When It's So Hard to Relate: Can the Legal System Mitigate the Trauma of Victim-Offender Relationships?

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WHEN IT'S SO HARD TO RELATE:
CAN LEGAL SYSTEMS
MITIGATE THE TRAUMA OF
VICTIM–OFFENDER RELATIONSHIPS?

Jody Lynée Madeira

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This Article argues that, in the aftermath of violent crime, a relationship that is both negative and involuntary can form between crime victims and offenders. This relationship fetters the victim to the crime and the criminal, rendering it difficult to recover from the transgression. To illustrate how such a relationship may form and what consequences it may have for victims, this Article uses the Oklahoma City bombing as a case study, documenting through the use of original interviews an involuntary relationship in which victims' family members and survivors perceived they were tethered to Timothy McVeigh. This perceived relationship with McVeigh aggravated family members' and survivors' emotional and psychological wounds, delaying their healing. The Article further argues that this relationship originated in media coverage of McVeigh that portrayed him as defiant, remorseless, and unemotional, and that the relationship was further developed at trial when family
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members and survivors were profoundly disturbed by McVeigh's conduct. To minimize the harmful effects of victim-offender relationships, this Article proposes that victim services workers educate victims about the possibility of such a relationship, help victims cope with media coverage of the defendant, and assist victims in understanding defendants' behavior during trial. Finally, it recommends that opportunities for voluntary victim-offender mediation be made available to help mitigate the negative consequences of these victim-offender ties.

I. INTRODUCTION

"It's over. We don't have to continue with him any more."
—Janice Smith, Family Member of Oklahoma City Bombing Victim

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. The blast left 462 homeless and damaged 312 buildings and businesses. In the weeks and months following the bombing, several reconstructive 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 a swifter peace to the survivors and victims' families. In subsequent trials, Timothy McVeigh and Terry Nichols were indicted and charged with eight counts of first-degree murder for the deaths of federal officials, as well as three other charges, including conspiracy. While McVeigh was convicted in June 1997

4. George Lane, Federal Charges, DENV. POST, Mar. 30, 1997, at D-06; List of
on all counts and sentenced to death, the jury in Nichols's trial found him guilty of involuntary manslaughter and conspiracy after deliberating for approximately forty hours, failing to reach a unanimous verdict on whether Nichols planned the bombing with the intent to kill. After he was sentenced to life in prison without possibility of parole, Nichols was tried and convicted in 2004 of 162 counts of 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, 242 witnesses—ten in the death house at the state penitentiary in Terre Haute, Indiana and 232 at a remote viewing location in Oklahoma City—prepared for an event they 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 Attorney General John Ashcroft’s remarks on McVeigh’s execution emphasized “closure,” most witnesses found some element of the event disappointing. Sue Ashford, a survivor who witnessed the execution via closed-circuit transmission, stated, “The man just went to sleep.” Paul Howell, another witness, lamented, “We didn’t get anything from his face. His facial expressions were just about as calm as they could be.” Larry Whicher said that “it [didn’t] really provide as much as I thought it would.”

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. In the context of the Oklahoma City

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9. Id.
12. Id.
13. Id.
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. The rapport that developed between members of prominent task-oriented community groups formed in the aftermath of the bombing was a key source of healing energy. These bonds were often felt to be as strong as those of blood kinship. In addition, an involuntary association between victims' families and survivors, on the one hand, and perpetrators Timothy McVeigh and Terry Nichols, on the other, crystallized at 9:02 a.m. on April 19, 1995. Unlike the voluntary relationships between members of community groups, which were strengthening and constructive ties, this involuntary victim–offender relationship was a destructive and confining tie that trussed victims to the bombing. To study these relationships, their construction, and their representative effects is to step into a realm in which research has yet to shed light.

This Article is the first to propose that an involuntary relationship forms between a victim and an offender after a crime is committed. It develops the argument that such a relationship exists and examines it through a case study of a perceived relationship between victims' family members and survivors of the Oklahoma City bombing and bomber Timothy McVeigh. Here, the term “relationship” is used to denote a perceived quasi-interpersonal bond, positive or negative, that forms between a previously unacquainted victim and offender after the commission of a crime; it is not used as it is commonly understood—to denote whether the victim and offender were known to one another before the crime was committed. The use of the term “relationship” captures the intimate ways in which a victim's tie to an offender continually pervades her life, potentially until the offender's release makes tracing impossible, or until the offender is executed. Although future research will document when and how the formation of such a tie forms in crimes other than mass murder, it is logical that it is most likely to form in the aftermath of violent crime, particularly offenses in which the victim is most intimately or grievously affected. This involuntary relationship is most harmful when offenders appear


15. The Author uses the term “victim” so as to include victims' family members and survivors as well.
defiant, remorseless, and unemotional, as McVeigh was perceived. Ironically, though this relationship is involuntary in the sense that it is forced upon victims as a consequence of crime, the quests for information and accountability that are part and parcel of this bond are crucial to recovery and release from such a tie.\textsuperscript{16}

The formation of such a relationship is the natural social byproduct of the adversarial and open nature of our criminal justice system, where media coverage is commonplace and defendants’ histories become part of the trials and public records. This is particularly true in capital cases in which mitigating evidence is introduced. Courtrooms are communicative as well as adjudicative forums, after all, and a great deal is on display besides the workings of justice. Victims will also track offenders’ progress through the criminal justice system; keeping apprised of appeals and likely release dates prolongs this involuntary relationship for years after conviction. An awareness of this relationship’s formation and effects is important not only because the law plays such a fundamental role in its composition and maintenance, but also because these involuntary ties may have profound consequences for victims’ ability to cope with and move on from the crime.

In Part I, this Article engages the novel topic of involuntary victim–offender relationships by summarizing current research on two tangentially relevant issues: victim–offender mediation and the courtroom as a theatrical or dramatic forum. In Part II, this Article sets the stage for explaining the victim–offender relationship in the context of the Oklahoma City bombing by discussing the efficacy of a collective memory and cultural trauma perspective for analyzing how victims make sense of crimes and legal proceedings in the aftermath of mass violence. In Part III, this Article will detail the involuntary relationship that formed between McVeigh and family members and survivors, a bond predicated on the basis of constructed social and media representations of McVeigh. Thereafter, it will examine how this involuntary relationship affected how victims’ families and survivors perceived McVeigh’s behavior during his trial and how these impressions affected their ability to narratively assimilate the Oklahoma City bombing into their

\textsuperscript{16} “Victims who never meet their offenders, or never learn much about the offenders’ lives, may fear them as monsters. Victims who learn the life story, or at least present circumstances, of their offenders may come to understand them better.” Heather Strang et al., Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis, 62 J. SOC. ISSUES 281, 285–86 (2006).
lives and to cope with its traumatic nature. Accordingly, this Article concludes in Part IV by proposing not only that victim services agencies are in the best position to educate victims on the nature and effects of this relationship so as to mitigate further trauma to the victim, but also that voluntary post-conviction victim–offender mediation could assist in helping victims cope with and eventually sever these involuntary ties to the offender.

II. LAYING THE GROUND FOR RESEARCH ON VICTIM–OFFENDER RELATIONSHIPS

No scholars have yet identified or analyzed contact between the victim and offender as an involuntary relationship. In part, this oversight likely stems from the dearth of qualitative research on how violent crime affects victims and their family members; evidence of concepts such as the victim–offender relationship is unlikely to surface without studies in which subjects may provide interviewers with clues to their existence.¹⁷

Researchers have begun to address two tangentially relevant subjects; however, the paucity of scholarship on these issues suggests that they are also under-researched. First, academics have examined the effects of interactions between victims and offenders in post-sentencing victim–offender mediation, reporting that prior to mediation, victims perceive that offenders exercise control over them or become preoccupied with the offender.¹⁸ Second, a few scholars have addressed the visibility of trial participants’ courtroom behaviors, but these scholars do not consider the particular significance of defendants’ conduct for victims.¹⁹ The former body of research is helpful in documenting

¹⁷. See Margaret Vandiver, The Death Penalty and the Families of Victims: An Overview of Research Issues, in WOUNDS THAT Do NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 235, 235 (James R. Acker & David R. Karp eds., 2006) (“There is surprisingly little research concerning the effects of capital punishment on the families of murder victims. . . . We know very little about how the death penalty in practice affects victims’ families.”). Despite the fact that crime victims are not often subjects in qualitative interviewing studies, there are a few studies to which interested readers may be directed. See, e.g., PAUL ROCK, AFTER HOMICIDE: PRACTICAL AND POLITICAL RESPONSES TO BEREAVEMENT 29 (1998) (discussing bereavement following homicide based on interviews with victims’ family members who joined victims’ advocacy groups); Mark S. Umbreit & Betty Vos, Homicide Survivors Meet the Offender Prior to Execution: Restorative Justice Through Dialogue, 4 HOMICIDE STUD. 63, 67 (2000) (interviewing victims’ family members who attended mediation sessions with their relatives’ murderers).

¹⁸. Umbreit & Vos, supra note 17, at 66.

¹⁹. See Laurie L. Levenson, Courtroom Demeanor: The Theater of the Courtroom, 92 MINN. L. REV. 573, 582–83 (2008); see also KATHY LASTER, THE DRAMA OF THE
the effects that offenders have upon victims, but it does not go far enough in chronicling victims' anger and angst from the immediate aftermath of the crime through sentencing and beyond. The latter area of research is most applicable, but focuses on the unorthodox effects defendants' behaviors might have upon jury members while neglecting the particular issues at stake for victims. For instance, in the most recent article to address this issue, Levenson argues that the courtroom is a "theater in which the various courtroom actors play out the guilt or innocence of the defendant for the trier of fact to assess." In this dramatic forum, she notes, "[T]he outcome of the case is affected by many factors that are not technically evidence: the quality of the lawyers' presentations, the appearance and reaction of the defendant in the courtroom, and even the presence of the victim's representatives." Levenson further asserts that "[j]urors scrutinize [the defendant's] every move, attaching deep importance to a quick glance or a passing remark.

This Part will first summarize research findings on victim-offender mediation. It will then summarize scholarship and case law on how jurors are potentially influenced by the courtroom appearance and demeanor of defendants and spectators.

A. Research on Victim-Offender Mediation

Victim-offender mediation may help loosen the negative ties that victims perceive bind them to offenders. Studying how victims benefit from mediation provides a means of documenting how victims are traumatized by crime and how they recover—

COURTROOM 2, 9–12 (2000) (discussing popular film depictions of courtroom drama and arguing that the popularity of the genre is due in part to its examination of social issues and institutions, as well as its purpose as a sort of morality play); Pinna Lahav, Theater in the Courtroom: The Chicago Conspiracy Trial, 16 LAW & LITERATURE 381, 385–86 (2004) (situating the Chicago Conspiracy Trial in its historical context and exploring its relevance to the jurisprudence of political trials and to theories of the theater); Daniel Larner, Justice and Drama: Historical Ties and "Thick" Relationships, 22 LEGAL STUD. F. 3, 17 (1998) ("[D]rama itself is a vital part of the tissue of experience that develops our ideas and expectations of justice."). Many scholars have recognized that courtrooms are dramatic forums and embody theatrical characteristics. See, e.g., MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 133 (1985) ("Courtmrooms are theaters. A lawsuit is a theatrical event where legal argument is devoted to achieving an affecting, just performance."); MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS 42–51 (1981) (analyzing courtroom trials as a form of "judicial theater," complete with "stage," audience, and dramatic format).

20. Levenson, supra note 19, at 573.
21. Id. at 574–75 (internal citations omitted).
22. Id. at 575 (citing HAZEL THORNTON, HUNG JURY: THE DIARY OF A MENENDEZ JUROR 46–47 (1995)).
issues that in turn provide insight on the origins of that trauma. The fact that these harms are reduced or disappear entirely upon meeting an offender may mean that they are negative consequences of the victim–offender relationship that are mitigated by mediation. For instance, one study found that, after mediation, victims felt as if the offender no longer exercised control over them and that they ceased to be preoccupied with the offender. Further research is necessary in order to precisely identify what effects of crime persist until mediation or how mediation alleviates these consequences.

Moreover, victim–offender mediation illuminates victims’ desire to terminate these ties to the offender through interpersonal confrontation and communication—an opportunity they are denied in the courtroom. According to Umbreit and Vos, family members wished to pursue mediation with offenders on death row because of a desire to communicate to the offender the horrific nature of the impact of his crime and potentially hear him take responsibility. Family members felt that this was impossible to do in legal proceedings because such an institutional setting “causes separation and disconnection where there should be connection.” All family members that Umbreit and Vos interviewed “sought a personal, human encounter” and stated that they wanted to see the defendant face-to-face, to look the defendant in the eye. Family members were also interested in “piecing together some kind of explanation through obtaining information about the [defendant’s] life and history.” After the mediation sessions were concluded, family members “felt that the experience was powerful and healing, and they were relieved and renewed,” and all family members found it very rewarding to hear the offender express responsibility.

B. The Defendant’s Courtroom Appearance and Demeanor

The notion that the defendant’s appearance affects trial outcome is not new. In *Estelle v. Williams*, the Supreme Court held that compelling a defendant to wear jail clothing at trial violates the right to a fair trial because “the constant reminder of

23. Umbreit & Vos, supra note 17, at 66.
24. Id. at 70–71.
25. Id. at 70.
26. Id. at 71.
27. Id. at 77.
28. Id. at 78 (noting, as one family member put it, that “it was gratifying to hear it out of his mouth and not out of a reporter’s mouth”).
the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment."29 Likewise, in Illinois v. Allen, the Supreme Court determined that a defendant may be prejudiced if forced to appear before the jury shackled and gagged because "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant."30

Like a defendant's physical appearance, a defendant's demeanor or conduct also can impact the outcome of legal proceedings.31 Well-publicized examples of this phenomenon abound. Joseph Hartzler, the lead prosecutor in the McVeigh trial, explicitly drew jurors' attention to McVeigh's stoicisim, reminding them that "not a single witness testified at any other time that Timothy McVeigh ever had a tear in his eye except when he was concerned about his own welfare, except when he was concerned and worried about his own death."32 Jurors in the Scott Peterson trial stated that Peterson's lack of remorse contributed to his conviction.33 Moussaoui's erratic courtroom rants engendered much speculation as to his mental condition.34 Certain defendants become infamous for their courtroom conduct. During his murder trial, cult leader Charles Manson continuously "interrupted proceedings by shouting, chanting, turning his back on the judge, assuming a crucifixion pose, and singing."35 Newspapers recount the blasé attitude of less well-known defendants in great detail.36

33. Diana Walsh & Stacy Finz, Peterson Jury: Death; The Jurors: How They Decided He Should Die, S.F. CHRON., Dec. 14, 2004, at A1 ("[Tihe cumulative weight of Peterson's deceptions and even his courtroom demeanor worked against him."). The article quoted one juror as stating that "there was no emotion, no anything.... That spoke volumes." Id.
34. See, e.g., Greg Gordon, Moussaoui Theatrics Continue as Jury Selection Begins, STAR TRIBUNE (Minneapolis), Feb. 7, 2006, at 4A; John Riley, Moussaoui Defiant in Courtroom, NEWSDAY, Feb. 7, 2006, at A05 (detailing one of Moussaoui's outbursts and noting that "[t]he behavior echoed his conduct during pre-trial hearings since 2001, where he has regularly railed against his lawyers and declared his hostility toward America, leading to questions about his mental competency"); Neil A. Lewis, Judge Ejects 9/11 Suspect After Outburst, N.Y. TIMES, Feb. 15, 2006, at A20 (stating Moussaoui repeatedly accused his lawyers of "conspiring with the judge and the prosecution to execute him").
36. See, e.g., Michael Brick, Facing Death Penalty, "Rated R" Betrays No Emotion,
Empirical research based on interviews with capital jurors has shown that jurors are more likely to impose the death sentence when the defendant appears bored or emotionally uninvolved, but more likely to favor a life sentence when the defendant appears sorry and sincere. In addition, capital jurors generally disapproved when defendants testified during the punishment phase, perceiving that the defendant was lying, displayed no remorse for the crime or murder victim, displayed no emotion while on the stand, or appeared arrogant or insincere. Furthermore, in death penalty cases in which capital jurors commented that the defendant's testimony lacked remorse or sorrow, the defendant was sentenced to death; conversely, in death penalty cases in which all capital jurors commented that a defendant seemed likeable and a majority of jurors stated that the defendant sounded remorseful, the defendant was sentenced to life. These studies bolster the conclusion of scholars such as Levenson, who recognize that the "defendant's demeanor off the stand" may affect case outcomes. Jurors therefore use a defendant's conduct in the courtroom "to determine his sincerity and culpability." Concern over the potential impact of demeanor upon juror decisionmaking has prompted scholars to propose solutions. Levenson argues that because "extreme dangers exist in allowing jurors to decide cases based on defendants' appearances and demeanors off the witness stand, then jury instructions should be used in every case to counter jurors' natural instinct to judge a defendant by his looks and mannerisms."

C. Spectators' Courtroom Presence and Conduct

In addition to defendants' appearance and demeanor, the presence and conduct of spectators, including victims' family
members, is an important part of courtroom dynamics. While the mere presence of victims' family members as spectators may send a message, they of course are not excluded from the courtroom merely because of their relationship with the victim. In State v. Richey, the West Virginia Supreme Court stated, "We must assume that a jury has the fortitude to withstand this type of public scrutiny, and cannot presume irreparable harm to the defendant's right to a fair jury trial by the presence of spectators who may have some type of associational identity with the victim of the crime."\footnote{State v. Richey, 298 S.E.2d 879, 889 (W. Va. 1982).}

Kinship to the victim is not the only controversial status that a courtroom spectator may possess. Numerous defendants have asserted that the presence of uniformed police officers seated in the gallery undermined their right to a fair trial. The U.S. Supreme Court held that a defendant was not inherently prejudiced when, at his armed robbery trial with five co-defendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectator section, because there was no reason to believe that the troopers' presence tended to brand the defendant with guilt.\footnote{Holbrook v. Flynn, 475 U.S. 560, 567-72 (1986).} The Court theorized that the jury may not even have noticed that extra guards were being used in the trial or that they most likely drew no impermissible inference from their presence because "[guards] are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm."\footnote{Id. at 569.}

Similarly, state courts have held that the presence of off-duty, uniformed officers as spectators in the trial of a defendant accused of shooting an officer did not violate the defendant's constitutional rights without a showing that police spectators significantly outnumbered civilian spectators because there was no allegation that the officers "gravitated" towards the jury.\footnote{Davis v. State, 223 S.W.3d 466, 474 (Tex. App.—Amarillo 2006, pet. dism’d as untimely); cf. Woods v. Dugger, 923 F.2d 1454, 1458–60 (11th Cir. 1991) (finding inherent prejudice when uniformed prison guards composed half of the spectators in a packed courtroom during the trial of a man accused of murdering a prison guard, coupled with pretrial publicity).}

Case law has also addressed the propriety of spectators' expressive conduct in the courtroom such as wearing buttons with logos or victims' pictures that may be directly related to the defendant's guilt.\footnote{Billings v. Polk, 441 F.3d 238, 246–47 (4th Cir. 2006) (holding that no
fair trial is violated by spectator conduct is “whether ‘an unacceptable risk is presented of impermissible factors coming into play.’”

In Norris v. Risley, several women sat in the spectator's gallery wearing buttons reading “Women Against Rape” during Norris's rape trial. The Ninth Circuit stated that the buttons served an obvious communicative purpose, and that “throughout trial, the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris’s guilt before it was proven, eroding the presumption of innocence.”

The Ninth Circuit relied upon Norris in Musladin v. Lamarque, in which Musladin claimed he shot his estranged wife's fiancé, Tom Studer, in self-defense, intimating that Studer was not a “victim.” During each day of the fourteen-day trial, Studer's family sat in the front row of the gallery, directly behind the prosecution and in clear view of the jury, and at least three members of the family wore buttons that were several inches in

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49. Norris v. Risley, 918 F.2d 828, 829 (9th Cir. 1990).
50. Id. at 831–32.
51. Musladin v. Lamarque, 427 F.3d 653, 654–56 (9th Cir. 2005).
diameter with Studer's photograph on them. After he was convicted of first-degree murder and his conviction was upheld in state habeas appeals, Musladin challenged the photo buttons in his federal habeas appeals, claiming that the buttons' content improperly influenced the jury and prejudiced his defense, and that the state court unreasonably applied established Supreme Court law in denying him relief when it held that the photo buttons were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member." Though the federal district court denied Musladin's petition, the Ninth Circuit granted relief, stating that the photo buttons conveyed a message that was "even stronger and more prejudicial" than the one in Norris because "the buttons actually depicted the individual that the defendant was charged with murdering and represented him as the innocent party." This prompted the court to determine that "the direct link between the buttons, the spectators wearing the buttons, the defendant, and the crime... was clear and unmistakable." Thus, the court concluded, "a reasonable jurist would be compelled to conclude that the buttons worn by Studer's family members conveyed the message that the defendant was guilty." The U.S. Supreme Court, however, addressing for the first time "the effect on a defendant's fair-trial rights of... spectator conduct," reversed the Ninth Circuit on procedural grounds. In his concurrence, Justice Souter stated that "[t]he display is no part of the evidence going to guilt or innocence, and the buttons are at once an appeal for sympathy for the victim (and perhaps for those who wear the buttons) and a call for some response from those who see them," which could prompt an expected response from jurors: "[T]he expected response could well seem to be a verdict of guilty, and a

52. *Id.* at 655.
53. *Id.* at 655, 658.
54. *Id.* at 660. After the California Court of Appeal found that the buttons did not brand Musladin with an unmistakable mark of guilt under *Flynn*, the Ninth Circuit was charged with determining whether the state court's decision resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at 655 (quoting *Antiterrorism and Effective Death Penalty Act (AEDPA)* of 1996, 28 U.S.C. § 2254(d)(1) (2006)).
55. *Id.* at 660.
56. *Id.* at 661.
58. *Id.* at 77. The Supreme Court stated that there was no precedent that required the state court to apply *Williams* and *Flynn* to the spectators' conduct and so the state court's decision had not been contrary to clearly established federal law under the meaning of the AEDPA. *Id.*
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The sympathetic urge to assuage the grief or rage of survivors with a conviction . . .

Of course, judicial concern over the defendant's courtroom appearance and demeanor and over spectator courtroom conduct is rooted in the need to avoid unduly prejudicing jurors against the defendant and not concern over the behaviors in and of themselves. After all, it is jurors, and not spectators, who determine the defendant's fate. However, for better or worse, victims' family members may still influence jurors by their presence in the courtroom, by their emotional displays, by bearing victims' photographs or pro-victim logos, and by their trial or victim impact testimonies. As one journalist noted, "One longstanding legal truism endures: The concept of family remains a potent weapon in court. The presence of family members often has an effect, great or small, on the outcome of the trial or arraignment . . . ." News coverage is replete with examples of how victims' family members affect jurors. How else can one explain the resolution of jurors in the McVeigh trial to "look him right in the eye" while delivering the verdict and their desire to provide closure through their verdict for victims' family members and survivors, or account for journalistic obsession with divining jurors' reactions to courtroom proceedings? After one trial which ended in a hung jury, jurors apologized to members of the victims' family and hugged them in front of the courthouse, saying that they felt they owed it to the victim's family to reach a verdict and that family members' presence in court each day had

59. Id. at 82–83.
60. See State v. Glassel, 116 P.3d 1193, 1214 (Ariz. 2005) ("The fact that the family members and jurors cried during the presentations does not warrant reversal. Senseless murders usually generate strong emotional responses. It is not unreasonable, therefore, to expect that murder victims' family members will often come to tears when making their impact statements. Nor is it unreasonable to expect that some jurors will also have emotional reactions when hearing the victims' families' accounts of the loss they have suffered.").
61. See Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant . . . as to whether or not the death penalty should be imposed.").
62. David Rohde, Drama on the Docket: Relatives' Emotions Can Raise Stakes for Defendant's Day in Court, DALLAS MORNING NEWS, July 9, 2000, at 12A.
63. Richard A. Serrano, McVeigh Gets Death, L.A. TIMES, June 14, 1997, at A1 ("[W]e [the jurors] had agreed earlier that when we gave the verdict, we would look him right in the eye. And we did, all 12 of us . . . . I just hope we made some sort of closure for the people of Oklahoma City . . . . I hope they are pleased with what we did.").
64. See, e.g., Andrea Ford, Simpson Panelists Offer Jury Watchers Few Clues, L.A. Times, Feb. 12, 1995, at A1 ("[T]he enigmatic behavior of the jurors has fueled even greater scrutiny. They are watched and commented upon constantly by those lucky enough to have snared assigned courtroom seats.").
been noted. This potential prompts judges to attempt to minimize even remote interaction between jurors and spectators and is why defendants are permitted to request that the court enjoin victims' families and friends from displaying emotion in the courtroom while sitting as spectators. The granting of such a request does not mean that it will be upheld in all circumstances, however, or that trial courts will rigorously police emotional displays by victims' family members. As one trial judge stated at a murder trial outside of the jury's presence, "It seems rather unfair to kill a woman's husband and then complain because she cries." Finally, victims' family members may exercise a right to meet with prosecutors in many jurisdictions, potentially influencing prosecutorial decisionmaking; prosecutors also often consult with family members in the event that a plea agreement is reached.

66. In the O.J. Simpson trial, for instance, courtroom spectators were of course forbidden to speak to jurors but were even discouraged from maintaining direct eye contact. Ford, supra note 64, at A23; see also Maurice Possley, Judge Tries to Rein in Courtroom Emotions, CHI. TRIB., June 6, 1997, at 3 ("[Judge] Matsch, by his own admission, was overcome... by the gripping words and tears of the victims' relatives..." Matsch then "moved to reassert control over the penalty hearing.").
67. See, e.g., Chase v. State, 645 So. 2d 829, 848 (Miss. 1994) (holding the defendant was not entitled to a mistrial in a capital murder prosecution when the murder victim's widow, a key eyewitness to the murder, began crying on the witness stand, and other family members began to cry, allegedly in violation of pretrial ruling against emotional displays, because the court found the need for the widow's testimony outweighed any prejudicial effect caused by her and the other family members' display of emotion); Evans v. State, 422 So. 2d 737, 743 (Miss. 1982) (involving defendants who requested that the victims' families be prohibited from displaying courtroom emotions).
68. Chase, 645 So. 2d at 848.
69. See generally Susan L. Karamanian, Victims' Rights and the Death-Sentenced Inmate: Some Observations and Thoughts, 29 ST. MARY'S L.J. 1025, 1028 (1998) (noting that prosecutors work directly with victims' families); Wayne A. Logan, Declaring Life at the Crossroads of Death: Victims' Anti-Death Penalty Views and Prosecutors' Charging Decisions, 18 CRIM. JUST. ETHICS 41, 44 (1999) ("[T]he constitutions of at least twenty-nine states contain victims' rights amendments securing significant participatory rights in criminal prosecutions, and all states as well as the federal government have enacted laws to ensure increased victim/survivor involvement." (internal citations omitted)).
70. See Karamanian, supra note 69, at 1028. A court has rejected the claim of a death row inmate that his equal protection and due process rights were violated when the victim's family "vetoed" a plea agreement favorable to him; the court stated that "[t]he state properly may consider the wishes of the victim's family in deciding whether to seek the death penalty, so long as it does not accord undue weight to those wishes... Arizona crime victims have a constitutional and procedural right to confer with the state on any prospective plea bargain." State v. Wood, 881 P.2d 1158, 1173 (Ariz. 1994) (en banc).

One well-publicized instance where victims' family members consulted with prosecutors in deciding to accept or reject a plea agreement occurred in the trials of the two perpetrators who murdered Matthew Shepard, in which prosecutor Cal Rerucha obtained the parents' permission before agreeing to the plea bargain, motivating the news
D. The Courtroom as a Communicative Forum and the Victim-Offender Relationship

Case law addressing defendant appearance and demeanor and spectator conduct, as well as newspaper accounts of defendants' and jurors' displays of emotion in the courtroom, suggest that the courtroom is not only an adjudicative forum, but a communicative one as well.

One could go further and describe legal proceedings as a series of communicative events that begin upon arrest; pretrial events such as "perp walks," in which suspects are displayed to media officials, showcase defendants to the public as if to prove investigative efficacy. McVeigh, for instance, was allegedly subjected to a perp walk approximately three hours before he was officially arrested for the Oklahoma City bombing. It is not enough, however, to acknowledge the communicative dimensions of legal proceedings; this recognition does not convey how very meaningful information about the defendant and opportunities to observe the defendant are to victims and victims' family members. Moreover, it places unnecessary constraints on our understanding of the victim-offender relationship, limiting it to the criminal justice context. This is too narrow. The victim-offender bond is not so much dependent upon legal proceedings for its formation, but more for its maintenance. The victims' desire for information and accountability predate a suspect's arrest and prosecution, and perhaps are even stronger if a suspect is never identified or cannot be found. In addition,

media to credit Matthew's parents, and not the prosecutor, with "mercy." See Julie Cart, Killer of Gay Student Is Spared Death Penalty, L.A. TIMES, Nov. 5, 1999, at A1 ("[The prosecutor] had reservations about the deal, but finally it was Matthew's mother who prevailed upon him to agree to spare McKinney's life."); Dave Cullen, A Dramatic Moment of Mercy, SALON.COM, Nov. 5, 1999, http://www.salon.com/news/feature/1999/11/05/shepard/ (reporting that the prosecutor claimed the decision to accept the agreement was ultimately his, but that he did not even enter the room where the Shepards negotiated McKinney's sentencing agreement). For additional discussion of the Shepards' "mercy," see Jody Lyne6 Madeira, A Constructed Peace: Narratives of Suture in News Media, 19 CAN. J.L. & SOCY 93, 113-16 (2004).

71. A "perp walk" occurs "when an accused wrongdoer is led away in handcuffs by the police to the courthouse, police station, or jail." Such events have been "featured in newspapers and newscasts for decades." Caldarola v. County of Westchester, 343 F.3d 570, 572 (2d Cir. 2003).


information-gathering and observational opportunities exist outside the criminal justice context. Local or national media coverage may provide prime prospects for scrutinizing the defendant’s conduct, and victims’ desire to learn about and keep tabs on defendants does not terminate when the defendant is sentenced at trial. Rather, criminal justice proceedings are just one stage of a trajectory that stretches from the immediate aftermath of the crime into a future in which victims and their families struggle to come to terms with the crime. Therefore, it is crucial that we regard the ties that bind victims to offenders as involuntary relational bonds, thus contextualizing criminal justice events—from “perp walks,” to trials and sentencing hearings, to parole and clemency hearings, and ultimately even executions—as occurrences during which victims and family members deepen their knowledge of the defendant and the crime through information gathering and observation. Utilizing the term “relationship” best captures the pervasive, persistent nature of these involuntary ties to the defendant. The significance of this term becomes fully apparent from an analysis of the formation and consequences of such bonds in the context of the Oklahoma City bombing.

III. COLLECTIVE MEMORY, CULTURAL TRAUMA, AND THE LAW

The story of victimization is the story of trauma. This Article describes the formation of a victim-offender relationship following an act of domestic terrorism that made bomber Timothy McVeigh the most heinous mass murderer in U.S. history. In the aftermath of the bombing, victims’ families and survivors grappled with two overwhelmingly powerful needs: the need to transform fragmented emotions and recollections of the bombing and its aftermath into more holistic narratives, and the need to overcome individual and collective traumas—including perceived ties to McVeigh—that challenged their ability to do so. In order to most accurately describe these obstacles, it is imperative to examine the ties that victims’ families and survivors perceived they shared with Timothy McVeigh through the lenses of collective memory and cultural trauma.

A. Defining Collective Memory and Cultural Trauma

Research on collective memory helps to address the way in which collective behaviors formed in association with the Oklahoma City bombing, such as attendance at McVeigh’s capital trial and execution, depend on memory work. Memory work 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 it—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. Studying memory from a collective perspective is necessary in the context of the Oklahoma City bombing because its mass violence devastated the local community of Oklahoma City and gelled individuals into the tragic categories of victims’ family members and survivors. Heretofore, these groups were nonexistent; group members soon purposefully joined together in order to cope with the bombing and accomplish necessary tasks such as building a memorial or advocating for reform of death penalty laws.

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. Compelled by the nature of trauma itself, 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, memory work has been shown to be central to the recovery or “working through” of the

74. This is the Author’s own definition; however, it contains elements of others’ writings as well. See, e.g., BARBIE ZELIZER, REMEMBERING TO FORGET: HOLOCAUST MEMORY THROUGH THE CAMERA’S EYE 3 (1998) (describing collective memory as a tool “not of retrieval but of reconfiguration [that] colonizes the past by obliging it to conform to present configurations” (quoting Patrick Hutton, Collective Memory and Collective Mentalities: The Halbwachs and Aries Connection, 15 HIST. REFLECTIONS/REFLEXIONS HISTORIQUES 311, 314 (1988))); id. (“Collective memories allow for the fabrication, rearrangement, elaboration, and omission of details about the past, often pushing aside accuracy and authenticity so as to accommodate broader issues of identity formation, power and authority, and political affiliation.”); Pierre Nora, Between Memory and History: Les Lieux de Memoire, 26 REPRESENTATIONS 7, 8 (1989) (“Memory is life, borne by living societies founded in its name. It remains in permanent evolution, open to the dialectic of remembering and forgetting, unconscious of its successive deformations, vulnerable to manipulation and appropriation . . . .”).

75. See generally MAURICE HALBWACHS, ON COLLECTIVE MEMORY 52 (Lewis A. Coser trans., 1992) (1941) (“What makes recent memories hang together is . . . that they are part of a totality of thoughts common to a group, the group of people with whom we have a relation at this moment . . . .”).
collective, which may require processes of sense-making, accountability, and restitution, often procured through collective institutional means such as trials and truth commissions. The psychological and psychiatric study of trauma has been advanced largely by investigating the presence of common symptoms among members of a certain social group, such as soldiers who fought in World Wars I and II. In these empirical studies, it is the commonalities among members that enabled the formulation of scientific conclusions about the nature of post-traumatic stress disorder. Most importantly, traumas affect collectives long after their survivors have passed on. The bombings of Hiroshima and Nagasaki and Holocaust death camps are just two examples of traumas that happened over sixty years ago but that remain problems with which American collective memory must grapple.

The type of collective memory is also significant, however, for it also implicates a theoretical subset of collective memory known as cultural trauma. Analyzing the creation of meaning after the Oklahoma City bombing entails documenting the creation of a specific culture of interpretation and rehabilitation against a larger national cultural backdrop that prompts American citizens to feel “compelled to honor those . . . who have been murdered for an unjust cause.” Memories of traumatic events, like those of nontraumatic events, represent an interpretive culture that did not emerge because it “had” to but because it was constructed by its participants and the cumulative effects of their beliefs and actions over time. As Alexander states, “[T]hose collective

76. See generally MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 50, 61 (1998) (detailing how trials, truth commissions, and other rituals provide the “memory work” that helps the healing process); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 24, 28–29 (1997) (explaining the cathartic role of collective memory in the face of tragedy and the role of criminal trials in its formation).

77. See generally PAUL FUSSELL, THE GREAT WAR AND MODERN MEMORY 325–27 (1975) (noting how vivid images of wartime horrors were imbedded in the memories of many World War I veterans); PAUL FUSSELL, WARTIME: UNDERSTANDING AND BEHAVIOR IN THE SECOND WORLD WAR 275–77 (1989) (noting that intense fear was shared by many soldiers during World War II, and that many soldiers were willing to admit to such things as being so scared they “fouled themselves”).

78. See ROBERT JAY LIPTON & GREG MITCHELL, HIROSHIMA IN AMERICA: FIFTY YEARS OF DENIAL 207–09 (1995) (introducing several groups of people who helped shape the general memory of Hiroshima, including the President, historians, journalists, veterans, scientists, and activists); PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE 1–2 (1999) (noting how the Holocaust was not discussed for several decades following the end of World War II, but became a more central part of American discourse beginning in the 1970s); ZELIZER, supra note 74, at 3 (discussing how work on collective memory might “shed light on visual memories of the Holocaust”).

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forces...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." As an event comes to be rationalized, the socially constructed narratives about that event derive their strength and stability from moral frameworks.

Cultural trauma occurs "when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks on their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways." 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." In this way, collectives formulate and demonstrate "solidary relationships in ways that, in principle, allow them to share the sufferings of others[,]... [and] societies expand the circle of the we." Conversely, not recognizing the suffering of others through acknowledging a particular experience as traumatic bars collectives from achieving a "moral stance."

Cultural trauma is explicitly trauma of culture and therefore "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." Cultural trauma is particularly invasive and damaging to a collective. Change destroys "cultural tissue," which is particularly sensitive to change because it is a "depository of continuity, heritage, tradition, [and] identity of human communities," and cultural "wounds" are "most difficult to heal" because "[c]ulture obtains a particular inertia, and once the cultural equilibrium is broken, it is most difficult to restore it."

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. "Collective" denotes not merely a mass of people, but a group of people who elect to join together on the basis of some core identity. This distinction is critical, for mass coping and collective coping are not the same thing at all. Collective trauma occurs when "people . . . perceive the similarity of their situation with that of others, define it as shared[,] . . . start to talk about it, exchange observations and experiences, gossip and rumors, formulate diagnoses and myths, identify causes or villains, look for conspiracies, decide to do something about it, [and] envisage coping methods." The process of designating an event as "traumatic" is a claims-making process in which a certain group enunciates "a claim to some fundamental injury, . . . and a demand for emotional, institutional, and symbolic reparation and reconstitution." In attempting to apply a trauma claim to an event, claims makers must effectively articulate a master narrative that is "[a] signification spiral" enunciating the nature of the pain (what happened that was allegedly traumatic), the nature of the victim (whom did the allegedly traumatic event affect), the relation of the trauma victim to the wider audience (what shared qualities lie between the audience and the alleged victims of the trauma), and attribution of responsibility (who was the perpetrator).

Trauma claims-making is "powerfully mediated by the nature of the institutional arenas . . . within which it occurs." In the Oklahoma City context, this includes the institutions of the law and of mass media, each of which shapes trauma claims in particular ways and imposes particular institutional consequences. 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

88. Id. at 48.
89. Sztompka, supra note 85, at 160.
90. ALEXANDER, supra note 79, at 93.
91. See, e.g., KENNETH THOMPSON, MORAL PANICS 31–42 (1998) (exploring the process of the signification spiral through 1960s Britain where British youth were vilified and portrayed as perpetrators of general moral decay).
and material reparations.\textsuperscript{93} The law as an institution narrows trauma claims to specific stages of the process of constructing an event as traumatic, such as the attribution of responsibility; "[s]uch a demonstration may have nothing at all to do with the perpetrators themselves accepting responsibility or a broader audience identifying with those who suffered as the trauma drama plays out."\textsuperscript{94} As a form of mediation, mass communication may provide heretofore inaccessible outlets for the dramatization of trauma and may allow one interpretation of an event to gain an edge over other competing interpretations. Yet, processes of constructing trauma "become subject to the restrictions of news reporting, with their demands for concision, ethical neutrality, and perspectival balance," and may be "exaggerated and distorted" due to the competition between news outlets.\textsuperscript{95}

The successful construction of trauma is rather anticlimactic, consisting of the naturalization of the traumatic designation. Of course, if an event is labeled as traumatic it will affect how that event is "experienced, and thus imagined and represented," necessitating that "collective identity ... become significantly revised."\textsuperscript{96} Once this re-remembering or reconstruction has been accomplished, however, there is a "calming down" period during which "[t]he spiral of signification flattens out, affect and emotion become less inflamed, preoccupation with sacrality and ... liminality gives way to reaggregation."\textsuperscript{97} It is during this period that memorialization of the trauma is fixed into place and the "lessons' of the trauma become objectified in monuments, museums, and collections of historical artifacts."\textsuperscript{98} Alexander refers to this period as the "triumph of the mundane,"\textsuperscript{99} but maintains that this naturalization is itself natural because reactions to the trauma cannot be maintained at fever pitch forever. Rather, this naturalization of trauma indelibly confirms it as such and enables the trauma to be continually accessed and shared:

The inevitability of such routinization processes by no means neutralizes the extraordinary social significance of cultural traumas. Their creation and routinization have, to the contrary, the most profound normative implications for

\textsuperscript{93} Alexander, \textit{supra} note 79, at 98.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 100.
\textsuperscript{96} Id. at 103.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 104.
the conduct of social life. By allowing members of wider publics to participate in the pain of others, cultural traumas broaden the realm of social understanding and sympathy, and they provide powerful avenues for new forms of social incorporation.100

Significantly, without this naturalization, there could be no reconstructive process, or what Sztompka terms “social becoming,” when the “[t]rauma appears as a stimulating and mobilizing factor for human agency, which through coping with and overcoming of trauma contributes to the ‘morphogenesis of culture.’”101


Today there is a 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.”102 Agents of legal institutions are summoned forth to answer the call of history, guised in the sheep’s wool of collective memory, to redress traumatic injuries and preserve certain moral truths for the benefit of future citizens. But do we choose to acknowledge the law as an institutional vehicle for collective memory? Or do we instead favor a “strict separation between the legal and the extralegal, between the rule of law and the interests of collective instruction”?103

Culturally traumatic events often serve as focal points for ritual commemoration because critical reassessment can provide opportunities for a “decisive moment of collective refounding.”104 In the wake of culturally traumatic events, then, there is a need for what Victor Turner called “social dramas,” ritual processes of social scrutiny and ultimately recovery.105 Trials, including criminal prosecutions, are social dramas; criminal law is especially akin to the formation of collective memory since its deterrence concerns are future oriented, where collective memory locates greater social solidarity, but its retributive concerns are past-oriented, where collective memory finds its narrative content.106

100. Id.
101. Sztompka, supra note 85, at 194.
103. Id. at 2.
104. OSIEL, supra note 76, at 27.
105. Id. at 16–17.
106. Id. at 18.
The notion that criminal trials can contribute to social solidarity originated with Emile Durkheim; as Garland notes, "[T]he rituals of criminal justice—the court-room trial, the passing of sentence, the execution of punishment—are, in effect, the formalized embodiment ... of the conscience collective." The act of imposing punishment reflects the process of working through an event which threatens the conscience collective. Legal decisions thus become touchstones for the formation of collective memory, as they "set the tone for the public's response at the very moment that they claim to express it" and "prefigure popular sentiment and give it a degree of definition which it would otherwise lack." "Justice" becomes the operative concept for social solidarity, involving a consensus both that certain acts committed are wrong and must be punished. Justice as a concept also has meaning for the many and the few—for society and for victims—and recent decades have witnessed the increasing influence of private justice needs on public justice demands. The needs of victims' families have come to be a paramount concern as prosecutors make private concerns—a need for closure—into reasons for public support for and application of capital punishment.

Collective memory is furthered by legal processes of the formation and enunciation of stories. In the criminal trial, prosecutors serve as public spokesmen who "tell the stories through which such sentiments are elicited and such membership consolidated." These stories are "about individual rights: the myriad forms of the human flourishing that the exercise of such rights permits and that their violation wrongly forecloses." In these stories, the free will of the perpetrator assumes primary importance; his choices dictate the outcome of the story and bring about the victim's death. After prosecution, imposing punishment "signals the greater or lesser presence of collective memory in a society" because it is the punishing of those who commit the most unacceptable acts that reinforces our

108. Id. at 58.
109. In the McVeigh trial, for instance, the selection of victim impact witnesses was explicitly choreographed to produce a death sentence. See Bruce Shapiro, Victims' Rights—and Wrongs, SALON.COM, June 13, 1997, http://www.salon.com/june97/news/news970613.html (noting that "the prosecution wanted an execution" and chose victims to participate accordingly).
110. OSIEL, supra note 76, at 29.
111. Id. at 72.
112. Id. at 72–73.
The ability to enunciate and fix stories in legal frames, then, becomes an important source of social power.

As an institution, however, the law is of limited efficacy as a vehicle of collective memory. The usefulness of legal proceedings is constrained by two concepts: (1) its modesty, or superficial unwillingness to play such a formative mnemonic role; and (2) its practices, which, though traditional, limit the breadth and depth of inquiry and focus on binary categories such as guilty or not guilty.

Because of its storying potential, citizens may expect legal proceedings to take a formative role in adjudicating history as well. However, courts have often protested taking on this task on the grounds of "modesty." In the socially potent trial of Adolf Eichmann, the Israeli court explicitly invoked judicial modesty in rejecting such a definitive role, pleading that it was too shortsighted and lacked the requisite authority:

[...]

[T]he Court... must not allow itself to be enticed to stray into provinces which are outside its sphere.

... [T]he Court does not possess the facilities required for investigating general questions of the kind referred to above... As for questions of principle which are outside the realm of law, no one has made us judges of them and therefore our opinion on them carries no greater weight than that of any person who has devoted study and thought to these questions.

Courts are nonetheless conscious that their opinions "prompt particular value commitments on the part of the participants and the audience and thus act as a kind of sentimental education."

The irony is that courts pay lip service to judicial modesty, but cater to processes of collective memory formation despite themselves; a court "cannot quite contain itself from proclaiming the trial's 'educational significance' and 'educational value.'" At

[113] Id. at 31.
[114] Cf. W. JAMES BOOTH, COMMUNITIES OF MEMORY: ON WITNESS, IDENTITY, AND JUSTICE, at xi (2006) ("[W]ho tells those stories, and what they contain, how certain persons and events are made to stand out... while others are... forgotten, is itself a story of filiation, power, and memory within the community.").
[115] OSIEL, supra note 76, at 82.
[116] It is Osiel who introduces this use of "modesty." Id. at 80, 246.
[118] GARLAND, supra note 107, at 67.
[119] OSIEL, supra note 76, at 81.
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a minimum, judges are aware that "their judgment will inevitably be viewed as making history and that their judgment will itself be subject to historiographical scrutiny." 120

The efficacy of the law as a vehicle for collective memory is also hampered by its narrow focus on questions of guilt and innocence—an inquiry whose scope 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. Thus, "[t]he central concerns of criminal courts . . . are often decidedly at odds with the public's interest in a thorough, wide-ranging exploration of what caused such events and whose misconduct contributed to them." 121 In addition, legal practices may be tedious and droll to a public hungry for dramatic developments. Even the Nuremberg trials seemed to many reporters as dull and of little dramatic import; novelist Rebecca West, covering the trials for The New Yorker, declared them to be "insufferably tedious." 122 It is true that trials perceived as dull by members of a social collective who lack a direct connection to the acts or individuals subject to judgment may contain other meaning for those intimately connected with these affairs. In addition, many participants saw dullness as a necessary characteristic of proceedings against McVeigh, an inherent result of the detailed presentation of evidence required to obtain a conviction. 123 Thus, dullness is a professionally necessary as well as a morally required quality of an effective criminal prosecution.

Legal practices may themselves constrain the impact of a trial upon collective memory. Evidentiary and procedural rules mandate that evidence be introduced in specific ways and limit elicited testimony to forms of questioning acceptable on direct or cross-examination. In addition, the law's singular focus upon the criminal suspect(s) narrows the scope of inquiry to the deeds and motives of these individuals, which means that the victims' story is often excluded. Thus, the legal narrative is a necessarily incomplete one. Other institutional actors, such as historians or sociologists, may need to step in to supplement the historical record of events whose memory consists largely of a legal record

120. Id. at 82.
121. Id. at 80.
122. Id. at 91.
123. See Shapiro, supra note 109 (stating that the McVeigh trial "offered little tension beyond grim, almost banal procedural momentum").
focused on objective proof of the crime and not the subjective experience of the event. In addition, the "attitude of sanctity [in which traumatic testimony is ordinarily regarded] is deeply at odds with the skeptical, scrutinizing posture of any competent cross-examiner, such as defense counsel." Witnesses—and their testimony—are on trial.

The law's efficacy as a vehicle of collective memory is directly imperiled when an offender receives a sentence that is perceived as inappropriate—when the punishment does not fit the crime. In the context of the Oklahoma City bombing, Nichols was convicted only of involuntary manslaughter in federal proceedings, although many study participants believed that he should have been convicted of first-degree murder, necessitating that he be tried again in Oklahoma state court. In situations such as this, adjudicative conclusions seem "morally compromised" because "what is most urgently desired by those seeking a complete accounting... is a thorough condemnation of all those sharing significant responsibility... plus a publicly enforced recollection of enduring 'debt' to victims and their families thus incurred."

Yet another limiting factor is that the law does not explicitly acknowledge its socially constructed nature, unlike "fickle" collective memory, which acknowledges that it incorporates past constructions and that it will be reshaped by future constructive processes. 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. In the law's eyes, the past informs the present by binding it, not by providing structuring lines to support constructions. The only situation in which legal practitioners overtly acknowledge constructive processes is the act of legal "interpretation." Yet, legal actors construct proceedings every day simply by allowing them to be mediated—not only by allowing reporters and cameras into the courtrooms, but also by

124. OSI EL, supra note 76, at 104.
125. Throughout, the Author refers to interviewees as "participants" and denotes specific participants by assigned number, not by name.
126. OSI EL, supra note 76, at 164.
127. Id. at 217.
128. Id. at 216.
129. Id. at 242.
reserving room for them in the front rows of the courtroom and in establishing media pens inside courthouse lobbies, in addition to actively orchestrating certain legal activities such as the perp walk for maximum mediated effect.

As a result of the mismatch between the means to the law's ends and the formation of collective memory, the law is caught between a need to maintain the legitimacy of its institutional narratives and to satisfy diverse justice needs. The law as an institution, then, cannot bear the weight of collective memory alone any more than any other social institution; its "credibility in telling a national story, one that will powerfully shape collective memory, is thus alternately threatened by the narrowness or breadth of the narrative framing." Instead, the law contributes to organic processes of collective sense-making. Habermas, for one, suggests that "courts may do for society at large what psychoanalysis does for individuals. They must unearth repressed memory of historic trauma, forcing the 'patient' to work through its enduring ramifications, so that he can confront the present on its own terms, not by acting out of unresolved issues."

As the 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 storytelling forum; "we have even become suspicious of stories themselves, that is, of their capacity to capture and impart important truths," and so our "desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary" is now recognized to be only a desire, and not actual coherence, integrity, fullness, and closure. Similarly, the law is also subject to new responsibilities to new 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 takes seriously their condition as victims." Legal proceedings can be therapeutic under the right circumstances, contributing to victims' self-respect when "their suffering is listened to in the..."
trials with respect and sympathy, the true story receives official sanction, the nature of the atrocities are publicly and openly discussed, and their perpetrators' acts are officially condemned."

An involuntary victim–offender relationship is part of how victims and their family members come to terms with a crime, including the formation of a narrative understanding of the event that constructs the crime as a trauma and defines its traumatic contours. In the Oklahoma City context, had the perceived relationship with McVeigh not been so disturbing for victims' family members and survivors due to McVeigh's perceived defiance and callous disregard for the lives lost in the broadcast of his antigovernment message, it may have been easier for these individuals to think through what had happened, enhancing their ability to cope with the bombing.

IV. VICTIM–OFFENDER RELATIONSHIPS IN THE AFTERMATH OF THE OKLAHOMA CITY BOMBING

A. Choosing the Oklahoma City Bombing as a Case Study Site

The Oklahoma City bombing is an ideal context in which to study the formation of a perceived victim–offender relationship for several reasons. McVeigh was not only a popular target of media coverage, but also generated media statements, granted media interviews, authored newspaper editorials, and collaborated on a book authored by journalists Lou Michel and Dan Herbeck. This heightened media presence made McVeigh a very visible defendant, and much was publicized about his childhood, ideology, and behavior. In addition, McVeigh's co-defendant, Nichols, was in many ways his foil, appearing soft where McVeigh was hard, ashamed where McVeigh was remorseless, and emotional where McVeigh was stoic. Nichols's behavior therefore approached that of the "ideal" criminal defendant who remorsefully accepts responsibility. Finally, the large victim population—comprised of both victims' families and

134. Id. (quotation omitted).


136. Displays of remorse are encouraged. For instance, remorse has been considered by courts as mitigating evidence at sentencing. See, e.g., State v. Jones, Nos. 48152-5-1, 51738-4-1, 2003 WL 22230128, at *7 (Wash. Ct. App. Sept. 29, 2003) (stating that remorseful defendants "speed up the healing and closure process for their victims").
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survivors—enables a researcher to gauge not only whether a victim-offender relationship formed but also the frequency with which individuals perceived such a relationship and the strength of those perceptions.

To select the Oklahoma City bombing as a case study context, however, is to choose the exception and not the rule. The Oklahoma City bombing is atypical in nearly every respect, rendered unique by the very same factors, such as extraordinary amounts of media coverage and large number of victims, that make it an ideal context in which to study the formation and implications of a victim-offender relationship. Future articles will explore the development of victim-offender relationships in less unusual instances of violent crime, such as rape or murder cases that receive little to no media attention.

Although the Oklahoma City bombing as a case study provides an excellent portrait of a negative victim-offender relationship that is destructive and disruptive, fettering victims' families and survivors to the bombing for years afterward, it is important to remember that a victim-offender relationship need not be negative. While victims are unlikely to possess warm feelings towards defendants in the immediate aftermath of their crimes, it is possible for victims to form healing relationships with offenders, perhaps through initiating contact with a convicted defendant who is serving a sentence or through victim-offender mediation programs. In addition, a negative victim-offender relationship does not preclude victims from feeling sympathy for offenders' family members, particularly in capital cases. It is most likely, however, that victim-offender relationships are overwhelmingly likely to have negative implications immediately after their formation, perhaps due in part to the adversarial nature of the criminal justice system, and to metamorphosize into positive relationships only after the defendant has been held accountable for his actions and only if the defendant expresses responsibility and remorse.137

137. Of course, murders affecting religious communities whose tenets stress the importance of Christian forgiveness are exceptions to this rule. When Charles Roberts murdered five girls at the West Nickel Mines Amish School in 2006, one of the key themes in newspaper coverage of the brutal killings was the Amish “grace” that enabled them to forgive the killer and reach out to his family. “Hours after the shootings, several Amish . . . walked to the homes of the shooter's widow, parents, and parents-in-law to express sympathy and offer forgiveness ... . When [the killer] was buried, about 30 members of the Amish community attended and mourned.” The Amish also contributed to a fund for the killer's children. Art Carey, Among the Amish, a Grace That Endures, PHILA. INQUIRER, Oct. 2, 2007, at A1.
B. Institutional Constraints and Communicative Interaction with Offenders

In the context of the Oklahoma City bombing, research participants perceived that they shared an involuntary relationship with Timothy McVeigh that cast a negative aura upon reconstructive social frameworks of memory. This hindered the recovery process by “manipulating” the victims through the media until his execution in June of 2001. Participants could not help but incorporate this involuntary relationship as part of their collective memory formation, and they did so in ways that delayed or at the very least unsettled the healing process. In the Oklahoma City context, the victim–offender relationship was entirely mediated by institutions. It was first facilitated by the news media and then boundaried by the criminal justice system, which controlled “exposure” to McVeigh and created forums such as the trial and execution where family members and survivors could assess McVeigh’s behaviors. Interestingly enough, the criminal justice system even provided the backdrop for media coverage of McVeigh while he was imprisoned; Ed Bradley’s 60 Minutes interview with McVeigh was filmed in his cell on death row.  

These constraints were in tension with the historical treatment of victims in criminal prosecutions, with key tenets of the victims’ rights movement, and with recent state reforms designed to expand victim participation in criminal trials and executions. Victim participation in death penalty jurisprudence and practice has grown increasingly complicated from medieval times to the present day. Before the criminal justice system evolved as a state institution, victims were responsible for initiating criminal charges and even prosecuting offenders. The state, however, gradually took over the tasks of criminal prosecution and sentencing, minimizing victim participation until they were altogether excluded from the process, and only granted the participatory rights enjoyed by other citizens. Execution itself was also radically different; mid-nineteenth century executions in America were typically public hangings in the courthouse square by the local sheriff, and executions in

140. Id. at 939 (explaining the subordination of blood feuds to the public interest).
141. NEGLEY K. TEETERS, HANG BY THE NECK: THE LEGAL USE OF SCAFFOLD AND NOOSE, GIBBET, STAKE, AND FIRING SQUAD FROM COLONIAL TIMES TO THE PRESENT 6, 59,
eighteenth and seventeenth century London were very dramatic public spectacles where prisoners were paraded before mobs eager for entertainment.  

In contrast, contemporary capital cases involve extended pretrial periods and trials, result more frequently in life sentences rather than death sentences, include occasional reversals and retrials, often see a decade or more transpire between sentence and execution, and incorporate numerous initiatives focusing on victims’ rights and interests. Significantly, capital trials now commonly involve victims’ families with much greater regularity and centrality than in earlier eras due to the advent of victim impact testimony and very recent accommodations made to assist victims’ families in witnessing executions. The Victims’ Rights movement of the 1980s won an increased role for victims in securing the defendants’ punishment for most crimes, and victims’ family members battled through a succession of Supreme Court cases (Booth v. Maryland, South Carolina v. Gathers) before winning the right to present “victim impact evidence” at the penalty stage of a capital trial in 1991 in Payne v. Tennessee. Furthermore, states have increasingly accommodated victims’ family members throughout the capital trial and execution. By 2004, thirty-five states had instituted a position of Victim...
Advocate responsible for maintaining contact with victim family members throughout condemned prisoners' successive appeals, preparing them for the execution, and actually attending the execution with victims' family members.148

Additionally, in the 1990s two themes converged to make victim-related issues of even more immediate importance: the suggestion that imposing and carrying out a death sentence brought needed "closure" to victims' families, and the notion that justice requires carrying out executions in the name of murder victims and their survivors. Currently, advocates and opponents of capital punishment both claim that the death penalty has a profound effect on the families of murder victims; the former assert that it provides them with "closure," the latter assert that it further victimizes them. Criminal justice officials themselves use "closure" as support for capital punishment.149

The constraints placed around Timothy McVeigh's prosecution and execution vastly limited opportunities for communicative engagement; participants not only were prevented from interacting interpersonally with McVeigh, but had to fight to witness legal proceedings from a distance in three contexts. First, after the trial judge granted McVeigh's attorney's request for a change of venue from Oklahoma to Colorado and refused to broadcast the trial back to Oklahoma City by closed-circuit feed, family members and survivors petitioned Congress to ensure that this broadcast occurred.150 Second, after the trial judge refused to allow a slew of family members and survivors to attend the trial because they were slated to give victim impact testimony during sentencing, these individuals again asked Congress to pass legislation (known as the "Victim Rights Clarification Act of 1997"151) allowing them to both attend the penalty phase of the trial and testify at sentencing.152 Third,

angered by the fact that only ten victims (assigned by lottery) were permitted to witness McVeigh’s execution in Terre Haute, family members and survivors had to petition Attorney General Ashcroft to broadcast McVeigh’s execution back to Oklahoma City via closed-circuit feed so that additional witnesses could be accommodated.\textsuperscript{153}

It is not surprising that such institutional mediation would alter reconstructive memory processes. Legal institutions, including the police, judiciary, and penal systems, specialize in capturing, prosecuting, and punishing an offender impersonally, concentrating on the offender and not on his victims. Institutional outrage at crime stems not from the human loss crime engenders but from the legal violation itself. Victims, in contrast, cannot remain impersonal but are submerged in an emotive role; their orientation to the crime is relational, their outrage stemming from an intimacy lost through criminal behavior. Victims cannot relate to institutional technology. Thus, while institutions are indirectly affected by a violation of a disembodied law, victims are directly affected by an embodied crime made manifest through a lost beloved body.

The lynchpin in the relationship between victims’ families and survivors and McVeigh was that he be held accountable for his role in the bombing, whether or not forcing accountability upon him later led him to accept responsibility for his heinous deed. The successful formation of new individual and social frameworks of memory demanded that McVeigh be tried and sentenced for his crimes—tasks that in a nation-state are solely within the province of the state or federal criminal justice systems. Thus, the criminal justice system also was at the helm of the accountability process that was key to the reconstruction of collective memory. Its institutional routines left indelible fingerprints upon the pursuit of accountability, defining the scope of inquiry into the bombing and investigating McVeigh’s criminal intent. The result was that the accountability inquiry was narrowed to a question of guilt and innocence, which of necessity excluded queries that were not legally relevant but still meaningful to victims’ families and survivors.

\textsuperscript{153} See David Johnston, Justice Dept. Sets Procedures for Viewing McVeigh’s Death, N.Y. TIMES, Apr. 20, 2001, at A17 (describing the additional procedures put into place to accommodate the victims in viewing the execution); McVeigh Victims’ Kin Will Get to See Execution, N.Y. TIMES, Apr. 12, 2001, at A27 (reporting Attorney General Ashcroft’s decision to allow closed-circuit television viewing of the execution); Jim Yardley, Execution on TV Brings Little Solace, N.Y. TIMES, June 12, 2001, at A26 (detailing the closed-circuit broadcast provided to victims of the Oklahoma City bombing).
In addition, victims' families and survivors were merely bystanders to the adjudication of guilt or innocence, aside from the handful who testified in the guilt phase of the trial; the primary actors in this drama were the trial judge and members of the prosecution and defense teams. Allowing victim impact testimony during sentencing proceedings did somewhat mitigate the silencing of victims' families and survivors, but the statements of such witnesses were very closely circumscribed. Criminal trials are key to the production of collective memory but are problematic vehicles of collective memory by themselves. Their specialized inquiries break down under the weight of memory's demands if asked to bear that full weight alone, and so must be supplemented by other endeavors. Nonetheless, the criminal justice system not only controlled visual access to McVeigh through the media and legal proceedings, but also affected the formation of collective memory through manners as diverse as how expeditiously the trial was held, how it was held (e.g., whether it was broadcast to other venues), whether family members and survivors were allowed to attend, what verdict was handed down, and whether the sentence was carried out.

C. The Importance of the Victim-Offender Relationship

Existing methods of researching the psychological and emotional states of homicide survivors are incomplete in and of themselves in addressing the experiences of victims' families and survivors. The phenomenon of how victims process the aftermath of murder, including how they understand legal proceedings, and how they witness and interpret an execution, cannot be accounted for merely by analyzing the processes of going through grieving "stages," attending or testifying in legal proceedings,

154. Research on traumatic grief began in 1917 with Freud's portrait of grief pathology in *Mourning and Melancholia* and continued through the 1900s. Scholarship on grief and mourning, including in the context of homicide, elaborates varying numbers of "stages" or "processes" that victims' families encounter after loss of a loved one. See JOHN BOWLBY, LOSS: SADNESS AND DEPRESSION 85 (1980) (describing four stages: numbness; yearning and searching for lost figure; disorganization and despair; and reorganization); ELIZABETH KUBLER-ROSS & DAVID KESSLER, ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS 7 (2005) (enumerating five stages of loss experienced by the dying but extended to bereaved survivors: denial; anger; bargaining; depression; and acceptance); J. WILLIAM WORDEN, GRIEF COUNSELING AND GRIEF THERAPY: A HANDBOOK FOR THE MENTAL HEALTH PRACTITIONER 10–18 (2d ed. 1991) (describing four tasks of mourning: to accept reality of loss; to work through pain of grief; to adjust to environment without the deceased; and to emotionally relocate the deceased and move on); Erich Lindemann, *Symptomatology and Management of Acute Grief*, 101 AM. J. PSYCHIATRY 141, 142 (1944), reprinted in 151 AM. J. PSYCHIATRY 155, 156 (1994) (listing three stages: emancipation from bondage to deceased; readjustment to environment...
witnessing the reading of the guilty verdict or the execution, or media representations of victims. Significantly, each of these approaches positions the victim as a passive self, a body that travels through grief stages, a body that attends the trial and perhaps witnesses the execution, a body that can be represented by others. This creates the impression that victims are both defined and confined by these models and their codes of behavior. An alternate approach is to examine the phenomenon of homicide survivorship as an involuntary relationship between the victims’ family and the offender, a bond that exists even when neither party knew the other prior to the murderous act, and that like any other has communicative dimensions, structured through speech and silence.

This relationship is rarely tacitly acknowledged (and never explicitly defined) in criminological scholarship. It is a concept whose logic is the combined logic of several facts—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 in order 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 thorough 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.” This relationship may also extend to offenders’ families; offenders, their families, and even their communities may be roped together into a category of otherness, set apart by disgust and hatred, with offenders’ family members experiencing intensely negative publicity.

What is the communicative nature of this relationship? In the context of the Oklahoma City bombing, it 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 and survivors perceived they had little communicative control over McVeigh. McVeigh was seen to have great communicative agency and an ability to communicate with
family members and survivors despite their antipathy towards such efforts, while victims and survivors 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 and survivors very much wanted to hear why and how McVeigh carried out the bombing and yearned in many cases to speak with him in person. It was a relationship whose only possibility of termination lay in the death of McVeigh or of victims and survivors 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 processes of identity reconstruction described earlier. As will be discussed shortly, because of the understandings of McVeigh that evolved amongst participants, many described McVeigh's continued existence as a barrier on the road to "recovery" and resolution. McVeigh occupied one camp in the involuntary relationship between family members and survivors and the offender, and therefore was bound to them. This also meant that 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 trauma and delayed family members' and survivors' control over the resolution process. At any time a message could issue from McVeigh (or an old media statement could resurface) that would potentially aggravate wounds just starting to heal. Thus, the collective memory of homicide—including that of the Oklahoma City bombing—was shaped not only by the events of the murder but also by occurrences for the duration of the involuntary relationship.

Significantly, refocusing research on the victim-offender relationship also recognizes that victims and survivors define, as well as become defined by, the experiences of survivorship. It implies an exchange, a give-and-take of activity and passivity, and acknowledges that processes of sense-making 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.

D. Perceptions of a Victim–Offender Relationship with McVeigh

In the wake of homicide, family members and survivors become involuntarily and intimately linked to the offender through the offense, so that they must "live with" the offender to a greater or lesser extent, often until death—either the offender's or their own. As Janice Smith, a 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." The obligations of this linkage are contradictory; on the one hand, the offender has murdered at least one family member, yet on the other, the offender is often the only possible source of information about the offense and the victim's last moments. This linkage is also most often mediated; through news coverage, other forms of media, and trial proceedings, victims become very familiar with the offender's personal history, including his family. Victims and offenders may hear each other's statements through press conferences, media interviews, trial testimony, books or websites, or other forms of public communication. Less often, victims and offenders may communicate more directly, through letters or by meeting face-to-face through mediation programs. Such communicative interchanges deepen and contextualize the victim–offender relationship. There may even be a sense that family members and survivors are an offender's "audience," and an interactive positioning develops based on this perception. Constance Richardson, a nonparticipant family member whose twenty-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."

Intensive interviews with family members and survivors revealed a perceived intentionality, a conviction that statements made by McVeigh were targeted to these individuals to further wound them. As Participant 21 stated, "it [seemed] like every time he turned around, he was doing something to jab at us and

157. Bryant, supra note 1.
158. Id.
it was just very painful because he could sit there behind those bars and get... three square[ ] meals a day and everything and not have all these worries..."

Many participants attributed malicious intent to McVeigh's communications; for instance, Participant 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 just keep digging at us, sticking that knife and twisting." Participant 25, however, contrasted McVeigh's intent with that of Nichols:

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 is a little different because since he's been tried and convicted, you don't hear about 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.

Termination of media coverage allowed Participant 15 to cease to think of McVeigh: "I've quit completely, stopped thinking about him the day they executed him." This intimation of malicious intent through media contact was especially strong when McVeigh made a statement that family members found especially painful. One of the most wounding messages that family members and survivors recalled hearing from McVeigh was his terming the murders of the children in the America's Kids daycare center in the Murrah Building "collateral damage."

Significantly, family members and survivors embodied their relationship to McVeigh in how they worded their responses to interview questions, creating the impression of a dialogue between themselves and McVeigh. Participant 21 referred to McVeigh jabbing "at us," while Participant 5 stated that McVeigh has hurt "me." Participant 25 noted that McVeigh "would tell the families," and Participant 24 spoke in terms of McVeigh and Nichols having "access to the family members, survivors through the media, through books." In addition, participants seemed at

159. See MICHEL & HERBECK, supra note 135, at 234.
160. Participants were not asked any questions addressing how they felt towards McVeigh or whether they perceived that they were tied to him in any manner.
times to assert that McVeigh would not have sincerely meant any apology that he may have given at his execution.

E. The Victim–Offender Relationship as a Para-Social Relationship

Attempts to define exactly what interactions constitute interpersonal communication are fraught with peril. As Knapp et al. remark, “[A]ttempts at specifying exactly what interpersonal communication is and is not are often frustrating and fall short of consensus.” Communication scholars disagree on “the number of communicators involved, the physical proximity of the communicators, the nature of the interaction units used to explain an encounter, and the degree of formality and structure attending the interactants’ relationship.” Perhaps all it is possible on which to agree is that interpersonal communication involves: “(1) at least two communicators intentionally orienting toward each other, (2) as both subject and object, (3) whose actions embody each other’s perspectives both toward self and toward other.” Cappella emphasizes influence as the focus of interpersonal communication analysis: “[I]f interpersonal communication has any essential feature, it is that persons influence one another’s behavior over and above that attributed to normal baselines of action.” Despite this lack of consensus, however, certain definitional practices are more common than others. For instance, it is most common to limit the number of participants in an interpersonal encounter to two, and it is frequently assumed that such interactions are face-to-face exchanges involving close physical proximity.

Though family members and survivors perceived themselves to be the targets of McVeigh’s statements, such communication does not fit within the narrowest formulation of the interpersonal communication interaction, which involves face-to-face meetings between two participants consisting of a simultaneous “two-way” exchange of meaning. All message exchanges outside of the

162. Id. at 9.
163. 2 INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATIONS 336 (1989).
166. See PETER HARTLEY, INTERPERSONAL COMMUNICATION 20–24 (2d ed. 1999).
trial context were mediated. At trial, those witnesses who testified in McVeigh’s trial were involved in interpersonal exchanges with the attorneys who were eliciting direct testimony from or cross-examining them, and not with McVeigh himself. It is entirely possible that there was an actual interpersonal interchange between McVeigh and trial witnesses, for participants recall looking at McVeigh during their testimony and remember their impressions of his reactions. However, even this interaction is not what is meant by a purist definition of interpersonal communication. So how best to explain the intimacy of the communicative relationship between McVeigh and his victims, to account for participants’ perceptions that McVeigh was speaking to them?

In 1956, Horton and Wohl published an article in Psychiatry seeking to explain television viewers’ perceived relationship to television personalities. 167 Terming this illusory relation a “parasocial interaction,” Horton and Wohl defined it as “the illusion of face-to-face relationship with the performer” in which “[t]he conditions of response to the performer are analogous to those in a primary group.” 168 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 participates in the show by turns.” 169 Para-social relationships are characterized by a “lack of effective reciprocity” because “[t]he interaction, characteristically, is one-sided, 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.” 170 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 presence. 171 Significantly, this presence is above all a reliable presence. Nonetheless, however artless this relationship may appear, it is also a strategic and constant one. Producers formulate the persona’s character

168. Id. at 188.
169. Id. at 189–90.
170. Id. at 189.
171. Id. at 190.
specifically to enhance audience members’ loyalty to the persona. Subsequent research into para-social relationships further suggests that this illusory intimacy, the subjective creation of audience members, is actually taken as “real.” Para-social relationships continue to pervade media usage today.

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. Thus, “[t]he audience is expected to accept the situation defined by the program format as credible, and to concede as ‘natural’ the rules and conventions governing the actions performed and the values realized.” For this to occur, audience members must be susceptible to a “coaching of attitudes”:

The acceptance by the audience of the role offered by the program involves acceptance of the explicit and implicit terms which define the situation and the action to be carried out in the program. Unless the spectator understands these terms, the role performances of the participants are meaningless to him; and unless he accepts them, he cannot ‘enter into’ the performance himself.

But audience members’ willingness to be susceptible to this coaching is entailed in the role of audience membership itself. Subsequent research into para-social relationships further suggests that this illusory intimacy, the subjective creation of audience members, is actually taken as “real.”

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172. See id. at 195–96 (stating that the persona’s character is developed in order to encourage the audience “to assume a sense of personal obligation to the performer”).

173. Analyzing the para-social relationships that viewers of television news form with newscasters, Levy notes, “Even 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 R. Levy, Watching TV News as Para-Social Interaction, 23 J. Broadcasting 69, 78 (1979), reprinted in INTERMEDIA: INTERPERSONAL COMMUNICATION IN A MEDIA WORLD, supra note 167, at 185.

174. In the wake of “Crocodile Hunter” Steve Irwin’s death on September 4th, 2006 from a stingray barb embedded in his chest, this popular figure was publicly mourned, becoming the leading celebrity story despite others such as the debut of Katie Couric on the CBS Evening News, Rosie O’Donnell’s arrival on The View, and the release of the first photographs of Suri Cruise. David Williams, Irwin’s Death Strikes a Chord, CNN.COM, Sept. 7, 2006, http://www.cnn.com/2006/SHOWBIZ/TV/09/06/irwin.outpouring/index.html. One CNN story on the intense coverage of Irwin’s death and public mourning featured a media expert who directly attributed the phenomenon to the strong para-social relationships Irwin fostered in audiences: “Every now and again 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.” Id.

175. Horton & Wohl, supra note 167, at 194.

176. Id. at 195–96.
There is of course a parallel between audience members who sit inert and watch television and victims' family members who are forced to spend at least most of the guilt and sentencing phases of a trial (with the possible exception of victim impact testimony) as passive witnesses in the courtroom gallery. Victims' families are for the most part consigned to a spectator role during the trial of "their" perpetrators. Either they play by the rules of "protocol" and "decorum," remaining present but passive, or they do not gain access to the trial. In order to be part of the courtroom audience, victims' families must also accept restrictions upon displaying tearful emotions and wearing clothing or buttons displaying their loved ones' photos.  

Like all media consumers, Oklahoma City bombing survivors and family members had been schooled in the audience role, taught to feel both affiliation for media personalities who they would like to have in their primary social circles, and a corresponding dislike for personalities who somehow threatened or opposed the characters to which they were partial. As such, they were already experienced in discriminating between positive and negative para-social relations with regard to television "heroes" and "villains." Because the media limelight also transforms criminals into horrific celebrities, familiarity with mass media also frames the ways in which we form perceptions of these most monstrous defendants. This phenomenon is so pervasive that media consumers may even process unfolding news accounts of criminal defendants and their nefarious deeds by comparing them to older celebrity criminals, including the most "evil" of celebrity murderers such as Ted Bundy or Charles Manson. McVeigh, of course, was purposefully constructed as such a criminal villain, whose murderous acts and lack of remorse rendered him deserving of condemnation and scorn.

Researchers have always 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.  

This type of investiture can be termed a positive para-social relationship, or an 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

177. See supra Part II.C (detailing restrictions on the presence and appearance of courtroom spectators).  
178. See Horton & Wohl, supra note 167, at 191 (describing the persona as "a friend, counselor, [and] comforter"); Levy, supra note 173, at 185 (construing the persona as friendly and reliable).
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. A para-social relation with an “enemy” also frames spectators’ perceptions of the performer, enabling persistent dislike and 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. Realizing how negative para-social relations are cultivated also necessitates broadening the application of the concepts of “media” and “media producer,” extending them from the narrower context of mass media to the broader context of social institutions that may take on strategic mediating roles—including criminal justice officials who orchestrate the arrest and trial of criminal offenders, from the perp walk to incarceration or execution. The media certainly plays a key role, however, in transforming an offender into a sort of media celebrity whom viewers are encouraged to “love to hate.”

Courts have noticed that the perp walk in particular displays the suspect “to the world, against his will, in handcuffs, and in a posture connoting guilt.” In [Lauro v. Charles](https://doi.org/10.13140/RG.2.2.2178710762839550), the Second Circuit found that a defendant’s Fourth Amendment rights had been violated when he was subjected to a staged perp walk in which he was restrained by handcuffs, made to walk outside the precinct house to a waiting car, driven around the block, then forced to walk back inside the precinct in front of television cameras. Terming this “an inherently fictional dramatization of an event that transpired hours earlier,” the Second Circuit stated that such a reenactment lacked any legitimate law enforcement purpose. The court stressed, however, that its holding did not encompass those perp walks “where a suspect is photographed in the normal course of being moved from one place to another by the police,” and that it had not addressed whether it was proper for the police to notify the media in advance that a suspect was to be transported.

From participants’ attributions of malicious communicative intent to McVeigh and the degree to which their responses attributed a dialogic character to their interactions with

179. Lauro v. Charles, 219 F.3d 202, 212 n.7 (2d Cir. 2003).
180. Id. at 212–13.
181. Id. at 213.
182. Id.
McVeigh, it is clear that there was ample evidence of a negative para-social relation between family members and survivors and McVeigh. McVeigh was their para-social enemy, the one who, however mediated his communications may be, both had the potential to communicate and actually communicated with the intent of inflicting further harm on an especially vulnerable and wounded population. However, while the para-social relationship as a concept implies that the victim–offender relationship was illusory, it was so only in the sense that participants spoke in terms of an unfortunate intimacy with McVeigh that never developed from interpersonal contact. McVeigh actually initiated the relationship, after all, by traumatizing them, injuring them, and murdering their loved ones. Thus, this “illusory” relationship had very real traumatic effects.

The intimacy of this negative para-social relation was particularly ironic in light of the impersonal nature of the Oklahoma City bombing itself. According to numerous media interviews and statements made to the authors of his biography American Terrorist, McVeigh saw himself as standing in opposition to the U.S. 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 for family members, survivors, and the nation, through iconic images such as that of the dying 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 in those terms.

F. Proxemics and the Para-Social Relationship

How did the para-social relationship between McVeigh and victims’ families and survivors come about? It originated in an institution that helps to establish an event as culturally traumatic—the mass media.

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. Meyrowitz contends that an affective relationship can be encouraged by the composition of a television shot, such that “the way in which a person is framed may suggest an interpersonal distance between that person and the viewer.” Meyrowitz finds support for his assertion in two sources. First, Meyrowitz relies upon Edward T. Hall’s theory of proxemics, or interpersonal distance, to bolster a “possible relationship between perception of interpersonal distance and the ‘framing variable,’” or the distance between viewer and viewed, because at “any given interpersonal distance one sees a specific amount of the other person clearly.” Meyrowitz finds additional support in the work of artist Maurice Grosser’s theory of the portrait, which “suggests that distance is a significant factor in shaping viewer response.” According to Grosser, “the portrait is distinguished from other painting formats in that the closeness of artist and model yields ‘the peculiar sort of communication, almost a conversation, that the person who looks at the picture is able to hold with the person painted there.’”

Applying the theories of Hall and Grosser, Meyrowitz argues 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. This relationship is altered by the “framing variable,” or the distance at which a shot places the viewer from the viewed: “The subject may be shot in close-up, medium shot, or long shot. This framing variable creates a mediated distance between the viewer and the content of the image.” Actions in long shots “tend to be viewed in terms of abstract ‘events,’” and “close-ups focus attention on personal characteristics and response,” with intensity of response being related to shot distance. In addition, some shots portray an “objective distance” of a detached observer, while others utilize a “subjective distance” that allows audience viewers to

186. Id. at 223, 225.
187. Id. at 225–26.
188. Id. at 226; see also MAURICE GROSSER, THE PAINTER’S EYE 9 (1951) (explaining the unique intimacy characteristics in the framing and dimensions of a portrait).
189. Meyrowitz, supra note 185, at 226.
190. Id. (emphasis omitted).
191. Id. at 229.
assume the perspective of a character.\textsuperscript{192} Also relevant is Goffman's concept of "front," "that part of the individual's performance which regularly functions in a general and fixed fashion to define the situation for those who observe the performance."\textsuperscript{193} "Personal front" includes manner and appearance, and "front region roles" are roles that reflect onstage behavior in which someone plays out an idealized conception of a social role.\textsuperscript{194} Significantly, "[t]he enemy is generally seen in front region roles only."\textsuperscript{195}

Media coverage of McVeigh was 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 \textit{60 Minutes} interview that aired March 12, 2000, which Ed Bradley conducted with McVeigh while he was on federal death row.\textsuperscript{196} The perp walk shots most certainly portrayed McVeigh in the "front region" role of criminal and social enemy. These photos featured McVeigh in an orange jumpsuit surrounded by federal marshals; his face angular, his jaw set, and his countenance blank, McVeigh stared (or squinted) into the harsh glare of the Oklahoma sun. McVeigh's fixed stare was clearly the captivating element of these images. Thus, it is not surprising that the perp walk images were the photographs of McVeigh that most frequently appeared in media coverage of the Oklahoma City bombing, and that his profile from these shots later became the centerpiece of news graphics headlining execution stories.\textsuperscript{197} Ed Bradley's \textit{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 expressions.\textsuperscript{198}

\begin{thebibliography}{99}
\bibitem{192} Id. at 227.
\bibitem{193} Id. at 232.
\bibitem{194} \textsc{Erving Goffman}, \textsc{The Presentation of Self in Everyday Life} 23–24 (1959); \textsc{Meyrowitz, supra} note 185, at 233–34 (contrasting Goffman's front region from the antitheatrical back region).
\bibitem{195} \textsc{Meyrowitz, supra} note 185, at 236.
\bibitem{196} See \textit{60 Minutes: Interview by Ed Bradley with Timothy McVeigh} (CBS television broadcast Mar. 12, 2000).
\bibitem{198} \textit{60 Minutes: Interview by Ed Bradley with Timothy McVeigh, supra} note 196.
\end{thebibliography}
Further attention was drawn to McVeigh's staring behavior 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." This first impression resurfaced continually, including on the morning of his execution: "In 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." Interestingly, early media constructions of McVeigh were recycled into subsequent constructions, snowballing upon one another to produce a coherent but redundant image of McVeigh as para-social enemy. Thus, McVeigh's staring behavior became crucial in the construction of McVeigh as a para-social enemy.

The heavy media focus on the perp walk images could easily have influenced the early impression formation of family members and survivors, engendering 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. 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 subsequent behavior." Moreover, interactants require only very brief glimpses of behavior to form "fairly accurate and strong judgments of actors." The rapidity of impression formation is necessary because humans are "driven by an underlying need for uncertainty reduction" and by a need for sense-making. Significantly, humans' initial impressions of unfamiliar individuals are highly consistent, but are more accurate as to judgments of sex, age, occupation, and social status than as to...
attitudes, values, and personality traits. Initial impressions are “highly persistent, even in the face of subsequent contradictory cues,” and humans seem to seek out communicative information that confirms first impressions.

Thus, the moment when family members and survivors were “introduced” to McVeigh via media broadcast of the perp walk was very likely when they formed initial impressions of McVeigh as a person and a perpetrator. Significantly, this footage or still shots from it were rebroadcast frequently and repeatedly in ensuing years on local and national news, thus reinforcing the visual cues from which the initial impression was formed. Several execution witnesses, unprompted by the interviewer, remarked on the similarities between McVeigh’s stare during the execution and his staring behavior in previous media images. For instance, Participant 22, a closed-circuit witness, stated, “[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 [he was] defiant.” Participant 15, another remote witness, stated in response to the inquiry of whether McVeigh’s gaze during the execution seemed cold, “Yes, very cold. He was the whole time. Any time you ever saw him on TV.” These comments revealed 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.

G. The Victim-Offender Relationship and the Prosecutorial Pursuit of Accountability

The negative para-social relationship that victims’ families and survivors perceived they shared with the defiant McVeigh also colored their perceptions of his behavior during his capital trial.

Significantly, participants’ remarks provide evidence of the strong belief of the Oklahoma City victims and survivors community (especially habeas group members) that institutions such as the criminal justice system must privilege their needs, most obviously by allowing attendance and participation in criminal trials. This belief pervades victims’ and survivors’ views on trial attendance and participation, and thus is a crucial part of understanding how participants came to draw a link between

\[205. \] Id. at 263.

\[206. \] Id. at 263–64.
such activities and recovery. Participants believed that they had rights to attend and be involved in proceedings; Participant 22 referred to both “our right to testify” and “our right to attend.” Similarly, Participant 28 recalled that victims and survivors gathered to persuade Ashcroft to arrange a closed-circuit broadcast of McVeigh’s execution and asserted that “we had the right to attend” McVeigh’s execution: “[If we want to witness then we should have been able . . . to witness it. That’s our right.” These uncompromising claims caused quite a bit of friction between victims and survivors and the criminal justice institution. Such claims are also solid tenets of the victims’ rights movement, in which victims claim the right to be kept informed of each development and the right to participate in criminal proceedings. Unfortunately, these demands have the effect of channeling victims’ and survivors’ expectations and hopes into the criminal trial, an institutional product that is not victim-centered in either its focus (which is upon the defendant’s actions) or in its inquiry (which centers upon guilt or innocence).

In the Oklahoma City context, the exercise of these “rights” became most concrete in two separate incidents when victims and survivors instituted legal appeals to the Tenth Circuit and ultimately lobbied Congress to override decisions by U.S. District Judge Matsch, which would limit or prohibit attendance at McVeigh’s trial. In 1996, after McVeigh applied for and received a change of trial venue from Oklahoma City to Denver, Colorado, victims and survivors hired Oklahoma City attorney Karen Howick to fight for McVeigh’s trial to be broadcast back to Oklahoma City via closed-circuit.207 On April 24, 1996, after an intense lobbying effort by victims, Congress passed legislation as part of the Antiterrorism and Effective Death Penalty Act of 1996, allowing for closed-circuit broadcasts of trials that are moved out of state or relocated 350 miles or more from the original trial location.208

Moreover, Judge Matsch initially ruled that victims and survivors slated to give victim impact testimony at sentencing could not attend the guilt phase of McVeigh’s trial, in keeping with the practice of barring trial witnesses from attending


208. 42 U.S.C. § 10608 (2006) provides that when a federal court changes the trial venue out of the state in which the case was initially brought to a venue more than 350 miles from the location in which the proceedings originally would have taken place, the court must order closed-circuit televising of the proceedings to be broadcast at the original location to permit victims who qualify under the statute to watch the trial proceedings.
proceedings before testifying. A group of victims and survivors appealed Judge Matsch's ruling to the Tenth Circuit, which upheld the ruling. Subsequently, another appeal was instituted. Participant 22, who was heavily involved in efforts to change Judge Matsch's ruling and who worked in the Oklahoma City Attorney General's office at the time, recalled that there was a sense that that route was going to be unsuccessful. After an intensive lobbying effort, legislation allowing victims to be present at trials was brought before Congress and passed with historic speed. As Participant 22 recalls:

[As it turned out the [Attorney General] and I went back [to Washington] and watched it pass the floor...[of] the House...one day and the floor of the Senate the next day. And then it was signed into law that evening by Clinton. So...in two days time it passed both Houses and [was] signed into law.

This legislation, known as the Victim Allocution Clarification Act of 1997, states amongst other provisions that “a United States district court shall not order any victim of any offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family...”

Survivors and victims' families also believed that they were entitled to accountability, achieved through the trials of the bombing suspects. As soon as Timothy McVeigh and Terry

209. Rule 615 of the Federal Rules of Evidence states in pertinent part that “[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.” FED. R. EVID. 615. Victims' or family members' right to be present during proceedings is therefore qualified. See generally OFFICE FOR VICTIMS OF CRIME, U.S. DEPT OF JUSTICE, THE CRIME VICTIM'S RIGHT TO BE PRESENT 1-3 (2001), available at http://www.ojp.usdoj.gov/ovo/publications/bulletins/legalseries/bulletin3/ncj189187.pdf (discussing various statutory schemes permitting or constraining victims' right to attend the criminal trial of their offender). Pursuant to this rule, Judge Matsch initially barred all victims and family members who might testify during the punishment phase from attending the trial and preliminary hearings. Maurice Poseley, Oklahoma Victims Barred from Court, CHI. TRIB., June 27, 1996, at 4N. Judge Matsch reconsidered the decision in October 1996 but did not change his ruling. Julie DelCour, Blast Victims to Appeal Ruling, TULSA WORLD, Nov. 1, 1996, at A18.

210. 18 U.S.C. § 3510(b) (2006). It took extensive lobbying, two appeals to the Tenth Circuit, and a "show of support from 49 congressional members and six state attorneys general" for Congress to pass the Victim Allocution Clarification Act of 1997, allowing victims' families and survivors to witness the trial proceedings regardless of whether they gave victim impact testimony. See Penny Owen, Victims Have Power to Move Congress, DAILY OKLAHOMAN (Okla. City), Mar. 19, 1997, at 4. The bill was introduced on March 5, 1997, and signed fifteen days later. Gary Fields, Judge Lets Victim-Witnesses View McVeigh Trial, USA TODAY, Mar. 26, 1997, at 3A.
Nichols were identified as the perpetrators, victims’ families and survivors of all political persuasions looked forward to the day when they would be held accountable. Even before trial, however, victims’ families and survivors felt that McVeigh was defiant. Perhaps this para-social impression affected expectations of McVeigh’s behavior at trial. What is certain, however, is that victims’ families and survivors who attended the trial either by closed-circuit broadcast or in person were truly positioned opposite to McVeigh, their aggressor and antagonist. It was in this trial forum that victims’ families and survivors sought accountability—not only in holding McVeigh responsible, but also in identifying his motivations and the origins of his criminal intent so as to answer the (potentially unanswerable) queries of “why” and “why us.”

Thus, the accountability inquiry took on an interpersonal dimension that penetrated beyond the question of guilt or innocence. It was profoundly important to victims’ families and survivors that they seek to understand both McVeigh and Nichols as persons and offenders, to gauge the depths of these men who had wrought such destruction. The offenders’ bodies were literally bodies of evidence that family members and survivors could scrutinize for insights essential to their emotional and psychological reconstruction. The following diagram illustrates this relationship between victims’ families/survivors, offenders, and the bombing.

![Diagram](https://via.placeholder.com/150)

**Figure 1: The Relationship Between Victims’ Families/Survivors, Offenders, and the Bombing**

Seeing the offenders’ behavior provided insight not only into the mediated victim–offender relationship, solidifying family
members’ and survivors’ perceptions of McVeigh and Nichols, but also into the relationship between McVeigh and Nichols and the bombing, which allowed trial attendees to speculate how the offenders felt about the bombing—whether they regretted or took pride in it. Family members and survivors had to form such perceptions to negotiate the involuntary victim-offender relationship; for example, it was necessary to apprehend how one felt towards McVeigh and how one believed McVeigh felt about the bombing in order to integrate the offender into the reconstructive process.

Family members and survivors could attend McVeigh’s trial in two locations: live in Denver, or via closed-circuit television at the FAA center in Oklahoma City. Those who attended the trial in Denver constantly scrutinized the defendants’ behaviors. As Participant 25 noted, these behaviors “were some of the things that we [were] trying to watch and see how both of them would react under [the] circumstances.” This suggests that the defendants’ bodies were objects on which memory work could be performed. Participant 17 described the intensity of this behavioral scrutiny: “[D]uring lunch breaks . . . [family members and survivors were] talking . . . [about] what McVeigh did at the table, . . . some facial expression that he had, . . . or how he sat on the chair . . . .” The nature of the Denver courtroom as a public space seemed to enhance such surveillance. Participant 19, a victim impact witness in McVeigh’s trial, described the Denver courtroom as a more “intimate” space; she enjoyed attending the trial in Denver because of the increased opportunity to see “body language” and other communicative cues: “[Y]ou could see demeanor of the body language, you could hear the vocal quality and the way that the witness was talking and so forth.”

The heightened physical proximity between attendee family members and survivors and McVeigh enabled a revelation for some. Participant 28 was struck by McVeigh’s humanity upon seeing him in person for the first time during the Oklahoma City change of venue proceedings: “[B]ut it hit me too, he’s just a man. He’s a man. You know, in my mind he was a monster. But he really was a man.” But the continued presence of McVeigh could also be unnerving; as Participant 28 stated of the FAA trial broadcast, “[T]he camera was set on Judge Matsch and we could see the attorneys . . . . Sometimes you could see him when he leaned back . . . . [T]hat was pretty unnerving, you know, upsetting . . . .” Thus, McVeigh’s body could serve as a mnemetic magnet, directly immersing onlookers once more in the horror of the bombing.
Impressions of McVeigh’s behavior at trial not only confirmed earlier perceptions of his defiant demeanor formed from media images of his “perp walk,” but also explicitly contrasted with impressions of Nichols’s behavior as a solemn, remorseful offender. The beginning of McVeigh’s trial meant that another institution besides the news media would offer visual access to McVeigh as a defendant. Not surprisingly, McVeigh’s demeanor in the courtroom bolstered his behavior “as seen on TV.” The most frequent characterizations of McVeigh at his trial reflected an “inappropriate” emotion or reaction to the trial event; McVeigh was 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 appeared in the most frequent characterizations of Nichols, wherein Nichols was emotional, shamed, quiet, and nervous. The entire range of characterizations of the two defendants is summarized in table form below.

<table>
<thead>
<tr>
<th>Characterizations of McVeigh’s Behavior</th>
<th>Characterizations of Nichols’s Behavior</th>
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<tbody>
<tr>
<td>Inappropriately happy/Joking</td>
<td>More emotional</td>
</tr>
<tr>
<td>Sneering/Sarcastic</td>
<td>Opposite of McVeigh</td>
</tr>
<tr>
<td>Evil</td>
<td>Ashamed</td>
</tr>
<tr>
<td>Maliciously interested in the hurt he had effected</td>
<td>Nervous</td>
</tr>
<tr>
<td>Proud/Arrogant</td>
<td>Refined</td>
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<tr>
<td>Aggressive</td>
<td>Quiet</td>
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<tr>
<td>Unremorseful</td>
<td>Afraid</td>
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<td>Unemotional</td>
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<tr>
<td>Impassive/Unreadable</td>
<td></td>
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<tr>
<td>Cold</td>
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<td>Callous</td>
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<td>Cowardly</td>
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Table 1: Participants’ Characterizations of McVeigh and Nichols 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. Participant 2, for instance, stated that McVeigh “was always just sitting there expressionless, never showed any remorse. Never showed any emotion. He was just like a statue there.” Participants associated this passivity with callousness, a capacity for deceit, or evil. Another of the most pervasive characterizations of McVeigh was as a proud or arrogant perpetrator who enjoyed attending the trial; for instance, Participant 8 stated, “He is a cold son-of-a-bitch and he sat there arrogant and looking like he was enjoying the show.” The moments of inappropriate jocularity and informality contrasted with other moments in which McVeigh was obviously paying a great deal of attention to the proceedings. Participant 25 also described McVeigh as “very aggressive” and very involved at times: “He watched a lot of the . . . people testifying. He got involved in a lot of it. When they brought out parts and they [were] talking about the telephones and the chemicals, he looked like he was really interested in it more than Nichols was.”

Trial witnesses characterized Nichols's conduct as the opposite of McVeigh's behavior; for Participant 25, these differences individualized the defendants. Participants reported that Nichols was more emotional than McVeigh, and also credited Nichols with displaying more situationally appropriate emotions; for example, Participant 8 stated that Nichols appeared to be “uncomfortable, scared, guilty. . . . He looked very frightened.” For Participant 29, these displays of emotion were signs of humanity: “And I hate to give him credit for this but you kind of see a person in Nichols.” Nichols was also described as quieter and more somber.

Participants' impressions of McVeigh as a defiant, remorseless defendant who took pride in the sophistication of his crimes set the tone for the years between McVeigh's guilty verdict and death sentence and his ultimate execution. It was this period of time in which McVeigh was perceived to attempt to manipulate victims' families through media contact, prompting Attorney General John Ashcroft to plead with journalists not to interview McVeigh shortly before the execution.\footnote{Dan Eggen & Lois Romano, \textit{Ashcroft Asks Media to Limit McVeigh's Exposure}, \textit{WASH. POST}, Apr. 13, 2001, at A4.}

McVeigh's behavior at trial was a nail in his coffin; it is what cemented family members' and survivors' initial impressions of
him as a defiant, remorseless, arrogant offender. Trial attendees now felt they "knew" what sort of men McVeigh and Nichols were. Moreover, McVeigh's behavior profoundly affected the reception of his later remarks to the media, cultivating the widespread perceptions that such remarks were made to manipulate and further wound families and survivors. This would ultimately produce a sense that McVeigh had to be executed in order to silence him and thereby end the victim-offender relationship—a justification that was never given in efforts to impose the death penalty upon Nichols.

V. HOW LEGAL INSTITUTIONS CAN MITIGATE THE HARMFUL EFFECTS OF VICTIM-OFFENDER RELATIONSHIPS

A. The Role of Victim Services in Mitigating Victim-Offender Relationships

Given that victims are likely to feel negative, involuntary ties to defendants in the aftermath of violent crime, what responsibilities do legal institutions have to assist victims in dealing with the consequences of these relationships? This Article proposes that victim services agencies be inserted into the breach to mitigate the negative effects of such relations. Such agencies, most often housed in county prosecutors' offices, already undertake the responsibilities of interacting with victims and their family members in the immediate aftermath of the crime and preparing them to attend trial.²¹² Thus, these agencies would be in the best position to provide education on the victim-offender relationships that are likely to form in order to mitigate the negative effects of such ties.

Moreover, the task of educating victims about victim-offender relationships already fits within the pantheon of duties fulfilled by victim services. The Office of Victims of Crime, housed in the U.S. Department of Justice, Office of Justice Programs, states that communities should strive to provide comprehensive victim services.²¹³ This includes an astonishing

diversity of tasks. Immediately following the crime, victim services assistance can include crisis intervention, emergency transportation, shelter, financial aid, counseling referrals, restraining or protective orders, child care services, and crime scene cleanup.\textsuperscript{214} In investigative stages, victim services is charged with offering regular updates, notification of suspect arrest, basic information on the criminal justice system, notification of pretrial release, and input on release decisions.\textsuperscript{215} During the prosecutory phase, victim services personnel provide an orientation to the criminal justice system, regular updates on case status, accompaniment to court, safe waiting areas, notification of plea negotiations and victim consultation in such decisions, transportation, child care, and so on.\textsuperscript{216} At sentencing, victim services employees notify victims and victims' family members of the right to submit a victim impact statement, coordinate the creation and delivery of these statements, and gather victim opinions on sentencing.\textsuperscript{217} Following sentencing, victim services inform victims and their family members of where the defendant is in custody (as well as of escape and capture), update them on the defendant's appeals, notify them of upcoming parole hearings (victim services also coordinates victim impact statements at parole hearings), alert them to violation or revocation of parole or probation, inform them of applications for clemency, pardon, or commutation, and report to them release or execution dates.\textsuperscript{218} Throughout the entire process, victim services is also charged with providing short and long-term counseling and intervention with employers, creditors, landlords, and public agencies.\textsuperscript{219} Descriptions of these duties are set forth in many governmental publications.\textsuperscript{220}

These lists of victim services duties do not define the outer limit of its responsibilities. During the McVeigh trial, for instance, a great deal of effort was invested in debriefing victims in attendance about the day's legal proceedings after the court recessed. An Attorney Liaison was utilized; this individual was a member of the prosecution team and advocated for victims'
WHEN IT'S SO HARD TO RELATE

interests. The Attorney Liaison “explained the relevance of what had been heard and seen that day in court and what could be anticipated for the next day of trial,” including “attorney decisions, judicial rulings, strictures on witness testimony, and the sequence of trial events,” and even warned family members and survivors “about upcoming potentially painful testimony or exhibits.” As one publication on the provision of victim services following the Oklahoma City bombing stressed, “[t]hese debriefings allowed individuals to prepare psychologically or to choose not to attend the session.” Significantly, “[t]hese meetings generally concluded with a brief discussion of ways in which the victims could take care of themselves emotionally,” and counselors were present to assist if needed.

Of all criminal justice personnel, victim services employees work with victims and their families most intensely, most frequently, and for the longest periods of time. Victim services is also the entity responsible for promoting victim comprehension of legal proceedings and providing counseling. Moreover, such agencies are already charged with satisfying many of victims’ core post-conviction informational requirements—the need to keep track of defendants, including developments in parole, release, and execution. Thus, victim services workers are the most qualified and in the best position to address the complicated consequences of victim-offender relationships.

But victim services cannot adequately assist victims and their families or effectively prepare them for trial without educating them of the presence and potential consequences of victim-offender relationships. Victim services employees must not only be aware of the likelihood that such involuntary ties will develop, but must also warn victims about such bonds in the aftermath of the crime and work with victims to mitigate the negative effects of any relations that are perceived to form at a later time. These efforts could include brochures or educational videos that describe the victim-offender relationship and its consequences and provide additional information on how such a relationship forms and progresses. For instance, such educational materials could contextualize defendants’ potential demeanor at trial by warning victims that defendants may strive to appear stoic on the advice of defense counsel or for cultural reasons.

221. RESPONDING TO TERRORISM VICTIMS, supra note 3, at 17.
222. Id.
223. Id.
224. Id.
225. OVC BULLETIN, supra note 213, at 28.
Significantly, educating victims and their families on the negative effects of victim-offender relationships also fits into the trauma model that many agencies have espoused since the President's Task Force on Victims of Crime concluded that the criminal justice system's treatment of crime victims was a national disgrace and specifically noted that violent crime produced psychological and physical injuries. The involuntary victim-offender relationship, which also is intertwined with victims' perceived needs to uncover as much information as possible about the crime and offender, to understand the crime, and to ensure that the offender is held accountable, helps to create and prolong the trauma when answers are not forthcoming or when the defendant is resistant or unremorseful or receives a sentence that victims believe is too lenient. Advising victims and their families on how to evaluate defendants' conduct and on how to cope with these perceived involuntary ties is an essential part of responding to post-victimization trauma. Significantly, the likelihood that victims will be further wounded by such involuntary bonds underscores how crucial it is for victim services workers to share as much information about the crime as possible with victims and to keep them informed of new case developments.

Moreover, incorporating such reforms into victim services' duties is in no way burdensome. Victim services agencies have already been in operation for several years or even for decades, and so incorporating such efforts could assist victims a great deal at no expense to states beyond that needed to develop and distribute educational materials. In addition, the provision of victim services is already oriented towards reducing post-victimization trauma. Victim services personnel are currently trained to improve victims' levels of social support and the degree and nature of their exposure to the criminal justice system, both of which play important roles in recovery from crime-related psychological trauma. Victim advocates are trained to


227. For a discussion of the impact a victim's participation in the criminal justice system has on his recovery, see Deborah Kelly, Victim Participation in the Criminal
encourage victims and their family members to maintain or establish positive social bonds by taking advantage of preexisting relationships with family and friends and by meeting others in similar situations, thereby building social support networks. Helping victims to enhance social support networks is important because victims with little social support are more likely to need professional counseling. In addition, a positive victim experience with the criminal justice system "is largely dependent upon comprehensive, sensitive and inclusive treatment of victims by criminal justice personnel." Victim services employees are instructed that they must recognize that, "by virtue of their association with the trauma and the perpetrator, they will often become 'triggers' for negative emotions and distress in crime victims," and that "steps must be taken to counter the effects of these associations so that victims might view criminal justice system proceedings and staff as supportive and worthwhile." If victim services employees must work to break victims' perceived associations between victim services and offenders, then it is even more crucial that they endeavor to properly contextualize perceived involuntary bonds between victims or their family members and offenders. The consequences of such effective mitigation include reduced traumatization and healthier victims who may be more willing to participate as effective prosecution witnesses.

B. The Importance of Offering Victim–Offender Mediation

Post-adjudication mediation offers victims and their family members the opportunity to replace the involuntary, negative para-social ties that characterize the victim–offender relationship with voluntary and likely more positive interpersonal dialogue. Critically, this dialogue allows victims to exercise much more control over subject matter than adversarial legal proceedings focused on questions of guilt or innocence, and takes place post-conviction, when victims are more likely to listen to an offender who has been held accountable and less likely to discredit.


230. Id.

231. Id.
expressions of remorse as self-serving. Productive interaction is much more likely to occur after parties establish temporal and emotional distance from adversarial legal proceedings, and after both parties can be prepared for the mediation. Moreover, it is essential to offer parties the chance to meet in a safe space that is free of the institutional and procedural constraints of the courtroom. Mediation may also supplement adjudication, since an opportunity to meet with the offender may be necessary for a victim to feel that he has truly been held accountable for his actions. Some victims’ perceptions of accountability, for instance, may include the need to inform the offender of the horrific impact that the crime has had on their lives. Ultimately, victim–offender mediation allows victims to move far beyond the one-sided para-social relationship that likely formed through media coverage and legal proceedings; they, not reporters or attorneys, get to ask questions beyond the threshold matters of guilt or innocence. Without such an opportunity, the negative effects of the involuntary victim–offender relationship will at best persist for much longer than they otherwise would; at worst, these traumatic effects may never be effectively resolved.

Victim–offender mediation embodies restorative justice principles and is therefore designed to increase the likelihood that victims and communities will heal from the wounds inflicted by criminal offenders. Restorative justice values see the victim as “central to the criminal justice process,” and support the victim through increased participation and services. In addition, its tenets require that offenders be held directly accountable to the person or the community that they victimized. As of 2004, twenty-nine states offered victim–offender mediation; twenty-three states had a statutory scheme for mediation in place; and six had victim–offender mediation-type programs. Nine states allowed victim–offender mediation for felonies, but only Texas offered it for murder. The vast majority of states either restricted victim–offender mediation to nonviolent offenses or

233. Id. at 419.
234. Id. at 420.
235. Delaware, Iowa, Tennessee, Texas, and Wisconsin allow victim–offender mediation for felonies and aggravated misdemeanors; Oklahoma, Minnesota, and Ohio permit it for felonies but restrict it in cases involving the death penalty, life imprisonment, or mandatory prison sentences, respectively; and North Carolina determines whether victim–offender mediation is appropriate based on a formula weighing the seriousness of the crime and criminal history. Id. at 433.
236. Nebraska, New York, Oregon, Alabama, Alaska, Florida, Kansas, and Montana
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did not specify in what cases victim-offender mediation was available, or left the matter entirely to authorities' discretion. Because negative, involuntary ties between the victim and offender are more likely to form and to be most intense in the aftermath of violent crimes, it is crucial that victim-offender mediation be implemented or extended to reach the victims of these most serious offenses.

There is, of course, a link between victim services and victim-offender mediation. In addition to educating victims about the negative repercussions of involuntary ties to offenders, victim services in states that provide for victim-offender mediation must inform victims that such opportunities are available and, if victims are interested in taking advantage of them, should help them to pursue this objective.

VI. CONCLUSION

In the Oklahoma City context, victims' families and survivors perceived that they were fettered to McVeigh by involuntary ties rooted in media coverage of the bomber and reinforced by his courtroom conduct. These bonds so pervaded family members' and survivors' lives that they felt trussed not only to McVeigh but also to the bombing. These ties also sapped the recuperative energies of family members and survivors, distracting them from processes of social, emotional, and psychological renewal as well as from other life activities. Those who attended McVeigh's trial to learn more about the man and the crime were obsessed with scrutinizing his conduct throughout the proceedings and were haunted by McVeigh's inappropriately unemotional, arrogant, and jocular conduct for years afterwards. For many, these involuntary relations were so unrelenting that they ceased only after his execution. Attesting to the constancy of these bonds, several participants stated that McVeigh's execution finally "silenced" him, intimating that he was killed not only in return for his role in the bombing but also because he was invariably a communicative presence in the lives of family members and survivors. Educating victims of the normality of these involuntary ties and their negative effects would have been an important step in helping victims to cope with them, and may have decreased family members' and survivors' preoccupation

only allow victim-offender mediation for nonviolent crimes. Id.

237. Arizona, Arkansas, California, Colorado, Illinois, Indiana, Louisiana, Maine, Missouri, Vermont, Virginia, and Washington either do not specify for what crimes victim-offender mediation may be utilized, or they leave it to authorities' discretion. Id.
with McVeigh and his behavior before and during his trial, thereby preventing proceedings from simply being another venue in which McVeigh traumatized these individuals.

Victim services and victim–offender mediation programs stand on the front lines and represent the best means of informing victims of violent crime and their family members of the likely formation of involuntary victim–offender relationships as well as for advising them on coping strategies. If a victim–offender relationship develops and persists, a preoccupation with the offender and his behavior will likely taint every stage in legal proceedings, distracting victims and decreasing the likelihood that they will be able to derive other more healing benefits from such events. In recent years, legal institutions have recognized what is at stake for victims in criminal prosecutions and opened many doors to allow them greater access to and participation in legal proceedings. Federal, state, and local governments have implemented programs such as victim services to assist victims in walking through these open doors of opportunity, crossing the threshold to greater involvement. Crucially, it is now time for legal institutions to take the next step: determining how existing victim services and other programs should be enhanced by conducting additional research on involuntary victim–offender relationships and designing and implementing appropriate interventions based on research findings. Otherwise, greater victim entrée could lead to greater victim traumatization.

Without such developments, victims will continue to be disturbed by these involuntary ties to the offender, an unfortunate outcome that is doubly tragic because it is preventable. It would be strange indeed to not only leave in place a key stumbling block that continues to trip victims as they try to take advantage of increased access and involvement, but also to stand unmoved as victim after victim continues to fumble. For it is not victims who are clumsy, but the systems that have been put into place to safeguard their interests.

**APPENDIX: METHODOLOGY**

The research conclusions in this Article are based on twenty-seven in-depth, face-to-face, open-ended interviews the Author conducted with individuals who were either victims’ family members or survivors of the Oklahoma City bombing. An open interviewing technique permitted the interviewer to conversationally guide participants through accounts of how the bombing, trials, and McVeigh’s execution affected their lives while granting participants complete freedom of response and
allowing 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 via telephone. All interviews were recorded with participants' permission and transcribed for analysis. Research participants were recruited through two methods. First, letters were mailed anonymously\textsuperscript{238} 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 the Author directly to participate. Second, other prospective research participants were contacted by individuals who had already been interviewed; these participants in turn contacted the Author directly to schedule interviews. The final participant sample was composed of seventeen females and ten males. Of the twenty-seven participants, twenty-six 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 eighteen years of age (participants' ages ranged from mid-thirties to early seventies) and thus were able to legally consent to participation. The Author maintains the transcript of each interview on file. Because this project was exploratory and no a priori theory existed to guide the Author's inquiry, a grounded theory methodology\textsuperscript{239} was adopted from the inception of this project.

\begin{footnotesize}
\textsuperscript{238} 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.

\textsuperscript{239} Grounded theory research involves developing theory inductively from data; one reads a set of data and categorizes it into themes through a process of open-coding, and then relates the codes to one another to decipher their interrelationships. See Barney G. Glaser & Anselm L. Strauss, The Discovery of Grounded Theory: Strategies for Qualitative Research 1 (1967) ("[T]he discovery of theory from data—which we call grounded theory—is a major task confronting sociology today."); Anselm Strauss & Juliet Corbin, Basics of Qualitative Research: Grounded Theory Procedures and Techniques 23 (1990) (defining grounded theory).
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