DISPOSABLE DEONTOLOGY: THE DEATH PENALTY AND NUCLEAR DETERRENCE

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Imagine that British Special Air Service soldiers capture Osama bin Laden, the former Saudi believed responsible for the terrorist attacks on New York City and Washington D.C. on September 11, 2001. Following the announcement of bin Laden's capture, the United States seeks his extradition to stand trial for his role in the terrorist attacks.[1] Unfortunately, the British government refuses to extradite bin Laden, unless the United States promises not to execute him.

As hard as this scenario might be to accept, it could happen. Some Western government officials have already stated publicly that if they were to capture bin Laden, they would not turn him over to the United States absent a guarantee that he would not be executed.[2] This is consistent with their current policy, which is a blanket refusal to extradite any death-eligible suspect without a guarantee that the death penalty will not be sought.[3] Even if

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1. Significant questions remain pertaining to whether bin Laden could be tried before a military commission, as opposed to an Article III court (or a state court). *See, e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002). Such questions are tangential, however, to the morality of the death penalty and nuclear deterrence; accordingly, I shall set these questions aside.

2. *See, e.g.*, Philip Johnson, *Fall of the Taliban – Britain Could Face Dilemma Over bin Laden Death Penalty*, DAILY TELEGRAPH, Dec. 11, 2001, at P14; T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.; Allies Oppose Death Penalty and Bush's Plan for Secret Military Tribunals*, WASH. POST, Nov. 29, 2001, at A23. *But see* Peter Ford, *Trying Al Qaeda: U.S. v. Europe*, CHRISTIAN SCIENCE MONITOR, Dec. 14, 2001, at 1 (stating that because the European Human Rights Convention does not apply in Afghanistan, the United Kingdom "would have no compunction in handing [bin Laden] over to the Americans" if he were caught in Afghanistan).

3. *See, e.g.*, Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 131 (2002); John Quigley, *Pressure from Abroad Against Use of Capital Punishment in the United States*, 8 ILSA J. INT'L & COMP. L. 169, 169-70 (2001). Canada, however, does not go quite so far as the European countries. The Supreme Court of Canada requires that the Canadian government condition extradition of death-eligible suspects on a waiver of the death penalty "in all but exceptional cases." See *United States v. Burns*, [2001] S.C.R. 7, which at least leaves open the possibility that a particular case, perhaps such as bin Laden's, might warrant extradition without any assurances.

the Osama bin Laden extradition scenario never comes to pass, the refusal of our Western allies to extradite death-eligible suspects without a waiver of the death penalty is already a matter of friction and is only likely to fester as the war on terrorism rages on. In the last four years, there have been at least nine high-profile death-eligible suspects, including four alleged Al Qaeda terrorists, whom the United States has sought to extradite; Europe or Canada has required the United States to waive the death penalty in each case.[4] All four of the alleged terrorists are suspected of having helped plot the bombings of the U.S. embassies in Kenya and Tanzania in 1998, which resulted in the deaths of 224 Africans and Americans. One of the four, Mamdouh Mahmud Salim, fled to Germany and was extradited to the United States in 1998, only after the United States agreed not to seek the death penalty against him.[5] The other three, Khalid al-Fawwaz, Ibrahim Eidarous, and Adel Abdel Bary, fled to the United Kingdom, where the House of Lords ordered them extradited in 2001; however, the British Home Secretary has yet to make a final decision, and extradition is still pending.[6]

Nor is the tension limited to instances of formal extradition. Spain, currently detaining eight alleged Al Qaeda terrorists, has stated that it will refuse to extradite them unless the United States agrees not to seek the death penalty. Thus far, the United States has not sought formal extradition of these men.[7] Accordingly, if the "war on terrorism" continues to result in the capture of Al Qaeda operatives in European countries opposed to the death penalty, the friction over the death penalty between the United States and its allies will continue.

Among Western nations,[8] the United States stands alone in retaining capital punishment.[9] The governments of the other Western nations consider

4. The five non-terrorist suspects are: James Charles Kopp, who allegedly stalked and murdered an abortion doctor, then fled to France; Ira Einhorn, who murdered his girlfriend in 1977, then fled to France; Atif Rafay and Glen Sebastian Burns, who allegedly murdered Burns's parents, then fled to Canada; and Robert Kleasen, who allegedly killed two Mormon missionaries in 1974, then chopped up their corpses with a power saw, and while retrial (after conviction and successful appeal) was pending, fled to the United Kingdom. *See Murder Suspect Agrees to Extradition*, L.A. TIMES, May 28, 2002, at A6 (Kopp); John J. Goldman, *Einhorn Guilty of Murdering His Ex-Girlfriend*, L.A. TIMES, Oct. 18, 2002, at A19 (Einhorn); Rod Mickleburgh, *Lawyer Says She 'Got Carried Away,'* THE GLOBE & MAIL (TORONTO), Aug. 21, 2002, at A7 (Rafay and Burns); *Texan Extradited*, TIMES OF LONDON, Aug. 17, 2002, at 6; Jason Spencer, *Extradition Delayed For Man Sought In Slayings*, AUSTIN AMERICAN-STATESMAN, Apr. 10, 2002, at B1 (Kleasen).

5. John J. Goldman, *Terror Suspect Admits Trying to Kill Guard*, L.A. TIMES, Apr. 4, 2002, at A16 (stating that while in prison awaiting trial, Salim stabbed a prison guard in the eye, causing permanent brain damage).

6. *See, e.g., British High Court OKs Extradition*, L.A. TIMES, Dec. 18, 2001, at A10; Philip Johnston, *Terror in Kenya—1998 Bomb Suspects Still Held in Britain*, DAILY TELEGRAPH, Nov. 30, 2002, at P18.

7. *See* Jean O. Pasco & Ann Conway, *O.C. Man Begins Duties as Ambassador*, L.A. TIMES, Nov. 28, 2001, at B7.

8. By "Western nations," I mean the United Kingdom, France, Germany, Spain, and other Western European nations, as well as Canada, Mexico, Australia, and New Zealand. Although some East Asia countries such as Japan, South Korea, and Taiwan might be considered "Westernized," I do not include them within this definition. I will note, however, that all three of those Westernized countries retain the death penalty.

9. Amnesty International Website Against the Death Penalty, *at*

the United States' continued use of capital punishment to be "morally wrong," "barbaric," "sad, pathetic[,] and wrong."[10] Now, some of these criticisms are little more than epithets or *ad hominem* attacks, so it can be difficult to understand exactly why other Western nations object to the death penalty. However, a more comprehensive objection comes from British Prime Minister Tony Blair, who declared in 1994 (prior to ascending to his current position):

> The death penalty cannot be justified, even on the grounds claimed by some hon. Members. But it is also wrong in principle. It is a response to evil that is evil itself. It is to act, as a society, not in justice but in anger; not in reason but for revenge. No matter how clothed it is in the legal process and however much it is attended by all the trappings of the law, it cannot disguise its real nature, which is cruel and barbaric. We do not uphold the sanctity of human life by taking it, or underline its precious nature by snuffing it out.[11]

In essence, it appears that these nations believe that killing someone as punishment for that person's misdeeds, no matter how heinous, is a violation of "human dignity."[12] This view is perhaps best illustrated by the French government's protests concerning alleged "20th hijacker" Zacarias Moussaoui, a French citizen who has been indicted for "conspiracy to commit acts of terrorism, to commit aircraft piracy, to destroy aircraft, to use weapons of mass destruction, to murder U.S. employees and to destroy property" as part of the September 11, 2001 terrorist attacks.[13]

The French government has protested the fact that Moussaoui could get the death penalty if convicted, but this protest is not based on the belief that Moussaoui is innocent, that he will not get a fair trial in the United States, or even that mitigating circumstances might ultimately show that he does not deserve the death penalty even if convicted. A spokesperson for the French Embassy stated: "We're confident the Americans will provide for a fair trial. But we oppose the death penalty—as do all the other countries of the European Union—whether it's against Mr. Moussaoui or anyone else. That's just a general principle."[14] Or, as Danielle Mitterrand of France ex-

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http://web.amnesty.org/pages/deathpenalty-countries-eng (last updated Jan. 4, 2003) [hereinafter Amnesty International].

10. *Europe Group Attacks U.S. Death Penalty*, HOUSTON CHRON., June 22, 2001, at 22 ("morally wrong"); Keith B. Richburg & T.R. Reid, *France Cautions U.S. Over Sept. 11 Defendant*, WASH. POST, Dec. 13, 2001, at A13 ("barbaric"); *Top French Lawmaker Calls for Action Against U.S., Japan Over Death Penalty*, AGENCE FRANCE-PRESS, June 22, 2001 (quoting Council of Europe President Lord Russell-Johnston who condemned the execution of the Oklahoma City Bomber as "sad, pathetic and wrong").

11. House of Commons Hansard Debates for Feb. 21, 1994, at 8.

12. *See* EU Memorandum on the Death Penalty, Feb. 25, 2000.

13. Josh Meyer, *Moussaoui Enters Plea of Not Guilty*, L.A. TIMES, Jan. 3, 2002, at A1.

14. *See, e.g.*, Eric Lichtblau & Josh Meyer, *U.S. Will Seek Death for Sept. 11 Suspect*, L.A. TIMES, Mar. 29, 2002, at A1 (quoting Remi Marechaux).

plained, "Whatever the crime, believing in the abolition of the death penalty is a philosophy of the mind and spirit. It can't change depending on the circumstances."[15]

Translating the position of the other Western nations into traditional criminal law theory is not a simple task; however, their opposition appears deontological, in the sense of being based not on practical or consequentialist (i.e., utilitarian) rationales.[16] That is, they remain opposed, even if one could show that the death penalty served some utilitarian purpose (such as deterrence).

That opposition, however, is flatly inconsistent with the theory of nuclear deterrence, which these same countries rely on, either directly, in the case of France and the United Kingdom (which are armed with nuclear weapons), or indirectly, in the case of other U.S. allies (who rely upon our nuclear umbrella). Sometimes known as "mutual assured destruction," nuclear deterrence rests on the threat that a country must retaliate against another country's civilian population in response to a first strike.[17] The idea of nuclear deterrence is that no one will launch a nuclear attack because the price of that attack—nuclear retaliation—is too high to bear. The morally questionable practice of targeting civilian populations is justified due to the positive outcome of such a practice: the avoidance of nuclear war. But anyone accepting this deterrence theory must be open to accepting capital punishment if it were shown to have a positive outcome.

Moreover, once deterrence fails, the act of retaliation cannot serve any useful purpose: it cannot stop the first strike and, thus, cannot protect the target country. Therefore, any country subscribing to the theory of nuclear deterrence must be prepared to retaliate for a first strike, knowing that doing so achieves no purpose other than retribution. Retaliation cannot stop the incoming missiles. Thus, any country willing to accept the benefits of nuclear deterrence holds a moral framework that is incompatible with an opposition to the death penalty.

It may be that foolish consistency is the hobgoblin of little minds. Certainly, there is a danger in extolling consistency as its own paramount value to the exclusion of what exactly it is that one is being consistent about.[18] But if being consistent can be defined as "harmony, regularity, or steady continuity throughout,"[19] and consistency can be defined as "harmony of conduct

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15. *See, e.g.*, Howard Mintz, *End Executions, Europeans Urge*, S.J. MERC. NEWS, Mar. 17, 2002, at 9.

16. *See, e.g.*, LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 55-56 (1996) (describing a deontologist as one who does not "evaluate actions merely by whether they serve to maximize desirable (or minimize undesirable) outcomes but by whether they are *right*").

17. *See* Baker Spring, *Why the ABM Treaty is Already Dead and What It Should Mean for United States Security*, 4 NEXUS 31, 35 (1999).

18. *See, e.g.*, John Rodman, *The Liberation of Nature*, 20 INQUIRY 83, 88 (1977) ("When a philosopher feels he has no other ground to stand on, he can always take some platitude and explore the implications that would follow from being consistent about it.").

19. Jay W. Stein, *The Hobgoblin Doctrine: Identifying "Foolish" Consistency in the Law*, 29 TEX.

or practice with profession,"[20] then it seems reasonable to put the burden on those who are inconsistent to demonstrate that consistency would be foolish. This is especially true in the specific comparison at issue here, where the other Western nations are criticizing the United States based on a rigid, morality-based principle.

I do not argue, however, that other Western nations possessing nuclear weapons (or relying upon them) are obligated to use capital punishment. There are a number of non-deontological reasons to abolish the death penalty, including the fact that it costs more to try to impose a death sentence than to imprison someone for life. And certainly other countries are free to be inconsistent in governing themselves. But these non-deontological reasons do not justify failure to cooperate in extraditing death-eligible suspects to a country that retains the death penalty.

I. CREDIBLE NUCLEAR DETERRENCE

The theory of nuclear war that developed during the Cold War was known by its apt acronym "MAD," which stood for "mutual assured destruction."[21] The idea behind MAD was that two nuclear superpowers could maintain an uneasy and wary peace by promising to respond to a nuclear attack with a massive retaliatory strike aimed at annihilating the attacker—especially its civilian population.[22] This "eye for an eye" approach has a conceptual ease to it, and the fact that the Cold War lasted for over forty years without an actual nuclear incident between the United States and the former Soviet Union suggests that it was effective.

A. Mutual Assured Destruction and the Arms Race

MAD, however, did not come into being at the same time as the nuclear bomb. Just after World War II, U.S. military plans called for the use of nuclear weapons for what might have been considered non-retaliatory purposes.[23] Because the former Soviet Union and its allies had military forces

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TECH. L. REV. 1017, 1019 (1998).

20. *Id.*

21. The person who coined the term MAD, Donald Brennan, intended for it to be a sarcastic acronym. *See* Wolfgang K.H. Panofsky, *The Mutual Hostage Relationship Between Russia and America*, 52 FOREIGN AFFAIRS 109 (1973), *reprinted in* NUCLEAR STRATEGY AND NATIONAL SECURITY: POINTS OF VIEW 74, 75 (1977); Spring, *supra* note 17.

22. *See, e.g.*, INTERNATIONAL ARMS CONTROL: ISSUES AND AGREEMENTS 202-03 (Coit D. Blacker & Gloria Duffy eds., 2d ed. 1984); Jonathan Granoff, *Nuclear Weapons, Ethics, Morals, and Law*, 2000 B.Y.U. L. REV. 1413, 1433; Spring, *supra* note 17 (noting that MAD "was predicated on the idea that by exposing their civilian populations to the horrors of nuclear war, neither U.S. nor Soviet leaders would risk launching an attack"); William A. Kinsel, Comment, *The Role of Arms Control in Strategic Nuclear Doctrine: SDI, MAD, and the ABM Treaty*, 62 WASH. L. REV. 763, 765 (1987) (noting that MAD "depends upon each superpower holding the other country's civilian population hostage to the threat of nuclear annihilation"); Robert S. McNamara & Thomas Graham, Jr., *A Pretty Poor Posture for a Superpower*, L.A. TIMES, Mar. 13, 2002, at B13.

23. PAUL BRACKEN, THE COMMAND AND CONTROL OF NUCLEAR FORCES 76-78 (1983).

that greatly outnumbered those of the United States and its allies in Europe, "[i]t was thought, reasonably enough, that the only way to halt an invasion of Western Europe was to destroy the Soviet armies before they could overrun the continent."[24] In other words, the United States was prepared to drop nuclear bombs on the Soviet army if it tried to invade Western Europe. Thus, in 1948, when the United States had about fifty nuclear bombs and the Soviet Union had none, the nuclear weapons were aimed at military, industrial, or transportation targets; civilian casualties were expected but not intended.[25] Even in 1950, when the United States had somewhere between 292 and 688 atomic bombs, the explosive yield of such bombs was small enough and the delivery mechanism—basically the same as was used in World War II (bombers)—was uncertain enough that the United States could not even be sure of destroying Moscow, much less the whole of the Soviet Union.[26]

This policy began to mutate in 1954, when Secretary of State John Foster Dulles declared that the United States would respond to Soviet provocation by launching "massive retaliation," which everyone understood to mean "a full-scale nuclear attack."[27] The critical catalyst for this policy change was the development of the hydrogen bomb in 1952.[28] The hydrogen bomb packs about a hundred to a thousand times the destructive power of the atomic bomb.[29] Once the United States perfected the hydrogen bomb, it solved the problem of not being able to ensure the destruction of Moscow—and much more. Of course, the Soviet Union did not lag behind for long, and it built a hydrogen bomb in 1955.[30]

By the 1960s, the United States and the Soviet Union had both developed intercontinental ballistic missiles ("ICBMs"), which could be launched from one side of the world and hit a target on the other side.[31] And as technology improved and more potent weapons were developed, the amount of warning time a superpower could expect to have shrunk to only a few minutes.[32] Submarines, for example, could park just outside an enemy country's

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24. *Id.* at 9.

25. *Id.* at 76-78.

26. WILLIAM POUNDSTONE, PRISONER'S DILEMMA 162-63 (1992).

27. BRACKEN, *supra* note 23, at 82; UNITED NATIONS DEP'T FOR DISARMAMENT AFFAIRS, NUCLEAR WEAPONS: A COMPREHENSIVE STUDY 45 (1991) [hereinafter COMPREHENSIVE STUDY].

28. In terms of the physics of nuclear weapons, the atomic bomb creates a fission reaction, whereby the fissile material (typically enriched uranium or plutonium) is compacted by conventional explosives until reaching "critical mass," at which point each atom splits into two; this split releases a tremendous amount of energy that had been the "strong nuclear force" holding the atom together. The hydrogen bomb, on the other hand, creates a fusion reaction, whereby heavy forms of hydrogen are combined with an atomic bomb. The ensuing reaction causes the heavy hydrogen atoms to fuse together into a helium atom, simultaneously releasing energy and other radioactive isotopes. *See, e.g.*, COMPREHENSIVE STUDY, *supra* note 27, at 6, 8.

29. RICHARD RHODES, DARK SUN: THE MAKING OF THE HYDROGEN BOMB 207 (1995).

30. *Id.* at 569.

31. *See* STEPHEN J. CIMBALA, THE PAST AND FUTURE OF NUCLEAR DETERRENCE 39 (1998); PAUL P. CRAIG, NUCLEAR ARMS RACE: TECHNOLOGY AND SOCIETY 79 (1986).

32. *See* ROBERT JAY LIFTON & RICHARD FALK, INDEFENSIBLE WEAPONS: THE POLITICAL AND PSYCHOLOGICAL CASE AGAINST NUCLEARISM 9 (1982).

waters and lob nuclear missiles with virtually no warning at all.[33] To be able to implement MAD under these conditions, a superpower needed to have enough of its own nuclear weapons such that even if it were devastated by a nuclear strike, it would still be able to strike back. This became known as "second strike capability," which drove the United States and the former Soviet Union to build more and more nuclear weapons.[34]

In 1962, for example, the United States' nuclear strategy, embodied in the Single Integrated Operational Plan ("SIOP"), called for the launching of *all* American nuclear weapons in the event of a nuclear war started by the Soviet Union.[35] An estimated 360 million to 525 million Russians and Chinese (who were also targeted) would die.[36]

The image of a mushroom-shaped cloud rising above a devastated city is familiar to just about everyone today. The image, however, fails to convey the awesomely destructive potential of nuclear weapons. A nuclear blast similar in size to the one at Hiroshima would kill or injure people and destroy buildings due to (1) the incredible heat of the fireball, which would melt or vaporize everything close to it, (2) the overwhelming blast wave, which would strike "as a sudden and shattering blow, immediately followed by a hurricane-force wind directed outwards from the explosion,"[37] and (3) neutron and gamma rays that would induce fatal radiation sickness at distances up to three-quarters of a mile or more.[38]

That qualification (a Hiroshima-sized bomb) is crucial to understanding how destructive today's nuclear weapons can be. The atomic bomb dropped on Hiroshima had an explosive yield of 13.5 kilotons, or the equivalent of 13,500 tons of TNT.[39] By contrast, a United States' Minuteman III Mk-12A ICBM in service today carries three nuclear warheads,[40] each with an explosive yield of 335 kilotons, meaning that a single ICBM packs approximately 17.4 times the destructive power of the atomic bomb that leveled Hiroshima.[41] American nuclear submarines are even more devastating. A sin-

33. *See* BRACKEN, *supra* note 23, at 6 (noting that submarine-launched nuclear weapons could strike inland targets in twelve to fifteen minutes); *id.* (noting that, in 1982, "warheads from a single Poseidon submarine, within minutes of being released, could annihilate all major Soviet cities and destroy the Soviet Union as a functional entity").

34. POUNDSTONE, *supra* note 26, at 92 (defining "second-strike capability" as "the ability of the United States to launch a counterattack on the Soviet Union even in the aftermath of a Soviet first strike that had killed most Americans"); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 606 (1989).

35. Matthew G. McKinzie et al., *The U.S. Nuclear War Plan: A Time for Change*, Natural Resources Defense Council monograph, at 6 (June 2001) [hereinafter *U.S. Nuclear War Plan*].

36. *Id.*

37. COMPREHENSIVE STUDY, *supra* note 27, at 72.

38. *Id.* at 71-73. About one-third of the explosive energy of the nuclear blast is released as heat, about half as the blast wave, and the rest as nuclear radiation. *Id.* at 72-73.

39. RHODES, *supra* note 29, at 304.

40. STOCKHOLM INT'L PEACE RES. INST. YEARBOOK 2002: ARMAMENTS, DISARMAMENT, AND NUCLEAR SECURITY, at 536 [hereinafter SIPRI 2002]. As of January 2002, the United States had 300 such Minuteman III Mk-12A ICBMs, along with 200 Minuteman III Mk-12 ICBMs, 50 of which carry one 170 kiloton warhead, and 150 of which carry three 170 kiloton warheads.

41. Destructive power increases with explosive yield in a less than linear fashion; specifically, the "equivalent megatonnage" of a given warhead is $Y^{2/3}$, where Y is the explosive yield. Thus, comparing

gle submarine launched into service in 1990, the Trident II Mk-5, can carry twenty-four submarine launched ballistic missiles ("SLBM"), each of which contains eight nuclear 475-kiloton warheads; one submarine can launch ninety-one megatons worth of destruction, amounting to 341 times the punch packed by Little Boy.[42] To put this in perspective, all of the explosives used by all countries in World War II amounted to five megatons.[43]

How powerful is a one megaton blast that could be achieved by targeting all three Minuteman III warheads on a single city? A one megaton blast over London could be expected to kill 1.6 million people and to injure another 3.2 million.[44] Another commentator estimates that a single megaton nuclear bomb detonated one mile above a city would

> flatten virtually every structure within a radius of four miles, and it would heavily damage buildings within a radius of eight miles. . . . The fireball . . . would produce at least third-degree burns on the body of any person out in the open and within a radius of nine miles from the center of the blast. Those closer to it would be incinerated if they were not otherwise killed by the force of the explosion, the ensuing winds, and the falling structures.[45]

In short, these weapons are designed to be city killers.[46] At the peak of the Cold War, the United States and the Soviet Union had thousands of such city killers aimed at each other.[47] France and the United Kingdom had their own nuclear arsenals, also aimed at the Soviet Union (and they were also targeted by the Soviet Union).[48] Today, things look much different. The Soviet Union has broken apart, and our former adversary, Russia, may well be invited to join the North Atlantic Treaty Organization ("NATO")—the organization whose very existence was predicated on a joint alliance *against* the Soviet Union.[49]

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the equivalent megatonnage of the atomic bomb dropped on Hiroshima to the combined yield of the three warheads results in the 17.4 figure. *See U.S. Nuclear War Plan*, *supra* note 35, at 114-15.

42. SIPRI 2002, *supra* note 40, at 536. As of January 2002, the United States had forty-eight such nuclear submarines, along with hundreds of others configured with multiple 100-kiloton warhead missiles.

43. RHODES, *supra* note 29, at 493-94.

44. COMPREHENSIVE STUDY, *supra* note 27, at 79.

45. Richard Wasserstrom, *War, Nuclear War, and Nuclear Deterrence: Some Conceptual and Moral Issues*, *in* NUCLEAR DETERRENCE: ETHICS AND STRATEGY, at 15, 16 (1985).

46. *See* Richard T. Cooper, *Making Nuclear Bombs "Usable,"* L.A. TIMES, Feb. 3, 2003, at A1 (noting how advocates of tactical nuclear weapons describe "existing strategic missiles" as "city killers").

47. *See generally* JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 3-11 (1987) (explaining one such city-against-city threat, the author states, "the French 'strategic' forces, directed against cities, are faced by an adversary which threatens most French cities, if not verbally then by other indications that they are among the potential targets of its nuclear forces").

48. *Id.*

49. *See, e.g.*, James Chace & Charles A. Kupchan, Opinion, *Bring Mother Russia Into the Fold*, L.A. TIMES, July 1, 2001, at M5 (arguing that Presidents Bush and Putin should work toward Russia's entry into NATO); *cf.* Eugene Rumer & Jeffrey Simon, Opinion, *NATO: Russia Should Have a Seat at the Table*, L.A. TIMES, Dec. 23, 2001, at M2 (arguing that Russia should be given a NATO vote on

One can legitimately ask whether MAD is still appropriate now that the Cold War has ended. As the current "war on terrorism" demonstrates, our greatest threat may come from non-state terrorist groups such as Al Qaeda, rather than another nation-state. If we do not need to worry about preemptive nuclear strikes from other countries, do we still need MAD? A large scale nuclear weapon such as an ICBM, which has the purpose of destroying entire cities, is generally too unwieldy to use against non-state actors.[50]

Perhaps MAD can be relegated to the trashbin of ideas that once seemed good but that have outlived their usefulness, like Niels Bohr's model of the hydrogen atom. But countries such as Iran, North Korea, and any others seeking to join the nuclear weapons club are probably still deterred by MAD.[51] Some believe that Saddam Hussein opted not to use any weapons of mass destruction in the Gulf War in 1991 because the United States had warned "Iraq's foreign minister that any use of nonconventional weapons would seal Iraq's destruction."[52] North Korea's recent decision to withdraw from the Nonproliferation Treaty and to reactivate its nuclear weapons program further demonstrates the continued need for nuclear deterrence,[53] especially as North Korea's defection may tempt other rogue nations to follow suit.[54] If the world is due for an increase in nuclear proliferation, particularly among the least stable countries (and perhaps the ones most likely to use nuclear weapons to blackmail the world into acceding to their demands), we may be forced to continue to rely on MAD (or at least, assured destruction) in the future.[55]

B. Moral Implications of MAD

There are two very disturbing implications about MAD. First, MAD is predicated upon the concept of countries' holding each other's *civilian* populations hostage.[56] The fact that MAD appears to have kept the peace for over fifty years, one commentator asserts, "blinds us to the fact that our

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"select issues of mutual interest" but should not be invited to join because NATO is not yet ready to commit to the defense of Russia).

50. Cooper, *supra* note 46.

51. Gerald F. Seib & Carla Anne Robbins, *Nuclear Arms Move to Center Stage for U.S. Policy*, WALL ST. J., Jan. 16, 2003, at A1.

52. Sonni Efron & Sebastian Rotella, *Confrontation with Iraq: Inside the Mind of a Dictator*, L.A. TIMES, Oct. 12, 2002, at A1. Others think that it is simply unknown why Hussein did not use chemical weapons during the Gulf War, and there is always the possibility that "an order was issued and never got through," or "the missiles failed to fire," or "field commanders, who had been told they would be treated as war criminals if they used chemical weapons, might have balked." *Id.*

53. *See, e.g.*, Bennett Ramberg, Commentary, *Accept Nuclear Reality on the Korean Peninsula*, L.A. TIMES, Jan. 16, 2003, at B15 ("Preventing [North Korea] from using nuclear weapons may be the easiest of the difficult challenges to overcome. The strategy: military deterrence coupled with the capability to destroy, with certainty, the North Korean regime by any means necessary in the event the North attacks the South.").

54. *See* Seib & Robbins, *supra* note 51.

55. Admittedly, there is a degree of uncertainty as to the continued applicability of MAD in the near future.

56. *See, e.g.*, Panofsky, *supra* note 21, at 75; Wasserstrom, *supra* note 45, at 25.

method for preventing nuclear war rests on a form of warfare universally condemned since the Dark Ages—the mass killing of hostages."[57] In other words, one can plausibly argue that even if a nuclear power has no real intention of retaliating against an adversary with a nuclear strike, simply threatening the innocent civilians of the adversarial nation is immoral.

The second disturbing implication of MAD is the requirement that the victim of a first strike act be willing to launch its own remaining nuclear weapons at the other superpower even though doing so will not do anything to save the victim country.[58] A superpower that detects a preemptive first strike would have a life-span measurable in minutes.

The moral problem is perhaps more easily grasped if simplified to the following: *X* is walking through a park when *X* is accosted by *Y*. *Y* shoots *X* in the arm and is going to shoot again, possibly through the chest or head. *X* has a gun as well. Is *X* justified in shooting *Y*? Under traditional principles of criminal law, the answer is yes; *X* is entitled in that situation to use lethal force for self-defense.[59]

But suppose that the first shot wounds *X* mortally and that *X* knows this instantly. Is *X* still justified in shooting back? At that point, *X* is no longer using lethal force in self-defense but is shooting in vengeance, which would technically be considered homicide.[60] While one might argue that *X* is justified in shooting *Y* on the theory that *X* is acting in defense of others, that justification does not work because no one is directly threatened by *Y*.[61]

In the unthinkable event that nuclear deterrence fails, the target country is essentially in the same position as *X*—mortally wounded and forced to

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57. Fred Charles Ikle, *Can Nuclear Deterrence Last Out the Century?*, 51 FOREIGN AFF. 267 (1973), *reprinted in* NUCLEAR STRATEGY AND NATIONAL SECURITY: POINTS OF VIEW 57, 70 (Robert J. Pranger & Roger P. Labrie eds., 1987); *see* Kinsel, *supra* note 22, at 766 ("Holding civilian populations hostage to nuclear annihilation is morally unsatisfactory to many individuals. . . .").

58. Wasserstrom, *supra* note 45, at 24 ("[T]o respond to a nuclear onslaught by launching nuclear weapons in return would be to act too late and in an equally murderous way in light of the danger that no longer can be averted."); *id.* at 31 ("If deterrence is unsuccessful, the use that does occur is no longer required (or even efficacious) and is instead murderous and profoundly wrong.").

59. *See generally* MODEL PENAL CODE § 3.04(1) (1962) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.").

60. This assertion is hardly demonstrable because, even apart from formidable problems of proof, one struggles to imagine that a prosecutor would seek to charge a dead person for murdering his killer. Nevertheless, as a theoretical matter, consider that the Model Penal Code provision on self-defense states that "[t]he use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat." MODEL PENAL CODE § 3.04(2)(b) (1962). Since the victim is going to die anyway, the use of deadly force cannot be said to be "necessary to protect . . . against death." *Id.* Without the self-defense justification, the victim appears to have committed homicide.

Wasserstrom uses a slightly different but analogous example of a hostage taker who is told that if he shoots his hostage, he in turn will be shot. The hostage taker is not deterred by the threat and shoots his hostage. Wasserstrom asserts that "it is hard, if not impossible, to develop plausible and convincing reasons to explain how completing the threatened action could have been either sensible or right." Wasserstrom, *supra* note 45, at 28.

61. For more reasons why the "defense of others" justification fails, see *infra* notes 196-197 and accompanying text.

decide whether to retaliate in vengeance. The one major difference is that an individual may not know that he has been mortally wounded; a country, however, is armed with satellite technology and computer simulations and would be in a much better position to have perfect (or close to perfect) information about the lethal consequences of the attack.

U.S. military planners were aware of the moral dilemma posed by MAD. Secretary of Defense Robert McNamara tried to move U.S. nuclear strategy away from primarily targeting civilians toward primarily targeting enemy nuclear forces, an approach known as "counterforce," while the targeting of cities was known as "countervalue."[62] But simply designating nuclear forces as primary targets and cities as secondary targets hardly resolves the moral dilemma. Counterforce makes little sense as a retaliatory strategy unless one has in mind limited nuclear wars; otherwise, if the other side has launched enough nuclear weapons to annihilate a country, that country gains nothing from launching against only the remaining nuclear forces.[63] Even if a country prefers to use counterforce in the end to deter a massive first strike, it has to be willing to use countervalue.

II. DEONTOLOGY AND THE DEATH PENALTY

We can now examine the general refusal of Western nations to extradite death-eligible suspects in the absence of a waiver of the death penalty. It seems incongruous that a country possessing nuclear weapons—and threatening retaliation in response to a nuclear attack—would claim the higher moral ground with respect to executions, and, in fact, there are sound reasons to question that moral integrity for the reasons that follow.

A. Western Objections to Extraditing Death-Eligible Defendants

The Western nations opposed to capital punishment have interpreted multiple sources of international law as prohibiting them from extraditing suspects to requesting nations where the suspects may face the death penalty; chief among these are the European Convention on Extradition [64] and the European Convention on the Protection of Human Rights and Fundamental Freedoms.[65]

The European Convention on the Protection of Human Rights does not forbid capital punishment explicitly; in fact, it allows for the imposition of a death sentence by "a court following . . . conviction of a crime for which this penalty is provided by law."[66] However, the Sixth Protocol to the Con-

62. *U.S. Nuclear War Plan*, *supra* note 35, at 6; Bret Lortie, *A Do-It-Yourself SIOP*, BULL. OF THE ATOMIC SCIENTISTS, July/Aug. 2001, at 22, 26.

63. *U.S. Nuclear War Plan*, *supra* note 35.

64. European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273.

65. European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

66. *Id.* at 224.

vention, which was adopted in 1983, outlaws death sentences in times of peace.[67] The Thirteenth Protocol to the Convention, which was signed by the Council of Europe in early 2002, slams the door on capital punishment under any circumstances, including war and serious national crises.[68]

The European Convention on Extradition does not provide the same absolute opposition to the death penalty. It states in relevant part:

> If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.[69]

In addition, extradition between countries is done pursuant to treaty, and the treaty typically allows the extraditing nation to condition extradition on a guarantee that the death penalty will not be applied.[70] For example, the Treaty on Extradition between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, which was ratified in 1976 (replacing earlier versions), contains language that is functionally identical to that in the European Convention on Extradition.[71]

These treaties and agreements are, of course, the means for expressing and enforcing certain norms regarding the death penalty. They are useful for understanding the positive law allowing or keeping other Western nations from extraditing death-eligible suspects absent a waiver of the death penalty.[72] But these laws do not, by themselves, provide a normative explanation of why extradition of death-eligible suspects should be denied absent a waiver of the death penalty. Nothing would prevent member countries from amending the European Convention on Extradition and the Convention on the Protection of Human Rights and Fundamental Freedoms to allow the

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67. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 1, 1985, Europ. T.S. No. 114.

68. Protocol No. 13 to the Convention of Human Rights and Fundamental Freedoms, May 3, 2002, Europ. T.S. No. 187.

69. European Convention on Extradition, Dec. 13, 1957, art. II, 359 U.N.T.S. 273, 282.

70. *See infra* notes 71-72 and accompanying text.

71. Treaty on Extradition, Oct. 21, 1976, U.S.-U.K-N. Ir., art. IV, 28 U.S.T. 227. A similar provision is found in the Treaty on Extradition Between the United States of America and Canada, Mar. 22, 1976 (amended Nov. 26, 1991), U.S.-Can., art. 6, 27 U.S.T. 983.

72. Note, however, that the United States-United Kingdom and United States-Canada treaties do not *forbid* those countries from extraditing death-eligible suspects to face the death penalty, at least, not if one assumes that the use of the permissive "may," as opposed to the mandatory "must," means anything. The United Nations' call for abolition of the death penalty is even clearer in that it asks those states "that have received a request for extradition on a capital charge *to reserve explicitly the right to refuse* extradition." *See* United Nations Commission on Human Rights Resolutions 1999/61 (adopted Apr. 28, 1999) and 2000/65 (adopted Apr. 27, 1999) (emphasis added).

extradition of death-eligible suspects without waiver of the death penalty where appropriate.[73]

Therefore, we have to examine the traditional arguments against the death penalty to understand what basis, if any, Western countries have for enacting the aforementioned positive law. The following section examines the arguments that Western nations have actually raised as the basis for refusing to extradite death-eligible suspects, as well as other arguments that U.S. abolitionist groups typically raise against the death penalty.[74]

1. The death penalty subjects inmates to "death-row-phenomenon."

In *Soering v. United Kingdom*,[75] the European Court of Human Rights held that the extradition of Jens Soering, a West German citizen, from the United Kingdom to the United States to stand trial for a capital crime would violate Article III of the European Convention on Extradition because extradition ran a significant risk of exposing Soering to "death-row-phenomenon."[76] The court described this phenomenon as the "prolonged mental suffering and anguish that a sentenced prisoner experiences while awaiting execution (six to eight years in Soering's case)."[77]

How "death-row-phenomenon" could support a blanket refusal to extradite death-eligible suspects without a waiver of the death penalty remains unclear. The nature of this harm appears to require an individualized showing that the particular extradite would be likely to suffer from the phenomenon. The *Soering* court noted that "[t]he applicant adduced much evidence of extreme stress, psychological deterioration and risk of homosexual abuse and physical attack undergone by prisoners on death row, including Mecklenburg Correctional Center."[78] This observation is perhaps too vague to support an absolute prohibition on extradition of death-eligible suspects, as it does not demonstrate that the death row of any given state produces such extreme stress, psychological deterioration, or risk of abuse or assault.[79]

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73. *See generally* Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103 (establishing the rules and procedures governing the Council of Europe).

74. I will put aside another objection that foreign countries have raised, namely, that the death sentences handed out to various foreign nationals violate the Vienna Convention on Consular Relations (signed on Apr. 24, 1963), because the defendants were not allowed to contact their consulates for assistance. *See* Case Concerning LaGrand (F.R.G. v. U.S.), 2001 I.C.J. P1 (June 27); Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 128 (Feb. 5). This objection would arise to extraditing a death-eligible suspect only if such a person were convicted without having been allowed to contact his consulate, received a death sentence, and then escaped to a foreign country. While conviction followed by escape is not unheard of, it seems sufficiently unusual to be worth setting aside. *See* Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779.

75. 161 Eur. Ct. H.R. (ser. A) (1989).

76. *Id.* at 17, 35.

77. Craig R. Roecke, Comment, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime*, 25 CAL. W. INT'L L.J. 189, 200 (1994).

78. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 27.

79. *See, e.g.*, Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 BROOK. L. REV. 719, 761 (2002).

Moreover, suppose that a new state or federal correctional facility claimed to be able to eliminate many of these conditions by, among other things, keeping prisoners isolated from one another in comfortable cells with soft classical music piped in the background to soothe their tensions. At this point, the European Court of Human Rights could not legitimately refuse to allow extradition of a death-eligible suspect on the ground of risk of exposure to death-row-phenomenon.

2. The death penalty is plagued with racial bias.

One common abolitionist argument is that the death penalty, as administered in this country, is racially biased.[80] "Racially biased," of course, is a complex and loaded term, which in this context could mean anything from (1) on a per capita basis, more African-Americans are on death row than whites; to (2) the criminal justice system, from prosecutors to judges to juries, *intentionally* puts African-American defendants on death row at a higher rate than they do similarly-situated whites.[81] From the standpoint of constitutional law, the difference between (1) and (2) is significant.[82] But from a practical standpoint, either one may be of great concern.

Thus far, it does not appear that other Western nations have raised such an objection. Still, given the fervor with which many of the other Western nations oppose the death penalty, racial bias could be raised at any time. However, this objection could not be invoked legitimately to block all extraditions. First of all, it is unclear whether the sort of racial bias assumed above exists. Twenty years ago, David Baldus completed what has been described as the "most exhaustive statistical analysis of the death penalty ever attempted."[83] The study examined more than 2400 homicide prosecutions in Georgia from 1973 to 1980 and concluded that there was basically no correlation between the defendant's race and the likelihood of a death sentence.[84] Instead, the stunning conclusion was that a defendant who killed a white person was 4.3 times more likely to get the death penalty than a defendant who killed a black person (in otherwise similar circumstances).[85] A more recent study of death penalty cases in Maryland (in which Baldus participated) confirmed Baldus's conclusion.[86]

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80. *See, e.g.*, Roecke, *supra* note 77, at 206-07 (discussing arguments made in *K.C. v. Canada*, Communication No. 468/1992, decision on admissibility of July 29, 1992, *reprinted in* 13 HUM. RTS. L.J. 352 (1992)).

81. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 552-74 (1997) (discussing types of racial classifications); DERRICK BELL, RACE, RACISM AND AMERICAN LAW 328-47 (3d ed. 1992) (providing an overview of discrimination in the criminal justice system).

82. *See generally* Washington v. Davis, 426 U.S. 229 (1976).

83. EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 167 (1998).

84. *Id.* at 168.

85. *See generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 401 (1990); McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

86. Press Release, Death Penalty Information Center, *Maryland Study Finds That Race and Geography Play Key Roles in Death Penalty* (Jan. 7, 2003), *at* http://www.deathpenaltyinfo.org/PR-

Of course, one can play with statistics and reach some other conclusions. One political science professor notes that since (1) most murders are *intra*racial, not *inter*racial,[87] and (2) the system treats killers of African-Americans more leniently than the killers of whites, then "we might conclude that white suspects get tougher treatment because they have overwhelmingly killed whites."[88] In other words, whether one believes that the death penalty embodies a racial bias against African-Americans may depend on which perspective one analyzes the problem from, that of the victims' or the defendants'.[89] Second, this objection perhaps proves too much. The entire U.S. criminal justice system has been criticized as being racially biased.[90] Yet, as far as I can tell, no Western country has invoked such an objection in refusing to extradite a non-capital defendant.[91]

Third, even if there were a statistically significant racial bias relating to the imposition of the death penalty in terms of African-American defendants charged with killing whites, that would hardly explain France's refusal to extradite *Caucasian* suspects, such as Ira Einhorn and James Charles Kopp, who murdered white victims.[92] Indeed, extraditing the Ein-

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DPICMarylandStudy.pdf (last visited Sept. 24, 2003).

87. *But see* Death Row U.S.A., at 7 (Winter 2003) (noting that of the 820 executions between 1976 and Jan. 1, 2003, the black killer-white victim combination occurred 180 times, while the black killer-black victim combination occurred only 83 times).

88. John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153, 161 (1998).

89. The fact that criminal punishments may harm African-American victims while benefiting African-American defendants who prey upon those victims is not unique to capital punishment. The controversial 100-1 differential between the base cocaine (crack)-powder cocaine—where one gram of crack cocaine results in the same sentence as 100 grams of powder cocaine—has been described as "racist" because the overwhelming prosecutions of crack cocaine dealers are of African-Americans. *See generally* MICHAEL COYLE, THE SENTENCING PROJECT, RACE AND CLASS PENALTIES IN CRACK COCAINE SENTENCING 1, 7, http://www.sentencingproject.org/pdfs/5077.pdf (last visited Oct. 1, 2003) ("Many have submitted that the disparities [between sentences for crack cocaine and power cocaine] illustrate something much more disturbing, namely, a deeply embedded racist and classist undertone to our society's political, legal and law enforcement structure."). Thus, if one looks only at the weight of cocaine sold (whether powder or crack), then African-American cocaine dealers, as a group, receive longer sentences than white cocaine dealers. *See* THE SENTENCING PROJECT, CRACK COCAINE SENTENCING POLICY: UNJUSTIFIED AND UNREASONABLE 2, http://www.thesentencingproject.org/pdfs/1003.pdf (last visited Oct. 1, 2003). But, could the 100-1 differential be viewed, not as racist against African-American defendants, but rather, protective of African-American *victims* "who are ravaged by abuse of this potent drug"? *See* Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 137, 153 (Stephen E. Gottlieb ed., 1993). The point is not whether the 100-1 differential is a good idea, but rather that its flaws may stem from problems other than racism. The same may be true of the race-of-the-victim disparity in death sentences.

90. *See, e.g.*, JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17-18 (1998); Bryan A. Stevenson & Ruth E. Friedman, Essay, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 525 (1994).

91. Conversely, at least one international court rejected an extradition challenge by an African-American who claimed systemic racism in the United States criminal justice system. *See* Cox v. Canada, Communication No. 539/1993, U.N. Human Rights Committee (Oct. 31, 1994), *reprinted in* 15 HUM. RTS. L.J. 410, 416 (1994).

92. *See* Daniel Schorr, *Sacrificing the Death Penalty to Nab Suspects*, THE CHRISTIAN SCI. MONITOR, Dec. 21, 2001, http://www.csmonitor.com; *Murder Suspect Agrees to Extradition*, *supra* note

horns and Kopps of the world to the United States would be a less drastic manner of relieving the perceived racial bias than requiring another country to alter its criminal justice system. This highlights the procedural nature of this objection—it is an objection to the manner (i.e., racially discriminatory) in which the death penalty is carried out and not to the basis of the death penalty itself.

The inability of a procedural objection to carry the burden of showing the absolute immorality of the death penalty is demonstrated neatly by the oral arguments in *McCleskey v. Kemp*.[93] In *McCleskey*, a death row inmate raised the Baldus study as a primary basis for arguing that the death penalty was unconstitutional.[94] During the arguments, the abolitionists representing McCleskey were stumped when Justice O'Connor asked whether the appropriate remedy for the racial bias identified in the Baldus study was "to execute more people."[95] After all, if African-American victims were being undervalued, as demonstrated by the fact that their killers were less likely to be sentenced to death, the problem could be solved in one of two ways: either eliminate the death penalty or sentence more killers of African-Americans to death. That McCleskey's lawyers thought Justice O'Connor's question was "totally inane" showed that their "chief concern lay not with ensuring that black victims and white victims received equal justice but rather with abolishing the death penalty."[96] But Justice O'Connor's question is "totally inane" only if one has already concluded that the death penalty should be abolished. If, instead, one is only concerned with the fairness of executing killers of Caucasians at a higher rate than killers of African-Americans, then ensuring that the system executes both at equivalent rates would address the problem.

Thus, while the racial disparity identified in the Baldus study is fairly disturbing in terms of what it says about how American prosecutors and/or juries value African-American lives versus Caucasian lives, it fails to rise to a categorical and absolute rejection of the death penalty. As such, it might only justify the decision on the part of foreign countries to condition extradition of a death-eligible suspect on the waiver of the death penalty in selected cases, such as African-American suspects charged with killing white victims.

4; Goldman, *supra* note 4.

93. 481 U.S. 279 (1987).

94. *Id.* at 286.

95. LAZARUS, *supra* note 83, at 203.

96. *Id.* at 203. In fact, the Baldus study "demonstrated that the discriminatory effect would disappear under a mandatory sentencing scheme, in which courts were statutorily required to choose death as the penalty for cases that reached a sufficiently high degree of aggravation." Claire Finkelstein, An A Priori Argument Against the Death Penalty 7 (Apr. 18, 2002) (unpublished article, *at* http://papers.ssrn.com).

3. The death penalty risks killing factually innocent persons.

Thus far, the other Western nations have not yet seemed to attack the death penalty on the ground that its use in the United States runs an unacceptable risk of executing factually innocent persons. However, it would not be surprising to see this objection raised, particularly since this exact concern recently led outgoing Governor George Ryan to commute all death sentences in Illinois.[97]

Much has been written on innocence and the death penalty, and it is not my intention to recap that discussion. I simply note the incongruity of fretting over the potential execution of an innocent person who would be given a full panoply of constitutional rights, while simultaneously accepting a nuclear strategy that, if executed, *intentionally* kills millions of innocent people with absolutely no due process of any sort.

4. The death penalty is ineffective and/or economically wasteful.

The other Western nations might also argue that capital punishment is ineffective (i.e., it has no deterrent effect)[98] and/or economically wasteful (i.e., it costs more to try to execute someone than simply to lock him up for life).[99] Or they might argue that a more effective approach than executing inmates would be to confine them for life and study them in an effort to determine "the social, psychological and physiological makeup of murderers," thereby potentially leading to the creation of "effective prevention programs."[100]

These are powerful consequentialist arguments. But other Western nations are not "harmed" by the decision to waste money on a practice that

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97. *See, e.g.*, Eric Slater, *Illinois Governor Commutes All Death Row Cases*, L.A. TIMES, Jan. 12, 2003, at A1.

98. The empirical evidence of deterrence is inconclusive; however, a number of studies have failed to detect any deterrence effect. *See, e.g.*, MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 103 (1997); H.L.A. HART, PUNISHMENT & RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 85 (1968); Rudolph J. Gerber, *Death is Not Worth It*, 28 ARIZ. ST. L.J. 335, 350 (1996) ("[N]o proof exists that general deterrence results from capital punishment as opposed to life imprisonment."); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 10 (1996) ("[T]he death penalty does, and can do, little to reduce rates of criminal violence.").

99. *See, e.g.*, Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 14 (1995) (noting that the authors' conservative estimate is that a death penalty case costs one million dollars more than a life sentence); Glenn L. Pierce & Michael Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. L. & SOC. CHANGE 711, 719 (1990/1991) (noting that in Florida, a death sentence case costs approximately $2.5 million more than a life sentence of forty years).

100. *See* Lewis Yablonsky, Opinion, *A Road Into Minds of Murderers*, L.A. TIMES, Jan. 14, 2003, at B15 (describing the need for "effective prevention programs"); *see also* PHILIP KERR, A PHILOSOPHICAL INVESTIGATION 45-46 (1992) (describing a fictional society that has identified an effective prevention program where a medical condition found in every serial killer, though many men who have the condition do not become serial killers, and where all men with the condition are required to register with the government, which keeps their identities secret until such time as a murder is committed and DNA evidence on the scene can be compared with theirs in the database).

may not have any deterrent effect on violent criminals. They are not harmed by the decision not to keep killers alive to be studied. These may be very good reasons to explain why the Western nations have abolished the death penalty and very good arguments for why the United States should abolish the death penalty. But Western nations have no standing, so to speak, to use these objections as the basis for conditioning the extradition of death-eligible suspects on waivers of the death penalty.

5. The death penalty is immoral.

Having separated the rhetorical chaff from wheat, we come to the crux of the justification by other Western nations for refusing to extradite death-eligible suspects without a U.S. waiver of the death penalty. These nations are left with the deontological position that the death penalty is never justified, and, hence, no suspect who faces such punishment should be extradited.

If true to principles, such a deontologist would oppose the death penalty no matter how terrible the crime. Therefore, these absolutists would oppose the death penalty for the crime of bombing a crowded building, resulting in mass deaths (including those of children). That was Timothy McVeigh's crime, and the horrific nature of the crime combined with McVeigh's complete lack of remorse challenged absolutists to hold fast to their opposition to capital punishment.[101] Still, there were some, including a parent of one of McVeigh's 168 victims, who opposed executing him.[102]

And the act of detonating a nuclear device in a major city,[103] aside from the greater expected casualties and the environmental impact, is not that different than the action by McVeigh. Indeed, some people have suggested that the combined explosive power of the two passenger airplanes that terrorists crashed into the World Trade Center was equivalent to a tactical nuclear weapon.[104] Yet, as noted earlier, the British have suggested that they would not extradite Osama bin Laden to face the death penalty.[105]

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101. *See, e.g.*, Naftali Bendavid, *Nation Returns to Death Business*, SOUTH FLA. SUN-SENTINEL, June 11, 2001, at 11A ("[M]any death penalty foes have had difficulty opposing" capital punishment for McVeigh); Richard Willing, *Even for Death Penalty Foes, McVeigh is the Exception*, USA TODAY, May 4, 2001, at A.01 (noting that more than half of Americans polled who reported being "generally oppose[d]" to capital punishment believed that McVeigh should be executed).

102. Jeff Jacoby, *McVeigh's Execution is Hardly a Lynching*, BOSTON GLOBE, May 14, 2001, at A.11 (noting Bud Welch's opposition); Leonard Pitts, Jr., *Forgiveness a Tough Sell with Timothy McVeigh*, SEATTLE TIMES, May 10, 2001, at B6 (opposing capital punishment for McVeigh because it "is morally unconscionable").

103. During the oral argument in *Gregg v. Georgia*, 428 U.S. 153 (1976), which ultimately upheld the death penalty schemes in Georgia, Anthony Amsterdam, advocate for the petitioner and one of the leaders of the abolitionist movement, was asked whether he thought the death penalty would be warranted "if some fanatic set off a hydrogen bomb and destroyed New York City." He said that he thought not, a response that led Justice Powell to think that he was a "nut." LAZARUS, *supra* note 83, at 114.

104. *See* Tim Rutten, *In His Book 'War in a Time of Peace,' David Halberstam's Observations About U.S. Policy Are in Some Ways Prescient*, L.A. TIMES, Oct. 8, 2001, at E1.

105. *See supra* note 1.

B. French and British Nuclear Weapons Programs

A complete critique of the inconsistency of the French and British positions on the death penalty and nuclear deterrence requires a review of their respective nuclear weapons programs, particularly their reasons for committing the resources necessary to join the nuclear powers club (which, at one time, consisted of just the United States and the Soviet Union).[106]

The British actually started researching nuclear weapons before anyone else during the early part of World War II.[107] By 1943, however, the British program had merged with the U.S. "Manhattan Project," leading to the development of the atomic bombs that destroyed Hiroshima and Nagasaki.[108] After the end of the war, the United Kingdom set off to build its own nuclear weapons.[109] Probably because of the prior shared research with the United States,[110] the British program, known as the Directorate of Tube Alloys, was "remarkably successful."[111] While the United Kingdom lagged seven years behind the United States in terms of building its first atomic bomb, that gap shrank to just one year with regard to the first "engineered thermonuclear ordnance."[112]

The British nuclear strategy developed from a threat of "mutual annihilation" in 1955 to a more nuanced promise of "massive nuclear bombardment of *the sources of power in Russia.*"[113] The latter statement was meant to promise that the United Kingdom would not "threaten to 'use nuclear weapons with the primary purpose of attacking civilians'."[114] Why the qualification "primary purpose"? One trio of commentators suggests that the United Kingdom wanted "to continue to threaten the Soviets with the destruction of civilians," but not to be so openly direct about such a potentially immoral strategy.[115]

France had actually started a program of nuclear research prior to World War II, and after the United States dropped atomic bombs on Hiroshima and Nagasaki in August of 1945, General Charles de Gaulle created the Atomic Energy Commissariat with the aim of developing France's own nuclear weapons.[116] Over the next dozen years, however, France waffled about

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106. *See, e.g.*, NUCLEAR AGE PEACE FOUNDATION, TIMELINE, *at* http://www.nuclearfiles.org (last visited Oct. 1, 2003).

107. PETER MALONE, THE BRITISH NUCLEAR DETERRENT 1 (1984).

108. *Id.*

109. *Id.* at 3.

110. *Id.* at 1.

111. *Id.* at 13.

112. *Id.*

113. FINNIS ET AL., *supra* note 47, at 6-8.

114. *Id.* at 10.

115. *Id.* at 10-11.

116. *See* FEDERATION OF AMERICAN SCIENTISTS, WEAPONS OF MASS DESTRUCTION: FRANCE DOCTRINE, *at* http://www.fas.org/nuke/guide/france/doctrine/index.html (last updated July 9, 1998) [hereinafter FEDERATION OF AMERICAN SCIENTISTS].

whether to carry out the program of actually building such a weapon.[117] In 1958, de Gaulle ended the indecision in favor of going nuclear.[118]

France elected not to build ever larger stockpiles of nuclear weapons.[119] The theory of this approach, subsequently known as "minimum deterrence," is that "[b]ecause nuclear weapons are so destructive, no adversary can be confident that a disarming attack on a nuclear-armed country will get 100 percent of its nuclear weapons."[120] France built just enough nuclear weapons to assure some retaliatory capability in the event of a Soviet first-strike.[121] Lest it be unclear, the targets of the French nuclear weapons were "the great urban centres of the adversary nation, where the greatest part of its demographic and economic strength are concentrated."[122]

Why did France and the United Kingdom commit the resources to build nuclear weapons? Even today, where the cost in real dollars to develop a nuclear weapon is much less than in 1945 due to technological advancement and wide dissemination of technical knowledge related to nuclear power, "[t]he cost to a country of trying to develop and construct nuclear weapons and their delivery systems would be enormous" due to the need "to divert a significant quantity of its human, technological and material resources to the project" along with "its highest quality resources to this task."[123] In the 1950s, the actual cost would have been even more staggering.[124]

In addition to the cost of building nuclear reactors to enrich fissile material, a country that succeeds in building nuclear weapons must commit annual resources to maintain the effectiveness of those weapons.[125] According to the Stockholm International Peace Research Institute, France and the United Kingdom spent $2.5 billion and $3.6 billion in 2002, respectively, on maintaining their nuclear forces.[126] Given their respective nuclear arsenals of 348 and 185 warheads in 2002,[127] that means they spent $7.18 million and $19.46 million per nuclear weapon. What is especially interesting about these amounts is that the French and British spend far more to maintain each nuclear weapon than the United States does. In 1998, the United States

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117. *See id.*

118. *See id.*

119. Mark T. Clark, *Law upon Order*, 40 BRANDEIS L.J. 759, 771 (2002).

120. *Id.* at 769; *see also* Robert A. Levine, *Deterrence and the ABM*, 18 WORLD POL'Y J. 23 (Oct. 1, 2001) (contrasting "minimum deterrence," with its emphasis on "the inevitable and horrible uncertainties" of nuclear war, with "extended deterrence," which emphasizes larger nuclear capacity), http://www.worldpolicy.org/jounal/articles/wpj01-3/levine.pdf; Burns H. Weston, *Law and Alternative Security: Toward a Nuclear Weapons-Free World*, 75 IOWA L. REV. 1077, 1078 (1990) (noting that 232 Polaris missiles would be enough to destroy the Soviet Union).

121. *See* CIMBALA, *supra* note 31, at 186-87; SHAUN GREGORY, FRENCH DEFENCE POLICY INTO THE TWENTY-FIRST CENTURY 14-15 (2000); Levine, *supra* note 120.

122. FINNIS ET AL., *supra* note 47, at 4-5.

123. COMPREHENSIVE STUDY, *supra* note 27, at 59.

124. *Id.*

125. *Id.* at 59-60.

126. SIPRI 2002, *supra* note 40, at 548.

127. *Id.* at 545, 548.

spent $35 billion to maintain approximately 10,000 nuclear weapons, or $3.5 million on each.[128]

By constructing and maintaining nuclear weapons, France and the United Kingdom increased the risk of disaster in the form of accidental launch or theft of fissile material by terrorists or rogue nations. On several occasions between October 1992 and December 1994, nuclear materials ranging in amount from 800 milligrams to 4.5 kilograms (over ten pounds) were recovered in various locations in Russia, Germany, and the Czech Republic, after presumably having been stolen from Russian nuclear programs.[129] While there have not been reports yet of similar problems with French or British nuclear materials, the possibility cannot be discounted. Nor can the possibility, however remote, of theft of a nuclear warhead; in the post-September 11 world, such a theft could be horrifying.[130]

Even if no cataclysmic disaster occurs, the construction and maintenance of nuclear weapons potentially cause environmental damage. Many of the steps involved in constructing nuclear weapons may lead to "[a]ccidental releases of radioactive substances and chemicals."[131] In 1957, for example, a Soviet nuclear waste dump near the country's oldest nuclear weapons production plant exploded, spewing radioactive particles over hundreds of square miles; more than 10,000 Russians had to be evacuated from a radioactive swath measuring sixty-five miles long and six miles wide.[132] Though perhaps more spectacular than most, the 1957 incident is not alone. As of 1991, the U.S. government proposed spending $28.6 billion over five years to clean up nuclear and chemical contamination and to repair damage at a number of nuclear sites across the country.[133] Even the United Kingdom admits that it has suffered contamination at least as a result of leakage from a nuclear weapons production plant.[134] While the French have not admitted any contamination as a result of their production of nuclear weapons, their nuclear weapons tests conducted in the territory of French Polynesia in the South Pacific Ocean have alarmed countries in that region.[135]

The desire for global respect cannot be understated, and this clearly drove the British and the French to join the nuclear club. In the 1950s, Lord Salisbury asserted that the United States would "'feel more respect for our

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128. *Nuclear Weapons Are No Bargain*, BOSTON PHOENIX, July 16-23, 1998.

129. CIMBALA, *supra* note 31, at 90. Of course, since it was never proven where the fissile material came from, there is the remote chance that it came from British or French nuclear programs.

130. *See, e.g.*, THE PEACEMAKER (Dreamworks SKG 1997) (depicting a Bosnian terrorist, irate over the failure of U.N. peacekeepers to prevent the killing of his family, stealing a Russian missile with the intention of detonating one of the missile's ten nuclear warheads in the U.N. plaza in New York City). This being a movie, American operatives avert catastrophe. However, in reality, Americans may not be so fortunate.

131. COMPREHENSIVE STUDY, *supra* note 27, at 62.

132. *Id.* at 69.

133. *Id.* Not all of the damage and contamination stems from military nuclear sites; some are civilian sites.

134. *Id.*

135. *Id.* at 73-74.

views if we continued to play an effective part in building up the strength necessary to deter aggression.'"[136] Or, as the British Air Ministry put it, "'if this country is to retain her stature as a world power she must have a nuclear bomber force of sufficient size to act as a deterrent in its own right and to take a significant share in planning and executing global war operations.'"[137] Of course, since France sought to ensure that it, not the United Kingdom, led Western Europe, it, too, had to develop nuclear weapons.[138] It was willing to commit resources and incur all of those costs involved in developing nuclear weapons because it wanted to assert its independence from the United States and to be able to pursue foreign policy objectives that the United States might not pursue or with which it might even disagree.[139]

Having joined the club, neither country wanted to give up the status that had been gained: "[N]o one could seriously maintain that by abandoning independent nuclear forces France and Britain could actually *enhance* their standing among the nations."[140] Additionally, France and the United Kingdom, as well as West Germany, "felt that they could not rely solely on the United States to deter a Soviet nuclear attack on them."[141] These countries were concerned that if they were attacked by the Soviet Union, whether through conventional or nuclear weapons, the United States would fail to retaliate on their behalf out of fear that it "might court suicide in the process of defending its allies."[142]

By developing their own nuclear weapons, France and the United Kingdom no longer had to worry about whether the United States felt chained "to a common nuclear fate" that would "guarantee that an attack on Europe is an attack against the United States."[143] What is remarkable is the length to which the Europeans were willing to go to ensure that they could drag the United States into any potential nuclear war with the Soviet Union.[144] British strategists conceived of two "trigger scenarios" to "recouple" the United

136. IAN CLARK & NICHOLAS J. WHEELER, THE BRITISH ORIGINS OF NUCLEAR STRATEGY 1945-1955, at 215 (1989) (quoting Lord Salisbury).

137. *Id.* at 227 (quoting The Joint Planners).

138. MALONE, *supra* note 107, at 167.

139. *See* FEDERATION OF AMERICAN SCIENTISTS, *supra* note 116.

140. MALONE, *supra* note 107, at 172.

141. Richard H. Ullman, *Denuclearizing International Politics*, *in* NUCLEAR DETERRENCE: ETHICS AND STRATEGY 191, 197 (Russell Hardin et al. eds., 1985).

142. Josef Joffe, *Nuclear Weapons, No First Use, and European Order*, *in* NUCLEAR DETERRENCE: ETHICS AND STRATEGY 231 (Russell Hardin et al. eds., 1985); *see* CLARK & WHEELER, *supra* note 136, at 217 (quoting British Air Defence subcommittee: when "'New York is vulnerable to retaliation, the USA will not use her strategic weapon in defence [sic] of London'"); MALONE, *supra* note 107, at 88-89 ("Churchill did not, of course, draw publicly the conclusion that, when American cities become vulnerable, American willingness to wage strategic nuclear war in response to European events must necessarily decline. But that conclusion was drawn privately."); Richard Hart Sinnreich, *NATO's Evolving Nuclear Strategy*, 19 ORBIS 461 (1975), *reprinted in* NUCLEAR STRATEGY AND NATIONAL SECURITY: POINTS OF VIEW 303, 305 (Robert J. Pranger & Roger P. Labrie eds., 1977).

143. Joffe, *supra* note 142, at 240.

144. Malone, *supra* note 107, at 90.

States to Europe.[145] The first scenario assumed that the Soviet Union could not tell the difference between British and American nuclear weapons, and, thus, if attacked, the Soviet Union would retaliate against the United Kingdom and the United States; this would ensure that the United States would feel that it had to protect Europe.[146] The second scenario assumed that the Soviet Union could distinguish between British and American nuclear warheads but concluded that if attacked by the United Kingdom, the Soviet Union would not want to retaliate only against the United Kingdom, which would leave the United States "unscathed."[147] The result of both scenarios would be a need for the United States to preempt Soviet attacks.[148] The unmistakable implication is that France and the United Kingdom had doubts about the credibility of American nuclear deterrence with respect to the defense of Western Europe. Because they were unwilling to live with this uncertainty, they were driven to develop their own deterrent threat.

In order to make their nuclear deterrence credible, however, France and the United Kingdom had to demonstrate their own willingness to retaliate against a nuclear attack. In the 1970s, British Prime Minister Margaret Thatcher's government stated that "[w]e need to convince Soviet leaders that even if they thought at some critical point as a conflict developed that the U.S. would hold back, the British force could still inflict a blow so destructive that the penalty for aggression would have proved too high."[149]

In short, despite a number of good reasons not to develop nuclear weapons, ranging from fiscal to environmental to safety, France and the United Kingdom deemed it necessary to increase nuclear proliferation so as to assure their capacity to engage in the retribution underlying nuclear deterrence. Doing so certainly increased or maintained their standing among the world—it is no coincidence that the five permanent members of the United Nations Security Council are the original nuclear powers—but political power is hardly a moral rationale for developing and keeping weapons of mass destruction.

C. Flaws in Potential French and British Responses to the Moral Dilemma

The French and British have never publicly justified their development and continued maintenance of nuclear weapons, while simultaneously condemning the United States for imposing the death penalty on occasion.[150] It does not appear as if the question has been put to those governments, but one can surmise some of the possible responses based on the voluminous writing already in existence about nuclear deterrence and nuclear strategy. None of those responses effectively distinguishes capital punishment. It

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 94.
150. *See supra* notes 8-15 and accompanying text.

should be pointed out that other non-nuclear Western nations, such as Canada and Germany, are equally ensnared in the moral dilemma because of their reliance on the United States' nuclear umbrella.[151]

1. "We don't subscribe to MAD."

Perhaps the French and British would argue that their nuclear forces are intended to be used in more limited ways than all-out retaliation. In the Cold War, when the greatest threat to those countries came from the Soviet Union, either European nuclear power theoretically could have achieved deterrence by threatening just Moscow with retaliatory nuclear strikes rather than the entire Soviet nation.[152] This was the theory, in essence, of "minimum deterrence" and was grounded on the idea that no rational country would risk one or two major cities in a campaign of aggression.[153]

If this argument is attractive, however, it is a skin-deep beauty. The willingness to destroy one city in retaliation for a massive first strike may be less immoral than the willingness to destroy an entire nation, but that does not make the former moral. It is still an exercise in retribution for the sake of retribution when deterrence has failed. True, the destruction of one city instead of an entire nation may be less likely to result in massive nuclear fallout, nuclear winter, or other such collateral effects, but that is of small comfort to the millions of residents of the city singled out for retaliatory destruction.[154]

Moreover, this argument would invert all reasonable conceptions of morality. Suppose that a terrorist destroys Paris by detonating a nuclear device; according to the deontological position, the terrorist would not deserve the death penalty if caught.[155] However, if Paris were destroyed by a nuclear warhead launched by a foreign country, the argument would justify France's annihilation of an entire city containing perhaps a million or more innocent persons. It is truly a warped conception of morality that would justify killing a million innocent persons yet condemn executing one guilty one.[156]

Could the French and British intend for their nuclear weapons to be used for purposes other than retaliation in response to massive first strikes? Suppose that the French and British were to argue that they would use their nuclear weapons *only* in response to conventional attacks or limited nuclear strikes,[157] with the goal of forcing the aggressor to cease its attacks. In other

151. *See infra* notes 258-262 and accompanying text.
152. CIMBALA, *supra* note 31, at 186-87.
153. *Id.*
154. Maybe the deontologist would argue that in the second example, there is a non-retributive purpose involved—self-defense. Apart from the utterly disproportional response, one wonders how destroying a city would constitute self-defense.
155. *See* Austin Cline, *Life is Sacred: Is All Killing, Even in War, Immoral?*, *at* http://atheism.about.com/library/FAQs/hil/blphil_eth_waranti_life.htm (last visited Sept. 25, 2003).
156. *Cf.* John H.E. Fried, *First Use of Nuclear Weapons: Existing Prohibitions in International Law*, 12 BULL. PEACE PROPOSALS 21, 28 (1981).
157. By "limited nuclear strikes," I mean a nuclear attack on a single city or a small number of cities,

words, these countries would use their nuclear weapons to bring about some consequentialist outcome.

Upon closer examination, this argument also suffers from significant flaws. First, and most significantly, this nuclear strategy would mean that its proponent does not intend to deter massive nuclear attacks. Can one take seriously a nuclear strategy that would leave its proponent open to an overwhelming attack—the type of attack that is least deterred through non-nuclear means? The number of nuclear weapons required to "assure destruction"[158] of a country is actually terrifyingly small: just one hundred twenty-four 475-kiloton warheads for the United States, eleven for Canada, twenty-five for France, nineteen for the United Kingdom, and fifty-one for Russia.[159] While 475-kiloton hydrogen bombs are probably beyond the reach of rogue nations for now, another round of nuclear proliferation may push them relentlessly toward such weapons. Thus, it may not be long before rogue nations can threaten Western nations with "assured destruction."

Second, the argument only postpones the moral dilemma in a world where the countries of greatest concern are countries with nuclear weapons. For instance, if during the height of the Cold War, the Soviet Union invaded the eastern part of France, would a French threat to destroy Leningrad if the Soviets failed to pull their troops out have been credible? Perhaps. But what would have happened if the Soviet Union had responded to the threat by promising massive retaliation in response to any limited French nuclear strike? If the Soviet threat had been credible, then France's threat to use a limited nuclear strike to deter the invasion would have been destroyed, because to have carried through on that threat would have been an invitation for annihilation. The only recourse open to the French would be to threaten all-out retaliation in response to any massive Soviet retaliation—but that just brings us back to the familiar moral problem of retributive retaliation.

Not only that, it would be somewhat hypocritical for the French (and to a lesser extent, the British) to argue for this kind of "flexible response;" after all, a significant reason that France defected from the integrated military command structure of NATO, in the late 1960s, was the United States' decision to adopt a flexible response strategy with regard to the use of nuclear weapons.[160]

Third, the French and British cannot plausibly assert that their nuclear weapons are targeted on Russian nuclear weapons as opposed to Russian cities. The French and British nuclear arsenals fall woefully short of being

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such that the target country is not annihilated.

158. We can take some minor solace in the fact that "assured destruction" refers to killing just 25% of a country's population. *U.S. Nuclear War Plan*, *supra* note 35, at 126. However, it also refers to the destruction of the great majority of industrial capacity and is intended to lead to the end of the target country as a meaningful entity. *Id.*

159. *Id.*

160. Sinnreich, *supra* note 142, at 305. True, the French and British concern was, as noted earlier, that any nuclear weapons strategy short of all-out retaliation—such as flexible response—might result instead in a limited nuclear war fought entirely in Europe. Still, the fact that this is a strategy that heightens the risk of limited nuclear war cannot be denied.

sufficient to target more than a fraction of Russian nuclear weapons.[161] Of course, if the concern shifts from Russia to rogue nations seeking to join the nuclear club, the French and British will have enough nuclear weapons—for now. But if rogue nations continue amassing nuclear weapons, the French and British will have to abandon their "minimum deterrence" strategy and build more warheads or once again realize their inability to target nuclear forces. Even so, it is not at all clear that targeting only nuclear forces is a viable strategy. During the 1960s, U.S. war planners realized that retaliation against enemy nuclear forces made no sense: "If you're going to shoot at missiles, you're talking about first strike."[162] In the final analysis, any argument that the French and British are not subscribing to MAD, but only some more limited nuclear strategy, is simply implausible as a matter of strategy and tactics.

2. "We're just bluffing; we would never take such a monstrous action."

A more internally consistent position that the French and British might take is that their threat to retaliate against any massive strike is just a "bluff" and that if it came down to it, they would not launch their nuclear weapons in acts of sheer retribution. Therefore, they might argue that they are morally superior to the United States because for the United States, capital punishment is not a "bluff."[163]

Of course, they could never justify the seeming inconsistency between nuclear deterrence and the deontological position on the death penalty by admitting publicly that they would never launch in retaliation. The last thing that a nuclear power engaged in the game of nuclear deterrence wants to do is to give its nuclear adversary a reason to *doubt* its credibility. One commentator, in opining that MAD violates international law due to the targeting of civilians, admitted that a nuclear power openly agreeing with such a view might negatively impact its own nuclear credibility.[164]

Still, the French and British might rationalize the inconsistency to themselves by resting on the "bluff" theory. This seems like a very slender reed upon which to support a weighty point. One commentator rejects the "bluff" theory of nuclear deterrence on the ground that it would not be possible to maintain such a bluff in an open society, and once a nuclear adversary

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161. In 2002, France had 348 nuclear warheads, the United Kingdom had 185, and Russia had 8331. SIPRI 2002, *supra* note 40, at 539-50.

162. *U.S. Nuclear War Plan*, *supra* note 35, at 6.

163. I will put aside the argument that capital punishment, as administered in this country, is doomed to failure because so few death row inmates are actually put to death. *See, e.g.*, Allan D. Johnson, *The Illusory Death Penalty: Why America's Death Penalty Process Fails to Support the Economic Theories of Criminal Sanctions and Deterrence*, 52 HASTINGS L.J. 1101, 1123 (2001) ("The credibility of the death penalty cannot possibly be maintained when so few persons who are sentenced eventually receive the punishment.").

164. Francis A. Boyle, *The Relevance of International Law to the 'Paradox' of Nuclear Deterrence*, 80 NW. U. L. REV. 1407, 1417-19 (1986).

learned that the nuclear deterrent threat was just a bluff, the threat would cease to be credible.[165] Thus, he concludes that "this approach will [not] salvage our deterrence practices."[166]

Other scholars who have devoted considerable attention to studying nuclear deterrence have also rejected the "bluff" theory. Although acknowledging that there is no way to confirm or refute the "bluff" theory, John Finnis argues that it is "highly implausible," [167] as it would require far too many people over different administrations to conspire indefinitely to keep the secret.[168] Given human nature, he finds it incredible that the strategy would have succeeded.[169] Moreover, if the bluff were confined to some inner circle of highly placed government officials, then the persons lower in the chain of command would themselves have to have the conditional intent to launch the nuclear weapons if ordered.[170] Finnis argues that "[t]hose who deliberately bring others to will what is evil make themselves guilty, not only of the evil the others will, but also of leading them to become persons of evil will."[171]

A final problem with the "bluff" theory is that it assumes an absolute, unified chain of command, such that the decision of whether to retaliate always rests entirely with one leader or the inner circle.[172] This is not an accurate description of reality. In the United States, for example, the SIOP allows military commanders to launch nuclear weapons on their own initiative if they conclude that the chain of command has been decapitated by a crippling strike; thus, "destruction or silencing of the [National Command Authority] blows away the safety-catch" and could override the hypothesized bluff.[173] Without such a similar provision—allowing military commanders to launch without the authorization of a political leader in certain circumstances—the French or British bluff would not be credible. Thus, even if the French or British leaders were bluffing, the very fact of establishing a credible threat requires the establishing of a process where the decision of whether to launch/retaliate could be taken away from the leaders

165. Steven Lee, *The Morality of Nuclear Deterrence: Hostage Holding and Consequences*, *in* NUCLEAR DETERRENCE: ETHICS AND STRATEGY 173, 176 (Russell Hardin et al. eds., 1985); Christopher W. Morris, *A Contractarian Defense of Nuclear Deterrence*, *in* NUCLEAR DETERRENCE: ETHICS AND STRATEGY 81, 83-84 (Russell Hardin et al. eds., 1985); *see also* Charles Krauthammer, *On Nuclear Morality*, 76 COMMENT. 48, 49 (1983) (discussing a 1983 letter by American bishops that, in the author's view, mandated that "the only moral nuclear policy is nuclear bluff" and arguing that such a policy is misguided because "[i]f one side renounces, for moral or other reasons, the intent of ever actually using nuclear weapons, deterrence ceases to exist.").

166. Morris, *supra* note 165, at 83-84.

167. FINNIS ET AL., *supra* note 47, at 116.

168. *Id.* at 114.

169. *Id.* at 115.

170. *See* Jeff McMahan, *Deterrence and Deontology*, *in* NUCLEAR DETERRENCE: ETHICS AND STRATEGY 141, 148 (Russell Hardin et al. eds., 1985).

171. FINNIS ET AL., *supra* note 47, at 119.

172. *Id.*

173. *Id.* at 56.

and reposed in the hands of military commanders who presumably are not let in on the bluff.[174]

As an aside, notice that the United States' bloodlust for the death penalty may have the curious side effect of bolstering the credibility of the threat of American nuclear deterrence. Given that the death penalty has not been demonstrated to have a deterrent effect, it obviously has no meaningful rehabilitative potential, and it costs more to implement than life imprisonment,[175] what emerges is that Americans are willing to pay a premium to exact retribution. If that is so, then any nuclear adversary of the United States must take into account the retributive character of Americans in deciding whether American nuclear deterrence is just a "bluff."

If I am right that nuclear deterrence cannot rest on a "bluff," but instead must involve some "intention to retaliate,"[176] then France and the United Kingdom cannot adequately distinguish the inconsistency between nuclear deterrence theory and capital punishment by arguing that they are just bluffing. Nor can they plausibly wiggle out of this dilemma by suggesting that it is morally acceptable to threaten the commission of a horrible deed, so long as one does not intend to commit the deed. This is just a roundabout way of rephrasing the "bluff" position and is equally infirm, as "[i]t does not indicate how the threat on which deterrence is based can be effectively maintained without also maintaining the intent to carry out the threat if necessary."[177]

True, when we examine actions threatening nuclear retaliation without carrying it out, they may be considered less reprehensible than actually carrying out an execution. But there is an important distinction that must be drawn here between *actions* and *morality.* The issue is not whether the French and British can justify the act of threatening nuclear retaliation while simultaneously condemning us for the act of imposing the death penalty on criminals. Rather, the issue is whether there is any coherent moral framework that would justify the mental state that the French and British, as nuclear powers, must maintain in order to implement credible nuclear deterrence, while simultaneously allowing them to condemn the United States for maintaining the mental state necessary to implement the death penalty.

A person can be immoral without being a criminal. Consider the following hypothetical: *X* sees the movie *The Accused,*[178] in which a woman is raped by three men in a bar while other bystanders exhort the rapists. *X,* instead of feeling revulsion and anger at the rapists and the bystanders, finds

174. *See* JOSEPH S. NYE, NUCLEAR ETHICS 53-54 (1986); Robert E. Goodin, *Nuclear Disarmament as a Moral Certainty, in* NUCLEAR DETERRENCE: ETHICS AND STRATEGY 267, 277 (Russell Hardin et al. eds., 1985).

175. *See supra* notes 83-84 and accompanying text.

176. Among Western nations, large, bureaucratic government organizations implement nuclear deterrence, and large organizations are less capable of bluffing than single individuals. Lee, *supra* note 165, at 176.

177. Robert W. Tucker, *Morality and Deterrence, in* NUCLEAR DETERRENCE: ETHICS AND STRATEGY 53, 65 (Russell Hardin et al. eds., 1985).

178. THE ACCUSED (UIP/Paramount 1988).

the notion of participating in a gang rape appealing. Without sharing his idea with anyone, *X* begins going to seedy bars in the hope of joining a gang rape. He is still waiting to take part in one.

X has not committed any crimes.[179] Yet, there should be no doubt that *X* is depraved and immoral. Most likely, *X* is not the sort of person that you would want to inculcate moral values to your children. Under *X*'s moral framework, it is acceptable to commit gang-rape. Regardless of whether *X* actually engages in such acts, his moral framework is corrupt and depraved.

Now, one might respond, "Wait a minute. I agree that *X* is horribly immoral. But that is because he *wants* to rape. That makes it totally different from France and Great Britain, which are happiest when they *do not* need to engage in nuclear retaliation."

There is some force to this distinction, but not enough to defeat the analogy. First, all the distinction demonstrates is that *X* is *more* immoral than the French and British; it does not, however, demonstrate that the French and British are *not immoral* under their deontological positions. They may not desire to do so, but they are still willing to kill millions of innocent civilians in retribution.[180] By their own measure, it would be immoral and inhumane to do so, yet they remain willing.[181] Second, this distinction, while clever, fails to distinguish nuclear deterrence from the capital punishment context. There does not appear to be any indication that the states and the federal government desire to execute people. Presumably, they, too, would be quite pleased if no capital crimes were committed, thereby rendering the death penalty unnecessary.[182] The states are in exactly the same situation as the French and the British, except that the states have been forced to carry through their threat to engage in retribution. Thus, the "bluff" theory cannot justify the use of nuclear deterrence while simultaneously condemning capital punishment.

3. "We'll decide whether to launch when we are actually forced into that situation, which we are not right now."

Next, in a variation on the "bluff" theory, the French and British might argue that nuclear deterrence is not inhumane and not immoral because they are agnostic about whether they would actually go through with MAD.[183]

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179. The clever criminal law specialist might attempt to manufacture a charge of some sort of inchoate crime, but I think that would be a stretch. Because *X* acted alone, there is no conspiracy or solicitation, and there is no object identified of any attempted rape.

180. GREGORY, *supra* note 121 at 143; MALONE, *supra* note 107, at 94.

181. GREGORY, *supra* note 121 at 143; *see* FINNIS ET AL., *supra* note 47, at 8.

182. The fact that executions are typically accompanied by cheering death penalty proponents does not nullify this observation. Given that a horrible crime has been committed, it is hardly surprising that death penalty supporters would cheer the imposition and implementation of the death penalty. However, I imagine that if the supporters were given a choice between (1) having the crime committed, and then executing the defendant; or (2) not having the crime committed, and thus, not executing the defendant, they would choose the latter.

183. *See, e.g.*, FINNIS ET AL., *supra* note 47, at 110 (discussing the argument that "[w]e will decide on

For many of the same reasons, this argument also fails to distinguish nuclear deterrence from capital punishment.

First, this is *not* how the French and British characterize their nuclear strategy. As discussed earlier, they have stated that they *will* retaliate against a nuclear aggressor.[184] Therefore, if their leaders truly were uncertain about whether they would launch a retaliatory nuclear strike, they would be bluffing, and for the reasons explained above, it is unlikely that uncertainty represents their true strategy.[185] In addition, as a matter of psychology, "turning the other cheek after an unprovoked nuclear attack may well be beyond the . . . capacities of most people."[186] If that is so, claiming to delay the decision of whether to retaliate is specious if human nature would invariably lead one to retaliate in that circumstance.[187]

Besides, if the French and British were truly content to rely upon the uncertainty of retaliation, there would have been no need for them to develop their own nuclear weapons. They could have relied upon the deterrence projected by the United States' nuclear umbrella. Of course, there was some question of whether the United States' deterrent threat was credible, but the Soviet Union could not be sure that the United States would not retaliate in response to an attack on Western Europe.[188] The fact is that the French and British wanted to *eliminate* uncertainty, not *rely* upon it.[189] Therefore, as a factual matter, reliance upon the uncertainty theory would be dubious.

Uncertainty fails, even if it is the true nuclear strategy. As a matter of morality, philosophers are not persuaded by the uncertainty argument. As John Finnis argues, "If one intends now to be in a position to commit murder, should one later decide that the situation warrants it, then even now one is willing (however reluctantly) to murder."[190] By setting up the machinery to implement MAD, the French and British have put themselves in the position to kill millions of innocent civilians for no purpose other than retribution. If a public leader were to take the position that he is uncertain whether he would retaliate in response to a nuclear attack, then he is unable to state that he would *never* retaliate. After all, if the leader believed that it would *always* be wrong to kill in retribution, then there would be no uncertainty: the leader would be certain not to retaliate. But once the leader is unable to say that he would never retaliate in response to a nuclear attack, he has lost the deontological opposition to killing in retribution. He concedes that there exist some circumstances in which he would retaliate. He hopes it will never

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the day").

184. *See supra* note 149 and accompanying text.

185. *See supra* notes 164-174 and accompanying text.

186. Goodin, *supra* note 174, at 277.

187. *Cf.* Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 McGILL L.J. 542, 574 (1983) (noting that nuclear weapons' "delivery systems allow [very little time] for rational thought").

188. Joffe, *supra* note 142, at 239-40.

189. *Cf. id.* at 240.

190. FINNIS ET AL., *supra* note 47, at 111.

come about—perhaps even expects it never to come about—but the circumstance still exists.

In any event, if the uncertainty of retaliation is the justification for nuclear retaliation, why is the same not applicable to the death penalty? While executions do occur in the United States, it is unclear whether a *particular* suspect, whose extradition is requested, will receive the death penalty and ultimately be executed. Just as the execution of the nuclear deterrence threat in response to a particular incident would require a collective decision to retaliate by a multitude of actors (the President, military commanders, the soldiers actually manning the nuclear weapons), so does execution of a particular suspect. The prosecutor might change his mind and not seek the death penalty after all; a plea agreement might be reached, sparing the defendant the death penalty; the defendant might be acquitted at trial; the defendant might be convicted but receive life imprisonment; the defendant might get the death penalty but have the sentence vacated in post-conviction proceedings; or the defendant might receive executive clemency. Furthermore, even if the French and British retain uncertainty about whether they would actually carry out the deed, one could argue that such nuclear powers subject their hostages to something akin to the very "death-row-phenomenon" that led to the refusal of the extradition of Jens Soering.[191] Why is it not inhumane to subject millions of innocent civilians to the uncertainty that they might be vaporized by retaliatory strikes?[192] Today, it is easy to forget that schoolchildren in the late 1950s and early 1960s practiced "nuclear air-raid drills."[193] But a study in the 1970s found that children were haunted by "frequent dreams or fantasies of people and neighborhoods and cities destroyed by explosion and fires, . . . disjointed images of terror and destruction," "frightening dreams related to the bomb," and "conscious fear or nightmares of nuclear war."[194] Another study in the late 1970s and early 1980s found that children associated the word "nuclear" with concepts such as "death, . . . cancer, chidren [sic] waste, . . . [and] terrible devaluing of human life."[195] If delays in capital punishment cause unacceptable psychological stress among convicted killers, then it is arguable that the nuclear Sword of Damocles wielded by countries such as France and the United Kingdom is even worse.

For all these reasons, the uncertainty of retaliation fails to justify a deontological opposition to the death penalty.

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191. *See supra* notes 75-77 and accompanying text.

192. *See* McMahan, *supra* note 170, at 145 ("Nuclear deterrence clearly has present victims—for example, those who are psychologically damaged by being held hostage by rival nuclear powers.").

193. LIFTON & FALK, *supra* note 32, at 48-49.

194. *Id.* at 49-50.

195. *Id.* at 52.

4. "We would not retaliate in retribution; we would retaliate to save the rest of the world."

Perhaps the French and British would argue that they would retaliate, not in retribution, but in a selfless act, intended at saving the rest of the world from further attacks by the evil aggressor. This argument fails, however, for a number of reasons.

First, as with the uncertainty or retaliation rationale, this argument is factually unsupported because there is no evidence that the French and British assert nuclear deterrence on a theory of retaliating to save the rest of the world. Therefore, this rationale rests implicitly on the "bluff" theory, which has been discredited.

Second, the rest of the world may prefer not to be "saved" in this manner. If the Soviet Union had launched a devastating nuclear attack on France, for example, and France responded by launching a devastating retaliatory strike against the Soviet Union, how might the Soviet Union respond? If the French response were sufficient to assure destruction, there is no guarantee that the Soviet Union would not decide to launch everything else at the United States and the United Kingdom out of spite, or in retaliation, considering those two countries to be the very allies that France would supposedly be protecting. By "saving" the rest of the world, France might well be dooming it.

Finally, if we are to take this argument seriously, then the death penalty would have to be accepted in principle if it could be argued to have some similar "defense of others" application. And while the death penalty may not have a demonstrable *general* deterrent effect (in the sense of deterring others from committing future crimes),[196] it certainly has a *specific* deterrent effect (in the sense of deterring the condemned person from committing future crimes). The number of imprisoned inmates who commit violent crimes within prison—whether rape, battery, robbery, or murder—may be small, but it is also not zero.[197]

Accordingly, I do not believe that a "defense of others" rationale can adequately distinguish between nuclear deterrence and the death penalty.

5. "We would only use nuclear weapons in a Hobbesean environment."

One of the more interesting defenses of the morality of nuclear deterrence comes from Christopher Morris, who argues that "[a] (sincere) threat to do x in circumstances C is morally permissible if doing x in C is not mor-

196. *See* Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 51 (1986).

197. Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1261 (2000) (estimating the number as 0.2 homicides per 1000 inmates per year).

ally impermissible."[198] What Morris means is that if it would be acceptable to kill innocent persons directly in a Hobbesean "state of nature,"[199] then it is acceptable during a state of justice to threaten to kill innocent persons directly, if plunged involuntarily into the Hobbesean state of nature.[200] This idea, transferred into the nuclear deterrence environment is that the sincere threat, made during peacetime, to engage in nuclear retaliation is morally permissible because during a nuclear attack, one would be justified in killing innocent persons directly.[201]

This philosophical distinction between nuclear deterrence and capital punishment is somewhat promising. Morris is careful to note that not all wars would trigger "circumstance C," which justifies massive killing of innocent persons: "In most wars there is an important residue of mutual interest, enough to generate binding rules of conduct—for instance, rules prohibiting certain weapons, protecting noncombatants, governing the treatment of prisoners, et cetera."[202] Thus, he does not attempt to justify the firebombings of Dresden and Tokyo nor the atomic bombings of Hiroshima and Nagasaki during the end of World War II, which are referred to as "[m]ere expediency in the conduct of war."[203] There is some basis for concluding that the Europeans do in fact accept something like this Hobbesean analysis. The International Court of Justice refused to rule out the categorical use of nuclear weapons under any circumstance, writing instead that their use might be lawful in "an extreme circumstance of self-defence."[204]

Of course, speaking of "circumstance C" in the abstract with regard to capital punishment is difficult, although this difficulty is partly due to the more limited response of the death penalty—only the guilty are executed.[205] Thus, "circumstance C" would have to constitute retaliation against the guilty without massive injury to innocent people in order to be justified, and something as forceful and destructive as a nuclear attack is not the means to this end. Furthermore, there would be a certain incongruity in relying on Hobbes to argue against the death penalty, as Hobbes considered the death of a criminal as a result of injuries sustained from "corporal punishment" to be acceptable.[206]

Finally, applying Morris's analysis, can the statement truly be made that there exists between society and a capital defendant that "important residue

198. Morris, *supra* note 165, at 92.
199. *Id.* at 93.
200. *Id.* at 93-94.
201. *Id.* at 94.
202. *Id.* at 95.
203. *Id.*
204. *See Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 227 (July 8, 1996).
205. Again, I realize that there may be instances where factually innocent persons are erroneously convicted, but that is not the intent of the system.
206. THOMAS HOBBES, LEVIATHAN 247 (Herbert W. Shneider ed., The Liberal Arts Press 1958) (1651).

of mutual interest, enough to generate binding rules of conduct"?[207] One could plausibly and persuasively argue that non-homicide criminals still adhere sufficiently to binding rules of conduct, but is the same true of a savage torture-murderer? What about a killer who murders not just his victim but also three witnesses so as to make his conviction more difficult? If Osama bin Laden was shown to have orchestrated the September 11 terrorist attacks, could one seriously argue that he retains any mutual interest in following any binding rules of conduct? In answering that question, keep in mind that bin Laden has allegedly declared that Muslims have a "religious duty" to acquire weapons of mass destruction[208] and presumably, to use them against Western countries.

Accordingly, I do not think that Hobbesean analysis can resolve the inconsistency between nuclear deterrence and deontological opposition to the death penalty.

6. "Nuclear deterrence deters; the death penalty does not."

The next possible argument is that France and the United Kingdom have a special interest, as does every country, in defending their own national sovereignty and that nuclear deterrence plays a unique role in such a purpose. This argument essentially posits that the end, national sovereignty, justifies the means: conditional intent to kill innocent civilians. This argument is predicated on the idea that France and the United Kingdom are justified in threatening millions of innocent civilians to preserve their forms of government, as opposed to potentially succumbing to an adversary.[209] Acceptance of this argument would open the door to the death penalty if one could demonstrate some sufficiently utilitarian benefit.

For example, suppose it could be demonstrated that executing Osama bin Laden and other Al Qaeda leaders would substantially reduce the risk of further September 11-type terrorism against the United States by Islamic extremists, whereas simply incarcerating them would increase the risk of further terrorism against Americans, including the taking of American hostages abroad in an effort to negotiate for bin Laden's release. Since 1990, there have been at least seven instances where Islamic extremists have taken hostages—sometimes hundreds of them—and demanded the release of imprisoned guerillas, leaders, or clerics.[210] Or suppose that the threat of the

207. Morris, *supra* note 165, at 95.

208. *See, e.g.*, Robin Wright, *Report Cites Victories in Battle Against Terrorism*, L.A. TIMES, May 22, 2002, at A5.

209. *See* Weston, *supra* note 187, at 586 ("Let us be candid. As Roger Fisher has written, 'honestly, each of us would prefer to have our children in Havana, Belgrade, Beijing, Warsaw, or Leningrad today than in Hiroshima or Nagasaki when the nuclear bombs went off'.").

210. *See, e.g.*, Rajiv Chandrasekaran, *Terrorism War's New Front*, WASH. POST, Dec. 22, 2001, at A1 (explaining that a Muslim rebel group kidnapped twenty-one people in a Malaysian resort, demanding "release of Yousef and Sheik Oman Abdel Rahman, both of whom are serving life sentences for the 1993 World Trade Center bombing"); Celia W. Dugger, *Hijackers of Jet End 2 Demands Made to India*, N.Y. TIMES, Dec. 30, 1999, at A1 (stating that Islamic militants hijacked an Indian Airlines jet, taking

death penalty spurred captured Al Qaeda terrorists to cooperate with interrogators in exchange for an agreement not to seek the death penalty against them, and this terrorist cooperation led to the disclosure of information useful in the ongoing war on terrorism.[211] Could France or the United Kingdom truly distinguish their concept of "national sovereignty" from the benefit identified in the hypothetical above?

Of course, one can debate what constitutes "substantial utilitarian benefit," and whether such a showing has been made, but the national sovereignty argument is a consequentialist argument, not a deontological one.[212] If the French and British were to rely upon such a consequentialist argument, they would be abandoning their deontological position. One can imagine that, in some circumstances, killing in retribution would be acceptable.

The pugnacious reader may be tempted to respond that my hypothetical assumes far too many things that could never be shown (i.e., that Islamic extremists would be deterred by the execution of bin Laden and other Al Qaeda leaders) and that, therefore, France and the United Kingdom could legitimately contend that the United States had failed to meet its burden of proof. This method, however, does not satisfactorily distinguish nuclear deterrence from capital punishment because of the difficulty in seeing how France and the United Kingdom could ever show that nuclear deterrence played a substantial role in preserving their national sovereignty. True, both

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154 hostages and demanding the release of a Muslim cleric believed to be a terrorist, as well as others jailed in India); *Hostages Moved in Kashmir*, WASH. POST, Dec. 10, 1995, at A31 (stating that the Al-Faran group kidnapped four tourists in Kashmir and demanded release of fifteen jailed guerillas); *Hijacked Jetliner Lands in France*, WASH. POST, Dec. 26, 1994, at A1 (explaining that an Armed Islamic Group hijacked a French jet, taking 180 hostages and demanding release of the jailed leaders of the Islamic National Front); *Hopes Rise for Kidnap Victims*, FIN. TIMES (LONDON), June 11, 1994, at 2 (explaining that the Harakat-ul-Ansar group kidnapped two Britons, demanding, at one point, the release of three jailed guerillas); Clyde Haberman, *Israel Releases 51 Arab Prisoners*, N.Y. TIMES, Sept. 12, 1991, at A1 (showing that the release of fifty-one Arab prisoners by Israel was in hopes that Islamic groups holding at least nine Western hostages would release those hostages); Clifford Krause, *Second Trial of New Yorker Jailed in Peru is Set to Open*, N.Y. TIMES, Mar. 19, 2001, at A3 (stating that Tupac Amaru terrorists took "hundreds of hostages" in Peru in December 1996, demanding release of 434 prisoners); Lara Marlowe, *Release of Lebanese Prisoners Raises Hopes for Hostages*, FIN. TIMES (LONDON), July 5, 1990, at 5 (showing that the release of 300 Muslim prisoners was contemplated by Israel in hopes that fifteen Western hostages held by Islamic groups also would be released). Indeed, the dishonorable tradition of taking hostages and demanding the release of imprisoned colleagues dates back to at least 1972. *See* Owen Bowcott, *Terrorism: Police Used Wrong Guns at Munich*, THE GUARDIAN (LONDON), Jan. 1, 2003, at 7 (stating that eight Palestinian terrorists kidnapped Israeli athletes at the 1972 Olympic Games, demanding release of more than 200 Palestinians).

211. Whether Al Qaeda operative Khalid Sheikh Mohammed, captured on March 1, 2003, has cooperated with interrogators, and if so, whether he did so in an effort to avoid the death penalty, remains to be seen. On the first point, however, law enforcement officials have stated that information provided by Mohammed led to the arrest of an American citizen, Iyman Faris, who plotted with Mohammed to destroy the Brooklyn Bridge. Susan Schmidt, *Trucker Pleads Guilty in Plot by Al Qaeda*, WASH. POST, June 20, 2003, at A1.

212. Indeed, national sovereignty is really a "secondary" consequentialist goal, compared to deterrence of nuclear war. If the end to be avoided was assimilation into the Soviet empire, as opposed to annihilation, it is even harder to justify nuclear deterrence under the deontological position articulated by the British and French. While living under a communist regime would have been undesirable, would avoidance of that outcome have justified slaughtering millions of innocent persons?

countries survived the Cold War intact, but so did Canada, Germany, and Japan—other Western nations that did not build nuclear arsenals.[213] Obviously, the existence of the United States' nuclear arsenal had something to do with their survival, but the point remains: neither France nor the United Kingdom appears to have needed to build nuclear weapons to maintain national sovereignty. The argument that only the addition of the French and British nuclear arms to those of the United States would sufficiently deter the Soviet Union seems too far-fetched.

Additionally, no country's national sovereignty was impaired during the period between 1945 and 1949, when only one country possessed nuclear weapons.[214] And the only wartime use of nuclear weapons ended a war begun by the target country.[215] When the United States engaged in armed conflict against non-nuclear adversaries in Korea from 1950-1952 and in Vietnam from 1964-1975, the national sovereignty of those adversaries was never subject to threats of nuclear annihilation.[216]

Even if France and the United Kingdom are given the benefit of the doubt based on their successful survival of the Cold War, the argument has reached a truly curious point. This point can essentially be boiled down to the following: countries have been willing to do anything to avoid nuclear retaliation because of the horrifying outcome, thus leading to the optimal outcome of intact national sovereignties.

Suppose, then, that one enterprising state, such as Texas, announces that, henceforth, the punishment for any unjustified homicide, violent battery, robbery, or rape shall be capital punishment for the defendant, the defendant's family (immediate and extended), and the defendant's closest friends.[217] Suppose that as a result of this announcement, violent crime in Texas drops 99%.[218] Would not such effective deterrence justify the threatened punishment under this argument? Under the logic of MAD supporters, the punishment would indeed be justified.[219] Life imprisonment would not be an available alternative, because, as hypothesized, this form of punishment would not be as effective at reducing violent crime. Yet, this proposal

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213. MICHAEL MANDELBAUM, THE NUCLEAR QUESTION: THE UNITED STATES & NUCLEAR WEAPONS, 1946-1975, at 25-26 (1979).

214. *See id.*

215. *See* THE NUCLEAR DILEMMA AND THE JUST WAR TRADITION 231 (William V. O'Brien & John Langan, S.J., eds., 1986). I take no position here whether the atomic bombings of Hiroshima and Nagasaki were justified, moral, or legitimate. I suggest only that the purpose of the nuclear attacks was not to conquer Japan but to force it to surrender and end hostilities. Following the end of World War II, the United States did not annex or seize any Japanese territory and add it to American territory. Multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169.

216. *See* MANDELBAUM, *supra* note 213, at 53, 205.

217. I realize that this proposal would be deemed unconstitutional for a number of reasons, including the automatic nature of the death penalty, as well as the imposition of the death penalty on innocent persons. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). This hypothetical is just a thought experiment.

218. If this proposal is not convincing as a deterrent, then the scenario can be altered with progressively more terrifying punishments, such as death by torture.

219. *See* NYE, *supra* note 174, at 52.

is so ghastly that one struggles to think about how it could ever be accepted. If one argues, however, that the threatened punishment is unacceptable because of the killing of innocent persons, how does one persuasively distinguish nuclear deterrence, which threatens a punishment involving the killing of (many more) innocent persons?

Therefore, the national sovereignty rationale cannot justify the use of nuclear deterrence and simultaneously condemn the United States for retaining the death penalty.

7. "The death penalty is more immoral than nuclear deterrence."

Could the French and British governments acknowledge that a certain amount of immorality exists in employing nuclear deterrence but then argue that the death penalty is even worse than MAD? In other words, can those governments argue that they are willing to tolerate a certain level of immorality—corresponding to the level reached by nuclear deterrence—but no more, thereby cutting off the death penalty?

Formulation of this argument is challenging. In the capital cases, a horrible crime has been committed, and while imposition of the death penalty will not bring the victim back to life, an urge for revenge is satisfied. In the theory of nuclear deterrence, a horrible crime (the launch of a devastating first strike) has been committed, and execution of MAD will not bring the victim (country) back to life, but the retaliatory strike satisfies an urge for revenge. Why is the death penalty morally worse than MAD?[220]

True, there is an alternative to the death penalty as a punishment, namely, life imprisonment. And I am willing to stipulate that a country that has been fired upon with nuclear weapons has suffered a far worse atrocity than that suffered by a society imposing the death penalty on a particular defendant.

But these points only go so far. Deontological opponents of the death penalty cannot invoke the greater atrocity argument because the power of that argument lies in distinguishing between the magnitude of the atrocity—that is, killing, for instance, 200 million people merits retribution, but killing, for example, 168 people does not. If one is willing to concede that kill-

220. Notice that the value embodied in the French and British governments' position (prohibition of killing in retribution) overwhelmingly refutes the argument because the value can be measured along a single axis—the number of people killed in retribution. This valuation is in contrast to the abortion/death penalty debate, where seemingly inconsistent positions, such as pro-life/pro-death penalty or pro-choice/anti-death penalty, can be reconciled by recognizing that the values involved must be placed on at least two axes (reducing the burden on women versus preserving innocent life). The pro-life/pro-death penalty camp can plausibly assert that they value protecting innocent lives more than protecting "guilty" life and are less concerned with reducing the burden on women. The pro-choice/anti-death penalty camp can plausibly assert that they value reducing burdens on women more than protecting innocent life but also value protecting the lives of people. Because the two camps assign different weights to the competing values, they reach seemingly inconsistent and opposing conclusions. With MAD and the death penalty, however, the value of prohibiting killing in retribution lies on just one axis.

ing some arbitrarily large number of innocent people justifies retribution, then, to paraphrase George Bernard Shaw, the rest is just haggling.[221]

Besides, anyone making the greater atrocity point has to take into account the proportionality of the response. A preemptive nuclear strike might kill 200 million people, but the number of persons killed in the retributive second-strike might be just as large, or even larger depending on the population of the aggressor country. Admittedly, the victim-to-aggressor kill ratio is, at best, a crude and incomplete gauge of immorality, but the ratio does measure proportionality. Because the Constitution arguably permits only murderers to be sentenced to death,[222] a capital defendant has a victim-to-aggressor kill ratio of at least 1:1 and probably greater.[223] McVeigh's victim-to-aggressor kill ratio was 168:1.[224] A second-strike nuclear retaliation, on the other hand, may have a victim-to-aggressor kill ratio below 1:1 if the aggressor country has a larger population or if the retaliator has more effective weaponry. From a proportionality standpoint then, nuclear retaliation is far worse than capital punishment.

As for the available alternative argument, it skates a little too cleverly past the point. Death penalty opponents generally do not present life incarceration as an alternative basis for *retribution*;[225] rather, life imprisonment

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221. *See* THE SAYINGS OF GEORGE BERNARD SHAW 64 (Joseph Spence ed., 1993).

222. Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that it was unconstitutional to impose the death penalty for the crime of rape). No case has since tested the constitutionality of the death penalty for other non-murder crimes, although in 1994, Congress enacted a host of death-eligible non-murder crimes, including obstruction of free exercise of religion through kidnapping, attempted kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse, or attempted murder (18 U.S.C. § 247 (2000)); espionage (18 U.S.C. § 794 (2000)); treason (18 U.S.C. § 2381 (2000)); large scale drug trafficking (18 U.S.C. § 3591(b)(1) (2000)); and attempted murder of public officers, jurors, or witnesses by a drug trafficker (18 U.S.C. § 3591(b)(2) (2000)). Clearly, the historical use of the death penalty to punish spies and traitors stands as a counterexample to the position that the death penalty can be inflicted only upon murderers. *See, e.g., Ex parte* Quirin, 317 U.S. 1 (1942) (allowing execution of German saboteurs captured in the United States during World War II). Because no recent case has tested this principle, we are left only with the musings of academics, the majority of whom have concluded that, to be constitutional, the death penalty can be inflicted only upon murderers. *See* Jeffery C. Matura, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249 (1998); Emily Marie Moeller, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621 (1996); Lynn D. Wittenbrink, *Overstepping Precedent?* Tison v. Arizona *Imposes the Death Penalty on Felony-Murder Accomplices*, 66 N.C. L. REV. 817 (1988); James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983). *But see* Eric Pinkard, *The Death Penalty for Drug Kingpins: Constitutional and International Implications of the 1994 Drug Kingpin Death Penalty*, 24 VT. L. REV. 1 (1999) (arguing that the death penalty for drug kingpins is constitutional). *See also* 10 U.S.C. § 906 (2000) (calling for mandatory death penalty for conviction of spying).

223. Anecdotally, death sentences for single homicides seem to be rare; such sentences are reserved for particularly heinous torture-murders, such as that in *Sawyer v. Smith*, 497 U.S. 227, 230 (1990), which involved the defendant's beating, scalding, kicking unconscious, and setting fire to the victim, along with "further brutalities." More typically, the "highest condemnation case[s]" most likely calling for a death sentence involve "multiple victims; execution-style slayings; multiple wounds; premeditation; . . . motive of thwarting the justice system . . . [and] prior criminal records." David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 22 (1998).

224. McVeigh's co-defendant, Terry Nichols, was spared the death penalty. *See* United States v. Nichols, 169 F.3d 1255, 1260 (10th Cir. 1999).

225. Interestingly, however, a 1993 survey asked respondents what they thought was the best reason to oppose the death penalty (regardless of whether they were pro-death penalty or anti-death penalty),

satisfies a valid but different penal goal, which is simply protecting society by removing a dangerous criminal.[226] In other words, life imprisonment is not an appropriate sentence because it satisfies society's thirst for revenge (although it certainly could be if one were to view the generally unpleasant conditions, particularly the possibility of assault or rape, as part of the sentence) but rather because it keeps those criminals from preying upon society in the future.[227] Moreover, the available alternative argument overlooks the fact that there is an available alternative to nuclear retaliation—namely, not to retaliate.

If the death penalty is not necessarily more immoral than MAD, there remains the converse question of whether MAD is necessarily more immoral than the death penalty. It would appear that it is. First and foremost, the death penalty is reserved for those who are convicted of terrible crimes, perhaps only murder with special circumstances.[228] There may be persons who are wrongly convicted and sentenced to death, but if we knew for certain that an innocent person had been executed, we would view that as an error and not as the goal of the system.[229] MAD, on the other hand, *intentionally* targets *millions* of innocent civilians.[230] Any moral justification for MAD on non-retributive grounds is about as flimsy as that offered by Osama bin Laden for why Al Qaeda intentionally targets American civilians;[231] both impute to civilians the perceived sins of their governments.

Second, although mistakes may happen from time to time so that a factually innocent person is wrongly convicted and sentenced to death, every person on death row has been accorded significant procedural protections. The Sixth Amendment guarantees capital defendants the right to counsel at trial and appeal,[232] and a federal statute provides and funds counsel for capi-

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and 11% answered "[p]rison more severe." Samuel R. Gross, *American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1462 (1998). In a similar vein, David McCord has proposed making incarceration a retributive punishment, consisting of sensory deprivation, resulting in psychological suffering by the prisoners. McCord, *supra* note 223. However, McCord notes that, at present, most death penalty opponents are unable "to propose a retribution-based alternative to the death penalty that could attract public support." *Id.* at 38.

226. *See, e.g.*, Jonathan M. Miller, Opinion, *"Tough on Crime" May Backfire*, L.A. Times, Nov. 17, 2002, at M5 ("There is a long tradition in European and Latin American jurisprudence that imprisonment exists not for punishment but to protect society and for rehabilitation of the offender.").

227. Capital punishment can also serve this goal. This explains why the Supreme Court has approved capital sentencing procedures where the jury must consider, among other things, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 272 (1976).

228. *See, e.g.*, 18 U.S.C. § 3591 (2000).

229. *See* Tung Yin, *The Probative Values and Pitfalls of Drug Courier Profiles as Probabilistic Evidence*, 5 TEX. F. ON C.L. & C.R. 141, 165 (2000) (discussing the Court's apparent acceptance of the potential for erroneous executions).

230. *See, e.g.*, JOHN NEWHOUSE, COLD DAWN: THE STORY OF SALT 27 (1973) ("The logic of deterrence is bizarre; it argues for targeting weapons at 'countervalue'—against people—instead of 'counterforce'—against other weapons.").

231. *See, e.g.*, Marshall Wittmann, *The Front Line in the War on Terror*, THE WKLY. STANDARD, Apr. 8, 2002 (stating that Osama bin Laden and Al Qaeda waged war on America to rid the Islamic world of America's influence).

232. U.S. CONST. amend. VI.

tal defendants in federal post-conviction proceedings.[233] Additionally, capital defendants will not be convicted except on proof beyond a reasonable doubt, a burden of proof set so high that many more factually guilty persons are expected to be acquitted than factually innocent persons are expected to be convicted.[234] Obviously, no such procedural protections are accorded to the targets of MAD; they would simply be massacred without any individualized assessment of whether they took part in their government's decision to launch a preemptive strike.

Apart from the instant deaths of millions of victims, nuclear retaliation would exact a horrible toll on the survivors. Robert Jay Lifton visited Hiroshima in 1962 and described in horrific detail the aftermath and lingering impact of the atomic bomb some fifteen years earlier: an initial belief among blast survivors that the world was ending, followed shortly by the symptoms of radiation sickness, "severe diarrhea and weakness, . . . bleeding from all of the bodily orifices . . . [and] loss of scalp and bodily hair,"[235] which the survivors thought resulted from some inescapable poison; subsequent "A-bomb" disease consisting of increased incidences of leukemia and cancer, as well as stunted growth, premature aging, and other maladies; and finally, "the fear that this invisible contamination will manifest itself in the next generation."[236]

Third, the negative fallout, so to speak, of the death penalty is far different from that of MAD. The relatives of the condemned inmate are about the only persons who may suffer from his execution and only then in an emotional sense. MAD, on the other hand, would inflict all kinds of horrible consequences on the rest of the world. One 1960 study estimated that an all-out nuclear attack by the United States would kill 500 million Russians, Chinese, and Eastern Europeans—the latter two populations being devastated primarily because of the fallout.[237] A study conducted in 1984 estimated that an all-out nuclear war between the United States and the Soviet Union would kill 1.15 *billion* people and would injure another 1.1 billion[238]—those numbers are so large that the total U.S. and Soviet populations accounted for less than a quarter of the estimated casualties.[239]

As if the radioactive fallout were not bad enough for the rest of the world, MAD risks bringing about a so-called "nuclear winter." The intense heat generated by the nuclear detonations could potentially set entire cities

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233. 21 U.S.C. § 848(q)(4)(B) (1999).

234. *See* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HAST. L.J. 457, 460 (1989) ("It is better to let ten guilty people go free than to convict one innocent person."); *see generally* Speiser v. Randall, 357 U.S. 526 (1958) ("Due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the factfinder of his guilt."); Coffin v. United States, 156 U.S. 432, 455-56 (1950) (quoting Justice Blackstone as saying that "the law holds that it is better that ten guilty persons escape than one innocent suffer").

235. LIFTON & FALK, *supra* note 32, at 40-41.

236. *Id.* at 43.

237. BRACKEN, *supra* note 23, at 84.

238. RHODES, *supra* note 29, at 576 n.*.

239. Statistical Abstract of the United States, 105th ed., U.S. Bureau of the Census 6, 838 (1985).

on fire, filling the atmosphere with smoke, soot, and other particles.[240] If this were to happen, the amount of sunlight that would get through would be "a tiny fraction . . . for weeks or months, causing a sharp temperature drop and changing the world's climate in possibly deadly ways."[241] In the worst case scenario, a nuclear winter could bring about another Ice Age and even doom humanity.[242]

When all is said and done, one cannot plausibly assert that the death penalty is more immoral than MAD.

8. "We are inconsistent; so what?"

Certainly, governments are entitled to be inconsistent, and, in any event, no one can force them to be consistent. But inconsistent behavior can demonstrate a lack of moral integrity when the inconsistency involves claims of moral superiority. Nuclear deterrence may have prevented France and the United Kingdom from being attacked or, worse yet, annihilated, but moral integrity does not depend on expedience or efficiency. If the French and the British truly believe that killing in retribution is immoral, then moral integrity would demand that they not undertake actions that would run afoul of such beliefs, even if the price for doing so is great risk to themselves.[243] Stephen Carter argues that it is especially important for political leaders to demonstrate this sort of moral integrity because citizens are entitled to expect their leaders "to display the virtue of consistency, for a moral understanding that has resulted from genuine reflection should certainly be applicable across very different cases."[244]

The failure to demonstrate moral integrity degrades the moral force of the argument.[245] Examples abound of how inconsistency cripples the moral authority to advance positions. When feminists were perceived as not having jumped to support President Clinton's female accusers, as they had with Anita Hill when she accused Clarence Thomas of sexual harassment, those feminists were subjected to withering attacks such as: "When the sexual harassment charges were brought against Clarence Thomas, members of the National Organization for Women fell all over themselves to circle the wagons in favor of Anita Hill . . . So where are NOW and all those other feminist organizations that came to the aid of Anita Hill?"[246] Republicans fared no better; those who had jumped to defend then-Judge Thomas against

240. Ernest Conine, *Nuclear Winter and Twisted Logic Would Shift to Small Weapons, Make War 'Thinkable' Again?*, L.A. TIMES, June 17, 1985, at Metro 5; *see* NYE, *supra* note 174, at 60.

241. Conine, *supra* note 240; *see* NYE, *supra* note 174, at 60.

242. Conine, *supra* note 240.

243. *See* Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 N.D. L. REV. 841, 845 (2002); *see also* Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORD. L. REV. 1629, 1657 (2002).

244. STEPHEN L. CARTER, INTEGRITY 47 (1996).

245. *Id.* at 21.

246. Amy E. Black & Jamie L. Allen, *Tracing the Legacy of Anita Hill: The Thomas/Hill Hearings and Media Coverage of Sexual Harassment*, GENDER ISSUES, Winter 2001, 46-47.

his accuser but suddenly found themselves sympathetic to President Clinton's alleged victims were skewered by observations such as: "Given a green light by the Paula Jones case to pontificate about the president's genitals and alleged indecent conduct, right-wing pundits have finally found a sexual harassment claim worthy of outrage."[247]

Of course, inconsistency need not be per se undesirable. John Coons, in an elegant study of consistency, has identified at least two instances of inconsistency that should not be troubling: (1) a rule has changed over time so that current cases end up with different results than prior cases that are otherwise similar in all meaningful respects;[248] and (2) a rule is applied in a number of similar cases by different decisionmakers who are given a certain amount of discretion.[249] The first instance should not be automatically troubling because, otherwise, consistency may breed staleness and rigid obedience to rules that no longer merit such obedience.[250] Even under this analysis, Coons tempers his point by acknowledging that consistency does serve certain values, such as predictability or reasonable reliance upon the rule.[251] As for the second instance, Coons argues that there is value in allowing different decisionmakers to bring their independent values to bear, even if doing so results in inconsistent results, because doing so allows participation by a wide number of actors in the process of governance, thereby "promoting diversity of ideas and broad participation in the social dialogue."[252]

Neither of Coons's categories of potentially desirable inconsistency explains the inconsistency exhibited by the French and British. True, the original decisions to develop nuclear weapons, which were developed in the 1940s and 1950s, were made by government officials who no longer run those countries, so, in one sense, this may represent an evolution of standards represented by the first category. But that analysis overlooks the crucial fact that the French and British governments maintain their nuclear weapons today. In no way can they point to a "change" in the rule (i.e., retribution is unacceptable) that would justify their maintenance of nuclear deterrence and their absolute rejection of the death penalty.

Nor is this a situation of multiple independent decisionmakers given the discretion to reach inconsistent results. The paradigm example that Coons has in mind is the jury charged with determining the amount to award a plaintiff in a given case.[253] Some critics have contended that juries are lotteries,[254] but Coons is not terribly troubled by the fact that different juries

247. *Id.* at 47.
248. John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 77-78 (1987).
249. *Id.* at 79-83.
250. *Id.* at 105.
251. *Id.* at 107.
252. *Id.* at 111.
253. *Id.* at 96.
254. JEFFREY O'CONNELL, THE LAWSUIT LOTTERY, at xi (1979).

can reach different results in similar cases.[255] As noted above, that is the price to be paid for involving more people in the process. But Coons does not extend his acceptance of such inconsistent results so readily to the *same* decisionmaker. As he notes, "A hanging judge may be a curiosity; a judge who hangs on Tuesdays and spares on Wednesdays is a lunatic."[256]

Most charitably, the inconsistency identified herein arises from what has been called "localized analysis"—that is, solving different problems by using the most expedient means available to that problem without regard to other problems.[257] This may help us understand how the French and British ended up with this massive contradiction in their moral stances, but it does not resolve that contradiction.

That we are speaking of the French or British *governments*—as opposed to an individual—should not change the analysis. This is not a situation where the government's official policy on a given matter (for instance, nuclear deterrence or capital punishment) is doled out for different officials to establish within some zone of discretion. It is not a situation where matters are decided by local jurisdictions, such as the fifty states, so that some states have the death penalty and others do not, a situation that might appear inconsistent to a non-American observer. Here, it is the central governments of France and the United Kingdom that have control over their respective nuclear arsenals, and they are the ones that are refusing to grant extradition requests unless they are given assurances that the death penalty will not be imposed. It would be as if the U.S. Congress enacted and the President signed two laws, one holding that life is absolutely sacred and that under no circumstances should a woman be able to get an abortion, and the other authorizing the death penalty.

If I am correct that the dangers of over-reliance on consistency identified by Coons and others do not apply to the discrete comparison of nuclear deterrence and capital punishment, then France and the United Kingdom should reconsider their deontological-based attacks on the United States' retention of the death penalty.

D. The Nuclear Umbrella

I do not mean to suggest that France and the United Kingdom could solve the problem of inconsistency simply by dismantling their nuclear weapons. Such action would *lessen* the inconsistency, but even more would be needed to clear the slate. Mere nuclear disarmament would only put France and the United Kingdom in the same position as Canada and Germany (among others)—that is, countries that are probably technologically

255. *See* Coons, *supra* note 248, at 77-96.

256. *Id.* at 96.

257. *See* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1150 (1996).

capable of building nuclear weapons but that signed the Nonproliferation Treaty of 1968 and that rely on the United States' nuclear umbrella.[258]

Germany, for example, became unnerved when, in the 1980s, the United States thought about adopting a so-called "No First Use" policy, whereby the United States would have committed to never being the first country to use nuclear weapons. Presumably, Germany was concerned that the United States might consider retaliation in response to an attack on its allies—as opposed to itself—as a First Use, with the result that the United States would be committing *not* to respond to an attack on Germany.[259] This suggests strongly that Germany did not view itself as an unintentional beneficiary of the United States' nuclear arsenal; rather, it was demanding that the United States be prepared to retaliate against any nuclear (or even non-nuclear) aggressor on its (Germany's) behalf. Indeed, all of the countries that are members of NATO are covered by American nuclear deterrence.[260] One Canadian critic derides his own country as a "crypto-nuclear state," by which he means one that is "benefiting [sic] from the full protection of the Western umbrella."[261] Canada's desire to remain a professed non-nuclear power had some curious results: even as the government was prohibiting its exported uranium "from being used for *any* military purposes"—including U.S. nuclear powered submarines—"Canadian policymakers . . . happily sought shelter" from the "nuclear umbrella" provided in large part by those very same submarines.[262]

Presumably, if France or the United Kingdom were to dismantle its nuclear weapons, it would still expect to be protected by the United States' nuclear umbrella, just as Canada and Germany are. I could be wrong; perhaps they would announce publicly that they are not only dismantling their nuclear weapons but also forsaking any protection from American nuclear weapons. But, unless they are willing to do so, they are still engaging in a course of conduct inconsistent with their deontological opposition to the death penalty.

E. American Discretion to Refuse Extradition to Countries with "Barbaric" Punishments

If other Western nations have no legitimate grounds to refuse (absolutely) to extradite death-eligible suspects to the United States without a waiver of the death penalty, does that mean in turn that the United States—

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258. *See* Douglas L. Bland, *Canadian Neutrality: Its Military Consequences*, *in* THE U.S.-CANADA SECURITY RELATIONSHIP: THE POLITICS, STRATEGY, AND TECHNOLOGY OF DEFENSE 93, 109 (1989) ("Canada has the expertise and the materiel [sic] to construct both the nuclear warheads and the delivery systems it would require.").

259. Joffe, *supra* note 142, at 239.

260. *See* COMPREHENSIVE STUDY, *supra* note 27, at 50.

261. David Haglund, *The SSNs and the Question of Nonproliferation*, *in* THE U.S.-CANADA SECURITY RELATIONSHIP: THE POLITICS, STRATEGY, AND TECHNOLOGY OF DEFENSE, at 239, 251 (1989).

262. *Id.* at 252.

owner of the world's largest nuclear arsenal—similarly has no legitimate grounds to refuse to extradite suspects to other countries whose criminal justice system we consider barbaric?

For example, in early 2002, in a particularly notorious case, a local authority in Pakistan ruled that the punishment for an eleven-year-old boy accused of improperly propositioning an older woman was for the boy's sister to be gang-raped, which was carried out in front of hundreds of witnesses.[263] If the United States were to receive an extradition request from a country where a potential punishment would be to subject the suspect or the suspect's female relative to gang rape, could the United States refuse to grant the extradition request?[264]

This is a difficult question, but I think the answer is yes. The link between the death penalty and nuclear deterrence is much tighter than that between the hypothetical gang-rape punishment and nuclear deterrence. With nuclear deterrence, the United States threatens a (potentially) immoral act that it would prefer not to have to carry out, but, if it does so, the horror of the act consists of the vast scale of destruction and not the personal degradation inflicted upon the target. The primary targets would be expected to be vaporized instantly. The same is essentially true of the death penalty, particularly now that most of the states and federal government have moved to lethal injection as the means for execution.[265] While the death penalty itself may still be viewed as barbaric, it is difficult to argue that lethal injection is inhumane in some manner above and beyond the execution itself.

With the "barbaric" punishment, on the other hand, the United States has not forfeited the moral authority to denounce such punishment because it necessarily intends degradation of the convict. In fact, in the Pakistan example above, the "punishment" was not even inflicted on the convict, but rather, on his sister.[266] The line between "harsh but tolerable" punishment on the one hand and "barbaric" on the other hand is unfortunately blurry, and punishments such as chopping off hands for theft may strike us as horrible, yet not so penologically infirm as to warrant automatic refusal to extradite.[267]

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263. *See* Rod Nordland & Ron Moreau, *Of Trials, Tribes, and Tribulations; Musharaff's Challenges Go Far Deeper Than Al Qaeda*, NEWSWEEK, Aug. 5, 2002, at 36.

264. *Cf.* Pub. L. 105-277, 112 Stat. 2681 (1998) (stating the United States will not extradite a person to a country in which "there are substantial grounds for believing the person would be in danger of being subjected to torture").

265. *See* AMNESTY INTERNATIONAL, FACTS AND FIGURES: METHODS OF EXECUTION IN THE U.S., *at* http://www.amnestyusa.org/abolish/methus.html.

266. Note that the lack of correlation between offender and target of punishment is not, by itself, immediately clear as barbaric. After all, in the nuclear retaliation scenario, the offender is the other nuclear power's government, while the target of punishment is the civilian population.

267. *See, e.g.*, David Finkel, *The Letter of the Law: Sharia Exacts Stiff Penalties for Nigerians*, SEATTLE TIMES, Nov. 28, 2002, at A3 ("Theft? That's amputation of the right hand."); Laurie Mylorie, *Iraq's New Reign of Terror*, N.Y. TIMES, Oct. 2, 1994, at sec. 4, p. 17; Carolyn Ratner, *Islamic Laws as Violations of Human Rights in the Sudan: God Has Ninety-Nine Names*, 18 B.C. THIRD WORLD L.J. 137, 153 (1998).

A related difficulty would arise if another country sought to extradite a suspect from the United States for a non-homicide crime carrying the death penalty in the requesting country. Thailand, Vietnam, and China are among countries that impose the death penalty on drug traffickers.[268] Could the United States legitimately condition the extradition of a drug trafficking suspect to such a country on a waiver of the death penalty?[269] What if another country sought to extradite a simple thief to stand trial with a potential punishment of death under that country's laws? This is a perplexing question. It is tempting to retreat to the logically defensible but unpalatable position of agreeing to extradite suspects to face the death penalty for any type of crime. But that position is problematic. It completely abdicates any role for the United States in setting moral norms for other countries and could potentially result in the extradition of U.S. citizens to foreign countries to face execution for trivial crimes.[270]

Without offering any hard and fast rules about where such lines can be drawn, it may well be possible for the United States to decline to extradite a death-eligible suspect to another country to stand trial for a non-homicide crime without a waiver of the death penalty from the requesting country without running afoul of the moral integrity issue discussed in this Article. The narrow reading of my argument is simply that deontological opposition to the death penalty cannot be maintained legitimately with simultaneous acceptance of the benefits of nuclear deterrence. Rejection of the deontological opposition to the death penalty need not, however, be equated with acceptance of the death penalty in any and all circumstances. After all, nuclear deterrence need not compel retaliation for any military attack, however slight, upon the aggressor. Just as one could argue that it would have been immoral for the United Kingdom to have reduced Argentina to radioactive waste following the invasion of the British-held Falkland Islands, one could argue that it would be immoral to impose the death penalty for speeding.

III. CONCLUSION

Western nations that either possess nuclear weapons or rely upon the United States' nuclear umbrella cannot criticize us categorically for our use of the death penalty.

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268. Amnesty International, *Southeast Asia: Execution of Drug Traffickers Does Not Control the Trade*, Sept. 5, 2001, *at* http://web.amnesty.org/library.

269. At the outset, the answer is no, because large scale drug trafficking is a federal crime that currently carries a potential death sentence in the wake of laws enacted in 1994. *See supra* note 222. Even if no one is executed in this country under this statute, it seems difficult to argue that it would be absolutely inhumane to execute drug traffickers when Congress saw fit to pass the statute and President Clinton saw fit to sign it.

270. Some crimes carrying the death penalty in foreign countries include "adultery (Iran, Saudi Arabia), prostitution (Iran), running a brothel and showing pornographic films (China), . . . embezzlement (China, Ghana, Somalia)[,] . . . [and] economic corruption (Iraq) . . . ." Ariana M. Schreiber, Note, *States that Kill: Discretion and the Death Penalty—A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263, 273 (1996).

This does not mean that a country maintaining an arsenal of nuclear weapons obligates itself to implement capital punishment, as there are a number of legitimate reasons not to use the death penalty, including the cost of administering it, that are not inconsistent with maintaining nuclear deterrence. Similarly, it would not be unreasonable to argue that the United States should refrain—for prudential reasons—from executing any convicted Al Qaeda members for their role in the September 11 terrorist attacks on the grounds that foreign enemies who capture American soldiers in battle may decide to execute them in response or, worse yet, to torture them first because they are going to be killed later anyway.[271]

At the same time, however, those reasons fail to justify an absolute refusal to extradite death-eligible suspects to a country that uses the death penalty. The world, unfortunately, is still a dangerous place where nuclear deterrence plays a potentially significant role in maintaining stability and security, and so long as one accepts the need for nuclear deterrence, it seems impossible to condemn capital punishment on a deontological—as opposed to practical—basis.

A final thought suggested by the dissonance between deontological rejection of the death penalty and acceptance of nuclear deterrence is that the distinction between what some have called "private morality" and "public morality" is perhaps less meaningful than asserted. Some death penalty opponents have attempted to separate individual desire for vengeance from their notions of government-sponsored actions. Perhaps the best example comes from the 1988 presidential campaign, when Democratic candidate Michael Dukakis was asked if he would support the death penalty for someone who (hypothetically) raped and murdered his wife. Dukakis's bland—and unsatisfying—response was that he would not, as he had always been against the death penalty.[272] Austin Sarat suggests that a better answer would have been that the primitive urge for revenge that we might have personally should not be a driving factor in what our government chooses as its policy.[273]

Just as our NATO allies exhibit inconsistency by refusing to extradite death-eligible suspects on purported moral grounds, those death penalty opponents who make the private/public morality distinction may not fully appreciate the consequences of their position. If it is true that private morality—including the understandable desire for revenge—should be kept out of public decisionmaking because it is not what our government should do,

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271. *See, e.g.*, Norman L. Greene et al., *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187, 219 (2001).

272. *See* Austin Sarat, *The "New Abolitionism" and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO ST. L.J. 343, 352 (2002).

273. *Id.* at 352-53 ("Of course I would want anyone who did such a thing to someone I loved to be made to suffer. Indeed if I got my hands on him I'd tear him limb from limb. But the death penalty is something different. *What my love and anger propels me to do is not what our government should do.* It should help heal my pain, but also find ways to punish that do more than exact the most primitive kind of vengeance.") (emphasis added).

then it is equally apparent that the traditional theory of nuclear deterrence cannot be supported as well. But just as state-sponsored threats of retaliation in the form of nuclear deterrence may achieve salutary results through a scheme that would be forbidden to individuals, so, too, must state-sponsored killing, in the form of the death penalty, be separated from the immorality of individual killing. In short, our Western allies—France, the United Kingdom, Germany, Canada, Mexico, and others—have demonstrated the danger of casting morality in terms of words like "always" or "never;" such deontological principles are not disposable at will and can rebound in unexpected ways. Living with such principles requires Gandhian courage and patience, and none of our allies has demonstrated those traits.