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CRIMINOLOGY

DETERRENCE AND THE DEATH PENALTY: A RECONSIDERATION

HUGO ADAM BEDAU

This empirical reconsideration of Professor Van den Haag's analysis of the deterrent effect of the death penalty (published in the June, 1969 issue of this Journal) attacks the loose framework of the analysis as a prototype of research in this area. It sharpens the questions and cuts away the misleading conclusions surrounding the death penalty controversy and challenges criminologists and the legislatures to determine empirically whether deterrence exists as a factor in the consideration.

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. This discussion will pass by any number of tempting points in his critique in order to focus in detail only on those which affect his asserted major topic—the issue of deterrence as it bears on the retention or abolition of the death penalty.

Van den Haag's main contentions appear to be the following:

(1) Abolitionists of a utilitarian persuasion "claim that capital punishment is useless because it does not deter others. . . ."²

(2) There are some classes of criminals and some circumstances for which "the death penalty is the only possible deterrent."³

(3) As things currently stand, "deterrence [of criminal homicide by the death penalty] has not been demonstrated statistically," but it is erroneous to assume that "non-deterrence" has been demonstrated statistically.⁴

(4) The death penalty is to be favored over imprisonment because "the added severity of the death penalty adds to deterrence, or may do so."⁵

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¹ Van den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L. C. & P.S. 141 (1969). This is a "revised version" under the same title of an article which first appeared in 78 ETHICS 280 (1968). The author is grateful to Professor Van den Haag for the provision of a reprint of each version of the article.

² 60 J. CRIM. L. C. & P.S. 141 (1969).

³ *Id.* at 145.

⁴ *Id.*

⁵ *Id.* at 146.

(5) "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."⁶

The refutation of the foregoing assertions will constitute the task of this article. The rebuttal arguments may be succinctly summarized as follows: regarding (1), utilitarian abolitionists do not argue as Van den Haag claims, and they would be in error if they did; his assertion in (2), that situations exist in which the death penalty is the only possible deterrent, is misleading and, in the interesting cases, is empirically insignificant; concerning (3), the heart of the dispute, Van den Haag is correct in affirming that deterrence has not been determined statistically, but he is incorrect in denying that non-deterrence has been demonstrated statistically; his suggestion, (4), that the added severity of the death penalty contributes to its deterrent function, is unempirical and one-sided as well; finally, his contention regarding the burden of proof, (5), which he would impose entirely upon abolitionists, is a dodge and is based on a muddled analysis.

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 nor that it is likely to be of unusual influence. The reason is that the issues he raises, even though they are familiar, have not been 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 execu-

⁶ *Id.* at 147.

tion 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.⁷ Its provisional conclusions, published late in 1968, though not in line with Professor Van den Haag's views, are open 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.

I

The claim Van den Haag professes to find "most persuasive"—"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 nonutilitarian ones."⁸ But he does not pursue this qualification. It may be conceded that if 'the main actual function' means the main intended or professed function of a punishment for those responsible for instituting it, deterrence is probably the main function of punishment. His definition of deterrence, however, remains vulnerable. According to Van den Haag, it is "a preconscious, general response to a severe but not necessarily specifically and explicitly apprehended or calculated threat."⁹

This definition of deterrence has two merits and at least one fatal defect. First, it preserves the idea that "a law can have no deterrent effect upon a potential criminal if he is unaware of its existence."¹⁰ Surely, this is a truism necessary to the establishment of a definition of 'deterrence'. Second, by emphasizing threats, it avoids the errors in defining deterrence as "the preventative

effect which actual or theoretical punishment of offenders has upon potential offenders."¹¹ On such a definition, one could not distinguish between the *deterrent* effect of the death penalty and its more inclusive *preventive* effects. Obviously, an executed criminal is prevented from further crimes, but not by having been deterred from them.¹²

Only rarely will the preventive and the deterrent effects of a given punishment be equivalent. Van den Haag's definition, however, falls before a similar objection upon consideration of the general, though by no means universal, desire of persons to avoid capture and punishment for the crimes they commit. Some criminologists have thought this desire to be the primary outcome of severe punishments. If so, then the outcome can result whether or not the deterrent function succeeds. Yet such a desire to avoid punishment is embraced by Van den Haag's rubric of "general response" and therefore could count as evidence for the deterrent efficacy of a punishment! Since Van den Haag's conception of deterrence does not discriminate between such fundamentally different types of "general response" to the threat of punishment, it is too ill-formulated as a definition to be of any serious use.

Among the ideas to be incorporated into any definition of deterrence are a pair of truisms: if someone has been deterred then he doesn't commit the crime, and conversely if someone does commit a crime then he hasn't been deterred. Likewise, the key notion in deterrence is prevention by threat of punishment. Therefore, assume (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* (the theory needed to account for the operation of A's beliefs and

⁷ See ch. 150, Mass. Acts & Resolves 929 (1969); MASS. LEGISLATIVE REPORT, 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 (1968) (unpublished).

⁸ Van den Haag, *supra* note 1, at 147 n. 11 (emphasis added).

⁹ *Id.* at 146.

¹⁰ Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L., C. & P.S. 347, 351 (1955).

¹¹ *Id.* at 347.

¹² Ball writes that "Capital punishment can be totally effective as a deterrent . . . The executed murderer is no longer a threat to society. He has been permanently deterred." *Id.* at 353. This is an erroneous conclusion to reach, and when Ball goes on to use it to argue in favor of the deterrent efficacy of the death penalty, it reveals the menace which lies hidden in a faulty definition.

preferences on his conduct is left open). Nor does it presuppose that anyone ever suffers P (P could be a "perfect" deterrent), nor that only P could have deterred A from C (some sanction less severe than P might have worked as well). Finally, it does not presuppose 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 erroneously from the fact that A does not commit C to the conclusion that P has succeeded as a deterrent: the definition contains conditions which prevent this. Further, the definition prevents the commission of the more subtle converse error of arguing from the fact that A has not been deterred by P to the conclusion that A will (or must have) commit(ed) C. Both these errors arise from supposing that "the educative, moralizing and habituating effects of punishment",¹³ which serve to prevent the bulk of the public from committing crime, are euphemisms for 'deterrence' or operate by the same mechanisms that deterrence does.

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 a 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 (the value of D) as a deterrent.

Definition 2 in turn suggests the following corollary for assertions of relative superior deterrent efficacy of one punishment over another: a given punishment P_1 is a superior deterrent to another punishment P_2 with respect to some crime C and some population H if and only if: if the members of H believe that they are liable to P_1 upon committing C, then they commit C to the degree d_1 ; whereas if the members of H believe that they are liable to P_2 upon committing C, then

they commit C to the degree d_2 ; and $d_1 < d_2$. This formulation plainly allows the P_1 may be a more effective deterrent than P_2 for C_1 and yet less effective as a deterrent than P_2 for a different crime C_2 (with H constant), and so forth for other possibilities. When speaking about deterrence in the sections which follow, these definitions and this corollary are presupposed.

Even if Van den Haag's notion of deterrence did not need to be reformulated to incorporate the above improvements, there would still be a decisive objection to his 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 monies 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 previously mentioned. Therefore, it is incorrect to assume that a demonstrated failure of the deterrent effect of the death penalty would generate an inference, 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 abolitionists¹⁴ 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 there is none among the non-utilitarians who would abolish the death penalty solely on grounds of its deterrent inefficacy.

II

Governments faced by incipient rebellion or threatened by a *coup d'etat* may well conclude, as Van den Haag insists they should, that rebels (as

¹³Zimring and Hawkins, *Deterrence and Marginal Groups*, 5 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 100 (1968).

¹⁴See the several essays reprinted in H. BEDAU, *THE DEATH PENALTY IN AMERICA* 166-70 (Rev. ed. 1967).

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."¹⁵ But this does not reveal the importance of providing such deterrence, any more than the fact that a threat of expulsion is the severest deterrent available to university authorities reveals whether they should insist on expelling campus rebels. Also, since severe penalties might have the effect of creating martyrs for the cause, they could provoke 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 impairs the force of the argument."¹⁶ From a logical point of view it impairs the argument considerably; from an empirical point of view, since one is 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 re-infliction of P were he to commit C₂. For if the dread of P did not deter him from committing C₁, how could the dread 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. 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.¹⁷ There are convicts who are exceptions to this generalization, but there is no known way of identifying them in advance, and their number has proved to be small. It would be irrational, therefore, to design a penal policy which invokes the death penalty for the apparent purpose of deterring such convicted offenders from further criminal homicide.¹⁸ Van den Haag cites no evidence that such policies accomplish their alleged purpose, and a review of authorities reveals none. The real question which Van den Haag's argument raises is: 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? With reference to this question there is no evidence at all, one way or the other. Until a determination is made as to whether there is a "marginal group" for whom the death penalty serves as a superior deterrent, there is no reason to indulge Van den Haag in his speculations.¹⁹

III

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 this author

¹⁷ See, e.g., Sellin, *Prison Homicides*, in CAPITAL PUNISHMENT 154-160 (T. Sellin ed. 1967).

¹⁸ Rhode Island (1852), North Dakota (1915), New York (1965), Vermont (1965), and New Mexico (1969), have all qualified their abolition of the death penalty by enacting such a policy. See H. BEDAU, *supra* note 14, at 12.

¹⁹ Zimring and Hawkins, *supra* note 13, at 104-05, explain that by a marginal group they mean "the entire class of persons who are objectively on the margin of a particular form of criminal behavior, or, in other words, the class of persons 'next most likely' to engage in criminal behavior in question."

¹⁵ Van den Haag, *supra* note 1, at 145. The same argument has been advanced earlier in Hook, 7 THE NEW YORK LAW FORUM 278-83 (1961). For the revised version of this argument, see H. BEDAU, *supra* note 14, at 150-51.

¹⁶ Van den Haag, *supra* note 1, at 145 n. 8.

has argued elsewhere,²⁰ 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, and since most are, in fact, reconciled to a punitive alternative of "life" imprisonment, we may concentrate on (2) here. It should be noticed in passing, however, that if (1) could be demonstrated to be false, there would be no need for abolitionists to marshal evidence against (2). Since the truth of (1) is a presupposition of (2), the falsity of (1) would obviate (2) entirely. While it is true that some abolitionists may be faulted for writing as if the falsity of (1) followed from the falsity of (2), this is not a complaint Van den Haag makes nor is it an error of inference upon which the argument against the death penalty depends. 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); he only observes in passing that "the question is not only whether the death penalty deters but whether it deters more than alternatives. . . ." ²¹ Since he explicitly argues over the evidential status of (1), it is unclear whether he chose to ignore (2) or whether he thinks that his arguments regarding the evidence for (1) also have consequences for (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).

Van den Haag writes as if his chief contentions were these two: first, 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 second, abolitionists have asserted (b) whereas all they are

entitled to assert is (a).²² I grant, as anyone must, that the distinction between (a) and (b) is legitimate and important. But since, as I have argued, (1) need not be at issue in the death penalty controversy, neither are (a) and (b). What is 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) (evidence that (2) is false). Whereas Van den Haag would presumably confine abolitionists to the former, weaker assertion, it shall be argued that they 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 test. 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—(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

²⁰ Van den Haag accuses Professor Thornsten Sellin, a criminologist "who has made a careful study of the available statistics," of appearing to "think that this lack of evidence for deterrence is evidence for the lack of deterrence." *Id.* That is, Van den Haag claims Sellin thinks that (a) is (b)! Sellin's writings, see, e.g., note 17 *supra*, do not support the contention that he "thinks" the one "is" the other. A review of his writings, which span the years from 1953-1967, will reveal a certain vacillation between the two manners of stating his conclusion. His most recent statement is unqualified in the (b) form. See Sellin, *supra* note 17, at 138. Since Van den Haag also cited this author's, *THE DEATH PENALTY IN AMERICA*, *supra* note 14, though not in this connection, it should be added that the distinction between (a) and (b) was there made; but it was not insisted, as it is here, that the argument entitles abolitionists to assert (b). See *id.* at 264-65. For the views of writers, all criminologists, who have recently stated the same or a stronger conclusion, see, e.g., Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 Wis. L. Rev. 703, 706 (1967) ("Capital punishment does not act as an effective deterrent to murder"); Morris & Zimring, *Deterrence and Correction*, 381 THE ANNALS 137, 143 (1969) ("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 . . ."); Reckless, *The Use of the Death Penalty*, 15 CRIME & DELINQ. 43, 52 (1969) ("[T]he evidence indicates that [the death penalty for murder] has no discernible effects in the United States . . ."); Doleschal, *The Deterrent Effect of Legal Punishment*, 1 INFORMATION REV. ON CRIME AND DELINQ. 1, 7 (1969) ("Capital punishment is ineffective in deterring murder").

²⁰ H. BEDAU, *supra* note 14, at 260-61.

²¹ Van den Haag, *supra* note 1, at 145.

burglary, etc. However, the disconfirmation of (2a) would be obviously a significant partial disconfirmation of (2). Secondly, (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, as we have noted above in section I. Other methods which might be devised 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 for (2a) proceeded? During the past generation, at least six different hypotheses have been formulated, as corollaries of (2a), as follows:²³

(i) death penalty jurisdictions should have a

²³ The relevant research, regarding each of the six hypotheses in the text, is as follows:

(i) Schuessler, *The Deterrent Influence of the Death Penalty*, 284 THE ANNALS 54, 57 (1952); Reckless, *The Use of the Death Penalty—A Factual Statement*, 15 CRIME AND DELINQ. 43, 52 (1969) (Table No. 9).

(ii) Thorsten Sellin, *The Death Penalty*, reprinted in H. BEDAU, *supra* note 14, at 274-84; updated in Sellin, *supra* note 17, at 135-38.

(iii) Sellin, *supra* note 17, at 34-38; reprinted in H. BEDAU, *supra* note 14, at 339-43.

(iv) See works cited in (iii).

(v) CANADA, MINUTES AND PROCEEDINGS OF EVIDENCE, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS OF CAPITAL PUNISHMENT AND CORPOREAL PUNISHMENT AND LOTTERIES AND THE STATE POLICE AND THE DEATH PENALTY, app. F, pt. I, at 718-35 (1955); *The Death Penalty and Police Safety*, in H. BEDAU, *supra* note 14, at 284-301, and in CAPITAL PUNISHMENT, *supra* note 17, at 138-54.

(vi) MASSACHUSETTS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMISSION [ON] THE DEATH PENALTY, 1958, in H. BEDAU, *supra* note 14, at 400; Sellin, *Prison Homicides*, in CAPITAL PUNISHMENT, *supra* note 17, at 154-60.

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—that the falsity of (i)-(vi) does not entail the falsity of (2a). Or it could be objected that each of (i)-(vi) has been too inadequately tested or insufficiently disconfirmed to establish any disconfirmation of (2a), even though it is conceded that if (i)-(vi) were highly disconfirmed they would disconfirm (2a). Van den Haag's line of attack is not entirely clear as between these two alternatives. It appears that he should 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 too implausible 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 were 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 disconfirmation of

the former does not constitute disconfirmation of the latter, even if it might be argued that verification of the former does not constitute verification of the latter. Therefore, there is nothing to be gained by further pursuit of this first line of attack.

Elsewhere, Van den Haag seems to adopt the alternative criticism, albeit rather crudely, as when he argues (against (iv), seemingly, since he nowhere formulated (i)-(vi)) that "the similar areas are not similar enough."²⁴ He fails to explain why the rates of criminal homicide in Michigan and in Illinois from 1920 to 1960 are not relevant, but simply alleges that the states aren't "similar enough." His criticism does, however, tacitly 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. Thus 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 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.²⁵ But the studies do not answer whether the difference is statistically significant because the data were not submitted to tests of statistical significance. Nor is

there any known method by which the 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 unproved assumptions is more important, and is worth examining somewhat more fully (though, again, only illustratively). Consider hypothesis (i). Is one 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 one 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 non-negligible proportion which is a function of the severity 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. Nevertheless, A₁ has been accepted by criminologists for over a generation.²⁶ 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 rate 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 rate 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 disconfirma-

²⁴ Van den Haag, *supra* note 1, at 146.

²⁵ A rate of 1.2 attacks per 100,000 population in abolition jurisdictions as opposed to 1.3 per 100,000 population in death penalty jurisdictions.

²⁶ For a discussion surrounding this point see, H. BEDAU, *supra* note 14, at 56-74.

tion of (i) because it is not known how infrequently a severe penalty such as death or life imprisonment may be imposed without decreasing its deterrent efficacy. The available information 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.²⁷

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 there is no evidence against (i)-(vi), or that although there may be evidence against (i)-(vi), there is none against (2a)? Probably not. Short of unidentified and probably unobtainable "crucial experiments," it is impossible to marshal evidence for (2a) or for (i)-(vi) except by means of certain additional assumptions 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 not confirmed) and that no other assumptions can be brought forward which will both be immune to objections and still preserve the linkage between the evidence, (i)-(vi), and (2a). The danger now is that one will repudiate assumptions such as A₁-A₄ so as 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. 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.

In sum, then, the abolitionist's argument regarding deterrence has the following structure: an empirical proposition not directly testable, (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 indirect-

ness. 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 assumptions, of which A₁-A₄ are typical. These assumptions in turn are not all testable much less directly confirmed; 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 surveyed.

An attempt has been made to review and appraise the chief "statistical" arguments, as Van den Haag calls them, marshalled 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 sceptical of (1) are led to this attitude not by the route we have examined—the argument 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 the 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).²⁸ The interested reader should consult in particular Professor Marvin Wolfgang's monograph on this subject.²⁹ 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

²⁷ See R. DANN, *THE DETERRENT EFFECT OF CAPITAL PUNISHMENT* (1935); Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L. C. & P. S. 338, 338-41 (1958) (reprinted in H. BEDAU, *supra* note 14, at 315-32); Graves, *A Doctor Looks at Capital Punishment*, 10 MED. ARTS & SCIENCES 137, 137-41 (1956) (reprinted in H. BEDAU, *supra* note 14, at 322-32).

²⁸ See, for an excellent critique of a recent study in deterrence, Zimring and Hawkins, *supra* note 13, at 111-14.

²⁹ M. Wolfgang, *PATTERNS OF CRIMINAL HOMICIDE* (1958).

effect of current legal sanctions is not possible today.³⁰

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 settle the reliability of the evidence. 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. The reply, so far as there is one, short of further empirical studies (which undoubtedly are desirable), is twofold: the evidence against (i)-(vi) is uniformly confirmatory; and this evidence is in turn made intelligible by the chief current sociological theory of the causation of crimes of personal violence. Finally, there do not seem to be any good empirical reasons in favor of keeping the death penalty, as a deterrent or for any other reason, a point to be amplified in the next section.

IV

Van den Haag 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 one might gather is used to offset the actual evidence that has been 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. 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 no evidence at all is offered to make this plausible principle into a confirmed hypothesis of contemporary criminological theory of special relevance to crimes of personal violence. Until evidence concerning specific crimes, specific penalties, and specific criminal populations is brought forward to show that in general The Greater the Severity the Greater the Deterrence, the risk of being stupified by the merely plausible is run. Besides, without any evidence for this principle there will be a complete standoff 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, one once again turns to study the evidence, he will find that the current literature on deterrence in criminology does not encourage a belief in Van den Haag's principle.³¹

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 counselled, on all the relevant factors, notably the ease, 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 this: to augment the severity of a punishment usually imposes little if any added

³⁰ For a general review, see Doleschal, *The Deterrent Effect of Legal Punishment: A Review of the Literature*, 1 INFORMATION REVIEW ON CRIME AND DELINQ. 1, 1-17 (1969), and the many research studies cited therein, especially the survey by Morris and Zimring, *supra* note 22, at 137-46.

³¹ See authorities cited notes 22 and 30 *supra*.

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.

V

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).²² This is not analogous, as he seems to think it is, with the general nature of gambling, investment, and other risk-taking enterprises. In none of them is death deliberately inflicted, as it is, for instance, when carrot seedlings are weeded out 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, is it necessary to *sacrifice* a present loss in the hope of securing a future net gain; there is only the risk of a loss in that hope. Moreover, in gambling ventures one recoups what he risked if he wins, whereas in executions society must lose something (the lives of persons executed) no matter if it loses or wins (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 marshalled to prove what Van den Haag wants proved, that "the greater severity inherent in irrevocability [of the death penalty] . . . adds nothing to deterrence"? The evidence alluded to at the end of section IV does tend to show that this generalization (the negation of Van den Haag's own principle) is indeed true, but it does not prove its unqualified validity. It must be concluded 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 sceptical. 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 III 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.

The death penalty is a sufficiently momentous matter and of sufficient controversy that the admittedly imperfect evidence assembled over the past generation by those friendly to abolition should by now be 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.

²² The same objection has been previously raised in Feinberg, *Review of the Death Penalty in America*, 76 *ETHICS* 63 (1965).