Michigan Law Review

Volume 112 | Issue 6

2014

Missing McVeigh

Michael E. Tigar
Duke University School of Law

MISSING MCVEIGH

*Michael E. Tigar**

KILLING MCVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE. By *Jody Lyneé Madeira*. New York and London: New York University Press. 2012. Pp. xxvii, 274. Cloth, $65; paper, $24.

INTRODUCTION

> [O]n the 19th morning of April at 9:02 in the morning, or actually just a few minutes before, Timothy McVeigh parked in front of the Murrah Building in Oklahoma City. He was in a Ford F-700 truck from Ryder rentals with a 20-foot box. . . . The driver parked the truck and set the bomb to go off.
>
> . . . .
>
> . . . An explosion as quick as a heartbeat and sadness as long as life.[1]

These words—from my opening statement in *United States v. Nichols*—sketch a story that many of us heard and saw in the days following April 19, 1995. The bombing that killed at least 169 people became an event by which time was thereafter measured—at least in Oklahoma.[2] Ninety minutes after the bombing, a state trooper arrested Timothy McVeigh on a traffic charge; within hours, he was linked to the bombing, and the legal process began.

Terry Nichols, who had met McVeigh when they were in the army together, was arrested in Herington, Kansas, where he lived with his wife and

* Professor Emeritus of Law, Duke University School of Law; Professor Emeritus of Law, Washington College of Law, American University. Thanks to Per Erichsen, Elliott Milstein, Abbe Smith, and Jane Tigar for thoughtful help. My discussion of memory and consciousness owes much to Jack Kornfield, particularly THE ROOTS OF BUDDHIST PSYCHOLOGY (Sounds True 1995).

1. Transcript of Opening Statements at 6411, 6450, United States v. Nichols, Criminal Action No. 96-CR-68 (D. Colo. Nov. 3, 1997), 1997 WL 677907.

2. The Oklahoma City events and trials have been chronicled in many books. ANDREW GUMBEL & ROGER G. CHARLES, OKLAHOMA CITY: WHAT THE INVESTIGATION MISSED—AND WHY IT STILL MATTERS (2012) is perhaps the most satisfactory account of the trials and is a helpful introduction to Professor Madeira's study. *See also* LOU MICHEL & DAN HERBECK, AMERICAN TERRORIST: TIMOTHY MCVEIGH & THE OKLAHOMA CITY BOMBING (2001) (containing many interviews with McVeigh); MICHAEL E. TIGAR, FIGHTING INJUSTICE 283–88 (2002); Michael E. Tigar, *Defending . . . Still*, *in* HOW CAN YOU REPRESENT THOSE PEOPLE? 185 (Abbe Smith & Monroe H. Freedman eds., 2013); Michael E. Tigar & James E. Coleman, Jr., *A Sanctuary in the Jungle: Terry Lynn Nichols and His Oklahoma City Bombing Trial*, *in* TRIAL STORIES 149 (Michael E. Tigar & Angela J. Davis eds., 2008). Madeira read and was influenced by EDWARD T. LINENTHAL, THE UNFINISHED BOMBING: OKLAHOMA CITY IN AMERICAN MEMORY (2001). P. xi. Linenthal's work has focused on the role of memory in creating images of past historical events. The trial transcript and pleadings are on a searchable Westlaw database, OKLA-TRANS (available only on Westlaw Classic at time of publication).

daughter. Within a few weeks, Michael and Lori Fortier, McVeigh's collaborators in Kingman, Arizona, had begun negotiating their plea bargain. Michael Fortier had traveled with McVeigh to inspect the Murrah Building as a potential bombing site. On the kitchen floor of the Fortiers' trailer home in Kingman, McVeigh had used soup cans to show how he would construct an ammonium nitrate–fuel oil bomb with plastic barrels in the back of a rented truck. Fortier and McVeigh were heavy methamphetamine users.

On August 11, 1995, the federal grand jury in Oklahoma City indicted McVeigh and Nichols for conspiracy to commit arson on a federal building and to use a weapon of mass destruction, as well as on substantive counts of arson, use of a weapon of mass destruction, and first degree murder of the eight federal law enforcement officers who died in the blast. The government alleged that Nichols had worked with McVeigh to plan the bombing and was therefore liable as a conspirator and accomplice, even though he had not been with McVeigh in Oklahoma City that morning. Nichols's defense was that his friendship with McVeigh did not include complicity in the bombing and that McVeigh had worked with others to plan and carry out the bombing.

District Judge Alley denied a recusal motion; his chambers had been damaged by the bombing, and he knew many victims and potential witnesses.[3] On mandamus sought by Nichols's counsel, the Tenth Circuit ordered all Oklahoma district judges recused.[4] The Tenth Circuit chief judge designated Richard Matsch,[5] chief judge for the District of Colorado, to preside over the case.

Judge Matsch came to Oklahoma City, where he heard—and on February 20, 1996, granted—a motion to change venue to Colorado.[6] In later hearings, he granted McVeigh and Nichols separate trials.[7] McVeigh's case went to trial in Denver on March 31, 1997. The jury found him guilty on all

3. The morning that the indictment was returned, Judge Alley called U.S. Attorney Patrick Ryan and me to say that the case had been randomly assigned to him and that he was denying a motion to recuse himself. When I said that I had not made such a motion, he replied that he was sure that I would do so and that he wanted to make things clear from the start.

4. Nichols v. Alley, 71 F.3d 347, 352–53 (10th Cir. 1995) (per curiam) (granting mandamus and directing that Chief Judge Seymour name a replacement judge). McVeigh's lawyer Stephen Jones refused to participate in our request for mandamus. When we filed our petition, Judge Alley retained his own counsel, who filed an opposition in addition to that filed by the government. My University of Texas colleague Charles Alan Wright read of Judge Alley's having hired a lawyer; he wrote to me to suggest that I cite a Fifth Circuit case holding that when a judge faced with a recusal motion hires his own counsel, it is another sign that recusal is required. (I wish I could remember the citation.) I welcomed Charlie's emails during the case, along with his support and wisdom.

5. The book sometimes refers to him as Robert Matsch, and he is referred to by that name in the index. *See, e.g.*, pp. xv, 313.

6. United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996).

7. United States v. McVeigh, 169 F.R.D. 362, 362–63 (D. Colo. 1996).

counts on June 2, 1997,[8] and after the penalty phase, it decided on June 13 that he should receive the death penalty.[9]

Voir dire for Terry Nichols's trial began on September 18, 1997.[10] On December 23, the jury found him guilty on the conspiracy count, not guilty of arson, not guilty of use of a weapon of mass destruction, not guilty of first degree murder, not guilty of second degree murder, and guilty of involuntary manslaughter.[11] Judge Matsch held that this verdict required a penalty trial, which began after a few days' recess for the holidays. On January 7, 1998, the jury announced that it could not agree on the threshold issue of whether Nichols had a culpable intent with respect to resulting death.[12] On June 4, 1998, Judge Matsch sentenced Nichols to life without parole.[13]

In an effort to get a death verdict, the Oklahoma County district attorney's office filed first degree murder charges against Nichols for victims other than the federal law enforcement officers. He was found guilty on May 26, 2004, but the jury declined to impose the death penalty. He is now serving a life sentence.[14] Michael Fortier served a little over ten years; Lori Fortier received immunity.

From the first days after the bombing, politicians called for justice in the form of capital punishment.[15] Media coverage was intense, particularly in Oklahoma: when an event disturbs the community, the media cater to the public desire for assurance that the immediate situation has been resolved and that something that can be called justice will be done with celerity.[16]

Victims groups—to give them a name that includes survivors, families, and supporters—exerted influence on the trials and on public policy. The victims groups focused on three principal tasks: first, to plan and build a memorial in Oklahoma City; second, to lobby for changes in the law to limit

---

8. Official Trial Transcript, United States v. McVeigh, No. 96-CR-68 (D. Colo. June 2, 1997), 1997 WL 286677.

9. Special Findings and Recommendation, United States v. McVeigh, No. 96-CR-68 (D. Colo. June 13, 1997), 1997 WL 318019.

10. More than 1,000 prospective jurors had earlier assembled at the Colorado state fairgrounds to fill out a long questionnaire. Tigar & Coleman, *supra* note 2, at 160–61.

11. Verdict, United States v. Nichols, No. 96-CR-68 (D. Colo. Dec. 23, 1997), 1997 WL 785580.

12. Proceedings, United States v. Nichols, No. 96-CR-68 (D. Colo. Jan. 7, 1998), 1998 WL 2518.

13. Sentencing Hearing, United States v. Nichols, No. 96-CR-68 (D. Colo. June 4, 1998), 1998 WL 286799.

14. *Killing McVeigh* has a helpful chronology, at pp. xiii–xviii.

15. *E.g.*, David Johnston, *U.S. Officials Scurry for Answers—Reno to Ask Death Penalty*, N.Y. Times, Apr. 20, 1995, at A1, *available at* http://www.nytimes.com/learning/general/onthisday/big/0419.html#article (quoting Attorney General Reno calling for the death penalty).

16. This media propensity was a theme of our change-of-venue evidence, which Judge Matsch largely credited. *See* United States v. McVeigh, 918 F. Supp. 1467, 1467–68 (W.D. Okla. 1996).

appeals in capital cases; and third, to witness, influence, and provide evidence in the criminal trials and posttrial events in the McVeigh and Nichols cases (pp. 70–78).

Now comes Professor Madeira's thoughtful and timely study, *Killing McVeigh: The Death Penalty and the Myth of Closure*.[17] Madeira examines the ways that victims groups came together and the goals they set for themselves. Her book is based on dozens of interviews with dozens of victims, her study of the trial record and media coverage, and a survey of literature on group memory and victim participation in trials.[18]

The book's title is apt. Madeira exposes and dismisses the myth that killing a perpetrator gives victims any benefit that can meaningfully be called closure. She focuses, rather, on "memory work," a term she uses over 100 times to describe words, actions, and feelings of victims.[19]

Madeira derives the idea of memory work from two distinct sources and amply documents the many sources on which she relies. First, she refers to the work of such groups as survivors of the Nazi holocaust, whose shared loss has led them to create memorial spaces and to seek redress, healing, and accountability.[20] Second, she draws on her own and others' work with and about crime victims, who seek to have their narratives and interests play a role in the criminal process.[21]

Reading this book compelled me to revisit my own memories of the Oklahoma City bombing and trials. I was appointed in April 1995 by a federal judge in Oklahoma to represent Terry Nichols in his federal trial. Cocounsel in this capital case was Ronald G. Woods, the best cocounsel one could imagine. "I" or "we" in this Review refers to the Tigar–Woods team and to the lawyers, paralegals, law students, investigators, and consultants who worked on that team for more than four years.

Madeira has captured the stories of victims, based on her contacts and work with them. She has respected their loss and honored her commitment to them. My relationship with the victims, collectively and in many cases individually, was different. I will not use their names in this Review; they are entitled to their privacy, at least to the extent that they have the right to control who refers to them in any public way.

---

17. Madeira is an Associate Professor of Law, Indiana University Maurer School of Law.

18. Compare her article, Jody Lyneé Madeira, *"Why Rebottle the Genie?": Capitalizing on Closure in Death Penalty Proceedings*, 85 IND. L.J. 1477 (2010), in which she speaks of closure as a useful "communicative theory."

19. In Madeira's words, "memory work" is "an interactive process by which individual family members and survivors construct meaningful narratives of [a traumatic event], its impact on their lives, and how they have dealt with, adjusted to, or healed from this event." Pp. xxiii–xxiv. As I discuss in this Review, I believe that this definition is too limited. A broader perception of the role of group memory yields a more nuanced appreciation of memory's importance and limits.

20. *E.g.*, pp. 118 & 290 n.1, 264 & 305–06 nn.6–10.

21. *E.g.*, chapter 3.

I should make my bias clear, although most readers will sense it without being reminded. My job was to test the prosecution's evidence and to present a defense—more than 80 witnesses in the defense case in chief. That work included sifting through more than 60,000 witness interviews and 100,000 items of physical evidence. It included legal research, motions practice, jury selection, a trial phase, and a penalty phase. This was the most intense experience of my professional life. Many days, our team met and talked with survivors, and we saw them in court. I said in opening statement,

> We understand that there's not a joy the world can give like—like that it takes away.
>
> . . . We will cross-examine all the witnesses who come here, even those who have lost so much. By doing that, we mean them no disrespect. To the living, we owe respect. To the dead, we owe the truth.[22]

Killing McVeigh centers primarily on the actions, trial, and execution of Timothy McVeigh. Madeira discusses Terry Nichols and his defense team as a sort of contrast, to share victims' reactions to, and resentment of, the fact that Nichols was acquitted of the most serious charges against him and did not receive the death penalty (p. 167).

This blending helps us see the Oklahoma City survivors' stories in a broad, empathic, and informative context. But, I shall argue, we ought also to be careful lest we assign primacy to the survivors' narratives over those of others in and beyond the trial process. In this Review, I assess the relationship of group memory to the study of history, the presentation and distortion of memory in the trial process, and the use of group memory as an argument for retribution. I conclude with reflections on McVeigh and his death.

I. Memory Versus History

Memory work is an *ingredient* of history, but it is not history; it influences the depiction of history. Madeira's book reminds us and warns us to see the relationship and separation between these two concepts. People who have been uprooted, suffered a natural disaster, or are victims of a horrific crime come together to share their stories. They seek a common narrative and spaces within which to display that narrative. They share experiences. They lend one another strength. They seek to vindicate their need for recognition and redress. I find this book so affecting because Madeira has taken care to recognize and record the victims' stories.

The concept of memory work, however, deserves a deeper analysis: memory's use and value are not unique to the Oklahoma victims. I have worked with displaced peoples, victims of systematic torture and genocide, and those who struggled to end apartheid. I have listened to their stories

22. Transcript of Opening Statements, *supra* note 1, at 6416.

and, as a human rights lawyer, tried to tell those stories with effect. Memory work has value for the group and for those who relate to it.

Looking at the nature and function of memory work is also helpful because it reminds us of the common thread that runs through narratives of many victimized and uprooted peoples. When we find this common thread, we more easily validate Madeira's work. Moreover, seeing these stories can—and in my view should—provoke us to practice compassion, which will animate us to recognize and confront injustice.[23]

Madeira's reference to memory work calls to mind Pierre Nora, who has made the relationship between memory and history his primary field of study since the 1960s. He is a principal author and editor of the three-volume work, *Les Lieux de mémoire*. He is concerned with the rapid pace at which social groupings are being moved off the stage of history.

"From now on," he wrote, "history will be written under the influence of collective memories" that "compensate for social and historical uprooting."[24]

> Our interest in *lieux de mémoire* where memory crystallizes and secretes itself has occurred at a particular historical moment, a turning point where consciousness of a break with the past is bound up with the sense that memory has been torn—but torn in such a way as to pose the problem of the embodiment of memory in certain sites where a sense of historical continuity persists. There are *lieux de mémoire*, sites of memory, because there are no longer *milieux de mémoire*, real environments of memory.[25]

These sites may be monuments, archives, museums, or other suitable environments. That is, they may have a solid physical dimension or consist of collected and recorded stories. Speaking of his work, Nora said,

> *Les Lieux de mémoire* . . . has two aspects: on one side, the illumination, by all possible lenses of refraction that embody those places (*lieux*), of French identity; and on the other, the analysis, by introductions, conclusions, and texts of relationships, of the philosophy that has inspired them and that has affected . . . the perception of memory as it relates to history.[26]

---

23. *See, e.g.*, Michael Tigar, *Narratives of Oppression*, Hum. Rts. Brief, Fall 2009, at 34, 36–38 (discussing Regis Debray and Frantz Fanon). In 2009, social anthropologist David Vine published his brilliant book, *Island of Shame*, about the Chagossian people's forcible expulsion from their island home on Diego Garcia and their search for redress. David Vine, Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia (2009). The late Gore Vidal, in our correspondence about the Oklahoma trials and some of my writings, helped my perspective on this point.

24. *Lieu de mémoire*, Wikipédia, http://fr.wikipedia.org/wiki/Lieu_de_m%C3%A9moire (last updated Aug. 23, 2013) (quoting Pierre Nora, *Mémoire Collective*, *dans* La Nouvelle Histoire (1978)) (my translation from the French).

25. Pierre Nora, *Between Memory and History:* Les Lieux de Mémoire, Representations, Spring 1989, at 7.

26. Historien public *et* Présent Nation Mémoire *de Pierre Nora*, Gallimard (Oct. 2011), http://www.gallimard.fr/Media/Gallimard/Entretien-ecrit/Pierre-Nora.-Historien-public-et-Present-Nation-Memoire/%28source%29/116021 (my translation from the French).

Nora's concern is primarily with events in French society, such as the "disappearance of peasant culture," occasioned by social change.[27] Social change is, however, the result of human activity, and so the Oklahoma City bombing victims faced challenges and issues similar to those faced by the groups that Nora studied.

One sees the distinction between memory and history more clearly by speaking of places of memory in conjunction with what Madeira terms "memory work." The Oklahoma City National Memorial is a *place* of memory; it *memorializes*. Its content has been dictated—and understandably so—by the victims. This is memory as revisited loss, a search to sustain and—through the group process—expand what is remembered. The Memorial staff resists all efforts to turn the narrative away from the one chosen by the victims.

The term "memory work" may not represent the same process for all members of the group. People's experiences, and the harms they suffered, differ. It was difficult for Oklahoma City victims to choose a single narrative of their loss, at least initially. Madeira describes the tensions among those who lost family, those personally injured, and those who suffered property damage from the bombing (pp. 82–83). "[F]amily members were very abusive . . . toward survivors. . . . Very angry, quite often said you don't belong in the same room with us."[28] Nonetheless, the group displayed solidarity in its approach and actions. In evaluating a group consensus, one must recognize that the group story may suppress or distort individual experiences and feelings. In the McVeigh case, the group's unity frayed over the issue of whether McVeigh should be executed.

Memory work turned inward toward unifying the group and refining its common narrative can be healing. It can contribute to the group members' understanding and provide the rest of us with insight about—to use Nora's image—what has been torn and how it might be repaired.

There is, however, a risk that inward-directed memory work can become solipsistic. This development might lead the group ideology to resist and resent the inevitable influences of living in the larger society, of being drawn into public controversy about who harmed the group, of determining how to assess accountability, and of resolving what should happen to the perpetrators. The attitudes of many victims, expressed during and after the McVeigh and Nichols trials, show us that the arc of memory can be bent toward vengeance.[29] Put another way, memory work may tend to circle back

27. Nora, *supra* note 25, at 7.

28. P. 83 (internal quotation marks omitted).

29. This risk may be seen in the actions of the group that first led Nora to work with the idea of memory—the French colonialists ("*colons*" or "*pieds noirs*") who came back to France after Algerian independence in 1962. Many of them turned to violent retribution against those they claimed had "sold out" France by assenting to Algerian independence. As a young journalist in Paris in 1962, I met and interviewed several victims of bombings committed by groups associated with this movement. The *colons*' memory was not only one sided; it helped to fuel their resentment and, in some instances, to justify violence. The memories of those who had carried on the Algerian resistance, who had felt betrayed by the post–World War II French

on itself for reinforcement. Social history, in contrast, moves in a helix, not a circle.

When memory moves from the place of memorialization and into the public arena, it becomes one part of a dialectic. Solipsism gives way to epistemology—to justifying belief through contradiction. If someone with a settled view of old Athens happened to meet Socrates on the street, the ensuing dialogue would illustrate this phenomenon very well.

Nora speaks of "memory as it relates to history"[30] and of viewing memory through many lenses. Visiting and viewing places of memory are important tasks for a historian. When she comes to write history, however, she will see the way in which different groups' experiences have played out in conflict and cooperation. An open-minded approach to history reflects and appreciates the dialectical process by which history moves.

II. Memory in the Trial Process

Telling the story in a courtroom of an uprooted or victimized group makes us face the limitations on the nature of narrative memory and on the trial process itself. The witnesses' memories may have been eroded by time or reshaped by external influences. The victims' story—in all its revelatory detail—may not entirely fit within categories of law, procedure, and rules of evidence. Trials—and in particular criminal trials—are hedged about with constitution-based rules that may conflict with victims' expectations and wishes.

Some victims of the Oklahoma City bombing sought to influence events by lobbying for changes in federal capital case procedures and in victim rights legislation (pp. 73–76). Their efforts were successful in the Antiterrorism and Effective Death Penalty Act of 1996, for which victims and their political allies lobbied (pp. 73–76). Their efforts could not have any immediate effect, however, because the capital trials of McVeigh and Nichols had not yet begun. The focus on making sure a death sentence would be carried out reveals one focus of many victims' memory work.

Victims groups' longest and most intense participation, however, focused on the McVeigh and Nichols trials, appeals, and sentences. "In a historic trial, one concern is that the verdict be seen as fair and fairly arrived at. Such a verdict commands community approval. It places beyond the reach of all but the most captious critic any claim that the events portrayed did not occur."[31]

Yet, and sometimes paradoxically, trials are controlled by people with a stake in the outcome—the plaintiff, the defendant, and their lawyers. They

---

government, and who were victorious in 1962 were quite different. The colonizers and the colonized will always have different memories. When one comes to write the history of that time, the historian will view events through the different "lenses" of memory—to borrow Nora's phrase—and subject each of them to critical examination.

30. Gallimard, *supra* note 26 (my translation from the French).

31. Trial Stories, *supra* note 2, at 3.

are presided over by judges whose temperament, learning, and patience affect events in sometimes-decisive ways. A trial is not a history seminar. It is an exercise in which advocates take charge of memories and seek to deploy them, and even bend them, to obtain a result. Many rules of evidence, procedure, and ethics seek to limit the ways in which advocates can manipulate memory and test the ways in which their adversaries are doing so. Soon after the bombing, prosecutors and investigators decided on the narrative they wished to present.[32] We of the defense worked to shape an alternative picture.

We speak of five senses—sight, hearing, taste, touch, and smell. But at the moment of sensing, we process information based on our own cultural, historical, and social attitudes. When we walk through a dark and unfamiliar neighborhood, what we see and hear may make us afraid, even if there is no objectively rational reason for fear. We react differently to people who are different from us, interpreting their words and gestures based on stereotypes we have built up. "We do not see things as they are, we see them as we are."[33]

When I cross-examine a witness, I explore how well or how badly she was able to sense—to perceive—what she describes. I probe her mode of expression to clarify what she said. I inquire about her biases. These are three of the basic tools of cross-examination: probing perception, meaning, and candor. The fourth focus of cross-examination is a witness's memory. When we relate what we have perceived, time and the tide of events may have eroded or reshaped it. The manipulation of memory has caused many injustices in the system that calls itself justice.[34]

This discussion illustrates that when memory enters the trial arena—as witness testimony or to authenticate documents and objects—it will inevitably be challenged and tested. The witness may then feel alienated from her own remembered experience, as her recounting of it is taken out and examined. In the Nichols case, many victims felt, and said angrily, that the trial process had failed to honor their own expectations about what should happen. These victims wanted Nichols convicted and sentenced to death.

Memory also appears in trials in the form of legal rules, yet this is not the group's memory but rather that of society as a whole. The public generally has expectations about what will happen in court. These expectations

32. As Ronald Woods said in his part of the Nichols opening statement, "If it please the Court, counsel, Mr. Nichols, members of the jury, the evidence will show that in conducting the investigation right after the bombing that the FBI did an excellent job for a day and a half." Transcript of Opening Statements, *supra* note 1, at 6451. He was referring to the government's fastening on a theory of the case very early and ignoring other leads.

33. Anais Nin, Seduction of the Minotaur 145 (1961).

34. *See, e.g.*, Wayne R. LaFave et al., Criminal Procedure § 7.1 (5th ed. 2009) (noting the danger of misidentification). For two dramatic illustrations, see *Friedman v. Rehal*, 618 F.3d 142 (2d Cir. 2010), discussing the problem of inducing false memories, and *Franklin v. Duncan*, 884 F. Supp. 1435 (N.D. Cal. 1995), a "recovered memory" opinion by Judge Lowell Jensen, *aff'd*, 70 F.3d 75 (9th Cir. 1995). The story of the *Friedman* case is chronicled at Exonerating Jesse Friedman, www.freejesse.net (last visited Oct. 30, 2013).

are embodied in constitutions, law, and customs. Verdicts derive their perceived legitimacy from public observance of accepted forms. Yet victims may perceive these time-bound rules as unfair. Learned Hand wrote,

> All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism.[35]

Prosecutors and police may give victims' desires priority over strict observance of legal forms. In the Nichols and McVeigh cases, victims groups lobbied for revision of trial procedures to accommodate their interests and found a receptive audience among prosecutors and legislators.

Madeira does not mention it, but another aspect of memory became visible from the moment that Judge Richard Matsch appeared. The O.J. Simpson murder trial had concluded on October 3, 1995, with a not guilty verdict. The Simpson trial process seemed to some to have wasted jurors' time and hindered the orderly exposition of the facts. Judge Matsch never said so, but his approach to his task seemed designed to reflect values that were not upheld in the Simpson trial.

Judge Matsch's attitude made a difference. In granting the change of venue,[36] he remarked on the Oklahoma City personnel having permitted Nichols to be photographed in handcuffs and jumpsuit, and on the publication of that photograph by media that prospective jurors were sure to see. He noted that bombing memorabilia were being sold in the Oklahoma City federal courthouse cafeteria. He made rulings that, while consistent with the First Amendment, sought to minimize the impact of prejudicial media coverage.

Judge Matsch saw and understood that jurors are influenced by many things beyond what is coming from the witness stand and the bench. Jurors look at the trial's spectators and interpret facial expressions. They look at the defense team to get clues about defense tactics and attitudes. They watch the defendant. They are conscious of living in the midst of intense public and media attention.[37] Judge Matsch saw the tension between the victims'

35. United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950).

36. *See* United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996).

37. Madeira speaks of how the judge, the prosecutors, and the defense "believed the law should function as a site of memory work," p. 142, and how their disparate beliefs collided with the victims' needs and expectations. It would be more accurate and precise to speak of "the courtroom" or "the trial process" as a site rather than "the law," and Madeira probably means to suggest this more narrow formulation. I have explored at length the formation of "law," or more accurately legal ideology, under the influence of social groups. *See generally* Michael E. Tigar & Madeleine R. Levy, Law and the Rise of Capitalism (new ed. by Michael E. Tigar 2000). I have commented on the same phenomenon in the development of the law of theft. Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 Tex. L. Rev. 1443 (1984) (discussing use of theft law to obliterate peasant culture).

agenda—as put forward by the prosecutors—and the idea of an adversary system in which every participant's version and view must be challenged and tested.

The jury trial could not and should not be a site of memory work, in the sense of assigning primacy to the victims' narrative. It could not be because the prosecutors had decided on a version of events that we were duty bound to challenge and that we could and did challenge effectively. It could not be because prosecutors were going to build on victim anger and sadness to drive the jury toward their desired result.

It *should* not be for reasons I expressed at least twice in open court. In arguing for change of venue, I stated,

> Two roads, two roads, diverge before us, gathered as we are, with the decades of constitutional liberty piled so high, the anguish of the victims close at hand. To one of those roads we are beckoned, from sadness, to anger, to vengeance. Governor Keating [who had called for death penalties] beckons us along that road by what I suggest is deliberate design. The media have beckoned us along that road, simply by their desire to serve their market. The other road, I suggest to the Court, is the one the framers laid out for us while the memory of unfair trials in distant forums was fresh in their minds.
>
> We neither dishonor nor deny the grief and anger of the victims, nor even their cry for vengeance. Your Honor . . . I believe . . . that when we summon someone, anyone, Terry Nichols, into court, to find out whether he's going to live or die, that it is our job to construct, where we best can, a kind of sanctuary in the jungle.[38]

Then, in the penalty phase closing argument, I urged,

> I am . . . not attacking these victims. We know their sacrifice. But we know that with the centuries of our civilization piled so high that we have come a very long way from justice based on vengeance and blood feuds.
>
> This trial was moved from Oklahoma City because, I submit to you, it was thought that even the neighbors of those who lost so much would not do to sit in judgment. And to them, therefore, we can only say when we hear their grief and their anger and their desire for vengeance, "Bless those in need of healing."[39]

Most of the victims wanted the trial held in Oklahoma. If it were to be moved, they wanted it to be telecast, despite the prohibition in Federal Rule of Criminal Procedure 53. They wanted the right to attend the trial even if they were to be trial witnesses, despite the provision of Federal Rule of Evidence 615 that codifies the traditional "rule on witnesses": a person who is going to be a witness must wait outside the court. Madeira speaks understandingly of the victims' frustration that Judge Matsch enforced these rules.

---

38. Tigar & Coleman, *supra* note 2, at 159.

39. Closing Arguments; Jury Instructions, United States v. Nichols, No. 96-CR-68 (D. Colo. Jan. 5, 1998), 1998 WL 1057, at *18.

Judge Matsch's venue ruling acknowledged that the bombing case had attracted international media attention. But, relying on expert testimony, he recognized that media coverage in Oklahoma was different, in that it focused more on the victims' and the community's demands for retribution than on the details of the crime. He understood that in the courthouse where he was chief judge, he had more control.

Congress responded to victims' concerns about the venue ruling and provided that when a trial was moved more than 350 miles from its initial venue, there could be closed-circuit television coverage to the original trial locale. In additional legislation, Federal Rule of Evidence 615 would not apply to a crime victim whose testimony related to the crime's impact on "the victim and the victim's family."[40]

While applying these provisions, Judge Matsch still took care to preserve the courtroom as primarily a place for trying the defendants. He ordered that a single camera at the back of the courtroom would provide the video feed. He directed that a screen be built to shield the jurors from the camera view. In Oklahoma City, only those with a demonstrated relationship to events would be allowed to view the closed-circuit broadcast, and the same courtroom decorum rules as in his court would be applied. A district judge presided over the Oklahoma City room where the video images were broadcast.

By the time the trials began, most victims had decided what the result should be, even though the only evidence available to them was their personal experiences, hearsay from others, and media reports. They were remembering their narrative truth. They had not had access to the scientific evidence nor to the narratives that would be provided by—in the Nichols case—almost 100 defense witnesses. Most prospective jurors had read about the case, but those who were eventually seated promised that they would wait until they had heard all the evidence before making up their minds.

The jury selection process frustrated some victims, in part because they believed that jurors who were opposed to the death penalty were not being excluded for cause. In a capital case, only jurors who say that they could vote for a death penalty are entitled to serve, although they must also promise to give weight to mitigating evidence.[41] During voir dire, the government

40. 18 U.S.C. § 3510(b) (2012); FED. R. EVID. 615(d).

41. Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding that a juror must be willing and able to consider mitigating evidence offered in punishment phase); Wainwright v. Witt, 469 U.S. 412, 414–26 (1985) (holding that a juror must be able to obey court's instructions as to penalty but is not required to affirm a personal belief in favor of the death penalty); *see also* LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW § 7.05, at 57–58 & n.33 (2d ed. 2008). Most death penalty lawyers agree that a "death-qualified" jury is more likely to convict than one selected from a true cross section of the community. George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); *see also* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 494–95 (1996); Richard Salgado, Note, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green, 2005 BYU L. REV. 519.

sought to root out death penalty opponents, and the defense sought to discover those who would not heed mitigating evidence. Madeira's description of victim reactions to the Nichols jury shows how the courtroom cannot be a place where victim memory work controls events:

> Family members and survivors closely scrutinized the behavior of the newly empaneled Nichols jurors and most assuredly did not like what they saw. "I don't think the Nichols jury had a clue what was going on," [victim] related. Family members and survivors predicted that one female juror in particular would be particularly problematic. According to [victim], [female juror] "spent a lot of time making eyes at Michael Tigar," which was worse than the other jurors who "weren't interested in what was going on."
>
> News media described how Nichols's defense attorney Michael Tigar was permitted to "rehabilitate" "would-be panelists who expressed doubts" about their ability to impose the death penalty, "getting them to indicate just enough willingness to qualify for service." This conduct did not escape the notice of family members and survivors; [victim], for one, was furious that Tigar was allowed to "badger" jurors by asking them again and again if they could give the death penalty after they initially told prosecutors that they could not. [Victim] finally took action:
>
> > I was so livid I couldn't wait to get out of the room where we were watching court on the next break. And I called one of the prosecutors and said, "What the heck is going on here? You guys cannot allow—you've got to make sure that they are not qualified before you let go of them and hand them over to Tigar."[42]

These paragraphs refer to more than four weeks of individual juror voir dire. The government and the defense each had twenty-three peremptory challenges. Prospective jurors had filled out detailed questionnaires. Judge Matsch controlled counsels' behavior during voir dire—no badgering, no undue repetition. This jury deliberated at length, was alert throughout the trial, and showed great sophistication in postverdict interviews in the ways they interpreted the evidence. One should hesitate before accepting the victims' characterization of events, particularly when the trial transcript paints a different picture; this is yet another instance of how perception is affected by one's hopes and fears.

In sum, the victims' expectations and impressions speak to some extent of a desire to make the courtroom events move in ways that basic principles of criminal law and of fair inquiry say that they cannot. When one recalls that the quoted material deals with the Nichols trial, the issue is even more

---

42. P. 163. Victims' references to the female juror are no doubt accurately reported but are quite unfair. The government wanted that juror on the panel because it believed that her political inclinations would favor it; our team deduced this from the kinds of questions the prosecutor put to her on voir dire. We disagreed with the government's assessment. Her lengthy and detailed posttrial comments showed her to have been attentive, intelligent, and compassionate. Gumbel and Charles also overstate the transcript voir dire evidence, calling it "something akin to a Spencer Tracy–Katharine Hepburn movie." Gumbel & Charles, *supra* note 2, at 326–27.

starkly defined. McVeigh had been convicted and sentenced. There was little doubt that he had set off the bomb; his lawyers expected the trial to be a prelude to a penalty hearing. The Nichols jurors, in contrast, had real, factual puzzles to solve—a pretrial complaint that they would not be able to render a death verdict betrays impatience inconsistent with seeking a fair result.

Every trial day, victims lined up outside the Denver courthouse. Their presence in the courtroom was obvious to the jurors because all the pretrial publicity had said that many of them would attend. Then there were reporters and members of the public. The jurors sat, watched, and listened—to figure out what had happened and what should be done about it. Almost all the victims knew what they thought had happened and what should be done. These roles defined the ways that the two groups—jurors and victims—observed courtroom events. People tend more easily to accept information that supports a view they already hold. When a view is strongly held, there is often a "backfire effect": a person clings more strongly to an opinion in the face of contradictory evidence.[43]

Madeira gives us valuable information on how the bombing victims perceived the defendants' demeanor. We sometimes make the mistake of thinking of the trial process as jurors watching a lawyer examine a witness. In fact, jurors are looking around the courtroom and taking their cues from the behavior of everyone in the room, including the parties, lawyers, judge, and audience, and even from symbols such as the flag, the seal on the wall, and the raised bench. It was inevitable that victims would observe McVeigh, and their evaluation of him may well have mirrored some of what the jurors perceived. Seeing McVeigh at trial, they viewed him as "never show[ing] any remorse," "military-like," and an "arrogant perpetrator" (pp. 152–54). The observed tenor of McVeigh's whispered conversations with his legal team and his occasional jocularity repelled victims.[44] They thought that he was proud of what he had done.

Social science research tells us that demeanor evidence may be unreliable.[45] I think, however, that the victims' impressions of McVeigh were largely valid; certainly his demeanor must have had a similar impact on his jury. His prison interviews bear out many of the personality characteristics that the victims saw.

The Nichols defense team was often in court with McVeigh and his lawyers. I thought that McVeigh behaved inappropriately. Here are two examples from what I observed: During the severance hearing, we called Bryan Stevenson as a witness about the unfairness of joint trials in capital cases. Stevenson is one of the country's most effective civil rights lawyers. He is

43. Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 307 (2010).

44. *See* pp. 153–54.

45. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991) (discussing several experiments testing whether jurors can effectively judge witness credibility using demeanor evidence and concluding that most cannot).

African American. As he recited his qualifications, he mentioned working for the National Association for the Advancement of Colored People Legal Defense and Educational Fund. At this comment, McVeigh made a disapproving face. During another pretrial hearing, McVeigh was doodling on the computer terminals that were installed at the counsel tables, ignoring what was going on in the courtroom.

Many victims judged Nichols differently than they had McVeigh: they determined that Nichols seemed "frightened," "concerned," "emotional," and "very definitely remorseful," and that "you kind of see a person in Nichols" (p. 164). Others thought that he looked guilty (p. 164). Outside the courtroom, we asked all members of our team to be respectful and compassionate to victims, regardless of what they might say to us. Nichols's mother and father reached out to victims, as McVeigh's father had done (pp. 111–12, 165). Nonetheless, some victims resented that the Nichols family members were seated close to them and even opined that the family was trying to "overhear victims' conversations" in and around the courtroom (p. 165).

III. Memory as Retribution

The sharpest contrast between trial as memory space and trial as inquiry into a just and moral response appeared in the McVeigh and Nichols penalty phases. Most victims wanted the state to kill McVeigh and Nichols.[46] When Nichols's federal trial did not result in a death verdict, victims were among those who lobbied for a state trial as well.[47]

The victims' efforts were visible in two settings: first, as they testified in the penalty phase, and then as plans for McVeigh's execution took shape. In 1991, the Supreme Court opened the door for victim impact evidence in capital sentencing trials.[48] Madeira notes that the Nichols defense team moved the court to limit testifying victims' emotional displays.[49] Judge Matsch responded by asking prosecutors to counsel their witnesses and by instructing the jury as to the permissible uses of the evidence (pp. 136–37).

Most of the victim witnesses in the Nichols penalty phase were angry with the jurors for having delivered so many acquittals (p. 167). Family members of the dead federal agents were particularly outraged, and they showed it. But the Nichols impact testimony did not include some of the graphic images that were evoked in the McVeigh case, in which one witness "gave a heartbreaking account of how she kissed her son's feet and legs at the funeral home because his head and face were so badly injured."[50]

---

46. P. 186; *see also* pp. 166–67, 171–73 (discussing victim disappointment when Nichols did not receive the death penalty).

47. *See* pp. 168–69.

48. Payne v. Tennessee, 501 U.S. 808 (1991) (overruling Booth v. Maryland, 482 U.S. 496 (1987)). *See generally* Carter et al., *supra* note 41, § 11.03.

49. *See* pp. 143–49 (describing Judge Matsch's decision to exclude victim impact testimony and the subsequent battle to overrule his choice).

50. Pp. 162–63 (internal quotation marks omitted).

The limits on memory work in the capital penalty trial reflect the nature of witness testimony in an adversary system. A witness gives an account on direct examination because an advocate chooses to ask certain questions and to keep asking until the picture she seeks has been painted with words and exhibits. Before a witness testifies, she meets with the advocate to map out the testimony. If there are exhibits, the lawyer and witness must review them. The witness is not in charge of what is being remembered, nor is she in charge of how memory will be narrated. And in the process of preparation and selection, narrative memory itself is altered. Evidence and discovery rules on production of prior statements and the right of cross-examination take account of such influences.

Madeira sees value in victim impact testimony. Her view, however, takes insufficient account of the ways in which prosecutors shape that testimony. Victim impact testimony is staged narrative memory culled from past emotions and feelings and packaged for rhetorical effect. Cross-examining the impact witness is fraught with peril because the advocate may seem to be inconsiderate of the witness's loss. The rules of evidence are filled with provisions that limit what a jury can hear—such as provisions excluding unqualified experts, evidence whose prejudicial effect greatly outweighs its probative value, and evidence that may improperly suggest a propensity to commit wrong—because of the risk that jurors will overvalue such evidence.

Victim impact testimony tells us what the victim feels that she has lost, and testimony about feelings runs the risk of becoming untethered from the requirement of personal knowledge and the limits on opinion testimony and hearsay. That is, the victim's testimony, whatever its content, semiotically draws a line from the victim's feelings to a desired result. When that result is the defendant's death, the jury may be led to minimize the mediating effect that mitigation evidence and the judge's instructions are supposed to have in calling for a "reasoned moral response."[51] The penalty phase might be a site of memory work, but if it becomes that, the victims' demand for death does not make it so. A trial is validly a place to hear and judge the concerns of a larger group that embraces victims, trial participants, and the entire community.

The victims' concern with punishment did not end with the sentences. McVeigh died on television, with a camera looking at his face, because a victims' group met with Attorney General Ashcroft and convinced him that this should happen. Victims had various reasons for wanting McVeigh dead and wanting—as the Johnny Cash song has it—to "watch him die."[52] McVeigh was, for them, a "toxic presence"—a phrase that Madeira uses at least thirty times.[53] At least one victim knew that when someone dies, the bowels

51. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis omitted). *See generally* Carter et al., *supra* note 41, §§ 12.02–.03.

52. Johnny Cash, *Folsom Prison Blues*, *on* With His Hot and Blue Guitar (Sun Records 1955). Cash later said, "I sat with my pen in my hand, trying to think up the worst reason a person could have for killing another person, and that's what came to mind." Johnny Cash with Patrick Carr, Cash: The Autobiography 57 (1997).

53. *E.g.*, p. 19.

evacuate: she said, "Now I can see Tim McVeigh in a diaper scared shitless" (p. 250).

Memory work pushed victims in different directions when McVeigh was sent to death row. Some victims asked themselves whether his death would serve or disserve the goals of remembrance and accountability that they shared. Many victims believed that McVeigh should not be executed; they organized their own group and held a demonstration outside the prison the day McVeigh died. Their words and actions bring us to consider again the boundaries on and uses of memory work. Vindicating a desire for vengeance is—literally—atavistic. From the earliest recorded legal history, retribution has been mediated by socially and historically determined norms.[54] The idea of mitigation traces deep roots. Victims may be moved to consider whether one more death serves a valid purpose.

I said in the penalty trial summation,

> Nobody knows the depths of human suffering more than those who have been the systematic victims of terror; and yet in country after country, judicial systems are saying that in each case, the individual decision must triumph over our sense of anger. . . .
>
> In South Africa, when Mandela was released from prison, it was decided . . . that a system would be put in place to make sure that acts of vengeance and anger were not carried out in the name of the law.[55]

The victims desired retribution for their own reasons, but they also argued for retributive justice as fulfilling social goals. Making the latter argument puts them outside a place devoted only to their memory work. When the work of memory emerges into larger and socially defined places of memory, there are choices about how memories will be put to constructive use. It is important that a criminal does not commit more crimes and that potential criminals are deterred. Sensible decisions about deterrence, however, require understanding why people act as they do. Killing McVeigh cut off an avenue of understanding.

IV. Missing McVeigh

With an unfortunate disregard for the historical facts about the bombing that only McVeigh knew and might one day share, McVeigh's criminal trial allowed for emotional memory work to influence his eventual death

54. *See, e.g.*, Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Calif. L. Rev. 1227 (1966); *see also* Michael E. Tigar, *"Willfulness" and "Ignorance" in Federal Criminal Law*, 37 Clev. St. L. Rev. 525 (1989) (discussing the origins of the mental element in criminal law).

55. Closing Arguments; Jury Instructions, *supra* note 39, at *21. My South Africa reference was to the Truth and Reconciliation Commission, a social experiment whose title embraces both truth in the form of memory and an alternative socially determined resolution. Indeed, the first decision of the Constitutional Court of South Africa was to hold the death penalty unconstitutional. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 453 para. 151 (S. Afr.).

sentence. Victims can, however, reflect on the time between his sentencing and execution to determine whether they should have pushed so fervently for his death. During his years awaiting execution, McVeigh gave interviews and kept up correspondence with many people. From prison, he sent me the Jon Krakauer book *Into the Wild*, inscribed, "To Mike Tigar—a domesticated man who nonetheless has some redeeming qualities," and his signature. Krakauer's book describes the journey of a young man who ventured into the Alaskan wilderness, carrying only minimal supplies, and died there. The young man had kept his plans secret from everyone, including close friends. "Domesticated," we had found, was McVeigh's word for someone who—perhaps because of family obligations—would not join his crusade.

Madeira recounts the victim response to McVeigh's statements and interviews. She notes that McVeigh "openly declared his hostility toward and desire to combat a select few highly visible 'spokes-victims,' whom he termed 'venomous'" (p. 211). McVeigh bragged to his biographers that three mental health professionals had examined him before his trial, and they could not find any basis for "'mental defect' mitigation" (p. 213).

McVeigh's self-diagnosis, and the victims' response to it, took place in the space confined by the victims' perceptions, thoughts, and words. I am similarly confined, but here is my perception: I believe that he might someday have had something important to tell us, perhaps with the assistance of those who study human behavior. Our investigators revealed behavior and attitudes that supported the victims' view of McVeigh. The FBI's killing of civilians at Waco and Ruby Ridge affected him. He had already joined with messianic, far-right people and groups. By the time he moved to Kingman, Arizona, to live near the Fortiers, he was already assembling and handing out literature with these groups' messages. Gore Vidal perhaps understated the matter: "I thought a somewhat overwrought sense of justice overwhelmed McVeigh."[56]

By the time McVeigh moved to Kingman, he had been using methamphetamines for some time, but he apparently increased his use. One of our investigators reported to me that McVeigh had become so fearful that he built an earthworks and timber berm around his house. Methamphetamine usage takes the user on a ride that moves quickly from addiction to psychosis and that adversely affects cognition and decisionmaking along the way.[57] As the saying goes, and with reference to McVeigh's self-diagnosis, addiction is a disease that tells you that you don't have a disease.

I am one with Sister Helen Prejean in believing that we are all "more than the worst thing [we] have ever done"[58]—that is, that redemption is

56. Letter from Gore Vidal to author (Oct. 7, 2002) (on file with author). Vidal's comment was in the context of his agreeing with the formulation of "sense of injustice" in my memoir, *Fighting Injustice.* TIGAR, *supra* note 2, at 9.

57. *See* Examination of Michael Abrams, Jeffrey Hayes and Theodore Udell, United States v. Nichols, No. 96-CR-68 (D. Colo. Dec. 8, 1997), 1997 WL 752014, at *1–25.

58. *E.g.*, Sue Halpern, *Sister Sympathy*, N.Y. TIMES, May 9, 1993 (Magazine), at SM28, *available at* http://www.nytimes.com/1993/05/09/magazine/sister-sympathy.html?pagewanted=all; *see also* HELEN PREJEAN, DEAD MAN WALKING (1993).

possible through personal understanding, acknowledgment, and remorse. In the Nichols penalty phase, we asked Judge Matsch to instruct the jury as a mitigating factor "[t]hat Terry Nichols is a human being."[59] He granted our request.[60]

Beyond that assessment of human worth, however, McVeigh's descent into calculated, murderous conduct is similar to the trajectory followed by other murderers whose substance abuse has affected brain function and therefore conduct. I have not seen the mental health reports to which McVeigh referred, but there is evidence that substance abuse affected his conduct.

Madeira writes, with perhaps unintended irony, "Now, 15 years after the bombing, it seems that the time is now ripe for more inclusive forms of remembrance, ones that incorporate the perpetrators without excusing their ideologies and actions" (p. 272). Our understanding of McVeigh and his conduct is forever limited by the fact that he was killed in our name. As we move from focusing on the victims' narratives to putting matters in historical context, we must question how much was lost when the government fulfilled many victims' wishes and killed Timothy McVeigh. A living McVeigh could have helped us bridge the gap between memory and history.

Conclusion

A review of Madeira's thoughtful and well-researched book is not the place for full-scale debate about the death penalty. I hope, however, that her book can help us assess how the arc of memory work might be bent toward healing.

As I worked on this Review, my friend Per Erichsen shared insights about the way that memory work was deployed after a mass murder in Norway. In 2011, Anders Behring Breivik killed seventy-seven people, most of them children.[61] Breivik's neo-Nazi demeanor and words are as toxic as one can imagine. Norwegian political and religious leaders reached out to the immigrant and Muslim communities that were the targets of Breivik's hatred. The community joined with victims to create a broad and inclusive space for remembrance, to emphasize the unity and dignity of all humans, and to express their shared loss.[62] A Norwegian popular song, *Mitt Lille*

59. Closing Arguments; Jury Instructions, *supra* note 39, at *20.

60. *See id.* at *29 ("[Y]ou must consider additional information about the crime and about the uniqueness of the defendant as an individual human being.").

61. *E.g.*, Mark Lewis & Sarah Lyall, *Norway Mass Killer Gets the Maximum: 21 Years*, N.Y. Times, Aug. 25, 2012, at A3, *available at* http://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html.

62. *See Mitt Lille Land*, Wikipedia, http://en.wikipedia.org/wiki/Mitt_lille_land (last updated Feb. 28, 2013).

Land—Our Small Country—became a kind of anthem.[63] A book bearing that title has also recently appeared.[64]

In our own country, we have read of dozens of wrongful convictions, brought about by errors of related memory and by the deliberate manipulation of memory. Taking memory from private into public space can and should lead to a reflective and shared consciousness. Victims' narratives can and should animate our compassion and our sense of injustice. As jurists, we do our best work when we understand how stories of loss are tested by the dialectic of contradiction and mediated by socially determined forms and institutions.

63. Nichlas Andre, *Maria Mena—Mitt Lille Land*, YouTube (July 24, 2011), http://www.youtube.com/watch?v=1LHAwC9Xn38.

64. Mitt Lille Land: Minnebok Etter 22. Juli 2011 (H. Aschehoug & Co. & Gyldendal Norsk Forlag AS 2011). The book is a collaborative effort. The subtitle means "remembrance book of July 22, 2011." Breivik's name and picture are not in the book, as a way of putting his toxic presence out of the picture. The photographs show scenes of grieving, of ceremonies, of the events, and of the Norwegian royal family and political figures meeting with Islamic clerics and others who were the targets of Breivik's hatred. The entire portfolio of text and image is dedicated to memorialization without vengeance. The dedication reads, "If one man can show so much hate, think how much love we could show, standing together," quoting the words of Helle Gannestad, a young labor activist.