

On Deterrence and the Death Penalty

Ernest Van Den Haag

1968. *Ethics*, Vol. 78, No. 4

1. If rehabilitation and the protection of society from unrehabilitated offenders were the only purposes of legal punishment, the death penalty could be abolished: it cannot attain the first end, and is not needed for the second. No case for the death penalty can be made unless “doing justice,” or “detering others,” are among our penal aims.¹ Each of these purposes can justify capital punishment by itself; opponents, therefore, must show that neither actually does, while proponents can rest their case on either.

Although the argument from justice is intellectually more interesting, and, in my view, decisive enough, utilitarian arguments have more appeal: the claim that capital punishment is useless because it does not deter others is most persuasive. I shall, therefore, focus on this claim. Lest persuasiveness suffer, I shall show, nonetheless, that claims of injustice have no independent standing: their weight depends on the weight given to deterrence.

2. Capital punishment is regarded as unjust because it may lead to the execution of innocents or because the guilty poor (or disadvantaged) are more likely to be executed than the guilty rich.

Regardless of merit, these claims are relevant only if “doing justice” is among the purposes of punishment. Unless one regards it as good, or at least better, that the guilty be punished rather than the innocent and that the equally guilty be punished equally,² unless, that is, one wants penalties to be just, one cannot object to them because they are not. However, if one does include justice among the purposes of punishment, it becomes possible to justify any one punishment—even death—on grounds of justice. Yet, those who object to the death penalty because of its alleged injustice usually deny not only the merits, or the sufficiency, of specific arguments based on justice but the propriety of justice as an argument: they exclude “doing justice” as a purpose of legal punishment. If justice is not a purpose of penalties, injustice cannot be an objection to the death penalty (or to any other); if it is, justice cannot be ruled out as an argument for any penalty.

Consider the claim of injustice on its merits now. A convicted man may be found to have been innocent; if he was executed, the penalty cannot be reversed. Except for fines, other penalties cannot be reversed either: time spent in prison cannot be returned. However, a prison sentence may be remitted once the prisoner is found innocent; and

he can be compensated for the time served (although compensation ordinarily cannot repair the harm). Thus, though (nearly) all penalties are irreversible, the death penalty, unlike others, is irrevocable as well.

Despite all precautions, errors will occur in judicial proceedings: the innocent may be found guilty,³ or the guilty rich may more easily escape conviction, or receive lesser penalties, than the guilty poor. These injustices do not reside in the penalties inflicted but in their maldistribution. It is not the penalty—death or prison—which is unjust when inflicted on the innocent but its imposition on someone who is innocent. Inequity between poor and rich also involves distribution, not the penalty distributed.⁴ Thus injustice is not an objection to the death penalty but to the distributive process—the trial. Trials are more likely to be fair when life is at stake—the death penalty is probably revocability is thought less important less often unjustly inflicted than any other. It requires special consideration not because it is more, or more often, unjust than other penalties but because it is always irrevocable.

Can any amount of deterrence justify the possibility of irrevocable injustice? Certainly injustice is by definition unjustifiable in each actual individual case; it must be objected to whenever it occurs. But we are concerned here with the process that may produce injustice, and the penalty that would make it irrevocable—not with the actual individual cases produced, but with general rules that potentially produce them. To consider objections to a general rule (the provision of any penalties by law), we must compare the likely net result of alternative rules and prefer the rule (or penalty) likely to produce the least injustice, since, however one defines it, to favor justice may mean more but cannot mean less than to favor the least injustice. If the death of innocents because of judicial error is unjust, so is the death of innocents by murder. If some murders could be avoided by a possibly deterrent penalty—for example, the death penalty—then the question becomes: which penalty will minimize the total number of innocents killed (by law enforcement and by law violation)? It follows that some amount of deterrence could justify irrevocable injustice.

In general, the possibility of injustice argues against penalization only if the expected usefulness of penalization is less important than the probable harm (particularly to innocents) and the probable inequities. The possibility of injustice argues against the death penalty only inasmuch as the added usefulness (deterrence) expected from irrevocability is thought less important than the added harm. (Were my argument specifically concerned with justice, I could compare the injustice inflicted by the courts with the injustice—outside the courts—avoided by the judicial process. That is, “important” here may be used to include everything to which importance is attached.)

We must briefly examine now the general use and effectiveness of deterrence to decide whether the death penalty adds enough deterrence to be warranted.

3. Does any punishment "deter others" at all? Doubts have been thrown on this effect because it is thought to depend on the incorrect rationalistic psychology of some of its eighteenth- and nineteenth-century proponents. Actually deterrence does not depend on rational calculation, on rationality or capacity for it, or on rationalistic psychology. Deterrence depends on the regularity—not on the rationality—of human responses to danger and on the possibility of reinforcing internal controls by vicarious external experiences.

Responsiveness to danger is generally found in human behavior; the danger can, but need not, come from the law or from society; nor need it be explicitly verbalized. Unless intent on suicide, people do not jump from high mountain cliffs, however tempted they are to fly through the air; and they take precautions against falling. The mere risk of injury often restrains us from doing what is otherwise attractive; we refrain even when we have no direct experience, and usually without explicit computation of probabilities, let alone conscious weighing of expected pleasure against possible pain. One abstains from dangerous acts because of vague, inchoate, habitual, and, above all, preconscious fears. Risks and rewards are more often felt than calculated; one abstains without accounting to oneself because "it isn't done" or because one literally does not conceive of the action one refrains from.

Unlike natural dangers, legal threats are constructed deliberately by legislators to restrain actions which may impair the social order. Thus legislators try to transform *social* into *personal* dangers. I must forego elaboration here of the added element of moral obligation, which transforms external into internal danger. Though arising from the authority of rulers and rules, it is constantly reinforced by the coercive imposition of that authority on recalcitrants. Most people refrain from offenses because they feel an obligation to behave lawfully. This feeling of obligation internalizes social rules and social authority and is reinforced with the help of penalties.

Although the legislators may calculate their threats and the responses to be produced, the effectiveness of the threats neither requires nor depends on calculations by those responding. The predictor (or producer) must calculate, not the predicted (or produced). Hence, although legislation (and legislators) should be rational, subjects need not be, in order to be deterred as intended. They only need to be responsive.

Punishments deter those who have not violated the law for the same reasons—and in the same degrees (except for reinforcement and internalization: moral obligation)—as

do natural dangers. Often natural dangers (all dangers not deliberately created by legislation—for example, injury of the criminal inflicted by the crime victim) are insufficient. Thus, the fear of injury (natural danger) does not suffice to control city traffic; it must be reinforced by the legal punishment meted out to those who violate the rules. These punishments keep most people observing the regulations. However, where (in the absence of natural danger) the threatened punishment is so light that the advantage of violating rules tends to exceed the disadvantage of being punished (divided by the risk), the rule is violated (that is, parking fines are too light). In this case, the feeling of obligation tends to vanish as well. Elsewhere, punishment deters.

To be sure, not everybody responds to threatened punishment. Non-responsive persons may be (a) self-destructive or (b) incapable of responding to threats (or even of grasping them). Increases in the size, or certainty, of penalties would not affect these two groups. A third group (c) might respond to more certain or more severe penalties.⁵ If the punishment threatened for burglary, robbery, or rape were a five dollar fine in North Carolina, and five years in prison in South Carolina, I have no doubt that the North Carolina treasury would become quite opulent (until vigilante justice would provide the deterrence not provided by law). Whether to increase penalties (or improve enforcement) depends on the importance of the rule to society, the size and likely reaction of the group that did not respond before, and the added punishment and enforcement required to deter it. Observation would have to locate the points-likely to differ in different times and places—at which diminishing, zero, and negative returns set in. There is no reason to believe that all present and future offenders belong to the a priori non-responsive groups or that all penalties have reached the point of diminishing, let alone zero, returns.

4. Even though its effectiveness seems obvious, punishment as a deterrent has fallen into disrepute. Some ideas which help explain this progressive heedlessness were uttered by Lester Pearson, then prime minister of Canada, when, in opposing the death penalty, he proposed that, instead, "the state seek to eradicate the causes of crime-slums, ghettos and personality disorders."⁶

"Slums, ghettos and personality disorders "have not been shown, singly or collectively, to be "the causes" of crime.

1. The crime rate in slums is indeed higher than elsewhere; but so is the death rate in hospitals. Slums are no more "causes" of crime than hospitals are of death; they are locations of crime, as hospitals are of death. Slums and hospitals attract people selectively; neither is the "cause" of the condition (disease in hospitals, poverty in slums) that leads to the selective attraction.

As for poverty which pulls people into slums and, sometimes, into crime, any relative disadvantage may lead to ambition, frustration, resentment, and, if insufficiently restrained, to crime. Not all relative disadvantages can be eliminated; indeed, very few can be, and their elimination increases the resentment generated by the remaining ones; not even relative poverty can be removed altogether. (Absolute poverty—whatever that may be—hardly affects crime.) However, though contributory, relative disadvantages are not a necessary or a sufficient cause of crime: most poor people do not commit crimes, and some rich people do. Hence, "eradication of poverty" would, at most, remove one (doubtful) cause of crime.

2. Negro ghettos have a high crime rate; Chinese ghettos have a low one. Ethnic separation, voluntary or forced, obviously has little to do with crime. I can think of no reason why it should.⁷

3. I cannot see how the state could "eradicate" personality disorders even if all causes and cures were known and available. Nor are personality disorders necessary or sufficient causes for criminal offenses,⁸ unless these be identified by means of (moral, not clinical) definition with personality disorders. In this case, Mr. Pearson would have proposed to "eradicate" crime by eradicating crime—certainly a sound, but not a very helpful, idea.

Mr. Pearson's views were voiced more vaguely but not less delusively by U.S. Attorney-General Ramsey Clark, when he told a congressional committee that "only the elimination of the causes of crime can make a significant and lasting difference in the incidence of crime." Uncharitably interpreted, Mr. Clark revealed that only the elimination of causes eliminates effects—a sleazy cliché and wrong to boot. Given the benefit of the doubt, Clark probably meant that the causes of crime are social and that, therefore, crime can be reduced "only" by non-penal (social) measures.

The attorney-general's view suggests a fireman who declines fire-extinguishing apparatus by pointing out that "in the long run only the elimination of the causes" of fire "can make a significant and lasting difference in the incidence" of fire and that fire-fighting equipment does not eliminate "the causes" except that such a fireman would probably not rise to fire chief. Actually, whether fires are checked depends on fire-fighting apparatus and on the efforts of the firemen using it no less than on the presence of "the causes": inflammable materials. So with crimes. Laws, court, and police actions are no less important in restraining them than "the causes" are in impelling them. If firemen (or attorneys-general) pass the buck, and refuse to use the means available, we may all be burned while waiting for "the long run" and "the elimination of the causes."

Whether any activity—be it lawful or unlawful—takes place depends on whether the desire for it, or for what-

ever is to be secured by it, is stronger than the desire to avoid the costs involved. Accordingly, people work, attend college, commit crimes, go to the movies—or refrain from any of these activities. Attendance at a theater may be high because the show is entertaining and because the price is low. Obviously, the attendance depends on both—on the combination of expected gratification and cost. The wish, motive, or impulse for doing anything—the experienced, or expected, gratification—is the cause of doing it; the wish to avoid the cost is the cause of not doing it. One is no more and no less "cause" than the other.⁹ In this sense, penalties (costs) are causes of lawfulness, or (if too low or uncertain) of unlawfulness, of crime. People do commit crimes because, given their conditions, the desire for the satisfaction sought prevails. They refrain if the desire to avoid the cost prevails. The crime rate increases if the cost is reduced or the desire raised. It can be decreased by raising the cost or by reducing the desire.

The cost of crime is more easily and swiftly changed than the conditions producing the inclination to it. Further, the costs are very largely within the power of the government to change, whereas the conditions producing propensity are often only indirectly affected by government action, and some are altogether beyond the control of the government.¹⁰ Our unilateral emphasis on these conditions and our undue neglect of costs may contribute to an unnecessarily high crime rate.

5. The foregoing suggests the question posed by the death penalty: is the deterrence added (return) sufficiently above zero to warrant irrevocability (or other, less clear, disadvantages)? The question is not only whether the penalty deters but whether it deters more than alternatives and whether the difference exceeds the cost of irrevocability. (I shall assume that the alternative is actual life imprisonment so as to exclude the complication produced by the release of the unrehabilitated.)

In some fairly infrequent but important circumstances, the death penalty is the only possible deterrent. Thus, in case of acute coups d'état, or of acute substantial attempts to overthrow the government, prospective rebels would altogether discount the threat of any prison sentence. They would not be deterred because they believe the swift victory of the revolution will invalidate a prison sentence and turn it into an advantage. Execution would be the only deterrent because, unlike prison sentences, it cannot be revoked by victorious rebels. The same reasoning applies to deterring spies or traitors in war-time. Finally, men who, by virtue of past acts, are already serving, or are threatened by, a life sentence, could be deterred from further offenses only by the threat of the death penalty.¹¹

What about criminals who do not fall into any of these (often ignored) classes? Professor Thorsten Sellin has made a careful study of the available statistics; he

concluded that they do not yield evidence for the deterring effect of the death penalty.¹² Somewhat surprisingly, Sellin seems to think that this lack of evidence for deterrence is evidence for the lack of deterrence. It is not. It means that deterrence has not been demonstrated statistically—not that non-deterrence has been.

It is entirely possible, indeed likely (as Sellin appears willing to concede), that the statistics used, though the best available, are nonetheless too slender a reed to rest conclusions on. They indicate that the homicide rate does not vary greatly between similar areas with or without the death penalty, and in the same area before and after abolition. However, the similar areas are not similar enough; the periods are not long enough: many social differences and changes, other than the abolition of the death penalty, may account for the variation (or lack of it) in homicide rates with and without, before and after abolition; some of these social differences and changes are likely to have affected homicide rates. I am unaware of any statistical analysis which adjusts for such changes and differences.

Homicide rates do not depend exclusively on penalties any more than other crime rates. A number of conditions which influence the propensity to crime, demographic, economic, or generally social, changes or differences—even such matters as changes in the divorce laws or in the cotton price—may influence the homicide rate. Wherefore variation or constancy cannot be attributed to variations or constancy of the penalties, unless we know that no other factor influencing the homicide rate has changed. Usually we do not. To believe the death penalty deterrent does not require one to believe that the death penalty, or any other, is the only, or the decisive, causal variable; this would be as absurd as the converse mistake that "social causes" are the only, or always the decisive, factor. To favor capital punishment, the efficacy of neither variable need be denied. It is enough to affirm that the severity of the penalty may influence some potential criminals and that the added severity of the death penalty adds to deterrence, or may do so. It is quite possible that such a deterrent effect may be offset (or intensified) by non-penal factors which affect propensity; its presence or absence, therefore, may be hard, and perhaps impossible, to demonstrate.

Contrary to what Sellin and others seem to presume, I doubt that offenders are aware of the absence or presence of the death penalty state by state or period by period. Such unawareness argues against the assumption of a calculating murderer. However, unawareness does not argue against the death penalty if by deterrence we mean a preconscious, general response to a severe but not necessarily specifically, and explicitly apprehended or calculated threat. A constant homicide rate, despite abolition, may occur because of unawareness and not because of lack of deterrence: people remain deterred for a lengthy interval by the severity of the penalty in the

past, or by the severity of penalties used in similar circumstances nearby.

I do not argue for a version of deterrence which would require me to believe that an individual shuns murder because of the death penalty while in North Dakota, and merrily goes to it in South Dakota, since it has been abolished there; or that he will start a murderous career, from which he had hitherto refrained, after abolition. I hold that the generalized threat of the death penalty may be a deterrent, and the more so, the more generally applied. Deterrence will not cease in the particular areas of abolition or at the particular times of abolition. Rather, general deterrence will be somewhat weakened, through local (partial) abolition. Even such weakening will be hard to detect owing to changes in many offsetting, or reinforcing, factors.

For all of these reasons, I doubt that the presence or absence of a deterrent effect of the death penalty is likely to be demonstrable by statistical means. The statistics presented by Sellin and others show only that there is no statistical proof for the deterrent effect of the death penalty. But they do not show that there is no deterrent effect. Not to demonstrate presence of the effect is not the same as to demonstrate its absence; certainly not, when there are plausible explanations for the non-demonstrability of the effect.

It is on our uncertainty that the case for deterrence must rest.¹³

6. If we do not know whether the death penalty will deter others, we are confronted with two uncertainties. If we impose the death penalty, and achieve no deterrent effect thereby, the life of a convicted murderer has been expended in vain (from a deterrent viewpoint). There is a net loss. If we impose the death sentence, and thereby deter some future murderers, we spare the lives of some future victims (the prospective murderers gain, too: they are spared punishment because they were deterred). In this case, the death penalty has led to a net gain, unless the life of a convicted murderer is valued more highly than that of the unknown victim, or victims (and the non-imprisonment of the deterred non-murderer).

The calculation can be turned around, of course. The absence of the death penalty may harm no one and therefore produce a gain—the life of the convicted murderer. Or it may kill future victims of murderers who could have been deterred and thus produce a loss—their life.

To be sure, we must risk something certain—the death (or life) of the convicted man, for something uncertain—the death (or life) of the victims of murderers who may be deterred. This is in the nature of uncertainty; when we invest, or gamble, we risk the money we have for an uncertain gain. Many human actions, most commitments—including marriage and crime—share this

characteristic with the deterrent purpose of any penalization, and with its rehabilitative purpose (and even with the protective).

More proof is demanded for the deterrent effect of the death penalty than is demanded for the deterrent effect of other penalties. This is not justified by the absence of other utilitarian purposes, such as protection and rehabilitation; they involve no less uncertainty than deterrence.¹⁴

Irrevocability may support a demand for some reason to expect more deterrence than revocable penalties might produce but not a demand for more proof of deterrence, as has been pointed out (Part 5 above). The reason for expecting more deterrence lies in the greater severity, the terrifying effect inherent in finality. Since it seems more important to spare victims than to spare murderers, the burden of proving that the greater severity inherent in irrevocability adds nothing to deterrence lies on those who oppose capital punishment. Proponents of the death penalty need show only that there is no more uncertainty about it than about greater severity in general.

The demand that the death penalty be proved more deterrent than alternatives cannot be satisfied any more than the demand that six years in prison be proved to be more deterrent than three. But the uncertainty which confronts us favors the death penalty as long as by imposing it we might save future victims of murder. This effect is as plausible as the general idea that penalties have deterrent effects which increase with their severity. Though we have no proof of the positive deterrence of the penalty, we also have no proof of zero or negative effectiveness. I believe we have no right to risk additional future victims of murder for the sake of sparing convicted murderers; on the contrary, our moral obligation is to risk the possible ineffectiveness of executions. However rationalized, the opposite view appears to be motivated by the simple fact that executions are subject to more social control than murders. However, this applies to all penalties and does not argue for the abolition of any.

¹ Social solidarity or “community feeling” (here to be ignored) could be dealt with as a form of deterrence.

² Certainly a major meaning of *suum cuique tribue*.

³ I am not concerned here with the converse injustice, which I regard as no less grave.

⁴ Such inequity, though likely, has not been demonstrated. Note that, since there are more poor than rich, there are likely to be more guilty poor; and if poverty contributes to crime, the proportion of the poor who are criminals also should be higher than of the rich.

⁵ I neglect those motivated by civil disobedience or, generally, moral or political passion. Deterring them depends less on penalties than on the moral support they receive, though penalties play a role. I also neglect those who may belong to all three groups listed, some successively, some even simultaneously, such as drug addicts. Finally, I must altogether omit the far-from-negligible role that problems of apprehension

and conviction play in deterrence—beyond saying that, by reducing the government’s ability to apprehend and convict, courts are able to reduce the risks of offenders.

⁶ I quote from the *New York Times* (November 24, 1967, p. 22). The actual psychological and other factors which bear on the disrepute—as distinguished from the rationalizations—cannot be examined here.

⁷ Mixed areas, incidentally, have higher crime rates than segregated ones (see, e.g., R. Ross and E. van den Haag, *The Fabric of Society* (New York: Harcourt, Brace & Co., 1957), pp. 102-4. Because slums are bad (morally) and crime is, many people seem to reason that “slums spawn crime”—which confuses some sort of moral with a causal relation.

⁸ The known incidence of personality disorders within the prison population does not exceed the known incidence outside—although our knowledge of both is tenuous.

⁹ Common speech supports this use of “cause” no less than logic: “Why did you go to Jamaica?” “because it is such a beautiful place.” “Why didn’t you go to Jamaica?” “because it is too expensive.”—“Why do you read ‘On Deterrence and the Death Penalty?’” “because it is so instructive.” “Why don’t you read ‘On Deterrence and the Death Penalty?’” “because it is too exasperating.”

¹⁰ Thus, if poverty, slums, etc., could be abolished, if everybody had all “necessities” (I do not pretend to know what this could mean), crime would remain; for, in the words of Aristotle, “the greatest crimes are committed not for the sake of basic necessities but for the sake of superfluities.” Superfluities cannot be provided by the government; they would be what the government does not provide.

¹¹ Cautious revolutionaries, uncertain of final victory, might be impressed by prison sentences- but not in the acute stage, when faith in victory is high. And one can increase even the severity of a life sentence in prison. Finally, harsh punishment of rebels can intensify rebellious impulses. These points, though they qualify it, hardly impair the force of the argument.

¹² Sellin considered mainly homicide statistics. His work may be found in his *Capital Punishment* (New York: Harper & Row, 1967); or, most conveniently, in H.A. Bedau, *The Death Penalty in America* (Garden City, N.Y.: Doubleday & Co., 1964), which also offers other material, mainly against the death penalty.

¹³ In view of the strong emotions aroused (it- self an indication of effectiveness to me: might not murderers be as upset over the death penalty as those who wish to spare them?) and because I believe penalties must reflect community feeling to be effective, I oppose mandatory death sentences and favor optional, and perhaps binding, recommendations by juries after their finding of guilt. The opposite course risks the non-conviction of guilty defendants by juries who do not want to see them executed.

¹⁴ Rehabilitation or protection are of minor importance in our actual penal system (though not in our theory). We confine many people who do not need rehabilitation and against whom we do not need protection (e.g., the exasperated husband who killed his wife); we release many unrehabilitated offenders against whom protection is needed. Certainly rehabilitation and protection are not, and deterrence is, the main actual function of legal punishment if we disregard non-utilitarian ones.

The Death Penalty as a Deterrent: Argument and Evidence

Hugo Adam Bedau

1970. *Ethics*, Vol. 80, No. 3

Professor Van den Haag's recent article, "On Deterrence and the Death Penalty,"¹ raises a number of points of that mixed (i.e., empirical-and-conceptual-and-normative) character which typifies most actual reasoning in social and political controversy but which (except when its purely formal aspects are in question) tends to be ignored by philosophers. I pass by any number of tempting points in his critique in order to focus in detail only on those which affect his account of what he says is the major topic, namely, the argument for retaining or abolishing the death penalty as that issue turns on the question of *deterrence*.

On this topic, Van den Haag's main contentions seem to be these five: (I) Abolitionists of a utilitarian persuasion "claim that capital punishment is use- less because it does not deter others" (p. 280, col. 1). (II) There are some classes of criminals and some circumstances in which "the death penalty is the only possible deterrent"(p. 284, col. 2). (III) As things currently stand, "deterrence [namely, of criminal homicide by the death penalty] has not been demonstrated statistically"; but it is mistaken to think that "non-deterrence" has been demonstrated statistically (p. 285, col. 1). (IV) The death penalty is to be favored over imprisonment, because "the added severity of the death penalty adds to deterrence, or may do so" (p. 285, col. 2; cf. p. 286, col. 1). (V) "Since it seems more important to spare victims than to spare murderers, the burden of proving that the greater severity inherent in irrevocability adds nothing to deterrence lies on those who oppose capital punishment" (p. 287, col. 1).

Succinctly, I shall argue as follows: (I) is not reasonably attributable to abolitionists, and in any case it is false; (II) is misleading and, in the interesting cases, is empirically insignificant; (III), which is the heart of the dispute, is correct in what it affirms but wrong and utterly misleading in what it denies; (IV) is unempirical and one-sided as well; and (V) is a muddle and a dodge.

The reason for pursuing in some detail what at first might appear to be mere polemical controversy is not that Professor Van den Haag's essay is so persuasive or likely to be of unusual influence. The reason is that the issues he raises, even though they are familiar, have not been nearly adequately discussed, despite a dozen state, congressional, and foreign government investigations into capital punishment in recent years. In Massachusetts, for example, several persons under sentence of death have been granted stays of execution pending the final report of

a special legislative commission to investigate the death penalty. The exclusive mandate of this commission is to study the question of deterrence.² Its provisional conclusions, published late in 1968, though not in the vein of Van den Haag's views, are liable to the kind of criticism he makes. This suggests that his reasoning may be representative of many who have tried to understand the arguments and research studies brought forward by those who would abolish the death penalty, and therefore that his errors are worth exposure and correction once and for all.

1. The claim Van den Haag professes to find "most persuasive," namely, "capital punishment is useless because it does not deter others," is strange, and it is strange that he finds it so persuasive. Anyone who would make this claim must assume that only deterrent efficacy is relevant to assessing the utility of a punishment. In a footnote, Van den Haag implicitly concedes that deterrence may not be the only utilitarian consideration, when he asserts that whatever our penal "theory" may tell us, "deterrence is ... the *main actual* function of legal punishment if we disregard non-utilitarian ones" (italics added). But he does not pursue this qualification. Now we may concede that if by 'function' we mean intended or professed function, deterrence is the main function of punishment. But what is deterrence? Not what Van den Haag says it is, namely, "a preconscious, general response to a severe but not necessarily specifically and explicitly apprehended or calculated threat" (pp. 285-86). How can we count as evidence of deterrence, as we may under this rubric of "general response," the desire of persons to avoid capture and punishment for the crimes they commit? Some criminologists have thought this is precisely what severe punishments tend to accomplish; if so, then they accomplish this effect only if they have failed as a deterrent. Van den Haag's conception of deterrence is too ill-formulated to be of any serious use, since it does not discriminate between fundamentally different types of "general response" to the threat of punishment.

Let us say (definition 1) that a given punishment (P) is a *deterrent* for a given person (A) with respect to a given crime (C) at a given time (t) if and only if A does not commit C at t because he believes he runs some risk of P if he commits C, and A prefers, *ceteris paribus*, not to suffer P for committing C. This definition does not presuppose that P really is the punishment for C (a person could be deterred through a mistaken belief); it does not presuppose that A runs a high risk of incurring P (the degree of risk could be zero); or that A consciously thinks of P prior to t (it is left open as to the sort of theory needed to account for the operation of A's beliefs and preferences on his conduct). Nor does it presuppose that anyone ever suffers P (P could be a "perfect" deterrent), or that only P could have deterred A from C (some

sanction less severe than P might have worked as well); and, finally, it does not pre-suppose that because P deters A at t from C, therefore P would deter A at any other time or anyone else at t. The definition insures that we cannot argue from the absence of instances of C to the conclusion that P has succeeded as a deterrent: the definition contains conditions (and, moreover, contains them intentionally) which prevent this. But the definition does allow us to argue from occurrences of C to the conclusion that P has failed on each such occasion as a deterrent.

Definition 1 suggests a general functional analogue appropriate to express scientific measurements of *differential deterrent efficacy* of a given punishment for a given crime with respect to a given population (definition 2). Let us say that a given punishment, P, deters a given population, H, from crime, C, to the degree, D, that the members of H do not commit C because they believe that they run some risk of P if they commit C and, *ceteris paribus*, they prefer not to suffer P for committing C. If $D = 0$, then P has completely failed as a deterrent, whereas if $D = 1$, P has proved to be a perfect deterrent. Given this definition and the appropriate empirical results for various values of P, C, and H, it should be possible to establish on inductive grounds the relative effectiveness of a given punishment as a deterrent.

Definition 2 in turn leads to the following corollary for assertions of relative superior deterrent efficacy of one punishment over another. A given punishment, P1, is a superior deterrent to another punishment, P2, with respect to some crime, C, and some population, H, if and only if: if the members of H, believing that they are liable to P1 upon committing C, commit C to the degree D1; whereas if the members of H believe that they are liable to P2 upon committing C, they commit C to the degree D2, and $D1 > D2$. This formulation plainly allows that P1 may be a more effective deterrent than P2 for C1, and yet less effective as a deterrent than P2 for a different crime C2 (with H constant), and so forth, for other possibilities. When speaking about deterrence in the sections which follow, I shall presuppose these definitions and this corollary. For the present, it is sufficient to notice that they have, at least, the virtue of eliminating the vagueness in Van den Haag's definition complained of earlier.

Even if we analyze the notion of deterrence to accommodate the above improvements, we are left with the central objection to Van den Haag's claim. Neither classic nor contemporary utilitarians have argued for or against the death penalty *solely* on the ground of deterrence, nor would their ethical theory entitle them to do so. One measure of the non-deterrent utility of the death penalty derives from its elimination (through death of a known criminal) of future possible crimes from that source; another arises from the elimination of the criminal's probable adverse influence upon others to emulate his ways; another lies in the generally lower budgetary outlays of tax moneys needed to finance a

system of capital punishment as opposed to long-term imprisonment. There are still further consequences apart from deterrence which the scrupulous utilitarian must weigh, along with the three I have mentioned. Therefore, it is incorrect, because insufficient, to think that if it could be demonstrated that the death penalty is not a deterrent then we would be entitled to infer, on utilitarian assumptions, that "the death penalty is useless" and therefore ought to be abolished. The problem for the utilitarian is to make commensurable such diverse social utilities as those measured by deterrent efficacy, administrative costs, etc., and then to determine which penal policy in fact maximizes utility. Finally, inspection of sample arguments actually used by abolitionists³ will show that Van den Haag has attacked a straw man: there are few if any contemporary abolitionists (and Van den Haag names none) who argue solely from professedly utilitarian assumptions, and it is doubtful whether there are any nonutilitarians who would abolish the death penalty solely on grounds of its deterrent in-efficacy.

2. Governments faced by incipient rebellion or threatened by a coup d'état may well conclude, as Van den Haag insists they should, that rebels (as well as traitors and spies) can be deterred, if at all, by the threat of death, since "swift victory" of the revolution "will invalidate [the deterrent efficacy] of a prison sentence" (pp. 284-85).⁴ This does not yet tell us how important it is that such deterrence be provided, any more than the fact that a threat of expulsion is the severest deterrent available to university authorities tells them whether they ought to insist on expelling campus rebels. Also, such severe penalties might have the opposite effect of inducing martyrdom, of provoking attempts to overthrow the government to secure a kind of political sainthood. This possibility Van den Haag recognizes, but claims in a footnote that it "hardly impair[s] the force of the argument" (p. 288). Well, from a logical point of view it impairs it considerably; from an empirical point of view, since we are wholly without any reliable facts or hypotheses on politics in such extreme situations, the entire controversy remains quite speculative.

The one important class of criminals deterrable, if at all, by the death penalty consists, according to Van den Haag, of those already under "life" sentence or guilty of a crime punishable by "life." In a trivial sense, he is correct; a person already suffering a given punishment, P, for a given crime, C1 could not be expected to be deterred by anticipating the rein infliction of P were he to commit C2. For if the anticipation of P did not deter him from committing C1, how could the anticipation of P deter him from committing C2, given that he is already experiencing P? This generalization seems to apply whenever P = "life" imprisonment. Actually, the truth is a bit more complex, because in practice (as Van den Haag concedes, again in a footnote) so-called "life"

imprisonment always has its aggravations (e.g., solitary confinement) and its mitigations (parole eligibility). These make it logically possible to deter a person already convicted of criminal homicide and serving "life" imprisonment from committing another such crime. I admit that the aggravations available are not in practice likely to provide much added deterrent effect; but exactly how likely or unlikely this effect is remains a matter for empirical investigation, not idle guesswork. Van den Haag's seeming truism, therefore, relies for its plausibility on the false assumption that "life" imprisonment is a uniform punishment not open to further deterrence-relevant aggravations and mitigations.

Empirically, the objection to his point is that persons already serving a "life" sentence do not in general constitute a source of genuine alarm to custodial personnel. Being already incarcerated and integrated into the reward structure of prison life, they do not seem to need the deterrent controls allegedly necessary for other prisoners and the general public.⁵ There are exceptions to this generalization, but there is no known way of identifying them in advance, their number has proved to be not large, and it would be irrational, therefore, to design a penal policy (as several states have)⁶ which invokes the death penalty in the professed hope of deterring such convicted offenders from further criminal homicide. Van den Haag cites no evidence that such policies accomplish their alleged purpose, and I know of none. As for the real question which Van den Haag's argument raises—is there any class of actual or potential criminals for which the death penalty exerts a marginally superior deterrent effect over every less severe alternative?—we have no evidence at all, one way or the other. Until this proposition, or some corollary, is actually tested and confirmed, there is no reason to indulge Van den Haag in his speculations.

3. It is not clear why Van den Haag is so anxious to discuss whether there is evidence that the death penalty is a deterrent, or whether—as he thinks—there is no evidence that it is not a deterrent. For the issue over abolishing the death penalty, as all serious students of the subject have known for decades, is not whether (1) *the death penalty is a deterrent*, but whether (2) *the death penalty is a superior deterrent to "life" imprisonment*, and consequently the evidential dispute is also not over (1) but only over (2). As I have argued elsewhere,⁷ abolitionists have reason to contest (1) only if they are against *all* punitive alternatives to the death penalty; since few abolitionists (and none cited by Van den Haag) take this extreme view, it may be ignored here. We should notice in passing, however, that if it were demonstrated that (1) were false, there would be no need for abolitionists to go on to marshal evidence against (2), since the truth of (1) is a presupposition of the truth of (2). Now it is true that some abolitionists may be faulted for writing as if the

falsity of (1) followed from the falsity of (2), but this is not a complaint Van den Haag makes nor is it an error vital to the abolitionist argument against the death penalty. Similar considerations inveigh against certain pro-death-penalty arguments. Proponents must do more than establish (1), they must also provide evidence in favor of (2); and they cannot infer from evidence which establishes (1) that (2) is true or even probable (unless, of course, that evidence would establish [2] independently). These considerations show us how important it is to distinguish (1) and (2) and the questions of evidence which each raises. Van den Haag never directly discusses (2), except when he observes in passing that "the question is not only whether the death penalty deters but whether it deters more than alternatives" (p. 284, col. 2). But since he explicitly argues only over the evidential status of (1), it is unclear whether he wishes to ignore (2) or whether he thinks that his arguments regarding (1) also have consequences for the evidential status of (2). Perhaps Van den Haag thinks that if there is no evidence disconfirming (1), then there can be no evidence disconfirming (2); or perhaps he thinks that none of the evidence disconfirming (2) also disconfirms (1). (If he thinks either, he is wrong.) Or perhaps he is careless, conceding on the one hand that (2) is important to the issue of abolition of the death penalty, only to slide back into a discussion exclusively about (1).

He writes as if his chief contentions were these two: we must not confuse (a) the assertion that there is no evidence that (1), with (b) the assertion that there is evidence that not-(1) (i.e., evidence that [1] is false); and abolitionists have asserted (b) whereas all they are entitled to assert is (a).⁸ I wish to proceed on the assumption that since (1) is not chiefly at issue, neither is (a) nor (b) (though I grant, as any-one must, that the distinction between [a] and [b] is legitimate and important). What is chiefly at issue, even though Van den Haag's discussion obscures the point, is whether abolitionists must content themselves with asserting that there is no evidence against (2), or whether they may go further and assert that there is evidence that not-(2) (i.e., evidence that [2] is false). I shall argue that abolitionists may make the stronger (latter) assertion.

In order to see the issue fairly, it is necessary to see how (2) has so far been submitted to empirical tests. First of all, the issue has been confined to the death penalty for criminal homicide; consequently, it is not (2) but a subsidiary proposition which critics of the death penalty have tested namely, (2a) *the death penalty is a superior deterrent to "life" imprisonment for the crime of criminal homicide*. The falsification of (2a) does not entail the falsity of (2); the death penalty could still be a superior deterrent to "life" imprisonment for the crime of burglary, etc. However, the disconfirmation of (2a) is obviously a partial disconfirmation of (2). Second, (2a) has not been tested directly but only indirectly. No one has devised a

way to count or estimate directly the number of persons in a given population who have been deterred from criminal homicide by the fear of the penalty. The difficulties in doing so are plain enough. For instance, it would be possible to infer from the countable numbers who have not been deterred (because they did commit a 'given crime) that everyone else in the population was deterred, but only on the assumption that the only reason why a person did not commit a given crime is because he was deterred. Unfortunately for this argument (though happily enough otherwise) this assumption is almost certainly false. Other ways in which one might devise to test (2a) directly have proved equally unfeasible. Yet it would be absurd to insist that there can be no evidence for or against (2a) unless it is direct evidence for or against it. Because Van den Haag nowhere indicated what he thinks would count as evidence, direct or indirect, for or against (1), much less (2), his insistence upon the distinction between (a) and (b) and his rebuke to abolitionists is in danger of implicitly relying upon just this absurdity.

How, then, has the indirect argument over (2a) proceeded? During the past generation, at least six different hypotheses have been formulated, as corollaries of (2a), as follows:⁹

- i) death-penalty jurisdictions should have a lower annual rate of criminal homicide than abolition jurisdictions;
- ii) jurisdictions which abolished the death penalty should show an increased annual rate of criminal homicide after abolition;
- iii) jurisdictions which reintroduced the death penalty should show a decreased annual rate of criminal homicide after reintroduction;
- iv) given two contiguous jurisdictions differing chiefly in that one has the death penalty and the other does not, the latter should show a higher annual rate of criminal homicide;
- v) police officers on duty should suffer a higher annual rate of criminal assault and homicide in abolition jurisdictions than in death-penalty jurisdictions;
- vi) prisoners and prison personnel should suffer a higher annual rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death-penalty jurisdictions.

It could be objected to these six hypotheses that they are, as a set, insufficient to settle the question posed by (2a) no matter what the evidence for them may be (i.e., that falsity of [i]-[vi] does not entail the falsity of [2]). Or it could be argued that each of (i)-(vi) has been inadequately tested or insufficiently (dis)confirmed so as to establish any (dis)confirmation of (2a), even though it is conceded that if these hypotheses were highly (dis)confirmed they

would (dis)confirm (2a). Van den Haag's line of attack is not entirely clear as between these two alternatives. It looks as if he ought to take the former line of criticism in its most extreme version. How else could he argue his chief point, that the research used by abolitionists has so far failed to produce *any* evidence against (1)—we may take him to mean (2) or (2a). Only if (i)-(vi) were *irrelevant* to (2a) could it be fairly concluded from the evidential disconfirmation of (i)-(vi) that there is still no disconfirmation of (2a). And this is Van den Haag's central contention. The other ways to construe Van den Haag's reasoning are simply too preposterous to be considered: he cannot think that the evidence is indifferent to or *confirms* (i)-(vi); nor can he think that there has been no *attempt* at all to disconfirm (2a); nor can he think that the evidence which disconfirms (i)-(vi) is not therewith also evidence which confirms the negations of (i)-(vi). If any of these three was true, it would be a good reason for saying that there is "no evidence" against (2a); but each is patently false. If one inspects (i)-(vi) and (2a), it is difficult to see how one could argue that (dis)confirmation of the former does not constitute (dis)confirmation of the latter, even if it might be argued that verification of the former does not constitute verification of the latter. I think, therefore, that there is nothing to be gained by pursuing further this first line of attack.

Elsewhere, it looks as though Van den Haag takes the other alternative of criticism, albeit rather crudely, as when he argues (against [iv], I suppose, since he nowhere formulated [i]-[vi]) that "the similar areas are not similar enough" (p. 285, col. 1). As to why, for example, the rates of criminal homicide in Michigan and in Illinois from 1920 to 1960 are not relevant because the states aren't "similar enough," he does not try to explain. But his criticism does strictly concede that if the jurisdictions were "similar enough," then it would be logically possible to argue from the evidence against (iv) to the disconfirmation of (2a). And this seems to be in keeping with the nature of the case; it is this second line of attack which needs closer examination.

Van den Haag's own position and objections apart, what is likely to strike the neutral observer who studies the ways in which (i)-(vi) have been tested and declared disconfirmed is that their disconfirmation, and, a fortiori, the disconfirmation of (2a), is imperfect for two related reasons. First, all the tests rely upon unproved empirical assumptions; second, it is not known whether there is any statistical significance to the results of the tests. It is important to make these concessions, and abolitionists and other disbelievers in the deterrent efficacy of the death penalty have not always done so.

It is not possible here to review all the evidence and to reach a judgment on the empirical status of (i)-(vi). But it is possible and desirable to illustrate how the two qualifications cited above must be understood, and then to

assess their effect on the empirical status of (2a). The absence of statistical significance may be illustrated by reference to hypothesis (v). According to the published studies, the annual rate of assaults upon on-duty policemen in abolition jurisdictions is lower than in death-penalty jurisdictions (i.e., a rate of 1.2 attacks per 100,000 population in the former as opposed to 1.3 per 100,000 in the latter). But is this difference statistically significant or not? The studies do not answer this question because the data were not submitted to tests of statistical significance. Nor is there any way to my knowledge, that these data could be subjected to any such tests. This is, of course, no reason to suppose that the evidence is really not evidence after all, or that though it is evidence against (i) it is not evidence against (2a). Statistical significance is, after all, only a measure of the strength of evidence, not a *sine qua non* of evidential status.

The qualification concerning un-proved assumptions is more important, and is worth examining somewhat more fully (though, again, only illustratively). Consider hypothesis (i). Are we entitled to infer that (i) is disconfirmed because in fact a study of the annual homicide rates (as measured by vital statistics showing cause of death) unquestionably indicates that the rate in all abolition states is consistently lower than in all death-penalty states? To make this inference we must assume that (A1) homicides as measured by vital statistics are in a generally constant ratio to criminal homicides, (A2) the years for which the evidence has been gathered are representative and not atypical, (A3) however much fluctuations in the homicide rate owe to other factors, there is a nonnegligible proportion which is a function of the penalty, and (A4) the deterrent effect of a penalty is not significantly weakened by its infrequent imposition. (There are, of course, other assumptions, but these are central and sufficiently representative here.) Assumption A1 is effectively unmeasurable because the concept of a criminal homicide is the concept of a homicide which *deserves* to be criminally prosecuted.¹⁰ Nevertheless, A1 has been accepted by criminologists for over a generation. A2 is confirmable, on the other hand, and bit by bit, a year at a time, seems to be being confirmed. Assumption A3 is rather more interesting. To the degree to which it is admitted or insisted that other factors than the severity of the penalty affect the volume of homicide, to that degree A3 becomes increasingly dubious; but at the same time testing (2a) by (i) becomes increasingly unimportant. The urgency of testing (2a) rests upon the assumption that it is the deterrent efficacy of penalties which is the chief factor in the volume of crimes, and it is absurd to hold that assumption and at the same time doubt A3. On the other hand, A4 is almost certainly false (and has been believed so by Bentham and other social theorists for nearly two hundred years). The falsity of A4, however, is not of fatal harm to the disconfirmation of (i) because it is not known how frequently or infrequently a severe penalty such as death or life imprisonment needs to be imposed in order

to maximize its deterrent efficacy. Such information as we do have on this point leads one to doubt that for the general population the frequency with which the death sentence is imposed makes any significant difference to the volume of criminal homicide.¹¹

I suggest that these four assumptions and the way in which they bear upon interpretation and evaluation of the evidence against (i), and therefore the disconfirmation of (2a), are typical of what one finds as one examines the work of criminologists as it relates to the rest of these corollaries of (2a). Is it reasonable, in the light of these considerations, to infer that we have no evidence against (i)-(vi), or that although we do have evidence against (i)-(vi), we have none against (2a)? I do not think so. Short of unidentified and probably unobtainable "crucial experiments," we shall never be able to marshal evidence for (2a) or for (i)-(vi) except by means of certain additional assumption such as A1-A4. To reason otherwise is to rely on nothing more than the fact that it is logically possible to grant the evidence against (i)-(vi) and yet deny that (2a) is false; or it is to insist that the assumptions which the inference relies upon are not plausible assumptions at all (or though plausible are themselves false or disconfirmed) and that no other assumptions can be brought forward which will both be immune to objections and still preserve the linkage between the evidence and the corollaries and (2a). The danger now is that one will repudiate assumptions such as A1-A4 in order to guarantee the failure of efforts to disconfirm (2a) via disconfirmation of (i)-(vi); or else that one will place the standards of evidence too high before one accepts the disconfirmation of (i)-(vi); or else that one will place the standards of evidence too high before one accepts the disconfirmation. In either case one has begun to engage in the familiar but discreditable practice of "protecting the hypothesis" by making it, in effect, immune to any kind of disconfirmation.

On my view things stand in this way. An empirical proposition not directly tenable, (2), has a significant corollary, (2a), which in turn suggests a number of corollaries, (i)-(vi), each of which is testable with varying degrees of indirectness. Each of (i)-(vi) has been tested. To accept the results as evidence disconfirming (i)-(vi) and as therefore disconfirming (2a), it is necessary to make certain assumption, of which A1-A4 are typical. These assumptions in turn are not all testable, much less directly tested; some of them, in their most plausible formulation, may even be false (but not in that formulation necessary to the inference, however). Since this structure of indirect testing, corollary hypotheses, unproved assumptions, is typical of the circumstances which face us when we wish to consider the evidence for or against any complex empirical hypothesis such as (2), I conclude that while (2) has by no means been disproved (whatever that might mean), it is equally clear that (2) has

been disconfirmed, rather than confirmed or left untouched by the inductive arguments we have surveyed.

I have attempted to review and appraise the chief "statistical" arguments (as Van den Haag calls them) marshaled during the past fifteen years or so in this country by those critical of the death penalty. But in order to assess these arguments more adequately, it is helpful to keep in mind two other considerations. First, most of the criminologists skeptical of (1) are led to this attitude not by the route we have examined—the arguments against (2)—but by a general theory of the causation of crimes of personal violence. Given their confidence in that theory, and the evidence for it, they tend not to credit seriously that idea that the death penalty deters (very much), much less the idea that it is a superior deterrent to a severe alternative such as "life" imprisonment (which may not deter very much, either). The interested reader should consult in particular Professor Marvin Wolfgang's monograph, *Patterns of Criminal Homicide* (1958). Second, very little of the empirical research purporting to establish the presence or absence of deterrent efficacy of a given punishment is entirely reliable because almost no effort has been made to isolate the relevant variables. Surely, it is platitudinously true that *some* persons in some situations considering *some* crimes can be deterred from committing them by *some* penalties. To go beyond this, however, and supplant these variables with a series of well-confirmed functional hypotheses about the deterrent effect of current legal sanctions is not possible today.

Even if one cannot argue, as Van den Haag does, that there is no evidence against the claim that the death penalty is a better deterrent than life imprisonment, this does not yet tell us how good this evidence is, how reliable it is, how extensive, and how probative. Van den Haag could, after all, give up his extreme initial position and retreat to the concession that although there is evidence against the superior deterrent efficacy of the death penalty, still, the evidence is not very good, indeed, not good enough to make reasonable the policy of abolishing the death penalty. Again, it is not possible to undertake to settle this question short of a close examination of each of the empirical studies which confirm (i)-(vi). The reply, so far as there is one, short of further empirical studies (which undoubtedly are desirable—I should not want to obscure that), is twofold: the evidence, such as it is, for (i)-(vi) is uniformly confirmatory in all cases; and the argument of Section IV which follows.

4. Van den Haag's "argument" rests considerable weight on the claims that "the added severity of the death penalty adds to deterrence, or may do so"; and that "the generalized threat of the death penalty may be a deterrent, and the more so, the more generally applied." These claims are open to criticism on at least three grounds.

First, as the modal auxiliaries signal, Van den Haag has not really committed himself to any affirmative empirical claim, but only to a truism. It is always logically possible, no matter what the evidence, that a given penalty which is *ex hypothesi* more severe than an alternative, may be a better deterrent under some conditions not often realized, and be proven so by evidence not ever detectable. For this reason, there is no possible way to prove that Van den Haag's claims are false, no possible preponderance of evidence against his conclusions which must, logically, force him to give them up. One would have hoped those who believe in the deterrent superiority of the death penalty could, at this late date, offer their critics something more persuasive than logical possibilities. As it is, Van den Haag's appeal to possible evidence comes perilously close to an argument from ignorance: the possible evidence we might gather is used to offset the actual evidence we have gathered.

Second, Van den Haag rightly regards his conclusion above as merely an instance of the general principle that, *ceteris paribus*, "the Greater the Severity the Greater the Deterrence," a "plausible" idea, as he says (p. 287). Yet the advantage on behalf of the death penalty produced by this principle is a function entirely of the evidence for the principle itself. But we are offered no evidence at all to make this plausible principle into a confirmed hypothesis of contemporary criminological theory of special relevance to crimes of personal violence. Until we see evidence concerning specific crimes, specific penalties, specific criminal populations, which show that in general the Greater the Severity the Greater the Deterrence, we run the risk of stupefying ourselves by the merely plausible. Besides, without any evidence for this principle we will find ourselves at a complete stand-off with the abolitionist (who, of course, can play the same game), because he has his own equally plausible first principle: the Greater the Severity of Punishment the Greater the Brutality Provoked throughout Society. When at last, exhausted and frustrated by mere plausibilities, we once again turn to study the evidence, we will find that the current literature on deterrence in criminology does not encourage us to believe in Van den Haag's principle.¹²

Third, Van den Haag has not given any reason why, in the quest for deterrent efficacy, one should fasten (as he does) on the severity of the punishments in question, rather than (as Bentham long ago counseled) on all the relevant factors, notably the ease and speed and reliability with which the punishment can be inflicted. Van den Haag cannot hope to convince anyone who has studied the matter that the death penalty and "life" imprisonment differ only in their severity, and that in all other respects affecting deterrent efficacy they are equivalent; and if he believes this himself it would be interesting to have seen his evidence for it. The only thing to be said in favor of fastening exclusively upon the question of severity in the appraisal of punishments for their relative deterrent

efficacy is that augmenting the severity of a punishment in and of itself usually imposes little if any added direct cost to operate the penal system; it even may be cheaper. This is bound to please the harried taxpayer, and at the same time gratify the demand on government to "do something" about crime. Beyond that, emphasizing the severity of punishments as the main (or indeed the sole) variable relevant to deterrent efficacy is unbelievably superficial.

5. Van den Haag's final point concerning where the burden of proof lies is based, he admits, on playing off a certainty (the death of the persons executed) against a risk (that innocent persons, otherwise the would-be victims of those deterrable only by the death penalty, would be killed).¹³ This is not as analogous as he seems to think it is to the general nature of gambling, investment, and other risk-taking enterprises. In none of them do we deliberately cause anything to be killed, as we do, for instance, when we weed out carrot seedlings to enable those remaining to grow larger (a eugenic analogy, by the way, which might be more useful to Van den Haag's purpose). In none, that is, do we venture a sacrifice in the hope of a future net gain; we only *risk* a present loss in that hope. Moreover, in gambling ventures we recoup what we risked if we win, whereas in executions we must lose something (the lives of persons executed) no matter if we lose or win (the lives of innocents protected). Van den Haag's attempt to locate the burden of proof by appeal to principles of gambling is a failure.

Far more significantly, Van den Haag frames the issue in such a way that the abolitionist has no chance of discharging the burden of proof once he accepts it. For what evidence could be marshaled to prove what Van den Haag wants proved, namely, that "the greater severity inherent in irrevocability [of the death penalty] ... adds nothing to deterrence"? The evidence alluded to at the end of Section 4 does tend to show that this generalization (the negation of Van den Haag's own principle) is indeed true, but it does not prove it. I conclude, therefore, that either Van den Haag is wrong in his argument which shows the locus of burden of proof to lie on the abolitionist, or one must accept less than proof in order to discharge this burden (in which case, the very argument Van den Haag advances shows that the burden of proof now lies on those who would retain the death penalty).

"Burden of proof" in areas outside judicial precincts where evidentiary questions are at stake tends to be a rhetorical phrase and nothing more. Anyone interested in the truth of a matter will not defer gathering evidence pending a determination of where the burden of proof lies. For those who do think there is a question of burden of proof, as Van den Haag does, they should consider this: Advocacy of the death penalty is advocacy of a rule of penal law which empowers the state to deliberately take

human life and in general to threaten the public with the taking of life. *Ceteris paribus*, one would think anyone favoring such a rule would be ready to offer considerable evidence for its necessity and efficacy. Surely, some showing of necessity, some evidentiary proof, is to be expected to satisfy the skeptical. Exactly when and in what circumstances have the apologists for capital punishment offered evidence to support their contentions? Where is that evidence recorded for us to inspect, comparable to the evidence cited in Section 3 against the superior deterrent efficacy of the death penalty? Van den Haag conspicuously cited no such evidence, and so it is with all other proponents of the death penalty. The insistence that the burden of proof lies on abolitionists, therefore, is nothing but the rhetorical demand of every defender of the status quo who insists upon evidence from those who would effect change, while reserving throughout the right to dictate criteria and standards of proof and refusing to offer evidence for his own view.¹⁴

I should have thought that the death penalty was a sufficiently momentous matter and of sufficient controversy that the admittedly imperfect evidence assembled over the past generation by those friendly to abolition would have been countered by evidence tending to support the opposite, retentionist, position. It remains a somewhat sad curiosity that nothing of the sort has happened; no one has ever published research tending to show, however inconclusively, that the death penalty after all is a deterrent, and a superior deterrent to "life" imprisonment. Among scholars at least, if not among legislators and other politicians, the perennial appeal to burden of proof really ought to give way to offering of proof by those interested enough to argue the issue.

¹ *Ethics* 78 (July 1968): 280-88. Van den Haag later published a "revised version" under the same title in *Journal of Criminal Law, Criminology and Police Science* 60 (1969): 141-47. I am grateful to Professor Van den Haag for providing me with a reprint of each version. I should add that his revisions in the later version were minimal, especially in his Section 5 which is mainly what I shall criticize. All page references in the text are to the version published in *Ethics*.

² See Massachusetts Laws, chap. 150, Resolves of 1967; "Interim Report of the Special Commission Established to Make an Investigation and Study Relative to the Effectiveness of Capital Punishment as a Deterrent to Crime," mimeographed (Boston: Clerk, Great and General Court, State House, 1968).

³ See the several essays reprinted in Bedau, ed., *The Death Penalty in America*, rev. ed. (New York, 1967), chap. 4, and the articles cited therein at pp. 166-70.

⁴ The same argument has been advanced earlier by Sidney Hook (see the *New York Law Forum* [1961], pp. 278-83, and the revised version of this argument published in Bedau, pp. 150-51).

⁵ See, e.g., Thorsten Sellin, "Prison Homicides," in *Capital Punishment*, ed. Sellin (New York, 1967), pp. 154-60.

⁶ Rhode Island (1852), North Dakota (1915), New York (1965), Vermont (1965), and New Mexico (1969), have all qualified their abolition of the death penalty in this way; for further details, see Bedau, p. 12.

⁷ Bedau, pp. 260-61.

⁸ Van den Haag accuses Professor Thorsten Sellin, a criminologist "who has made a careful study of the available statistics," of seeming to "think that this lack of evidence for deterrence is evidence for the lack of deterrence" (p. 285, col. 1), that is, of thinking that (a) is (b)! In none of Sellin's writings which I have studied (see, for a partial listing, note 9, below) do I see any evidence that Sellin "thinks" the one "is" the other. What will be found is a certain vacillation in his various published writings, which span the years from 1953 to 1967, between the two ways of putting his conclusions. His most recent statement is unqualifiedly in the (b) form (see his *Capital Punishment*, p. 138). Since Van den Haag also cited my *Death Penalty in America* (though not in this connection), I might add that there I did distinguish between (a) and (b) but did not insist, as I do now, that the argument entitles abolitionists to assert (b) (see Bedau, pp. 264-65). It is perhaps worth noting here some other writers, all criminologists, who have recently stated the same or a stronger conclusion. "Capital punishment does not act as an effective deterrent to murder" (William J. Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions," *Wisconsin Law Review* [1967], p. 706); "The capital punishment controversy has produced the most reliable information on the general deterrent effect of a criminal sanction. It now seems established and accepted that ... the death penalty makes no difference to the homicide rate" (Norval Morris and Frank Zimring, "Deterrence and Corrections," *Annals* 381 [January 1969]: 143); "the evidence indicates that it [namely, the death penalty for murder] has no discernible effects in the United States" (Walter Reckless, "The Use of the Death Penalty," *Crime and Delinquency* 15 [January 1969]: 52); "Capital punishment is ineffective in deterring murder" (Eugene Doleschal, "The Deterrent Effect of Legal Punishment," *Information Review on Crime and Delinquency* 1 [June 1969]: 7).

⁹ The relevant research, regarding each of the six hypotheses in the text, is as follows: (i) Karl Schuessler, "The Deterrent Influence of the Death Penalty," *Annals* 284 (November 1952): 57; Walter C. Reckless, "The Use of the Death Penalty—a Factual Statement," *Crime and Delinquency* 15 (1969): 52, table 9. (ii) Thorsten Sellin, *The Death Penalty* (Philadelphia: American Law Institute, 1959), pp. 19-24, reprinted in Bedau, pp. 274-84; updated in Sellin, *Capital Punishment*, pp. 135-38. (iii) Sellin, *The Death Penalty*, pp. 34-38; reprinted in Bedau, pp. 339-43. (iv) See works cited in (iii), above. (v) Canada, *Minutes and Proceedings of Evidence*, Joint Committee of the Senate and House of Commons on Capital Punishment and Corporal Punishment and Lotteries (1955), appendix F, pt. 1, pp. 718-28; "The Death Penalty and Police Safety," reprinted in Bedau, pp. 284-301, and in Sellin, *Capital Punishment*, pp. 138-54, with postscript (1967); Canada, "The State Police and the Death Penalty," pp. 729-35, reprinted in Bedau, pp. 301-15. (vi) *Massachusetts, Report and Recommendations of the Special Commission ... [on] the Death Penalty ...* (1958), pp. 21-22,

reprinted in Bedau, p. 400; Thorsten Sellin, "Prison Homicides," in Sellin, *Capital Punishment*, pp. 154-60.

¹⁰ See, for discussion surrounding this point, Bedau, pp. 56-74.

¹¹ See Robert H. Dann, *The Deterrent Effect of Capital Punishment* (Philadelphia, 1935); Leonard H. Savitz, "A Study in Capital Punishment," *Journal of Criminal Law, Criminology and Police Science* 49 (1958): 338-41, reprinted in Bedau, pp. 315-32; William F. Graves, "A Doctor Looks at Capital Punishment," *Medical Arts and Sciences* 10 (1956): 137-41, reprinted in Bedau, pp. 322-32, with addenda (1964).

¹² See, for a general review, Eugene Doleschal, "The Deterrent Effect of Legal Punishment: A Review of the Literature," *Information Review on Crime and Delinquency* 1 (June 1969): 1-17, and the many research studies cited therein, especially the survey by Norval Morris and Frank Zimring, "Deterrence and Corrections," *Annals* 381 (January 1969): 137-46; also Gordon Hawkins, "Punishment and Deterrence," *Wisconsin Law Review* (1969), pp. 550-65.

¹³ The same objection has been raised earlier by Joel Feinberg (see his review of Bedau in *Ethics* 76 (October 1965): 63.

¹⁴ For a general discussion which is not inconsistent with the position I have taken, and which appeal to burden of proof in philosophical argument, see Robert Brown, "The Burden of Proof," *American Philosophical Quarterly* 7 (1970): 74-82.

Deterrence and the Death Penalty: A Rejoinder

Ernest van den Haag

1970. *Ethics*, Vol. 81, No. 1

In his reply (April 1970) to my “On Deterrence and the Death Penalty” (July 1968), Mr. Bedau has interpreted my views so eccentrically that no useful purpose could be served by discussing it point by point. To indicate as much, just three instances will have to do. (Interested readers can easily multiply them by comparing the two essays.)

1. Bedau says it is “strange” and implies it is wrong to attribute to abolitionists the claim “that capital punishment is useless because it does not deter others.” I state in the first two paragraphs of my essay why I focus on this claim. Should only a few make it, the importance of my examination of the claim would be reduced but not the correctness of the examination. Bedau tries to show that my examination is misguided by

a) laboriously defining deterrence (as I did not); but he does not show wherein his definition would compel a change in my argument (it does not);

b) making the “central objection” that I disregard the usefulness of execution as protection from the executed (actually I pointed out in the first paragraphs of my essay that execution is “not needed” for protection) and that I disregard the usefulness of execution in saving money. I plead guilty to the last charge and am astonished that anyone expects me to do more than to ignore the argument on which it rests. *De minimis non curat praetor*.

2. Bedau seeks to invalidate my argument that in certain classes of cases the death penalty “is the only possible deterrent” by pointing out that it might not work, or be counterproductive (as I explicitly recognized), and that these cases may be infrequent. To show that the death penalty is not always deterrent in such cases (who would claim otherwise?) is quite irrelevant to its being “the only possible deterrent.” Bedau here misinterpreted the burden not just of my argument, but of his own as well.

3. My “On Deterrence and the Death Penalty,” after raising some questions about the relevance of injustice ([sections] 1, 2), asks “does any punishment deter others at all?” (3, 4) and then “is the deterrence added (return) sufficiently above zero to warrant irrevocability? ... The question is not only whether the death penalty deters, but whether it deters more than alternatives, and whether the difference exceeds the cost of irrevocability” (5, 6).

Bedau nonetheless charges me

a) with confusing the second question discussed in sections 5 and 6 with the first question discussed in sections 3 and 4. I am forced to conclude that he thinks that anyone who discusses two questions, however separately, must confuse them (*tua res agitur*);

b) with failing to see that the death penalty might not be a superior deterrent against homicide even if it were against burglary (I use no argument that would be affected if it were so);

c) with failing to see the importance “of the ease and speed and reliability with which the punishment can be inflicted.” If Bedau overlooked my statement, “I must altogether omit the far from negligible role problems of apprehension and conviction play in deterrence, “he would still be guilty of culpable neglect (in the absence of evidence of *mens rea*) if he does not recognize that one may analyze the deterrent effect of penalties, or of a penalty, without analyzing the whole penal and social system, that is, the deterrent effect of other variables. I cannot say whether Bedau did not, or pretended he did not, know that *ceteris paribus* is usually implied (although actually explicit in my essay); nor which is worse. Since Bedau mentions him: Bentham, unlike Bedau, did not infer from the importance of other factors that the severity of penalties is unimportant or should not be analyzed, *ceteris paribus*.

I have always been somewhat embarrassed by the conclusions forced on me by the logic of my own arguments with respect to the death penalty. I do therefore wish for someone to demonstrate the argument incorrect, the death penalty useless, or unnecessary. Unfortunately Bedau has not done so. I should like to help anyone who will try to address the argument.