

The Ethics of Entrapment: A 'Dirty-Hands' Problem?

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The 'dirty hands' account

- Under the 'dirty hands' account of political power, exercising it inevitably involves situations where whatever the politician does is morally unsavoury.
- The term was taken from a play by Jean-Paul Sartre and applied to this view by Michael Walzer.



Nathan on 'dirty hands'

Christopher Nathan (2017) argues against the 'dirty hands' justification of undercover policing on the grounds that:

- (1) The public would correctly feel that morally wrongful acts were central to police practice.
- (2) The public would feel uneasy with the practice.
- (3) The police would probably become, via internalization of the 'dirty hands' ethic, even more secretive.
- (4) Public justification of undercover policing would be harder than if the police were to hold that it need not involve wrongful acts.



Two questions concerning legal entrapment

1. Does the ‘dirty hands’ account apply to legal entrapment?
2. If so, does Nathan’s criticism of it hold good?

Our answer to (1) is a tentative ‘yes’: from among three versions of the ‘dirty hands’ account set out by János Kis (2008), only one could apply to legal entrapment.

Our answer to (2) is ‘no’: when we use the correct version of the ‘dirty hands’ account, this precludes Nathan’s criticism.



What is legal entrapment?

- We set out our view in Hill, McLeod, & Tanyi (2018).
- Cases of entrapment involve:
 - a party intending to entrap, whom we call the ‘agent’,
 - and an entrapped party, whom we call the ‘target’.
- On the definition we favour, an act is one of *legal entrapment to commit a crime* (‘legal entrapment’) when the following conditions are met...



Conditions for legal entrapment

- (i) a law-enforcement agent (or deputy), acting 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* or via *testimony*, that is, by *evidence that would link the target to the act*;
- (v) in procuring the act, the agent intends that a *prosecution (or threat of prosecution)* of the target for having performed the act be possible.



Nathan on the elements of dirty hands

- Moral wrongs (i.e. impermissible actions) are committed.
- Genuine moral dilemmas are involved.
- A moral residue is involved that we must accept.
- We, and undercover agents, are encouraged not to dwell too much on their misdeeds.
- The overall picture is *tragic*, despite a reduction in crime and an increase in security, since a moral wrong must be committed (a ‘sacrifice’ must be made) to pursue these gains.



Our approach

- ‘Dirty hands’ gives a moral dilemma: every course open to the agent is *morally unsavoury*.
- ‘Morally unsavoury’ instead of ‘morally wrong’: even on the assumption that ‘dirty hands’ involves (as we say) moral dilemmas, these dilemmas are not best characterized in terms of moral wrongness.
- Following Kis (2008, Chapter 9), we now explain three dilemmatic versions of the ‘dirty hands’ account.
- In the third case, we significantly modify Kis’s discussion.



Account 1: '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.



Analysis of 'Tragic'

- 'Tragic' does not generally apply to legal entrapment.
- First, it is at least unclear that every act of legal entrapment involves the *violation* of an in-force moral demand, rather than the *trumping* of one moral demand by another.
- Secondly, legal entrapment involves the agent in *choosing* to entrap. Normally, this choice is different from the inescapable choice of classical tragic dilemmas: usually, law-enforcement agents make informed choices on entering the profession, and their choices to entrap are usually free and informed.



Account 2: 'Residue'

- S is bound by two moral demands, a and b , that cannot simultaneously be satisfied.
- Demand a overrides b , but b 's normative force does not evaporate
- b 's normative force gives rise to a derivative requirement that the target of S 's act must receive *redress*.
- Cf. Williams (1965).



Analysis of 'Residue'

- If redress is impossible then it cannot be morally required (Assumption; we don't say 'ought' *always* implies 'can').
- This dilutes the tragic element in 'Residue'.
- If, on the one hand, the damage is reparable, then no residue.
- If, on the other hand, the damage is irreparable, then a residue remains, but redress is not required (because it is impossible).
- In either case, no derivative moral demand remains that could, if violated, trigger a tragic dénouement.
- Also, it is very rare that legal entrapment renders redress impossible.



Account 3: 'Dirty' (modified)

- *S* is bound by two moral demands that cannot simultaneously be satisfied.
- One may trump the other, but this trumping does not remove the other's force.
- It may be right for *S* to choose the least bad course of action, but, for all that, that course of action remains bad.



Preliminary analysis of 'Dirty'

- Many actions, e.g. speaking sharply to someone or treading on their toes, should not be done without good reason.
- This is because these actions have a certain negative value.
- Nevertheless, this negative value can be outweighed: if we have good reason to speak sharply to someone etc., then it is permissible—not wrong—to do so.
- This act of outweighing does not remove the negative value of the actions; the actions remain bad, albeit not wrong.
- The phenomenon of 'dirty hands' arises when the least bad action is still *very* bad.



János Kis on 'Dirty'

...cases of (justified) dirty hands have their place [...] somewhere between the phenomena that properly involve guilt on the part of the agent and those where the appropriate first-person reaction is what [Bernard] Williams calls agent-regret. Guilt is not appropriate in these cases. [...] But neither is mere agent-regret appropriate [...]. Some philosophers recommend that we call the first-person emotional reaction appropriate to agents who act in moral dilemmas *remorse*, and distinguish it from guilt. [...] I also want to make a similar distinction between remorse and mere agent-regret.

Kis (2008: 265–6)



'Dirty' and legal entrapment

- We agree with Kis that in 'Dirty' the agent is right to feel remorse at having to take the course of action in question, even though taking that course is permissible (and perhaps even mandatory) in the circumstances, and that this remorse is something more than mere agent-regret but less than guilt.
- For 'Dirty' to apply to legal entrapment, the act of entrapment must be bad, but in the circumstances the least bad action, one that agents will be justified in choosing, but one for which they should feel remorse.



When is legal entrapment permissible?

- There is a balance between the level of harm averted by the entrapment and the level of inherent badness of the act.
- Entrapment is permissible only where the badness of the action is outweighed by the (overall) goodness of the consequences.
- The account is not consequentialist: the action of legal entrapment has negative value that the gains *do not nullify*.
- ‘Dirty’ not only explains why legal entrapment is sometimes permissible, but also why it is aptly regarded as a last resort.
- Legal entrapment is still bad in itself, and the fitting response to having done it is remorse.



Conclusion

- Of the three accounts surveyed, ‘Tragic’, ‘Residue’, and ‘Dirty’, only ‘Dirty’ remains generally applicable to legal entrapment.
- ‘Dirty’ avoids Nathan’s criticism by removing from the picture morally wrong acts, as opposed to bad acts.
- A viable ‘dirty hands’ model of legal entrapment remains a possibility because, unlike its rivals, the ‘Dirty’ version of the ‘dirty hands’ model of legal entrapment is both applicable and not susceptible to Nathan’s criticism.
- Can Nathan simply substitute ‘bad’ for ‘wrong’ in his criticism?
- Nathan’s criticism would seem to us less compelling in that case.



References

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