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Jody Lynnee Madeira

Indiana University Maurer School of Law, jmadeira@indiana.edu

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BLOOD RELATIONS: COLLECTIVE MEMORY, CULTURAL TRAUMA, & THE PROSECUTION AND EXECUTION OF TIMOTHY McVEIGH

Jody Lyneé Madeira[†]

ABSTRACT

In the aftermath of the Oklahoma City bombing, processes of reconstruction—remembering victims, caring for family members and survivors, and punishing the perpetrators—began even as debris from the Murrah Federal Building was being cleared. Based on conclusions obtained from intensive interviews with 27 victims’ family members and survivors, this article explores how memory of the bombing as a culturally traumatic event was constructed through participation in groups formed after the bombing and participation in the legal proceedings against perpetrators Timothy McVeigh and Terry Nichols. These acts cultivated the formation of various relationships—between family members and survivors as well as between these victimized populations and the perpetrators—that both helped and hindered individual and communal reconstructions of meaning. This article will first address the efficacy of a collective memory and cultural trauma perspective for analyzing two collective processes of sense-making—group membership and legal proceedings—in the aftermath of the Oklahoma City bombing. It will then briefly describe the mental context in which family members and survivors joined groups in the wake of the bombing, and the functions those groups played in trauma recovery, after which it will summarize the impact of group membership on punishment expectations. Next, it will discuss the involuntary relationship that formed between McVeigh and family members and survivors predicated on the social and media representations of McVeigh; due to this relationship, McVeigh was felt to be a constant presence in victims’ lives until his 2001 execution. Finally, this article will examine family members’ and survivors’ perceptions of communicative interchange with McVeigh in the venues of the trial and execution. The implications of this case study illustrate in what ways concepts such as victimhood and justice are continually being expanded, with the implication that law is not only a social institution that mediates cultural trauma and cultivates collective memory, but also is manifestly *conscious* of these roles.

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[†] Associate Professor of Law, Indiana University School of Law, Bloomington, Indiana. J.D., University of Pennsylvania, 2003; Ph.D., Annenberg School for Communication, University of Pennsylvania, 2007. The author would like to thank Martha Minow, William J. Bowers, Barbie Zelizer, and Edward Linenthal for their invaluable comments on earlier drafts of this project.

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I. INTRODUCTION

On April 19, 1995, thousands of pounds of fuel oil and fertilizer brought down the nine-story Alfred P. Murrah Federal Building. A total of 842 persons were injured or killed as a direct result of this tragedy; 168 of the 842 were killed, 19 of whom were children.¹ The blast left 462 homeless and damaged 312 buildings and businesses.² In the weeks and months following the bombing, several groups emerged and became extraordinarily active, serving as magnets for community membership and resources; formative among them were the Oklahoma City National Memorial Task Force, charged with overseeing the building of the Oklahoma City National Memorial, and a group comprised of family members and survivors seeking to shorten the lengthy habeas appeals process so as to bring peace to victims' families. In subsequent trials, Timothy McVeigh and Terry Nichols were indicted and charged with 8 counts of first-degree murder for the deaths of federal officials as well as several other federal charges, including conspiracy. While McVeigh was convicted in June 1997 on all counts and sentenced to death, the jury in Nichols' trial found him guilty of involuntary manslaughter and conspiracy after deliberating for 41 hours, failing to reach a unanimous verdict on whether Nichols planned the bombing "with the intent to kill." After being sentenced to life in prison without possibility of parole, Nichols was tried and convicted in 2004 of 162 counts for first-degree murder in Oklahoma state court, but again escaped the death penalty.

The legal aftermath of the Oklahoma City Bombing culminated in the execution of Timothy McVeigh. On June 12, 2001, 232 witnesses—10 in the death house at the state penitentiary in Terre Haute, Indiana and 222 at a remote viewing location in Oklahoma City—prepared for an event that all hoped would bring some ending to an unspeakable period in their lives. Whereas "live" witnesses viewed a side profile of McVeigh, "remote" witnesses observed the closed circuit feed from a camera positioned on the ceiling directly over McVeigh's face. Although the remarks of Attorney General John Ashcroft emphasized "closure," most witnesses found some element of the execution disappointing. Sue Ashford, a survivor who witnessed the execution via closed-circuit transmission, stated "the man just went to sleep."³ Paul Howell, another witness, lamented, "We didn't get anything from his face. His facial expressions were

¹ Karen A. Sitterle & Robin H. Gurwitch, *The Terrorist Bombing in Oklahoma City*, in *WHEN A COMMUNITY WEEPS: CASE STUDIES IN GROUP SURVIVORSHIP* 163 (Ellen S. Zimmer & Mary Beth Williams eds., 1999).

² *Id.* at 163-64.

³ Lois Romano, *McVeigh is Executed: Bomber is 1st Federal Prisoner Put to Death Since 1963*, *WASHINGTON POST* Tuesday June 12, 2001 at A01.

just about as calm as they could be.”⁴ Larry Whicher said that “it doesn’t provide as much as I thought it would.”⁵

Dramatic and tragic deaths are cultural traumas that require explanation. In their wake, understandings are formed collectively through such processes as interpersonal discussion and media coverage. “Interest” groups form in the aftermath of traumatic events to facilitate collective information-gathering and mourning. In the context of the Oklahoma City bombing, memory of the bombing as a culturally traumatic event was constructed through social processes, and ties formed out of bloodshed that both helped and hindered family members’ and survivors reconstructions of meaning. Rapport formed between members of prominent task-oriented community groups formed in the days and weeks after the bombing was a key source of mnemonic energy, and these bonds were often felt to be as strong as those of blood kinship. In addition, an involuntary association between victims’ families and survivors and perpetrators Timothy McVeigh and Terry Nichols crystallized at 9:02 a.m. on April 19, 1995. If voluntary relationships between members of community groups were strengthening and constructive ties, then this involuntary victim-offender relationship was a destructive and confining tie that trussed victims to the bombing as an event.

To study these relationships, their construction and representative effects, is to step into a realm where Ockham’s Razor fails. This article considers how family members and survivors made sense of the bombing through both group membership and participation in legal proceedings. Engaging in collective memory work, their responses to the bombing were shaped by two primary relationships—the positive, healing, unmediated relationships formed between group members and the negative, destructive, mediated relationships between family members/survivors and Timothy McVeigh. Specifically, it poses three research questions. First, in the wake of collective cultural trauma, what impact, if any, does advocacy group membership have upon memory? Second, when pursuing accountability for criminal perpetrators of collective trauma, how do victims’ family members and survivors negotiate institutional constraints to form perceptions of these perpetrators and conclusions about the “meaning” of the traumatic event? Finally, how do victims’ family members and survivors react to the execution of a criminal perpetrator, and what factors are “meaningful” in the reactions they have?

In endeavoring to answer these important questions, I conducted in-depth, face-to-face open-ended interviews with 27 individuals who were either victims’ family members or survivors of the Oklahoma City bombing. Throughout this article, I refer to these interviewees as research “participants.” This interviewing technique allowed me to conversationally guide participants through accounts of how the bombing, trials, and McVeigh’s execution impacted their lives while granting participants complete freedom of response and allowing me the flexibility to ask follow-up questions. Interviews were conducted at any site in Oklahoma City that was comfortable for the participant, and most were conducted in participants’ residences. Three interviews with participants who did not reside in Oklahoma were conducted electronically via land-line telephone. All interviews were recorded with participants’ permission and transcribed for analysis. A total of 29 participants were interviewed; however, two were not included because they were rescue workers, and not victims’ family members or survivors present at the moment of the bombing. More specific information on individual participants’ characteristics is included in the Appendix. Research participants were recruited

⁴ *Id.*

⁵ *Id.*

through two methods. First, letters were mailed anonymously⁶ to individuals on the mailing list of the Murrah Federal Building Survivors Association; these letters described the research project and requested that interested individual contact me directly to participate. Second, other prospective research participants were contacted by individuals who had already been interviewed; these participants in turn contacted me directly to schedule interviews. The final participant sample was composed of 17 females and 10 males. Of the 27 participants, 26 were Caucasian and one was African-American. This demographic composition parallels both the overwhelmingly white membership of the post bombing groups, including the Murrah Building Survivor's Association, and that of the larger victim population. All participants were over 18 years of age (participants' ages ranged from mid-30s to low-70s) and thus were able to legally consent to participation. Because this project was exploratory and no a priori theory existed to guide my inquiry, I adopted a grounded theory methodology from its inception.

This article will first explore the efficacy of a collective memory and cultural trauma perspective for analyzing collective processes of sense-making through group membership and legal proceedings. It will then briefly describe the mental context in which family members and survivors joined groups in the wake of the bombing, and the functions those groups played in trauma recovery, after which it will summarize the impact of group membership on punishment expectations. Thereafter, this article will detail an involuntary relationship which formed between McVeigh and family members and survivors and which was predicated on the basis of constructed social and media representations. Finally, this article will examine family members' and survivors' perceptions of communicative interchange with McVeigh in the venues of the trial and execution. Throughout, victims' family members and survivors are referred to by number instead of name to preserve their anonymity.

II. COLLECTIVE MEMORY, CULTURAL TRAUMA, AND THE LAW

“With memory set smarting like a reopened wound, a man's past is not simply a dead history, an outworn preparation of the present: it is not a repented error shaken loose from the life: it is a still quivering part of himself, bringing shudders and bitter flavours and the tinglings of a merited shame.”

GEORGE ELIOT, MIDDLEMARCH⁷

As George Eliot astutely observed, memory is a *living* concept, one that is not merely alive and evolving but *social*, capable of triggering emotions such as shame that only have meaning within a collective. Thus, in the aftermath of culturally traumatic events, there is a need to study the creation of meaning from a collective memory perspective that focuses upon the collision between victims' demands and law's institutional needs for rule adherence and legitimacy. Communication scholars recognize that “memory is not simply a mental operation that a person uses or that she or he can refine and improve” but is instead a “phenomenon of community.”⁸ Memory has been “a major preoccupation for social thinkers since the Greeks.”⁹

⁶ Contact letters and postage were provided to an officer of the Murrah Federal Building Survivor's Association, who then addressed and mailed the letters to association members.

⁷ Book 6, ch. 61 (1871).

⁸ Carole Blair, *Communication as Collective Memory*, in COMMUNICATION AS...: PERSPECTIVES ON THEORY 52, (Gregory J. Shepherd, Jeffrey St. John & Ted Striplas eds., 2006)

⁹ Jeffrey K. Olick & Joyce Robbins, *Social Memory Studies: From “Collective Memory” to the Historical Study of Mnemonic Practices*, ANN. REV. OF SOC. No. 24 at 106 (1998).

Yet, a *social* perspective on memory only took root in the late nineteenth and early twentieth century, with the work of Henri Bergson, Sigmund Freud, Walter Benjamin, and Frederic Bartlett.¹⁰ Contemporary usage of the term is traced to Maurice Halbwachs, and the 1950 publication of his essay on collective memory, *Les mémoires collectives*.¹¹ Halbwachs posited that collectives enable memory, such that “no memory as possible outside frameworks used by people living in society to determine and retrieve their recollections.”¹² Since 1980, there has been a “pursuit, rescue, and celebration of collective memory,” perhaps due to political developments such as multiculturalism, the decline and fall of Communism, and movements of victimization and victim’s rights;¹³ this focus upon collective memory has been “less in texts than in the spoken word, images, gestures, rituals and festivals.”¹⁴

Memory work, then, is the process of working through and narrating experiences. As such, it is always interpretive and constructive, and concerned with reaching closure about past events. Through memory work, individuals gain distance from a life event that is necessary to understand and contextualize them and place them in causal relationships to other life occurrences—in other words, to position themselves in relation to that event. Memory work is collective in the sense that individuals share many life events, and collaborative interpretations of these events may take shape as individuals gather and share memories and interpretations, with the result that individual perceptions are in turn reshaped by these communal exchanges. Groups may therefore perform memory work by constructing areas of common knowledge which create social bonds between members.

A collective memory perspective is the most appropriate lens through which to scrutinize the roles that behaviors such as group joining and attendance and participation in legal proceedings played in helping victims’ families and survivors to recover from the Oklahoma City bombing. In essence, memory offers a form and content for addressing the Oklahoma City bombing in that it both structures and explains the evolving understandings of the bombing and its perpetrators formed by individuals and groups. This conclusion is also compelled by the nature of trauma, which acquires its horrific proportions from its ability to destroy not only an individual’s sense of normality but the normality of the collectives that constitute that individual’s social support network. Trauma has profound consequences for communities as well as individuals, and memory work has been shown to be central to the recovery or “working through” of the collective, which may require processes of sense-making, accountability and restitution, often procured through collective institutional means such as trials and truth commissions. Most importantly, traumas affect collectives long after their survivors have passed on; the bombing of Hiroshima and Nagasaki and Holocaust death camps are just two examples of traumas which happened over sixty years ago but which remain problems with which American collective memory must grapple. Surely, then, trauma as a phenomenon is not reducible merely to individual proportions since its effects resonate most pervasively and permanently in the culture of a collective. “Collective” here denotes victims’ family members and survivors of the Oklahoma City bombing.

¹⁰ *Id.*

¹¹ *Id.*

¹² MAURICE HALBWACHS, ON COLLECTIVE MEMORY 43 (Lewis A. Coser trans., University of Chicago Heritage of Sociology Series 1992) (1941).

¹³ See Michael Kammen, *Review of Frames of Remembrance: The Dynamics of Collective Memory*, by I. Irwin-Zarecka, HIST. THEORY No. 34(3) at 245-61 (1995); Barry Schwartz, *Memory as a Cultural System: Abraham Lincoln in World War II*, AM. SOC. REV., 61(5) at 908-27 (1996)

¹⁴ JACQUES LE GOFF, HISTORY AND MEMORY 95 (1992).

The theoretical mirror I hold up to this data, however, is not simply framed by collective memory. The type of event structured by collective memory is also significant; traumatic events such as the Oklahoma City bombing call into play a theoretical subcategory of collective memory known as cultural trauma. In analyzing the creation and reconstruction of meaning in the aftermath of the Oklahoma City bombing, I document the evolution of a specific culture of interpretation and rehabilitation formed *against a larger national cultural backdrop* that prompts American citizens to feel “compelled to honor those...who have been murdered for an unjust cause.”¹⁵ As Alexander and Smith state, “those collective forces that are not *compulsory*, the social forces to which we enthusiastically and voluntarily respond....We do not mourn mass murder unless we have already identified with the victims, and this only happens once in a while, when the symbols are aligned in the right way.”¹⁶ According to Alexander, a recent leader in developing a theory of cultural trauma under the rubric of “cultural sociology,” cultural trauma “occurs when members of the collectivity feel they have been subjected to a horrendous event that leaves indelible marks on their group consciousness, marking their memories forever in changing their future identity in fundamental and irrevocable ways.”¹⁷ Cultural trauma provides a means by which collectives can begin to address an event perceived as traumatic, to “not only cognitively identify the existence and source of human suffering but “take on board” some significant [moral] responsibility for it.”¹⁸ In this way, collectives formulate and demonstrate “solidary relationships in ways that, in principle, allow them to share the sufferings of others.... societies expand the circle of the we.”¹⁹ Notably, cultural trauma is, like collective memory, a *collective* process of construction; as Smelser notes, “a collective trauma, affecting a group with definable membership, will, of necessity, also be associated with that group’s collective identity.”²⁰ And cultural trauma is also explicitly trauma of *culture*—what Sztompka terms the “axio-normative and symbolic belief systems of a society.”²¹ Finally, because trauma is socially mediated, collectivities sense trauma in much the same way as a spider senses a fly in the web, by disturbing vibrations that disrupt the “patterned meanings of the collectivity.”²² But these “patterned meanings” that are disturbed must be meanings that penetrate to and are bound into the core of collective identity, so that that core is imperiled when those meanings are stretched too taut or broken altogether.

Of course, trauma claims-making—like other forms of “linguistic action”—is “powerfully mediated by the nature of the institutional arenas within which it occurs.”²³ This includes the institutions of the law and of mass media, each of which shape trauma claims in particular ways, and impose particular institutional consequences. The legal institution is

¹⁵ Jeffrey Alexander, *Introduction* to JEFFREY ALEXANDER, *THE MEANINGS OF SOCIAL LIFE: A CULTURAL SOCIOLOGY* 3 (2003).

¹⁶ *Id.*

¹⁷ *Id.* at 85.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Neil J. Smelser, *Psychological Trauma and Cultural Trauma*, in JEFFREY C. ALEXANDER, RON EYERMAN, BERNHARD GIESEN, NEIL J. SMELSER, & PIOTR SZTOMPKA, *CULTURAL TRAUMA AND IDENTITY* 43 (2004).

²¹ Piotr Sztompka, *The Trauma of Social Change: A Case of Postcommunist Societies*, in JEFFREY C. ALEXANDER, RON EYERMAN, BERNHARD GIESEN, NEIL J. SMELSER, & PIOTR SZTOMPKA, *CULTURAL TRAUMA AND IDENTITY* 161 (2004). Traumatic change that is cultural “may reverberate in the area of affirmed values and norms, patterns and rules, expectations and roles, accepted ideas and beliefs, narrative forms and symbolic meanings, definitions of situations and frames of discourse.” *Id.*

²² ALEXANDER, *supra* note 15, at 92.

²³ *Id.* at 97.

particularly significant for victims' family members, who must rely on its proceedings to hold an offender accountable—a key step in working through the trauma of the crime. According to Alexander, when the “cultural classification” of an event as traumatic “enters the *legal* realm, it will be disciplined by the demand to issue a definitive judgment of legally binding responsibilities and to distribute punishments and material reparations.”

The institutional effect of law, then, is to narrow trauma claims to specific stages of the mnemonic process, such as the attribution of responsibility.²⁴ Similarly, the ways in which the mass media as an institution affects claims of trauma enable the mnemonic process to gain new narrative “opportunities” but at the cost of becoming subject to “distinctive kinds of restrictions.”²⁵ As a form of mediation, mass communication may provide heretofore inaccessible outlets for the dramatization of trauma, and may provide a vehicle for one interpretation to gain an edge over other competing interpretations.²⁶ Yet, processes of constructing trauma “become subject to the restrictions of news reporting, with their demand for concision, ethical neutrality, and perspectival balance,” and may be “exaggerated and distorted” due to the competition between news outlets.²⁷

Law an institution, then, mediates cultural trauma and is a forum for the formation of collective memory. There is a contemporary perception that, in the words of Elias Canetti, the dead “are nourished by judgment,” and that criminal law is a “means of recompensing the slain through a deliberative act.”²⁸ As do other institutions, law has a collective memory of its own, particularly as a site for the communication and construction of cultural authority.²⁹ The rule of law itself is a product of collective memory; the boundaries between the legal and the extra-legal are maintained through the judicial tradition—“a tradition that pervades all its members to a high degree”—which cumulatively “represent the collective work of a line of jurists and eminent magistrates.”³⁰ Oliver Wendell Holmes famously noted that “the life of the law has not been logic: it has been experience,” and stated that “the law embodies the story of nation’s development through many centuries,” so that “the degree to which it is able to work out desired results depend very much on its past.”³¹ Significantly, law is product of social and well as legal actors; jurists always remain members of the social collective even after they put on the robes of advocacy or office.³²

Trials, including criminal prosecutions, belong within the category or rituals designated by Turner as “social dramas;” criminal law is especially comparable to the formation of collective memory since its deterrence concerns are oriented in the future, where collective

²⁴ *Id.* at 98.

²⁵ *Id.* at 100.

²⁶ *Id.*

²⁷ *Id.*

²⁸ LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 1* (2001).

²⁹ Halbwachs, who connects this delimiting behavior to the role of the judiciary as a collective memory institution. Halbwachs first notes that the judiciary’s erection of “barriers between its members and those of the other groups to whom they render justice” serves the purpose of “resist[ing] external influences and the passions and prejudices of the plaintiffs.” HALBWACHS, *supra* note 12, at 140.

³⁰ *Id.*

³¹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1-2 (1881).

³² As Halbwachs notes, “when a judge or attorney enters the court building, he does not feel himself excluded or separated from the groups in the midst of which he spends the rest of his day.... Their actual presence is in fact unnecessary to allow him to continue to think and to behave -- even when he is at a distance from them -- as a member of these groups.” HALBWACHS, *supra* note 12, at 142.

memory locates greater social solidarity, but its retributive concerns are situated in the past, where collective memory finds its narrative content.³³ Garland notes that the rituals of criminal justice—the court-room trial, the passing of sentence, the execution of punishments—are, in effect, the formalized embodiment of the *conscience collective*,” which is “protected by a strict code of penal law, which -- unlike most law in modern society -- *does* evoke deep-seated emotions and a sense of the sacred.”³⁴ Thus, the act of imposing punishment becomes a process of working through an event which imperils a collective.³⁵ “Justice” becomes the operative concept for social solidarity, involving a consensus both that certain acts committed are wrong and must be punished.

Collective memory is furthered by the delivery of legal stories. In the criminal trial, the prosecutor serves as a public spokesman who “tell[s] the stories through which such sentiments are elicited and such membership consolidated.”³⁶ In these stories, the culpability of the perpetrator assumes primary importance, since it the illegal exercise of the offender’s free will that dictates the outcome of the story and bring about the victim’s death.³⁷ After conviction, punishment “signals the greater or lesser presence of collective memory in a society”; disciplining those who commit the most socially unacceptable acts reinforces our awareness of what acts are proscribed.³⁸ The ability to enunciate and fix stories in legal frames, then, becomes an important source of social power.

But the efficacy of legal proceedings as a trigger for collective memory formation is constrained by two concepts: law’s modesty, or its superficial unwillingness to play such a formative mnemonic role; and its practices, rules and traditions that narrow the breadth and depth of inquiry to binary categories such as guilty or not guilty. Because of law’s storying potential, citizens may expect legal proceedings to take a formative role in adjudicating history, leading to judicial protest. In socially potent trials such as that of Adolf Eichmann, courts have explicitly invoked judicial modesty in rejecting such a definitive role, pleading shortsightedness and the lack of cultural authority. But while courts pay lip service to judicial modesty, they cater to processes of collective memory formation despite themselves.³⁹

But legal doctrine certainly limits its efficacy for collective resolution of cultural trauma. Criminal prosecutions are formulated to hear and adjudicate evidence on whether a given suspect committed a criminal act—an inquiry with a very limited scope which is unlikely to reach the social implications of that criminal behavior. Legal conclusions are inherently professionalized, derived through the application of legal principles to decide disputes on the basis of evidence introduced and evaluated in accordance with legal doctrine, all orchestrated by procedural rules. Stretching a conviction into a social statement may actually distort collective memory; a conviction, though comprehensive enough for professional purposes, is but the product of a necessarily narrow professional inquiry into a unique set of facts and may not be elastic enough to stretch to fit into a collective memory frame. And that assumes that specialized legal practices

³³ MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 18 (1999).

³⁴ DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 67, 57 (1990)

³⁵ *Id.* at 67. Garland continues, “[i]n doing justice, and in prosecuting criminals, these procedures are also giving formal expression to the feelings of the community -- and by being expressed in this way those feelings are both strengthened and gratified.” *Id.*

³⁶ OSIEL, *supra* note 33, at 28.

³⁷ *Id.* at 72.

³⁸ *Id.* at 31.

³⁹ “Even as the court seeks to delimit its professional tasks, to reject any role as history teacher or scholar, it cannot quite contain itself from proclaiming the trial’s ‘educational significance’ and ‘educational value.’” *Id.* at 82.

translate into or are meaningful within a social collective. Law may also be focused on minute evidentiary details that may seem meaningless to a public hungry for dramatic developments. The danger is not in boredom *per se* but in how it affects a trial's impact upon collective memory, as it decreases the likelihood that significant attention will be paid to legal developments and thereby diminishes the impact of such proceedings on collective memory.

Finally, the very legal practices through which an event is interrogated may constrain the impact of a trial upon collective memory. Evidentiary and procedural rules mandate that evidence be introduced in very specific ways, and limit elicited testimony to forms of questioning acceptable on direct or cross-examination. A criminal prosecution is the story of a crime, and not a story of that crime's effects, which means that the victims' story is left out, or at least put aside until sentencing. Attendants at legal proceedings hear about the defendant and sometimes hear from the defendant as well, but information about the victim is largely confined to "objective" evidence such as the nature and characteristics of injuries and markings, and rarely if ever hear about the victim or the victim's family before sentencing, when victim impact testimony may be given. Thus, the legal narrative is a necessarily incomplete narrative. Other institutional actors, such as historians or sociologists, must step in to supplement the historical record of events whose memory consists largely of a legal record focused on objective proof of the crime and not the subjective experience of the event. When subjective testimony is permitted into legal inquiry, confrontational means of eliciting and challenging testimony may directly contrast with the sacrosanct status that testimony—and witnesses—are accorded in collective memory, where proof is not prioritized.⁴⁰ Finally, law does not explicitly acknowledge its socially constructed nature, unlike "fickle"⁴¹ collective memory. Legal reluctance to acknowledge the primacy of social construction stems from its needs for finality and fixation; legal doctrines such as "res judicata, collateral estoppel, stare decisis, double jeopardy, mandatory joinder, statutes of limitations, and restrictive standards of appellate review" are designed to discourage or thwart altogether the subsequent reinterpretation of precedent.⁴² The only situation in which legal practitioners overtly acknowledge constructive processes is the act of legal "interpretation."⁴³

As a result of the mismatch between the means to law's ends and the formation of collective memory, law is caught between a need to maintain the legitimacy of its institutional narratives and satisfying diverse justice "needs." Law as an institution, then, cannot bear the weight of collective memory alone. Instead, law contributes to organic processes of collective sense-making. As law sees itself as an institution with the potential to shape collective memory, it becomes changed by that potential, aware of and thus more vulnerable to the same movements that influence collective memory formation. Postmodernism has brought new challenges to the collective sense-making processes, including problematizing the primacy of legal proceedings as a storying forum. Similarly, law has subjected itself to obligations owed to new, previously excluded populations such as victims' families. Legal conclusions must now "affirm as well-warranted the victims' feelings of resentment and indignation, for this affirmation is the only way for society at large to show that it acknowledges and take seriously their condition as victims."⁴⁴

⁴⁰ *Id.* at 104.

⁴¹ *Id.* at 217.

⁴² *Id.* at 216.

⁴³ *Id.* at 242.

⁴⁴ *Id.* at 273.

III. VOLUNTARY BLOOD RELATIONS

The focus of our attention must now shift from the social construction of memory to mnemetic processes themselves, what Halbwachs termed the social frameworks of memory, because the act of social construction—the social articulation and maintenance of memory—occurs in groups.⁴⁵ The memory practices of groups constitute attempts to interpret and assign meaning to culturally contested issues. Here, “collective” denotes the membership of communal groups organized almost immediately after the Oklahoma City bombing. The bombing as an event abruptly birthed a memorial collective whose members were immediately instantaneously bound to one another by the ties of loss and the shared experience of suffering.⁴⁶ It was within this memorial community that “interest” groups formed to pursue defined goals such as reforming habeas law or building a memorial. In mediating cultural trauma, group membership became a form of “active grief” behavior through which “family members and survivors formed new communities to offer support to each other.”⁴⁷ This article will focus on two of the most effective mnemetic groups formed in the wake of the Oklahoma City bombing: the Oklahoma City National Memorial Task Force, which organized the construction of the Oklahoma City National Memorial from 1995 to 2000, and a “habeas” group of family members and survivors who sought speedier executions and whose lobbying efforts culminated in the passage of the Antiterrorism and Effective Death Penalty Act of 1996.⁴⁸ Several members of the habeas group later banded together to lobby for the passage of the Victim Allocation Clarification Act of 1997⁴⁹ clarifying the rights of victims set forth in the 1990 Victims Rights and Restitution Act (better known as the “Victims Bill of Rights”) so as to allow victim impact witnesses to both observe a trial and offer impact testimony.⁵⁰

A. Members’ Mental State Upon Joining

⁴⁵ For Halbwachs, collective frameworks are not “constructed after the fact by the combination of individual recollections” but are the “instruments used by the collective memory to reconstruct an image of the past which is in accordance, in each epoch, with the predominant thoughts of the society.” HALBWACHS, *supra* note 12, at 40.

⁴⁶ According to Irwin-Zarecka, although the very presence of a “community of memory bonded by traumatic experience” in a broader collective such as a nation-state may “be enough to secure remembrance or redefine collective identity,” more often, there will be a transition from “unspoken bonding to outspoken (and frequently institutionalized) activity that the community of memory acquires public resonance.... but others, especially as the years go by, find it essential to record their experience, to create memorial markers for those who had died, to talk to the young, to join groups or associations.” IWONA IRWIN-ZARECKA, *FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY* 51 (1994).

⁴⁷ EDWARD LENINTHAL, *THE UNFINISHED BOMBING: OKLAHOMA CITY IN AMERICAN MEMORY* 98 (2001).

⁴⁸ S. Res. 735, 104th Congress (1996). Title I of the Act substantially amended federal habeas corpus law (as it applies to both state and federal prisoners whether on death row or imprisoned for a term of years) by a) barring federal habeas reconsideration of most legal and factual issues ruled upon by state courts; creating a general 1 year statute of limitations and a 6 month statute of limitation in capital cases, and requiring the approval of an appellate court for repetitious habeas petitions.

⁴⁹ H.R. 924, 105th Congress (1997).

⁵⁰ Of the participant population, six were members of the habeas group, and 17 were members of the memorial task force.

Group joining behaviors took place at a time when family members and survivors were in an extremely vulnerable mental state. Complicated or traumatic grief⁵¹ was rampant, and trauma also resulted from the loss of a perceived “just world” prior to the bombing.⁵² Simply put, murder is disorder.⁵³ Common emotional experiences of participants⁵⁴ prior to group membership include feelings of alienation and loss of control, simplification of moral categories, a need for information about the bombing, and anger towards the perpetrators. Crucially, participants were joined groups either to overcome these emotional obstacles or to find positive outlets for potentially destructive energies.

Survivors of traumatic events, including murder victims’ family members, often feel increasingly alienated in their wake, and perceive that they are unable to connect with the everyday world around them.⁵⁵ This pervasive helplessness and loneliness may take forms that are physical, such as the inability to control physical behavior (e.g., spontaneous weeping in “inappropriate” locales), or social, such as loss of established routines and avoidance by former social acquaintances immediately after the event or at a point where victims fail to “bounce back” as expected.⁵⁶ Homicide also creates a sense of “unfinished emotional and practical business which will cloud subsequent recollections, prevent the possibility of a fitting farewell, and lead to a continuing sense of the presence of the dead.”⁵⁷ In an effort to restore control and prevent future losses, survivors may adopt a practice of “keeping vigil” for the dead, behaviors that maintain the traumatic pitch of post-disaster life as well as create needs to protest injustice, to keep others safe from harm, and to resist loss of meaning, and to remember and represent the dead or wounded.⁵⁸ In addition, complex moral schemas break down in the collapse of meaning following homicide, devolving into radically stripped and simplified evaluative mechanisms that paint the world in absolutist tones of good and evil.⁵⁹ Survivors, then, are defined in opposition

⁵¹ According to Rando, complicated mourning arises from the nature of a homicidal death—its suddenness, violence, trauma, and horror, and preventability—as well as survivors’ feelings of anger, guilt, self-blame, and shattered assumptions. See THERESE A. RANDO, *TREATMENT OF COMPLICATED MOURNING* (1993).

⁵² The “just world hypothesis” posits that “individuals have a need to believe that they live in a world where people generally get what they deserve” in order to “confront his physical and social environment as through they were stable and orderly” and “commit himself to the pursuit of long-range goals or even to the socially regulated behavior of day-to-day life.” M.J. Lerner & D.T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, PSYCHOL. BULL. No. 85, at 1030 (1978).

⁵³ “Major bereavement is not calm, appraising, and rational. It is instead at once a physical, emotional, and symbolic process that is built around a bewildering cacophony of intense sensations that suffuses fields of experience.” *Id.* at 40.

⁵⁴ Again, the term “participants” is used to refer to interviewees, and not to group participants who did not participate in the research project.

⁵⁵ Not only do survivors feel a “loss of interest in the world without the loved one,” but they also feel isolated from the “experience of frustration felt by others with the bereaved person’s continued suffering, to the extent that this isolation interferes with natural healing processes. M. Katherine Shear et al., *The Syndrome of Traumatic Grief and its Treatment*, in PSYCHOLOGICAL EFFECTS OF CATASTROPHIC DISASTERS: GROUP APPROACHES TO TREATMENT 327 (Leon A. Schein et al. eds., 2006).

⁵⁶ See PAUL ROCK, *AFTER HOMICIDE: PRACTICAL AND POLITICAL RESPONSES TO BEREAVEMENT* 31-42 (1998).

⁵⁷ *Id.* at 39.

⁵⁸ Melissa S. Wattenberg et al., *Present-Centered Supportive Group Therapy for Trauma Survivors*, in PSYCHOLOGICAL EFFECTS OF CATASTROPHIC DISASTERS: GROUP APPROACHES TO TREATMENT 568 (Leon A. Schein et al. eds., 2006).

⁵⁹ As Rock notes, “in their fervour and sense of urgency, in their anger and bewilderment, most survivors could have had no patience with anything but a simple and certain morality, and they turned to unambiguous schemes that would subdue doubt, establish firm boundaries between order and disorder, expel confusion, and point to directions for action.” ROCK, *supra* note 56, at 101. Reconstructed moral schemas can sometimes have archetypal or mythic

not to the deceased victim but to the perpetrator, and each evolves its meaning from its relationship to the other. Significantly, survivors perceive this relationship as inequitable. Survivors also experience a desperate need for information, which is perceived as a key ingredient in undertaking life reconstruction. Because one cannot move forward without thoroughly understanding insofar as possible the circumstances of the murder, information about the crime and perpetrator is precious. Information is power, and the best way of gathering it is often by attending legal proceedings.⁶⁰ Finally, anger is of course the prototypical survivor response; one thinks of survivors as angry voices demanding vengeance against the murderer. Anger, then, is not only an emotion but an activity of “self assertion and of accusation.”⁶¹ Anger is purposive and “intentional, establishing not only the angry subject but also the object against which the anger is directed.”⁶² Anger is an important activity for survivors simply because it motivates and orients survivors toward a goal, encouraging them to once again assert control. Thus, in acting from anger, survivors perform anger, and live in the anger experience.⁶³

B. Group Functions

Groups formed in the wake of the Oklahoma City bombing served three primary mnemonic functions for their members: providing companionship, serving as sites for narrative and norm construction, and providing opportunities for action and goal accomplishment. Regarding companionship, group bonding can be a powerful antidote to feelings of isolation or alienation, offering companionate stability and solidarity. Theories of group therapy for those afflicted by traumatic grief are based on the understanding that members may feel the kind of understanding and safety that is often missing from their natural social network.⁶⁴ Attending group meetings was the first time in which participants took stock of their social network in the sense of realizing who else had survived the bombing, or how everyone else was faring physically and emotionally; in the words of participants, group meetings were “reunions.” For family members, meeting survivors who had known their loved ones was especially important. In addition, after the bombing, participants’ paramount need was to speak with other survivors or family members. For five participants, the bonds of companionship were so strong that fellow group members became “family,” and often replaced family support networks that were weakened or altogether absent. When asked about the benefits of group membership, nine participants reported that family members either did not want to talk about the bombing, did not understand the true impact of the bombing upon their lives, or placed ill-fitting limits upon “proper” coping strategies. Groups also provided listening ears to satisfy the imperative to share experiences of loss. Coming together as a group, however, was not always an easy or productive process; the first years after the bombing were marked by tensions between family members and survivors and between supporters and opponents of the death penalty.

In addition to being sources of companionship and camaraderie, groups that formed in the wake of the Oklahoma City bombing were also “storying” sites where narratives of the bombing

proportions; Rock notes, ““it was as if on occasion survivors were recapitulating the plot of some very ancient myth, moral disorder turning to order, flux to structure . . .” *Id.*

⁶⁰ “Survivors thereby sought information, a restoration of control, and an end to the marginality which magnified their feelings of powerlessness and kept them apart from important sources of understanding.” *Id.* at 99.

⁶¹ *Id.* at 101.

⁶² *Id.* at 102.

⁶³ *Id.* at 49.

⁶⁴ Shear et al., *supra* note 55, at 327.

and of its perpetrators were continually constructed. Key to mnemonic processes were members' ability to meet others with similar experiences, to join a normative community, and to gather information. In addition to playing an important companionship role, talking through the event with others who "were there" was important in sense-making processes. The need to find others with similar experiences is so integral to recovery that it is one of the chief purposes of group therapy for traumatic grief.⁶⁵ Exchanging stories also created a set of normative expectations or assumptions as to "who" a group was and what it stood for. Simplified moral schemas developed by homicide survivors very soon after losing a loved one to murder actually become incorporated into homicide survivor groups, and perpetuated within group culture.⁶⁶ Finally, group meetings also were forums where members could learn of and discuss the latest developments in memorial construction and in the prosecutions of McVeigh and Nichols. Information gathering and commensurate sense-making was an important part of initiating mnemonic processes, what participants spoke of as "putting the pieces of a puzzle back together." As a result of interaction, participants were able to collectively impose a narrative meaning upon grief, and describe learning how to speak of the bombing and exchanging stories with others as "healing" and "cathartic."

Finally, processes of life reconstruction became enmeshed with group goals. Accomplishing a goal such as the passage of habeas legislation or the building of the memorial provided an outlet for anger-motivated activity. Family members of victims killed in other instances of terrorism have used anger as a unifying force; Rock remarks that "it was with anger that people came together....Lockerbie relatives group was formed in March within a few months and the first few meetings."⁶⁷ When united, survivors and family members were a potent advocacy force, as families of homicide victims have often been.⁶⁸ Members were able to see how particular group goals both aligned with members' unique interests after the bombing and fulfilled members' personal needs for certain kinds of activity. Accomplishing group goals aided members to once more regain a sense of control and overcome perceived helplessness; for instance, participants describe being empowered by the habeas group's successful lobbying for the passage of habeas reform. Significantly, different groups fulfilled different functions. Whereas the memorial task force allowed participants to remember murdered victims, the habeas group was about achieving justice. Of course, group goals were also seen by members as worthy accomplishments in their own right independent of their healing potential; participants described the memorial as a truth-telling mechanism, a site that was symbolic of the culture of Oklahoma City, and as a monument to a creative use of destructive forces and to the healing process itself. Group members themselves remain intensely proud of goal accomplishment, describing the passage of the AEDPA in 1996 as "a miracle in most of our eyes," and participation in the memorial process as "quite an honor." Goal achievement as a point in time also designated an appropriate moment for members to transition into lives reconstructed in the process of trying to accomplish a certain end; as beneficial as group membership was, there came a time when some members felt that involvement was no longer necessary. Moving forward often created the incentive to cease intense involvement on bombing-related activities.

C. Effects of Group Membership on Perceived "Justice Needs"

⁶⁵ *Id.* at 326.

⁶⁶ ROCK, *supra* note 56, at 103.

⁶⁷ *Id.* at 47

⁶⁸ *Id.* at xiii.

Groups—and group goals—affected the degree to which members felt that attending various stages of legal proceedings, including McVeigh’s execution, was personally meaningful, particularly in comparison with other possible activities such as work, involvement in non-legal activities, and family time. In essence, then, members’ “justice needs”—consisting of the hoped-for outcomes of the legal proceedings, attainment of accountability, and the desired impact of proceedings upon finality, remembrance and recovery—were partially constructed through the formation of group identity and the selection of group goals.

The memorial task force indisputably had a very different focus than the habeas group; it endeavored to remember and represent murdered victims as well as living survivors and rescue workers, and focused on making these memorial constructions as full and robust as possible. Thus, the memorial task force pursued a goal centered around creating and ensuring a *presence*, not an absence. In so doing, it strove to give voice to the dead and the living, a voice that emphasized tragedy and turmoil but also rebirth and rebuilding through remembrance. Significantly, these voices belonged only to those victimized by the bombing; the Oklahoma City Memorial marginalized the presence of McVeigh and Nichols. The only museum display describing prosecutory proceedings is a two-panel installation entitled “Justice” that includes chronological timelines of the prosecutions along with sketches from the trials and blowups of three newspaper articles. There is no mention of McVeigh’s execution with the exception of a nondescript 4-by-8-inch bronze plaque that was installed within an hour of McVeigh’s death. The habeas group, in contrast, may have pursued death penalty reform in the names of murdered loved ones, but its primary focus was on what surviving family members of murder victims had to endure through waiting as long as seventeen years for an offender’s execution to be carried out. Thus, the habeas group prioritized the *justice* of eradicating opportunities for offenders such as McVeigh to pursue additional appeals which prolonged execution—a focus on the offender and on the need to expeditiously carry out death sentences, albeit one pursued in the names of murder victims and their families.

In keeping with these goals, core members of the memorial group were likely to find the building of the memorial *or* the guilty verdict in the McVeigh trial more meaningful than the execution. By the time of the execution in June of 2001, more memorial task force members stated that they were too involved in family or work or other activities that they perceived as positive and “healthy” to attend the execution. Habeas group members, on the other hand, were more likely to see both the trial and execution as meaningful, and characterized the execution as the culmination of legal proceedings. Habeas group members not only spoke of a need to *see* as much of the legal proceedings as possible, but also verbalized a need to be *involved* in proceedings for reasons of completion and because members had struggled to ensure broader access to proceedings (i.e., ensuring that victim impact witnesses could attend evidence presentation in the case in chief, ensuring that the trial was broadcast back to Oklahoma City after the change of venue, ensuring that the execution would be broadcast back to Oklahoma City from Terra Haute). Thus, since group goals were healing, choosing a goal for many members defined not only a major mnemonic focus, but also defined a moment in time—the accomplishment of the goal—after which members felt comfortable leaving behind both intense involvement with the group and preoccupation with the bombing and its legacy. As Participant 27 stated, “after about the fifth anniversary, when they opened the Memorial, and the Memorial got off and running, I sort of didn’t feel like it was as therapeutic anymore.” Reconstruction was complete only after the building of the memorial or McVeigh’s trial and/or execution. Group

goals also influenced which institution would “enable” healing, namely the memorial or the criminal justice system. Goal selection also reflected informed judgments about what was the most appropriate way to memorialize the bombing, those murdered, and the bombing’s impact on survivors, rescue workers, and family members.

The difference between the memorial group and the habeas group can most conservatively be characterized as a rhetorical difference—in how members spoke of the meaningfulness of legal proceedings versus other possible time investments. It is not surprising that memorial task force members who opposed the death penalty stated that they did not need an execution for “justice” to be attained. It is surprising, however, that whereas all habeas group members speak of a need to attend and be involved in legal proceedings for various reasons, some memorial task force members who either supported the death penalty either all the time, held “no opinion,” or supported it on a case-by-case basis do not mention that the trial and execution were particularly meaningful proceedings. In contrast, *all* participants who were members of the habeas group felt that attending the trial and/or execution were important steps in being “involved” in the process or “made a difference.” Habeas members’ widespread support for legal proceedings is not shocking; the habeas group, which at an approximate maximum membership of 30 was much smaller than the memorial group with its hundreds of members, was explicitly formed to be an advocacy group and was comprised of individuals who literally dedicated themselves to that end. The memorial goals of the memorial task force did not overlap with legal proceedings against McVeigh and Nichols; the task force only had to conceive of a way to represent these proceedings in a display that illustrated their significance to the Oklahoma City community and indeed to the national and international community. In contrast, members of the habeas group explicitly sought to change legal proceedings in several different ways and so from its inception the group focus was *on* legal proceedings. Thus, statements made by habeas group members attesting to the importance of attending McVeigh’s trial and execution directly contrast with the statements of memorial task force members who elected not to attend the trial and/or the execution, choosing instead to prioritize of other concerns such as work and family.

IV. INVOLUNTARY BLOOD RELATIONS

A. The Source of the Involuntary Victim-Offender Relationship

Collective memory usually derives from more traditional group formations, such as the memorial task force and habeas group. But another type of relationship also proved to be significant in the context of the Oklahoma City bombing. The reconstruction of memory in the wake of the bombing was also heavily influenced by an involuntary relationship that existed between family members and survivors on the one hand and McVeigh and Nichols on the other, a relationship that existed even though neither party knew the other prior to the murderous act, a relationship that like any other is communicative, structured through speech and silence. This relationship is rarely tacitly acknowledged let alone explicitly defined in criminological scholarship, and is a concept that is completely logical when one looks at factors that affect the presence and strength of this relationship—publicity about the offender and the murder, the victims’ families’ need to know “why” and “how” the crime occurred and the necessity of understanding the offender to answer those questions at least in part. How could victims’ families help but feel they know an offender through the plethora of intimate details that emerges

through contemporary media coverage? Sharp notes that coverage of Jeffrey Dahmer's murders extended to the most banal details of his personal life: "the type of beer he drank, his cigarette preference, the types of potato chips he ate, and the brand of baking soda he used in his refrigerator."⁶⁹ This relationship may extend to offenders' families as well; offenders and their families (and even offenders' communities) may be roped together into a category of otherness, set apart by disgust and hatred, with offenders' family members experiencing intensely negative publicity.⁷⁰ In the context of the Oklahoma City bombing, this was a relationship in which victims' impressions of McVeigh as a man and, in some cases, as a monster contextualized his mannerisms and his statements. It was a relationship characterized by perceptions of communicative iniquity, inequity and inequality, in which victims/survivors perceived they had little communicative control over McVeigh, where McVeigh was seen to have great communicative agency and an ability to communicate with victims/survivors despite their antipathy towards such efforts, while victims had to settle for channeling their own communications through media or through victim impact testimony. It was a relationship pregnant with communicative necessity and perceived obligation, in which victims very much wanted to hear "why" and how McVeigh carried out the bombing and yearned in many cases⁷¹ to speak with him in person. Finally, it was a relationship whose only possibility of termination lay in the death of McVeigh or of victims themselves.

In addition, this involuntary relationship between McVeigh and family members and survivors profoundly influenced the formation of collective memory and the resolution of cultural trauma because it was perceived as a challenge to the reconstruction of identity through group and individual processes such as those discussed in the previous chapter. As will be discussed shortly, because of the constructed understandings of McVeigh that participants evolved, ten participants directly referred to McVeigh's continued existence and media communications as barriers on the road to "recovery" and resolution and connected his execution with the need to silence him.⁷² A living Timothy McVeigh was simultaneously a reminder of his potential to "jab" at victims, a reminder of the bombing, and a reminder of injustice. In occupying one camp in the involuntary relationship between victim's family/survivor and offender, and therefore bound to victims' family members and survivors, McVeigh became a part of the collective, instead of being cast outside it. The inclusion of McVeigh in the collective was traumatizing to family members and survivors because it directly affected the narrative resolution of the trauma and delayed family members' and survivors' control over the resolution process because at any time a message could issue from McVeigh that could potentially aggravate wounds just starting to scab over. Communication could not cease and the relationship could not be terminated until McVeigh was dead. Thus, the collective memory of homicide—including the collective memory of the Oklahoma City bombing—is shaped not only by the events of the murder but also for the duration of the involuntary relationship between offender and family members/survivors.

⁶⁹ SUSAN F. SHARP, *HIDDEN VICTIMS: THE EFFECTS OF THE DEATH PENALTY ON FAMILIES OF THE ACCUSED* 1 (2005).

⁷⁰ *Id.* at 36.

⁷¹ Eleven participants were willing to meet with McVeigh, 12 did not want to meet with McVeigh, and 4 were unsure whether or not they would have been willing to take this step.

⁷² Emblematic of these comments are the remarks of Participant 25: McVeigh . . . was defiant . . . He would speak out to the media. He would tell the families to grow up . . . And everything that he did was doing nothing but hurting the family members here in Oklahoma. So the only way for us to have any kind of peace was to execute this man."

It is possible to describe the tie between family members and survivors and McVeigh in other ways besides terming it a “relationship.” Framing it in relational terms, however, is most fitting because of it captures the profound way in which these ties colored family members’ and survivors’ processes of sense-making, particularly in formulating their preferred legal resolution to the bombing—what punishment was deserved. Focusing research on the victim-offender relationship also appropriately recognizes that victims and survivors define as well as become defined by the experiences of survivorship, that they act upon and are acted upon in turn. It implies an exchange, a give and take of activity and passivity, and recognizes that processes of sensemaking are mutually constructive and cyclical, and not self-constructive and linear. Victims change and alter conceptions of grieving in the course of healing; they are active participants in the trial with the potential to change its practices and potentials; and they challenge representations of victims in addition to conforming to existing representations. Finally, refocusing research on the victim-offender relationship also effectively organizes how participants made sense of the chaos of post-bombing social relations. It explains why the vast majority of participants regardless of political views on the death penalty felt relief in the wake of the execution which terminated the involuntary relationship that had begun six years before.

In the wake of the bombing, family members and survivors became involuntarily and intimately linked to McVeigh and Nichols through the offense, so that they must “live with” the them to a greater or lesser extent until death—either the offender’s, or their own. As Janice Smith, a nonparticipant and nonwitness family member whose brother was murdered in the bombing, stated in a media interview after McVeigh’s execution on June 11, 2001, “It’s over. We don’t have to continue with him any more.”⁷³ There may even be a sense that family members and survivors are an offender’s “audience” and an interactive positioning based on this perception. Constance Richardson, a nonparticipant family member whose 20-year old daughter was murdered in the bombing, chose to visit the memorial on the morning of June 11, 2001 instead of witnessing the execution by closed-circuit, stating “I didn’t want to be part of his audience.”⁷⁴

Intensive interviews with family members and survivors reveal a perception that statements made by McVeigh were targeted to these individuals to further wound them. Participant 21 states, “like every time he turned around, he was doing some thing to jab at us and it was just very painful because he could sit there behind those bars and get us three squares a day and everything and not have all these worries and, and he kept jabbing at us in his own little way.” After McVeigh was executed, however, the “jabbing” ceased; as Participant 15 explains, “I never think about McVeigh now that he’s been executed cause he’s not in the media now. You know he played the media and the media played him and he was there....I’ve quit completely, stopped thinking about him the day they executed him. He’s you know he’s hurt me enough and he doesn’t care. Not at all.” Participant 25’s comments are most illustrative of this point:

McVeigh, even though he knew that he was getting the death sentence, he was defiant all the way up to the point where it actually happened, okay? He would speak out to the media.....And everything that he did was doing nothing but hurting the family members here in Oklahoma....Nichols, Nichols is a little different because since he’s been tried and convicted, you don’t hear about

⁷³ Nick Bryant, *Pain Remains For McVeigh Victims*, BBC, June 11, 2001, available at <http://news.bbc.co.uk/1/hi/world/americas/1383171.stm>.

⁷⁴ *Id.*

him....I can live with him being in prison for the rest of his life, for the simple reason that he is not defiant and he's not going out and getting on the news and so forth and trying to hurt the family members.⁷⁵

Participants also perceived that this relationship was intimate in the sense that McVeigh as a communicative agent made statements *to* family members and survivors in an attempt to further wound them. Participants speak of McVeigh jabbing "at us," of McVeigh hurting "me" and "telling the families," and of McVeigh and Nichols having "access to the family members, survivors through the media, through books." In addition, participants seem at times to assert that they "knew" what McVeigh would do in a given situation; thirteen participants, for instance, remarked that McVeigh would not have sincerely meant any apology that he may have given at his execution.

It is considerably easier to understand the interpersonal process of collective memory construction in a social setting such as the memorial task force or the habeas group, where most communicative interaction is face-to-face, and not mediated. It is more difficult to comprehend a "relationship" that forms in a completely mediated context, in the utter absence of direct communication. Such a relationship is not "interpersonal" in the traditional sense of the term, involving "at least two communicators; intentionally orienting toward each other; as both subject and object; whose actions embody each other's perspectives both toward self and toward other."⁷⁶ Yet, there is a tangible perception on the part of family members of survivors of intimacy, of "knowing" McVeigh and Nichols, that would be present in an interpersonal relationship.

B. McVeigh as Para-Social Enemy

This relationship bears a strong resemblance to *para-social interaction*, a concept devised in 1956 by Horton and Wohl in seeking to explain the phenomenon of television viewers' perceived relationship to television personalities, defined as "the illusion of face-to-face relationship with the performer" in which "the conditions of response to the performer are analogous to those in a primary group."⁷⁷ This relationship is built upon a cumulative "exchange" of affective messages between the personality, termed the "persona," and the audience, whereby the audience is "subtly insinuated into the program's action and internal social relationships and, by dint of this kind of staging, is ambiguously transformed into a group which observes and participate in the show by turns."⁷⁸ Para-social relationships are characterized by a "lack of effective reciprocity" since "the interaction, characteristically, is one-sided,

⁷⁵ Participants 19 and 24 also made similar statements. 19 reflected, "if he wouldn't have been writing people and calling people and giving interviews and making pronouncements and so on, you know, it'd be a lot easier to live with him, being in prison for the rest of his life." 24 stated, "I have always felt like that if, if McVeigh and Nichols for example had access to the family members, survivors, through the media, through books, through whatever purposes they had that it would always just be keep digging at us, sticking that knife and twisting."

⁷⁶ A.P. Bochner, *Interpersonal Communication*, in INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATIONS 336 (E. Barnouw et al. eds. 1989).

⁷⁷ Donald Horton & R. Richard Wohl, *Mass Communication and Para-Social Interaction: Observation on Intimacy at a Distance*, PSYCHIATRY 19(3) (August 1956), republished in INTER/MEDIA: INTERPERSONAL COMMUNICATION IN A MEDIA WORLD 188 (Gary Gumpert & Robert Cathcart eds, 2d ed., 1979).

⁷⁸ *Id.* at 189.

nondialectical, controlled by the performer, and not susceptible of mutual development"; thus, "the audience is free to choose among the relationships offered, but it cannot create new ones."⁷⁹ Other ways in which audience members may communicate to the persona or to show producers, such as letters or telephone calls, "lie outside the para-social interaction itself."⁸⁰ Despite the lack of communicative give and take, the persona who is the focus of the para-social relationship becomes integrated into the audience member's social circle as a familiar presence⁸¹ Significantly, this presence is above all a reliable presence.⁸² But however artless this relationship may appear, it is also a strategic and constant one.⁸³ Producers formulate the persona's character specifically to enhance audience members' loyalty to the persona, with respect to the personality's image, "its major theme is that the performer should be loved and admired."⁸⁴ Audience members are expected to adapt to the engineered relational format with the persona as it is offered; they may not alter it, and so must continue the relation on those inflexible terms.⁸⁵ Thus, audience members must be susceptible to a "coaching of attitudes."⁸⁶ But audience members' willingness to be susceptible to this coaching is entailed in audience membership itself, since that role entails some level of identification. Subsequent research into para-social relationships further suggests that this illusory intimacy, the subjective creation of audience members, is actually taken as "real."⁸⁷ Para-social relationships continue to pervade media usage today.⁸⁸

It is abundantly clear that researchers have construed the persona that is the target of the para-social relation as being in the position of a para-social "friend," someone who is likeable and trustworthy. Thus, this type of investiture can be termed a "positive" para-social relationship, or a investiture of positive affect in a persona. But logically, if one can have relationships with para-social "friends," then one may also have relationships with para-social "enemies," opening the door to the formation of "negative" para-social relationships. Negative para-social relations have the same characteristics as their positive counterparts, though these characteristics form an identification that is the inverse of that encouraged by the positive relation. As in Herbert and Wohl's conception of the positive para-social relation that prompts audience members to be loyal to a media persona, a para-social relation with an "enemy" likewise frames spectators' perceptions of the performer, enabling persistent dislike and

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 190.

⁸² *Id.*

⁸³ *Id.* at 191.

⁸⁴ *Id.* at 195.

⁸⁵ *Id.* at 194.

⁸⁶ *Id.* at 195, 196.

⁸⁷ Analyzing the para-social relationships that viewers of television news form with newscasters, Levy notes, "[e]ven though this affective tie is completely the subjective invention of the audience, para-socially interactive viewers believe it is genuine and they interpret the behavior of the news personae as reciprocating this 'real' bond." Mark Levy, *Watching TV News as Para-Social Interaction*, in *INTER/MEDIA: INTERPERSONAL COMMUNICATION IN A MEDIA WORLD* 185 (Gary Gumpert & Robert Cathcart eds, 2d ed., 1979).

⁸⁸ In the wake of "Crocodile Hunter" Steve Irwin's sudden death on August 31, 2006 from a stingray barb embedded in his chest, this popular figure was publicly mourned, as reported by one CNN story on the intense coverage of Irwin's death and public mourning that featured a media expert who directly attributed the phenomenon to the strong para-social relationships Irwin fostered in audiences: "Every now and then a TV star has the ability to transcend the electronic barrier of what a television is and really feel like they're one of the family..." David Williams, *Irwin's Death Strikes a Chord*, available at <http://www.cnn.com/2006/SHOWBIZ/TV/09/06/irwin.outpouring/index.html> (September 6, 2006).

animosity. Whereas the positive para-social persona is an “ingroup” member, a desirable associate, the para-social enemy is an outsider, a deviant Other. Victims are as encouraged to be loyal to their hatred of criminal personas as audience members are encouraged to admire their media personas. The criminal persona is as enduring a figure as a positive persona, engendered to predictably inspire loathing. And audience members who form negative attachments to para-social enemies also must accept the relational format imposed by the media “producers” who construct that persona. Realizing how negative para-social relations are cultivated also necessitates broadening the concepts of “media” and “media producer,” extending them from application in the narrower context of mass media to application in the broader context of social institutions who may take on strategic mediating roles—including the criminal justice system. This means that the producers of para-social enemies in the context of homicide are not only the producers of hit television crime dramas but also criminal justice officials who orchestrate the arrest and trial of criminal offenders from the “perp walk” to incarceration or execution, the public rituals for exposing and judging “enemies of the system.”

But gauging from participants’ attributions of malicious communicative intent to McVeigh and the degree to which their responses attributed a dialogic character to their interactions with McVeigh, it is clear that there is ample evidence of a negative para-social relation between family members and survivors and McVeigh. McVeigh is their para-social enemy, the one who, however mediated his communications may be, both has the potential to communicate and actually communicates with the intent of inflicting further harm on an especially vulnerable and wounded population.

The intimacy of this negative para-social relation is particularly ironic in light of the impersonal nature of the Oklahoma City bombing itself. McVeigh saw himself as standing in opposition to the United States government, at the narrowest opposing the government agencies involved in Waco and Ruby Ridge, and explained that he chose to bomb the Murrah Federal Building because he thought that it would make a spectacular media target, not out of personal animosity toward anyone who worked in the building or anything housed in the building. Yet, the bombing immediately became intensely personal, as images brought to life stories such as the iconic image of the dead Baylee Almon, the one-year-old baby girl cradled in the arms of Oklahoma City firefighter Chris Fields. The impersonality of the bombing was an incomprehensible affront to family members and survivors, who could not see it as impersonal, and in asking the unanswerable question “why,” sought to learn, “why us.”

Because para-social identification is enhanced or discouraged by the construction of mediated images of a persona, the visual technology of mediated images plays a key role in the formation of such relationships. Joshua Meyrowitz contends that an affective relationship can be encouraged by the composition of a television shot, arguing that the para-social identification of viewers with viewed personae is enhanced by technological reproduction of key interpersonal proxemic distances. According to Meyrowitz, there is a “visual ‘relationship’ between the viewer and the image” which exists for the duration of the television viewing.⁸⁹ This relationship is altered by the “framing variable,” or the distance at which a shot places the viewer from the viewed.⁹⁰ Each variety of shot has a para-social consequence: “actions in long shots, for example, tend to be viewed in terms of abstract ‘events,’ while close-ups focus attention on

⁸⁹Joshua Meyrowitz, *Television and Interpersonal Behavior: Codes of Perception and Response in INTER/MEDIA: INTERPERSONAL COMMUNICATION IN A MEDIA WORLD* 225 (Gary Gumpert & Robert Cathcart eds, 2d ed., 1979).

⁹⁰ *Id.*

personal characteristics and response.”⁹¹ Meyrowitz further divides television views of subjects into two categories, portrayed objective distance” which “‘maintains the role of a detached observer’ of the action” and “portrayed subjective distance” which ‘assumes the point of view of one of the characters’” and “shows the viewer what one person within the action sees.”⁹²

Applying these theories to media coverage of McVeigh facilitates insight into how McVeigh came to be constructed as a para-social enemy. Media coverage of McVeigh can be limited to two “moments”: shots of McVeigh being escorted to and from the courthouse in Oklahoma City by law enforcement, and an Emmy-award winning interview that aired March 13, 2000 which Ed Bradley conducted with McVeigh for “Sixty Minutes” while McVeigh was incarcerated on death row in federal prison. The “perp walk” shots most certainly portrayed McVeigh in the “front region” role of criminal and social enemy. Thus, it is not surprising that McVeigh’s profile from these “perp walk” shots later became the centerpiece of news graphics headlining execution stories. Ed Bradley’s “60 Minutes” interview, on the other hand, allowed McVeigh to explain himself in his own words, yet the interview alternated between camera shots of McVeigh captured over Bradley’s shoulder, positioning the viewer in the interrogator’s chair, and close-ups of McVeigh’s facial expression. In addition, the image from McVeigh’s Oklahoma “perp walk” was the dominant photograph of him used in media coverage of the Oklahoma City bombing, and was often incorporated into news graphics, as in the following examples of online news graphics and images from execution coverage and images from print media. McVeigh’s gaze was also highlighted by textual descriptions of these very same images. Early media stories described McVeigh’s expression as that of “hard eyes unlit by the faintest flicker of emotion,” the look of a man whose “name didn’t mean much then but the image did,” the stare of “a poker-faced killer in a crewcut.”⁹³ This first impression resurfaced continually, including on the morning of his execution: “[i]n his last moments, his face was as blank as it was that April day six years ago when America first saw him escorted out of an Oklahoma jail.”⁹⁴ Thus, early media constructions of McVeigh were cyclically incorporated into subsequent constructions, snowballing upon one another to produce a coherent image of McVeigh as para-social enemy.

The degree to which McVeigh’s stare is incorporated into media images and the way in which McVeigh himself was framed during the “60 Minutes” interview illustrates how crucial this gaze became in the construction of McVeigh as a para-social enemy. The heavy media focus on the “perp walk” images could very easily have influenced the early impression formation of family members and survivors, socially constructing expectancies regarding the import of his communicative behaviors. Impression formation upon initial acquaintance is rapid, or even instant, as the subconscious makes its “highly stereotypic” impressions.⁹⁵ Because what can be gleaned from introductory verbal exchanges is restricted by convention, nonverbal cues such as “stable physical appearance and kinesic and vocalic cues” are especially significant in “shaping interpersonal expectations and in generating a frame for the parties’ interpretation of

⁹¹ *Id.* at 229.

⁹² *Id.* at 227.

⁹³ Sam Handlin, Profile of a Mass Murderer: Who is Timothy McVeigh?, available at http://www.courtstv.com/news/mcveigh_special/profile_ctv.html.

⁹⁴ “McVeigh Shows No Remorse at Execution,” available at http://www.courtstv.com/news/mcveigh_special/0612_noremorse_ap.html.

⁹⁵ Judee K. Burgoon & Gregory D. Hoobler, *Nonverbal Signals*, in HANDBOOK OF INTERPERSONAL COMMUNICATION 262 (Mark L. Knapp and John A. Daly eds., 3d ed., 2002).

subsequent behavior. Fortunately, “thin slice” methodology⁹⁶ has shown that interactants require only very brief glimpses of behavior to form “fairly accurate and strong” judgments of actors.⁹⁷ The rapidity of impression formation is necessary because humans are “driven by an underlying need for uncertainty reduction” and by a need for sensemaking.⁹⁸

Thus, the moment when family members and survivors were “introduced” to McVeigh via media broadcast of the “perp walk” was very likely the moment that they formed initial impressions. Significantly, this footage or still shots from it were rebroadcast extremely frequently in ensuing years, thus reinforcing the visual cues from which the initial impression was formed. Three of the eight execution witnesses remarked on the similarities between McVeigh’s gaze during the execution and his gaze on previous occasions captured and aired on television; as Participant 22 recalled, “[h]e didn’t just look. He had that same look in his eyes when they arrested him. Do you remember him coming out of the court house and that stern look on his face? That’s the look he had. . . . Like defiant.”⁹⁹ Such comments reveal not only that witnesses were aware of how McVeigh was constructed in and by the news media as a person and an offender, but that they found these constructions meaningful.

V. ENDURING PARA-SOCIAL LEGACIES: IMPRESSIONS OF McVEIGH’S CONDUCT AT TRIAL

Family members’ and survivors’ initial impressions of McVeigh formed as a result of pre-trial images such as the “perp walk” were “confirmed” by their impressions of his behavior at trial. The most frequent characterizations of McVeigh at his trial all reflect an “inappropriate” emotion or reaction to the trial event; McVeigh is described variously as inappropriately jocular, sarcastic, arrogant, unemotional and unremorseful. Presumably, the ideal defendant should be solemn, respectful, remorseful, and intimidated by the machinations of justice moving against him. These very same qualities appear in the most frequent characterizations of Nichols, wherein Nichols is emotional, shamed, quiet, and nervous.

A. Perceptions of McVeigh’s Conduct at Trial

One of the most pervasive trial witness characterizations of McVeigh was as an unemotional defendant whose reactions were nonexistent or impossible to interpret, and connected this blankness of expression to moral failing such as dishonesty, arrogance, callousness, and even evil.¹⁰⁰ This coldness also evoked an impression of arrogance; Participant

⁹⁶ See, e.g., N. Ambady, M. Hallahan & B. Conner, *Accuracy of Judgments of Sexual Orientation From Thin Slices of Behavior*, J. OF PERSONALITY & SOC. PSYCH. No. 77 (1999), N. Ambady & R. Rosenthal, *Half a Minute: Predicting Teacher Evaluations from Thin Slices of Nonverbal Behavior and Physical Attractiveness*, J. OF PERSONALITY & SOC. PSYCH. No. 64 (1993).

⁹⁷ Burgoon & Hoobler, *supra* note 95, at 262.

⁹⁸ *Id.*

⁹⁹ Participants 15 and 29 made similar statements. Participant 29, a live execution witness, noted, “I’d say leaning towards more like a glare like you know boy- I can’t give him credit for anything. You know, the guy... has never had much of a look in his eye. Even when I listen to like that 60 Minutes interview.” Similarly, Participant 15, a closed-circuit execution witness, stated, “Yes, very cold. He was the whole time. Any time you ever saw him on TV.”

¹⁰⁰ Five participants commented on McVeigh’s failure to display emotion. Participant 2 stated that he “was always just sitting there expressionless, never showed any remorse. Never showed any emotion. He was just like a statue there.” Participant 24 remarked, “there was absolutely no remorse whatsoever...no emotion whatsoever uh no I mean you just really couldn’t read from his expressions whether anything bothered him or not.” Participant 28

8 stated “He is a cold son-of-a-bitch and he sat there arrogant and looking like he was enjoying the show,” and 24 noted, ““He was almost proud, I felt like, proud of what he had accomplished, what he had done.”

Seven participants recall being struck by McVeigh’s perceived jocularity:¹⁰¹ These moments of perceived jocularity and informality contrasted with other moments in which participants apprehended that McVeigh was paying a great deal of attention to the proceedings.¹⁰²

B. Perceptions of Nichols’ Conduct at Trial

Trial witnesses characterized Nichols’ conduct as the opposite of McVeigh’s behavior. Participant 25 noticed a “very definite” difference between McVeigh’s and Nichols’ courtroom presences, and that that difference individualized the defendants: “it made us look at both of them as individuals. . . . So you could tell that they was two different individuals altogether.”

Participants reported that Nichols was more emotional than McVeigh. Participant 2 and 24 stated that of Nichols that “he seemed to be more emotional,” and Participant 8 stated that “you could see emotions on his face.” According to Participant 24, this emotion was elicited by the trial: “I felt like things that were said or done not necessarily by me during my testimony but by maybe others, victim impact, that kind of thing, that there were times when he was very emotional.”

Participants also credited Nichols with displaying situationally appropriate emotions. Participant 8 stated that Nichols appeared to be “uncomfortable, scared, guilty . . . He looked very frightened.” Participant 25 also characterized Nichols as afraid: “But most of the time he was, how would you say, he was...looked like he was a little afraid about what was going to

noted that “he never showed anything....It was -- so what, people die....even if he’d said something whether you could have trusted that what he was saying was honest or... I mean just because he was so stoic throughout the trial and he always had the same look on his face.” Participant 29 recalled that “McVeigh was just automaton almost. Just so- didn’t move. Nothing. Just stony. Like I said, no like- wasn’t even a human being.” Finally, Participant 8 stated, “he started looking around the room. And I remember he met...met me eye to eye....I just went white and I had to turn around....it’s like someone had just taken my breath away....I said it was like looking at the devil eye to eye. It was just a horrible, horrible feeling.”

¹⁰¹ Participant 28 stated, “[t]hat [change of venue proceeding] was the first time I saw McVeigh you know, face to face that is, from here to the door. . . . And I remember when they drove in, he was...he was just waving at people and talking to them. And I was like...and I thought, he was really smiling. And I thought, oh my gosh...”

Participant 8 recalled that “...Tim was just like I’m enjoying myself. Propped his feet up on the chair in front of him.” Finally, Participant 16 noted that “McVeigh would walk into the courtroom laughing, and joking, and sneering, and looking at the victims, you know. And he was just carrying on and laughing like he was just having a good old time until the jury and the judge would come in...”

¹⁰² Participant 22 remarked,

[i]t was interesting watching him in the courtroom. The things he paid attention to were anyone who was testifying about that had bomb knowledge, uh, how they’re built and what works, what doesn’t work. Oh, he was very interested in that testimony and any rescue workers. He was interested in that because he wanted to know the damage he’d done. And victims. He wanted to know how much he had hurt everybody.

Similarly, Participant 25 stated, “He watched a lot of the jurists, I mean the people testifying. He got involved in a lot of it. When they brought out parts and they was talking about the telephones and the chemicals, he looked like he was really interested in to it more than Nichols was.”

happen than anything.” And Participant 28 described Nichols as “a little more nervous.” Participant 24 stated that Nichols may have felt shame: “I also felt like that McVeigh was proud of what he did and I felt like that Nichols was maybe more ashamed of what he couldn’t have stopped from doing.” For Participant 29, this display of emotion was a sign of humanity: “And I hate to give him credit for this but you kind of see a person in Nichols.” Nichols was also quieter, according to Participant 25: “more the quiet, refined individual, who sat there and didn’t say a heck of a lot or didn’t do a lot. He would write notes to his lawyer every once in a while.” Participant 28 stated that he was more serious: “He didn’t...he wasn’t the jokester whatever. I mean he was just...he didn’t...he did lean over and talk to his attorneys and but he didn’t do the waving at people and the laughing and you know, he did not do that. He was much more serious.” Participant 29 described Nichols as “resigned.”

C. Dissatisfaction With Limited Access to McVeigh Through Trial Proceedings

Participants often wanted to meet with McVeigh outside of the trial forum. This suggests that the constraints placed upon the victim-offender relationship and the accountability process by the criminal justice institution also unfortunately constrained memory work, and that participants wanted to escape these institutional constraints upon access to McVeigh and/or as to the types of queries that were asked and answered. This includes an unwillingness to entirely defer to the criminal justice system as arbiter of guilt and innocence. There was a sense that seeing McVeigh in person would confirm guilt; for instance, Participant 8 attended trial proceedings in person because “I had to see for myself I mean all the media was telling you was that he was guilty but I had to look at him and know and I knew if I looked at him I’d know if he was guilty or not no matter what the jury came back with . . .” Other participants expressed disappointment with the questioning limitations of the trial’s narrow guilt/innocence inquiry; Participant 25 wanted to ask other questions that had not yet been answered: “I wanted to find out why, with the questions that I had, not some lawyer or the judge or whatever asking him. I wanted to ask my own questions.” Finally, the fact that trial attendees’ access to McVeigh was mediated by the trial forum and direct access was foreclosed could be frustrating to participants; three participants spontaneously remarked on the constraints imposed by legal procedures and in legal venues. Participant 25 stated, “it would have been nice to have been able to ask, personally ask and not have to, you know, go through a lawyer . . . just to say you know, why did you do that? What were you thinking? What did you think you were going to accomplish?” These reactions to the encountering McVeigh through the trial forum illustrate the limited efficacy of criminal trials as vehicles of individual, and therefore collective, memory.

VI. THE COMMUNICATIVE RAMIFICATIONS OF McVEIGH’S EXECUTION

Like McVeigh’s conduct during media interviews and trial, his behaviors at the execution continued to heavily influence family members’ and survivors’ collective memory of his identity as a perpetrator of the bombing (Was he repentant? Was he defiant?) and thus to color the ways in which they made sense of the final legal stages of the bombing.¹⁰³

¹⁰³ Although McVeigh terminated his appeals of his own accord and asked that an execution date be set, this did not seem to affect participants’ perceptions that he was defiant until the moment of his death, other than fueling participants’ perceptions that McVeigh did so as an act of defiance and was attempting to establish himself as a martyr. No participant commented on the ironic fact that when McVeigh dropped his appeals he opted for an

A. Understanding the Execution as Communicative Interaction

It may seem odd at first to speak of an execution as a communicative act, which will herein be defined as a specific episode in which someone is engaged in meaning-making by drawing on enculturated systems of communicative practices, the underlying sociocultural systems or toolboxes from which we strategically choose spoke, written, or gestural behaviors. Human communication is not a transmission of transparent meaning but a negotiated exchange of meaning. Communication does not take place in a vacuum but in a social context seething with entities that may either facilitate or hinder human interaction. Differing cultural backgrounds or ideological assumptions may result in deviating perceptions as easily as does a noisy environment or technological malfunction. A communicative framework of action and reaction is the ideal means by which to address punishment in general, capital punishment in particular, and the execution as a specific imposition of capital punishment. Criminal law's efficacy itself presumes the existence of communication, expressions that some actions are illegal and that those commit crimes will be punished. That we all understand what actions are illegal is proof that those concepts have been successfully communicated to us. As a state-instituted ritual, punishment is a social act, and capital punishment is its most extreme form.

Thus, an execution is both communicative action and an event with social consequences. An execution is the enactment of the pronounced death sentence. The state is the primary actor in the execution ritual that outlines, regulates, and supervises the execution though the execution is carried out in the name of the people. The state actor communicates both with and through the condemned to reach the immediate witnesses and more remote audiences exposed to the execution through media. The state's expression to the condemned is a unique punitive message. Usually punishment is meant to express censure, and a "don't do it again" warning. Here, the object of the punishment won't live to learn his lesson, so one can infer that the state's ultimate communicative target is not the condemned but the witnesses to the execution.

The condemned plays a remarkably passive role in the execution process. The execution is designed to subordinate the will of the individual to the will of the state, reenacting the contract between the governed and the governing. Punitive acts, then, are the means by which the state seeks to "prevent the despotic spirit . . . from plunging the laws of society into its original chaos."¹⁰⁴ Executions are the ultimate confirmation of this reposed popular power over the body of the infractor. The state has codified its gatekeeping role in carrying out the execution, most notably for our purposes in 28 C.F.R. § 26.4(f), which prohibits photographic, audio, and visual recording devices at federal executions.¹⁰⁵

Significantly, "execution finally puts the body beyond the possibility of social control."¹⁰⁶ Social control over the social *person* must cease upon death, but social control over the *body* can continue in perpetuity. But until the moment of execution, the body is the site and target of the most rigid forms of social control. The state imprisons the condemned until the date of his death, and impresses additional restrictions upon his final moments. Since the days of

outcome that was desired by numerous family members and survivors, ultimately aligning his interests with theirs. Similarly, no participants remarked that McVeigh's willingness to die was a factor affecting any satisfaction or relief they might have felt following the execution.

¹⁰⁴ CESAR BECCARIA, ON CRIMES AND PUNISHMENTS 12 (Henry Paolucci, trans., 1963) (1764).

¹⁰⁵ 28 C.F.R. § 26.4

¹⁰⁶ ANTHONY GIDDENS, MODERNITY AND SELF IDENTITY 162 (1991).

public hangings, prisoners have often been hooded or masked “to spare spectators the sight of the condemned person’s distorted or disfigured features,” and after the electric chair replaced the noose, leather face masks concealed the condemned’s features.¹⁰⁷ When lethal injection is used, the prisoner’s body is often sanitized by a sheet cover, and the prisoner lays supine upon a gurney so that witnesses see only one side of his features. In McVeigh’s execution, the closed-circuit camera was suspended directly over his head, so that witnesses had an unobstructed view of his features.

The state also restrains the condemned’s final expressions and actions. Formerly, “at large spectacles and at small private executions as well, the prisoner was made a part of the ritual by being offered an opportunity to deliver his final words.”¹⁰⁸ Now, however, this privilege has been “gradually withdrawn” because “there is a fear that he will say something nasty that will disrupt the proceedings,”¹⁰⁹ and in some cases, the prisoner is only permitted to write his last words.¹¹⁰

Finally, the physical space in which the execution is carried out further emphasizes that the state is the primary actor and others but incidentally connected to the act. According to Foucault, the execution, once a “pure event” and “collective spectacle,” moved out of view with the invention of the prison organization. Death was dissected into silent and rehearsed routine processes, “a sequence of technical modifications” to make it “instantaneous” and “unobtrusive.”¹¹¹ The very existence of the witness room distances witnesses from the invocation and metaphysical and physical consequences of the execution; witnesses become bystanders because of the distance imposed by concrete and glass. The layout of the witness rooms further regulates witnesses’ impressions and responses and structures the execution as a distant communicative event, allowing the state to “minimize the fascination of looking by effecting death as mechanically and as precisely as possible.”¹¹²

B. Deconstructing the Gaze

1. The Marked Gaze

Witnesses literally attend and attend to an execution on the basis of general communicative expectancies. Such dynamics are activated when the condemned invites or opens an interaction by either looking into the witness rooms or by addressing witnesses through “last words.” Often, the condemned does make some communicative endeavors, but rarely makes the gestures that witnesses most desire. In exploring the interactive dimensions of the McVeigh execution, we come first to the importance of his visual awareness of witnesses established through gaze. Witnesses in the death chamber reported that, when the curtain was opened, McVeigh physically lifted his head and slowly stared into three of the four witness rooms wherein sat his own witnesses, bombing victims, and media witnesses. There is some question whether McVeigh stared into the room reserved for government witnesses. Persons in all of these rooms but the offender witness room were concealed by a one-way glass. McVeigh

¹⁰⁷ JOHN BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 151 (1997).

¹⁰⁸ ROBERT JAY LIFTON & GREG MITCHELL, *WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS* 182 (2000).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ GIDDENS, *supra* note 106, at 162.

¹¹² AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 189 (2001).

then lay back down and stared up at the ceiling, into the closed circuit camera. This active visual engagement with witnesses was noted by all three participants who witnessed the execution live in Terra Haute, and all five remote witnesses believed that McVeigh was staring directly at them.

Execution witnesses are often intensely interested in watching the offender's face throughout the procedure, to the point that corrective measures may have to be taken when logistics such as the location of the gurney vis-à-vis the victim witnessing room and the girth of the defendant combine to make this impossible.¹¹³ Interviews with witnesses who viewed McVeigh's execution by closed circuit reveal that witnesses felt that the placement of the camera directly over the gurney in Terre Haute was ideal because it allowed them to clearly see McVeigh's facial expressions. The desire to see McVeigh face-to-face fueled some witnesses' desire to view the execution. When asked about the desire to see the execution in person, Participant 25 remarked in a media interview five days before the execution:

I'm hoping that if I can see his face maybe I can get some kind of idea exactly who he is and what he thinks....Stare him in the eye and I hope he stares me back. I'm hoping that if I can see his face maybe I can get some kind of idea exactly who he is and what he thinks.¹¹⁴

Closed circuit witnesses report being "shocked" or "jarred" by the sudden sight of McVeigh's face on the screen. But this shock did not prevent most witnesses from unhesitatingly endorsing this placement. Participant 5's spouse states, "I'm glad I saw him that close up and everything cause that way I knew from his eyes and his expression what he was feeling." Participant 15 stated, "I wanted to see his face." Participant 21 credits a spiritual experience of forgiveness that she underwent during the execution to the being able to see McVeigh's face: "I think the face thing is what, really brought it to reality with me. . . . it was a face-to-face thing and I think that's probably what drew me in to what I needed to go through." The two closed circuit witnesses who wanted to see a more inclusive picture stated that they wanted to see more of what was going on in the execution chamber.

Interviews with witnesses manifest that McVeigh's gazing behaviors gave rise to an intense perception among closed circuit witnesses that McVeigh was aware that his death was being witnessed, that he wanted to create a certain image, and that his gazing behavior produced an interactional expectancy. Closed circuit witnesses believed that McVeigh was staring at them through the camera and that he was conscious of their presence. Larry Whicher, a closed circuit witness, stated in a media interview immediately after the execution that McVeigh "actually lifted his head and looked directly into the camera and it was as if he was looking directly at us." Whicher described his stare as "totally expressionless, blank stare—and his eyes were unblinking...he didn't need to make a statement. I truly believe that his eyes were telling me he had a look of defiance and that if he could he'd do it all again."¹¹⁵ Participant 5's spouse also sensed that McVeigh was aware that he was being watched: "He knew that people were looking

¹¹³ In a conversation with one state victim advocate who witnesses executions with victims' families and who wished to remain anonymous, the advocate described that the victim viewing room was positioned at the foot of the gurney, which was flat and not inclined. During the execution of an obese offender, victims complained that they were not able to see past the offender's girth to his face. Afterwards, the head of the gurney was positioned at a sloping angle to allow witnesses to see the offender's face at all times.

¹¹⁴ Transcript, CNN Breaking News, *Judge Denies Stay of Execution for McVeigh, Appeal Expected*, available at <http://transcripts.cnn.com/TRANSCRIPTS/0106/06/bn.03.html> (June 6, 2001).

¹¹⁵ *Id.*

at him, watching him . . .” When McVeigh’s face appeared on the screen, it seemed to Participant 7 that he was looking at the witnesses in the viewing rooms.¹¹⁶ Not only did witnesses feel that McVeigh was aware of live and closed circuit witnesses, but there was a definite perception that McVeigh was actually and purposefully *looking at* all witnesses, whether they viewed live or by closed circuit. Participant 21 stated that “he raised his head up and I mean he kind of did like this and it was almost like he was just staring at each person. . . . and it was something he did on purpose.” 21 described the sight of McVeigh’s face as intimate, stating “It’s almost like it was a face-to-face contact with him.” Participant 22 stated that when McVeigh’s face, 22’s reaction was, “there’s his face *looking at you*” (emphasis added). Participant 28 perceived that McVeigh was not only aware of witnesses’ presence and that his gaze seemed to penetrate through the mediated images to reach witnesses:

And as he stared at the camera, knowing that we were watching, I mean he knew, he knew. . . . And but I...you know, he...he would just stare at that camera. And it was just...like it was just he was just staring right through you. I mean absolutely everyone said the same thing. It looked like he was looking right at you, like he was looking right at me.

Witnesses in the death chamber in Terre Haute had a different experience of McVeigh than witnesses who viewed via closed-circuit television. Participant 25 stated that McVeigh “glared into the room, you know, trying to figure out who was who, who was in there and where we were standing at.” Participant 29 recalled that McVeigh raised his head in an effort to look at victim witnesses, although it was unexpected: “I never expected him to look at us. And then... it was like drum roll. His head turns to his right. He rolls over and he looks at all of us. Or at our window. Four, maybe five second and then turns his head back.” Live witnesses, then, only had seconds of perceived eye contact with McVeigh.

In the closed-circuit image, McVeigh was lying on his back and so his gaze defaulted to the ceiling, making it unclear whether he was looking at the camera, the ceiling, the remote witnesses, both, or neither. The remote witnesses, however, did impose meaning upon that gaze, and perhaps even felt its full impact even though they were the most removed. As closed circuit witness Larry Whicher stated in a media interview immediately following the execution: “I think that stare in the camera is something that will stay with me . . . It won’t haunt me, but I think it will be a memory that will stay with me and make me think there are others like that in the world.”¹¹⁷

¹¹⁶ Participant 7 and 22 also felt that McVeigh was aware of witnesses’ presence. 7 states,

you almost, you could see him almost like visibly like he’s looking at each person in there. Specifically making specific attention of the fact that he’s looking at each person in there. . . . There being, ah, in Indiana, where he is. It’s almost like he’s looking at each family member or whoever’s there. . . . His eyes could move, I don’t recall him picking up his head. Uh, I just remember he’s laying and it’s like, so he might have tilted it a little bit, um, I don’t recall him actually picking up his head, but you could see him you know – You could tell what he was doing.

Participant 22 believes that McVeigh was conscious of the camera suspended above him: “Oh, yeah, he knew. He knew. He was very aware of it. No doubt.”

¹¹⁷ Terry Horne, *Viewers Struck by Look in McVeigh’s Eyes*, THE INDIANAPOLIS STAR, June 12, 2001, available at http://www2.indystar.com/library/factfiles/crime/national/1995/oklahoma_city_bombing/stories/2001_0612b.html.

2. The Social Consequences of the Gaze

For sighted people, gaze is an important social behavior.¹¹⁸ Of course, “looking at others and being looked by them, is of central importance in social behavior, for those who can see.”¹¹⁹ Above all else, a gaze conveys visual attention.¹²⁰ In a classic 1967 study of eye gaze, Kendon proposed that eye contact had three functions, the first two of which are directly relevant here: to express emotion, monitor others’ actions, and regulate conversational flow.¹²¹ Similarly, Argyle found that eye contact signaled the level of intimacy which existed between two interactants; the greater the eye contact, the closer the relationship between them.¹²² Mutual gaze is also physiologically arousing; Mazur et al found that mutual gaze between experimental participants caused more arousal (measured by “strong, significant, and consistent drops” in thumb blood volume, or TBV, which measures the quantity of blood moving from the “periphery of the body to the heart, lungs, and large muscles”) than control conditions of nonmutual gaze.¹²³

Because of McVeigh’s gazing behavior, witnesses perceived that he was both conscious of and paid careful attention to their presence. McVeigh’s staring behavior was likely marked for closed circuit witnesses because it was interpreted as unexpected behavior or a breach of social norms.¹²⁴ According to Kendon, 11 out of 20 subjects in an experimental interview situation spontaneously commented on variations in an interviewer’s gaze pattern when it deviated from normal, whereas none mentioned the gaze when the interviewer’s gaze patterns remained normal.¹²⁵ If these findings with respect to gaze in an interpersonal context may be extended to other non-face-to-face interactions, then attendees’ frequent commentary on McVeigh’s gaze may be an indication that his gaze was an unexpected behavior, or that it was interpreted as deviant or in breach of social norms.

Having established that McVeigh’s gaze was socially significant, we may begin to explore what exactly it signified and how it positioned McVeigh *vis a vis* the witnesses; in other words, we may explicate the social consequences of the gaze. The most obvious element that a gaze conveys is visual attention.¹²⁶ It is McVeigh’s gesture of straining to gaze into each witness room that informed witnesses of his conscious and careful attention to and awareness of their presence. Logically, witnesses who were in the death chamber in Terre Haute may have had a more immediate or intimate encounter with McVeigh than witnesses who viewed the execution via closed-circuit television because of the close physical proximity. McVeigh was reclining on his back so that his gaze was directed upwards to the ceiling as a matter of course, and so it is unclear whether his upturned gaze was into the camera (and through its lens to the witnesses in

¹¹⁸ MICHAEL ARGYLE & MARK COOK, *GAZE AND MUTUAL GAZE* ix (, 1976).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 84.

¹²¹ See generally A. Kendon, *Some functions of gaze direction in social interaction*, ACTA PSYCHOLOGICA 26: 1-47 (1967).

¹²² See MICHAEL ARGYLE, *BODILY COMMUNICATION* (2d ed., 1988)

¹²³ A. Mazur et al., *Physiological Aspects of Communication via Mutual Gaze* 62, 71, AM. J. OF SOC., 86(1) (1980).

¹²⁴ According to Kendon, 11 out of 20 subjects in an experimental interview situation spontaneously commented on variations in an interviewer’s gaze pattern when it deviated from normal, whereas none mentioned the gaze when the interviewer’s gaze patterns remained normal. ARGYLE & COOK, *supra* note 118, at 83 (citing Kendon, 1968, “The gaze-direction of the interviewer as a factor regulating temporal aspects of the interviewer’s utterance patterns (unpublished paper, Dept. of Anthropology, Canberra University)).

¹²⁵ *Id.*

¹²⁶ *Id.* at 84.

Oklahoma City) was targeted at the ceiling, the remote witnesses, both, or neither. However, it was the remote witnesses who viewed McVeigh's face throughout the entire procedure who imposed the meaning upon that gaze, just as the death chamber witnesses assigned meaning to McVeigh's physical gaze into the witness rooms. Ironically, it was the remote witnesses who felt the full impact of McVeigh's gaze.

Thus, visual attention can act as a summons, and an attentive gaze may be the indication that a communicative interaction is starting or is likely to start. Because of its attentive properties, a gaze unites persons who were previously inattentive both towards each other and to the interactive potential that arrived with an awareness of the gaze. This interpersonal unity is there even if the motivation that engendered the gaze divides its participants, as in the case of an openly hostile stare. When a gaze thus serves as a trigger for attention, communicative expectancies are a logical corollary.¹²⁷ In effect, then, the gaze constitutes a summons to pay attention *because* the gazer is paying attention, implying that attention is a reciprocal behavior.

The attentive gaze also objectifies its target. According to Merleau-Ponty, people can be "stripped of existence" or "transformed into an object" by "being looked at by someone who dares not strike up any relationship."¹²⁸ Thus, a gaze that is an invitation to attention (and therefore to awareness of attention) but is not an invitation to further communicative interaction is a truly objectifying gaze, a behavior which has significant social consequences and positioning effects for its target.

A gaze may also signify an attempt to establish dominance. Evidence suggests that status is determined very soon within an interaction, from the first 15 seconds to 1 minute, instead of emerging over a longer term.¹²⁹ Staring behavior is commonly interpreted as assertive in a wide range of cultures, and empirical research has illustrated shown that staring behavior can be perceived as threatening or dominating.¹³⁰ Stares are likely to be perceived as showing anger, aggression or assertiveness when accompanied by lowered eyebrows.¹³¹ The experimental findings of Mazur et al suggest that mutual gazes accompanied by lowered brows were more physiologically arousing than mutual gazes accompanied by raised brows; declines in subjects' TBV were "significantly deeper" in the lowered brow situations.¹³² Mazur et al found that participants' level of comfort with staring behavior was a "strong predictor" of dominance in subsequent interactions, with participants who reported being more comfortable with the scale

¹²⁷ *Id.* at 85.

¹²⁸ *Id.*

¹²⁹ Fisek and Ofshe found that half of groups comprised of students undifferentiated in status characteristics such as sex, race, and age formed a stable status order within the first minute of interaction. M. Fisek & R. Ofshe, *The Process of Status Evolution*, SOCIOLOGY 33: 327-46 (1970). In addition, Rosa and Mazur were able to predict students' rankings in similar groups moderately well by observing eye contact behavior during the first 15 seconds of interaction. E. Rosa & A. Mazur, Incipient Status in Small Groups, SOC. FORCES 58: 18-37 (1979).

¹³⁰ See H. Moore & A. Gilliland, *The Measurement of Aggressiveness*, J. OF EXPERIMENTAL SOC. PSYCH. 7: 623-26 (1921); S. Thayer, *The Effect of Interpersonal Looking Duration in Dominance Judgments*, J. OF SOC. PSYCH. 79: 285-86 (1969); R. Exline, S. Ellyson, & B. Long, *Visual Behavior as an Aspect of Power Role Relationships*, in NONVERBAL COMMUNICATION OF AGGRESSION (P. Pliner, L. Krames & T. Alloway eds., 1975); P. Ellsworth, *Direct Gaze as a Social Stimulus: The Example of Aggression*, in NONVERBAL COMMUNICATION OF AGGRESSION (P. Pliner, L. Krames & T. Alloway eds., 1975); P. Ellsworth & E. J. Langer, *Staring and Approach: An interpretation of the Stare as a Nonspecific Activator*, J. OF PERSONALITY AND SOC. PSYCH. 33: 117-22 (1976); E. Liebow, *Talley's Corner* (1967); D. Fromme & D. Beam, *Dominance and Sex Differences in Non-verbal Responses to Differential Eye Contact*, J. OF RES. IN PERSONALITY 8: 76-87 (1974).

¹³¹ Mazur et al., *supra* note 123, at 63.

¹³² *Id.* at 64.

taking a dominant role in subsequent conversation and decision making tasks.¹³³ In a communicative purposes related to assertions of dominance, gazes can also communicate threat or challenge.¹³⁴

The positioning effect of a gaze can also result from an active “staring down” which puts the subject “in her place,” or may result from deviant behavior that violates norms of interaction and thus provides discomfort in the subject. For instance, “staring on the part of strangers constitutes a bizarre piece of rule-breaking, whose meaning is unclear, from which the person stared at might well want to escape.”¹³⁵ The interpretation of a gaze, like the meaning of other nonverbal signals, is heavily dependent on its social context, how actors define the situation.¹³⁶ An execution setting is not the same type of interaction as a friendly chat between friends; the condemned’s past behavior has in some way opposed him to those who witness his execution either because they were somehow harmed by him (survivors or family members of victims) or because they are there to commemorate the consequences of his transgression (media and government witnesses). This explains why McVeigh’s gaze was interpreted as confrontational or defiant, particularly when interpreted in light of his silence at the warden’s request for “last words.” Such a confrontational gaze connotes animosity and dominance and implies emotion and power roles: “looks can express aggression and hostility, and can also evoke it.”¹³⁷

Witness responses suggest that McVeigh’s gaze could have been perceived as one of two particularly aggressive gazing behaviors, a “stare down” or a “hate stare.” A stare down is a “dominance encounter” in which one party decides to hold another’s gaze so that it becomes a staring contest in which each interactant attempt to outstress the other that ends only when one party looks away.¹³⁸ Participant 8 wanted to stare down McVeigh when 8 attended his trial in Denver: “I just stared at him I said I’m gonna stare at you until you look me in the eye and he did. And I said I’m not going to, you’re going to look away before I do.” An especially antagonistic gaze that Goffman termed the “hate stare” is a deliberate breach of the nonstaring accord between strangers that Goffman terms “civil inattention.”¹³⁹ The hate stare is “insulting partly because it implies the person stared at doesn’t really count as a person at all.”¹⁴⁰ This perspective prioritizes the “deliberate breaking of the social norm.”¹⁴¹ Both of the consequences of the hate stare parallel likely consequences of McVeigh’s gaze: objectifying the targets of the gaze, and its deviance from social norms. Such a gaze implies that the gazer is dominant and has the right to stare at and impose upon the target of his gaze. In studies of dominance, increased looking by a person makes him or her appear more dominant to others.

3. Witnesses’ Perception of a Communicative Gaze

The execution did indeed have communicative dimensions for most witnesses, so much so that one journalist was prompted to refer to McVeigh’s gaze as “a look they will long

¹³³ *Id.* at 70.

¹³⁴ B.J. Smith, F. Sanford, & M. Goldman, *Norm violations, Sex, and the ‘Blank Stare*, J. OF SOC. PSYCH., 103, 49-55 (1977).

¹³⁵ ARGYLE, *supra* note 122, at 93.

¹³⁶ See Mazur et al., *supra* note 123.

¹³⁷ ARGYLE, *supra* note 122, at 74.

¹³⁸ Mazur et al., *supra* note 123, at 52.

¹³⁹ ARGYLE, *supra* note 122, at 74.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 75.

remember, the long hard stare into the camera,” that was comprised of a “blankness” and an “unblinking gaze.”¹⁴² Closed circuit witnesses most certainly perceived that McVeigh was attempting to send a message. Witnesses described McVeigh’s expression as either confrontational (“staring” into the camera), or “stern” or “defiant” (“I’ve seen it a lot in my grandchildren. You know that kind of defiance of ah, you can whip me if you want to but it’s not hurting.”) or as overtly malicious, terming it a “go to hell” or “eat shit and die” expression, one that “just spit on us all some more,” and an “evil” expression.¹⁴³ For Participant 22, McVeigh’s expression was so defiant that a relaxation in his facial posture was the preeminent physical sign of his death; 22 could sense that he had passed “because the facial expression changed” where “he was so defiant until the end.” Witnesses also stated that McVeigh’s face registered pride or arrogance, describing it as “triumphant,” a “fuck you all, I won” look, one that said “I did the right thing and I’m not sorry” or “I’m willing to die for my idea.” Ironically, witnesses further described McVeigh’s expression as registering absence, explaining that it was blank (“nothing”), unremorseful (“no remorse”), uncaring (“didn’t give a flip,” “didn’t care”) and free of suffering (“you’re not hurting me”, “no sign of discomfort,” “showed no pain”).

Interpreting McVeigh’s gaze as communicative certainly had interpersonal consequences from survivors, from angering them to disappointing them to hurting them further or, in a more positive direction, enabling forgiveness. Participant 25 stated in a media interview following the execution that “What I was hoping for, and I’m sure most of us were, we could see some kind of, maybe, ‘I’m sorry,’” he said. “You know, something like that. We didn’t get anything from his face.”¹⁴⁴ Similarly Participant 15 stated, “he died like he didn’t care and I cried because of that, because he did not care.” Participant 5 stated in a media interview following the execution that “He got the final word . . . I thought I would feel something more satisfying.”¹⁴⁵ This perception was echoed by Jay Sawyer, a nonparticipant closed-circuit witness whose mother was murdered in the bombing, who stated in a media interview, “[w]ithout saying anything he got the final word, absolutely. His teeth were clenched, just like when he was first arrested. His teeth were clenched, his lips were pursed and just a blank stare. It was the same today.”¹⁴⁶ But according to Participant 21, confronting McVeigh face to face is what enabled 21 to have an intensely spiritual experience in which 21 forgave McVeigh.¹⁴⁷

It is immediately apparent that perceptions of McVeigh as defiant are confined to remote witnesses who saw McVeigh’s face throughout the execution procedure. Surprisingly, live

¹⁴² Horne, *supra* note 117.

¹⁴³ The impression of “evil” was also echoed by closed-circuit witness Gloria Buck, who stated in a media interview that “It was almost like the devil was inside him, looking at us.” *Id.*

¹⁴⁴ “McVeigh Shows No Remorse,” *supra* note 94.

¹⁴⁵ Bryant, *supra* note 68.

¹⁴⁶ *Id.*

¹⁴⁷ Participant 21 stated,

I am still not looking at him and he kind of raised up and I think was glaring into the camera, and all of sudden it’s like, you know because I have this faith....when I was there viewing him and watching him, it was like, all of sudden he came to me,....I started to thinking of him as Timothy McVeigh, the soul and not Timothy McVeigh, the man and I started praying for him that this is his last chance, this is his last breath and I prayed for him and it just like overtook me. . . . Um, I was able to let it go, I guess to me that was the true forgiveness, not to oh yeah Timothy you could be my best buddy type forgiveness. So it’s forgiveness in different stages To me this was a true forgiveness letting it go.

witnesses who viewed the execution in Terre Haute did not sense either that McVeigh was attempting to communicate with witnesses or what he was attempting to communicate. Participant 25 stated that McVeigh “glared” into the victim witness room, “trying to figure out who was who, who was in there and where we were standing at,” but 25 did not interpret anything significant in McVeigh’s expression other than confusion. In a media interview immediately following the execution, Participant 25 had stated, “we didn’t get anything from his face. His facial expressions were just about as calm as they could be.”¹⁴⁸ Participant 29 also recalled McVeigh’s prolonged gaze into the victim witness window, but other than characterizing that look as being akin to a “glare,” 29 does not know whether McVeigh was “trying to give us [live witnesses] something.” Live witnesses may have wished for more communicative interaction; survivor Anthony Scott, another live execution witness, stated in a media interview immediately following the execution that “I wish that there might have been eye to eye contact, but he couldn’t see us.”¹⁴⁹ Participant 25’s disappointment was also evident, “I was hoping to look at this man, but it didn’t work guys. So we went with what we felt like going in.”¹⁵⁰ This communicative ambiguity may have made it difficult for live witnesses to categorize McVeigh’s emotional state at the moment of his execution. As Participant 25 stated in a media interview, “I mean he’s not a monster, guys. I mean not when you’re looking at him in the face. I mean he’s just a regular human being. But, you know, there’s no facial expressions on him whatsoever so there was no way of knowing just exactly what he is and how he is.”

Still other closed circuit witnesses revealed in media interviews or statements that McVeigh exhibited signs of fear. Survivor Calvin Moser stated “To me, he had the look of, ‘I’m not in control of this. As much as I’ve criticized the government, the government has me.’”¹⁵¹ Oneta Johnson, a family member, stated that “He looked up and stared at us, but I saw his jaw quiver.”¹⁵²

Witnesses, whether live or closed circuit, wanted to respond communicatively in turn to McVeigh’s gaze.¹⁵³ Significantly, the one closed circuit witness who stated that it was not meaningful that McVeigh could not actually see other witnesses believed that only “someone who has a lot of vengeance would want that.” Strikingly, two of the live witnesses brought in small photographs of their murdered loved ones and held the photographs up against the glass during the execution. Participant 29 brought a photograph of 29’s murdered sibling. While entering the witnessing room in Terra Haute, Participant 29 was in the front row, and placed it up to the glass; Participant 29 described how another witness did the same thing with a photograph

¹⁴⁸ Transcript, CNN Live Event, *Family Members Witness [sic] to McVeigh Execution Recount Their Experience*, June 11, 2001, available at <http://transcripts.cnn.com/TRANSCRIPTS/0106/11/se.08.html>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Horne, *supra* note 117.

http://www2.indystar.com/library/factfiles/crime/national/1995/oklahoma_city_bombing/stories/2001_0612b.html.

¹⁵² *Id.*

¹⁵³ Participant 7 noted, “[I wish McVeigh could have seen me] Just so that he could see that I’m not a monster. That we are not monsters, we’re just people too. You know and all we did was go to work that day. That’s it.” Participant 28 stated, “I would like for him to look at my face and know the pain that I knew he’s caused. And to see, you know, to see my daughter and to know that you know, you killed my daughter and her baby. You killed them.” Finally, Participant 25 remarked, “I wanted to see him when he was in the chair, like that, and I wanted him to see me. Because I wanted him to know that no matter what he did or didn’t do, we were going to survive this thing and we would be better afterwards.”

of a murdered child.¹⁵⁴ When asked whether it was “almost like not only were you witnessing but it was also like your brother was also witnessing,” Participant 29 replied “Yeah, that’s why I did it. Symbolically I felt that way, yeah.”

C. Dimensions of Silence

Silence has a multitude of meanings. It may be “a sign of someone’s power or control over others, or it may be a sign of a person’s weakness and submission,” it may be “a state in which one gains knowledge, or it may be a state of idle ignorance or unlearning.”¹⁵⁵ “Affection, reverence, attention, hesitation, and other states and emotions are ordinarily and naturally communicated through silence.”¹⁵⁶ Jaworski states that silence is a “highly ambiguous” form of communication as “it does not manifest any particular assumptions in a strong way” and so “is more open for the audience to speculate about which assumption(s) the communicator had in mind to make manifest or more manifest in his or her use of silence.”¹⁵⁷ Therefore, we must reject a simplistic view of silence as merely a counter to speech, an absence defined as such because it is bereft of verbal presence. Under such an impoverished perspective, “humans are metaphorically conceptualized as machines, and the constant ‘humming’ of the machine is regarded as a sign of its proper functioning,” but when the humming ceases and silence reigns, “the (human) machine is perceived as if it no longer work[s] well.”¹⁵⁸ Under this perspective, wording equates to working. However, silence does “retain the illocutionary force of speech . . . it is fully capable of actualizing the common speech acts of apologizing, refusing, complaining, questioning, etc.,” and “it is through this potential that silence can have positive or negative social consequences: cohesive or devisive . . . informative and revelational.”¹⁵⁹ Jaworski posits instead a conceptualization of silence that does not treat it as a “negative phenomenon with respect to speech” but locates both silence and speech “on a communicative continuum of forms . . . from most to least verbal.”¹⁶⁰

We are interested here in the communicative dimensions of silence. Therefore, it is a clear prerequisite that, for silence to be communicative, it must be somehow communicatively significant, invested with meaning. Jaworski posits that one person only interprets another’s silence when there is an interactional expectation, when “the communication process is expected or perceived to be taking place,” when one person intends to communicate something to

¹⁵⁴ Participant 29 recalled that she and another execution witness pressed pictures of their lost relatives up against the glass:

“I got in the front row and [witness] and I had both had a picture. Because both our guys were [same name]....She had her [name]’s picture and we put them right up to the window. Not that he could see it. It was more symbolic and we had to do it very discreetly because we had guards behind us. But yeah, stuck a picture up there so [sibling’s name] could watch it happen.”

¹⁵⁵ ADAM JAWORSKI, *THE POWER OF SILENCE: SOCIAL AND PRAGMATIC PERSPECTIVES* 69 (London: Sage Publications 1993).

¹⁵⁶ *Id.* at 38.

¹⁵⁷ *Id.* at 85.

¹⁵⁸ *Id.* at 46 (quoting R. Scollon, *The Machine Stops: Silence in the Metaphor of Malfunction*, in *PERSPECTIVES ON SILENCE* (D. Tannen & M. Saville-Troike eds., 1985)).

¹⁵⁹ Włodzimierz Sobkowiak, *Silence and Markedness Theory* 46, in *SILENCE: INTERDISCIPLINARY PERSPECTIVES* (Adam Jaworski ed., 1997).

¹⁶⁰ JAWORSKI, *supra* note 155, at 46.

another.¹⁶¹ He then exemplifies “noncommunicative” silence by a hypothetical situation where two strangers pass on the street without intending to interact with one another; the lack of intent to communicate means that the silence is not socially meaningful. This seems a strange notion, for as researchers, we would contest that this silence does have communicative meaning regardless of the intentions of these two strangers. In Jaworski’s eyes, then, meaningfulness is constructed from the perspective of the interaction participant and not an external observer. This conception of communicative silence thus presupposes communicative engagement or the expectation for such engagement.

When silence is meaningful, then, it may assume social functions. According to Jensen (1973), there are five functions of silence: a linkage function, where “silence may bond two (or more) people or it may separate them”; an affecting function, where “silence may heal (over time) or wound”; a revelation function, where “silence may make something known to a person . . . or it may hide information from others”; a judgmental function, where “silence may signal assent and favor or it may signal dissent and disfavor”; and an activating function, where “silence may signal deep thoughtfulness . . . or it may signal mental inactivity.”¹⁶²

Within the interactional context of the McVeigh execution, there are three primary contexts of silence: that of the witnesses, that of McVeigh himself, and execution as a means of imposing silence upon McVeigh.

1. Witnesses’ Own Silence

At the FAA Center in Oklahoma City, the remote site to which McVeigh’s execution was broadcast via closed circuit television, what talking there was took place before the execution began. Three of the five remote witnesses spoke of the execution as something of a reunion or social gathering, a description aided by the fact that juice, coffee and fruit were provided in the kitchen in the back part of the viewing room.¹⁶³

The social dimensions of collectively witnessing the execution were especially apparent for live witnesses, some of whom traveled to Terra Haute together, and all of whom had dinner together the evening before the execution and breakfast the morning of the execution. 29 knew many of the other live witnesses: “when I got there, this was the first time I had met [witness] and [witness]’s a little bit of a character and of course [witness] was there and I knew, I knew a couple of others which was given- you only have 10 people, that I knew about half of us was really weird. So we had a nice sense of camaraderie right off the bat.” 29 and other witnesses shared a similar attitude toward many aspects of the proceedings, including viewing in a humorous light the many preachers and mental health professionals present at a dinner with the

¹⁶¹ *Id.* at 34.

¹⁶² *Id.* at 67.

¹⁶³ Participant 7 recalled, “it was almost like just a little social gathering before a meeting.” Participant 15 stated, “you got to see people you hadn’t seen because I quit going to survivor’s meetings and....there weren’t any meetings to plan the memorial and so it’s really sad that something like that you had to see those people again because it was the execution but it was nice seeing them again.” Finally, Participant 21 noted,

it had been a long while since a lot of us had been together and we all were there for one purpose. We were all there...we were able to talk and laugh and share things that have gone on with our families because I mean we’re like a whole community....it was like...even with the memorial, the anniversary, it’s almost like a, a family reunion.

warden the evening before the execution: “you know we were all like- we were in a pretty good mood given you know what- maybe we hadn’t thought about what we’re getting ready to do, the gravity of it but anyway it’s just- we were... I think the people I was close to there kind of felt the same way....Anyway, we made a joke of it.” According to 29, the “good mood” of witnesses persisted through the execution itself: “I think there was one person and this was not even until we were in the room that one person seemed you know to be very solemn about it. . . . you know we were just kind of I don’t want to say joking and certainly not laughing but it was not a somber experience in that room.”

Closed circuit witnesses describe the atmosphere in the witness room in Oklahoma City as being very different than the atmosphere in Terre Haute. Despite the interactions between witnesses, an air of nervous anticipation was palpable. Participant 5’s spouse stated that closed circuit witnesses were “milling around” “really restless” and “on edge” before the execution began because “their anticipation was kinda getting to them.” Participant 21 stated that different witnesses awaited the execution in differing frames of mind: “The mood in there. There were some that were just, somber like me just, you know, there were some that were like, I remember one, one woman go, ‘This is a great day for an execution.’ I mean, you know, you had every feeling in there.” Participant 22 stated that “Everybody was nervous. I think. I mean it appeared to me that everybody I talked to was pretty nervous. One girl just passed out. She just, she just was too overwhelmed. She stayed though. She got better.” Participant 28 described there being “all kind of nervous talk, kind of chitchatting.”

During the remote broadcast of the execution itself, witnesses were silent; Participants 7 and 15 states that they were “very quiet,” and 7 stated that there was no audible crying. Participant 5’s spouse was allowed to describe to 5 what was going on during the closed circuit execution even though “everybody else was cautioned to be quiet, be orderly . . . they didn’t want any outbursts or no, ah, they didn’t want any kind of clapping or yelling or loud crying or anything like that,” and so 5’s spouse described “real low.” Participant 21 stated that things were “Very quiet, I was amazed, when he actually died. It was silent. . . . I really expected some people to, to have an outburst, you know, clap or something. It was very silent.” In Terre Haute, however, according to Participant 25, there was some talking in the execution chamber as some of the female witnesses who had brought photographs made comments: “Probably the women made comments about this is my husband or this is my brother or what. . . . With photographs.” Participant 29 also stated that one of the witnesses was speaking during the execution: “I mean [witness] was ‘hey you son of a bitch over here, look at this picture.’ You know yelling at him.”

After the execution, 7 stated that there was an attitude of “okay it’s done, let’s move on.” This is precisely how live witnesses described the execution; as Participant 25 stated, “when it was over with, you know, they said, ‘It’s over, it’s done.’” In Oklahoma City, there was an air of quiet afterwards according to Participant 28: “everyone kind of just got up, made their way out, went and got in the cars.”

If we accept Jaworski’s proposition that silence and speech are a two ends of a communicative spectrum, it is easy to understand that, like speech, silence can be “situation specific,” depending on “the practical conventions of the event itself.”¹⁶⁴ Such events may actually be interactions structured through silence.¹⁶⁵ It thus appears that the closed circuit viewing of McVeigh’s execution was structured for witnesses through silence, while the live

¹⁶⁴ JAWORSKI, *supra* note 155, at 22.

¹⁶⁵ Jaworski posits that meditation and walking are two such activities. *Id.* at 19.

viewing was either structured to a much lesser degree through silence or, more likely, was not structured at all through silence.

These statements causes us to question the nature of the “silence” that characterized the remote and live witnessing experiences. It is abundantly clear that, in the live witness room, there was no felt need for reverent silence, as is observed at funerals.¹⁶⁶ In such somber ceremonies, silence mediates status transitions; through “the reduction of the amount of ceremonial talk—reserved to very few high-ranking participants—the community’s silence manifests its unity with the absolute.”¹⁶⁷ Instead, feelings of relief were celebrated through noise.

In view of the rather obvious somber silence one would expect would characterize execution witnessing, it initially seems surprising that live witnesses report that there was less silence in the witnessing room at Terra Haute than closed circuit witnesses report in the remote witnessing room in Oklahoma City. After all, one might think that the strictures in the prison environment would impose silence upon the act of witnessing in Terra Haute. This would suggest that the farther one gets from the event, the looser the controls over speech and silence during the act of witnessing become. Clearly, participants’ remarks support the opposite of this observation. An explanation may be found, however, by switching the focus from how far removed witnesses are from the witnessed event to whether the target of witness’ communicative actions is within communicative range. Thus, it is more likely that the converse is true: that closed circuit witnesses in Oklahoma City had little reason to break silence because McVeigh, the target of any communicative efforts they would have made, was literally remote, appearing through a mediated image. It was the live witnesses standing in a room removed from McVeigh by only one wall who stood in communicative proximity to McVeigh. This change in focus was provoked by a conversation I had with a colleague concerning the college graduation of his daughter.¹⁶⁸

2. Witness Perceptions of McVeigh’s Silence

¹⁶⁶ Włodzimierz Sobkowiak, *Silence and Markedness Theory* 48, in *SILENCE: INTERDISCIPLINARY PERSPECTIVES* (Adam Jaworski ed., 1997).

¹⁶⁷ JAWORSKI, *supra* note 155, at 24 (quoting W. Enninger, *What Interactants Do With Non-Talk Across Cultures* 292, in *ANALYZING INTERCULTURAL COMMUNICATION* 292 (K. Knapp, W. Enninger, & A. Knapp-Potthoff eds., 1987). In instances of ceremonial spectacle, silence ensures that listening ears do not overtax listening eyes with respect to the visual focus of the event: the body to be buried, the life lost, the couple being joined, the infant being dedicated. Silence also contextualizes these events, infusing them with a peaceful, proprietary, respectful, reflective, and solemn character. Indeed, we speak of such rituals being “solemnized.” Silence may mark or facilitate moments of transcendence; “it is in silence that [church] members experience ‘the presence of God’ and are able to ‘listen’ to what it is that God wishes to communicate to them.” Bohdan Szuchewycz, *Silence in Ritual Communication* 241, in *SILENCE: INTERDISCIPLINARY PERSPECTIVES* (Adam Jaworski ed., 1997).

¹⁶⁸ I am indebted to Bill Bowers for providing this insight. Graduation day temperatures soared to 90 degrees, and there was limited shade for attendees, prompting college officials to open a remote witnessing location featuring a big screen in the campus chapel. Attendees in the chapel, including my colleague, could see everything of note—individual graduates receiving degrees, the enthusiastic cheering of the live spectators. However, when the loved ones of remote witnesses received their degrees, remote witnesses did not cheer or clap; what my colleague referred to as a “sheepish few” clapped, but did so half-heartedly and stopped their clapping very soon. There seemed to be little purpose in either communicating in the absence of the communicative participant, particularly in view of the code of silent witnessing that was imposed, producing the differences in communicative activity in the closed circuit location in Oklahoma City and the witness room in Terra Haute.

Witnesses elect to view executions for many reasons, prominent among them being the longing for some sign of repentance or suffering from the condemned—an apology, an acknowledgment of the pain and suffering endured by those reclaiming their lives after a capital crime. Thus, witnesses subject the condemned’s behavior to intense scrutiny—searching for a communicational opening, some sign of interactional engagement. McVeigh did not make any statement, remorseful or otherwise, at the warden’s request for last words. However, copies of his final written statement, a copy of the poem “Invictus” by William Ernest Henley, was distributed at least to media officials, since media sources reported receiving copies of the statement whereas no witnesses recall having received one.

After the execution, McVeigh’s appellate attorney Robert Nigh, who had visited with the McVeigh prior to the execution, addressed the media to explain why his client had not made a final statement, stating “To the victims of Oklahoma City, I say that I am sorry, that I could not successfully help Tim to express words of reconciliation that he did not perceive to be dishonest.”¹⁶⁹ Thus, Nigh connected McVeigh’s silence to an unbending insistence that his actions were justified.

Whereas some execution witnesses wanted McVeigh to say something instead of remaining silent, other witnesses were fearful that McVeigh would use the opportunity to hurt survivors and family members further. Participant 5 just wanted McVeigh to say something instead of remaining silent: “I’d liked for him to say something. . . . I don’t know. I just liked for him to say something.” Witnesses’ hope for a remorseful statement was dimmed by the perception that it wasn’t in his nature to apologize, perhaps because McVeigh had never seemed to regret the bombing. Thus, witnesses wanted an apology yet either did not expect one or would not have believed McVeigh if he had apologized. Participant 5 was not surprised when McVeigh did not make a remorseful statement, and stated that “I think it’d have been important if he’d apologized, but I don’t, I don’t think he’d meant it if he did apologize. . . . And he didn’t mean it even if he you know, no, no apology was really in that man as far as I could tell.” 5’s spouse who narrated the execution for 5 would have been surprised if an apology had been forthcoming: “It didn’t surprise me that he was silent. I really, it would have surprised me if he would have just said anything.” Participant 22 acknowledged a “ridiculous” hope for an apology.¹⁷⁰

Participant 7 is the only execution witness who was angered by McVeigh’s silence, particularly given his prior commitment to his “movement,” but also was not surprised that McVeigh chose to remain silent in view of his military training, acknowledging that McVeigh’s behaviors were constructed by past life experiences.¹⁷¹

¹⁶⁹ “McVeigh Shows No Remorse,” *supra* note 94.

¹⁷⁰ 22 stated,

I think also many of us who attended the execution were, you just can’t help but have this hope even though you know its ridiculous and that’s not going to happen you still have that hope you’ll say something that is remotely remorseful. And, uh, you know, it didn’t happen. He was very very defiant until the last instant.

¹⁷¹ As Participant 7 explained,

Well, it ticked me off. . . . I thought if you’re so um, behind your movement, whatever his movement was, then why don’t you speak about it to the end? You know, if you truly believe what you did was the right thing to do, why don’t you talk about it to the very end? . . . I think it just goes back to military training. You just keep your mouth shut and say nothing unless asked and even then maybe say nothing.

Two live witnesses, Participants 25 and 29, did not care whether or not McVeigh apologized. Though 25 wanted McVeigh to finally reveal “what had happened and why he did it,” 25 states that an apology was unimportant because McVeigh would not have meant it and because remorse was unexpected: “I feel like in my own mind that if this man apologized I think it would have been phony. And so I didn’t really expect him to say anything like it.” 29 states similarly that an apology was unexpected: “I knew he would never would so I never really thought about it. I- I- given his personality it was not even- that’s not even an option.”

Two execution witnesses were relieved that McVeigh was silent, in view of other, more harmful communicative choices he could have made. Participant 21 did not only expect an apology, but expected McVeigh to make a statement with the intent to cause further harm.¹⁷² Participant 28 would have appreciated an explanation of “why” McVeigh carried out the bombing, or a statement of remorse, but preferred McVeigh’s silence to a hurtful statement.¹⁷³ 28 also was concerned that McVeigh would gasp for breath as 28’s father had done at his own death, and felt peace because McVeigh’s death was more peaceful.¹⁷⁴

In communicative interactions, the refusal to speak can be troubling and potentially toxic; “one’s failure to say something that is expected in a given moment by the other party can be interpreted as a sign of hostility or dumbness.”¹⁷⁵ In hostile situations colored by anger and violence, where silence is usually thought to be the antithesis of noisy rage, silence can be a weapon, and “silent treatment of the opponent may be even more powerful than uttering the harshest of words and drives many people crazy.”¹⁷⁶ Hence the power of the adage “turn the other cheek.” How much more painful can silence as a weapon be when there is no future opportunity for the one who wields it to reestablish communication and contact? When delivered in response to an offer or invitation, “silence is the extreme manifestation of indirectness” and, consequently, a strong form of disengagement, if not disregard.¹⁷⁷ It is also a

¹⁷² Participant 21 stated,

I felt going in there that he was going to say something that would anger everybody. I didn’t expect him to confess or ask for forgiveness. I was more concerned that he was going to say something that had angered everybody. He had that book that was written and it was seem like every time he turned around, he was doing some thing to jab at us and it was just very painful because he could sit there behind those bars and get us three squares a day and everything and not have all these worries and, and he kept jabbing at us in his own little way and we didn’t get that with Nichols.

¹⁷³ Participant 28 remarked, “I didn’t want him to say anything except why he did it or that he was sorry that he did it. I would have liked for him to have said something like that. But if he was going to be ugly...I did not want it. More than anything, I probably just wanted him to be quiet.”

¹⁷⁴ Participant 28 recalled,

My dad struggled for every breath. It was horrible, it was horrible to hear him. And I was afraid. That was the one thing I was afraid of, because my Dad was the only person I’d ever seen die. And so I was afraid that I was going to hear the same sounds. So maybe that gave me a little peace, because he just went to sleep and I didn’t hear all that.

¹⁷⁵ JAWORSKI, *supra* note 155, at 25.

¹⁷⁶ *Id.* at 49.

¹⁷⁷ *Id.* at 52 (quoting Deborah Tannen, *Silence: Anything But 97*, in *PERSPECTIVES ON SILENCE* (D. Tannen & M. Saville-Troike eds., pp. 21-30, Norwood, NJ: Ablex 1985).

“highly face-threatening act.”¹⁷⁸ Here, silence embodies rejection—of the offer, and potentially of the offeror as well.

When this request to speak/refusal to speak pattern plays out in the context of an execution, the condemned only has a very limited attempt to respond, and to refuse this invitation to give “last words” is to remain silent forever, barring a last minute reprieve. The scripted regimentation of an execution protocol provides an opportunity for the warden to invite the “condemned” to utter any last words.¹⁷⁹ This very request/refusal pattern played itself out in the McVeigh execution. Thus, one of the obvious manifestations of a condemned body’s taboo status is that the condemned becomes silenced through the order-bearing protocol of the execution, speaking only when he is bidden, just as other taboo bodies do when subject to the strictures of other ceremonies, in giving vows, taking oaths, and delivering eulogies.¹⁸⁰

In the point-counterpoint pattern of offer and refusal, McVeigh’s silence was in effect his response; his reaction to the warden’s request for “last words” immediately before the process of lethal injection began. McVeigh’s particular responsive intent in remaining silent is largely irrelevant simply because numerous witnesses found his silence to be so meaningful. Eighteen participants desired some statement from McVeigh relating to his motivations, the “truth” behind the bombing, remorse, divine reconciliation, or admission of guilt; however, most of these participants commented that they did not expect McVeigh to be so forthcoming. Yet, witnesses still interpreted McVeigh’s silence as pregnant with defiant meaning.

McVeigh’s execution, as a ceremony involving change in status, posed a threat that had to be mediated through protocol and formulaics. But McVeigh’s silence itself posed an additional threat since he did not oblige witnesses with a verbal response. Additional insight can be gained into the communicative, threatening nature of McVeigh’s silence by applying the principles of Brown & Levinson’s Politeness Theory. Brown and Levinson follow Goffman’s conception of “face,” defined as “the public self-image that every person wants to claim.”¹⁸¹ Face is both “positive” and “negative,” where positive face refers to “the desire to be liked, appreciated and approved of by selected others,” and negative face “expresses the desire to be free from imposition.”¹⁸² In every interaction, “it is in the mutual interest of both participants in an interaction to attend to each other’s face.”¹⁸³ According to Brown and Levinson, almost all “verbal activities”—which as the previous discussion shows would include silence—“entail a threat to either the positive or negative aspect of face of the addressee and/or the speaker, and are thus face-threatening acts (FTAs).”¹⁸⁴ The extent of the threat is not intrinsic to the verbal act but is dependent upon “the social distance between the interactants, the relative power differential between them, and the intrinsic weight of the imposition entailed by the particular act.”¹⁸⁵ A speaker will determine which verbal act to make depending on this social calculus of threat.

Brown and Levinson propose five major “strategies” or choices for managing FTAs:

¹⁷⁸ *Id.* (quoting P. BROWN & S. LEVINSON, *POLITENESS: SOME UNIVERSALS IN LANGUAGE USAGE* (Cambridge, UK: Cambridge UP 1987) (1978).

¹⁷⁹ 2001 Bureau of Prisons Execution Protocol, <http://www.thesmokinggun.com/archive/bopprotocol24.html>

¹⁸⁰ JAWORSKI, *supra* note 155, at 198.

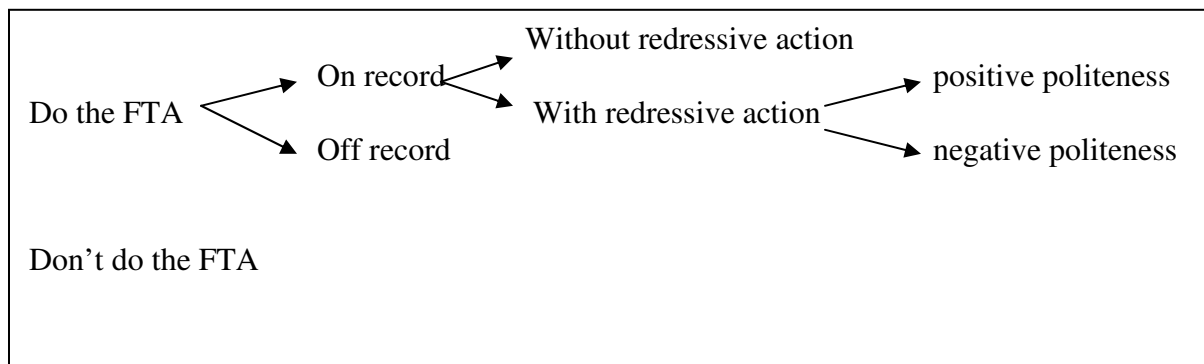
¹⁸¹ M. Sifianou, *Silence and Politeness* 66, in *SILENCE: INTERDISCIPLINARY PERSPECTIVES* (Adam Jaworski ed., 1997) (citing ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 62 (New York: Anchor Books).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*



Speakers proceed through a communicative “calculus” when determining what interactive route to take.¹⁸⁶

Witness responses suggest that McVeigh’s decision to remain silent in response to the request for “last words” was interpreted as an FTA within the calculus of Politeness Theory—preserving his own face by not apologizing or otherwise undercutting his anti-government creed, a decision that also did not save witnesses’ face. McVeigh at times was even credited with a desire to threaten witnesses’ face further. In essence, he was either perceived to be not concerned with politeness, or thought to be deliberately impolite. Witnesses ascribed McVeigh’s choice to a conscious decision, crediting him with the choice to perform the FTA. Thus, McVeigh’s silence was perceived as a strategic verbal act—demonstrating that silence and speech are part of the same communicative continuum, and silence is then a species of linguistic act. The strategic nature of silence explains the presence of its social consequences. As Sifianou states, in encounters where the participants have unequal status, “the superior’s status may indicate domination, whereas the inferior’s silence may indicate subordination.”¹⁸⁷ It is the interaction of silence and volubility which determines the reading of the behavior.¹⁸⁸ Even when witnesses do not read McVeigh’s silence in conjunction with his handwritten final statement, they perceive that McVeigh’s strategy did not involve negative politeness—an unwillingness to burden witnesses by introducing an interactive potential into the event. Such silence was not

¹⁸⁶ This calculus can be described as follows:

The first decision a speaker has to make is whether to perform the act or remain silent. He or she has to weigh two conflicting desires very carefully: the desire to avoid or minimize the loss of face against the desire to communicate the face-threatening act and achieve his or her goal. When the risk of loss of face is judged as extremely high, most speakers will seek to avoid the threat If the speaker decides to perform the face-threatening act, there are various ways of doing so. The speaker may decide to perform the act baldly on record, without redressive action. . . . Redressive action means action which counterbalances the potential face threat; it is achieved by using additional linguistic elements and/or structural elaboration Such direct utterances . . . are normally considered to be least polite since they pay no attention to face considerations The last major alternative is for a speaker to go off record, i.e. to use a vague, ambiguous or indirect utterance.

Id. at 66-67.

¹⁸⁷ *Id.* at 68.

¹⁸⁸ *Id.*

perceived as having a rapport benefit, implicating “shared mutual knowledge” and “solidarity and common ground,” but a dividing quality, emphasizing unequal or imperfect knowledge and a disparate perspective.¹⁸⁹

Having examined more precisely the threatening dynamics of McVeigh’s silence, we can thus return to the silencing of the condemned’s taboo body. The notion that a body is silenced implies that there is an authoritative agent which silences—an entity that can be responded to. Therefore, McVeigh’s silence, connected to his anti-government creed, was perceived by witnesses as both a linguistic response and an ideological response—if indeed the two can be separated—or perhaps more appropriately, a linguistic response dictating a social and ideological orientation. This perception sheds additional light on why witnesses were not surprised by McVeigh’s silence. In analyzing the silenced status of other organizational bodies such as dominated sociopolitical groups and political opponents whose position is potentially or actually threatened, that group often chooses not to engage in genuine dialogue with the superordinate structure, instead questioning that structure’s authority by not responding, remaining silent. Thus, witnesses may have thought that McVeigh utilized this strategy in responding to the “last words” request through silence. Alternatively, an oppressed group may respond by speaking on its own terms or in its own context, breaking its silence by “choosing media of communication that are not controlled by the power group.”¹⁹⁰ Witnesses were also aware that McVeigh pursued these strategies as well, pursuing a response in other contexts free of state protocols. First, McVeigh collaborated in the publication of *American Terrorist: Timothy McVeigh & the Oklahoma City Bombing*,¹⁹¹ an account in which McVeigh classified the bombing as an act of war, angering untold numbers of family members and survivors who took issue with his casual “collateral damage” treatment of victims, particularly children, killed in the Oklahoma City Bombing. McVeigh also did an interview on “60 Minutes” which further angered survivors and family members. A possible third context of which many witnesses do not appear to be aware is his final statement distributed to media witnesses after his death.

3. McVeigh’s Death as Imposing Silence

A third dimension of silence in Timothy McVeigh’s execution was the fact that McVeigh himself was now permanently silenced, an absence instead of a communicative presence. A living Timothy McVeigh—both in the sense of McVeigh himself as a communicative presence, and the construction of McVeigh by continued media coverage—served simultaneously as a potential to “jab” victims (as Participant 21 described it), as a reminder of the bombing, and as a reminder of injustice, as those who he had murdered were no longer alive to speak. In addition, there was a fear that McVeigh could somehow influence others through media communications, and a weariness of continuously hearing the defendants’ names in the press; as Participant 1, a nonwitness, stated of Nichols: “to think he’s still influencing people every day in the media I am *tired* of seeing his name appear in the Oklahoma newspaper and it still appears in there every few months.” Execution is perceived by ten pro-death penalty participants as the only way to effectively silence an offender; as Participant 24 states, “You know, after someone is executed you are completely finished with every battle you

¹⁸⁹ *Id.* at 72 (citing Brown & Levinson, *supra* note 102, at 111).

¹⁹⁰ JAWORSKI, *supra* note 155, at 131.

¹⁹¹ LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY McVEIGH & THE OKLAHOMA CITY BOMBING* (2003).

have to fight in that arena. No more McVeigh battles to fight. Don't have to worry about what's gonna come out in the newspaper that he said to some reporter somewhere."

Eighteen nonwitnesses and witnesses experienced relief that there was silence following the execution. However, participants characterize this silence very differently depending on whether they were for or against the death penalty. All participants who oppose the death penalty speak of this relief in terms of a cessation of media activity, whereas all participants who are for the death penalty state that it was an end to McVeigh's actual presence—*his* silence, not that of the media—that was the crucial factor. This suggests that participants who supported the death penalty felt that their relationship with McVeigh as para-social enemy was somehow more threatening.

Both nonwitnesses and witnesses who supported the death penalty expressed relief from McVeigh's death. Participant 1, a nonwitness survivor, stated, "when those people are executed and you know they're *gone*, there, there is a change for the people that were victims of that crime. It's gotta be better. It was for me." Most participants who were for the death penalty specifically connected this relief to either McVeigh's ability to no longer speak with the intent to harm others or his ability to incidentally harm others in speaking. In these statements, survivors and family members are positioned as being affected by communications from the offender(s), and are thus accorded a quasi-participant status in these interchanges. Participants also acknowledged that McVeigh was the *subject* and not the *origin* of media coverage was also problematic and hurtful; as Participant 24, a nonwitness survivor, remarked, "[a]nd part of that [the inability to entirely leave behind the emotional entanglement with offenders] without blaming the media, part of that was the media because.... every time you write a story, every time you, you know, question what happened or who was involved and those kind of things, those lesions were always there period." Similarly, 16 was thankful that "I don't hear his name constantly for the rest of my life."

Nonwitnesses who supported the death penalty also experienced relief that McVeigh was silenced. Describing her relief after the execution, Participant 8, a nonwitness whose best friend was killed in the bombing, stated that "It's still death but yeah there was that relief. We don't have to hear his crap anymore. He can't he can't hurt us. He's gone. He got what he deserved. . . . You know he can't write no books any more, he can't grant no interviews" 8 would have felt differently had McVeigh remained alive, with the potential to keep speaking: "I think that would have been harder because he would've, you would've heard things. Every now and then I'm sure he would've wrote something or talked to a reporter or you know it would have been in your face for life." For that reason, 8 only could forgive McVeigh "[w]hen his mouth was shut." Participant 12, a critically-injured survivor and nonwitness, felt a physical relief from McVeigh's silence: "But the interesting thing to me is that uh when, when McVeigh was killed I felt a huge sense of relief....I think physically it was a major uh benefit to me, and uh I think spiritually um he's not making headlines, no one is reading his letters in the newspaper, like the bomber the clinic, abortion clinic bomber." Speaking about a recent statement that Nichols had released from prison, 12 compared Nichols to the infamous murderer Charles Manson, stating "he [Nichols] should be dead, he shouldn't be capable of speaking, and I knew that this was something that could happen because Manson is alive. And he's still impacting people and....and that shouldn't happen, and that can't happen for McVeigh, he's gone." 12 stated that life imprisonment should mean an inability to communicate with others: "to me, life imprisonment would be cruel and unusual punishment, because they should not see another living human being, they should not be able to communicate with another human being." 12 connects an

offender's ability to communicate with the ability to impact victims and survivors: "I don't care what they do, it's what they say, if they can impact, affect have any type of bearing on any other human being, it's wrong. And if they're dead, they can't do that."

Execution witnesses who supported the death penalty also focused on McVeigh as a communicative agent in expressing relief in the aftermath of his execution. Participant 15, a survivor and closed circuit witness, spoke in terms of silencing McVeigh: "I don't have to listen to his mouth ever again, ever....That's what I wanted. You know I wanted someone to silence him because all he did was hurt people still and he got his kicks out of it and there was nothing." For Participant 25, McVeigh's willingness to use the media to continue to inflict harm on family members and survivors was one reason why 25 felt McVeigh needed to be executed, in contrast to Nichols, whose quiet prison presence met that 25 could "live with" his continued existence.¹⁹² Similarly, Participant 28, a family member and closed circuit witness, found the execution meaningful in terms of the silence of McVeigh: "I wanted him to be silenced and I saw him being silenced."¹⁹³ Finally, for Participant 29, a live witness, the execution ended McVeigh's presence: "I felt a real peace....because I'm not carrying him in my head. He's gone. He's out of my head now. And that's more room for [29's sibling]. To think I have to share room with that son of a bitch with such a nice guy like my [sibling]. That sucks."

Participant 21, one of the few who expressed no opinion on the death penalty, also explained the sense of relief after the execution in terms of terminating McVeigh's potential as a communicative agent: "Um the jabbing is what I am very happy has stopped . . . Because that was a very, very painful when he came out and said the children were collateral damage and it was like, that was so hard on the families."

Participants who were against the death penalty, on the other hand, described their sense of relief as emanating from the termination of media coverage from McVeigh, and not the death of McVeigh in itself. Participant 3, a survivor and nonwitness, stated that "I just wanted the media to quit talking about it [the execution] . . . I just wanted some return to, as much return to normalcy as I could have." But 3 stated that, while cessation of media coverage was an improvement, coverage would have "died down" if McVeigh had been given life imprisonment, as it had with respect to Nichols. 11 also stated that it was media coverage was kept 11 on

¹⁹² Participant 25 stated,

McVeigh, even though he knew that he was getting the death sentence, he was defiant all the way up to the point where it actually happened, okay? He would speak out to the media. He would tell the families to grow up, it's collateral damage that we killed your kids, you know. And everything that he did was doing nothing but hurting the family members here in Oklahoma. So the only way for us to have any kind of peace was to execute this man. Now on Nichols, Nichols is a little different because since he's been tried and convicted, you don't hear about him. And so even though he was ninety percent involved . . . I can live with him being in prison for the rest of his life, for the simple reason that he is not defiant and he's not going out and getting on the news and so forth and trying to hurt the family members.

¹⁹³ Participant 28's full statement was:

Seeing it through and to know that he really was silenced. That he really is dead. I saw him die. It can't be any of this - we saw President Kennedy on a yacht or we saw . . . you know, Elvis Presley working at Burger King or whatever, you know. I mean you hear all this crap. And I mean I know I saw him die and I know he is silenced. And that is what I wanted.

edge.¹⁹⁴ Participant 19, a survivor and nonwitness, specifically attributes a sense of relief following the execution to media coverage instead of McVeigh's presence.¹⁹⁵

VII. CONCLUSION

This inquiry is but the first step towards researching the perceptions which murder victims' family members form towards legal proceedings, including execution, as well as the psychological and mnemonic effects that attendance and participation in legal proceedings has upon reconstruction and recovery. More research is needed to determine more precisely the effects of perpetrator media images upon families' perceptions of those perpetrators, as well as on the permutations and limitations of the victim-offender relationship. Finally, McVeigh is an atypical perpetrator, and the Oklahoma City bombing is most definitely an atypical murder case in terms of mass victimage and intensity of media coverage, and so additional research is needed to address what occurs in less-publicized murders with fewer victims.

Nonetheless, this research into the collective formation of memory and resolution of the cultural trauma of the Oklahoma City bombing through social group membership and legal proceedings offers a glimpse into the mechanisms by which "justice" is expanded and status as "justice" stakeholders is extended to victims' families and survivors in addition to legal actors. The expansion has two dimensions. First the status of "victim" no longer is granted only to the dead body of the murder victim whose wounds and markings serve as objective "evidence" at the murder trial, but now encompasses as well the murder victims' family members and all the subjectivity of their suffering. The living make more demands than the dead, but speak with the weight of the grave in their rhetoric. Prosecutory proceedings for McVeigh and Nichols were rife with instances where victims asserted their right to move out of the legal periphery—the right to be allowed to attend the presentation of evidence despite being slated to give victim impact testimony, the right to attend the trial after venue was moved from Oklahoma City to Denver, the right to witness the execution despite a witness room with a capacity of 10 witnesses. Second, the concept of penal "justice" itself has been enlarged from what is privately owed to the perpetrator in recognition of his individual free will and capacity for responsibility to include as well that which is publicly owed to the victims' family in recognition for their loss and suffering. As part of this expansion from privatized punishment to public reckonings, demands for justice have increasingly been for *witnessed* justice. These developments serve to problematize concepts such as accountability and vengeance, rendering them more complex than merely prosecuting and obtaining a conviction.

¹⁹⁴ Participant 11 remarked, "I just felt like, it was kept stirring up, stirred up, stirred up, stirred up and just -- all the time and...there was still Terry Nichols to deal with, that all the media and everything, it just -- that kept me toned up...it was constant-- constantly bringing everything up again."

¹⁹⁵ Participant 19 noted,

it's not so much that he is or isn't alive, it's that, his...access to media... if he wouldn't have been writing people and calling people and giving interviews and making pronouncements and so on, you know, it'd be a lot easier to live with him, being in prison for the rest of his life...all the media packed up like you know what we are free, they will not ever come back in this manner again ever...you will not ever get any more pronouncements from McVeigh on anything.

The implications of this case study are sundry. Just as the social construction of victims and justice alters, so must the responsibilities of the State incorporate these constructions into its judicial operations. No longer may the State just arrest and prosecute; now it must recognize the victims' suffering and compensate for their losses as well. Evolving constructions of victimhood demand that law be progressive in its aims, expanding its focus so that "[i]t is no longer about individuals and their responsibilities, about crime and punishment," but increasingly about "public responsibility and public solidarity, about risks of life and collective support."¹⁹⁶ In this way, law—as a collective institution—"not only defines the imperfection of the social order but takes responsibility also for its repair; it not only assesses the harm inflicted to victims but also carries the burden of its healing."¹⁹⁷ Law's foundations, then, are no longer rooted in individual responsibility but collective accountability, "engender[ing] a turn from retaliatory justice to public responses to suffering."¹⁹⁸ Gradually, then, law is stepping into the shoes of cultural redefinition, albeit at times unwillingly.

¹⁹⁶ BERNHARD GIESEN, TRIUMPH AND TRAUMA 66 (2004).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Appendix: Participant Characteristics

Participant No.	Sex	Status	Interviewed	Viewed Execution	Attended Trial	Testified at a Legal Proc.	Opinion on DP B/F	Opinion on DP After	Misc. Info
1	M	S	6/24/2005	N	Y-all	N	For	For	
2	F	S	6/24/2005	N	Y-2/3 days	Y	Against	Against	
3	M	S	6/24/2005	N	N	N	Against	Against	
4		RESCUE							Not Included in Analysis
5	M	S	7/2/2005	Y	Y	N	For	For	
6	F	S	7/3/2005	N	Y, one day	N	Against	Against	
7	F	S	7/5/2005	Y	Y	Y	For	For	
8	F	FM	7/5/2005	N	Y	N	For	For	
9	F	S	7/5/2005	N	Y-1 day	N	No opinion	For	
10	F	FM	7/6/2005	N	Y, extensively	Y	For	For	
11	F	S	7/9/2005	N	Y	N	Against	Against	
12	M	S	7/9/2005	N, but would have liked to	Y	Y	Against	For	Critically injured
13		RESCUE							Not Included in Analysis
14	F	FM	7/16/2005	N	N	N	For	For	
15	F	S	7/16/2005	Y	Y—40 hours	N	For	For	
16	F	S	7/17/2005	N	Y	N	For	For	
17	M	FM	7/17/2005	N	Y	Y	Against	For, then Against	
18	M	S	7/24/2005	N	N	N	For	For	Does not live in Oklahoma
19	F	S	9/29/2005	N	Y	Y	For	Come to be more against	
20	M	S	9/29/2005	N	N	N	For	For	
21	F	S	9/30/2005	Y	Y	Y	No opinion, on fence	No opinion, on fence	
22	F	FM	9/30/2005	Y	Y	Y	For	For	
23	M	S	10/2/2005	N	Y	Y	Against	Against	
24	M	S	11/2/2005	N	Y only as witness	Y	For	For	
25	M	FM	4/29/2006	Y-Live	Y-1 week Denver, 40-45%	N	N	Case-by-case	

					in OKC				
26	F	S	4/29/2006	N	Y-2 weeks	N	For	Case-by-case, now more against	
27	F	S	4/29/2006	N	Y – 3 days	N	For	Against	
28	F	FM	4/30/2006	Y-Live	Y, 1 week Denver, 2-3 days/week OKC	Y	For	For	
29	F	FM	5/22/2006	Y-Live	Y—1 week for each of 3 trials	Y	Case-by-case	Case-by-case	