

## *LIBERALISM IN THE AGE OF TERROR: On Defining Our Barbarians*

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“Power tends to make uniform demands on its aspirants. . . . Unbridled power tends to breed arrogance and greed no matter who holds it.”<sup>2</sup>

### I. INTRODUCTION

Fifteen years after the collapse of the bipolar world order, the international system is at another cross road. The “new world order” that followed the collapse of communism is unlikely to arrive at adulthood. For many, the United States invasion and occupation of Iraq appears aberrational. American International law scholars typically argue that, based on poor intelligence, and founded on an ill-conceived doctrine of “preventive warfare,” the United States in defiance of the United Nations Security Council invaded a sovereign state, deposed a brutal regime, and is now tied-down in the reconstruction of a state about which it knows very little.<sup>3</sup> Non-Americans are inclined to be even less charitable. The invasion of Iraq, they contend, reflects the hubris of unilateralism by a singularly powerful state. Ill-informed and arrogant, the Bush Administration unnecessarily went to war to promote a variety of nefarious aims.<sup>4</sup> Among both groups, United States actions in Iraq are viewed and presented as *sui generis*.<sup>5</sup> Might Iraq, nonetheless, represent a continuity (rather than a break) with the philosophy of governance that has come to dominate international law over the last two decades? Might not the United States be enforcing, as its leaders have argued, an internationally acceptable policy of “regime change” that replaces autocratic leadership with democracy, human rights and the rule of law? If so, does such a policy necessarily represent an objective worth striving for?

Whatever else knowledgeable observers might disagree about, all will accept that much as the international system during the past decade and-a-half has come to be dominated by a singular military and economic power, relations within contemporary international society are framed by the precepts of a dominant political philosophy. Today’s international society is heir to a philosophy of governance commonly referred to as “liberalism.” While elements of the philosophy may have existed in varied cultures

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<sup>2</sup> Paul Starobin, “MISFIT AMERICA: Is our evolving national character a liability in our foreign relations?” *The Atlantic Monthly* (Jan. 2006).

<sup>3</sup> *See, e.g.*, NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* (Princeton University Press 2004); LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* (Times Book 2005).

<sup>4</sup> Typically included among these aims are control of Middle-East oil sources, the settling of scores between the Bush family and Saddam Hussein, and waging a “war of aggression” on behalf of Israel against Iraq.

<sup>5</sup> *Compare* GEORGE PACKER, *THE ASSASSINS' GATE: AMERICA IN IRAQ* (Farrar, Straus and Giroux 2005) with Philippe Sands *Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War* (Penguin Books, 2005).

and societies and at varied times, as a fully worked-out construct, it is the product of the demands and travails of cohabitation in an environment of commerce and industrialization molded by the ethics of West European enlightenment.<sup>6</sup> Liberalism's central tenet is that societal welfare is and should be achieved by giving precedence to preferences that are determined by individuals. This tenet has been formulated in different ways at different times, and its implementation has been far from uniform. At its core, however, is the belief that governance is essentially a matter of contract among individuals who come together to form a political community for their mutual protection and advancement.<sup>7</sup> Its current incarnation, which I shall term "neoliberalism" has assumed the mantle of orthodoxy since the collapse of communism. Neoliberalism shares Classical Liberalism's subscription to the primacy of individual preference in the political community, but it departs from the latter in its willingness to identify absolutes, and to draw a clear-cut line between "good" and "evil." Three supposedly interrelated doctrines -- "Democracy," "Human Rights" and "The Rule of Law" have come to dominate Neoliberalism's conceptions of "good governance."

Recent revelations about how Western Liberal democracies, confronted with the problem of terrorism have responded to it, it might be thought, calls for pause and some reflection about the elevated stance they take in the promotion of liberal ideals. Indisputably Democratic Governments have demonstrated a propensity to employ force and minimal resort to legality in waging a so-called "global war on terrorism." Practices that not too long ago were deemed to be taboo, and which were almost uniformly condemned are now routinely employed and sometimes defended as essential to winning the "war". Government-sanctioned assassinations,<sup>8</sup> other forms of Extrajudicial killings,<sup>9</sup> torture and inhumane treatment,<sup>10</sup> the unreviewable rounding up and indefinite detentions

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<sup>6</sup> See, e.g., KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (Princeton University Press 2005).

<sup>7</sup> This contractarian underpinning of liberalism have been extensively adumbrated in such foundational works as THOMAS HOBBS, *LEVIATHAN* (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1821); and JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>8</sup> See, e.g., John McWethy, *Predator Drone Kills Six Al Qaeda Suspects*, ABC NEWS, November 5, 2003, available at <<http://abcnews.go.com/sections/wnt/DailyNews/yemen021105.html>>. See also, Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287 (Fall 1998 – Winter 1999). These so-called "targeted killings" used even where those potentially accused of crimes can be captured and tried has become Israel's tool of choice in combating the Intifada in the West Bank.

<sup>9</sup> A common refrain is to "kill" or "capture" an alleged terrorist, with the "capture" almost always added as an afterthought. And the killings may be contracted out to private bounty hunters. President Bush could thus offer 25 million dollars for Osama Bin laden "dead or alive." And, not surprisingly, executing the foreign head of state is simply another tool of war. The United States Government began the 2003 war with Iraq by blowing up a building where – erroneously as is more often the case than not – its Intelligence indicated Mr. Saddam Hussein was present. The result was the killing of many unintended victims – so-called "collateral damage."

<sup>10</sup> Visual images of the treatment of persons detained at the Abu Ghraib prison in Iraq while the most notorious examples are far from being unique. Entire bookshelves can now be filled with reports and debates over the use of torture and allied treatments in connection with the war on terrorism. See, e.g., MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (New York Review Books 2003); *THE TORTURE DEBATE IN AMERICA* (Karen Greenberg ed., Cambridge University Press 2005); SANFORD LEVINSON, *TORTURE: A COLLECTION* (Oxford University Press 2004); ANTONIO TAGUBA, *TAGUBA REPORT ON TREATMENT OF ABU GHRAIB PRISONERS IN IRAQ* (Cosimo 2004).

of whole groups of persons,<sup>11</sup> and the outright disappearance of persons into untraceable black holes of the administrative state have become accepted tools of the war.<sup>12</sup> Even where democratic governments resort to law as a tool in this war, the applicable legal regime at best has been corrupted to achieve desired results. Mere affiliation with “undesirable groups, speech that is deemed as “inciting” or “glorifying” terrorism routinely are being outlawed and punished.<sup>13</sup> The administrative freezing of personal assets if governed at all, at best is under the most Kafkaesque of rules. And where judicial proceedings have been made available to those charged with crime, they have been substantially curtailed.<sup>14</sup>

If this draconian regime were applied with equal vigor to all, that pause will very likely occur. But it is not. Ostensibly liberal societies, shielding their governance in the banner of “democracy” have engaged in the discriminatory application of the rules by framing two distinctive categories of the non-citizen and the radical islamist for whose benefit the traditional rules of liberalism are inapposite. These are the new barbarians. Explaining how we arrived at this juncture, and what it portends for our understanding of “liberalism” is the undertaking of this paper.

## II. *THE CREATION OF A NEOLIBERAL WORLD ORDER.*

“The rules of the game are changing,” Prime Minister Tony Blair of the United Kingdom, and a quintessential neoliberal,<sup>15</sup> told the world as he tried to explain a slew of

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<sup>11</sup> The detentions of persons on Guantanamo Bay is, of course, the best known but by no means only example of this phenomenon. *Compare* *A and Others v. Secretary of State for the Home Department*, 2004 UKHL 56 (H.L. 2004). This is also a well-worn tool of Israel’s war with Palestinians.

<sup>12</sup> Newspaper stories on the subject abound. Because much of the information is closely guarded as “national security secrets,” it is virtually impossible for a lay person to ascertain the boundaries, if any, of this unadorned “use” of power.

<sup>13</sup> *See, e.g.*, S.C.Res. 1625, U.N. Doc. S/RES/1625 (Sept. 14, 2005). In the United States, a life imprisonment sentence has been imposed on a Muslim preacher for “making a series of speeches that prosecutors contended -- and a jury found -- incited his followers to train for war against the United States.” *See Sentenced for Speaking*, *The Washington Post*, July 17, 2005.

<sup>14</sup> In the United States, for example, the use of so-called “Military Commissions” to “try” alleged “enemy combatants” for being members of a “terrorist” outfit stands as a glaring illustration of the travesty of judicial process. But the perversion of the process goes further. As an element of the so-called “global war on terrorism,” persons are routinely “lawfully” arrested as “material witnesses” the basic right of an accused person to “confront” a witness has been greatly vitiated in the name of “national security.” *See, e.g.*, *U.S. v. Moussauoui*, 365 F. 3d 292 (4<sup>th</sup> Cir. 2004) amended on rehearing at 382 F.3d 453 (4<sup>th</sup> Cir. 2004). Moreover, the Government views the game as a “heads I win tails you lose” proposition. Thus, it accepted as vindication the willingness of a Virginia jury to convict solely on the basis of reported speech the association of an Imam with terrorism, but in response to the acquittal of a Palestinian-born Professor from similar charges – again proffered solely on the basis of speech – it has threatened to deport this stateless academic to any country that would accept him.

<sup>15</sup> To the extent that the neoliberalism of the 1990s can be pinned down to a distinctive statement, it is to be found in the so-called “third way”; a philosophy in which the “left-of-center intelligentsia” of the Anglo-Saxon world, in the wake of the collapse of Communism, while fearful of embracing “social democracy” as a discredited political movement, felt sufficiently self-assured to reject class-based explanations of politics and social structures, but insufficiently snobbish to embrace the divine right to rule. The moralism of individual merit was the rallying nostrum of this ethos. *Compare* PHILIP STEPHENS, *TONY BLAIR: THE MAKING OF A WORLD LEADER* (Viking Adult 2004).

draconian antiliberal steps that his government intended to take in response to the exploding of bombs in London.<sup>16</sup> Among those proposed steps are the administratively determined deportation of foreigners who, in the government's view, are "fostering hatred, advocating violence to further a person's beliefs, or justifying or validating such violence." Similarly, "active engagement" with any of a list of "specific extremist websites, bookshops, networks, centres and particular organisations of concern," drawn up by the government might lead to deportation of the person so engaged. Foreign-born persons with British citizenship can be stripped of that citizenship and deported if they are found to be members of proscribed groups, including those that are engaged in no more than the dissemination of speech deemed to be "extremist."<sup>17</sup> Notably, all of these activities which are to be punished by the expulsion and banishment of persons from the United Kingdom involve no more than the hitherto quintessential attribute of liberal practice, the exercise of the "human" (one might even contend "natural") right to free speech.<sup>18</sup> To his credit, Prime Minister Blair did not attempt to obfuscate the identities of those who would be directly adversely affected by the changing rules of the game, nor the reasons for changing the rules in the middle of the game. While asserting that "this is not in any way whatever aimed at the decent law-abiding Muslim community of Great Britain," he forthrightly pointed out that Muslims, as a racial and religious minority were in the United Kingdom at the sufferance (or, in his own words, "good nature, tolerance and hospitality") of the British people, that the "mood" of the British society towards Muslims had changed, and that as a politician, he had to respond to that mood.<sup>19</sup> Pointedly, he noted that the politicians had tried to change the rules earlier – following the September 11, 2001 attack on the United States – but that the judiciary had invalidated that change.<sup>20</sup> And more than politicians in the United States, he candidly acknowledged that in implementing these new policies, his government was confronted by adverse judicial rulings which he nonetheless intended to undercut.

The Prime Minister's statements and proposals uncommonly and refreshingly present the tensions – if not outright contradictions – that characterize contemporary Western Liberal thought. On the one hand, contemporary liberalism (or, more accurately, neoliberalism) presents itself as a creed that embraces all of humanity within an egalitarian ethos. Each and all individuals are to be accorded the same level of fairness and respect from governmental authorities. On the other hand, each and all individuals are right-bearers only to the extent they can assert it against their own governments. Individuals within a state through democratic processes may be entitled to regulate their

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<sup>16</sup> See, e.g., Kevin Sullivan and Fred Barbash, *Blair to Institute New Deportation Measures: Britain Could Deport and Exclude Foreign Nationals for 'Fostering Hatred'*, Washington Post, Aug. 5, 2005. In what is surely an unintended irony, Blair's statement appears to be a subconscious echo of one of the memorable phrases of one of the rebellious icons of the "baby boom" generation to which he belongs – Bob Dylan.

<sup>17</sup> See Sullivan and Barbish, *supra* note \_\_\_. Compare Marc Champion, *Zambia Departs Briton Suspected Of Having Links to Terror Network*, Wall Street Journal, Aug. 7, 2005 (On Friday, Mr. Blair named two Muslim groups that he wanted to add to the U.K.'s list of banned terrorist organizations, Hizb-ut-Tahrir and the successor to the now defunct al-Muhajiroun. Both have radical views, but in public, at least, have steered clear of advocating terrorism inside the U.K.).

<sup>18</sup> See, e.g., UNDR, Preamble (1948); ICCPR, Art. 19 (1976); ECHR, Art. 10 (2003).

<sup>19</sup> See PM's Press Conference (August 5, 2005), available at <http://www.number10.gov.uk/output/Page8041.asp>.

<sup>20</sup> See *Id.* Compare *supra* note \_\_.

relations with the state, but sojourners, regardless of how long they have sojourned within the state, are entirely at the mercy of the changing moods of their hosts. Moreover, and relatedly, the power of the state – or more accurately, of the state to which the individual belongs – is wholly dispositive of the power and rights of the individual. But the explicitness of this dichotomy in liberal thought hitherto had been buried in the sophistry of the universalist claims of neoliberalism. Revisiting the origins and scope of that sophistry is essential if we are to appreciate how intrinsically embedded in neoliberal thought is Mr. Blair’s seeming outburst in the wake of the London bombings.

#### A. *The Ascendancy of the Neoliberal world Order*

The unchallenged dominance of neoliberalism – indeed, of liberalism generally – as the international standard of governance is a very recent phenomenon. Prior to 1979, liberalism was on the defensive. Engaged in a rivalry with several competing modes of governance, it appeared no more surefooted in guaranteeing an environment for optimizing social welfare or personal security than did a host of other philosophies of governance.<sup>21</sup> While the most vigorous confrontation was with “Soviet style” Communism, it was also challenged by such regional ideologies as “Maoism,” “Euro-Communism,” “third world nationalism,” “Latin American Corporatism,” “Arab nationalism,” “African socialism,” “and revolutionary (or intellectual) nihilism, to name some of the most conspicuous of them. But all of these were to change within a decade.<sup>22</sup> Rarely investigated, this transformation is typically presented as an inevitable fait accompli in which the unquestioned superior virtues of liberal institutions have become embedded in societies because they are “universal values.”

The publication of Francis Fukuyama’s *End of History*<sup>23</sup> gave voice to the new zeitgeist. Liberalism, the ideal of the French Revolution that was realized in practice by American Constitutional Republicanism was the ultimate objective of modernity, and in the collapse of communism, history had reached its culmination. International Law scholars wasted little time in translating Fukuyama’s polemics into the sedate crypto-conservative creed of reasoned analysis and dispassionate elaboration of “norms” for which lawyers justly are famous. Essentially, these writers distilled four principles as regulating the “new world order.” There was, they opined, an “entitlement to democratic rule” under international law. Governments that could not establish their mandate to rule through periodic elections by a significant subset of the general population were therefore illegitimate. Such governments, and the states that they run therefore were not entitled to receipt of the traditional rights, prerogatives, or courtesies that typically are accorded “legitimate states” international law. They were deemed to be “pariah states.” Secondly, Governments are bound to respect the human rights of their citizens. The failure to do so renders such governments outcasts (or “pariah states”) within the international system.

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<sup>21</sup> See, e.g., CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS* (Basic Books 1977).

<sup>22</sup> Extensive discussion of the reasons for the triumph of neoliberalism over the competing ideologies is beyond the scope of this essay. My thoughts on the subject are available at *The Other in International Law: 'Community' and International Legal Order*, U. of Maryland, Pub Law Research Paper No. 2004-03. available at <http://ssrn.com/abstract=504782>.

<sup>23</sup> FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

Thirdly, International legitimation also requires that a society be governed by “the rule of law.” This mandates that the institutions and practices of the society be “transparent”; i.e., rationally comprehensible and acceptable to those schooled in “liberal” intellectual thought. Substantive norms such as those that define “corruption,” women’s rights, freedom of press and of property take on legal meaning only when framed in terms that are fully consonant with the values of “transparency.” Fourthly, success in the international system, it was often intimated, hinged on the willingness of a society to accept and build on those free economic institutions which had made the West the dominant force in the international order that it had become; that is, the market system for organizing the production, accumulation, and distribution of resources.

The creation of a standardized global regime that unstintingly enfolded these concepts became the driving force of international relations and international law in the 1990s. The new technologies of the “digital” and “information” “revolutions,” which permitted near-instantaneous communication at relatively little cost backed up the universalist zeitgeist. The entire planet had become a “global village,” and nation states were no longer the ultimate (or perhaps even primary) arbiters of the destinies of mankind. Human beings were free to form their own associations and identities, and to have them fostered and respected under international law. The “state” was shrinking, and international “civil society” expanding. Simply put, the international law apostles of the “end of history” posited a universal society in which all individuals were members of a single international community. In this vision, there was no “other”. International law equitably subsumed the interests of all, and dispensed justice without regard to nationality or the other traditional cleavages of international law.

Empirical arguments were advanced in support of these claims. It was said, for example, that democratic states did not go to war with each other.<sup>24</sup> Moreover, and of particular resonance for international lawyers, democratic states followed the rule of law both in the regulation of their domestic governance and in their transnational relationships.<sup>25</sup> As such, they respected the dignity of the person, honored the human rights of all persons, were less subject to corruption and to other forms of misfeasance, and kept the compacts they made with their citizens and with outsiders. Similarly, democratic states necessarily embraced the market system of organizing economic interactions, grounded, as the latter is, on respect for the sovereignty of individual choices. It is thus hardly surprising then, went the contention, that societies whose economies were based on the market system were also the richest and those who provided best for the welfare of their citizens.

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<sup>24</sup> See, e.g., BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993). Compare John Norton Moore, *Solving the War Puzzle*, 97 AM. J. INT’L L. 282 (2003) (arguing that “incentives theory” may provide a better explanatory fit for the proclivity of societies to go to war).

<sup>25</sup> See, e.g., Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Jose E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory*, 12 EUR. J. INT’L L. 183, 194 (2001) (noting that “we do not know for sure whether liberal States behave better] but there is plenty of reason to be skeptical”). See generally Fareed Zakaria, *The Rise of Illiberal Democracy*, Foreign Aff. (Nov. – Dec. 1997); SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 59 (2000).

The view of the “democratic entitlement” generated its own antithesis and backlash. Many of those whose scholarly work had formed the basis for the polemics of the newly fanged world order began to protest that their disciplined and carefully segmented analysis of the disintegration of the old order and the birth of the new had been misconstrued and misapplied by zealots. That a “third wave” of democratic governance had sprang up in the 1980s, argued one influential theorist, should not be mistaken for the universality of a single democratic culture.<sup>26</sup> To the contrary, there remain fundamental differences among the various “civilizations” of the world, and one should not see in democracy or in the particular triumphs of the West the convergence of a single world order.<sup>27</sup> Others pointed out that despite the tendency to invest in “globalization” and the homogeneity of societies, there remain fundamental cultural, social, and economic differences between the impoverished worlds of Africa and Asia, and the opulence of Western Europe and North America.<sup>28</sup> In the legal context, some writers made explicit that their idea of an international community was limited to “liberal democratic” societies. The convergence of interests and rules which they preached did not thus apply to all members of the international society, but only to a limited subset of the countries of Western Europe and North America.<sup>29</sup> In fact, some writers questioned whether the same legitimating effect accorded the democratic process in the West should be extended automatically to some non-Western societies.<sup>30</sup> As these writers recognized, legal and political institutions are culturally derived and fostered. And, contrary to the attitudes and assertions of the “end of history” theorizers, there is no universal culture. As such, legal rules and political institutions are framed by and respond as much to expedient facts and considerations as to any normative beliefs. In the 1990s, no less than in earlier times, the international system continued (and must continue) to distinguish among cultures.

Events on the ground both initiated and provided practical support for what otherwise may have amounted to little more than intellectual musings. Liberal Democratic societies in Western and Northern Europe and in East Asia and Australasia were in peace and prospering mightily even as much of the rest of the world disintegrated. It became relatively easy to equate correlation with causation, as one scholar after another contended that Western prosperity was due to its democratic institutions.<sup>31</sup> The long-squabbling countries of Western Europe, sharing liberal democratic institutions, and confirmed in their Kantian heritage, moved to develop a functioning political federation.<sup>32</sup> The “Maastricht” Agreement transformed a limited

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<sup>26</sup> See Samuel P. Huntington, *The Clash of Civilizations?*, Foreign Aff. (Summer, 1993).

<sup>27</sup> See, e.g., RONALD STEELE, *TEMPTATIONS OF A SUPERPOWER* (Harvard Univ Press 1995).

<sup>28</sup> Robert D. Kaplan’s essays are illustrative of this genre. See, e.g., Robert D. Kaplan, *The Coming Anarchy*, *The Atlantic Monthly* (Feb. 1994).

<sup>29</sup> See Burley, *supra* note \_\_.

<sup>30</sup> See, e.g., Gregory Fox, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1 (1995).

<sup>31</sup> See, e.g., Russett, *supra* note \_\_; Compare Moore, *supra* note \_\_. More recently, this contention has been decisively challenged. See, e.g., Joanne S. Gowa, *Ballots and Bullets: The Elusive Democratic Peace* (Princeton U. Press, 1999).

<sup>32</sup> This onward march may have been temporarily checked by the rejection in recent referenda of the European Constitution by the French and Dutch publics.

economic institution into an overarching political entity with continent-wide aspirations.

In contrast with the unbounded optimism that the “European Union” represented was the ethnically-driven disintegration of the satellite societies of Central and Eastern Europe, with events in the Balkans reminding all of the evils that Western European democracies had now seemingly transcended. Similarly, the socio-economic disintegration of non-Democratic societies outside of Europe was often explained by pointing to their non-democratic heritage, and by insisting on the “restoration” (but, more accurately, “imposition”) of democratic governance to these societies. With its global reach, the United States was seen as the natural sheriff to undertake the task. Somalia, Haiti, Bosnia-Herzegovina, the “no flight zones” of Iraq, Liberia and Kosovo were simply stopping points en route to Afghanistan and Iraq.

The triumph of neoliberalism as the dominant philosophy of governance in the 1990s thus flowed from the indisputable military and economic might of liberal societies; particularly, the selective willingness of these societies to deploy that military and economic might in the service of the ideology. In such an environment, the internal coherence of the ideology was either assumed or facilely papered over. But that coherence could be maintained only as long as there was a congruence of power and preference. Challenges to power or divergence of interests would open for inspection the coherence of doctrine and practice. And it is precisely this dimension of neoliberalism that the terrorism debate has rendered no longer avoidable. But before inquiring more closely into the relationship of power and ideology, it is important to present the two other legs of the stool on which neoliberalism rested.

### *B. Coercion, Human Rights and the Rule of Law*

Classical Liberalism, springing as it did in the interstices of European debates as an intellectual response to the absolutisms of the monarch and the church understandably has always employed utilitarian or consequentialist arguments to support specific prescriptions. Yet, for every Hobbes, Montesquieu, Hume or Bentham, there has been a Locke, Kant or Mills that seeks to justify Liberalism on non-consequentialist grounds; that is, on an argument that elevates the internal rationality of liberalism over its functional justification. Invariably, the consequence of that internal rationality has been the privileging of the “rights of the individual” over any claims that can be made on him or her by the community. The emergence of neoliberalism as the dominant ideology of the 1990s followed this well-worn route. If the consequentialist wing of neoliberalism waived the banner of democracy, its nonconsequentialist adherents just as loudly proclaimed the inherent virtues of human rights and the rule of law

The view that each individual human being who is a member of a community has some inherent worth which may not be capriciously sacrificed at the mere whim of another is probably present in all cultures. Cultures have varied, however, in both time and space as to the living being that is to be considered “human” and therefore fully entitled to recognition as a member of the community. “Slaves,” to take an example, in many societies and at various times were not accorded the status of recognition, while in

others, they simply were deprived of some attributes of “humanity” generally available to non-slave members of the community.<sup>33</sup> An even greater difference existed among societies as to the class of attributes to be deemed “unalienable.” “Life” was probably generally recognized as one such attribute, but, the memorable phrasing of the American Declaration of Independence, notwithstanding, neither “liberty” nor the “pursuit of happiness” can make such a claim.<sup>34</sup> But even of much greater differentiation among societies has been the determination of what constitutes “caprice” or arbitrariness in the deprivation of a “right” that is otherwise available to a member of the community. Thus, for example, while virtually all societies may subscribe to an inherent right to life, virtually all societies probably also agree that the taking of another’s life when necessary to defend one’s own is not capricious. But, is it equally permissible for a society to “sacrifice” the life of one of its members if, in doing so, the society would be obviating a generalized danger to the society itself? Different societies, over time and place, have provided significantly different answers to this question. The normalization or standardization of the answer to this question in a given time and place constitutes an embryonic definition of “the rule of law.”<sup>35</sup>

For the most part, classical liberalism sought to answer these difficult questions by eschewing an all-embracing substantive answer. While the right of personal security<sup>36</sup> and of the “property” that is created by one’s labor<sup>37</sup> tenably can be argued to represent a reaching by classical liberal scholars for a substantive definition of rights, the dominant resolution among such scholars was essentially procedural. The right available to the individual was to be determined by the application of procedural rules. For Hobbes or Locke, the rights flow from the process of contract. For Kant or Mills, the right as those that an atavistic individual, located within a particularized environment would want to be tendered to him or her. Neoliberalism dispensed with this process orientation to the definition of rights.

The procedural/substantive difference in approaches between classical and

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<sup>33</sup> Here, I want to make explicit that I distinguish between material inequality which, in all societies, has been a mark of status in a community, from a binary division between the recognition of a living being as “human” or a “person,” and the recognition of an otherwise equally physically and mentally endowed being as a member of the community. The relationship between a “nobleman” and a “peasant” in medieval Europe is for my purposes, qualitatively different from that between a Greek and a slave in Fifth Century (BCE) Sparta. Many will accept the distinction, others will find it metaphysical. This note, however, should avert a spurious charge of false relativism. *Compare generally* Sanford v. Dred Scott, 60 U.S. 393 (1857) (discussing whether a “freed slave” is a “citizen” of the United States. I take up the relevance of “citizenship” to this discussion in Part IV, *infra*.)

<sup>34</sup> The same can be said of the other two declarations of the French articulated “rights of ‘man’” (or ‘citizen,’ equality and fraternity; or, for that matter of the Canadian Charter’s provision of “personal security.” *See* The Declaration of Human Rights (France 1789) *available at* [http://www.elysee.fr/elysee/anglais/the\\_institutions/founding\\_texts/the\\_declaration\\_of\\_the\\_human\\_rights/the\\_declaration\\_of\\_the\\_human\\_rights.20240.html](http://www.elysee.fr/elysee/anglais/the_institutions/founding_texts/the_declaration_of_the_human_rights/the_declaration_of_the_human_rights.20240.html); Canadian Charter of Rights and Freedom (Can. 1982). And even less so can the claim be made for viewing “property” as a core transcendent primordial right of humanity.

<sup>35</sup> I return to this issue in Part II, *infra*.

<sup>36</sup> *See, e.g.,* THOMAS HOBBS, LEVIATHAN (1651).

<sup>37</sup> *See, e.g.,* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1821); *compare* KARL MARX, DAS KAPITAL (1867); *see also* FREDERICK BASTIAT, THE LAW (1850).

neoliberal thinkers reflected differences of outlook as to the basic institutions for organizing relationships among members of a political society. If classical liberalism saw its project primarily in terms of providing a rational explanation for preferred political behavior within the framework of the State, neoliberalism viewed its project as the search for justifying the choice of preferred legal rules within the political community. Where enlightenment scholars sought to legitimize the state with reference to politics, neoliberals took legal rules as the foundational premise against which all behavior is to be measured. And, within the legal imperium, “enforcement” was assigned the pride of place.

The conflicts between classical liberalism and neoliberalism play out extensively in the context of International Human rights. Spurred by revulsion at the gross atrocities perpetrated on minority groups in Europe before and during World War II, international society undertook to impose obligations on the nation state with regard to its treatment of persons within its jurisdiction. As a first step, the Universal Declaration on Human Rights identified baseline obligations of member states of the United Nations to *all persons* within their jurisdiction. Despite the egregious human rights violations that spawned the Declaration, it was framed and presented as a political rather than a legal instrument.<sup>38</sup> Subsequent efforts to translate the Declaration’s political aspirations into formal legal obligations took the conventional international law-making processes of minutely negotiating the terms of the obligations, enshrining those in treaties, and having each state, employing its own domestic processes, voluntarily take on the requisite obligations by signing and ratifying the treaties as discrete legal instruments.<sup>39</sup>

Although the human rights treaties embodied broad substantive undertakings by signatories, they are notable for the flaccidity of the mechanisms for their enforcement. In general, good faith compliance by the signatory is the norm. These are backed-up by periodic self-reporting requirements and peer review.<sup>40</sup> Notably, countries that fall short of their obligations are subject only to those sanctions that flow from peer disapproval or self-imposed shame. But the seeming ineffectiveness of such a weak enforcement structure was particularly glaring in the political environment of the Cold War. Although countries readily signed unto the multiple extant human rights agreements, the repression of rights was the rule rather than the exception in much of the world. Denial of free expression and association, as well as the use of torture was said to be pervasive in Communist countries as well as through much of the so-called Third world. But neither the terms of the human rights treaties, nor the finely-balanced power arrangements of the Cold War permitted liberal democratic societies to call these countries to account. Liberals who believed in the promotion of human rights were relegated to the virtually impotent use of “letter writing campaigns” by private individuals and nongovernmental

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<sup>38</sup> Both the drafting of the document primarily in semi-official settings, and its promulgation by a nonbinding “declaration” of the United Nations General Assembly attest to this point.

<sup>39</sup> A slew of Human Rights treaties resulted from these processes. These included those providing for “Civil and Political rights,” “Economic and Social rights,” and “the rights of the Child.” Others forbade discrimination against women or an account of race, while others forbade genocide or the use of torture. The point worth noting is that here is that each and everyone of these laudable substantive undertakings by a state remained within the capacity of each state to accept or decline.

<sup>40</sup> See, e.g., ICCPR, Art. 40(1976); ICERD, Art.

organizations.

The collapse of Communism and the corresponding withering of governments associated with it offered an opportunity for transforming the human rights regime. Liberal democratic societies could have insisted on and promoted a much more strict adherence to the existing regime by, among other things, rigorous enforcement of the self-reporting provisions of the extant treaties. Alternatively, they could have sponsored renegotiations of the existing treaties and included more robust enforcement rules. Either one of these approaches would have reaffirmed a belief in and commitment to the classical idea of the “equality” of states. But, as already explained, the dominant climate, among liberal democratic societies in the early 1990s was to question both the empirical validity and the usefulness of the concept of equality of state.<sup>41</sup> Confident in the supremacy of liberal ideology, and backed by the singular military and economic power of the “civilization” that embodied it, Western liberal democratic societies systematically set about to enforce their conception of “international human rights.” The enforcement of human rights were now to be undertaken in much the same way that any legal right is enforced in a liberal democratic society; that is, through compulsory and binding judicial processes.

The inclination to enforce international human rights through binding adjudication initially confronted several seemingly insurmountable roadblocks that were both practical and intellectual. But against a self-assured elite backed by unparalleled military and economic power, the hurdles were, if untidily, dispensed with. In-doing-so, however, neoliberals undermined established tenets of liberalism, and laid the groundwork for many of the illiberal assaults that ostensibly liberal democratic societies have employed in the “war” against terror.

An initial practical difficulty confronted in the judicialization of international human rights enforcement was the absence of competent institutions to undertake the task. As already explained, the transformation of human rights following World War II from a set of political to those of legal norms did not include mechanisms for coercive enforcement. In particular, there were no international judicial tribunals fitted out for the purpose. Neoliberalism has sought to override this difficulty in two distinct ways, each of which presents different but related difficulties. First, domestic judicial tribunals were pressed into service. From the United States to Spain, to Belgium and to the United Kingdom, among others, domestic tribunals were asked to sit in judgment over alleged human rights violations that occurred in repressive non-democratic societies, and which otherwise had no connection with the political jurisdictions in which the courts sat. These demands raised significant questions as to the legal competence and political wisdom of employing domestic tribunals in such situations. Among other issues, such requests threatened the viability of established legal principles that regulated the assertion of jurisdiction by the courts of one state over conduct or activities that occur outside of the territory of the state.<sup>42</sup>

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<sup>41</sup> See supra \_\_\_\_.

<sup>42</sup> These doctrines, generally subsumed under the term “extraterritorial jurisdiction” constrains the power of a state to enact rules or adjudicate claims relating to occurrences outside of the territorial boundaries of the

Neoliberalism tried to get around this basic core of legality by positing that human rights violations belonged to a special specie of international law, that of a “universal” obligation that each and every state undertakes to vindicate on behalf of all individuals, regardless of where that individual happens to reside.<sup>43</sup> But as a legal proposition, this conception of enforceable universal rights has run into substantial difficulties, the effective results of which have been to discriminate substantially on the basis of the nationality of both the alleged perpetrator and that of the victim. In the United States, for example, much judicial ink has been spilled trying to determine precisely which alleged human rights violation(s) rises to the status of being a “*jus cogens*,” a standard that the courts have found necessary as a means of controlling the influx of human rights claims that have inundated United States courts. A cursory inspection of these cases make it plain that outcomes ride as much on generalized perception of the society in which the offensive conduct allegedly took place as on any other criterion. Allegations of human rights violations – regardless of their particulars – will almost always be found to give rise to enforceable proceedings if alleged to have taken place in such places as Burma, Iran, Cuba or some benighted African country, while allegations of similar wrongdoings in Germany, France or the United States are likely to be dismissed. But the United States is not unique. The persistence of Belgian courts in taking literally the mandate of “universal jurisdiction” that the Belgian legislature had conferred on them forced that legislature, in the wake of pressure from major liberal democratic powers like the United States to recast the law, thereby making obvious its intended discriminatory reach.<sup>44</sup>

In claims brought to enforce “universal human rights law in domestic courts, then, each country is free to determine the reach of the law and the persons whose conduct is to be regulated; except that each liberal democratic society goes out of its way to apply the law *only* to disfavored states, and most significantly almost always never to its own citizens.<sup>45</sup> Moreover, the doctrine of “universal jurisdiction” which had evolved as an

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state. With the exception of the concept of “universal jurisdiction,” states may regulate activities outside of their boundaries only if they can identify some close relationship between the activity and quite specific interests of the state, such as the nationality of the wrongdoer or victim, or some other security interest of the state in deterring or punishing the allegedly wrongful conduct. *See* generally Restatement (third) of the Foreign Relations Laws of the United States, §§ 401 et seq.

<sup>43</sup> The Second Circuit Court of Appeals of the United States, in a seminal decision, explained the rationale for such a rule as follows:

“the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”

*Filartiga v. Pena Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

<sup>44</sup> See “Act of June 16, 1993 regarding the punishment of breaches of the 1949 Geneva Convention,” (*translated* in 38 I.L.M. 918).

<sup>45</sup> The United States Supreme Court recently confronted this situation in *Sosa v. Alvarez-Machain*. Seemingly oblivious to the ironies of the situation, it managed to avoid holding United States officials responsible for conspiring with bounty hunters to kidnap and falsely imprison a Mexican national from Mexico, while at the same time holding that United States domestic court interpretations of international

exceptional tool for the criminal prosecution of private outlawry on the high seas,<sup>46</sup> -- that is, to punish egregious private criminal conduct that takes place outside of the territory of any and all states -- had now metamorphosed into a routine justification for private civil actions against foreign officials. And, in keeping with the zeitgeist of the age, the coercive use of the litigation was a one-way affair. Under the mantle of enforcing human rights, private parties, within powerful neoliberal states invoked the judicial processes of these states to obtain review of political processes in and to slap down public officials in so-called “pariah” (that is to say “weak”) states. United States courts, for example, have found it entirely within their competence to review political decisions in several African countries, as long as the claim was couched in the language of alleged violations of human rights; a situation that ordinarily, United States courts would otherwise eschew under a host of mandatory and prudential jurisdictional doctrines.

International adjudicatory tribunals have emerged as alternative loci for human rights enforcement. The history of their growth and the circumscription of their jurisdiction only reinforce the power play that already has been outlined. These institutions initially emerged as ad hoc responses to widespread and systematic atrocities in civil wars. In Bosnia Herzegovina, the creation of an International Criminal tribunal served the dual purpose of cementing the emerging assertiveness of Security Council authority as well as deflating the increasingly shrill demands in the United States for a robust response – if necessarily unilateral – to the human tragedies being reported in the Balkans.<sup>47</sup> The tribunal for the atrocities in Rwanda was without question a “me-to” institution intended as much to quiet criticism that the United Nations – and more particularly its sole superpower – did nothing allegedly because the victims were black. The obvious tension between the popular demand (at least among the international law intelligentsia) for their creation, and their grudging acceptance by politicians as the least interventionist measure under the circumstances assured that these ad hoc institutions would be endowed with limited powers. But that they had come into being at all was a testimonial of the driving influence of “civil society,” and the extent to which politicians of the neoliberal persuasion were willing to work with them. Furthermore, the exceptionally positive press given these ad hoc institutions despite their narrowly circumscribed jurisdiction which, among others, narrowed its focus to “out of power” politicians (rather than on those in power, or on the state itself) mapped the possible routes for the accommodation of the interests of the legal intelligentsia and neoliberal politicians. The accommodation of these interests were worked out in negotiations over the creation of a permanent tribunal, the International Criminal Court, under the auspices of the Rome Treaty.

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human rights law could be applied extraterritorially to conduct otherwise having no connection with the *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>46</sup> The quintessential example of a crime subject to “universal jurisdiction” was “piracy,” and the slave trade is often cited as another. The standard explanation for universal jurisdiction in these instances is that the privateer or slave trader might, by remaining on the high seas, be otherwise beyond the reach of any municipal law.

<sup>47</sup> See, e.g., DAVID HALBERSTAM, *WAR IN A TIME OF PEACE: BUSH, CLINTON, AND THE GENERALS* (Scribner 2001).

What is genuinely remarkable – although far from being surprising – about The Treaty of Rome is the explicitness of the homage and deference paid to power in an ostensibly legal institution. Understandably, the classical view of a treaty as being effective only against those states that voluntarily assent to its terms is maintained. But within this framework, the legitimation through law of inequalities within the international system is pursued vigorously.<sup>48</sup> Thus, what is provided for is the punishment of individuals rather than the state for essentially official conduct.<sup>49</sup> In the one crime where this fiction of individual responsibility for state crimes could not be easily finessed – “aggression” -- the answer was to punt the issue to the indefinite future.<sup>50</sup> Within the realm of individual culpability for state actions, the privilege of national citizenship is elevated to a trump. Prosecutions before an ostensibly impartial international tribunal may be avoided by a state showing that it is willing and capable of prosecuting its own nationals.<sup>51</sup> The United Nations Security Council, the epitome of an unrepresentative institution that is grounded entirely on the unequal distributions of political and military power within The international system has an unreviewable authority both to instigate criminal investigations as well as to defer such investigations.<sup>52</sup> And so, in recent months, international law has witnessed the spectacle of the Security Council referring for possible prosecution – and the ICC prosecutor taking up – allegations of human rights violations in Darfur, Sudan, even as Sudan claims that it will set up domestic tribunals to investigate and punish such wrongdoers. And meanwhile, the international system is conspicuously silent about possible human rights violations in the invasion and occupation of Iraq, or, for that matter, the treatment of combatants in Afghanistan; and this, despite extensive publicity of seemingly inhumane treatment in both theaters of conflict.

What has been said so far should make it plain that taking account of the national identity of the individual – whether as an alleged offender or victim – was a central feature of the rejuvenated practice of human rights under neoliberalism. This is of course contrary to the standard self-congratulatory teaching of human rights scholarship in the 1990s. During that period, liberal scholars portrayed themselves as denationalized (AKA “cosmopolitan”) knights doing battle on behalf of the oppressed against dictatorial governments. Victory demanded the complete emasculation of such governments, and this was possible only if these governments were shorn of all attributes of legitimacy that is conveyed in the term “sovereignty” (or, as a well known scholar put it, “the ‘S’ word”).<sup>53</sup> There is afoot a reconsideration of the virtuous pretensions of human rights

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<sup>48</sup> This is of course not a new theme. See, e.g., GERRY J. SIMPSON, *GREAT POWERS AND OUTLAW STATES* (Cambridge 2004).

<sup>49</sup> See *The Rome Statute of the International Criminal Court, Final Act, (U.N. Doc. A/CONF.183/9)* (1998), Art. 1.

<sup>50</sup> *Id.* at Art. 5(2). Notably, “aggression” (essentially the unprovoked attack of a state) is a crime more likely to be committed by powerful states – or their representatives – than by weak ones.

<sup>51</sup> *Id.* Arts. 12(2)(b), 17(1).

<sup>52</sup> *Id.* Arts 13(b) and 16.

<sup>53</sup> See, e.g., Louis Henkin, *The Robert Levine Distinguished Lecture Series That “S” Word: Sovereignty, and Globalization, and Human Rights, Et. Cetera*, 68 *Fordham L. Rev.* 1 (1999).

proselytizers,<sup>54</sup> but the state remains a bogeyman for human rights activists, although not so for neoliberal politicians. For the latter, the state has gained renewed importance because of the so-called “war” on terrorism. In fighting the war, politicians have discovered a new enemy “stateless terrorism” whose animating evil is said to flow from “fundamentalist Islam”. But how readily can one distinguish between state and religious identities? Is the belittling of “fundamentalist Islam” significantly different from that of the state? Or, is neoliberalism doomed to repeat the same miscalculations about the strength and vitality of attachments between the individual and his/her social community, whether political or religious? These are the issues to which I turn.

### III. NEOLIBERALISM IN THE FIGHT AGAINST FUNDAMENTALISM

The hijackings by 19 box cutter wielding passengers of 4 jet aircrafts in the United States on September 11, 2001, and the subsequent crashing of three of the planes into the Pentagon – the building housing the United States Department of Defense – and the twin towers of the World Trade Center in New York have had far-reaching ramifications for contemporary international society. Under any circumstance, these events would have been memorable. Directed as they were at symbols of the power and influence of the singularly powerful state of our time, they have been particularly so. But the events themselves pale into insignificance in the wake of the responses that they have unleashed. It is commonplace to view these responses as a break with the past (the standard refrain is “911 changed everything”),<sup>55</sup> but are they? What makes it possible for liberal democratic and rule of law societies to abandon, on the basis of a single event, core aspects of their social and legal structures? This is the puzzle about which, despite the volumes that have been written about the post-“911” world, very little attention has been given.<sup>56</sup> In what follows, I shall explain why the post-911 responses inexorably flowed from the groundwork of international rules and norms that neoliberalism had laid in the 1990s. The point that I seek to demonstrate here is how the externally directed intolerance of neoliberalism in the 1990s has driven the internal responses to terrorism since 2001.

The use of terror in political conflicts is older than and at least as diffused among societies as is liberalism. Yet, one of the striking aspects of the reactions engendered by September 11, and which subsequently has become embedded in the response to terrorism by Western liberal democratic societies has been its equation with a particular religion, Islam. This response was foreshadowed in the immediate aftermath of

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<sup>54</sup>See, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (Princeton U. Press 2004); David Rieff, *A BED FOR THE NIGHT: Humanitarianism in Crisis* (Simon and Schuster, 2002); Slavoj Žižek, “Against Human Rights,” 34 *New Left Review* 115 (2005).

See, e.g., *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?*, (Mary L. Dudziak, ed., Duke U. Press, 2003).

<sup>56</sup> The United States led the response to the September 11 attacks; but much of international society either went along – with differing levels of enthusiasm, of course – or simply stood by. What is clear is that, at least until the invasion of Iraq in March 2003, the international society did not protest any of those responses. Moreover, when other countries came under terrorist attacks, their legal responses were not fundamentally different from those of the United States. For intellectual purposes, then, the United States behaved fundamentally no differently from other liberal democratic societies.

September 2001 by a statement of the President of the United States. Inadvertently or otherwise, he referred to the U.S. response as a “crusade,” attaching to it much of the baggage of the millennial conflict between Christianity and Islam. Others within and without the administration were less oblique.<sup>57</sup> The attacks, they suggested, was one aspect of the clash of civilizations that had been prophesied in the backlash to the globalization mindset of the 1990s.<sup>58</sup> Concurrently, many of the initial steps taken in the United States to prevent other terror incidents seemed to single out Muslims for special attention. In particular, persons whose clothes or physical features coincided with stereotypes of Muslims, or of persons from the Arab world came in for close scrutiny.<sup>59</sup> But to the rescue, came the politics of multiculturalism which, whatever its defects, the economic prosperity (and its attendant propensity for social toleration) of the 1990s had mainstreamed. Determined not to succumb yet again to its inglorious history of racial and ethnic prejudices, United States society (especially its politicians and intellectuals) went out of its way to de-emphasize any presumption of a linkage between creed and terrorism.

But the same could not be said for nationality. Relying on the fact that the 19 hijackers were all foreigners, it became conventional to view terrorism simply as an aspect of alienage.<sup>60</sup> As the country went to war – first in Afghanistan, and then in Iraq – and defended its attacks on sovereign states with the argument that it wanted to forestall future attacks on itself,<sup>61</sup> the desire to distinguish between all United States citizens, on the one hand, and foreigners of the Islamic faith on the other, became central to the waging of the war on terrorism. Terror was not viewed as an instrument, but as an ideology; more specifically, an ideology that combined anti-Americanism with “radical” or “fundamentalist” Islam.<sup>62</sup>

United States policies, practices and debates may best illuminate the conflicts that liberal democratic societies encountered in dealing with terrorism following September 11, but neither the dilemmas nor its choice of resolutions were unique to it. With varying degrees of candor and forcefulness, liberal democratic societies capriciously drew lines between their presumptively blame-free citizens and the inherently suspicious foreign-

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<sup>57</sup> See, e.g., Notebook, *New Republic*, Jan. 21, 2002, at 8 (prominent Christian evangelists, the Reverends Jerry Falwell and Pat Robertson, portrayed the September 11 attacks in Messianic terms); Seymour M. Hersh, *Moving Targets: Will the Counter-Insurgency Plan in Iraq Repeat the Mistakes of Vietnam?*, *New Yorker*, Dec. 15, 2003, at 48 (a senior Pentagon official in whom Defense Secretary Rumsfeld continues to have confidence had equated the Muslim world with “Satan,” and that Satan wants to destroy this nation as a “Christian army”).

<sup>58</sup> See, *supra* N. \_\_\_ and accompanying text.

<sup>59</sup> See, e.g., Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, *N.Y. Times*, July 30, 2004, at A14.

<sup>60</sup> See, e.g., Viet D. Dinh, *Nationalism in the Age of Terror*, 56 *Fla. L. Rev.* 867 (2004).

<sup>61</sup> See, e.g., White House, *The National Security Strategy of the United States of America* (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

<sup>62</sup> Interestingly, but not surprisingly, this view has been most forcefully articulated by a Frenchman, Jean-François Revel, but it is also to be found in the writings of other Europeans. See, e.g., JEAN-FRANCOIS REVEL AND DIARMID CAMELL, *ANTI-AMERICANISM* (Encounter Books 2005). See also Jose-Maria Aznar, *NATO vs. Islamist Terror*, *Wall Street Journal*, Nov. 28, 2005 at A16.

born Muslim.<sup>63</sup> In the United Kingdom, for example, the Government of a society with a rich history of having harbored foreign dissenters adopted and enforced a policy of indefinite detention for foreigners that it deemed to be “national security risks,” all of whom turned out to be Muslims or from Muslim-dominated lands.<sup>64</sup> In its December 2004 ruling, the House of Lords, to its credit rejected the equation of terror with nationality and creed.<sup>65</sup> But following the recent bombings in London, the British Prime Minister while blithely skipping over the national origins of the bombers, has had no hesitation in equating the terrorist method with a particular ideology.<sup>66</sup> Nor has this equation been harmless political rhetoric. A dark-skinned Brazilian, apparently assumed to have been a Muslim of South Asian origin was needlessly shot to death in pursuance of protecting the British state from Islamic terror. An insignificant cost, one might say, when put alongside the wars in Afghanistan and Iraq, and the well-documented violations of human rights that have accompanied those wars.

Nor are the United States and United Kingdom alone in invoking the “war on terrorism” as the ground for draconian actions against the foreigner solely on account of being a foreigner, whether on “national” or religious grounds. Australia has sought to adopt legislation that parallels that of the United Kingdom. The French, invoking the unique identity of the République applies its extensive antiterrorism rules harshly on Muslims – especially those of North African origin. And in much of Europe, suspicions of and antipathies towards the immigration of nonwhites has coalesced with the insecurities of the fear of terrorism to foster a pervasive climate of xenophobia towards foreigners from the less developed regions of the world.

That countries might respond to the threats of terrorism with exceptionally harsh measures is hardly surprising. This is especially so when terrorist acts are treated not as criminal, but rather as acts of belligerence. What distinctive about the responses here under investigation flow less from their existence, but from their nature and the lines along which they have been drawn. Ostensibly liberal societies have adopted unequivocally illiberal means to safeguard their societies. In doing so, they have focused on nationality and religion as if these were decisive determinants of behavior. Moreover, the institutional checks on governmental power that have been touted for liberal democracies – limited executive power, responsive legislature and a principled (or “rule of law”) judiciary – have not proved to be effective constraints on the adoption of these draconian measures. To the contrary, to the extent the measures have been directed at the foreigner, democratic principles seem to have exacerbated the tendency to impose their costs disproportionately on outsiders. The rhetoric of the elected President of the United States thus has been “protecting the ‘American people.’” And, apparently, he believes

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<sup>63</sup> See, e.g. Lucy Scott-Moncrieff, *Suspicion of Terrorism*, London Rev. Books, Aug. 5, 2004, at 22; see also John Carreyrou, *Fighting Words: France Moves Fast to Expel Muslims Preaching Hatred*, Wall St. J., Aug. 9, 2004, at A1.

<sup>64</sup> See, e.g., John Upton, *In the Streets of Londonistan*, London Rev. Books, Jan. 22, 2004, at 3.

<sup>65</sup> See *supra* note \_\_.

<sup>66</sup> See *supra* note \_\_ and accompanying text (quoting Mr. Blair’s statement explaining his proposed new antiterrorism legislation). See also his statement before the Security Council, Sept. 14, 2005 (“This terrorism is a movement. It has an ideology and it has a strategy.”) Notably, while facing the world as opposed to his compatriots, he fails to disclose the “ideology.”

that in the pursuance of this goal, the only check that he needs to be bothered with is the effect of the means on Americans. Extrajudicial assassinations, secret and indefinite detentions of suspected terrorists and the extraordinary rendition of “bad guys” to societies where they may be tortured are, under this view, perfectly acceptable means of waging the war on terrorism. Indeed, it has become a source of pride for the President that the war against terror should be fought outside of the United States and against non-Americans regardless of the cost on outsiders. Under this view, the entire country of Iraq can be laid to waste as a means of protecting the American people from terrorism. And, of course, as long as the effects of any measures taken by the President are visited on non-Americans, a responsive American legislature scarcely sees any reason for being bothered. Four years after the Executive’s adoption of a policy of secretive indefinite detentions, the legislature is yet to take a position on this quintessential gauge of the practices of a liberal democracy. And, even as some members appear to be bestirring themselves to limit the unconstrained exercise of power by the Presidency, others, relying exclusively on the distinction between the “citizen” and the non-citizen, have moved to limit the use of the writ of habeas corpus by the detainees in challenging executive power.

These responses to terrorism raise several problems for classical liberal thought. At a purely philosophical level, they challenge several of the walls whose construction and maintenance have been central to the idea of liberalism as a political philosophy. The erection of walls between spheres of the individual and the community, of the private and the public, of self-rule and social governance, and of thought and action, among others, has been crucial to the liberal ideology that, as a social good, the exercise of power by any person and all institutions must be checked if there is to be social peace and harmony. In Prime Minister Blair and President Bush’s utterances, we find a remarkable disdain for the traditional liberal distinctions between thought and action, individual and collective responsibility, the state and religion. The “war” on terrorism is to be prosecuted by penalizing individuals for their thoughts, punishing them on the basis of their associational memberships, and “radical” religion is deemed an enemy of the state that is to be destroyed by force of arms. But if these were merely asserted as beliefs, one can dispute them in much the same climate that liberalism has always permitted – indeed encouraged – in intercourse among persons within a society; that is through debate and discussion, however vigorously pursued. But in choosing to ground the breaching of these walls on the basis of citizenship and creed, neoliberal politicians have astutely exploited, at least in the case of citizenship, the one dichotomy in liberal thought for which liberal philosophy on its face provides no effective counter-force.

Classical liberalism’s focus on the persuasive force of reasoned argument as the essence of governmental power rendered the claim of citizenship no more than a footnote in its philosophy. French revolutionaries and American constitutionalists, alike, while recognizing the existence – if not the necessity – of a deontological tie between the individual and the political community, vested little of real significance on it.<sup>67</sup> Recognizing that the state wielded distinctive powers, these eighteenth and nineteenth century “liberals” were intrigued primarily by the obligations of the state to “man” (or, as

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<sup>67</sup> See, e.g., Alexander Bickell, *The Morality of Consent* (Yale U. Press 1977).

we might more properly say, “persons”), rather than to the “citizen.” Classical liberalism understandably focused on the rights of the person, rather than of the citizen.<sup>68</sup> Similarly, such offsprings of classical liberalism, whether that of laissez-faire capitalism, or of syndicalist communism de-emphasized the relevance of citizenship to a stable and harmonious polity. Indeed, these ideologies drew their recruits from wherever they could find them any where on the globe. In a genuine sense, merit, rather than national identity was decisive.

Neoliberalism, despite its purported emphasis on the existence of “universal” human rights has based much of its credo by emphasizing principles that are essentially nationalistic in character. Thus, as already demonstrated, “democracy” and “the rule of law” derived their force by contrasting the alleged persistence in the nation states of the West, and their alleged deficiencies in other national societies. And it is precisely on these national distinctions that such Western politicians as Prime Minister Blair and President George Bush have anchored their “war” against terrorism. Nationality and religion have become proxies for ideology and acceptable behavior. Rather than rationally coming to terms with arguments, it now suffices to identify one’s citizenship or religion in order to dispose of an argument. And rather than confronting the argument, force is considered the appropriate response.

But the most consequential differences between classical liberalism and neoliberalism lie in the stances that their proponents take towards the deployment of state power. Succinctly put, classical liberalism focused on the dynamics of coexistence among presumptively free actors within a state, while neoliberalism has carved out for itself the task of bringing to presumptively unfree persons in non-democratic societies the blessings of democracy.<sup>69</sup> If classical liberalism saw democracy as a to-be-hoped-for (but by no means guaranteed) product of confrontations among inhabitants within a polity, neoliberalism sees it as an unalloyed good that must be grafted – by force, if necessary -- unto those societies that do not yet have it. Classical liberalism grew alongside the creation of the modern state. Its ideals infused the practices of the state. But those ideals were often in opposition to the preferences of those in charge of the state. It thus gained its influence over the state in spite rather than because of the doctrines that it espoused. That it did so was often a reflection of the persuasive force of the rational arguments that it adduced in support of its tenets. Those arguments addressed the internal needs of the society. Free speech, to take one illustration, permitted the relatively disempowered middle and working classes, speaking through newspapers and pamphlets to argue for the

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<sup>68</sup> An American constitutionalist might dispute this assertion by pointing to Article IV of the United States Constitution which speaks in terms of the “privileges and immunities” of the “citizen.” Aside from noting the limited scope of this reference to citizenship (“privilege” and “immunity,” not “right”), in practice, the distinction here was of little significance since American citizenship was readily available to all who sought it, excepting “slaves” (or as the mid-19<sup>th</sup> century decision of *Sanford v. Dred Scott*, 60 U.S. 393 (1857) phrased it, “persons of the ‘negro race.’”).

<sup>69</sup> Reconciling this image of individuals as presumptively free and autonomous actors in the “liberal” West, and individuals presumptively as automatons of autocracies is the distinctive underpinning of John Rawls two classics: “A theory of Justice” (1971) “Law of the Peoples” (1998). That Rawls, in the latter book, does not fully embrace the neoliberal prescription has been a source of much of the criticism to which “Law of the peoples” has been subjected.

broadening of the franchise and the improvement of labor conditions. Liberalism thus provided a philosophical legitimation of the challenge to monarchic and aristocratic power, and it was this methodological challenge, rather than any intrinsic norm in the concept of liberalism itself that led to democracy. Democracy is thus a byproduct of liberalism. While classical liberalism through its focus on the structure of relations within the state provided the philosophical foundation for the legal legitimation of democratic practices, it does not ineluctably mandate such practices. The common feature of both democracy and classical liberalism lay in the belief that right results flowed from the relatively uncoerced choices made by individuals who were to be directly affected by those choices. This is a far-cry from the animating ideologies of neoliberalism.

Neoliberalism presents a dramatically different portrait. It is now embedded and feels most comfortable in the exercise of power. Far from being in opposition to power, it seeks to reinforce it. It takes the dominant social structures and norms of the powerful states of the West and seeks to make them universal. And coercion, rather than persuasion, is the primary instrument for achieving this end. In place of the press and pamphlets, proponents of neoliberalism, ranging from privileged professors to powerful politicians see the selective use of national armies, international institutions and judicial tribunals as relevant tools. Where classical liberalism focused on the internal organization of the state, neoliberalism claims as its proper sphere the organization and distribution of power within the international system. Because neoliberalism is itself part of the power structure, it explicitly abjures challenges to the internal structures of the liberal state. To the contrary, it accepts without question Prof. Fukuyama's assertion that the contemporary Western society represents the "end of history." The internal structures of power within the Western state are thus taken as being at the zenith of human perfectibility, and what is needed is the dissemination of these structures throughout the world. And most critically, Neoliberalism believes that this goal trumps the means by which it is to be achieved.

It's hardly surprising then that even as the systematic undermining of classical liberal ideals by the "global war on terrorism" have been exposed, neoliberalism essentially has been indifferent about the costs they impose on the internal institutions and power structures of western societies. Rather, it has taken umbrage in distinguishing between the treatment of the citizen and the non-citizen, of the radical fundamentalist Muslim from the rest, of democratic societies from pariah or rogue states. For Neoliberalism, what matters is the external rather than the internal dimensions of the use and corruption of power. Identity is determinative. To be a citizen of the United States or of Pakistan is to dispose of the virtue of the individual and the respect to be accorded her views. Torture, inflicted on a Pakistani by her government is unequivocally to be condemned. Similar conduct, when engaged in by the United States may be excused as "torture light," or as the lesser evil in the war against Islamic fundamentalism. To have attended a Madrasa is, without more, to be a terrorist suspect, and to be a terrorist suspect is to relinquish any claim to a process of individualized determination of guilt.

That neoliberalism's theater of interest is different from that of classical liberalism is not in itself necessarily a defect. What makes the conflict of interest is the fact that neoliberalism seeks to legitimize its coercive role in interstate relations by appeal to classical liberal norms. classical liberalism and neoliberalism the focus of Political Philosophy may be asking no new questions, but the particular answers that it provides unquestionably are conditioned by time and place. Asking that liberal democratic societies of the twenty-first century uncritically adhere to the precepts of classical liberalism would be irrational. Insisting that neoliberalism justify its adoption of illiberal means is essential. Do the practices of democracy, on the one hand, and the rise of "fundamentalist Islam" on the other hand appropriately explain and justify this willingness of liberal societies to draw a distinction between the treatment of the citizen and the non-citizen in determining the "human rights" that is to be accorded the individual in the war against terrorism? This is the ultimate issue posed by the responses that liberal democratic societies have adopted in the wake of Sept. 11, 2001. It is the cardinal question confronted in the next section.

#### IV. NEOLIBERALISM, THE STATE AND CONTEMPORARY INTERNATIONAL SOCIETY

Perhaps the central consequence of the "War" on terrorism has been a return to and the reinvigoration of the idea of the state as the organizing institution of contemporary society. In the aftermath of the collapse of communism, and in the euphoric glow of a "single Europe," it was fashionable to scorn the relevance of the State to modern life. In Neoliberal circles, belief in the continuing relevance of the state was associated with repressive "third world despots." For some (notably, economic conservatives), the idea of the state was replaced by the theme of "globalization." For others (notably social radicals) the idea of the state normatively had to be replaced by the concept of "civil society." In both cases, the state was seen as a relic of the past that, like communism, should be confined to the dust-bin of history. But the fear and insecurities of a post-911 world has banished these thoughts and reasserted the primacy of the state for Neoliberals. And alongside the reemergence of the centrality of the state has been the identification of a new enemy, "radical Islam." But is this reassertion of the role of the state as a response to a purported "Islamic terrorism" any more anchored in the realities of contemporary life than was its disdain in the 1990s?

The return of focus to the centrality of the state in the post-911 world is not difficult to grasp. It merely confirms the absurdity of the claims of its demise in the 1990s. In the post-911 world, the West rediscovered those uncertainties of daily existence that had been at the root of the emergence of the state as the central institution of political life. The unpredictabilities of terrorism – its source, from and consequence, among others – and the resulting pervasive lack of trust rekindled the atmosphere of insecurities that Hobbes had persuasively argued as necessitating the formation of the state.<sup>70</sup> It was in response to those uncertainties that the state had developed a cadre of institutions. Preventively, it acted through administrative and regulatory mechanisms to organize and manage daily existence so as to limit the frequency and scope of possible

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<sup>70</sup> See *supra* note \_\_\_\_.

uncertainties. Retrospectively, it sought to enforce compliance by punishing wrongdoers. And when threatened with imminent or catastrophic danger, it employed military force to repel the danger and/or to eliminate its source. Classical liberalism recognized these realities. Its proponents sought to ameliorate their adverse consequences by positing that the preferred state is that which is under the control of its members whose interactions with each other is best regulated through contract. The exercise of state power was therefore to be legitimized through processes that embedded the consent of its members.<sup>71</sup> In the post-Cold War environment, the absence of this last feature was seized upon by Neoliberals to define not merely the “good state,” but the state simpliciter. The imagery of a “globalized world” in which all peoples strove for economic growth and material wealth only intensified this drive towards the delegitimization of the state as a social institution. The touting of state succor in the aftermath of September 11, 2001, on its face would seem to contradict what had preceded in the earlier decade. But, in the embrace of national citizenship and in the crusade against “Islamic fundamentalism,” Neoliberals are doing no more than returning to the comforting cocoon of the primordial which they had temporarily abandoned in the heady triumphalism of the 1990s. In-doing-so, Neoliberals have come to see the state less as a process-based instrument for promoting communal welfare, and more as a status-driven tool for hammering outsiders into submission. But is this reorientation necessary? In the postmodern world, must the choice be between the homogenized “McState” and the atavistic theocratically-based “pariah” society?

#### A. *Citizenship*

In its embrace of citizenship as a core attribute of the modern state, Neoliberalism departs radically from the conception of the idea as adumbrated in classical liberalism. Although undertheorized, citizenship for Neoliberalism posits a functional and reciprocal relationship between the individual as an atomistic being and the state. It describes the rights and privileges that flow from the state to the individual, and the concomitant obligations that the individual has to the state. To be a citizen is to exist within a privileged environment that is bounded by the wealth and power of the state. Citizenship is the trump that defines not only claims to the protective shield of the state in intercourse with outsiders, but the treatment to be expected from the state within its territorial boundaries. And such differential treatment applies not only to the distribution of such affirmative goods as licenses and income payments, but apparently also to negative obligations such as equal treatment before the courts of justice. While the state is prohibited from discriminating among similarly situated citizens, to engage in such discrimination vis-à-vis noncitizens is taken as the essence of the prerogative of citizenship.<sup>72</sup>

The functionally reciprocal relationship of the atomized individual and the state that characterizes the Neoliberal conception of citizenship differs significantly from the

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<sup>71</sup> That consent was sometimes constructively inferred while occasionally troublesome did not undercut this core pillar of classical liberal political philosophy.

<sup>72</sup> An early critique of this view of citizenship was presented by Alexander Bickell in his *Morality of Consent* (Yale U. Press 1977).

vision of the relationship as an ideal of classical liberalism. For classical liberalism, citizenship was simply an assertion of the existence of a permanent and vested relationship between the individual and the community. Like any vested relationship, it conferred some rights and obligations that are different from those of non-citizens, but such rights and obligations were vague and in the main undifferentiated from those of the non-citizen. In any event, they arose from positive law and not from any sense of inherent special entitlement. The fundamental right of the individual was her participation in shaping the community in which she belonged. To be a citizen was to assert that the individual had actively participated in the affairs of society. Unlike feudalism, classical liberalism did not see the individual as a creation or subject of the state. Unlike neoliberalism, classical liberalism did not put much weight on the “obligations” of the individual to the state because those “obligations” were fashioned directly by the individual through her participation in the construction of the state. Nor was the state’s obligation to the individual framed in terms of the right of the citizen. For example, the right to security of person and property which were at the core of the state’s obligation did not depend on whether one was a citizen; but simply on whether one was within the political or territorial boundary of the state. Functioning as an administrative rather than a political unit, the state served to provide protection for all within its boundaries, not to isolate the “citizen” for special preference. Thus, under classical liberal thought, the idea of consent could be fictively advanced because the reality was that all who genuinely participated in the affairs of the state became citizen by virtue of that participation. This gave to citizenship a descriptive rather than a prescriptive quality. Individuals were citizens by virtue of their acts.

While the modern view of the state and the citizen drew heavily on classical liberal thought, as in much else, the triumph of classical liberalism was at best partial.<sup>73</sup> The classical liberal view of citizenship was as much philosophical as it was practical. While it did in practice shape much of the understanding of citizenship, it did so often in contest with the feudal perspective of citizen as one who was the subject of the state, and who was bound to promote the interests of the state at all cost.<sup>74</sup> The need to raise armies, distribute limited material resources, and engage in interstate relations often provoked conflict between the liberal and the feudal visions of citizenship. The compromises fashioned to address these conflicts sometimes aggrandized the feudal over the liberal. One such compromise, for example, related to the relevance of national citizenship in framing the protections due a foreign investor. For much of the nineteenth century, the classical liberal notion which equated the capacity to participate within the life of the state as tantamount to citizenship held sway. By the last quarter of the century, however, as European national rivalries were played out in the carving-up of colonial territories in Africa and Europe, and the United States manifested its emergence as a world power in Latin America and the Philippines, the feudal view of citizenship became

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<sup>73</sup> A similar observation can be made with regard to the economic sphere where the doctrines of “free trade” and “mercantilism” continually compete for ascendancy within the international economic order.

<sup>74</sup> The modern statement of this feudal perspective has been captured by the term “nationalism” or “patriotism.” See, e.g., Viet Dinh, *supra* Note \_\_. And for counterpoint, see Maxwell O. Chibundu, *Commentary: For God, For Country, For Universalism: Sovereignty as Solidarity in our Age of Terror*, 56 Fla. L. Rev. 883 (2004).

dominant. Against the protest of the Calvo doctrine, citizenship became less a description of participatory status within a political community, and more a badge entitling the wearer to the special protections of its home state. The Capitulations system entitled a citizen of the Ottoman or Chinese empire to second-class treatment not only within the British empire, but also within Turkey or China. The wilsonian principles of self-determination and the decolonization process each sought to restore the liberal view of citizenship, only for that view to be rejected in turn by fascism and neoliberalism.

Neoliberalism, of course, is no more aligned to fascism than post-colonial national liberation movements are to proponents of Wilsonian self-determination.<sup>75</sup> Indeed, as already explained, Neoliberalism started out by espousing universalists ideals of non-citizenship.<sup>76</sup> What is equally indisputable is that Neoliberalism's conception of citizenship now relies as much on the privileged status of the state as did feudal conceptions of citizenship. For Neoliberalism, especially in the aftermath of "9/11," the prerogatives of national citizenship have become the measure of an individual. The rationale behind this understanding of the relation of the citizen to the state is not difficult to grasp. In fact, any conception of the nature of the relationship between the individual and the state must take account of the distinctly different functions that the concept of citizenship has come to perform in the modern and postindustrial state.

The relationship of the individual to the state thus can be viewed through three distinct prisms. In the pre-industrial age, the relationship was primarily one of certifying identity. The inhabitant of a territory existed in a spiritual or quasi-spiritual relationship to the territory and its ruler. The feudal liege used that certification as the basis for compelling service to the lord. The Classical Liberal saw in the certification the basis for affirming the right of the individual to participate in the construction of the polity. In the industrial and post-industrial ages, citizenship has served an additional and distinctly different objective: as the moral and legal grounding for the assertion of claims against the state. This additional function is related to the emergence of the state as more than a spiritual and an administrative entity. Even more substantially, the state has come to be the provider of social and economic welfare. The ensuing concentration of economic and regulatory powers within the institution of the state has given it a central distributive role, and with it, the need to classify and to apply rigidly the distinction between the "citizen" and the non-citizen. Were the force of this classification to be limited to those instances in which it matters – that is, for administrative purposes, for the distribution of economic goods or even for quasi-sanctification reasons such as flag-waving – the discrimination would not only be comprehensible but perhaps morally justifiable as well. But the Neoliberal treatment of the dichotomy has gone a good deal further. As already explained, it now also embraces criteria for determining who legally may be detained indefinitely without judicial process, or indeed whose life may be snuffed out without accountability. These positions simply are not justified by any rational grounds that validly can be tendered in defense of the dichotomy between the citizen and the non-citizen. In viewing citizenship (or more accurately its lack) as dispositive of how

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<sup>75</sup> Compare Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, 80 Chi.-Kent. L. Rev. 235 (2005).

<sup>76</sup> See supra at [redacted] and accompanying notes.

completely an individual can be rendered nonexistent, neoliberalism endows the concept with the absolutist feudal overtones that preceded the formation of the modern state. But the modern state itself has never embraced such an all-encompassing vision of the determinative consequence of what it means to be a citizen. The unhappy but evident conclusion that emerges from the distinctly different approaches of Classical Liberalism and Neoliberalism for the relevance of citizenship in determining the basic rule of law treatment to be accorded an individual is that thoroughly assured of its supreme position, the latter now sees no need for compromise with nonbelievers. The “rule of law,” like economic goods in the welfare state is now a right to be given only to the deserving: the national citizen.

### B. *Creed*

The second dichotomy drawn in the war on terror has been that between so-called "Muslim Fundamentalists" and others. Any one described as a "Muslim Fundamentalist" presumptively is a "terrorist," and to be so described is to forfeit all of the standard rights typically said to be due an individual in a liberal democratic society. Such a person may be picked up on no more sound a ground than her suspected affiliations. This may be done -- and indeed frequently is done -- entirely in secret. She will be held in secret indefinitely and without recourse to review by an independent entity. Any demand for subjecting suspicion to some modicum of independent scrutiny is typically dismissed with the claim that such review would undermine the means and methods for waging the war on terrorism. The same justification also apparently legitimizes “shoot to kill” orders, i.e. the complete deprivation of any process whatsoever. Thus, quite early in the war against terrorism, a standard refrain was “kill or capture.” This draconian “take no prisoners” approach has been defended on the ground that this is “a new kind of war.” And this is in apparent recognition that, even if one accepts on its face that the fight against terrorism constitutes a “war,” it is nonetheless been the case that civilized warfare has meant that an opponent ought to be given the opportunity to surrender, and that a captured prisoner of war is entitled to the continuation of his/her life. What then, it might be asked, makes it acceptable to view terrorists as having forfeited customary treatments of process typically accorded warriors, let alone criminals? Remarkably, there has been no meaningful discussion of the ease with which Western leaders have invoked barbarism as a legitimate means in fighting the war on terrorism. Regrettably, the reasons are as simple and primordial as they are distasteful. Those reasons are found in the ease with which terrorism has become synonymous with “Muslim Fundamentalism.”

That many of those who employ terrorism across national boundaries or explicitly against foreigners are Muslim is indisputable. Equally clear is that Islam is going through a revivalist phase. Relying on these threads of reality, contemporary neoliberal discourse portrays a sinister and dark world in which Islam directs terrorism externally towards the destruction of the West, and the overthrow of liberal political order. Fundamentalist Islam is presented as a brooding omnipresent threat to the Western way of life. It is at once both the agent and principal of shadowy organizations whose names mystically appear and disappear in the mass media. In some mystifying and usually indecipherable ways, they are said to be connected to al Qaeda. For a brief moment, their

names roll off the tongue of overnight experts, and then just as suddenly and as inexplicably, our knowledge of these organizations and persons become unreal. Policies are pursued to exterminate them, but whether they have successfully been exterminated is any one's guess. The only certainty in all of these is that the de jour terrorist organization or person is part of the hidden network of Islamic Fundamentalists whose *raison d'être* apparently is to torment the West. But why have Islamic Fundamentalists chosen to torment the West? The grounds offered are just as elusive as the organizations and persons. Any serious inquiry is usually forestalled by such banal and unexamined claims as "they hate us for whom we are," or "they hate our way of life," and equally preposterously, "they hate democracy and our freedoms. Interestingly, it is never asserted that they hate Christianity. But even more fundamentally, the political pundits and leaders who have framed the Neoliberal discourse have spent little time explaining – if they have ever pondered – why the fundamentalists employ terrorism as their chosen weapon. Rather, they assert and present terrorism as in and of itself an ideology that is part and parcel of Islamic fundamentalism. By delegitimizing one, one ipso facto delegitimizes the other. Suicide bombing, historical evidence to the contrary, becomes solely the province of Islamic Fundamentalism, nurtured by the apocryphal belief in virgins that await the martyred jihadist.

The debilitating consequences of the conflation of terrorism and Islam – even if presented solely as the fundamentalist variety – are easy enough to demonstrate.<sup>77</sup> A war against terrorism is no more likely to be won than one against religion, and when one unifies both in a single fight, the struggle surely is lost, however titanically it is waged. But it is neither with the shortsightedness of the policies on the war against terrorism, nor the consequences of taking on Islam that this essay is concerned. As with the discussion of citizenship, my interest is in seeking to understand through explanation how neoliberalism came to frame the issue in the terms in which it has chosen to do so. As in the discussion of citizenship, I want to suggest that the arch is to be found in the triumphal ethos of the post-Cold War world, and the willingness of Neoliberals to abandon persuasion in favor of coercion as a means of spreading European enlightenment ideals. In the process, those ideals themselves – notably the toleration of and respect for the dignity and autonomy of the individual embodied in the concepts of human rights and the rule of law -- have come to be bent out of shape. Fortified by the efficacy of coercion to obtain results in a monochromatic post-Cold War world, and threatened by persons whose religious faith differed from the familiar and the comfortable, classical liberal virtues have proved to possess no restraining force in the Neoliberal confrontation with Islam. Portraying the "war on terrorism" as a conflict between "fundamentalist Islam" and "Western Christianity," is thus more a transference by Neoliberalism of its vision of the post-Cold War world order than it is a fair or accurate description of reality.

The straightforward equation of terrorism with Islamic Fundamentalism is a post-September 11 2001 development. Each of course existed independently and both

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<sup>77</sup> I have argued elsewhere that it is a mistake to see terrorism as an ideology. See Maxwell O. Chibundu, *Commentary: For God, For Country, For Universalism: Sovereignty as Solidarity in our Age of Terror*, 56 Fla. L. Rev. 883 (2004).

occasionally functioned in tandem well before September 11.<sup>78</sup> Terrorism has always served as a tool of the powerless, Muslim and non-Muslim alike, and Muslims, whether of the moderate or fundamentalist stripe, like Christians, Jews, Hindus and atheists, have resorted to terror when it suited their needs. It is certainly the case that Muslims, whether “moderate” or “fundamentalist” long have wrestled with the Christian West on religious grounds, but the more recent conflicts between the West and Muslim societies have revolved much more around religion than around the political independence of these societies, and control over their natural resources. Nor have these conflicts been limited to Muslim communities. From Sub-Saharan Africa to the Middle-East, Southern Asia and Southern Europe, the political and territorial boundaries of societies have been decreed, shaped and reshaped by Western politicians with little or no knowledge of those societies.<sup>79</sup> These societies in turn have responded through force and politics. Religion has furnished some of the grounding for the response, but so also have other normative theories of legitimation such as nationalism, self-determination, economic sovereignty and political independence. Terrorism has been employed by these movements, but no one equates them with terrorism. The current use of terror is hardly any less geopolitical or any more religiously driven than these other conflicts in which aggrieved groups, unable to match the firepower of their perceived oppressors resort to irregular or nontraditional means of warfare. Indeed, the roots of the September 11 attack make this obvious.

The one certainty about the September 11 attack, the response to it, and the counter-responses is that they have been inspired by an entity known as “al Qaeda.” The precise nature of al Qaeda remains unclear. But that it was created as a response to geopolitical conditions in the Middle-East is indisputable. Its founders, we are told, were veterans of the war in Afghanistan that had been financed and logistically supported by the United States Central Intelligence Agency, and similar clandestine organizations of the Saudi Arabian and Pakistani Governments. Having successfully driven the Soviet Union out of Afghanistan, these veterans turned on their financiers, and demanded that the United States withdraw its troops and military bases from Saudi Arabia. The demand was framed in part on religious grounds – protection of the Muslim holy places from the “infidels” – but this hardly made the movement a religious one; at least no more so than the proffered justification of control over Jerusalem by Palestinians makes the Palestinian claim for national independence a religious one. Indeed, a constant refrain in speeches attributed to al Qaeda leaders is the quite secular one for the creation of a Palestinian state. To be sure, religion is not irrelevant to al Qaeda. It draws its pool of fighters from Muslims across the globe. Prior to September 11, 2001, it was sheltered by a theocratic regime, the Taliban government of Afghanistan. But just as the Republican Government in the Spanish Civil War was not ipso facto Communist simply because Communists and leftist sympathizers flooded to its defense, it would be wrong to tar Islam (or even the more cynical term “Islam Fundamentalism”) with terrorism merely because al Qaeda employs terrorism.

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<sup>78</sup> Indeed, the use of suicide bombings against the United States by a Muslim and Arab organization dates at least as far back as 1984 when 241 United States soldiers were killed in Lebanon.

<sup>79</sup> See, e.g., David Fromkin (Elizabeth Stein Ed.), *Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Modern Middle East* (2001).

What are genuinely striking in the debate over the war on terrorism is thus the ease with which Neoliberal politicians such as Blair and Bush have conflated methodology with ideology, and the extent to which this conflation has attracted virtually no attention among scholars. Politicians repeatedly elected to office by societies ostensibly committed to a world view that emphasizes individual accountability, and distinctions between religious rhetoric and political action have been all-too-willing to frame the “war on terrorism” as a struggle against a particular form of Islam. Conduct which one finds offensive – or even criminal – is portrayed as sociological thereby warranting its extermination within the entire group. Why do these politicians believe that this approach would sell? In a climate of Classical Liberalism, one might have expected such an appeal to fail. Yet, Neoliberalism fosters precisely the socio-religious intolerance that is evident in this approach to the fight against terrorism.

Classical Liberalism, as already explained, focuses on the internal structures of the society. A Classical Liberal critiques her society from within. Her recommendations are directed at perfecting her society. The Kantian Categorical Imperative, is perhaps the quintessential statement of the values and ideals of classical liberalism. Neoliberalism, as also has been explained, derives from the desire to reform (“civilize,” is perhaps a more accurate description) non-Western societies. The collapse of communism having confirmed the superiority of Western values, Neoliberalism directed its attention externally. Neoliberals in the zeal to perfect the external world overlooked flaws within their own societies. Indeed, ignoring those flaws were essential for the legitimation of the external civilizing mission. After all, the effectiveness of that mission lay in contrasting the nasty, short, brutish and poor lives of residents of weak and pariah states with the economic wealth, political stability and military might of Western societies. The existence of human rights, democracy and rule of law in the latter and their absence in the former were asserted to provide causation for these differences. To inquire into just how well these institutions functioned within the West, and to demand proof of the asserted causal linkages would have undermined the edifice of the civilizing mission.

Along comes September 11, 2001. Nineteen foreigners primitively equipped with “box cutters” turns the West’s most technologically advanced civilian aircrafts against its most potent symbols of financial and military prowess, destroying in the event not only 3000 lives, but the auras of certainty and control that had become the birthright of the post-Cold War era. Self-assurance over the capacity to dominate the future gave way to feelings of national insecurity. Seemingly, settled rules of civilized behavior were opened up for debate, with the claim for national security acting as a trump.

With little debate and a sole dissenting vote, the legislature of the most powerful democracy, in a single sentence, authorized its President to use “all necessary and appropriate military force” in whatever way he sees fit against those responsible for the September 11 attacks, and all persons and entities who harbored or aided them.<sup>80</sup> In

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<sup>80</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). *See also Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Authorization for the war in Iraq rests on more ambiguous language, but the United States Congress repeatedly has shown its support for it through several appropriations.

quick succession, the President invaded two countries, offering as justification that they harbor terrorists and thereby present a danger to the United States.<sup>81</sup> Invoking the same “national security” mantra, he orders extrajudicial killings, secret and indefinite detentions, and trials before commissions of persons who are subject to his complete control, and whose decisions are put beyond the purview of judicial review or control.<sup>82</sup> Measures in other Western societies are barely less draconian. Virtually all pass new legislation against “terrorism,” the thrust of which is the revocation of hitherto cherished rights to fair process.

As antithetical to liberalism as many of these autocratic decisions might be, the near-indifference with which they were initially accepted by the legislatures, the people and indeed the courts of ostensibly democratic republics spoke volumes about the value structures that had emerged within Neoliberalism. As long as specific inhumane practices could not be captured in photographs, or were linked to seemingly victorious wars, none of those institutions of liberal democracies that purportedly exist to make power accountable performed their checking function. But as the wars got bogged down in the internecine civil strife of the presumptively failed states of Afghanistan and Iraq, and immediate and total victory became elusive, Western democratic institutions began to stir and to ask those questions that hitherto conveniently had been overlooked.<sup>83</sup> The process of seeking answers and refuge in legal textualism proved to be unedifying. The desired interpretations could be obtained only by torturing the text of the settled rules which, after all, had been adopted in an environment of moral certainty, if not outright superiority.<sup>84</sup> Whether “Water boarding” constitutes the type of torture that is forbidden by United States assent to the Convention Against Torture, thus depends, we are didactically informed on whether it is applied against a foreigner outside of the territories of the United States, and whether it is intended to cause and causes severe physical damage to organs. But such arguments are tenable only if the victim is denuded of humanity; that is rendered as a non-victim. And it is here that the re-emergence of Islamic Fundamentalism as the culprit begins to make sense.

The motif of “war” as the response to terrorism in the aftermath of September 11 initially may have been an instinctual reaction of the President of the United States. But it succeeded remarkably in galvanizing the population, and in inducing it to abandon many of the peacetime constraints on the arbitrary exercise of power that one ordinarily

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<sup>81</sup> Much has been written about the factual accuracy and legal validity of these claims. These issues are beyond the scope of this essay. For a notable treatment however of the challenge to international law posed by U.S. military action in Afghanistan, *See Simpson, supra* note \_\_\_\_.

<sup>82</sup> Executive Order \_\_ (Nov. 13, 2001).

<sup>83</sup> As I have explained elsewhere, democracies are no less likely to go to war than non-democracies. What they are very good at is in insisting that the war be concluded as promptly as possible. The means employed to achieve this end are of secondary concern as long as the costs that they impose on society – at least those that are obvious and visible – are felt only briefly. *See Maxwell O. Chibundu, The Other in International Law: 'Community' and International Legal Order*, U. of Maryland, Pub Law Research Paper No. 2004-03. *available at* <http://ssrn.com/abstract=504782>.

<sup>84</sup> The debate over the use of torture is symbolic of a more pervasive phenomenon. In the moral certainties of the 1990s, no one – at least outside of the Israeli judicial system – openly debated what constituted torture, let alone whether its use is ever permissible, or whether its use was precluded to a party to the torture convention only with reference to the terms of its enactment in domestic law.

assumes to be built into a democratic republican form of government. A similar initial instinctual effort to equate the enemy with Islam apparently failed, but as the conflict has taken on more and more the characteristics of war, and Western societies have had to bear the real costs of war-fighting, including above all attacks on Western soil, the need to frame the combatant in an intelligible garb has become more pressing. The enemy must be endowed with mysticism without itself being mystical. A shadowy organization known as al Qaeda may have served this purpose at the outset, but the persistence of terrorism in spite of the drastic methods employed to wipe it out necessitates a plausible explanation of the failure. The obvious answer is fanaticism. And since Neoliberalism, in its embrace of globalization has already discounted the capacity of non-Westerners to be loyal to their governments – they are rulers of pariah states – religion comes handily to the rescue. And so, while contemporary identity politics discourages blaming terrorism on Muslims or on Islam simpliciter, “Radical Islam” or “Islamic Fundamentalism” are convenient proxies. What makes “fundamentalist Islam” any more susceptible to being an “ideology of terrorism” (as the quintessential Neoliberal, Tony Blair puts it), is far from being any more obvious than what makes an IRA bomber a disciple of fundamentalist Catholicism. Yet, there is little doubt that the concept of terrorism as an identity with fundamental Islam is intended to render illegitimate, *ab initio*, any claim to human dignity that may be asserted by one who is decreed to be a “fundamentalist Muslim.”

#### V. CONCLUDING THOUGHTS

Many who subscribe to the Neoliberal creed doubtless will contest much of what has been written here. To believe that contemporary Western political and economic institutions represent the height of human achievement, and to seek to propagate them universally, it might be argued is a far-cry from supporting, let alone encouraging, the waging of wars or the use of torture. And surely, one should not blame the demonization of Muslims (fundamentalist or otherwise) on mere adherence to Neoliberalism. The basic contention of the essay is that there is in fact a quite straight line between Neoliberalism and the tendency to be dismissive of views and actions that do not fit into the Neoliberal catechism. I do not contend that Neoliberals necessarily intend the logical outcome of their positions, but I do argue that those outcomes are inherent in the creed. I hope that the essay has effectively explicated linkages that I find to exist, but some of them are worth restating.

Neoliberalism stands for the proposition that substantive ends rather than processes matter. Human rights is usually presented as the quintessential example of this doctrine.<sup>85</sup> In this sense, it is clearly a reaction to the classical view of liberalism as process-based. Optimally, certain processes can be essentialized by turning them into ends. Democracy is a classic example of this belief. One need only identify the essential attributes of a process and then make them universal. The notion that values might be culturally-based are thus pooh-poohed as “relativism.” That this is a philosophy of the 1990s, rather than of the 1960s or 1970s is easily explained. The substantive beliefs in human rights, democracy and the rule of law subscribed to by Neoliberals were very

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<sup>85</sup> See, e.g., THE PHILOSOPHY OF HUMAN RIGHTS (Morton E. Winston, ed., Wadsworth, 1989).

much part of the intellectual landscape in the 1950s through 1980s. What that landscape lacked was the architecture of coercion. That became available in the 1990s, and with it, the Neoliberal worldview became complete. The position that a viewpoint constitutes an infallible universal truth can be held only by those with the means to make it plausibly so. Neoliberalism, stripped to its essence is a doctrine based on the use of coercive power to implement a set of world-views. In the 1990s, it jettisoned persuasion for coercion because it no longer saw the need for the former. Coercion when available is a good deal more efficient – and, at least in the short run more effective – than persuasion. Coercion worked tolerably well in the early years of the 1990s, but that it would lose its effectiveness could even then have been predicted, but the conventional visions offered up by competing ends-oriented theories were quite unappetizing, challenging as they did the core belief of universality to which Neoliberalism subscribed, and emerging technologies and interactions seemed to suggest as inevitable.<sup>86</sup> Neoliberals thus grew accustomed to the of theirs as the only legitimate world view.

The lack of competition over ideas had another deleterious effect. One consequence of competition is to cause introspection. What is genuinely remarkable about Neoliberalism is the extent to which it was devoid of any serious internal examination. Human Rights, Democracy and Rule of Law proponents are notable for the eagerness with which they expound the merits of their philosophy, and their desire to assure that violators of their precepts are punished. Much of the scholarship in these fields are devoted to stating the standards and what constitutes breach of those standards, but very little by way of explaining why those standards might be preferable over competing standards. Indeed, the basic assumption seems to be that there could not conceivably be any legitimate competing standards. The self-assurance has been so complete that when Neoliberal governments employ illiberal means, there is doubt as to whether that could possibly be so. But as the application of those means migrate from the treatment of the non-citizen fundamentalist Muslim to ourselves, perhaps we will become aware of the continuing validity of process in civil life.

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<sup>86</sup> For such alternative visions, see Robert D. Kaplan, *The Coming Anarchy*, *The Atlantic Monthly* (Feb. 1994); Robert D. Kaplan, *Balkan Ghosts: A Journey Through History* (Picador 2005); Samuel P. Huntington, *The Clash of Civilizations?*, *Foreign Aff.* (Summer, 1993).