

Whatever the Cost:
The Illusion of Deterrence and What Should Replace It

Introduction

Let us consider some of the most famous words in the history of war without being distracted by their eloquence: “We shall go on to the end. We shall fight in France, we shall fight on the seas and oceans, we shall fight with growing confidence and growing strength in the air, we shall defend our island, *whatever the cost may be.*”¹ [emphasis added] The speaker, Winston Churchill, meant what he said. Throughout eight months of the bombing of Britain’s cities and the 60,000 deaths that resulted, there was no sign of surrender.² In fact, in his examination of The Blitz and its implications for deterrence theory, Ward Wilson notes that a contingent of historians believe Churchill incorporated the devastation of his country’s cities into his overall strategy, hoping they would divert the Luftwaffe from military targets and provide a justification for a counter-strike on Berlin. Wilson uses this case study to argue that the cost of nuclear war is not prohibitively high for our countries’ decision-makers. There is no line drawn on the other side of which lies the destruction of cities and the accompanying deaths of civilians. Thus, the legs are swept out from under deterrence, a concept which, at its core, requires that leaders not be willing to risk exactly what Churchill accepted as the steep but acceptable price of victory in the Second World War.³

Conceding that The Blitz was not carried out with nuclear weapons, Wilson, in his 2008 paper “The Myth of Nuclear Deterrence,” turns to the cases of Hiroshima and Nagasaki. The world is fast approaching a century of strategic theory propped up on the belief that atomic

¹ Winston Churchill, House of Commons of the Parliament of the United Kingdom, *We Shall Fight on the Beaches* (June 4, 1940).

² See Ward Wilson, The Myth of Nuclear Deterrence, 15 *Nonproliferation Review* 421 (Nov. 2008).

³ See *id.*

bombs ended the war in the Pacific theater, but Wilson has been a leading voice in arguing that it was the Soviet declaration of war that finally convinced Japan to surrender, not the destruction wrought by the atomic bomb. In addition to the content of primary source materials such as diaries and letters, Wilson supports his claim by observing that dozens of Japanese cities had already been destroyed by conventional means before the dropping of the atomic bombs without a sign of surrender from the country. Wilson also notes that it is no surprise that Japan opts for the explanation that the unprecedented introduction of these weapons is what cast the finishing blow; this is a more self-serving line of reasoning than an admission of strategic blunder on their part.⁴

Moreover, Wilson argues that the distinction between the cases of the destruction of cities through conventional warfare and the cases involving nuclear weapons is an irrelevant one in determining the legitimacy of deterrence theory. Such a distinction confuses the significance of ends with those of means. In other words, it is the psychology which leads to a decision to accept a certain cost or engage in a particular course of action that matters, not the particular technology used. Once one realizes that history is rife with samples of human psychology in various situations such as those faced in a potential nuclear confrontation, abstract theories can be tested and, in the case of deterrence, largely proven to be illusory. This paper seeks to continue the process of testing the theory of deterrence by looking at historical case studies. It also seeks to provide an explanation for why generations of scholars have remained stubbornly wed to the concept of deterrence as the justification for the continued development and maintenance of nuclear weapons. Finally, the execution of this study naturally suggests what should follow the realization that deterrence theory is untenable: a system of international law based on the values

⁴ *See id.*

and concerns revealed by the historical record. Our leaders have proven themselves shockingly willing to accept large-scale destruction. But they have also shown themselves to be repeatedly restrained by considerations of the traditional code of conduct in war and the impact of public opinion. These considerations open the door for international law.⁵

Errol Morris' award-winning documentary "The Fog of War: Eleven Lessons from the Life of Robert S. McNamara" includes a video from McNamara's time as Secretary of Defense in which a reporter conducting an interview inquires as to a curious object on McNamara's desk. It is a small, silver calendar with a number of days in the month of October highlighted. McNamara explains: "Yes, this was given by President Kennedy. On the calendar are engraved the dates: October 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and finally 28, [which] were the dates when we literally looked down the gun barrel into nuclear war."⁶ This thirteen-day period in 1962 is referred to as the Cuban Missile Crisis, and it would seem to be a prime candidate for testing the assumption that deterrence is an influential factor in the minds of those political and military figures carrying out wars of the hot or cold variety. The educational program on the Crisis at the JFK Library is appropriately titled, "World on the Brink: JFK and the Cuban Missile Crisis."⁷ One of the leading works of academic history on the Crisis is titled, "One Minute to Midnight: Kennedy, Khrushchev, and Castro on the Brink of Nuclear War."⁸ A Washington Post article marking the 50th anniversary of the Crisis is titled, "The Cuban Missile Misunderstanding: How cultural misreadings almost led to global annihilation."⁹ Thus reads the mainstream

⁵ *See id.*

⁶ THE FOG OF WAR: ELEVEN LESSONS FROM THE LIFE OF ROBERT S. MCNAMARA (Sony Pictures Classics 2003).

⁷ *World on the Brink: JFK and the Cuban Missile Crisis*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.jfklibrary.org/node/11666>.

⁸ MICHAEL DOBBS, *ONE MINUTE TO MIDNIGHT: KENNEDY, KHRUSHCHEV, AND CASTRO ON THE BRINK OF NUCLEAR WAR* (First Vintage Books Edition 2008).

⁹ Max Fisher, *The Cuban Missile Misunderstanding: How cultural misreadings almost led to global annihilation*, THE WASHINGTON POST, <https://www.washingtonpost.com/news/worldviews/wp/2012/10/16/the-cuban-missile-misunderstanding-how-cultural-misreadings-almost-led-to-global-annihilation/>.

consensus on the proximity to nuclear conflict brought about by this critical period. If there was ever a time for the theory of deterrence to save the day, surely it was this one. Only the historical record will tell.

I. The Status Quo of Deterrence Theory

As we approach the internal record, which constitutes the closest thing to a factual basis for this analysis, we must keep in mind a certain theoretical framework for the law. Many, including scholars and the United States government itself, seem to speak of deterrence as though it were a legal force—something solid and guiding for the behavior of our leaders. The Obama Administration’s 2017 Nuclear Posture Review admits that “as long as nuclear weapons exist, the United States will sustain safe, secure, and effective nuclear forces. These nuclear forces will continue to play an essential role in deterring potential adversaries and reassuring allies and partners around the world.”¹⁰ The work of RAND analyst Thérèse Delpech includes a similarly confident declaration that “as long as nuclear weapons exist, deterrence appears to be the most—some would say the only—acceptable policy, far better than any possible alternative (such as blackmail, intimidation, coercion, or actual use).”¹¹ Regardless of the fact that deterrence theory is merely a strategic justification for the continued possession and development of nuclear weapons by the country invoking it, this idea of “deterrence” is discussed in scholarship and in the public relations literature of the government as something close to a fundamental rule of international relations, as predictable and authoritative as any law. Whether it is actually treated as such by those decision-makers whose thoughts are reflected by the internal record will be tested at length in this paper.

¹⁰ UNITED STATES OF AMERICAN DEPARTMENT OF DEFENSE, NUCLEAR POSTURE REVIEW REPORT (Apr. 2010).

¹¹ THÉRÈSE DELPECH, DETERRENCE IN THE 21ST CENTURY: LESSONS FROM THE COLD WAR FOR A NEW ERA OF STRATEGIC PIRACY, RAND CORPORATION (2012), https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1103.pdf.

II. Defining Deterrence

Before turning to the plethora of internal documents on the matter, we must hypothesize about what one might see in the record that would indicate a strong and impactful sense of deterrence theory in the minds of the decision-makers. Ward Wilson defines nuclear deterrence as “using the threat of nuclear attack to dissuade,” and he crucially identifies the destruction of cities as the main purpose of any nuclear attack.¹² This is hardly unsubstantiated as Wilson quotes Robert Jervis, one of the most cited international relations scholars in the world, as writing, “Deterrence comes from having enough weapons to destroy the other’s cities.”¹³ Wilson notes the striking similarity between the concept of nuclear deterrence and that of terrorism, writing, “Terrorism is supposed to work by killing civilians in order to shock and horrify governments into complying with a terrorist’s demands. Nuclear attack also threatens civilians (because nuclear weapons are so clumsy, even nuclear attacks aimed at military targets would likely kill large numbers of civilians).”¹⁴ In his canonical 1966 book, *Arms and Influence*, Thomas Schelling, perhaps the most esteemed nuclear strategist of the 20th century, frames his coining of the term “deterrence” in relation to nuclear war with discussions of the history of “[p]ure hurting” and “punitive attacks on people” as separate even from what he would call “military engagements.”¹⁵ Schelling also includes a standard etymological exploration of the word “deterrence” as inextricable from the concept of fear.¹⁶

Moving on to more primary sources, the foundational government document on post-Cold War nuclear deterrence was written in 1995 and is appropriately titled, “Essentials of Post-

¹² See Wilson, *supra* note 2.

¹³ See *id.* at 423.

¹⁴ *Id.* at 430.

¹⁵ See THOMAS C. SCHELLING, *ARMS AND INFLUENCE* (Yale University Press 1966).

¹⁶ See *id.*

Cold War Deterrence.”¹⁷ Prepared by the Policy Subcommittee of the Strategic Advisory Group of the United States Strategic Command, the document aims to provide a terms of reference for nuclear strategy in the new age. Attempting to dig to the core of what any deterrence policy should seek to accomplish, the author rather admiringly describes an incident in Lebanon in which revolutionaries were punished by the Soviets for a kidnapping. The passage demands full quotation:

When three of its citizens and their driver were kidnapped and killed, two days later the Soviets had delivered to the leader of the revolutionary activity a package containing a single testicle—that of his eldest son—with a message that said in no uncertain terms, “never bother our people again.”Such an insightful tailoring of what is valued within a culture, and its weaving into a deterrence message, along with a projection of the capability that can be mustered, is the type of creative thinking that must go into deciding what to hold at risk in framing deterrent targeting for multilateral situations in the future.¹⁸

Applying the destructive potential of nuclear weapons to this microcosm and incorporating the definitions of the leading theorists on the topic, we arrive at a lucid picture of deterrence theory which involves instilling a fear of the destruction and torment of civilians so compelling that the adversary is left completely unwilling to respond with military action.¹⁹

This unwillingness as a condition of deterrence theory’s success must be explicated further. The ultimate decision on the part of the United States not to instigate a military confrontation which likely would have escalated into nuclear war cannot alone be a sign of the efficacy of deterrence theory. Two points prevent this from being so: First, even if there was some dominant, consistently influential policy that swayed the decision-makers away from attacking Cuba, we cannot know that this policy involved deterrence until the record on the

¹⁷ POLICY SUBCOMMITTEE OF THE STRATEGIC ADVISORY GROUP OF THE UNITED STATES STRATEGIC COMMAND, ESSENTIALS OF POST-COLD WAR DETERRENCE (1995).

¹⁸ *Id.* at 4.

¹⁹ *See id.*

internal discussions is carefully sifted through. Second, deterrence theory does not postulate that some minor seed of doubt or fear will eventually, even at the last moment, push the consensus toward restraint, for it demands that the fear instilled by the threat of nuclear destruction of the civilian population be utterly intolerable.

Thérèse Delpech, in her tome for the RAND Corporation on why deterrence is the best option, quotes Robert Oppenheimer's remark that the unique power of the atomic bomb was that "[i]t has made the prospect of war unendurable."²⁰ An early appearance of the theory of deterrence, this comment reveals that the theory exists along a psychological plane and necessitates that the mere "prospect" of nuclear destruction be outside of the realm of consideration for our leaders. In his 1958 RAND memorandum, Bernard Brodie describes the potential failure of deterrence theory in a rather abstruse but revealing passage: "To be willing to accept enormous destruction only for the sake of inflicting greater destruction on the enemy...argues a kind of desperation at the moment of decision which rules out reason. We have to expect that at certain extreme conditions of excitement, which may involve erroneous conviction that an enemy attack upon oneself is imminent, the deterrent posture will tend to collapse or be discarded..."²¹ Brodie uses such descriptors as "extreme" and "erroneous" likely to obscure this strange admission that in times of heightened tension and expectation of conflict, presumably the only times at which the possibility of nuclear attack would arise, leaders might demonstrate a willingness to accept the costs and act despite their fear. Thus, the founder of the field describes what the failure of deterrence actually looks like—it is the willingness to move forward, regardless of whether the action is ultimately taken. Indeed, of what use would such a

²⁰ Delpech, *supra* note 11 at 25.

²¹ Bernard Brodie, *The Anatomy of Deterrence* 11 (U.S. Air Force Project Rand, ASTIA Document Number AD 156026).

policy be if it existed within that slim, inscrutable space between what our leaders find themselves willing to do and the reality of their actions. Thus, deterrence theory will be proven by the internal record on the Cuban Missile Crisis to the extent that the American leaders, in the face of such fear, exhibit an unwillingness to respond to the Soviet threat with military action.

III. Psychological Framework for Analysis

Theories of psychology will play an important role in this analysis, both with regard to the cognitive illusions surrounding deterrence theory and the implications of the internal record for international law. If it is the case that a large contingent of well-educated, astute analysts are and have been suffering from a misapprehension as to the existence of a policy of deterrence among the nuclear powers of the world and the efficacy of such a policy in preventing conflict, it is likely that certain causal fallacies are to blame. Such psychological phenomena are examined by students of cognitive biases such as Daniel Kahneman and Nassim Nicholas Taleb. In his book, *Thinking Fast and Slow*, Kahneman delves into Taleb's views on the difficulty the human mind encounters in dealing with nonevents.²² Taleb observes that we tend to drastically simplify the circumstances which lead to a given event or nonevent, thereby fabricating causes that cannot truly capture the complexity of the situation at hand. If this is the case, then surely the nonevent of nuclear war over the past seventy-five years is no exception—human nature may very well dictate our tendency to lose sight of the myriad of circumstances that have allowed this period of relative peace to be maintained. The hypothesis of this paper being that the conception of the impact of deterrence theory constitutes such a misapprehension, it would be helpful to keep in mind Taleb's criteria for what makes a given cause an accurate explanation of an event. In Kahneman's words, "The ultimate test of an explanation is whether it would have made the event

²² DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (Farrar, Straus and Giroux 2011) (ebook).

predictable in advance...”²³ As we examine the internal record, we must therefore ask ourselves, when presented with an apparently confirmatory data point, whether it was strong enough to have served as an accurate predictor of the ultimate result. For instance, a stray mention of the Soviet deterrent or the price of military action does not serve as an explanation for the nonevent of nuclear war unless it proves itself to be so compelling that it could be said to have been an accurate portend of what was to come.

To the extent that the record makes suggestions about what the law says or has the potential to say on the matter of nuclear weapons and their use, the work of Kahneman might serve as an effective bridge between the abstract, strategic realm of deterrence and the reality of the law. In an article for the Loyola University Chicago Law Journal, Russell Korobkin, who describes Kahneman’s influence on legal academy as “extraordinary,” summarizes the psychologist’s theoretical delineation of two systems of thought: one which makes decisions quickly and based on heuristics and another which involves slower, more deliberate forms of reasoning.²⁴ If nuclear weapons present overwhelmingly daunting questions to decision-makers and the law on this issue is at best unclear, then it might be safe to speculate that the thinking of these individuals in moments of high stress and uncertainty is governed by System 1. Indeed, Korobkin outlines part of Kahneman’s influence on the legal academy as the realization that lawmakers lean on this heuristic reasoning more often than we might like to admit. One of the underlying mechanisms of this system is that it tends to substitute simple, digestible questions for more difficult ones. If heuristics make fertile ground for the law, then patterns in the types of

²³ *Id.* at 494.

²⁴ Russell Korobkin, *Daniel Kahneman’s Influence on Legal Theory*, 44 LOY. U. CHI. L. J. 1349 (2013).

questions asked in the internal record and the answers provided must be detected and evaluated for their potential in legislation.²⁵

IV. Analysis of the Internal Record

The declassified, internal record on the events of October 1962, compiled by the CIA History Staff, is rife with memoranda and notes on expressions of thought by such figures as the President, his highest-ranking cabinet members, the top military figures, and even former leaders of the country such as Dwight Eisenhower who were sought out for advice during this time of crisis.²⁶ What first must be established using this record is the fact that the decision-makers were reasonably aware of the presence of nuclear warheads planted in Cuba by the Soviet Union and directed at the United States, and, furthermore, that their presence there was understood as a deterrent to certain actions by the Americans. Without these conditions, the situation would be too clouded by misapprehension to serve as a serious case study. A memorandum dated October 16, 1962 and titled, “Probable Soviet MRBM Sites in Cuba,” not only runs through the photographic evidence of warheads in Cuba gathered to that point, but provides a perfectly explicit introduction to the experiment in deterrence that was to ensue: “The Soviet leaders’ decision to deploy ballistic missiles to Cuba testifies to their determination to deter any active US intervention to weaken or overthrow the Castro regime...They also probably believe that the missiles will reinforce the deterrent link between Cuba and Berlin...”²⁷ The test is thereby written. If henceforth the Americans show either a willingness to “intervene” in Cuba or accept the incorporation of Berlin into the conflict, then the deterrent was ineffective enough to add to the accumulation of doubt around its underlying theory.

²⁵ *See id.*

²⁶ CIA HISTORY STAFF, CIA DOCUMENTS ON THE CUBAN MISSILE CRISIS: 1962 (Mary S. McAuliffe ed., Oct. 1992).

²⁷ *Id.* at 141.

The test is failed almost immediately, with the call for military action in the face of a nuclear threat being sounded first by Secretary of State Dean Rusk. In a memorandum dated October 17, 1962, Rusk is pointed out to be “greatly disturbed” by the evidence for warheads in Cuba and in response advocates for “[a] quick-strike surprise attack by air to wipe out these bases” and “[c]onsideration to expand this into a total invasion to take over the island.”²⁸ Ultimately, Rusk’s thoughts are shaped for the record as reflecting the view “that we had to either make a quick surprise attack and knock out these bases or to lay on a heavy propaganda barrage in all areas which might cause a withdrawal.”²⁹ In that same memorandum, the voices of four other figures are noted: those of Secretary of Defense Robert McNamara, Chairman of the Joint Chiefs of Staff General Maxwell Taylor, National Security Advisor McGeorge Bundy, and President John F. Kennedy. None of these decision-makers express opposition to Rusk’s proposal for military action. McNamara mentions that any such action must be carried out before the warheads are operational, Taylor discusses prospects for blockade and invasion, Bundy muses on the possibility that Khrushchev is confused, and Kennedy merely defers further talks to the next meeting. No one mentions the potential costs for the civilian population of the United States of a direct attack upon a Cuba equipped with nuclear missiles.³⁰

The first general expression of opposition to military action against Cuba only provides further evidence of the lack of influence of deterrence theory on the minds of the decision-makers. First of all, it is worth noting the rank of the individual behind this opposition. George Ball was an Under Secretary of State for Economic and Agricultural Affairs, not a member of the National Security Council. He can hardly be called a key “decision-maker.” Second, delving into

²⁸ *Id.* at 145.

²⁹ *Id.* at 146.

³⁰ *See id.*

the actual content and motivations for Ball's opposition as articulated by the memorandum detailing a meeting in Ball's conference room on October 17th, one finds that Ball exhibited no fear of the destructive consequences upon the population, but instead "seemed to feel military action would throw the NATO allies in disarray and permit Britain and France to separate from us on Berlin policy."³¹ This therefore is a reluctance borne out of diplomatic concerns. It does not reach the level of psychological terror crucial to a successful deterrent.

A second force for military action, outside of the National Security Council but influential in an advisory capacity, former President Dwight Eisenhower is represented in a memorandum dated October 17th as seeming "to lean toward...military action which would cut off Havana and therefore take over the heart of the government."³² Specifically, Eisenhower indicates that a full-force, widespread attack should be favored over a more limited approach. This strategy, he feels, would "mean less bloodshed, could be accomplished more quickly than a landing and a conventional type of slow invasion."³³ Thus the rational thinking predicted by deterrence theory grows more remote from reality as Eisenhower does express a concern for "bloodshed" but feels that military action, not inaction, is the path to mitigating this element. Again, the concept of *détente* as a means of avoiding civilian bloodshed is absent from the discussion. Eisenhower displays the very willingness to accept the risks of nuclear war in exchange for possible strategic victory that Bernard Brodie considers detrimental to the theory of deterrence.³⁴

The "Memorandum of Meeting, Wednesday, October 17th, at 8:30 a.m., and again at 4:00 p.m.," dated October 19, 1962, provides one of the most complete landscapes of internal thought

³¹ *Id.* at 159.

³² *Id.* at 168.

³³ *Id.*

³⁴ Brodie, *supra* note 23.

around potential actions in response to the threat from Cuba.³⁵ It also displays the impact, or lack thereof, of the kind of thinking associated with deterrence theory. McNamara, the numbers-minded whiz kid and former professor of accounting argues “that missiles in Cuba had no great military consequence because of the stalemate mentioned in my October 18th memorandum,” and “that the military equation would not be changed by the appearance of these missiles.”³⁶ Thus, in a rather indirect way, McNamara makes the case for safety through deterrence under the threat of mutually assured destruction. He essentially argues that the symmetrical capabilities of the United States and the Soviets, with the Russian base in Cuba corresponding to American bases in Turkey and Italy, eliminate the possibility of destructive action by either side. However, McNamara does not explicitly draw the conclusion that deterrence demands: that the United States should refrain from military action. He merely invokes the balanced military equation to reduce the importance assigned to the missiles installed in Cuba.³⁷

McNamara’s faint and incomplete version of deterrence theory is, at the same meeting, steamrolled by the confidently forceful advocacy of former Secretary of State Dean Acheson. Fully apprised of McNamara’s view of the balanced military equation before him, Acheson states, “We should proceed at once with the necessary military actions and should do no talking. The Soviets will react some place. We must expect this; take the consequences and manage the situations as they evolve.”³⁸ There is no subsequent mention of a direct opposition to this position, from McNamara or from anyone else present. The strongest response comes from Ambassador At Large for Soviet Affairs Llewellyn Thompson who merely advocates for a

³⁵ CIA Documents, *supra* note 26 at 169.

³⁶ *Id.* at 170.

³⁷ *See id.*

³⁸ *Id.* at 171.

declaration of war and a blockade as an alternative to direct military action.³⁹ We are therefore left with a troubling reality: In response to a threat of nuclear attack, the leaders of the United States were tolerant of a firm willingness to engage in military action and, most significantly, were prepared to “take the consequences” that follow. The hypothesis that such decision-makers will quake before the possibility of such consequences is simply not confirmed by this reality. The fear that is foundational to deterrence theory is far from “unendurable.”⁴⁰ Following suit with Acheson, Rusk and General Taylor both argue for military action before the meeting is adjourned.⁴¹

A subsequent memorandum, dated the same day, expands upon the decision-makers’ willingness to accept the destructive consequences of a military strike on Cuba. Secretary Rusk reappears as the fearless hawk. It is documented that Rusk “questioned whether, if it is necessary to move against Cuba, and then concluded that it was because Cuba can become a formidable military threat...”⁴² Rusk then “pointed out to the President that action would involve risks” and that “[w]e could expect action in Berlin, Korea and possibly against the United States itself.” Addressing the effects on the population, Rusk stated that “he felt that the American people will accept danger and suffering if they are convinced doing so is necessary and that they have a clear conscience.” Rusk is therefore hardly a case study for Thomas Schelling’s vision of the pain inflicted upon civilian populations as a key element of deterrence. He is not only willing to accept this pain as a consequence of the policy for which he is advocating, he is confident that such pain will be taken on and accepted by the people of his country.⁴³

³⁹ *Id.* at 172.

⁴⁰ Delpech, *supra* note 22.

⁴¹ CIA Documents, *supra* note 26 at 172.

⁴² *Id.* at 183.

⁴³ *See id.*

The same memorandum reveals Ambassador Bohlen, Secretary McNamara, Ambassador Thompson, and President Kennedy expressing tempered opposition to Rusk's position. Aside from the continued discussions of blockade and a formal declaration of war as alternatives to military action, Secretary McNamara actually invokes "the price of Soviet retaliation" and even mentions responding to the presence of the missiles in Cuba by dismantling American bases in Turkey and Italy.⁴⁴ We should not, however, fall into the trap of viewing any reluctance to engage in military action as confirmation of the theory of deterrence. First of all, McNamara's opposition cannot be considered firm or consistent since his newfound argument against direct strike is explicitly noted as a reconsideration of his prior view.⁴⁵ Second, for McNamara to be said to be under the influence of an effective nuclear deterrent, he would have to be expressing specific fear of the devastation of the American population, a feeling which is not reflected by the record. Finally, McNamara is only one voice among several, and, despite his position at this time, the President concludes the meeting by "requesting that we organize into two groups. One to study the advantage of what might be called a slow course of action which would involve a blockade to be followed by such further actions as appeared necessary as the situation evolved" and a second group whose position "would be referred to as a fast dynamic action which would involve the strike of substantial proportions with or without notice."⁴⁶ No group is assigned to study the benefits of military inaction or to analyze the cost of heightening tensions upon the population of the United States.

A memorandum to USIB members dated October 19, 1962 provides a synoptic survey of the viewpoints within the government throughout the crisis.⁴⁷ This document records that the

⁴⁴ *Id.* at 185.

⁴⁵ *See id.*

⁴⁶ *Id.* at 186.

⁴⁷ *See id.* at 193.

consensus among the “principals” is that “a limited blockade designed to prevent the importation into Cuba of additional arms” is the best possible strategy. The memorandum reflects concern that direct, quick strike military action would be “unwise” and even notes “the price to us of extreme actions of which the Soviets appear capable of executing” as one of the factors militating against that option, albeit after a list of other major concerns. The fact that this price of attack in the face of a deterrent was taken into account is once again not dispositive of the truth or efficacy of deterrence theory. As previously established, deterrence theory demands that the target of the deterrent be entirely unwilling to take on the risks of action. The fear of such risks must be “unendurable.” This is proven not to be the case by the same memorandum, which notes, “The above course of action is by no means unanimous. The opinions range from doing nothing on the one hand, to immediate military action on the other.”⁴⁸ Even if the deterrent angle would have been vehemently expressed by one or several of the voices in the room, the fact that there was nothing close to unanimity violates Taleb’s test for an accurate explanation since one could not have predicted which of these opinions would ultimately have prevailed.

As the crisis progressed, the effect of the Soviet deterrent in Cuba did not grow proportionately. If anything, it weakened. In a memorandum dated October 21st of a meeting with the President, the Attorney General, Secretary McNamara, General Taylor, and Director of Central Intelligence John McCone, the troubling fact that an air strike on the missile sites in Cuba would not guarantee total destruction and thus would introduce the possibility of counterstrike on the United States is noted.⁴⁹ However, inaction is not advised in the face of this possibility. Instead, “Taylor therefore recommended, on the basis of military grounds, that the air strike be conducted immediately, suggesting tomorrow morning, and that it be without

⁴⁸ *Id.* at 194.

⁴⁹ *See id.* at 241.

warning.”⁵⁰ McNamara, who made note of the price of Soviet retaliation in a memorandum just two days earlier, “confirmed the military appraisal expressed above but made no recommendation as to policy.”⁵¹

A memorandum detailing a “Leadership Meeting on October 22nd at 5:00 p.m.” reveals late-stage rationalizations for plans of action in defiance of the Soviet deterrent.⁵² Secretary Rusk places his previously expressed hawkish position within the context of “the philosophy of the “hard-liners.””⁵³ This, Rusk observes, is the position that the USSR has taken, and it involves accepting “very serious risk.”⁵⁴ The President philosophizes further, providing one of his most substantive contributions to the discussions to that point as he “concluded whatever we do involves a risk; however we must make careful calculations and take a chance.”⁵⁵ The President makes this point within the context of a proposed blockade of Cuba and mentions that military preparations for a strike and subsequent invasion will be in place. Thus, both Rusk and the President demonstrate a willingness to accept the risk of potential nuclear war. Kennedy shatters the naïve hope of deterrence theorists that our leaders will never be prepared to “take a chance” and risk annihilation.⁵⁶

The internal record contains gaps and constitutes nothing like a cohesive narrative. This, perhaps, is what opens it up to such misunderstanding by those who champion the supposedly proven peace-keeping effects of deterrence. As figures comprising the President’s key advisory council continue to display a willingness to strike in the face of nuclear threat, a series of letters are exchanged between Khrushchev and Kennedy. These letters are remarkable for the

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See id.* at 275.

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *Id.* at 276.

⁵⁶ *See id.*

disconnect they reveal. While Kennedy is of the mind that Khrushchev betrayed his trust and committed a grave act of aggression by introducing offensive weapons into Cuba, Khrushchev insists that the weapons are for solely defensive purposes and expresses disbelief at the American readiness to engage in conflict. Khrushchev's disbelief, whether genuine or feigned, is in a sense the most direct and conscious confirmation of the failure of deterrence theory that exists in the record. In his letter to Kennedy of October 26th, Khrushchev asks, "...do you seriously think that Cuba can attack the United States and that even we together with Cuba can attack you from the territory of Cuba? Can you really think that way? How is it possible?"⁵⁷ These questions come from the assumption of the efficacy of deterrence, which was broken by the American willingness to take drastic military action. Khrushchev expands upon this assumption as he continues, "Has something so new appeared in military strategy that one can think that it is possible to attack thus. I say precisely attack, and not destroy, since barbarians, people who have lost their sense, destroy."⁵⁸ Thus, Khrushchev understands nuclear deterrence as resting upon the principle that, while some leaders might be willing to attack and risk limited damage, no rational leader will be willing to accept the risk of total destruction. It is this assumption that was proven incorrect by the actions and discussions around the Cuban Missile Crisis. Regardless of the sincerity of Khrushchev's words, an attentive reader of the internal record will note that his conclusions are basically correct. The crisis dispelled any notion that states can be predictably restrained by a nuclear deterrent.

Posterity's insistence upon the wonders that deterrence theory worked throughout this crisis is likely a partial response to an uncomfortable truth: Up until the Kennedy-Khrushchev

⁵⁷ Telegram From the Embassy in the Soviet Union to the Department of State (Oct. 26, 1962) (on file with Yale Law School).

⁵⁸ *Id.*

exchange and what is called the “K message” (the October 26th letter from the Soviet leader), the President’s advisors were counseling some form of military action and their attitude was that of general preparedness for massive conflict.⁵⁹ One cannot know for certain if it was Khrushchev whose words finally affected the President, but there is some evidence for this. Notes from a National Security Council Meeting dated October 28th (widely considered the final day of the crisis), are uncharacteristically sparse. The thrust of the document is captured by eleven words, left unexplained and unelaborated: “Decision made to release a brief statement welcoming the K message.”⁶⁰ In the documentary, *The Fog of War*, an aged McNamara seems deferent to the impact of this correspondence.⁶¹ He references the knot of war metaphor included in the K Message:

If you did this as the first step towards the unleashing of war, well then, it is evident that nothing else is left to us but to accept this challenge of yours. If, however, you have not lost your self-control and sensibly conceive what this might lead to, then, Mr. President, we and you ought not now to pull on the ends of the rope in which you have tied the knot of war, because the more the two of us pull, the tighter that knot will be tied. And a moment may come when that knot will be tied so tight that even he who tied it will not have the strength to untie it, and then it will be necessary to cut that knot, and what that would mean is not for me to explain to you, because you yourself understand perfectly of what terrible forces our countries dispose.⁶²

Thus the crisis ends and generations of analysts are left to misinterpret the events which occurred as a feather in the cap of deterrence theory and a fortification of its status as de facto law.

V. The Perpetuation of an Illusion

There is no world in which one could apply Taleb’s test for a sensible explanation and reach the conclusion that deterrence theory saved the day in the Cuban Missile Crisis. When we

⁵⁹ See generally CIA Documents, *supra* note 26.

⁶⁰ *Id.* at 345.

⁶¹ THE FOG OF WAR: ELEVEN LESSONS FROM THE LIFE OF ROBERT S. MCNAMARA (Sony Pictures Classics 2003).

⁶² Telegram From the Embassy in the Soviet Union, *supra* note 56.

ask if the nuclear deterrent and the fear it instilled in our leaders would have made the eventual outcome predictable, we are confronted by the uncomfortable truth that this fear is barely expressed in the record, nor is the effect of the American deterrent on the Soviets much invoked. In the absence of this evidence, we should not fall prey to fanciful counterfactuals. As psychologist and critic of deterrence theory David P. Barash remarks, “Post facto arguments – especially negative ones – might be the currency of pundits, but are impossible to prove, and offer no solid ground for evaluating a counterfactual claim, conjecturing why something has *not* happened.”⁶³ Before moving on to what the record on the Cuban Missile Crisis *does* offer, it might be worthwhile to ask why so many analysts are hung up on this false explanation. For the answer, we turn to behavioral psychology and its intersection with the law.

In a chapter of *Thinking Fast and Slow* titled, “The Illusion of Understanding,” Kahneman explains how “Taleb suggests that we humans constantly fool ourselves by constructing flimsy accounts of the past and believing they are true.”⁶⁴ Kahneman points out two relevant facts about the nature of the narratives we construct: First, they are often colored by the perceptions we have of the figures involved.⁶⁵ This helps explain why we might be inclined to tell ourselves that President Kennedy was consistently reluctant to engage in a military strike which would spark an escalation to nuclear war during the Cuban Missile Crisis. We want to believe that the President is sensible, restrained, and unwilling to even consider putting a vast number of American lives in danger, so we write ourselves a tale about the reliability of deterrence theory and tell it over and over again. Second, Kahneman explains that humans are

⁶³ David P. Barash, *Nuclear deterrence is a myth. And a lethal one at that*, THE GUARDIAN, <https://www.theguardian.com/world/2018/jan/14/nuclear-deterrence-myth-lethal-david-barash>.

⁶⁴ Kahneman, *supra* note 24 at 490.

⁶⁵ *See id.* at 491.

biased towards simple, understandable causes for events (and particularly *nonevents*).⁶⁶ The truth of the Cuban Missile Crisis is that the advisers to the President, right up until the end, encouraged at the very least preparedness for war and at the most immediate action. Despite this alarming truth, annihilation was eventually evaded after an exchange between the leaders of the two countries, the surrounding details of which are not well-reflected by the record. This is a complicated history, filled with contradictions, surprises, and, substantial gaps. It is much easier, more convenient, and less frightening for us to simplify the whole affair and attribute the outcome to a basic, understandable concept. This, as Kahneman explains, is what makes a story compelling—it “fosters an illusion of inevitability.”⁶⁷

We might test these hypotheses as to the psychological phenomena that perpetuate what Ward Wilson calls the “the myth of nuclear deterrence” by looking to a legitimate secondary source.⁶⁸ Thérèse Delpech authored a monograph for the RAND Corporation titled “Nuclear Deterrence in the 21st Century” that was intended as a defense of the continued relevance of the concept in the modern age.⁶⁹ In her book, Delpech reviews a number of case studies, one of them being the Cuban Missile Crisis, to which she devotes about two pages of analysis.⁷⁰ Perhaps most striking about this analysis is the degree to which Delpech adulates Kennedy and speaks of him as a hero who bested the villain Khrushchev. Such a hagiographical slant is in contrast to the conclusions of psychoanalyst of nuclear strategy Robert Jay Lifton who would likely dub Delpech a member of “the peaceable-world school” whose adherents “stress the capacity for human wisdom displayed by John Kennedy...and Nikita Khrushchev...in avoiding catastrophe”

⁶⁶ See *id.* at 494.

⁶⁷ *Id.* at 492.

⁶⁸ See Wilson, *supra* note 2.

⁶⁹ See Delpech, *supra* note 11.

⁷⁰ See *id.* at 68.

but miss “the larger lesson from the crisis that existing nuclear stockpiles and concepts of national purpose on either side could bring the two nations shockingly close to destroying much of the planet and murdering a large percentage of its inhabitants.”⁷¹ Delpech does not internalize this lesson, instead falling upon a tidy narrative of international affairs as a game of good versus evil when she states that the whole ordeal “was a great gamble for Khrushchev, who lost” and “underestimated Kennedy and American reconnaissance...”⁷² There is no mention of any fundamental error on the part of the President or his advisers besides Kennedy’s self-admitted miscalculations in not expecting that Khrushchev, who along with Castro is illustrated as utterly blameworthy for the crisis, would ever install missiles on the island. Finally, Delpech declares that “[t]he outcome was a clear victory for the United States (the missiles were quickly withdrawn)...”⁷³ She makes no mention of the fact that Kennedy subsequently removed his own corresponding weapons from Turkey.⁷⁴ It can hardly be said that Delpech simplifies the deep complexity of the crisis to arrive at a neat explanation, for she does not even reference the internal record. Instead, she rests on the public testimony of McNamara to Congress and the reminiscence of Arthur Schlesinger that during the crisis “[o]ne lobe of the brain had to recognize the ghastly possibility; another found it quite inconceivable.”⁷⁵ Schlesinger was not even a member of the National Security Council in October 1962.⁷⁶

⁷¹ See Robert Jay Lifton, *The Dimensions of Contemporary War and Violence: How to Reclaim Humanity from a Continuing Revolution in the Technology of Killing*, 69 *Bulletin of Atomic Scientists* 9 (July 1, 2013).

⁷² See Delpech, *supra* note 11 at 68.

⁷³ *Id.* at 69.

⁷⁴ See *Cuban Missile Crisis*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/cuban-missile-crisis>.

⁷⁵ See *id.*

⁷⁶ David Coleman, *NSC ExComm Meetings, 1962-1963*, HISTORY IN PIECES, <https://historyinpieces.com/research/meetings-excomm-executive-committee-national-security-council>.

VI. Positive Suggestions: The Opening for International Law

As previously mentioned, Kahneman has been received and dissected by legal scholars who have noted that lawmaking often comes from heuristic reasoning—from those System 1 impulses that jump out of the abyss without clear explanation.⁷⁷ In the face of an overwhelming crisis like the one the National Security Council faced in October 1962, System 1 functions to substitute simpler questions for more difficult ones.⁷⁸ Looking at the record and eliding the dominant theme of willingness to take on risk, we find in the periphery a question that is repeatedly formulated. That question concerns public opinion, particularly the views of the United States' network of allies across the world. Much unlike deterrence theory, concern for public opinion exhibits a basic openness to the possibility of international law which could enshrine and codify the standards of behavior the decision-makers of the Cuban Missile Crisis occasionally attempted to navigate.

Before delving into this possibility, however, we should disabuse ourselves of any illusions as to the willingness of our leaders to abide by international law. An essential priority of the President and his advisers, as amply expressed by the record, is the maintenance of a wide latitude of action, untethered by restrictive rules and guidelines. In an October 19th memorandum, any inclination to nurture transparency and respect legal standards is tempered by this concern as “Secretary Rusk seemed to favor asking Congress for a declaration of a state of war against Cuba and then proceed with OAS, NATO, etc., *but always preserve flexibility as to the type of action.*”⁷⁹ [emphasis added] Such a prioritization of freedom of action over abidance by law is later confirmed by Secretary Acheson who, at the 1963 Proceedings of the American

⁷⁷ See Korobkin, *supra* note 12.

⁷⁸ See *id.* at 1351.

⁷⁹ *Id.* at 169.

Society of International Law, mentioned that, in relation to the 1962 quarantine of Cuba, “[t]he power, position and prestige of the United States had been challenged by another state; and the law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty.”⁸⁰ Accordingly, a memorandum outlining a discussion on October 22nd describes President Kennedy’s response to questions of the legality of the blockade. The records recounts, “[Senator] Saltonstall...asked whether a blockade would be legal if the OAS did not support it. The President answered that it probably would not; however we would proceed anyway.”⁸¹

It is through the lens of the American government’s distaste for international law and its desire to preserve its own freedom of action that we begin to see why political leaders push the language of deterrence theory. As previously noted, the Obama Administration’s Nuclear Posture Review accepted deterrence as perhaps not ideal, but nonetheless strategically necessary. Going further, the Nuclear Posture Review of the Trump Administration included deterrence theory as an implicit assumption of its entire analysis with the opening sentence of the Secretary’s Preface reading, “On January 27, 2017, the President directed the Department of Defense to conduct a new Nuclear Posture Review (NPR) to ensure a safe, secure, and effective nuclear deterrent that protects the homeland, assures allies and above all, deters adversaries.”⁸² In light of the revelations of the declassified record on the Cuban Missile Crisis, such positions, uniform across ideologically diverse administrations, appear for what they are: simple justifications for the dearth of legal constraints and the continued maintenance and advancement

⁸⁰ Remarks of the Honorable Dean Acheson, Proceedings of the American Society of International Law at its annual meeting (1963).

⁸¹ CIA Documents, *supra* note 26 at 278.

⁸² UNITED STATES OF AMERICAN DEPARTMENT OF DEFENSE, NUCLEAR POSTURE REVIEW, I (Feb. 2018).

of nuclear weapons as tools in Dean Acheson's game of "power, position and prestige."⁸³

Concomitantly, the championing of deterrence theory by strategic analysts emerges as a sign of the triumphant success of the government's efforts to propagandize their own unbounded quest for power. These analysts are allowing their own need for comfort in the face of the great causal uncertainty of history to obscure their vision of the truth.

However, despite the principals' apathy towards international law, which is preserved by the legions of scholars who validate deterrence theory, the decision-makers of the Cuban Missile Crisis did exhibit a degree of sensitivity to public opinion and established norms. Secretary Rusk's call to action documented by the memorandum dated October 19, 1962 is on the one hand shocking for its assumption that the American people would accept "danger and suffering" but on the other hand promising for the fact that the view of the American people is considered at all.⁸⁴ Such a fact gives one hope that perhaps if the position of the American population was more clearly elucidated through international law, it would have its own voice in such internal deliberations. In that same memorandum, President Kennedy is noted to have "seemed to continually raise questions of reactions of our allies, NATO, South America, public opinion and others."⁸⁵ Particular concern is placed on the perception by the rest of the world of an American surprise attack on Cuba. Voices throughout the crisis, particularly those associated in a professional capacity with diplomacy, counsel that any decision made to move forward with military confrontation should be accompanied by a formal declaration of war. The act of a strike without warning was seen by many as officially condemnable. In a memorandum dated earlier that day, former Ambassador to the Soviet Union Charles E. Bohlen "consistently warned that

⁸³ See Acheson, *supra* note 81.

⁸⁴ CIA Documents, *supra* note 26 at 183.

⁸⁵ *Id.* at 184.

world opinion would be against us if we carried out a military strike” and that an attack without warning would “subject us to criticism throughout the world.”⁸⁶ Such criticism is situated in the context of world history, the lessons of which Kennedy’s advisors seem to have internalized. A memo of October 17th bearing the title, “The Cuban Situation,” has Director of Central Intelligence McCone advising that “the United States should not act without warning and thus be forced to live with a “Pearl Harbor indictment” for the indefinite future.”⁸⁷ McCone thus counsels transparency and clear notification to the world of the American position.

To further understand how international law might impose itself, we should recall Kahneman’s System 1 and its bearing upon lawmaking.⁸⁸ The principals of the Cuban Missile Crisis were indeed confronted by a question of colossal difficulty with unimaginable implications. They were put in a position to decide whether or not the United States would obey a nuclear deterrent with the appropriate fear and reluctance to risk annihilation or whether it would meet the challenge head-on and fight no matter the cost, as Winston Churchill did decades earlier. In the face of this question, however, it is not deterrence theory that is borne out, but rather that of Kahneman, for the President and his advisers repeatedly substituted the simpler question of “How will the public respond?” for the more difficult one they faced. This is the opening for international law to convert heuristic reasoning into legal analysis. If public opinion and the standards of the international community were legislated with greater force and specificity, perhaps our leaders would be left with fewer questions and more answers. Perhaps the fear of international censure would sway our political leaders where the fear of nuclear annihilation clearly does not. International law may seem like a modest tool for taking on a

⁸⁶ *Id.* at 169.

⁸⁷ *Id.* at 162.

⁸⁸ *See* Korobkin, *supra* note 12.

problem of such dreadful magnitude, but if we are to believe Kahneman, then perhaps a less ambitious, easily-digestible set of questions is exactly what is needed for our leaders to govern guided by pre-ordained principles instead of wandering haphazardly in the anarchy cultivated by deterrence theory.

To understand how this insight might be applied, we should look again to the historical truths of the internal record. The principals' worry surrounding the appearance and reception of an attack without warning is left rather vague and disconnected from any specific international law or agreement. Looking to modern secondary literature, Scholars Pnina Sharvit Baruch and Noam Neuman outline the fecund history of international customary law around such conduct.⁸⁹ They trace the origins of this area of law from Article 19 of the Lieber Code of 1862 through Article 6 of the 1907 Hague Convention and up to the study of the International Committee of the Red Cross, "Customary International Humanitarian Law."⁹⁰ All of these sources are surely legitimate and worthy of deference and consideration. They remain, however, disjointed. If we are to take seriously the work around the intersection of behavioral psychology and the law, we must understand that individuals acting in a time of high stress and confusion are not likely to activate their System 2 cognition to the extent needed to mentally survey the landscape of scholarship.⁹¹ They are instead more likely to function off of instinct and heuristics, as they did during the Cuban Missile Crisis. Thus, if this case study has anything to tell us about international law, it is that unless it is codified and expressed clearly by as large and impactful a consortium of parties as possible, it is likely to slip by unheeded and under-utilized.

⁸⁹ See Pnina Sharvit Baruch & Noam Neuman, *Warning Civilians Prior to Attack under Intentional Law: Theory and Practice*, in 87 INTERNATIONAL LAW STUDIES: INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 359 (Raul A. Pedrozo & Faria P. Wollschlager, eds.)

⁹⁰ See *id.* at 360-61.

⁹¹ See generally Korobkin, *supra* note 12.

Conclusion

These problems are as daunting as they come, but we cannot afford to allow their complexity to lead us down the path of causal fallacy and into the poppy field of deterrence theory. Thankfully, a serious look at the record not only disabuses us of our illusions but points toward under-explored areas of potential progress. The Cuban Missile Crisis demonstrates that if there is to be any bulwark against nuclear annihilation, it will be found in the work of international law, which has the potential to organize and enforce those principles our leaders have acknowledged in the past but chosen to ignore. With this as our project, we might hope to one day effectively establish that there *is* a cost too high and a future too bleak for consideration. Having accomplished that, the next crisis might not bring us so close to the edge.