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Evidence? Or Emotional Fuel?

*The following excerpt is from *Defending Mohammad: Justice on Trial* (Cornell University Press, 2003), by Robert E. Precht, and appears here with permission of Cornell University Press. The excerpt is from Chapter 8, "Relevance and Prejudice." The book is based on the author's experience as public defender for Mohammad Salameh, the lead suspect in the 1993 bombing of the World Trade Center.*

By Robert E. Precht

In theory, jurors are supposed to separate their decision about a defendant's guilt from their reaction to the heinousness of his conduct. If the evidence is weak, they should be just as willing to acquit a terrorist as a shoplifter. As scholar Samuel Gross notes, however, no one believes this actually happens. [Samuel R. Gross is the Thomas G. and Mabel Long Professor of Law at the University of Michigan Law School.] Even in civil trials, where the jury is asked to decide a case by a preponderance of the evidence, studies suggest that juries are more likely to find defendants liable, on identical evidence, as the harm to the plaintiff increases. In criminal trials, the problem is worse, because the government must prove its case beyond a reasonable doubt. In a close criminal case, jurors are supposed to release a defendant even if they believe he is probably guilty. This is a distasteful task under any circumstances, but it becomes increas-

ingly unpalatable — and unlikely — as the severity increases from nonviolent crime, to violent crime, to homicide, to terrorist acts of mass murder. Prosecutors can limit the impact of heinousness by avoiding appealing to the jury's emotions and instead keeping the members focused strictly on the evidence of the defendants' actions.

During the first month of testimony, prosecutors never mentioned the defendants. Instead, they called witness after witness to document the human suffering and physical destruction caused by the explosion. For days, anguished survivors relived their brushes with death when the bomb detonated in the garage of the Trade Center complex at exactly 12:18 in the early afternoon of February 26. The testimony was gripping. It is all the more heart wrenching today in that the witnesses' words seem eerily to foreshadow the tragedy of eight years later.

A hurricane of hot air hurled stockbroker Timothy Lang a hundred feet, dropping him near the rim of the crater caused by the bomb. He crawled in the darkness and came to the edge of [the] huge pit. "I looked inside the pit, and it looked very, very deep, and at the base I saw a yellow glow, but the stuff spewing out of the pit was hot and very smoky. I could almost see the particles and taste them. I sensed a great danger there, and moved away from the pit."

Floyd Edwards, a worker in the mechanical shop in an underground level of the Trade Center, wandered the black underworld with a co-worker in search of an exit. They were down on their knees clawing through the rubble with their bare hands. "I remember looking at Jerry and I said, 'I got a bad feeling about this,' and he said, 'me too.' And I thought, damn, we're going to die here, Jerry, and it's going to be twenty years before they find us. We thought both towers done fell in on top of us." He blacked out and regained consciousness when a rescuer stumbled on him.

The elevator in which Peter Rinaldi and ten others were traveling came to an abrupt halt on the sixty-first floor. They remained calm for fifteen minutes, but then they began to smell smoke. Their eyes began to tear, and they started coughing. Ten minutes later the smoke had thickened and the passengers were now gasping for breath. In desperation, they pried open the elevator doors only to be confronted by two inches of sheetrock. They used keys to claw a small opening and felt air.

When firefighter William Duffy opened another elevator, this one stuck on the forty-fourth floor, a blast of hot air, ash, smoke, and soot washed over him. He found people lying on the floor head to toe and thought they were dead. "They looked like they were coated with charcoal," he said. "It was like a tomb." The people were revived, and they escaped.

Port Authority police officer Michael Podolak, sent to the forty-first floor, recalled drilling a hole in the roof of the elevator and finding a dozen young children, most about five years old, who were at the Trade Center on a school trip to the observation deck. One of the first out, a little girl, "was all curled up and scared. She held onto my neck, real tight."

People who tried to make it down the stairs faced their own hell. One witness reported looking down the smoke-choked stairwell and crying. A man had fallen down, and people were clambering over him. "I thought we were all going to die due to smoke inhalation," the witness recalled.

Throughout, the defense lawyers repeatedly objected that the admission of this testimony violated the Federal Rules of Evidence. Rule 401 defines relevant evidence as "evidence having

any tendency to make the existence of any fact that is of consequence to the determination of the action more probable." Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." We argued that victims' testimony was irrelevant because it did not make it more likely that the defendants committed the acts with which they were charged. Moreover, even if the testimony was marginally relevant, the relevance was outweighed by the danger that it would inflame the passions of the jury and distract them from the legal issues. Judge Duffy denied all our objections and permitted the government to parade the emotional accounts.

Robert E. Precht, below center, at a book signing, is assistant dean of public service and director of the Office of Public Service at the Law School. His writing and professional activities focus on criminal justice and terrorism issues. Precht came to Michigan from The Legal Aid Society's Federal Defender Division, Southern District of New York, where he was a staff attorney from 1985 to 1994. Precht received his B.A. in history from Northwestern University and his J.D. from the University of Wisconsin Law School.

As an undergraduate, Precht was awarded the Hearst Fellowship for Academic Excellence. In law school, he was a member of the National Moot Court Team.

A gifted speaker, Precht was named the 2002 Goodman Cohen Lecturer in Trial Advocacy by Wayne State University Law School. He has published articles in *The New York Times*, *the National Law Journal*, and *the Fordham Urban Law Journal*. His most recent work includes an inquiry into the use of the criminal justice system to prosecute accused terrorists in the aftermath of the September 11 attacks.

