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# ECONOMIC AND HISTORICAL IMPLICATIONS FOR CAPITAL PUNISHMENT DETERRENCE

RUDOLPH J. GERBER\*

*Executions are different today . . . There are no afternoon sermons or speeches—just a group of grim prison employees, shortly after midnight, trying to finish the job as quickly as they can. In 1821, when Stephen Clark died, an execution was outside, open to the public, and embedded in ritual; now it is behind closed doors, accessible only to a few, with as little ceremony as possible.*  
—Stuart Banner<sup>1</sup>

At the forefront of the American death penalty debate lies the question about its deterrence potential. While other studies have addressed statistical data about executions and crime deterrence, this article takes an historical approach to address American capital punishment as it implicates both economic assumptions about human nature and criminological expectations about deterrence.

Supporters of capital punishment often claim that it serves as a homicide deterrent based on the economic assumption that a murderer, like law-abiders, calculates in advance the costs and benefits of the anticipated murder and will forego the crime if the anticipated penal cost—execution—outweighs the anticipated benefits. The key to this deterrence theory is the assertion from law and economics scholars like Richard Posner and Gary Becker that all of us, murderers included, rationally offset likely benefits and costs of a contemplated course of conduct, including homicide, and then choose conduct that maximizes benefits and minimizes costs.<sup>2</sup> At least in theory the criminal law suggests an impressive economic logic rooted in the common notion of premeditation or, in the utilitarian term, rational calculation.

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1. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 2–3 (2002).

2. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 219 (6th ed. 2003); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

Punishment and execution appear in this economic calculus as costs. If the execution cost appears sufficiently likely, economic theory posits that it dissuades the contemplating murderer from homicide.

I propose here to accept uncritically this arguable economic assumption about human beings in general and, in particular, rationally calculating criminals.<sup>3</sup> I do this in order to explore its feasibility in the context of the historical development of American execution practices and to determine if these practices permit a realistic cost-benefit calculation producing deterrence. And while I consider very important the retributive question about whether at least some murderers “deserve to die” via capital punishment, I hope to explore here whether that question necessarily takes precedence over structural questions relating to the deterrent and equitable capabilities of our present justice system.

## I. PRIOR STUDIES

Academic researchers have investigated the ability of capital punishment to deter in at least three recurring types of studies: immediate impact studies, comparative research, and time-series studies. Immediate impact studies test the assumption that highly publicized executions reduce the number of homicides after executions.<sup>4</sup> In an early study of this kind, Dann found that homicides after a publicized execution showed no decrease and that the murder rate actually slightly increased.<sup>5</sup> More recently, Thomson and others have used a similar approach to examine homicides in Los Angeles before and after the well-publicized execution of Robert Harris in 1992. After a twenty-five year exe-

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3. The economic assumptions about human nature, morality, and criminal behavior are subject to much debate. Entry into that debate is beyond the scope of this paper other than to observe with novelist Scott Turow that usually “murder is not a crime committed by those closely attuned to the real-world effects of their behavior,” but instead by people “unable even to conceive of the future.” SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER’S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 60 (2003).

4. Immediate impact studies are so named because they typically study homicide rates immediately before and after an execution, with the expectation, under deterrence theory, that the “impact” of an execution would appear in at least a temporary diminution in the number of homicides.

5. ROBERT H. DANN, *THE DETERRENT EFFECT OF CAPITAL PUNISHMENT* 14–18 (Friends Soc. Serv. Comm., Bulletin No. 29, 1935). Dann’s study, though dated, remains representative of this approach.

cution hiatus, they found an increase, rather than a decrease, in the subsequent homicide rate.<sup>6</sup>

Comparative research typically matches similar jurisdictions that have abolished the death penalty with those that continue to employ it, comparing homicide rates between the two jurisdictions in the same time periods. Studies regularly find little difference in the murder rates of adjacent capital and non-capital jurisdictions, regardless of death penalty practices.<sup>7</sup> The third class of studies, time-series research, looks at the long-term association between capital sentencing and homicide. If capital punishment deters, periods with an increase in executions should show a decrease in violent crime and murder. Most of these studies find no such relationship. A recent test of the deterrence hypothesis in Texas found no association between the frequency of execution and homicide rates.<sup>8</sup> William C. Bailey of Cleveland State University also found no evidence for deterrence after Oklahoma resumed executions following a twenty-five year moratorium.<sup>9</sup>

Despite the recurring patterns from these differing statistical approaches, a significant portion of the general population still clings to the expectation that capital punishment does, or at least should, deter.<sup>10</sup> President Bush himself has repeatedly said he favors capital punishment because it is a deterrent.<sup>11</sup> I propose here to study this deterrence hypothesis based not on the three

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6. Ernie Thomson, *Effects of an Execution on Homicides in California*, 3 HOMICIDE STUD. 129 (1999); Ernie Thomson, *Deterrence Versus Brutalization*, 1 HOMICIDE STUD. 110 (1977); Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 CRIM. JUST. REV. 65 (1997); Michael J. Godfrey & Vincent Schiraldi, *How Have Homicide Rates Been Affected By California's Death Penalty?*, IN BRIEF (Ctr. on Juvenile and Criminal Justice), April 1995.

7. See, e.g., THORSTEIN SELLIN, *THE DEATH PENALTY* 23-24 (1959); THORSTEIN SELLIN, *THE PENALTY OF DEATH* 171-72 (1980).

8. Jon Sorenson et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481 (1999).

9. William C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 CRIMINOLOGY 711 (1998). See also John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 107 (1994).

10. See, e.g., Death Penalty Information Center, National Polls, <http://deathpenaltyinfo.org/article.php?scid=23&did=210#National> (last visited May 11, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); Jeffrey M. Jones, *Understanding Americans' Support for the Death Penalty*, The Gallup Organization, at <http://www.gallup.com/poll/tb/religValue/20030603c.asp?Version=P> (June 3, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

11. President Bush responded affirmatively to repeated questions during his presidential campaign about the death penalty in general and particularly

kinds of statistical studies above but rather on how our nation's past and present execution practices satisfy the deterrence prerequisites needed for any cost-benefit calculation of crime.<sup>12</sup>

## II. DETERRENCE REQUIREMENTS

Deterrence theory finds parallel roots in classical criminology and in assumptions about human nature in economic theory. In particular, economic theory posits that an individual of any moral level, criminal or law-abiding, wants to maximize gains of material satisfaction and to minimize painful losses or risks associated with punishment in general and execution in particular.<sup>13</sup> Homicidal benefits might include such things as material acquisition and/or psychological satisfaction. If the rationally calculating potential murderer sees the risk of these costs exceeding the likelihood of these benefits, her choice would be to abandon the homicidal course of conduct. A realistic assessment of the likelihood of risk becomes an important part of this economic calculus.

For such a rational calculator, what factors would increase the risk of penal costs beyond the likelihood of homicide benefits? Most, if not all, criminologists adopt the central factors suggested by Cesare Beccaria in his *Of Crimes and Punishments*.<sup>14</sup> Four criteria form the bedrock of similar-minded assumptions about deterrence prerequisites: (1) punishment must appear to follow the commission of crime with swiftness ("celerity"); (2) punishment must be perceived as highly or absolutely certain to follow crime ("certainty"); (3) punishment must appear roughly proportionate in severity to the original crime, under a penal theory of "like deserves like" treatment; and (4) official punishment must occur in public, before a large population, in order to disseminate these messages as widely as possible. Does the historical development of capital punishment in this country achieve these prerequisites?

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the high volume of executions in his home state of Texas. See TUROW, *supra* note 3, at 57.

12. For a summary of some recent statistical studies, see FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 59-61 (2003).

13. See Becker, *supra* note 2.

14. See CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 55-59 (Henry Paulucci trans., The Bobbs-Merrill Company, Inc. 1963) (1764).

### III. CELERITY

Beccaria declared that the more quickly punishment follows the commission of crime, the more useful it is.<sup>15</sup> To potential offenders contemplating crime, a swiftly-imposed punishment creates a psychological cause-effect connection between the contemplated criminal behavior and the resulting punishment. This cause-effect connection strengthens with the speed with which the effect follows the cause.

Celerity resonates deeply with both economic theory and also with deterrence goals. Does it find support in our execution practices? Our colonial and revolutionary eras might suggest an affirmative answer. Colonial executions generally occurred within a few days of homicide convictions.<sup>16</sup> Following a conviction and imposition of a death sentence, officials typically needed time only for erecting gallows and adjusting work and school schedules to disseminate information about the impending execution. Sometimes, in order to permit time for penitence, a delay of a few weeks might occur.<sup>17</sup> Once the execution date was set, only minimal additional delays occurred to permit official encouragement to spectators to gather for the procession to the place of execution, usually in the town square.<sup>18</sup> This process typically occurred only a few days after conviction which itself often occurred but a few days after apprehension.<sup>19</sup>

While the pattern just described appears regularly in colonial executions, an even quicker procedure developed in the form of post-revolution executions known as lynchings, which became prevalent in the eighteenth and nineteenth centuries. This form of execution was especially common in the South, particularly involving crimes with black offenders. Our lynching practices reflect a tradition of vigilante justice closely aligned with celerity because lynching proponents disdained governmental officialdom and delay.<sup>20</sup> Frontier lynchings both in the South and the West, though now seen as cruel, unethical, and unconstitutional, achieved almost instant execution following apprehension and frequently occurred without any trial at all. Lynching appears as a significant precursor to capital punishment prac-

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15. *Id.* at 55.

16. BANNER, *supra* note 1, at 15, 24 (2002).

17. See Edmund S. Morgan & Marie Morgan, *A Very Popular Penalty*, N.Y. REV., Apr. 10, 2003, at 52 (reviewing BANNER, *supra* note 1); see also BANNER, *supra* note 1, at 24.

18. See BANNER, *supra* note 1, at 11, 15, 24.

19. *Id.* at 15.

20. ZIMRING, *supra* note 12, at 109, 113, 119.

tices; our most frequent executing jurisdictions today were also our most frequent lynching jurisdictions.<sup>21</sup>

Though weakening with increasing post-conviction delays, execution celerity continued as a recognizable reality until the Supreme Court's 1972 decision in *Furman v. Georgia*,<sup>22</sup> though even by then some post-conviction delays consumed not days but months. From 1900 to 1960 the average length of time on death row prior to execution was about eight months.<sup>23</sup> However, soon after *Furman's* unwitting resuscitation of capital punishment in some thirty states, the increasing complexity of post-conviction and appeal proceedings dramatically lengthened the interval from conviction to execution. Speaking from experience, the interval between arrest and sentencing takes about twice as much time for homicide as it does for all other violent crimes.<sup>24</sup> The greatest court delays, however, appear after capital convictions. Prisoners executed in 2001 spent an average of eleven years and five months on death row before execution; a significant minority had spent nearly two decades awaiting execution.<sup>25</sup>

As of 2004, celerity has disappeared entirely from the deterrence equation among both high and low volume executing jurisdictions. California, for example, has sentenced 512 people to death since 1973 but has executed only two; meanwhile at least 18 have died in prison.<sup>26</sup> There and in the thirty-seven other executing states, the interval between conviction and execution widens each year because of increasingly complex appeal processes. Kozinski and Gallagher estimate that emptying the nation's death row backlog would require one execution every day for the next twenty-six years.<sup>27</sup> The larger conclusion seems without doubt: as of 2004, execution celerity is no longer, if it ever was, a reality.

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21. *Id.* at 109–10, 113–19.

22. 408 U.S. 238 (1972).

23. *Death Row Diaries* (The History Channel television broadcast, Dec. 9, 2000).

24. Bureau of Justice Statistics, Department of Justice, Washington DC, 2001.

25. See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 12, 19 (1995); TUROW, *supra* note 3, at 61. In my state of Arizona, the median time from sentence to execution is 17.4 years. Brief of Amici Curiae Arizona Voice for Victims, Inc. et al. at 11, *Schriro v. Summerlin*, 341 F.3d 1082, cert. granted 124 S. Ct. 833 (2003) (No. 03-526).

26. Kozinski & Gallagher, *supra* note 25, at 18.

27. *Id.* at 19.

## IV. CERTAINTY

According to Beccaria and most contemporary criminologists, certainty that punishment follows on crime directly impacts deterrence. Penal certainty also serves as a requirement for the economic theory of rational calculation.<sup>28</sup> To the carefully calculating economic mind, certain punishments deter while uncertain ones do not. The reason in each instance is the same: penal probability supposedly enters into the murderer's calculus.<sup>29</sup> Beccaria seems to have thought certainty more important than celerity, for he asserts that certainty sends the stronger message.<sup>30</sup> Whether viewed from the standpoint of classical criminology or from contemporary economic theory, certainty of punishment, especially certainty of execution, supposedly acts as a strong disincentive to homicidal behavior.

In our nation's execution dramaturgy, certainty makes an intermittent but mostly waning historical appearance. Even in colonial days, when many less serious crimes merited death, executions generally addressed more serious offenders. Of those, some received pardons. Some of these pardons occurred dramatically—in full view of assembled crowds—when a sufficiently penitent murderer received reprieve while standing near the gallows.<sup>31</sup> In the early 1800s, as the abolitionist movement gathered force, moral disapproval of barbaric modes of killing generated petition drives for clemency that, when granted, further undermined execution certainty. By the middle of the nineteenth century, a steady increase in discretionary sentences, pardons, and clemency further diminished execution certainty as a predictable payback for homicide.

As of 2004, execution certainty has succumbed to its opposite. Today, the complex legal procedures of our courts have dramatically reduced the certainty of executions as well as the reliability of guilty verdicts. Radelet and Bedau claim that 350 wrongful convictions have occurred in the twentieth century alone, with twenty-three innocent persons executed, mixing lottery-like error into the certainty equation.<sup>32</sup> James Liebman's exhaustive studies of capital appeals reveal that well over half of the nation's capital sentences fall on appeal.<sup>33</sup>

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28. Kozinski & Gallagher, *supra* note 25; Becker, *supra* note 2.

29. Kozinski & Gallagher, *supra* note 25.

30. BECCARIA, *supra* note 14, at 58.

31. BANNER, *supra* note 1, at 9–10, 19–20.

32. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23 (1987).

33. James Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) [hereinafter Liebman et al., *Cap-*



My own state of Arizona is a representative example. A high volume death sentencer, Arizona has capital reversal rates among the highest in the nation. Some sixty-eight percent of its death sentences fall on appeal, less success than from a coin flip. In high volume death sentencing Pima County (Tucson), the reversal rate is seventy-one percent, in Maricopa County (Phoenix), it is eighty-four percent. In this state's two largest counties, appellate courts throw out more than seven in ten death sentences for trial court errors.<sup>34</sup> What happens to these defendants on retrial? Between 1974 and 2000, fifty-seven of Arizona's retried capital defendants have received a life sentence, twelve received a term of years, and a surprising seven have been acquitted. In total, fifty-six percent of Arizona's retried capital defendants have won sentences less than death, raising the question about how the same evidence can generate such disparate results.<sup>35</sup>

Arizona's capital goals about certainty of execution regularly suffer from its own capital enthusiasm. Liebman has found a statistical connection between capital zeal and reversible error—the more death penalties sought, the more reversible error found on appeal, meaning fewer executions.<sup>36</sup> In Arizona, as in the thirty-seven other executing states, only one in ten capital-sentenced defendants is actually executed, a small return, if it can be called that, for such an enormous investment of time, money, and rhetoric.<sup>37</sup> In the manufacturing world, a product recalled more than seven in ten instances would disappear. An expensive drug that worked only once in ten instances, or one that failed fifty-six percent of the time, would lose support and disappear from pharmacy shelves. This is not the case for our death penalty.

National data on the embarrassing discovery of innocents on death rows increase uncertainty. Since 1973, 112 people in twenty-five states have been released from death rows with evidence of their innocence.<sup>38</sup> The prolonged appeal process has

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*tal Attrition*]. Liebman's studies find not a one-in-ten rate of actual execution, but instead only half that, about five percent. I use the one-in-ten figure only because Zimring adopts it. For information as to the same effect on reversal rates, see Kozinski & Gallagher, *supra* note 25, at 17; see also Fox Butterfield, *Death Sentences Being Overturned in 2 of 3 Appeals*, N.Y. TIMES, JUNE 12, 2000, at A1.

34. Liebman et al., *Capital Attrition*, *supra* note 33; James Liebman, *Why There Is So Much Error in Capital Cases*, Presentation to Arizona Criminal Defense Bar (June 26, 2002).

35. OFFICE OF THE ATTORNEY GEN., STATE OF ARIZ., CAPITAL CASE COMMISSION FINAL REPORT, ATTACHMENT B, at 23 (2002).

36. Liebman et al., *Capital Attrition*, *supra* note 33.

37. See ZIMRING, *supra* note 12, at 168.

38. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 2 (2004), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf> (last

generated these discoveries of innocence. One of our most respected criminologists now estimates that about one in every seventy of our death sentences befalls an innocent defendant.<sup>39</sup> While capital punishment proponents and economic theorists alike see appeal complexities as prime obstacles to execution certainty, recurring innocence discoveries during appeal make it unlikely that appeals will be shortened or simplified. This source of uncertainty is likely to remain a continuing fixture of our capital punishment liturgy.

Added to these sources of uncertainty are the highly discretionary aspects of capital punishment at the front and back ends of trial court prosecutions. Death sentences are awarded in fewer than one in every fifty homicide prosecutions,<sup>40</sup> meaning that the odds in ninety-eight percent of homicides strongly favor a sentence less than death. At the tail end of the system, of the nationwide cohort of persons sentenced to death, if only one in ten of this group is actually executed, ninety percent of murderers under capital sentences escape execution, meaning that even an imposed execution is improbable.<sup>41</sup> If the death penalty is to appear certain, these statistics would need to be turned on their head, which appears impossible given today's legal complexities. We are in a spiral of declining expectations of executions because of prosecutorial discretion at the front end and appellate complexity at the back end of the justice system. A death sentence is unlikely to be sought by the prosecution in the first place; when sought, it is unlikely to be imposed; when imposed, it is highly unlikely to be carried out. Rather than execution certainty, our legal liturgy has achieved the exact opposite.

## V. PROPORTIONAL SEVERITY

Deterrent and economic theories of human nature both imply that penalties must appear severe enough to a calculating mind to outweigh the supposed benefits of crime. Ideally, in making her economic calculus of costs and benefits, the would-be calculating murderer entertains second thoughts in the realization that the pain of a brutal official death outweighs any pleasures resulting from the crime. Jeremy Bentham and John Stuart Mill, founders of modern utilitarianism, suggested that legislators could insure that pain outweigh pleasures of crime by

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visited Feb. 2, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

39. See ZIMRING, *supra* note 12, at 167.

40. *Id.* at 56.

41. *Id.* at 167-68.

the simple expedient of increasing the degree of pain inflicted.<sup>42</sup> Legal philosophers like John Austin and economic theorists like Gary Becker reach similar conclusions.<sup>43</sup> In these schools of thought, the severity of punishment acts as a deterrent because the murderer's anticipation of brutal pain trumps any expectation of pleasure from the murder.

What does our history of capital punishment demonstrate about this demand for proportional severity? As Richard Posner has explained, in medieval times, people did not consider capital punishment to be as serious as they do today because the medievals generally believed in an after-life. Thus, executioners made the death penalty a more costly punishment by exacting more horrible forms of punishment, such as drawing and quartering, for serious crimes like treason. Likewise, murder by poison merited execution by boiling because poisoners were especially difficult to apprehend. Punishments such as boiling in oil, however, were short-lived as they were morally inflammatory. In the nineteenth-century American West, hanging replaced boiling in oil as a way to punish the difficult-to-apprehend horse thieves. Hanging, in turn, was replaced by electrocution, gas, and eventually lethal injection in the twentieth century.<sup>44</sup>

In this penal evolution one detects a distinct, even purposeful, diminution in the government's official infliction of pain. While our colonial era may well have sought, for a short time, to impose painful punishment under a "like for like" rationale, or in biblical terms, under "eye for eye" proportionality, our established criminal justice system has never institutionalized the philosophy that the kind or severity of the offender's crime should be re-imposed on the offender as punishment. The "like for like" or "eye for eye" notions of mirroring the offender's crime onto the offender have never materialized because of fears of sending the counterproductive message that the government in punishing could repeat the offender's depravity. While the government could appear to be tough, it must not appear criminal itself. Our justice system has never institutionally opted to rape the rapist, steal from the thief, or pummel the assaulter.

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42. See, e.g., Konstantin Kolenda, *Philosophy's Journey: A Historical Introduction* 169-73 (1974); see also JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 179 (Hafner Publ'g Co. 1970) (1789).

43. See Becker, *supra* note 2; JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 118-361 (1832).

44. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 226 (6th ed., 2003).

Apart from rejecting this penal mirror, our justice system has evolved execution methods showing a steady progression away from the brutality of the Salem witch executions and town square hangings to today's nearly painless mode of death. We have moved progressively from burning at the stake and boiling in oil, to hanging, electrocution, gassing, and finally to today's quiet antiseptics of lethal injection, a procedure so painless even President Reagan approvingly said it was just like falling asleep.<sup>45</sup> Our uninterrupted historical trend from the colonial "like deserves like" to today's lethal injection aims to protect us spectators at least as much as the condemned. No less than the condemned, we spectators want to be spared the spectacles of past grotesque and botched hangings, electrocutions, and gassings.<sup>46</sup>

What then does our execution history offer as response to demands from Beccaria and economic theorists that the murderer's pain exceed her expected pleasure? The justice system offers the prospect of the government killing the killer, of course, but aside from the statistical improbability of that happening with any frequency, the governmental method of executing today shows no severity similar to the killer's original act. No matter how brutal the original homicide nor how vengeful the governmental motive, our justice system answers the original brutality with painless lethal injection, the antithesis of the original brutality.

## VI. PUBLICITY

Displaying executions in public serves important goals both for deterrence and for economic theory because the three required messages above—certainty, celerity, and proportionality—require widespread dissemination to the kinds of people tempted to commit homicide. Our colonial and most post-revolutionary executions certainly reflect a concerted effort to maximize this public awareness. Colonial executions occurred in the town square, usually preceded by a public procession along main streets, with spectators lining the curbs for a look at the condemned person. School and work recessed so throngs could assemble in the town square. At their gallows speeches sheriffs, ministers, and even the condemned person sought to impress on the assembly the gravity of the offender's conduct and its mortal consequence for any in the audience tempted to act likewise. After the execution the offender's corpse sometimes remained

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45. ZIMRING, *supra* note 12, at 51 (quoting Henry Schwarzschild, *Homicide by Injection*, N.Y. Times, Dec. 23, 1982, at A15).

46. BANNER, *supra* note 1, at 162-63.

on display in a gibbet or on the scaffold for hours or days as a continuing reminder to passers-by of the consequences of criminal behavior.<sup>47</sup>

Efforts at wide dissemination of executions continued through the nineteenth century. Official executions as well as lynchings occurred in public, often with posters, advertisements, and bulletins alerting the citizenry in advance and encouraging their attendance. As a representative example, when "Four Negroes" were to be executed on an island in the Mississippi River across from St. Louis in 1841, steamboat and carriage lines used posters to advertise the event in advance and promised opportunities for good views of the hangings.<sup>48</sup>

In retrospect, public executions accomplished at least three main goals: they drew a crowd to hear and spread official messages about the wages of criminality; the ritual offered a solemn pedagogy about respect for law; and the entire ceremony from jailhouse to scaffold constituted a collective community condemnation. To heighten these messages colonial executions aimed to generate large audiences, with long processions, as well as gallows rituals, lengthy speeches, and sermons as a collective lesson in legal observance. Swiftmess was not a goal of the ceremony itself; indeed, the more the execution proceeding could be extended the greater the supposed deterrent message.

By the beginning of the abolitionist movement in the early nineteenth century, however, changes in public sensitivities prompted moving executions away from the town square and reducing the public pageantry. Paradoxically, it was media coverage of executions that contributed in good part to official exclusions of journalists and, later, the general public from executions. Journalists reporting on executions regularly focused on any botched proceedings, describing minutely any official failings that prolonged the dying person's agonies. These messages were officially unwelcome. Legislation and local officials gradually excluded journalists from public executions. Because journalists could not be effectively excluded from crowds in public squares, the execution ceremony had to be moved from the town square to jail yards inside prison walls where admission could be regulated. An invitation soon became a necessity. By the mid-1800s journalists were banned from jail yard executions precisely in order to avoid their impartial reporting. Eventually, to avoid spectators' efforts to peer around or

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47. *Id.* at 72–74.

48. *Id.* at 50–51 (reproduced photographs).

over prison walls into the yard, executions had to be moved inside the building itself.

The geographical move became even more imperative with the use of electrocution and gas because both required special equipment in a prepared setting. By the 1930s, executions had moved into the privacy of a specially fitted room within the prison to avoid not only journalists and abolitionists but also the critical gaze of the citizenry.<sup>49</sup> Today, as of 2004, our nation's executions typically occur in private, late at night, in a special prison execution room, with only ten or twenty invited spectators, none of whom is the type needing deterrence nor able to disseminate that message once thought so essential.

### CONCLUSION

Our nation's history of capital punishment demonstrates a steady departure from the four requirements needed both for deterrence and for rational calculation of disincentives. Our capital punishment is not swift because the appeal process takes many years, with the average death row resident spending well more than a decade on death row after the commission of the original murder. Our capital punishment is not certain because only a miniscule number of murderers receive the death sentence, and even among those so sentenced, only one in ten is actually executed. Capital punishment no longer mirrors the severity of the original killing because lethal injection has made execution physically painless. Perhaps most notably absent among these requirements, executions today are no longer public events accessible either firsthand or even via detailed media accounts. They have moved progressively from the town square to the jail yard to the privacy of the execution room where the few witnesses are not those needing to learn the deterrent message—paradoxically, the only audience present is the wrong one.

Instead of meeting these four requirements, our capital liturgies reveal their exact opposites. Rather than being swift, capital punishment creaks along like a slow interminable roller coaster of legal ups and downs. Rather than certain, it is imposed in only one in fifty murder prosecutions, and even if imposed, only one in ten so sentenced actually suffers it, meaning that it is uncertain to the point of being an unpredictable lottery. Rather than matching the severity of the original crime, today's executions are as painless as falling asleep, leaving the threat of matching pain with pain unattained. Instead of public

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49. *Id.* at 150.

spectacles in the town square, today's infrequent executions occur not in town squares nor on front pages but in nocturnal and seemingly embarrassed silence, without fanfare and without the attendance of those most needing the deterrent message.

On this record the economist's careful rational calculator must conclude that today's execution risk itself is illusory. We should not be surprised then that law enforcement officials as well as criminological scholars regularly conclude that capital punishment offers no prospect of deterrence.<sup>50</sup> Given today's legal complexities, capital punishment cannot be reformed to achieve any of these four requirements. To capital punishment enthusiasts and economic theorists alike who urge deterrence as a realistic goal of capital punishment, our execution history from colonial days to the present shows deterrence falling so far below these requirements as to be not only illusory but beyond recapture. The retributive question about whether murderers deserve to die is, then, not the decisive inquiry, regardless of that answer, our legal system, like Humpty Dumpty, cannot be reconfigured to achieve the prerequisites for a predictable or equitable threat of capital punishment.<sup>51</sup>

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50. TUROW, *supra* note 3, at 59; see also Gary Wills, *The Dramaturgy of Death*, N.Y. REV. OF BOOKS, June 21, 2001, at 8.

51. In the triumph of our strange current political logic, one could well argue that if all the king's horses and all of the king's men cannot put Humpty together again, that in itself becomes a compelling argument for enlisting still more of the king's horses and men in the futile effort.