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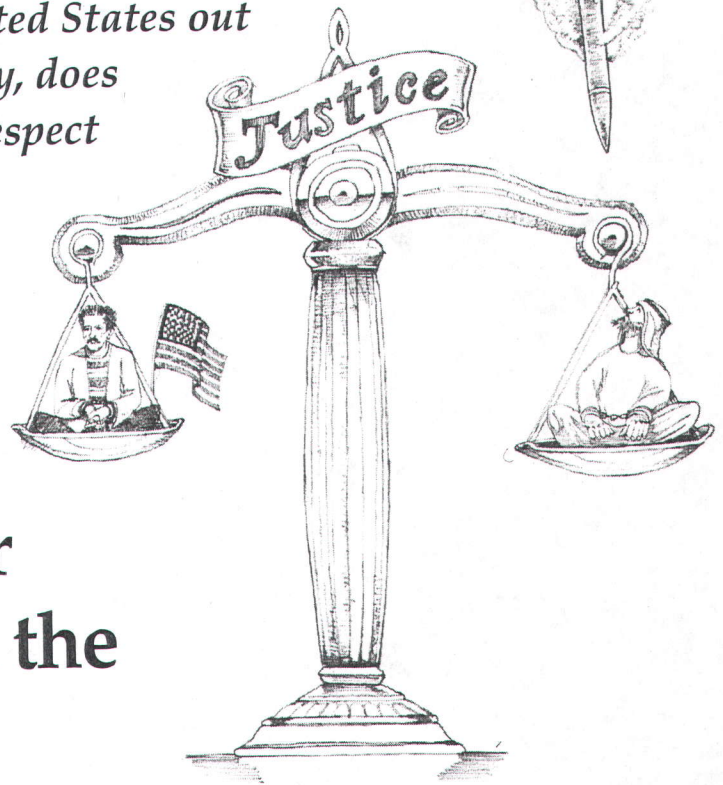
COMMON GROUND FOR PRO-LIFE AND PRO- CHOICE

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If our law restricts the state's power to punish persons for criminal acts within the United States out of respect for the person's dignity, does not that same dignity demand respect outside our borders?



Human Rights for Terrorists Beyond the Water's Edge

By **TERRENCE BERG**

AS A FEDERAL PROSECUTOR, I felt a strong sense of irony in reading about the arraignment in New York Federal court of two Middle-Eastern men accused of bombing the U.S. Embassy in Nairobi. These alleged "Islamic terrorists"—one of whom reportedly confessed—are from the same group our military had tried to destroy in a missile attack last August. Yet they will enjoy all the sacred protections of due process enshrined in our Constitution: counsel to defend them, the right not to answer any questions, the right to call their own witnesses and submit any Government witnesses to cross-examination, the right to have a jury of ordinary people—not Government officials—decide their fate.

Providing constitutional protections to alleged terrorists is something we can be proud of as Americans. No matter how atrocious the crime, or how trivial, in the United States you may not be punished by the state until the full fact-finding and truth-sifting function of "due process" has run its course. Even in the face of such strange results as

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those of the O. J. Simpson murder trial or the New England baby-sitter case, most Americans, and other people the world over, recognize that our criminal justice system, despite its many flaws, strives to protect the dignity of the human person by interposing strong barriers between the accused and punishment by the Government. These barriers include protection against unreasonable searches and seizures, the right against self-incrimination, the presumption of innocence and the burden of proof beyond a reasonable doubt.

The respect for human dignity enshrined in our Bill of Rights requires us to go through the slow and careful procedures mandated by due process before imposing any finding of guilt or any punishment on a person. The notion that the law must respect the dignity of the human person is an ideal to be held up as an example for other nations to follow and a goal to which our own society must continue to aspire.

But compare for a moment the slow and tedious criminal justice process—ultimately a procedure for determining the facts and then assessing the appropriate punishment—with the swift judgment and overpowering punishment imposed upon the people who died as a result of our military's cruise missile strikes against Afghanistan and the Sudan. What fact-finding was done before invoking this most powerful of all state punishments, the use of lethal force? What standards were applied to determine whether the evidence of guilt was sufficient? In our criminal justice system, even to

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lodge a criminal charge against someone requires an independent fact-finder—a magistrate or a grand jury—who examines the Government's evidence and issues the charge only after finding that there is "probable cause" (better than 50-percent likelihood) that the person committed the crime. To find guilt, there must be "proof beyond a reasonable doubt," sometimes called "proof to a moral certainty" by judges who are explaining the concept to juries. To bring a death penalty case, there are whole sets of internal Justice Department policies and procedures that must be carefully followed by the several levels of officials who examine such applications. Even after guilt is established, no death sentence may be imposed until an entire separate procedure is held, again before a jury, during which the jury hears more evidence that must meet certain standards showing that the murder was committed under particularly aggravating circumstances.

Our law's respect for human dignity requires that such rules be followed before the Government may invoke criminal punishments against individual persons. Obviously, we cannot expect our President or our military to hold a trial before a jury of citizens who would determine guilt and then impose a death penalty prior to taking military actions that may result in killing others. Nearly all military actions result in killing others. Although our cruise missile attack on the Sudan was timed to occur when there would be few people near the target, the attack nevertheless, according to the Associated Press, killed one person and wounded nine others. On the other hand, our attack on the training camps in Afghanistan was timed to occur when a meeting of Osama bin Laden's group was supposed to be taking place.

THE IRONY of watching the criminal process unfold for Mohamed Rashed Daoud al 'Owhali and Mohammed Saddiq Odeh is that these same two men could have been killed in an instant if they had been "lucky" enough to escape back to the camps in Afghanistan in time for the military strike. Yet here they sit, safe in a Federal holding facility in New York, enjoying three square meals a day, benefiting possibly from expert legal counsel paid for by the Government, being presumed innocent and given every chance to challenge the proof against them. The same Government that launched 75 \$60-million missiles at their confederates may not even impose a sentence of probation on these two until after due process has been followed.

It is quite proper that the great protections of our Constitution apply to these two men with unchallengeable force, just as they would in any other criminal case. The respect and protection that our laws provide for human dignity is a beacon for all to see. But as a nation that goes to great pains not to allow the state to harm a person in the United States until after a very careful process has determined that person should be harmed, we must recognize a big difference between the rights that we accord persons accused of crimes within our borders, and the rights we accord those accused of crimes outside our borders.

If our law restricts the state's power to punish persons for criminal acts within the United States out of respect for the person's dignity, then does not the same human dignity demand respect beyond the water's edge? As a nation with a highly developed legal tradition regarding human rights, we have a responsibility to be extremely judicious in using force in other parts of the world. With the collapse of the ideological competition between capitalism and Communism, the need for our nation's use of force to be consistent with our values concerning human dignity is even greater.

WHEN APPLYING MILITARY FORCE, as our nation must do at times, we must be an example in protecting human rights and defending human dignity. It must be clear to our citizens, and to the world as well, that our nation's use of military force is factually justified, seeks to minimize the loss of innocent human life and is a proportionate response. The Administration has not yet made its case to meet these standards with respect to the cruise missile attacks, because it has not yet fully disclosed the evidence upon which the use of force was based.

As the laborious criminal process in the New York Federal court unfolds, perhaps many of the facts that supported our use of force will come to light. In the meantime, the irony persists that it appears much easier for our Government to use force to punish terrorists who have not been caught than it is to punish those who have been. A

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