

Want to torture? Get a warrant

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IF AMERICAN law enforcement officers were ever to confront the law school hypothetical case of the captured terrorist who knew about an imminent attack but refused to provide the information necessary to prevent it, I have absolutely no doubt that they would try to torture the terrorists into providing the information.

Moreover, the vast majority of Americans would expect the officers to engage in that time-tested technique for loosening tongues, notwithstanding our unequivocal treaty obligation never to employ torture, no matter how exigent the circumstances. The real question is not whether torture would be used -- it would -- but whether it would be used outside of the law or within the law.

Every democracy, including our own, has employed torture outside of the law.

Throughout the years, police officers have tortured murder and rape suspects into confessing -- sometimes truthfully, sometimes not truthfully.

The "third degree" is all too common, not only on TV shows such as "NYPD Blue," but in the back rooms of real police station houses. No democracy, other than Israel, has ever employed torture within the law. Until quite recently, Israel recognized the power of its security agencies to employ what it euphemistically called "moderate physical pressure" to elicit information from terrorists about continuing threats.

This "pressure" entailed putting the suspect in a dingy cell with a smelly sack over his head and shaking him violently until he disclosed planned terrorist attacks. Israel never allowed the information elicited by these methods to be used in courts of law as confessions. But it did use the information to prevent terrorist acts.

Several attacks were prevented by this unpleasant tactic. In a courageous and controversial decision, the president of the Israeli Supreme Court wrote a majority opinion banning the use of this tactic against suspected terrorists.

The Israeli Supreme Court left open the possibility, however, that in an actual "ticking bomb" case -- a situation in which a terrorist refused to divulge information necessary to defuse a bomb that was about to kill hundreds of innocent civilians -- an agent who employed physical pressure could defend himself against criminal charges by invoking "the law of necessity."

No such case has arisen since this court decision, despite numerous instances of terrorism in that troubled part of the world. Nor has there ever been a ticking bomb case in this country.

But inevitably one will arise, and we should be prepared to confront it. It is important that a decision be made in advance of an actual ticking bomb case about how we should deal with this inevitable situation.

In my new book, "Shouting Fire: Civil Liberties in a Turbulent Age," I offer a controversial proposal designed to stimulate debate about this difficult issue. Under my proposal, no torture would be permitted without a "torture warrant" being issued by a judge.

An application for a torture warrant would have to be based on the absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it.

The suspect would be given immunity from prosecution based on information elicited by the torture. The warrant would limit the torture to nonlethal means, such as sterile needles, being inserted beneath the nails to cause excruciating pain without endangering life.

It may sound absurd for a distinguished judge to be issuing a warrant to do something so awful.

But consider the alternatives: Either police would torture below the radar screen of accountability, or the judge who issued the warrant would be accountable. Which would be more consistent with democratic values?

Those opposed to the idea of a torture warrant argue -- quite reasonably -- that establishing such a precedent would legitimize torture and make it easier to extend its permissible use beyond the ticking bomb case.

Those who favor the torture warrant argue that the opposite would be true: By expressly limiting the use of torture only to the ticking bomb case and by requiring a highly visible judge to approve, limit and monitor the torture, it will be far more difficult to justify its extension to other institutions.

The goal of the warrant would be to reduce and limit the amount of torture that would, in fact, be used in an emergency. This is an issue

that should be discussed now, before we confront the emergency.

So, let the debate begin. . Alan M. Dershowitz is a Harvard law professor and a former member of the O.J. Simpson ""Dream Team." Last Sunday, he appeared on ""60 Minutes" to make a case for legal torture. His latest book is ""Shouting Fire: Civil Liberties in a Turbulent Age" (Little Brown, 2002).

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