

# Is there such a thing as government ethics?

Or: A Machiavellian Plea for Excuses<sup>1</sup>

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## 1. Introduction

Is there such a thing as government ethics? The question is a deliberately provocative but nevertheless serious one. A negative answer would put the axe at the roots of the practice which is so dear to us. And we should not close our eyes to the fact that at least part of the *raison d'être* of that practice consists in a resolution to combat the cynicism (which by its adherents is sometimes styled 'realism') of those denying that morality (and its study, ethics) and government can go together.

There is, I believe, an affirmative answer to the theoretical side of our provocative but serious question - but we cannot take it for granted. We shall have to provide an argument for it to convince our cynic opponent. The strategy to be adopted in this paper consists in showing that the cynic's hero, Machiavelli, is, in point of fact, on our side. We can demonstrate that there is no substance to the orthodox view that Machiavelli draws a fatal conceptual distinction between the spheres of politics and administration or (as I shall call it for the purpose of easy reference) government on the one hand and morality on the other. Even better, we shall invoke an example to establish this in a Machiavellian way - that is, by inspecting the facts themselves.

We may approach the matter through a type of problem, which we strongly feel is a *moral* problem for public officials. The problem is called 'Machiavelli's problem'.<sup>2</sup> It is a first-order problem of decision-making, and some would call it kind of moral dilemma. What the default interpretation of this first-order problem is meant to bring out is that in government the modes of justification of action, or the standards of moral assessment, categorically differ from those of the morality regulating the conduct of individuals in their private capacity. If this interpretation is correct, then there is no such thing as a moral standard in government. By implication, there cannot

be such a thing as morality in government. And if ethics is the study of morality, the idea of government ethics is incoherent by proxy.

On the other hand, Machiavelli's problem is part and parcel of our ways of conceiving public integrity. What is more, it forcefully appeals to our moral intuitions – and I intend to take these intuitions very seriously indeed. It appears, then, that we ourselves have gotten into a dilemma: either we junk Machiavelli's problem (flouting our moral intuitions) or we junk the subject (government ethics).

There is an escape route and I shall use the rest of this introduction to signpost it. To put some flesh on the theoretical bones, and to engage the reader's moral intuitions I present a real life torture case, which is classical instance of Machiavelli's problem. Having provided some conceptual background from ethical theory we embark on the reinterpretation of Machiavelli's problem. It will turn out that a careful examination of the concepts in a key passage of one of his major works points to a subtle but consequential distinction between the notions of justifying and excusing an action. This distinction will enable me to bring Machiavelli back to morality and morality back to government. If we then bring to bear this reinterpretation on the question we set out with, we will have succeeded in bringing the cynic's major theoretical authority to our own camp.

In the process, we shall have shown that Machiavelli points to a way of handling the *moral* problem. This happens to be exactly the way the responsible authorities in our torture case handled it. In this way, we can both stave off the theoretical threat to the *concept* of government ethics and point to a *practical* way out of the first-order problem. We have, in one word, saved our subject and given some practical advice to government officials – in the very way Machiavelli advocated.

A final preliminary remark. I am thoroughly aware of the contaminating effects of Machiavelli's reputation on those who write on him in a sympathetic mood. However, I shall take in my stride any blows accruing to my own reputation for trying to foist a benevolent interpretation on 'the old Nic'.

## 2. Torturing problems

The torture case is a popular, perhaps even a little trite clarifying device in government ethics. One of the reasons for this is that torture is the paradigm case of criminal state action. It is a necessary condition for torture that an act of (physical or mental) violence be committed by (a representative of) the state. This emerges clearly from the definition of torture in article 1.1 of the *UN Convention Against Torture*: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>3</sup> This definition explicitly states that an act of inflicting pain is only torture when it is committed by (a representative of) the state. According to the *UN Convention*, then, torture is by definition a state act.<sup>4</sup>

Another reason for the attractiveness of the torture case is that it exposes in a particularly salient and dramatic way the vulnerable spots in the self-image of the liberal-democratic polity, in which physical violence by authorities is carefully constrained. As the revelation of practices of torture and maltreatment of prisoners in Iraq has shown, torture is capable of mobilizing vehement gushes of collective moral indignation and vicarious shame.

As a clarifying device, the torture case is usually structured in such a way as bring to the surface one of the fundamental tensions designed into our constitutions – tensions which sometimes translate into moral conflicts for those who administer that polity. Here are two examples:

- 1) You are interrogating an accomplice of a terrorist whom you know is about to commit a suicide assault somewhere in a densely populated area of the city. There are good reasons to think that the accomplice is in the know about time and place of the planned assault. Is torture permitted to wrench the information required to prevent the attack?
  
- 2) You are interrogating a kidnapper who refuses to tell where he is hiding his victim, whom you have good reasons to believe to be in mortal danger. Is torture allowed to make the kidnapper reveal the hiding place?

The latter example is, however, not only to be found in textbooks and television thrillers. Here is a real life instantiation of the pattern.

On 27 September 2002 Jakob von Metzler, son of a Frankfurt-based private banker, is kidnapped by the 27 year old law student Magnus Gäfgen. In a letter to Jakob's parents Gäfgen demands a ransom of one million Euro. Two days later, the kidnapper is identified while collecting the money. The next day, on 30 September, Gäfgen is arrested by the Frankfurt police. During interrogation the suspect accuses others of having committed the crime and subsequently misleads the police officers by giving false hints as to the place where Jakob is kept. At one point Gäfgen induces his interrogators to go and take a look at a cottage near a lake not far from Frankfurt.

In the cottage police officers find a bed with blood-stained blankets. On the basis of the suspect's inconsistent and deliberately confusing statements they assume that Jakob is still alive, but that he is very probably in serious danger.

Early in the morning of 1 October 2002 Wolfgang Daschner, the vice-president of the Frankfurt police and in charge of the case, receives a report from his subordinate, Ottwin E. Given the assumption that the boy is in mortal danger Daschner, after twenty minutes of deliberation, orders to make preparations to have a small amount of pain administered to the suspect by a police doctor and to threaten Gäfgen with it. When the latter is confronted with the threat, he at once gives way and tells the police about Jakob's hiding place. It turns out that the boy is no longer alive, and that he was already dead when the interrogation sessions started. On 14 October Gäfgen gives a full confession. On 27 July 2003 Gäfgen is convicted for abduction and homicide. He is sent to prison for the rest of his life.

Having given the order, Daschner informs the *Staatsanwalt* or public prosecutor of his decision. The public prosecutor, who, according to German penal law, is obliged to bring to court any crime which is brought to his attention, has no choice but to set in motion the required investigations. In addition to the legal case, Daschner is, by way of internal disciplinary measure, demoted. His new task consists in performing menial administrative tasks at the Frankfurt police *Präsidium*, awaiting his case to be examined in court.

During the days following his decision Daschner gives interviews to some of the leading German newspapers. In those interviews he states that he, when taking the decision, he was fully aware of the fact that he was making himself guilty of a moral wrong – and of the possible consequences. He knew what he was putting at risk, for himself, but also for his family. He realized that he was about to lose 42 years of

pension rights, that he was likely to have to pay a lawyer for a case he was almost certain to lose. When he is asked the inevitable question whether he would do the same thing again in similar circumstances he answers in the most emphatic affirmative terms that he would.<sup>5</sup> He says that he felt it to be his moral duty to save the boy's life – which, to make things worse, had already expired.

On 20 February 2004 the public prosecutor lists a complaint against Daschner. In December 2004 he is convicted. The sentence is mild: *Verwarnung mit Strafvorbehalt* (§ 59 *Strafgesetzbuch*). This article, which is seldom applied, makes it possible, so to speak, to punish someone formally without punishing him materially (a conditional fine of 10800 Euro). The newspapers write that Daschner has been convicted, without having been punished.

### 3. Ex post facto

Given the attitude of Germans towards their past, it is hardly surprising that a heated debate ensued in the German media. Many contributors sympathized with Daschner, who was compared to the protagonist of a Greek tragedy, facing the impossible choice between violating the rights of the defendant or yielding the life of the victim.

Politicians like Wolfgang Bosbach and Roland Koch (CDU) pleaded for exemption on the ground that a police officer has to protect citizens (*Abwehr*). In Daschner's case the legal foundation for this takes is provided for by § 1 of the Hessen *Statute on public security and order (HSGO)*. Indeed, Daschner said so much in newspaper interviews and also based his legal case on (among other things) that article. What is more, if the so-called *Todesschuss*, shooting a criminal caught *in flagrante delicto* in order to prevent worse is allowed, why not torture? And can it be right to put the rights of the evildoer above the life of his victim? The usual and familiar train of exculpating arguments was set in motion.

Others, those of a more absolutist mindset, like Hans-Christian Ströbele (Green Party), stressed the unconditional thrust of the first article of Germany's constitution, which states that human dignity is inviolable: "Die Menschenwürde ist unantastbar" (art. 1 *Grundgesetz*). If Daschner were let off the hook, the gates to torture would be wide open. The media reverberated with slippery slope arguments, suggesting a natural progression from justification of torture in Daschner's case to a repetition of Auschwitz. However, the absolutist camp had the law on firmly on its side. Judge Bärbel Stock of the *Landeskammer* in Frankfurt, who had to give verdict

in the lawsuit against Daschner, duly appreciated that Daschner's decision to (threaten with) torture cannot be justified, not only because of article 1 of the *Grundgesetz*, but also in virtue of Germany's being a party to international treaties, such as the already mentioned *UN Convention Against Torture* and the *European Convention on Human Rights and Fundamental Freedoms*.

The absolute character of the prohibition on torture emerges perhaps most clearly from article 3 of the latter: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". At first sight, the derogation clause of article 15.1 of that convention ('Derogation in time of emergency') seems to specify conditions in which a state may be released from its obligation not to torture: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." However, article 15.2 rules that the ban on torture of article 3 does not fall within the scope of 15.2.<sup>6</sup> According to these conventions torture is both by definition a state act and absolutely proscribed. This implies that where individuals in their private capacity can make an appeal to self-defense (acknowledges by the penal code), the state is barred from such an appeal to justify or excuse torture: *dura lex sed lex*.

Naturally, in a full-blooded *Rechtsstaat* a judge cannot but respect the absolute embargo on torture. Here we have an imperative of 'institutional ethics': it cannot be ignored by anyone operating within that institutional framework without damage to that framework.<sup>7</sup> The judge in Daschner's case, then, was by several legal ties bound to the absolute ban on torture. She could not but convict Daschner of torture. At the

same time, she had to acknowledge that Daschner was also under a legal (and moral) obligation to protect the life of Jakob von Metzler. Daschner's dilemma had, in an important sense, become her dilemma too. She had to find a way to express the latter horn of the dilemma in her verdict while respecting the absolute legal obligation to punish the threat with torture. According to one contributor to the continuing public debate, the judge's verdict, conviction without (material) punishment, was the nearest thing to mercy or grace.<sup>8</sup>

I would prefer to call it an expression of forgiveness or, perhaps, an excuse. We shall see that this was just the direction in which Machiavelli points for a way to deal with the problem he himself put on the agenda of reflection on government action.

#### 4. A problem for government ethics

Daschner's case is one instance of a problem in government ethics which Machiavelli is generally believed to have been the first to articulate and which therefore has been baptized 'Machiavelli's problem'. It has ever since been one of the most intractable issues in government ethics. In its standard formulation, Machiavelli's problem is that an action may be exactly the right thing to do in terms of political expediency, while leaving its perpetrator guilty of a moral wrong (Hampshire 1989: 162-8). As noted in the introduction, this is a first-order, or practical, problem of decision making in government ethics. It is little wonder, then, that Machiavelli's problem engages the attention of both theoreticians and practitioners alike: it is generally and traditionally considered to be one of the ethical problems government officials can be confronted with, in one form or other.

However, Machiavelli's problem draws in its wake a conceptual or theoretical problem – and this has not been duly recognized. We can exhume these conceptual problems by paying close attention to the formulation 'an action may be exactly the right thing to do in terms of political expediency, while leaving its perpetrator guilty of a moral wrong'. As noted in the introduction, this way of putting the problem presupposes a clear-cut distinction between the domain of government and the realm of morality. What is justified in the latter may not be so in the former and vice versa. Each area of human action has its own mode of *justifying* action, which is different from, and sometimes downright opposed to from that obtaining in the other. Political prudence and morality are conceptually distinct.

This poses a conceptual problem. Actually, it poses two conceptual problems, and I shall begin by mentioning the less important one for the sake of completeness, and leave it to one side. It is the question whether Machiavelli's problem, taken as a first-order problem of decision-making, is an *ethical* problem. Since only one horn of the dilemma has its origin in morality, we are as justified to call it a political or administrative problem. This problem we shall dismiss, but only after having remarked that it contains the root of the more consequential conceptual problem.

The classical formulation of Machiavelli's problem is troublesome for anyone who believes, like I do, that there is such a thing as government ethics. For the label 'government ethics' at least suggests that there is something ethical to study in government. But if the sphere of government and politics is distinct from that of morality, and if action in that sphere is governed by a different kind of justification, what is left for the student of government ethics to study? If this is correct, then there is no such thing as government *ethics* at all. It is conceptually impossible.

In other words, where Machiavelli's problem is, at first glance, a first-order of problem of decision making – it is at a deeper level also a *conceptual* problem for the subject of government ethics. So it appears that the student of government ethics too is facing a dilemma: how can we, on the one hand, retain the appeal of Machiavelli's problem as a way of bringing out what is special about the subject government ethics, while, on the other hand, conceptually preserve the subject of government *ethics*? It seems that we either have to dismiss the relevance of Machiavelli's problem, which has been so influential in our traditional view of the subject, or deny the subject.

I think we can find a way out of this quandary by subjecting Machiavelli's own words to closer scrutiny. We can save Machiavelli, and the prominent place he deserves in the tradition of government ethics, by redeployment of his own (Tuscan)

words. Of course, this will require a touch (and not more than that) of exegesis, for which I humbly apologize. In the end, it will turn out that Machiavelli's position is, quite literally, a 'plea for excuses'. If that turns out to be what he actually means to say, then the judge in Daschner's case has decided in his spirit.

Let us first import some necessary conceptual background from ethical theory to get the theoretical implications of the issue clearer in view.

## 5. Some necessary background from ethical theory

At first sight, most of those ethical theories which are captured by the unlovely term ‘motivational internalism’ seem to deny that one can get trapped in a quandary like Daschner’s. According to those theories, one cannot value an action and *not* be motivated to perform it. For the internalist about motivation holds, unsurprisingly, that that motivation is internal to value, that is to say, that one cannot value  $\varphi$ -ing (where ‘ $\varphi$ ’ stands for a verb of action) without being motivated to  $\varphi$ . Conversely, if one thinks that  $\varphi$ -ing is wrong, one has a motivation *not* to indulge in it. Daschner cannot believe in the wrongness of torture and at the same time be motivated to torture. I myself firmly believe that motivation is internal to value.

There are two theoretical ways to make sense of Daschner’s dilemma. The first is a denial of motivational internalism or, which is an equivalent formulation, to embrace motivational externalism. According to the externalist it is perfectly possible believe some action to be wrong and at the same time be motivated to do it. For instance, I can truly believe that it is wrong for me to drink this beer, because I have to drive my family back home- and still be motivated to drink it. I may have a nonrational desire for that beer (say, thirst), and having such a desire (and acting on it) is fully compatible with believing it to be wrong.<sup>9</sup> Since I am committed to internalism, this escape route is not open to me.

Fortunately, there is another way to make sense of the dilemma, viz. by way of moral pluralism. Moral pluralism is the thesis that “human values are necessarily many, not one, and that of the many of the values there is not one to which the others are properly subordinate” (Wollheim 1993; 22). It is consistent with motivational internalism that we morally disapprove of torture, when considered in itself, but are at

the same time motivated to torture if an ulterior value can be secured by it. There is another way of putting this. A police officer may value the integrity of the person (in fact he is under a constitutional obligation to so), but also the common good (which he is also required to protect). And these values may, in certain circumstances, get into conflict. In a certain situation flouting one value will be necessary in order to secure the other. When it does we speak of a conflict of values. More particularly, the conflict of values in which the police officer in our example is trapped is an instance of Machiavelli's problem. For the internalist about motivation Machiavelli's problem is only possible against a pluralist backdrop. The first thing we have to establish, then, is whether Machiavelli is a moral pluralist.

## 6. Machiavelli's pluralism

Machiavelli has been the most influential of a group of writers on state action and its relation to morality. One of these was Francesco Guicciardini, an intimate friend of Machiavelli and, incidentally, one of the first to speak of 'reasons of state' (*ragioni di stato*). When, towards the end of his *Dialogue on Florentine Government* Guicciardini discusses Florence's lenient policy towards the Pisans, he claims that sometimes one ought to indulge in cruelty if the safety of the state is at stake. Machiavelli, Guicciardini, and also Venetian theorists like Botero and Contarini are the pioneers of what has come to be known as 'reason of state doctrine' – for whom the *salus populi*, or the safety of the people, was the *suprema lex*, the highest law.<sup>10</sup>

Reason of state doctrine tells us (among other things) that, if the safety of the people is at stake, then it is justified to violate the rights of individual persons. That is why this doctrine is usually felt to be at loggerheads with most forms of liberalism, which gives pride of place to individual liberties. Now we ought to stress two points. The first is that reason of state doctrine and individual liberties are to be found in any liberal-democratic constitution. For a typical constitution of the liberal-democratic persuasion has a catalogue of individual rights and a clause about the possibility of governing by decree in a state of emergency. So even if there is a theoretical difficulty in reconciling them (and who will deny that there is such a conflict?), they happily coexist in our polities. The other point is that in the canonical texts in the history of political thought, the coexistence of individual liberties and reason of state doctrine is not even considered to be theoretically problematic. For even the *Second Treatise* of

John Locke, which is usually considered to be one of the founding texts of liberalism, contains stretches of reason of state doctrine.<sup>11</sup>

According to the orthodox interpretation of Machiavelli his version of reason of state doctrine is predicated on a certain conception of the political, which sets him (theoretically, not historically) apart from the liberal tradition. This interpretation suggests that the sphere of the political is autonomous in the sense that it is not reducible to or emerging from moral obligations binding private persons, as in e.g. contractarian accounts of liberalism.<sup>12</sup> Machiavelli's account of the political is not a 'genetic' one in this sense. He is not concerned to show how the political emerges; for Machiavelli the political is *given*, and it is autonomous, obeying its own imperatives. Obviously, these imperatives may conflict with those governing private individuals.

Any one who believes that there is such a thing as government *ethics* and that Machiavelli is one of its founders (as I do) will have to reject this interpretation. For those who are not prepared to do this a residual uneasiness remains. For it is all very well to distinguish the political from the moral for purposes of theory, but in the real world, the world Machiavelli implores us to examine when writing about government, the political and moral interpenetrate. If this is so, we have to impose a constraint on our interpretation of Machiavelli. It is not likely that, on the basis of empirical fact, Machiavelli will have concluded that there is such a theoretical distinction at all. The time has come to take a closer look what Machiavelli himself has to say on the subject.

## 7. Machiavelli on justifying and forgiving

The tag typically associated with Machiavelli is ‘the end justifies the means’. He nowhere says this. The association is itself unjustified, on two counts.

In the first place, misleadingly (and anachronistically) suggest that Machiavelli endorses instrumental rationality, because it suggests that there are only *formal* requirements on rationality. In point of fact, Machiavelli is quite explicit (as we shall see below) that there are *substantive* constraints on the end. The end of the ruler is not any end occurring to him. The view of Machiavelli as a die-hard consequentialist or uncompromising instrumentalist reflects the hermeneutic attitudes of a preconceived reader (or translator) rather than the relevant texts.

Secondly, and more importantly, it cannot be assumed that the use of ‘to justify’ is justified. To see why this is so we may examine the following passage from Machiavelli’s *Discourses on Livy*:

“It is a sound maxim that reprehensible actions may be justified [*scusii*] by their effects, and that when the effect is good, as it was in the case of Romulus, it always justifies [*scuserà*] the action. For it is the man who uses violence to spoil things [*per guastare*], not the man who uses it to mend them [*per racconciare*], that is blameworthy”<sup>13</sup>

As is well-known, Romulus, the legendary founder of the Roman Republic, killed his twin brother Remus in order to organize its institutions. He was a man “prudent and virtuous” (in the specific Machiavellian sense of ‘virtuous’) enough not to bequeath power to other men who might use it for “ambitious” purposes.<sup>14</sup>

“That Romulus was a man of this character, that for the death of his brother and of his colleague he deserves to be excused [*meritasse scusa*], and that what he did was done for the common good and not to satisfy his personal ambition, is shown by his having at once instituted a senate with which he consulted and with whose views his decisions were in accord.”

I think we need to emphasize three interdependent points.

In the first place, in the first quotation Machiavelli appears to speak as if actions are to be justified by their *actual* effects, not by the effects envisaged or aimed at. However, the last sentence shows that it is intended affects, not actual effects which carry the day. In other words, he betrays indecision or a lack of awareness as to the huge moral difference between taking actual or intended effects as decisive in the moral assessment of action. For if actual effects count, then Machiavelli imports an element of moral luck into that assessment: actions done with the meanest of intentions may turn out to have very beneficial consequences. On the other hands, if intended effects count, then intention is the criterion by which the moral value of action is established.

This leads us to the second point. As can be gleaned from the passages just quoted, the translator adopts both ‘to justify’ and ‘to excuse’ for one and the same Italian (or rather Tuscan) verb, viz. *scusare*, ‘to excuse’.<sup>15</sup> We shall come back to this point presently.

The third point has already been mentioned in passing, but it is important enough in its own right to merit separate (although brief) treatment. It is the point that Romulus ought to be forgiven on the condition that “what he did was done for the

common good and not to satisfy his personal ambition”. So base acts are only to be forgiven if they are for the general interest: *esto salus populi suprema lex*. Viewed in this light, this maxim, which is associated with reason of state theory, acquires other overtones. On this reading it is not the one-dimensionally consequentialist doctrine it has traditionally been thought to be.

Let us now examine the second point at close quarters. It is not my aim to indulge in exegesis, but we should stop and dwell a bit on the translator’s choice to render one Italian word (*scusare*) by two different English words (‘to justify’, ‘to excuse’). Now it might not be uncommon to use the verb ‘to excuse’ in ways suspiciously similar to ‘to justify’. However, this does not alter the fact that the two verbs have quite different senses. In the *Oxford Dictionary* the verb ‘to excuse’ has, roughly speaking, two meanings: it covers both attempting to lessen the blame attaching to or to forgive a fault. Now it should be noted that to justify a killing is not the same as to forgive it – far from it. But even attempting to *lessen* the blame is something different from justifying it. Justifying an action makes that action (quite literally) right, whereas forgiving it makes only sense when it is acknowledged that it was wrong. This is a subtle but crucial distinction (Austin 1961: 125).

Another way to point out the distinction between justifying and forgiving looks to the emotional reactions normally accompanying it. If an action is justified, then regret (or shame or guilt) is out of order. To say this is of course not to say that, as a matter of empirical fact, a person cannot feel regret at an action which turns out to be quite justified. It is to say that that feeling *has no point*. When an action is forgiven, however, those retrospective feelings are not pointless. On the contrary, I submit that it is vital for a correct understanding of the concept of forgiving that the agent ought to have these feelings – even if, in fact, he does not have them.

Machiavelli's 'sound maxim', therefore, states that the intended effects of an action may excuse its perpetrator, without, however, claiming that action to be *right*. Yet there is an important condition on forgiving an action: it should be performed for the common good. Thus it matters for which end the action is done: for a statesman's actions to be forgiven it is crucial that they be performed *virtuosamente*, that is, with the common good in view. What Machiavelli calls 'reprehensible actions' are not *justified* by their intended consequences at all, no matter how beneficial they are. This means that, in a sense yet to be specified, Machiavelli is a pluralist. For he acknowledges that an action which is done for the common good leaves its perpetrator guilty of a moral wrong. Otherwise there would be no need to excuse him. Therefore we should jettison the orthodox interpretation of Machiavelli.

## 8. Machiavelli and morality

Someone might object, 'So what? What you have shown is that Machiavelli is a value pluralist *avant-la-lettre*. And this is nothing new, because Isaiah Berlin has shown him to be one in his essay on the originality of Machiavelli.' (Berlin 1979) Now this objection certainly cannot be dismissed. Isaiah Berlin indeed ought to be credited with being the first to construing Machiavelli as a value pluralist – I am quite happy to grant this.

Berlin claims that for Machiavelli the sphere of the political is not bare of morality, but that it is a moral sphere in its own right. It is true that it is autonomous, but this does not entail that it is not responsive to moral imperatives. Moral values come in systems, and the system of politics differs from the system of values justifying (and, so one hopes, regulating) the conduct of individuals in their private capacity. Of course, Berlin merely wants to say that Machiavelli is a moral pluralist.

I agree with Berlin that Machiavelli acknowledges, like the value pluralist does, that there is more than one ultimate value. I disagree, however, with his claim that Machiavelli considers the moral standards in the political realm to be different from (and possibly, or partially, incommensurable with) the moral standards in the non-political world. The preceding section shows that the whole point of the distinction between justifying and forgiving is *denying* that there is a different, or independent standard for government action. For if government action is justified when it is for the common good, there is no need for forgiveness. Therefore, what Machiavelli appears to be saying is that the standard for judging government action is of a piece with that by means of which we judge *any* action, in which sphere

whatsoever. Even with the common good in view it is *wrong* to commit cruelty. The most we can do is acknowledging its wrongness, and forgive the reprehensible action.

To put it succinctly: there is *no* difference of standard for moral assessment of government action. There is *one* system of moral standards and the very fact that, according to Machiavelli, government action for the common good ought to be forgiven instead of justified contradicts the orthodox claim that the realm of political action is amoral. There is no way to escape morality, not even in the words of that thinker who is most commonly associated with, and blamed for, the suggestion that there is. The pluralist point I want to make is that the standards of a ubiquitous morality themselves are many, and not one. And it behoves each person, whether in their private or public quality, to weigh the claims of those standards in situations of choice.

We have established, then, that, from a moral point of view, Machiavelli's problem is not adequately construed as an attempt to partition the spheres of government and morality. The reason why we should not do so is that Machiavelli does not speak of justification of cruelty perpetrated by the state, but of excusing it – and this presupposes that it is *wrong by moral standards*. However, although Isaiah Berlin's reinterpretation of Machiavelli as a pluralist suffices for his recruitment to the field of government ethics, it still too much depends on a idealized distinction between different value systems. On the interpretation defended here, Machiavelli is a pluralist thinker, but a pluralist thinker who claims that our values are many and possible in tragic conflict, but that this conflict is not explained by a clash between different value systems. It is the value system of morality itself which is heterogeneous in such a way that it makes possible such conflicts. Government ethics,

both its practice and its study, are possible because government is part of and located within the orbit of just that heterogeneous system of values.

## 9. Conclusion

It is time to bring theory and practice together. I believe we should view the verdict in Daschner's case as a way for dealing with Machiavelli's problem in a *Rechtsstaat*. Of course, this may not be, and probably has not been, the way the judge would have put it. However, it is a way to put it. It is a way to give expression to the idea that there is a tragic dimension to violating a right with a good end in view, because one has been enmeshed in a situation beyond one's control. Daschner has taken responsibility and thus exposed himself to blame for the wrong he has done. One way to read the verdict (conviction without punishment) is that it does not justify the action, but tries to express forgiveness by means of administering the mildest form of punishment possible. Although the verdict is clearly a legal decision, I believe the judge has deployed all legal her resources for assessing the case in moral terms.

The case was decided in terms compatible with the reinterpretation of Machiavelli presented here. So there is empirical plausibility for that reinterpretation in hard cases like these. We set out, however, with a theoretical point, namely, whether the subject of government ethics is at all coherent. We saw that the concept is under pressure from cynics who claim that morality has no legitimate place in government. What we have shown is that, if there is anything at all to that position, it will not do to recruit Machiavelli to its service. Of course, one might say that this is not lethal to this position – and that is true. In general, the cynic is beyond the grasp of rational persuasion. On the other hand, we what we have gained, apart from the theoretical restoration of legal excuses in government, is that we have found a way of

tugging the alleged originator of modern theoretical forms of cynicism into the camp of government ethics.

To get back to the question we set out with, namely, whether there is such a thing as government ethics. We have seen that the concept is not incoherent, because there is no such thing as the autonomy of the sphere of government relative to morality. Not even in the writings of Machiavelli. So, yes, there is such a thing as government ethics. And it is an intriguing field.

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<sup>1</sup> The title of this essay is a tribute to J.L.Austin's famous and (in analytical philosophy) influential essay 'A Plea for Excuses' on the adverbs by means of which we qualify actions among other things to assign responsibility to their perpetrators (Austin 1961; 123-52).

<sup>2</sup> The problem is sometimes called 'the problem of dirty hands', see Walzer 1973. Since the notion of dirty hands is deployed in many different contexts (notably in those concerned with corruption) I prefer the term 'Machiavelli's problem'.

<sup>3</sup> My emphasis. The article excludes pain involved in lawful sanctions.

<sup>4</sup> The conceptual nature of connection, however, has been slightly relativized by ECHR decision in *M.C. v. Bulgaria* of 4 December 2003, which allows that also private action can be qualified as torture.

<sup>5</sup> Interview in *Frankfurter Rundschau*, 4 October 2002.

<sup>6</sup> "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."

<sup>7</sup> See Nieuwenburg 2003. This would be different in the case of Israel, which has not ratified the *UN Convention Against Torture*.

<sup>8</sup> Lienemann 2005: 59.

<sup>9</sup> The dominant ethical theories, those inspired by Kant and Hume, are internalist about motivation.

<sup>10</sup> For these thinkers and their place in the putative republican tradition of political thought, see Pocock 1975.

<sup>11</sup> Note, for instance, the important passages on prerogative, Locke 1988: 374-80. This is simply a consequence of one of those other cornerstones of liberalism, the

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separation of powers. The executive (frequently the monarch, conceived as the head of armed forces) should be capable of quick and concerted action in times of crisis.

<sup>12</sup> In a liberal-contractarian account of the political, the political emerges from a pre-political morality: those who want to leave the state of nature, because (as in John Locke's account) there is nothing to protect their rights, already have certain obligations on each other. Put differently, there is, in the state of nature, no *executive power* to guarantee individual rights. But that these rights cannot be safeguarded does not mean that those rights are not there.

<sup>13</sup> Machiavelli 1983.

<sup>14</sup> The opposition *ambiziosamente-virtuosamente* refers to making use of power for private purposes (*ambizione propria*) and using it for the common good (*per il bene commune*) respectively (Machiavelli 1993 :90-1).

<sup>15</sup> In fact, Machiavelli here rhetorically plays with the words *scusare* and *accusare* (like Austin 1961: 123-4)