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POLITICS LETTERS EDITORIAL GAY & LESBIAN
THURSDAY, FEB. 14 2013 SEARCH FEEDBACK

Torture warrants? (continued)

SOME ADVOCATES of torture justify their position on the simple ground that monsters like those who helped level the World Trade Center deserve to be tortured, ostensibly to get information that might prevent future catastrophic destruction of human life. (Of course, if the pain inflicted also goes a small way toward exacting some retribution for the WTC carnage, though the suspected terrorist had nothing to do with September 11 but is planning an entirely new attack, some would view it as a just bonus.) But Dershowitz is not in that camp. He understands that in the real world, when law-enforcement authorities have reason to believe that a suspect has information that can save lives, individual cops and agents will resort to torture no matter what. After all, we have long struggled to control the gratuitous use of torture by police on suspects from whom they seek to extract confessions, and by sadistic prison guards against inmates for no apparent practical purpose whatsoever. Can there be any real doubt that a law-enforcement officer, or, for that matter, most of us, would probably be willing to resort to the torture of a person who knew where to find our kidnapped child or where to locate an atomic bomb ticking away in some major American city?

So what, then, is wrong with a system that requires torture warrants — especially if an opponent of torture like Dershowitz can argue for their constitutionality? The answer is threefold.

First, institutionalizing torture will give it society's imprimatur, lending it a degree of respectability. It will then be virtually impossible to curb not only the increasing frequency with which warrants will be sought — and granted — but also the inevitable rise in *unauthorized* use of torture. Unauthorized torture will increase not only to extract life-saving information, but also to obtain confessions (many of which will then prove false). It will also be used to punish real or imagined infractions, or for no reason other than human sadism. This is a genie we should not let out of the bottle.

Second, we should think twice before entirely divorcing law from morality. There can be little doubt that until now, Americans have widely viewed torture as beyond the pale. The US rightly criticizes foreign governments that engage in the practice, and each year our Department of State issues a report that classifies foreign nations on the basis of their human-rights records, including the use of torture. Our country has signed numerous international treaties and compacts that decry the use of torture. We tamper with that hard-won social agreement at our grave moral peril.

Third, our nation sets an example for the rest of the world: we believe not only in the rule of law, but in the rule of *decent* laws, and in a government composed of decent men and women who are accountable to a long tradition. There may be more efficient ways of governing, but our system is intentionally inefficient in certain ways in order to protect liberty. Our three co-equal branches of government immediately come to mind. Also, government can almost always proceed more efficiently if it is not dogged by an independent press protected by the First Amendment. But we have found from long experience that, as Jefferson

the First Amendment. But we have found from long experience that, as Jefferson famously said, if one were forced to choose between government without the press or the press without government, the latter might well be preferable. Trials by jury are long, inefficient, expensive, and sometimes lead to the acquittal of defendants whom the state is convinced are guilty and wants very much to incarcerate or even execute. Some of those acquitted are indeed guilty. Yet trial by jury remains the best (albeit imperfect) system ever devised for ascertaining truth while curbing government excess and abuse of power. Torture may sometimes offer an efficient means of obtaining information, but efficiency should not always trump other values.

Yet we still face Dershowitz's "ticking bomb" hypothetical. How do we deal with that? Is it really moral, after all, to insist on having "clean hands" and to refrain from torture, when thousands or even hundreds of thousands of people could die as a result of our pious and self-righteous morality?

THE ANSWER to this quandary lies in a famous criminal-law decision rendered in Victorian England by the British appeals court known as the Queen's Bench. It is a case studied by virtually every American law student at virtually every law school. In *Regina* [the Queen] *v. Dudley and Stephens*, the court dealt with one of the most difficult criminal cases in English legal history.

In July 1884, four crewmen of a wrecked English yacht were set adrift in a lifeboat more than 1000 miles from the nearest land mass. They had no water and no food except for two one-pound tins of turnips. Three of the men — Dudley, Stephens, and Brooks — were "able-bodied English seamen," while the fourth lifeboat passenger was an 18-year-old boy who was less robust than the others and soon showed signs of weakening. As they drifted, severe hunger and thirst set in. It became clear, as the trial court found, that unless the three stronger seamen killed the boy — who by then had deteriorated substantially and was on the verge of dying anyway — and then ate his body and drank his blood, all four of them would die. "There was no appreciable chance of saving life except by killing one for the others to eat," and the boy seemed the most logical candidate since he was "likely" to die anyway, as the trial court put it. Dudley and Stephens followed this course, with Brooks dissenting. Once the boy was killed, all three partook of his flesh and blood. Four days later, the three survivors, barely alive, were rescued by a passing ship.

The Queen's Bench was faced with the question of whether, under English law, the three were guilty of murder, or whether the homicide was justified by a "defense of necessity." The judges concluded that they were guilty of murder and should be sentenced to death. "[T]he absolute divorce of law from morality would be of fatal consequence," they wrote, "and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defense of it." Were this bright line against murder abandoned, warned the court, it might "be made the legal cloak for unbridled passion and atrocious crime." The genie, in other words, would have escaped from the bottle, with unimaginable consequences.

But since this case is a very hard one and the outcome — the death penalty — would strike most civilized people as excessive under the circumstances, the judges suggested a way out of the dilemma. The judges claimed that it is left "to the Sovereign" — in this instance, the Queen — "to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it." In other words, executive clemency offers a way to trim the harsh edges of the law in the truly exceptional case.

The lesson of this case for the use of torture warrants is clear. When a law-enforcement officer truly believes that a suspect possesses life-saving information, and commits the perfectly human act of torturing the suspect to obtain that information, the officer *should* be tried for the crime of violating the suspect's constitutional rights, or for some related crime such as assault and battery or mayhem (willful bodily mutilation). If the jury, acting as the conscience of the community, decides that the officer does not deserve to be convicted and punished under the circumstances, it will acquit. Indeed, under our system of unanimous jury verdicts in federal and most state criminal trials, a single juror who refuses to vote for conviction can "hang" the jury and prevent a verdict and hence a conviction. In our legal history, there have even been instances where juries, exercising what is known as "jury nullification," have refused to convict or have acquitted obviously guilty defendants. Such verdicts are hardly unknown, as in

cases of mercy killings or the medical use of marijuana.

Further, even when a conviction has been handed down in a hard case, the government's chief executive (the president of the United States or, on the state level, usually the governor) may exercise his or her constitutional authority to commute (or terminate) the sentence and free the defendant, or even pardon the defendant and thereby wipe clean his or her criminal record. In the *Dudley and Stephens* case, in fact, Queen Victoria commuted the sentence to six months' imprisonment. This is how a civilized nation upholds civic decency and the rule of law while allowing for those exceptional situations when normal human beings break the law for some greater good or under conditions of overwhelming necessity.

We do not need, and should not dare to enact, a system of torture warrants in the United States. Our legal system is perfectly capable of dealing with the exceptional hard case without enshrining the notion that it is okay to torture a fellow human being.

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