"Dirty Hands Revisted: Morality, Torture, and Abu Ghraib"

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“Dirty Hands” Revisited: Morality, Torture, and Abu Ghraib

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This essay considers the morality of torture in light of Michael Walzer’s argument in “Political Action: The Problem of Dirty Hands.” Walzer argues that, under certain conditions, actions such as torture may be politically necessary but should never be given moral justification. This argument is analyzed in light of the question of responsibility in Christian ethics and in light of current U.S. policies on torture.

In April 2004, when photographs from the Abu Ghraib prison in Iraq were first aired in the United States, it began a fierce debate that continues to rage as to the proper limits that should be placed on interrogation techniques used on prisoners detained in the U.S. “war on terror.” These photos depicted U.S. personnel engaged in acts of torture and humiliation against Iraqis housed at the prison. These included simulated acts of homosexual sex, forced masturbation, covering of prisoners with excrement, attacking them with dogs, and forcing them to stand, blindfolded and immobile, for long periods of time.

Although the photographs themselves were disturbing, perhaps more disturbing were the questions that they raised about their connection to U.S. policy toward the treatment of detainees. Were the pictures a record of the actions of a “few bad apples,” or did they reflect a wider set of institutional mandates, which were filtering through the executive branch? In the end, seven enlisted men and women were court-martialed for their roles in the Abu Ghraib scandal, and a number of senior officers were subjected to less severe discipline. However, the accumulating evidence of the past several years has made it increasingly clear that Abu Ghraib, far from being an aberration, was in fact a manifestation of an institutional policy that condoned and encouraged the torture of detainees for the sake of the war on terror. The goals of this torture policy were to extract intelligence information vital to preventing attacks against the United States and to halt attacks on U.S. forces in Iraq. This policy neither began nor ended with Abu Ghraib, yet the unique visual record bequeathed by the Abu Ghraib scandal has given the prison a unique place in the conversation.

about the acceptability of torture by the United States. The questions raised by the scandal apply to the entire U.S. policy of torture, whether committed in Iraq, Afghanistan, Guantánamo Bay, or in any number of secret sites spread across Eastern Europe.

The goal of this essay is to offer an ethical analysis of the U.S. torture policy in light of a Christian conception of moral responsibility. If, as the political theorist Michael Walzer has argued, public officials must sometimes accept the risk of acquiring “dirty hands” in the fulfillment of their duties, what does that mean for Christians in the public realm? In the end, I argue, whatever case can be made for or against the use of torture, the actions of the George W. Bush administration have been morally culpable, because rather than accept responsibility for their actions, they have sought in bad faith to deflect that responsibility, under the cover of law and executive power.

In the first section of this essay, I examine the legal and political context for the creation of the U.S. policy of torture at Abu Ghraib and Guantánamo Bay, elaborating on the thought process that led to the policy as well as the problems with how it was applied. Next, I consider the problem of “dirty hands” as described by Walzer. He argues that political responsibility demands that politicians sometimes perform acts that are, in themselves, morally repugnant, yet nevertheless necessary.

By bringing this position into conversation with Dietrich Bonhoeffer’s analysis of the nature of guilt and responsibility in his Ethics, I argue that, even granting the argument from “Dirty Hands,” political responsibility requires that those responsible accept the guilt for their actions and submit themselves to public legal judgment. By crafting a policy that permits torture but then defines it in ways that evade its consequences, the Bush administration has, I argue, acted in a politically irresponsible and reckless fashion.

In the third section, I consider how the U.S. torture policy, as well as the application of the disingenuous idea of “torture lite,” is both morally objectionable and strategically ineffective. This application makes the current policy all the more troubling, because it not only violates long-standing legal prohibitions on the use of torture and well-established moral arguments against the practice but also fails to meet even the pragmatic test of effectiveness at achieving its goals. In the end, this application represents a practice of enormous bad faith on the part of the U.S. government on the question of torture.

Abu Ghraib, Guantánamo Bay, and U.S. Torture Policy

The origins of the Abu Ghraib scandal emerge from a series of executive orders and memos generated by the office of the president of the United States, the secretary of defense, and the attorney general's office. Central to the ad-
ministration detainee policy and its results was a determination before the war in Afghanistan that those captured in the conflict were not to be considered prisoners of war but rather "enemy combatants," entitled to none of the rights ensured to prisoners of war under the Geneva Conventions.

The particular rights specified under the Geneva Conventions from which the administration exempted itself were those contained in article 3, which specifically ban "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment." According to a memorandum drafted by Deputy Assistant Attorney General John Yoo, these provisions did not apply to members of al-Qaeda on the grounds that (1) "Al Qaeda's status as a non-State actor renders it ineligible to claim the protection of the treaties specified by the [War Crimes Act];" (2) "Al Qaeda is not covered by common Article 3, because the current conflict is not covered by the Geneva Conventions"; and (3) "al Qaeda members fail to satisfy the eligibility requirements for treatment as [prisoners of war] under Geneva Convention III."

Meanwhile, members of the Taliban were considered ineligible on the grounds that "for the period in question, Afghanistan was a 'failed State' whose territory had been largely overrun and held by violence by a militia or faction rather than by a government." Therefore, Yoo argued, "Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban militia, like al Qaeda, is therefore not entitled to the protections of the Geneva Conventions. Furthermore, there appears to be substantial evidence that the Taliban was so dominated by al Qaeda and so complicit in its actions and purposes that the Taliban leadership cannot be distinguished from al Qaeda, and accordingly that the Taliban militia cannot stand on a higher footing under the Geneva Conventions."

Although Yoo's memo provides a legal argument for regarding both members of al-Qaeda and the Taliban as ineligible for the protections of the Geneva Conventions, it does not address an important provision in the Conventions. According to article 5 of the Conventions, "Should any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." This article would seem to negate Yoo's entire argument, because a prisoner appealing to the Conventions would seemingly have to be afforded those protections.

Another memo, written by Assistant Attorney General Jay S. Bybee, attempts to deal with this issue by arguing that "the President could determine categorically that all Taliban prisoners fall outside Article 4 . . . . He could interpret Geneva III, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of prisoners of war as defined by Article
4." In other words, according to this interpretation, the president can unilaterally declare himself to be a tribunal competent to declare all Taliban prisoners as by definition ineligible for the protections of Geneva.13 This series of memoranda, which included contributions from then-attorney general John Ashcroft and subsequent-attorney general Alberto Gonzalez, both of whom endorsed the interpretations offered by Yoo and Bybee, set the stage for the creation of the detainee facility at Guantánamo Bay and provided the basis for understanding how prisoners should be treated there. At the same time, according to the account given by Seymour Hersh in Chain of Command, the president had authorized what was known as a “Special Access Program” to aid in the fight against al-Qaeda. According to Hersh, “The roots of the Abu Ghraib scandal lie not in the criminal inclinations of a few Army reservists, but in the reliance of George Bush and Donald Rumsfeld on secret operations and the use of coercion—and eye-for-an-eye retribution—in fighting terrorism.”14 The goal of this program was to respond quickly to possible leads and terrorist threats without going through the normal channels of authorization. As Hersh notes, “The rules are ‘Grab whom you must. Do what you want.’”15

During this same period, Bybee drafted a now-notorious memo for Gonzalez on the appropriate standards for interrogating detainees in U.S. custody. In this memo, Bybee concluded that “torture . . . covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder . . . Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.”16

At Guantánamo Bay, these two policies met. Under the command of Major General Geoffrey Miller, Guantánamo became a center not for simply detaining prisoners captured on the battlefield but also for the aggressive interrogation of prisoners deemed to possess important intelligence information. “This is a war in which intelligence is everything,” according to John Arquilla. “Winning or losing depends on it.”17

Guantánamo was to be the locus for intelligence gathering, but it ran into problems early on. There was very little useful intelligence flowing out of Guantánamo, despite the many prisoners flowing in.18 A Central Intelligence Agency (CIA) analyst fluent in Arabic was sent to investigate. “He came back convinced that we were committing war crimes in Guantánamo. . . . Based on his sample, more than half the people there didn’t belong there. He found people lying in their own feces, including two captives, perhaps in their eighties, who were clearly suffering from dementia.”19 He concluded, “The wrong peo-
people were being questioned in the wrong way.” Among the techniques utilized at Guantánamo under the supervision of General Miller were “sleep deprivation, exposure to extremes of cold and heat, and placing prisoners in ‘stress positions’ for agonizing lengths of time.”

In August 2003, General Miller was sent to Iraq to assist in improving interrogation techniques there. Before this he was “read into” the Pentagon’s Special Access Program. It was his recommendation that Abu Ghraib be “Gitmo-ized,” that is, made to function more like Guantánamo Bay, in order to extract more useful information from detainees during a period when the war in Iraq was going badly. This involved, among other things, enlisting the guards in efforts to “prepare the conditions” for interrogations. Shortly before the Abu Ghraib scandal broke, General Janet Karpinski, who had been the senior officer in charge of the prison during the abuses, was forced to step down and retire. Her replacement was General Geoffrey Miller.

What this narrative illustrates is the development of a set of policies regarding the treatment of detainees, the end result of which was the scandal at Abu Ghraib. Yet, once more, Abu Ghraib was but one component of a larger set of consequences, which resulted in the detention and torture of an as-yet-unknown number of prisoners at Guantánamo Bay; the forced “rendition” of prisoners to other countries, where it was known that they would be tortured (yet another policy that violates the principles of the Geneva Conventions); and the maintenance of secret prisons around the world that are not acknowledged and to which the Red Cross has no access.

The intent of these policies seems to have been to give the Bush administration a free hand to engage in a set of activities that, under ordinary circumstances, were deemed to be violations of the laws of war, U.S. law, and international treaties. The memos written by Yoo, Bybee, Gonzalez, Ashcroft, and others legitimated a policy of torture and freed the executive branch and the U.S. military of legal responsibility for these actions.

The purported justification for these policies was the acquisition of intelligence data from high-value detainees, particularly data that could prevent another attack akin to those of September 11, 2001, or protect U.S. troops in the field in Iraq. In the end, it will be up to the courts to decide whether the legal arguments made by the Bush Justice Department are truly valid. However, the motive for the creation of these policies is worth moral scrutiny. And it is to a moral analysis of the policies that I now turn.

**The Argument of Dirty Hands**

The problem of “dirty hands,” as Michael Walzer argues in his article “Political Action: The Problem of Dirty Hands,” has to do with the apparent impossibility
of maintaining one’s innocence in the face of the kinds of decisions that one must make as a politician. The term “dirty hands” comes from Jean-Paul Sartre’s play of that name, in which Hoederer, a revolutionary, contrasts his own willingness to do evil for the sake of a better world with another character’s belief that one can “govern innocently.” Walzer writes: “I don’t think I could govern innocently; nor do most of us believe that those who govern us are innocent, . . . even the best of them. But this does not mean that it isn’t possible to do the right thing while governing. It means that a particular act of government (in a political party or in the state) may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong. The innocent man, afterwards, is no longer innocent.”

To “govern innocently,” to keep one’s hands clean in political life, would require one to abandon many of the central responsibilities of a political leader. The role of the politician is to serve the public and not his or her own personal moral predilections. He or she must do that which is necessary for the sake of their constituents. This includes the usual mundane and unpleasant political tasks of taxation, regulation, legislation, and so on. But it also involves, more troublingly, the willingness to use violence in the exercise of political power. “The sheer weight of official violence in human history does suggest the kind of power to which politicians aspire,” argues Walzer, “the kind of power they want to wield. . . . The men who act for us and in our name are often killers, or seem to become killers too quickly and too easily.”

The paradox of political life, Walzer argues, is that many enter it in order to do good. Yet, they may succeed in political life, and do the good they set out to do, only if they learn, in Machiavelli’s phrase, “how not to be good.” “Sometimes it is right to try to succeed, and then it must also be right to get one’s hands dirty,” writes Walzer. “But one’s hands get dirty from doing what it is wrong to do. And how can it be wrong to do what is right? Or, how can we get our hands dirty by doing what we ought to do?”

To illustrate the point, Walzer proposes an example that has become exceedingly well known—and is directly germane to U.S. policies in the war on terror. He imagines a politician who is pledged to a policy of bringing about peace in a war-torn region: “The first decision the new leader faces is this: he is asked to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings around the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of the people who might otherwise die in the explosions—even though he believes that torture is wrong, indeed abominable, not just sometimes, but always. He had expressed this belief often and angrily during his own campaign; the rest of us took it as a sign of his goodness. How should we regard him now? (How should he regard himself?)”
This “ticking-time-bomb” scenario has become part of the vocabulary of moral reasoning about torture. But most popular treatments of this dilemma leave out most of Walzer's moral nuance. The question that he is asking is not only “Is this the right thing to do?” but also “Does the politician incur guilt for doing it?” Many times the debate over these issues focuses on the first question and totally ignores the second.

Yet Walzer has neatly stacked the deck in favor of the decision to torture. Consider: The circumstances are deadly. Many people will be killed if the politician refuses to engage in an act of torture. The rebel leader “knows or probably knows” the location of the bombs. And most important, there is a time constraint. They need the answer immediately or people will die. Given the circumstances, it is hard to come up with a convincing argument against torturing this person in this case. There is simply no time to engage in subtler (and arguably more effective) means of extracting the information. It is a matter of torturing one guilty person or allowing many innocent persons to die.

This exigency is important for the case that Walzer is trying to make. The protagonist in Walzer's story is indisputably good and is indisputably dedicated to bringing about a peaceful end to the insurgency. Furthermore, the act that the protagonist authorizes is indisputably evil, as Walzer says, “not just sometimes, but always.” The fact that a good person can, and sometimes must, engage in such acts is part of the very nature of politics. The responsible politician must incur guilt in the furtherance of noble ends or else refrain from entering politics altogether. “When he ordered the prisoner tortured,” according to Walzer, “he committed a moral crime. His willingness to acknowledge and bear (and perhaps to repent and do penance for) his guilt is evidence, and it is the only evidence that he can offer us, both that he is not too good for politics and that he is good enough. Here is the moral politician: It is by his dirty hands that we know him.”

The validity of this argument hinges on the acceptance of the idea that there can be acts that produce a good effect (preventing an act of terrorism), which are nevertheless abominable in themselves (torturing prisoners). Absent this presumption, the kind of moral quandary that Walzer is attempting to illustrate simply does not arise. Either the good effect justifies the act, or the abominable act negates the good effect. Walzer wants to hold these two poles in tension. The moral politician is the one who must not flinch from the necessary act but does not make a moral fig leaf of necessity, acknowledging responsibility while contemplating his dirty hands.

According to Walzer, one cannot plead that the state of emergency overrides the ordinary moral rules by which we live, nor argue on utilitarian grounds that the greatest good is served by our actions. It is the testimony of one's guilty conscience, and the suffering that such guilt entails, that gives credence to the possibility that a (morally) good politician can engage in or authorize
evil acts. And yet—and this is key to Walzer's argument—the mark of morality under such circumstances is not only the testimony of the guilty conscience but also the willingness to be punished for one's acts. Referring to Albert Camus' play *The Just Assassins*, Walzer writes: "Only their execution . . . will complete the action in which they are engaged. . . . On the scaffold they wash their hands clean."\(^{37}\)

Yet Walzer acknowledges the problem with applying this example to the ordinary course of political events: "There is rarely a Czarist executioner waiting in the wings for politicians with dirty hands, even the most deserving among them."\(^{38}\) Because he does evil as a function of his office, the politician with dirty hands seldom incurs the cost of his actions. "Short of the priest and the confessional, there are no authorities to whom we might entrust the task."\(^{39}\)

Walzer’s argument ends by pointing out the paradox of any attempt to uphold standards of public responsibility. We must hold criminals responsible for their crimes, even if we benefit from those crimes. Yet, in holding them responsible, we ourselves may incur guilt. The politician, like the hero of Sartre’s play, seeks to create a better world: "Meanwhile, he lies, manipulates, and kills, and we must make sure he pays the price. We won't be able to do that, however, without getting our own hands dirty, and then we must find some way of paying the price ourselves."\(^{40}\)

A similar concern motivates Dietrich Bonhoeffer’s reflections on the subject of guilt and the ethical quandaries raised by life under Nazism. For Bonhoeffer, the central question was not one of torture but one of treason—specifically, the question of whether one was permitted to conspire to overthrow and murder a tyrant. The most direct parallel can be seen in his reflection, "After Ten Years," a circular letter he sent to several of his coconspirators in the 1943 plot to assassinate Adolf Hitler.\(^{41}\)

In this essay, portions of which were later incorporated into his *Ethics*,\(^{42}\) Bonhoeffer laments the way that Nazism has corrupted all the usual ways of framing ethical questions, and he critiques several of those methods, such as appeals to reason and conscience, freedom and virtue.\(^{43}\) Of particular interest is his comment on the limitations of "freedom" as an ethical category: "As to the man who asserts his complete freedom to stand foursquare to the world, who values the necessary deed more highly than an unspoilt conscience or reputation, who is ready to sacrifice a barren principle for a fruitful compromise, or the barren wisdom of the middle course for a fruitful radicalism—let him beware lest his freedom should bring him down. He will assent to what is bad so as to ward off something worse, and in doing so he will no longer be able to realize that the worse, which he wants to avoid, might be the better. Here we have the raw material of tragedy."\(^{44}\)

It is hard to read this passage, given the context of his own life, and not see Bonhoeffer’s admonition as applying to himself and his coconspirators. They,
like Sartre’s rebel Hoerderer, were making a conscious decision to “plunge” their hands “in filth and blood” in conspiring to assassinate Hitler; and Bonhoeffer, like Hoerderer, was not willing to indulge himself or his coconspirators in the fantasy that they were actually doing something morally pristine. Far from it. Their actions were “the raw material of tragedy.”

Nevertheless, in such boundary situations, one must accept responsibility in freedom for one’s actions. “Freedom,” writes Bonhoeffer, “exhibits itself in my accountability for my living and acting, and in the venture of concrete decision.” The parallels with Walzer continue to go deeper as Bonhoeffer develops his conception of responsibility as “vicarious representative action” in which “a person is literally required to act on behalf of others, for example as a father, as a statesman, or as the instructor of an apprentice.” Standing in the place of others, these representative figures do not act solely on their own behalf but in the name of and with regard to the good of those others.

At the same time, argues Bonhoeffer, responsibility goes hand-in-glove with freedom. And “the structure of responsible action involves both willingness to become guilty and freedom”: Precisely because and when it is responsible, because and when it is exclusively concerned about the other human being, because and when it springs from the selfless love for the real human brother or sister—it cannot seek to withdraw from the community of human guilt. Because Jesus took the guilt of all human beings upon himself, everyone who acts responsibly becomes guilty. Those who, in acting responsibly, seek to avoid becoming guilty divorce themselves from the ultimate reality of human existence; but in so doing they also divorce themselves from the redeeming mystery of the sinless bearing of guilt by Jesus Christ, and have no part in the divine justification that attends this event. They place their personal innocence above their responsibility for other human beings and are blind to the fact that precisely in so doing they become even more egregiously guilty.

Responsible action, for Bonhoeffer as well as for Walzer, entails the willingness to take on guilt. But in this regard, Bonhoeffer takes his analysis of the matter in a very different direction. Unlike Walzer, Bonhoeffer roots his analysis of freedom, responsibility, and guilt in the nature and character of Jesus Christ. Our freedom is rooted in God’s grace and forgiveness, which is in turn rooted in Christ’s own vicarious representative action on our behalf, through his incarnation and death. Our guilt, furthermore, brings us into community with Christ, who himself became guilty for our sake.

To further elaborate: The relationship between responsibility and guilt is rooted for Bonhoeffer in an understanding that there are circumstances in life that may bring us to the limit of that which is morally permissible, what he refers to as “borderline cases.” The obvious case in Bonhoeffer’s experience
is the plot to assassinate Hitler. In such cases, one's free responsibility to act vicariously on behalf of others demands that one transgress the normal boundaries of the morally permissible to perform the necessary, yet terrible, act.

At the same time, the moral boundaries that one must transgress to do so still remain. One has not, in such cases, "reset" the borderline but only crossed it into an unfamiliar and hazardous terrain. Such situations "no longer permit human reasoning to come up with a variety of exit strategies, but pose the question of the ultima ratio." Thus, argues Bonhoeffer, "the borderline case could never justify substituting chaos for the relative order that is ensured by an appropriate observance of the law." Yet, were one to refuse to cross that borderline and remain within the safe confines of the morally unobjectionable, one would not thereby escape guilt but only replace the guilt of moral transgression with the guilt of irresponsibility. Real damnation lies in the avoidance of guilt, in the failure and the refusal to take responsibility, and in the bad faith that accompanies attempts to evade the consequences of those abominable acts that flow from our free responsibility and selfless living for the sake of others. In the attempt to remain innocent, we reveal ourselves as most completely guilty.

Bonhoeffer's emphasis on the solidarity in guilt that is shared with Christ by those who act responsibly is typical of his Lutheran theological ethos, in particular his interpretation of what it means to be simul justus et peccator. The point of Christ's solidarity with the guilty is not, for Bonhoeffer, to excuse or justify their guilt, but to concretely enact God's love for human beings and to call humanity into "a life that is lived in God's love, and that means lived in reality." Living in reality, in this sense, means for Bonhoeffer the willingness to take responsibility, even in those circumstances where one is pushed beyond the borders of the moral law for the sake of others.

Whereas Walzer's analysis of the problem of dirty hands points us toward a theological solution yet finally refuses to follow it to its logical conclusion, Bonhoeffer makes an explicitly theological case both for getting one's hands dirty and for accepting guilt and the attendant consequences of one's actions. Bonhoeffer and his fellow conspirators were well aware that the consequences of their actions could very easily fall directly on them. Like Camus' just assassins, they were willing to commit an acknowledged evil and to suffer the consequences, but with the crucial difference (for Bonhoeffer at least) that they saw God with them in their actions—not in the sense of self-justification but in its opposite. God was with them in their guilt, and therefore they could accept the consequences of their actions.

The most significant moral component of this argument, both in Walzer's more secular formulation and in Bonhoeffer's explicitly theological formulation, is that only by accepting responsibility for one's actions, including the consequences that flow from those actions, can one acknowledge both the evil done and the good for which it was done. When we seek to clothe our actions in the
garb of moral rectitude, necessity, or utility, or to move the borderline in such a way as to include them, we destroy their significance and the legitimacy of our own motivations. This is what is meant by “bad faith.” And it is this move that leads us back to Abu Ghraib, Guantánamo Bay, and the U.S. policy of torture.

Bad Faith and the Justification of Torture

The thrust of the remainder of my argument will be that the United States’ torture policy, aside from any question about whether a particular act of torture can or cannot be justified by circumstances, is rooted in bad faith, as evinced through the variety of attempts to evade responsibility via the creative interpretation of the legal and ethical issues at stake. Before continuing, I want to make it clear that my intention here is not to justify torture either as a matter of policy or in any particular circumstance. I agree with Walzer that, even were I forced to admit that torture is sometimes unavoidably necessary, it would nevertheless be abominable, and the perpetrators would be morally and legally guilty. By implementing a set of policies, the goal of which is to encode the practice of torture in U.S. law while simultaneously absolving the torturers of responsibility for their actions, the Bush administration has abandoned even the semblance of moral integrity, as well as regard for international standards, treaties, and laws.

This evasion of responsibility has occurred in several ways, the first of which is the formulation of the policy itself. The memos and interoffice conversations surrounding the applicability of the Geneva Conventions to the war on terror were written not in an attempt to provide an accurate interpretation of the law but to interpret the law in such a way as to allow what the administration wanted to do.54 As Joshua Dratel writes: “Any claim of good faith—that those who formulated the policies were merely misguided in their pursuit of security in the face of what is certainly a genuine terrorist threat—is belied by the policy makers’ more than tacit acknowledgement of their unlawful purpose. Otherwise, why the need to find a location—Guantánamo Bay—purportedly outside the jurisdiction of the U.S. (or any other) courts? Why the need to ensure those participating that they could proceed free of concern that they could face prosecution for war crimes as the result of their adherence to the policy? Rarely, if ever, has such a guilty governmental conscience been so starkly illuminated in advance.”55

This lack of government conscience is the result, Dratel argues, of “a wholly result-oriented system in which policy makers start with an objective and work backward, in the process enlisting the aid of intelligent and well-credentialed lawyers who . . . all too willingly failed to act as a constitutional or moral compass that could brake their client’s descent into unconscionable behavior.”56 The result is a set of policies that undermine a carefully constructed set of checks
and balances within U.S. law that exists to limit the degree to which the executive branch can act with impunity. Where the plain sense of the law seemed to prohibit torture, the crafters of the policy argued either that the law did not mean what it seemed to say, or else that the executive branch was not bound by the law at all.\footnote{57}

A second way that the administration seeks to avoid responsibility for its policy of torture is by minimizing the definition of torture. It is certainly true, as Jean Bethke Elshtain has noted, that “if we include all forms of coercion or manipulation within ‘torture,’ we move in the direction of indiscriminate moralism and legalism.”\footnote{58} Yet there are boundaries that need to be observed far short of, to refer again to, Bybee’s formulation: “an intensity akin to that which accompanies serious physical injury such as death or organ failure.”

In the debates surrounding U.S. policy on this matter, the kinds of coercive techniques used at Guantánamo Bay and in Abu Ghraib have often been referred to as “torture lite,”\footnote{59} as a means of minimization. This includes such practices as water-boarding, a technique in which water is poured over the face of an immobilized prisoner to simulate drowning;\footnote{60} sleep-deprivation and solitary confinement;\footnote{61} and the use of “stress positions,” in which one is forced to remain in the same uncomfortable position for extended periods of time.\footnote{62}

Elshtain adopts the sanitized language of “torture lite” to describe such practices. Yet this particular combination of techniques, “sensory disorientation” and “self-inflicted pain”\footnote{63} has been documented to be psychologically and physically devastating. Referred to in the official literature as “no-touch torture,” these techniques were pioneered by the KGB and CIA in the early 1960s in a quest for more effective methods of interrogation.\footnote{64} As Alfred McCoy writes: “Although seemingly less brutal than physical methods, no-touch torture leaves deep psychological scars on both victims and interrogators. One British journalist who observed this method’s use in Northern Ireland called sensory deprivation ‘the worst form of torture’ because it ‘provokes more anxiety among the interrogatees than more traditional tortures, leaves no visible scars, and therefore, is harder to prove, and produces longer lasting effects.’ Victims often need extensive treatment to recover from injury far more crippling than mere physical pain.”\footnote{65}

One of the most widely known pictures from Abu Ghraib depicts this technique in action. It shows a man, hooded and standing on a box, arms extended with what appear to be electrical wires attached to his fingertips.\footnote{66} Add to this technique the depictions of sexual humiliation as well as the documented instances of beating and other forms of “softening up” prisoners for interrogation, and it is hard to argue that these techniques fall on the acceptable end of Elshtain’s coercion continuum.

Indeed, as Elshtain further develops her argument, she reaches the conclusion that “there is no absolute prohibition on what some call torture.”\footnote{67}
she acknowledges that “pulling out fingernails, grinding the teeth down or pulling teeth, . . . raping men or women; burning breasts, genitalia; hanging for hours from the arms; crucifying, [and] torturing the spouse or children” qualify as beyond the pale, she leaves the door open to “forms of coercion that involve ‘moderate physical pressure’ and that do no lasting physical damage.”

By minimizing these acts of torture in this way, Elshtain's argument paves the way for an escalation of cruelty beyond the limits of what she herself finds to be permissible or palatable. It is not clear why, for her, there should be any impermissible acts. If she is indeed willing to permit “moderate physical pressure” to avert a disaster, then why not permit crucifixion, rape, or the torture of a suspect's spouse or children? Once one allows for the possibility of using pain to compel compliance, it is merely a question of what qualms one has. But one need not even go that far. If the boundary of moral impermissibility in interrogation is the lasting harm done to the victim, then the forms of no-touch torture that Elshtain is willing to tolerate most certainly qualify as torture. By arguing that they require a different, less offensive name (“torture 2” or “coercive interrogation” are the names she suggests, in addition to the aforementioned “torture lite”), she shares in the bad faith of the administration's enablers of torture.

This enabling is further exacerbated by the Bush administration's cavalier attitude toward the effectiveness of torture as a tool for getting accurate information. In the ticking-time-bomb scenario, the deck is stacked in favor of committing torture: first, because the torturer “knows or probably knows” the location of the bombs; and second, because the attacks are due to take place within the day. But the deck is stacked in a third way as well, with the assumption that torture is an effective means of extracting information. The consensus among professional interrogators, however, is that such methods are generally ineffective at obtaining accurate information and may be counterproductive. What is more, such ticking-time-bomb scenarios, by opening the door to torture in such theoretically unambiguous circumstances, create the context for torture in more and more uncertain situations, as the case of Abu Zubaydah illustrates.

Abu Zubaydah was a midlevel al-Qaeda operative captured in Pakistan, along with a computer and a number of documents, including Zubaydah's diary. Before too long, CIA analysts were able to determine, first, that Zubaydah possessed very little useable intelligence information, and second, that he was severely mentally ill. Despite this knowledge, according to Ron Suskind, “the United States would torture a mentally disturbed man and then leap, screaming, at every word he uttered.”

This event is revealing for two reasons. Despite the rhetoric of the ticking time bomb, which would serve to justify acts of torture, or even “torture lite,” as Elshtain would have it, in the case of Abu Zubaydah, the United States tortured a man who was not only not unambiguously in possession of vital information...
but who was known by analysts to possess almost no information at all. The internal debates among intelligence professionals and administration appointees focused precisely on ticking-time-bomb cases, but when faced with a real life scenario, the policy they crafted led to completely gratuitous and useless acts of torture. Zubaydah is just one such case: “According to CIA sources, he was water-boarded. . . . He was beaten, though not in a way to worsen his injuries. He was repeatedly threatened, and made certain of his impending death. His medication was withheld. He was bombarded with deafening, continuous noise and harsh lights. He was, as a man already diminished by serious injuries, more fully at the mercy of interrogators than an ordinary prisoner.”

What is more, apart from providing no worthwhile intelligence, the torture of Abu Zubaydah caused a panic that may well have distracted the U.S. government from pursuing genuine leads. Suskind writes: “Under this duress, Zubaydah told them that shopping malls were targeted by al Qaeda. That information traveled the globe in an instant. Agents from the FBI, Secret Service, Customs, and various other related agencies joined the local police to surround malls. Zubaydah said banks—yes, banks—were a priority. FBI agents led officers in a race to surround and secure banks. And also supermarkets—al Qaeda was planning to blow up crowded supermarkets, several at one time. People would stop shopping. The nation’s economy would be crippled. And the water systems—a target, too. Nuclear plants, naturally. And apartment buildings.”

In the end, none of these leads actually led anywhere. But they overwhelmed the agencies responsible for investigating them: “Where should they start sniffing?” writes Suskind. “No idea. Start with everywhere.” In the end, the only valid intelligence provided by Zubaydah was obtained by interrogation without torture.

That the administration knew that Zubaydah had little accurate intelligence to give, and yet tortured him anyway, just in case, is perhaps the most damning example of the kind of bad faith that underlies the entire policy of torture as formulated by the Bush administration. Coupled with a set of legal formulations that distort the meaning of the U.S. Constitution, U.S. law, and international treaties, and and a dismissive minimization of the meaning of the term “torture” itself, it is a stunning case of avoiding genuine responsibility for one’s actions.

**Conclusion**

Walzer and Bonhoeffer both attempt to grapple with the moral ambiguity of what good people are permitted to do in those “borderline situations” where the ordinary categories of morality fail. Both recognize that the moral guilt that comes with choosing to do evil in the name of good—the “dirty hands” of
Sartre's Hoederer—can only be expiated by the acceptance of responsibility and the ownership of one's own guilt in the face of one's gravest transgressions.

The bad faith displayed by the Bush administration is rooted both in a presumption of its own moral rectitude and a conviction that only by relying on such techniques as torture can it effectively fight the war on terror. Neither presumption is valid, and the administration's attempts to manipulate U.S. law to justify its own bad acts is a demonstration that, however dirty its hands may become, it will go to great lengths to avoid washing them clean.

Notes

1. The pictures and videos that were publicly released can be viewed at www.salon.com/news/abu_graib/2006/03/14/introduction/index.html. In all, there are 279 photographs and 19 videos available for review.


4. Greenberg and Dratel, Torture Papers, 135. See also Seymour M. Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib (New York: Harper Perennial, 2004, 2005), 1. The memo continues on to note that “as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva” (emphasis added).


6. “Geneva Conventions relative to the Treatment of Prisoners of War,” article 3, section 1. It should also be noted, based on subsequent revelations about the motives for much of the abuse at Abu Ghraib, that at least some of those abuses also violated subsection (b) of article 3, section 1, which prohibits the “taking of hostages,” given that pictures were used for purposes of blackmail in order to coerce otherwise innocent former prisoners to act as informants for the U.S. military. Hersh, Chain of Command, 39.


8. Ibid., 49.

9. Ibid.

10. Ibid., 50.


12. Quoted by Greenberg and Dratel, Torture Papers, 110.

13. An interesting counterpoint to the almost exclusively anti-Geneva arguments made in this series of memos is a reply by Secretary of State Colin Powell, which points to several possible problems with the interpretation offered by Yoo, Bybee, and others, arguing that “the draft does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option.” Greenberg and Dratel, Torture Papers, 122.

15. Ibid., 51. It should be noted that the Special-Access Program itself did not per se lead to the larger policy of torture (although the open-ended implications of “do what you must” certainly imply torture as an option). However, as Hersh, *Chain of Command*, 52, notes that “the SAP was useful as long as it was under the control ‘of good well-trained guys. But politics got involved, and decisions were based on speed, and not patience,’ the former official said. ‘It’s a Greek tragedy. The guys are asking me, “When do we start blowing the whistle? When do small transgressions and physical abuse become a bigger offense? When does it cross the line from abuse of prisoners to war crimes?”’ he said.” As this quote indicates, there were multiple layers of interpretation as to the permissibility of particular kinds of prisoner treatment. “Abuse” was deemed to be permissible as long as they didn’t cross the line into the realm of “war crimes.” Yet from a moral standpoint, it is not clear that, even in exigent circumstances, such distinctions can be maintained, as I will argue below.

16. Quoted by Greenberg and Dratel, *Torture Papers*, 214; emphasis added. Of additional interest in this memo is the reiteration of a theme that can be seen as well in the Yoo memo, that of the president’s exclusive power to determine any and all actions in war as a result of his power as commander in chief. According to Bybee, “We conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President’s Commander-in-Chief powers may be unconstitutional.” In other words, Bybee argues that legislation that limits the president’s powers as commander in chief are an unconstitutional breach of executive power by the legislative branch.

17. Quoted by Hersh, *Chain of Command*, 2.

18. Ibid.

19. Ibid.

20. Ibid., 3.


23. Hersh, *Chain of Command*, 64.


25. Ibid. This involved, according to one of the accused guards, instructions from Military Intelligence to “‘Loosen this guy up for us,’ ‘Make sure he has a bad night.’ ‘Make sure he gets the treatment.’” Guards were praised when they were seen to do a good job: “The MI staffs to my understanding have been giving Graner [the supervising MP on the cell block, and one of those eventually convicted of abuse] compliments . . . statements like, ‘Good job, they’re breaking down real fast. They answer every question. They’re giving out good information.’” Hersh, *Chain of Command*, 30. Cf. “Investigation of the 800th Military Police Brigade” (i.e., “The Taguba Report”), in *Torture Papers*, ed. Greenberg and Dratel, 405–556.

27. Priest and Stephens, "Secret World."
34. Ibid., 167
35. Ibid., 167–68.
36. Ibid., 170–71.
37. Ibid., 178
38. Ibid., 179
39. Ibid.
40. Ibid., 180
42. Dietrich Bonhoeffer, Ethics (Minneapolis: Fortress Press, 2005). In the critical edition of Bonhoeffer's works, Ethics was radically overhauled, and some sections were placed into subsequent volumes. Though this possesses the virtue of presenting Bonhoeffer's work in a more critically precise way, it strips out some of the most challenging portions of the Ethics, particularly the section titled "What Does It Mean to Tell the Truth?" which is now found in the volume Conspiracy and Imprisonment 1940–1945 (Minneapolis: Fortress Press, 2006), 601–8. This essay illustrates much of what Bonhoeffer means by "free responsibility" in ethics.
44. Ibid., 5.
45. Bonhoeffer, Ethics, 257, emphasis in the original.
46. Ibid
47. Ibid., emphasis in the original.
48. Ibid., 275–76.
49. Ibid., 273
50. Ibid.
51. Ibid., 274.
52. Ibid., 232.
53. However, it should be noted, such willingness did not necessarily mean that they sought punishment. There is not evidence to suggest that either Bonhoeffer or his coconspirators had any intention of getting caught or ultimately executed for their actions. They did nevertheless recognize this as a very real possibility. Like Walzer's just assassins, they were prepared for the gallows, though by no means eager for them.
54. Anthony Lewis puts the situation succinctly "Any lawyer acting for a business must be asked by its officials, from time to time, 'Can we do this?' The lawyer understands that
the company executives want her to say 'Yes.' She is expected to spell out how the company can do what it wants to do without getting into legal trouble. That was the implicit scenario here. Lawyers were asked how far interrogators could go in putting pressure on prisoners to talk without making themselves, the interrogators, liable for war crimes. . . . They responded with the advice that American interrogators could go very far to the brink of killing prisoners—and not face legal consequences." Anthony Lewis, "Introduction," in Torture Papers, ed. Greenberg and Dratel, xiii.

56. Ibid., xxi.

57. Thus, John Yoo was able to argue that "the President has broad authority under the Commander-in-Chief Clause to take action to superintend the military that overlaps with Congress's power to create the armed forces and make rules for their regulation. . . . These independent powers of the President as Commander-in-Chief have frequently been exercised in administering justice in cases involving members of the armed forces." This enables Yoo to assert that "the President has authority to limit or qualify the application of such rules. He could exempt, for example, certain operations from their coverage, or apply some but not all of the common laws of war to this conflict. This, too, is an aspect of the President's Commander-in-Chief authority. In narrowing the scope of the substantive prohibitions that apply in a particular conflict, the President may effectively determine the jurisdiction of military courts and commissions. He could thus preclude the trials of United States military personnel on specific charges of violations of the common laws of war." He could do this, Yoo argues, irrespective of congressional oversight. See Greenberg and Dratel, Torture Papers, 78.


59. See, e.g., Mark Bowden, "The Dark Art of Interrogation," Atlantic Monthly 292, no. 3 (October 2003): 51–76. Elshtain references Bowden's account of these techniques in formulating her own argument.

60. Alfred McCoy, A Question of Torture: CIA Interrogation from the Cold War to the War on Terror (New York: Henry Holt, 2006), 59.

61. Strasser, Abu Ghraib Investigations, 178.

62. Ibid., 178.

63. McCoy, Question of Torture, 8.

64. Ibid., 7.

65. Ibid., 9. The particular techniques are documented in the Kubark Counterintelligence Interrogation Manual, published in 1963. See McCoy, Question of Torture, 10. The manual itself as well as other related documents are available at the National Security Archives website: www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/.

66. As to the physical effects of such procedures, McCoy writes of the use of such tactics by the KGB: "Instead of exotic methods, the KGB simply made victims stand still for eighteen to twenty-four hours—producing 'excruciating pain' as ankles double in size, skin becomes 'tense and intensely painful,' blisters erupt oozing 'watery serum,' heart rates sore, kidneys shut down, and delusions deepen." Much of this information is taken from a Cornell University study in which, as McCoy notes, "the authors found no reason to differentiate the 'nonviolent' KGB methods 'from any other form of torture.'" McCoy, Question of Torture, 46.


68. Ibid., 85.
69. Ibid., 86.

70. Ibid., 87.

71. Jennifer K Harbury, *Truth, Torture, and the American Way: The History and Consequences of U.S. Involvement in Torture* (Boston: Beacon Press, 2005), 162. Further, Suskind reports of the debates between CIA and FBI interrogators over the most effective methods: “What the captives didn’t expect, FBI interrogators knew from experience, was respect and judicially offered favors. Coleman and FBI interrogators had successfully plied prisoners—like Wadi al Hage, a key player in the 1998 embassy bombings, or Jamal al Fadl, a close aide to bin Laden and Zawahiri who turned into a witness-stand star—with Chinese food, porn, and in one case an operation for a captive’s wife. Agents were present when the grateful wife told her husband, ‘Now, you tell them whatever they want.’ He did.” This technique was scorned by some: “No one has time to build ‘relationships’—a word that was repugnant to those who viewed al Qaeda operatives as evil incarnate.” Ron Suskind, *The One Percent Doctrine* (New York: Simon & Schuster, 2006), 115. This view of al-Qaeda as “evil incarnate” may point to a truer motive for the enthusiastic embrace of torture by many in the administration: a desire to punish.


73. Ibid., 100.

74. Ibid., 111.

75. A case in point involves an exchange between Rolf Mowatt-Larson and Cofer Black, two administration officials involved in formulating this policy. In debating the policy with Mowatt-Larson, Black is reported to have used just such a ticking time bomb justification: “‘What about a case where a person may know something about the status of UBL and a bomb? And finding out what he knows could save a lot of lives. Then what’s your standard, buddy?’ Black pointed a finger at Mowatt-Larson. ‘What do you do then?’” See Suskind, *One Percent Doctrine*, 53.

76. Ibid., 115.

77. Ibid.

78. Ibid., 116; emphasis in the original.

79. Ibid., 116–17.
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