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The Machiavellian Case Against Legal Moralism

LUÍS PEREIRA COUTINHO*

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I. THE MACHIAVELLIAN THEORY OF RIGHT

In this paper, “legal moralism” is to be understood in a wide sense as the promotion, outright coercive, or otherwise, of conceptions of the good by the state—assuming in a Kelsenian way that any state action means legal action.¹ Under consideration is the possibility of excluding the good from the bounds of the law under a theory of political right of Machiavellian origin.² Anticipating the conclusion, this paper will seek to verify whether the Machiavellian case is the only one excluding the good from the bounds of the law in a coherent manner, regardless of its merits and the inherent condemnation of legal moralism in conclusive terms.

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1. Norberto Bobbio, *Kelsen and Legal Power*, in *NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES* 438 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., Bonnie Litschewski Paulson, Stanley L. Paulson & Michael Sherberg, trans., Clarendon Press, 1998).

2. See *NICCOLÒ MACHIAVELLI, THE PRINCE* 61 (Harvey C. Mansfield trans., Univ. of Chi. Press 2d ed. 1998) (1532).

A Machiavellian theory of right is different from that which is usually considered.³ The usual case against legal moralism rests on categorical reasons regarding respect for personal autonomy. Well, the latter case, one may consider preliminarily, is either under-solid or over-solid, according to the scope of those categorical reasons.

If what is meant is the respect for autonomy as a regulative principle (hereinafter A1),⁴ and if that principle concerns the desirability of human beings acting according to valid reasons and involving themselves in valid pursuits, then the case is both incoherent—which will be elaborated on in a later section—and under-solid: many conceptions of the good excluded by the case against legal moralism are not grounded in the exercise of autonomy in any recognizably regulative sense, but those conceptions can be considered unreasoned or even silly with property. If, on the contrary, what is meant is respect for autonomy in a non-normative sense (hereinafter A2), the “just do it” version of autonomy, and the inherent exclusion of heteronomy altogether—being the case against legal moralism, a negative case, one for mere non-heteronomy—then the case will be solid in excluding the good from the bounds of the legal; however, I am afraid it will be so at the prohibitive price of extinguishing the law altogether.

From a political right perspective, the case is different.⁵ Autonomy, if it is to be respected, will not be respected categorically or out of respect either for A1 or A2 in themselves, but rather might be respected hypothetically or instrumentally.⁶ Individual autonomy is to be respected, and legal moralism is to be excluded only if—and to the degree in which—the constitutional arrangement, which respects autonomy is a better arrangement overall from a political perspective that has its own reasons. The latter are therefore political reasons against which no categorical reasons are opposable.

Those political reasons concern the effectiveness of power in achieving its ends, taken to be the only source of its legitimacy. More precisely, from this perspective, the effectiveness of power corresponds to its legitimacy: according to Machiavelli, there is a necessary correspondence between political ends and the ends of “vulgar” men.⁷ For the Florentine, if “in the world there is no one but the vulgar,” they are necessarily the only ones acknowledging the legitimacy of power, and they will do it in the exclusive

3. PHILIP BOBBITT, *THE GARMENTS OF COURT AND PALACE: MACHIAVELLI AND THE WORLD THAT HE MADE* 32 (2013).

4. This version of autonomy values reasoned self-regulation as a *right* in the Kantian tradition. *See infra* Section III.

5. *See* MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 43 (2003).

6. *See id.* at 140.

7. *See* MACHIAVELLI *supra* note 2, at 71.

measure of its success—namely, in the satisfaction of their own utilities because they are “taken in by the appearance and the outcome of a thing.”⁸

The “vulgar” value types of utilities—against which the legitimacy of power or the constitutional arrangement establishing it is exclusively to be assessed—that must therefore be satisfied. Indeed, it is “not prudent to challenge” the “opinion of the many,” even if illusory.⁹ Accordingly, if in light of that opinion—namely, the “common understanding” of what it means to respect persons and for the state to be neutral—mere non-heteronomy is, among others, an individual utility to be enjoyed, then an effective constitutional arrangement should respect A2, keeping those in power from unnecessarily challenging it.

To the degree in which A2 is respected only instrumentally and is not the only utility valued by “the many,” not to challenge it unnecessarily means to restrict it within a calculus in which the utility of non-heteronomy is measured up against other utilities also valued by those “many,” including, most importantly, collective and individual security.¹⁰ The “harm principle” in its strong non-perfectionist sense may well be the result of that utilitarian calculus.¹¹

From a Machiavellian perspective, A2 is respected, not A1. As already seen, from that perspective, what must be respected is the common understanding of autonomy, its significance according to vulgar opinion— and it is hard to deny that, in that light, or darkness, autonomy means mere non-heteronomy. Moreover it is doubtful whether A1, as a regulative principle, can be respected non-categorically and, from a Machiavellian perspective, no categorical reasons are opposable to power.¹² This regulatory principle does not necessarily keep someone who, as an individual, accepts and cultivates A1 from also accepting a Machiavellian case against legal moralism involving the respect for mere non-heteronomy. Reasons that are suitable at the

8. *Id.*

9. *Id.*

10. See NICCOLÒ MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 163 (Christian E. Detmold trans., Carlton House 1900).

11. For a detailed discussion of the harm principle, see JOHN STUART MILL, *ON LIBERTY* 9 (Alburey Castell ed., F.S. Crofts & Co., Inc. 1947) (1859) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

12. See LOUGHLIN, *supra* note 5, at 40.

level of individual action may be counterproductive at the level of political action considering the “paradox of consequences.”¹³

At the latter level, the worst reasons—the awareness that autonomy is regarded by the “vulgar” as a utility amongst others and not as a regulative principle—may eventually lead to better results in the promotion of A1. If A2 is respected, the “opinion of the many”—which should not be challenged by a prudent state—will also be respected. Moreover, the possibility of A1 will be preserved without necessarily excluding A2, and it is hard to deny that A1 is promoted more if there is no external compulsion leading to its endorsement through coercively excluding A2.

It may also be the case that A1 is better promoted if the inevitable harms A2 causes for those pursuing it fall upon themselves alone, and there is no reason for not being so when non-heteronomy is the utility to be respected according to the “opinion of the many.”¹⁴ Thus, by not hindering A2, the state may well be promoting A1 more effectively, even if indirectly.

II. AGAINST PERFECTIONISM

Those endorsing A1 will only be kept from accepting the Machiavellian case against legal moralism if they simultaneously take A1 to be a perfectionist good and share a perfectionist approach to politics: an approach according to which the state should not only not hinder the perfectionist good—in this case, reasoned self-regulation—but also endorse it directly, either through the repression of unreasoned self-regulation or through the promotion of reasoned self-regulation and the goods resulting from it, namely by the establishment of constitutive rules.

A Machiavellian, perhaps unlike a perfectionist, will bear in mind that there will always be an element of coercion in the arrangement, be it repressive or strictly promotional: mere non-heteronomy is negatively affected both by repression of unreasoned self-regulation and by the promotion of reasoned self-regulation and the goods resulting from it—in the latter case, because the merely non-heteronomous action will not be promoted *equally*. Some believe there is no coercion in the latter case and achieve that result by narrowing the concept of “coercion.”¹⁵ However, withholding benefits can serve as an inducement for legal compliance,

13. See JULIEN FREUND, *THE SOCIOLOGY OF MAX WEBER* 54 (1968); H.H. Gerth & C. Wright Mills, *Introduction to MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 54, 332 (H.H. Gerth & C. Wright Mills eds. & trans. 1953) (1946)..

14. See John Christman, *Autonomy in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 9, 2015), <https://plato.stanford.edu/entries/autonomy-moral/>.

15. See, e.g., Philip Selznick, *Communitarian Jurisprudence*, in *TO PROMOTE THE GENERAL WELFARE: A COMMUNITARIAN LEGAL READER* 35–36 (David E. Carney ed., 1999).

that being the more truthful the more citizens are dependent on the state for the necessities of life.¹⁶ Moreover, it is difficult, when state action is at stake, not to associate inequality with external compulsion: inequality in access to benefits or utilities or inequality regarding the *factispecies* of constitutive rules—for example, the rule establishing marriage—can be as compulsory as inequality in supporting penalties.¹⁷ One cannot even say that the latter is always harder to bear. Therefore, rather than isolating the state’s promotional activities from coercive ones, one should distinguish outright coercion from other forms of coercion, involving manipulation or unequal treatment.¹⁸

The coercive nature of a perfectionist arrangement is not in itself an objection from a Machiavellian perspective. A Machiavellian has nothing against coercion in itself, be it outright coercion or otherwise, but only against ineffective and politically illegitimate coercion. Strict political legitimacy—actual acknowledgment of power by those obeying it—will only be possible if power does not challenge the “opinion of the many,” including those utilities which, according to it, must be satisfied.¹⁹ Well, if the state tries to impose a regulative principle—negatively affecting utilities, mere non-heteronomy in the case, outside a utilitarian calculus intelligible by them—on “the many,” it is bound to see its legitimacy contested. In that case, the imposition of a regulative principle (A1) will be made in detriment of A2 outside a utilitarian calculus intelligible by those “many” valuing A2 for its own sake.²⁰

One may object to a Machiavellian that those exercising A2 by not being coerced in any way to adopt A1 are also being invited to bear the inevitable harms resulting from A2. By coercing those exercising A2 to adopt A1, the state is thus potentially exempting them from those harms.

16. See FREDERICK SCHAUER, *THE FORCE OF LAW* 114 (2015) (citing JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 8, 193–94 (John Bowring ed., 1841)).

17. See, e.g., Hendrik Hartog, *Wives as Favorites*, in *LAW AS CULTURE AND CULTURE AS LAW* 297–98 (Hendrik Hartog, William E. Nelson & Barbara Wilcie Kern eds. 2000); Dolores Miller, *Constitutive Rules and Essential Rules*, 39 *PHIL. STUDIES: INT’L J. PHIL. ANALYTIC TRADITION* 183, 184 (1981).

18. See *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987); Mario Loyola, *Trojan Horse: Federal Manipulation of State Governments and the Supreme Court’s Emerging Doctrine of Federalism*, 16 *TEX. REV. L. & POL.* 113, 116–17, 135 (2011).

19. On the “bond between prince and people” that is created when princes serve the “ends” of “ordinary citizens,” see JEFFREY ABRAMSON, *MINERVA’S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT* 158 (2009).

20. Lawrence Haworth, *Autonomy and Utility*, 95 *ETHICS* 5, 5–6 (1984).

The “chilling effect” of the latter harms on A2 can be more intense than the harm, which results from the outright promotion of A1. However, that objection would be beside the Machiavellian point. From this perspective, the utilities of “the many” *as perceived by* “the many” are relevant for the legitimacy of power. The concept that one should bear the harms A2 causes is understood by “the many” who value A2 for its own sake. Moreover, the idea that one should bear penalties or lack equal benefits as defined by the state in the same circumstance is not so understandable, even if the latter are potentially more lenient than the former. Political legitimacy is only affected when the state is to blame for the hampering and not when, according to the “opinion of the many,” those who are hampered by those inevitable harms, which result for themselves from the state failing to promote A1 are the only ones to blame.²¹

The second and most important Machiavellian objection to a perfectionist case made in the name of A1 is that the direct promotion of normative principles or goods, perfectionist or otherwise, by political means or arrangements is bound to fail.²² In the case of A1, we have already seen that the good effects that eventually result from directly promoting it will fail in relationship to the good effects that result from indirectly promoting it through the respect of A2: a coerced reasoned self-regulation is hardly *self-regulation*. One may even ask whether A1 has any real advantage from its transformation into an ideal to be coerced. Because moral agents are, in this case, implicitly assumed not to be entirely capable of determining themselves exclusively on their own into an actual exercise of A1,²³ this may well be a clear case in which the political endorsement of a good means its very negation.²⁴

The counterproductive nature of the political endorsement of a perfectionist good, clear in the case of A1, can perhaps be affirmed regarding any perfectionist good, that if one considers the “endorsement constraint”: “no life goes better by being led from the outside according to values the

21. See MACHIAVELLI *supra* note 2, at 71.

22. STEVEN WALL, *LIBERALISM, PERFECTIONISM AND RESTRAINT* 109 (Cambridge Univ. Press 1998).

23. Jeremy Waldron, *Autonomy & Perfectionism in Raz’s Morality of Freedom*, S. CAL. L. REV. 1098, 1131 (1989).

24. Steven Wall, *Perfectionism in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Oct. 10, 2012), <https://plato.stanford.edu/entries/perfectionism-moral/>. Wall acknowledges that “[i]t is possible that an ethical environment that results from no state perfectionism will be ideal for the autonomous decision making of its members”; however, he adds that “[n]oncoercive state perfectionist measures may be able to counteract or cancel various pressures and influences that would otherwise impede rational decision making by its citizens. Designed well, such measures might contribute to an ethical environment in which people were best able to respond to the reasons for and against the options they confront.” *Id.*

person does not endorse.”²⁵ That is, for a perfectionist good “to improve a person’s life[,] he or she must endorse its value,” or at least accept it wholeheartedly—if one distinguishes endorsement from wholehearted acceptance²⁶—and therefore “political measures that compel or guide people into activities or pursuits that they do not value will be counterproductive.”²⁷ If one added to the “endorsement constraint” the eventual incompetence of state officials, one could even be led to imagine, as Steven Wall did, “a view that holds that perfectionist political ends will be best achieved if no state official accepts the perfectionist approach to politics.”²⁸

Until now, the perfectionist approach being discussed assumes A1—as previously defined as reasoned self-regulation, instead of arbitrary or plainly silly—is the perfectionist good to be promoted.²⁹ If instead the perfectionist good to be promoted is autonomy in a Razian sense—thus, A1 + N, because it involves more than merely reasoned self-regulation, implying also the adoption of multiple “acceptable and valuable projects and relationships”³⁰—then I believe the Machiavellian case against perfectionism will be reinforced. Indeed, in the latter case, the state is called to determine which projects and relationships are valuable or not, and the state can be taken to be “the last agency to whom subtle questions of personal morality should be entrusted.”³¹

Effectiveness is always a background consideration for a Machiavellian, and, in this case, effectiveness can be doubted on solid grounds. The widespread “best judge” argument—that is, that individuals are always in a better position to judge what projects and relationships are more valuable for themselves than the state³²—is not necessarily one of those grounds. Empirically, it is possible to argue against the best judge argument in a quite convincing manner. Simon Caney has made the contrary case and pointed out the epistemological and evaluative problems inevitably involved

25. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 216 (2d ed. 2002).

26. Wall, *supra* note 24.

27. *Id.*

28. *Id.*

29. *See infra* Section II.

30. JOSEPH RAZ, THE MORALITY OF FREEDOM 417 (1986).

31. Waldron, *supra* note 23, at 1131.

32. Simon Caney, *Consequentialist Defences of Liberal Neutrality*, 41 PHIL. Q. 457, 463 (1991).

in single individuals' judgments: problems that may be minor in the case of collective action on communitarian grounds.³³

The empirical effectiveness problem, however, does not concern only the probability of the state incurring less judgment errors than individuals as long as it follows adequate procedures and considers solid communitarian grounds, eventually regarding those "cherished aspects of our culture" Raz refers to.³⁴ Instead, the problem concerns the exponential nature of any state error, which will be induced on multiple individuals; that does not happen with those errors individuals make, which are only induced on themselves.

The greatest problem for a Machiavellian, however, is not so much empirical ineffectiveness but political ineffectiveness, which concerns the possible endangerment of political consistency—and legitimacy—resulting from the state interfering on these matters. After sustaining that "the general effect of the risk of failure cannot lead to anti-perfectionism" but only to "general caution," Raz affirms that he thinks of no "special reason to fear failure or the consequences of failure when trying to promote conceptions of the good."³⁵ Well, Raz's imagination may be failing him in this respect.

Indeed, if according to Raz, autonomy is a value in itself, and the value of projects and relationships is not independent from their autonomous validation—and if one believes Raz also considers that his "A1 + N" sort of autonomy should be accepted as such by autonomous persons themselves—then autonomous failure will be much more acceptable from the perspective of an autonomous person, or a person considering herself as autonomous, than state-induced failure: if it was not state-induced failure but self-induced failure, at least the equation would be "A1 - 1" and not "- A1 - 1," which will be in the case of state-induced failure. She may eventually be convinced to accept the equation "- A1 + 1"—although I cannot see exactly how Raz himself is; however, she will not accept the equation "- A1 - 1" and will therefore contest the arrangement fiercely. For a Machiavellian, this is more than a "special reason" to fear failure or the consequences of failure.

One may eventually consider that the "valuable projects and relationships" are those which are valued in the traditional ways of life of the society over which the state rules and that the state cannot err, at least politically, in endorsing them.³⁶ However, in modern societies those traditional ways are increasingly contested and even vanishing, which gives way to autonomy-supporting environments. As Raz himself says, "[f]or those who live in an autonomy-supporting environment[,] there is no choice but to

33. *See id.* at 463–64.

34. RAZ, *supra* note 30, at 162.

35. *Id.* at 160.

36. *Id.* at 417.

be autonomous: there is no other way to prosper in such society.”³⁷ Taking up that description of modern social environments, Waldron considers accurately that:

[It] suggests that a government which fails to promote autonomy [as non-heteronomy] in a social environment of this kind, makes life unbearable for its citizens. When the government engages in this type of activity it takes away from its citizens the only chance to prosper that they have. Stifling autonomy might be a permissible political strategy in a society where traditional ways of life are still available; where the conditions for non-autonomous life have disappeared, however, the government must accept autonomy as the only route left open for the individuals it governs. When an account of the duty to promote, or not interfere with, autonomy is presented along these lines, it is not clear at all that it is a duty to promote autonomy only to the extent that autonomous choices are good choices. Though the value of autonomy to the people who exercise it will certainly be bound up with the values they pursue in their choosing, the importance of promoting autonomy *as an imperative for governments* can be defended [or non-defended] quite independently of that.³⁸

One could say that there is still something a government can do to promote autonomy in a regulative sense and as leading to the adoption of “acceptable and valuable projects and relationships”³⁹—that something being a perfectionist education of its citizens. A Machiavellian will doubt whether such a course will be effective in leading citizens, at least “the many,” to take subsequent interferences in their autonomy as bearable considering educational goods themselves are not and cannot plausibly be open to all in an equal degree; no government will insure that they are unless it turns into a Platonic government, which deprives parents and non-state social institutions from interfering in education.

37. *Id.* at 391.

38. Waldron, *supra* note 23, at 1129. Even if traditional ways of life are still available and are considered to be goods by the states, there is no chance in any known modern social context for them to be the single goods available. On the contrary, they will still be available in an inescapably autonomous-supporting environment. Since we are talking about non-divisible goods, it is not clear whether there is an effective strategy for the state to promote them non-arbitrarily and legitimately. Wall’s case according to which it is not arbitrary for the state to endorse a perfectionist political action if a substantial majority supports it, if there is some form of compensation for minorities, does not seem to be convincing, see Steven Wall, *Neutrality for Perfectionists: The Case of Restricted State Neutrality*, 120 *ETHICS* 232, 244 (2010); minorities can be vocal and have constitutional means on their side even if Wall departs from a very valid point: before non-divisible goods, “the strategy of apportioning support for different goods according to the numbers is not an option.” *POLITICAL NEUTRALITY: A RE-EVALUATION* 69 (Roberto Merrill & Daniel Weinstock eds., 2014).

39. RAZ, *supra* note 30, at 417.

Moreover, the definition of those “acceptable and valuable projects and relationships,” which are to be promoted through education, is bound to be contested. In an autonomy-supporting environment, which inevitably is the environment of modern societies, it will be perhaps wiser for a government to avoid an education that explicitly cultivates valuable projects or relationships. In that case, at least, it will not be forced to cultivate “equally” those non-valuable projects and relationships its citizens take up as their own—vocational training in prostitution comes to mind in this context.

There is still one consideration to be made: the state, even if it could reach consensual results on what the perfectionist projects and relationships to be promoted are, would never guarantee full effectiveness regarding the non-promotion of non-valuable projects and relationships. The latter, perhaps more satisfying immediately, would still be pursued, and there would be no way of not blaming a state enjoying the monopoly of force for that pursuit.

In this context, Scalia’s remarks at a Harvard lecture in 1989 may be relevant: “Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions—no television in the afternoon, or no television in the evening, or even no television at all. But try to let [or not to impede by outright coercion] one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.”⁴⁰ That is, unless one is ready to use outright coercion in repressing everything one considers non-valuable—and Raz does not make that case—and that outright coercion is fully effective—which it may be in the case of parents but will not be in the case of states unless they are fully totalitarian states and these are by no means supported by Machiavellians⁴¹—one does better if one does not interfere minimally in the business of defining what is valuable.

Indeed, the well-known point Raz made against state neutrality may be inverted: “within the range of duties which the State owes its citizens, failure to help is hinderance.”⁴² And unless the state wishes to permanently awake its citizens’ “fundamental sense of justice”—in Scalia’s ironic but unfortunately accurate sense—it is better not to be perceived that way.⁴³

40. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

41. A Machiavellian rejects totalitarianism, not on moral reasons, but on pragmatic reasons: totalitarian states are only possible if taken over by all-encompassing ideologies leading to full mobilization, to a degree in which pragmatism—including most importantly pragmatism regarding the effectiveness of power and the utilities of individuals—is lost. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 420 (1976). Nothing can be more un-Machiavellian than that.

42. RAZ, *supra* note 30, at 124.

43. Scalia, *supra* note 40.

I hope these last considerations made it clear that the Machiavellian reasons for rejecting the perfectionist approach to politics are not necessarily the worst reasons. Those reasons do not imply denying the value of regulative autonomy and of valuable projects and relationships as goods for individuals. A Machiavellian may even sympathize with the perfectionist case at the normative level when considering an ideal state, but he will not ignore the “actual truth of things,” therefore conceiving of actual states as *Don Quixotes* fighting windmills.⁴⁴

What ultimately matters, when considering the “actual truth of things,” is that the reasons for which *actual* governments promote, or abstain from, perfectionist goods—A1 or A1 + N—are not and cannot be “exactly or simplistically identical with the value of autonomy to autonomous individuals.”⁴⁵ Reasons for actual governments, unlike reasons for individuals, must concern political legitimacy and effective results: what would be the good of a government bound to reach counterproductive results and paralyzed by contestation?

III. THE INCOHERENCE OF THE DEONTOLOGICAL CASE

The typical non-Machiavellian case against legal moralism rests on deontological reasons centred on A1, in there residing the axis of a “critical morality” leading to the exclusion of “positive moralities” from the law.⁴⁶ Autonomy is the axis of a “critical morality”—a *right* in the Kantian

44. MIGUEL DE CERVANTES, *DON QUIXOTE* 230 (Charles Jarvis trans., 1853) (1605).

45. Waldron, *supra* note 23, at 1129.

46. One could say that that is not a fair description of the case made by Hart, since his “critical morality” is utilitarian or consequentialist and not Kantian or deontological. H.L.A. HART, *LAW, LIBERTY, & MORALITY* 21–22 (1963). However, if one goes back to the confessed source of Hart’s argument, Mill’s anti-paternalism, which is also purportedly “utilitarian,” its bedrock is the human being as a “progressive being” an ideal relating to his or hers autonomous “reasoning and judgment,” in there residing the foundation of his or hers “comparative worth,” which would be referred to by Kant as his or her “dignity.” See JOHN STUART MILL, *ON LIBERTY & OTHER ESSAYS* 46, 65, 66, 148 (John Gray ed., 1991). Indeed, the core of Mill’s argument seems to be that the autonomous “reasoning and judgment” of human beings is to be respected, even if the consequences to be eventually endured by themselves—or the overall consequences for society—are worse. From Mill’s perspective, nothing would be worse than to unrightfully dehumanize those virtually “progressive beings,” for example, to reduce them into “apes” by paternalizing them. Well, that is a deontological argument even if presented as utilitarian. It is not therefore unfair to refer to this tradition, also in its Millian branch, as centered on a moral axis centered on the respect for persons as autonomous, or virtually autonomous.

tradition⁴⁷—because it is a regulative principle, allowing individuals, taken to be free and equal, to reasonably endorse purposes and relationships in a way that should not be obstructed by external compulsions.

One of the objections—perhaps the main objection—raised against the typical case against legal moralism concerns its incoherence.⁴⁸ That incoherence is exposed by not begging the questions as to why and how autonomy is a right in the aforementioned sense. Indeed, the answer to those questions cannot be immune to the idea that autonomy, A1, besides being a self-regulative principle, is also a perfecting principle to be endorsed by individuals; A1 is therefore a good and can only be plausibly defended as a right if it is also a good. Moreover, even if the deontological reasons—that is, reasons regarding A1 as a right—could be separated from corresponding teleological reasons—that is, reasons regarding A1 as a good—the fact that both rationales belong to a “common moral core” would still taint the possibility of using the former without promoting the latter.⁴⁹

In summary, it will be ultimately difficult, if not impossible, to explain why the state should act on the basis of a “moral core” and implicitly demand individuals to endorse it, precisely when it is required to be neutral on questions regarding the good; that is, it seems that the deontological case against legal moralism is legally moralist.⁵⁰

Well, that difficulty will not be one from a Machiavellian perspective. Its *right*—a *political right*⁵¹—defines itself as autonomous from morality and even from a moral foundation. Its axis is the state itself: the secular ends of the state taken to be coincidental with the ones of the “vulgar”: if

47. Hart, and before him, Mill, present their arguments as utilitarian but the core of their case against legal moralism is deontological and is only understandable as deontological. See HART, *supra* note 46, at 20, 22.

48. HART, *supra* note 46, at 3.

49. RAZ, *supra* note 30, at 137. Raz has a point in saying that, if an autonomy-related conception of the right—or deontological reasons—and an autonomy centered conception of the good—or teleological reasons—derive from a “common moral core”, then the case for the exclusion of ideals of the good from politics is endangered. *Id.* For him, “since the core moral concern should be politically promoted through the enforcement of some deontological constraints it seems plausible to hold that it should also be promoted by advancing the correct conception of the good as well.” *Id.*

50. This difficulty was previously pointed out by Thomas Nagel who accused those who defend neutrality as a principle of political morality of being incoherent with themselves: as such, the principle will need a morally non-neutral justification, and how can one be morally non-neutral when justifying neutrality? See Thomas Nagel, *Rawls on Justice*, 82 CORNELL PHIL. REV. 220, 227 (1973). I believe the point Nagel makes cannot be entirely dismissed through the distinction of critical morality from positive morality, HART, *supra* note 46, at 17, 20, the right from the good, see JOHN RAWLS, *A THEORY OF JUSTICE* 392–94 (rev. ed. 1999), or autonomy from conceptions of the good, Waldron, *supra* note 23, at 1136.

51. On political right, see MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 43 (2003).

there is any “foundation” at all, the “vulgar” are that foundation—“We the people,” one could say mischievously. From that perspective, a “political morality” is a contradiction in terms, and state neutrality, the exclusion of legal moralism, is not only acceptable—we have seen it can be advantageous for political legitimacy and political effectiveness—but fully coherent.

In other words, a Machiavellian *right*—political right—may justify neutrality in a non-incoherent way because there is nothing *good* about it. More precisely, if there is any good about political right it is, unlike autonomy, a good of a different order and with a different justification from the goods individuals should consider as their own. If that good of a different order considers the goods of or for individuals—namely autonomy in an autonomy-supporting social environment—it does so, not because they are goods in themselves but because an alternative course would be politically imprudent. Individual goods, therefore, are reflexively considered from a Machiavellian right perspective—and as such individuals may have an interest in accepting a Machiavellian political arrangement, perhaps even a “highest interest” as will be seen, but individual goods do not justify political right, nor do they pertain to the “core” of political right—namely, individual goods do not pertain incoherently to the core of the conception of the right leading to their respect.⁵²

In this context, it is important to notice that the Rawlsian justification for political neutrality may have always been political and not Kantian, even if presented as Kantian.⁵³ Indeed, Rawls’s argument for political neutrality can only be sustained on political reasons regarding the social role of justice in political societies dominated by disagreement; not on the value of autonomy itself—the value according to which conceptions of the good adopted by human beings should be the outcome of deliberations of the same as free and equally rational. As Raz points out:

[E]xtending the Kantian insight . . . explains the elimination of moral beliefs and ideals of the good from behind the veil of ignorance. But this argument by itself does not justify political neutrality. The argument for neutrality still rests on the further assumption that it is in people’s highest interest to adopt principles fulfilling the social role of justice [and not principles concordant or deriving from their moral beliefs and ideals of the good]. Without its support we still have no reason to believe that any agreement will be reached behind the veil of ignorance.

52. RAZ, *supra* note 30, at 132, 137.

53. See JOHN RAWLS, A THEORY OF JUSTICE 452 (Harvard Univ. Press rev. ed. 1999) (arguing that the Kantian interpretation of justice is based on people’s autonomy in acting from principles that best express their nature as free and equal rational beings).

Rawls shows neither that this assumption follows from the Kantian insight nor that it leads to neutral political concern.⁵⁴

Rawls does not show that the argument leads to neutral political concern because he does not explain, at least explicitly, why it is in the “people’s highest interest” to adopt principles fulfilling the social role of justice.⁵⁵ It is not because individuals endorse autonomy as a good from the start—that would be self-defeating—or out of the existence of disagreement itself—it is a *non sequitur* to infer the imperative of neutral political concern from the mere fact of disagreement.⁵⁶ Rather, it is because it is of utmost concern for individuals to live in societies in which there is an effective and legitimate government capable of fulfilling their utilities, namely respect for their conceptions of the good in an atmosphere of peace and stability.⁵⁷ That structure can only be possible if the corresponding constitutional arrangement accomplishes the “social role of justice”—thus endorsed for prudential and not categorical reasons.⁵⁸

Being only defensible as an implicit political case and not on its explicit Kantian grounds, the Rawlsian case for state neutrality is worse than an outright Machiavellian case: a Machiavellian will not necessarily consider it in the people’s highest interests to *generally* adopt principles fulfilling the social role of justice but only to *specifically* adopt *political* principles—those concerning political effectiveness and legitimacy. Unlike a Rawlsian, a Machiavellian knows that he must be modest in his claims, and, also unlike a Rawlsian, he does not despise those endorsing non-autonomous conceptions of the good or heteronomous ways—or, if he does it at the

54. RAZ, *supra* note 30, at 132.

55. See RAWLS, *supra* note 53, at 456.

56. On this point, see Wall *supra* note 38, at 240.

57. See Rawls, *supra* note 53.

58. Lamore points out that the prudential nature of “people’s highest interest” in endorsing the “social role of justice” is present in Rawls, who “himself sometimes relies upon a prudential basis for agreement to the principles of justice as well as the Kantian one.” Charles Larmore, *Michael J. Sandel: Liberalism and the Limits of Justice*, 81 J. PHIL. 337–38, 340 (1984) (book review). If that is not entirely explicit in the *Theory of Justice*, it would later be clarified in *Political Liberalism*, one may add. Indeed, one can read Rawls, not as a champion of the liberal ideal of neutrality but as suggesting a different model—the “*modus vivendi* model”—according to which

the political system represents chiefly a *modus vivendi* among people having different ultimate commitments . . . a system of mutual advantage, to which we primarily adhere, not because it expresses our deepest self-understandings, but rather for the more prudential reason that it serves our other values. In the midst of disagreement about the good life it not only preserves civil peace, but also protects our own particular view of the good . . . This *modus vivendi* model holds, not that we lack an intrinsic as well as prudential interest in justice, but only that this prudential interest may be our primary motive for allegiance.

Id. at 338.

personal level, he does not confuse his own reasons with political reasons. On the contrary: he does know that people's conceptions of the good, including autonomy, should not be despised or undervalued—least of all in what comes to the fundamental reasons for the political arrangement they are to inhabit—if political legitimacy is to be maintained.

One must insist that, if a Machiavellian is led to the respect of autonomy, inherently keeping the state neutral, it is because it is wiser to do so from the perspective of political effectiveness and legitimacy in the context of autonomy-supporting environments, which is the context of modern societies.⁵⁹ Conversely if it turned out to be unwise to fully respect autonomy and keep the state neutral, a Machiavellian would have no qualms in adopting a non-autonomist and non-neutralist stance. There can be a Machiavellian case against legal moralism, as there can be a Machiavellian case for legal moralism—namely, in the case of traditionalist or fundamentalist societies in which the state can only attain stability if it rejects neutrality; it all depends on the context.

The point of this paper was not to deny that a Machiavellian can either be a “state neutralist” or a “legal moralist,” depending on the context, but to verify whether a case against legal moralism can be non-Machiavellian. According to the argument above, the answer to the latter question seems to be negative: only a Machiavellian can defend a case against legal moralism in a fully coherent manner. It is quite another question to see whether that case is normatively worthy or not. If it can only be Machiavellian, it probably is not worthy.

It is also another question to know whether the Machiavellian case against legal moralism is ultimately a viable case and that considering something that is persistently ignored by all those who oppose legal moralism either from a deontological or a Machiavellian perspective, that something being the necessary embeddedness of law in the good. But that is a different matter, one transcending this mere *divertimento*.

59. See RAZ, *supra* note 30, at 392–93.

