Liberalism versus Terrorism: Warfare, Crime Control, and the United States after 11 September

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The United States' 'war on terror' has drawn widespread criticism in the years since the attacks of 11 September 2001. For some, it not only entails major violations of human rights but signals an active effort to dismantle legal protections refined over the course of centuries and is therefore a mortal threat to the liberties enshrined in the Constitution. For others, it demonstrates the continued ascendancy of the executive branch in a manner at odds with the principle of checks and balances. Still others resent the United States waging war against a country with no demonstrable relationship to the horrors of that day. By contrast, those fighting the war on terror argue that the president enjoys sweeping powers during wartime that constitutional protections are reserved for Americans who choose to obey the law, and that international legal frameworks improperly limit the sovereignty of nation-states under attack. While these issues are undoubtedly important, they also tend to assume the relevance of the classically defined liberal state for purposes of understanding the United States' war on terror. That state, so the story goes, exercises sovereignty over a given territory and hence has certain rights and responsibilities which are simultaneously limited by a social contract that requires the protection of the natural rights and freedoms of its citizens. This framework, of course, sets the stage for the heated debates since 11 September about the use and abuse of state power in the war on terror. It also inhibits a more comprehensive analysis of the changing nature of political power and the citizen-state relationship in the early twenty-first century.

In this chapter, I argue that the American response to 11 September cannot be adequately understood if we assume the continued relevance of the classically defined liberal state and the accompanying division of state violence into an external warfare mode and an internal domestic crime control mode. Instead, we must recognize the ambiguities that trouble the liberal state's use of violence and take seriously the ways in which these uncertainties reshape the relationship of citizens to their state. Terrorists figure prominently here because they pose a unique challenge to the credibility of the state's exercise of sovereignty over a given territory as well as its claim to secure the lives of its citizens against external aggression. As we know from Locke and Weber, among others, the legitimate use of violence in accomplishing these tasks is one criterion by which the liberal state is distinguished from other sources of authority whose violent possibilities have been gradually expropriated over time (Kaufman-Osborn 2002). When this is a question of either arresting criminal activity within or of combating aggression from without, the use of liberal violence is a relatively straightforward matter. In the former, the state exercises its statutory right to detain offenders and deprive them of either life or liberty (the state in crime control mode as ensurer of domestic tranquility), while in the latter the state combats acts of war against it by matching force with force in a manner that can be provided by no other entity within the polity (the state in warfare mode as provider of common defense).

Things become more complicated, however, when the categorical distinctions upon which liberal violence is predicated become blurred as they do when the danger to which the state must respond comes from 'unlawful combatants', meaning those whose violence fails to come from within the confines of state sovereignty. Matters are complicated still further when the combatants in question are also citizens who have allegedly sided with non-state terrorists, as was the case with Yaser Hamdi, John Walker Lindh, and Jose Padilla. The problem lies not so much in identifying the perpetrators as in how to think about them. Not quite domestic criminals (calling the cops seems a bit feeble), not quite soldiers fighting in war (sending the military seems oddly inapplicable), citizen terrorists, theoretically speaking, are something of a paradox. Simultaneously members of the commonwealth and allegedly committed to its destruction, they are those whom the liberal state promises both to protect and destroy. That the United States chose the second of these two options has understandably been criticized as a departure from liberal principles that accord citizens certain legal protections. Yet it is important to situate this departure within the increasing tendency to regard liberalism's warfare mode as the default response to disorder. In other words, the tactics employed against Lindh, Hamdi, and Padilla indicate not simply a frustration with the constraints imposed by the contractual dimension of liberalism – the

dimension that requires governmental protection of individual rights as a condition of legitimacy – but also the conviction that responding to terrorists as if they were mere criminals is insufficient. The terrorist is simply too evil, too radically 'other,' to qualify for law's privileges and the sorts of correctionalist interventions that have for many decades been the standard response to domestic malefactors. The preferred result involves a shift away from the liberal state's crime control mode and towards the tactics peculiar to warfare that have come to characterize American society more generally (witness the 'war on cancer,' the 'war on drugs,' the 'war on terror,' etc.).

It is in light of the increasing application of warfare to disorder that we should understand the United States' response to the events of 11 September. Among other things, this approach trivializes liberalism's legal rights and presumptions of innocence as cumbersome at best or even aids to the enemy when applied to accused terrorists like Hamdi, Lindh, and Padilla. So too does it render 'quaint' the protections of the Geneva Conventions concerning prisoners of war in the eyes of U.S. Attorney General Alberto Gonzales (Cohn 2004). It also entails a qualitative shift in the nature of the citizen's relationship to the state, one whose defining elements were perhaps best captured by White House Press Secretary Ari Fleischer when he issued his immediate post-11 September warning 'to all Americans that they need to watch what they say, watch what they do' (White House 2001b). Presented thusly, individual reaction to 11 September boiled down to a choice between the freedom of expression or cautious silence. Americans, Fleischer implied, should assess the options and then reason their way to appropriate modifications of their behaviour or else risk some unspecified reprisal. Orwellian overtones notwithstanding, Fleischer was on familiar liberal ground when he insisted on reason as the unique faculty that impels man to forsake the state of nature in favour of life in the commonwealth. Presented with the inconveniences and risks that accompany life without government, humans voluntarily accept certain restrictions on their liberty in exchange for the superior freedom that occurs in a society governed by laws. Newly liberated, citizens are now free to pursue their self-interest without worrying about attacks from their neighbours or excessive meddling by their government. What makes this work, in turn, is the neutrality of the government that then enforces those laws. It must not become a participant in the affairs it claims to regulate, nor can it have a predetermined interest in the outcome of those disputes it must from time to time resolve. The state, therefore, relate to citizens as an umpire to players: there when needed, silent and unobtrusive when not.

It is precisely this relationship that gets perverted when the state's warfare mode is employed as a response to disorder. Most noticeably, the forms of rationality specific to warfare become goods in themselves. Not only must citizens reason correctly between competing alternatives, so too must the state become a rational actor, its erstwhile regulatory function transformed by the norms appropriate to combat. So too does the state increasingly participate in

the affairs it claims to supervise, as when it establishes incentive structures that reward citizens who reason 'correctly' while punishing those who do not. Still more, disorder-as-warfare reorients the liberal compass away from punishment and rehabilitation and towards repulsion and destruction. An ethic of absolute enmity gradually transforms difference into alterity, with consequences for those who depart (willfully or otherwise) from accepted forms of personhood. Citizens now relate to the state not as players to an umpire but as choosers whose efforts to reason through what they say and what they do is represented as a matter of life or death. Accordingly, I think it helpful to conceptualize the war on terror not so much as a complete dismantling of liberalism but as a strategy for the administration of disorder in late-modern society, one that not only mocks liberalism's traditional limitations on power but fundamentally reframes critical components of the social contract.

By way of contextualizing these developments, I begin by presenting a version of liberalism attuned to the ways in which the social contract amplifies precisely the forms of enmity it claims to minimize when it puts forth the state as a mediator of disputes. The social contract, in other words, *worsens* the seriousness of domestic conflict and external aggression when it embodies the citizenry in an imagined community that now thinks in terms of inside and outside. Because citizens are members of a group defined by territorial borders and specific identity configurations, threats are no longer simply threats to an individual as was the case in the state of nature but to the political order as a whole. Abetting this tendency to inflate the threat posed by disorder are recent criminological theories which emphasize the absolute otherness of the criminal temperament. In particular, the 'criminology of the other' (Garland 2001) explicitly favours retributive punishment in the belief that illicit behaviour arises out of dispositional factors that are beyond the reach of the interventionist strategies of penal welfarism. As will be shown, it is the interaction between the criminology of the other and liberalism's warfare mode that enables the unsavoury practices of the war on terror and contributes to the changing nature of the citizen's relationship to the liberal state.

By way of example, I briefly discuss the indefinite detention of unlawful combatants at the United States naval facility at Guantanamo Bay, Cuba. Despite being a clear departure from liberal principles in the eyes of the United States Supreme Court, this tactic has nevertheless been accepted as a necessary element in the war on terror by substantial majorities of the American public. This apparent necessity is fueled by endless fear-inducing warnings from government officials that characterize terrorism as not only a pure form of evil but a permanent feature of life in the twenty-first century that requires both a militarized response and measures designed to curb forward behaviour before it occurs. Accordingly, I conclude with some reflections on the implications of the war on terror for the future of the citizen-state relationship. As indicated, that relationship is decreasingly amenable to comprehension solely on the basis of the liberal social contract and increasingly governed by norms proper to the marketplace that fetishize reasoning choosers while simultane-

ously constricting (for those who make the wrong choices) the liberty which social contract theory promises will follow.

John Locke's Disciplinary Liberalism

In *The Second Treatise of Government*, John Locke argues that what differentiates men living in the state of nature from those living in society is the absence among the former of a neutral means of settling disputes. The term 'disputes' is undoubtedly meant to have wide-ranging applicability but it is instructive that Locke draws his examples from activities that are distinctly criminal, as opposed to, say, economic or athletic. In other words, the sorts of conflicts for which Locke seeks a remedy are serious to the point of death and have a conspicuously Hobbesian feel. Not surprising, therefore, is Locke's (1988: 278) use of an overtly martial vocabulary in describing them. Occurring in either nature or society, the 'state of war' arises when someone exhibits 'a sedate settled design upon another man's life,' a problem for which Locke sees very few alternatives. He argues (1988: 279) that 'when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the common law of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures, that will be sure to destroy him whenever he falls into their power.' While Locke is clearly no Hobbesian, one can nonetheless see that the fear of violent death so familiar in *Leviathan* plays an equally pivotal, if smaller, role in Locke's account of the virtues of the social contract.

Said contract is the mechanism by which humans are able to exit the state of nature and enter into society, that unique form of fellowship which permits a modulation of the state of war by providing for third-party resolution of conflict. I say modulation because of Locke's insistence, *pace* Hobbes, that the state of war can still exist in society. Locke, in other words, acknowledges that some will have 'sedate settled design[s]' on the lives and property of others regardless of whether they live within the confines of civil society.[1] The

1 Locke's imagery again illuminates just how seriously he regards these conflicts. As he says (1988: 280) by way of example, 'But force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war: and it is the want of such an appeal gives a man the right of war even against an aggressor, tho' he be in society and a fellow subject. Thus a thief, whom I cannot harm, but by appeal to the law, for having stolen all that I am worth, I may kill, when he sets on me to rob me but of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our

all-important difference lies in how those designs are to be met, which is by society as a whole serving as the maker and enforcer of laws which are 'indifferent, and the same to all parties' (Locke 1988: 324). Now, when confronted by an aggressor, citizens must defer to the authority of the government and the laws created thereby rather than draw their swords. The result, ideally, are conflicts mediated by the community for whom the common good (understood as the protection of property), is the highest priority and under which is subsumed the private interest of any single member. Put differently, Locke does not see the social contract as a means by which force and violence are to be eliminated. Rather, they are to be redressed through superior versions thereof, both in terms of overall strength and in terms of the legitimacy bestowed when government settles disputes according to neutrally administered laws.

By virtue of his contractarian approach to conflict resolution, Locke can now make a distinction unavailable in the state of nature, namely between inside and outside.[2] Those who have given their express consent to the contract are properly understood as members of the commonwealth and therefore on the inside, while those on the outside are either members of a different commonwealth or remain in the state of nature. The importance of this distinction lies in the way it conditions the understanding of disputes, which, in a manner that I doubt Locke quite realizes, become more acute and fundamental than the disunited confusion that characterizes violence in the state of nature. In other words, conflict is now a far more totalizing 'us against them' sort of scenario. Attacks from without become a calculated form of aggression by one commonwealth against another, while domestic criminal activity morphs into an attack on the social body as a whole rather than the individual victim per se. The authors of disorder become wholly alien and fundamentally other, as indicated by Locke's claim that such people do not live under the common law of reason and hence may be treated as beasts of prey. Such circumstances are not mitigated by the legal mechanisms of dispute resolution put forth as one of the prime virtues of civil society. Instead, those mechanisms become weapons that must necessarily be deployed when Locke commits to managing inter-human conflict by folding it within the institutional complex we call the liberal state.

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common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable. Want of a common judge with authority, puts all men in a state of nature: force without right, upon a man's person, makes a state of war, both where there is, and is not, a common judge.'

2 Locke (1988: 325) argues in this context that the principal role of government is 'to judge by standing laws, how far offences are to be punished, when committed within the commonwealth; and also to determine, by occasional judgments founded on the present circumstances of the fact, how far injuries from without are to be vindicated; and in both these to employ all the force of all the members, when there shall be need.'

Derived from the opposition between inside and outside is a second distinction that has long been one of liberalism's hallmarks, namely that between the violence brought to bear on external aggressors and that employed against domestic criminals. Because those on the inside are members of the commonwealth, they enjoy certain rights and privileges the protection of which is the state's responsibility. Consequently, the liberal state cannot simply destroy the body of the criminal as was routine under the *ancien régime* without jeopardizing, among other things, its sovereign pretenses and the clear line of demarcation between public and private violence.[3] Instead, the state's power to punish must be grounded in laws that recognize the offender's status as a member of the commonwealth and consequently a bearer of natural rights which the state exists to protect, and all this no matter how heinous the criminal act in question. The liberal state's warfare mode, however, knows no such limitations.[4] There, it is understandable, and Locke gives ample support for thinking, that the state should regard external aggressors as radically other. After all, what else could such aggression portend but an end to the social contract and a return to the state of nature? Liberal states thus tend to wage total warfare because their theoretical foundations incline them to view such conflicts as a matter of life or death. Issues of justifiability aside, the point is that liberalism intends a qualitative distinction between the forms of violence employed in the crime control and war making contexts. It is ultimately this difference that enables the escape from the state of nature to take on the character of a reasoned act.

From Welfare to Warfare

With this brief sketch of Lockean liberalism in mind, we can now take stock of changes in the American approach to crime that help explain many of the tactics now being brought to bear in the war on terror. Throughout most of the twentieth century, that approach embraced the doctrines of penal welfarism, which argued that the punishment of criminal activity ought to take the form of rehabilitative interventions rather than retributive sanctions. Accordingly,

3 As Foucault (1995: 58-69) has pointed out, the public executions of the ancien régime often devolved into festivals of illegal and other insubordinate behaviour that actively contested the sovereign's right to punish. Rather than reconstitute the sovereignty injured by the criminal act, such events showed just how fragile the king's authority actually was. As for public versus private violence, Kaufman-Osborn (2002: 70) argues that the line separating these is blurred when, as sometimes occurred during public executions, members of the condemned's family intervened to ensure a quick death for their loved one by pulling down on his feet as he swung from the gallows.

4 Theoretically speaking, at least. Clearly, international accords governing state conduct in times of war have led to practical modifications of this point.

imprisonment was generally de-emphasized in favour of social and psychiatric inquiry, criminological research and social work, and sentencing laws that could be tailored to the individual in question. When used, prison in the penal welfare model was designed to be corrective and to include the possibility of early release and parole supervision (Garland 2001: 34-35). Such strategies were supported by two maxims that were as unquestioned as they were influential. The first held that social reform and economic prosperity would eventually reduce the incidence of crime. Criminal activity was caused not so much by corrupt character but by economic and social deprivation, particularly among the lower classes. Fix these underlying problems, the thinking went, and you solve the problem of crime. The second axiom held that the state was responsible for the care of criminals as well as their punishment and rehabilitation. In an overtly Lockean sense, the state was figured as something like a parent, responsible for both reform and repression, care and control, welfare as well as punishment. In lieu of retribution, 'one needed expert knowledge, scientific research, and flexible instruments of intervention, as well as a willingness to regulate aspects of life which classical liberalism had deemed beyond the proper reach of government' (Garland 2001: 40). The Lockean idea of third-party dispute resolution was broadened to include a range of social services aimed at reducing the problem of crime by eliminating its causes.

In the years after 1970, however, what David Garland (2001) has called the 'criminology of the other' gradually began to supplant penal welfarism. This new way of thinking about crime resulted in part from the gradual demise of penal welfarism, itself prompted by major losses of faith in the power of the state to address social problems (Garland 2001: 55-57). If anything, the civil rights and anti-war movements had starkly revealed the state's complicity in *causing* widespread social problems through its often unconscious tendency to promote class and racial biases. Crime rates in the United States also rose dramatically in this period, peaking by the early nineteen-eighties at three times what they had been twenty years previously (Garland 2001: 90). The significance of these changes lies in the responses that were deemed necessary as a result. Virtually everyone from policy makers on down to prison wardens blamed the failure to control crime on the theory of penal welfarism itself rather than with faulty implementation (Garland 2001: 115). Wholesale changes in both philosophy and strategy were needed, changes which drew far more heavily from the control side of the authority coin than did penal welfarism with its more explicitly liberal ethos.

Grounding this change in attitude was the 'assumption that certain criminals are "simply wicked" and in this respect intrinsically different from the rest of us' (Garland 2001: 184). Rehabilitation and therapeutic intervention were essentially wastes of resources because there could be no rapprochement between good and evil. Penal welfarism could therefore be represented as a 'failure of moral nerve,' an unwillingness to judge and condemn, and a strategy that had 'unleashed the floodgate of crime, disorder and social problems

that have characterized the late modern period' (Garland 2001: 184). In place of investigations into causation and prevention, the criminology of the other substituted the desire to punish. High crime rates generated an emphasis on control and discipline rather than the penal welfarist concern with etiology and reform because criminal activity resulted from the voluntary choices of essentially evil people.[5] Resentment was transformed into a political project as the victims of crime came to be regarded as 'righteous figure[s] whose suffering must be expressed and whose security must henceforth be guaranteed' (Garland 2001: 11).

Here again it is worth recalling the ways in which the Lockean social contract generates this sort of totalizing response. As seen, that contract tends to inflate the seriousness of disorder by lending it an 'us versus them' quality. The criminology of the other, while distinctly illiberal in many respects, is nonetheless highly dependent on the liberal notion of an essentially embodied collectivity, united by contractual consent, which can then be understood as threatened either from within or from without. Yet even this, I would argue, is not the most distinctive feature of the current approach to crime. What should also catch our attention is the susceptibility of this framework to an 'us versus *us*' mindset. Because domestic criminals are already on the inside, they are arguably even more dangerous than those who would wage war from without. The citizen terrorist, of course, ratchets up the threat still further by having allied, in the case of al Qaeda, for example, with those on the outside who have declared a sedate settled design on the American body politic.

Yet it is equally important to note that the Lockean social contract is not ideally suited to this 'us versus us' mentality. In other words, Locke's overriding concern is with the solidarity generated by express consent to the laws of the commonwealth rather than with drawing up elaborate lists of potential threats to it. Accordingly, lawbreakers are still members of the compact despite their untoward behaviour.[6] It is because the criminology of the other substantially alters this arrangement that it becomes key to an understanding of the war on terror and the many objectionable practices that have become its hallmark. By virtue of the interaction between the ethic of absolute enmity that belongs to liberalism's warfare mode and the belief in the radical alterity of the authors of disorder characteristic of the criminology of the other, the terrorist (citizen or otherwise) becomes the most mortal of threats to the body politic. It is the 'us versus them' outlook supplied by liberalism's inside/outside distinction and embraced by liberalism's warfare mode adapted

5 The enthusiasm for the death penalty in the United States can be understood along these lines.

6 The contrast with Hobbes (1996: 106) is noteworthy in this regard. According to his Fifth Law of Nature (Compleasance), citizens are to strive to get along with each other. However, he who 'for the stubborness of his Passions, cannot be corrected, is to be left out, or cast out of Society, as cumbersome thereunto'.

for use both within and without the body politic as a general response to disorder. In this context, penal interventions aimed at rehabilitation are reserved for the naïve, those who do not understand the true nature of the threat posed by terrorism.

In what follows, I document the application of this strategy in the years since 11 September. I begin with the aforementioned citizen terrorists, Hamdi, Walker, and Padilla, to show how the rationality specific to warfare results in the jettisoning of basic legal protections such as habeas corpus and the right to counsel even though the danger allegedly posed by these three individuals has never been adjudicated before a neutral arbiter. I then briefly discuss the indefinite detention of unlawful combatants at Guantanamo Bay to show how warfare's violence can be inflicted without a shot being fired. In these instances, the thoroughgoing antagonism characteristic of liberal warfare translates into the creation of spaces entirely outside the law where terror suspects can be kept indefinitely and where the freakish violence of the state of nature masquerades as policy. It is here where we see with alarming clarity just what President Bush means when he talks of the 'sacrifices' necessary to secure freedom (Fox News.com: 2005).

Citizen Terrorists: Hamdi, Lindh, and Padilla

In light of the pronounced shift towards the modalities of warfare inspired by the criminology of the other, an account can now be offered of the American response to 11 September that reflects the tensions within liberal violence noted earlier and shows how frustration with the legal protections extended to those on liberalism's inside leads to reactions formerly reserved for those on its outside. Those tensions are revealed when, as the monopolist of legitimate force, the United States government seeks to eradicate terrorist violence through recourse to its violent prerogatives. But when those terrorists also happen to be citizens, the state opens itself up to the contractarian side of the legitimacy coin which includes the right of citizens to appeal state actions taken against them. This conundrum became apparent almost immediately after 11 September and the Congressional passage one week later of the Authorization for Use of Military Force (AUMF), which permitted President Bush 'to use all necessary and appropriate force against those nations, organisations, or persons' responsible for the attacks (Authorization for Use of Military Force 2001). During the resulting invasion of Afghanistan in October, Yaser Esam Hamdi was detained by the Northern Alliance, turned over to the U.S. military and held first in Afghanistan, then at the U.S. detention facility at Guantanamo Bay, Cuba.

In the spring of 2002, Hamdi was designated an 'unlawful combatant', which meant he could be held without being charged, deprived of the ability

to challenge his detention in a court of law, and denied access to counsel.[7] The sole basis for the designation was a statement by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy (now known as the 'Mobbs Declaration'). According to Mobbs, Hamdi travelled to Afghanistan in July or August 2001, affiliated himself with the Taliban for purposes of military training, and then engaged in operations against the United States. In addition, Mobbs stated that because the Taliban and al Qaeda '"were and are hostile forces engaged in armed combat with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants"' (*Hamdi v. Rumsfeld* 2004: 5). This remains the only evidence ever provided by the United States in support of Hamdi's detention and enemy combatant status.

In June 2002 Hamdi's father filed a petition for a writ of habeas corpus alleging that, as an American citizen, Hamdi enjoyed the protections of the United States Constitution, particularly those of the 5th and 14th amendments (*Hamdi v. Rumsfeld* 2004: 2-3). The Eastern District Court of Virginia initially found in Hamdi's favour, appointing him counsel and ordering access to Hamdi. On appeal, the Fourth Circuit Court of Appeals reversed this order, arguing that the District Court 'had failed to extend appropriate deference to the Government's security and intelligence interests' (*Hamdi v. Rumsfeld* 2004: 4). It also ordered the district court to conduct an inquiry into Hamdi's status, an inquiry which found that the Mobbs Declaration fell 'far short' of supporting Hamdi's detention and was 'little more than the government's "say-so"' (*Hamdi v. Rumsfeld* 2004: 5). The district court itself then ordered a far more comprehensive review of Hamdi's status and the legality of his detention, which the Bush administration appealed. Again the Fourth Circuit found in the government's favour, arguing that the AUMF and the Mobbs Declaration were sufficient to render Hamdi's detention constitutional. It consequently directed Hamdi's habeas petition to be dismissed (*Hamdi v. Rumsfeld* 2004: 6). In June 2004 the United States Supreme Court vacated the findings of the Fourth Circuit, arguing that the due process requirements of the Constitution did, in fact, apply to Hamdi and that 'the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator' (*Hamdi v. Rumsfeld* 2004: 28-29). Further, while not invalidating the government's right to indefinitely detain unlawful combatants, the Court asserted its right to review such detentions in spite of the Bush administration's strident opposition on the basis of

7 According to the Department of Defense, an enemy combatant is 'an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces' (U.S. Department of Defense 2005).

the separation of powers doctrine. Lacking the ability to keep Hamdi legally, the United States agreed to release him to Saudi Arabia (where he was also a citizen and had lived since childhood) on condition that he gives up his U.S. citizenship and agrees to certain travel restrictions for the rest of his life.

The situation can hardly be said to have improved for John Walker Lindh, the other American captured in Afghanistan during the United States' 2001 invasion and who subsequently came to be known as the 'American Taliban'. Indeed, it was Lindh rather than Hamdi who became the public face of Islamic radicalism in the American imagination, thanks in no small measure to his conversion to Islam during high school. This conversion eventually led him to Afghanistan in the spring of 2001 where, at the age of twenty, Lindh joined the Taliban in its struggle against the Northern Alliance. According to the United States, he also attended a military training camp affiliated with al Qaeda, twice met with Osama bin Laden, and remained on the front lines even after the events of 11 September and the American invasion of Afghanistan (*United States v. Lindh* 2002). Though he was not designated an enemy combatant, the details of Lindh's capture, interrogation, and prosecution suggest that the United States also regarded him as someone so threatening as to be ineligible for the legal protections of citizenship. Captured with his Taliban unit, Lindh was held incommunicado for the next fifty-four days as he was interrogated by agents of the U.S. government. During this time, Lindh's parents hired a lawyer and sought to inform him of this through the State Department, the Department of Defense, and their Congressional representatives. All these efforts were blocked by American officials. In the meantime, Lindh gave a confession to an agent of the Federal Bureau of Investigation which Lindh was not allowed to read or sign, was not taped, and which, in violation of FBI protocol, did not include the presence of a second agent (Mayer 2003: 57).

Lindh was subsequently indicted on ten federal charges related to his Taliban activities, including aiding the Taliban, conspiracy to kill nationals of the United States, and providing material support to al Qaeda, offenses for which he faced three life sentences plus an additional ninety years in prison if convicted (Mayer 2003: 50). In July 2002, two days before Lindh's defense planned to challenge the legitimacy of his confession in court, the government abruptly offered Lindh a plea bargain which entailed his serving a twenty-year prison term on one of the charges (aiding the Taliban) in exchange for the other nine being dropped. Since early 2003, Lindh has been at a medium-security federal prison in California, where he will remain until 2022 (Mayer 2003: 50).

While Lindh's circumstances certainly differ from Hamdi's, the space he occupies in the American response to 11 September does not. Not simply denied the privileges of citizenship, Lindh became one of 'them,' an American Taliban whose 'allegiance to those fanatics and terrorists never faltered, not even with the knowledge that they had murdered thousands of his countrymen', to quote Attorney General Ashcroft (in Mayer 2003: 50). Never mind

that none of these allegations was ever proven in a court of law, that Lindh's Islamic fundamentalism bears a strong resemblance to its Christian counterpart so fashionable in the United States, or the possibility that Lindh may simply have been tremendously naïve and consequently in the wrong place at the wrong time. Each of these interpretive possibilities was outweighed by the threat he allegedly posed to the body politic and obscured by the inflationary pressure of the social contract that transformed his deviance into a mortal danger. It is the ethic of destruction that belongs to warfare. As one of Lindh's attorneys remarked, 'It's part of the change in approach to the law in this country, to prevention. You can detain people without evidence, make allegations, then develop the evidence later. If you have no evidence, you drop the charges. The only problem is, you've destroyed someone's life in the process' (in Mayer 2003: 59).

A third American caught up in the American offensive against terror is Jose Padilla, apprehended on 8 May 2002 by federal officials in Chicago as he stepped off a plane recently arrived from Pakistan. Padilla was initially held in federal criminal custody as a material witness in a grand jury investigation into the 11 September attacks. Accordingly, an attorney was provided for him by the Southern District of New York. On 9 June, however, President Bush designated Padilla an enemy combatant and ordered him into military custody for detention at the naval brig in Charleston, South Carolina. The basis for the designation was Padilla's alleged conspiracy to detonate a 'dirty bomb' in the United States, as well as his suspected links to al Qaeda. Like Hamdi, Padilla was a United States citizen and therefore sought to challenge the legitimacy of his detention via a habeas petition filed in district court for the Southern District of New York alleging violations of his Fourth, Fifth, and Sixth Amendment rights. The petition ultimately reached the Supreme Court, which in June 2004 rejected Padilla's claim on a jurisdictional technicality (*Rumsfeld v. Padilla* 2004).[8] During the appeals process, however, the Second Circuit Court of Appeals declared that the president lacked constitutional authority to detain citizens indefinitely without charge. When Padilla refiled his habeas petition, the South Carolina district court agreed with the Second Circuit Court concerning the president's lack of constitutional authority. On appeal in September 2005 the Fourth Circuit Court of Appeals reversed, setting the stage for another review by the Supreme Court.

It is here where things get interesting. Facing another challenge to its practice of indefinitely detaining citizens without charging them with a crime, the government accused Padilla of conspiracy to 'murder, kidnap and maim' people overseas and requested that he be transferred from military to civilian custody to stand trial. No mention was made of the dirty bomb allegation or

8 Padilla filed his habeas petition in the Southern District of New York, which is where he was held immediately after his arrest. The Supreme Court found, however, that because he was transferred to South Carolina, he should have filed his petition in that state.

any of the other circumstances that had led to his enemy combatant designation. Unimpressed, the Fourth Circuit rejected the government's transfer petition while pointedly criticizing the government's bizarre legal maneuvering. Judge J. Michael Luttig observed that the ever-shifting rationale behind Padilla's detention created the impression that 'Padilla may have been held for these years, even if justifiably, by mistake', and that the government seemed to believe it could engage in such behaviour 'with little or no cost to its conduct of the war against terror'. Luttig concluded with the warning that such conduct might in fact entail 'substantial cost to the government's credibility before the courts' (in Frieman 2006). Undeterred, in January 2006 the United States government asked for and received Supreme Court permission to transfer Padilla back to civilian custody, where he now awaits trial scheduled for January 2007 (JURIST Legal News and Research 2006).

Noteworthy in each of these cases is just how little the privileges of citizenship actually helped the individuals in question, a circumstance indebted to the criminology of the other and its tendency to view the authors of disorder as fundamentally evil. No longer offenders from liberalism's inside, Hamdi, Lindh, and Padilla became part of the outside when they affiliated with those who, by attempting to harm the body politic, intended its death by definition. Yet the paucity of actual evidence in support of the government's contentions suggests that the real offence here is betrayal of the norms and ideals that define what it means to be an American and of which citizenship has increasingly become the legal expression. Lindh, as an upper-middle-class white male, is especially instructive in this regard. As the government's strangely evaporating case against him suggests, Lindh was quite likely never a material threat to the United States and was most certainly not threatening to the degree suggested by the ten crimes with which he was initially charged. However, with his conversion to Islam, he departed from the view that sees in Christianity divine inspiration for the existence of the United States. His act of religious difference (admittedly more thoroughgoing than most), was transformed in the aftermath of 11 September into a total repudiation of the republic and effortlessly linked to the horrors of that day. As a result, claimed the Bush administration, Lindh forfeited the rights that belong to citizens (despite this being a legal impossibility absent a judicial procedure). Likewise might Hamdi's and Padilla's transgressions be seen as less significant for the threat they posed (quite little in the former, as it turned out; still to be seen, in the latter), than for what they indicated about the status of Islamic Americans, who rightly fear the very real possibility of being cast into a zone beyond the law at least partly on the basis of who they are. Such responses are animated by the belief that liberalism's warfare mode is the appropriate solution to disorder and that such disorder permits the exclusion of citizens from the legal and political order of which they are nevertheless members. Citizenship itself becomes an artifact of executive branch determinations made in response to the imperatives of the 'war on terror'.

Guantanamo Bay

Guantanamo Bay, Cuba, has been under United States jurisdiction since the conclusion of the Spanish American War in 1898 and, since 2001, has served as a prison for suspected Taliban and al Qaeda members detained during the war on terror. From the beginning, Guantanamo detainees have been denied basic legal protections, including access to counsel, knowledge of the charges against them, and the right to file habeas corpus claims in the court system of the United States. Likewise have Guantanamo detainees been denied Geneva Conventions protections as prisoners of war. Despite international outrage over these circumstances, the United States have consistently claimed that foreign fighters captured in the war on terror do not deserve Constitutional protections because they are not citizens and are ineligible for Geneva Conventions protections because they are non-state enemies. They are, in a very concrete sense, no longer persons. Instead, Guantanamo detainees are unlawful combatants, a legal non-status beyond the reach of law that has made it nearly impossible for them to contest the circumstances of their detention, much less to defend themselves or secure their release.

Legally speaking, the practice of indefinite detentions is rooted in both the Authorization for Use of Military Force and in an executive order signed by President Bush on 13 November 2001 authorizing him to detain persons who are members of al Qaeda, who engaged in or conspired to commit acts of terrorism against the United States, or who have harboured anyone in these two categories. While such authorisation might be seen as more or less legitimate considering the circumstances, it is language near the end of the order which signals the administration's conviction that belligerents on the wrong side of the war on terror deserve nothing less than the full force of liberalism's war making capacity. In particular, the order stipulates that 'military tribunals shall have exclusive jurisdiction with respect to offenses by the individual,' and that 'the individual shall not be privileged to seek any remedy […] in any court of the United States, or any state thereof, any court of any foreign nation, or any international tribunal' (White House 2001a). In short, no judicial review of unlawful combatant status or the indefinite detentions that result.

During legal proceedings pursued on behalf of the Guantanamo detainees by American legal rights organisations, both the district court and the Washington DC circuit court of appeals agreed that the courts of the United States lack jurisdiction to consider habeas petitions filed by aliens held outside the sovereign territory of the United States. In June 2004 the United States Supreme Court vacated these findings, arguing that American courts have the power to determine the legality of alien detentions regardless of where they're held, and that at any rate, the United States government exercises exclusive jurisdiction over Guantanamo Bay, thus bringing it within the purview of the American court system. The Supreme Court further pointed out that nothing in any of its previous decisions categorically excluded aliens from invoking

habeas privileges, again irrespective of whether they are held by the military or by the civilian criminal justice system (*Rasul v. Bush* 2004, Center for Constitutional Rights 2006).

Thanks to *Hamdi* and *Rasul*, it momentarily appeared as though the war on terror and the Bush administration's efforts to keep accused terrorists in a zone beyond the law would be reined in by liberalism's traditional limitations on the power of government. Faced with this prospect, Congress in 2005 elected to strip the federal courts of jurisdiction over Guantanamo detainees via passage of the Detainee Treatment Act of 2005. According to Section 1005(e)(1), 'no court […] shall have jurisdiction to hear or consider […] an application for […] habeas corpus filed by […] an alien detained […] at Guantanamo Bay' (Detainee Treatment Act of 2005). Of even greater concern, from the detainees' perspective, at least, was the Bush administration's intent to interpret the act as applying to all pending Guantanamo habeas petitions, thereby jettisoning the legal protections recently conferred by *Rasul*.

However, a second Guantanamo-related case was gradually making its way towards the Supreme Court, one that would not only bear directly on the jurisdiction-stripping provisions of the Detainee Treatment Act but other elements of the war on terror as well. Broadly speaking, *Hamdan v. Rumsfeld* (2006) pertained to that part of the president's 13 November executive order creating military tribunals for the trial of Guantanamo detainees. The petitioner in the case was Salim Hamdan, a Yemeni national captured in Afghanistan in 2001 and who, it turned out, had formerly been Osama bin Laden's driver. The circumstances of Hamdan's detention were familiar: he was held without charge for a year at Guantanamo, at which point 'the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes' (*Hamdan v. Rumsfeld* 2006: 1). Another year passed, at which point Hamdan was charged with conspiracy 'to commit […] offenses triable by military commission' (*Hamdan v. Rumsfeld* 2006: 1). Via pro bono counselors acting on his behalf in the United States, Hamdan argued that Bush's military commissions lacked authority to try him because such commissions were not created by a specific act of Congress and that the procedures adopted for purposes of his trial violated both military and international law.

The Bush administration's initial response was to seek dismissal on the basis of the Detainee Treatment Act's jurisdiction-stripping provision. The Supreme Court demurred, arguing that the act failed to specifically include pending cases. The Court also had much to say concerning the substantive points raised by Hamdan. First, it found that Congress' Authorization for Use of Military Force did not contain specific language authorizing the creation of military tribunals and that therefore the president's 13 November executive order could not be justified through reference to that act. Accordingly, the legally binding provisions for military tribunals were those provided by the UCMJ, which are in turn bound by the Geneva Conventions. However, the Court found numerous violations of the provisions of these two laws. In particular, the commissions not only enabled the admission of hearsay evidence

but provided that the accused and his attorney could be denied access to evidence presented during any part of the proceedings declared 'closed' by the presiding officer, the grounds for which included vague 'national security interests' (*Hamdan v. Rumsfeld* 2006: 4). Still more to the point, the Court concluded that 'there *is* a basis to presume that the procedures employed during Hamdan's trial will violate the law: He will be, and *indeed already has been* excluded from his own trial' (*Hamdan v. Rumsfeld* 2006: 5). As for the Geneva Conventions, the Court cited Common Article III's 'prohibition on "the passing of sentences […] without previous judgment […] by a regularly constituted court affording all the judicial guarantees […] recognized as indispensable by civilized peoples"' (*Hamdan v. Rumsfeld* 2006: 6). Further, the Court pointed out that while Common Article III's requirements 'are general, crafted to accommodate a wide variety of legal systems […] they are *requirements* nonetheless' (*Hamdan v. Rumsfeld* 2006: 7).

In late September 2006, however, Congress once again joined the fray with passage of the Military Commissions Act of 2006 (Military Commissions Act of 2006). Acting as though the Supreme Court had uttered nary a word on the subject, the Act gives Congressional support to precisely the sort of military commissions so roundly criticized in *Hamdan*. In particular, the Act specifically authorizes the president to establish such commissions, prohibits an individual subject to trial by commission from invoking the Geneva Conventions as a source of rights, and permits the admission of hearsay evidence at the discretion of the presiding officer. As for habeas corpus, the Act specifically prohibits any court, judge, or justice from considering a habeas petition related to any aspect of the detention by the United States of unlawful combatants anywhere in the world. Further, the new law applies this provision to all pending habeas claims. On 20 October 2006, (the day after President Bush signed the measure into law), the government informed the U.S. District Court for the District of Columbia that it no longer had jurisdiction over 196 habeas petitions brought by Guantanamo Bay detainees. At a minimum, the new law indicates that the legislative branch is now also committed to marginalizing the judiciary's role in the 'war on terror'. Despite repeated judicial opinions concerning the right of detainees to access the federal court system, Congress has decided to bypass those rights by providing legislative validation of executive fiat. It also indicates that the particulars of the United States' conduct of that war will remain shrouded in secrecy, which is to say that the war on terror will be waged outside the parameters of the law. Only the overwhelming force of the state's war making capacity, so it seems, is adequate to the task of eliminating the radical evil of terrorism.

Conclusion

Certainly it is tempting to explain the United States' response to 11 September in terms of an enthusiasm for wild west-style justice on the part of President Bush or through reference to the extreme version of Christianity and its simplistic division of the world into good and evil which guides his conduct. Alluring though this may be, it fails to describe how an established system of national and international laws has been so easily subverted for purposes of waging war against those deemed responsible for the attacks of that day or how an entire nation can accede to acts of torture and abuse committed in its name. It is for these reasons that I have highlighted the importance of recent developments in the national attitude towards domestic criminals. Only when the authors of disorder are represented as fundamentally other and therefore implacably opposed to the social order does it become possible to imagine the suspension of basic human rights which domestic and international law formerly regarded as sacrosanct. As threats multiply and become increasingly atavistic, so too does the horizon of possible responses expand, even to the point of discarding the very rules for managing interhuman conflict laid down in the social contract. Yet the United States has faced grave threats in the past without having to torture, indefinitely detain, abuse, or otherwise compromise the principles in defense of which it was allegedly founded. Accordingly, in the space that remains I wish to highlight some of the implications of these developments, particularly as they concern the future of the citizen's relationship to the decreasingly liberal state.

I say 'decreasingly liberal' because of the ways in which the state's dispute resolution function has been displaced by the norms of the neoliberal marketplace in which rationally informed 'choice' serves as the orienting principle of both individual and state behaviour. Locke's use of the term 'umpire' in describing the state's function is instructive here because it implies a state that *regulates* the realm of rational decision-making without itself participating in that realm or endorsing one version of rationality over others. It is by virtue of this neutrality that the state can make good on its promise to protect the members of the commonwealth even when they make poor decisions. Simply put, from the state's point of view, protection is the higher value. In the agent-centric orientation of the criminology of the other, however, crime is explained as the outcome of a flawed calculus that can and should be punished. It's less the deed itself that matters than the calculations that led up to it. After all, choosing between competing alternatives is what liberal, reasoning man does, and the social contract is clearly preferable to the state of nature in the eyes of any rationally thinking being. Accordingly, said beings choose to abide by its mandates and the modification of their behaviour these entail. No coincidence, then, that the criminology of the other represents criminal behaviour as a similar type of choice made in the opposite direction by fundamentally wicked people.

As Wendy Brown (2005: 39-40) has argued, this neo-liberal version of citizenship involves 'extending and disseminating market values to all institutions and social action' as well as the development of 'institutional practices and rewards for enacting this vision'. Even decisions made in what Locke would undoubtedly regard as the private sphere come to be viewed in terms of market criteria, with all the associated rewards and penalties. So, for example, individuals' 'moral autonomy is measured by their capacity for "self-care" – the ability to provide for their own needs and service their own ambitions. In making the individual fully responsible for her/himself, neo-liberalism equates moral responsibility with rational action […] no matter how severe the constraints on this action – for example, lack of skills, education, and childcare in a period of high unemployment and limited welfare benefits' (2005: 42). Along the way, the citizen-state relationship is radically transformed. The state is no longer that unique associational form for the resolution of disputes but an actor like any other which 'must not simply concern itself with the market but think and behave like a market actor across all of its functions, including law' (2005: 42). Not surprisingly, the model citizen in this context 'is one who strategizes for her/himself among various social, political and economic options, not one who strives with others to alter or organize these options' (2005: 43).

The effect of extending the mores of the marketplace to liberalism's formally non-political spheres is twofold: the production of subjects for whom a highly depoliticized version of rationality becomes the highest priority, and the implementation of controls for those deemed incapable of adhering to the dictates of reason. After all, the criminology of the other presumes that the capacity to reason correctly is not equally present in everyone and therefore takes for granted the existence of a class of people who are 'strongly attracted to self-serving, anti-social, and criminal conduct unless inhibited from doing so by robust and effective controls' (Garland 2001: 15). Accordingly, behavioural interventions 'should centre not upon individuals but upon the routines of interaction, environmental design and the structure of controls and incentives that are brought to bear upon them. The new policy advice is to concentrate on substituting prevention for cure, reducing the supply of opportunities, increasing situational and social controls, and modifying everyday routines' (Garland 2001: 16). That the state has become an active participant in the implementation of these controls ought not come as a surprise given the increasing fluidity of liberalism's inside/outside distinction. Now itself a rationally calculating 'being', and consequent to its enthusiasm for looking upon war and crime as flip sides of the same coin, the state now has little choice but to regard everyone as a potential combatant/criminal.

Of course it is precisely within the context of the 'war on terror' that the embrace of an overtly martial and therefore highly restrictive rationality comes to seem most necessary and most logical. Especially for those citizens raised on the virtues of the social contract as a mechanism for resolving disputes, terrorism – and especially that perpetrated by citizens – is the most

comprehensive repudiation of the body politic and therefore the ultimate irrational act. Consequently, it becomes rational to reduce the opportunities for terrorist activity through constraints on personal freedom, the hardening of public spaces, and the spending of untold billions on the military. So too does warring against terror further abet the tendency of the criminology of the other to regard acts of disorder as rooted in dispositional factors rather than concretely situated political circumstances. In what has become an interpretive double standard, 'we' are waging war in the sedate, settled sense implied by liberalism, whereas 'they' are akin to Locke's 'dangerous and noxious creatures' beyond the pale of civilisation and who must therefore be eliminated because they cannot be rehabilitated to the norms of liberal reason. The recent fondness for civilisational comparisons can thus be read as shorthand for the rationality/irrationality divide that allegedly differentiates those committed to freedom and those not. Criminology's 'evil other' becomes applicable on a global scale, embodied in the person of the 'terrorist'.

The modifications to the citizen-state relationship entailed by these developments are therefore far from haphazard. The citizen needs the state now more than ever, not simply as a protector from external dangers and as a regulator of internal affairs but also as a bulwark against the irrationality now regarded as omnipresent and implacably opposed to the interests of those reasoning choosers who remain committed to the social contract. Yet there is ultimately an additional paradox here, insofar as the fear inspired by the war on terror is so utterly *irrational*. After all, the chances of dying in one's bathtub are many thousands of times greater than that of dying in a terrorist attack. But fear, of course, has a way of inducing its own forms of rationality, such that the citizen can be forgiven for occasionally relating to the state as someone in need of protection might, and whose contractual obligation now includes acquiescence to whatever forms of behaviour are deemed necessary. In such an environment, passivity, too, becomes a rational, reasoned act designed to ensure one's survival.

Predictably, fear also stimulates a pronounced turn towards the executive branch and its version of events, versions that are as damaging as they are fantastical. I refer here to the July 2006 Harris poll which found that half of all Americans still believe Iraq possessed weapons of mass destruction at the time of the United States' 2003 invasion. Analysts and pundits put forth all sorts of explanations, including repeated assertions to the effect of same by the White House, right-wing talk radio, and a general need to justify the war in Iraq (*New York Times* 2006). Undoubtedly each of these explanations is plausible in its own way. Yet they each fail to account for the ways in which belief in such ephemera is the concomitant of the state's monopolisation of what it means to be rational and of the highly restricted options for thinking about threats and dangers that result as a consequence. Increasingly deprived of the ability to fashion the reality to which they now relate as consumers, citizens frequently have little choice but to acquiesce to the version of truth formulated by those at the helms of control. Accordingly, along with the legal

protections ideally afforded by liberalism, we might also list a meaningful sense of citizenship as an additional casualty in the war on terror.

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