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Ethics in Public Policy: Three Dilemmas Regarding Issues of Death

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Dr. Jim Bolner
Thesis Advisor
Louisiana State University
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PART I

Introduction

As American lawmakers shape policies that govern the life of our nation, they are often presented with ethical dilemmas, situations in which "good reasons for mutually exclusive alternatives can be cited."[1] Should physician-assisted suicide be legalized? What forms of punishment have a place in our justice system? Should weapons of mass destruction ever be used? In *After Virtue,* Alasdair MacIntyre highlights the struggles such dilemmas can create:

> [T]he rival premises are such that we possess no way of weighing the claims of one as against another. For each premise employs some quite different normative or evaluative concept from the others, so that the claims made upon us are of quite different kinds. . . It is precisely because there is in our society no established way of deciding between these claims that moral argument appears to be necessarily interminable.[2]

Are our arguments over ethical dilemmas interminable? Perhaps, but the fact remains that these seemingly intractable problems often *demand* attention and decision, especially in lawmaking. Even leaving an issue without legislative remedy will have implications for the people, relationships, and institutions that form the identity of our nation. Any examination of this decision-making process must be undertaken with objectivity and consideration for the people the given ethical issues affect.

In this paper, I will examine three ethical issues related to death: assisted suicide, capital punishment, and nuclear weapons policy. I will use philosophical arguments as a starting point for the examination. However, I will not limit my discussion to philosophy because, while two or more sets of philosophical arguments may be reasonable and pertinent to an issue, rarely will they be

equally useful and appropriate in a certain context. Because I am specifically interested in ethical issues in the "context" of American policymaking, I will be considering America's history, how its ideals, mores, and customs have evolved, and what decisions would make sense for the kind of country we are and what we seem to value collectively. This is by no means a comprehensive list of the non-philosophical factors one might consider, but it does include those I believe to be most important, because they are so closely related to philosophy.

In attempting to determine the extent to which the factors I have listed *should* be considered in ethical decision-making, I will first recall the eclectic base of legal thought and tradition drawn upon throughout American history by returning to the early legal philosophies of Cicero, Aquinas, and Hobbes. I could use any number of legal philosophers to accomplish this purpose, but I have selected these three because their ideas about natural law and contract theory have endured in American law from its founding to the present. Also, they best represent the traditions and thoughts that serve as a backdrop for my own ideas about how ethical dilemmas should be treated.

Second, I will look at how the original purposes and functions of law influenced subsequent interpretation of American law. I will look, for example, at the reasoning behind the judgment in *Riggs v. Palmer*, an 1889 New York appellate court case involving a young man who, fearing that he might soon be disinherited, murdered his grandfather and attempted to secure the benefit of the will. The *Riggs* case will serve as one reminder among many of the difficulties presented by codifying and interpreting law.

Third, I will turn to early twentieth century legal philosophers Oliver Wendell Holmes, Benjamin Cardozo, and Roscoe Pound to examine their ideas on the forces which influence lawmakers. I chose these three philosophers because they are among the most American legal

thinkers, and because two of them served on the Supreme Court. Their familiarity with American politics and law makes their ideas especially relevant to my inquiry into ethical issues. I will pay particular attention to Pound's "theory of interests" as a starting point for weighing rational and empirical factors in law and policy development, and I will develop his theory using observations on the tension between rights and utility in policymaking. In the course of my analyses, I hope also to recognize and respond to alternative views, not to assert that my own arguments are beyond reasonable objection, but to explain why I find one set of ideas on a subject more compelling than others for the purpose of American policymaking. I also hope to show that the "good reasons for mutually exclusive alternatives" we encounter in ethical dilemmas do not translate to hopelessness; rather, they require that we objectively and open-mindedly seek the *better* of the good reasons.

Nature and Function of Law

Mulford Sibley once remarked, "Cicero was neither an original nor a particularly profound social and political thinker."[3] And yet it is in Cicero that we find one of the first enunciations of the idea of natural law and also a hint of the contract law to be developed several hundred years later by Hobbes. In setting forth his understanding of law, Cicero said:

> Law is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. . . Law is intelligence. . . Law is a natural force. . . [It] begin[s] with that Supreme Law which had its origins ages before any written law existed or any State had been established.[4]

Similarly, Aquinas later wrote:

> The natural law is a participation of the eternal law. . . and therefore endures without

> change, owing to the unchangeableness and perfection of the Divine Reason, the Author of nature. But the reason of man is changeable and imperfect: wherefore his law is subject to change. Moreover, the natural law contains certain universal precepts, which are everlasting: whereas human law contains certain particular precepts, according to various emergencies.[5]

For Aquinas, natural law is inherent in the understanding and allows rational apprehension of general principles of right and wrong,[6] whereas human law is a more specific and expanded version of natural law, consisting of commands, prohibitions, permissions, and punishments.[7] Aquinas' human laws are always anchored in the rationality of natural law, and they are always framed for the community as a whole. Therefore, they become a mechanism of expression by which a group of people who come together in community can create and maintain the kind of environment that they intend for their society. These laws both bring assurance to the members of a community that they may pursue courses of action which are in keeping with the ideals they set forth for themselves and afford them protection from other actions which are contrary to reason and to their ideals.

But how did this hypothetical community come about? Cicero asked rhetorically, "For to what end were cities and commonwealths established but only that everyone might be safer and securer in the enjoyment of his own?"[8] Hobbes explored the same idea more fully in *Leviathan*, where he discussed the problem of disorder, or potential disorder, in the natural human state. He defined the state of nature as a condition of war, rooted in "three general causes of quarrel: competition, diffidence, and glory," adding:

> In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; . . . no Arts; no Letters; no Society; and

which is worst of all, continual feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.[9]

Due to the excesses of mankind in the state of nature as described by Hobbes, people will join together to form a community. In doing so, they will voluntarily transfer some measure of liberty to a central authority and adopt certain principles of conduct for the sake of protecting themselves in the new social order. Eventually, the community will require a system for lawmaking, and then for administration of the laws to keep order, deal with infringements of law, and restore balance to the parties involved in controversies.

Thus far we have a system of law with two prominent characteristics: it originated in a sense of right and wrong based on the highest reason, and it was formed to govern a group of people chiefly by protecting them, both physically and in the ideals they hold in common. The picture is simple, but confusion and controversy often arise when reason must be applied to solving specific problems.

Law and Legislative Intent

Defining the boundaries of acceptable action within the framework of community becomes particularly complex when those boundaries must be codified into law. Then more new problems ensue as citizens, lawyers, and judges must interpret and apply the written law. The *Riggs* case mentioned above provides a clear illustration of what may happen when a written law comes into conflict with the purpose for which the law was established--protecting the members of the community.

In 1880, Francis B. Palmer made his last will and testament, in which he left a sizable portion

of his estate to his grandson Elmer. Elmer, who was then sixteen years old and lived with his grandfather, was aware of the provisions of the will. Sometime later, Elmer learned of his grandfather's apparent intention to disinherit him by revising the will. Soon thereafter, he murdered his grandfather by poisoning in order "to obtain the speedy enjoyment and immediate possession of his property."[10] One of Elmer's aunts, Mrs. Riggs, sued to prevent the boy from collecting the inheritance. In the end, Elmer was indeed prevented from collecting the portion of the estate left him in his grandfather's will, despite the binding force of the will, which was invoked by the two dissenting judges.

The majority of the court in *Riggs* decided that abiding by the letter of the law would have been counterproductive to justice because such action would allow a lesser moral imperative (upholding the law as written) to override a stronger one (preserving the purpose of law to maintain a safe environment for the citizenry.) In articulating the court's decision and reasoning, Judge Earl advocated an interpretation and application of law guided largely by legislative intent. He wrote:

> It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. . . . What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws.[11]

In contrast, Judge Gray asserted that the defendant had been duly punished for his crime and that the court was not at liberty to increase his punishment by revoking his right to claim the benefits of the will of the deceased. He argued:

> The statutes of this state have prescribed various ways in which a will may be altered or revoked; but the very provision defining the modes of alteration and revocation implies a prohibition of alteration or revocation in any other way. . . I think that a valid will must continue as a will always, unless revoked in the manner provided by the statutes. Mere intention to revoke a will does not have the effect of revocation.[12]

Here we see some of the difficulties which arise once a law is out of the hands of lawmakers and in the hands of the courts for interpretation and administration. These difficulties underscore a dual responsibility on the part of lawmakers and judges. Lawmakers bear the responsibility of thoroughly assessing potential implications for parties affected by the laws they formulate. Courts must not add to or subtract from written law and must, above all, make judgments consistent with the purposes for which law is intended: protecting citizens' physical property and ideals. The type of argument put forward by Judge Gray rebels against these purposes.

Approaches to Policy Decisions

Lawmakers are likely to be most successful in protecting, providing for, and promoting the best interests of the people by treating law not as a purely philosophical or ideological enterprise, but rather as a practical endeavor shaped by an appreciation of the many factors which influence the life of a nation. Former Supreme Court Justice Oliver Wendell Holmes (1841-1935) had a dynamic view

of law which encompassed more than compiled philosophical goals and ideals. He understood law as a living institution which changed constantly according to a nation's experience. He explained in a lecture:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.[13]

He argued that while logic and philosophical analysis form an indispensable *basis* for lawmaking, they can be only one means to a achieving well-defined end. Holmes sought to know the ends of existing laws and the reasons behind them is imperative in both lawmaking and jurisprudence, so that those ends may be evaluated to determine "what is given up to gain them and whether they are worth the price."[14] He explained, "[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[15]

Holmes also suggested that the study of history can help us "get to the bottom of a subject itself"[16] in order to assess the relevance of individual laws over time. However, he in no way advocated a return to some "golden age" in the past. He warned that in looking to the past, "our only interest. . . is the light it sheds on the future."[17] In other words, history can remind us which ideas have worked and not worked, but it should not enslave us to principles no longer relevant to the function of our society. This relationship of past, present, and future is important, because even as Holmes admitted the significant role played by "felt necessities of the time" and "prevalent moral theories" in lawmaking, he emphasized the place and importance of history as well.

Benjamin Cardozo (1870-1938), another former Supreme Court Justice, also acknowledged influences in law other than philosophical argument. He observed, "The directive force of logic does not always exert itself along an unobstructed path."[18] When Cardozo spoke of history, he treated it much like Holmes--as a tool to maintain the vitality of law. He first described the "historical method" of developing and interpreting law, a method which may work independently of philosophy, but often works *within* the method of philosophy. He explained:

> *The tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history.* I do not mean that even then they are always in opposition. . . . Very often, the effect of history is to make the path of logic clear. The directive force of the precedent may be found either in the events that made it what it is, or in some principle which enables us to say of it that it is what it ought to be. Development may involve either an investigation of origins or an effort of pure reason. Both methods have their logic.[19] [emphasis added]

Cardozo went on to mention some other factors which may influence lawmaking decisions, particularly custom. He first called upon custom to "fix the direction of a principle."[20] He identified the function of customs not so much in generating new laws, but as "tests and standards"[21] for measuring the effectiveness of existing laws, and for creating a sense of *boundary* (similar to the role of history) within which those laws are best applied for a given community. In the customs of a society--and by extension in its mores--Cardozo finds points of "interaction between conduct and order, between life and law."[22]

With so many elements working together--or at times in conflict with one another, as may

be the case--Cardozo reminds us that the good of the people is the ultimate aim of all efforts of law. In trying to understand what that "good" might be, he stressed the preeminence of the principles of liberty and equal protection under the law, although he pointed out that we have few steadfast rules to apply to every scenario. Instead, he maintained that "there are chiefly standards and degrees"[23] which come into play when questions regarding negligence, nuisance, civil rights, liberties, and other matters arise. The effects of many socio-economic forces may be incorporated into legal discussion, but the final decision will hinge upon the "comparative importance or value of the social interests that will thereby be promoted or impaired."[24]

Here it is useful to turn to American legal philosopher Roscoe Pound (1885-1972). Where Holmes only affirmed that law must be directed to some purpose, Pound expanded the idea into a method for determining those purposes. He proposed the "theory of interests" as a strategy for evaluating what MacIntyre would identify as "rival premises," defining an "interest" as "a demand or desire which human beings either individually or in groups or in associations or in relations, seek to satisfy, of which, therefore, the ordering of human relations must take account."[25] These interests arise due to the inherent competitiveness among people seeking fulfillment of their desires. Pound suggested that "[a] legal system attains the ends of the legal order (1) by recognizing certain interests, individual, public, and social; (2) by defining the limits within which these interests shall be recognized legally and given effect through legal precepts; and (3) by endeavoring to secure the interests so recognized within the defined limits."[26] He also understood that in order to make use of the theory of interests, some method of valuation must be devised in order to judge the "weight to be accorded in any given case to the practical limitations upon effective legal action."[27] (The *Riggs* case involved this type of recognition and weighing of competing moral and legal claims.)

Moreover, Pound recognized many factors outside of philosophical inquiry which affect the valuation of interests and thus the making of law. He refrained, however, from discussing the possible contributions of each, and so we shift our focus back to Holmes, who discussed some specific non-philosophical interests, beginning with the place of history in the making and administration of law.

With Holmes' and Cardozo's discussions of philosophy, history, and custom in mind, I must now explain how I will assess the "comparative importance" of the philosophical and social forces at work in ethics issues so that I can use Pound's theory of interests effectively. There are many philosophical approaches to ethical dilemmas, but the two primary schools of thought I will use to "weigh interests" are deontology and utilitarianism.

Deontology judges the moral rightness of actions by the motivations behind them, and it presents duty as the highest moral motivation. One tenet of deontology is summarized in Kant's "categorical imperative," which states that every maxim should be subject to universal generalization. In this way, decisions are made independently of individual interests. In addition, the categorical imperative emphasizes that each individual must always be treated as an end and not as a mean's to another's ends. This approach accords certain moral rights to individuals which exist prior to "the common good" and determines ethical rules without focusing on their consequences.

The Declaration of Independence was heavily influenced by John Locke, a proponent of natural rights who proclaimed that all persons have rights to life, liberty, and property. In fact, the Declaration states that governments are instituted for the very purpose of securing these rights. A few years later when the Constitution and Bill of Rights were written, our nation's founders further codified both their purposes in establishing American government and several more specific rights

of American citizens. Their purposes, as listed in the Preamble, were "[to] establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity." In studying nuclear weapons, physician-assisted suicide, and capital punishment, I will return to Constitutional purposes and rights to try to determine their role in addressing these issues. One of the main problems I will address in deontology is that people inevitably disagree on whether or not a given action could be universalized and just what moral rights an individual has and how far they extend.

Utilitarianism posits that right actions always produce the greatest good for the greatest number, with the definitions of "good" varying widely, but often including happiness and well-being. Unlike deontology, utilitarianism judges actions only according to their consequences, with no merit or demerit given for intention or intrinsic moral features of the act. Moreover, the consequences are considered equally for all parties involved. Utilitarianism is often criticized for devaluing the individual, but Ronald Dworkin points out that representative democracies, such as the American system, are by nature utilitarian in many respects. He explains:

> Representative democracy is widely thought to be the institutional structure most suited, in a complex and diverse society, to the identification and achievement of utilitarian policies. It works perfectly at this, for the familiar reason that majoritarianism cannot sufficiently take account of the intensity, as distinct from the number, of particular preferences, and because techniques of political persuasion, backed by money, may corrupt the accuracy with which votes represent the genuine preferences of those who have voted. Nevertheless, democracy seems to enforce utilitarianism more satisfactorily, in spite of these imperfections, than any alternative

general political scheme would.[28]

Whether or not American democracy is "majoritarian" could be debated. Certainly we have preserved several structures and processes that attempt to diffuse strict majoritarianism, such as the Electoral College, the splitting of Congressional bodies so that the Senate is not population-based, and the elaborate set of checks and balances among the three branches of government. However, many (if not most) elections and votes taken, whether they are on a local level, in Congress, or in the Supreme Court, generally operate on a "majority rules" basis.

Dworkin's observations on utilitarianism serve as a reminder that it is not impossible for one system to draw from two seemingly incompatible philosophies. Deontology and utilitarianism begin with different premises and end with different conclusions. However, if we see deontology as aligned with the idea of individual rights and utilitarianism as aligned with the idea of majoritarianism, it is easy to see how both philosophies are imbedded in American legislative and judicial processes.

PART II

Nuclear Weapons

Of the three ethical dilemmas I will address, nuclear weapons use is the one most constrained by the state of affairs in international law. I will begin by tracking the dynamic attempts to control nuclear weapons in the international community, citing the treaties, customs, general principles, and court cases which have been relevant to nuclear weapons regulation over the years. Tracing this historical development is crucial because the actual and assumed consent involved in the four above

categories is binding upon states in international law and severely limits the occasions for legal use of nuclear weapons by states. Finally, I will look at the "loopholes" which remain for legal use of nuclear weapons, as well as the looming dangers of *illegal* use of nuclear weapons. In all of my observations and arguments, I will be concerned with America's initiation of and responses to the use of nuclear weapons. I will not include as part of my inquiry the role of the United States in regional conflicts such as India and Pakistan, Israel and its neighbors, or North and South Korea. While the possibility of U.S. participation in regional conflicts is real, it would be difficult to make generalizations about that involvement in the abstract with no detailed knowledge of the circumstances or efforts of the United Nations. In addition, the immediate likelihood that U.S. involvement in regional conflicts would take the form of nuclear weapons use is slim.

Controversy has surrounded the regulation of nuclear weapons since their inception and continues to escalate more than fifty years after the U.S. bombings of Hiroshima and Nagasaki. The controversy began with disagreement over the applicability of the Laws of War to nuclear weapons, because nuclear weapons did not exist during the 1920s when the Laws of War were formulated. However, the controversy extends to several different issues, including self-defense and self-preservation of nations, environmental protection, and human rights. Amidst the discussions and debates over nuclear weaponry, humanitarian groups are placing increasing pressure on world leaders to take definitive steps toward complete nuclear disarmament. However, due to the complexity of nuclear arms issues and the delicate legal and political maneuvering which accompanies them, progress toward nuclear disarmament has been slow and erratic.

To date, the nuclear powers--the U.S., Russia, France, Britain, and China--have conducted well over 2,000 nuclear tests and possess over 20,000 nuclear weapons.[29] The first and only use of

nuclear weapons occurred in 1945 when the U.S. dropped atomic bombs on Hiroshima and Nagasaki. These bombs caused a total of 130,000-145,000 deaths immediately by heat and blast, and their effects are still felt through radiation-related health problems and deaths.[30] In 1963, five Japanese citizens brought suit in the Tokyo District Court against the Japanese government in the *Shimoda v. Japan* case. These citizens attempted to hold the Japanese government liable for injuries they sustained in the Hiroshima and Nagasaki bombings. Their claims were refused by the court due to the fact that "individual citizens, in the absence of treaty provisions, have no standing under international law"[31] and, therefore, may not be awarded reparations. Interestingly, the Court *did* accept the plaintiffs' assertion that the dropping of atomic bombs violated international law in two respects:

- "an indiscriminate bombardment of undefended cities far beyond the requirements of destroying military objectives within those cities," and
- as a use of "weapons which give rise to 'unnecessary ailments' to enemy personnel."[32]

At around the same time the Tokyo District Court heard the *Shimoda* case, the Partial Test Ban (PTB) Treaty was signed and entered into force. This treaty provided that nuclear testing would be prohibited in the oceans, the atmosphere, and in outer space. The PTB Treaty was brought about largely by intense pressure from concerned citizens worldwide, including Linus Pauling and over 9,000 other scientists who personally petitioned the UN Secretary General for a test ban treaty. However, the PTB Treaty failed to stop or even reduce nuclear testing, despite its language directed to that end. Instead, it simply caused the tests to be moved underground and resumed.[33]

In 1968, five years after the signing of the PTB Treaty, the Non-Proliferation Treaty (NPT)

was also signed. This treaty was considered a major milestone by proponents of nuclear disarmament. As of the 1995 indefinite extension of the NPT, the agreement had been signed by 182 states. The main goals of the NPT were twofold:

- to prevent nuclear weapons states from spreading nuclear weapons and weapons-grade materials to non-nuclear weapons states, and
- to prohibit non-nuclear weapons states from receiving, manufacturing, or developing nuclear weapons.

The non-nuclear weapons states were dissatisfied with these requirements and negotiated two modifications--one allowing development of nuclear weapons for peaceful purposes, the other attempting to eliminate the "two-tier structure of nuclear 'haves' and 'have-nots'."[34] From these negotiations came Article VI, generally regarded as the most important portion of the treaty: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete nuclear disarmament under strict and effective international control."[35] The NPT has had limited effect because certain key states, including China, France, India, Pakistan, and South Africa, refused to sign.[36] In addition, neither this treaty nor the PTB Treaty, both of which were aimed at gradually reining in and eliminating nuclear weapons possession and testing, resulted in significant progress toward disarmament in the following two decades. Not until a UN Advisory Opinion in 1996 would the NPT return to prominence in furthering nuclear disarmament goals.

During the 1970s, no new nuclear weapons treaties were signed, and the only international court cases involving nuclear capabilities involved Australia's and the Netherlands's disputes with

France over nuclear weapons tests conducted in the South Pacific. Likewise, the 1980s held no meaningful breakthroughs in nuclear weapons policy. However, a series of nuclear accidents and near-accidents caused an upsurge of humanitarian concern and a renewed push toward the goal of nuclear disarmament. The worst and most memorable nuclear devastation since Hiroshima and Nagasaki occurred in 1986 at the Ukrainian nuclear power plant Chernobyl. A nuclear reactor exploded, blew off its 2,000-ton lid, and released approximately 50 tons of radioactive material (about ten times the amount released at Hiroshima.)[37] Although thirty-two workers at the plant were the only immediate deaths resulting from Chernobyl, estimates of subsequent deaths attributable to the disaster run into the tens of thousands. An additional 375,000 people had to be relocated, and hundreds of thousands still live in contaminated areas, where radiation levels have grown higher due to radiation entering the soil and food chain.[38] Furthermore, countless health problems have plagued those who were exposed to the excessive amounts of radiation released at Chernobyl. Some of the maladies observed include Acute Radiation Syndrome (characterized by diarrhea, vomiting, fever, and erythema), low white blood cell counts and bone marrow damage, radiation burns, gastrointestinal syndrome, greater than normal psychological distress, and elevated occurrences of thyroid cancers, especially in Ukrainian children.[39] The world continues to be witness to the extreme destruction unique to nuclear energy as it afflicts victims of Chernobyl twelve years after the accident. As a result, the international community has given greater attention to the environmental and human rights aspects of nuclear weapons containment. It is perhaps this attention which brought about such immense activity in the 1990s in the realm of nuclear weapons.

Early in the 1990s, the U.S. and Russia began Strategic Arms Reduction Talks, which resulted in the START I and II Treaties. These two treaties, the second of which has not yet been

ratified by the Russian Duma, together call for a two-thirds reduction in the nuclear stockpiles of both states.[40] David Krieger of the Nuclear Age Peace Foundation notes, however, that even if the Russians do sign the START II treaty by the 1997 deadline, "there will still be as many deployed strategic nuclear weapons in the arsenals of the two major nuclear weapons states as there were when the NPT was signed in 1968. This has led many of the non-aligned states to question the sincerity and good faith of the nuclear weapons states in fulfilling their Article VI promises."[41] Meanwhile, START III discussions between Presidents Clinton and Yeltsin aim to further reduce nuclear arsenals incrementally through the year 2007.

Nineteen ninety-six proved to be a landmark year for nuclear weapons control activities. In January, the French halted their nuclear tests in the South Pacific after six of eight had been completed. In June, Ukraine completed a Trilateral Statement with the U.S. and Russia declaring its nuclear-free status. Ukraine cited the devastation of the Chernobyl incident as an impetus not to station, produce, or obtain nuclear weapons. It also announced its removal of strategic nuclear weapons to the Russian Federation for destruction.[42] In July, the ICJ handed down an Advisory Opinion on the legality of nuclear weapons, and in September states began to sign the long-awaited Comprehensive Test Ban Treaty.

The 1996 ICJ Advisory Opinion came about because of two requests for Advisory Opinions. The first, submitted in 1993 by the World Health Organization, asked, "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO constitution?"[43] One year later, the UN General Assembly submitted a similar request, asking, "Would the threat or use of nuclear weapons in any circumstance be permitted under international law?"[44] In 1996, the ICJ

declined to answer the WHO's request because it fell outside the scope of the organization's activities. However, it accepted the Assembly's request and presented its thirty-seven-page Opinion on July 8, 1996.

In researching the Assembly's question, the Court first identified three areas of inquiry most likely to expedite their response: UN Charter provisions related to threats or use of force, international humanitarian law applicable in armed conflicts and the law of neutrality, and treaties on nuclear weapons. The UN Charter has three relevant Articles on the use of force. Article 2 contains a general prohibition on the use of force, Article 51 makes allowances for the use of force as a self-defense measure, and Article 42 authorizes the Security Council to use military force in certain circumstances. None of the three Articles mentions *specific* types of weapons or uses of force, so the ICJ took them to apply to all weapons and uses of force. The Court also stated that these provisions of the Charter do not lend legality to weapons made illegal through treaty or custom. It added, "Whatever the means of force used in self-defense, the dual condition of necessity and proportionality and the law applicable in armed conflict apply, including the very nature of nuclear weapons and the profound risks associated with their use."[45]

The Court next proceeded to examine treaty law and customary international law. It decided that any pronouncement of the illegality of nuclear weapons would have to come from a direct prohibition of some kind, and not merely from an absence of authorization to use them.[46] Accordingly, the Court found no treaties on nuclear weapons which contained a general prohibition on their use. Likewise, it found that neither non-use by states nor General Assembly resolutions dealing with nuclear weapons constituted a definite prohibition by general principle, despite their collective indication of a desire in the international community to take steps toward nuclear

disarmament.[47]

In examining the principles and rules of international humanitarian law applicable in armed conflict and the law of neutrality, the Court drew from several sources, including the 1899 Hague Conventions, the 1907 Hague Regulations, and the 1949 Geneva Conventions.[48] The Court recognized in these sources two basic principles that must be observed by all states, *regardless* of whether or not they have ratified the conventions that contain them:

- the protection of the civilian population and civilian objects and the prohibition of the use of weapons incapable of distinguishing between combatants and non-combatants, and
- a prohibition on causing unnecessary suffering to combatants by using certain weapons.[49]

Additionally, they stated that the laws of neutrality apply to all armed conflicts and to all weapons. Unfortunately, the laws of neutrality are so vague and controversial that few states heed them in actual wartime situations.

Based upon their findings, the ICJ determined that threats or use of nuclear weapons would be illegal if inconsistent with the fundamental humanitarian principles listed above and in any other circumstance besides self-defense when "the very survival of a State would be at stake."[50] This pronouncement prompted David Krieger to question the practical application of the ICJ's guidelines. First, who qualifies to decide whether or not a state's survival is at stake, and what criteria will they use in making this determination? Second, do the extreme circumstances under which nuclear weapons use is allowed "trump" international humanitarian law, or vice versa?[51] It is just such ambiguities which leave portions of the Advisory Opinion open to exploitation by states acting in

their own self-interest.

The final and most compelling issue the ICJ considered was the obligation of nation-states to pursue nuclear disarmament. It recognized that all 182 states who signed the Non-Proliferation Treaty--"the vast majority of the international community"[52]-- were obliged not only to pursue but also to *conclude* negotiations on disarmament in good faith. In fact, the Court pronounced that the stability of international law and the "international order which it is intended to govern"[53] depend on states' ability to reconcile differing views of the legal status of nuclear weapons.

Essentially, the ICJ did not render a definitive opinion because it found the law too vague. Instead, it gathered all the applicable laws and other relevant sources for consideration, including humanitarian laws and laws related to armed conflict. The Court split seven-seven before the President's tie-breaking vote on whether even to declare the threat or use of nuclear weapons "generally contrary"[54] to international law. Because of the Court's ambivalence, coupled with its suggestion that resolution in the matter of nuclear weapons would most likely occur by political compromise, it opened itself to antagonism. Critics argued that the inaction of the Court reveals its weakness--the reluctance to explicitly define its positions--which in turn undermines the purpose and utility of the Court. Judge Vereshchetin defended the Court, however, explaining that it ought not attempt to "improve the law by judicial legislation" when laws related to the issue at hand are absent or "inconclusive."[55]

Although Advisory Opinions issued by the ICJ carry no binding legal effect, they are nevertheless pronouncements by the highest and most respected court in world. In addition, the Opinions of the Court give a clear indication of how it would be inclined to rule in the event that a case related to the Opinion is brought to it in the future. Consequently, both legal scholars and

political leaders emphasize the broad implications and compelling nature of ICJ Advisory Opinions. The nuclear weapons Opinion in particular drew immense attention worldwide. During the time the ICJ was deliberating the Assembly's request, over twenty UN member states gave testimony to contribute to the forthcoming Opinion. The *New York Times* reported at that time that the international community was "split between nations that either have nuclear weapons or come under the protection of the so-called nuclear umbrella, and those that do not." Predictably, the non-nuclear weapons states argued for outlawing nuclear weapons, while the nuclear weapons states responded that nuclear weapons are "vital for global security."[56]

Despite these sharp divisions over nuclear weapons issues, nation-states were able to complete a comprehensive test ban treaty, another goal which has received considerable attention in the international community. This type of treaty has long been heralded as the all-important first step towards nuclear disarmament, and its completion marks the end of years of discussions on the subject. In 1991, the United States, the United Kingdom, the Soviet Union, and France agreed to a self-imposed moratorium on nuclear weapons testing. In 1995, Japan and China resumed testing, but later that year France, the U.S., and the U.K. agreed to a "zero-yield" comprehensive test ban treaty. Just after the ICJ addressed nuclear weapons issues in its Advisory Opinion, the General Assembly approved the Comprehensive Test Ban Treaty by a vote of 158-3, and the treaty was opened for signatures in New York on September 24, 1996.[57] The treaty would theoretically prohibit all nuclear testing, but it is unlikely to take effect anytime in the foreseeable future. India--one of the forty-four nuclear weapons states which must sign for the treaty to go into effect--has refused to sign the CTBT in its current form.[58] In addition, the U.S., which signed the treaty immediately, has nevertheless undertaken a series of "sub-critical" tests, which it says does not violate the CTBT

provisions.[59] By taking this step, the U.S. has set a precedent of questionable integrity, a precedent which effectively advocates bypassing the spirit of the treaty when it is convenient to do so.

In assessing worldwide progress toward disarmament, it is clear that the past decade has brought nuclear weapons issues to the forefront of the moral, political, and legal scenes. What is unclear is whether states will ever be willing to unify and submit themselves unconditionally to a program which would strip them of their ability to deter assaults on their sovereignty through nuclear weapons. In fact, complete nuclear disarmament may not be the most logical step for the international community. Even if nuclear weapons should not be used, a complete disarmament "in good faith" could only encourage outlaw states (who do not act in good faith) to capitalize on the vulnerability of a disarmed international community. The threat of equal ability to retaliate is probably one of the best deterrents of actual nuclear weapons use. Furthermore, this balance of nuclear capabilities, along with the state of international affairs and agreements, makes full-scale nuclear warfare less likely. Limited nuclear warfare, however, remains a stronger possibility, especially between the United States and Iraq.

Clearly, history and customs related to warfare will govern any future use of nuclear weapons. States are bound by the treaties and customs they accept, and even the states which do not express consent in some circumstances risk exposing themselves to action by the United Nations if they violate well-established norms or practices commonly held among the nations of the world. With political and legal issues aside, how do deontology and utilitarianism speak to the ideological aspects of the nuclear weapons use?

The competing interests at work in wartime scenarios are difficult to weigh because they involve conflicting rights claims, most notably the right to human life. The Declaration of

Independence cites rights to life and liberty for every person. Of course, the foremost claim to those rights is for the Americans for whom the Declaration was written. The fact remains, however, that Americans recognize human rights for everyone. Is there a point at which people effectively forfeit the right to life? One might argue that the citizens of an offending state give tacit if not explicit approval of any aggression by their governments and thus forfeit the defending states' usual duty to respect and preserve their lives. But if a state's government were such that these citizens lacked the power or the voice to effectively oppose aggression, how could the defending state retaliate without affecting the innocent?

First, the defending state would have to consider how to differentiate between those who supported their government's aggression and those who did not. Second, it would have to keep in mind that any action must be susceptible to generalization for all similar circumstances. The first consideration is simpler in conventional warfare than in nuclear warfare. The types of confrontation in conventional warfare usually target armies and other designated combatants who represent "the aggressor." With nuclear warfare, on the other hand, it is more difficult to determine exactly who will be affected, due to the uncertainties of atmospheric conditions and locations of civilians. Even if nuclear strikes are strategically planned to target military and defense-related facilities, the actual outcome is not as precisely calculable as it would be with conventional weapons. For these reasons, deontology must reject nuclear weapons use.

Could utilitarianism validate any uses of nuclear weapons? The value of human life dictates that we be as careful, conservative, and just as possible in our taking of human life, avoiding it altogether when possible. Since the primary duty of American government is to protect the interests of its own citizens, the tasks of considering "the greatest good for the greatest number" and

considering all parties equally, as required by utilitarianism, may prove difficult. But if we think about human lives as objectively as possible, we may find weak justification for at least two uses of nuclear weapons:

- Occasions of self-defense, when refraining from nuclear weapons use would cause protracted military struggle such that the loss of life would be, by reasonable estimate, greater in conventional warfare than in nuclear warfare.
- When a serious threat of all-out nuclear holocaust generated by an outlaw state or states is present.

In these situations the citizens of the aggressor state do not forfeit the right to life. Instead, utilitarian considerations override deontological ones, in that peace and well-being around the world might be best preserved through the use of nuclear weapons. It is difficult to imagine the specifics of a situation in which these allowances might be legitimately made; however, it is precisely this lack of foresight which points to the need to preserve some nuclear capabilities. In addition, because human life is valued fundamentally and above all other rights, other interests such as economic concerns could never override the life rights of the aggressor state's citizens.

President Truman undoubtedly considered the first rationale above when he dropped nuclear bombs on Hiroshima and Nagasaki, but his action may have been both premature and in violation of the principles of necessity and proportionality. Could he not have demonstrated his seriousness about ending the war through any necessary means by, for example, dropping a bomb in the ocean as a visible warning? The ultimate goal of the defending state is to protect and provide for its citizens by overcoming aggression which threatens them. Sometimes it is a nation as a whole, and other times only an unjust government, which causes the threat. In all cases, every party has the duty

to use force as a last-resort measure, especially the unbridled power of nuclear force.

Physician-Assisted Suicide

The competing interests in physician-assisted suicide are much different from those in nuclear weapons. In warfare, the main concern is sparing innocent life, whereas in physician-assisted suicide, the main concern is whether or not doctors should be allowed (or even compelled) to help end a life upon a person's request. I will be discussing the type of assisted suicide often referred to as voluntary active euthanasia. My discussion will not involve withdrawing or withholding food, hydration, or medical treatment from patients in a coma or persistent vegetative state (PVS), or from patients who are brain dead or mentally incapacitated. I will look only at those patients who are mentally competent and aware, terminally ill or in chronic acute pain, and have requested aid in dying.

Many states have had laws prohibiting assisted suicide for well over 100 years, and these laws were rarely questioned before 1937, when The National Society for the Legalization of Euthanasia (NSLE) was founded.[60] This society has operated under a variety of names (most recently Choice in Dying, Inc.) and continues to be active in promoting aid-in-dying issues. In 1975, the debate over assisted suicide became more widespread after a British man named Derek Humphry published *Jean's Way*, a book detailing how he helped his wife, a breast cancer patient, commit suicide. Then, in 1980, Humphry moved to the U.S. with his second wife Ann and founded the Hemlock Society, "an organization committed to the legalization of assisted suicide."[61] In 1991, Humphry published another controversial book, *Final Exit.* This "cookbook on how to take your own life"[62] soon became a New York Times No.1 best-selling advice book.

In the meantime, Michigan doctor Jack Kevorkian entered the public eye in 1990 after reports

surfaced on the first of dozens of suicides he would eventually assist. Despite numerous arrests, three jury trials, court injunctions barring him from assisting any future suicides, and the revocation of his medical license, Kevorkian has never been convicted of a crime and continues to assist in suicides, some of which do not involve terminally ill patients. His legal battles have polarized Americans throughout the 1990s, contributing to extensive discussion of assisted suicide issues, as well as several legislative and judicial battles (discussed below).

Another early contributor to the swarm of assisted suicide activity was New York doctor Timothy Quill. Quill published an article in the *New England Journal of Medicine* in 1991 explaining the case of his cancer patient "Diane," for whom he prescribed a lethal dose of barbiturates to aid her in suicide.[63] He was not sanctioned for this action, and the responses of the medical community and the general public were split.

Kevorkian's and Quill's home states of Michigan and New York, as well as Washington, Oregon, and California, have generated most of the legislative activity and judicial decisions which have punctuated the discussion of assisted suicide in America. In November of 1991, Washington voters rejected Initiative 119, a proposition which would have legalized assisted suicide, by a 54% to 46% margin. One year later, California voters rejected a similar proposal by the same margin.[64] One month after the California vote, Michigan Governor John Engler signed into law a measure establishing a commission to study assisted suicide and making assisted suicide a felony. The Michigan legislature had been considering assisted suicide bills since June of 1990, but the legislation was not approved until shortly after Oakland County Circuit Judge David Breck dismissed murder charges against Dr. Kevorkian on the grounds "that there is no law against assisted suicide and that patients have a right to request such assistance."[65] On November 8, 1994, Oregon

became the only state to approve an assisted suicide measure by voter initiative (by only a 51% to 49% margin), but a series of legal disputes delayed the first use of the measure until March 24, 1998. At that time, a woman in her eighties who had suffered from breast cancer for twenty years, ingested a lethal dose of barbiturates prescribed by a doctor pursuant to the 1994 law.[66]

Several judicial battles preceded the first use of Oregon's assisted suicide measure. In Michigan, lower courts cycled through numerous decisions alternately striking down and reinstating the Michigan assisted suicide ban, the U.S. Supreme Court finally settled the matter in 1995 by denying two appeals of Michigan Supreme Court decisions. One appeal was filed by Jack Kevorkian, who contested a decision denying that there is a constitutional right to assisted suicide. The other appeal was filed by the American Civil Liberties Union, which contested a decision that 1992 Michigan law was constitutionally valid.[67] Furthermore, the U.S. Supreme Court in 1996 "let stand without comment a 1991 Michigan court order that bars Kevorkian from helping people commit suicide."[68] Currently, assisted suicide in Michigan can only be prosecuted as a felony under common law, as legislators failed to make the ban on assisted suicide indefinite after the original ban expired in November of 1995.[69]

District Court rulings also struck down Washington and New York state laws against assisted suicide on constitutional grounds, prompting a U.S. Supreme Court review of both cases. The Court unanimously ruled on June 26, 1997, that prohibitions against assisted suicide do not violate the Fourteenth Amendment of the Constitution. Chief Justice Rehnquist, in expressing the Court's opinion, wrote:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint... But we 'have always

> been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open ended.' Collins, 503 U.S., at 125. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. . . Throughout the nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.[70]

And so let us look at the continuing debate over assisted suicide and the arguments presented in favor and in opposition.

The two principles weighing most heavily in favor of legalizing physician-assisted suicide are compassion and personal autonomy, both of which have always been highly valued in American society. Our collective compassion for and desire to aid the sick, elderly, and dying are manifest in every facet of American life: government programs like Social Security, Medicare, Home Health Care, and the Charity Hospitals system, numerous volunteer and social service agencies like the Red Cross, and political action groups like the American Association of Retired Persons. In addition, we have devoted billions of dollars and countless hours to medical research aimed at curing and controlling diseases such as AIDS, cancer, Alz-Heimers, and heart disease. Our high regard for personal autonomy is equally manifest. The idea that all Americans should be allowed to control their own lives as long as they do no malicious harm to others is enshrined not only in the founding documents and laws of our nation, but in the conscience of its citizens. Most arguments in favor of physician-assisted suicide cite our appreciation for compassion and respect for autonomy as evidence

that we should allow physicians to help their patients with terminal illnesses or uncontrollable pain die, most often by prescribing lethal doses of narcotics.

The overwhelming misery of many sick and dying patients is real and not to be dismissed. These patients struggle with the loss of dignity prolonged illness often brings, the physical and psychological suffering shared with family members and friends, and the financial strains of extensive medical treatment. Protecting and promoting personal liberty and dignity, and making the sick and dying as comfortable as possible should be an American priority. However, legalizing physician-assisted suicide may not be the best way to accomplish those goals. It would be difficult to identify any issues bearing on assisted suicide which are not repeated again and again throughout available literature on the subject. The arguments that have been considered are private and social, practical and ideological, legal and medical, and they are identified by people of all professions and world-views. Taken individually, perhaps few if any of the factors I will cite would outweigh the interests set forth by assisted suicide advocates. Taken as a whole, however, they underscore serious problems and risks the legalization of physician-assisted suicide carries.

The first problem with physician-assisted suicide is its incompatibility with the principles of medical practice. Doctors and nurses are called upon to heal their patients or, when this is impossible, to provide palliative care. They are trained to do everything within the bounds of medical technology to sustain their patients' lives and their quality of life. Despite many patients' greater awareness of medical science in recent years because of media coverage, educational efforts, and a less "paternalistic" attitude on the part of doctors, most patients still trust their doctors implicitly to make suggestions, explain options, and guide their medical decisions. What kind of message are doctors sending when they act as both the individual who is trusted to treat and heal and

also the one who expresses a willingness to make a hastened death possible? Patients may feel relieved and appreciative, but they may also feel confused and bewildered, wondering if illness has devalued their lives, making them more burdensome than meaningful. They may wonder if the doctor was merely stating an *option*, or if he or she was making a *suggestion*. Many doctors want the opportunity to assist their patients in dying quickly and with dignity, and many patients want to be able to make that request. However, it is interesting to note that "the American Medical Association, the American Geriatrics Society, the British Medical Association, the Christian Medical and Dental Society, many other professional organizations, and a large majority of physicians strongly oppose the legalization of. . . physician-assisted suicide."[71]

The question the U.S. Supreme Court addressed in 1997 was whether we have a "right to die." Long before the Court denied the existence of such a right, many people were troubled by the terminology of a "right" being linked to death. The term "right" is often used as a polarizing word which obscures the true issues in a debate rather than illuminating them. It often seems that people feel they have a "right" to almost anything they strongly desire. What they actually have is probably more like an interest, as described by Pound, which deserves consideration but not necessarily the status of a "right," which implies a responsibility incumbent upon others to recognize and accommodate that right. Handicapped individuals, for example, have a right under the Americans with Disabilities Act to certain means of accessing public buildings, and building contractors are responsible for accommodating that right. Accused persons have constitutional rights to a variety of protections such as those against unwarranted search and seizure, compelled self-incrimination, and cruel punishments, and the court system is responsible for accommodating those rights. If the right to die does exist, who incurs the responsibility for accommodating that right? If it is the

attending physician, there are many who would raise serious objections to acquiring such a responsibility. Arthur Caplan also made an interesting point in a 1996 interview with *New York Times Magazine* in which he was called on to explain several current medical ethics controversies. He observed, "We still don't have a national system of health care. To have the right to die before you have the right to treatment seems a little bit backward."[72]

Another troublesome matter is the *reasoning* behind patients' requests for aid in dying. First of all, if patients consider suicide a viable option, why do they feel the need to enlist a physician? Many people have already pointed out the obvious fact that suicide is usually easily carried out on one's own. In fact, it gets easier all the time with suicide support organizations like the Hemlock Society and books like Humphry's *Final Exit.* Several motivations have been identified for this solicitation of help by patients. Some patients may seek affirmation from their doctors regarding the moral aspects of assisted suicide, or release from moral culpability for having carried out the action alone. Others are depressed or overwhelmed by endless pain and financial concerns. (Many who responded to the first use of Oregon's assisted suicide law were saddened at the patient's statement that she was looking forward to being "relieved of all the stress I have."[73] It was not the *pain* she cited, but the *stress*, an almost sure sign of depression.) Still others may feel that if the option is open, assisted suicide is the best choice for the sake of their families.

None of these motivations seems a good justification for legalizing physician-assisted suicide. If a patient is uncertain about or uncomfortable with the moral implications of suicide, psychological or pastoral counseling seems preferable to providing a second party to "absorb" the patient's shame or guilt. The same is true for patients who are depressed, suffering, or financially strained. Would financial planning institutions counseling people in financial crisis or psychiatrists

counseling people with depression ever concede that their clients' lives were of no worth and offer to help them commit suicide? Of course not. And we should not expect doctors affirm that their distraught patients' lives or final days are worthless either. Kathleen Foley, a neurologist and pain specialist at Memorial Sloan-Kettering Cancer Center in New York, is one advocate of finding better methods of pain management. She says that even the daunting pain of cancer can usually be controlled, but she adds:

> It is not managed well because we doctors don't have time for the pain. Even oncology residents and fellows are poorly trained. . . It's a well-documented fact that those asking for assisted suicide almost always change their mind once we have the pain under control. We undermedicate terribly in American medicine. . . but even when we do prescribe, only 10 to 20 percent of pharmacies in New York carry drugs like morphine, hydromorphine, and methadone. The starting point I take with the doctors who work with me on Memorial's pain service is: if patients say they are hurting, believe them. And do something about it.[74]

Furthermore, Foley points out the importance of helping patients cope with emotional issues, such as the anticipation of pain and the fear that accompanies it. In the *Washington* opinion, Chief Justice Rehnquist expressed a similar sentiment regarding responses to the emotional issues behind requests for aid in dying:

> In almost every State--indeed, in almost every western democracy--it is a crime to assist a suicide. The States' assisted suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. . .[Washington's] assisted suicide ban reflects and

reinforces its policy that the lives of the terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's.

The final difficulties I will discuss involve "slippery slope" arguments regarding the regulation and enforcement of potential laws related to physician-assisted suicide. My main interest is in discerning how we would go on to steps two and three of Pound's theory, "defining the limits within which these interests shall be recognized legally" and "endeavoring to secure the interests so recognized within the defined limits," if we looked at all the interests present in this practice and decided that arguments in favor outweighed arguments against. From a deontological perspective, the question is whether or not physician-assisted suicide is a practice that, if universalized through policy, would erode patient rights. From a utilitarian perspective, the question is whether or not the consequences of legalizing assisted suicide would bring the greatest good for all Americans. These two concerns are closely related and widely debated.

The arguments I will highlight here are not an exhaustive compilation, but they are representative of the lines of reasoning on both sides of the issue. They include both *speculations* on the effects of legalizing assisted suicide and *observations* of the assisted suicide practices in the Netherlands, the only country in which physician-assisted suicide is currently not prosecuted if certain guidelines are followed.

Many opponents of physician-assisted suicide argue less about the moral aspects of the practice than the doors its legalization might open. They are hesitant to implement a policy which they view as nearly impossible to monitor and likely to expand beyond originally-intended purposes.

For example, they fear that approval of measures to allow voluntary active physician-assisted suicide for competent patients who are terminally ill or suffering with chronic acute pain might easily lead to 1) cases of "proxy" decisions or pressuring of patients by doctors or family members, 2) assisted suicide for patients with treatable conditions, or 3) involuntary euthanasia of incompetent or otherwise incapacitated patients. They also argue that vulnerable groups such as the disabled, elderly, dying, and mentally ill would become much more difficult to protect, and that improvements in their care would become a lower priority. Chief Justice Rehnquist, quoting a 1973 Supreme Court opinion, wrote, "Each step, when taken, appear[s] a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance."[75]

The following are the seven Royal Dutch Medical Association guidelines which, if followed, will not result in prosecution of the assisting doctor:

1. Only a physician may implement requests for euthanasia
2. Requests must be made by competent patients
3. Patients' decisions must be free of doubt, well documented and repeated
4. The physician must consult another independent physician
5. A determination must be made that no one pressured patients into their decisions
6. The patient must have unrelievable suffering without prospect of change
7. No measures can be available that could improve the patient's condition or render his or her suffering bearable.[76]

Psychiatrist Herbert Hendin is one of the several doctors and scholars who have studied and written about these guidelines and the actual physician-assisted suicide practices in the Dutch medical

community. Hendin had originally hoped that his 1993 travels to the Netherlands would shed some light on ways Americans could adapt the Dutch system for our own consent to or legalization of assisted suicide.[77] He returned to America disillusioned with his findings. Hendin's experiences essentially reiterated findings of the 1991 Dutch government's Remmelink Commission, which uncovered thousands of cases of abuse and negligence in physician-assisted suicide practices there.[78] He reported cases of euthanasia for many treatable patients, growing fear among Dutch citizens that they might be euthanized against their wills, a growing "compulsion" among doctors who practiced euthanasia, and a low priority for hospice and palliative care alternatives. He added:

> People point to the Netherlands as a prototype for American practice on assisted suicide, for their laws to be a model for our laws. The Netherlands? With a homogeneous, pretty much law-abiding citizenry, almost all of whom have medical coverage? And America, with many different cultures represented, many marginalized people, tens of millions without health care insurance? As bad as it was *there*, in other words, it could be much, much worse *here*.[79]

Proponents of legalizing assisted suicide dismiss fears of out-of-control assisted suicide practices as both alarmist and unfounded. They insist that adequate constraints could be placed on legislation to prevent such abuses and unintended expansions of allowable instances of assisted suicide. In addition, proponents contend that even if any abuses were to occur, they would likely be rare, isolated cases and would not overshadow the positive effects of permitting personal autonomy through aid in dying upon request. Dan Brock wrote in his article "Voluntary Active Euthanasia":

> The legal rights of competent patients and, to a lesser degree, surrogates of incompetent patients to decide about treatment are very firmly embedded in a long

line of informed consent and life-sustaining treatment cases, and are not likely to be eroded by a debate over, or even acceptance of, euthanasia. It will not be accepted without safeguards which reassure the public about abuse.[80]

If we are confident in our ability to legislate well and enforce physician-assisted suicide measures well, I wonder why we should not be equally as confident in our ability to give better care to the patients who ask for aid in dying? Americans could just as easily look upon the experiences and needs of patients as an extra incentive to seek alternatives to a rush to suicide, uncovering innovative ways to facilitate natural dying processes and make patients more comfortable during their last days. We have made great technological advances in this century, but it is largely those same advances which have complicated the dying process. Now it is time to apply our resources to answering the needs we have created, exploring new and better methods of palliative care, with special concern for containing costs and attending to the emotional needs of both patients and their families.

Capital Punishment

Nuclear weapons have been used only once by the United States. Physician-assisted suicide has likewise been used legally only once. Capital punishment, however, has been used thousands of times throughout American history. From 1930 (when the Bureau of Justice first began maintaining annual records of capital punishment) until December 31, 1997, 4,291 prisoners were executed[81] by five methods--lethal injection, electric chair, gas chamber, hanging, and firing squad. Capital punishment is simply a part of the American judicial system. So why discuss the pros and cons of a seemingly moot issue? Because, of the three topics treated in this paper, capital

punishment is the one most subject to what Holmes called "the felt necessities of the time" and "prevalent moral and political theories." I will look at the history and development of this issue and consider how the current political and moral climate in America indicates the proper role of capital punishment in our state and federal policies.

Despite its almost constant presence in the American judicial system, capital punishment has been modified throughout the years at times when public sentiment so dictated. For example, types of crimes punishable by execution, acceptable methods of execution, and appeal and review procedures have all been redefined within the past few decades. In addition, the number of executions per year have varied significantly in accordance with societal circumstances and concerns. In the mid-1930s, executions reached an all-time high of 200 in a single year (see Figure 1.) Throughout the next three decades, homicides, and therefore executions, dropped steadily until a ten-year moratorium on executions from 1967-1977 while issues of constitutionality were in litigation.[82] In 1972, the U.S. Supreme Court heard the *Furman v. Georgia* case and held that capital punishment, as it was being administered at the time, violated the Eighth and Fourteenth Amendments. Justice White wrote:

> [T]he death penalty is exacted with great infrequency even for the most atrocious crimes and. . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[83]

Immediately after the *Furman* decision, state legislatures began to revise their capital punishment provisions to make them constitutionally sound. In order to accomplish this, most states instated one

or more of the following guidelines to decrease chances of arbitrary judgments in capital cases:

- dividing trials into two parts to separate the assessment of guilt phase from sentencing;
- requiring judges and jurors to consider certain mitigating and aggravating factors for sentencing purposes; and
- mandating an automatic review process for death penalty cases, some for both the conviction and the sentence, others for the sentence only.

The first test of these new laws came in 1976, when the U.S. Supreme Court heard the *Gregg v. Georgia* case. Mr. Gregg was convicted and sentenced to death for armed robbery and murder under Georgia law which, after revisions subsequent to the *Furman* decision, incorporated all three of the guidelines listed above. The Supreme Court upheld the revised Georgia law, concluding:

> The existence of capital punishment was accepted by the Framers of the Constitution, and for nearly two centuries this Court has recognized that capital punishment for the crime of murder is not invalid per se. . . Legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency; and the argument that such standards require that the Eighth Amendment be construed as prohibiting the death penalty has been undercut by the fact that in the four years since Furman, supra, was decided, Congress and at least 35 states have enacted new statutes providing for the death penalty. . . [I]t cannot be said that Georgia's legislative judgment that such a penalty is necessary in some cases is clearly wrong.

Once the *Gregg* case had been decided, several more tests of new capital punishment laws followed,

leading to further revisions, such as the abolition of automatic death sentences for capital crimes, and elimination of the death penalty for rapists and "nontriggermen" in murder cases.[85] Once these procedural technicalities were worked out, execution numbers began to increase again. From 1977 through 1991, the number of executions remained at or under twenty-five per year. In recent years, however, execution rates have grown consistently, totaling seventy-four in 1997--the most executions carried out since 1955.[86]

The Supreme Court has affirmed the constitutionality of capital punishment, pointed to centuries of precedent for the practice, and recognized popular support for it through most of American history. But is capital punishment able to establish justice, insure domestic tranquility, and promote the general welfare in America? The ideas of racist application of the death penalty and of taking human life present deontological considerations, while economic and "social good" considerations present utilitarian issues.

I began my search for evidence of racist application of capital punishment by examining crime statistics from 1992, the most current year in which the government reports both the total number of homicides committed by each race and the total number of inmates added to death row by race. The information I found contained no evidence that minorities are disproportionately sentenced to death. Since blacks and whites made up 98.5% of all those added to death row in 1992[87], I compared only those two groups. Also, since capital punishment sentences are rendered almost exclusively for murder, I looked at sentences for homicide only. Blacks were convicted of 55% of homicides in 1992 (13,849 of 25,180 convictions)[88], but they comprised only 43% of those sentenced to death (114 of 265), and 35.5% of those actually executed (11 of 31).[89] In addition, blacks comprised 40.2% of all those sentenced to death since 1977 (1,598 of 3,975).[90] I do not

know the crime statistics for other years, nor whether the convictions themselves were race biased. However, these figures do not indicate that minorities have been unfairly targeted. If evidence of discrimination did surface, it would still point more to a need to identify and fix the problems, not to abolish an entire form of punishment.

When I considered forfeiture of the right to life in the context of nuclear weapons use, I asserted that rights are not *forfeited* but *overridden* by utilitarian concerns. The same holds for capital punishment, as I will show. The primary difference in the context of capital punishment is that those being deprived of life are directly culpable. They are not considered blameworthy for the actions of their government, but because of their own actions. John Locke, despite being a proponent of natural rights, believed that the right to life *is* forfeited by murderers, because "[t]he offender, by violating the life, liberty, and property of another, has lost his own right to have life, liberty, and property respected."[91] Deontology rejects Locke's line of reasoning, because a criminal loses the status of an *end* and takes on the status of a *thing*.

The difference between forfeiting and overriding is not merely semantic. If we adopt the idea that a murderer forfeits the right to life upon commission of the murder, no other reasoning is required to impose capital punishment. On the other hand, if we adopt the idea that a murderer's right to life can be overridden, we must provide support for that idea from non-deontological reasons. Can utilitarianism provide those reasons?

The chief utilitarian or "consequence-based" aspects of capital punishment are deterrence, cost-containment, and protection of society. Deterrence may be viewed in two ways: as an example to other would-be criminals about the repercussions of committing capital crimes, or as a deterrent for the criminal who has committed a capital offense, in that if that criminal is dead, there exists no

possibility that he or she could pose any further threat to society. Numerous studies of capital crime statistics in states with versus without a death penalty and capital crime statistics before, during, and after the ten-year national moratorium on capital punishment suggest that, while the deterrent value of capital punishment cannot be measured precisely, it does not seem to be significant. In fact, all of the statistical comparisons Michael Endres studied showed either no deterrent effect in capital punishment states or the opposite effect--higher capital crime statistics in capital punishment states. For example, William Bailey's complex and meticulously-conducted study during the moratorium period revealed that states retaining the capital punishment laws "had higher first degree murder rates, second-degree murder rates, total murder rates, and homicide rates."[92] No irrefutable reason for these findings can be given, but several explanations have been offered, including:

- violence by the state breeds violence among the populace
- capital punishment contributes to the general devaluing of human life, or
- the long period of time between sentencing and execution (an average of 125 months for prisoners executed in 1966)[93] waters down any deterrent effects.

Proponents of the deterrence-by-example view maintain that, despite evidence that capital punishment does not deter capital criminals, no one can account for the number of crimes that were *not* committed as a result of the deterrent value of capital punishment. As for the view of deterrence that cites elimination of future risks to society, there is no reason to believe that life prison sentences are unable to produce similar results. Prisoners *have* escaped from prison and committed more crimes, but these instances are extremely rare and do not provide adequate justification for retaining capital punishment.

The idea that execution is cheaper than supporting a life-term prisoner is simply a myth. It

is estimated that carrying out one execution, after the appeal and review processes are exhausted, cost upwards of $2 million, whereas supporting a life-term prisoner for forty years costs about $800,000.[94] Furthermore, the value placed on human life in America dictates that we not allow economic efficiency to be pitted against it.

The first of two plausible arguments for capital punishment is that in a society without the death penalty, citizens would have no means of expressing their moral outrage through judicial channels and would, therefore, be more likely to resort to "self-help justice." In the *Furman* opinion, Justice Stewart wrote:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self-help, vigilante justice, and lynch law.[95]

Stewart's argument is utilitarian in the sense that, if it were true, retaining capital punishment could help maintain better overall safety and expediency of justice. The arguments is also deontological, in that victims' families have the right to see justice done. Some people reject the idea of retribution, especially through capital punishment, and find that forgiveness brings them greater satisfaction and healing. Other people are able to forgive, and yet feel that the consequences of taking a life must still be faced, even if one of the consequences is death. Still others are unable to forgive, finding the most closure and satisfaction that justice was served only through the death of the murderer. There is no objective way to judge the rightness or wrongness of any of these three sentiments, and making

capital punishment completely unavailable would only further victimize many people, alienating them from the fulfillment of their reasonable conception of justice.

The second reasonable utilitarian argument, formulated by Edward Malloy of Notre Dame University, is not relevant to current circumstances in the United States but could be in the future. Malloy argues that capital punishment would be useful in promoting the common good if America experienced "a sustained internal threat" such as conspiracy to overthrow the government, terrorism, or assassinations occurring on a large scale."[96] In fact, these types of crimes are included in federal laws and in many state laws defining capital crimes. (See Figures 2 and 3.)

In the final analysis, arguments for retaining capital punishment are more compelling, and utilitarian concerns do provide convincing reasons to override a murderer's right to life in many cases. However, my judgment for capital punishment is probably the least decisive of the three issues I have treated. In this type of situation, lawmakers have a special duty to respond to their constituents' ideas about the policies they believe will promote welfare, justice, and tranquility in the best way. Better appeal and review procedures and more humane methods of execution, like lethal injection, have made Americans more confident in capital punishment and jurors more comfortable applying it in appropriate circumstances. If this confidence ever wavers, it will be up to legislators to respond accordingly with policy revisions.

Conclusions

Objectively addressing the three ethical dilemmas of nuclear weapons, physician-assisted suicide, and capital punishment has been challenging in many ways. First the literature on all three topics is so cast that just narrowing the scope of my inquiry to discuss the most important facts and

arguments was difficult. Second, each topic is uniquely complex, containing many uncertainties that create problems with speaking generally about highly variable issues. But making general observations and decisions about complicated topics is, after all, what public policymaking is all about. Third, it is almost impossible to be completely objective in discussing any issue. Every person has "gut feelings" about controversial issues, values certain ideas over others, and makes decisions in certain ways. Consensus may be reached up to a point, but we will never completely reconcile opposing fundamental beliefs. However, it is still important that we continue to think about and discuss the ethical problems that arise in every area of American life. In doing so, we will come to understand the reasons behind differing viewpoints, and we will become better equipped to assess the value of those reasons. Moreover, we will make more informed decisions about the officials we elect to make our policy decisions.

There are many more questions to ask and arguments to consider related to nuclear weapons, assisted suicide, and capital punishment. Still more will arise with further technological advances and changing national and international political circumstances. I knew when I undertook the task of examining these three ethical dilemmas that I would not be able to find "*the* answer" to each problem–otherwise they would not present much of a dilemma! However, I hope that in treating these topics I have recognized the main concepts which come to bear on our analysis of each issue, sorted fact from fiction in the relevant arguments, and evaluated opposing arguments as objectively as possible.

Persons executed, 1930-96

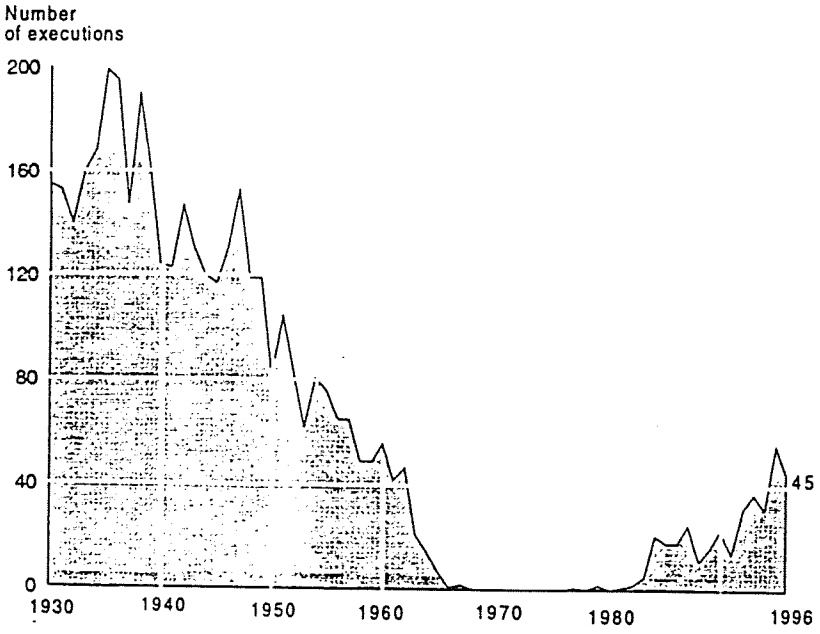

FIGURE 1

Capital offenses, by State, 1996

Alabama. Intentional murder with 1 of 18 aggravating factors (13A-5-40).

Arizona. First-degree murder accompanied by at least 1 of 10 aggravating factors.

Arkansas. Capital murder (Ark. Code Ann. 5-10-101) with a finding of at least 1 of 9 aggravating circumstances; treason.

California. First-degree murder with special circumstances; train-wrecking; treason; perjury causing execution.

Colorado. First-degree murder with at least 1 of 13 aggravating factors; treason. Capital sentencing excludes persons determined to be mentally retarded.

Connecticut. Capital felony with 9 categories of aggravated homicide (C.G.S. 53a-54b).

Delaware. First-degree murder with aggravating circumstances.

Florida. First-degree murder; felony murder; capital drug trafficking.

Georgia. Murder; kidnaping with bodily injury or ransom when the victim dies; aircraft hijacking; treason.

Idaho. First-degree murder; aggravated kidnaping.

Illinois. First-degree murder with 1 of 15 aggravating circumstances.

Indiana. Murder with 15 aggravating circumstances. Capital sentencing excludes persons determined to be mentally retarded.

Kansas. Capital murder with 7 aggravating circumstances. Capital sentencing excludes persons determined to be mentally retarded.

Kentucky. Murder with aggravating factors; kidnaping with aggravating factors.

Louisiana. First-degree murder; aggravated rape of victim under age 12; treason (La. R.S. 14:30, 14:42, and 14:113).

Maryland. First-degree murder, either premeditated or during the commission of a felony, provided that certain death eligibility requirements are satisfied.

Mississippi. Capital murder (97-3-19(2) MCA); capital rape (97-3-65(1) MCA); aircraft piracy (97-25-55(1) MCA).

Missouri. First-degree murder (565.020 RSMO).

Montana. Capital murder with 9 aggravating circumstances (46-18-303 MCA).

Nebraska. First-degree murder with a finding of at least 1 statutorily-defined aggravating circumstance.

Nevada. First-degree murder with 10 aggravating circumstances.

New Hampshire. Capital murder (RSA 630:1).

New Jersey. Purposeful or knowing murder by offender's own conduct; contract murder; solicitation by command or threat in furtherance of a narcotics conspiracy (NJSA 2C:11-3C).

New Mexico. First-degree murder (Section 30-2-1 A, NMSA).

New York. First-degree murder with 1 of 10 aggravating factors. Capital sentencing excludes persons determined to be mentally retarded.

North Carolina. First-degree murder (N.C.G.S. 14-17).

Ohio. Aggravated murder with at least 1 of 8 aggravating circumstances (O.R.C. secs. 2929.01, 2903.01, and 2929.04).

Oklahoma. First-degree murder in conjunction with a finding of at least 1 of 8 statutorily defined aggravating circumstances.

Oregon. Aggravated murder (ORS 163.095).

Pennsylvania. First-degree murder with 17 aggravating circumstances.

South Carolina. Murder with 1 of 10 aggravating circumstances (§ 16-3-20(C)(a)). Mental retardation is a mitigating factor.

South Dakota. First-degree murder with 1 of 10 aggravating circumstances.

Tennessee. First-degree murder.

Texas. Criminal homicide with 1 of 8 aggravating circumstances (TX Penal Code 19.03).

Utah. Aggravated murder; aggravated assault by a prisoner serving a life sentence if serious bodily injury is intentionally caused (76-5-202, Utah Code Annotated).

Virginia. First-degree murder with 1 of 9 aggravating circumstances (VA Code § 18.2-31).

Washington. Aggravated first-degree murder.

Wyoming. First-degree murder.

FIGURE 2

Federal laws providing for the death penalty, 1996

8 U.S.C. 1342 - Murder related to the smuggling of aliens.

18 U.S.C. 32-34 - Destruction of aircraft, motor vehicles, or related facilities resulting in death.

18 U.S.C. 36 - Murder committed during a drug-related drive-by shooting.

18 U.S.C. 37 - Murder committed at an airport serving international civil aviation.

18 U.S.C. 115(b)(3) [by cross-reference to 18 U.S.C. 1111] - Retaliatory murder of a member of the immediate family of law enforcement officials.

18 U.S.C. 241, 242, 245, 247 - Civil rights offenses resulting in death.

18 U.S.C. 351 [by cross-reference to 18 U.S.C. 1111] - Murder of a member of Congress, an important executive official, or a Supreme Court Justice.

18 U.S.C. 794 - Espionage.

18 U.S.C. 844(d), (f), (i) - Death resulting from offenses involving transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce.

18 U.S.C. 924(i) - Murder committed by the use of a firearm during a crime of violence or a drug trafficking crime.

18 U.S.C. 930 - Murder committed in a Federal Government facility.

18 U.S.C. 1091 - Genocide.

18 U.S.C. 1111 - First-degree murder.

18 U.S.C. 1114 - Murder of a Federal judge or law enforcement official.

18 U.S.C. 1116 - Murder of a foreign official.

18 U.S.C. 1118 - Murder by a Federal prisoner.

18 U.S.C. 1119 - Murder of a U.S. national in a foreign country.

18 U.S.C. 1120 - Murder by an escaped Federal prisoner already sentenced to life imprisonment.

18 U.S.C. 1121 - Murder of a State or local law enforcement official or other person aiding in a Federal investigation; murder of a State correctional officer.

18 U.S.C. 1201 - Murder during a kidnaping.

18 U.S.C. 1203 - Murder during a hostage-taking.

18 U.S.C. 1503 - Murder of a court officer or juror.

18 U.S.C. 1512 - Murder with the intent of preventing testimony by a witness, victim, or informant.

18 U.S.C. 1513 - Retaliatory murder of a witness, victim, or informant.

18 U.S.C. 1716 - Mailing of injurious articles with intent to kill or resulting in death.

18 U.S.C. 1751 [by cross-reference to 18 U.S.C. 1111] - Assassination or kidnaping resulting in the death of the President or Vice President.

18 U.S.C. 1958 - Murder for hire.

18 U.S.C. 1959 - Murder involved in a racketeering offense.

18 U.S.C. 1992 - Willful wrecking of a train resulting in death.

18 U.S.C. 2113 - Bank-robbery-related murder or kidnaping.

18 U.S.C. 2119 - Murder related to a carjacking.

18 U.S.C. 2245 - Murder related to rape or child molestation.

18 U.S.C. 2251 - Murder related to sexual exploitation of children.

18 U.S.C. 2280 - Murder committed during an offense against maritime navigation.

18 U.S.C. 2281 - Murder committed during an offense against a maritime fixed platform.

18 U.S.C. 2332 - Terrorist murder of a U.S. national in another country.

18 U.S.C. 2332a - Murder by the use of a weapon of mass destruction.

18 U.S.C. 2340 - Murder involving torture.

18 U.S.C. 2381 - Treason.

21 U.S.C. 848(e) - Murder related to a continuing criminal enterprise or related murder of a Federal, State, or local law enforcement officer.

49 U.S.C. 1472-1473 - Death resulting from aircraft hijacking.

FIGURE 3

All facts from Bureau of Statistics "Capital Punishment 1996."

Notes

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In his account, MacIntyre traces the evolution of historical and philosophical perceptions of virtue, focusing on the loss of a unified sense of morality in modernity. His hope for the future rests strongly on the past, but he never develops a mechanism by which we can draw from it. He writes, "What matters at this stage is the construction of local forms of community within which the civility and the intellectual and moral life can be sustained through the new dark ages which are already upon us." He identifies this great need for communities with shared visions of "the moral life," but his exhortations are too few and too vague to be of great practical value in addressing matters of legislation.

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[9]Morris 110.

[10]*Riggs et al. v. Palmer et al.* 1889, 115 N.Y. Supplemental 506.

[11]Ibid.

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[39][Online] Available http://www.nea.fr/html/rp/chernobyl/c05.html, 1996.

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[46]Szasz 129.

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[76]Hollman 185.

[77]Wilkes 25.

[78]Washington, et al., Petitioners v. Harold Glucksburg et al. [Online] Available http://caselaw.findlaw.com/US/000/96-110.html. Some of the statistics from the report include "more than 1,000 cases of euthanasia without an explicit request" and "an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent."

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