Essay

Defending

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The editors have asked for an Essay, a sort of travelogue of the distance between Austin and Oklahoma City, home and away, sanity and madness, hope and despair. They hinted vaguely that I might want to answer criticisms of my representing Terry Lynn Nichols. I am not responding to those hints, because I do not need to, at least not in a publication by and for lawyers. I was appointed by the court. Almost everyone I meet has been warm, supportive, and understanding. The man who ably keeps my boots repaired told me last week that he well understood what I was doing. "If people who get arrested did not have lawyers, then anybody the police suspect would be railroaded off to jail. It would be a police state."

By similar token, you will not find much in this Essay about the "facts" of the Oklahoma City tragedy. Trials are the place for evidence. The media, even a law review, is not the place for me to try this lawsuit.

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* Joseph D. Jamail Centennial Chair in Law, The University of Texas School of Law, Austin. I thank Professor Ellen T. Birrell for reviewing drafts of this Essay and helping me—again—with the concepts of semiotics. There are no footnotes, save this one. The quotations from Martha Nussbaum are from her article, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994). The Jacques Derrida work is *Spectres de Marx* (1993). The English translation is *Specters of Marx* (Peggy Kamuf trans., 1994). The Derrida paraphrase towards the end of the Essay is my translation from page 14 of the French original. The Kamuf translation of the Derrida passage I am paraphrasing seems a bit wrong to me. He writes *"Ce qui suit s'avance comme un essai dans la nuit . . . ."* JACQUES DERRIDA, SPECTRES DE MARX 14 (1993). The English text has it: "What follows advances like an essay in the night . . . ." JACQUES DERRIDA, SPECTERS OF MARX xviii (Peggy Kamuf trans., 1994). *"Essai"* means a tentative exploration, and *"s'avance"* means to take oneself forward; neither subtlety is captured in the English text. I have derived some insights from Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process*, 32 AM. CRIM. L. REV. 743 (1995). Recent figures on incarceration rates are from Adam Walinsky, *The Crisis of Public Order*, ATLANTIC MONTHLY, July 1995, at 39, 47. I agree with Mr. Walinsky's view that more police patrols and other devices devoted to preventing crime are one good way to make people feel safer and to end the drive to put more and more people in prison.

I have read Professor Freedman's response. Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995). The transcript of our debate 25 years ago, and the videotape of our more recent encounter at Hofstra, are available to anyone who wants to look at them. My remarks at the latter encounter were directed at the points Professor Freedman is making. For the present discussion, that is enough to say.

The reader will, however, detect some passion and even anger in the words below. To accept a great challenge requires, at least for me, a passionate commitment to fulfill it. In litigation as in love, technical proficiency without passion is not wholly satisfying.

The call came on Thursday, May 11, 1995. I had spent the day talking about appellate practice at the Thurgood Marshall Building in Washington, D.C. The audience members were federal public defenders, who do a difficult job with too little recognition, working every day to see that the line between the state and human liberty is drawn fairly.

Chief Judge David L. Russell of the Western District of Oklahoma had called my home. My eleven-year-old daughter took the message. When I checked in from Washington National Airport, my daughter said I should call the judge.

Chief Judge Russell and former Chief Judge Lee West (before whom I had appeared some years ago) said they wanted to appoint me to represent Terry Lynn Nichols, the forty-year-old father of two who was being held as an accomplice in the April 19, 1995, Oklahoma City bombing.

I confess I had not followed the details in the media. I knew the government did not claim that Mr. Nichols was present in Oklahoma City on that day. I also knew that the case had been characterized as capital by the Attorney General and the President.

Judge Russell said he first had the idea of appointing me when he remembered a videotape of a mock closing argument in a capital case that I had done as part of the Smithsonian's annual Folk-Life Festival in Washington, D.C. nearly a decade ago. He said he had checked me out with lawyers and judges, mentioning Judge Patrick Higginbotham of the Fifth Circuit by name.

When a judge tenders an appointment in a criminal case, only the most compelling reasons should make a lawyer try to avoid the assignment. We daily proclaim our commitment to the adversary system. While we have the right to pick and choose among clients who come to our doors, the indigent defendant facing death at the state's hands has a powerful claim on us. Were it not so, our protestations about the adversary system would crumble into hypocrisy and cynicism.

Judge Russell's story of how my name came to mind is probably incomplete. The Administrative Office of the U.S. Courts has statutory responsibility for advising judges on appointments in federal capital cases, and that office has said that there was a "short list" of advocates being considered for appointment. Some lawyers had gone on national television to say they would not take such an appointment.

The charges against Mr. Nichols might make this a capital case. Hence, he is entitled to at least two experienced lead counsel. I was lucky

that Ronald G. Woods, a University of Texas graduate with thirty years' experience as prosecutor and defense counsel, agreed to accept appointment along with me. Ron Woods has seen law practice as few lawyers have. He was an FBI agent, an assistant district attorney, an assistant United States Attorney, the United States Attorney for the Southern District of Texas, and a lawyer in private practice. I have opposed him when he was in government service, and worked with him during his time in private practice.

During my eleven years at the University of Texas, I have been counsel in many challenging pro bono and appointed cases. Law students have worked alongside me, with the consent of the dean, and have received course credit for their work. Using pro bono cases as a learning ground for students may be reason enough to accept such responsibility. In addition, the law professor's obligation of public service demands some form of contribution to the community.

There is more. I remain a defender because I am dismayed and angered by what I see around me, and I think that as a lawyer the only way through the present terrible time is to fashion and refashion a certain image of justice.

I am not speaking now of the tragedy of April 19, 1995. I am visited every day with the sense of loss felt by all the people of Oklahoma, which is one reason I think it unfair and unreasonable to ask them to pass dispassionate judgment on those events. Nor am I conjuring up the image of the President and the Attorney General rushing before the television cameras to call for the death penalty, as though no fact that could ever be found would stand in the way of deliberately taking another life as a means of doing justice for the ones already lost.

I am not talking of the storm of publicity, nor of a sense that this is a "historic" case. Every lawyer in the Oklahoma City case knows that our work will be judged, now and in time to be. It is important not to be self-conscious about that knowledge. None of us can make a bargain with history, saying, "Well, if I act in this way, can I guarantee that I will be regarded in a certain way twenty years hence?" We can only do the next right thing as best we see it. History, the past and the present, informs us, teaches us. History yet to be written cannot turn us from our honestly determined duty.

In deciding to act, one steps into a space between past and future. The past—the suffering and tragedy—are established events, to be understood as well as one can. Stepping into the moment now is a search for something called justice. Justice or injustice, in the now and in the future, is part of a process. The past events cannot be unraveled or undone, but one can perhaps prevent people's attitudes towards those events from becoming an excuse for injustice.

I am talking of a prosaic, down-to-earth notion of justice. Something like Camus was describing when he said that our chance of salvation is to strive for justice, which is something that only the human species has devised. Justice, as Camus also reminded us, must be more than an abstract idea; it must be a reflection of compassion for one's fellow beings. In the name of Justice, the abstract idea writ large, great wrongs have been done. Jordan and Carol Steiker have given us a compelling essay about a death row inmate weighted down by abstract and yet inhuman justice. The inmate, Karla Faye Tucker, had a T-shirt that said, "Kill them all. God will sort them out." This is one version of a cry attributed to the Papal Legate who presided over the massacre of some 15,000 men, women, and children at Beziers, near Marseille, in 1209. It seemed that some of these people had been adjudged (and there is the word again—derived from the same root as justice itself yet separate from it in its essence) heretics.

Today, and close by, legislators are busy terminating and trimming programs of legal assistance for the poor. The most visible casualties are the Resource Centers that have valiantly struggled to represent—and to help volunteer lawyers represent—defendants charged with and convicted of capital crimes. The most despised, the most endangered defendants may be without counsel. Yet their cases, as history teaches us without any reason for doubt, are the ones most likely to have excited governmental passion in ways that make judgment fallible.

Do you doubt this statement about fallible judgment? Consider the Haymarket trial, in which innocent men were railroaded, and only those who escaped the noose could be pardoned years later. Sacco and Vanzetti were swept up in the xenophobic hysteria fomented by the federal government, most visibly in the person of Attorney General A. Mitchell Palmer. More recently, a Cleveland auto worker spent years in a death cell convicted of being Ivan the Terrible of Treblinka; not only was he innocent of that charge, but our own government had defrauded the federal courts to get him extradited to Israel for trial.

In each of these cases, there were victims of crime. It was no honor to them, nor proper solace to those who mourned them, that their deaths became an excuse for crimes committed in the name of the state—in the name of justice.

Yet, in cases like these that may arise in the future, and that are now pending, there are not to be lawyers, unless something is done very quickly.

This is not to speak of the civil claims of people who simply want access to the justice system to present or protect their theoretically valid rights. These folks are to lose many of the lawyers provided by legal services offices.

In Alabama, the newspaper reports, the chain gang is back. There is no social need for it. The state gets all the gravel for its roads from

commercial quarries. But rocks are being shipped at state expense to prisons, so that men in prison can be chained together and break the rocks into smaller rocks. Nobody has any proof that this degradation of humans deters anyone from crime, and there is no hint that the rock-breakers acquire a skill or do some useful labor.

Alabama's atavistic adventure is simply one example in a growing list of savageries committed in the name of justice. In 1993, 2.9 times as many people were behind bars in America as in 1980. The prison population continues to increase; sentences are longer. Yet the proportion of violent offenders among the prison population declines, telling us that prison is becoming the remedy of choice for nonviolent crime. The statistics become grimmer in the inner cities, where incarceration rates for African-American males are multiples of the already high national average. In the United States, we incarcerate a far higher percentage of the population than any country in the world, and that includes the former Soviet Union and pre-democracy South Africa.

I doubt many people feel safer knowing that prison sentences are longer and more readily handed out. To say this is not to endorse a vague commitment to finding the "social causes of crime" and doing nothing until we make the discovery. The drive for ever-sterner sentences handed out in proceedings where defendants have ever-fewer rights is simply an abandonment of rational discourse. The political success of such proposals is partly due to a gap in criminological theory. Criminologists try to tell us why people commit crimes and to describe the patterns of criminal behavior. They have had little to say about how to make people safe from criminal behavior.

It is possible to accommodate the perceived need for public safety with the diguity of all persons, but doing so will require a rational search based upon familiar values. That is, indeed, one of the most important tasks now facing us.

To look beyond our shores, we must all share a sense of horror at the waves of ethnic violence—and the incipient pogroms—that wash over nations on several continents. These tortures and murders are being inflicted by groups possessing state power, and therefore claiming a legitimate monopoly on the instruments of violence. The perpetrators are pleased to call what they are doing "justice."

For me, the question is "What personal responsibility do I, as one trained in the law, living the law, have right now?" Responsibility from where, from whom? Responsibility how determined? Responsibility to whom? When one says responsibility, one inevitably summons up some "other" or "others," present and not present, from the past, and in some time to come. One summons up a dialectical image of process. This sense of the other, the not-present, is eloquently evoked by Jacques Derrida in his series of lectures published as *Spectres de Marx*.

Derrida moves from considering continuity to confront the idea of justice. Just now, I used the term "justice system." That is a mistake. It is the system-called-justice. It is called-justice in the same sense that the Papal Legate was sent to Beziers to dispense "justice." The "system" is an abstraction, a machine for putting a name, the name "justice" or "judgment," on results. The "system" is not "justice" because the system makes "justice" into an abstraction. When I say "justice" I do not mean a name-giver. I mean what Camus meant—an idea that unites uniquely human values based upon compassion.

When I speak of a prosaic and down-to-earth idea of justice, I mean simply that one can deduce principles of right from human needs in the present time. That is, I reject the cynical, or Stoic, or no-ought-from-an-is idea that one set of rules is just as good as another. I reject the notion, as Professor Martha Nussbaum has characterized it, "that to every argument some argument to a contradictory conclusion can be opposed; that arguments are in any case merely tools of influence, without any better sort of claim to our allegiance." Rather, again borrowing from Professor Nussbaum, my notions of justice "include a commitment, open-ended and revisable because grounded upon dialectical arguments that have their roots in experience, to a definite view of human flourishing and good human functioning." One element of such views is that "human beings have needs for things in the world: for political rights, for money and food and shelter, for respect and self-respect," and so on.

By hewing to a basic definition of justice, I mean to confess a certain hesitation, perhaps humility. In times as turbulent as these, with opinions swinging widely and violently from side to side, I want to return to the most basic skills and values I know and possess. I want to live my lawyer-life in the search for, and fidelity to, this "justice" as I understand it.

I will try to derive truths from the past and present, and from a sense of responsibility to those who will come after, but I am making decisions for myself and not as an apostle of others or with a claim to lead. If the ideas appeal to you, there is plenty of work to do and all are welcome.

The sense of hesitation, and of personal quest, is also evoked by Derrida in his lectures. He begins with a translated passage from the first act of *Hamlet*. Hamlet sees the spirit of his father, and learns how and why his father was murdered. "The time is out of joint," Hamlet says, "O cursèd spite, That ever I was born to set it right!"

Derrida conjures with the spirit, and with various translations, of this passage to show us that thinking of justice drops us into the stream of history, the flow from past to future. In the past are the events that put time "off its hinges," or that "turn the world upside down." But to say that things are "wrong" implies that from that same past there is some idea of how things are "right-side up," or "on their hinges." This past-given

sense, which is encompassed in an ideology that we can study and know, is not simply about carpentry or gravity. It is about subjective but verifiable principles of human flourishing.

And then in the present is our action, which tends into the future, towards the "set it right." To make a personal commitment to that path is not to pretend to be Prince of Denmark. It is simply to have understood the text in a certain way, and to have drawn from it certain lessons—as well as certain warnings about excessive or obsessive commitment.

This last observation is important. If the time is out of joint, the remedy is surely not to swing off one's own hinges, to become "unhinged." "And what if excessive love bewildered them till they died," Yeats wrote of the Easter martyrs, and again warned us that "Too long a sacrifice can make a stone of the heart." But the dangers are not, for me, a reason not to step into the stream.

So to return to the theme, the system-called-justice dispenses "judgments" that bear the name "law" or "right"—in French "*loi*" and "*droit*." But the term "*droit*" or "right" rarely goes out alone. Sometimes it is modified with an eye to justice, as in "human rights" ("*droits de l'homme*"). More often, it is qualified (and particularly in French) by words that give it an arid and abstract quality, like "civil right" as something the "law" recognizes, or "*droit criminel*" as the French would say "criminal law" and refer by those words to the system of penal rules enforced by the state. So we do best by sticking to a certain, more basic and yet more ample, sense of the term "justice."

As law students, we studied the branches of the common-law system: contracts, torts, property, criminal law, civil procedure, constitutional law, and whatever else our law schools required. What branches of learning did you find at Harvard, Emerson said to Thoreau, who replied, All of the branches and none of the roots.

We had our chance to study the roots. Most of us did so, and from that study can come an informed judgment that the time is out of joint. Our study, and our passports to the places where the system-called-justice does its judging, adjudges, gives judgments, give us unique access. I will not say our study and our passports give us a responsibility. We must each figure that one out for ourselves.

For me, I will take my knowledge and my passport and try to advocate, in the places I am admitted, for just principles and just results. I will remember that I am lucky enough to be "admitted" to classrooms and lecture halls and street corners and byways and law journals and newspapers, as well as to places where more formal advocacy is done in the system-called-justice.

In making this decision, I am borne up by the example of my friends. Dullah Omar, a lawyer in South Africa, struggled for so many years

against apartheid generally and for Nelson Mandela's release specifically. He came to be Minister of Justice in the new South Africa. His struggle, and his decisions in it, were the product of experience, the result of stepping into the stream and not of standing beside it lost in thought.

If I see the time is out of joint, and want to help "set it right," how shall I decide to use my energy in this, the sixth decade of my life? I am not alone on the path, so I must protect the well-being of my family in whatever I do.

Beyond that, I take my knowledge and passport to places I think I am best suited to be, not as compared to anybody else but only to how well or not-well I would do in other places where I might be.

Today, the system-called-justice poses its greatest threat to justice properly-so-called in the criminal-law system. Criminal trials, particularly famous ones, are intended to be didactic. That is, the state uses the criminal system-called-justice not only to take away liberty and life, but to announce and enforce social priorities.

Taking lawyers away from people sentenced to death announces a priority—to kill inmates without ceremony, in a way that says that poor people's claims of innocence, claims for justice, are not important.

In the Oklahoma City cases, we have already witnessed some announcements of priorities. Custodial interrogations of the defendant and his family were done without semblance of process or legality. Government agents felt free to leak theories of the defendant's complicity, only to leak contradictory stories a few days later. It seemed that many people in government had decided that the stakes were high enough that the rules didn't matter.

I have seen this arrogance of power before. A federal judge asked me in oral argument why the government would commit the frauds I had alleged in an effort to condemn John Demjanjuk for a crime he did not commit. I recalled simply the rhetorical excess in which the entire government case had come to be enfolded, and summoned up Ruskin's words that there is no snare set by the fiend for the mind of man more dangerous than the illusion that our enemies are also the enemies of god.

To spare a life that might be wrongly taken, or shelter a freedom that might be wrongly abridged, is already a significant participatory act. One must bring to bear the sense of justice, and the skills learned because one is an advocate.

There is more to it. The state sees its system-called-justice as didactic, and arranges matters in the service of that goal. When the system delivers someone from the state's power, the lesson taught is not the one intended, but is a lesson nonetheless. Because the initial decision to make the system-called-justice didactic in a particular way is the state's to begin with, these deliverances have a significance all out of proportion to their

number. The opportunity to weigh in that balance is an additional benefit of participating.

When the colonial newspaper editor John Peter Zenger was charged with seditious libel, no doubt colonial Governor Cosby thought to teach Zenger, his cohorts, and his supporters all a lesson. When the tables were turned, and Zenger acquitted, a far greater and longer lasting lesson was taught. When George IV sought to rid himself of his wife, Queen Caroline, by charging her with adultery in the House of Lords, her vindication had more force than the opposite result could ever have had.

When a South Carolina jury refused to condemn Susan Smith to death for killing her children, its members were expressing a community sentiment about justice, and their verdict sounded out louder than a plea-bargained life sentence would have.

These lessons—unintended from the state's perspective—redeem, refine, and announce justice and reaffirm the human commitment to it. These reaffirmations in turn help to validate norms and principles of justice, in commands and procedures. The time is out of joint, swinging on its hinges, turned upside down, dishonored; the dominant theme in every reading of Hamlet's cry is flux, change, uncertainty. "The time," the good old boy would say, "is like a hog on ice." In such a time, an image of justice—of which the human species is the only one to conceive—and of participation in a process fixed between the no-longer-there and the yet-to-be, is a guide to behavior. The option of doing nothing, a "kind of silence about injustice," as Brecht said it, is itself a participation.

So I participate because I have an inkling, and am given a means to validate it step by step.

In telling about stepping into the stream between past and future, I make clear why I part company with those who criticize my representation of this or that person. I owe those detractors no duty of explanation. My private reasonings are mine to share or not as I should wish. By focusing on some purported obligation of personal justification, these misguided souls are missing the entire point of the journey. I am not trying to set an example. I am trying to understand how to live my life. *Je voudrais apprendre à vivre enfin.*

I can say I am not *trying* to set an example. I realize that by making some public expression—for the lawyer as for the artist—one is condemned to signify. Neither the artist nor the advocate can plausibly claim to be tracing figures on the inside walls of his mind, for his own delectation.

But in a time out of joint, the surest signifying is done in a context provided by events. For the advocate, the event is a cry for justice, not usually spectral but from a flesh and blood human being.

I know, of course, that the rigged didactic of the criminal trial has false elements. In the courtroom arena, there is a symbolic equality of

defense and prosecution. We understand that in fact the balance of resources almost always tips in favor of the government, and this is particularly so in high-profile cases where high officials have announced an intention to take the defendants' lives. The defendant is not given a choice whether to participate in the unequal contest. The inequality is just another device of the system-called-justice. The lawyer's job is to expose the device, deploying the signs of justice against the signs of system-called-justice. The signs of justice include empowering the jury, calling on the tribunal to respect its oath, exposing contradiction—bringing out solid reasons why the judge and jurors should go beneath the surface of things.

About 90% of criminal cases are disposed of on pleas of guilty, so the 10% of cases that are tried bear all the semiotic weight. The trial-court struggle over what will be taught covers the entire range of symbols. On one side, we see the government's reassuring sense of power and knowledge, of things as they should be, that we will be safer if another creature is jailed or put to death. On the defense side, the symbols are of individual responsibility for results; the image is one of courageous individuals standing up to superior force and using their intellect, power, and insight.

Maybe when time is rejointed, back on its hinges, right-side up, we will see more equal struggles over liberty. I can hope so.

My purpose in Oklahoma, and in whatever venue to which the case is moved, is not to justify myself. That would be an arrogant, foolish, pointless act. I am and will be there to try and see that the system-called-justice respects and renders justice properly-so-called. I am there to see that done for a fellow creature whose life I am to shelter.

Where am I then? To borrow again from Derrida, *Où suis-je enfin*? Where am I finally? Not "finally" in the sense of an end, but of a moment between past and future, and about to push ahead again like feeling one's way forward in the dark. On a mountain road in the coal black night, C.S. Lewis wrote, we would give far more for a glimpse of the few feet ahead than for a vision of some distant horizon.

I am in that moment that has fascinated writers for centuries. The place between. "Your sons and daughters shall prophesy, your old . . . shall dream dreams, your young . . . shall see visions." I am old enough to be the dreamer evoked by this passage from Joel 2:28. My dreams are of things recollected, which I flatter myself to call old truths and insights. The visions and prophesies are of the future, where those who will live there longer than I will reap the harvest of this moment in time.