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Cover Page Footnote

Member of the Nashville Bar; Professor of Business Law, College of Business, Tennessee State University; B.S., Belmont College, 1969; J.D., Vanderbilt Law School, 1973; M.B.A., University of Tennessee at Nashville, 1973; Ph.D., George Peabody College, 1978. 1 John Adams, Defense of the British Soldiers in the Boston

OPINION PIECE

FACT-BASED DEATH PENALTY RESEARCH

Lewis L. Laska*

“Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence: nor is the law less stable than the fact.”¹

I. What is Fact-Based Death Penalty Research?

The goal of fact-based death penalty research is, simply put, to capture and document as many facts surrounding legal executions as possible, organize them in a clear and logical manner, and present them without bias, cant, or sentiment. This compilation of facts is then made available for an analysis of whether patterns appear suggesting which facts were and possibly still remain the lead-

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¹ John Adams, Defense of the British Soldiers in the Boston Massacre Trials (Dec. 3, 1770). John Adams' famous defense of the soldiers charged in the Boston Massacre resulted in the acquittal of the officer in charge. 3 GEORGE BANCROFT, HISTORY OF THE UNITED STATES OF AMERICA, FROM THE DISCOVERY OF THE CONTINENT 390 (D. Appleton and Co. 1896) (1882). It could not be shown that the officer, rather than some other person, had told the soldiers to fire. *Id.* The jury returned manslaughter convictions on two of the eight soldiers who fired on the rabble. *Id.* at 391. The jury “acquitted the other six; choosing that five guilty should escape rather than one innocent be convicted.” *Id.*

ing factors influencing legal death. The focus of fact-based research is clear and orderly facts. Indeed, publications that grow out of fact-based death penalty research document executions in chronological order, and each entry includes the executed person's name, age, gender, race, a detailed account in narrative form of the crime for which the accused was sentenced to death, and information on the place and method of execution. Regardless of the legal issue, the first place to begin death penalty research is with a list of those known to have suffered irrevocable punishment.

II. The History of Fact-Based Death Penalty Research

Like many other forms of social science research, fact-based death penalty research had an unlikely origin, an Alabama gentleman by the name of M. Watt Espy. The story is well known. In 1970, Espy, an unalterable abolitionist of the death penalty, undertook the solitary task of attempting to capture information about all legal executions in the United States. By speaking to county clerks and librarians and referencing newspapers, official sources, and even “true crime” magazines,² Espy captured information regarding well over 15,000 executions that were carried out in the United States from 1608 to 2002.³

² The best quality “true crime” magazines were published by Bernarr McFadden in the 1920s and 1930s. Bernarr McFadden (1868-1955), “The Father of Physical Culture,” <http://www.bernarrmacfadden.com/> (follow “A Publishing Empire”) (last visited Feb. 12, 2008). These included, among others, *True Detective* and *Master Detective*. *Id.*

³ M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File*, app. B (Inter-University Consortium for Political and Social Research 2004) available at <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/08451.xml> (last visited Feb. 16, 2008); see also M. Watt Espy, *American Gothic*, in A

The famous Espy inventory has spawned several books addressing America's death penalty including the works of Daniel Allen Hearn. Hearn steadfastly refuses to state publicly his view of capital punishment. Rather, he is a death penalty historian, patiently gathering facts and declining to offer premature conclusions. Hearn's first book was entitled *Legal Executions in New York State: A Comprehensive Reference, 1639-1963* and appeared in 1997.⁴ Hearn has since published two more books in the same fact-based model, *Legal Executions in New Jersey: A Comprehensive Registry, 1691-1963*⁵ and *Legal Executions in New England: A Comprehensive Reference, 1623-1960*.⁶

One truth, largely unknown by those who acknowledge the value of the Espy list, is that numerous additions were made to the list through the assistance of Hearn.⁷ In particular, Hearn captured and contributed additional facts from newspaper accounts—most notably *The New York Herald*—"true crime" magazines, and local government records.⁸ Specifically, Hearn read microfilm of Memphis newspapers dating from 1866 to 1876 in order to capture information about executions in Tennessee, Mississippi, and Arkansas.⁹ Even now, Hearn continues to expand on the Espy list, and he plans to publish an updated list of legal executions in the United States since 1866.¹⁰ Hearn urges caution in using unrefined data in the Espy list be-

PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY, 47-53 (Ian Gray & Moria Stanley eds., 1989).

⁴ DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW YORK STATE: A COMPREHENSIVE REFERENCE, 1639-1963* (1997).

⁵ DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW JERSEY: A COMPREHENSIVE REGISTRY, 1691-1963* (2005).

⁶ DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW ENGLAND: A COMPREHENSIVE REFERENCE, 1623-1960* (1999).

⁷ Interview with Daniel Allen Hearn, in Nashville, Tenn. (Oct. 12, 2007).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

cause it contains numerous omissions.¹¹ For example, the Espy list contains approximately 312 entries for Maryland.¹² Hearn, presently writing a comprehensive reference on Maryland's executions, has located over 755.¹³

III. What Is the Value of Fact-Based Death Penalty Research?

Death penalty commentators often speak about the random nature of the death penalty. Indeed, the United States Supreme Court struck down the death penalty after determining that Georgia's death penalty statute afforded sentencing jurors unguided discretion which resulted in the arbitrary and capricious imposition of the death penalty.¹⁴ It was only after passing legislative standards, in the form of aggravating and mitigating circumstances aimed at eliminating unbridled discretion, that states were again allowed to sentence defendants to death.¹⁵

Fact-based death penalty research questions the theory that the death penalty is or has ever been imposed randomly; it suggests, rather, that there may be untraditional macro-patterns to explain legal death that simply cannot be seen without a more complete nation-wide compilation of executions. Fact-based death penalty research asks, for example, "What patterns of jury conduct will be revealed if *all* executions in the United States are presented for examination by fair-minded people?" These patterns are akin, for

¹¹ *Id.*

¹² See M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File*, app. B (Inter-University Consortium for Political and Social Research 2004) available at <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/08451.xml> (last visited Feb. 16, 2008).

¹³ Interview with Daniel Allen Hearn, in Nashville, Tenn. (Oct. 12, 2007).

¹⁴ *Furman v. Georgia*, 408 U.S. 238, 294-95 (1972).

¹⁵ *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

example, to the discovery of large-scale pre-Columbian civilizations in South America—almost impossible to see close up, but evident from the air?¹⁶

Fact-based death penalty research has the potential to address more narrow issues of law as well. It might, for example, offer insights into one of the most intractable injustices encountered during death penalty trials, misidentification based on eyewitness testimony.¹⁷ A basic rule of evidence holds that eyewitness testimony holds the greatest reliability. However, in the United States between 1989 and 2003, at least 219 defendants were exonerated in part on the basis of at least one eyewitness misidentification.¹⁸ Could fact-based death penalty research reveal the fact patterns within which misidentification is most likely to occur?

IV. What Are the Bounds of Fact-Based Death Penalty Research?

Because Hearn steadfastly refuses to commit the bounds of his research to any fixed medium, they must be drawn from him in personal conversations. This is not a pleasant experience. Hearn, age fifty, has become the alter ego of M. Watt Espy in many ways: stubborn, sometimes helpful, always critical, and downright irascible. Without

¹⁶ See CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 3-27 (2005).

¹⁷ See generally Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (discussing the modern debate regarding innocent persons convicted in capital cases). However, various authors have addressed the issue of factual innocence over the past century. See generally EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1932); JUDGE JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957); EDWARD D. RADIN, *THE INNOCENTS* (1964).

¹⁸ Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005).

the leavening influence of a wife and children, Hearn practices his science largely alone. Although sometimes distracted by a poker game with friends, most of his free time is spent capturing information about legal executions in the United States. Nevertheless, here are the bounds of fact-based death penalty research, as this author understands them.

It seems self-evident that only *legal* executions are contemplated within the ambit of fact-based death penalty research—discussions of extra-legal killings are not included. Extra-legal killings include but are not limited to the following: those who died by their own hand while awaiting execution, those who died while attempting to escape, those who were murdered while incarcerated, or any execution that was not directly administered by the state. These deaths were not the result of legal executions.

In the same vein, the fact-based death penalty researcher should always document the *fact* of the legal execution. Two sources demonstrate that this is, somewhat surprisingly, a common omission; the authors of both of the following books fail to confirm whether certain people sentenced to death were actually executed. The first source, which documents Tennessee executions, is a notable county history series published in the nineteenth century known as *Goodspeeds*.¹⁹ *Goodspeeds*, for example, reported “Nelson, a slave of James Elliott, was indicted for the murder of David Sellers on November 11, 1845. The case resulted in a sentence of death on June 8, 1846.”²⁰ This statement is correct but misleading. Nelson’s conviction was overturned by the Tennessee Supreme Court in an

¹⁹ HISTORY OF TENNESSEE FROM THE EARLIEST TIME TO THE PRESENT: SKETCH OF HENDERSON, CHESTER, MCNAIRY, DECATUR, AND HARDIN COUNTIES 834 (The Southern Historical Press 1978) (1887) available at http://www.mytennesseegenealogy.com/tn_county/hrn.htm. (last visited Feb. 16, 2008).

²⁰ *Id.* at 834.

important decision setting out the rules of admissibility of dying declarations.²¹

The second source is a book written by Dr. and Mrs. Phillip Crane, a physician and his wife, who used vacation time to travel by car to each jail in Tennessee's ninety-five counties taking pictures of the jails.²² Included in the picture book were the names of people executed in that county or sent to Nashville to be executed.²³ The Cranes reported the executions of Eve Martin in Hawkins County in 1820²⁴ and Green Turner in Giles County in 1871.²⁵ Neither was executed. Interestingly, Eve Martin was actually murdered by two men, Robert Delap and Mitchell Marcum, neither of whom the Cranes mention.²⁶ Turner's death sentence was reduced to a twenty-one-year prison sentence.²⁷

Confirming that an execution actually occurred is a difficult task that requires a researcher to exhaust a number of sources; all available sources must be used to ferret out facts. Most importantly, every effort must be made to locate state supreme court opinions. Failure to make a good faith effort to locate *all* state supreme court opinions is inexcusable. This includes those affirming a conviction, as well as those reversing a conviction. Surprisingly, these opinions often go unaddressed. Quite often, this is because researchers assume these opinions have all been published.

²¹ *Nelson v. State*, 26 Tenn. 542, 543-44 (1847).

²² SOPHIE CRANE & PAUL CRANE, *TENNESSEE'S TROUBLED ROOTS passim* (1979) (summarizing Tennessee county facilities for incarceration).

²³ *Id.*

²⁴ *Id.* at 41.

²⁵ *Id.* at 31.

²⁶ *State v. Delap*, 7 Tenn. 90 (1823) (affirming Robert Delap's conviction for murder); KNOXVILLE REG. June 19, 1821, at 3 (containing the confession of Mitchell Marcum).

²⁷ *Turner v. State*, 50 Tenn. 452 (1871); Journal of the H.R., 39th Gen. Ass., 1st Sess., app. Tbl. Showing Name and Number of Convicts, at 21 (Tenn. 1875) ("282 Green Turner col Giles Circuit Horse-stealing October 21, 1872 21 years").

On the contrary, many state supreme court opinions were handwritten. After all, many courts did not begin issuing typewritten opinions until the early twentieth century. Consequently, these opinions often prove very difficult to read. However, even the most diligent researcher may encounter an empty vessel. For at least sixty-three men condemned to death, the Tennessee Supreme Court, for example, issued written opinions, but these opinions cannot be located.²⁸ Startlingly, some of these “missing” opinions were issued as late as the 1940s and 1950s.²⁹

If an appeal exists but no written opinion, published or otherwise, can be located or if the supreme court opinion contains no recitation of facts, as many do not, the trial court and appellate court opinions must be consulted. In addition to these court opinions, a death penalty researcher should examine court records. Hearn suggests the following research protocol for determining whether an execution actually occurred: Because many rural counties had no newspapers until the late nineteenth century, a diligent researcher must consult the minutes of the local county court to find entries where that body appropriated money to build a scaffold for the execution and to pay the sheriff to actually hang the accused.³⁰ Finally, fact-based death penalty research may also encompass short accounts known as “confessions,”³¹ commutation records, newspaper accounts, and even “true crime” magazines.

²⁸ See Lewis L. Laska, *Missing and “Mystery” Supreme Court Opinions*, 5 NASHVILLE B.J., June 2005, at 20-21. Even when a newspaper reports the court announced its decision on a certain day, many decisions from East Tennessee, especially from 1883-1903, cannot be located. *Id.* The fact that these opinions are “missing” is a discouraging aspect of fact-based death penalty research in Tennessee.

²⁹ *Id.*

³⁰ Interview with Daniel Allen Hearn, in Nashville, Tenn. (Oct. 12, 2007).

³¹ During the eighteenth and nineteenth centuries, a new form of popular literature arose, namely, the “confession” of a murderer. These pamphlets, prepared with the assistance of the condemned, recounted

Until the latter part of the twentieth century, most executions were carried out within a year of the crime. Hence, newspaper articles from that period are particularly helpful because they often include an account of the execution as well as the crime. In fact, one of the first national compilations of executions in the United States was the Chicago Tribune's Year Book, which was published for several decades.³² "True crime" magazines may also be considered a useful source because many of the articles were written by the law enforcement officers who worked on the cases and therefore contain photos and details drawn from actual records that no longer exist.³³ Scholarly discussions of specific cases, however, should be used for their factual content, rather than any argumentative material therein.³⁴

the crime details. See THOMAS M. MCDADE, *ANNALS OF MURDER, A BIBLIOGRAPHY OF BOOKS AND PAMPHLETS ON AMERICAN MURDERS FROM COLONIAL TIMES TO 1900* (1961) (discussing the genre and describing 1,126 books and pamphlets); see also, Patterson Smith, *Thomas McDade and the Annals of Murder*, AB BOOKMANS' WEEKLY, Apr. 22, 1996, available at www.patterson-smith.com/mcdadeArt.htm (discussing the book as a "reference work of towering importance").

³² It should be noted, however, that the Chicago Tribune inventories are strikingly incomplete: Death penalty researchers, including Espy and Hearn, have discovered hundreds of legal executions that were not included in The Chicago Tribune's Year Book. Interview with Daniel Allen Hearn, in Nashville, Tenn. (Oct. 12, 2007). Moreover, many of the people shown as executed were actually suicides, lynchings, phantom cases, or reprieves at the last minute. *Id.*

³³ See generally Bernarr McFadden (1868-1955), "The Father of Physical Culture," <http://www.bernarrmacfadden.com/> (follow "A Publishing Empire") (last visited Feb. 12, 2008).

³⁴ This author has found only three books devoted to scholarly discussions of specific Tennessee cases. See generally ETHELRED W. CROZIER, *THE WHITE-CAPS: A HISTORY OF THE ORGANIZATION IN SEVIER COUNTY* 118-132 (1899) (describing the killing of Laura and William Whaley on December 28, 1896 and the execution of Catlett Tipton and Pleas Wynn on July 5, 1899); THURMAN SENSING, *CHAMP FERGUSON: CONFEDERATE GUERRILLA* (1942) (describing the killings Ferguson committed during the Civil War as proven at his trial in 1865); DO-

Finally, fact-based researchers are scientists, not storytellers. Language used must be clear and without viewpoint. For example, a murder is a killing or a shooting, not a slaughter. Perpetrators are not slashers, brutes, or bloodthirsty maniacs. Police are law enforcement officers, not conniving men protected by a thin veneer of law. Mental status must be described in the most neutral language possible. Perpetrators are not moral degenerates or imbeciles, but they may be mentally ill, suffering from schizophrenia, or mentally retarded. Likewise, cases must be discussed by placing facts first and law second, if at all; the law changes but facts do not.³⁵

V. Conclusion

Replacing death penalty story-telling with fact-based research should be a concern of all fair-minded people researching the death penalty in the United States. Again, the goal is to capture as many facts as possible within the bounds of fact-based death penalty research, as outlined, and present them clearly, without bias, cant, or sentiment. In the end, the best story-telling is simply this: Provide the facts that tell the truth. Facts are truly stubborn things.

NALD E. SPURLOCK, *THE BRASSELL HANGINGS OF PUTNAM COUNTY, TENNESSEE* (1981) (describing the killings of brothers Russell Allison and John Allison and the execution of brothers Joseph Lewis Brassell and George Andrew “Teek” Brassell in 1878).

³⁵ Many perpetrators would not forfeit their lives today under “evolving standards of decency.” *See generally* *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that execution of people under the age of eighteen is barred by the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of the mentally retarded is barred by the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 603 (1977) (holding that execution for the crime of rape is barred by the Eighth Amendment).

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