannot be denied. However, these security concerns can be ameliorated in a manner that does not so grossly prejudice the entire process against the applicant, as the total non-disclosure of evidence does. Provided that the case against the detainee is not based entirely or to a decisive degree on evidence that cannot be disclosed to him, something akin to a Special Advocates scheme[82] can effectively be used in

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79. This was one of the main motivations for the finding of the Inter-American Court of Human Rights that *habeas corpus* and *amparo* were non-derogable rights. Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8 (30 Jan. 1987).
80. These features are extrapolated as the core features of the right to challenge the lawfulness of one's detention as protected by international human rights law. *See generally* de Londras, *supra* note 7; Jayawickrama, *supra* note 36.
81. *Combatant Status Review Tribunals/Administrative Review Board*, U.S. Dep't of Defense (10 Feb. 2009), *available at* http://www.defense.gov/news/csrtsummary.pdf.
82. Special Advocates are government appointed lawyers who represent the interests of individuals to whom it has been determined that not all information grounding the state's suspicion can be disclosed. The Special Advocate is intended to protect the interests of the individual in question, notwithstanding the fact that s/he may not be able to consult

this respect. However, it appears that there will be cases where at least the thrust of that security-sensitive evidence must be disclosed to the detainee in order to facilitate the Special Advocate in effectively putting a case on his behalf.[83] Again, the point here is merely to demonstrate that security concerns are not necessarily insurmountable obstacles to effective process. In order for any review process to be meaningful and effective—and to reach the standards laid down by international law—it must be adversarial and representative.[84] All detainees must have legal representation, and that representation must include opportunities to meet and consult with one's lawyer in confidence. Again, security concerns can be overcome through mechanisms such as the Special Advocate.

Third, the burden of proof must lie with the government to justify the deprivation of liberty that is under review. As a matter of principle this burden ought to refer not only to convincing the reviewing body that circumstances exist within which the internment system itself is legitimate and permissible; the government must also convince the reviewing body that the individual detainee is implicated in those circumstances and, having been subjected to an evidence-based security assessment, must be detained. This may be sufficient for the first review of an individual's detention, but where (as is elaborated on below) an individual is detained for an unlimited/undefined number of days it is imperative that the review process would recur on a regular basis (such as quarterly) and that, on each review, the standard of proof to be met by the government would increase in respect of the individual detainee's case. Thus, in the first review it may be sufficient to establish that detention is necessary, but in the next review the government ought to be required to establish that detention is necessary, that the information on the basis of which this decision was made is not tainted by illegality, and that criminal charges are not appropriate. The standard to be met for each of these factors should increase as time progresses, and any deference exhib-

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fully (or at all) with the individual detainee. For a historical and comparative consideration of the development of Special Advocates, especially through the intervention of the European Court of Human Rights, *see* David Jenkins, *There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology*, 42 Colum. Hum. Rts. L. Rev. 279 (2011).

83. A & Others v. United Kingdom, App. No. 3455/05, ¶ 220.

84. Sanchez-Reisse v. Switzerland, 9 Eur. H.R. Rep. 71 (1986); Toth v. Austria, 14 Eur. H.R. Rep. 551 (1991); Bousroual v. Algeria, Communication No. 992/2001, *adopted* 24 April 2006, UN Doc. CCPR/C/86/D/992/2001 (2006), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/0aef3b15e0b6c761c125719a00486e57?Opendocument; de Morais v. Angola, Communication No. 1128/2002, *adopted* 18 April 2005, UN Doc. CCPR/C/83/D/2002 (2005), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/7f6baf300710a4aec1257029004bcb9d?Opendocument. For an overview of the nature, requirements and status of the right to challenge the lawfulness of one's detention in international human rights law *see* Fiona de Londras, Detention In The 'War On Terror': Can Human Rights Fight Back? 36-71 (2011).

ited to the state's arguments ought to sharply decrease with the passage of time. The burden and standard of proof would therefore occur on a sliding scale where there is a correlation between the length of detention and the burden of proof (i.e. > time = > proof).

Finally, it is vital that where the court or equivalent body has heard an application for review of the lawfulness of one's detention and has concluded that the state was not, in fact, holding that individual in a lawful manner, the court would have the power to order release and that court order would be enforced. All of the reviews in the world would be meaningless if they did not enable someone to secure their liberty.

By means of example, litigation continues in the United States to secure the liberty of detainees in Guantánamo Bay who have been found not to be unlawful enemy combatants but who the United States is not prepared to return to their home country. *Kiyemba* v. *Obama* concerns a number of Uighurs who cannot be returned to China and wish to be moved to the United States where there is a substantial Uighur community in the Washington, D.C. area.[85] In early 2010 Chief Justice Roberts remanded the case to the federal Circuit Court for a consideration of whether the offer to resettle the applicants changed the Circuit Court's previous decision that a judge could not order the executive to release detainees into the United States.[86] In 2011 the detainees petitioned the US Supreme Court again, in spite of the fact that they had been given a number of resettlement options by the government, although none to the mainland United States as they desired. Refusing *certiorari* unanimously in the case, the US Supreme Court held that the offers of resettlement were reasonable, that there was no question of the detainees being ill-treated in the countries offering them residence and, as a result, they would not entertain an attempt to compel the Obama Administration to resettle them in the United States itself.[87] In this particular case, the petitioners were essentially obstructing their own release, but there are other cases—especially relating to Yemeni nationals in Guantánamo Bay who are deemed eligible for release but who are not being returned to Yemen because of the political instability in the country—where release has not yet been secured, notwithstanding an acknowledgment that the individuals ought not to be detained any longer.[88] Should it continue to be so difficult to effectively secure release, even after a successful *habeas corpus* petition in federal court, this may suggest a somewhat pyrrhic victory for a

85. Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009).
86. Kiyemba v. Obama, 130 S. Ct. 1235 (2010) (per curiam).
87. Kiyemba v. Obama, 131 S. Ct. 1631 (2011), *cert denied.*
88. Guantanamo Review Task Force, Final Report (22 Jan. 2010), *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf.

petitioner even if, from a constitutional perspective, *Boumediene* marked a significant high point.[89]

D. Legitimacy Factor 4: Strict Temporal Limitation

Finally, any system of detention without charge or trial must be subject to strict and effective temporal limits. It is important to note that this does *not* mean that the period of individual detention without charge or trial is bound to a strictly enforced maximum number of days. Rather, this temporal limitation means that any period of detention without charge of trial ought to be strictly limited. It appears that the European Court of Human Rights no longer subscribes to the idea that emergencies, including terrorist emergencies, are necessarily temporary.[90] However, the defense and counter-terrorism measures required to manage an emergency do not necessarily remain stable throughout the entire period of the emergency. Indeed, it would most commonly be the case that the severity of the measures required decreases with the passage of time from the catastrophic event or series of events that would have ushered in the emergency itself.[91] Thus, while internment might be necessary, justifiable, and make sense in the first month after the bombing of government buildings, for example, it might no longer be justifiable six months afterwards. Thus, when a government convinces the public that internment is required, internment should be agreed upon for a particular period of time with any renewal once more requiring public justificatory deliberation and the burden of proof becoming higher for each renewal that may follow. The advantage of this approach is that it compels the government to immediately consider what approaches would be best regarding detainees: can they be tried, or released, or must they be detained on a security assessment even though there may be insufficient evidence (or insufficient admissible evidence) for trial? Placing a strict time limit on the

89. Keith Ewing has made a similar argument in relation to A & Others v. Secretary of State for the Home Department, as the petitioners in that case were rearrested on different authority and some now live under very repressive control orders. Keith Ewing, *The Futility of the Human Rights Act—A Long Footnote*, 37 Bracton L. J. 41 (2005); Keith D. Ewing & Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act*, 2008 Pub. L. 668.

90. A & Others v. United Kingdom, App. No. 3455/05, ¶ 178.

91. This is partially because urgency is reduced, meaning that immediate responses can be refined to a more sustainable and rights-compliant shape. Although the European Court of Human Rights has now held that emergencies need not necessarily be temporary, it has held that the duration of the emergency can be taken into account when determining the proportionality of a measure under consideration, thus suggesting that the further in time from a traumatic event, the less repressive we will expect emergency measures to be. A & Others v. United Kingdom, App. No. 3455/05, 49 Eur. H. R. Rep. 29 ¶ 178 (2009).

systemic internment period provides an exogenous motivation for reflection and management, combined, of course, with the individual judicial reviews of each detainee's detention.

The idea of a stopwatch on emergency is difficult to impose, although a stopwatch on how long one can be detained before being brought before a judge or court is entirely plausible and important. Sunset clauses are commonly used, which require repressive measures embedded in legislation to be reassessed by parliament after a certain period of time and either renewed for another limited period or expunged.[92] The difficulty with sunset clauses historically has been that they simply do not work. Either parliamentarians do not turn up and the sunset clause vote is a damp squib that the government wins easily, or, even where the vote is contested, a three-line whip is imposed and there is no meaningful opportunity to ensure exhaustion of the emergency system.[93] Therefore, sunset clauses *simpliciter* are not enough within this model of process-based detention without charge; such clauses can be effective *only* if they are the subject of a free, un-whipped vote that parliamentarians take seriously. Creating a mechanism by which parliamentary and popular processes can work effectively to insist on justification of continued internment by a government is certainly difficult, but if it were to be achieved it would at least force the government in question to re-engage in public deliberative justification of the system on the expiry of a defined and relatively short period of time and create an opportunity for any design flaws detracting from legitimacy that have come to light to be tackled.

What is not proposed here as a definitive legitimacy factor is the requirement that an internment system specify the maximum number of days for which an individual can be detained without charge or trial. This is excluded for three primary reasons. First, the availability of effective judicial review on a regular basis with a sliding scale relating to the burden of proof (i.e. > time = > proof to justify detention without charge or trial) ought to ensure that individuals are not interned for longer (or significantly longer) than can be justified. Second, there may be limited cases where, on a balanced and rigorous security assessment, individuals pose a real and substantial threat to security and cannot be released, but the evidence supporting that assessment is inadmissible, because of illegal acts committed by the holding state or by other sources. In such situations it is inconceivable that this individual

92. The Joint Committee on Human Rights of the UK Parliament has, for example, noted the importance of inserting "proper" sunset clauses in counter-terrorist laws. It defines a "proper" sunset clause as "one which provides for statutory provisions to lapse altogether after a specified period, requiring the Government to bring forward new primary legislation to renew the powers". Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 14 (2010).
93. de Londras & Davis, *supra* note 58, at 35.

would be released and there may be a case for indefinite detention. This, of course, is an egregious violation of individual rights and ought only to be undertaken or contemplated in the most extreme and exceptional circumstances possible. Significantly, if all the legitimacy factors are in fact strictly adhered to and *bona fide* applied, this article contends that there would be next to no cases of this nature. In other words, general commitment to legitimacy and the rule of law ought to ensure that acts of extreme illegality (such as interrogative torture) do not occur, evidence is not tainted, and people are not interned on the basis of inherently illegitimate techniques and consequentially illegitimate security assessments.

E. The Dynamic between the Legitimacy Factors

The legitimacy factors as outlined are interlinked and mutually dependent; the exclusion of one factor undermines the remainder. Thus, the envisioned dynamic would play out in this way: (1) the government determines that internment is required for national security purposes and proposes same in public fora including parliament and public debate; (2) the government succeeds in justifying the decision and acquiring support; and (3) the system is designed taking into account the concerns raised during the debate. The system as designed is (1) limited to the degree that is strictly required and designed with proportionality principles in mind; (2) introduced for a limited period of time although without necessarily limiting the detention period for individual detainees, and; (3) designed so that all detention decisions are subject to strict judicial review in which factors such as the evidentiary basis for the detention and whether the system was applied in a non-discriminatory manner to the individual detainee are considered. Once the initial period of time for internment has been exhausted (1) the government determines whether the internment policy ought to remain in place; (2) the government either ends internment or proposes renewal of the system, and; (3) if renewal is proposed, the government once more engages in justificatory deliberation, at which point the burden of convincing relevant stakeholders of the continued need for internment ought to rise because of the temporal distance from the event ushering in the internment.

During internment, all detainees remain capable of applying for strict judicial review of their detention with review reoccurring on a regular basis. The standard for the government to meet in order to satisfy the court that continued internment is justified raises as the period of internment increases. The model is, therefore, designed to simultaneously recognize the reality that internment can be a necessary measure for the purposes of counter-terrorism but also that it poses serious difficulties for individual rights and the rule of law generally. For it to be legitimate, internment must

both be necessary for security *and* minimally intrusive on individual rights. The legitimacy factors proposed here suggest that in fact it may be possible for both of these principled requirements to be met, even in the context of internment—a national defense and counter-terrorism mechanism that is generally considered to be inherently illegitimate.

IV. CONCLUSION

Illegitimacy in internment is not consigned to the pages of history but neither is it inevitable. Focusing on legitimacy by means of these four legitimacy factors, which cover the different organs of the state (including administration and law enforcement) and reflect basic rule of law principles may help us to emerge from a period of counter-terrorist internment without having fundamentally undermined constitutional values. It might also have the more practical effect of minimizing backlash and the practical impediments that can occur when a state attempts to close down an internment program.[94] If we assess Guantánamo Bay by reference to the legitimacy factors laid out above it is clear that the US policy of detaining suspected terrorists in the War on Terrorism has been nothing short of an abject failure.

The decision to detain in Guantánamo Bay was taken and announced at the Executive level without deliberative justification.[95] So far only non-US-citizen Muslims have been detained there,[96] and for many years the Bush Administration argued that there should be no review by federal courts because of Guantánamo's physical location outside of the territorial United States.[97] Even when the Supreme Court held that some kind of review process had to be introduced on a statutory basis,[98] Congress gave legislative force to the Combatant Status Review Tribunals[99]—a mine field

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94. In the French-Algerian War, for example, French forces had used such brutality in internment that some internees were in fact murdered instead of being released. *See* David P. Forsythe, *United States Policy toward Enemy Detainees in the "War on Terrorism,"* 28 Hum. Rts. Q. 465, 468-470 (2006), for a thorough account that also maps the lessons of that occurrence on to the present day.
95. John Yoo, War by Other Means: An Insider's Account of the War on Terror 128-164 (2006).
96. U.S. citizens that had been detained in Guantánamo Bay were moved to mainland United States once their citizenship was discovered. For an overview *see* Jennifer Elsea, *Detention of American Citizens as Enemy Combatants* (2005), *available at* http://www.fas.org/sgp/crs/misc/RL31724.pdf.
97. For analyses of the approach of the Bush Adminstration *see, e.g.*, Fiona de Londras, *Guantánamo Bay: Towards Legality?*, 71 Mod. L. Rev. 36 (2007); K. Elizabeth Dahlstrom, *Detention and Trial of Foreign Citizens at Guantánamo Bay*, 21 Berkeley J. Int'l L. 662 (2003); David Golove, *United States: The Bush Administration's 'War on Terrorism' in the Supreme Court*, 3 Int'l J.Const. L. 128 (2005).
98. Rasul v. Bush, 542 U.S. 466, 485 (2004).
99. Detainee Treatment Act of 2005, *supra* note 21.

of process-deficiencies[100]—and stripped courts of their jurisdiction to hear such cases.[101] It was not until the summer of 2008, when the US Supreme Court took the important step of recognizing that non-US-citizens detained in Guantánamo Bay had a constitutional right to *habeas corpus* or equivalent,[102] that the US administration was forced to accept that federal courts should have some role in assessing whether or not individuals were lawfully detained there.[103] Although President Obama signed an Executive Order to review Guantánamo Bay and the status of every individual detained there on his first day of office in January 2009,[104] it is now clear that the detention facility will not close in the foreseeable future.[105] What remains to be seen is whether President Obama's plans for rejuvenated and more rights-compliant military commissions, together with the new system of regular review he is introducing in Guantánamo Bay, can succeed in injecting any *ex post facto* legitimacy into the detention regimes there.[106]

Primary among the challenges in closing Guantánamo Bay is dealing with the cloud of illegitimacy that hangs over the prison camp. What is President Obama to do with those who are still detained in Guantánamo Bay but who cannot be tried because the evidence against them is tainted by torture or other ill-treatment but who, intelligence tells him, pose a real threat to the United States?[107] The detainees who fall into this grey area between "charge" and "release" are perhaps the embodiment of the illegitimacy of this detention regime. Although there seems to be only a small number of people who can be thus categorized, they force President Obama into a situation where he may be required—by both political pressure and a feeling of executive responsibility to preserve security—to continue to detain these people, albeit in much more comfortable surroundings and with full access to counsel, courts, medical professionals, and their families. That eventuality results from the process-phobic approach of the Bush Administration to

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100. Fiona de Londras, *What Human Rights Law Could Do: Lamenting the Absence of an International Human Rights Law Approach in* Boumediene & Al Odah, 41 Isr. L. Rev. 562, 569–72 (2008).
101. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635 (2006).
102. Boumediene v. Bush, 553 U.S. 723, 795 (2008)
103. For a review of the litigation on Guantánamo Bay and the reactions by the United States Congress, *see* Sarah Hannett, *A Tale of Judicial Perseverance: The Restoration of Habeas Rights for Guantánamo Detainees*, P. L., 2008, at 636.
104. Exec. Order No. 13492, 74 F.R. 4897 (2009), Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, *available at* http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities.
105. Press Release, The White House, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force (7 Mar. 2001), *available at* http://www.whitehouse.gov/sites/default/files/Executive_Order_on_Periodic_Review.pdf.
106. *Id.*
107. For a fuller consideration of the future for these detainees see David Jenkins, *The Closure of Guantánamo Bay: What Next for the Detainees?*, P. L., 2010, at 46.

the question of detention without charge or trial; it reflects the illegitimacy of this particular regime of detention without trial, rather than proving the general illegitimacy of internment *per se*.

This article argues that it is possible to sculpt a system of internment that has legitimacy. Such a system would be process-based, taking the four elements discussed above into full account: public justificatory deliberation, non-discrimination, meaningful review, and temporal limitation. It would exist in a space of proportionality, reflecting the requirements of *both* security and rights and their coexistence. It would reflect legitimacy in four main ways and thereby feed into both narrow (individual process) and broad (general principles of accountability, legitimacy, equality, rights protection, and equal application of law) conceptions of the rule of law.

This article contends that process-based design makes legitimacy a result of compliance with principles of rule of law rather than with assertions of power. In this respect, the design, introduction, and perpetuation of any internment system that is aligned with the legitimacy factors outlined herein—if done wholeheartedly—should ensure that there would be as close as possible to no cases where indefinite detention without charge would occur for any substantial period of time. Of course, the proposals herein contained are advanced from a standpoint of dispassion and without the difficulties, panic, fear, and pressure of a proximate terroristic crisis. That a government acting in the aftermath of a traumatic terrorist attack and in the midst of a crisis would *in fact* concern itself with questions of legitimacy seems unlikely.[108] What is clear, however, from the first ten years of counter-terrorist internment in the "War on Terrorism" and its historical antecedents in Northern Ireland and elsewhere, is that if a government hopes that its state will emerge from such a crisis with the rule of law as intact as possible, it ought to.

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108. On the impact of panic and fear on governmental decision making in times of terroristic crisis *see* Fiona de Londras, Detention in the War on Terror: Can Human Rights Fight Back? 8-35 (2011).