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JUSTICE IN THE TIME OF TERROR

*Sharon L. Davies**

DEFENDING MOHAMMAD: JUSTICE ON TRIAL. By *Robert E. Precht*. Ithaca: Cornell University Press. 2003. Pp. xi, 183. \$22.95.

On my drive into work recently I found myself behind a Ford pickup truck and noticed its bumper sticker: “When the going gets tough, I get a machine gun.” Not a doctor. Not a counselor or mediator. Not a shelter for cover. Not the wisdom of a favored advisor or a proven friend. But a machine gun. How odd, I thought, to prefer a weapon incapable of identifying with any precision, any careful thought, where the enemy of the wielder of it might actually be hidden. A weapon as apt to injure non-targets as targets. A weapon mindless of its unintended consequences, and one that exhibits no inkling that such acts of aggression, whether capable of justification or not, are more likely to be met with hatred and more violence than concessions of desert and a laying down of arms. How odd, and yet how disturbingly familiar.

I wondered about the thought processes that might have led the driver of the truck to place such a sentiment on his bumper for all the world to see. What emotion, what belief might lead a person to conclude that, out of all the options available, a machine gun was the right choice to deal with going tough? And then I had it: Fear.

To someone fearful of being seriously injured or perhaps even killed by another, I supposed, a machine gun could appear to be a perfectly reasonable weapon of choice. Perhaps especially if the other was a stranger, with unfamiliar ways, whose very lack of familiarity, of sameness, seemed to make him unpredictable, threatening, worthy of suspicion and distrust. Even more so if there were many such “others,” who by their very numbers became an even greater threat, perhaps particularly if they lurked in places unknown, amidst innocents, to make their detection all the more difficult — and necessary. In the mind of the machine gun wielder, such a voluminous and elusive prey might warrant the choice of this particular firearm.

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If so, why then not a machine gun? Certainly such a weapon would intimidate most would-be transgressors. Might not that deterrence value by itself provide sufficient justification for choosing it rather than some other less threatening approach? And if it was used, its impressive fire power would certainly be more likely to bring down its intended foes than would a weapon demanding a more deliberate aim, a more precise calculation of who was and who was not sufficiently threatening to deserve to be a target. True, it might ensnare some innocents as well, but the gravity and imminence of some threats justify the incursion of some unwanted costs.

The problem with this instinct, of course, is that history warns that, for all our strengths and talents, we may not be particularly skilled at assessing the gravity of threats and telling those who present real threats from those who don't. This is especially true in moments of national crisis and heightened public insecurity. Indeed, fear has been at the heart of most of history's misjudgments. It was fear that convinced so many in the 1940s, including the President,¹ the Justice Department,² and the nation's highest court,³ that the forced relocation of Japanese Americans into camps was a good and constitutionally defensible idea. We have since rethought the wisdom of that.⁴

It was also fear that lay at the heart of the infamous Palmer Raids, the government's answer to a series of bombings that terrorized the country in 1919, including a mail bomb sent to Supreme Court Justice Oliver Wendell Holmes and another that detonated outside the home of then Attorney General A. Mitchell Palmer.⁵ The nation's answer included a hasty piece of legislation that authorized the nationwide round-up of 6000 foreign nationals; individuals who were arrested not on suspicion of involvement in the terrorist bombings, but on charges of associating with the Communist Party and the Communist Labor Party.⁶ This was a blunt approach, and one that promised to sweep up far more individuals *not* connected to the bombing spree than to it. It was an answer calibrated to the heightened level of the nation's fear, not the reality of the threat.

1. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943).

2. For excellent discussions of the detention program, see Robert Justin Goldstein, *An American Gulag? Summary Arrest and Emergency Detention of Political Dissidents in the United States*, 10 COLUM. HUM. RTS. L. REV. 541, 558-61 (1978), and Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103, 109 (2003).

3. See *Korematsu v. United States*, 323 U.S. 214 (1944).

4. Take the apology of President Reagan to the Japanese American community. Julie Johnson, *President Signs Law to Redress Wartime Wrong*, N.Y. TIMES, Aug. 11, 1988, at A16.

5. See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 16 (2003).

6. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 996-98 (2002).

In his book *Defending Mohammad: Justice on Trial*, Robert E. Precht⁷ worries a lot about fear — specifically, how fear might have “doomed” his client Mohammad Salameh’s chance for a fair trial in 1993 when Salameh, an illegal Palestinian immigrant, was charged along with three others (Nidal Ayyad, Mahmoud Abouhalima and Ahmad Ajaj)⁸ with planning and carrying out the first bombing of the World Trade Center (pp. 17-18). By any standard, the first bombing was a crime of intense national interest, and if Salameh’s lawyer had any doubt about that, he was disabused of it when, following his first appearance as Mohammad’s counsel, reporters literally pinned him against one of the stone pillars outside the Manhattan federal courthouse and peppered him with questions (p. 7). The bombing left six dead, injured more than one thousand others, and destroyed hundreds of millions of dollars in property (p. 64). Thus public calls for an aggressive investigative response in the wake of the attack were hardly surprising, and they were voiced well before the last body was discovered and removed from the debris (p. ix). The throngs of reporters who packed the courtroom throughout the trial were testament to the great interest in both the crime and the four defendants charged with involvement in it.

Robert Precht and I did know each other, but we were not friends, when he tried the case that is the subject of his memoir, *Defending Mohammad*. Indeed, at the time, there was little chance that Precht and I would have seen eye-to-eye about much about the case, including the rightness of the accusations, the fair-mindedness of the prosecutors assigned to the case, and the manner in which United States District Court Judge Kevin Duffy presided over the trial.⁹ For in 1993, when Precht, an experienced Legal Services attorney working for the elite federal-defenders unit in Manhattan, found himself assigned to defend Mohammad Salameh (p. 3), I worked directly across the street as a federal prosecutor in the U.S. Attorneys Office for the Southern District of New York, the office responsible for Mohammad’s prosecution. I was not involved in Mohammad Salameh’s case, but I knew and admired the prosecutors who were. So I am quite sure that at the time of the trial neither Precht nor I would have predicted that, some ten years later, the editors of the *Michigan*

7. Assistant Dean of Public Service, Michigan Law School.

8. A fifth suspect, and the alleged mastermind of the bombing plot, was Ramzi Yousef, a fugitive believed to be hiding out throughout the trial in Iraq. *See* p. 18.

9. We still disagree about much relating to the way in which the trial was conducted. But my conversations with Precht since, and my own writing about legal and social developments after 9/11, *see* Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003), convince me that we share many concerns about the future of terrorism investigations and prosecutions.

Law Review would ask me to review the book that he would write about experiences as Mohammad's attorney.

But life is filled with wondrous Jungian synchronicities and unexpected surprises.

I. THE TRIAL

One need not have been involved in the 1993 case to have a more nuanced perspective today on the significance of the first bombing of the World Trade Center. For one, as Precht explains so well in his book, the failure of the perpetrators of the first bombing to bring the tower down created for many a false confidence in the indestructibility of the imposing structures, a confidence that continued to their collapse on September 11, 2001. Although it was apparent at the time of the 1993 bombing that the perpetrators could have inflicted far worse damage and loss of life had the buildings been less resistant to attack, those familiar with the North Tower were not surprised that it withstood the explosion. After all, the towers had been well built; they had been designed by folks who knew enough about the unpredictable nature of human conduct to consider in advance the possibility that a plane, even a fully fueled 707 aircraft, might be flown into one of them one day.¹⁰ The towers could withstand such an assault, its designers predicted, and the 1993 bombing seemed simply to prove the point.

We know now, of course, that the buildings were not impervious. And, as a result, the "if only" that linger in the aftermath of the 9/11 attacks on the towers are likely to haunt us forever. "If only" we had realized that the towers were more vulnerable than we thought they were. "If only" we could have predicted that as icons they would be too tempting a target ever to be safe from additional terrorist attacks.¹¹ And perhaps, "if only" we had considered more carefully the significance of Mohammad Salameh's and his co-defendants' defiant cries of protest and anger when the jury pronounced its verdicts of guilt upon each of them: "Victory to Islam!" "Injustice people!" "God is great!" "Cheap people, cheap government!" (p. 162).

It is tempting to respond to such defiance and remorselessness with a defiance of one's own. To assuage our own lingering fears about

10. See p. 73 (referring to structural-engineer Leslie Robertson's testimony that the towers had been built to withstand the impact of "the largest jet aircraft in the air at the time").

11. During his opening remarks at Mohammad Salameh's trial, the federal prosecutor predicted that "February 26, 1993, would become a day that would mark for all time the single most destructive act of terrorism ever committed here in the United States." P. 61. Would that he had been right. But Timothy McVeigh's bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995, resulting in the deaths of 168 innocents, would soon eclipse the destructiveness of the first bombing of the World Trade Center. The loss of nearly 3000 lives from the September 11, 2001 attacks would prove the prosecutor wrong yet again.

those who would do us such grievous harm with a lack of concern about the rights and treatment of those who fall (or even just *might* fall) within that group of enemies. It is tempting to get a machine gun. Such is the thought-bending power of fear. Rob Precht's powerful retelling of his experiences defending one in this group of enemies, however, invites us to reach for a more deliberative response. For what we do to our enemies says much not only about the principles against which we would measure ourselves, but the steel of our very belief, or lack of belief, in our own system of justice.

A. *Remembrances of a Defense Attorney*

Defending Mohammad is a fast-moving read, dotted with frequent, highly moving descriptions of the complex, often-emotional relationship between an accused and his counsel. The author has a knack for capturing the grey in human relationships, and his best success at this is when he invites his readers into the exchanges that occurred between him and his young client over the course of twelve months after he accepted the assignment to serve as Salameh's counsel (p. 3), found himself in the heady vortex of what would surely be the most high profile case of his life, and thereafter struggled to keep his high profile client happy while attending to his legal defense.

On a technical level, the book provides an excellent descriptive account of the various phases of a federal criminal trial. Precht explains the stages of the trial and pretrial process in a clear, coherent, and accessible way, making the text as accessible to the lay reader as it is to the legally-trained. The order of the account is, unsurprisingly chronological, beginning with a vivid recollection of the day when, shortly after the bombing, Precht received a late-afternoon call from prosecutor Henry DePippo asking him to come to the ceremonial courtroom to represent "the bomber" (pp. 2-3).

Even from this early moment, the reader feels the weightiness of the terrorism charge and discerns the uniqueness of this client. Precht's description of his hurried first meeting with Salameh just before a hearing was held to determine the question of bail puts on self-conscious display the author's own cultural biases, challenging us to examine our own. "I expected to encounter a wild-eyed zealot," he writes (p. 3). "But the man sitting on the bench who looked up at me appeared quite ordinary. Mohammad Salameh was small, thin, in his mid-twenties, with a closely cropped beard, large nose, and brown eyes. He looked utterly defeated."¹² After this introduction to

12. P. 3. Precht confronts his cultural biases at a number of places in the book. For example, he describes his discomfort with Hassen Abdellah, the attorney for Mahmud Abouhalima, one of Salameh's co-defendants. Unlike Precht, Abdellah was able to speak with Mohammad and the other defendants in Arabic. Abdellah also tended to end strategy

Salameh, the book moves quickly, providing a rare opportunity to witness the development of the oddly mutually-dependent relationship that can develop between a suddenly infamous criminal defendant and the attorney who is left (because the client is in jail) as the accused's only public spokesperson.

More fundamentally, the book raises serious questions about the rightness of arguments currently in vogue which would subject future terrorism suspects to expanded police powers during criminal investigations, while denying them the procedural protections to which they would normally be entitled after formal charges are lodged. The sections that follow immediately below provide an analysis of some of the memoir's many strengths. Part II then considers the book's more fundamental warning that, in moments of grave national insecurity, legislative and judicial officials tend to discount the value of civil liberties and procedural protections and overestimate the value of expanded police authority.

1. *Defense of the Possibly Guilty*

By the end of *Defending Mohammad* one feels that she has a much firmer understanding of how difficult it is to represent a client whom the country suspects is guilty and as a result is intent to loathe, and yet how electrifying it is to be the attorney at the center of a case as to which the public has a seemingly insatiable interest.¹³ A particularly poignant example of one of the challenges is supplied by the author's recollection of a late-night confrontation on a Manhattan subway with a man who recognized Precht from one of his many televised interviews on Salameh's behalf. The man asked Precht accusingly how he would feel if he succeeded in getting Salameh and his co-defendants acquitted, and then they did it again?¹⁴ The author wisely

meetings involving the four defendants and their counsel by invoking Allah. Precht wrote about the experience:

Islam still seemed like an impossibly remote and alien religion to me. I had grown up in Scarsdale, New York, my maternal grandmother was Jewish, and most of my friends were Jewish. In high school, I watched news clips of airliners blown up in the desert by Muslim fanatics. . . . [M]y views of the religion were not positive.

P. 56. In fact, Precht admits that Mohammad Salameh was the first Muslim "[he] had ever had an extended conversation with, and the circumstances of [their] coming together were hardly conducive to dispelling [his] negative impressions of the religion." Pp. 56-57.

13. Precht writes: "I had to admit that the allure of publicity was intoxicating. I told myself I was making statements to the media to protect my client's interests, but I also enjoyed the limelight." P. 23.

14. The subway encounter occurred after Precht had given "hundreds of interviews to television, radio, and newspaper reporters" in connection with Salameh's defense, including appearances on the *Larry King Show*, ABC's *Good Morning America*, CBS's *Morning Show*, and NBC's *Today Show*. P. 12. Stepping closer to Precht, the middle-aged subway rider asked:

attempts to provide a fuller answer to his readers than the perfunctory one he offered to his subway interrogator. He reminds us of similar unpopular defenses taken on by such notables as John Adams (when he defended British soldiers who fought at the Boston Massacre) and Edward Bennett Williams (who represented Joseph McCarthy against censure by fellow senators), who were branded “traitor” (Adams) or “fascist” (Williams) for their efforts and lost many clients and supporters in the process (p. 77).

This history lesson is fair as far as it goes, though it is impossible not to wonder why the author skips over more recent examples, like Johnnie Cochran, and his defense of O.J. Simpson. I suspect that it is because when answering a question as important as this — how can an attorney defend a client whom she personally thinks might be guilty? — one instinctively feels the need to be in the company of “great ones” who have made like choices in the past.¹⁵ But such grand company provides an unneeded shield. For even had Rob Precht no famed predecessors with whom he could join company, even had he been the very first to have got up the courage to come to the defense of a publicly unpopular defendant charged with a heinous or hated crime, he would have been right to do it. Our adversarial system of criminal justice depends on lawyers demanding that it live up to its rules. Rules that, among other things, require proof beyond a reasonable doubt and place the burden of proof on the shoulders of the party advancing the accusation of wrongdoing. As Precht explains, “Vigorous advocacy on behalf of every defendant, guilty or innocent . . . serves to further ‘society’s determination to keep unsoiled and beyond suspicion the procedures by which men are condemned for a violation of its laws.’”¹⁶

“How are you going to feel?”

“I beg your pardon?”

“How are you going to feel when you get them off?”

“I don’t know that’s going to happen.”

“They’re going to do it again. You know that, don’t you? How are you going to feel?”

“Look, sir, it’s not for me to judge the defendants, it’s the jury’s job. I’m just trying to make sure my client gets a fair trial.”

“How do you feel about the pregnant lady who got killed? How do you feel tricking people?”

I decided to get off at the next station, before my regular stop and rose from my seat. The subway pulled into the station. The doors opened. I walked out.

From behind, I heard him shout. “This is just a game for you!”

Pp. 76-77.

15. As talented an attorney as Cochran may be, he has yet to rise to the level of Adams and Williams.

16. P. 78 (quoting Lon Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30, 37 (Harold J. Berman ed., 1961)).

2. *Fame*

With fame for the client comes fame for the lawyer, and as Precht describes so well in his memoir, such fame can be very seductive stuff. The media attention devoted to the 1993 bombing prosecution was fierce and unyielding, and all who played a part in the case experienced its intensity and the fame that accompanied it in very personal ways.¹⁷ For Precht, the attention was both exhilarating and addictive. “The case was a great break for my career,” Precht recalls with refreshing honesty in his book, “I now had a public stage on which to act out my fantasies of being a Super Lawyer.”¹⁸ Thus, when Judge Duffy, at the first pretrial conference, imposed a gag order on all of the attorneys in the case, forbidding any further statements to the press, Precht fought back with the determination of an addict looking for his next fix. Brushing aside his boss’s advice that the gag order might just be “a blessing in disguise” (p. 21), Precht successfully appealed the issue to the United States Court of Appeals for the Second Circuit, which lifted the gag order and issued a “sharply worded” reminder to the trial judge that such restrictions on attorneys were extreme measures to be imposed only upon a showing that permitting statements to be made to the press would make the possibility of a fair trial substantial unlikely, and a showing that the trial court had considered less extreme measures before imposing it.¹⁹ A stern rebuke.

As a matter of law, Precht was precisely right about the gag order, and he had the reversal order to prove it. As a matter of trial strategy, however, the reader is entitled to wonder (even before the author recounted what happened next) whether this would turn out to be a Pyrrhic victory. There were at least two reasons to fear that it would. First, Precht was himself concerned about the effect that the heavy publicity surrounding the case would have on the jury that was picked to decide the case. Thus the author asks much of his readers when later in the book he complains about that publicity and worries that it jeopardized his client’s chance for a fair trial.²⁰ It is difficult to be

17. For Gil Childers, the lead prosecutor in the case, the extremely intense interest in the case resulted in fear for his and his family’s safety. Gil received death threats while prosecuting the case. This was a rare occurrence for federal prosecutors, and thus I and the rest of the Assistant U.S. Attorneys in the office were made aware of it.

18. P. 15. Hand in hand with the thrill of such newfound fame went the fear of losing it. The author recounts, for example, being fearful that Salameh would decide to fire him and hire someone else. *See* p. 15 (“I was like an insecure lover, and when Mohammad did not telephone me as he usually did, I became anxious.”).

19. *See* pp. 22-23; *United States v. Salameh*, 992 F.2d 445, 446 (2d Cir. 1993) (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1038 (1991)).

20. *See* p. 57 (arguing that “the jury selection process was not maximized to reveal whether jurors had been negatively influenced by the wealth of pretrial publicity,” and complaining that leading questions asked by a judge whom the prospective jurors seemed to

sympathetic when the defense itself carried at least some of the responsibility for that publicity by making a conscious decision to use the media as a part of its strategy.²¹ Indeed, the trial court delighted in reminding Precht about the cost of having its gag order vacated when it denied his pretrial motion for a change of venue.²²

Nevertheless, to be fair, had Precht submitted to the gag order, there seems little reason to believe that the media's interest in the case would have subsided. In such a case, even if the prosecutors refused to pass along information to satisfy that hunger (and I believe they would have refused) there was no assurance that an agent or other person knowledgeable about the government's case would have been equally circumspect. If information advantageous to the prosecution continued to leak, as Precht feared it would, he truly would have been between a rock and a hard place, having been ordered not to talk by the judge and thus having no way to defend his client in the court of public opinion.

An additional, and more pragmatic, reason counseled against seeking an appeal of the gag order — the judge who had made that order was slated to preside over the trial, and having him reversed before the trial was hardly likely to endear the lawyer to him. That Rob Precht was willing to press on with the appeal is a credit to his courage and commitment to his client, for this judge in particular was not known for pulling his punches when angered.²³

look up to and wanted to please were not apt to ferret out those whose views had been tainted by the heavy publicity that preceded the trial).

21. See p. 12 (noting that Precht's boss, Leonard Joy, booked him on the *Larry King Show* so that he could respond to the information being given to the media by federal authorities).

22. The motion was based on the ground that no New York City jury would be able to ignore the publicity that had been leaked to the press before the trial and decide the case impartially. Judge Duffy was unsympathetic:

Counsel for Salameh points a finger at the Government for this state of affairs. The fault, as counsel knows full well, however, does not lie with the Government. This court attempted to prevent the dissemination of prejudicial publicity by imposing a "gag order" upon the attorneys and their agents at the time the matter initially came before me. Counsel for Salameh strenuously objected to this order, and successfully had it vacated by the Court of Appeals. In effect, counsel is really complaining that he was unable to "control" the publicity.

P. 46.

23. The book details a number of incidents after the gag-order reversal hinting that Precht's decision to appeal may have soured the judge's view of the lawyer permanently. The Judge referred to the lawyer as "Bobby" rather than Rob, for example, when introducing him to prospective jurors during jury selection, see p. 47, a slight that seemed intentionally designed to belittle the attorney. The venom in the trial court's rejection of the defendant's motion for a change of venue specifically referenced Precht's decision to appeal the gag order is another example. See p. 46.

3. *Second Thoughts*

Second guessing one's strategic calls is inevitable, whether one is on the defense or prosecutorial side, and Rob Precht is no exception. For example, he wonders out loud in his book whether he should have filed a motion to recuse Judge Duffy after the judge tipped his hand and revealed that he had been privy to information that Salameh's co-defendants had at some point admitted their roles in the conspiracy — and had pointed the finger at Salameh as well.²⁴ Judge Duffy told Precht that due to that information he was fairly sure that Salameh was in fact guilty, and this caused the experienced federal defender to conclude in his book that the judge could not be fair to his client.

I am not sure. Certainly no one familiar with Judge Duffy would consider him a soft touch, but there is little in Precht's account of the trial to indicate that the judge treated Salameh unfairly (although he was certainly not gentle with Precht) (p. 54). To the contrary, the judge seemed to exercise real patience with Salameh. For example, when Salameh refused one day to come to court until the judge held a private session with him to talk about his complaints about his prison conditions, Judge Duffy held that meeting with the defendant, and Precht himself depicts the judge's response during the meeting as "patient[]," attentive, and polite. It is true that several motions were decided against the defense, including a motion for a change of venue,²⁵ a motion to reveal the identity of an unindicted co-conspirator,²⁶ and a motion for a mistrial after the federal prosecutor remarked in his opening statement that, after the explosion, the nation understood in a new way that terrorism was no longer a problem for the rest of the world, but could happen to us here.²⁷ But there is no reason to think that those motions would (or should) have been decided any other way by any other judge in the courthouse. In this respect, the reader may find Precht's understanding of the pressures on prosecutorial team²⁸ and the trial judge²⁹ less nuanced than his fine

24. He worries similarly about his cross-examination choices, but here seems as willing to second guess the examinations conducted by his co-counsel as his own. Precht adds to this additional, engaging descriptions of missteps of his co-defense counsel and the prosecutor. See chapter 10. This is high drama, and grist for the mill of every evidence professor who teaches her students not to ask open-ended "why" questions on cross-examination.

25. See pp. 44-46.

26. See pp. 24-30.

27. See p. 64. Defense counsel argued that the opening went beyond the charges in the indictment, and essentially pitted a group of "foreign alien defendants" against "We the Americans" in the first chapter of "a war of terrorism on the United States." P. 64.

28. But now and then even the prosecutor is humanized. Gil is described in a fairly complimentary way at various points. See pp. 46-47, 159-60.

29. For example, as is the custom in every federal courtroom, the judge's entry is preceded by that of a clerk who announces the judge's arrival with a commanding "All

depictions of the interactions with his client and the year-long development of their relationship. If so, this is a weakness that can be forgiven, for it is evident throughout the narrative that what the author is really retelling here is the defense's experience of the trial. The insider view that this account provides itself makes the book well worth the read.

4. *The Unbearable Lightness of a Defense*

Another of the book's real strengths is the way in which the author conveys the difficulties counsel face when deciding upon the best defense strategy, a difficulty that in this case was exacerbated by several factors, including: the limited access Precht had to his incarcerated client (p. 40), the cultural gulf that continued to torment the two men throughout the course of the representation,³⁰ the tensions and conflicts that arise when multiple defendants who are tried together choose different lines of attack on the prosecution's evidence (pp. 43-44), and the sheer volume of that evidence.

As to the evidence, conviction of the four defendants accused of involvement in the 1993 Trade Center bombing was by no means a lock. As pointed out in the book, the prosecution's case was entirely circumstantial (p. 156). There were no eye witnesses to the bombing and no one to identify the person who drove the bomb-carrying van into the garage below the tower on the day of the attack. The prompt arrest and conviction of all four defendants then, is creditable to the abilities of the prosecutorial and investigative team of individuals who weaved together a mass of evidence that linked the defendants to each other, the chemicals that were used to make the bomb, the storage locker in which those chemicals were kept for a time, the apartment in which the bomb was constructed, and the van that was used to transport it to the site of the explosion. The fact that the prosecution was able to do this also shows that, contrary to popular belief, the lack of direct evidence is hardly fatal to a criminal case. Indeed, quite often, the multi-layered process of drawing connections between those standing accused of working together to commit a crime, of linking them to the ingredients that made the crime possible, as well as the location at which it occurred, can be more convincing than a case based on direct identification evidence.

Rise!" But unlike the other judges in the Manhattan courthouse, Judge Duffy "walked into the courtroom . . . telling people to 'sit down, sit down' as soon as he got through the door and well before he actually reached the bench." P. 59. Unlike Precht, who thought this all an act, a pretense of disdain for the normal rituals of respect owing a federal judge, I found this a genuine reflection of the judge's lack of regard for pomp and circumstance.

30. See 116 (relating how Salameh told his lawyer that the lawyer would never understand him).

Such circumstantial proof, if it holds together, often severely limits the trial strategies available to defense counsel. In this case, for example, the prosecutors alleged that Mohammad Salameh's role in the offense included opening a joint bank account with co-defendant Ayyad into which funds were deposited to finance the making of the bomb (p. 62). Other evidence showed that money from that account was used to rent a storage shed in Jersey City, New Jersey (pp. 62-63). Still more proof established: the presence of chemicals in that shed, which were consistent with the chemicals in the bomb that went off in the World Trade Center tower; that Salameh helped to find and rent the apartment in which those chemicals were fashioned into a bomb; that the co-defendants were in frequent telephone contact with each other throughout the period of the bomb plot; that Mohammad rented the Ryder van which would be shown to have contained the homemade bomb; that an anonymous letter to the *New York Times* taking credit for the bombing could be linked to Mohammad's co-conspirator, Ayyad; that his other co-defendants Yousef, Abouhalima and Yasin fled the country immediately after the bombing occurred; and that Salameh would have done the same had he not been arrested first (p. 64).

To be sure, a jury might find some or even all of these pieces of evidence unconvincing when tested against the beyond-a-reasonable-doubt standard. But if pretrial discovery of the prosecution's proof could convince defense counsel that the allegations likely could be proved, a wide array of otherwise possible defenses would disappear as quickly as did the walls and other supports of the World Trade Center garage. Put slightly differently, if the prosecution could prove that co-defendants Nidal Ayyad and Mohammad Salameh had in fact opened a joint account together, out of which funds were used to rent a storage facility in which bomb-making chemicals were stored, at minimum a juror would likely want to know the innocent explanation for that account and the innocent purpose for the storage-facility rental. Certainly that proof would make it impossible to claim that the government's case was simply one of mistaken identity (i.e., that the bank account belonged to another, or that the person who rented the storage facility or apartment or van was someone else). Further, if the evidence of the association between these defendants effectively tied them to these instrumentalities of the crime, the defense would be left with little to argue but that the accused *lacked knowledge* of the purpose for which the money or van were to be used. And after reviewing the government's discovery, this was precisely the conclusion Rob Precht reached on behalf of his client prior to the start of the trial — his best defense was lack of knowledge of the bomb

plot.³¹ This meant that if Mohammad Salameh was to be acquitted it would be because his able lawyer had succeeded in convincing the jury that, at minimum, there was reason to doubt that Salameh knew what his acquaintances had been up to. His client, Precht would argue, had been duped.³²

As with other decisions, in his reminiscences about the trial the author spends a considerable amount of time second guessing this defense strategy, as well as his decision to sum up the case in the way that he did, a summation that resulted in his client sending a letter to the judge in complaint (p. 147). In the summation as at trial, Precht stressed his “dupe” theory, arguing that even if the government’s proof established his client’s association with the other defendants, it did not show beyond a reasonable doubt that Salameh knew what the others were up to prior to the bombing (p. 140). This line of argument angered the other defendants who preferred to keep a unified front and would have had Precht argue simply that the government’s evidence failed to stand up to scrutiny.³³ The problem was (as the verdicts later showed) the government’s evidence did stand up to scrutiny, as Precht suspected it would.³⁴ Thus, however unpopular, he cannot fairly be faulted for choosing his “dupe” approach over that preferred by the other attorneys at the defense table.

Rob Precht does not concede in his book that the similar tact that he took in summation was in fact at odds with Salameh’s wishes (pp. 146, 149), despite his client’s letter to the judge suggesting that it was (pp. 146, 149), and a telephone interview that Salameh gave to a reporter from Reuters the day after the summation during which Salameh criticized his attorney for conceding there had been a conspiracy to bomb the Trade Center and maintaining that the mastermind of that conspiracy had duped him (p. 147). Precht maintains that he agreed to both press the dupe theory³⁵ and attack

31. The author recalled in the book, “I did not attempt to challenge the physical evidence, and I tacitly accepted the government’s proof that Mohammad had rented the storage locker, the house, and the van that carried the bomb. But I maintained that he truthfully reported the van stolen hours before the explosion.” P. 65.

32. For the other defendants who were not as easily connected to the funds and storage locker and van used in the bombing plot, there were other defenses available. One argued that the prosecution was merely seeking a scapegoat for the explosion, “pandering to the jury’s patriotic sympathies” and building its case on “rhetoric” rather than facts. *See* p. 66. Another pointed out that it was impossible for his client to have been involved, as he was in jail at the time the explosion occurred. *See* p. 66.

33. One of the defense attorneys was so upset that he moved for a mistrial on the ground that Precht had done “more damage to [his client] in the first six minutes or so of his summation than [the prosecutor] did in the six hours of his summation.” P. 143.

34. *See* p. 134 (“[T]he volume of evidence against Mohammad was truly staggering.”).

35. *See* pp. 135-37 (recounting part of the summation where Precht argued Salameh was manipulated by Ramzi Yousef, a fugitive in Iraq at the time of the trial).

the strength of the prosecution's proof.³⁶ At the last minute, however, the lawyer decided to hit hardest the idea that the evidence was insufficient to show that Salameh knew the true purpose to which the storage locker he rented, the apartment he secured, and the van he leased would be put.³⁷ And it was this call that earned Precht the ire of both his client and his fellow defense attorneys.

As to which was the *better* defense for his client, Precht's judgment was clearly the wiser call.³⁸ But his decision to emphasize that argument over Salameh's preferred attack raises an interesting question about the ethical obligations of a defense attorney who fears that his client's strategic preferences will lead to sure conviction. Against heavy criticism that the client, not the attorney, must be left to make such calls, Precht defends his contrary view as follows:

I do not believe that a defendant can or should dictate tactics. . . . ABA model rule 1.2(a) says that a lawyer is required to abide by the client's decisions concerning the "objectives of representation." To me that means that a lawyer must abide by a client's decision whether to go to trial to contest the charges, to plead guilty to avoid a long prison term, to cooperate with government authorities, and the like. Beyond that, it is the lawyer's call as to how best to achieve these objectives. The lawyer should consult with the client, but the lawyer has the final say as to tactics. (p. 150)

Precht is right. It is certainly true that the client has the ultimate authority to determine the objectives of litigation at least within legal limits, and once set, an attorney has a professional obligation to abide by her client's directives in that regard.³⁹ Nevertheless, the means by which an attorney seeks to achieve those objectives are largely within her discretion.⁴⁰ Thus, while the client has the plain authority to make such a decision as whether to testify at trial, to accept a plea offer, to plead guilty, and to waive his right to a jury trial,⁴¹ in the famous words

36. See pp. 137-38 (recounting the part of the summation where Precht challenged the proof connecting Salameh to the storage locker rental application, pointed out that the person who took a cash deposit on the apartment from Salameh had not actually seen him move into the apartment, etc.).

37. The author himself acknowledges this. See p. 149 ("I certainly did not think reversing the order of the arguments and shortening my attack on the physical evidence when the jury started to lose interest was a major departure from the strategy we had agreed on.").

38. When the attorney for one of the other defendants moved for a mistrial based on Precht's summation, the judge denied the request and stated, to the contrary, that the summation "may have been Mr. Salameh's best chance." P. 144.

39. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983).

40. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101.B (1980); see also ABA, STANDARDS FOR CRIMINAL JUSTICE 4-5.2 (1993).

41. See *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977).

of one trial lawyer, the attorney is “not a potted plant.”⁴² Determining the trial or appellate strategy that is most likely to achieve the client’s stated objectives is a decision left largely to the attorney.⁴³ And, absent a strong showing of ineffective representation, the lawyer cannot be faulted simply because her strategic decisions were unable to win the day.

II. DEFENDING THE MOHAMMADS OF THE FUTURE

As this Part shows, *Defending Mohammad* delivers an engaging and informative account of the trial of the four individuals convicted of carrying out the 1993 bombing of the World Trade Center from the perspective of an attorney assigned to defend the case. The book reminds us that every criminal trial is an unfolding human drama, and advances the reader’s understanding of the way in which our system of justice strove, even if imperfectly, to deliver justice in a single case. But it also does more than that. The book’s deeper contribution is the questions it raises about the nation’s future responses to terrorist threats. What made the 1993 crime so significant, the author reminds us, was the sense of vulnerability that lingered in the explosion’s wake and the impact such vulnerability can have on our commitments to our own justice system and the rules that govern official investigations. As Precht puts it, “On trial were not simply the defendants’ deeds, but the threat of terrorism” (p. 61). He thus pauses toward the end of the book to consider the future of terrorism investigations and prosecutions, and the nation’s tendency in times of widespread national fear and insecurity to submit perhaps too easily to reductions in rights and liberties. The author points to two ways in which this erosion of liberties had begun to happen in the wake of the 9/11 attacks: 1) through acquiescence to the use of torture on terrorism suspects;⁴⁴ and 2) by increased reliance on military tribunals.⁴⁵

42. Comment of attorney Brendan Sullivan while defending Oliver North at the Iran-Contra hearings.

43. See, e.g., *Jones v. Barnes*, 463 U.S. 745 (1983).

44. Although the government has yet to state that it has used torture as a tool in its “war on terror,” a number of scholars have argued that it could. See, e.g., Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE* (Sanford Levinson ed., Oxford Univ. Press, forthcoming in 2004). Arguments on various grounds that torture may be acceptable in some circumstances are not new. See, e.g., THOMAS NAGEL, *MORTAL QUESTIONS* 56 (1979) (arguing that when special conditions exist “it may become impossible to adhere to an absolutist position”); Michael S. Moore, *Torture and the Balance of Evils*, 23 *ISR. L. REV.* 280 (1989).

45. In November 2001, President Bush issued a military order that dispensed with criminal trials and authorized the trial of aliens accused of terrorist acts or harboring terrorists before military tribunals. Such trials could be held in secret and be based on classified information as to which the accused would have no right of access; the normal rules of evidence would not apply; there would be no jury right, conviction could be had upon 2/3 agreement of the military officers who presided over the proceeding; there was no

Precht's account of the 1993 trial can help the reader assess for herself the necessity for such measures, including in particular the necessity of an extra-civilian court system for the adjudication of future terrorism cases.⁴⁶ If anything, the successful prosecution of Mohammad Salameh and his co-defendants suggests that the criminal justice system was well-enough equipped in 1993 to apprehend such wrongdoers and to bring them swiftly to justice. Thus one is entitled to question whether dramatic modification of our rules and system are truly needed to redress future acts of terror. Although clearly concerned about the fairness of the judicial process afforded Mohammad Salameh, Rob Precht's belief in the ability of the civilian judicial system to ensure a fair trial to individuals charged with terrorist acts remained largely unshaken after defending the case. He writes toward the end of his book:

It especially seems premature to give up on the criminal justice system when there is no evidence that the system is unable to handle terrorism cases. The 1993 Trade Center trial was swift, and it did not disclose government secrets. While I believe the trial was unfair, the fault was not that the system lacked safeguards. Rather, the participants failed to use them. Jury trials are not perfect. . . . Nevertheless, the jury trial system is premised on the idea of impartiality, a concept alien to military tribunals, which lack any safeguards for insuring it. . . . The best weapon we have against terrorist is not our passions. It is the rule of law. (p. 169)

I would add to Precht's list of reflections about the future of terrorism investigations one other concern that, to date, has received far less scholarly attention than those the author raises in his memoir: the weakening of federal constitutional restrictions on police power to detain and gather evidence from groups of people without having to satisfy the "reasonable suspicion" standard.⁴⁷ In the space that remains here, I will focus on that concern, and the way in which the U.S. Supreme Court's recent decisions in *Illinois v. Lidster*⁴⁸ and *United States v. Flores-Montano*⁴⁹ make this an additional topic of concern.

right of appeal and the penalty could be death. See A copy of the Military Order issued on Nov. 13, 2001 can be found at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

46. I have written elsewhere about a third area in which the public seems willing to demand less of its government officials in a time of terror — by permitting (if not encouraging) ethnic profiling. See Davies, *supra* note 9, at 45; see also William J. Stuntz, *Local Policing after the Terror*, 111 YALE L.J. 2137 (2002); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); Muller, *supra* note 2.

47. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (establishing the reasonable-suspicion standard as the justification demanded by the Fourth Amendment to conduct a temporary seizure of an individual).

48. 124 S. Ct. 885 (2004).

49. 124 S. Ct. 1582 (2004).

For although the facts of *Lidster* and *Flores-Montano* involve no acts of terrorism, the Justices' unanimous agreement that suspicionless group seizures (*Lidster*) and searches (*Flores-Montano*) are in some circumstances constitutionally defensible can be understood, I think, only in an age of terror, and we would be wise carefully to consider the implications of such broadened police power.

In my earlier article, *Profiling Terror*,⁵⁰ I challenged arguments advanced by a number of prominent criminal-procedure scholars after the 9/11 attacks defending more-liberal profiling practices targeting Arabs and Muslims in terrorism investigations. Harvard Law Professor William Stuntz was among those scholars, and he argued (quite presciently as it turns out) that, as is true after any crime wave, after 9/11 it was inevitable that both legislative and judicial steps would be taken to trim individual rights and expand police powers.⁵¹ This was not a development to be avoided, Professor Stuntz argued further. To the contrary, the police should be given more robust authority to seize and search groups of individuals without individualized suspicion of wrongdoing. Civil libertarians should concern themselves not with the fact that the police were permitted to do so more easily,⁵² but with the manner in which those police-citizen contacts occurred.⁵³ If this new authority was conferred upon the police, as Professor Stuntz thought it should be, it would result in (among other things) expanded police power to set up highway checkpoints in traditional criminal-investigative settings, and expanded power to conduct searches of individuals and their property without the necessity of a showing of exceptional need or individualized suspicion.⁵⁴ And the best restriction on such suspicionless searches and seizures, Professor Stuntz argued, would be ex post judicial review of the manner in which the encounters occurred.

At the time Professor Stuntz made this argument, the prospect that a police right to conduct suspicionless group searches and seizures would materialize seemed fairly remote, even to those most fearful that individual rights and liberties were being trimmed and

50. See Davies, *supra* note 9.

51. See Stuntz, *supra* note 46, at 2142-60.

52. See *id.* at 2163.

53. See *id.* at 2173. Stuntz argues that the line between valid and invalid police intrusions should be changed from the (then) sharp focus separating seizures/non-seizures and searches/non-searches to a "hazier" line separating "decent" from "indecent" police behavior. *Id.* at 2174 ("Worrying about *how* street stops happen makes more sense than worrying about *how many* of them happen.") (emphasis added).

54. See *id.* at 2164-65.

investigative authority broadened in the wake of the 9/11 attacks.⁵⁵ After all, the Supreme Court had considered and rejected the constitutionality of a highway checkpoint only a year before those attacks, where the primary purpose of the roadblock was to discover and interdict illegal narcotics. In *City of Indianapolis v. Edmond*,⁵⁶ the Court reminded the nation's police forces that a "search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."⁵⁷ Thus, the drug checkpoint was unconstitutional because its primary purpose was "to advance 'the general interest in crime control' "⁵⁸ rather than to address the special and challenging "problems of policing the border"⁵⁹ or "the necessity of ensuring roadway safety,"⁶⁰ or some other limited administrative or "special need."⁶¹ "We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing," wrote Justice O'Connor for the *Edmond* majority, for fear that any such holding would allow such intrusions to become "a routine part of American life."⁶²

1. *Suspicionless Group Seizures — Illinois v. Lidster — The "Seeking Information" Exception to the Reasonable-Suspicion Requirement*

In light of this holding, few save perhaps Professor Stuntz would have guessed (never mind advocated) that suspicionless stops of groups of motorists and suspicionless searches of their vehicles would soon be declared constitutionally permissible investigative techniques. In January 2004, however, the Court unanimously upheld a suspicionless roadblock in connection with a murder investigation in *Lidster*, and in March 2004 it unanimously agreed that a suspicionless

55. *See id.* at 2164 (acknowledging that "with a few limited exceptions . . . the law holds that police may not seize groups of people unless each individualized seizure is justified").

56. 531 U.S. 32 (2000).

57. *Edmond*, 531 U.S. at 37.

58. *Id.* at 44 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)).

59. *Id.* at 41; *see, e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (approving suspicionless stops at a fixed border checkpoint designed to intercept undocumented aliens).

60. *Edmond*, 531 U.S. at 41; *see also Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447-48 (1990) (approving suspicionless stops of motorists in connection with highway sobriety checkpoint program); *Prouse*, 440 U.S. at 661 (approving suspicionless stops for a spot check of motorists' licenses and vehicle registrations).

61. *Sitz*, 496 U.S. at 450; *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (involving random drug testing of student athletes); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (involving more selective drug or alcohol testing of railroad employees who had been involved in accidents or violated a safety regulation).

62. *Edmond*, 531 U.S. at 41-42.

search of a car crossing the border into the United States violated no Fourth Amendment norm. Neither case directly involved a terrorism investigation, but both are best understood as examples of justice in the time of terror.

The facts of *Lidster*, in brief, were these. A hit-and-run driver struck and killed a 70-year-old bicyclist on the side of an Illinois highway just after midnight. Approximately one week later, local police authorities set up a highway checkpoint at the same time of night in the same location, stopping all motorists for ten to fifteen seconds, ostensibly to hand each motorist a flyer which requested assistance in identifying the hit-and-run driver, and to ask each motorist if “they had seen anything happen there the previous weekend.”⁶³ When Lidster’s car approached the roadblock it swerved, nearly hitting an officer, and a sobriety test revealed that he had been drinking. He was subsequently arrested and convicted on a DUI charge.⁶⁴

Lidster appealed his conviction on the ground that the police stop of his car without reasonable suspicion was unconstitutional under the rule of *Edmond*.⁶⁵ Like the Indianapolis drug-checkpoint program, the primary purpose of the Illinois checkpoint was to gather evidence of “ordinary criminal wrongdoing,” Lidster argued, making it violation of his Fourth Amendment right to be free of an unreasonable seizure. The Supreme Court disagreed. Unlike in *Edmond*, Justice Breyer wrote, the Illinois police had stopped cars in the hit-and-run case “*not* to determine whether a vehicle’s *occupants* were committing a crime, but to ask the vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.”⁶⁶ This different type of suspicionless group stop was thus not analogous to the kind of stop before the *Edmond* Court, Justice Breyer explained, and the Fourth Amendment demanded no “*Edmond*-type rule of automatic unconstitutionality.” To the contrary, such “information-seeking”⁶⁷ seizures could be upheld, the Court concluded, provided they were brief and thus “interfered only minimally with the liberty of the sort the Fourth Amendment seeks to protect”; the concern generating the seizures was “grave”; and the stops were conducted “systematically” with no allegation that the

63. *Illinois v. Lidster*, 124 S. Ct. 885, 888 (2004).

64. *See id.*

65. 531 U.S. 32 (2000).

66. *Lidster*, 124 S. Ct. at 889 (second emphasis added).

67. *Id.* at 889.

police “acted in a discriminatory or otherwise unlawful manner while questioning motorists.”⁶⁸

2. *The Power to Conduct Suspicionless Searches* — United States v. Flores-Montano

In *Flores-Montano*⁶⁹ the Court extended this seizure reasoning to border vehicle searches. The case involved a customs search of the respondent’s car as it attempted to enter the country at a port of entry on the California-Mexico border. Customs officials found and seized thirty-seven kilograms of marijuana in the gas tank of the car after an inspector tapped the tank, determined that it “sounded solid,” and ordered the tank’s physical removal from the undercarriage of the car, a process that took about an hour to complete.⁷⁰ Rather than argue that the result of the tapping gave the government officials reason to suspect the presence of narcotics in the tank, and therefore a valid basis for investigating further,⁷¹ the government “advised the District Court that it was not relying on reasonable suspicion” to meet Flores-Montano’s motion to suppress the drugs.⁷² Rather, no individualized suspicion is constitutionally required in order to remove, disassemble and reassemble a fuel tank of a car seeking entry into the country, the government urged. The Court unanimously agreed, in light of “the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country.”⁷³ Such searches are reasonable per se “simply by virtue of the fact that they occur at the border.”⁷⁴

Significantly, the government did not even bother to argue the presence of individualized suspicion in these two cases, an argument that might well have saved the stop (*Lidster*) and search (*Flores-Montano*) without breaking any new jurisprudential ground.⁷⁵ Its choice to eschew reliance on the reasonable-suspicion standard in both

68. *Id.* at 891 (noting also that the police “were investigating a crime that had resulted in a human death”).

69. 124 S. Ct. 1582 (2004).

70. *See id.* at 1584.

71. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE (2d ed. 1996).

72. *Flores-Montano*, 124 S. Ct. at 1584-85.

73. *Id.* at 1585 (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)).

74. *Id.* (quoting *Ramsey*, 431 U.S. at 616). The *Flores-Montano* Court later cites *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985), for the proposition that “the expectation of privacy is less at the border than it is in the interior.” *Flores-Montano*, 124 S. Ct. at 1586.

75. There is a fair argument that the police had an individualized basis in both cases, based on *Lidster*’s plainly impaired operation of his vehicle (his swerve), and the solid sound of *Flores-Montano*’s gas tank when tapped.

cases illustrates that its true goal was to expand the authority for government investigators. If there ever was a time to press the argument for such an expansion, it was after 9/11. The effect of the decisions is a further reduction in the importance of the line separating seizures from non-seizures and searches from non-searches. *Terry v. Ohio* chipped away at that line some years ago when the Court held that a seizure, if temporary, and a search (frisk), if limited in scope, could be justified by reasonable suspicion rather than probable cause. *Lidster* and *Flores-Montano* go farther still, raising grave questions about the importance of the search/seizure line of cases. At minimum, the Fourth Amendment seems now to erect a three-tiered system, distinguishing between full-blown searches and seizures (arrests) which require probable cause, temporary searches and seizures (*Terry* stops and frisks) which require reasonable suspicion, and other miscellaneous searches and seizures justified by a variety of circumstantial factors (e.g., searches at the borders, seizures of innocents for information-seeking purposes only) which require no individualized suspicion.

On one level it is impressive that Professor Stuntz was able to predict that all of this would happen in the aftermath of the 9/11 attacks, and although I continue to disagree with the normative arguments he has advanced in favor of these developments,⁷⁶ I bow to his powers of clairvoyance.⁷⁷ On the other hand, perhaps one need not be blessed with the powers of a fortune-teller to be able to predict with fair accuracy that measures such as these are likely to be proposed and adopted in the wake of an event that leaves the country fearful of its safety from future threats. For never is our confidence in our own rules and systemic procedures so easily shaken as when (in the words of one truck driver's bumper sticker) "the going gets tough."

76. See Davies, *supra* note 9, at 82-93.

77. As put by Professor Stuntz before *Lidster* or *Flores-Montano*:

What I propose here is no more than what was at stake in *Edmond*. The roadblock in *Edmond* involved brief detentions in public, along with a few minutes of police questioning and, sometimes, a brief search of a suspect's outer clothing and the inside of her car. These are the usual incidents of a *Terry* stop and frisk. They should be within the scope of police authority, not only when the police have reasonable suspicion of both a crime and the presence of a weapon, but also when the people seized and searched qualify as a group.

Stuntz, *supra* note 46, at 2168.

CONCLUSION

To all but his lawyer and others who knew him personally,⁷⁸ Mohammad Salameh quickly became a distant memory. This is not uncommon, despite the importance of his case, for the human drama involved in any individual case dissipates quickly once a trial court pronounces its sentence. Indeed, it is the rare case that will reengage the public's interest after a sentence is upheld on appeal. That Rob Precht's *Defending Mohammad* is able to do so is a testament to the author's storytelling skills and the powerful emotions that he manages to convey when describing young Mohammad Salameh and his own roller-coaster ride as the attorney who unexpectedly found himself in charge of his defense.

Even more importantly, *Defending Mohammad* challenges us to pause before concurring with those who claim that dramatic reductions in liberties and rights and expansions to police power are needed to protect against future acts of terrorism. At the bottom, such claims are persuasive only in a time of fear. They take hold and thrive only when the public is left so unsure of its security that it is willing to turn a blind eye to processes that distinguish our system of justice from all others. It is claims such as these that permit our detractors to point to abuses such as those in Abu Ghraib as illustrating American "justice" rather than the opposite of it.

The investigation of the 1993 bombing of the Trade Center and the successful prosecution of those responsible for that crime is a powerful reminder that the best answer to lawlessness is not, as some seem currently to believe, more of the same. The best answer to lawlessness is, and always has been, an unswerving commitment to the law, perhaps especially when the going gets tough.

78. Judge Duffy sentenced Salameh to 240 years in prison, a sentence calculated "by figuring the life expectancy of each of the six people killed in the bombing and subtracting the number of years left in their lives." P. 165. The sentence was upheld on appeal. P. 165.