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ON DETERRENCE AND THE DEATH PENALTY

ERNEST VAN DEN HAAG

The author is presently Adjunct Professor of Social Philosophy at New York University; lecturer in Sociology and Psychology at the Graduate and Undergraduate Faculties of The New School for Social Research; and Visiting Professor at Vassar College. He formerly held positions on the faculties at City College of New York, Brooklyn College (Graduate Division), and the Universities of Minnesota, Nevada, and Colorado.

Professor van den Haag received an M.A. degree from the State University of Iowa and earned the Ph.D. degree from New York University. He also studied at the Universities of Florence, Naples and Sorbonne.

The author is a practicing psychoanalyst. He is a Fellow in the American Sociological Ass'n and the Royal Economic Society, and was a Guggenheim Fellow in 1967. His many published works include three books.

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I

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 the argument be thought to be unduly narrow, I shall show, nonetheless, that some claims of injustice rest on premises which the claimants reject when arguments for capital punishment are derived therefrom; while other claims of injustice have no independent standing: their weight depends on the weight given to deterrence.

¹ Social solidarity of "community feeling" (here to be ignored) might be dealt with as a form of deterrence.

II

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 one purpose 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.

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

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, penalties never can be reversed. Time spent in prison cannot be returned. However a prison sentence may be remitted once the prisoner serving it 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. However, these injustices do not reside in the penalties inflicted but in their maldistribution. It is not the penalty—whether death or prison—which is unjust when inflicted on the innocent, but its imposition on the 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 less often unjustly inflicted than others. 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? Surely injustice is 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 with the penalty that would make it irrevocable—not with the actual individual cases produced, but with the general rules which may 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 select the rule (or penalty) likely to produce the least injustice. For however one defines justice, to support it 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

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 that of the rich.

murders could be avoided by a penalty conceivably more deterrent than others—such as the death penalty—then the question becomes: which penalty will minimize the number of innocents killed (by crime and by punishment)? It follows that the irrevocable injustice, sometimes inflicted by the death penalty would not significantly militate against it, if capital punishment deters enough murders to reduce the total number of innocents killed so that fewer are lost than would be lost without it.

In general, the possibility of injustice argues against penalization of any kind 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. *I.e.*, “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 could add enough deterrence to be warranted.

III

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 18th and 19th century proponents. Actually deterrence does not depend on rational calculation, on rationality or even on capacity for it; nor do arguments for it depend on rationalistic psychology. Deterrence depends on the likelihood and on the regularity—not on the rationality—of human responses to danger; and further 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 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, pre-conscious 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. Animals as well refrain from painful or injurious experiences presumably without calculation; and the threat of punishment can be used to regulate their conduct.

Unlike natural dangers, legal threats are constructed deliberately by legislators to restrain actions which may impair the social order. Thus legislation transforms social into individual dangers. Most people further transform external into internal danger: they acquire a sense of moral obligation, a conscience, which threatens them, should they do what is wrong. Arising originally from the external authority of rulers and rules, conscience is internalized and becomes independent of external forces. However, conscience is constantly reinforced in those whom it controls by the coercive imposition of external authority on recalcitrants and on those who have not acquired it. Most people refrain from offenses because they feel an obligation to behave lawfully. But this obligation would scarcely be felt if those who do not feel or follow it were not to suffer punishment.

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) of effects must calculate; those whose responses are predicted (or produced) need not. Hence, although legislation (and legislators) should be rational, subjects, to be deterred as intended, need not be: they need only be responsive.

Punishments deter those who have not violated the law for the same reasons—and in the same degrees (apart from internalization: moral obligation) as do natural dangers. Often natural dangers—all dangers not deliberately created by legislation (*e.g.*, 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 (*i.e.*, 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 \$5 fine in North Carolina, and 5 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 acceptance of 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.

IV

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

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 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.

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 the 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 draws 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 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.

In the United States, the decline of poverty has not been associated with a reduction of crime. Poverty measured in dollars of constant purchasing power, according to present government standards and statistics, was the condition of $\frac{1}{2}$ of all our families in 1920; of $\frac{1}{5}$ th in 1962; and of less than $\frac{1}{6}$ in 1966. In 1967, 5.3 million families out of 49.8 million were poor— $\frac{1}{9}$ of all families in the United States. If crime has been reduced in a similar manner, it is a well kept secret.

Those who regard poverty as a cause of crime often draw a wrong inference from a true proposition: the rich will not commit certain crimes—Rockefeller never riots; nor does he steal. (He mugs, but only on T.V.) Yet while wealth may be the cause of not committing (certain) crimes, it does not follow that poverty (absence of wealth) is the cause of committing them. Water extinguishes or prevents fire; but its absence is not the cause of fire. Thus, if poverty could be abolished,

⁶ *N.Y. Times*, Nov. 24, 1967, at 22. The actual psychological and other factors which bear on the disrepute—as distinguished from the rationalizations—cannot be examined here.

if everybody had all “necessities” (I don’t pretend to know what this would mean), crime would remain, for, in the words of Aristoteles “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.

(2) Negro ghettos have a high, Chinese ghettos have a low crime rate. 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. (They are not.) Further, the known incidence of personality disorders within the prison population does not exceed the known incidence outside—though our knowledge of both is tenuous. Nor are personality disorders necessary, or sufficient causes for criminal offenses, 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 helpful idea.

Mr. Pearson’s views are part as well of the mental furniture of the former U.S. Attorney General, Ramsey Clark, who 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, Mr. Clark probably meant that the causes of crime are social; and that therefore crime can be reduced “only” by non-penal (social) measures.

This view suggests a fireman who declines fire-fighting 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 equipment and on the efforts of the firemen using it no less than on the presence of

⁷ Mixed areas, incidentally, have higher crime rates than segregated ones. See, e.g., ROSS & VAN DEN HAAG, *THE FABRIC OF SOCIETY*, 102-4 (1957). 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.

"the causes": inflammable materials. So with crimes. Laws, courts 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 whatever 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 theatre may be high because the show is entertaining and because the price of admission 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. (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 buy this?" "Because it is so cheap." "Why don't you buy that?" "Because it is too expensive.") 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. Given the desire, low cost (penalty) causes the action, and high cost restraint. Given the cost, desire becomes the causal variable. Neither is intrinsically more causal than the other. 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 to crime are often only indirectly affected by government action, and some are altogether beyond the control of the government. Our unilateral emphasis on these conditions and our undue neglect of costs

may contribute to an unnecessarily high crime rate.

V

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 wartime. 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.⁸

What about criminals who do not fall into any of these (often ignored) classes? Prof. 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.⁹ Somewhat surprisingly, Prof. 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 Prof. Sellin appears willing to concede), that the statis-

⁸ 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.

⁹ Prof. Sellin considered mainly homicide statistics. His work may be found in his *CAPITAL PUNISHMENT* (1967), or, most conveniently, in *BEDAU, THE DEATH PENALTY IN AMERICA* (1964), which also offers other material, mainly against the death penalty.

tics 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) 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. And logically, it is quite consistent with the postulated deterrent effect of capital punishment that there be less homicide after abolition: with retention there might have been still less.

Homicide rates do not depend exclusively on penalties any more than do 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 of the divorce laws or of the cotton price—may influence the homicide rate. Therefore 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 don't. 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 of absence therefore may be hard, and perhaps impossible to demonstrate.

Contrary to what Prof. Sellin *et al.* seem to presume, I doubt that offenders are aware of the absence of 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 pre-

conscious, 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 while in North Dakota, because of the death penalty, and merrily goes to it in South Dakota since it has been abolished there; or that he will start the 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 Prof. Sellin *et al.* 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.¹⁰

VI

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

¹⁰ In view of the strong emotions aroused (itself an indication of effectiveness to me: might murderers not 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 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.

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 spared 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.¹¹

¹¹Rehabilitation 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

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 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 can not 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 more subjected to social control than murder. However, this applies to all penalties and does not argue for the abolition of any.

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 purposes.