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Collateral Damage in Defense of Timothy McVeigh

Randall T. Coyne, *University of Oklahoma College of Law*



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COLLATERAL DAMAGE IN DEFENSE OF TIMOTHY McVEIGH

PROFESSOR RANDALL COYNE*

Abstract:

A lawyer represents a client in one of the highest-profile capital cases in our nation's history. In this essay, he opens his soul to the public, sharing his very personal story and the agonizing life-lessons he learned.

So, where to begin this confessional As good a place as any, I suppose, would be my matter-of-fact journal entry for April 19, 1995:¹ “Car bomb destroyed Murrah Federal bldg in OKC murdering many. Lyn was safe at the State Capitol. She was sent home as part of a large scale evacuation. Ordered pizza for dinner.”²

My wife Lyn was then clerking for Oklahoma Court of Criminal Appeals Judge Charles Chapel, whose chambers in the State Capitol building were only a few miles from the site of the Murrah Building mass murder. She learned of the bombing shortly before she and all other state employees were sent home in fear that there might be another attack, this one aimed at the state government.

This abundance of caution would prove to be as unnecessary as it was understandable. Seventy-five minutes after the explosion, Timothy James McVeigh—armed with a loaded Glock 9-millimeter pistol and a buck knife—would politely permit Oklahoma Highway Patrolman Charles Hanger to arrest him for driving without a license plate near Perry, Oklahoma, 78 miles from the Murrah Building rubble. Rather than kill Hanger and continue heading north, McVeigh told Hanger that he was armed, and peacefully surrendered both weapons. When federal authorities eventually connected McVeigh to the bombing, Hanger was hailed as a national (if somewhat accidental) hero. If, as the

* Randall Coyne is the Frank Elkouri and Edna Asper Elkouri Professor of Law, at the University of Oklahoma College of Law. He teaches criminal law, criminal procedure, capital punishment, constitutional law, and legal aspects of terrorism. Professor Coyne clerked for Judge Oscar H. Davis, of the U.S. Court of Appeals for the Federal Circuit, and the Washington, D.C. firm of Skadden, Arps. Along with Professor Lyn Entzeroth, he is the co-author of *Capital Punishment and the Judicial Process* (Carolina Academic Press) (3d. ed. 2006), the first law school casebook devoted exclusively to the death penalty.

¹ For years I had been in the habit of recording mundane and insignificant events in a Week-at-a-Glance Appointment book. Far from a diary, this journal was more of an organizational tool than a window to my soul. During the McVeigh trial, I kept a different type of journal, far more cathartic and revelatory.

² Randall Coyne, McVeigh Trial Journal, Apr. 19, 1995 (on file with author).





government alleged—and a federal jury eventually believed—168 people died earlier that morning because McVeigh decided that they should, then one fortunate highway patrolman lived to collect his commendations only because McVeigh decided that he should. Tim would later explain that he had no quarrel with the state government.

As a full-time law professor, I was safely tucked away in the proverbial Ivory Tower in Norman, Oklahoma, sheltered from the attack by a 22 mile stretch of Interstate 35. I learned of the attack in far less dramatic fashion than had Lyn. Early reports of a “gas main explosion downtown” spread through the Goddard Health Center where I had stopped for a check-up before heading into the office. When I arrived for work at the University of Oklahoma College of Law, a silent congregation of students, faculty, and staff hovered around television sets that had been set up in the lobby. The live video images left no room to doubt the depth of the destruction. The force of the explosion had ripped the face off the Murrah Building and laid waste to nearby buildings. The estimates of the dead and injured crept steadily upward throughout the day.³

Jammed circuits made it impossible to contact Lyn by phone, but for some reason I never doubted that she was safe. Only in retrospect am I able to imagine the hellish uncertainty that must have haunted countless friends and family members who awaited word of the fate of their loved ones. For many, an abiding religious faith would make these cruel hours more bearable. For me—raised on the battlefield of alcoholism and breast fed by a mother whose addiction to Scotch would kill first her liver and finally her at age 53—the coping mechanism of choice was emotional detachment. Just 18 months earlier, our infant daughter Marley—barely one-month-old—underwent surgery to correct a life-threatening condition, and I had wrapped my emotions in the same cloak of calm confidence.

When my dean, Peter Goplerud, caught up with me outside the lobby elevator and asked what I thought about the unfolding events, I candidly and, to be sure, callously, answered that at least Americans would now have something other than the O.J. Simpson murder trial to discuss. I watched Peter’s face wince in response, and it was as if someone had held up a mirror to my insensitivity. But the truth remained: While those around me seemed dizzied by the contagious intoxication of tragedy, I felt mostly numb—almost nothing. Of course, I had empathy for those killed and injured. But I wasn’t fearful, angry, or captive to the frenzied, and eventually morose, emotional state that seemed to envelop the entire state. Certainly, as Lyn and I shared a pizza that night, I had no reason to believe that the tragedy unfolding live on all three networks would ensnare, consume, and nearly destroy me.

Early on I learned that I was in fact vulnerable; my emotion-resistant armor could be pierced. Lyn and I returned home one evening and checked our answering machine for

³ In all, 168 persons—including 19 children in the Murrah Building daycare center—perished in the blast. Rebecca Anderson, a 37-year-old licensed practical nurse, was killed trying to rescue victims after the attack, she was the last casualty. Mike Connell, *Sacred Ground*, TIMES HERALD, Apr. 15, 2001 at 5A, 2005 WLNR 6156180.

messages. One caller identified himself and then continued in a somber tone, “Mr. and Mrs. Coyne, I am so sorry for your loss. If possible, we’d like to set up an interview” I unplugged the answering machine in disgust. That some low-life reporter, scavenging about for a story, would comb the area phone books for the last names of grieving victims who might be lured into granting interviews shocked and angered me. But the realization that our number had been called because Sharon Coyne, a clerk at the federal courthouse across from the Murrah Building, had dropped her precious daughter Jaci off at the Murrah Building daycare center on the morning of April 19, startled me. Jaci, only 14-months-old, was one of 19 children murdered in the daycare center. Our daughter Marley was then 19-months-old. Lyn, who clerked for a judge on the state court of criminal appeals, just a few miles away from the Murrah Building, could just as easily have been clerking for a federal judge. And there could just as easily have been 20 children murdered that day.⁴

The national obsession with O.J. Simpson and the brutal murders on Bundy Drive had largely cured me of television, and I could barely bring myself to watch the terrible images constantly bombarding my senses. When the news coverage metastasized into maudlin memorials to those slain, I quit watching altogether.

My teaching package at the law school—criminal law, criminal procedure, and capital punishment—somehow seduced the national media into believing that I was a legal expert and someone to talk to for comment on an array of pretrial issues: the right to counsel, conspiracy, and the federal death penalty, among others. So, for a time I found myself providing terse commentary and then, after I caught on, somber sound bites, to all three major networks, CNN and Fox. I was quoted in the *New York Times*, and the *Associated Press* was kind enough to pass along to lesser newspapers my profound pearls of pretrial pontificating. I gradually removed myself from the media maelstrom after I became one of Tim McVeigh’s lawyers.

My job as legal counsel to the McVeigh defense team began with a Sunday telephone call, about a month after the bombing, from James Hankins, a former student who worked for Stephen Jones, the lawyer who had been appointed lead counsel for McVeigh. Two days later, on May 23, I walked into Jones’s Enid office, discussed the death penalty aspects of the government’s case, and joined the McVeigh defense team, initially as an unpaid consultant. That left me free to grade my exams from the preceding semester, teach my summer criminal law class, finish up my paid mitigation work on behalf of California death row inmate Freddie Lee Taylor, and continue my pro bono work for mass murderer Roger Dale Stafford, an Oklahoman represented by the Jones firm whose July 1 execution date was approaching relentlessly. No worries.

During my interview with Stephen Jones, I first observed his remarkable gift for storytelling (the trial lawyer’s stock in trade). The conversation ranged from his charming wife Cheryl’s failed bid to get elected to the state legislature to the merits of

⁴ A few years later, Lyn in fact accepted a job clerking for a federal judge whose chambers had been damaged by the April 19 blast.



Charles DeGaulle. It was apparent that he was well-read and mannered and possessed both a keen intellect and wry wit. When Jones told me that Dick Burr, an extremely gifted, thoughtful, and compassionate death penalty expert, also had joined the team, I began to feel that McVeigh's life was in good hands. Only later, after talking to other Jones-firm lawyers, assessing their professional capabilities, and getting a whiff of their dissatisfaction and concerns, would I begin to sense that the Good Ship McVeigh might not be sea-worthy, and its captain was vulnerable to mutiny.

On June 8, Julia Sims (another former student and Jones's associate) escorted me to the Federal Correctional Institution in El Reno, Oklahoma, for my first meeting with Tim McVeigh. He shook my hand somewhat formally, and asked if I had a business card so he would know that I "meant business." To strike a more personal note, I had decided that rather than hand over a business card, I would give him a humorous trading card sized birth announcement with Marley's picture that I had designed and distributed to friends and family when she was born.

Tim McVeigh struck me as tall, young, serious, disciplined, articulate, and passionate—and in dire need of legal help. It was unimaginable that with the aid of co-defendant Terry Nichols this rangy former Army sergeant, clad in a clownish orange prison jumpsuit, white tee-shirt and blue cloth slippers, could have deliberately caused the deaths of 168 fellow human beings.

The McVeigh defense had a gravity of its own, and before long I was devoting huge chunks of what free time I had to pretrial motions and trial preparation. Early large-scale projects included research and writing in connection with our motions for severance and change of venue. Each month my non-billable pro bono hours increased dramatically from the month before. Before long, my work as one of Tim McVeigh's lawyers consumed all of my waking (and many of my resting) hours. Over the next two years I would spend considerably more time with him than with any other human being.

Wayne Alley, the Oklahoma federal judge who expected to preside over the McVeigh and Nichols prosecutions, grudgingly agreed that I could be paid for work done on the McVeigh motion in opposition to the government's demand for the death penalty. Soon, the Nichols defense team, led brilliantly by Michael Tigar, persuaded the Tenth Circuit to throw Judge Alley off the case. His replacement—the capable, then Chief Judge for the District of Colorado, Richard P. Matsch—ordered the federal government to compensate me for all my future work on any aspect of McVeigh's defense. Once Judge Matsch signed that order, I secured an unpaid leave of absence from the University to work fulltime on Tim McVeigh's defense, but only after (falsely) assuring some functionary from the President's office that I wouldn't be sitting at counsel's table with McVeigh.

On January 1, 1997, I loaded up the Saturn station wagon (my first new car, purchased with money earned defending Tim McVeigh), bid Lyn and Marley a tearful goodbye, and slipped U2's album *Boy* into the car stereo. While the speakers blared the cut *New Year's Day*, I drove myself to Denver, where I would live for the duration of the trial.

Stephen Jones had somehow managed to persuade Judge Matsch to authorize him to hire virtually his entire law firm to work on the McVeigh defense. It was as if Jones had morphed into Jed Clampett, loaded up the truck (with his law firm, private investigators, friends, and relatives) and moved to Denver (Colorado, that is . . .). Most of these folks were young and inexperienced, but dedicated lawyers.

I deliberately kept a low profile in Denver—not because of my suspicion that the University wasn't happy having one of its professors associated with the defense team—not because I was ashamed of the service I provided for Tim McVeigh—not because of any irrational fear that as a McVeigh lawyer I was somehow at risk—but for two far less complicated reasons: First, there was way too much work to be done to waste time courting the media. Second, the media preening, vulgar vainglory, and shameless self-promotion sickened me. In my opinion, had Jones been paying attention, he would have seen what was obvious to everyone else: Jones's obsession with the media cost him his client's confidence and eroded the respect of the defense team he expected to lead.

My role in Denver remained fairly constant. Stephen Jones described my job as head of the legal counsel office of the McVeigh defense team.⁵ In short, I was the chief brief and motion writer. This meant that I researched legal issues and drafted pleadings during all phases of the case, from pre- to post-trial. While the principal courtroom lawyers selected jurors and questioned witnesses, I did most of the team's legal research and writing in our office, one block from the courthouse.

As expected, I put in long hours. All-night sessions, often with Dick Burr, were fairly common and tremendously rewarding. A brilliant lawyer with a Texas-sized heart, Burr was somewhat of a legend in death penalty circles long before he signed on to the defense team.

Most days found me glued to my computer. The younger Jones-firm lawyers, at least those with enough free time to sit-in on the court proceedings, provided me with courtroom updates.

A typical Sisyphean day is illustrated by this journal entry dated April 17, 1997:

Met with Rob [Nigh, another McVeigh defense lawyer], who asked how I was feeling and asked me about my various assignments. Rob helped me prioritize the projects: reply brief to strike [government] witness [Tim Chambers] issue; prosecution memos; motion to quash [Michael] Tigar's subpoena of [*Playboy* reporter Ben] Fenwick chronology; brief to permit [Cheryl Ramsey] to cross-examine Charlie Hanger; brief to strike first 20 jurors for failure of judge to inquire or let us inquire as

⁵ Stephen Jones & Jennifer Gideon, *United States v. McVeigh: Defending the "Most Hated Man in America,"* 51 OKLA. L. REV. 617, 635 (1998).



to reasonable doubt, presumption of innocence; 10th Circuit media argument on May 15, etc., etc., etc.⁶

From the very beginning, I felt strongly that disproportionate time and energy were spent on ancillary media matters. Surely my time would have been more wisely spent marshaling legal authority and crafting legal arguments solely to protect McVeigh's rights to a fair trial and sentence. Instead, I was frequently pulled away from those tasks to research and brief the First Amendment and media law issues in order to preserve Jones's right to swamp the airwaves with daily public appearances and sound bites.

Early on, Jones's media strategy made sense. We forcefully and correctly argued that the press—long before trial—had demonized McVeigh through prejudicial stories that described him as a rightwing extremist, anti-government zealot, militia sympathizer, survivalist, and anarchist. These descriptions and depictions of McVeigh as cold, emotionless, and steely-eyed seriously undercut the presumption of innocence and completely compromised the possibility that McVeigh might be fairly tried either within Oklahoma or by Oklahoma jurors.

Judge Matsch recognized as much, and cited three reasons for granting our motion for change of venue. The local Oklahoma pretrial media coverage was very different from the national media coverage outside Oklahoma. Oklahoma media portrayals demonizing McVeigh and Nichols simultaneously emphasized the victims' humanity. Frequent televised interviews of Oklahoma citizens stressed the importance of guilty verdicts and hinted darkly that death would be the only suitable punishment.⁷

Nonetheless, once our change of venue motion was granted and the trial was moved 501 miles away to Denver, Colorado, these concerns abated dramatically. Not only were Coloradoans far less personally invested in the events of April 19, they had not been bombarded with the same anti-McVeigh media spin. Yet, even then Judge Matsch endorsed Jones's media campaign:

Defense counsel are understandably concerned that the pretrial publicity may predispose public opinion to guilt of the defendants. Mr. McVeigh's lawyers have been very sensitive to the possible effects of those pictures of him and reports about him that they characterize as condemnatory. Mr. Jones has been active in generating countervailing publicity by granting interviews and making public statements about the investigations the McVeigh team has conducted, including leads to other suspects and theories about possible perpetrators. Mr. Jones has also helped Mr. McVeigh obtain personal publicity to dispel the demonization effects of the early camera coverage of his arrest and detention.⁸

⁶ Randall Coyne, *McVeigh Trial Journal*, Apr. 17, 1997 (on file with author).

⁷ See *United States v. McVeigh*, 918 F. Supp. 1467, 1471-72 (W.D. Okla. 1996).

⁸ *United States v. McVeigh*, 931 F. Supp. 756, 758 (D. Colo. 1996).



To state that Stephen Jones was “active in generating countervailing publicity by granting interviews and making public statements”⁹ is, in my opinion, a little like saying a heroin junkie in the throes of withdrawal is “active” in trying to score another fix. And Judge Matsch’s observation that Jones “helped Mr. McVeigh obtain personal publicity”¹⁰ suggests that McVeigh himself courted media attention and ignores, in my opinion, the shameful fact that Jones dangled McVeigh before the national media much as P.T. Barnum exhibited Tom Thumb. That McVeigh became embittered and resented being used this way was plain to all on the defense team who paid attention or cared. Judge Matsch is entitled to his opinions. (After all, what would a judge be without opinions?) But Judge Matsch had no way of appreciating how Jones’s personal quest to saturate the media damaged his relationship with his client and demoralized the defense team.

There were other tools available to mitigate the corrosive influence of pretrial publicity, many of which were implemented. In general, Jones favored those that both protected McVeigh from negative press and preserved Jones’s right to engage in positive spin.

In addition to the venue change, other judicial safeguards we sought (and that were eventually provided to some extent) included severance,¹¹ juror questionnaires and voir dire on the issue of pretrial publicity, and jury instructions.

On the other hand, after two alleged confessions were published 11 days apart—purportedly lawfully obtained by the *Dallas Morning News* and *Playboy* magazine and supposedly based on defense team documents—we moved for a continuance of one year so that the tremendous prejudice produced might have a chance to dissipate before a jury was selected. Judge Matsch denied this motion, satisfied that voir dire and jurors’ assurances of impartiality would reliably ferret out any taint.¹²

Finally, Judge Matsch eventually put an end to public statements by trial participants by issuing a series of increasingly restrictive gag orders.

Others are better equipped to assess whether Jones’s media strategy was consistent with our defense mission. According to one standard, “[t]he basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counsel and advocate with courage and devotion and to render effective, quality representation.”¹³ And, as Jones would later note in his defense, Judge Matsch addressed

⁹ *Id.*

¹⁰ *Id.*

¹¹ To be candid, the severance of the joint trial of McVeigh and Nichols into two separate trials benefited Terry Nichols far more than Tim McVeigh. As Mike Tigar and his excellent team clearly recognized, Nichols—who after all was at home hundreds of miles away when the bomb exploded—had a great deal more to lose by being associated with McVeigh than vice versa.

¹² *United States v. McVeigh*, 955 F. Supp. 1281, 1282 (D. Colo. 1997).

¹³ ABA Criminal Justice Section, Criminal Justice Standards, Defense Function Standard 4-1.2 (1991), available at http://www.abanet.org/crimjust/standards/dfunc_blk.html#1.2 (last visited May 31, 2005).



Jones in open court at the trial's end and said, "I think you and the other lawyers on your team in the courtroom conducted the defense of Timothy McVeigh with honor and dignity and with a due regard for your role as officers of the Court."¹⁴

Describing the McVeigh defense team's office as the eye of the hurricane is an inapt analogy insofar as the picture conjured is of a calm center of a powerful storm. The truth was just the opposite. Compared to the worst days in the office, the shootout at the O.K. Corral was a simple misunderstanding.

By far the most (and perhaps only) truly indispensable member of the McVeigh defense team was a tall, strapping recent college graduate, Scott Anderson. Compared to Scotty, Radar O'Reilly has Alzheimer's disease. A Renaissance clerk, if there is such a thing, Scott's duties ranged from mundane tasks like insuring that McVeigh's court clothes were dry-cleaned, to knowing exactly where every critical document or piece of evidence was at any given time. Everyone relied on Scott, often all at once, and he always delivered. He exemplified grace under fire, and was frequently the target of Jones's wrath. If he ever crumbled due to pressure, I didn't see it.

On the other hand, more than once, I snapped like a dry twig under an ATF agent's boot at Ruby Ridge. Days after one particularly heated argument with Jones I was able to record in my journal this coda: "Received a copy of the bill for the tile repair in the Denver Place office bathroom: \$264.96. Money well spent."¹⁵

The experience wasn't all piss and vinegar. In late April of 1997 I was thrown a bone. I had filed a motion to strike or reopen voir dire as to the first 20 jurors to survive "for cause" challenges. The government's response claimed that I had failed to cite a controlling case and petulantly criticized a factual exhibit prepared by two young lawyers who assisted me. This annoyed me, so I decided to file a reply brief.

I finished a draft of the reply brief at 1:00 a.m. and asked a young lawyer to give me a 6:30 wake up call, so that I could fax the brief to Jones by 7:30. I did so and, according to my journal, Jones told me to file it. Then he called back at 8:00 and asked me if I wanted to argue the motion (in open court, in less than an hour). I said, "Well, what do you think, Stephen?" He said, "You wrote it. You should argue it." I thought if I said "no" he might never offer me another shot. So I told him that I would do it, but that I'd have to run back to the apartment to put on a suit. He said, "Yes, Randy, you'll have to clean up." I was nervous as hell. Rushed to my apartment, got dressed and started furiously sketching notes for my oral argument debut. I arrived at the courthouse at about 8:30 and continued drafting notes for my presentation. A clerk approached me and asked for my name. It wasn't on her list of McVeigh counsel.

¹⁴ Transcript at 15, *United States v. McVeigh*, Case No. 96-CR-68-M (June 13, 1997), cited in Stephen Jones & Jennifer Gideon, *United States v. McVeigh: Defending the "Most Hated Man in America,"* 51 OKLA. L. REV. 617, 621 (quoting Tr. at 15, *United States v. McVeigh*, Case No. 96-CR-68-M (June 13, 1997)).

¹⁵ Randall Coyne, *McVeigh Trial Journal*, July 2, 1997 (on file with author).

[Wheelchair-bound lead prosecutor Joseph] Hartzler approached the podium and lowered it. He was unable to raise it and had to ask a court clerk for help. I thought, “That’s O.K. I’d rather argue seated, since my pants are already wet and my legs won’t shake so much.” Tim arrived and I told him that I was going to argue the motion and related pleadings that had been filed. Tim leaned over to me and, to give me encouragement, said, “Remember, Randy. It’s just a classroom and these are students.” I told Tim, “Thanks.”

Then the judge abruptly denied my motion without argument. I looked at [Jones], who was looking at me, laughing. I asked, “How’d I do?”¹⁶

Shortly before the guilt phase portion of the trial ended, Tim asked me to visit him during the lunch break in his holding cell on the third floor of the courthouse. As I headed back to the office, I caught an elevator going down:

Stepped onto the elevator which was occupied by [prosecutor] Larry Mackey, [FBI Agent] Larry Tongate, [FBI Agent] Jon Hersley and [prosecutor] Aitan Goelman. I said, “Hi guys.” They all answered politely. The button for the 2d floor was pushed (because they were heading back to court) and I pushed the button for the first floor. Mackey asked, “You’re leaving?” I said, “There are work horses and show horses.” They all laughed; someone said, “I’ve never heard that before.” As they got off, Hersley said, “See you later, workhorse.” Everyone laughed. One big f@&*ing fraternity. “Brother can you spare my client?”¹⁷

The day after the jury found McVeigh guilty, as we began the penalty phase, I argued that Judge Matsch should declare the Victims’ Rights Clarification Act (VRCA) unconstitutional. In a breathtaking display of the power of the victims’ rights movement, Congress intruded into our trial and by statute overruled Judge Matsch’s ruling that victim-witnesses would not be permitted to attend trial sessions until after testifying, to eliminate the risk that their testimony would be influenced by the testimony of others. My June 3, 1997 journal entry recounts my failure: “After 5 hours sleep during the past two nights, I did our oral argument challenging the VRCA. Motion to strike as unconstitutional, denied. No big surprise there sports fans.”¹⁸

Nonetheless, I received kind reviews, particularly from Terry Nichols’s legal team. Tim, never a spendthrift with praise, thought I did a good job, and that was validation enough. I consoled myself in three ways. First, I reminded myself that I lost the argument to Sean Connelly, the incredibly capable Justice Department prosecutor whose mastery of case law and encyclopedic recall continue to amaze me. Second, my ill-fated effort had been sketched by talented courtroom artist, Walt Stewart, and was suitable for framing. Third, I failed—I deserved to drink a little more than usual.

¹⁶ Randall Coyne, McVeigh Trial Journal, Apr. 22, 1997 (on file with author).

¹⁷ Randall Coyne, McVeigh Trial Journal, May 23, 1997 (on file with author).

¹⁸ Randall Coyne, McVeigh Trial Journal, June 3, 1997 (on file with author).



If we had generated any momentum in the months leading up to trial, it was decimated by the sensationalized accounts of leaked defense documents that allegedly detailed McVeigh's supposed confession. Our Hindenburg of hope had vaporized. Jones's media strategy had imploded with a vengeance. (How could they do this to us? Weren't we all friends? Hadn't every courtesy been extended, practically every interview request granted? And this is the thanks we get?) In my view, the Good Ship McVeigh had run ashore on the shoals of its captain's ego. Or, to borrow a phrase of which Mike Tigar seemed fond: Jones had been "hoisted on his own petard."¹⁹

Any sane reporter, observing how national media figures were constantly roaming the halls of the McVeigh defense team's office, sometimes unescorted, might have predicted that such dangerously cozy relations between the defense and the press would lead to a critical security breach. But, then again, most sane reporters (and a few whose IQs approached room temperature) were clamoring for the same defense team access accorded to a select group from national media outlets.

The immediate aftermath of the *Dallas Morning News* and *Playboy* stories was nothing short of a total conniption fit. McVeigh desperately attempted to call his attorneys who were not affiliated with Jones's firm to discuss what to do about Jones. McVeigh later told me that the secretaries had received orders from Jones that McVeigh's calls were to be routed to him—and no one else. In frustration, McVeigh called the federal courthouse and asked to speak to Judge Matsch. Obviously, the clerk knew that Judge Matsch would not be happy to receive an ex parte communication from Timothy McVeigh, so the clerk suggested that McVeigh talk to his lawyer. McVeigh pleaded with the clerk that the suggestion was the root of the problem. He didn't *want* to talk to his lawyer—he *needed* to talk *about* his lawyer.

The non-Jones firm lawyers seriously considered resigning, but we concluded that Jones would never resign; and that we could best serve McVeigh by staying on board and performing legal triage. Bent, bowed, utterly humiliated, and damned near broken, we continued on. Media mavens began chirping that a guilty verdict was inevitable. After four days of deliberation, the jury confirmed the conventional wisdom and found McVeigh guilty.

During the sentencing phase, I put on a pair of mitigation witnesses, and did a reasonably creditable job. At least McVeigh thought so. After I examined one witness, McVeigh insisted on whispering his assessment of my performance. As a result, I didn't hear Judge Matsch ask if I had any questions for redirect. When Judge Matsch somewhat peevishly asked me a second time, I said no, but McVeigh (who had distracted me) seemed tickled that I had been scolded for not paying attention.

¹⁹ When I first heard Tigar use this expression to describe some misadventure of the government, I was lured into looking it up. The French used the word petard, "a loud discharge of intestinal gas," for a kind of infernal engine used to blast through the gates of a city. "To be hoisted by one's own petard," the now familiar phrase which apparently originated with Shakespeare's *Hamlet*, means to blow oneself up with one's own bomb; to be undone by one's own devices. See WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc.4.



I never submitted a bill for my last month's work in Denver. Was I ashamed to ask to be paid knowing that Tim would almost certainly die? Did I fear that Jones would withhold his authorization from the necessary forms? Was foregoing payment a self-imposed penance, a way of purchasing expiation for the cardinal sin of inadequate representation? You choose. All I know is that well over \$10,000 in legal fees went unbilled. As I look back, it's easy to see that I had come full circle. My work on the McVeigh trial defense ended much the same way it had begun: pro bono.

Perhaps the greatest pro bono service I performed for Tim McVeigh was accomplished in the months immediately after I left Denver. It remains a small comfort to know that I was able to help Tim rid himself of Stephen Jones as appellate counsel. When it became clear that Jones had no intention of honoring his promise to step aside after trial, McVeigh took matters into his own hands and called the *Buffalo News* to complain. Jones retaliated by publicly filing in the Tenth Circuit a pleading which described McVeigh as an "ingrate" but made it clear that this was one ingrate Jones would be perfectly happy to continue to represent. I was personally infuriated by his bald allegation that (1) he had never had any trouble with his client until (2) he had fired me. First, long before the frenzy over the multiple media claims that reporters had managed somehow to lawfully pry incendiary and incriminating confessions from the defense team, McVeigh had, in my opinion, grown to distrust, perhaps even despise, his lead lawyer. Second, my work as part of the Jones-led McVeigh defense team ended at the same time everyone else's work had ended: when the motion for new trial and brief in support were filed. If I had in fact been "fired," it would have been nice to have been told by someone other than a reporter for the Oklahoma City newspaper. I stand by what I said then: I served at the pleasure of my client—Tim McVeigh.

Dick Burr, his wife Mandy Welch, Tim McVeigh, and I fashioned a response that was filed under seal, asking that Jones be removed. News accounts claimed that attached to our sealed response was a copy of Jones's book contract with Doubleday Publishers. (If true, wouldn't it be ironic that Jones's undoing was yet another defense team leak?)

Jones replied, this time under seal, but was unable to unscrew his hand from inside the cookie jar. The Tenth Circuit relieved Jones of his appellate duties, and appointed two of the three lawyers McVeigh had requested to represent him on direct appeal: Dick Burr and Rob Nigh.²⁰

I returned to teaching law, comforted by knowing that although McVeigh had been sentenced to death, he had a strong defense team representing him in his direct appeal.

²⁰ In a June 22, 1997 letter to Judge Matsch, McVeigh wrote:

It has been represented to me that you are aware of the problems and difficulties I have had with my appointed counsel in the past. With this letter I do not waive anything with respect to these concerns—but if I have any voice in who represents me on appeal, I would prefer Richard Burr, Randall Coyne, and Robert Nigh, Jr.

Howard Pankratz & George Lane, *Jones Will Remain if Asked: Irked McVeigh Wants New Lead Attorney for Appeal*, THE DENVER POST, August 15, 1997, at A16, 1997 WLNR 531320.



Most folks ignored the fact that I had worked on the McVeigh defense team. Those that acknowledged it were just as likely to make some hateful comment regarding McVeigh's just desserts as to offer me any comfort or encouragement.

As my sense of alienation from my peers deepened, my drinking steadily increased. As any alcoholic can easily understand, over time it simply takes more and more to enable you to feel less and less. When sober, my political instincts were poor at best. When drunk, they became self-destructive. I became the guy that everyone wanted to whisper to in the hall, but no one dared sit near at a faculty meeting. Never good. When my dear old friend, former New Hampshire Supreme Court Justice Bill Grimes, was unceremoniously retired against his will, I lashed out publicly at our new dean, Andy Coats. Bad idea. Colleagues were no longer interested in whispering to me, and concentrated instead on avoiding me altogether.

In my alcohol-induced fog and post trial depression, one group seemed genuinely interested in my experiences and willing to listen as I vented my frustration and rage: my students. But the nightmares continued, and the profound sense of sadness intensified. Sometimes the color autopsy photos would come alive in my dreams to haunt me. Slightly more merciful, but equally jarring, were recurring dreams of Tim being strapped to a gurney and his arm prepped for the intravenous poison.

Eventually, my dependence on students for support, comfort, and companionship became the subject of gossip and spawned salacious rumors. I had become a self-pitying, jaded, pathetic wretch. I was more interested in spouting tirades against the administration and my colleagues than in teaching my classes.

As expected, the home front was equally littered with the ghosts of my enemies, real and imagined. I moved back into a family that had carried on without me, quite nicely thank you, and I felt like an intruder. Lyn and Marley had developed their own routines and as I had grown apart from them, they grew closer to each other. I withdrew totally from my wife and daughter, preferring the company of Foster's beer and the solitude of my locked office. My priorities had become so distorted that I resented the time it took to put my daughter Marley to bed and dreaded being asked to read her a bedtime story because doing so would delay my nightly appointment with drink and oblivion. One particularly clever tactic I developed was to pick a fight with Lyn so that I could storm off and be assured of ample space within which to drown my sorrows. (I'll be damned if the resilient little bastards didn't learn to swim.)

I eventually moved out, in part so that Marley would be spared having to see her father destroy himself, but mainly so that I could continue feeding my monstrous addiction without having to endure the increasingly shrill and well-deserved recriminations of my wife, Lyn.²¹ Nothing ruins a buzz as quickly as a spouse pleading with you to stop

²¹ I put Lyn through hell. How she found the strength and grace to endure, I'll never know. But I'm certain that without her support and tough love I would never have had a moment's recovery or peace.



drinking. And when drunk, nothing is more invigorating than looking reality right in the eye and denying it. (Allow me to retort: “Problem? YOU’RE the one with the problem.”) Truly resourceful drunks like me recognize that these inevitable quarrels with misunderstanding, unsympathetic loved ones can conveniently be converted into *raisons du buvez*. Drinking provokes fighting provokes drinking provokes fighting, and so on. Savvy?

Another brilliant ploy, designed to keep the loved ones at arms-length, was to get into therapy, creating the illusion that things would soon get better. (Not so fast.) Half-hearted experiments with a variety of anti-depressants failed miserably. Neither Prozac, Zoloft, nor Celexa had active ingredients stout enough to survive the steady deluge of Fosters chasers. By the time I realized that my party was over (all guests had long since fled the host) I was pretty much homeless, living out of my office, stealing showers where I could, and canceling so many classes that demand for my courses was certain to soar.

On Marley’s fifth birthday, as a secret present to her, I silently promised myself that if I couldn’t quit I would check myself into a treatment center. I somehow limped through until the end of the semester, and then checked myself into a residential treatment center.

Although I had vigorously resisted going into treatment, once I settled in it felt like the first safe place I had been for two years. I wrote my exams while at the treatment center, and sent them back to the law school to be copied and administered.

After nearly four weeks of inpatient treatment, I was discharged back into the free world (with nearly four weeks of clean time). My pre-release interviewer informed me, a bit too cheerfully for my taste, that my prognosis for remaining sober was below average. I knew that if I hoped to continue to play live music, I would eventually have to march back into a smoky bar, set up my drums, and pray that no one bought me a shot. So, my first night out of captivity—much as a child might dip a big toe into the water before jumping in—I inched my way into one of my favorite dives. Just as the bartender spotted me and reflexively reached for a Fosters beer, I asked him instead for a Diet Coke.

I made a habit of attending as many Alcoholics Anonymous meetings as possible to build up insurance against the first time I was sorely tempted to resume drinking. When the next semester began, I had a whopping two months of sobriety, and I returned to work optimistic that I would be able to make a fresh start. Hell, I even wore a suit and tie.

I was suspended almost immediately. My worries that I wouldn’t be able to attend a sufficient number of AA meetings to stay sober evaporated. The AA aphorism, “Be careful what you pray for; you just might get it,” echoed inside the empty space where billions of brain cells had gone to their foamy graves.

Not that any alcoholic, in recovery or otherwise, needs a reason to drink—but as I faced the prospect of being stripped of tenure—I had what I considered to be a pretty damn good reason. (Poor me; poor me; pour me another drink.)



I didn't drink; instead, I went to four AA meetings a day. (Yes, that's a lot of meetings; but I had done a lot of drinking.) The University made good on its promise and revoked my tenure. I still didn't drink.

With the help of family and friends, the compassion of my wonderful dean, Andy Coats, and God's grace, the University and I reached an accord. All I had to do was spend a year and a half away from teaching on what's euphemistically referred to as "administrative leave." (That's when the administration tells you to leave.) I could come back and spend a few years on probation and, if things worked out, I would be permanently reinstated and my tenure would be restored. Oh, yeah, just one more thing: I had to stay sober. No worries.

And I still didn't drink. So far, things have worked out. I try to remain humble and whenever possible I resist the temptation to brag to friends from other schools that I'm actually the only person I know who has been *twice tenured* by the University of Oklahoma. (AA aphorism number three: most alcoholics are egomaniacs with inferiority complexes. Could the same be true of most law professors?)

I've learned that rebuilding a reputation takes much longer than destroying one, and that trust is much harder to regain than to lose. But through it all, I've also known the spiritual satisfaction of introducing students who wrestle with their own addictions to the possibility of recovery.