

## Liberal Lustration\*

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THE morality of post-war actions is little understood because *jus post bellum* is a relatively new area of just war thinking and non-ideal theory, becoming prominent only after World War II. In the aftermath of a regime-changing war, a state's institutions are often purged of dangerous, corrupt, or culpable remnants of the previous system, such as was seen in de-Nazification or the more recent de-Ba'athification in Iraq. Lustration—a symbolic purification through the assignment of collective responsibility for the previous regime's sins and any subsequent collective punishment for that responsibility<sup>1</sup>—is an important and complicated affair for each of the state's institutions and branches of government. This article asks whether the group treatment of lustration is justified when transitioning from an illiberal state (defined here as one that does not respect rule of law or recognize moral individualism) to a liberal one, and uses the military as the primary institutional example.<sup>2</sup> The ideas are relevant to other situations, but rather than explore lustration in general or for the regime as a whole, the focus here is narrowed for clarity's sake.

Lustration holds groups responsible for injustices perpetuated under the previous regime—no more, no less. That includes, but does not require, the delegation of punishments, which may range from prosecution, jail terms, and reparations to purges or bans from future office. Punishment can also be purely symbolic, such as a public condemnation that subjects guilty parties to social disapproval. I argue that lustration should be acceptable to liberals on ethical grounds, despite necessarily judging people in groups, and leave as a separate policy question what in particular should be done in each post-war scenario.

Greater understanding of lustration's moral dimensions not only helps countries choose their most desirable form of lustration, but also contributes to

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<sup>1</sup>“Lustration,” as defined here, incorporates both traditional (sacrifice or ritualistic cleansing for expiatory purposes) and contemporary (in its application to group punishment) usages of the term.

<sup>2</sup>The military's features as a collective agent—strict hierarchy, obedience to authority, division of labor, and self-understanding as a collectivity—make it a more straightforward example.

a better grasp of post-war transitional justice more broadly. The paucity of thought about *jus post bellum* makes it even more difficult to straddle the divide between retributive and distributive justice. Post-war lustration metes out retribution because it decides what a person deserves for his actions—most likely for the wrong of supporting an unacceptable, losing regime. It is also distributive in nature because it guides the allocation of post-war spoils, by determining who gets to participate in the new economic system and how the benefits and burdens will be assigned.

A regime change's drastic transformations to a society's fundamental political structure will inevitably result in lustrating some of those involved with the previous government. At that point, we arrive at Morton's Fork and must choose between two equally unpalatable alternatives—chase inevitably imperfect retribution for the past (e.g., by devoting massive resources to ascertaining and publicizing each individual's actions and giving him exactly the punishment he deserves) at the expense of future reconstruction and institution- and civil society-building, or sweep aside the past (thus denying justice to victims of the old regime) in an effort to set the stage for future justice. Given the need to simultaneously pursue both goals to some extent and the reality of limited resources, perfect and complete justice will never be achieved. The new regime's choice along this spectrum—from greater retribution and restitution to greater reconstruction—reflects which injustices it prefers to live with.

Why is it important to ascertain the moral acceptability of lustration? After all, if justice is inevitably imperfect in transition and if people will be lustrated anyway for practical reasons, it might be best to focus pragmatically on reconstruction and on rooting out the obviously corrupt or guilty as quickly as possible. But in righting past wrongs, even if there is no way to avoid violating the letter of the moral law and committing new injustices, it is still important to try to act in the spirit of the law; hence my attempt to see if this kind of group treatment is morally consistent with liberal theory. It is possible that liberalism permits, or even recommends, lustration. The goal is to eventually restore both the spirit and the letter of the moral law to the land, and that is only possible when we know what the moral law allows or requires.

## I. IS LUSTRATION MORALLY ACCEPTABLE?

Because even thoughtful and nuanced lustration involves blaming groups, instead of treating each case individually, this poses a potential problem for liberalism's moral individualism. Before deciding on a group's just deserts, one must first explain why it is morally acceptable for liberals to sweepingly condemn and punish everyone in a group for acts performed only by some, by virtue of their membership in the collective. Lustration is by nature a blunt instrument, even if one is careful to make distinctions between types within groups. Combine this

with the necessity for speed, and not everyone will get individual consideration; some will get greater or lesser punishments than what they personally deserve for their actions.

While traditional, feudal, or conservative political traditions might advocate that any collective—especially military personnel—that made its living by following orders and behaving as a group should therefore be judged accordingly, liberalism would seem to start from the opposite end of the spectrum and deny such a collective remedy. Almost all transitional justice scholars stress the importance of not accidentally punishing the innocent.<sup>3</sup> The belief that this is wrong in itself, even in transitional circumstances, is grounded in an unspoken assumption of moral individualism—that each person deserves to and should only be punished for what he individually did. The orgies of revenge and public humiliation that have accompanied many regime and even administrative turnovers throughout history rightly cause discomfort in liberals who wish to avoid even the appearance of unwarranted retribution for sins that one did not commit.<sup>4</sup> Other liberals protest that inevitable shortfalls and mistakes in lustration make matters worse and violate the rule of law and due process.<sup>5</sup>

So can lustration in the name of liberalism be justified? How do we introduce group intentions while retaining individual agency? Lustration necessarily treats individuals as members of a group, no matter how finely delineated the sub-categories are, and this presents problems of discerning group agency and responsibility from a collection of individual actions. This complication is compounded when military service in illiberal regimes is compulsory, so draftees would be held accountable not only for simply doing their jobs, but also for jobs they might not have chosen. There is a significant element of moral luck involved, and many soldiers are themselves the victims of unfortunate circumstances—born into the wrong country at the wrong time and lacking other means of social mobility or forced into compulsory military service to an illiberal government that ends up defeated—and often serve not out of fervent desire to support an immoral regime but simply to make do with circumstances beyond their control. Yet, they will be punished for the bad luck that has befallen them. Furthermore,

<sup>3</sup>See, e.g.: Nalepa 2003; Rzeplin'ski 1992; Stinchcombe 1995; and Offe 1993. Also, strong and weak retributivists differ on how to trade-off between punishing the innocent and letting the guilty go (Alexander 1983).

<sup>4</sup>Holmes (1994) and Ost (2005), among others, criticize some post-Communist transitions in Eastern Europe for illiberal, exclusionary practices. Polish lustration, for example, was hijacked by conservative successors to the Solidarity party in an effort to rid the new government of their more liberal counterparts (Ost 2005, pp. 70–4).

<sup>5</sup>Ackerman (1992, p. 88) defines the “liberal revolution” by its observance of the rule of law (underscored by a constitution), and opposes backward-looking, corrective-justice measures because they are divisive and politically-alienating and can lead to further abuses of power. “The search for perfect justice is beyond human capacities,” he says; it is better to “burn the files than hire the thousands of lawyers and bureaucrats required to spin the wheels of justice in the service of an illusion.” To do otherwise would squander the moral capital gained from the liberal revolution, in favor of continued illiberality. In fact, Elster (1992) champions a radical all-or-nothing approach to lustration that he knows will inevitably result in nothing.

lustration holds them responsible under *ex post facto* standards. When they joined the military and/or committed wrongful acts under the aegis of the old regime, they were only doing what was perfectly reasonable, legal, and expected at the time; now, they are accountable under new standards they could not have predicted. In light of these problematic circumstances, it seems counter-intuitive to lustrate the unfortunate and obedient. There may be, however, good reasons for this and not just out of expedience.

While group treatment might be justified on grounds of convenience and realism in times of transitional justice, it need not necessarily be a temporary and pragmatic move that must be swallowed under messy circumstances. Contrary to both the liberal aversion to group treatment and the pragmatic acceptance of group punishment, there are valid arguments consistent with liberalism for wholesale lustration after a war.

This article offers four justifications consistent with moral individualism and due process for lustration, in the wake of a regime change: (1) complicity in a group agent that was wrong for having defended an illegitimate regime; (2) representative responsibility for an epistemically-unreliable system; (3) holding a political appointment made from above (executive) or below (people); and (4) dissolution of the social contract. Each defense justifies condemning slightly different sets of people and each has peripheral features and applications, but within the overlapping core is the notion that lustration (of the military in particular) is morally permissible.<sup>6</sup>

These arguments are not meant nor do they have to be exhaustive of all possible liberal justifications. The purpose of presenting different lines of reasoning is to defend the core concept of lustration as consistent with liberalism, which is controversial because of its inherent group treatment. This is not dissimilar to defending a core conception of free speech. Some notions of free speech protect pornography, some sedition, some for children, and so forth. But at the center of each is the idea that free speech for adults' legitimate, peaceful criticism of government institutions is to be protected. Similarly, this article seeks to demonstrate the robustness of the permissibility of post-war lustration when transitioning from an illiberal to a liberal regime.

The core notion being defended is that it is morally acceptable from a liberal point of view to lustrate *as a group* all military personnel who served an illiberal regime. The first two justifications rely on individual responsibility by placing the onus on the individual's membership in the military or his decision-making in and understanding of the political system he served. The latter two show that what appears at first to be punishment actually is not and therefore does not violate any standards of due process. All four defenses are also capable of answering the charge of *ex post facto* treatment, as none are predicated on the individual having

<sup>6</sup>For example, "representative responsibility" may also justify lustrating police forces and bureaucrats, while "the nature of political appointments" would also pick up legislators.

committed any wrong other than having joined a disgraced military, and potentially apply to liberal societies switching to other types of regimes (liberal or not) as well.

### A. COMPLICITY

Soldiers, who have individually chosen or accepted membership in the military institution, can be called to account for their participation in the shared martial project even if they did not violate *jus in bello*, on a complicitous understanding of group agency and collective action.

Persons in complicated contemporary societies are bound by overlapping constraints, tacit consent, implicit and explicit representation, and joint participation in complex social enterprises and institutions, and it is difficult to assign collective culpability to individuals for “group” actions that are always some composite of individual deeds. Often, the ability to identify individual agency and assign individual responsibility disappears, most notably in cases of spontaneous orders. When languages evolve, the use of money emerges, the Chinese bind girls’ feet, or bell-bottom jeans come back into style, it does not make sense to point to single individuals and attribute to them a defined portion of the effect, (e.g., 1/100,000 responsibility for a fashion trend). Certainly, the first official use of “O.K.” has been traced to a 1839 Boston *Morning Post* article<sup>7</sup>, but others must hear or read the new words and spread them further, and no one knows exactly how often a word must be used before it is considered legitimate. In every spontaneous order, the effect of each person’s action interacts with the effect of another person’s action and so forth (including that of people who do not participate) to generate a phenomenon larger than the sum of its parts and impossible to attribute wholly to particular individuals.

Determining agency is also problematic when individuals are organized. What did it mean when “Allied armies won the Battle of the Bulge?” You could say that Generals Eisenhower, Patton, Bradley, and Montgomery commanded 830,000 American and British soldiers who killed or wounded over 84,000 Germans and, eventually, Hitler ordered each and every German soldier to withdraw from the Ardennes area. Yet this does not fully express what happened. It was not just that over a million individuals fought and killed each other until some decided to leave. Each person belonged to a larger organization—an army—that had an overarching goal of defeating the other army, not just in this battle but in the war. Granted, victory was won through individual soldiers on one side killing enough on the other so that the latter retreated, but it was the cooperation and coordination as a larger military organization that directed every Allied soldier’s actions toward the common goal of “defeating the German army,” rather than “killing enough German soldiers.” In addition, each soldier’s contribution—e.g.,

<sup>7</sup>Anon 2002.

the rounds he fired, the number of people he killed or wounded, and the particular orders he gave or obeyed—is but a marginal part of the whole effect. Any one soldier’s input could have been subtracted or substituted for another’s and the result would have been the same. Neither an artillery gunner nor Patton himself can say, “I won the battle.” Instead, he must say, “We [the Allied forces, as a group agent] won the battle.” The cumulative and interactive effect of all the individuals’ actions led to victory, and it is difficult to proportionally attribute responsibility among participants. This can be expanded to the entire war—it is the combined and cumulative effect of all the battles won and lost and of all the participants’ actions that wins or loses a war, so that every Allied person involved *in this group agent as an army*, not just involved with the army, won this war.

In what way exactly can soldiers be said to constitute a group agent and to act collectively? To hold the individual responsible for his marginally-negligible actions as part of a group (i.e., for being complicit), we must be able to simultaneously recognize group and individual agency and appropriately assign responsibility to each. An organized set of people must meet the following conditions before it constitutes a “group agent” and can properly be said to “act as a group”.

- 1) Members intend to participate in the group and see themselves as acting for the sake of some shared goal, share overlapping (but not necessarily the same) conceptions of the goal, and jointly will the goal, although they need not believe the goal can be achieved. Sustained responsiveness between members is unnecessary, but initial responsiveness is required. Any group with shared goals and participation must at least initially coordinate on how to achieve those goals, even if communication is one-sided, such as from educational departments’ pre-planned teaching schedules or “how-to” newsletters from your composting club.<sup>8</sup>
- 2) Members mutually expect each others’ participation in achieving the shared end. Otherwise, nothing distinguishes this group from a set of unorganized people milling about, trying to get into a tennis stadium in time for the opening serve. They may all get in, but only because each person pursued the goal of getting himself into the stadium under the constraints presented by other people wanting the same thing, and not because each person worked together with the others to get everyone in.

<sup>8</sup>This draws from the complicity framework of Kutz (2000, pp. 83, 90–96, 139). I add to his notion of “group agents” because without mutual expectations or responsiveness, his conception is so broad that it could capture almost any set of people, including spontaneous orders, so long as individuals are aware of their potential categorization in that so-called group. Individual culpability within spontaneous orders, however, is less meaningful than within established, organized groups. Even if members of spontaneous orders intend to participate, they need not jointly will the goal, overlap their goals, have mutual expectations of each other, or respond to others. The nature of a spontaneous order—namely that it is amorphous, its composition is constantly changing, and its boundaries cannot be accurately identified before it takes action—means that while the group’s actions can be predicted, it cannot be said to intend to do something. It can only be said to “be doing” or “have done” something after the fact.

- 3) Members intend to achieve the goal, even if it is not any particular action but rather simply the constitution of a group.
- 4) There is some essential connection between members' ends, such that they share the same (if general) goals. It is not enough that a private says, "My end is to follow orders, so therefore my officer's ends are my ends." Their content must overlap to some extent, beyond just the procedural connection.

Being in a military naturally accounts for an essential connection between a soldier's ends and those of his superiors. With the exception of Japanese companies or Wal-Mart, few private-sector employees are indoctrinated the way soldiers are when they enter the service. Through rigorous training, soldiers are taught to live and breathe the military's values at all times and especially under duress. It demands comprehensive obedience, though not necessarily blind acceptance. The training includes extensive disclosure of the institution's goals, and places the impetus on the individual to help achieve them.

The question is *how* essential the connections between ends must be for a group agent to be formed. You do not have to know all your superiors' specific and intermediary ends; it is enough to know their general ends and to accept them as yours. One of the primary purposes of intentional groups is delegation and division of labor—while general ends are shared and intermediary ends often public, there cannot be complete and universal knowledge of everyone's objectives in large organizations. There is full disclosure of the fact of delegation and everyone knows that there are intermediate goals and processes of which they are ignorant, but subordinates are not fully aware of all their superiors' overall and intermediary objectives and superiors are also unaware of all their subordinates' supporting tasks and goals. Otherwise, it would be impossible for any group of more than three or four to function at all. With some, but not complete, essential connection between members' ends, a group agent can still be formed. One can always reject other members' intermediary ends in retrospect.

- 5) Participants share and condone at least a general conception of the means. (Tacit acceptance is enough.) If we want to preserve a notion of individual agency within groups, then acceptance of the ends cannot automatically include concurrence on the means.

In group settings, the means must be publicly known. For example, most inter-war Germans sought to socially isolate and "politically and economically disenfranchise" the Jews, and happily saw them shipped to concentration camps where they would inevitably suffer severely. But many Germans did not know they were being gruesomely and systematically annihilated there. Genocide is one way of achieving the desired goal, but not the only way, and presumably, many would not have condoned this method. It is fair to say that "the German people are

responsible for pervasive and often violent persecution of Jews,” but not entirely accurate that “the German people are responsible for the systematic genocide of the Holocaust.” Rather, “the Nazi regime and its participants are responsible for the Holocaust.” Public knowledge of the means is required if individuals’ wills are to be manifested in pursuit of the collective goal—only then can members be said to be complicit. (Members who believe they know and condone the means are, *ex ante*, genuine participants in the group agent. If they were deceived about and would not have condoned the means, however, then they would not be considered accountable members, *ex post*.)

This complicity model hinges on each individual’s personal intentions, and as such, individual participants in organized enterprises meeting these conditions—especially a military—can be meaningfully held accountable for their membership and for group actions, since a properly-constituted group has been formed by every person’s exercise of autonomy in joining. Because an actor’s participation is autonomously chosen and intentional, however, this relationship also works in reverse, and individuals who will a shared project can also be held responsible for their roles in it and lustrated accordingly. (In many cases, persons in executive offices would qualify for lustration on complicity grounds if the executive constituted a group agent, for instance, if the country was ruled by a military junta, a one-party dictatorship, or some similarly tight-knit, well-organized group.) It is important to note that the implication of the complicity framework here is that membership alone in a guilty military is enough to justify a person’s lustration; he need not have participated in any other crimes. In practice, however, lustration policy can take that into account and attempt to differentiate between degrees of culpability, especially at the punishment stage.

## B. REPRESENTATIVE RESPONSIBILITY AND THE NUREMBERG DEFENSE

Even if individuals did not personally engage in wrongdoing under the old regime, they served as representatives of their institutions and therefore bear some responsibility for actions undertaken by that establishment. This is not dissimilar to heads of companies or institutions who resign in the wake of a scandal in order to maintain public confidence in the organization, even though they did not themselves participate in or know about the wrongdoing.

One way to look at representative responsibility returns to the complicity model and its requirement for public knowledge of the means. In large, complex organizations like militaries, it is impossible for every individual to know what every other member is doing. An infantryman is aware of what his squad, platoon, and company are engaged in, but has less knowledge of other members of his brigade and very little of other divisions or corps. Without knowing, he cannot condemn or condone any actual means employed, only what he believes



to be the means. The higher a soldier is in the chain of command, the more he can be expected to know and the more plausibly one can say that his will was manifested in the pursuit of collective goals. Different standards will apply to executives than to ordinary participants in an organized group.

Another approach is to extract what it really means when someone says he is “obeying orders.” To do this, let us start with an epistemic proceduralist approach (from the deliberative democracy literature) and the sanitizing process of military hierarchical organization as described by David Estlund. Under the right conditions, says Estlund—for which he proposes “consultative epistocracy: an elite of wise and reliable decision-makers [who] make the decisions after consulting the views of the many”—a soldier is “morally obligated . . . to follow all normally binding orders,” consistent with *jus in bello*, even if the war itself is unjust.<sup>9</sup> Because he follows orders generated by a morally-acceptable and epistemically-reliable process, his obedience and any ensuing immoral behavior is “sanitized” even if he knows, whether through personal information or otherwise, that the war is wrong.<sup>10</sup> Not only is he not personally responsible for injustices he commits by perpetuating the war, but he is morally obligated to commit them.<sup>11</sup> In a process similar to a jury trial, such an “epistemic authoritative procedure” sanitizes a soldier’s otherwise impermissible actions.<sup>12</sup> How so? Elsewhere, Estlund argues that people have sufficient reasons to believe in the original authority of a jury system, and invokes Locke to say that an organized justice system in which people are judged and either punished or convincingly exonerated so as to preclude private justice is far better than the anarchy that would otherwise result.<sup>13</sup> In this way, Estlund analogizes between the jury system and the “epistemic procedural” form of deliberative democracy.

This can also be analogized to the military hierarchy. Without some protection for individuals who commit mistakes or wrongs in conjunction with the collective activity, organizations and states would not be able to function effectively. Hierarchical organization is a process for dealing with insurmountable information constraints on the individual, particularly in war or with classified

<sup>9</sup>Estlund 2007, pp. 215, 221, 223–4.

<sup>10</sup>Ibid., p. 213.

<sup>11</sup>Good procedures will not always generate the right or the best outcomes. Procedures are assumed to be fallible (ibid., p. 218), and mistakes generated will at least be honest ones, falling within an acceptable standard (ibid. p. 221). Estlund advocates a “range of error” criterion for obedience, determined by “whether the command is (or is not) too far from a just response, in light of a reasonable view of the facts, by a legitimate authority that has, in a publicly recognizable way, a general capacity to respect justice of waging and fighting wars” (ibid., pp. 230–1).

<sup>12</sup>Ibid., p. 224. Estlund denies that this treats soldiers as less than autonomous agents: “There are ways in which we ought to be instruments of larger systems in a certain sense. . . . Sometimes the responsible and courageous conclusion is to acknowledge a moral obligation to obey a command even though you disagree with it, and even though, in your own view, others will be unjustly harmed . . . nothing here tells the soldier to ignore [whether the order is just] . . . what you ought to do when it is unjust is another [matter] . . . agency is hardly incompatible with . . . having moral duties of obedience. Obedience is a substantive moral question that agents must face” (ibid., pp. 228–9).

<sup>13</sup>Estlund 2008, p. 140.

information, and is the only way that a military can operate. Even if a person has relevant knowledge in a particular case, preserving the system of decision-making (provided that it is a good one) might yield the greatest overall utility. It might also be the case that a person is stuck between two injustices in the midst of a just process—the injustice of the order and the injustice of disobedience—and in some cases, the injustice of the order may be the lesser.

What is a soldier or any subordinate in such a system actually saying when he claims, “I was only obeying orders,” and that his actions, individually right or wrong, are sanitized as a result? He is really offering an abbreviated justification for the epistemic procedure that generated that order. Because the epistemic procedure specified is consultative, it was chosen with the input of the many, with their wide and varied knowledge. As a result, it is assumed that all qualified points of view believe that this procedure is more likely to generate demographically-neutral and substantively-valuable goals and to assign more appropriate orders in their pursuit.<sup>14</sup> It is on those grounds that the consultative epistocratic procedure commands moral authority.

So the full version of the defense the soldier gives when he says that he “obeys orders” is as follows: (a) there is an epistemically-valuable process that was developed through consultation with the many, of which I or my representative is included; (b) this process generates orders for me; (c) whether or not an individual order I now receive is unjust or incorrect, it is just that the order be obeyed, because the process has practical value (as the only method by which a military could function) and moral authority (because of the way in which the process was developed); and (d) I obeyed the command in order to behave justly. In saying “I was only following orders,” then, a person actually offers a deep, rather than shallow, justification of the procedures that generated his orders and sanitized his actions.

In doing so, he sets himself up not only as a subordinate of the system, but also as its representative. His responsibilities become clearer when one considers that if it is the case that a person must carry out even incorrect orders issued from an epistemically-valuable process but is immunized from blame or responsibility in unjust happenstances, then he must also take some responsibility for the organization’s mistakes although he is personally innocent in that situation. The sanitation of his actions comes at a price.

Suppose the person turns out to be wrong about the justness of the epistemic procedure and the institutional apparatus that generated his orders. Based on his “following orders” defense, he can be held responsible for having complied with those commands on the grounds that he was assumed to have reflected on and endorsed the process, regardless of whether his particular actions were right or

<sup>14</sup>I analogize from Estlund’s jury system analogy, which he says compels a duty to obey even orders one might believe to be incorrect in part because it has, “in a way that all qualified points of view can accept, a decent tendency to make accurate judgments of guilt or innocence, and to assign appropriate punishments” (*ibid.*, p. 146).

wrong. In the case of the military, when its government has been overthrown and deemed unjust, its individual members, as representatives, are responsible for having perpetrated the illegitimate regime and should accordingly be held accountable. Any unjust orders they heeded might be forgiven so long as the process behind them was satisfactory, but if the process itself is discovered to be unacceptable, then its members are considered to have understood and knowingly endorsed the nature of the institution that commanded them. Such is the nature of representation.

Does this argument work in the context of an illiberal regime, where there was presumably little consultation, much less democratic deliberation, in developing the military's epistocracy? Yes, because consultation, deliberation, and democracy are not at all essential to the Nuremberg defense. The case for rejecting a simple claim of obedience and holding the person responsible as a representative is much stronger when there is consultation, deliberation, or democracy, but it is not dependent on them. A person can be expected to have some rudimentary knowledge of the process by which his orders were issued and he can be duly represented in that process even without his individual consultation or deliberation. (See (a) above.) If the agent did not endorse the system he was representing, he would not offer a defense grounded in obedience but rather something else, such as survival, and he might say instead, "I had no choice but to obey because my own livelihood was at stake. What would you have me do?" Inherent in a Nuremberg defense is the assumption that the orders were justly obeyed.

Are there no instances in which good-faith belief in a flawed system would be exonerated? It may seem wrong to hold someone responsible if he genuinely believed that the justice of the process was being looked after elsewhere. Perhaps an additional moral mechanism—an objective standard for the quality of faith in a system's epistemic reliability with regard to *jus ad bellum*—is needed to fully determine whether a soldier should be accountable for his obedience to a mistaken system.

Definitive formulation of the criteria is too ambitious a task for this article, so here, I merely offer one possibility for a standard containing two parts.

- (1) The regime's ideology must be endorsable on Kantian republican grounds. The republic requires actual ratification of the law by either the people or their representatives, but universal and actual consent to the just social contract is impossible. So, under non-ideal conditions, Kant proposes a minimal standard of legitimization consistent with the spirit of republicanism, by evaluating what people could reasonably agree to *even if at present they might refuse it if asked*.<sup>15</sup> Legislators are obligated to produce laws that the people, as a whole, would vote for were they to do so. This determines how much the law conforms with right. As for what a

<sup>15</sup>Kant [1793] 2006, 8:297, pp. 296–7.

people could reasonably agree to, we should consider the content of a system's self-stated ideology and its structure, such as its checks and balances, transparency, and so on. If the regime cannot be endorsed on those grounds, then it fails the standard of reliability, and any faith professed in the system's ability to generate epistemically-correct orders regarding *jus ad bellum* is unwarranted. If the regime passes this first test of endorsability, then we go to the second.

- (2) A regime's practices must reasonably approximate its rhetoric. If the two are and have been fairly consistent, then a soldier's faith in the system's epistemic reliability is warranted and he can be exonerated. If there is a large gap—e.g., the regime waxes poetic about freedom and equality in a worker's paradise, yet regularly sends its citizens to gulags for imagined transgressions, or it urges people to “dare to think, dare to act,”<sup>16</sup> but censors and punishes dissenters harshly—then he knows the system is unreliable. His belief in its ability to arrive at the correct *jus ad bellum* answer is thus indefensible, and he should be lustrated as its representative.

Accordingly, who should be exempted for their good-faith belief? In reality, probably only representatives of liberal democracies—regimes with endorsable ideologies and reasonably-consistent behavior—would qualify. Even if the system was wrong about a particular war, belief in its overall reliability would be legitimate.<sup>17</sup> Those representing regimes with either unendorsable ideology or endorsable ideology but contradictory behavior—and *who therefore had relevant information with which to deduce that the system generated unreliable outcomes*—should be lustrated. Under those circumstances, mistaken good-faith in the system's epistemic reliability is hardly reasonable.<sup>18</sup>

What about the person who obeys orders knowing that the procedure generating them is illegitimate? Take Bernard Williams' example of George, the scientist opposed to chemical and biological warfare, whose acceptance of a supervisory role in such a lab could allow him to sabotage the research or at least prevent a more zealous colleague from taking charge and pushing it along more rapidly.<sup>19</sup> Christiano adds some details to the scenario—it is a Nazi-affiliated lab and George does not believe Nazis should possess chemical weapons—and says that while George would be right to take the job given the circumstances, the authority he obeys in that role would be illegitimate.<sup>20</sup>

<sup>16</sup>This Great Leap Forward slogan encouraged increased production and commune formation.

<sup>17</sup>Reliability is about generating good results more often than not, so mistakes in particular instances do not necessarily mean the soldier's faith is unwarranted.

<sup>18</sup>There is some convergence of the quality of a regime with the quality of faith in it, on the “good” end of the spectrum of regimes. The more transparent, self-checking, and historically-acceptable the regime, the more likely that belief in it was well-placed, as “good” systems possess multiple indicators of acceptability. Convergence comes apart at the other end, however. One could have good-quality faith in a bad system if an ideologically-malevolent regime lives up to its promises.

<sup>19</sup>Smart and Williams 1973.

<sup>20</sup>Christiano 2004.

Assuming this is right, George would still be accountable for heeding the commands of the illegitimate regime and for his work in the lab. George has thought about the process that generates his orders and does not endorse it, but in taking the job, he chooses to comply and also explicitly conveys to others an acceptance of the system and its authority. George had some choice here; the same would be true even if he had none. Although things would have been worse overall had he refused the job, in accepting it, he knowingly takes responsibility for what happens as a result of his work. If he was successful in slowing down or sabotaging the lab, then he is also responsible for preventing worse things from happening, and credit for that other aspect of his actions should simultaneously be given.<sup>21</sup>

### C. THE NATURE OF POLITICAL APPOINTMENTS

Although it may appear unseemly and hypocritical to usher in a new liberal system by lustrating whole groups without regard for individual culpability in a manner more reminiscent of its predecessor, systematic purging is not unknown and, under some circumstances, perfectly acceptable in liberal democracies where election of a new president or prime minister is accompanied by fervent jockeying for political appointments in his administration. Heads of ministries (defense, treasury, education, etc.) and their assistants, and in some countries the ambassadors and special envoys as well, start looking for other jobs, and new people prepare to take their place. This kind of elite turnover is entirely routine—everyone expects it, no one complains, and it happens all the time.

Liberal democracies exercise what Weber calls “legal (or rational) authority with a bureaucratic administrative staff.”<sup>22</sup> People in authority positions, including elected heads of state and legislators, hold offices. As such, their authority and their commands are impersonal. Similarly, subordinates obey orders in their capacity as “members” of the political organization<sup>23</sup>, and the loyalty they confer is impersonal and directed at the office, not at the rotating cast of persons occupying the position.

Lower-level civil servants are unaffected by elite turnover. As demanding as their jobs are, ordinary bureaucrats are not policy-makers in the broadest sense, nor are they responsible for the successes or failures of particular policies. They exercise “technical expertise,” rather than broad vision or leadership, and they organize, facilitate, and carry out policy decisions regardless of the content and

<sup>21</sup>George’s single action—working at the lab in order to sabotage the program from within—has multiple moral valences. Insofar as he prevented worse things from happening, it is morally-praiseworthy. At the same time, working at the lab is morally-blameworthy, and that is not erased by the moral goodness of his goal, even if the goal is only achievable by engaging in morally-wrong acts. His single act has at least two simultaneous and conflicting moral facets, and he should be both praised and blamed.

<sup>22</sup>Weber [1922] 1947, pp. 328–9.

<sup>23</sup>Ibid., p. 330.

irrespective of which branch of government orders them.<sup>24</sup> They are, therefore, immune while high-level appointments are given and taken away with each new administration because of, simply, the political nature of the top appointments.

Heads of ministries and other political appointments are given significant freedom and expected to exercise a fair amount of discretion in developing and promoting the head of state's policies and overall political vision. Presumably, the population elected the president or prime minister because it wanted his proposals carried out; as all heads of state must delegate much of that work to others, he should be free to install like-minded and trustworthy people in major policy-making positions. In that respect, political appointees are extensions of the head of state and, as part of his team, they come and go with the fortunes of the elected official.<sup>25</sup> As for legislators and the head of state himself, political appointments made from below are subject to the same fate, and in a regime change, they are tied to the fortunes of the population that selected them and/or tacitly endorsed the political system in which they held office.

While some top military positions in liberal democracies are political appointments, such as the United States' head of the Joint Chiefs of Staff, the average soldier in a liberal democracy is more like a civil servant who should be protected from the turbulence at the top of the political food chain than a political appointee whose own views ought to support the head of state's, because he is loyal to the office and not to the person occupying it. Says Weber, "The modern army is essentially a bureaucratic organization administered by that peculiar type of military functionary, 'the officer.'"<sup>26</sup> One result of such bureaucratic organization is

the dominance of a spirit of formalistic impersonality, '*Sine ira et studio*,' without hatred or passion, and hence without affection or enthusiasm. The dominant norms are concepts of straightforward duty with regard to personal considerations.<sup>27</sup>

Soldiers will feel passion more so than the average bureaucrat, but it is a patriotism for military institution and country. "Following orders" has a special and distinct place in military morality, and soldiers learn to fulfill their duties regardless of their opinions on a particular war or the policies leading to it.

In liberal democracies, the separation of powers (whether into legislative, executive, and judicial branches or with a combined legislative/executive)

<sup>24</sup>Ibid., pp. 333-4.

<sup>25</sup>Adequate "solidarity of interests" between the "chief and his administrative staff as opposed to the subjects" on ideological and material grounds is essential in any type of system, not just rational-legal ones (ibid., pp. 327, 383).

<sup>26</sup>Ibid., pp. 334-5. Later, Weber says that "the modern army officer is a type of appointed official who is clearly marked off by certain class distinctions" (ibid., p. 336). This appears to contradict my argument, but when this was published in 1922, modern army officers were pre-WWII creatures, who came primarily from the upper classes and who formed a mini-class of their own. Now, however, most officers acquire their positions by virtue of completing a strict training regimen and passing grueling tests. Only top commanders, such as generals and colonels, are subject to appointment.

<sup>27</sup>Ibid., p. 340.

provides some check on the use of military might. Because the military answers primarily to a single branch of government (usually the executive), checks by the other branches (perhaps by withholding funds, refusing to declare war, or hearing military cases in court) mean that it is not the private instrument of the executive. In addition, the head of the military in a liberal democracy is usually a civilian, and top military commanders report directly to him or his appointee. This structure reinforces the idea that the military is merely a policy tool, rather than an interest group of its own, and its members are simply parts that make it run. The combination of a separation of powers and the structure of civil-military relations makes the average soldier in a liberal democracy just like a civil-servant bureaucrat, albeit one with deadlier skills and better uniforms.

In illiberal regimes, however, the rank-and-file soldier is more like a political appointee than a career civil servant, and soldiers should be subject to the turnover that accompanies that kind of work. Without separation of powers, no other branch has a say in how the military is utilized, so the average soldier knows that he is more beholden to the executive than to any other and that he can be its private and exclusive tool.<sup>28</sup> Without strong civilian oversight and strict separation between military and civilian leadership, the civil-military political structure and the military in practice lack the reinforcing principle that it is merely an instrument for national well-being and not a policy player or separate interest group.

In many ways, illiberal regimes are more like traditional than rational systems of authority. Although Weber includes socialist states (which have historically been illiberal) with liberal democracies in the category of rational systems, at the time of his death in 1920, he had not yet seen the full manifestation of the socialist form of rational-legal authority, which actually practices many traditional aspects of governance.<sup>29</sup> I depart from Weber by making a distinction between liberal and illiberal systems that does not overlap cleanly with his typology and by arguing that, in some important ways, illiberal regimes more closely resemble traditional systems of authority.

<sup>28</sup>Without effective separation of powers, says Weber, “this system involves the complete appropriation of all powers by the party organization in control at the time” (ibid., p. 418). In rational systems, administration is separated from ownership of the means of production, and administration must render an account of the resources provided for its use. Property belonging to the organization (and controlled by the office) is separated from the official’s personal property (ibid., pp. 331–2). In non-rational systems, however, this separation breaks down to varying degrees; ownership and control of resources (property and labor) are more personal.

<sup>29</sup>Weber was probably thinking of nineteenth-century monarchical nation-states as examples of rational-legal yet illiberal regimes. In contemporary times, however, perhaps only Singapore’s highly-legalistic dictatorship under Lee Kuan Yew and the People’s Action Party qualifies as both illiberal and rational-legal. Few other twentieth or twenty-first century systems come to mind. Taiwan under the Kuomintang or Mexico in the late days of Institutional Revolutionary Party (PRI)-rule had significant corruption problems, and Saudi Arabia’s seemingly rational-legal *sharia* law co-exists alongside the traditional executive rule of kings and princes, in a land with no written constitution (Feldman 2008, pp. 92–102). That there is perhaps only one contemporary example of an illiberal rational-legal system, and many examples of illiberal traditional ones, is quite telling.

In traditional societies, the head of state increases his personal power by acquiring that position, and his administrative staff is made up not of “officials,” but rather of personal retainers, which often include military forces.<sup>30</sup> Obedience is owed to the person rather than the position, and

obligations of obedience on the basis of personal loyalty are essentially unlimited. There is thus a double sphere: on the one hand, of action which is bound to specific tradition; on the other hand, of that which is free of any specific rules.<sup>31</sup>

Traditional authority systems lack several important traits of genuine bureaucratic administrative staffs, including a “clearly defined sphere of competence subject to impersonal rules,” “rational ordering of relations of superiority and inferiority,” and “a regular system of appointment and promotion on the basis of free contract.”<sup>32</sup> Illiberal regimes are characterized by absence of the rule of law, insufficient protections for individual rights, and little freedom of conscience, speech, and economic activity—all features they share with traditional societies.

The militaries of illiberal regimes range widely in form, from warlord armies in Somalia and Afghanistan (whose authority over their fighters is deeply personal) on one end of the spectrum to Soviet-style militaries (which look rational-legal in many ways but retain many traditional elements) on the other. Like all militaries, illiberal ones are hierarchical and their members are expected to obey superior orders without question. Administrative organizations in traditional societies can still employ a structure of “promotion on a basis of seniority or of particular objectively determined achievements,”<sup>33</sup> which maintains many of the key features of rational bureaucracies so that they appear rational-legal on the surface.

However, their militaries all embody illiberal and traditional features, including lack of separation of powers and little or no protection against indentured servitude. Training soldiers includes teaching them important political principles, such as what their duties are and to whom or what they owe their loyalty. Without the separation of powers or a civilian commander embedded at the top of the structure, even regular soldiers are aware that they are not mere tools, but more intimately tied to the policymaker and therefore personal representatives of him and his office. Although all militaries maintain strict hierarchies in order to function properly, their respective ethos reflect the core values of the countries they serve. Militaries of liberal societies are similarly governed by rule of law, their processes (e.g., for advancement or court martial) are transparent, and indentured servitude is not allowed. A sergeant can make his troops crawl through a swamp for days or do hundreds of push-ups, but he

<sup>30</sup>Weber [1922] 1947, p. 347.

<sup>31</sup>*Ibid.*, pp. 341–2.

<sup>32</sup>*Ibid.*, p. 343.

<sup>33</sup>*Ibid.*, p. 351.



cannot order them to mow his lawn. Soldiers obey the sergeant only insofar as he is a representative of the state, and not the sergeant personally. In militaries of illiberal societies, however, the opposite is more likely: processes are more opaque and subject to nepotism, and there is little freedom of conscience and some indentured servitude. This last feature is extremely important, because the idea that soldiers are not personal servants of their superiors is absent from the society—neither instituted in practice nor recognized in the books.

A brief look at the Soviet military illustrates that the rational-legal nature of illiberal militaries is more apparent than real. The USSR should have been an exemplar of illiberal but rational-legal systems; yet its military was plagued with horrifyingly brutal and widespread hazing of conscripts, senior soldiers stealing personal items from new recruits, and indentured servitude.<sup>34</sup> Not only was military authority highly personalized, but the military was subject to thorough political indoctrination that taught loyalty not just to the country, but to the Communist Party in particular.<sup>35</sup> And lest one think that the Russian military has become less politically-charged since the collapse of Communism, active-duty military officers are not only legally allowed but encouraged to run for political office, and hundreds have done so since 1991.<sup>36,37</sup>

These are but a few examples of how a seemingly rational-legal system of governance can actually operate according to very traditional forms of authority.

<sup>34</sup>Suvorov 1982, pp. 216–7, 221–3. Barany 2007, pp. 64–5. Reese 2000, pp. 150–5. Soldiers were rented out as laborers or ordered to lay brick at officers' homes, underscoring the extremely personal nature of military service (Barany 2007, pp. 64–5; Reese 2000, p. 170). They also sought their commanders' favor by brutally jockeying with each other to offer their personal services, such as lighting officers' cigarettes, in order to win the prize of being able to polish the officer's boots (Suvorov 1982, pp. 233, 237).

<sup>35</sup>As in other Communist militaries, the *zampolit* (political officer) played an important role in the Soviet army, and had no equivalent in other Western militaries. He managed the army's party organization and oversaw its "political socialization," that is, the indoctrination of military personnel with approved values and attitudes (Jones 1985, p. 115). The Soviets attempted to create Party cells in each company and, in the 1930's, purged officers for incorrect, especially Trotskyite, Communist beliefs (Reese 2000, pp. 71, 88). Soviet and other Communist soldiers were instilled with loyalty to specific rulers, in this case the Communist Party (Jones 1985, p. 123). Proper ideology and loyalty to the country are important in any military, but permeation of political party activities demonstrates a very personal, traditional bond to the ruler (in this case a party), as opposed to a more rational-legal and impersonal loyalty to the country and form of governance, regardless of who might happen to rule.

<sup>36</sup>Barany 2007, pp. 4, 9, 78–80, 93. In contrast, American active-duty military officers have been forbidden from holding Foreign Service appointments since 1868 and from holding elected or appointed civil offices since 1870 (United States [1871] 1963, Sec. 18, p. 319). Department of Defense Directive 1344.10 lists current restrictions.

<sup>37</sup>Abolishing Party domination over the military created a vacuum, and subsequent attempts to assert civilian control led to a power struggle between the executive and legislative branches, which the president (Yeltsin) won in 1993: "The resultant system of civilian control . . . is a personalistic and unregulated arrangement based on the president's overwhelming political power and his ability to play off institutions and individuals against each other" (Barany 2007, p. 85).

Regarding Russia's 2008 invasion of Georgia over South Ossetia, for example, *The Economist* points to several causes, including complicated geopolitical maneuvering *vis-à-vis* the West and NATO, but also notes, "Putin's personal hatred of . . . Saakashvili, and his ability to deploy the entire Russian army to fulfill his vendetta, made war all but inevitable" (Anon 2008).

Even ordinary soldiers in those illiberal regimes understand this dynamic; so soldiers at all levels of these militaries are more like political appointments and should expect to be let go when the executive is deposed.

#### D. CONSTITUTIONAL CHANGE AND DISSOLUTION OF THE SOCIAL CONTRACT

A society's civil-military structure and the ethical and patriotic training it gives its soldiers reflect the underlying foundational values and principles of the political system the military serves and the social contract upon which service is based. Whenever society's fundamental beliefs, political structure, and legal code are overhauled—not simply fine-tuned—the military must also be refashioned to suit, because it was responsible for the country's security and was trained in and guaranteed the value system being discarded. Now that the previous system is considered wrong, having defended it is also wrong. The classic post-war examples of Germany and Japan demonstrate the need to drastically transform the military's very essence in order to complement and complete the parallel changes in the broader political and social system.

In a new system, that is, under a new social contract, the new regime need not honor the old contract's obligations. With regime change, one of two things will be dissolved—the demos or the regime, the society or the government. In some cases, only government is dissolved. This happens “from within,” usually because of abuses of power,<sup>38</sup> such as by coups against corrupt, totalitarian, or otherwise failing regimes. On those occasions, society's boundaries remain largely intact and the people themselves remain, as a people, but they must renegotiate their desired form of governance:

*[W]hen the Government is dissolved, the People are at liberty to provide for themselves, by erecting a new Legislative, differing from the other, by the change of persons, or Form, or both as they shall find it most for their safety and good.*<sup>39</sup>

At other times, regime change dissolves the whole society. The “usual, and almost only way” this happens is through foreign conquest, says Locke. When the boundaries of society and of the “people” are drastically altered—perhaps the people are subsumed into another country or enough are killed or scattered such that they can no longer be said to constitute a group—society itself dissolves, and the people return to a state of nature, free to create a new society. (If incorporated into a new society and contract, however, they are unlikely to return to a state of nature in between.) Foreign invasions do not always end in empire or absorption

<sup>38</sup>Locke [1690] 1979, II §§211, 212, 222, 227. (“II” refers to the *Second Treatise, on Civil Government*.) A state of war exists when there is “no common Superior on Earth to appeal to for relief,” in response to force (II §19). When war-induced regime change dissolves the government or society (II §211), the Lockean cycle calls for a new social contract to bring people out of the resulting state, whether of war or nature.

<sup>39</sup>*Ibid.*, II §220.

of the losing country, so foreign conquests may only dissolve the government. On the other hand, internal dissolutions might also break up the society, as with the USSR or Yugoslavia.

Whether government or society dissolves, two arguments can be made for the old contract's obligations not being binding on the new regime and allowing it to dismiss, as a group, military personnel from the former establishment for doing nothing except having served. The first takes the social contract metaphor more literally, for instance, as contemporary Hobbesians do.<sup>40</sup> Individuals in a society governed by an illiberal regime can be said to have agreed to that contract under duress. When the contract is extreme enough, it could be declared invalid or forcibly renegotiated under the standard of unconscionability. (Circumstances typically include fraud, misrepresentation, duress, mistake, impossibility, or lack of actual agreement.) Usually, unconscionability is invoked when a contract is deemed so unfair or immoral that it is appalling and thought that no reasonable party would agree to it.<sup>41</sup> It considers both substantive and procedural aspects of the agreement, and is often applied to situations in which there is gross asymmetry in the parties' relative bargaining strengths. Such extreme coercion often exists in illiberal regimes, and the society ends up with an illegitimate contract,<sup>42</sup> the terms of which cannot be binding. Because their soldiers participated in, supported, and were bound by a regime that should never have existed, not only were the soldiers not beholden to the illegitimate contract at the time, but neither now is the new regime, so it need not honor the previous terms.

Most people take the social contract more metaphorically, however, and another argument could be made along those lines. Locke says that people would not have given up certain rights in a just social contract<sup>43</sup>—especially property rights<sup>44</sup> and religious liberties<sup>45</sup>—so any contract that makes such demands is a false one. The stipulation is that, using Rousseau's language, one can distinguish between "true" (here, liberal) contracts and nominal (here, illiberal) ones in this way, and that the latter are illegitimate and non-binding on present participants as well as their successors.

Soldiers under the old system who want to remain in this employ may no longer qualify if new rules exclude participation on the basis of newly-undesirable traits, notably service to the old regime. Despite expectations for continued employment, they may be lustrated and their contracts terminated, when previously-existing terms no longer apply. At the very least, they are not

<sup>40</sup>See, for example, Hampton (1986), Kavka (1986), Gauthier (1986), and Buchanan (1975).

<sup>41</sup>*Williams v. Walker-Thomas Furniture Co.* (1965) and U.S. Uniform Commercial Code (2010) §2–302.

<sup>42</sup>Rousseau [1754] 1964, p. 168.

<sup>43</sup>Locke [1690] 1979, II §137.

<sup>44</sup>*Ibid.*, II §124.

<sup>45</sup>Locke [1689] 1979.

owed their jobs, the terms of employment they agreed to when signing on, or their pensions.<sup>46</sup>

This is not to say that new regime *cannot* honor them, if that is desirable and expedient; nor, for that matter, are basic human rights completely thrown out and reaffirmed each time. Rather, it is the old society's *specific* institutional obligations—in particular, employment contracts—that are no longer valid and binding.

Whether the demos or government is dissolved, the state of nature is not a free-for-all. There are still natural duties outside of civil society, such as duties of mutual aid and not causing harm or unnecessary suffering. Moreover, they pertain

without regard to our voluntary acts . . . they have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements . . . they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally.<sup>47</sup>

While there are no *strong* obligations to people under the previous system (e.g., they are not owed the pensions they expected), it does not mean that anything at all can be done to them. They cannot be taken out into the woods and summarily shot. Basic rights are not up for grabs. The new regime owes everyone natural duties, but nothing more, and it gets to decide which of the old obligations it wants to honor.

## II. LUSTRATION IN PRACTICE

Although lustration is morally justifiable to liberals, from a liberal perspective, it will still cause uneasiness, and rightly so. Such collective judgment is consistent with recognizing individual wrongdoing, however. Lustration charges groups with responsibility, not necessarily guilt, and this assessment remains separate from the punishment portion of lustration. A group agent may be complicit, for example, and thus responsible, even when not all its members are guilty. Of course, punishments are meted out to individuals, but one can be punished on grounds of strict liability instead of *mens rea*, that is, for his responsibility and

<sup>46</sup>Locke ([1690] 1979, II §87) says that political society exists only when everyone has agreed to forego private judgments and punishments. In relinquishing his natural executive powers, man must also authorize the making and execution of public laws on his behalf (*ibid.*, II §89). Public laws create responsibilities and obligations specific to the particular civil society in place, beyond any natural duties. When a particular government (or society) dissolves, your political and legal obligations to that establishment similarly dissolve, because they were created under and tied to a specific contract. When the contract no longer exists, you no longer owe those obligations to others who were in contract with you; they also no longer owe you.

<sup>47</sup>Rawls 1999, pp. 98–9. See also Locke [1690] 1979, II §7.

not his guilt.<sup>48</sup> But when individual blame can be apportioned, individual punishments may be accommodated, in which case special circumstances (mitigating or exacerbating) could lessen or enhance sentences after general punishment is imposed. In order to individuate punishments, however, relevant and reliable information is needed about a person's particular actions, and that availability will vary according to circumstances.

Individuating punishment is also hindered by other realities of warfare. For example, peace treaties often times do not confer blank slates on the victors but are, rather, negotiated settlements of the conditions of conquest, which may include official protections against lustration for ruling groups. The latter might also retain informal bargaining power in the post-war process if the victor worries about alienating the population. Whether residual bargaining power is formally- or informally-held, it is merely one of many ways in which fully-just outcomes are rendered impossible. The frequency of such circumstances forces us to ask what good the abstract theory is, if there is always a gap between moral permissibility and facts on the ground.

But philosophy can still shed light on what is acceptable even if real-world circumstances never approach theoretical ones, by helping us decide how to implement the terms of defeat. An analogy to the ideal/non-ideal distinction may be helpful here. According to Rawls, ideal theory is required because it informs and constrains non-ideal theory by providing goals and insights on how we should proceed under unfavorable conditions.<sup>49</sup> Similarly, just war theory should inform our actions even when fully-just outcomes are impossible under messy or difficult circumstances.

After a war, many factors compete with the imperative to lustrate, including the need to buy off former ruling groups, balancing turnover with stability, minimizing corruption, proceeding with reconstruction, promoting reconciliation, and avoiding undue recrimination in order to build a strong civil

<sup>48</sup>Strict liability is legal responsibility for injury or damages even when the person is not at fault or negligent. It can apply to certain tort activities (e.g., holding an employer responsible for an employee's work-related wrong-doing or negligence) and to consumer goods (e.g., making sellers of defective or dangerous products responsible for harm to the user) (*Black's Law Dictionary* 1990, p. 1422).

*Mens rea*—"a guilty mind," i.e., having wrongful purpose, criminal intent, or guilty knowledge and willfulness—is one element of criminal responsibility (*ibid.*, p. 985). In many legal systems, criminal guilt requires both wrongful action and *mens rea*. Intent to perform the crime is sufficient but unnecessary for *mens rea*, as reckless negligence or foreseeing unintended side effects could also qualify.

<sup>49</sup>Although justice is a "cautious, jealous virtue," ideal theory provides "the only basis for the systematic grasp of these more pressing problems [of partial compliance]. . . . I shall assume that a deeper understanding can be gained in no other way, and that the nature and aims of a perfectly just society is the fundamental part of the theory of justice" (Rawls 1999, p. 8). Only then can we determine what principles to adopt under unjust and unfavorable circumstances (*ibid.*, pp. 215–6). For example, says Rawls, the principles of cooperation and non-violence embodied within ideal theory enable us to condemn violent protest within a "more or less just democratic state for those citizens who recognize and accept the legitimacy of the constitution" (*ibid.*, p. 319) and to see that non-violent protest like civil disobedience and conscientious objection, though illegal, can actually promote justice and stability (*ibid.*, p. 336).

society. Moral theory may tell us that certain types of concessions or justifications in order to end a war are never acceptable, even under non-ideal constraints. It will also indicate which arguments for or against lustration are legitimate, and therefore which should be used or discarded.

For example, both the Japanese people and the emperor retained so much informal bargaining power after WWII that the U.S. not only excluded Hirohito from the Tokyo war crimes tribunal, but preemptively absolved him of any involvement in or responsibility for the war. Despite the far-reaching scope of indictments against Japanese leadership and military personnel, the emperor was exempted because: (1) Japanese emperor-worship was so strong that punishing him in any way would alienate the population, so an inviolable (if human) emperor was necessary to facilitate successful post-war occupation and reform; and (2) he was, in any case, an innocent figurehead who lacked knowledge of and guilt for the war.<sup>50</sup>

Should the emperor have been lustrated along with everyone else? The first justification was highly suspect. Sometimes, something close to blank-slate conditions actually exist. The population was decimated, terrified, demoralized, and starving. In reality, they probably would have accepted anything—certainly the deposition of their emperor, perhaps even his execution.

This leaves us with the second reason, that he was not guilty. In fact, the emperor's innocence was a popular myth; he gave orders for, approved, or understood everything that went on. For the sake of argument, however, let us assume that he was not in any way involved with or had relevant knowledge of the bloody war waged in his name. It does not matter. This article tells us that in the absence of compelling prudential concerns—and it seems the costs of deposing the emperor were grossly overestimated—Hirohito should have been lustrated along with everyone else. Innocence by itself is not enough to exclude someone from lustration. If that was the deciding factor, then the U.S. was wrong to have not deposed the emperor.<sup>51</sup>

The ramifications of that failure were significant, and long-lasting. Excluding the emperor only enhanced the arbitrariness of the “victor's justice.” It also squandered a limited opportunity to force ordinary Japanese to confront their own responsibility for the war in a serious way, rather than simply adapt to the realities of losing.

<sup>50</sup>See Dower (1999) and Bix (2000) for historical details regarding Japan.

<sup>51</sup>In cases like this, lustration could be symbolic (e.g., public reprimands, purification rituals, or truth-and-reconciliation commissions) and co-opted former leaders made to publicly recant the war and accept responsibility for wrong-doing. It may be lip service, but it is not devoid of meaning or effect. Lustration does not mandate exclusion from future political life, as declaration of responsibility and actual punishment are separate. Responsible parties may even retain their offices, if their moral or practical authority will prove useful, or if they will cause more trouble than it is worth if not given power in the new regime, for instance, by forming reactionary groups and continuing the fight informally. In the latter case, it might be wise to co-opt and otherwise distract them with authority positions from which they can do little harm, perhaps in the Ministry of Silly Walks.

The near blank-slate conditions in Japan were not properly used, but often, victors are legitimately constrained. The most pressing factors are probably threefold: (1) peace settlement terms and parties' residual bargaining powers (above), (2) available resources, and (3) the country's physical and social instability. In light of other urgent post-war demands, the new regime may not have the considerable resources required to adequately investigate alleged crimes and assess responsibility, and opt instead for symbolic or less-individuated lustration. Furthermore, extensive infrastructure projects will favor keeping more of the military (provided it has the relevant skills), while doubts about military loyalty to the new regime would tend toward purging.

Finally, when turbulent regime change follows harsh oppression, stability can be tenuous, and it is essential to begin building or repairing civil bonds. The best way to do that will depend on how society was oppressed. The latter-20<sup>th</sup> century oppressions in Latin America and Central Europe differed in part because Latin American repression was "deep," while Central European repression was "broad." The former group of victims was fairly clear and finite, having been tortured, murdered, or made to "disappear" by equally-limited groups of perpetrators (usually military, police, and death squads), while in the latter, regimes were propped up by "a much larger number of people exerting less violent or explicit pressure on a much larger number. Many people were on both sides."<sup>52</sup> East German Stasi often blackmailed people into becoming state informants by deliberately arresting them for minor crimes; similarly, rather than blatantly censoring the foreign press, the Soviet government more subtly tried to entice married foreign reporters with bebies of women, hoping to gain leverage by ensnaring one. Higher rates and lesser levels of complicity overall meant that many were less clearly either victims or perpetrators but more often both, and partly responsible for their own repression and that of others, even as they were themselves victimized.<sup>53</sup>

In comparing Latin America with Central Europe, then, one might recommend harsher lustration for the former. When the group of perpetrators is smaller and more easily identifiable, separating them from the rest of society will not impact the social fabric as much. If collaborators are strewn throughout, however, the danger is greater. When Stasi archives were opened and records made available to the public—so individuals could find out what information the state had gathered and who, including family and friends, had spied on them—the repercussions for a cohesive civil society were obvious.<sup>54</sup>

After all these considerations, it may very well be that a new regime chooses an all-or-nothing approach to lustration, similar to what Elster advocates. But whatever it chooses, it should do so knowingly, with awareness of the moral

<sup>52</sup>Rosenberg 1995, pp. 398–400.

<sup>53</sup>These are broad-stroked characterizations, but they illustrate how such circumstances might factor into lustration policy.

<sup>54</sup>Ash 2000, p. 234. In fact, in several Central European countries, *lustrace* was a relatively mild affair.

considerations and implications, even as the prudential ones are inevitably unpredictable.

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