

Torture warrants?

Our legal system already recognizes that, under exceptional circumstances, people may be exonerated for committing otherwise criminal acts. That is why the current debate about authorizing torture through the courts is so unnecessary — and dangerous.

BY HARVEY A. SILVERGLATE

AMONG THE UNSETTLING effects of the September 11 terrorist attacks on New York and Washington and the anthrax mailings that followed is their triggering, seemingly overnight, of a national debate over whether the United States should practice torture — as a matter of national policy — to combat terrorism. The pro-torture camp wants to authorize law-enforcement agents to inflict intense physical pain in order to extract information from suspected terrorists (the word "suspected" is often conveniently omitted by the law's proponents) where that information might pinpoint the location of a "ticking bomb" or otherwise avert some imminent act of mass carnage.



So imagine the surprise of many long-time legal observers when Harvard Law professor Alan Dershowitz published an op-ed piece in the *Los Angeles Times* on November 8, arguing that "if we are to have torture, it should be authorized by the law" and that the authorities should be required to apply to judges for "torture warrants" in each case. A careful reading of his op-ed indicates that Dershowitz did not actually go so far as to say he favors torture. And in subsequent lectures and interviews he placed on record his personal opposition to torture. But the

piece drew a firestorm of criticism from both liberals and libertarians, who argued that Dershowitz had indirectly sanctioned the use of torture and should now be regarded as a turncoat in the battle to preserve civil liberties.

Nonetheless, Dershowitz's op-ed makes a fairly powerful, though flawed, argument that torture would be ruled constitutional. Under the right circumstances, he claims, torture, while "very troubling," would pass a test the Supreme Court has sometimes used to determine the constitutionality of the government's use of

has sometimes used to determine the constitutionality of the government's use of an extreme law-enforcement technique: whether it "shocks the conscience."

"Consider a situation in which a kidnapped child had been buried in a box with two hours of oxygen," suggests the law professor, ever the master of the difficult hypothetical. "The kidnapper refused to disclose its location," he continues. "Should we not consider torture in that situation?"

Dershowitz, clearly uncomfortable with his own rhetorical question, does not quite give a direct answer. In order to avoid an ugly answer to an impossibly difficult moral and legal question, he takes another route. Since there is "no doubt that if an actual ticking bomb situation were to arise, our law enforcement authorities would torture," he says, "the real debate is whether such torture should take place outside of our legal system or within it." The answer to this question is clear and easy for Dershowitz: "If we are to have torture, it should be authorized by law" because "democracy requires accountability and transparency."

Besides, Dershowitz argues, the Constitution poses no obstacle to legal, court-authorized, supervised torture. That's because the Fifth Amendment's protection against self-incrimination does not protect against requiring someone to testify and disclose information; it merely protects against the use of such information against the person interrogated. Thus, in the face of a court-issued "immunity" order, any citizen may be forced to testify in a judicial forum, or suffer imprisonment for the refusal to do so. Nor does Dershowitz believe that any "right of bodily integrity" that might be read into the Bill of Rights prohibits, say, the injection of "truth serum," since the Supreme Court has already authorized the forcible drawing of blood from a suspect for alcohol testing. "Certainly there can be no constitutional distinction" he argues, "between an injection that removes a liquid and one that injects a liquid." (This particular argument is spurious, and Dershowitz should know better: he is a long-time opponent of the death penalty, where the current preferred method of execution is the injection of deadly poisons into the veins of the convict.)

Dershowitz fails to mention altogether another amendment — the Eighth, which states quite plainly that no "cruel or unusual punishments [shall be] inflicted." The modern-era Supreme Court has ruled that this standard, which is inherently subjective, must be interpreted according to society's evolving standards of decency. It is likely that the pre-September 11 Court would have ruled that techniques all would agree constitute "torture" would qualify as "cruel" and (for our society, at least) "unusual." But in the atmosphere created by the ghastly attacks of September 11, the Court might now rule that it is neither cruel nor unusual to torture a convict, a prisoner, or even a mere suspect, if the information that might be wrung from that person could save thousands of innocent lives. (After all, the Supreme Court did uphold the constitutionality of President Franklin D. Roosevelt's transfer of Japanese-Americans from the West Coast into "relocation camps" after Pearl Harbor, and of his using a military tribunal to try — and execute — German saboteurs who landed on our shores intending to destroy strategic targets.) War does change mindsets, even of the courts — and understandably so.

But leaving aside his interpretation (or neglect) of inherently vague constitutional provisions, Dershowitz's conclusion is clear: if torture is to be administered, it should require "torture warrants" issued by judges before whom the government must lay out reasons why torture — and only torture — could extract life-saving information. "Thus we would not be winking an eye of quiet approval at torture while publicly condemning it," he says.

[page 1](#) [page 2](#)

Issue Date: December 6 - 13, 2001

Back to the News and Features [table of contents](#).