

## READINGS

**On Deterrence and the Death Penalty**

Ernst van den Haag

When deciding whether considerations of deterrence favor the death penalty, you might confront this argument from abolitionists:

1. The death penalty is morally justified only if there is substantial evidence that it is an effective deterrent.
2. We lack such evidence.

Therefore,

3. The death penalty is not morally justified.

Van den Haag rejects the first premise of this argument. He mentions, very briefly, that he is also attracted to a retributivist justification—he believes that the death penalty is justified because it gives murderers their just deserts. Perhaps more interesting, though, is that he accepts the second premise. He believes that, from a deterrence perspective, considerations of deterrence can justify imposing the death penalty even if we lack evidence that it does a good job at preventing crime.

He makes three points in defense of this view. The first is designed to prevent an error on the part of his critics, who sometimes claim that death's irrevocability means that we must have better evidence of its deterrent effects than we do for less severe penalties. Van den Haag replies that this is not so; all we need is reason to believe that the death penalty will yield more deterrence than a lesser penalty would. And, second, we do have such reason, in the form of this general principle: the more fearful a penalty is, the greater its deterrent effect. Most people fear death more than any other potential punishment, so we have reason to think that capital punishment is indeed a more effective deterrent than lesser punishments. Van den Haag's third point is that given our uncertainty about the deterrent effects of the death penalty, we are bound to be risking lives no matter whether we impose the death penalty or abolish it. Given that we are risking things either way, van den Haag believes that we should risk the life of a convicted murderer so as to spare the lives of potential innocent victims.

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. 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.

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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. . . .

For I doubt that the presence or absence of a deterrent effect of the death penalty is likely to be demonstrable by statistical means. . . .

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

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.

### Ernst van den Haag: On Deterrence and the Death Penalty

1. Van den Haag claims that we are not required to provide more proof of capital punishment's deterrent effect than of other punishments' deterrent effect. Can you think of a good reason to support this claim?
2. Is it true that the more fearful a punishment is, the more deterrence it will yield?
3. Explain the way (if any) in which the death penalty is uniquely irrevocable. Does this status impose any special argumentative burdens on defenders of the death penalty? If so, which ones?

4. Given that we are unsure of the deterrent effects of the death penalty, is it acceptable to take the life of a convict—a certain loss, according to van den Haag—for the chance that doing so will save innocent lives in the future? Why or why not?
5. Do you think it plausible to support the death penalty on deterrence grounds even if we are unsure of its deterrent effects? If your answer is yes, explain how your case agrees with or differs from van den Haag's. If your answer is no, defend your belief that such support is implausible.

## Civilization, Safety, and Deterrence

Jeffrey H. Reiman

Jeffrey Reiman believes that murderers deserve to die. But he denies that the death penalty is morally justified. By sparing the life of a murderer, we communicate the great value of human life, the disvalue of pain, and the horror at allowing one person complete control over another. Reiman also believes that by sending this message, we will, over the long run, contribute to a society that is more civilized, more respectful of human life, and consequently less violent. In short, sparing the lives of convicted murderers may well have a deterrent effect.

Reiman devotes the bulk of this selection to critiquing Ernst van den Haag's claim that capital punishment is likely to be our most effective deterrent because it inspires more fear than any other punishment. Reiman identifies four grounds of suspicion.

First, a less fearful punishment may be fearful enough, and may deter all who can be deterred. Second, people assess risks in a very crude fashion, so even if people fear death more than other punishments, the prospect of facing death may not deter them from their criminal preparations. Third, while van den Haag claims that capital punishment deters by sending a message of the wrongness of murder, Reiman counters (as earlier) that refraining from executing murderers sends a civilizing message that stands an equal chance of preventing crime. Finally, Reiman alleges that van den Haag's argument proves too much. If it were sound, then we should torture people to death, since that is more feared than lethal injection; since we shouldn't torture people to death, it follows that van den Haag's argument is unsound.

... By placing execution alongside torture in the category of things we will not do to our fellow human beings even when they deserve them, we broadcast the message that totally subjugating a

person to the power of others *and* confronting him with the advent of his own humanly administered demise is too horrible to be done by civilized human beings to their fellows even when they have earned it: too horrible to do, and too horrible to be capable of doing. And I contend that broadcasting this message loud and clear would in the long run contribute to the general detestation of murder and

From Jeffrey H. Reiman, "Civilization, Safety, and Deterrence," *Philosophy and Public Affairs* 14 (1985), pp. 142–147.

be, to the extent to which it worked itself into the hearts and minds of the populace, a deterrent. In short, refusing to execute murderers though they deserve it both reflects and continues the taming of the human species that we call civilization. Thus, I take it that the abolition of the death penalty, though it is a just punishment for murder, is part of the civilizing mission of modern states. . . .

. . . I said that judging a practice too horrible to do even to those who deserve it does not exclude the possibility that it could be justified if necessary to avoid even worse consequences. Thus, were the death penalty clearly proven a better deterrent to the murder of innocent people than life in prison, we might have to admit that we had not yet reached a level of civilization at which we could protect ourselves without imposing this horrible fate on murderers, and thus we might have to grant the necessity of instituting the death penalty. But this is far from proven. The available research by no means clearly indicates that the death penalty reduces the incidence of homicide more than life imprisonment does. . . .

Conceding that it has not been proven that the death penalty deters more murders than life imprisonment, van den Haag has argued that neither has it been proven that the death penalty does *not* deter more murders, and thus we must follow common sense which teaches that the higher the cost of something, the fewer people will choose it, and therefore at least some potential murderers who would not be deterred by life imprisonment will be deterred by the death penalty Van den Haag writes:

. . . our experience shows that the greater the threatened penalty, the more it defers.

. . . Life in prison is still life, however unpleasant. In contrast, the death penalty does not just threaten to make life unpleasant—it threatens to take life altogether. This difference is perceived by those affected. We find that when they have the choice between life in prison and execution, 99 percent of all prisoners under sentence of death prefer life in prison. . . .

From this unquestioned fact a reasonable conclusion can be drawn in favor of the superior deterrent effect of the death penalty. Those who have the choice in practice . . . fear death more than they

fear life in prison. . . . If they do, it follows that the threat of the death penalty, all other things equal, is likely to deter more than the threat of life in prison. One is most deterred by what one fears most. From which it follows that whatever statistics fail, or do not fail, to show, the death penalty is likely to be more deterrent than any other.<sup>1</sup>

Those of us who recognize how common sensical it was, and still is, to believe that the sun moves around the earth, will be less willing than Professor van den Haag to follow common sense here, especially when it comes to doing something awful to our fellows. Moreover, there are good reasons for doubting common sense on this matter. Here are four:

1. From the fact that one penalty is more feared than another, it does not follow that the more feared penalty will deter more than the less feared, unless we know that the less feared penalty is not fearful enough to deter everyone who can be deterred—and this is just what we don't know with regard to the death penalty. Though I fear the death penalty more than life in prison, I can't think of any act that the death penalty would deter me from that an equal likelihood of spending my life in prison wouldn't deter me from as well. Since it seems to me that whoever would be deterred by a given likelihood of death would be deterred by an *equal* likelihood of life behind bars, I suspect that the commonsense argument only seems plausible because we evaluate it unconsciously assuming that potential criminals will face larger likelihoods of death sentences than of life sentences. If the likelihoods were equal, . . . where life imprisonment was improbable enough to make it too distant a possibility to worry much about, a similar low probability of death would have the same effect. After all, we are undeterred by small likelihoods of death every time we walk the streets. And if life imprisonment were sufficiently probable to pose a real deterrent threat, it would pose as much of a deterrent threat as death. And this is just what most of

the research we have on the comparative deterrent impact of execution versus life imprisonment suggests.

2. In light of the fact that roughly 500 to 700 suspected felons are killed by the police in the line of duty every year, and the fact that the number of privately owned guns in [the United States] is substantially larger than the number of households. . . , it must be granted that anyone contemplating committing a crime *already* faces a substantial risk of ending up dead. . . . It's hard to see why anyone *who is not already deterred by this* would be deterred by the addition of the more distant risk of death after apprehension, conviction, and appeal. Indeed, this suggests that people consider risks in a much cruder way than van den Haag's appeal to common sense suggests—which should be evident to anyone who contemplates how few people use seatbelts (14 percent of drivers, on some estimates), when it is widely known that wearing them can spell the difference between life (outside prison) and death.
3. Van den Haag has maintained that deterrence does not work only by means of cost-benefit calculations made by potential criminals. It works also by the lesson about the wrongfulness of murder that is slowly learned in a society that subjects murderers to the ultimate punishment.<sup>2</sup> But if I am correct in claiming that the refusal to execute even those who deserve it has a civilizing effect, then the refusal to execute also teaches a lesson about the wrongfulness of murder. My claim here is admittedly speculative, but no more so than van den Haag's to the contrary. [My] view has the added virtue of accounting for the failure of research to show an increased deterrent effect from executions *without having to deny the plausibility of van den Haag's commonsense argument that at least some additional potential murders will be deterred by the prospect of the death penalty*. If there is a deterrent effect from *not executing*, then . . . while executions will deter some murderers,

this effect will be balanced by the weakening of the deterrent effect of not executing, such that no net reduction in murders will result. And this . . . also disposes of van den Haag's argument that, in the absence of knowledge one way or the other on the deterrent effect of executions, we should execute murderers rather than risk the lives of innocent people whose murders might have been deterred. . . . If there is a deterrent effect of not executing, it follows that we risk innocent lives either way. And if this is so, it seems that the only reasonable course of action is to refrain from imposing what we know is a horrible fate.

4. Those who still think that van den Haag's commonsense argument for executing murderers is valid will find that the argument proves more than they bargained for. Van den Haag maintains that, in the absence of conclusive evidence on the relative deterrent impact of the death penalty versus life imprisonment, we must follow common sense and assume that if one punishment is more fearful than another, it will deter some potential criminals not deterred by the less fearful punishment. Since people sentenced to death will almost universally try to get their sentences changed to life in prison, it follows that death is more fearful than life imprisonment, and thus . . . will deter some additional murderers. Consequently, we should institute the death penalty to save the lives these additional murderers would have taken. But, since people sentenced to be tortured to death would surely try to get their sentences changed to simple execution, the same argument proves that death-by-torture will deter still more potential murderers. Consequently, we should institute death-by-torture to save the lives these additional murderers would have taken. Anyone who accepts van den Haag's argument is then confronted with a dilemma: Until we have conclusive evidence that capital punishment is a greater deterrent to murder than life imprisonment, he must grant *either*

that we should not follow common sense and not impose the death penalty; *or* we should follow common sense and torture murderers to death. In short, either we must abolish the electric chair or reinstitute the rack. Surely, this is the *reductio ad absurdum* of van den Haag's commonsense argument.

## NOTES

1. Ernest van den Haag and John P. Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983), pp. 68–69.
2. *Ibid.*, p. 63.

### Jeffrey Reiman: Civilization, Safety, and Deterrence

1. Reiman claims that abolishing the death penalty advances the cause of civilization. Do you think he is right about that?

2. Do you think that abolishing the death penalty would have as much deterrent effect as retaining it? Why or why not?
3. Deterrence theorists argue that we should impose the least harmful punishment that can effectively deter crime. Does this thought help to answer Reiman's claim that van den Haag's argument proves too much?
4. There is plenty of evidence that people fail to assess risk in a rational way. How does Reiman use this evidence to argue against van den Haag? Are his critiques on this point sound?
5. Reiman claims that if the prospect of life imprisonment doesn't deter a would-be murderer, then the chance of the death penalty won't, either. Do you think Reiman is right about that? Why or why not?