

Punishing ‘Dirty Hands’—Three Justifications

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Abstract Should those who get dirty hands be punished? There is strong disagreement among even those who support the existence of such scenarios. The problem arises because the paradoxical nature of dirty hands - doing wrong to do right - renders the standard normative justifications for punishment unfit for purpose. The Consequentialist, Retributivist and Communicative approaches cannot accommodate the idea that an action can be right, all things considered, but nevertheless also a categorical wrong. This paper argues that punishment is indeed appropriate for those who dirty their hands and that there are three normative justifications that can be used to support this claim. These are the justifications from ‘Catharsis’, ‘Recognition of Evil Suffered’ and ‘Causal Responsibility’. Together they provide the *sui generis* justifications for punishing dirty hands.

Keywords Dirty Hands · Punishment · Justification · Michael Walzer

The notion of ‘dirty hands’ (hereafter DH) is a puzzling one. It essentially relies on a paradoxical claim; namely, that it is possible to do wrong in order to do right. Expressed more formally, DH situations are those where it is possible (necessary in some situations, and all things considered, the justified and best option) to commit a moral wrong in order to do what is morally required. This somewhat perplexing claim, if taken seriously, raises a number of very difficult questions. Firstly, is there the conceptual space in which to coherently claim that we can do wrong and right at the same time?¹ Secondly, even if we do manage to establish the philosophical space for DH, can we offer a set of necessary and sufficient conditions for such a phenomenon so that we can distinguish DH scenarios from a host of other kinds of ethical scenarios?² Thirdly, which moral emotions do we properly associate with this paradoxical notion of DH given that neither ‘regret’ nor ‘remorse’ is

¹See Stocker (1992): Chs 1 and 2 and de Wijze (1994)

²I have in mind alternative scenarios such as acts of straightforward immorality, moral dilemmas, justified and/or inescapable moral wrongdoing. For discussions of these notions see Gowans (1994) and Gardner (2005).

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appropriate. I have argued for ‘tragic remorse’ given that we need to acknowledge genuine wrongdoing but also recognise the bravery and good done by those who get genuine DH.³

There is yet another element of the DH puzzle which is the focus of this paper. It is the question of how to justify (if at all) both punishing and praising (at the same time) those who get DH. There has been very little written on this somewhat perplexing paradoxical situation.⁴ The difficulties here are not simply pragmatic ones about who ought to carry out the punishment, and under which conditions. Nor is it the related and much vexed question of just what types of punishment and praise would be appropriate for those who get DH. Rather, the problem is a conceptual one concerning the issue of justification itself. How can we justify punishing (or praising) those who do wrong in order to do right, and are any of the standard justifications in the philosophical literature fit for purpose?

This paper sets out to answer these questions and argues following Michael Walzer *pace* Neil Levy and Tamar Meisels,⁵ that punishment is necessary for those who dirty their hands. However, the justification for inflicting such punishment cannot be made by the standard theories of punishment that dominate the philosophical literature; namely, the Consequentialist, Retributivist and Communicative positions. Rather a novel way of understanding the purpose of punishment sets out the justifications needed and I argue for three closely related accounts which I call the justifications from ‘catharsis’, ‘evil suffered’ and ‘causal responsibility’. These three justifications, whether taken severally or together provide the conceptual rationale for inflicting punishment on those who paradoxically do wrong in order to do right. In it important to make explicit here that while those who get DH ought to be both punished and praised at the same time, I only focus on the issue of punishing since its infliction demands an especially strong justification given its unpleasant and harmful nature. I begin this paper with an account of the paradoxical nature of DH actions and why it raises the conundrum about punishment that it does. This leads to a brief discussion of the three well trod influential approaches to justifying punishment which I argue are not suitable for considering DH cases. I then outline and defend my three alternative justifications.

1 DH: a brief synopsis

DH scenarios are those situations where a conscientious moral agent does wrong in order to do right. More formally, DH scenarios, following Stocker, are situations where there is an action which is ‘justified, even obligatory, but none the less wrong and shameful’.⁶ This claim that DH is part and parcel of our moral reality is strongly contested. The reason is that such claims appear to be incoherent and confused at best and fly in the face of a moral metaphysics accepted by nearly all consequentialist and deontological moral theorists. However, I shall assume (for the purposes of this paper) that DH scenarios are conceptually possible. Furthermore, I shall also assume that there is a set of necessary and sufficient conditions that identify DH scenarios and that these conditions best reflect how we approach certain kinds of intractable moral conflict or dilemmas. The defence of these assumptions against the counter claims of Consequentialists and Deontologists I have discussed at length elsewhere.⁷

³ de Wijze (2005).

⁴ The literature available focuses almost exclusively on punishment rather than praise. For an extensive, although not exhaustive, discussion of punishment and DH, see Walzer (1973), Levy (2007), Meisels (2008), Garrett (1996): ch.2, Thompson (1987):ch.3, Arendt (1958), Digeser (1998).

⁵ See Walzer (1973), Levy (2007) and Meisels (2008).

⁶ Stocker (1992): 9.

⁷ See de Wijze (1994) and (2005).

The phrase 'doing wrong to do right' captures the paradoxical nature of DH but to understand why such acts evoke both punishment and praise needs further discussion. There is no single agreed upon definition of DH. Some theorists argue that DH are those actions that result from the intractable 'means-ends' problem in politics.⁸ Others insist that DH arise from a clash between the different moral guidance given by deontological and consequentialist moral reasoning.⁹ Yet others focus on the different moral duties and obligations found in public and private moralities where the former expresses the duties of a particular public role that sometimes necessitates actions which violate private moral convictions.¹⁰ I shall use Stocker's account which essentially sidesteps these different understandings but which is compatible with any of the above definitions of DH that one finds most congenial.

Essentially then DH scenarios are circumstances where it is possible for an action to be '(1) justified, even obligatory, but (2) none the less somehow wrong'.¹¹ The predicament of DH arises for moral persons due primarily to the immoral and evil acts (or projects) of other persons.¹² When an autonomous moral agent is faced with choosing between the lesser of two evils, or forced to act so that a much-cherished moral principle will be violated, she finds that she is morally polluted by having so to act. In short, DH scenarios are those cases where agents are motivated by moral considerations to commit moral violations. Agents experience a loss of moral goodness due in part to the knowledge that in so acting they have voluntarily become part of a causal process that aids or abets an immoral/evil project. DH scenarios are particularly pernicious and morally vicious states of affairs since they co-opt good persons into voluntarily committing immoral acts or participating in immoral projects. To claim that one has DH in this context is not merely to offer a description of a feeling or sentiment that may arise due to the distastefulness of an action. It is a claim that genuine wrongdoing has taken place and that serious moral fall-out from such an action is inescapable.

As I mentioned above, the claim that it is possible to do wrong and right at the same time is strongly rejected by both consequentialist and deontological moral theorists. They insist that the right application of the appropriate moral theory (rule utilitarianism, or Kantian ethics etc.) dissolves this apparent paradox and the very existence of moral conflict/dilemmas of this kind are shown to be chimerical. However I shall simply assume that this attempt to 'dissolve' the problem fails and agree with Bernard Williams who points out that our moral reality throws up cases where for some actions, we 'have reason to approve of the outcome, and ...an agent who is able to make that choice, while conscious that there has been a "moral cost"'.¹³ The existence of genuine moral conflict, the incommensurability of cherished values, the conflicting personal and role based moral claims that press on agents seeking to act morally, sometimes give rise to moral conflict situations where it is impossible to avoid getting DH. In such situations, as Stocker points out, 'even if morality requires that that the injuries and deaths of innocents must be endured, they are matters of moral moment and matters for extreme regret'.¹⁴ When this happens, we admire and praise those who acted in this way and also we acknowledge that they must bear the moral pollution that such acts bring with them. By so acting, good persons have compromised their moral integrity and it

⁸ See Machiavelli (1997); Hampshire (1983):Ch.5 and (1978): 1–22; and Galston (1991):175–197.

⁹ See Walzer (1973), Nagel (1972) and Nielsen (1996).

¹⁰ For DH as a clash between the public and private, see Weber (1948), Hollis (1982) and Williams (1981a, b) 'Utilitarianism and moral self indulgence': 41–42.

¹¹ See Stocker (1992): 10.

¹² Whether or not DH scenarios can arise from natural events I leave aside here. For a view that natural events do give rise to DH see Goodwin (2009): ch. 7.

¹³ Williams (1981a, b) 'Moral Luck': 37.

¹⁴ Stocker (2000), 'Dirty Hands and Ordinary Life': 28.

ought to affect how we think of them and what they think of themselves for what they have become. They ought not just to feel regret since this would trivialise terrible actions and undermine the moral revulsion of the harms done. However, neither can such agents properly feel remorse, the emotion appropriate to immoral behaviour with no justification or redeeming factors. Rather, as I have argued elsewhere, they ought to feel ‘tragic-remorse’; the appropriate way of characterising the moral emotion that arises from getting DH.¹⁵

This brings us to the issue of punishment and praise for those who dirty their hands. As I mentioned earlier, I will concentrate on punishment because the infliction of punishment involves the imposition of a burdensome action such as harsh and unpleasant treatment of some kind that results in discomfort or the curtailment of rights. These are things we and the State may only do to others when properly justified.¹⁶ While praising inappropriately without proper justification also has deleterious consequences they are *ceteris paribus* less morally problematic.¹⁷

2 Punishment

The key questions that require answers with respect to a theory of punishment are:

- 1) why punish?
- 2) who do we punish?
- 3) What kinds of punishments should we inflict and what quantity would constitute the appropriate punishment for a particular action?

For the purposes of this essay I am primarily interested in (1) above since this paper argues that the standard justifications for punishment are not appropriate in DH cases and that we must and can find better alternatives. Consequently, I am not concerned with offering anything like a comprehensive overview of justifications for punishment with the different variations and nuances that have been developed in the extensive philosophical literature available.¹⁸ Even if it were possible to do this in a short paper, it would take me too far away from my present purposes. Rather, I shall argue that existing approaches are inapplicable to the DH scenarios because of the *sui generis* nature of such acts and I shall then seek to offer three alternative justifications for punishing the dirty.

Punishment then, according to Duff, ‘is typically, something intended to be burdensome or painful, imposed on a (supposed) offender for a (supposed) offence by someone with (supposedly) the authority to do so; and that punishment, as distinct from other kinds of penalty, is typically intended to express or communicate censure’.¹⁹ Different theorists tweak this definition in different ways or focus on different aspects of it but incorporate many if not all of Duff’s main points. Tasioulas, for example, endorses Duff’s definition but

¹⁵ de Wijze (2005): 463–471.

¹⁶ For an extended account of why punishment needs to be justified see Bedau et al. (2010).

¹⁷ I need to be clear here that I am not suggesting that finding a *justification* for praising those with DH is easier than finding one for punishment. The former task might prove even more difficult than a justification for punishment. However, I leave this task to another paper.

¹⁸ The literature on punishment is extensive, complex and subtle. There are the different strands of consequentialism, retributivism, and communicative theories in addition to hybrids that seek to combine the different justifications. Punishment can also be justified from a purgative or incapacitative rationale. For a taste of some of the central texts on punishment see Bennett (2008), Duff (2001), Feinberg (1970), Garvey (1999), Hart (1968), Kramer (2011), Matravers (2000), McDermott (2001): 403–432, and Von Hirsch (1998). For a useful discussion on the problems with defining punishment see Lacey (1988): 4–8.

¹⁹ Duff (2001): xiv–xv.

focuses on the communicative aspect insisting that 'the hard treatment is intended to communicate to the wrong-doer justified censure for their wrong-doing.'²⁰ Tasioulas insists that this communicative aspect is not just a condition for something to be properly called punishment, but rather that it 'is the over-arching justifying 'point' of punishment. Or to put it slightly differently, it is 'the justifying *ground* of punishment'.²¹

All justifications for punishment of whatever stripe presuppose that there has been a crime (in the legal context) and/or some form of moral wrongdoing. The philosophical literature offers three broad and different theoretical approaches to justifying punishment which are either forward or backward looking or a combination of the two.²² These approaches are roughly the Consequentialist (forward-looking), Retributivist (backward-looking) and the Communicative approaches.²³

Consequentialists justify punishment in purely instrumental terms. Punishment is justified only if it brings about certain goods or prevents certain evils. A penal system, for example, is justified if it reduces crime by reforming or incapacitating offenders and deterring possible future offenders. For Consequentialists, punishment always remains an evil and it is to be used only if it brings about a lesser evil. Retributivists, in contrast and in both their 'desert' and 'rights-based' forms, argue that those who have committed a crime (or who have acted immorally) necessitates punishment that is proportionate to the wrong done.²⁴ Punishment is an end in itself; the reassertion of the correct and legitimate moral order which has been violated by the wrongdoing. Punishment in the appropriate proportion re-establishes the moral order and needs to be administered even if from a consequentialist perspective it would not bring about certain goods or prevent certain evils.

²⁰ Tasioulas understands punishment to be 'a practice that involves (a) the deliberate infliction of hard treatment, (b) on an alleged wrong-doer, (c) because of the alleged wrongness of their conduct, (d) by someone who claims the authority to inflict it for that reason, where (e) the hard treatment is intended to communicate to the wrong-doer justified censure for their wrong-doing.' See Tasioulas (2006): 283.

²¹ Tasioulas (2006): 284. Although Duff includes an expressive element to his account he focuses on punishment as reparation or atonement. Duff insists that condemnation itself is sufficient to justify punishment on the grounds that it ought to take place even if the offender cannot repeat the violation or has already repented or is unlikely to be persuaded to act otherwise by the communicative or deterrent nature of punishment. See Duff (1998): 162. (I am indebted to Kimberly Brownlee for this point.)

²² There is a fourth approach which favours the abolition of punishment altogether but I shall not include this position largely because its focus is mostly on the abolition of legal sanctions and my focus is on the normative. As Cohen points out, 'for abolitionists ... punishment is not a solution to be justified by philosophers, allocated by lawyers and measured by criminologists. It is a problem to be solved by an imaginative quest for alternatives.' Cohen (1991): 733. For a far reaching debate on the abolitionist position and alternative to punishment see the 'Alternative to Punishment' section of the *Israeli Law Review* 1991. 25 (3–4).

²³ I say 'roughly' as I am not claiming that this threefold categorisation exhausts the different philosophical approaches to justifying punishment. What I do contend is that these three significant approaches cannot be used to justify punishing DH.

²⁴ The 'desert-based' approach argues that those who do wrong deserve to be punished while the 'rights-based' approach argues that punishment is due since those who have been wronged have had their rights violated and the punishment is necessary to correct this injustice. It is useful to examine Kant's justification for punishment as a paradigmatic Retributivist account. Kant argues that there is a 'principle of equality' which must be enforced. If a wrong is committed, this upsets the balance of the scale of justice. The person who has committed the wrong has inflicted suffering on another, and so now is herself deserving of suffering to rectify the balance. Consequently, it is necessary to punish the offender. The notions of justice and desert are clearly fundamental to Kant's justification of punishment and he does this to ensure that the punishments are proportionate and directed only at those who properly deserve such treatment. Punishing the innocent is strictly prohibited in stark contrast to what may be justified under a Consequentialist justification. Also see Kemp (1968): 89.

However, both the Consequentialist and Retributivist approaches (notwithstanding the various sophisticated adjustments made by supporters) face serious criticisms. Consequentialists fail to provide the empirical evidence that punishment does indeed bring about the lesser evil and it always remains something of a speculative affair. Furthermore, since a Consequentialist justification depends on the predicted effects of the punishment, it opens up the possibility that punishing the innocent or punishing in a disproportionate manner could be justified. For many this is unacceptable and opens the Consequentialist approach to the serious charge that it does not take the distinction between persons seriously allowing (at least in principle) for the use of persons as means to some other end.²⁵ Retributivists similarly face powerful criticisms. Essentially Retributivists of all stripes face the difficulty of adequately explaining the relationship between punishment and guilt. What is it precisely about guilt that makes punishment an appropriate and necessary response? All the explanations offered seem to require either a disputed appeal to intuitions or deeply controversial metaphysical claims or are really consequentialist arguments in disguise.²⁶

Given these and many other problems faced by the Consequentialist and Retributivist justifications for punishment (despite each having considerable intuitive appeal), there have been attempts to develop the so called 'Communicative' approach which draws on both the forward and backward-looking views. The Communicative approach, in essence, justifies punishment as the way to convey deep disapproval toward those who have acted immorally and/or criminally. Punishment conveys the message that their actions are unacceptable (backward-looking aspect of the justification) and that there needs to be repentance for acting in this way with the foregoing of similar actions in the future (the forward-looking influence). Needless to say, the Communicative approach is not without its trenchant critics either. It is not clear, for example, why the Communicative approach needs to employ punishment as such to send a message to the transgressor rather than some other means of communication. What is more, the attempt to incorporate both the forward and backward-looking aspects of the justification may result in a self-cancelling incongruity where registering disapproval undermines the aim of preventing future wrongful actions.²⁷

3 Punishing DH

My concern in this paper is not to assess the superiority or plausibility of any one of the three different philosophical justifications *vis á vis* each other. There is a rich and subtle literature already available that seeks to do this. Rather, my focus is primarily on an aspect of DH theory, specifically whether we can establish a plausible philosophical justification for punishing those who genuinely get DH. What I hope will become clear is that the three standard approaches outlined in the previous section are not capable of providing the normative justification for doing so if indeed we think that punishment is necessary. DH, as stated above, are peculiar and *sui generis* situations where autonomous agents deliberately do wrong in order to do right. For DH scenarios, the forward-looking or Consequentialist

²⁵ John Rawls famously makes this criticism of consequentialist accounts of distributive justice in his *A Theory Of Justice*. See Rawls (1971): 27–33.

²⁶ See Duff (2001): Ch. 2.

²⁷ There are different variants of the Communicative theory. Duff, for example, formulates a Monastic approach that is essentially backward-looking as it is desert based. The Communicative aspect affords no independent justification for punishment. Pluralistic variants, such as Tasioulas', are not purely desert based since justified punishment is not necessarily the same as deserved punishment. For example, the former can be reduced if the offender repents. (I am indebted to Kimberley Brownlee for bringing this to my attention).

justification is deeply problematic since punishment is defensible in order to change future behaviour and bring about the less deleterious consequences. But genuine DH scenarios are always cases where an agent has done what was needed in the circumstances to bring about the least bad consequences and if such a situation were again to arise in the future we would hope that the agent repeats her actions even though it involves (sometimes serious) wrongdoing. Indeed we are grateful for the wrongdoing as it brought about the lesser evil and we need to praise the agent for so acting in a difficult moral situation. The backward-looking or Retributivist justification does no better with cases of DH. This approach (in both its desert and rights-based forms) punishes because a wrongdoing has been committed and the agent deserves the proportionate punishment. However, the peculiarity of the DH scenario is that the agent did the wrong thing *because* it was also the right thing to do in the circumstances. Recall that central to DH scenarios is that a good person is motivated by moral reasons to commit moral violations. So to punish an agent for doing the wrong thing here means also punishing that person for doing the right thing with the right motive. To do this, it seems, is to punish an innocent person; something that is both deeply counter-intuitive and without proper justification also morally repugnant. Finally the third approach to justifying punishment, the Communicative approach, is problematic if not simply incoherent with DH situations at least as it is usually understood when applied to ordinary wrongdoing. In DH cases we need to simultaneously praise/honour and blame/punish the agent for so acting and, as Levy puts it, 'what punishment is also an expression of our honouring attitude?'²⁸ In short, despite the fact that DH acknowledge that a categorical wrong has been committed it seems that the standard justifications for punishing wrongdoers are unsuitable in such situations.

While this problem has not been widely addressed by DH theorists, in large part due to a prior concern with whether such a notion is even possible and coherent, there are two theorists, Michael Walzer and Neil Levy,²⁹ who have endeavoured to bring some clarity to this issue. While both theorists support the existence of genuine cases of DH they differ sharply on whether punishment can be justified. Walzer argues that it is both necessary and important to punish DH while Levy emphatically rejects the idea as both incoherent and immoral.

3.1 Walzer on punishing dirty hands

Walzer's contribution in his groundbreaking article 'Political Action: The Problem of Dirty Hands' vividly and enigmatically sets up the problem and is clear on at least this much; those who get DH ought to be punished.³⁰ However his justification to support this view runs the gamut of all three approaches to justifying punishment. In different places when discussing

²⁸ Levy (2007): 43.

²⁹ See Walzer (1973) and Levy (2007).

³⁰ The issue of whether it would be possible to find a legal basis for punishing DH is a difficult one. As far as I am aware, there is no room in existing criminal law theory for a case where an agent commits a justified wrong and is also the object of legal punishment. Wrongdoing accompanied by an adequate justificatory defence attracts no punishment and wrongdoing that proffers an excusatory defence is either not punished or draws a lesser punishment. DH scenarios fall between the cases of wrongdoing that ought to be punished and those with a justificatory defence that ought not to be punished. In legal terms the latter category renders the wrong done defeasible, one trumped by an undefeated reason. I am concerned with the normative rather than legal basis for punishment in this paper and my justifications for punishing DH seek to find that space which is not available in the legal framework. However this does not mean that DH can avoid legal sanction. In some cases and especially for public figures, it may be necessary. However, the legal issues raise further complications even if we could find the legal space for the idea of a justified action that nevertheless violates a categorical wrong. There is an additional problem that if such acts are committed by the legitimate authorities (politicians, police, army etc.) there may be no one (short of the priest and the confessional) to whom we could entrust with the task of punishing those with DH even if we could find the legal space for such punishment. See Walzer (1973): 179.

the three traditions of thinking about the interaction between politics and morality,³¹ Walzer helps himself to the Retributivist, Consequentialist and Communicative accounts insisting that while we uniquely and paradoxically both honour and punish those with DH, we also punish them for ‘the same reasons we punish anyone else’. Walzer makes it clear that he is not defending any particular view of punishment and even introduces a fourth possibility which justifies punishment as a form of self-punishment and expiation.³² So when discussing the ‘Ticking Bomb scenario’ and other DH cases in his 1973 article, Walzer explicitly invokes all three philosophical approaches. Firstly, Walzer offers a Retributivist account insisting that in those rare circumstances where a politician, for example, was justified in ordering torture, he nevertheless ‘committed a moral crime and he accepted the moral burden’.³³ The committing of a moral crime leaves him a guilty man and ‘we can expect more than melancholy from him now’.³⁴ Those who commit a determinate moral crime ‘must pay a determinate penalty’.³⁵ Secondly, Walzer draws on the Communicative account when he acknowledges that punishment of DH sometimes requires a social expression and social limitation since one of its main purposes is to remind us that certain actions are always wrong no matter the justification.³⁶ Thirdly, Walzer makes use of the Consequentialist approach when he argues that to prevent DH scenarios from occurring too often and too hurriedly, punishment is necessary to ensure that the stakes for so acting remain high. This serves to protect the moral (and legal) code.³⁷

Walzer’s use of the different philosophical justifications for punishing DH fails to acknowledge the critical question that needs addressing; namely, how do we justify punishing DH given its *sui generis* and paradoxical nature.³⁸ The standard approaches for justifying punishment assume that actions are either right or wrong and punishment is appropriate and justified only for wrongful actions. But with situations where the action was both wrong and right, these theories of justification are no longer suitable. The very basis on which the justification rests in each of the different approaches is fundamentally undermined. Retributivists cannot punish those who did right, Consequentialists cannot punish to change

³¹ Walzer explores three traditions of thinking about the interaction between politics and morality and each of these offers an account of the costs for getting DH; namely, the Neoclassical, Protestant and Catholic perspectives. These three approaches draw on the works of Machiavelli (1997), Weber (1948) and Camus (1958) respectively. These traditions do not offer normative justifications for punishment but rather illustrate the different ways in which the costs of DH could be experienced. The Neoclassical tradition focuses on the consequences to the individual of success and failure. There is no reward for good motives if the actions undertaken fail. A politician dirtying her hands does not risk her goodness but rather glory and power. The Protestant tradition focuses on individual suffering for committing wrongs. A politician who gets DH lives by an ‘ethic of responsibility’ and loses her soul becoming a tragic hero and suffering servant. She pays the price so that others do not need to do so. The Catholic tradition, which Walzer is inclined to endorse, rejects the Protestant approach as it focuses entirely on the inner life of the politician. Political crimes need to be socially acknowledged and the punishment socially limited. For a more detailed account of these traditions see Walzer (1973): 174–180.

³² Walzer (1973): 178. I return to this justification when I examine my justification from ‘Catharis’ below.

³³ Walzer (1973): 167.

³⁴ Walzer (1973): 167.

³⁵ Walzer (1973): 178.

³⁶ Walzer (1973): 177 puts it this way: punishment needs to be socially expressed as ‘it confirms and reinforces our sense that certain acts are wrong’.

³⁷ Walzer (1973): 179/180.

³⁸ While Walzer hints at this problem his main focus is on the politician’s role and the fact that those who get DH (especially for reasons of state) are highly unlikely to be punished for so acting. Walzer enigmatically states that if such punishment was consistently and reliably applied so that politicians could acknowledge their responsibility for violating a moral or legal rule, then DH would not be a problem. (Walzer 1973: 179.) It is not clear to me why Walzer thinks that this would solve the problem of seeking a normative basis for punishing DH. The issue of who punishes and the institutional problems with enforcing or administering punishment are practical questions that need to be considered after the justification for so acting has been settled.

future behaviour and the Communicative approach needs significant adjustment since the complexity of DH scenarios requires a different and subtle message to those who dirty their hands and the society at large. If we accept the reality of DH, then genuine cases are significantly different to cases of unjustified wrongdoing and so will be the justifications for punishment that may be warranted.

If I am correct here then that leaves two possible routes to travel. Either we can agree with Walzer that punishment of DH is necessary and seek alternative justifications, or we could adopt a different strategy and reject any need for punishment. The latter approach, with which I disagree, is championed by Neil Levy and Tamar Meisels. They accept that there are genuine cases of DH but argue that such scenarios do not require that agents be punished. I now turn to outlining and then rejecting this position in favour of seeking alternative normative justifications.

3.2 Levy (and Meisels) on DH and punishment

Apart from Walzer, Levy offers the most extensive analysis of the problem of DH and punishment. In his 'Punishing the Dirty'³⁹ Levy devotes a great deal of his article to outlining Walzer's position discussed above and then comprehensively rejecting it. Levy's arguments against the standard Consequentialist and Retributivist justifications for punishing DH focus on the paradoxical nature of DH. For example, the Consequentialist justification that punishment is needed to prevent future adverse consequences in DH situations serves to undermine itself. If the consequentialist justification is true then, as Levy points out,⁴⁰ we are committed to a wider consequentialism. And if we are committed to wider consequentialism, one that rejects the possibility of doing wrong to do right, then the DH problems disappears. So it seems that the Consequentialist approach is simply self-defeating. Walzer would clearly find this conclusion unpalatable and contrary to his core argument that those who dirty their hands ought to be punished.

Concerning the Retributivist justification, Levy argues that it is both incoherent and immoral. The incoherence arises due to an erroneous understanding of the relationship between wrongdoing and blameworthiness.⁴¹ Levy correctly points out that the wrongness of an action and the blameworthiness of the agent who so acted are not always inextricably linked. In some situations an agent who is ignorant of particular rules or who could not have reasonably predicted the outcome of her actions, may have acted wrongly but is not blameworthy. Conversely, a person can be blameworthy for acting in a certain way even if through luck her intended malevolent action resulted in a good or neutral outcome. What is important to stress here is that in order to be blameworthy, an agent must have had the option to act differently in the circumstances. If this were not possible as is the case in DH scenarios then, even if one acts wrongfully, one cannot be properly blamed for so acting. If 'one cannot avoid blame', then 'by the principle of the avoidability of blame', one is blameless.⁴² And, if one is blameless, then one does not, *pace* Walzer, deserve punishment. Levy sums his position as follows:

In dirty hands cases, therefore, blame is not appropriate, and responsibility is widely distributed, at least in democracies. If our representatives employ dirty means for our

³⁹ Levy (2007).

⁴⁰ Levy (2007): 40–41.

⁴¹ Levy relies on the distinction between first-person and second-and-third-person ascriptions of responsibility. The former is identified by the moral emotions of guilt, shame and pride. The latter are associated with blame and praise. In DH scenarios the agent is right to feel guilt and pride for having so acted but ascription of blame and praise rests with others who benefited from the action. See Levy (2007): 40.

⁴² Levy (2007): 45.

benefit, and they truly have no better alternative, they are not blameworthy, any more than we are.⁴³

Levy agrees with Walzer that we need to acknowledge the violation of important rules and values that we violate due to the ‘complex of immorality’⁴⁴ which sets the parameters for DH scenarios. But this is done by ‘confronting the events’ and ‘compensating the wronged’.⁴⁵ If there is any blame for so acting, it is widely distributed (at least in democratic societies) among all of us who benefited from the dirty acts. It is a short step to see why Levy now sees the Retributivist justification as immoral. If the Retributivist approach is indeed incoherent, then there is no justification for punishing the dirty. To do so would be an immoral practice with no redeeming qualities. Indeed, as Meisels insists, punishing an agent who has acted in good faith with the appropriate caution and with all the incumbent risks to career and reputation would be ‘not only unjustifiable...but inexcusable’. It would be equivalent to punishing the innocent and it is not ‘an irony or a paradox: it is simply wrong.’⁴⁶

Since Levy presumably does not believe it is possible to establish any alternative normative justifications for punishing the dirty, he takes the second route and rejects outright the imposition of punishment for DH actions. Levy of course may ultimately be correct about this but, it seems to me, that his (and Meisels’) decision to not look for alternative justifications rests on the uncritical acceptance of certain assumptions that underlie the standard justifications for punishment. I hope to show that there are alternative normative justifications which are available to justify punishing DH but to do this requires that we reevaluate our understanding of the relationships between responsibility, guilt, blame and punishment. (See Appendix 1). Levy holds that a necessary condition for punishment is blameworthiness and a necessary condition for blameworthiness is that an autonomous agent was able to choose otherwise. However, just as Levy is right to think that in some situations blameworthiness and responsibility can pull apart, so can punishment and our inability to avoid acting in a particular way. DH scenarios are just such cases where due to the immoral circumstances created by others, good persons are forced for moral reasons to commit moral violations. These violations are categorical wrongs and even if blame is not appropriate, there is still a need for punishment as I hope to make clear in section 4 below.

What is more, even if we were to agree with Levy that punishing the dirty is incoherent and immoral his alternative ‘solution’ for recognising the violation of categorical wrongs is puzzling. He puts it this way:

Walzer is right to insist that we must seek a way to affirm the values that necessity forced us to ignore. We best do that by confronting the events, not by ignoring them. Society should compensate the wronged, if possible, and should do so in the name of all those who bear responsibility for it. In the final analysis that means all of us.⁴⁷

⁴³ Levy (2007): 50.

⁴⁴ By ‘complex of immorality’ I mean those situations in which good persons find themselves facing options where they cannot avoid committing a categorical wrong. These situations are brought about by the immoral or evil projects of other persons.

⁴⁵ Levy (2007): 50.

⁴⁶ Meisels (2008): 173. Meisels argues that Walzer acknowledges the immorality of punishing the dirty when he states that when we so act we too get dirty hands. See Walzer (1973): 180. ‘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.’

⁴⁷ Levy (2007): 50.

But what does it mean to 'confront the events' rather than ignore them? One of the ways of doing just this is to recognize that punishment is needed and seek a justification that does not rely on the standard normative approaches to justifying punishment. Levy's rejection of punishment raises more questions than it solves. For example, how does one acknowledge those wronged? How do we compensate the tortured terrorist in Walzer's Ticking Bomb scenario? Does this involve giving him his freedom, a public apology, a monetary reward or some combination of all three? To be fair to Levy, these questions would be the subject of another paper but this said it is too easy to dismiss punishment in favour of alternatives without giving some clearer idea of what these alternatives would involve. What is more, since Levy does acknowledge the reality of DH, how would the wrongdoing be properly acknowledged if not by punishing those who so acted? Even if those who did get DH are not blameworthy, we may need to punish for other reasons because 'blameworthiness' is only one important aspect of how we understand our moral reality and how we best respond to it. The peculiar case of DH forces us to abandon the standard approaches to justifying punishment and if we are not to abandon the idea of punishing the dirty, then we need to find justificatory replacements. In section 4 I turn to three possible justifications for imposing punishment on those with DH. My hope is that each justification alone offers sufficient reason for punishing the dirty and when they are taken collectively make the argument for such punishment irresistible to those who accept the reality of such scenarios.

4 Three alternative justifications

As stated repeatedly above the standard justifications for punishment are not fit for purpose when applied to DH scenarios. The key difficulty is that all the standard justifications assume that it is impossible to do wrong and right in the same action. They further assume that punishment only attends to actions that are wrong and/or do harms. This standard view also rests on the idea that there is a body of accepted rules or values which are capable of guiding the ordinary conduct or behavior of rational autonomous agents. These agents are able to follow these rules should they choose to do so and are aware of the consequences of not doing so. The various theories of punishment then take off with either a forward looking, backward looking, communicative or some hybrid approach that justifies inflicting the punishment.⁴⁸ But some of the above assumptions are not operative in cases of DH. In such scenarios we do wrong and right in the same action, and the rules are confusing if not silent in the face of intractable moral conflicts or dilemmas. Consequently, we need to look elsewhere and the best place to begin is with what we want punishment to convey to those who commit dirty acts and those who benefit and suffer from them. Given this approach there are three possible justifications⁴⁹ which I shall call the justifications from 'catharsis', 'recognition of evil suffered' and 'causal responsibility'.

⁴⁸ See Davis (2009): 75–77. I have borrowed and modified what Davis refers to as the 'Flew-Benn-Hart definition' where punishment is concerned with institutions inflicting penalties on individuals who fail to follow a body of rules.

⁴⁹ There may be a fourth justification, which I call the justification from 'metaphysical concerns', where punishment acknowledges the complexity and moral pluralism underlying our ethical lives. One way of understanding DH is to see such acts as the inevitable consequence of unavoidable conflicting pluralist values where punishment is necessary for proper acknowledgment of this reality. For example the value of punishing those who violate categorical wrongs is pressing yet we also balk at punishing those who are blameless. (DH scenarios, for example, involve conflicting values in the same way that freedom and equality conflict in theories of justice. Too much freedom undermines equality whereas too much equality unacceptably restricts freedom.) However I decided to leave 'metaphysical concerns' aside as it is less a justification as one particular way of understanding the structural background of our moral reality of which DH is a part.

1) Justification from catharsis

In his discussion of DH and punishment Walzer raises, albeit rather briefly, what I have called the ‘cathartic’ justification.⁵⁰ Here punishment for those who get DH, especially for those who commit terrible acts such as murder or torture, serves as a means to wash the blood from their hands, to enable them to pay the price for what they have done. In so doing the agent is forgiven her wrongdoing (and she can forgive herself to become morally whole once more). To use Walzer’s terminology, she will be able to regain her soul as punishment in these circumstances enables a form of atonement through self-punishment and expiation. While I argue that the justification from ‘catharsis’ is a proper and persuasive normative basis from which to justify punishing DH, it has been proposed by others as a justification for ordinary wrongdoing. Stephen Garvey outlines and defends a similar normative justification for punishing wrongdoers in an ideal community.⁵¹ This justification is based on the view that wrongdoers need to undergo a form of secular penance in order to expiate their guilt and enable reconciliation with the community in which they live.⁵² Garvey argues that under ideal circumstances, wrongdoing leads to guilt for which the wrongdoer can and should atone. This atonement occurs when the offender undergoes expiation for her wrongdoing which involves four stages: repentance, apology, reparation and penance. When the victim of the wrongdoer sees a genuine attempt by the offender to expiate her guilt, she forgives the offender and enables reconciliation. The expiation and reconciliation together bring about atonement and heal the rift within the community caused by the wrongdoing and importantly brings the offender back into the community as a member of good standing.

While Garvey’s ‘punishment as atonement’ theory focuses solely on straightforward wrongdoing it has insights that underlie my justification as catharsis. Here punishing those with DH is justified as it provides the best means for the DH agent to reconcile herself with having committed a categorical wrong. Through a process of expiation she can acknowledge the moral pollution of the DH action, cleanse herself and become a member of good standing in the community once again. Here punishment serves as a ritual of cleansing and when the DH act was committed in a public or professional role, the punishment needs to be a public one and enforced by the appropriate authorities. Part of the process of expiating the guilt arising from a wrongdoing committed in the public sphere is to publicly acknowledge the wrongness of what has been done and publicly pay the appropriate and proportionate price for so acting. In short, a public punishment enables public forgiveness. This is especially important for politicians engaged in ‘noble cause’ corruption⁵³ or for acts which necessitated serious moral violation yet are highly praised by those who benefited from them. It is very easy for politicians to erroneously believe that the wrong they committed has no moral import because it was done for the right reasons.⁵⁴

⁵⁰ See Walzer (1973):178. Walzer refers to this cathartic purpose of punishment as ‘self-punishment and expiation’.

⁵¹ Garvey (1999): 1810–1845 offers a secular version of punishment as atonement. This justification for punishment is one that is developed for an ideal community. By ‘ideal community’ Garvey means those groups of persons who identify with each another as members of a community but also sometimes act in ways that wrong others in the community.

⁵² Justice as atonement clearly has a theological heritage and we find religious justifications of this kind at least as far back as St Anselm in the 11th Century. (Garvey (1999): 1802–3.) Recent theorists who offer secular accounts are Duff (1991) who argues for a communicative account of punishment where punishments are understood as penances. Also see Adler (1991) and Hershenov (1999) for similar approaches to justifying punishment.

⁵³ See Miller (2007).

⁵⁴ The view that doing the right thing all things considered or that the overall good (or least evil) was achieved and hence no moral violation has occurred is the standard view of deontological and and consequentialist moral theories. The justification from ‘catharsis’ is designed specifically to reject this approach by acknowledging the paradoxical nature of DH.

The catharsis justification for punishing those with DH largely (but not exclusively) focuses on the needs of those with DH, in particular their need to atone for what they have done and cleanse their hands. Note that in such cases punishment is neither required to prevent future genuine cases of DH, nor is it an attempt to change the character of the person who committed the actions.⁵⁵ Here, as pointed out above, is where the *sui generis* nature of DH is recognized. The DH actions were the right actions all things considered and we admire the agent that took the difficult decision to so act. But what the justification from catharsis also recognizes is that in committing a categorical wrong the agent needs a way of atoning for such an action and be seen to do so by the community for whom she so acted.

The catharsis emerges from the penance that is undergone by the person who gets DH. The penance also serves to communicate to the victim of the DH act that despite the necessity for so acting there is a recognition that dishonour and disrespect of their rights has occurred. This may seem odd given that the person harmed may have created the circumstances which required a good person to commit a moral violation for moral reasons. But good persons recognize that the violation of categorical wrongs must be properly acknowledged even when forced by necessity to so act. It is what enables others to recognize their goodness in such situations.⁵⁶ For example, engaging in an act of justified targeted killing may be unavoidable in order to save many lives but the recognition that such an action is morally polluting and that penance is needed for so acting is one important way to distinguish them from cases of cold blooded assassination and other forms of extra judicial killing.⁵⁷

The justification as catharsis requires punishment of DH in order to enable the agent to publicly acknowledge the moral violation, do penance and cleanse themselves. Here punishment acts as a form of therapy for the person who dirties their hands.⁵⁸ There is a retributive element as those with DH pay a proportionate price for having so acted. This justification also provides a communicative element where those who benefited from the DH action are made aware that moral violations had occurred and that atonement (albeit in a different way from ordinary wrongdoers) is being made. It also acknowledges the victims of

⁵⁵ Garvey argues that the process of expiation involves four processes: repentance, apology, reparation and penance. Of these four processes only penance applies to DH scenarios in an uncomplicated manner. Repentance for getting DH cannot be the same as repentance for the wrongdoer who ought to repudiate that aspect of their character that led to such acts accompanied by the resolve to never so act again. Similarly, the apology given is of a different order to that given by the wrongdoer who by apologising acknowledges her wrongdoing and simultaneously disowns it thereby dissociating the true self from the guilty self. (See Garvey 1999: 1816). An apology in the DH scenario is one which apologises for committing a categorical wrong in order for the community to observe that the politician (or public servant) is aware of the violation of a cherished value/rule and is aware of the moral pollution that results from such an action. Reparation for the ordinary wrongdoer involves two aspects: the material harms done and the moral wrong committed. In DH scenarios reparation is complicated by the fact that the violation of another person's rights and the material harm inflicted were the right thing to do in order to bring about the lesser evil. But the need for reparation, especially for the moral wrong committed, is important to uphold the inviolability of certain central and cherished moral values.

⁵⁶ This view is echoed by Walzer when he argues that we want a politician that is 'not too good for politics and that he is good enough'. That is, a politician who will be willing to get DH (not too good) and also be willing to pay the price for doing so (good enough). See Walzer (1973): 167–8.

⁵⁷ See de Wijze (2009) for an analysis of targeted killing as a case of DH.

⁵⁸ If the justification from catharsis does indeed act as a form of therapy is it punishment rightly understood? Does it fit with the definition of punishment offered, for example, by Duff? It seems to me that it does and that the punishment meted out to those who have DH will be burdensome or painful and imposed by an appropriate authority expressing or communicating censure. Imposing such burdens on agents with DH works as a form of therapy precisely because it is understood to be a form of punishment for so acting.

such actions by conceding that they have been morally wronged even though this was caused by the complex of immorality in which the agent found herself.

2) Justification from Evil Suffered

The second justification draws on insights taken from Raimond Gaita⁵⁹ by focusing on punishment for DH scenarios that properly illustrate the uniqueness of this situation and ‘capture the evil in it’.⁶⁰ The justifications for punishment offered by the Consequentialists and Retributivists are underpinned by a rather narrow understanding of our ethical lives. From this perspective, the primary and sole task of moral theory is to provide a reliable decision procedure on how to act in all conceivable situations.⁶¹ The moral theory establishes the right action (or demonstrates why an act is impermissible) and if agents fail to do what they ought to do, then they have committed a moral violation and punishment is the fitting, necessary, and justified response. However, this view of our moral commitments is inappropriately reductionist which undermines our moral reality and diminishes the ethical domain of our lives.

There is another important aspect to understanding human actions that are immoral or evil. An evil or immoral action, as Gaita points out, is *sui generis* in that it does ‘not remain solely with the deed or with the character of the evil-doer: it spreads beyond them to their victim’.⁶² When we correctly feel remorse for our immoral actions, what this recognises is ‘the shock of the acknowledgement of the sacred in ourselves and in our victims’.⁶³ We acknowledge the ‘special dignity’ or ‘special authority’ of the ethical. To put it in Kantian terms, we recognize that persons are ends in themselves and by acting immorally we have failed to treat them as such. The acceptance of punishment for having done wrong is the best way to demonstrate that we understand the ‘evil in the situation’ and that we recognise the humanity and importance of other human beings – even those who have sought to harm us.⁶⁴

It is noticeable that politicians and especially revolutionaries have been driven by a need to fight injustice and relieve suffering, what Arendt called a ‘passion for compassion’ (Arendt 1990)⁶⁵, have themselves often perpetrated terrible crimes. Typically, such persons dismiss the reality of DH scenarios, that there are situations, especially in politics, where some actions are justified and necessary yet also terribly wrong. They fail to see the evil in the situation they have brought about due to an adherence to a simplistic reductionist ‘right or wrong but never both’ approach. Such moral decisions can lead to the loss of humanity and the committing of terrible moral crimes even when pursuing justice or the lesser evil. For this reason the need to punish those with DH is especially important. Good persons can erroneously and too readily assuage their guilt by believing that the moral (and legal) violation was unavoidable given the choices available. It is also tempting for agents to feel no moral responsibility for such acts because those

⁵⁹ Gaita (1991): Chs. 4 and 5.

⁶⁰ Gaita (1991): 74. By drawing on Gaita’s work I don’t mean to imply that he would endorse my use of his ideas for justifying punishment in DH cases. Given Gaita’s views on the relationship between ethics and politics, I suspect he might find the very notion of DH (at least as I have construed it) problematic and so too the justifications for punishment that I offer here. (See Gaita’s ch.14 but especially his comments on Walzer’s notion of DH on 261–262.)

⁶¹ This belief in part explains why the standard deontological and consequentialist moral theories deny the existence of genuine moral dilemmas. The correct application of the preferred moral theory dissolves the *prima facie* moral conflict. It has been pointed out to me that hybrid and pluralist theories of morality and their attending views on punishment would not need to be reductionist about our ethical lives. I agree and expect that such theories are likely to be sympathetic to my account of DH and my justification from ‘evil suffered’.

⁶² Gaita (1991): 80.

⁶³ Gaita (1991): 80.

⁶⁴ Some might consider the scope of this recognition to be wide enough to encompass most higher sentient beings.

⁶⁵ Arendt (1990): 71

transgressed against are of lesser concern or because they created the circumstances which necessitated an immoral response. Punishing those with DH offers the appropriate corrective to these sorts of misunderstandings ensuring that the necessary harms done and the wrongs committed are properly understood and kept to an absolute minimum.

3) Justification from Causal Responsibility

The third justification challenges the widely accepted link between responsibility, guilt and blameworthiness which underlies Levy's rejection of punishment for those who get DH. This justification draws on a Retributivist sense of why punishment is necessary but does so without holding to certain assumptions about the link between blameworthiness and intentionality of an action. It draws on Williams' insight that we can be held responsible for actions we did not intend but which nevertheless formed an important part of the causal chain of events that resulted in some terrible harm or serious rights violation. We have an impact on the world through both our intended and unintended actions and we ought to feel the weight of our unintended actions especially if they bring about a terrible state of affairs. This is Williams' point in his 'Lorry Driver' example where he argues for a species of moral emotion he calls 'agent-regret'.⁶⁶ This is a species of regret that one can only feel towards one's own actions and it is not restricted to intentional actions. As Williams makes clear:

It can extend far beyond what one intentionally did to almost anything for which one was causally responsible in virtue of something one intentionally did.⁶⁷

The Greek tragic plays, such as Sophocles's *King Oedipus*, certainly understood and explored the impact of non-intentional actions.⁶⁸ Oedipus, as is well known, had no intention of killing his father Laius and marrying his mother Jocasta - but he did and that made all the difference. He was guilty of patricide and incest, both terrible crimes which need to be severely punished. But how is one to respond to the dreadful knowledge that one has unintentionally killed one's own father and married one's mother? For Oedipus it was self blinding and exile. He punishes himself for actions he did not intend because he properly feels the moral weight and pollution of what he has done. Oedipus need not be seen as acting irrationally, or as holding an inappropriate sense of moral pollution based on a primitive moral sensibility. Punishment may be appropriate and necessary even when one finds oneself involuntarily part of a causal chain that ends in a terrible state of affairs.⁶⁹

If this is true, then it has important implications for those who get DH. When we dirty our hands we ought to feel 'tragic-remorse' since in addition to feelings of guilt and shame we also feel anguish, pride and a strong sense of moral pollution. We feel the pollution of being complicit with the immoral actions of others and from acting in ways that violate much

⁶⁶ Williams (1981a, b) 'Moral luck': 27–29.

⁶⁷ Williams (1981a, b) 'Moral luck': 28.

⁶⁸ By 'non-intentional' here I do not mean that the each specific action was compulsive or due to outside forces that could not be resisted. Oedipus does not act like an automaton. Rather, what is meant here is that his chosen actions were inevitable given his destiny foretold by the prophecy at his birth, one which Oedipus did not choose nor could he change.

⁶⁹ Williams (1994): ch. 3 points out that any conception of responsibility for actions has four different elements: cause, intention, state and response (55.) Our actions are sometimes caused by events outside our control or knowledge. But our actions cause things to happen, and some of these outcomes were intended but often they are not. Certain outcomes that are involuntarily brought about might be regretted by the agent and/or by those who suffer from such outcomes. When this happens there is a demand for a response – a demand from the agent herself and/or by those who suffer from the action. Williams' crucial insight here is that it is entirely plausible to have such situations where there is responsibility for actions which were not intentional but brought about outcomes that are regrettable. Consequently, if our actions caused by circumstances beyond our control result in unintended harmful outcomes, we can still be held responsible for them. And if this is true, then we can justifiably punish such persons for their actions.

cherished categorical moral principles. *Pace* Levy's (and Meisels') claim that punishment in these circumstances is incoherent and unjust, it is necessary to acknowledge the wrong done and pay a proportionate price. Blameworthiness in such contexts is not dependent on the view that the agent could have done otherwise or that the responsibility for wrongful actions presupposes intended or voluntary actions. Doing something horrendous and wrong, even if unintended or strenuously but unsuccessfully resisted, leaves a moral remainder and the need for some price to be paid. While this justification for punishment rests on a retributivist sense of desert, it does not link blame and intentionality in the same way marking a significant modification from the standard retributivist justification outlined in section 2.

4) Final thoughts on the three justifications for DH

The three justifications above when taken together contain forward, backward and communicative elements but also differ significantly from the standard justifications. In DH cases punishment does *not* seek to rehabilitate the agent but it does attempt to provide a process which expiates the guilt and removes the moral pollution for violating a cherished and categorical moral prohibition. Secondly, punishing the dirty has a retributivist element to it because since the agent has committed a serious moral wrong or crime (even if they had no alternative given the options) they deserve punishment for so acting. This protects the dignity and majesty of the moral realm (and the legal system) which even when violated for the right reasons needs to be paid for through punishment. Thirdly, punishment for DH violations are *not* intended to prevent future occurrence of the specific moral violation given that it was the right thing to do and brought about the lesser evil. Rather, it seeks to communicate the seriousness of such violations and make agents carefully evaluate the necessity and wisdom of future DH actions given that so acting brings with it a serious moral cost. As Walzer points out rather vividly using religious imagery, when a good moral agent gets DH the choices are hard and painful and he pays the price not only while making them but forever after. A man doesn't lose his soul one day and find it the next.⁷⁰

This is the communicative element warning of the gravity of such acts and reminding agents to so act only when absolutely necessary.

5 Conclusion

Those who get dirty hands should be punished. I have argued *pace* Levy who holds that it is both inconsistent and immoral to punish those with dirty hands. I then offered three justifications why those with DH ought to be punished.⁷¹ Many of these arguments,

⁷⁰ Walzer (1973): 177.

⁷¹ If my justifications for punishing DH are persuasive there remains the separate and difficult question of what kinds and how much punishment would be appropriate. The justifications in themselves do not give guidance concerning the specific nature and severity of appropriate and reasonable punishments. However, there are moral boundaries constraining the nature and extent of punishments in a just liberal society which can be stated as useful general principles. (Bedau et al. 2010: section 4, for example, offer four principles for constraining the use of punishment in a just liberal society.) While this is not the place to examine these issues at length I simply state three principles that constrain punishment for DH in a liberal democratic society. To this end we can say that punishment for getting DH cannot be cruel and gratuitous nor violate the rights of agents. Secondly, it must be proportionate to the immoral or criminal act committed. And, thirdly, it must be open to an even greater degree of discretion and flexibility than cases of punishment for ordinary wrongdoing. Beyond this there is a wide variety of punishments for political agents ranging from criminal trials, electoral retaliation, social ostracism and removal of office. In some cases self-punishment such as resignation would be appropriate. For a more detailed account of such punishments see Garrett (1996): ch 2.

especially concerning the justification of punishment for DH scenarios, are uncomfortable ones requiring a deep revision of what we have long taken to be unassailable assumptions about the purpose of moral theories and the place of guilt, responsibility and punishment within them. But for all that, I contend that the justifications for which I have argued offer a better fit with our deep intuitions and reflective understanding of our moral reality of which DH scenarios are a part.

When we punish those who do wrong to do right, we do this because it is right to do so and it serves to protect us and the agent's moral standing. However it always remains an uncomfortable situation since we find ourselves in a grey zone where good persons do wrongful actions in order to prevent terrible outcomes. This leaves them morally stained and leaves us ambivalent about how we are to respond (and how the agent ought to respond) for so acting. If this is right we have no way to offer more comfortable advice than that we need to find a way to live with the duality of being both right and wrong at the same time. Martin Hollis acknowledges the strangeness of the DH phenomenon. He states at the conclusion of his article:

A paper on the art of the morally permissible cannot end tidily. If there were a clear line which marked the limit of manoeuvre, then there would finally be no Dirty Hands problem. .. It is an arena where the best is the enemy of the good, where we license our agents to pursue the good and where they can succeed, only if they operate partly beyond our ken and our control. Can some critic please find me a more comfortable conclusion?⁷²

I do not think there is a comfortable solution, something which consequentialists and deontologists claim to have and seek to impose on us. To accept their views would require us to ignore our complex moral reality and diminish our ethical lives. The price of doing that is too high and even more uncomfortable than living with ambiguity and paradox. The puzzle of DH demonstrates that sometimes our ethical lives can be complex, messy and difficult. And from this there can be no escape.⁷³

Appendix 1

The table below sets out the different ways in which the relationship between responsibility, avoidability, guilt, praise, blame and punishment might be understood. The 'Responsibility' column refers to the chosen action taken by an autonomous moral agent who does so knowing that her actions have violated an important moral value. The 'Avoidability' column refers to whether the agent could have done otherwise given the circumstances in which she finds herself (Table 1).

⁷² Hollis (1982): 398.

⁷³ I am indebted to Jeremy Barris, Chris Bennett, Kimberley Brownlee, Eve Garrard, and Mark Reiff for extensive comments on earlier versions of this paper. They have prevented me from making many elementary errors. My thanks also to Tony Coady, David Rodin, Michael Neu, Jon Quong, and the participants attending the MANCEPT one day conference on 'Terrorism and Dirty Hands' in 2011 for their useful comments. An earlier version of this paper was also read at the weekly philosophy seminar at Virginia Tech University 2011, and at the 2011 MANCEPT Political Theory Workshops. I am grateful to the participants of the philosophy seminar and the 'Dirty Hands' workshop for the many helpful suggestions and comments. I am also indebted to two anonymous reviewers for their insightful comments.

Table 1 Responsibility and Evaluation—A Summary of the Different Positions

Action	Responsibility	Avoidability	Guilt	Praise	Blame	Punishment
Ordinary wrongdoing	Yes	Yes	Yes	No	Yes	Yes
Tragic dilemma	Yes	No (natural events and some situations caused by human actions)	No	No	No	No
DH scenario (Levy)	Yes	No (situations arise because of a complex of immorality)	Yes	Yes	No	No
DH Scenario (Walzer/ de Wijze)	Yes	No (situations arise because of a complex of immorality)	Yes	Yes	No	Yes

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