

Liberal democracy and nuclear despotism: two ethical foreign policy dilemmas

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Abstract

This article advances a critical analysis of John Rawls's justification of liberal democratic nuclear deterrence in the post-Cold War era as found in *The Law of Peoples*. Rawls's justification overlooked how nuclear-armed liberal democracies are ensnared in two intransigent ethical dilemmas: one in which the mandate to secure liberal constitutionalism requires both the preservation and violation of important constitutional provisions in domestic affairs, and the other in which this same mandate requires both the preservation and violation of the liberal commitment to international legal arrangements and to the rule of law generally. On this view, the choice to violate constitutional provisions and international legal arrangements is evidence of nuclear despotism. Moreover, this choice does not imply that the ethical foreign policy dilemmas were resolved. Instead, it implies that the dilemmas force liberal democratic governments into implementing ethically paradoxical policy outcomes.

Keywords: *nuclear ethics; nuclear deterrence; liberal democracy; nuclear despotism; John Rawls; national security; foreign policy*

Despite the rhetorical turn toward 'global nuclear zero' taken by US President Obama and a small cadre of other foreign policy notables, the United States and the other nuclear-weapon states (NWS) have not advanced the goal of nuclear abolition at the heart of the Nuclear Nonproliferation Treaty (NPT).¹ Instead, the United States and its nuclear-armed partners within the NPT regime have chosen to retain their nuclear weapons and accordingly have concentrated on preventing new nuclear proliferation, especially among the so-called rogue states. For the three liberal democracies in this nuclear club—the United States, Great Britain, and France—the focus on preventing nuclear spread at the expense of NPT disarmament

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commitments is legally, politically, and ethically disturbing. Notwithstanding their reductions in nuclear forces,² the United States in particular has stalled the progress of the Comprehensive Test Ban Treaty and a Fissile Materials Cut-Off Treaty which are considered benchmarks of nuclear abolition. Moreover, the United States recently allocated an additional \$537 million to upgrade its 180 B61 gravity nuclear bombs located in Europe and whose original purpose died with the end of the Cold War.³

Given the nuclear-armed democracies' priority on nuclear weaponry, it is difficult to see how 'rogue' state nuclear aspirations are irrational. Indeed, the security studies literature has examined the motivations of nuclear aspirant states, and the nuclear ethics literature has similarly examined the ethics of those motivations.⁴ However, the nuclear-armed democracies' continued reliance on these weapons raises important questions for the ethics of international security and foreign policy. One relates to the ethical dilemmas of their reliance on nuclear weapons. If 'dilemma' in this context refers to a state actor's uncertainty over competing and seemingly equally forceful response options to a grave security threat, then an 'ethical' dilemma involves uncertainties produced by conflicting ethical requirements for policy action.⁵ Recalling the familiar 'horns of a dilemma' metaphor, where an actor is 'impaled' on one or the other of two undesirable outcomes, it might follow that negative foreign policy outcomes indicate ensnarement in a preceding ethical foreign policy dilemma.

On this understanding of the relationship between ethical dilemmas and the outcomes of policy, this article explores two questions: (1) To what extent are basic constitutional democratic practices undermined by the diverse requirements on liberal democracies to maintain nuclear deterrence indefinitely? (2) To what extent are liberal democratic commitments to international legal obligation and the rule of law generally undermined by the few nuclear-armed democracies' current policies to retain indefinitely their nuclear deterrents? Since these questions invite us to examine 'the complex considerations of the moral "ought" in contexts of what "is",⁶ a thorough inquiry would require an empirical and conceptual analyses possible only in a book length treatment. Instead, this article advances a more narrow critical analysis of John Rawls's justification of liberal democratic nuclear deterrence in the post-Cold War era as found in *The Law of Peoples*.⁷ I will argue that Rawls overlooked how nuclear-armed liberal democracies are ensnared in two intransigent ethical dilemmas: one in which the mandate to secure liberal constitutionalism requires both the preservation and violation of important constitutional provisions in domestic affairs, and the other in which this same mandate requires both the preservation and violation of the liberal commitment to international legal arrangements and to the rule of law generally. Since the United States is the foremost nuclear-armed democracy in the world today, I will concentrate my analysis on its nuclear postures in the post-Cold War period.

A final introductory remark: the location of this inquiry within Rawls's work (as opposed to another democratic theorist) is motivated by the juxtaposition of his original and careful elaboration of egalitarian-liberal democratic theory with the derivative and less than carefully developed position on nuclear deterrence. This juxtaposition has intrinsic theoretical interest: can a liberal democracy retain nuclear

deterrence without ultimately corrupting its democratic character? It also has historical interest. The *Law of Peoples* (*LP*) is, among other things, an important document of intellectual history, immediately preceding the transition from the Clinton to the Bush administrations in which paramount concerns emerged over ‘rogue’ states and terrorist groups with nuclear ambitions. While I am not claiming that Rawls’s views on these matters had palpable influence on policymakers, his thinking reflected an emerging consensus at that time among neoconservative-leaning policymakers.

In what follows, I reconstruct the Rawlsian justification of liberal democratic nuclear deterrence against rogue nuclear aspirant states. In the later sections, I use it to explore two ethical dilemmas that respectively apply to the questions that animate this article. I conclude with some reflections on the implications of the article’s analysis.

JOHN RAWLS ON LIBERAL DEMOCRACY AND NUCLEAR DETERRENCE IN THE POST-COLD WAR WORLD

John Rawls’s *A Theory of Justice* and *Political Liberalism* theorized the conditions of egalitarian liberal society around an array of core concepts: e.g. justice as fairness, the equal liberty of citizens, public reason, and constitutionalism.⁸ Space considerations permit only a brief recounting of these concepts. Rawls’s concept of justice as fairness describes two basic principles of liberal democratic society: that each person shall have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme for others, and that social and economic inequalities should be arranged to the greatest benefit of the least advantaged and attached to offices and positions open to all under conditions of fair equality of opportunity.⁹ These two principles of justice place the equal liberty of citizens at the heart of liberal democracy. From there, Rawls claims that public reason is the exercise of the reason by the representatives of free and equal citizens over matters of constitutionality and basic justice. It is the exercise of public reason that makes a constitutional democracy a deliberative democracy.¹⁰ These representatives include the judiciary, the combined elected executive and legislative officials, and candidates for public office.¹¹ The constitution of liberal democracy and its devices attempt to operationalize (however imperfectly) the ideal of procedural justice that satisfies all the basic requirements of the principle of equal liberty of citizens.¹² These devices include a bicameral legislature, separation of powers mixed with checks and balances, and a bill of rights with judicial review.¹³ Rawls implicitly acknowledges in these works that the foreign policy powers shared between the executive and legislative branches in the United States comprise the constitutional device for ensuring war power is not abused or exercised illegitimately.

In *LP*, Rawls moves onto imagine how a society of liberal and decent peoples is possible.¹⁴ Rawls locates *LP* within the Kantian concept of the pacific federation,¹⁵ which involves ‘the social contract idea of liberal political conception of a constitutionally democratic regime . . .’.¹⁶ Rawls’s explicit linkage of ‘liberal political

conception' and 'constitutionally democratic regime' suggests his belief that an order of liberal democratic societies would necessarily incorporate familiar and effective constitutional devices. Thus, with *LP*, the notion of a league of constitutional republics with robust deliberative institutions is established fairly well.

In contrast to Rawls's careful and lengthy explication of liberal democracy's elements, his remarks on the necessity of liberal nuclear deterrence against outlaw states are made almost in passing. Yet, these remarks have philosophical and historical interest. Philosophically, Rawls seems to advance a conditional right of liberal democracies to retain their nuclear arsenals. He does not extend the right of nuclear possession to any other society except liberal democracies and perhaps those 'decent hierarchical societies' with which liberal societies can coexist. Specifically, Rawls fails to indicate if 'decent' societies have a right to possess nuclear weapons. His remarks here fall short of unequivocally advancing a conditional right of liberal democracies to nuclear weapons, but they are enough to suggest this possibility.

Historically, it is interesting that *LP* was published at the end of the Clinton administration, whose foreign policy emphasized globalization and democratization efforts in the republics of the former Soviet Union. It also came at the beginning of a period of concern over 'rogue' states and new nuclear threats: e.g. the North Korean withdrawal from the NPT in 1994¹⁷ and India and Pakistan's surprising nuclear tests in 1998.¹⁸ Rawls's defense of liberal nuclear deterrence thus coincided closely with the reluctance to move toward nuclear abolition in a post-Cold War world, and with the Bush administration's importation of a democracy requirement on all matters nuclear.¹⁹ Rawls's account is therefore quite relevant when exploring the question of ethical foreign policy dilemmas facing nuclear-armed democracies.

Rawls's view on nuclear deterrence is predicated on an affirmation of Democratic Peace theory:

The crucial fact of peace among democracies rests on the internal structure of democratic societies, which are not tempted to go to war except in self-defense or in grave cases of intervention in unjust societies to protect human rights. Since constitutional democracies are safe from each other, peace reigns among them.²⁰

Rawls claims emphatically that the internal constitutional structure of democratic societies leads to durable relations of mutual non-aggression among them. Indeed,

[a]mong reasonably just liberal and decent peoples the control of such [nuclear] weapons would be relatively easy, since they could be effectively banned. These peoples have no reason for going to war with one another. Yet so long as there are outlaw states – as we suppose – some nuclear weapons need to be retained to keep those states at bay and to make sure they do not obtain and use those weapons against liberal or decent peoples.²¹

Rawls asserts that nuclear abolition is possible among liberal and decent peoples, given their mutually pacific relations. However, he also claims that it is impossible when 'outlaw states' pose an existential threat to liberal society. This claim is based on grounds similar to his advocacy of democratic peace: i.e. the internal constitution

of a society determines the character of their inter-state relations. Thus, outlaw states are innately hostile to liberal democracies insofar as their practices contradict the principles of equal liberty of citizens, public reason, constitutional checks on arbitrary power, and thus justice as fairness. Accordingly, outlaw states lack any serious respect for international law. Similar to Nazi Germany, today's outlaw states recognize no possibility of sustaining a political relationship with their enemies who 'were always to be cowed by terror and brutality, and ruled by force'.²² If they were to obtain nuclear weaponry, Rawls suggests that they would use them against liberal democracies.

Finally, Rawls refers to 'decent' peoples which deserve inclusion in a 'law of peoples' and protected from outlaw states by a nuclear deterrence regime. They are included because the exercise of liberalism must involve tolerance of peaceful, non-liberal societies.²³ This is in contrast to two other kinds of peoples—burdened societies and benevolent absolutisms—that should not or cannot be included in a society of peoples due to their 'indecent' political arrangements and yet which do not present a security threat to liberal democracies. This means that Rawls's focus on liberal democratic nuclear deterrence is limited to the concern over (nuclear) threats of outlaw states.²⁴

This juxtaposition of a robust theory of liberal democracy and an undeveloped but unambiguous defense of liberal nuclear deterrence has not been examined adequately to my knowledge in the extant literature. The next two sections argue that nuclear-armed liberal democracies are ensnared in two kinds of ethical foreign policy dilemmas. One relates to the dilemma produced by a single ethically rooted imperative, and the other relates to the conflicts among formal legal imperatives and informal ethical imperatives.

THE ETHICAL DILEMMA OF NUCLEAR DESPOTISM AND CONSTITUTIONAL PRACTICES

The foregoing suggests that Rawls is committed to the claim that a liberal democracy's nuclear weapons are necessary for national security and that they do not threaten its constitutional practices or its commitments to international law and the rule of law generally. However, Daniel H. Deudney challenges this claim by arguing that nuclear weapons are intrinsically despotic:

Whatever their formal constitutional principles, all nuclear-armed states have become 'monarchical' because decision making about nuclear use has devolved into the hands of one individual, creating what has been termed a "nuclear monarchy" or an "absolute monarch." Nuclear explosives are intrinsically despotic for three related reasons: the *speed* of nuclear use decisions, the *concentration* of the nuclear use decision into the hands of one individual, and the *lack of accountability* stemming from the inability of affected groups to have their interests represented at the moment of nuclear use. Nuclear despotism increases the possibilities of nuclear use because of the inherent fallibility and corruptibility of the lone individual.²⁵

On Deudney's account, the reliance on nuclear deterrence necessarily produces nuclear despotism. For, nuclear deterrence involves threats of nuclear reprisal to prevent (nuclear) aggression, but a government must also be prepared to act on those threats if deterrence fails. In the strategic planning process, Deudney claims that the logic of speed dictates the concentration of authority over war powers into one person prior to the advent of nuclear aggression. This logic is a function of the speed at which ballistic missiles travel. It takes approximately 30 minutes after launch for a nuclear-armed intercontinental ballistic missile to hit its target, and it takes less time for nuclear-armed intermediate or short-range missiles to strike. Since detecting incoming missiles by radar cannot be immediate, the time for decision on response options is even shorter. As a result, no state can avoid concentrating nuclear decision making to the chief executive prior to nuclear aggression. Accordingly, he cannot be: (1) concerned with constitutional procedures of sharing war powers with the legislative branch on the premise of fair representation of the diverse and contrary interests; and (2) held accountable by constitutional devices before the decision.

If Rawls's central point is that liberal political order must be secured from the nihilism of outlaw states, the paradoxical outcome is that nuclear despotism ultimately subverts liberal constitutionalism. It is admitted that nuclear despotism's effect on ordinary constitutional devices has been limited so far. Deudney acknowledges that the '... concentration of nuclear command authority in executives has certainly not produced full spectrum political despotism as leaders of nuclear-armed states remain subject to powerful electoral, judicial, and legislative restraints'.²⁶ The reason is that nuclear deterrence has not so far required the strengthening of state hierarchies necessary under conditions of full mobilization for conventional and heavily industrialized warfare.²⁷ Deudney thus implies that the threat of 'full spectrum political despotism' is more latent than imminent.

And yet, the nuclear-armed democracies have introduced increasingly large homeland security and surveillance programs since the introduction of nuclear weapons.²⁸ Today, their choice is between the despotic institution of nuclear deterrence to maximize security or the abandonment of nuclear deterrence and the insecurity that follows. The security dilemma which ensnares liberal societies is therefore that which would affect non-liberal societies which have nuclear-armed rivals or enemies: adopt or avoid nuclear deterrence and nuclear despotism. Moreover, this security dilemma assumes an ethical dimension if the underpinnings of liberal democracy are as Rawls imagines: i.e. the varied aspects of justice as fairness which (however imperfectly) are embodied by separation of powers, checks and balances, and a bill of rights with judicial review.²⁹

Thus, the first ethical foreign policy dilemma which liberal democracies face might be called the *dilemma of the contradictory ethical imperative*, where the ethical requirement to secure liberal democracy from external nuclear threats obliges two incompatible courses of action.³⁰ One is to deter nuclear aggression effectively *via* nuclear deterrence and the despotism with which it comes. The other is to preserve liberal constitutionalism from the threat of outlaw states. If the rule of securing constitutional democracy requires the subversion of the very devices that comprise it,

then constitutional democracy itself is impaled on one or the other of this ethical dilemma's horns.

The rest of *LP* does not contain remarks that permit a definitive prediction on Rawls's likely response to the foregoing analysis. Given his reliance on Michael Walzer's account of just war doctrine,³¹ I believe Rawls might have argued that liberal democracies facing hostile nuclear-armed powers must be prepared to put physical security before concerns for constitutional devices and liberties. After all, nuclear aggression is probably the most severe case of 'supreme emergency' imaginable and constitutional devices are worthless if liberal society has been destroyed.³² If I am right on this point, it is likely that the context surrounding the various nuclear threats to liberal society is enmeshed in contradictory normative pulls. However, it also means that Rawls did not foresee two important implications of his view—i.e. how the implementation of liberal nuclear deterrence can ensnare liberal peoples with an illiberal and immoral appetite for nuclear retaliation *and* how the need to secure the country against rogue state and terrorist nuclear espionage leads to the weakening of constitutional liberties.

On the first implication, let us note that Rawls was quite critical of the US uses of the atomic bomb and of the Allied strategy of carpet-bombing in World War II (WWII) after 1942 when, he claims, the supreme emergency condition had effectively disappeared.³³ He argued that, as a liberal democratic people, 'the United States owed the Japanese people an offer of negotiations in order to end the war'.³⁴ Second, Rawls criticized the lack of liberal statesmanship in WWII that permitted the popular tolerance of, and even appetite for, atomic retribution. For Rawls, liberal statesmanship is necessary to prevent democratic popular sentiments from overwhelming a policy process that ought to be as sensitive to moral considerations as to those of power. In other words, liberal statesmanship in the mode of public reason has an educative function. When the citizenry are not sufficiently sensitive to moral considerations, it functions as a check and balance against popular sentiments. Thus, for Rawls liberal constitutionalism ensures that policymakers do not slavishly follow popular pressures, but instead make decisions that might be unpopular but in the national interest nonetheless. If the logic of Rawls's remarks on these points are applied accordingly, then he clearly did not anticipate how a popular appetite for nuclear retribution in the United States is likely to follow an instance of rogue state nuclear aggression.

On the second implication, that Rawls overlooked how constitutional liberties have been weakened to prevent nuclear espionage, rogue state illicit nuclear trade, or nuclear terrorism, it is useful to consult two cases in US history. The first involves the post-9/11 US-led counterproliferation efforts against illicit nuclear trade and the prospect of nuclear terrorism in a major US city.³⁵ Deudney argues that these threats are driving liberal society's progressively more stringent restrictions on civil liberties, along with the increased use of computerized surveillance measures.

Given the threat from [hostile non-state actors and their state sponsors], liberal states can remain liberal only if global nuclear material containment policies remain

strong. Otherwise, the steps to achieve security in a loose nuclear world will come at the expense of liberal institutions.³⁶

In other words, nuclear despotism is no longer limited to an outwardly focused institutional effort to prepare for nuclear reprisal following nuclear aggression. It is now extended to preventing nuclear or other weapons of mass destruction (WMD) terrorism within or around a major US city.³⁷ The recent debates on the use of drones for surveillance in the United States speak to the on-going pull between the requirements of security and those of constitutional civil liberties.³⁸ That liberal society is convulsed with such debates is evidence of a contradictory ethical rule dilemma.

The second historical case involves the erosion of civil liberties in the 1950s over fears of Soviet nuclear espionage. Reg Whitacker argues that a legitimate concern over Soviet theft of US nuclear secrets was deflected by Senator Eugene McCarthy and his allies' witch-hunt for Communists and homosexuals that purportedly sought to subvert American democracy:

... American anti-Communist crusaders ... hijacked the espionage issue, which was real and pressing, and turned it into a campaign of fear and intimidation against their enemies, citing a threat of subversion that was grossly exaggerated (unlike the espionage threat) and to a degree, even imaginary. Spy-hunting was transformed into witch-hunting.³⁹

The McCarthyite association between homosexuality and communism played on their warped notion of perversion.

Like Communists driven by perverted political ideas, homosexuals were driven by perverted sexual desires; both possessed a higher loyalty that overrode patriotism. Like Communists, homosexuals worked 'underground', concealing their true identities. Since they wore no obvious signs of their deviancy, they could only be identified by surreptitious surveillance, covert sources, cumulative dossiers, entrapment and other arcane tradecraft - just as secret Communists were kept in check.⁴⁰

Whitacker thus suggests McCarthyites believed that homosexuals would be more vulnerable to Soviet offers of money for nuclear secrets than heterosexuals. The perceived moral perversion of homosexuality combined with the political insecurities of the Cold War to justify the wholesale violation of due process and privacy rights on a wide scale.⁴¹ Moreover, such intrusive and illiberal practices occurred in other places such as Great Britain and Canada.⁴²

In summary, if we suppose that the ethically grounded imperative in Rawls's account to secure liberal democracy by nuclear deterrence comports with the actual thinking of liberal democratic officials, it then prescribes both that constitutional devices (separation of power, checks and balances, due process, individual privacy rights) must be preserved and simultaneously not preserved. The paradoxical prospect that liberal democracy must be saved by subverting it inwardly strongly suggests the existence of this very ethical foreign policy dilemma.

THE ETHICAL DILEMMA OF NUCLEAR DESPOTISM AND COMPETING ETHICAL REQUIREMENTS

In addition to the ethical imperative to secure liberal society from illiberal aggression, liberal societies also assume that they have binding legal obligations to the international community and an ethical obligation to uphold the rule of international law generally as the legitimate method of international conflict resolution. The liberal conception of the respect for the rule of law is grounded in an ethical norm (or, for some, a customary international legal norm) called *pacta sunt servanda*—i.e. that states are obliged to honor their voluntary legal commitments.⁴³ If these conflict with the ethically rooted security imperatives of liberal societies, then a second kind of ethical foreign policy dilemma emerges—that between *competing ethical requirements*.⁴⁴ In this specific case, a conflict arises between the nuclear-armed democracies' commitment to the disarmament obligations in the NPT and their (mis)understandings of the necessary conditions for securing liberal democracy from outlaw states' nuclear aspirations. If nuclear-armed democracies adhere to their legal commitments absolutely, their security as liberal societies is put at greater risk. Alternately, if they decide to eliminate the risk of outlaw state nuclear aggression, it might result in the sacrifice of their commitments to legal requirements and the rule of law generally. The uncertainties of interpreting the threat environment combined with those of deciding on the appropriate response constitute this type of ethical dilemma. A short history of the NPT regime from its inception to the beginning of the Bush administration is a useful background to relate prior to examining this dilemma of competing ethical requirements.

A summary history of the NPT regime—1968–2001

The United States enjoyed a nuclear monopoly after WW II until 1949. In the next 15 years, the Cold War rivalry between the liberal democratic 'West' and the communist 'East' motivated the spread of nuclear weapons to the former Soviet Union (or Russia), Great Britain, France, and the People's Republic of China.⁴⁵ After China's 1964 nuclear test, the United States and the other NWS realized that they shared a common economic and security interest in containing the nuclear arms race and preventing further nuclear proliferation. Yet, their continued and mutual mistrust, primarily between the liberal democracies and the communist dictatorships, deflated any hope for nuclear abolition at that time.

In 1968, the objective of nuclear arms control was advanced significantly by the creation of the NPT, which went into force in 1970. Under its terms, the five NWS mentioned above were legally permitted to retain their nuclear arsenals while all other state signatories were prohibited from acquiring them. By the early 2000s, all states had joined the NPT except India, Israel, and Pakistan. This arrangement, which William Walker calls 'a managed system of deterrence and a managed system of abstinence', was built on a grand bargain expressed in Article VI of the treaty.⁴⁶ Article VI states that

Each of the parties to the Treaty undertakes to pursue negotiations in good faith relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

According to this article, each NPT member state carried both arms control and disarmament obligations. Unfortunately, it became obvious that the Cold War rivalry would limit the application of Article VI to arms control.⁴⁷ Walker correctly notes that the managed systems of deterrence and abstinence were based on a temporary trust awarded exclusively to the NWS for the purpose of gradually shepherding the international community toward nuclear abolition, which ‘remained the eternal norm, which would eventually displace the provisional norm of non-proliferation’.⁴⁸

The Cold War’s end in the early 1990s dissolved the superpower standoff, and many non-nuclear-weapon states (NNWS), including some US allies, expressed hopes that nuclear abolition could be realized as a large part of a peace dividend.⁴⁹ These hopes were elevated at the 1995 NPT Review Conference in which the NNWS were led to believe that their support for the US-sponsored plan for NPT indefinite renewal would be followed by the NWS’s good faith and collective pursuit of nuclear abolition. This, in effect, was the re-affirmation of the original Article VI grand bargain.⁵⁰

A major reversal occurred, however, in 1998 when India and Pakistan conducted several nuclear tests within weeks of each other.⁵¹ With three additional NWS outside the NPT regime (the other one being Israel), a renewed fear of new proliferation emerged.⁵² The original NWS, and especially the United States, now seemed to face a forced choice. Should they proceed apace with nuclear abolition, or should they retain their arsenals to hedge against the new nuclear threats?

The post-9/11/2001 nuclear order: from non-proliferation to counterproliferation

Paradoxically, the despotic reliance on nuclear weapons to secure liberal democracy not only undermined domestic constitutional checks and balances, due process, and privacy rights but it also undermined foreign policy consistent with the ethical duty of nuclear-armed liberal democracies to honor binding international legal commitments to nuclear disarmament and to the rule of (international) law generally. After 9/11/2001, the Bush administration radically reconstituted US foreign and nuclear weapons policy largely because of their fear of rogue state nuclear proliferation and nuclear terrorism.⁵³ Much of that reconstitution survived into the Obama Presidency, despite Obama’s early rhetorical turn toward nuclear abolition.⁵⁴ For instance, under Obama no progress has been made on core benchmarks of nuclear abolition, such as US Senate ratification of the Comprehensive Test Ban Treaty or the Fissile Materials Cut-Off Treaty. Some modest reductions in nuclear arms have been achieved with the New Strategic Arms Reduction Treaty in 2010.⁵⁵ However, Obama has continued the Bush administration’s incessant drive to prevent Iranian

nuclear breakout and to rollback North Korea's nuclear weapons program. This suggests that the foreign and nuclear policy anchors laid during the Bush administration remain largely in place. The balance of this section will accordingly concentrate on the ethically dilemmatic features of Bush's nuclear-related foreign policy.

The radically reconstituted foreign and nuclear policies under Bush had varied manifestations; but, as William Walker explains, each was anchored on four inter-related assumptions that conflicted strongly with the US commitment to the NPT regime as a 'dynamic instrument of cooperative engagement and innovation . . .'.⁵⁶ The first assumption was that rogue states were not rational actors and therefore could not be deterred by the kind of nuclear or conventional threats that contained the former Soviet Union during the Cold War. Instead, US policy needed to abandon the deterrence of containment and undertake counterproliferation and if necessary preventive war and regime change.⁵⁷ This change of approach amounted to a unilateral and *de facto* revision of the NPT nuclear order without the rightful consent of the other state parties,⁵⁸ which would suggest a subversion of the NPT regime as a whole.⁵⁹

Second, Bush assumed that the necessary level of verification for nuclear arms agreements was impossible to achieve. During the Cold War, the United States and former Soviet Union had adopted verification procedures that helped support the common interests of arms control.⁶⁰ His administration, however, did not trust any rogue state declaration on WMD, and it did not trust the International Atomic Energy Agency (IAEA) as the NPT's investigative and enforcement arm to acquire valid information on rogue state proliferation activities. Certainly, the hostility between the United States and Iran did not dispose the Bush administration to regard any Iranian declaration on nuclear enrichment programs as anything less than a signal of interest in nuclear weapons.⁶¹ Moreover, in the run-up to the Iraq War, the United States refused to believe Iraqi claims that it had no more WMD and it refused to let the IAEA inspectors finish their job.⁶²

Third, Bush assumed that the United Nations Security Council (UNSC) could no longer be expected to act decisively against rogue state threats. His administration believed that some of the other veto-carrying UNSC members—i.e. France, Russia, or China—would not act consistently with resolutions requiring these states to comply with IAEA inspections or to avoid expanding their nuclear enrichment programs. Consequently, Bush decided that the United States would be free to act outside the UNSC with a 'coalition of the willing' or unilaterally, all the while justifying this independent action on the relevant UNSC resolutions. Yet, the choice to act outside the UNSC was itself an inconsistency with the United States' professed regard for international legal order and collective security.

Finally, Bush assumed that the post-9/11 dangers came from WMD generally, and not merely from nuclear weapons. The 2003 Iraq War was based largely on this assumption and on the assumption that Saddam Hussein was irrational and unable to be deterred. And, on the basis of this assumption, Bush expanded US

counterproliferation policy to include threats of nuclear reprisal against prospective WMD attacks of all kinds.⁶³

Beyond the insights Walker offers, it seems that policies made on these four assumptions were undergirded by a guiding fifth assumption which can be found in Rawls's remarks on the need to use nuclear deterrence against outlaw states: i.e. that rogue states constitute a perpetual supreme emergency condition for the United States and its liberal democratic allies. Supreme emergencies permit the suspension of otherwise binding norms of warfare, the foremost of which is a rigorous concern for non-combatant immunity.⁶⁴ This fifth assumption is necessary in order to avoid an interpretive uncertainty that helps constitute this second ethical foreign policy dilemma—i.e. do rogue states actually pose an *imminent* and *existential* threat to liberal democracies?⁶⁵ Without this assumption, the United States would likely have exercised due diligence, permitted the IAEA inspectors to finish their work, and vetted more carefully the repeated claims that al Qaeda and Saddam Hussein's government were linked. However, this due diligence was never afforded,⁶⁶ and it seems unlikely that it is truly exercised with respect to Iranian nuclear pursuits.

If the imminence of rogue state nuclear threats is not indisputable, then the necessity of any particular (nuclear) response is also not indisputable. Yet, the Bush administration ignored these uncertainties and proceeded with policies that produced the kind of negative paradoxical outcomes which indicate an ethical foreign policy dilemma. Thus, armed with the first assumption of actor irrationality, Bush decided that the American and former Soviet mutual vulnerability to nuclear attack, which during the Cold War stabilized superpower deterrence, could no longer apply when facing rogue state nuclear threats. Accordingly, Bush withdrew the United States from the Anti-Ballistic Missile Treaty and began increasing its ballistic missile defense capabilities against the prospect of an Iranian nuclear attack.⁶⁷ Unfortunately, Bush's decision exacerbated tensions with Russia, who believed that the missiles were really meant for them.⁶⁸

Armed with the second assumption, Bush showed no patience for continuing the work of IAEA weapons inspectors during the lead-up to the Iraq War. After Operation Iraqi Freedom began, coalition troops could not find any evidence of WMD. Had the inspections process continued with the respect and commitment it deserved, it is likely that the war would have been delayed or not undertaken at all. Accordingly, the United States could have been saved from major embarrassment and a corresponding erosion of influence in the region.

Finally and most importantly, armed with the assumptions of the supreme emergency condition and the UNSC's unreliability, the Bush administration prosecuted the Iraq War even in the face of opposition by France and Germany. After the relatively rapid overthrow of Saddam Hussein in 2003, the United States and the coalition of the willing became mired in the politics of occupation and insurgency even though Bush had predicted a relatively quick and cheap Iraqi transition to a robust and secure democracy. Despite rhetoric to the contrary, the US withdrawal from Iraq almost a decade later marked one of the most flawed military interventions in post-Cold War history. Thus, the 'sheriff's posse' which carried out

regime change in the name of UNSC resolutions produced greater collective insecurity than had obtained before the operation began.⁶⁹

With respect to the post-9/11 NPT regime, Bush foreign and nuclear policy led to North Korea and Iran intensifying their nuclear pursuits, and accordingly the NWS hardened their resolve to retain their nuclear arsenals indefinitely. According to Walker, the NWS

no longer owed a formal duty to the [nuclear] have-nots to rein in their armament programmes. The have-nots had increased obligations (notably to the Additional Protocol) but no rights, while the haves had rights and few obligations other than to ensure that capabilities did not fall into the hands of rogue actors. *It followed that issues of justice and the principle of reciprocal obligation had lost their relevance and could be drained out of discourses about ordering strategy.*⁷⁰

In this passage, Walker indicates that the structure of legal and ethical obligation was reconstituted by US-led NWS suspension of the pursuit of nuclear abolition. By transforming the NPT regime from a cooperative and expanding pursuit of both arms control and disarmament, the United States had almost unilaterally subverted it into a 'static instrument of disciplinary confinement' which served to harden existing power asymmetries.⁷¹

Walker's analysis is, however, only partly correct. He is correct to suggest that the NPT had been subverted or at least seriously compromised.⁷² By their actions, the U.S. and the other NWS sacrificed the international legal disarmament requirements and the general respect for the rule of international law on the altar of national security. However, he is mistaken that the NWS no longer owed an objective, formal duty to their Article VI commitments. It is important to distinguish between the *belief* that obligations are dissolved from the objective moral *fact* of their dissolution. Without this distinction, it is impossible to hold an actor accountable for their behavior in the face of denials of responsibility. Accordingly, the mistaken belief in the suspension or dissolution of Article VI obligations seems based on an unconventional neoconservative understanding, namely that nuclear abolition itself depends upon passing a 'treaty on general and complete disarmament under strict and effective international control'.⁷³ The conventional view was that nuclear abolition was prior to and independent of any such future treaty.⁷⁴ Evidence that the neoconservative understanding is mistaken comes from, Michael Quinlan, a former non-proliferation official with the British Ministry of Defence:

... [Article VI] does not explicitly call for complete nuclear disarmament, [yet the understanding to that effect] was affirmed unanimously at the 1995 [NPT] review conference, and again- very clearly - at the 2000 conference as part of the programme to which the five NWS pledged themselves politically. ... [Indeed] UK governments have repeatedly, for over twenty years and most recently in the White Paper of December 2006 on the future of UK nuclear-weapon capability, declared their adherence to the ultimate abolitionist goal.⁷⁵

Quinlan's position is consistent with Walker's that nuclear abolition is the 'eternal norm' and that the Bush administration had 'arrogated to itself the right to set

[the duty of reconciliation within the NPT] aside'.⁷⁶ It is difficult to believe that the Bush administration adopted this mistaken belief in the dissolution of their Article VI obligations without knowing that they were transgressing on a range of ethical requirements.

The competing ethical requirements dilemma

The foregoing has supported the claim that the United States' and their allied nuclear-democracies' avoidance of nuclear abolition and the corresponding set of counterproliferation policies against 'rogue' state violated international legal commitments to nuclear abolition and to the general respect for the rule of international law which distinguishes them from outlaw states. However, it still might not be clear how the United States and other nuclear-armed democracies are ensnared in a competing ethical requirements dilemma.

It is important to recall that the 9/11/2001 terrorist attacks had taken the United States and the world by complete surprise. No one could rule out the possibility of nuclear terrorism or nuclear breakout among the 'rogue' states, and no one could know precisely what such events would mean for international politics generally and the security of liberal societies in particular. The uncertainties over these events constituted one part of this dilemma—have they altered the conditions of the NPT enforcement and therefore to the pre-established ethical duty of commitment to the regime? Another customary international legal norm (or on my account, an ethical norm), *rebus sic stantibus*, was at play—i.e. that withdrawal from an international treaty was justified if the conditions of the treaty's implementation had fundamentally changed such that a state's vital interests were endangered. And, grave legal and moral uncertainties would likely ensnare the policy decision process over any set of responses if this interpretive uncertainty could not be resolved.

For this reason, the widespread unease over Indian and Pakistani nuclear proliferation, along with the intensified hostility of many in the Muslim world toward the United States and their liberal democratic allies, seemed to authenticate neoconservative and even liberal fears which found expression in works like Rawls's *LP*. These fears established the perceptual frame from which policy decisions with broad impact would be taken. The apparent psychological need among Bush officials to restore certainty to the meaning of these events and thus to the policymaking process seems to have driven the thinking and response to 9/11/2001 and subsequent events. Nevertheless, this deliberate assuredness of the neoconservative assumptions that Walker describes above masked the depth of the uncertainties that decision makers actually faced, both in the interpretation of outlaw states' actions and in the subsequent appreciation of the appropriateness of various response options.

Therefore, it is reasonable to infer that the Bush administration sought by word and deed to avoid this conflict between competing ethical requirements, which ensnared them and which continues to ensnare the Obama administration. The first part of this dilemma involves the formal requirement on the United States and the

other nuclear-armed democracies to pursue nuclear abolition and the corresponding informal ethical requirement to this treaty and to the rule of international law generally. The second part involves the conflicting requirement of securing liberal democracy against rogue state and nuclear terrorist threats, which also has its formal and informal elements. Formally, the national security imperative is expressed in the US Constitution and, in international law, in Article 51 of the UN Charter. Yet, the informal political and ethical requirement of securing liberal society, the argument for which we've seen in Rawls's *LP*, is conceptually and historically prior to its legal codification. That this kind of ethical foreign policy dilemma continues to ensnare the Obama administration is evident in their oft-repeated discussion of balancing the interests of security with liberty.⁷⁷

CONCLUSION

This article has made two arguments. One is that some essential features of liberal constitutionalism are undermined by a liberal society's indefinite reliance on nuclear deterrence. As Rawls argues in *LP*, the constitutionalist devices of shared powers, checks and balances, public reason, and due process must be secured from the threat of rogue state (nuclear) aggression. The singular requirement to secure liberal constitutionalism generates the first ethical foreign policy dilemma: adopt nuclear deterrence (and nuclear despotism) to scare off rogue states with hostile intent *or* preserve liberal constitutionalism and remain vulnerable to rogue states with nuclear aspirations. Importantly, the dilemma is not avoided by choosing nuclear deterrence, for by succumbing to nuclear despotism, liberal democracies experience the erosion of the very domestic constitutional practices that are meant to be secured. The logic of speed in responding to nuclear aggression eliminates the possibility for constitutionally shared war powers, and the recurring fears of internal subversion or vulnerability lead to aggressive surveillance and police state measures which overwhelm civil liberties.

The second argument is that liberal democratic NPT Article VI commitments to pursue nuclear disarmament, as well as respect for the rule of international law generally, have been undermined by the nuclear-armed democracies' indefinite retention of nuclear weapons. This indicates a conflict between competing ethical requirements. On the one hand, liberal nuclear-armed democracies within the NPT regime are legally and ethically bound to nuclear disarmament and, on the other hand, to secure liberal society from rogue state (nuclear) threats. Since the end of the Cold War, the United States and some other nuclear-armed democracies have maintained that Article VI disarmament obligations are no longer binding. Instead of honoring those obligations, these democracies have transformed the NPT regime from the collective pursuit of nuclear arms control and disarmament to a disciplinary institution in which the nuclear haves can effectively disregard their legal obligations and where the nuclear have-nots are punished if they entertain nuclear aspirations. However, the nuclear-armed democracies are wrong that the duty of nuclear

abolition is objectively dissolved. Rather, they have attempted to evade the dilemma by subverting the NPT regime. Similar to the first argument, then, this choice to retain nuclear arms and transform the NPT regime does not dissolve the dilemma, even though it might be perceived that way by some.

Two implications seem to follow from these arguments. The first is that liberal democracies which eschew nuclear deterrence—i.e. undertake a course of action which the United States, Great Britain, and France have abandoned—would and do not necessarily escape these dilemmas. Such eschewal might preserve for a time the constitutional practices and respect for the rule of international law that are necessary elements of liberal political order. However if Rawls is correct that rogue states have no interest in sustaining a political relationship with their enemies, then a de-nuclearized society of liberal and decent peoples in a post-Hiroshima world is entirely vulnerable to any determined rogue nuclear aspirant. Liberal democracies cannot avoid the decision on how much risk they are willing to assume in order to avoid the path of nuclear despotism.

A second and related implication is that none of the practicable choices available to liberal democracies in a post-Hiroshima world seem free of ethical peril. On the one hand, the erosion of constitutional practices and the withdrawal from international legal commitments is ethically wrong. On the other hand, it is ethically wrong to permit the external overthrow of liberal society by illiberal and nuclear-armed aggressors. It seems to follow from this latter point that it is also ethically wrong to provide liberal society with an insufficient defense against an evolving threat environment. And yet, the defense that has seemed to work so far has involved a violation of international legal and ethical commitments. It is not difficult to conclude that it is unlikely that these dilemmas of the contradictory ethical rule and the formal and informal ethical requirements can be transcended. If they can be, it will require new and insightful political and ethical analysis that can be translated into effective policy action.

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 9. Rawls, *A Theory of Justice*, 42, 72.
 10. Rawls, *The Law of Peoples*, 14, 132–40.
 11. Rawls, *Political Liberalism*, 227–30.
 12. Rawls, *A Theory of Justice*, 194.
 13. *Ibid.*, 197.
 14. Rawls, *The Law of Peoples*, 6.
 15. Immanuel Kant, 'Towards Perpetual Peace', in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (1795; repr., Cambridge, UK: Cambridge University Press, 1996), 311–52.
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20. Rawls, *The Law of Peoples*, 8. For Democratic Peace theory, see Michael W. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', *Philosophy and Public Affairs* 12, no. 3 (Summer 1983): 205–35; Michael W. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs—Part 2', *Philosophy and Public Affairs* 12, no. 4 (Autumn 1983): 323–53; and Bruce Russett et al., 'The Democratic Peace', *International Security* 19, no. 4 (Spring 1995): 164–84.
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26. *Ibid.*, 256.
27. *Ibid.*
28. *Ibid.*, 261; Reg Whitacker, 'Cold War Alchemy: How America, Britain, and Canada Transformed Espionage Into Subversion', *Intelligence and National Security* (2000): 177–210.
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30. This nomenclature is adapted from Sinnott-Armstrong, *Moral Dilemmas*. Sinnott-Armstrong offers a philosophical account of four moral dilemmas, one of which is the contradictory moral rule dilemma. I have retained the substance of his definition of this dilemma, except for the substitution of 'ethical' for 'moral'.
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32. Walzer, *Just and Unjust Wars*, chap. 16.
33. Rawls, *The Law of Peoples*, 99–102.
34. *Ibid.*, 101.
35. Chaim Braun and Christopher F. Chyba, 'Proliferation Rings: New Challenges to the Nuclear Nonproliferation Regime', in *Going Nuclear*, eds. Michael E. Brown et al. (Cambridge, MA: The MIT Press, 2010), 368–412.
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41. *Ibid.*, 198.
42. *Ibid.*, 191–204.
43. David J. Bederman, *International Law Frameworks*. 2nd ed. (New York, NY: Thomson West, 2006), 51.
44. This nomenclature is also an adaptation of the term 'competing moral requirements dilemma' coined by Sinnott-Armstrong in Sinnott-Armstrong, *Moral Dilemmas*. The definition of the adapted term remains substantively the same.
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55. <http://www.hindustantimes.com/world-news/Americas/Obama-announces-nuclear-arms-treat\hich\af31506\dbch\af31505\loch\af31506-y-with-Russia/Article1-523808.aspx> (accessed May 17, 2013).
56. Walker, 'Nuclear Enlightenment and Counter-Enlightenment', 439.
57. Janssen, 'Preventive Defense and Forcible Regime Change', 105–6.
58. Ibid., 111–14.
59. Thomas E. Doyle, II, 'The Moral Implications of the Subversion of the Nonproliferation Treaty Regime', *Ethics and Global Politics* 2, no. 2 (2009): 131–54.
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64. Rawls, *The Law of Peoples*, 99.
65. According to Booth and Wheeler, security dilemmas are one-part dilemma of interpretation and a second-part dilemma of response. See Booth and Wheeler, *Security Dilemma*, 1–10.
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