

Transitional Justice: Vetting and Lustration

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Introduction

Vetting and lustration are transitional justice measures often used in post-authoritarian and post-conflict transitions to facilitate personnel and institutional reforms. Most basically, the measures involve the screening of individuals in public institutions, semi-public positions and/or loosely defined positions of public trust in order to verify that personnel have the integrity and capacity to fulfill their positions in a way that supports the goals of the new regime.¹ Individuals found lacking in certain integrity or capability criteria are either compulsorily removed from their positions, prevented from taking new positions, encouraged to voluntarily resign from positions or face the public disclosure of their past, or alternately required to confess past involvement as a form of accountability. In essence there are potential and actual employment consequences for individuals in the new regime based on their previous actions, affiliations or behaviors.

There are a host of benefits ascribed to vetting and lustration in the transitional justice literature. Vetting and lustration measures are alleged to establish a break with the past and provide opportunities for state and societal rebuilding and reconciliation, which is often deemed necessary in the wake of a conflict or authoritarian regime change.² The United Nations (UN) suggests that vetting can improve the trustworthiness of public institutions by

¹ United Nations, *Rule-of-Law Tools for Post-Conflict States: Vetting: An Operational Handbook* (United Nations 2006); Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Societies* (SSRC 2007); Monika Nalepa, ‘Lustration,’ in Lavinia Stan and Nadya Nedelsky (eds), *Encyclopedia of Transitional Justice* (CUP 2013).

² Neil Kritz (ed) *Transitional Justice* (USIP Studies 1995); Roman David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland* (U. Penn 2011).

removing individuals whose integrity or competency makes them untrustworthy to fulfill the new regime's mandate.³ Vetting public office holders and bureaucrats could demonstrate a commitment by the new regime to hold people accountable for past wrongdoings, breaking cultures of impunity and possibly preventing future abuses.⁴ Vetting could also prevent future abuses by breaking down informal networks and removing opportunities for the abuse of privileges that might linger from the previous system.⁵ More narrowly, lustration policies have been linked to trust building, by which both the state and society are cleansed through the cathartic process of addressing the past through truth revelations.⁶ Vetting and lustration have also been directly and indirectly linked to democracy promotion by international institutions, transitional justice scholars and policy practitioners.⁷ In sum, as personnel reforms, both vetting and lustration are designed to directly improve the trustworthiness and functionality of the new regime's institutions and indirectly support the process of democratization.

Given the important role ascribed to vetting and lustration in the transitional justice literature, this essay seeks to explore and differentiate vetting and lustration policies. First, it presents a review of vetting, highlighting the ways in which vetting is defined and implemented, with particular attention to the operational strengths and weaknesses of this form of transitional justice. Second, the essay reviews lustration policies, differentiating them from vetting policies, and exploring the legal challenges surrounding their use in the

³ UN (2006).

⁴ Pablo de Greiff, 'Vetting and Transitional Justice,' in Mayer-Rieckh and de Greiff (2007) 522.

⁵ Alexander Mayer-Rieckh, 'On Preventing Abuse: Vetting and Other Transitional Reforms,' in Mayer-Rieckh and de Greiff (2007) 482.

⁶ Lavinia Stan (ed) *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the communist past* (Routledge 2009).

⁷ Ždanoka v Latvia, Judgment 58278/00 (ECHR, 16 March 2006); Roman David, 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001),' (2003) 28(2) L.& Soc.Inquiry 387; Council of Europe, *Measures to Dismantle the Heritage of Former Communist Totalitarian Systems* (Resolution 1096 Council of Europe, 1996).

post-communist transitions. Finally, the essay examines impact assessments to date, reviewing what we know about the effects of vetting and lustration in practice.

Vetting

The UN operational guide to vetting suggests, ‘Vetting can be defined as assessing integrity to determine suitability for public employment. Integrity refers to an employee’s adherence to international standards of human rights and professional conduct, including a person’s financial propriety.⁸ There is an element of employment exclusion to vetting, either removing individuals from positions they hold or preventing them from taking new positions in the event of integrity or capacity deficits.⁹ The process is designed to improve the trustworthiness of the individuals employed in public institutions and by extension the trustworthiness and functionality of the institutions themselves. More specifically, the UN guidelines suggest, ‘Vetting processes aim at excluding from public service persons with serious integrity deficits in order to reestablish civic trust and re-legitimize public institutions, and to disable structures within which individuals carried out serious abuses.’¹⁰ There is a growing normative expectation in the international community that post-conflict societies should vet their public institutions to bolster citizen trust, improve performance, and support democracy.¹¹

Vetting is a form of administrative justice, relying on administrative law for its legal grounding.¹² Vetting normally relies on parliamentary or legislative acts to set out the parameters for procedures that are consistent with rule of law principles. Ideally, vetting

⁸ UN (2006) 4.

⁹ Roger Duthie, ‘Introduction,’ in Mayer-Rieckh and de Greiff (2007) 17.

¹⁰ United Nations Development Programme, *Vetting Public Employees in Post-conflict settings: Operational Guidelines* (UNDP Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform 2006) 9.

¹¹ UN (2006) 32; Sikkink’s ‘Justice Cascade’ also captures this growing international assumption about the necessity of transitional justice. Kathryn Sikkink, *The Justice Cascade* (W.W. Norton 2011).

¹² Ruti Teitel, *Transitional Justice* (OUP 2000).

processes are legally prescribed and delimited, bound by due process requirements, involve integrity criteria and conditions for removal or reappointment that are stipulated in advance and are both transparent and evidence based.¹³ Vetting assessments are targeted procedures focused on an individual's actions or behaviors.¹⁴ In this way, vetting is structured around individual culpability criteria. Additionally, vetting procedures generally include a right to appeal decisions, thereby institutionalizing legal safeguards against unmerited dismissals.

While there is a rich history of the use of purges to enact institutional changes or remove personnel after an authoritarian transition, the UN guidelines for vetting established in 2006 explicitly worked to differentiate the legal parameters of vetting from purges.¹⁵ ‘Purges differ from vetting in that purges target people for their membership in or affiliation with a group rather than their individual responsibility for the violation of human rights.’¹⁶ The lack of individual responsibility for crimes and the absence of legal safeguards mean that purges can potentially violate rule of law principles. Purges ‘are seldom based on constitutional consensus,’ and ‘rarely emanate from legislative or parliamentary laws.’¹⁷ The motivations for purges and vetting can also differ. While vetting is ideally done to build trust and promote state building in a forward-looking justice context, purges are often framed as instruments of backward-looking justice, retribution or victor’s justice.¹⁸ Moreover, purges do not have the same explicit democratization aspect that is associated with vetting.¹⁹ To the extent that intentions influence outcomes, there is a potential difference in each measure’s ability to build trust, support democracy and promote peace. While there is a gray area in

¹³ This differentiation is stressed in the UN’s Operational Handbook and the UNDP’s Operational Guidelines, presumably both as a proscriptive as well as a policy prescriptive.

¹⁴ UN (2006) 4.

¹⁵ UN (2006); Moira Lynch, ‘Purges,’ in Lavinia Stan and Nadya Nedelsky (eds). *Encyclopedia of Transitional Justice* (CUP 2013) 61.

¹⁶ Duthie, in Mayer-Rieckh and de Greiff (2007) 18.

¹⁷ Lynch in Stan and Nedelsky (2013) 61

¹⁸ Claus Offe explores the forward-looking and backward-looking aspects of lustration and vetting in *Varieties of Transition: The East European and East German Experience* (CUP 1996). Lynch highlights the potential retributive aspects in Stan and Nedelsky (2013).

¹⁹ Nalepa, in Stan and Nedelsky (2013) 47.

which a vetting program can potentially blur into a purge, having a clear process with transparent and legitimate vetting criteria, limiting the procedures in advance of their commencement, basing the process on reliable and verifiable information, and cleaving to rule of law practices, are a few suggestions proffered by the UN to promote an authentic and legally bound vetting program.²⁰

Scope conditions

National level variations are possible in the scope, review process, and institutional oversight of vetting programs. The scope of vetting can be relatively narrow, targeting a few key public institutions, or broadly construed across public institutions as part of a larger process like denazification or decommunization.²¹ However, ‘there is no case of vetting in a post-conflict or post-authoritarian transition in which vetting has been applied to the entire public sector.’²² In this way, while there is variation in the institutional scope of vetting, it does not result in the wholesale replacement of the public sector. In terms of screening methods, vetting could result in the replacement of unqualified individuals with new personnel through a review process, or it could take the form of a reappointment process, in which everyone is removed and individuals must reapply for their positions. Bosnia-Herzegovina used both a review based program to vet the police and a reappointment process to vet the judiciary.²³ To decrease resistance to the measures from those who might be displaced through a review process, review could be limited to only new appointments, resulting in less opposition to reforms but also less institutional change. Independent vetting committees could oversee the process in order to bring a sense of fairness and accountability

²⁰ UNDP (2006) 11-13.

²¹ Christiane Wilke, ‘The Shield, the Sword, and the Party: Vetting the East German Public Sector,’ in Mayer-Rieckh and de Greiff (2007) 348.

²² Duthie, in Mayer-Rieckh and de Greiff (2007) 20.

²³ See Annex 6 of the OECD DAC Handbook on Security System Reform, in UNDP (2006).

to the process, in addition to judicial appeal options and oversight mechanisms.²⁴ In other words, vetting procedures can be shaped to fit a diverse array of justice needs and state resource constraints.

While the vetting of public institutions could encompass a range of sectors at various levels within the government hierarchy, the security and justice sectors are often listed as vetting priorities. The UN suggests that vetting programs ‘should prioritize the military, the civilian security sector, intelligence services, the judiciary, and other institutions that underpin the rule of law,’ such as the police.²⁵ Vetting is regularly included as one Security Sector Reform (SSR) measure and/or as an institutional reform measure in the disarmament, demobilization and reintegration of former combatants into society (DDR) programs.²⁶ For example, vetting in El Salvador targeted the armed forces, the police and the judiciary, vetting in Liberia similarly focused on security sector reforms after two civil wars, and vetting in Bosnia also concentrated on security related sectors.²⁷

Vetting is also possible in a variety of institutional and cultural settings, and has been enacted in both post-conflict and post-authoritarian contexts. Elster documents examples of vetting after WWII in Belgium, Japan, Germany, Austria, France, Hungary, Norway, and Holland.²⁸ Mayer-Rieckh and de Greiff present cases of vetting across Europe (Greece), Eastern Europe (Hungary and Poland), and Latin America (Argentina and El Salvador), analyzing both post-conflict and post-authoritarian cases in comparative perspective.²⁹

²⁴UN (2006) 17.

²⁵ UNDP (2006) 19.

²⁶ Ana Cutter Patel, ‘Transitional Justice, DDR, and Security Sector Reform,’ *Research Brief International Center for Transitional Justice* (ICTJ 2010).

²⁷ Rubén Zamora and David Holiday, ‘The Struggle for Lasting Reform: Vetting Processes in El Salvador,’ in Mayer-Rieckh and de Greiff (2007) 80; Thomas Jaye, *Transitional Justice and DDR: The Case of Liberia* (International Center for Transitional Justice 2009); Alexander Mayer-Rieckh, ‘Vetting to Prevent Future Abuses: Reforming the Police, Courts, and the Prosecutor’s Offices in Bosnia and Herzegovina,’ in Mayer-Rieckh and de Greiff (2007) 180.

²⁸ Elster (2004). It is of note that some of the scope conditions in these cases might be placed in a gray zone between purges and vetting programs.

²⁹ Mayer-Rieckh and de Greiff (2007).

Fithen similarly compares vetting in Bosnia, Liberia, Hungary, and the Czech Republic, despite the significant differences across the cases.³⁰ The range of cases speaks to the potential flexibility of this form of transitional justice, hinting at one of the reasons it has been so widely embraced as a tool of institutional reform.

Vetting is compatible with the use of trials (Bosnia), truth commissions (South Africa), and former combatant reintegration programs (Liberia), to name a few examples of the use of multiple transitional justice measures.³¹ The pairing of vetting with other types of personnel reforms or accountability measures might improve the efficacy of vetting and the accompanying measures. Mayer-Rieckh suggested that ‘as a stand-alone measure, vetting is generally insufficient to ensure that abuses are not repeated.’³² Whether vetting alone or combined with measures yields the most effective outcomes remains an empirical question for impact assessments, but Mayer-Rieckh’s suggestion highlights the need for attention to the efficacy of measures both individually and combined with other reforms.

Operational challenges

As with other forms of transitional justice, vetting relies on the availability and quality of information. Unfortunately in many post-conflict and post-authoritarian environments, the veracity of information compiled by the previous regime might be dubious. For example, many have questioned the reliability of the communist secret police files due to the known tendency for the inclusion of falsified information in the files, as well as problems with selective file destruction on the eve of the regime change.³³ Vetting programs that are reliant

³⁰ Caspar Fithen, The Legacy of Four Vetting Programs: An Empirical Review (ICTJ 2009).

³¹ International Center for Transitional Justice, 2014. *Institutional Reform Measures*. <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>, accessed 15 December 2014.

³² Duthie in Mayer-Rieckh and de Greiff (2007) 31.

³³ For information about the veracity and completeness of files in the post-communist cases see Rafał Leskiewicz and Žáček, Pavel (eds) *Handbook of the European Network of Official Authorities in Charge of the Secret Police Files* (The Institute for the Study of Totalitarian Regimes 2013).

on incomplete or flawed information could result in biased transitional justice processes, and therefore fail to achieve trust-building goals. Moreover, the process of vetting requires significant financial resources, especially if impartial committees are tasked with compiling and reviewing thousands of files. In many transitional environments, there are significant resource limitations and a plethora of state (re)building demands on those resources. The costs of transitional justice pose operational hurdles to effective implementation.

There are challenges and potential weaknesses in the design and implementation of vetting that go beyond the typical information or financial constraints inherent in many transitional justice measures. First, vetting necessarily removes individuals from positions. The assumption is that those individuals lack the integrity and/or the capacity to effectively execute their job in keeping with the new goals of the regime. However, in many transitional environments there is a dearth of personnel qualified to staff public offices and bureaucracies. Removing individuals with bureaucratic specific training might create capacity deficits and institutional problems, especially if there are few replacements or if it would take considerable time to train or educate replacements. This has the potential to render the new bureaucracy incompetent or unstable.

Second, swiftly vetting individuals from the police, military or security sectors following a conflict could create a pool of highly trained but unemployed (and potentially unemployable) security personnel. The UN cautions that if public employees are removed *en masse* and cannot find alternative employment they ‘may drift into criminality and obstruct the reform process. In particular the removal of a large number of armed security personnel may constitute a significant security risk and represent a threat to the transition itself.’³⁴ There is some evidence that this happened in some of the post-communist states, when large swaths of the military and secret police personnel were vetted post-1989 and found

³⁴ UN (2006) 18.

themselves with security related training, existing networks, no jobs, and possibilities to use their previous positions and networks in illegal or semi-legal ventures.³⁵ Rather than tackling corruption problems, vetting could unintentionally abet them.

Third, there is a possibility for political misuse or manipulation of vetting, which could reduce the legitimacy of the measures and therefore undermine the potential trust building effects. The DeBa'athification program in Iraq is cited as an example of the way in which well intentioned vetting can become instrumentalized, resulting in something more closely resembling a politically motivated purge in practice.³⁶ There is evidence of the instrumental use of lustration in post-communist countries, in which political parties attempted to wield the measures against political opponents for political advantage.³⁷ Although not a form of criminal justice, the potentially punitive employment dimensions of vetting make it a potential instrument for political jockeying, especially in the fluid transitional environment. If intentions affect outcomes, instrumentalized or politicized retributive justice could undermine trust rather than build it.

In sum, the UN's Operational Handbook provides cautionary advice for policy makers in the design of vetting programs to try to maximize the possibility of a transparent and effective program bound by rule of law. The assumption remains that vetting supports transition goals: 'Increasingly, vetting public employees, in particular in the security and justice sectors, is recognized as a central component of an effective and legitimate transitional

³⁵ Lavinia Stan. *Transitional Justice in Post-Communist Romania: The Politics of Memory* (CUP 2012); Center for the Study of Democracy. *Corruption and Anti-Corruption in Bulgaria (2011-2012)*; CSD Brief No 35. (Sofia, Bulgaria 2012).

³⁶ Miranda Sissons and Abdulrazzaq Al-Saiedi, 'A Bitter Legacy: Lessons of DeBaathification in Iraq' (2013) March ICTJ.

³⁷ Csilla Kiss documents the political manipulation of lustration in Hungary in 'The Misuses of Manipulation: The Failure of Transitional Justice in Post-Communist Hungary' (2006) 58 (6) Eur.-Asia Stud. 925. Brian Grodsky similarly critiques the misuse of lustration in the post-communist context, *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses* (U. Notre Dame 2010). Lavinia Stan documents problems with lustration in Poland in, 'The Politics of Memory in Poland: Lustration, File Access and Court Proceedings,' *Studies in Post-Communism Occasional Paper*, No. 10. (St. Francis Xavier University, Centre for Post-Communist Studies, 2006).

justice strategy.³⁸ The extent to which vetting can actually achieve trust building and democracy promotion remains an empirical question because it rests partially on the effectiveness of the design and implementation of the programs and partially on the complexity of any given post-authoritarian or post-conflict transition environment. Impact assessment issues will be raised in the last section of this piece but to preview the findings, the results are mixed.

Lustration

The post-communist screening programs in Central and Eastern Europe capture a slightly different form of vetting, more typically called ‘lustration’ in the regional transitional justice literature. Early in the post-communist transitions terms like decommunization, purges, vetting, screening, and lustration were often used synonymously. Over time scholars and practitioners gravitated to the term lustration in order to differentiate the scope, legality, and intent of the post-communist programs from other types of vetting programs. Lustration can be broadly defined as ‘a form of vetting--the set of parliamentary laws that restrict members and collaborators of former repressive regimes from holding a range of public offices, state management positions, or other jobs with strong public influence (such as in the media or academia) after the collapse of the authoritarian regime.’³⁹ This definition situates lustration firmly within the range of vetting measures and suggests the portability of lustration as a form of transitional justice to extra-regional cases.

Lustration can also be defined in a more regionally or historically situated manner as ‘the banning of communist officials and secret political police officers and informers from post-communist politics and positions of influence in society.’⁴⁰ This definition draws heavily

³⁸ UN (2006) 32.

³⁹ Nalepa in Stan and Nedelsky (2013) 46.

⁴⁰ Stan (2009) 11.

on the actual design and implementation of the measures within the post-communist sphere, both those programs that have concluded and those still active in 2015. The backgrounds of certain public and some quasi-public/private officials were screened to determine whether those individuals were members of, or collaborators with, the secret police, or if they held certain positions in the former communist regime.⁴¹ In practice, this meant the screening of individuals to ascertain if there was a need for them to be removed (either voluntarily or through compulsion) from positions of public importance based on their competencies, previous actions, memberships or positions. In some countries the consequences of this collaboration or involvement entailed compulsory removal from office or position. In other cases, only lying about the nature of that involvement was grounds for compulsory removal. In still other contexts, disclosure or threat of disclosure of previous collaboration were designed to catalyze either public confessions or shame voluntary resignations.⁴² In all scenarios, there was a personnel reform component to lustration measures, which clearly resembles traditional vetting procedures.

Integrity assessments were based on information in the former secret police files, concentrating on whether and how an individual abetted the previous communist system. The secret police files provided central data repositories, documenting different types of engagement with the former communist regime, such as active and passive collaboration with the secret police, high ranking Communist Party positions, and other types of engagement with the communist party.⁴³ Many post-communist countries assumed that individuals with

⁴¹ Natalia Letki, ‘Lustration and Democratisation in East-Central Europe’ (2002) 54 (4) Eur.-Asia Stud. 529; David (2003).

⁴² Monika Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (CUP 2010); Kieran Williams, Aleks Szczerbiak, and Brigid Fowler, ‘Explaining Lustration in Eastern Europe: “A Post-communist politics approach”,’ (2003) 62 SEI Working Paper.

⁴³ There is an organization of file repositories across seven countries in Central and Eastern Europe that cooperates on questions regarding the use of and preservation of the secret police files. See <http://arch.ipn.gov.pl/en/international-cooperat/352.EuropeanNetworkofOfficialAuthoritiesinChargeoftheSecretPoliceFiles.html>, accessed 4 January 2015.

either direct security service backgrounds or collaborative associations with the secret police had compromised integrities, rendering them unsuitable to uphold the new values and laws of a democratic system. Again, this mirrors the integrity and capacity evaluations outlined by the UN for general vetting procedures, albeit the criteria on which vetting evaluations rested were focused on communist era activities.

However, lustration measures went beyond personnel reforms, combining symbolic and retributive measures into programs that included an array of ‘lustrating’ mechanisms such as secret police file access provisions, truth telling mandates, compulsory public disclosures, as well as employment vetting. Lustration extended beyond high level public institutions into societal relations, vetting social institutions, quasi-public institutions and institutions at the local and regional levels of government in an attempt at a more general moral cleansing of the past.

In sum, lustration is clearly a form of vetting, but not all vetting is lustration.⁴⁴ The Humanitarian Law Center’s program for Documentation and Memory emphasized the distinction: ‘Even though there are certain similarities between the process of lustration implemented in some Eastern European countries and vetting, the differences between them are still quite significant.’⁴⁵ Although lustration can be defined in a historically contextual manner, this is not to suggest lustration measures are regionally or culturally limited to that observed in the post-communist sphere. Policymakers have suggested lustration possibilities in the wake of the Arab Spring in places like Tunisia, Egypt, and Libya, drawing on the post-

⁴⁴ Maria Lós, ‘Lustration and Truth Claims: Unfinished Revolutions in Central Europe,’ (1995) 20 (1) *L.& Soc.Inquiry* 117; and Letki (2002).

⁴⁵ Humanitarian Law Center, ‘Vetting,’ (Humanitarian Law Center: Documentation and Memory 2011). <http://www.hlc-rdc.org/PravdaReforma/Vetting/index.1.en.html>, accessed 25 July 2011.

communist examples.⁴⁶ However, the post-communist examples illustrate certain observed difference between vetting and lustration programs in both design and reform objectives.

Scope, content and duration of lustration

Differences in the intent, scope and duration of lustration measures, especially as developed in the post-communist transitions, differentiate the programs from traditional institutional vetting programs. First, there was an explicit moral cleansing component to lustration that made it substantially broader than employment vetting. The term lustrate means ‘to purify ceremonially,’ and the act of lustration can be thus explained as an ‘expiatory sacrifice or a purificatory rite.’⁴⁷ The measures conferred an atonement element to the process of transitional justice, reflecting ‘the purification of state organizations from their sins under the communist regimes.’⁴⁸ The use of the term *sins* also resonates with other descriptions of lustration as a means of cleansing the past, restoring the social order, and transforming the ‘moral culture’ of citizens in Eastern Europe.⁴⁹ The Council of Europe’s 1996 resolution *On Measures to Dismantle the Heritage of Former Communist Totalitarian Systems* acknowledged this critical symbolic component to lustration, in which lustration was framed as a means to facilitate the process by which ‘old structures and thought patterns have to be dismantled and overcome.’⁵⁰ For example, the files also documented secret collaboration in which citizens betrayed their families, their spouses, their co-workers, and their neighbors. Disclosing the past involvement of citizens in abetting the communist regime

⁴⁶ ‘The Arab Uprisings: Democracy’s Hard Spring,’ (2011) The Economist, 10 March; ‘Libya’s Government and the militias: Is the Tide Turning?’ (2013) The Economist, 15 June.

⁴⁷ Merriam-Webster’s online dictionary, <http://www.merriam-webster.com/dictionary/lustre>, accessed 30 July 2014.

⁴⁸ Roman Boed, ‘An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice,’ (1999) 37 (2) Colum.J.Transnat'l L. 357, 358.

⁴⁹ Vojtěch Capl, ‘The Transformation of Hearts and Minds in Eastern Europe,’ (1997) 17 (2) The Cato Journal 229.

⁵⁰ Council of Europe (1996).

was designed to restore a moral social order that went beyond personnel reform. From this perspective, lustration was intended to catalyze moral changes as well as bureaucratic change.

Second, the scope of lustration also distinguished the measures from traditional vetting. Vetting programs tend to target certain public institutions and have largely focused on the security sector, with the military, police, judiciary and rule of law institutions prioritized. Lustration policies also screened individuals in the security sector but extended the range of public institutions subjected to lustration. For example, laws in CEE have included a range of traditional public institutions like the parliament, the police, and the president, public oversight institutions like the media and the judiciary, quasi-public institutions like the banking sector, universities, and railroads, and social institutions like unions, churches, and heads of cultural centers. Poland's 2006 lustration legislation included provisions for the screening of 56 categories of workers or persons in 'positions and professions of public trust', including teachers, academics, journalists, state company executives, school principals, diplomats, lawyers, police, and other broadly defined civil servants.⁵¹ To rephrase, lustration has been broadly interpreted across a variety of public, semi-public, and social positions in a way atypical of traditional vetting programs.⁵²

Third, the duration of lustration has been significantly longer than most vetting programs. The Czech Republic's lustration program started in 1991 and has continued through the present. Poland's started in 1997 and continues through the present, and Hungary, one of the shortest programs in the region, started in 1994 and ended the formal lustration measures in 2005, although the process of public disclosures continues. This means that even

⁵¹ ACT of 18 October 2006 on the disclosure of information on documents of state security in the years 1944-1990; and Amending Act of 14 February 2007. Government of Poland, http://www.ipn.gov.pl/portal/en/31/328/Act_on_the_Disclosure_of_Information.html, accessed 17 September 2012.

⁵² Lithuania's 'Law on Registering and Confession' (Law VIII-1436/1999) enumerates the semi-public lustration categories.

the shortest of the formal lustration programs lasted for more than a decade, suggesting that the time frame and goals of lustration were broader than the traditional vetting program.⁵³

Fourth, the number of individuals touched by the lustration process speaks to the expected larger scope of the measures. In the Czech Republic, David reported that as of March 2009, 473,398 lustration certificates were issued, resulting in 10,325 positive lustration decisions.⁵⁴ In Hungary, an estimated 7,872 individuals were screened over the first 10 years of the process, resulting in 126 positive cases of collaboration.⁵⁵ Poland has reviewed tens of thousands of files, investigated 5,367 public office holders, holds 90 km of documents and files to draw on, and expects at least 10 more years of lustration.⁵⁶ The breadth, depth, and scope of lustration suggest qualitative differences from the UN descriptions of targeted personnel vetting.

Fifth, lustration encompassed a broad truth telling mandate. Even if no one was compulsorily removed from public office, lustration forced a reckoning with the past either through voluntary confessions or forced public disclosures. Truth telling provides a focal point for societal rebuilding, possibly promoting reconciliation through the accountability that comes with confession and atonement. Forced confessions could potentially catalyze personnel changes as well, as shamed individuals voluntarily leave public positions or voters change their support for candidates with known collaborator backgrounds. The explicit truth telling aspect of lustration makes it more than a traditional employment vetting program.

⁵³ For a review of the different time periods and durations of lustration in CEE see Stan (2009) and Lavinia Stan and Nadya Nedelsky (eds) *Encyclopedia of Transitional Justice* (CUP 2013).

⁵⁴David (2011) 76.

⁵⁵ Elizabeth Barrett, Péter Hack, and Ágnes Munkácsi, ‘Lustration as Political Competition: Vetting in Hungary,’ in Mayer-Rieckh and de Greiff (2007) 277.

⁵⁶ Nalepa cites the number of officials investigated in Stan and Nedelsky (2013). See also Adam Czarnota, ‘The Politics of the Lustration Law in Poland, 1989-2006,’ in Mayer-Rieckh and de Greiff (2007) 222. For all other information on Polish Lustration see

www.ipn.gov.pl/portal/en/1/2/Institute_of_National_Remembrance_Commission_for_the_Prosecution_of_Crimes_again.html, accessed 20 December 2014.

In sum, lustration in the context of the post-communist transitions was (and is) understood as a transitional justice process that authorizes legally constrained government actions against individuals who were complicit with the previous communist regime, defined in terms of secret police affiliation, secret police collaboration, active abetting of the communist regime, and/or possible Communist Party affiliations. The legal mandates and constraints on lustration distinguish it definitionally from purges, although in practice some critics have accused lustration of careening into the realm of extra-legal purges.⁵⁷ The government action could include soliciting information about individuals, investigating said individuals, trying and disqualifying those individuals from public, semi-public, and social positions of trust, making information about complicity accessible, and/or publicly disclosing information about certain individuals. A number of transition goals have been ascribed to lustration policies, including to make public institutions more trustworthy, to improve the trustworthiness of government, to rebuild the state, to reduce corruption, and to support societal reconciliation. As with vetting, lustration aims to support the process of democratization in transitional societies.

Rule of law concerns

Lustration has come under fire from academics, legal scholars and policy practitioners because of the potential and actual rule of law violations in the design and implementation of the measures.⁵⁸ Removing individuals from public office or publicly releasing damaging information about individuals on the basis of previous regime affiliations and behaviors could violate individual liberties and legal protections. Screening not on individual criteria but on broad communist party affiliations and communist era relationships of necessity might

⁵⁷ Nalepa highlights differences between lustration and purges in Stan and Nedelsky (2013).

⁵⁸ László Sólyom, ‘The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary,’ (2003) 18 (1) Int’l Sociology 133.

violate due process safeguards.⁵⁹ Penalizing individuals for actions or affiliations associated with the previous regime, when those behaviors were not criminal, raises potential retroactive justice concerns. Even providing access to information in secret police files could violate personal rights of privacy, and undermine the constitutional guarantees of the new state. Opponents of lustration argue that if a new government is willing to transgress rule of law guidelines in order to pursue justice, this could signal a lack of commitment to the process of democratization.

Even if lustration was not legally questionable, the methods might undermine rather than enhance the transitions. On moral grounds, some contend that lustration amounts to a purge, evoking the unfair and personalistic purges of the Stalinist era and previous communist regimes.⁶⁰ Others question the validity of a policy that bases integrity assessments on the contents of secret police files. The veracity of the files has been routinely questioned, since there was an incentive on the part of both secret police agents and informers to falsify information. Many files are missing or were destroyed, limiting the ability to conduct a full lustration process and potentially biasing results. The use of the ill-gotten secret police files as a mechanism to create a new democracy has struck many critics as both inappropriate and possibly counterproductive.⁶¹

The broader scope of lustration into social spheres and the extended time frame over which lustration has been implemented generated additional concerns about the legality and appropriateness of lustration measures as used in the post-communist cases. For example, the Czech Republic's shift from an initial five year period for lustration to an indefinite extension

⁵⁹ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon 1998) 30; and Eric Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice,' (2004) 117 (3) Harv.L.Rev. 761, 792.

⁶⁰ Boed (1999). Lustration is often pejoratively described in the press as a purge to connote problems with the political manipulation of the laws. See BBC, 'Weekly warns "purges" in secret services rendering Poland "defenceless",' (2007) BBC Monitoring European, 4 January; and 'Poland's Purges: False Lustre,' (2007) The Economist 19 May, 57.

⁶¹ Adam Michnik and Václav Havel, 'Justice or Revenge,' (1993) 4 (1) J. of Dem. 20; and Piotr Cywinski, 'Interview with Joachim Gauck: The Clean-Up Bureau,' (1992) Summer Uncaptive Minds, 123.

of the policies raised questions about the appropriate end point for *transitional* justice. To the extent that the post-communist examples of lustration become emblematic of lustration in general, discussions about the duration and scope of these measures take on greater legal importance for future cases.

Additionally, lustration might undermine rather than enhance the trust building. Revelations about the scope of the interpersonal betrayals under the previous regime by neighbors, relatives and co-workers might undermine societal trust, irrespective of its effects on the trustworthiness of public institutions. There is also a potential to decrease institutional trust, should citizens recoil from current office holders with histories of complicity with the secret police. There is the additional danger that the files and information could be politically manipulated, thereby tainting the overall process and undermining trust in government, political parties and agents of the government.⁶² The many potential problems and adverse consequences associated with the process led several prominent dissident voices to call for a thick line to be drawn between the past and the present in order to avoid these dilemmas altogether.⁶³

International courts, domestic courts, international organizations and non-governmental organizations examined aspects of lustration for potential or actual rule of law violations. In particular, concerns about information veracity problems, potential due process violations, employment discrimination dangers, and bureaucratic loyalty concerns motivated examinations of the legality of both the design and appropriateness of the measures.⁶⁴ The International Labour Organization (ILO) heard cases addressing the potential legal problems associated with lustration and criticized aspects of the measures for violating fair employment

⁶² Stan (2006).

⁶³ Michnik and Havel (1993).

⁶⁴ Cynthia M. Horne, ‘International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context,’ (2009) 34 (3) L.& Soc.Inquiry 713.

practices.⁶⁵ The Helsinki Committee also questioned the potential excesses of lustration, suggesting some variants of the measures could violate human rights and individual liberties.⁶⁶ The European Court of Human Rights (ECHR) heard a number of legal challenges to lustration. While many of the ECHR rulings cautioned about the potential for misuse of lustration and the importance of following due process and rule of law procedures, the ECHR has consistently upheld a state's right to use lustration to make assessments about the political loyalty of its bureaucracy in order to uphold and defend its democratic principles.⁶⁷ In fact, the ECHR rulings framed lustration as a potential democracy safeguard for transitional states. The international rulings conferred legitimacy on the authenticity of the motives for lustration, and reaffirmed the legality of lustration in design. National courts in Central and Eastern Europe, including the Czech Republic, Poland and Latvia, similarly ruled in favor of the legality of lustration measures and described the rationale for lustration as a means of democracy protection and promotion.⁶⁸

In conclusion, the expansive design and implementation of lustration measures in the post-communist space distinguished this form of vetting from other narrower types of institutional vetting. In particular, the coupling of lustration with truth telling, societal disclosures, and public file access provisions ensured that the measures extended beyond the

⁶⁵ ILO. CEACR: Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Czech Republic (2006); Helsinki Committee of Poland. Position Regarding the Act of disclosing information regarding security services documents (Warsaw, 18 March 2007); ILO, CEACR Individual Observation Concerning Convention No. 111, Discrimination (Employment and Occupation), section 3, 1958 Lithuania (ratification 1994) (2007).

⁶⁶ Helsinki Committee of Poland. Position Regarding the Act of disclosing information regarding security services documents. (Warsaw, 18 March 2007).

⁶⁷ *Rekvényi v Hungary*, Judgment 25390/94 (ECHR, 20 May 1999); *Sidabras and Dziautas v Lithuania*, Final 55480/00 and 59330/00 (ECHR 27 July 2004); and *Ždanoka v Latvia* (2006) 21 §100.

⁶⁸ ‘Czechoslovakia: Constitutional Court Decision on the Screening Law (November 26, 1992),’ Kritz (ed. trans. 1995) 350; Latvian Constitutional Court, Case No. 2004-13-0106(2005) 22 March; Polish Constitutional Tribunal, Judgment of 11th May 2007, file Ref. No. K_2/07 LUSTRATION. <http://trybunal.gov.pl/en/case-list/judicial-decisions/art/5898-lustracja/>, accessed 12/19/14.

It is of note that the Hungarian Constitutional Court ruled against the legality of lustration as originally designed, however it did approve a modified form of lustration. See ‘Hungary: Constitutional Court Decision on the Statute of Limitations No. 2086/A/1991/14,’ in Kritz (ed. trans. 1995) 629.

personnel reform of public institutions and penetrated more deeply into social institutions and semi-public spheres. The expanded scope, retroactive nature, long duration, and employment criteria that include potential collective culpability components have catalyzed more criticism than traditional vetting measures for potential and actual rule of law derogations.⁶⁹ Despite the legal challenges, the laws continue to be implemented in many countries in Central and Eastern Europe and as such remain potential templates for extra-regional lustration programs in other post-authoritarian transitions.

Definitional, Measurement and Assessment Challenges

The terms vetting, lustration, screening, and even purges are sometimes used interchangeably to describe country cases, blurring and reconfiguring definitional distinctions between them over time.⁷⁰ For example, Elster's edited volume on retributive justice adopts a relatively high definitional level of abstraction, describing most vetting procedures under the umbrella term purges.⁷¹ McAdams' edited volume on transitional justice in new democracies has no index item for vetting at all, using terms like purges, lustration and decommunization to describe policies in Hungary, Poland and the Czech Republic instead.⁷² A decade later, Mayer-Rieckh and de Greiff group the cases of Hungary, Poland, Greece, El Salvador and the Czech Republic together as examples of vetting.⁷³ Some of the definitional slippage is a function of the way terms evolved and definitions were partially layered on each other, such as the way the first post-communist employment vetting law in Czechoslovakia was initially

⁶⁹ Stan details problems with the process in Romania (2012).

⁷⁰ Lynch stresses the overlap but conceptual distinction between the measures in 'Purges' in Stan and Nedelsky (2013) 61. Nalepa also emphasizes the distinctions between vetting and lustration in Stan and Nedelsky (2013). Duthie reviews the conceptual challenges surrounding vetting, see Duthie, in Mayer-Rieckh and de Greiff (2007) 17.

⁷¹ Elster generally refers to acts of retribution, including vetting, screening, and lustration, as purges. Jon Elster (ed) *Retribution and Reparation in the Transition to Democracy* (CUP 2006) 15.

⁷² See in particular Gábor Halmai and Kim Lane Schepppele, 'Living Well is the Best Revenge: The Hungarian Approach to Judging the Past,' in McAdams (1997) 155; and Andrzej Walicki, 'Transitional Justice and the Political Struggles of Post-Communist Poland,' in McAdams (1997) 185.

⁷³ See in particular chapters 6, 7, and 8, Mayer-Rieckh and de Greiff (2007).

described as a type of screening law or vetting law and then gradually became emblematic of lustration laws.⁷⁴ Sometimes there is a normative connotation embedded in the choice of a definition or word, in the way that architects of lustration framed the screening practices as bound by rule of law in order to differentiate them from the extra-legal purges prevalent under communism.⁷⁵ Other times the level of abstraction adopted by the author affects the definitional umbrellas employed. The definitional fluidity highlights the familial resemblance across the measures, but it also creates some confusion regarding how to consistently label and assess country cases.⁷⁶ Definitions matter to the extent that policy prescriptions, warnings and caveats are derived from the actual performance of vetting or lustration measures.

Definitional distinctions affect coding decisions with resulting policy implications. For example, the Transitional Justice Database project has compiled an impressive array of country cases across five types of transitional justice.⁷⁷ In classifying transitional justice measures, the database compresses all cases of purges, vetting and lustration together, and codes them all as ‘lustration.’ In practice, this means the case of Sudan in 1985 to remove coup plotters, a case against six army officers in Indonesia in 1992, the case of Bosnia in 1995 involving war criminals, and the Czech Republic’s decades long lustration policies against secret police informers are all coded in exactly the same way as lustration measures.⁷⁸

⁷⁴ Czech and Slovak Federal Republic: Screening (Lustration) Law, Act 451/1991 (October 4, 1991), in Neil Kritz (ed, trans) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. III (USIP 1995); Jiri Pehe, ‘Czechoslovakia: Parliament Passes Controversial Law on Vetting Officials’ (1991) 2 (43) RFE/RL 25 October; Jirina Siklova, ‘Lustration or the Czech Way of Screening’ (1996) Winter ECCR 57.

⁷⁵ Letki (2002).

⁷⁶ Oskar Thoms, James Ron and Roland Paris, ‘State-Level Effects of Transitional Justice: What Do We Know?’ (2010) 4 (3) Int’l. J. Trans. Just. 329.

⁷⁷ The five measures are trials, truth commissions, amnesties, reparations, and lustration policies. Transitional Justice Database Project, <http://www.tjdbproject.com/#>, accessed 22 December 2014.

⁷⁸ See the Lustration Policy cases, <http://www.tjdbproject.com/index.php?mtype%3A%3A5=Lustration+Policy&startyear=&endyear=&go=Search>, accessed 22 December 2014.

Conclusions drawn about the relationships between lustration and outcomes must be interpreted in light of these definitional and coding decisions.

There are measurement challenges to also consider in thinking about coding cases and assessing impact. It is not simply the presence or absence of vetting or lustration that matters, but the quality and implementation of the program. Statistical analyses using bivariate measures—presence or absence of lustration-- to explore correlations between transitional justice and transition goals like trust building, democracy, promotion, adherence to human rights, or peace, would gloss over differences in the quality of programs. In order to better understand the impact of transitional justice in general, and vetting and lustration more specifically, we need to be able to conceptualize and operationalize differences across cases with reasonably consistent inter-coder reliability.

Advances in the assessment of the conditions under which transitional justice measures are able to support a range of transition goals partially depend on our collective ability to address some of these aforementioned measurement and definitional issues.⁷⁹ While the vast majority of studies refrain from drawing conclusions about the efficacy of vetting measures, initial impact testing has generated mixed results with some studies supporting and others refuting the alleged benefits of vetting.⁸⁰ Sotiropoulos concluded that vetting had varied effects in Greece in the 1970s, partially dependent on the public institution targeted.⁸¹ The OECD review of police vetting in Bosnia-Herzegovina concluded both that the procedures violated basic due process guarantees and that their implementation created

⁷⁹ For a thoughtful review of possible methods for assessing impact, see Hugo van der Merwe, Victoria Baxter and Audrey Chapman (eds) *Assessing the Impact of Transitional Justice* (USIP 2009).

⁸⁰ For a review of the state of the discipline and how little we know about impact see Thoms, Ron, and Paris (2010) 354.

⁸¹ Dimitri Sotiropoulos ‘Swift Gradualism and Variable Outcomes: Vetting Post-Authoritarian Greece,’ in Mayer-Rieckh and de Greiff (2007)120.

new problems.⁸² Fithen argued, ‘The legacy is profoundly negative and undermines efforts to instill objective, impartial procedures to strengthen integrity and professionalism.’⁸³ The vetting of the judiciary in Bosnia was viewed more positively, with observed improvements in public perceptions of the judiciary and the prosecutorial office.⁸⁴ The vetting of the judiciary and the police in Liberia did not yield the hoped for changes, and the security sector reforms were even associated with new problems.⁸⁵ The vetting in Iraq as part of the De-Ba’athification program was widely assessed as a failure, leaving negative legacies that undermined reconciliation.⁸⁶ Since we lack counter-factual evidence, we cannot say with certainty if things would have been better or worse in the absence of reforms in any of these cases. While these examples are too limited to draw conclusions about the efficacy of vetting as a form of transitional justice, they do elucidate some of the challenges involved in assessing the overall impact of vetting from single cases.

In the case of lustration policies in post-communist countries, preliminary analyses of lustration’s effects on trust-building and democracy have also yielded mixed results. There is some indication that lustration has supported trustworthy public institutions and contributed positively to democratization across the region.⁸⁷ It is also possible that certain types of trust could be enhanced and other types of trust undermined by revelations of regime complicity among the population, suggesting even more nuance is necessary in assessing the possible

⁸² OECD, Annex 6, in UNDP (2006). Alexander Mayer-Rieckh also documented the problems with vetting in Bosnia and Herzegovina in ‘Vetting to Prevent Future Abuses: Reforming the Police, Courts, and the Prosecutor’s Offices in Bosnia and Herzegovina,’ in Mayer-Rieckh and de Greiff (2007) 180.

⁸³ Fithen (2009) 13.

⁸⁴ Ibid. 8.

⁸⁵ Jaye (2009); Fithen (2009).

⁸⁶ Sissons and Al-Saiedi (2013).

⁸⁷ David (2011); Marek Kaminski and Monika Nalepa, ‘Judging Transitional Justice: A New Criterion for Evaluating Truth Revelation Procedures,’ (2006) 50 (3) *J. Conflict Resol.* 383; Cynthia Horne, ‘Assessing the Impact of Lustration on Trust in Public Institutions and National Government in Central and Eastern Europe,’ (2012) 45 (4) *Comp. Pol. Stud.* 412; Cynthia Horne, ‘The Impact of Lustration on Democratization in Post-Communist Countries,’ (2014) 8 (3) *Intl. J. Trans. Just.* 496.

divergent effects of lustration measures.⁸⁸ However, the many examples of problems with lustration in certain countries raise questions about the utility or disutility of lustration in specific national contexts.⁸⁹ Finally, the manner in which lustration has been extended, amended, repurposed and instrumentalized engenders reasonable temporal concerns now that the region has passed the twenty fifth anniversary of the fall of the Berlin Wall.⁹⁰

These examples beg a series of questions regarding what we know about the impact of vetting and lustration. Perhaps the problems witnessed with certain vetting examples were in the design or the implementation of the programs, which means that programs with different designs might have been more effective. Or perhaps the trust-building and democratization goals for vetting (or lustration) are unrealistic in the highly fluid and immensely complicated transitional environments, thereby setting the measures up for suboptimal results. It is also possible that the effects are conditional on other transitional justice measures being used concurrently or sequentially.⁹¹ Given the frequency with which vetting measures are recommended, such as the recent proposals for vetting in the Democratic Republic of Congo in 2014, Nepal in 2012, and the proposals for lustration measures in some of the Arab Spring states, it is vital to better understand how context affects the effectiveness of reforms.⁹² These questions can only be explored systematically if the transitional justice community is better able to classify cases and link the cases to outcomes.

⁸⁸ David (2011); Cynthia M. Horne, ‘Lustration, Transitional Justice and Social Trust in Post-Communist Countries: Repairing and Wrest the Ties that Bind?’ (2014) 66 (2) Eur.-Asia Stud. 225.

⁸⁹ For examples in Hungary, Romania, Poland and Albania see Kiss (2006); Stan (2012); Matt Killingsworth, ‘Lustration after totalitarianism: Poland’s attempt to reconcile with its Communist past,’ (2010) 43 (3) Comm. and Post-Comm. Stud. 275; Robert Austin and Jonathan Ellison, ‘Post-Communist Transitional Justice in Albania,’ (2008) 22 (2) EEPS 373.

⁹⁰ Lavinia Stan and Nadya Nedelsky (eds.) *Post-Communist Transitional Justice: Lessons from 25 Years of Experience* (CUP 2015).

⁹¹ Olsen, Payne and Reiter’s work suggested that trials and amnesties have positive results when combined, or when combined with truth commissions, but not necessarily used alone. See Tricia Olsen, Leigh Payne, and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (USIP 2010).

⁹² Alexander Mayer-Rieckh, ‘Building Trust and Strengthening Rule of Law,’ (2012) ICTJ briefing, April; and Human Rights Watch, ‘Establishing a Vetting Mechanism for Security Forces of the Democratic Republic of Congo,’ (2014) 7 April <http://www.hrw.org>, accessed 10 November 2014.

Conclusion

Vetting and lustration are both types of transitional justice that include personnel reforms and institutional change mechanisms. They both assess the integrity and capabilities of individuals in positions of power and public trust broadly defined. Both vetting and lustration strive to support transitional states by building more trust in public institutions, promoting trust in government, upholding rule of law practices, facilitating adherence to human rights, and supporting democracy.

Despite their familial resemblance, there are differences between typical vetting programs and lustration programs in the scope, depth, and duration of the measures that bear continued consideration in the literature on transitional justice. To move forward with impact assessments, the field of transitional justice will need to conceptualize and operationalize measures like vetting, purges and lustration, in a manner that highlights their similarities and differences. Continued attention to the conceptual differences will facilitate the cumulation of knowledge about the conditions under which the measures are able to support transitional regime goals.

Neil Kritz recently assessed the state of our knowledge regarding vetting and lustration measures:

Noncriminal sanctions, such as purges, lustration, and public access to security files, are a critical piece of transitional justice programs and have been featured in one combination or another, in almost every transitional justice case, yet they continue to get short shrift in the research literature... They are more important for the democratic reform element and arguably for the peacebuilding element. Research must evaluate how effective these efforts have been.⁹³

His suggestions highlight what we know and what we have yet to know about the effectiveness of vetting and lustration in practice, encouraging scholars to take up the empirical challenges ahead.

⁹³ Neil Kritz, ‘Policy Implications of Empirical Research on Transitional Justice,’ in Van der Merwe, Baxter, and Chapman (2009) 13, 19-20.

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