

POLICING, UNDERCOVER POLICING AND ‘DIRTY HANDS’: THE CASE OF LEGAL ENTRAPMENT

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I. Dirty hands (DH) and undercover policing: Nathan’s criticism

“The view often attributed to Machiavelli is that power inevitably involves doing some things that are wrongs, arising from genuine moral dilemmas. We must accept this moral residue, but we also do better not to dwell on our misdeeds. On this view, committing moral wrongs is part of the core of undercover work. The best we can do is to embrace the values we gain: in this case, the reduction of crime and the increase in security. It retains, nonetheless, a tragic element, since it is necessary that the work is performed, and those who perform it commit wrongs, thereby performing a sacrifice.” (Nathan 2017: 371)

However, Nathan introduces the model (DHM) only to side-line it as wrong (lb.):

“A public that takes on board this view of manipulative policing will correctly feel that it puts wrongful acts at the centre of police practice. The wrongs may be justified by appeal to necessity, but unease will remain. Furthermore, one can reasonably expect that the effects of an internalisation of a dirty hands ethic by agents of a practice that is inherently secretive would be to encourage further secretiveness. A belief on the part of its agents that the practice is not wrongful is more conducive to public justification.”

We qualify our focus in one important way. Our interest in this paper won’t be undercover policing *per se* but a particular method of it: *legal entrapment*. In the last part, however, we will extend our analysis to (undercover) policing in general.

Nathan argues that on the DHM of undercover policing:

- 1) The public would correctly feel that morally wrongful acts are at the centre of police practice.
- 2) Despite the justification of these acts, public unease will remain.
- 3) The police becomes, because of internalization of this ethic, even more secretive.
- 4) By contrast, the belief on the part of the police that undercover policing is not wrongful would be more conducive to publication justification.

Our focus will be on 1). We will argue that it relies on a particular dilemmatic understanding of DH that is controversial and does not apply well to legal entrapment, whereas the truth of 2) and 3) is questionable whether or not 1) is correct.

II. Legal entrapment to commit a crime: a definition (from Hill, McLeod, Tanyi 2018, forthcoming ab)

“Agent” – the entrapping party

“Target” – the party that the entrapping party intends to entrap

	A	B
1. Is the agent acting (permissibly or otherwise) in their capacity as a law-enforcement agent or their deputy?	Yes	No
2. Is the act that the agent intends the target to commit of a type that is criminal?	Yes	No

Type 1 = 1A + 2A = legal entrapment to commit a crime
Type 2 = 1B + 2A = civil entrapment to commit a crime
Type 3 = 1B + 2B = civil moral entrapment
Type 4 = 1A + 2B = legal moral entrapment

Our interest is in Type 1.

Legal entrapment to commit a crime occurs whenever:

- (i) a law-enforcement agent (or the agent's deputy), acting in an official capacity as (or as a deputy of) a law-enforcement agent, *plans* that the target perform an act;
- (ii) the act is of a type that is criminal;
- (iii) the agent *procures* the act (using solicitation, persuasion or incitement);
- (iv) the agent intends that the act should, in principle, be *traceable* to the target either by being *detectable* (by a party other than the target) or via *testimony* (including the target's confession), that is, by *evidence that would link the target to the act*;
- (v) in procuring the act, the agent intends to be enabled, or intends that a third party be enabled, *to prosecute* (or threaten to prosecute) the target for having performed the act.

(Entrapment (without the qualifier) differs from this definition in that conditions (i) and (ii) are more inclusive.)

III. Moral dilemmas, dirty hands, and legal entrapment

According to DHM, Nathan writes, the following features of a situation must be in place:

- Moral wrongs (i.e. impermissible actions) are committed.
- Genuine moral dilemmas are involved.
- A moral residue is involved that we must accept.
- The overall picture is tragic, despite a reduction in crime and an increase in security, because a moral wrong is unavoidable: a 'sacrifice' must be made to achieve these gains.

The more formal part of our analysis – the formal structure of the models – follows Kis (2008) in the depiction of the first two models. We heavily modify his third model. The application to legal entrapment – and later to (undercover) policing - is our own.

The tragic account (TRAGIC)

The agent, *S*, is bound by two moral demands that cannot simultaneously be satisfied. Whichever demand *S* disregards, *S* violates a valid, in-force demand. The dilemmatic situation is inescapable, in that even if *S* becomes involved innocently *S* cannot come out of it innocently. However *S* acts, *S* will act impermissibly and incur guilt.

The primary ingredients that never change:

A1: There is a moral demand that *S* should perform *a*, and there is a moral demand that *S* should perform *b*.

A2: *S* can satisfy each of the two demands separately.

A3: *S* cannot satisfy both demands together.

This gives us moral conflict but it doesn't give us TRAGIC. For that we must add:

A4_{TR}: Of the two demands, neither overrides the other: both emerge undefeated.

Implications:

I1_{TR}: Whichever moral demand S chooses to disregard, S violates a valid, in-force moral demand.

I2_{TR}: The dilemmatic situation is such that S may become involved in it innocently.

I3_{TR}: Once in the dilemmatic situation, S has no choice of coming out of it innocently.

I4_{TR}: Whether S performs *a* or *b*, it will be appropriate for S to feel guilty.

Issues:

1. A4^{TR} is overly restrictive, doesn't fit the normative picture of entrapment (policing).

2. Innocence lost: inescapability (by necessity or coercion) is also too restrictive.

3. What/where is the moral residue (other than phenomenological)?

Possible twist: de Wijze's (2007) version of TRAGIC – choosing the lesser evil, hence acting (overall) *rightly*, but still doing (pro tanto) *wrong*.

Issues:

1. Incoherence? (Right and wrong at the same time.)

2. How does it accommodate our original TRAGIC? (There is no right choice.)

3. Burden of proof: somehow undefeated (pro tanto) wrongness that remains but is *not* action-guiding but serves as a disvalue. Why then not RESIDUE or DIRTY?

The moral residue account (RESIDUE)

S is bound by two moral demands, to *a* and to *b*, that cannot simultaneously be satisfied. The demand to *a* overrides the demand to *b*, but the latter's normative force does not evaporate: rather, it gives rise to a derivative requirement that the target of S's act must receive redress.

As always:

A1: There is a moral demand that S should perform *a*, and there is a moral demand that S should perform *b*.

A2: S can satisfy each of the two demands separately.

A3: S cannot satisfy both demands together.

We should add, following this version of RESIDUE, a fourth assumption (Kis 2008: 253):

A4_{MR}: *a* involves a non-eliminable moral residue, and *b* either involves a non-eliminable moral residue or the demand to perform it is not overriding.

Issues:

1. Dilemma: either the residue is non-eliminable and then, by OIC, we ought not compensate. Or the residue is eliminable, but then there is nothing further to do, there is nothing tragic left.

2. Irreparable damages, when applied to entrapment (police work), is too restrictive.

3. Irreparable damage cannot be what makes a dilemma one of DH. It serves neither as necessary nor as sufficient condition.

Possible twist: Goodin (1989)'s account of compensation? It doesn't seem to be targeted at this kind of problem though, nor does it help with the dilemma above. (Or at least not obviously).

The dirty hands account (DIRTY)

S is bound by two moral demands that cannot simultaneously be satisfied. One may override the other, but this overriding does not remove the other's force. While it may be right for S to choose the lesser evil, whatever S does remains bad.

For the last time:

A1: There is a moral demand that S should perform *a*, and there is a moral demand that S should perform *b*.

A2: S can satisfy each of the two demands separately.

A3: S cannot satisfy both demands together.

On Kis's version, we have the following fourth assumption:

A4_{DH}: *a* is morally reprehensible, and *b* is either morally reprehensible or it is not morally overriding.

The way we see it, Kis builds A4_{DH} on five central ideas:

1. Moral reprehensibility: some acts are morally unacceptable in any situation.
2. Essential properties: because these acts have such properties.
3. Threshold deontology (TD): beyond a certain threshold of consequences, the act is right even if it remains morally reprehensible.
4. DHM is paradoxical: such acts are morally acceptable and unacceptable at the same time.
5. Moral phenomenology: but they are not blameless and blameworthy at the same time.

We disagree with 1 and 2 (so we switch from acts that are essentially morally reprehensible to acts that are intrinsically morally bad), and prefer to avoid 4. For these reasons, we replace A4_{DH} with:

A4_{DH*}: *a* has a morally bad aspect, and *b* either has a morally bad aspect or it is not morally overriding.

This is our preferred version of DHM. How does it fare when applied to entrapment? This depends on when the inherent moral badness is outweighed by the good consequences of entrapment. We analyse Howard's objection to entrapment as subversive of agency for illustration.

IV. Policing, Dirty Hands and Public Justification

Assume that we are right and DIRTY replaces DHM as characterized by Nathan. Accordingly, DHM would be characterized via the following list (with changes italicized):

- Acts with *morally bad aspects* are committed.
- Genuine moral dilemmas are involved.
- A moral residue is involved that we must accept.
- The overall picture is tragic, despite a reduction in crime and an increase in security, since *a moral evil is unavoidable*: a 'sacrifice' must be made to achieve these gains.

The amended criticism could then be summarized as follows (only 1) and 4) change):

- 1*) The public would correctly feel that *acts with morally bad aspects* were at the centre of police practice.
- 2) Despite the justification of these acts, public unease would remain.

- 3) The police would become, because of the internalization of this ethic, even more secretive.
- 4*) By contrast, if there were a better model for understanding the morality of undercover policing that would yield the belief on the part of its practitioners (the police) that it *did not involve acts with morally bad aspects*, that would be more conducive to public justification.

We think, however, that neither 1*) nor 4*) is a serious problem, and, partly for the reasons that support this suggestion, neither 2) nor 3) grounds a serious objection.

Concerning 1*):

1. DIRTY applies to at least in principle, not only to the comparatively exotic, and certainly specialized, domains of undercover or covert proactive policing, but also to any forceful or coercive elements of policing that are necessary to the practice of law-enforcement.
2. The observation that even everyday police practice involves morally bad aspects is innocuous, realistic, and compatible with conscientious, but morally careful, policing. To deny it would seem naïve.

Concerning 4*):

1. On our version of DIRTY, the relevant acts are not morally *wrong*, but only morally *bad*. This makes public justification easier, and perhaps much easier, than Nathan envisages.
2. Nathan emphasizes the *consequences* of embracing the ‘dirty hands’ ethic for public morale, as well as for police morale. The very ethic he targets, however, has resources in it to control these detrimental effects, and these resources centre exactly on the notion that Nathan finds detrimentally affected: public justification. That is, *exactly because* the acts involved are DH, public accountability is placed centre stage in DHM.

Concerning 2):

To the extent that the public is at ease with the idea that policing is necessary at all, the public will be, or at least ought rationally to be, at ease with the idea that the police will engage in forceful or coercive acts.

Concerning 3):

The modified DIRTY account makes increased secrecy by the police *less likely* than would a contrary account that denied that morally bad acts were an inevitable aspect of policing.

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