

MORAL ABSOLUTISM AND THE PROBLEM OF HARD CASES

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Abstract:

In *The Theory of Morality* Alan Donagan discusses two problems recently raised for anti-consequentialist moral theories. He calls these "cases of necessity" anti "the problem of dirty hands." What is common to each is that anti-consequentialist theories seem to posit requirements the fulfillment of which sometimes results in disastrous consequences. Donagan argues that the anti-consequentialist theory which underlies the Hebrew-Christian moral tradition can avoid these problems. It is argued that Donagan's defense is inadequate. At the end of the paper what the anti-consequentialist must do to deal with these problems is discussed.

Article:

For the greater part of the last few decades consequentialists have been on the defensive, answering various well-known objections raised against their theory. Recently, however, they have launched an attack on anti-consequentialist theories, raising important new problems for those views. In response, Alan Donagan (1977) has tried to show that the moral system of the Hebrew-Christian tradition is anti-consequentialist and that it can deal adequately with these objections. In this paper I shall critically assess what Donagan has to say on this matter. In the course of my discussion of Donagan's views, I hope that I contribute to the more general debate by putting the issue in much sharper focus.

I. PHILOSOPHICAL BACKGROUND

Consequentialist (or teleological) moral theories hold that the rightness or wrongness of actions is determined solely by the value of the consequences those actions produce. According to consequentialism an act is right if and only if it produces consequences at least as good as the consequences of any alternative act open to the agent. Consequentialist theories are alike in that they require an agent to maximize the good; they differ with respect to whose good it is that the agent must maximize. The most popular consequentialist theory, utilitarianism, requires an agent to do that action which brings about the greatest balance of good over evil in the universe as a whole; that is, utilitarianism requires an agent to maximize the good of all humans or of all sentient beings. The objections to this theory are well known. Typically, opponents of utilitarianism argue that in certain circumstances the theory yields results that conflict with our considered moral judgments. Thus it is held that in certain situations the utilitarian theory will permit (and, indeed, require) an agent to punish knowingly an innocent person (Ross, 1930:56-57; Carritt, 1947:65). Similarly, critics charge that under some conditions the utilitarian theory allows for slavery or serfdom (Rawls, 1971:158-159). Most people are appalled by these judgments, and so they are inclined to have doubts about utilitarianism.

Because of considerations such as these, non-consequentialist or deontological moral theories have been thought by many to be more plausible. That is, many have been inclined to say that the moral status of an action is not determined solely by the consequences; the kind or type of action an agent performs is also morally relevant. Following this line of thought, some deontologists have adopted absolutism, the view that moral rules hold without exception. The absolutist maintains that certain actions are *always* wrong, regardless of the

consequences of not performing them. For example, it might be held that killing an innocent person is absolutely forbidden; or one might say this about the act of torture. Recently critics of such deontological theories have raised problems with these views that parallel the difficulties that consequentialists face. In extreme situations, the critics argue, we do want to say that an agent ought to do an otherwise heinous act (e.g., killing an innocent person) because failure to do so will lead to disastrous consequences (e.g., the loss of hundreds of lives). This is known as the problem of hard cases. It is a *problem* for the absolutist because many do think that in these extreme circumstances an agent *ought* to do an act that is forbidden by absolutism in order to prevent some far greater evil (or bring about some great good). The best known proponents of this objection are Kai Nielsen (1972 and 1973) and Michael Walzer (1973). They do draw different conclusions from the problem of hard cases, however. Nielsen states this problem in the context of defending his own consequentialist moral theory. Walzer, by contrast, takes these cases to show that there are genuine moral dilemmas. Moral dilemmas, for Walzer, are situations in which the political actor is doomed to do something wrong no matter what he does. They agree, however, that in certain situations there are some actions which absolutism forbids but which must, morally, be done. Hence, like utilitarianism, moral absolutism yields counterintuitive moral judgments.

II. THE PROBLEM OF HARD CASES

Alan Donagan (1977) sets out to describe and defend (his moral views embedded in the Hebrew-Christian tradition. According to Donagan the common morality of the Hebrew-Christian tradition is anti-consequentialist. He puts it forcefully when he says that this moral tradition "is outraged by the consequentialist position that...the lesser of two evils is always to be chosen" (1977:183). The reason for this is that some actions may never be done, regardless of the evil that might be prevented. The common morality of the Hebrew-Christian tradition, then, is committed to a version of moral absolutism. Donagan is well aware of the standard criticisms to which such absolutist systems have been subjected, and he wants to show that the moral theory of the Hebrew-Christian tradition can meet these objections. The problem of hard cases is one of the objections that Donagan tries to answer.

Donagan characterizes this difficulty as "the external problem of hard cases to which [common morality] gives rise" (1977:172). In particular, he distinguishes two types of hard cases. The *first* kind of problem case is one in which the person who observes the rules of common morality will suffer irreparable harm. The individual can avoid this harm only by doing what is (normally) wrong. If common morality is confronted with cases of this sort it will be worrisome because, though many people do think that agents are sometimes required to make sacrifices, a sacrifice of this magnitude is too much to require of anyone. Thus this seems to be a type of case in which an agent is permitted to disregard the restrictions of common morality. The *second* kind of hard case involves public men and women. In order to gain, keep, or exercise power, public officials must sometimes violate the moral law in the interest of the whole community. If a political actor can prevent a great evil or bring about a great good for his society only by disregarding the rules of common morality, then he is permitted to do so, or so many think, contrary to absolutism. Donagan calls the former of these situations "cases of necessity" and the latter "the problem of dirty hands" (1977:172, 180). Thus, there are cases in which it seems that one *ought* (or at least is permitted) to act contrary to the otherwise applicable rules of common morality. This is the feature which Donagan's two hard cases have in common, and, in fact, is the very feature that critics of absolutism such as Nielsen and Walzer have in mind. If the critics are right, neither absolutism nor consequentialism squares perfectly with our intuitions about particular cases; in that respect, they are on a par.

III. CASES OF NECESSITY

Donagan devotes the greater part of Chapter 6 of *The Theory of Morality* to defending the absolutist theory of the Hebrew-Christian moral tradition against the problem of hard cases. For Donagan, the fundamental principle of morality the principle underlying the Hebrew-Christian tradition— is this: "Act always so that you respect every human being, yourself and another, as being a rational creature" (1977:65). This principle and the rules that it generates are said to hold without exception. But don't cases of necessity force one to abandon these rules, at least in some circumstances? Donagan thinks not. In order to demonstrate this, he considers two examples, claiming that there is a plausible response to cases of necessity that a defender of the Hebrew-

Christian moral tradition can make. The first case he considers is taken from English law (1977:175-177). Two English seamen and a seventeen year old boy were lost at sea. After several days, their supply of food and water ran out. Having gone for eight days without food and for six days without water, the seamen killed the boy (who was going to die soon anyway) and fed upon his body and blood. After four more days, they were picked up by a passing vessel. It seemed clear that the men would have died had they not used the boy for nourishment. The moral system that Donagan describes and defends absolutely forbids killing an innocent person. Yet, in this case, if the seamen had not killed the boy, they would have suffered irreparable harm (viz., their own deaths). Assuming that all three would have died had the seamen not killed the boy, utilitarianism implies that the men did the right act. To declare that the actions of these men were wrong seems a bit austere. So it would seem that the moral judgment yielded by the utilitarian theory is more acceptable than the one yielded by an absolutist system. Donagan, however, denies this. He explains this case by distinguishing between first-order moral precepts, the assessing of an agent's *action* as right or wrong, and second-order moral precepts, when a *person* is judged to be culpable or inculpable. In the case of the seamen, Donagan suggests, the action they performed was wrong, but the circumstances were so extreme that they were not culpable, or at least not very culpable. Such a judgment seems quite plausible. Certainly one's reaction to this case is mixed: something has gone wrong, yet one empathizes with the seamen. This mixed reaction is reasonably explained if we distinguish between assessing the action and assessing the agents. It would appear, then, that Donagan's strategy concerning this example is to show that what the Hebrew-Christian moral tradition says about the case is defensible.

Donagan considers a second example of a case of necessity, the story of the fat man in the cave (1977:177-180; Foot, 1967; Nielsen, 1972). In this situation a group of potholers imprudently allow a fat man to lead them out of the cave. Unfortunately, he gets stuck in the mouth of the cave. As it happens, high tide will soon be upon them, and the rising water will drown all of the explorers except the fat man. However, someone has a stick of dynamite. So the potholers have two alternatives. They can do nothing and all of them except the fat man will be drowned; or they can use the dynamite and blast the innocent fat man from the mouth of the cave, thereby killing him but saving the rest of them. Consequentialism, of course, will direct the potholers to kill the fat man. That act is clearly the lesser of the two evils. It is natural to assume that the absolutist will say that such an act is forbidden (Nielsen, 1972:222). After all, the fat man is an innocent party. Now, having examined Donagan's strategy in dealing with the first case of necessity, one expects him to argue that common morality too prohibits the killing of the fat man. Donagan does not argue this way, however. Surprisingly, he suggests that the absolutism of the Hebrew-Christian moral tradition may allow the explorers to kill the innocent man. His argument to support this claim might be called the "tacit consent argument." It is not impermissible, he asserts, for a group of people embarking on a dangerous enterprise to *agree* that if in the course of this project they are forced to choose between either allowing a certain number of their party to be killed or causing the death of fewer of them, they should choose the latter. The reason that each should agree is simple: "In so agreeing, each member of the group would act in his own probable interest" (Donagan, 1977:178). Suppose, however, that the members of the group had made no such pact. Suppose that they had not anticipated such a situation. It is here that Donagan appeals to the notion of tacit consent. "And perhaps it would have force even if it were virtual: that is, even if all members of the group, were they to think about it, would agree that everybody in the group would think that so to conduct themselves was the only rational course" (1977:179).

Donagan completes this argument by trying to persuade us that the *reason* the Hebrew-Christian moral tradition approves of blasting the man from the mouth of the cave (if it approves) is the appeal to consent and not to utilitarian reasoning. He cites a case that is similar (in all other relevant respects) to the one in question, but in which the possibility of even tacit consent is not possible. He asks us to imagine again that the explorers have somehow become trapped in the cave and the water is rising. They can use explosives and blast their way out, but to do so will kill two picnickers lunching near the cave (who cannot be warned in advance). Utilitarianism will again counsel us to save the greater number and to kill the picnickers. But, Donagan maintains, many who would approve of blasting the man from the cave would condemn killing the innocent picnickers. If this is correct, then the *reason* for permitting the fat man to be killed *need not* be utilitarian in nature; that is, one can be an absolutist and still permit the man to be killed.

How are we to assess Donagan's analysis of this case? Some, no doubt, will disagree with his judgment concerning the case of the picnickers. A consequentialist such as Nielsen will surely say that, unfortunately, the innocent picnickers ought to be killed. He might even argue that the moral views embedded in the Hebrew-Christian tradition are, in the final analysis, utilitarian; or at least they contain a utilitarian escape clause. Even those who agree with Donagan about the picnickers' case, however, may reject his claim that it is permissible to blow the man from the mouth of the cave. Certainly one expects the hard-nosed absolutist to reject such a judgment. And most importantly, even if one agrees with the judgment that the potholers may kill the man, one may still have serious reservations about Donagan's argument that purports to demonstrate this. Donagan seems to rest his entire case on the consent of the victim, be it explicit or tacit. Many have doubts about the notion of tacit consent, but the trouble with the argument is deeper than that. It would seem that one of the precepts which follows from Donagan's own fundamental principle is that the mere fact that the victim consented is neither a justification nor an excuse for killing. To be sure, common morality *may* allow exceptions to this rule, such as the case of voluntary euthanasia. Exceptions such as this are usually allowed, however, because the victim will suffer or is going to die soon anyway, and neither of these conditions obtains in the case of the fat man in the cave. Donagan does claim that it is permissible to take risks. But even if his point is that the explorers agreed, in advance, to follow a risky procedure that happened to result in the death of the one, it is difficult to see what the *morally relevant difference* is between that and consenting to one's own death. Even if common morality does countenance the killing of the man in the cave, it may be for reasons other than those suggested by Donagan. Perhaps the common morality of the Hebrew-Christian tradition is committed to consequentialism; or, more plausibly, perhaps there is a more complex deontological principle at its root.

Finally, Donagan himself later seems to abandon the claim that the consent of the victim justifies killing. This occurs when he discusses the case, first presented by Bernard Williams (1973:98-99), of the captain who is about to kill unjustly twenty Indians. However, the captain tells Jim, a visitor to the country, that if he (Jim) will kill one of the twenty, he will release the others unharmed. As the case is described, each of the twenty desperately *wants* Jim to accept the offer. Clearly it is in the probable interests of each of the twenty to so consent. And one might even regard the Indians as agreeing to a procedure on the spot, as it were. Yet, in spite of this explicit consent, Donagan says that common morality tells Jim that "he would on no account agree to kill anybody" (1977:208). One wonders why the *tacit* consent (or the tacit acceptance of a procedure) of the potholer justifies killing him to save the rest of the group when the *explicit* consent (or acceptance of a procedure) of the Indians does not justify killing one of them. It should be pointed out, however, that Donagan does think that there are *special* reasons for not complying with the captain's demands. He says that in the description of the case one is "imputing to the agents a knowledge they cannot possess" (1977:207). Apparently Jim should not comply with the demand because he *cannot know* that the deaths of twenty Indians will result from his refusal. It is true that any agreement that Jim makes with the captain will be worth little since he cannot be sure that the captain will keep his end of the bargain. The relevant comparison with the case of the potholers, however, must make reference to the sort of agreement that the Indians can reasonably make among themselves. And in this case they have explicitly consented that one of them be killed in order that the other nineteen might live. Of course, they cannot know that the death of the one is necessary for saving the others: they cannot even know that it will save them. Given their situation, however, it is surely their best bet. And one can say the same thing about the case of the potholers. How can the others know that the man stuck in the cave will not escape before they drown? They cannot even be sure that blasting him from the entrance will save them; tampering with entrances to caves, after all, is a tricky business. But like the Indians, they must go with their best bet. For these reasons, then, doubt has been cast on Donagan's handling of the second case of necessity.

IV. THE PROBLEM OF DIRTY HANDS

Let us turn now to the problem of dirty hands. Again, Donagan wants to defend absolutism against the charges of the critics. The problem is this: there are some situations in which it seems that the political actor ought to do an act that is forbidden by absolutism in order to bring about some great good or to prevent some disaster. The leader is dirtying his own moral hands, but is acting in the best interests of the community in doing so. Donagan handles this problem by considering two examples discussed by Walzer. He tries to show that the absolutist

theory of the Hebrew-Christian tradition need not handle these cases in the simple, naive way that Walzer supposes. Here I shall confine my discussion to the first example, that of a political candidate who would govern effectively and well if elected, but who, because of the circumstances in his district, cannot win without paying a moral price, "In order to win the election the candidate must make a deal with a dishonest ward boss, involving the granting of contracts for school construction over the next four years" (Walzer, 1973:165). Since this person is an absolutist, he will feel guilty about making the deal. If he does not make the deal, though, he will not be able to effect the many changes needed in his society (because he will lose the election). Walzer describes the dilemmatic nature of his situation when he says, "We know he is doing right when he makes the deal because he knows he is doing wrong" (1973:166). Walzer assumes, of course, that non-consequentialist moral theories forbid one to make such a deal; yet we have good moral reasons to want the politician to make the deal. As a result, no matter what the person does, he will have done something wrong.

Before dealing with this example, Donagan suggests that many too readily and uncritically accept what he calls the Machiavellian assumption: "that in politics nobody succeeds except by getting his hands dirty" (1977:184). Given this comment, one expects Donagan to argue that the candidate ought not to deal with the ward boss; he ought to keep his own hands clean. This is not what Donagan argues, however. Instead, he says that his deontological moral principle permits the politician to make the deal; the contracts may be awarded on a preferential basis (though the well-being of others may not be threatened by, say, agreeing to have the projects inspected inadequately). Common morality, Donagan says, is "subtler" than Walzer believes. The specifics of his reply to Walzer's example, however, are puzzling. He makes two major points in defense of his claim that the candidate may deal with the ward boss. The *first* is this: "Even in a society in which corruption is normal and lawful, it is wrong to initiate the corruption of others or to harden them to it; but it is not wrong to defend yourself by means of corruption against corruption already initiated by others" (1977:186). This is certainly correct. Most of us would even grant that killing in self-defense or in defense of others is permissible, at least when that is the only way that one can save one's own life or the lives of others. But how is that relevant to the case in question? It does not seem that the candidate for public office is trying to defend the community against wrongdoing; rather, he wishes to contribute positively to the welfare of his constituents. Since ostensibly this is an act of beneficence, one would expect it to be restricted in the way that Donagan says that all such acts are, viz., "that it is absolutely impermissible to promote the well-being of others by any action that is impermissible in itself" (1977:86). And making a deal with a ward boss is a deceitful action that is normally impermissible. Awarding contracts preferentially is unfair to the other competitors and to the community paying for the contracts.

Of course, one might take another approach here. Perhaps one should regard this as a case of self-defense because the honest politician's ultimate goal is to fight against those corrupt ward bosses with whom he must deal; and in order to fight effectively, he must gain access to power. This is an odd case of self-defense, however. The victims of the deception are not the corrupt bosses; rather, they are innocent members of the community. Admittedly the case is altered if it is not necessary for the candidate to keep his bargain with the ward boss once he is elected. That, however, is not the case discussed by Walzer, and if it were, it would hardly merit the description "hard case."

Donagan's *second* point is also unconvincing. He points to an example of a political deal made by Abraham Lincoln. It is claimed that Lincoln could not have procured the passage of the amendment abolishing slavery through the House of Representatives had he not allotted patronage gifts. Yet, Donagan concludes, most people "would have been taken aback at the suggestion that by doing so Lincoln violated common morality" (1977:187). One is, I think, inclined to agree with this claim. But this leaves the most important question unanswered. *Why* does the (allegedly) absolutist view of the Hebrew-Christian tradition allow Lincoln to make such a deal? Donagan does not give us *reasons* for this (as he does in the second case of necessity). Most people who regard themselves as advocates of the common morality of the Hebrew-Christian tradition would, no doubt, approve of Lincoln's act. That, however, does not show that an absolutist theory can permit such actions. The issue here is not so much the judgment yielded by common morality; rather it is the theoretical underpinning of that judgment. After all, the judgment about Lincoln's case may simply show that common

morality is consequentialist in nature; or it may show that those who profess to adhere to the Hebrew-Christian moral views are inconsistent. One might, I suppose, appeal again to considerations of self-defense: what Lincoln is doing is fighting evil and to do so is not only appropriate but obligatory. The absolutist, however, cannot allow an agent to victimize an innocent person in any way, even if he is fighting evil. To allow this is to succumb to the utilitarian view of choosing the lesser of two evils, a view that Donagan rejects (1977: 183). In this case those more meritorious persons who were passed over because of the favoritism were innocent victims.

If the appeal to fighting evil does not work, then one must admit that the most obvious reason that one can give to justify Lincoln's action is a consequentialist one. And that is precisely *why* the problem of dirty hands is a problem for the absolutist; that is also why one defending an absolutist view must provide reasons why such a theory can permit actions of the sort in question. It is not enough to *say* that such an exception can be built into the moral rule in question. Since the act is a *prima facie* violation of some other moral rule, the *moral reasons* for allowing this exception must be explained. The absence of such reasons in Donagan's discussion is conspicuous, especially when one contrasts this case with his handling of cases of necessity. Donagan's response to the problem of dirty hands, then, is not entirely convincing.

V. THE TASK OF THE ABSOLUTIST

The discussion of the problem of hard cases is often a confused one—and Donagan sometimes seems to be guilty of this confusion—because two distinct issues are frequently fused. The first of these issues is the dispute between the consequentialist (in particular, the utilitarian) and the anti-consequentialist (i.e., the deontologist). In contrast with consequentialism, the deontologist holds that on at least some occasions factors other than the consequences determine the moral status of an act. The second issue is the clash between the "clean hands" thesis and the "dirty hands" thesis.¹ The former is the view that an agent is *never* permitted to do something evil even if doing so will prevent a greater evil or bring about a greater good; the latter, that a person may (at least) *sometimes* do something that is normally evil in order to prevent a greater evil.

The relationship between these two issues must be clarified. The clean hands thesis entails absolutism, the view that all moral rules hold without exception. But one can be a deontologist and not an absolutist. Thus it is false that if one supports the dirty hands thesis, one must be a consequentialist. Consequentialists say that whenever one can prevent a greater evil, one is *always* obligated to do so, regardless of the nature of the act. By contrast, advocates of what I call the dirty hands thesis are only committed to the view that one is at least *sometimes* required to do a normally evil act in order to prevent a greater evil. Thus some deontologists can consistently support the dirty hands thesis.

It is not unreasonable, I think, to claim that the views of many people are anti-consequentialist and opposed to the clean hands thesis too. And as we have seen, this position is not inconsistent. To point this out, however, is not enough. One must realize that this presents the deontologist with a serious challenge. What we learn from the problem of hard cases is that appearances suggest that any plausible non-utilitarian moral theory must allow for exceptions to moral rules. There are three ways that a deontologist might respond to these appearances. First, he might deny the need to recognize exceptions to the rule; when presented with hard cases he might "bite the bullet." This seems to be Donagan's strategy in the case involving the English seamen, but not in the other cases.

Second, the deontologist might allow utilitarian elements to enter into his theory. W. D. Ross takes this route when he accepts the principle of bringing about good as one of his moral rules (1930:21). Moreover, many philosophers have argued that any reasonable system of ethics must have utilitarian elements such as a "disastrous consequences" clause (Brock, 1973:251). Donagan, however, rejects this idea (1977:180) and he is probably right to do so. If a deontological theory does contain a utilitarian clause, there is a danger that it will allow for irresolvable moral conflicts or it will yield exactly the same moral judgments that utilitarianism does (Sartorius, 1975:10-11). The former danger will obtain if the theory provides no way of resolving conflicts

between the utilitarian clause and other rules in the system; the latter will obtain if such conflicts are always resolved by appealing to the utilitarian principle.²

The third response, the one that Donagan seems to be committed to, is to provide a *principled, nonutilitarian* way of building exceptions into the moral rules. The challenge here—and this is the task the absolutist must accomplish—is to show *why* doing a normally evil act to prevent a greater evil or bring about a greater good is sometimes, but only sometimes, permissible.³ In the case of necessity involving the killing of the innocent potholer Donagan does try to provide nonutilitarian reasons to justify the moral judgment that he makes though, as I have argued, these reasons are not entirely convincing. In dealing with the problem of dirty hands, the only apparent reason cited to justify making a deal with the ward boss is that of fighting evil. But it is hard to see how an absolutist can appeal to this principle when innocent persons are victimized. It seems, then, that the fundamental challenge posed by the consequentialist has not been answered satisfactorily by Donagan. And more importantly, this leaves open some very basic questions concerning the foundation of the Hebrew-Christian moral tradition.⁴

NOTES

1. In this context, I use the phrase "dirty hands" in a somewhat broader sense than Donagan does.
2. Elsewhere I try to show that this argument of the utilitarian is less compelling than it first seems (McConnell, 1981b).
3. Elsewhere I argue that with regard to at least one particular moral problem the deontologist can meet this challenge (McConnell, 1981a).
4. I would like to thank several readers for *The Journal of Religious Ethics* for some helpful suggestions. An earlier version of this paper was read at a meeting of the American Society for Value Inquiry, December, 1979.

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