

ENTRAPMENT AND ITS ETHICS: A DIRTY HANDS PROBLEM?

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Oslo, 15.10.2019

I. Classification of entrapment (from Hill, McLeod, Tanyi 2018)

“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

My interest is in Type 1 but I will also remark occasionally on media entrapment (Type 2 or 3).

II. Definition of legal entrapment (from Hill, McLeod, Tanyi 2018)

Legal entrapment to commit a crime occurs whenever:

- (i) a law-enforcement agent (or their deputy), acting in their capacity as (or as a deputy of) a law-enforcement agent, *plans* that the target commit an act;
- (ii) the planned act is of a type that is criminal;
- (iii) the agent *procures* the act (by solicitation, persuasion or incitement);
- (iv) the agent intends that the target's 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 a third party to be enabled, *to prosecute or to expose the target* for having committed the act.

Entrapment (without the qualifier) differs from this definition in that condition (ii) is more inclusive. Entrapment should also be distinguished from mere temptation and virtue testing.

III. Dirty hands and legal entrapment: 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)

Main elements:

- Moral wrongs are committed;

- Genuine moral dilemmas are involved [I take this to refer to a choice situation in which the agent is confronted with moral oughts/reasons (these can be duties etc.) and whatever course she takes that will be, in some sense, morally unacceptable];
- A moral residue is involved that we must accept;
- We gain the values of reduction in crime and increase in security;
- The overall picture is tragic, though, since a moral wrong must be committed (a 'sacrifice' must be made) in order to pursue these values.

"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." (Ibid.)

Nathan's critical points:

1. (Morally) wrongful acts would be at the centre of police practice.
2. This can cause public unease.
3. The police become even more secretive and wary of public justification.

IV. How to understand the problem of dirty hands?

The tragic account (TRAGIC)
(from Kis 2008)

- A1: S ought to do *a*, and S ought to do *b*;
 A2: S can satisfy each of the two oughts separately, but
 A3: S cannot satisfy both oughts together.

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

A4^{TR}: Neither "S ought to do *a*" overrides "S ought to do *b*" nor "S ought to do *b*" overrides "S ought to do *a*". Both oughts emerge from their encounter undefeated.

Implications:

- I1^{TR}: Whichever ought S should choose to disregard, S violates a valid, in-force ought;
 I2^{TR}: the situation described by A1-A4^{TR} is such that S may become involved in it innocently,
 I3^{TR}: once in it, however, S has no choice of coming out of it innocently.
 I4^{TR}: It will be appropriate for S to feel guilty about what she does.

Problems:

1. TRAGIC may not be the correct description of most cases of legal entrapment.
2. If the agent has done wrong, then the agent, as per I3^{TR} and I4^{TR}, is not innocent but guilty and this isn't a moral remainder somehow.
3. TRAGIC is not compatible with ought-implies-can (OC): If S cannot do *a*, then it is not the case that S ought to do *a*.
4. TRAGIC also severs the ordinarily confirmed connection between blame and responsibility.

The moral residue account (RESIDUE)

Williams (1973): one ought overrides other oughts but the defeated oughts are not silenced: their force doesn't evaporate. They give rise to derivative oughts to compensate, to repair.

RESIDUE doesn't encounter the problems that beset TRAGIC, but it faces other difficulties:

1. There appear to be no place for wrongness in it – hence its tragic character can be questioned.
2. Even acting on the overriding ought amounts to acting wrongly? But it is difficult to accept that this is the relevant moral residue in question, esp. given the new kind of framework (competing *pro tanto* oughts) employed here.
3. There is also the question of how exactly compensation/reparation would look like in legal entrapment cases - could we encounter instances of legal entrapment when compensation is not feasible?

Irreparable damages? From Kis 2008:

A1: S ought to do *a*, and S ought to do *b*;

A2: S can satisfy each of the two oughts separately, but

A3: S cannot satisfy both oughts together.

A4^{MR}: At least *a* involves a non-eliminable moral residue, and *b* either involves a non-eliminable moral residue or the requirement of doing it is not overriding.

But replacing A4^{TR} with A4^{MR} produces its own problems:

1. If a damage is irreparable, i.e., if it *cannot* be repaired, then, by OC, it *ought not* be repaired. This means that the 'rediscovered' tragic element in RESIDUE begins to fade away again.
2. Although S can think of her act as morally reprehensible and feel accordingly, this gives only a very thinly tragic analysis: whatever S does, it is appropriate for her to feel bad about her choice of act. Is this enough?
3. Only those instances of legal entrapment come under this version of RESIDUE that involve irreparable damage. These surely are very rare!
4. Kis shows that reference to irreparable damage cannot be what constitutes moral dilemmas because hard choices that are not moral dilemmas can also involve irreparable damage (just imagine cases when you allow someone to die by deciding to save another and your choice is perfectly well supported by moral reasons).

V. **Must dirty handed acts be responses to moral dilemmas?**

If we side-line TRAGIC and RESIDUE, the obvious choice is to go for a non-dilemmatic reading of moral dilemmas. Take DOUBT:

A1: S ought to do *a*, and S ought to do *b*;

A2: S can satisfy each of the two oughts separately, but

A3: S cannot satisfy both oughts together.

A4^{MD}: S is uncertain whether the requirement to do *a* overrides the requirement to do *b*, or whether the requirement to do *b* overrides the requirement to do *a*, or else whether both requirements are non-overridden.

Implication:

I1^{MD}: Even if S should permissibly do *a* (or *b*), it may be appropriate for her to be haunted by doubts as to whether doing *a* (or *b*) was not wrong after all.

However, whether or not this is the correct account of the phenomenology of moral dilemmas (and there are serious doubts), it doesn't help to criticize the dirty hands model along the lines Nathan suggests. In fact, from our point of view, DOUBT throws the baby out with the bathwater.

The dirty hands account (DIRTY)

A1: S ought to do *a*, and S ought to do *b*;

A2: S can satisfy each of the two oughts separately, but

A3: S cannot satisfy both oughts together.

A4^{DH}: At least *a* is morally reprehensible, and *b* is either morally reprehensible or it is not morally overriding.

Implication:

I1^{DH}: Even if what S does is no worse than any of its alternatives, it is appropriate for S to feel remorse about her action.

Kis argues for three points:

1. An act can be right to do (hence morally acceptable) in certain circumstances and nonetheless morally reprehensible in the same circumstances.
2. Consequently, such acts are morally acceptable (because right) and morally unacceptable (because reprehensible) at the same time.
3. Although these acts are morally acceptable and unacceptable at the same time, they are not blameless and blameworthy at the same time.

DIRTY appears to be a good candidate to use for our purposes. But is it applicable to legal entrapment?

1. Do acts of legal entrapment have essential properties that make them morally reprehensible because they involve ways of treating their targets inappropriately? From literature: not unlikely.
2. Where does the threshold lie? Avoiding great harm is needed? Perhaps not.
3. This is fine if 1 and 2 turn out to be fine.

VI. **Moral wrongness without dirty hands?**

Could Nathan's criticism be saved in some other way without appealing to dirty hands?

Admirable immorality

"Acts are *admirably immoral* when they are (a) somehow great, (b) morally wrong, and (c) these two features are intrinsically connected." In contrast, "People have *dirty hands* when they perform acts that are both morally required and morally repugnant." (Curzer 2002)

Three versions:

1. Conflicts between morality and *other value systems* (religious, aesthetic etc.) Cases of legal entrapment can hardly be so construed. (Legality?)
2. Conflicts between morality and certain *role moralities*. Could we list also policemen here? Don't really like the idea of role morality; besides, dirty-hands can accommodate this.
3. *Virtue-virtue* conflicts. Curzer: when admirable immorality meets dirty hands. Ethics of care vs. ethics of justice in the case of legal entrapment?

Multi-dimensional consequentialism

Peterson (2013): there are deontic degrees – an act can be somewhat right and somewhat wrong at the same time. Applied to TRAGIC, this would mean that, indeed, all options in a moral dilemma are morally wrong but they are not equally wrong; instead, they are wrong to some (varying) extent only. Two problems with this theory. One is general, see my work with Andric (2016). The other is specific: would it be enough for Nathan's criticism if it turned out that options in a moral dilemma are wrong but, say, only to a small extent?

VII. Dirty-handed acts, public justification and the police

Let us go back to Nathan's critical points:

1. (Morally) wrongful acts at the centre of police practice.
2. This can cause public unease.
3. The police become even more secretive and wary of public justification.

Could 2 and 3 go through even if 1 is false? Perhaps!

But: could we turn around Nathan's points? Four points:

1. Since dirty-handed acts are not morally wrong, it seems that the agent would be, in some sense, accountable to her own conscience, but not to the public.
2. This is in line with some traditional accounts of the morality of the political leader: Machiavelli, Weber, even Walzer (to some extent).
3. This is naturally not enough for us. Kis: public justification is needed even if dirty-handed acts are not morally wrong. First, there is the problem of *moral corruption*. Second, *uncertainty*. Those who are more easily inclined to dirty their hands, are also more likely not to care about the fact that they might be wrong. We must avoid this happening!
4. Best solution is *public accountability*. Typical elements of a liberal (constitutional) democracy can all be mentioned here, but in the case of the police, other, less general institutional measures are also important.

If this need for public accountability stands, then Nathan's point 2 is much less of a danger. The point of public accountability is exactly to make dirty-handed acts (relatively) rare occurrences; to make sure that they are costly enough to be considered carefully before carried out.

Nathan's point 3 is trickier. While Nathan puts forward a slippery slope kind of argument, i.e., a claim about what (morally wrong acts) will cause what (secretiveness, less willingness to subject yourself to public justification), I am saying that to endorse the moral justification of dirty-handed acts is only possible if parallel to this, we also put in place a structure that makes sure that such acts are costly, rare, and well justified. It is then exactly this very (institutional) structure of public accountability that will make sure that we do not start down on the kind of slippery slope Nathan describes.

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