2

There is No Dilemma of Dirty Hands

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I

I will examine here the moral and political problem of dirty hands. In doing so, I will deploy and further characterize the method of ethics – with its appeal to considered judgements, and with its distinctive kind of consequentialism – which I have elucidated and defended elsewhere.[1] However, an acquaintance with those writings is not presupposed, though, of course, it would be useful. It is often argued that politicians, and others as well, must sometimes take horrible (at least, normally completely unacceptable) measures to avoid even worse evils. They must, that is, sometimes dirty their hands to do what is right. When, if ever, are they justified in doing that? And in doing that, are they guilty of committing moral crimes?

I shall take an austere line about the problem of dirty hands. Treating it as a moral problem for political leaders and for other political and moral agents as well, I shall argue that what should be done, in the horrifying circumstances in which problems of dirty hands arise with the greatest urgency, is always to seek to do the lesser evil where that is possible. The choice here – where there is a choice – is not between good and evil, right and wrong, but between evil and evil, between wrong and wrong. It is a truism that we should avoid evil altogether if we can. Often we cannot. Where we cannot, and yet when we still have some *lebensraum* to act, we should choose what we have the best reason to believe is the lesser evil.[2]

Anyone in such a circumstance with an ounce of humanity will feel anguish in so acting and very deep regret for having so acted or for condoning such acts. It is not that he should feel merely saddened. That is hardly an appropriate response. Indeed, someone who did not

feel anguish and regret in such situations would hardly count as a moral agent. But in so acting, or in condoning such acts, such an agent is not guilty of wrongdoing. He has (*pace* Michael Walzer) committed no moral crime, though, psychologically speaking, it is perhaps inevitable that he will feel guilty.[3] But to *feel* guilty is not necessarily to *be* guilty. Plenty of people feel guilty without being guilty, and plenty of others are guilty without feeling guilty. The connection is a contingent one. Where our choice is inescapably a choice between evils – where there is no third possibility – we should, as responsible moral and political agents, batten down the hatches and try to do the lesser evil. Jean-Paul Sartre's character Hoederer, in the play *Dirty Hands*, is exemplary: a paradigm of what a morally committed political agent should be in the world in which he finds himself. To try to wash one's hands, Pontius Pilate-like, of a dirty hands situation – to say, 'It is none of my business, my hands are clean', where some choice on our part might make a difference – is impossible. We do not escape responsibility by so acting. Failing to act in such a circumstance is itself an action. By so refraining, we dirty our hands just as much as, and perhaps more than, a person who acts resolutely to achieve the lesser evil, though in doing so he does horrible things. It is a conceptual confusion with unfortunate moral residues to describe the problem of dirty hands as Nagel, Walzer and Williams do.[4] They start out on what seems to me to be the right track by contending that even when our political ends are the noblest of ends, it is sometimes true that, to succeed in politics, political leaders, and frequently others as well, must get their hands dirty. That is, they will have to do things, or condone the doing of things, which in normal circumstances at least would be utterly morally impermissible. Moreover, it is sometimes right to try to succeed even in those circumstances and thus it must be right in those circumstances to get our hands dirty. Not to do so would be irresponsible and immoral, or at least a not inconsiderable moral failing, on the part of those political actors. Walzer et al. get off track, I shall argue, when they maintain that we are caught in a paradox here. This very paradox, they take it, is the problem of dirty hands. Walzer puts it thus:

> Sometimes it is right to try to succeed, and then it must be right to get one's hands dirty. 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?[5]

In certain circumstances – Hoederer-like circumstances – political agents, Walzer has it, *must do wrong to do right*. But that is, if not a contradiction, at least a paradox. It would seem that *one cannot logically do what is right by doing what is wrong*.

However, this – or so at least I shall argue – is a mistaken way to conceptualize things. Where *whatever we do or fail to do leads to the occurrence of evil or sustains it, we do not do wrong by doing the lesser evil. Indeed, we do what, everything considered, is the right thing to do: the thing we ought – through and through ought – in this circumstance to do*. In doing what we ought to do, we cannot (*pace* Walzer et al.) do wrong. We may do things that in normal circumstances would be horribly wrong, but in these circumstances of dirty hands, they are not, *everything considered*, wrong. It is difficult enough in such situations to ascertain what the lesser evil is and to steel ourselves to do it without adding insult to injury by making, artificially and confusedly, a conceptual and moral dilemma out of it as well.

II

It is a mistake to say that this is just the same old utilitarianism again and that, as we all know very well, utilitarianism is mistaken: a thoroughly inadequate moral and normative political theory. We cannot use that to dismiss the way I am arguing about dirty hands. In the contexts described, the above conception of always doing the lesser evil is, of course, *compatible* with utilitarianism, but does not *require* it. However, it may require, or at least its clear articulation will be facilitated by, what (following Brian Barry) I have characterized as *weak consequentialism*.[6] But this view is compatible with accepting, as I do and as Barry does as well, a roughly Rawlsian conception of justice as fairness, where in addition to Pareto optimality an independent principle of just distribution is required for the structuring of our institutions, if they are to be morally acceptable institutions. Unlike Rawls, I am not saying that, morally speaking, considerations of justice always override considerations of utility.[7] Normally they do, but again in certain extreme situations they do not. We should not – morally should not – Michael Kohlhaas-style, do justice though the heavens fall.[8]

However, what I am committed to denying, with such a conception, is that there are any absolute side-constraints that, where they apply, must always determine what we are to do, no matter what the consequences. The serious moral and political problem over dirty hands is not over some trumped-up moral dilemma rooted in conceptual confu-

sion, and perhaps even in moral evasiveness as well. It is over whether moral agents acting in the political sphere, including sensitive and aware moral agents, who have taken Machiavelli's lessons to heart, should always try to do the lesser evil in inescapably dirty hands situations, or whether instead they should follow Leszek Kolakowski, and a host of others, in believing that we must always stick with putatively absolute side-constraints, no matter what.[9] I shall argue, against Kolakowskian absolutism, that that is not the way to have clean hands. It is, rather, a way of evasively and irresponsibly dirtying our hands even more than we would by resolutely and intelligently seeking, in such circumstances, to do or assent to the lesser evil.

In many, perhaps most, circumstances, we cannot ascertain what the lesser evil is and, in such circumstances, we should be *morally conservative*. This is particularly evident where it is possible not to act in such a circumstance: where inaction is not itself a form of action. There, we should not do things which in normal circumstances would plainly be horrendous. Where doing nothing is possible (and not, in effect, taking a side on the issue in question), and where doing what we only have a hunch is the lesser evil would mean doing something horrendous, then we should do nothing. In such a circumstance, we should not risk doing something that normally is an unquestionably evil thing to do. In that respect, and in that context, moral conservatism is a good thing.

Similarly, where the foreseen consequences of our proposed actions or policies are opaque, and careful reasoning and investigation will not make them tolerably clear, then we should, in most circumstances, stick with the normal moral verities, that is, our firmest considered convictions. But the probable consequences are not always that opaque. More crucially, even where they are, if it is also evident enough that we will do considerable evil *no matter what we do or fail to do*, then we should act on our best hunches about where the lesser evil lies, even when our best hunches are not very good. Where so acting is a moral necessity, moral action is traumatic. There is no escaping anxiety and anguish here. This, in some circumstances, is just what the moral life is like. But to try to do nothing – as understandable as it is – is, in most circumstances of this sort, deeply morally evasive. There is the problem of how much we can expect from human beings: it is not reasonable to expect people to be saints or heroes or to try to make this a requirement for the status of moral agency. But people who can and do so act are morally admirable. Their actions are often so supererogatory that we can hardly say of others that they *ought* to so act, let alone

that they *must* so act. That is both morally sanctimonious and unreasonable. But that does not gainsay the fact that each of us, when we reflect on what we as individuals should do in such situations, will, if we are reasonably clear-headed, hold that this is what we should ideally do, if only we can summon up enough courage. Some of Sartre's and Brecht's moral heroes are persons who, though not without anguish and regret, act resolutely in dirty hands circumstances. I think, if we carefully reflect on what morality is, they will be our heroes and our exemplars too, even where we do not share their background politics.

III

It might be thought that I am begging questions and sweeping things under the rug with my conception of the lesser evil. I am assuming implicitly, it might be argued, that the lesser evil is what results in the least harm (fewer deaths, less misery or pain, less undermining of self-respect, autonomy, security, and the like). But, the objection will continue, the 'lesser evil' may not be that, but the not-doing of such plain moral evils as, for example, not violating someone's rights, not administering unjust laws, not taking (let alone shooting) hostages, not refusing to take prisoners, not lying, and the like. Where any of the rights violations that go with the doing of these forbidden things occur, we have a greater evil than if they do not. Suffering and misery are bad, but rights violations are even worse.

It seems to me that this is an implausible response. Sometimes violating someone's rights may avert a catastrophe. In this case, it seems to me, these rights should be violated. There are other sorts of examples that drive home my point. Even when, under the Nazis, it became apparent that he would be required to administer abhorrent racial laws, a German judge, appointed during the Weimar Republic, might rightly have not resigned. He might have stayed because he realized that, by applying these vile laws in a discriminatory way, he might very well be able to save lives that would not have been saved if he had been replaced by a Nazi supporter. To move to a different example, shooting a hostage and threatening to shoot others might prevent the sacking and shooting of a whole village, or at least give the villagers time to flee. (Remember the comments of Brecht, as well as Marx, on the Paris Commune.) It seems to me that there is no serious question where the lesser evil lies in situations where one might violate someone's rights to prevent a massacre. The violation of one person's

rights here is plainly a lesser evil. It is blind rights worship or rule worship not to see that.

IV

The view I take here, as I remarked, is compatible with utilitarianism but does not require it, for it is also compatible with a pluralistic deontological view of the familiar and sophisticated sort set forth by W. D. Ross and C. D. Broad. For these thinkers we start with a collection of familiar *prima facie* duties. These duties are just that: *prima facie*. They not infrequently conflict with each other, and we must determine in the particular situation in question which of these conflicting *prima facie* duties is our actual duty. There is, for such deontologists, no overriding moral rule or moral principle – no categorical imperative, no lexical ordering *prima facie* duties – which will tell us in any situation what we must do. They, like utilitarians, do not appeal to any absolute moral prohibitions that we must always act in accordance with come what may. My account, however, is incompatible with Kant's absolutism about particular moral principles, or Elizabeth Anscombe's and Alan Donagan's Christian absolutism, which maintains that there are some particular things that must never be done, no matter how much evil results from our not doing them.[10] But in rejecting such absolutism, I am not saying anything that for us now is at all iconoclastic or even unusual. Williams, Walzer and Nagel no more accept such an absolutism than do I. But I am trying to think through such a non-absolutism consistently, while still starting, as they do, with our considered convictions, and continuing to take them seriously – realizing that they are as close as we can get to a rock-bottom court of appeal in moral deliberation.

V

In so reasoning, I utilize the justificatory method of an appeal to our considered judgements in wide reflective equilibrium (a thoroughly holistic form of coherentism), and I appeal consistently with that coherentism to consequences.[11] But my consequentialism is, as I remarked, a weak consequentialism; it does not commit me to utilitananism. I shall now, expanding on what I have said elsewhere, briefly explain my consequentialism.

As we have seen, absolutism has it that there are certain things that we must never do no matter what the consequences of not doing these

things are. It will forbid certain kinds of actions, even if they produce less overall harm than the other alternatives. Torturing someone, for example, can never be justified on such an account. My *weak* consequentialism, by contrast, neither affirms nor denies that sometimes an individual may rightly refrain from doing that which will have, or may be reasonably expected to have, the best overall consequences, everything considered. I do not (*pace* G. E. Moore) argue that we have a duty to try to produce or secure the greatest overall good; I do not argue that we have a duty or an obligation to do our best to achieve either the greatest average utility in the world or the greatest total utility. I refrain, as contemporary utilitarians do not, from making such strong claims. Weak consequentialism is most usefully seen as a negative doctrine that denies (*pace* Anscombe and Donagan) that it is possible to specify a list of act-descriptions which, in terms of their very nature, can be recognized in all circumstances to be the wrong thing to do, where the wrong in question is an everything-considered wrong. My *weak* consequentialism rejects such absolutism and asserts, rather, that it all depends. Acts of a kind which we are inclined to believe would always be wrong (wrong everything considered) might very well not be if the circumstances were altered and the consequences were very different from how they usually are. *There are no acts, such as consequentialism avows, that we can rightly say never should be done without taking into consideration their circumstances and consequences*. And with such consideration of circumstances and consequences, our judgements concerning whether they can be rightly be done in some particular circumstances may shift.

'Weak consequentialists', as Barry puts it, 'hold that there is no class of cases, definable in advance, such that the consequences are never relevant to the question of what is the right thing to do.'[12] By contrast, strong consequentialism holds that there is at all times a duty to act so as to maximize the amount of good in the world. More generally, consequentialism, both weak and strong, should be conceptualized as follows: the morality of any action is to be judged by its consequences, or in part by its consequences, and not just, or perhaps not even at all, by what the action is apart from its consequences.

Weak consequentialism takes the two weaker alternatives in the above characterization; strong consequentialism the stronger alternatives. Both deny that there are any actions that, simply by virtue of what they are, regardless of their consequences, their circumstances and their relations to other actions, must be done or avoided *sans phrase*.

Pace absolutism, there can be no justified *categorical denials of permission to act to avoid the lesser evil*. There are no such *categorical prescriptivities* which are justified. My defence of doing the lesser evil in dirty hands situations even when that evil is very considerable indeed cannot be defeated by arguing that my consequentialism commits me to utilitarianism, as, it is argued, any consistent consequentialism does. There can be forms of consistent non-utilitarian consequentialism.[13] We can reject the inflexibility of moral absolutism without ending up in the straitjacket of utilitarianism. Still, with the type of appeal to consequences that I have defended, we can attend to important factors of context, circumstance and situation without committing ourselves to utilitarianism. We need not go from one inflexibility to another.

VI

Even where the government truly represents the people (if ever that obtains), there still may be dirty work for it to do, and in such a circumstance the dirty work is ours.[14] When, if ever, is it morally justified, everything considered? My answer is that it is justified where the dirty work cannot be avoided without there remaining or resulting still greater evil, everything considered, than would obtain without the government so acting. In such circumstances its 'dirty work' is morally justified, and so we have the scare quotes. If that situation does not obtain, then the dirty work is not justified and should not be morally condoned.

This doctrine is generally thought to be both too simple and too morally insensitive to be right. It is believed to smack too much of the spirit of utilitarian calculation even if it is not strictly utilitarian. In the gloss I have given it in the preceding sections, I have tried to show that it is neither too simple, nor morally insensitive, nor committed to utilitarianism or to simple reliance on utilitarian calculation. In so arguing I am running against a rather persistent orthodoxy over the problem of dirty hands articulated in sophisticated forms in some of the writings of Nagel, Walzer and Williams, previously cited. Walzer's 'Political Action: the Problem of Dirty Hands' is a particularly developed and reflective statement of such a view. I want to argue in this final section that we are not caught in the dilemma in which Walzer and others think we are caught and that he has misconceptualized the problem.

Walzer believes, as does Nagel, that sometimes we must choose between two courses of action, both of which it would be wrong for us to undertake. This obtains wherever we must choose between acting in

accordance with an important moral principle and avoiding a looming disaster. Here we have the stuff of moral tragedy. Walzer remarks that 'a particular act of government … may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong'.[15] But it becomes clear from what he later says that Walzer, like Nagel, in effect drops the above 'in utilitarian terms' and claims, more generally, that a particular government act or policy could be exactly the right thing for it to do *tout court* and yet leave the people who carry out the act or policy guilty of a grave moral wrong. It is this claim that I am resisting. For me the dirty hands *dilemma*, psychological anguish notwithstanding, is unreal. There are indeed problems about when to take normally unacceptable means, but there is no resulting moral or conceptual dilemma. For Walzer, Nagel and Williams, the alleged dilemma is very real. As Walzer puts it, the very 'notion of dirty hands derives from an effort to refuse "absolutism" without denying the reality of the moral dilemma'. I want to argue that this position, psychologically attractive as it is, is incoherent. It can, in Walzer's phrase, only 'pile confusion upon confusion'.[16]

To act politically, particularly if you are a political leader, is to put yourself into a position where you might be required to do terrible things.[17] Walzer works carefully with a key example – indeed, a realistic and not a desert island example – which he believes will strikingly confirm his account of how a morally committed politician can be caught in a moral dilemma in which *he must do wrong to do right*. I think it is a key, indeed a perfect, example for the discussion of such issues, though I shall argue that his moral dilemma account is wrong and that, in his commentary, he misdescribes and misconceptualizes what is involved.

I shall first quote his own statement of his paradigm case in full, then describe his discussion and finally try to make good my claim that he misconceptualizes the matter.

> Consider a politician who has seized upon a national crisis – a prolonged colonial war – to reach power. He and his friends win office pledged to decolonization and peace; they are honestly committed to both, though not without some sense of the advantages of the commitment. In any case, they have no responsibility for the war; they have steadfastly opposed it. Immediately the politician goes off to the colonial capital to open negotiations with the rebels. But the capital is in the grip of a terrorist campaign, and the first decision the leader faces is this: he is asked to authorize the torture of a cap-

> tured 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?)[18]

Let us assume, as I take it Walzer assumes, that there was no other way of defusing the bombs or otherwise effectively cancelling their effects, that there was no other way of extracting the information from the rebel leader in time or otherwise gaining the relevant information, that the torture ordered was no more severe or prolonged than was necessary to get the information in time, and that afterwards the rebel leader was promptly and humanely cared for. Given all this, and the case as described, both Walzer and I believe that the politician should order the torture. But Walzer believes that the politician does wrong, indeed commits a moral crime, in order to do right, while I do not.

Walzer remarks:

> 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 (and perhaps repent and do penance for) 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. Here is the moral politician: It is by his dirty hands that we know him. If he were a moral man and nothing else, his hands would not be dirty: if he were a politician and nothing else, he would pretend that they were clean.[19]

This seems to me the wrong way to think about the case and about the morally committed politician forced by circumstances to do such a terrible thing. Walzer will have it that our conscientious and morally committed politician, in ordering torture, has committed a moral crime. This politician, if he is morally serious, will know that, and 'he will not merely feel, he will know that he is guilty (and we will know it too), though he may also believe (and we may agree) that he has good reasons' for so acting.[20]

Let me first clear the decks by pointing to where there are important areas of agreement between Walzer and myself. The belief that torture is wrong and *always* wrong is something we share. I view that belief as one of our firmest and most deeply embedded considered moral convictions. It is not a conviction we are about to, or even can, abandon, if we are moral agents. We also agree that that considered conviction, and indeed any considered conviction – any deeply embedded moral principle – can be rightly overridden 'to avoid consequences that are both imminent and almost certainly disastrous'.[21] The torture case is a good example of where that condition obtains. In addition, we both believe that where the rules or principles articulating these considered convictions are rightly overridden, that overriding should be a painful process. When, in the case in question, the conscientious politician, after soul-searching, orders the torture to avoid the loss of many lives, including the lives of children, his decision to do so will still leave 'pain behind, and should do so, even after the decision has been made'.[22] He will, if he is a decent human being, feel that acutely.

About all these things we agree. Where we disagree is over his claim that the man knows he has done something wrong, that he has committed a moral crime, that he is guilty, and that perhaps he should repent and do penance, fully acknowledging his guilt. He should, I agree, feel pain, anguish and regret. He should do what he can to compensate the torture victim for the dreadful harm done to him (incommensurable as it must be), show that it is something he did not want to do and, if possible, give a clear account of his actions so that the victim, if he can be clearheaded about it, will recognize that he would have done the same if their roles had been reversed. If the politician is morally sensitive, his pain over this should be a pain that will be with him the rest of his life. It is not something he will set aside as he might do a bad dream. But guilty he is not, a moral or any other kind of criminal he is not, a person who has departed from the bounds of morality or failed to reason in accordance with the moral point of view he is not. It is, *in fine*, a mistake to say, as Walzer does, that he has done something wrong. He was not doing something which was both right and wrong; he did something which, *everything considered*, was the right thing to do in that circumstance. What he did would in almost all circumstances be an utterly impermissible, indeed a heinous and vile thing to do, but in this circumstance, as Walzer himself acknowledges, it was the right thing to do. So, *contra* Walzer, he could not have done wrong in doing it. The best succinct way of describing the situation is to say that the politician, in ordering the torture, did something

which in almost all circumstances would plainly be a very wrong thing to do indeed, but that in that circumstance, which was very extraordinary but still generalizable (universalizable), it was not wrong to do it but right.[23] (It is, of course, always at least *prima facie* wrong, but it may not always be *actually* the wrong thing to do. And thus when that obtains, it is not the wrong thing to do,)

Where the only choice is between evil and evil, it can never be wrong, and it will always be right, to choose the lesser evil. The politician in the situation described, if he is clearheaded as well as morally sensitive, will not *excuse* his behaviour, either implicitly or explicitly acknowledging guilt, but will be prepared to publicly *justify* it. Whether it is *politically expedient* to do so at a given time is a *tactical* matter and as such is another thing altogether. But it can be publicly justified and, at least in the fullness of time, it must be publicly justified. (Remember that if something cannot be *publicly justified* it cannot be justified at all.) Since the choice is such a revolting, morally enervating choice between evils, he will not be proud of it, but if he is clearheaded, he will be able to accept himself, recognizing that he has soldiered on and has done what, morally speaking, was the best thing to do under the circumstances. Doing it, and the memory of doing it, will not make him happy, will not give him a sense of satisfaction and certainly will not make him proud; but he will be able to hold his head up, realizing that he did what he had to do and that others in similar situations should do so as well if they are able to act on the most compelling moral considerations. With such an understanding, he can accept himself. He did not, when he made his choice, depart from the moral point of view; quite to the contrary, he steadfastly stuck with it where it is very hard indeed to stick with it.

VII

Walzer is aware that a response like the above could be made. But he thinks he can set it aside because he takes it to be tied up with the acceptance of utilitarianism. He argues, not implausibly, that utilitarianism has certain evident defects which make it a problematic morality. We have already seen that the lesser evil argument, while compatible with utilitarianism, is also compatible with a Rossian-type pluralist deontology, with a weak consequentialism that makes no commitment to utilitarianism, and with my own, largely coherentist account of morality, which is similar to the justice-as-fairness conception of Rawls. (The latter conception is also compatible with weak con-

sequentialism and, on my account, they work together hand in glove.[24])

It seems to me that any coherent morality will be consequence-sensitive (something I do not think Walzer would deny) and in morality we can, in some contexts, use utilitarian calculations without being utilitarians. Moreover, sometimes we not only can do it, but we should.

However, while I think that it is important (perhaps even unavoidable) to appeal to consequences in the way I specified, the core of my account about dirty hands does not even require that, *unless* all moral reasoning requires it in some contexts. But I can leave that open here. In deciding what is the lesser evil, we could perhaps treat rules such as 'Torture is wrong', 'Suffering is bad', 'Life should be protected' and 'Security should be maintained' as being rules that hold *prima facie*. Moreover, they are rules which always hold, *prima facie*. But any one of the things they say should always *prima facie* obtain, be done or be avoided, should also *actually* be done (or obtain, or be avoided) if, on reflection, we come to appreciate that of all the various principles or rules holding *prima facie* and applicable in the circumstances at hand, this is the rule or principle which has the most stringent claim on us. All of them always hold *prima facie* (not doing them, or avoiding them, is always *prima facie* wrong), but they sometimes conflict. When they do, we must simply try to 'see' (appreciate, apprehend, intuit) which moral rule or principle has, in that situation, the strongest claim. There is, on such a Rossian account, no higher rule or principle we can appeal to and there is no lexical ordering of rules; we must just reflect and come to appreciate which claim in that particular situation is the most stringent.

Thus the Rossian deontologist, in acknowledging that torture is always wrong, does not say that torture is *never* permissible as a necessary evil to avoid a still greater evil. We have a duty (*prima facie*) not to torture, but we also have a duty (*prima facie*) to prevent harm to others. The person saying that torture is not wrong in that situation, *everything considered*, need not be a utilitarian, he could be as thoroughly deontological as Ross and Broad. My account here does not have to choose between utilitarianism or other teleological views on the one hand, and deontological views on the other. What my account is incompatible with, as I have already remarked, is an absolutism such as Kolakowski's, Anscombe's or Donagan's which claims that there are some specific laws, rules or principles, such as 'Torture is always impermissible', which must be acted in accordance with, no matter what the circumstances, no matter what the consequences, no matter what

human catastrophes follow. To be consistent, such an absolutism would have to say that the politician in Walzer's example should never have ordered or condoned torture. Let the bombs go off, if they have to, and let many people be killed if there is no other way to prevent the bombs going off except by recourse to torture. That fierce absolutism is not Walzer's, Williams' or Nagel's position any more than it is mine. But it would take the establishment of such an absolutism to undermine my argument that in this situation – and it is a good paradigm for the dirty hands problem – it is a mistake to say that our politician has done something wrong, committed a moral crime, in ordering torture to achieve what is plainly right. According to such an absolutism, his ordering torture is *absolutely* morally impermissible, and is thus a moral crime. Such a moralist might even describe it as morally monstrous. However, such an absolutist, to be consistent, must agree with me that there is no moral dilemma of dirty hands, for, unlike Walzer, he will not accept that we can do right by using such an absolutely and categorically forbidden means. The politician, on this view, cannot rightly so act. But there is nothing for him to be in a *dilemma* about, though he will not infrequently be anguished by the consequences of his absolutism. Indeed, to the extent that he has much in the way of moral awareness, he will have to be anguished. Such absolutists are often Christians and, as Kierkegaard stressed, it is not easy to be a Christian. There were very few Christians of this type in what was then Christian Denmark.

VIII

Let me return to Walzer's argument from a somewhat different perspective. Whatever may be true for utilitarians, I do not take moral rules or moral principles as mere rules of thumb or guidelines to be used in trying to calculate what we should do. Moral rules are very often, as Walzer observes and as we both believe, prohibitions on our acting which none the less may be overridden in the ways we have discussed. But we also agree that in their being overridden, 'we do not talk or act as if they had been set aside, canceled, of annulled. They still stand …'[25] However, in certain circumstances they can still be overridden by another rule or principle which takes precedent over them in that situation, or by the fact that the consequences of following the rule in that situation would be disastrous.

However, this does not make moral rules *mere guidelines*, and some of the more deeply embedded ones in our moral life, such as prohibitions

against killing or torture, are not annulled or cancelled even when they are rightly overridden. 'Moral life,' as Walzer says,

> is a social phenomenon and it is constituted at least in part by rules, the knowing of which (and perhaps the making of which) we share with our fellows. The experience of coming up against these rules, challenging their prohibitions, and then explaining ourselves to other men and women is so common and so obviously important that no account of moral decision-making can possibly fail to come to grips with it.[26]

We have these moral rules; they are social prohibitions which partly constitute our morality. There would be no morality without them. They are just part of what it is for something to be a morality. Still, there are good reasons not to treat these rules as absolute, exceptionless prohibitions. And when we do not, we can also see how, without paradox or inconsistency, they can be rightly overridden *without* being annulled or set aside. When a rule in a certain circumstance is rightly overridden, it is overridden by what, in those circumstances, are more demanding moral considerations. When this obtains, the moral political agent does not do wrong to do right. Such paradox-mongering is confused. Rather, he rightly and justifiably does what, but for these special circumstances, would be the wrong (indeed, in the cases we have been discussing, monstrously wrong) thing to do. This is not relativism, subjectivism or even historicism (though it is compatible with the latter), but a thorough contextualism.[27] It all depends on the circumstances, and these will vary. But to say that is no more relativist, subjectivist or attitudinalist than it would be to say that in the Yukon people ought to have very warm clothes, but there is no good reason for people to have them in the Amazon. What determines the shift in judgement about what is appropriate or inappropriate, or about what is right or wrong, in these cases is the *objective situation itself* and not the feelings, attitudes, cultural set or perspective of the people involved. 'It all depends' and 'All is relative' are very different things. The importance of circumstance and context is vital. We are not likely to have very useful general rules for determining what is the lesser evil in any complicated case where there is a live moral issue. Philosophical generalizations are more or less useless here. But careful concrete attention to the situation will sometimes give us a good understanding of what is the lesser evil in particular cases, though at other times we simply have to act in the dark. Sometimes we should take hard means (including

means that are normally morally impermissible) to achieve morally imperative ends, but we will have very little in the way of general formula telling us when this is so. The formula 'Always do or support the lesser evil, when it is necessary to choose between evils' does not tell us very much. It is important not to lose sight of the maxim 'It all depends', while also keeping in mind that there are repetitive patterns in the problems of human life. When we know that there are several evils, not all of which can be avoided, we should always go for the lesser evil, but *what* the lesser evil is can only be determined on the scene and contextually.[28]

IX

What, in its most morally demanding form, is the problem of dirty hands? Dirty work goes on in the world (and not only in politics), and the 'foundations of kindliness,' to use Brecht's phrase, do not seem to be anywhere in sight. Maybe such a notion is like 'pie in the sky, by and by'. The problem of dirty hands in its most pressing form is this: when, if ever, are we justified in using what would in normal circumstances clearly be a morally impermissible means to achieve what is clearly a morally demanding end? The answer is that we are justified when 1) evil (e.g. killing, destruction, misery, oppression, suffering, and the like) is inescapable, and 2) we have good grounds for believing that in such circumstances using what are normally morally impermissible means will make for less evil in the world – and *not* taking those means would, most likely, plainly and immediately lead to greater evil (e.g. more deaths, destruction, misery, etc.) than would obtain from taking them. When these conditions obtain (something which may be very difficult to ascertain) we should use the otherwise impermissible means. It is in such circumstances that morality enjoins seizing the day and taking measures that otherwise would be totally unacceptable. This is not romanticism but moral non-evasiveness. There are no categorical prescriptions built into nature, including human nature, or substantive ones built into our choosing selves, whether our choices are rational, non-rational or irrational. In morality, it all depends.

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Notes

1 See Kai Nielsen, 'Rights and Consequences: It All Depends', *Canadian Journal of Law and Society* 15 (1996), and 'Philosophy within the Limits of Wide Reflective Equilibrium Alone', *Iyyun: The Jerusalem Philosophical Quarterly* 43 (1994).
2 See Nielsen, 'Rights and Consequences'.
3 Michael Walzer, 'Political Action: The Problem of Dirty Hands', *Philosophy and Public Affairs* 2 (1972/73), pp. 169–80.
4 Bernard Williams, 'A Critique of Utilitarianism', in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against*, Cambridge: Cambridge University Press, 1973; Walzer, 'Political Action'; and Thomas Nagel, *Moral Questions,* New York: Cambridge University Press, 1979, pp. 53–90, 128–41.
5 Walzer, 'Political Action', p. 164.
6 Brian Barry, *Liberty and Justice,* Oxford: Clarendon Press, 1991, pp. 40–77.
7 Kai Nielsen, *Equality and Liberty: A Defense of Radical Egalitarianism,* Totowa, NJ: Rowman & Allanheld, 1985, and 'Rights and Consequences'.
8 See Heinrich von Kleist, *Michael Kohlhaas,* New York: The New American Library, 1960.
9 Kai Nielsen, 'On the Ethics of Revolution', *Radical Philosophy* 9 (1973), and 'Violence and Terrorism: Its Uses and Abuses', in Burton M. Leiser (ed.), *Values in Conflict,* New York: Macmillan, 1981.
10 G. E. M. Anscombe, *Ethics, Religion and Politics,* Minneapolis: University of Minnesota Press, 1981, and Alan Donagan, *The Theory of Morality,* Chicago: The University of Chicago Press, 1997. For a response, see Kai Nielsen, *Ethics without God*, rev. edn., Buffalo, NY: Prometheus Books, 1990, pp. 128–62.
11 See Nielsen, 'Philosophy within the Limits', and 'Rights and Consequences'.
12 Barry, *Liberty and Justice*, p. 76.
13 R. Miller, 'Marx and Aristotle: A Kind of Consequentialism', in Kai Nielsen and S. C. Patton (eds.), *Marx and Morality,* Guelph, ON: Canadian Association for Publishing in Philosophy, 1981; Barry, *Liberty and Justice*, pp. 40–70.
14 Martin Hollis, 'Dirty Hands', *British Journal of Political Science* 12 (1982).
15 Walzer, 'Politcial Action', p. 161.
16 Walzer, Politcial Action', p. 162.
17 Walzer, Politcial Action', p. 165.
18 Walzer, Politcial Action', pp. 166–7.
19 Walzer, Politcial Action', pp. 167–8.
20 Walzer, Politcial Action', p. 174.
21 Walzer, Politcial Action', p. 171.
22 Walzer, Politcial Action', p. 174.
23 Nielsen, 'Universalizability and the Commitment to Impartiality', in Kai Nielsen, Nelson Potter and Mark Timmons (eds.), *Morality and Universality,* Dordrecht: Reidel, 1985, and 'Justice, Equality and Needs', *Dalhousie Review* 69 (1989).
24 Nielsen, 'Rights and Consequences'.
25 Walzer, Politcial Action', p. 160.
26 Walzer, Politcial Action', p. 160.

27 Kai Nielsen, *Naturalism without Foundations,* Buffalo, NY: Prometheus Books, 1996, ch. 1.

28 It might be thought that I am in a pragmatic self-contradiction here. I deny that there are any unconditional categorical prescriptives, but is not 'Choose the lesser evil' just such an unconditional categorical prescriptive? It is not, because, like 'Do good and avoid evil,' it is an empty formal 'principle' that does not, by itself, guide conduct. Where we give 'evil' content so that the above maxim, *so supplemented*, can guide conduct, we get something that is neither unconditional nor certain. That such and such is evil can perhaps always be coherently challenged. At least there never will be a contradiction in denying that so and so is evil. Unconditionality and certainty are bought at the price of emptiness. I do not say that we can prove this must be so, but I do say that when we look at how things go, including how our language-games are played, that is what we find. There is no pragmatic self-contradiction here. I am not taking a transcendental stance to prove that nothing can be transcendental. For a useful collection of contemporary essays on absolutism and its consequentialist critics, see Joram Graf Haber (ed.), *Absolutism and its Consequentialist Critics,* Lanham, MD: Rowman & Littlefield, 1994.