

Jean Bethke Elshtain

Reflection on the Problem of “Dirty Hands”

Torture invariably appears on the “never” list of the “forbiddens” of human politics. Genocide tops that list but torture follows close behind. There are good reasons for this. Brutal regimes historically, like Stalin’s Soviet Union and Hitler’s Nazi Germany, used torture as a routine dimension of the state apparatus. Enemies or alleged enemies of those two evil regimes were often tortured for the sadistic pleasure of it—not to get useful information. For torture was used primarily against internal foes of the regime. Torture was also widespread in Argentina at the time of its so-called dirty war in the late 1970s—before the restoration of constitutionalism in 1982. In my discussions with the “Mothers of the Disappeared” who had lost children to the military juntas, torture was listed as the most horrible thing imaginable that their children had suffered prior to their outright killing. One mother of three “disappeared” told me that she couldn’t bear the thought that her children’s last memories on earth were of being tortured. That final image of another human being torturing you, and doing so with sadistic pleasure, prior to taking your last breath, was too much for her to bear. Her health broke, and she never recovered either her health or her faith in humanity.

Before the watershed event of September 11, 2001, I had not reflected critically on the theme of torture. I was one of those who listed it in the category of “never.” It did not seem to me possible that the United States would face some of the dilemmas favored by moral theorists in their hypothetical musings on whether torture could ever be morally permitted. Too, reprehensible regimes tortured. End of question. Not so, as it turns out.

The Dilemma Presented

The usual dilemma proffered in order to debate torture went something like the following (and there are many variations on the theme). A bomb has been planted in an elementary school building. There are several hundred such buildings in the city in question. A known member of a terrorist criminal gang has been apprehended. The authorities are as close to 100 percent certain as human beings can be in such circumstances that the man apprehended has specific knowledge of which school contains the deadly bomb, due to go off within the hour. He refuses to divulge the information as to which school, and officials know they cannot evacuate all of the schools, thereby guaranteeing the safety of thousands of school children. It follows that some four hundred children will soon die unless the bomb is disarmed. Are you permitted to torture a suspect in order to gain the information that might spare the lives of so many innocents? The circumstances are desperate. The villain is thoroughly villainous. The probability that he knows where the bomb is planted is as close to a certainty as human beings can be in such situations. It is also undeniably the case that, were police to see this man attempting to run into the school, bomb in hand, he would be shot outright. Is it not, therefore, acceptable in this rare instance to torture him to gain the information?

What usually followed the presentation of this, or some other, vivid example was a discussion of options within the framework of the two dominant and competing moral philosophies of modernity: deontology and utilitarianism. The deontologist says “never”—one is never permitted to use another human being as a means rather than an end in himself. The utilitarian says that the greatest good for the greatest number will be served by torturing the creep and saving the school children.¹ So—where do you stand? With Kant or with Bentham?

Most often I found myself standing with neither. I didn’t realize it at the time but this “neither . . . nor” surely reflected my ethical formation within the Christian theological tradition, which is not primarily a deontological ethic (despite attempts by some Christian philosophers to assimilate Christianity to deontology). Instead, what is called up and called upon within Christianity is the concrete responsibility of neighbor-love and neighbor-regard. Where would one’s responsibility lie in this circumstance? With the

innocent or with the guilty? With school-children who cannot defend themselves or with a prisoner who cannot defend himself either? These are the sorts of considerations that are the stock-in-trade of the moral casuist. It is the tradition of casuistry—a discredited tradition in many quarters—that I will bring to bear in this discussion.²

Let me leave this particular dilemma for a moment in order to explore my “neither . . . nor” in greater detail. The burden of my argument is that, while deontology makes something called “torture” impossible, utilitarianism makes it too easy and too tempting. There is another problem, and that lies in the word itself. Is a shouted insult a form of torture? A slap in the face? Sleep deprivation? A beating to within an inch of one’s life? Electric prods on the male genitals, inside a woman’s vagina, or in a person’s anus? Pulling out fingernails? Cutting off an ear or a breast? All of us, surely, would place every violation on this list beginning with the beating and ending with severing a body part as forms of torture and thus forbidden. No argument there. But let’s turn to sleep deprivation and a slap in the face. Do these belong in the same torture category as bodily amputations and sexual assaults? There are even those who would add the shouted insult to the category of torture. But, surely, this makes mincemeat of the category. If everything from a shout to the severing of a body part is “torture,” the category is so indiscriminate as to not permit of those distinctions on which the law and moral philosophy rest. If we include all forms of coercion or manipulation within “torture,” we move in the direction of indiscriminate moralism and legalism—a kind of deontology run amok. At the same time, we deprive law enforcement, domestic and international, of some of its necessary tools in an often violent and dangerous world.

In the context of domestic life, we tend to place a *verbal insult*—at least we used to—in the realm of manners and basic human decency. A person who insults another is to be chastised, rebuked, even shunned. So we teach children not to insult others: “Don’t be rude,” we say. Nowadays, of course, because we tend to moralize and to criminalize nearly everything, shouted insults can become the occasion for lawsuits or charges of hate speech and harassment. That said, a verbal insult is rather far down on the scale of awful things that can happen to people. We think worse of a *slap in the face*. Slapping a child can lead to charges of child abuse and, whether the child is physically harmed or not, slapping demeans. If one spouse consistently slaps another, spousal abuse charges may result. A slap is meant to frighten and to demean, to remind someone of who is in the driver’s seat. If a slap

enters the realm of criminality and turns into a beating, we distinguish it from a *verbal insult*, for it has crossed that barrier that separates the symbolic—speech—from the corporeal—an affront to the body. A third case, *a beating with the butt of a gun*, is the most serious of all in this list of three. Such beatings are the occasion for charges of felonious assault and battery. If a policeman has beaten a person he has arrested, who is handcuffed and subdued, he, too, may be charged: his badge is no protection. Just as we discriminate between accidental death, manslaughter, and capital murder—for a dead body isn't just a dead body; we want to know how it got there—so we make distinctions when it comes to various 'assaults' on persons.

Just War Rules and Restraints

Now let's move to the realm of interrogation of prisoners in the context of a deadly and dangerous war against enemies who know no limits. We have seen these persons in action. We know that they torture, demean, and assault those they have apprehended and then exult when they have beheaded an unarmed man. (Here the murder of Daniel Pearl, a civilian, hence a noncombatant.) In warfare, the rules of *jus ad bellum* and *jus in bello* have no meaning to them. The whole point of terror is the purposeful, random killing of innocents, defined as those in no position to defend themselves. In actual war-fighting, it is often the case nowadays that some, like the United States military, take seriously those ethical restraints on war-fighting derived from the just or justified war tradition and encoded in various international conventions and agreements. Others may ignore these restraints. Nevertheless, those restraints—most importantly *noncombatant immunity*—are central to the way the United States makes war. Soldiers abide by rules of engagement that limit what they can do, and to whom. Terrorists simply unleash violence. Indeed, their favorite targets are "soft targets"—persons working or dining or going to school and who are not prepared, and have no means to, defend themselves.

There are hard-bitten *Realpolitikers* who claim that restraint in war-fighting amounts to "fighting with one hand tied behind your back" and gives the enemy unfair advantage. But the rules of war-making are clear and accepted as normative by the United States. Victory alone is not the singular goal. How one achieves victory is also important. There is, of

course, no pristine way to make war. You cannot make war, any more than you can govern, without getting your hands dirty. Thirty years ago, Michael Walzer plumbed the question of "dirty hands" in what has become a standard essay on the subject. Those who take responsibility for the polity and for the wars fought by a polity will, at some point, incur moral guilt—not because they have intentionally committed crimes but, rather, because the courses of action to which they have committed the polity often result in unintended harm to innocents.

Michael Walzer's "Dirty Hands"

In his important essay, Walzer references St. Augustine's "melancholy soldier, who understood both that his war was just and that killing, even in a just war, is a terrible thing to do."³ If the war is just, and if the person killed is, like the soldier who does the killing, a combatant, we do not burden the soldier with the burden of having murdered. That would be an act of injustice. But it is appropriate that he feel the burden of it all the same. Walzer pursues the issue further by noting that Augustine "might have thought it wrong to torture in a just war, and later Catholic theorists have certainly thought it wrong. Moreover, the politician I am imagining thinks it wrong, as do many of us who supported him. Surely we have a right to expect more than melancholy from him now." (Walzer is here hypothesizing that the political leader has ordered a man tortured in order to protect civilians who might otherwise die in apartment buildings that have been booby-trapped.) "When he ordered the prisoner tortured, he committed a moral crime and he accepted a moral burden. Now he is a guilty man. His willingness to acknowledge and bear . . . his guilt is evidence, and it is the only evidence he can offer us, both that he is not too good for politics and that he is good enough."⁴ He is good enough to do what is wrong but necessary in order to provide for the common defense—to protect the citizens he has a particular responsibility to protect—and he is guilty, as he should be, and as any decent person would be, at what he felt compelled to do, given his vocation of statecraft.

This imagined response of the political leader eschews the exculpatory stratagems of utilitarianism that would enable the leader to torture but to keep his hands clean at the same time. Nor is Walzer's leader a strict deontologist who must do the right thing even if thousands of innocents die,

rather like the person Kant imagines who is forbidden, under Kantian deontology, to tell a lie even if it means turning a friend hidden about his house over to a murderer who comes inquiring as to his whereabouts.⁵ As I noted earlier, there is an alternative. Although Walzer himself doesn't "name" it, he describes it. One begins with a rule-governed activity. Such rules are moral guidelines. The just war tradition is such a rule-governed activity. There may be situations that were not anticipated and that are so serious, so dire in their potential consequences, they may require overriding the rule. The rule in question is not thereby "set aside, canceled, or annulled."⁶ One is obliged to acknowledge violation of the rule and to offer reasons for why, in this circumstance, the rule was temporarily overridden. This overriding of a rule should not be easy: it should, in fact, be *in extremis*, or close to it. And one overrides the rule in recognition that a moral wrong does not make a "right" but it might bring about a "less bad" or "more just" outcome.

In his essay, Walzer associates this form of prudential reasoning with the Catholic tradition. Interestingly, his example of such Catholic reasoning is that of Albert Camus, a lapsed Catholic who was, nonetheless, in dialogue with believers throughout his life. Camus reiterated over and over again the limits that must pertain in political action. If a situation requires the breaking of a moral rule, the person who violates the rule or goes beyond it must "acknowledge their responsibility" and, in many situations, accept punishment or do penance. This way of thinking differs from what Walzer characterizes as the "Protestant tradition" in which the rule-breaker is construed as a kind of tragic hero who has violated his own conscience. For Walzer, the latter sanctions a personal melodrama and directs our attention away from where it rightly belongs: with a system of moral rules and restraints and whether, and under what circumstances, overriding a rule may be the least bad thing to do.

The Dilemma Revisited: Statescraft and a Theologian

Now let's recall the hypothetical scenario I sketched earlier. Ask yourself who you would want in a position of judgment at that point. A person of such stringent moral and legal rectitude that he or she would not consider torture because violating his or her own conscience is the most morally se-

rious thing a person can do? Or a person, aware of the stakes and the possible deaths of hundreds of children, who acts in the light of harsh necessity and orders the prisoner tortured? This second leader does not rank his or her "purity" above human lives. The irony, of course, is that the leader who demurs in the name of living up to a moral code we probably share with him, or her, becomes directly complicit in the deaths of hundreds of innocents. Parents, grandparents, and siblings of those children will probably curse his or her name, and they are right to do so.

Within Christian moral thinking, and the tradition of casuistry that arose from it, the statesman or stateswoman has another chance. He and she can stand before God as a guilty person and seek forgiveness. There are no second chances for school-children blown to smithereens. They will never have the opportunity to grow up in order that they, too, might one day face moral dilemmas. Albert Camus would say of the person who incurs guilt that she is certainly no saint but neither has she given in to the plague of terror. Rule-mania and the moralism that flows from it aims to insulate the statesperson from any tragic dimension: if one just follows the rules, one's conscience is clear. But the route of concrete responsibility, or neighbor-regard in Christian moral teaching, suggests another and more difficult path. Remember: the political leader who has approved torture as a way to elicit information that may save the lives of hundreds of children does *not* thereby sanction or normalize torture.

Torture remains a horror and, in general, a tactic that is forbidden. But there are moments when this rule may be overridden. The refusal to legalize and to sanction something as extreme as torture is vitally important. It follows that Alan Dershowitz's suggestion that there may be instances of "legitimate torture" and those about to undertake it should be obliged to gain a "torture warrant" to sanction the activity is a stunningly bad idea. Sanctioning torture through torture warrants partakes of the same moralistic-legalism as the statesperson who values his pure conscience above all else and who will not violate a moral norm under any circumstances. We cannot—and should not—insulate political and military leaders from the often harsh demands of necessity by up-ending the moral universe: that which is rightly taboo now becomes just another piece in the armamentarium of the state.

A certain asceticism is required of those who may be required, in a dangerous and extreme situation, to temporarily override a general prohibition. They should not seek to legalize it. They should not aim to normalize it. And they should not write elaborate justifications of it, as if there were a tick-list one can do down and, if a sufficient number of ticks appears, one is given leave to torture. The tabooed and forbidden, the extreme, nature of this mode of physical coercion must be preserved so that it never becomes routinized as just the way we do things around here. The case of the anti-Nazi theologian Dietrich Bonhoeffer offers an interesting example that points to this general truth. Bonhoeffer joined a conspiracy to assassinate Hitler. The view of Bonhoeffer and his coconspirators was that the Nazi system was so dependent on this one man that, if the “head of the snake were cut off,” the Nazi system might begin to unravel. Whether that was or not we will never know, as the conspiracy was uncovered and its participants were shot or hanged, including Bonhoeffer.

Subsequently, some Bonhoefferians have expressed frustration that Bonhoeffer never left behind, or smuggled out, a document detailing his decision to override the command not to murder (the correct way to translate the commandment against killing). They wish there was something in the nature of a justification, by Bonhoeffer, of his deeds. But Bonhoeffer, appropriately, offered nothing of the kind. Instead, he notes Machiavelli and *necessita*. He acknowledges guilt and complicity in the name of being a Christian in an autonomous, secular world.⁷ “Civil courage,” he wrote, “can grow only out of the free responsibility of free men.” The “ultimate question for a responsible man is not how he is to extricate himself . . . but how the coming generation is to live.”⁸ The key question, for Bonhoeffer, is *not* “What is the right thing for me to do?” but rather “What is to come?” In his circumstance that meant what would the future hold, unless action was taken to stop it? It would hold a world in which Nazism maintained its power and extended its sway and its genocidal policies. In our context, it is whether terrorists who know no limits and who would kill as many innocents as they can, simply because they are Americans or Jews or infidels, are to be stopped lest they murder again with the ultimate aim of establishing repressive Taliban-type regimes that institute cruelty and a perverse form of “virtue.” I don’t mean to suggest that these are precisely analogous situations. Nothing in history ever is. But I do agree with Bonhoeffer that the question that should animate us is: What is to come?

Redefining Torture: Torture and Severe Coercion

The observant reader will have noted that I have not, as yet, defined what torture is. I have suggested, or hinted, that it is not any and all forms of physical restraint or coercion. Let’s turn to another hypothetical. Suppose you had Terry Nichols in custody before the Oklahoma City bombing. You know enough to know that (1) a public building is going to be bombed, and (2) Terry Nichols knows *who, where, and when*. How do you think about torture in such a circumstance? The position I have developed pushes in the following direction: there is no absolute prohibition to what some call torture. Once again, torture is not sufficiently disaggregated. Recall the possibilities: pulling out fingernails; grinding the teeth down or pulling teeth as does a sadistic Laurence Olivier to Dustin Hoffman in the film *Marathon Man*; raping men or women; burning breasts, genitalia; hanging for hours from the arms; crucifying; torturing the spouse or children. There should be—and are—prohibitions against such practices. In an exceptional and truly extreme circumstance, would it be defensible to do any of these things? Everything in me says no and tells me that when we think of torture it is these sorts of extreme forms of physical torment we are thinking of. If torture is the inflicting of severe and devastating pain, as the dictionary defines it, the horrors I have listed are certainly torture.

But there are other options that also come under condemnation as torture. In a striking piece, “The Dark Art of Interrogation,” Mark Bowden details some of these.⁹ They are called “torture lite,” and, Bowden tells us, some argue that such methods are not properly torture at all. This list includes

sleep deprivation, exposure to heat or cold, the use of drugs to cause confusion, rough treatment (slapping, shoving or shaking), forcing a prisoner to stand for days at a time or sit in uncomfortable positions, and playing on his fears for himself and his family. Although excruciating for the victim, these tactics generally leave no permanent marks and do no lasting physical harm.¹⁰

The Geneva Convention, however, makes no distinctions of any kind between these tactics and the horrific possibilities I noted earlier. Torture is torture, it says in effect.

But is this not like saying a dead body is a dead body, as if we could not distinguish between accidental death, involuntary manslaughter, and out-

right murder? The interrogators Bowden interviewed weigh a situation in which the well-being of a captive sits on one side and “lives that might be saved by forcing him to talk” on the other.¹¹ To bring clarity to the situation, Bowden distinguishes between torture as the horrific practices about which no decent person has any doubts as to whether they constitute torture or not and, by contrast, forms of coercion that involve “moderate physical pressure” and that do no lasting physical damage.¹² It seems to be the case, as Bowden documents it, that techniques like solitary confinement and sensory deprivation often suffice to induce a prisoner to give up sensitive information about terrorist operations. The skilled interrogator often finds that the fear that something may happen is “more effective than any drug, tactic, or torture device. . . . The threat of coercion usually weakens or destroys resistance more effectively than coercion itself.”¹³ Forms of psychological pressure and the arts of deception and trickery—for example, telling a captive that others have capitulated so he might as well talk—are standard tools of the interrogator’s trade, though some absolutists would forbid them, too. What interrogators learn quickly is that most people want to tell their stories. It is enough, then, to get them talking, for if you succeed, the prisoner keeps talking.

Bowden concludes that few “moral imperatives make such sense on a large scale”—referring to the prohibition against torture—“but break down so dramatically in the particular.”¹⁴ When you put a microscope above the word “torture” and peer through it, you see a teeming mess of possibilities, prohibitions, complexities, legalities, and ethical perils. It follows that when human rights groups label “unpleasant or disadvantageous treatment of any kind” torture, they do a disservice to the complexity of the matter; they fail to discriminate between cases; they embrace a moralistic “code fetishism” that flies in the face of the harsh and dangerous realities of the world in which we find ourselves; and, ironically, by failing to distinguish between sleep deprivation and amputation or burning or some other horror, they elevate the former and diminish the latter.

Bowden shares with me an aversion to making torture commonplace. The ban on torture must remain. But “moderate physical pressure” to save innocent lives, “coercion” by contrast to “torture,” is not only demanded in certain extreme circumstances, it is arguably the “least bad” thing to do.¹⁵ Bowden quotes Jessica Montell, the executive director of a human rights advocacy group in Jerusalem, who recognizes—as many human rights groups do not—that the issue is a complex one. She tells him:

If I as an interrogator feel that the person in front of me has information that can prevent a catastrophe from happening . . . I imagine that I would do what I would have to do in order to prevent that catastrophe from happening. The state’s obligation is then to put me on trial for breaking the law. . . . I can evoke the defense of necessity, and then the court decides whether or not it’s reasonable that I broke the law in order to avert this catastrophe. . . . It can’t be that there’s some prior license for me to abuse people.”¹⁶

This is an excellent, if somewhat legalistic, description of casuistry at work: the norm remains; it may have to be broken; the one who broke it for a strong reason must nevertheless make amends in some way. In other words, the interrogator must, if called on, be prepared to defend what he or she has done and, depending on context, to pay a penalty.

An Unhappy Subject Summed Up

Let’s sum up this unhappy subject. Far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to “torture” one guilty or complicit person. One hopes and prays such occasions emerge only rarely. Were I the parent or grandparent of a child whose life might be spared, I confess, with regret, that I would want officials to rank their moral purity as far less important in the overall scheme of things than eliciting information that might spare my child or grandchild and all those other children and grandchildren. But I do not want a law to “cover” such cases, for, truly, hard cases do make bad laws. Instead, we work with a rough rule of thumb in circumstances in which we believe an informant might have information that would probably spare the lives of innocents. In a world of such probabilities, we should demur from Torture 1—the extreme forms of physical torment. But Torture 2, for which we surely need a different name, like coercive interrogation, may, with regret, be used. (“Torture lite,” Bowden calls it.) This is a distinction with a difference.

One puts together in a single frame, then, normative condemnation of torture with appropriate consequentialist considerations—What is to come? To condemn outright Torture 2, or coercive interrogation, is to lapse into a legalistic version of pietistic rigorism in which one’s own moral pu-

rity is ranked above other goods. This is also a form of moral laziness. One repairs to a code rather than grappling with a terrible moral dilemma. The neighbor-regard in Christian moral thinking ranks concrete responsibility ahead of rigid rule-following. This neighbor-regard involves concern for forms of life and how best to make life at least slightly more just or, to cast it negatively, slightly less unjust. One is willing to pay a price and, if necessary, to incur moral guilt, when the lives of others are at stake.¹⁷

Notes

The title of this chapter reflects my indebtedness to Michael Walzer's classic essay "Political Action: The Problem of Dirty Hands," most of which is reprinted in chapter 3.

1. Clearly, I am simplifying each of these perspectives, especially utilitarianism, which comes in several varieties, e.g., rule utilitarianism, act utilitarianism, and so on. But this broad characterization of the direction these respective moral philosophies tend is correct.

2. The Protestant brief against casuistry was that it was "Jesuitical" and a way wily Jesuits used to wiggle out of various circumstances or to wheedle and maneuver people toward conclusions that were opposite what they began with. Casuistry took a major hit in the condemnations of Blaise Pascal and lost much credibility. Despite this, legal reasoning is primarily of a casuistical nature.

3. Walzer, "Political Action," p. 65 herein.

4. Ibid.

5. Kant's stringency infuriated the anti-Nazi theologian and martyr Dietrich Bonhoeffer, who declares that Kant carries the principle of not telling a lie to cruel absurdities. Bonhoeffer denounces the "fanatical devotee of truth" who "can make no allowance for human weakness" and who "betrays the community in which he lives." This version of 'truth' demands "its victims" even as the truth-teller remains "proud" and "pure." See Dietrich Bonhoeffer, *Ethics* (New York: Simon and Schuster, 1995), 361, 363.

6. Walzer, "Political Action," p. 68 herein.

7. Readers can turn both to his *Ethics* and his *Letters and Papers from Prison* (New York: MacMillan, 1972).

8. Bonhoeffer, *Letters and Papers from Prison*, 6–7.

9. Mark Bowden, "The Dark Art of Interrogation," *Atlantic Monthly*, October 2003, 51–76.

10. Ibid., 53.

11. Ibid., 54.

12. Ibid., 54.

13. Ibid., 60.

14. Ibid., 70.

15. Ibid., 74.

16. Ibid., 76.

17. These concluding considerations emerged in correspondence with Randall Newman concerning Reinhold Niebuhr and the incompleteness of his spelling out of neighbor-love as a form of justice.