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ABSTRACT

LEGALITY AND JUSTICE: THE U.S. TURN TO COERCIVE INTERROGATIONS

The United States has just been through a remarkable period in its history, when long-standing policies and practices for handling “detainees” captured in a war-like situation were abandoned abruptly. This change proceeded generally in secret and, initially, with little attempt to justify publicly the new policies. It is of the utmost importance that we as a nation attempt to learn as much as we can from this experience.

For example, there is in the philosophical and related literature a longstanding and powerful debate as to whether torture ought invariably be forbidden, or whether in some cases the likely favorable consequences make it permissible, some would even argue a duty, to apply torture in order to try to extract some time-sensitive intelligence which might allow a major saving of life.

The Bush Administration officials who authorized torture did not often, or perhaps at all, argue the morality of doing so. They were mainly concerned to argue that it was legally permissible, i.e., statutorily, and in terms of international law and our treaty obligations. But in attempting to show that the coercive policies they were asked to approve were acceptable under law, they came close, especially when discussing the possible defenses interrogators might offer, to arguing for their moral acceptability too.

Perhaps the question to ask is: Whether or not the Bush Administration itself succeeded in providing an adequate, or at least close to adequate, justification of the ethics of the “enhanced interrogation” in this context, was the basis there for providing a consequentialist justification for torture? Might the exigencies of the circumstances have provided the grounds for a reasonable case, if one cared to make it? There is a long line of competent philosophical and legal argument, stretching from Jeremy

Bentham to Alan Dershowitz to Jean Bethke Elshtain, that holds strongly that it is possible to make such a case, given the right conditions.

Alternatively, does the country's recent experience, with making use of harsh techniques to try to forcefully elicit intelligence information, shed light on the case for absolutely forbidding torture, with no exceptions? Many philosophers and legal scholars would argue for that, from David Cole to Michael Ignatieff. Does, for example, the situation in which the U.S. found itself, unable to authorize the use of torture only on "high-value" detainees without having it descend to far lower levels of targets (e.g. Abu Ghraib), confirm the absolutist position's plausibility? Do the phenomena which accompanied the practice of torture, such as holding prisoners indefinitely, secretly and mostly without charges, to keep their treatment from becoming public, provide additional evidence against it?

Another way of putting the question is this: Does our recent experience show that the arguments of those philosophers who have given a consequential defense of torture are too abstract and theoretical, using unreal possible scenarios and failing to confront the realities which attend real torture? Or does our recent experience show the inevitability that some officials will, under some conditions, resort to torture, no matter what the rules say? Are we forced into accepting the position Ignatieff (and the Israeli Supreme Court) defend, that those who resort to torture must be allowed to offer a plea of "necessity" but without any guarantee such as a defense will even be allowed, let alone accepted?

Clearly this seems to be a situation in which there is much to learn from a close consideration of the arguments on several sides of this momentous issue.