Explaining patterns of lustration and communist security service file access in post-1989 Poland
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Abstract

As an archetypal case of late and recurring lustration and communist security service file access, Poland provides us with an excellent basis for developing frameworks to explain this phenomenon. This paper examines whether and how the explanations available in the comparative and theoretical literature that has developed in recent years on lustration and transitional justice in the newly emerging democracies of post-communist Central and Eastern Europe help us to understand the extent and recurrence of lustration and file access in countries like post-communist Poland. It shows how these issues became entwined with other discourses and developments in post-communist politics and identifies two such fields of debate which could form the basis for more detailed, grounded research both on the Polish case specifically and other cases of 'late lustration' more generally. Firstly, the re-emergence of the lustration and file access issue as an element of broader concerns about the need to improve the quality of post-communist democracy more generally. Secondly, the way that the issue became embroiled in what might be termed the 'politics of history' as a means of using historical narratives to buttress and question the legitimacy of political actors. Considering how states such as Poland deal with the communist past is, therefore, not just interesting in its own right but also has the capacity to provide us with insights into patterns of post-communist politics in these countries more generally.

Explaining patterns of lustration and communist security service file access in post-1989 Poland

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Having previously been one of the most under-researched and scantily understood areas of transitional justice, the former Soviet Union and Eastern bloc has become a growing area of research and academic discussion in recent years. Although it started as a subject for historians and lawyers primarily, there is now an expanding political science literature which looks at the measures taken by the former communist states to deal with past atrocities and overcome the legacy of communist dictatorship. However, despite the existence of a large and expanding comparative literature on this topic, the late implementation of lustration and access to communist-era security service files - together with the intense, on-going and recurring politicisation of the issue - in countries like Poland remains something of a puzzle. It is this puzzle, of 'late' lustration and communist security service file access, that this paper seeks to address by surveying the explanations available in the existing literature and, on the basis of the Polish case, seeking to develop a tentative explanatory framework.

The paper begins by examining the various definitional debates in the comparative literature that have sought to answer the questions of: (a) what is lustration and (b) how does it fit in with other transitional justice measures? Here the importance of focusing on lustration as a (if not *the*) key (and certainly most controversial) transitional justice mechanism in the post-communist states of central and Eastern Europe is considered together with the argument that one needs to examine lustration laws in conjunction with the question of access to communist-era security service files more generally. The paper then moves on to reflect on why Poland is interesting as a case of late (and recurring) lustration by running through the progress of the various attempts to introduce lustration and file access laws in this country. This began with a communist-forgiving approach exemplified by the so-called 'thick line' policy that avoided radical transitional justice measures. However, although one might have expected the issue to fade from public memory, it remained on the political agenda and the following years were punctured by various attempts to renew efforts at securing transitional justice, before belated lustration and file access laws were finally adopted at the end of the 1990s. Attempts were then made to extend these truth revelation processes in the mid-2000s culminating in them finally being amended in 2006 and 2007 to radically expand their scope. In the course of this discussion, the paper attempts to locate Poland within the various comparative typologies that have been developed to categorise lustration laws and so-called 'lustration systems'.

The paper moves on to examine whether and how the large and growing literature that has developed in recent years on lustration and transitional justice in the newly emerging democracies of post-communist Central and Eastern Europe helps us to understand the extent and recurrence of lustration and file access in countries like post-communist Poland. It begins by looking at attempts to explain such variance using structural factors such as the nature of the previous regime and transition to democracy in that country. It moves on to consider what might be termed 'politics of the present' approaches, which stress the role of post-communist party political competition as a key explanatory variable, and those that have tried to refine historical-structural and transition-type approaches, sometimes by supplementing them with

'politics of the present' type explanations. It then considers one particular variant of the 'politics of the present' approach, what might be termed the 'political elite strategy explanation', which is based on the notion that political actors responded rationally to impulses such as (actual or anticipated) popular and societal demand to further their own partisan interests. It also examines attempts to account for different patterns of lustration and transitional justice, including the recurrence of the issue and changes of trajectory, through examining ideological-programmatic factors, based on the idea that political elites believed, or came to believe, that a more radical approach to such issues was both necessary and desirable from a normative perspective.

Finally, the paper considers how examining how post-communist states such as Poland deal with the communist past is worth looking at not just because it tells us more about the causes and consequences of belated lustration, file access and transitional justice but because it is also interesting in its own right. These issues became entwined with other debates so examining them tells us, or at least has the capacity to tell us, something about post-communist politics more generally. This, it will be argued, was because the emergence of late lustration and file access were often felt to be indicative of the need to deepen post-communist democratisation and linked to efforts to improve the quality of post-communist democracy more generally, as well as becoming entangled in what might be termed the 'politics of history' rather than the politics of transitional justice.

What are lustration and file access and why do they matter?

So what are lustration and file access? How do they fit in with other transitional justice measures? And why are they important to examine, particularly in relation to the way that post-communist states have pursued transitional justice? Stan defines transitional justice as: 'the measures and policies adopted by governments and civil society actors to address, and possibly redress, legacies of widespread and systematic human rights abuse, mass atrocity, genocide or civil war.'[1] According to Nalepa, the transitional justice literature is 'an inter-disciplinary field concerned with how democracies deal with collaborators of the past regime.'[2] It has, she argues, both a *normative* component originating in the literature on legal and constitutional theory that examines possible reasons for (and problems created by) retroactivity, and a *positive* component trying to explain empirically occurring phenomena such: as why democracies try to right wrongs, who are the actors responsible for implementing transitional justice measures, and whether or not these institutions have led to reconciliation?

The repertoire of transitional justice procedures is vast and diverse but, as Nalepa points out, can be divided into four broad sets of measures.[3] Firstly, using *court trials and criminal proceedings* to bring prominent or representative members of the former dictatorial regime to trial; particularly those who are accused of being perpetrators of human rights violations. This can include both high ranking dignitaries and low ranking officials such as secret service officers and agents. Secondly, *compensation packages* for victims and/or their surviving relatives such as: official apologies; monetary compensation; and restitution of rights to, and

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[1] See: Lavinia Stan, 'Transitional Justice', SciTopics, February 6 2009, http://www.scitopics.com/Transitional_Justice.html (accessed February 6 2014).
[2] See: Monika Nalepa, *Skeletons in Closet: Transitional Justice in Post-Communist Europe*, New York: Cambridge University Press, 2010, p165.
[3] See: *Skeletons in Closet: Transitional Justice in Post-Communist Europe*, p5.

the return of, property expropriated by the former regime. Thirdly, *legal or symbolic acts* directed against the former regime such as: legislation condemning it and expropriating the former rulers of their assets; programmes to re-write history textbooks in order to better reflect the plight of the victims of the regimes; changing the names of streets and localities; opening new museums and exhibitions; and removing statues associated with the regime. Fourthly what might be termed *truth revelation procedures.*[4] These include: vetting public officials for links with the former regime's security services as secret police officers and informers and possibly banning them (together with other prominent or representative members of the former regime) from public office and positions of influence in society. They may also involve: de-classifying and opening up the extant secret archives and files of the former security services for public inspection; and establishing truth commissions, temporary bodies of formal inquiry appointed to re-examine the past and document the repressive activities of the previous regime (sometimes with the objective of achieving societal reconciliation).

Why is it worth focusing particularly on lustration and other truth revelation procedures as transitional justice mechanisms in the post-communist context? Lustration was one of, if not the, most important and controversial transitional justice method to be used in post-communist Central and Eastern Europe. The region was the first to embrace it so comprehensively and it remained an important tool of transitional justice; so much so that, as Stan put, it '(many) observers have employed it as a yardstick for measuring the progress of transitional justice in Eastern Europe and the former Soviet Union'.[5] The fact that lustration was a particularly salient issue, and the primary means by which transitional justice was often pursued and measured in post-communist states, could be attributed to the level of societal surveillance by the communist authorities. Infiltration by informants became the prevalent means by which communist regimes harassed their opponents. This was particularly the case towards the end of communist rule as the random terror and enforced societal mobilisation of the Stalinist totalitarian period gave way to a political strategy based on atomisation and pervasive mass surveillance that characterised the so-called 'post-totalitarian' period.[6] As a consequence, hundreds of thousands of citizens were functionaries of or collaborators with the internal security services, leaving these countries to deal with what Linz and Stepan have dubbed the 'informer legacy'.[7]

The term 'lustration' had long been used by Slavophone archivists simply to refer to the compilation of an inventory or register. To lustrate someone was to check whether their name appeared in a database. The term was more widely adopted not because, as is commonly

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[4] See: Marek M. Kaminski and Monika Nalepa, 'Judging Transitional Justice: A New Criterion for Evaluating Truth Revelation Procedures', *The Journal of Conflict Resolution*, Vol 50, No 3, June 2006, pp383-408; and Monika Nalepa, 'To Punish the Guilty and Protect the Innocent: Comparing Truth Revelation Procedures', *Journal of Theoretical Politics*, Vol 2 No 2, April 2008, pp221-245.

[5] See: Lavinia Stan, 'Introduction: Post-communist transition, justice, and transitional justice' in Lavinia Stan, ed, *Transitional Justice in Eastern Europe and the Former Soviet Union*, Routledge: London and New York, 2009, pp1-14 (12).

[6] See: Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South American and Post-communist Europe*, Baltimore: John Hopkins University Press, 1996, pp42-51.

[7] See: *Problems of Democratic Transition and Consolidation*, p251. For example, in a journalistic account of transitional justice in the Czech Republic, German Democratic Republic (GDR) and Poland, Rosenberg draws attention to the fact that in authoritarian Latin America repression was 'deep', while in post-totalitarian Eastern Europe it was 'wide' to explain why so few court proceedings were launched against communist leaders and secret agents. See: 'Transitional Justice'.

alleged, of its etymological association with ancient Roman rites of purification, but because politicians and the public heard it used by bureaucrats during battles for control of Czechoslovak files in early 1990s. Definitional debates over the term have focused on: whether it should encompass the exclusion from, or limiting of access to, certain offices or simply vetting individuals to identify those who worked for and collaborated with the communist secret services; and whether this vetting and exclusion should also encompass communist party officials above a certain level. David, for example, defines lustration as 'the examination of certain groups of people, especially politicians, public officials, and judges, to determine whether they had been members or collaborators of the secret police, *or held any other positions in the repressive apparatus of the totalitarian regime*' (emphasis added).[8] Similarly, Stan defines it as: 'the *banning* of communist officials and secret police officers and informers from post-communist politics and positions of influence in society' (emphasis added).[9]

My own preference is to adopt the Polish convention which defines lustration as being aimed at revealing whether an individual (generally an occupant of, or candidate for, a particular post) had links with the communist regime that were kept secret from the public such as working, or collaborating as an informer, for the communist security services. Leadership (or even membership) of the communist party or employment in other branches of the party-state bureaucracy was more openly known. In terms of whether consequences follow automatically, reflecting the broader vernacular usage of the term across the region, [10] I would argue that lustration includes all forms of vetting and file access and not simply those which carry the consequence of (automatic) exclusion. Consequently, I am inclined to stick to the definition of lustration that I helped to develop in earlier work with Williams and Fowler where we defined it as 'measures directed against former officers of and collaborators with the state security apparatus.'[11] As I pointed out in an earlier single-authored paper, this could include 'simply vetting or screening individuals for past associations with the communist security services without any sanction necessarily following (other than the damage to their reputation that the disclosure of this information could cause)....(rather than necessarily also) then attempting to automatically exclude them from public life on the basis of such links'.[12] Moreover, although the terms 'lustration' and 'de-communisation' are often used interchangeably, I would argue it is important to distinguish the two processes with the latter

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[8] See: Roman David, 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)', *Law and Social Inquiry*, Vol 28 No 2, April 2003, pp387-439 (388).

[9] See: 'Introduction: Post-communist transition, justice, and transitional justice', p11.

[10] Although in some countries, such as Hungary and the former GDR, the term is not actually used at all to describe truth revelation procedures.

[11] See: Kieran Williams, Brigid Fowler and Aleks Szczerbiak, 'Explaining Lustration in Central Europe: A "Post-communist Politics" Approach', *Democratization*, Vol 12 No 1, February 2005, pp22-43 (23).

[12] See: Aleks Szczerbiak, 'Dealing with the Communist Past or the Politics of the Present? Lustration in Post-Communist Poland', *Europe-Asia Studies*, Vol 54 No 4, June 2002, pp553-572 (553). Interestingly, having initially defined lustration as a set of 'laws *limiting the access to public office* of politicians with an authoritarian past' (See: 'To Punish the Guilty and Protect the Innocent', p222) or 'a truth revelation procedure in which public officials who collaborated with the former authoritarian regime are *disqualified* from holding high-level public positions in the public sector' (See: Monika Nalepa, 'Lustration' in M. Cherif Bassiouni, ed. *The Pursuit of International Criminal Justice: A World Survey on Conflicts, Victimization, and Post-Conflict Justice. Volume 1*, 2010, Mortsel: Intersentia, pp735-778 [735-6]) (emphasis added), Nalepa also went on to adopt a broader definition as of the process as simply 'revealing links to the former communist secret police of persons holding public office' (See: Monika Nalepa, 'Lustration as a Trust-Building Mechanism? Transitional Justice in Poland' in Monica Serrano and Vesselin Popovski, eds, *After Oppression: Transitional Justice in Latin America and Eastern Europe*, Washington DC: Brookings Institute Press 2012, pp333-362 [333]).

referring to the wider removal from public life of the former functionaries of the communist party or related institutions (generally above a certain rank).[13]

Although scholars such as David view lustration primarily as a 'personnel system',[14] it can also - or perhaps, more accurately, even more so - be seen as a 'truth revelation procedure'. Moreover, lustration, in the sense of truth revelation, depends a great deal upon access to the secret archives compiled by the communist-era political police. Indeed, in those countries, such as (as we shall see) Poland after the passage of the 1998 law - when access to security service files was granted to journalists, historians, researchers and some individuals - there was also a great deal of public identifications of former agents conducted by state and non-state actors and 'informal' screening of individuals and groups not covered by procedures set down in lustration laws. Consequently, it is only by examining *both* lustration as a personnel and employment policy *and* the question of access to the communist-era security service files that one can properly get to grips with this issue in post-communist states.

Poland: a case of late (and recurring) lustration and file access debates

In Stan's general typology of post-communist states' approaches to transitional justice - based on whether they instituted court proceedings against former communist regime functionaries, as well as their enactment of lustration laws and access to communist security service archives - Poland was (along with Hungary) classified as a 'mild' case. In such countries, transitional justice was both delayed in time and less radical in scope than those that, to a greater or lesser extent, pursued all three of these processes strongly and vigorously through citizenship and electoral as well as screening laws (such as the former GDR, the Czech Republic and the Baltic states) but more advanced than those countries that adopted weak approaches to transitional justice with only one or two of the methods outlined (such as Bulgaria and Romania) or those that resisted attempts to re-evaluate the past and seemingly followed a 'forgive and forget' approach (such as Slovakia, Slovenia, Albania and all of the Soviet successor republics except for the Baltic states).[15]

In Poland, the revelation of links between persons holding public office and the former communist secret police by lustration and file access was by far the most extensively used transitional justice mechanism, much more so than trials or compensation of victims of communist rule. While it was the first country in the region to overthrow communism, as a result of peaceful negotiations between the outgoing regime and former opposition, it was more than eight years after the transition to democracy began that Poland finally approved a lustration law. Despite various attempts to pass lustration laws in the early-to-mid 1990s, a

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[13] Bertschi also makes this distinction where he defines de-communisation (along with de-Stalinisation, de-partyization and de-idolization) as '(a) transformational process(es) that pertains more to institutions and social structures than people'. See: C. Charles Bertschi, 'Lustration and the Transition to Democracy: The Cases of Poland and Bulgaria', *East European Quarterly*, Vol 28, No 4, Winter 1995, pp435-451 (437). Kaminski and Nalepa also make this distinction, arguing that de-communisation was analogous to de-Nazification in post-war Germany in the sense that it denoted 'purging the state's administration and bureaucracy of high ranking communist (or Nazi) officials' and, unlike in lustration, the identity of a high-ranking communist (or Nazi) official was common knowledge so they were not vulnerable to blackmail in the same way as the former undercover agent. See: 'Judging Transitional Justice', p384.

[14] See: Roman David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary and Poland*, Philadelphia: University of Pennsylvania Press.

[15] See: Lavinia Stan, 'Conclusion: Explaining country differences' in Lavinia Stan, ed, *Transitional Justice in Eastern Europe and the Former Soviet Union*, Routledge: London and New York, 2009, pp247-270 (261-262).

formalised lustration programme came late to Poland with the law only being passed in 1997, file access legislation approved in 1998, and the two only becoming operational in 1999 and 2000 respectively following further amendments. However, one of the most striking things about the Polish case was the on-going politicisation of the lustration issue with communist security service secret archives generating a number of public scandals which, as we shall see, contributed to the collapse of two governments. Indeed, David argues that it was precisely due to the length of the pre-lustration period that Polish discourses on this issue developed such a 'poisonous' character.[16] Poland is thus an interesting case of 'late and recurring lustration': moving away from an initial communist-forgiving approach to a functioning mild lustration law and communist security file access finally taking effect and being enforced at the end of the 1990s, and then to a more radical lustration and file access law being passed (although not fully enacted) in 2007. It is this significant delay and recurrence of the issue that is one of the most striking features of the development of lustration in Poland and one that needs explanation and analysis.

In August 1989, Tadeusz Mazowiecki, a Catholic intellectual advisor to the Solidarity opposition movement and the first non-communist prime minister in Poland since the country was incorporated into the Soviet bloc at the end of the 1940s, announced that a 'thick line' would be drawn between the past and present. Although he was actually seeking to distance his government from the damage done to the national economy by the previous regime, the 'thick line' was often cited as a metaphor epitomising the lenient approach to the communist regime adopted by his administration. However, in spite of these attempts to 'forgive and forget' by both the Mazowiecki government and subsequent post-Solidarity government led by Jan Krzysztof Bielecki (who took over when Mr Mazowiecki resigned as prime minister following his defeat in the November-December 1990 presidential election) the issue of dealing with the communist past did not go away. Moreover, although Poland refrained from systematically verifying whether persons holding or running for public office had collaborated with the communist secret Security Service (Służba Bezpieczeństwa: SB), the issue of secret police files gained notoriety in the years prior to the initiation of a formal lustration programme and public identifications of former agents conducted by state and non-state actors and 'informal' screening of individuals and groups not covered by procedures set down in lustration laws occurred on many occasions to discredit political opponents.

Following the first fully free parliamentary election held in October 1991, a right-wing administration led by the Solidarity-linked lawyer Jan Olszewski came to office as a self-proclaimed government of 'breakthrough'. Although it was always a weak and unstable minority coalition, Mr Olszewski's government had huge political ambitions and promised a clean break with both the communist past and the communist-forgiving policy of the two previous cabinets. Consequently, in May 1992 the Sejm, the more powerful lower house of the Polish parliament, voted by 186 votes to 15 (with 32 abstentions) in favour of a resolution proposed by Janusz Korwin-Mikke from the small liberal-conservative Union of Real Politics (Unia Polityki Realnej: UPR) party requiring the then interior minister, Antoni Macierewicz, to publicly disclose within twenty one days the names of all current senior public officials occupying the rank of provincial governor upwards who had collaborated with the communist security services. However, because the motion had been neither channelled through the relevant parliamentary committees nor debated in a plenary session, Mr Macierewicz was not

[16] See: 'Lustration Laws in Action', p418.

provided with any guidelines on how this objective should be achieved.[17] Consequently, a special investigation bureau was established within the interior ministry to compile a list of collaborators based on the secret archives and, on June 4th, Mr Macierewicz presented parliament and the then President Lech Wałęsa with secret lists of 66 leading public officials who had allegedly figured in the communist security service archives as informers. The list included Mr Wałęsa, who led the Solidarity trade union from its formation at the beginning of the 1980s through to the democratic transition, and other former anti-communist opposition activists, including those who had previously advocated lustration such as: Wiesław Chrzanowski, the speaker of the Sejm and leader of the post-Solidarity clerical-nationalist Christian-National Union (Zjednoczenie Chrześcijańsko-Narodowe: ZChN) party and Leszek Moczulski, the leader of the radical anti-communist Confederation for an Independent Poland (Konfedracja Polski Niepodległej: KPN).[18] However, these 'secret lists' were immediately leaked to the press and the next day (June 5th), Mr Olszewski's government was dismissed by 273 votes to 119 (with 33 abstentions) among hints from the prime minister that it had fallen victim to a conspiracy by dark political forces linked to the previous regime.[19]

Nonetheless, although the controversy that ensued from this failed attempt to introduce lustration was widely felt to have discredited the entire process, the issue did not go away. For sure, none of the various draft lustration laws that were presented during the remainder of the 1991-93 and start of the 1993-1997 parliaments made any progress. Indeed, the 1993 parliamentary election - which brought the communist successor Democratic Left Alliance (Sojusz Lewicy Demokratycznej: SLD) and the Polish Peasant Party (Polskie Stonnictwo Ludowe: PSL), another regime-successor grouping, to government - followed by the 1995 presidential election, where Alliance leader Aleksander Kwaśniewski defeated Mr Wałęsa, suggested that the issue of how to deal with the communist past was being suppressed and moving to the bottom, if not completely off, the political agenda. However, at the end of 1995 outgoing President Wałęsa and his interior minister Andrzej Milczanowski warned that Poland's security was endangered by Democratic Left Alliance prime minister Józef Oleksy, whom they claimed had been (and still was) a Russian spy who had passed on secret documents to a KGB agent. Although Mr Oleksy declared his innocence, and military prosecutors later dismissed the charges, he was forced to step down as prime minister in April 1996.

The so-called 'Oleksy affair' meant that the call to tackle the legacy of the former secret police began to gradually dominate political debate and this was echoed in parliament, setting off a chain of events that culminated in the passage of a lustration law in April 1997.[20] The Sejm adopted a proposal sponsored by a three-party coalition comprising the governing Peasant Party and two post-Solidarity opposition parties: the liberal centrist Freedom Union (Unia Wolności: UW) and social democratic Labour Union (Unia Pracy: UP). The new law contained a number of provisions. Firstly, all elected state officials from the rank of deputy provincial governor up to ministers, prime minister and the President, parliamentary candidates, barristers, judges, prosecutors and leading figures in the public mass media (approximately 20,000 individuals in total) were required to submit written declarations stating whether or not they consciously worked for or collaborated with the communist

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[17] See: *Skeletons in Closet: Transitional Justice in Post-Communist Europe*, p15.
[18] See: Y-Elita Pl, 'Lista Macierericza', undated, available at: http://yelita.pl/artykuly/art/lista-macierewicza (accessed December 16, 2013).
[19] See: Jacek Kurski and Piotr Semka, *Lewy Czerwcowy*, Warsaw: Editions Spotkania, 1993.
[20] See: 'Dealing with the Communist Past or the Politics of the Present?'.

security services at any point from 1944-1990.[21] Secondly, all statements denying collaboration were transferred to a state prosecutor, the Public Interest Spokesman (Rzecznik Interesu Publicznego: RIP), who used the communist security service secret archives to assess their accuracy. Thirdly, if the prosecutor found evidence that the declaration was false, the public official was to be tried before a lustration court. Fourthly, office holders or candidates for office who made false statements were banned from public office for ten years. Fifthly, verdicts could be appealed but the appeal court's rulings were binding and anyone found guilty of being a 'lustration liar' had to resign immediately upon it making judgement (although the lustration process could be re-opened subsequently if the Supreme Court overturned the decision of the appeal court). President Kwaśniewski was dissatisfied with the lustration bill because it did not define collaboration narrowly enough for him[22] nor did it offer all citizens access to their communist security service files.[23] Nonetheless, he did not veto the lustration bill and signed it into law immediately prior to the 1997 parliamentary election.

However, due to organisational difficulties in establishing the lustration court the process did not actually take effect until 1999. The problem of finding twenty one judges willing to conduct lustration trials and be involved in passing such sensitive moral and political judgements (only eleven had agreed to do so) was solved, and the lustration law was made workable, following the election in September 1997 of the right-wing Solidarity Electoral Action (Akcja Wyborcza Solidarność: AWS) grouping which formed a coalition government with the Freedom Union. In June 1998, to circumvent the problem of finding willing judges the Sejm amended the lustration law so that the Warsaw District Appeal Court was recognised as the lustration court. The 1998 amendments also strengthened the law, transforming the lustration prosecutor (now appointed by the head of the Supreme Court) from being simply the government's representatives to a key figure conducting the process, and allowing MPs to initiate lustration trials directly themselves through the so-called 'parliamentary denunciation', whereby they could demand the investigation of particular individuals.

Nalepa, who distinguishes between two types of lustration system, categorised the Polish law as an example of a so-called 'confession-based truth revelation procedure' (CTR) that gave the target of lustration a chance to self-report before any charges were presented by a prosecutor.[24] Confession-based lustration thus only targeted collaboration with the communist regime as an informer or agent that was kept secret from the public, not the open membership or leadership in the communist party. Other examples of these kinds of systems were Estonia, Lithuania and Romania. Nalepa distinguishes these from 'accusation-based truth revelation procedures' (ATRs) that made specific accusations relying on evidence of collaboration with the former regime from archival and other sources. Examples of these kinds of systems included: Bulgaria, the Czech Republic and Hungary.

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[21] As clarified subsequently by the Constitutional Court, collaboration had to be conscious, secret and connected to the security services' operational activities. A declaration of intent was not enough, there had to be proof of actual activities undertaken in the form of information reports.
[22] For example, he wanted it to exclude military intelligence and counter-intelligence, which were the communist-era security services that his erstwhile Democratic Left Alliance colleagues were most likely to have collaborated with.
[23] Which critics argue that Mr Kwaśniewski wanted to allow so that former security service operatives would have the opportunity to view what had been retained about their activities in their files and, more generally, it would make the law un-workable.
[24] See: 'To Punish the Guilty and Protect the Innocent'.

According to his typology of what he terms 'lustration systems', David,[25] on the other hand, classifies the Polish model as an example of a *reconciliatory* system, which institutionalised forgiveness and gave those in public employment a second chance; or rather, *semi-reconciliatory* because, while it resembled the South African Truth and Reconciliation process (which exchanged amnesty of perpetrators for truth) in so far as the Polish law facilitated the access of collaborators to leading public offices in exchange for disclosure, it did not provide a wider forum for the country to come to terms with the past, thus also performing a reconciliatory function.[26] However, in contrast to simple *inclusive* systems, whereby a public official could, under certain circumstances (generally a bargain to exchange the retention of public office for the revelation of truth about their past) or their own election, remain in their position despite past collaborations,[27] in the Polish semi-reconciliatory system a person could only remain in office under condition of *demonstrating a change in their behaviour* by making inclusion conditional upon the individual's *own* public revelation of past collaboration.[28]

At the end of 1998, the Solidarity Election Action-dominated parliament also voted to establish the Institute for National Remembrance (Instytut Pamięci Narodowej: IPN) which, apart from investigating Nazi and communist crimes and informing and educating the Polish public about the country's recent past, was set up as the custodian of the communist security service files. The 1998 law granted researchers, journalists and historians access to the secret archives as well as giving citizens who had been victims of secret police invigilation access to their own files. Those who were not felt to be victims of communist persecution or worked as informers for, or collaborators with, the communist security services (even if they had themselves been spied upon) could not have access to their files.[29] However, like the 1997 lustration law the implementation of this file access legislation was delayed following difficulties in agreeing a procedure to elect, and then identifying a suitable candidate to act as, its chairman, and did not actually being functioning properly until 2000.

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[25] See: Roman David, 'From Prague to Baghdad: Lustration Systems and their Political Effects', *Government and Opposition*, Vol 41 No 3, June 2006, 347-372; *Lustration and Transitional Justice*.

[26] See: 'From Prague to Baghdad', p360. However, in later work he argues that the Polish system should be described as simply 'reconciliatory'. See: *Lustration and Transitional Justice*, ppxi-xii. For more on the similarities and differences between the Polish and South African models, see: Roman David, 'In Exchange for Truth: The Polish Lustrations and the South African Amnesty Process', *Polittikon*, Vol 31 No 1, April 2006, pp81-99.

[27] The model that was, according to David, adopted in Hungary (1994), Romania (1999) and partly in Serbia (2003). See: 'From Prague to Baghdad', pp357-359.

[28] According to David, the two other kinds of lustration systems were: *exclusive* systems, where a public official associated with particular departments or activities in the former regime was excluded automatically from certain state positions posts in the new administration (adopted in Czechoslovakia in 1991, and subsequently the Czech Republic, Bulgaria in 1992, Albania in 1993 and, for some high-ranking public officials, in Serbia in 2003); and *mixed* systems that gave an opportunity to adopt any or all of the other three strategies, deciding on a case-by-case basis whether that a person would receive tenure or not (adopted in the former GDR following German re-unification). See: 'From Prague to Baghdad', pp354-357, 361-363. In his later classification of 'personnel systems' (of which 'lustration systems' were an East European regional variant) David also adds the category of 'systems of continuation' in which he locates Slovenia and (pre-lustration) Poland. See: *Lustration and Transitional Justice*, pp31-32.

[29] See: Sejm RP, *Ustawa z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej-Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*, Dziennik Ustaw, 1998 nr 155 poz. 1016. http://isap.sejm.gov.pl/Download;jsessionid=CA1405B658D079ABB3B206BFD076EBF0?id=WDU199815510 16&type=2 (accessed 20 February 2014).

Following the 2001 parliamentary election that brought the Democratic Left Alliance back to office once again in coalition with the Peasant Party, there were various on-going attempts to weaken and narrow the scope of the lustration law. These focused mainly on: excluding those who worked for military intelligence and counter-intelligence from its provisions; and defining the scope of collaboration more narrowly so that it only encompassed conscious collaboration with the intention of providing information damaging to the Church, independent trade unions, the underground opposition or the Polish nation, or participation in actions that threatened the civil liberties or properties of others. However, all of these amendments were unsuccessful, although it was agreed to scrap the 'parliamentary denunciation' provisions.

At the same time, other developments during the 2001-5 parliament once again brought the issues of lustration and communist security service file access to the fore and led to calls for strengthening existing lustration laws and truth revelation procedures or introducing more radical ones. Firstly, calls for more radical lustration became linked to the fight against political corruption, which became a more salient issue in Poland following the emergence of the so-called 'Rywin affair' at the end of 2002. Lew Rywin, a film producer, offered Adam Michnik (a veteran anti-communist opposition strategist but who in post-communist Poland became proprietor of the Agora media empire that published the influential liberal daily 'Gazeta Wyborcza', of which Mr Michnik was founder and editor-in-chief) that, in exchange for a bribe, he would arrange for a change in a draft law aimed at limiting the print media's influence on radio and television. Mr Rywin claimed that he was acting on behalf of what he called the 'group in power' which wanted to remain anonymous but possibly included the then prime minister and Democratic Left Alliance leader Leszek Miller. The Rywin affair was followed by a raft of further scandalous revelations involving politicians and officials from the ruling party, which meant that the corruption issue moved to the top of the political agenda. These scandals were felt to exemplify the corrupt and croneyistic network that had allegedly colonised Polish capitalism and led to calls for more radical lustration and revelation of former communist security service networks as a means of breaking this corrupt nexus.

Secondly, the very act of opening up the communist security service files by the Institute of National Remembrance led to pressure for further truth revelation procedures. For example, in February 2005 the allegedly slow pace at which the Institute's files were being made available, and its apparent failure to fulfil its mandate and publicly name secret agents, prompted journalist Bronisław Wildstein to disclose a 'working' list of 240,000 persons on whom secret files existed (including former agents, military intelligence, secret informers, prospective candidates for informers, and victims) and to post it on the Internet. The list contained no information on whether those named were victims or informers and no details regarding their date of birth or place of residence that would identify them. As well as leading to heavy criticisms of the Institute for allowing such a security breach, the publication of the 'Wildstein list' also increased pressure on the Polish authorities to open up the communist security service secret archives more widely.[30]

Thirdly, calls for further lustration and file access were also spurred on by the emergence of links between prominent Catholic clergymen and the communist security services. These

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[30] See: 'To nie jest lista agentów,' *Rzeczpospolita*, January 31, 2005; Agnieszka Kublik and Wojciech Czuchnowski, "Wildstein wyniósł listę 240,000 nazwisk z IPN," Gazeta.pl, January 31, 2005, available at http://serwisy.gazeta.pl/kraj/2029020,34317,2520547.html (accessed January 31, 2005).

began with the revelation by the Institute of National Remembrance in April 2005 that Father Konrad Hejmo, an acquaintance of Pope John Paul II who for 20 years was the main link between the Polish-born pontiff and Polish pilgrims visiting Rome, had been a communist spy. At a press conference, the Institute's director Leon Kieres said that it had proof that Father Hejmo, a Dominican monk, had collaborated with the Polish communist secret police in the 1980s under the names codenames 'Hejnal' and 'Dominik'.[31] News of the allegations broke at a time when Poles were still mourning Pope John Paul II who had died three weeks earlier and Father Hejmo had played a central role organising the pilgrimage of up to one million Poles who flocked to Rome for the former pontiff's funeral. A series of further revelations about links between Catholic clergymen and the communist security services followed, peaking in January 2007 when the Archbishop of Warsaw Stanisław Wielgus resigned a few days as after his consecration (but immediately prior to his public investiture) following revelations in the Institute's files about his collaboration with the communist security services, which he had initially denied.[32]

Following the election of a government led by the right-wing Law and Justice (Prawo i Sprawiedliwość: PiS) party in 2005, the Polish parliament passed a series of amendments - firstly at the end of 2006 and then, in a revised version after the President Lech Kaczyński refused to approve the original, at the beginning of 2007 - which led to a radical expansion of the scope of the lustration law; although the legislation on this issue was also supported by the centre-right (although evolving in an increasingly centrist direction) Civic Platform (Platforma Obywatelska: PO), the main opposition party. It was felt that the provisions of the previous law, whereby during lustration proceedings the Public Interest Spokesman conducted the initial screening and then directed questions to the Institute of National Remembrance, slowed the lustration process down too much. Under the new law, in order to streamline the verification process, the Spokesman's office was abolished and replaced by a special lustration department within the Institute that determined which declarations raised suspicion and warranted investigation. The new lustration law, which came into force in March 2007, also broadened existing rules on disclosing collaboration to include all 'people filling a public function' requiring up to an estimated 700,000 individuals (including, for the first time, teachers, academics and journalists) to declare if they were communist security service informants.[33]

However, in May 2007 the Polish Constitutional Tribunal gutted the new provisions when it ruled that large sections of the amended law violated Poland's constitution. Firstly, it ruled that the definition of who held public offices was too broad and should not include academics, journalists, bank and stock exchange managers, tax advisers, school heads, managers of sports organisation and those who worked for private enterprises. Secondly, it struck down provisions that, it argued, defined the state security organs too broadly. Thirdly, it annulled penalties for failure to submit a lustration declaration. Fourthly, it banned the publication of a list of so-called 'secret collaborators'(Tajni Współpracownicy: TWs) and 'operational links'

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[31] See: Andrzej Kaczyński, Ewa K. Czaczkowska and Paweł Siennecki, 'Donosił z Wiecznego Miasta', *Rzeczpospolita*, April 28, 2005.

[32] See: Tomasz P. Terlikowski, 'Arcybiskup Stanisław Wielgus był agentem wywiadu PRL', *Rzeczpospolita*, January 4, 2007.

[33] See: IPN, *Ustawa z dnia 18 października 2006r o ujawnianiu informacji o dokumentach organów bezpieczeństwa z lat 1944-1990 oraz treści tych dokumentów*, 2007, available at: http://ipn.gov.pl/__data/assets/pdf_file/0009/49284/1-7967.pdf (accessed May 3, 2012); and Jan Cienski, 'Polish witch-hunt "risks business chaos",' *Financial Times*, March 14, 2007.

(Kontakti Operacyjni: KOs). [34] Fifthly, it limited the Institute of National Remembrance chairman's discretion as to whether or not he could withhold access to files from journalists or academics. However, the Tribunal did not question the provisions for lustrating candidates for senior office nor those that required the loss of office for anyone found to be submitting a false declaration and, as Nalepa put it, 'even with the provisions struck down by the Tribunal, the Institute still expanded its powers compared to what they were under the 1997 law'. [35]

After 2007, the issue of lustration and file access became less salient in Polish politics. One might argue that this was inevitable given passage of time since the collapse of communism. However, it was also because the Constitutional Tribunal's gutting of the new legislation created confusion as to what the new law's precise provisions were, together with the fact that, in the snap parliamentary election held in the autumn of that year, Civic Platform ousted the Law and Justice party from government. Civic Platform had supported the 2006-7 lustration law amendments and, if anything, had actually adopted a more radical policy towards file access in the run up to the 2005 parliamentary election when more right-wing conservative elements within the party were in the ascendant. However, at the same time the party increasingly downplayed the issue as part of a conscious effort to reach an accommodation with the liberal-left Polish cultural and media establishment which had always been extremely wary of, and in some cases openly hostile to, radical lustration and file access.

Nonetheless, lustration and communist security service file access retained their capacity to flare up as major political issues. For example, in 2008 the Institute of National Remembrance was criticised for publishing a book by two historians, (Sławomir Cenckiewicz and Piotr Gontarczyk) who suggested that Lech Wałęsa had been a communist security service informer in the early 1970s (discussed in more detail below). [36] Among its other effects, the political debates surrounding the publication of this book led to a 2010 amendment to the law regulating the work of the Institute which the Civic Platform-led government hoped would make it easier to replace its chairman, Janusz Kurtyka, [37] who was heavily criticised by the anti-lustration liberal-left media for allegedly being too closely politically aligned with the Law and Justice party (although Mr Kurtyka actually died tragically in the April 2010 Smolensk air crash before the law took effect).

Explaining the Polish case using prior communist regime and transition frameworks

A large and growing number of scholars have attempted to develop comparative explanatory frameworks to analyse why and how the newly emerging democracies of central and Eastern

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[34] Secret collaborator was the operational name for those individuals who collaborated consciously with the communist security services from 1957-1990. Operational link was a special category of collaborators with simplified recruitment procedures created in the 1970s when the security services stepped up its goal of infiltrating the dissident movement. Most of these were conscious collaborators but, due to simplified recruitment procedures, some of them (those drawn from the communist party and its satellites) may not have known about their secret collaboration. See: Monika Nalepa, 'Institute of National Remembrance-Commission for the Prosecution of Crimes against the Polish Nation/Instytut Pamięci Narodowej-Komisja Scigania Zbrodni przeciwko Narodowi Polskiemu,' in Lavinia Stan and Nadya Nedelsky, eds., *Encyclopaedia of Transitional Justice: Volume 3,* New York: Cambridge University Press, 2013, pp200-205 (202).

[35] See: Ibid.

[36] See: Sławomir Cenckiewicz and Piotr Gontarczyk, *SB a Lech Wałęsa. Przyczynek do biografii*, Warsaw: IPN, 2008.

[37] See: Cezary Gmyz, 'IPN według Platformy', *Rzeczpospolita*, March 19, 2010.

Europe have chosen to come to terms with their communist past and whether or not they attempted to secure some kind of historical justice. Many of these have tried to explain: why some countries have dealt with the issue more promptly and decisively than others; why truth revelation procedures such as lustration and file access were pursued; and, where they were, why more or less radical methods of transitional justice were adopted. All of them have attempted to explain variations in country differences through examining factors such as: the nature of their dictatorial past and the injustices that their people's suffered, the legitimacy of the dictatorial and post-communist democratic regimes, the type of exit from dictatorship to democracy, and the balance of power between - and different strategic and ideological motives driving - old and new elites, particularly during the first stages of democratisation. How can the Polish case be located within the current literature and to what extent do these explanatory frameworks help us to understand it?

In the broader transitional justice literature, authors such as Elster[38] and Nino[39] have argued that the demand for prosecutions of functionaries linked to the previous regime would be greater where citizens faced gross, widespread human rights abuses and where these crimes were committed recently, than where they cost fewer lives and were committed long ago. In line with these arguments, some authors argue that the scope of the transitional justice programmes in post-communist states depends on structural factors such as the nature of the previous communist regime and the injustices that it inflicted. Moran, for example, argues that the intensity of transitional justice depended upon the nature of the former communist regime: how liberal it was and how much scope there was for expressing dissent and tolerating emigration; what he conceptualised as 'the psychological variables of "exit" and "voice"'.[40] If a regime did not allow citizens the opportunity to voice discontent there would be more pressure for the settling of scores and former regime functionaries faced an 'explosive situation' as the anger produced by repression was channelled into vengeance. However, if a country allowed its citizens some scope for self-organisation and protest, or permitted emigration as an alternative 'pressure release', there would, he argued, be little desire for retribution.

Moran's empirical case studies were Bulgaria, Czechoslovakia and the GDR and he did not examine the Polish case in any detail. The communist regime in Poland was a relatively liberal one that allowed its citizens some scope for dissent and protest.[41] In his comparative typology of communist regimes, for example, Kitschelt categorises Poland alongside Hungary in the more liberal 'national-accommodative' category.[42] Indeed, in their typology of all non-democratic regimes (not just communist ones) Linz and Stepan argue that Poland was the only former communist state that never actually experienced a period of totalitarian

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[38] See: Jon Elster, 'Coming to Terms with the Past. A framework for the study of justice in the transition to democracy', *European Journal of Sociology*, Vol 39 No 1, 1998, pp7-48; and Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, New York: Cambridge University Press, 2004.

[39] See: Carlos Nino, *Radical Evil on Trial*, New Haven: Yale University Press, 1996.

[40] See John Moran, 'The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget?' *Communist and Post-Communist Studies*, Vol 27 No 1, March 1994, pp95-109.

[41] On communist Poland, see: George Kolankiewicz and Paul G. Lewis, *Poland: Politics, Economics and Society*, London and New York: Pinter, 1988.

[42] Although he also argues that Poland contained elements of the harsher 'bureaucratic-authoritarian' type to be found in the Czech Republic. See Herbert Kitschelt et al., *Post-Communist Party Systems: Competition, Representation and Inter-Party Competition*. Cambridge: Cambridge University Press, 1999, pp39-40. In his typology of communist regimes, Offe also argues that the level of repression in Poland was low. See: Claus Offe, *Varieties of Transition: The East European and East German Experience*, Oxford: Polity Press, 1996, p139.

rule and, therefore, place it in the milder 'authoritarian' rather than the 'post-totalitarian' category.[43] Consequently, Moran argues that in a country like Poland (and Hungary) 'where exit and/or voice were allowed by the former regime' there would be a 'tendency to forgive and forget'.[44] On the basis of his model, therefore, one would have expected Poland not to have to pursued a policy of radical lustration whereas, of course, although it did indeed initially adopt a relatively 'communist forgiving' approach, the issue re-surfaced until lustration and file access laws were passed and then strengthened and their scope widened.

Other authors, notably Huntington, argue that 'justice was a function of political power' and attempt to find a predictive link between the new regime's policy towards dealing with previous non-democratic leaders and the type of transition that a society underwent in its efforts to democratise, particularly the role of elite bargains in the 'mode of exit' from authoritarianism to democracy.[45] Writing in a seminal book on the so-called 'third wave' of democratisation at the beginning of the 1990s as the Central and East European revolutions were just beginning (and, therefore, at something of a disadvantage to other analysts given the short time span that he was able to investigate) and focusing on the actions taken against communist leaders in a small number of cases, Huntington extrapolates from other regions' experiences to try and explain and predict what would be the outcome of what he terms 'the torturer problem'. According to Huntington, if the last leaders of the non-democratic regime did not go willingly or had to be overthrown by revolutionary forces, a mode of exit that he termed transition by 'replacement', there would be a desire for retribution and officials in these regimes would be in no position to demand any kind of amnesty. If such leaders participated willingly in the democratisation process and gave up peacefully following revolts, so-called 'transplacements' (a process which often involved amnesty as part of the negotiated transition), or initiated reform themselves and stepped down once those reforms went beyond their initial intentions, so-called 'transformations', they were able to declare amnesties to protect their positions. Thus, the more broadly society was implicated alongside the regime in its injustices the less likely it was that former regime officials would be held accountable for their previous actions in the new democracy. On the other hand, the weaker an authoritarian regime was at the time of the transfer of power to democratic forces, the more likely officials and collaborators would be held accountable for their acts of oppression. According to Huntington's predictions based on transition type, therefore, only East European countries where the intransigent communist officials were replaced by new elites (transition by replacement), such as Romania and the GDR, would be likely to confront the past and enact transitional justice legislation, prosecuting and punishing former communist regime officials and secret agents. Looking around Central and Eastern Europe, therefore, Huntington saw an 'initial overall tendency' to forgive and forget.[46]

Nonetheless, in spite of the criticisms that Huntington encountered fairly soon after his book was published, his approach of trying to explain patterns of variation by the nature of the democratic transition was adopted by several authors working on this broad topic, either implicitly or explicitly. For example, without acknowledging Huntington explicitly, Bertschi argues that, '(t)he method of transition of power in many ways conditioned the course of

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[43] See: *Problems of Democratic Transition and Consolidation*, p255.
[44] See John Moran, 'The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget?' *Communist and Post-Communist Studies*, Vol 27 No 1, March 1994, pp95-109 (101).
[45] See: Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman: University of Oklahoma Press, 1991, p228.
[46] See: Ibid.

future lustration attempts'. Thus 'genuinely revolutionary transfers' of power led to 'more retribution and a stronger will to pursue elements of the old regime', while cases of brokered or negotiation transitions, such as Poland, were less likely to lead to a wholesale purge.[47] Similarly, but drawing more explicitly on Huntington's framework, David argues that transition type was the main causal driver of 'the substance and shape' of transitional justice measures in a particular country[48] - and, subsequently, the origin of the four 'lustration systems' that he went on to develop. [49] David sets out in detail a model that links a country's mechanisms for dealing with the past with Huntington's modes of exit of the authoritarian regime so that if old elites were defeated new leaders would be able to determine transitional justice un-impeded but if the transition was negotiated, as in Poland, the new leaders would face 'political and structural constraints that undermined or obstructed any serious attempt to deal with the past'. [50] Making a similar argument, Appel cites the speed with which communism was dismantled as a possible explanatory factor for the intensity of what she terms 'anti-communist programmes'. The greater rigidity of the orthodox communist regimes, she argues, meant that they collapsed suddenly compared to those countries such as Poland where political and economic change emerged gradually in the 1980s with the aid or acquiescence of former communists so that communist leaders in these countries gained legitimacy as they embraced democratic and capitalist change.[51]

As with approaches based on the nature of the previous regime, the transition-type model, therefore, also suggests that Poland should have been a relatively 'communist forgiving' state and not pursued a policy of radical lustration and de-communisation. The transition to democracy in Poland was a negotiated one, an example of what Huntington terms a 'transplacement' with the last communist leaders initiating reform themselves and then stepping down once those reforms went beyond their initial intentions.[52] As a result of the so-called 'round table' negotiations held in February-April 1989 between the communist Polish United Workers' Party (Polska Zjednoczona Partia Robotnicza: PZPR) and the Solidarity democratic opposition, the regime agreed to allow 35% of the seats in the Sejm to be contested. They also agreed to the formation of a less powerful but freely elected second chamber, the Senate. In fact, the communists were trounced in the 'semi-free' elections that were held in May–June 1989 with Solidarity winning all of the 161 contested Sejm seats and 99 out of 100 of the Senate seats.[53] On their own, the communists only held 38% of the seats in the new Sejm and the subsequent defection of their erstwhile allies in the so-called 'satellite' parties deprived them of a parliamentary majority and the ability to form a government. In August 1989, therefore, Tadeusz Mazowiecki was, as noted above, confirmed as the first non-communist premier in post-war Poland heading up a government in which the

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[47] See: 'Lustration and the Transition to Democracy', p449.
[48] See: 'In Exchange for the Truth', p81.
[49] See: Ibid, pp84-85.
[50] See: Ibid, p81. Although David acknowledges that the model is only approximate and rather provides 'necessary, though not sufficient conditions'. See: Ibid, p97.
[51] See: Hilary Appel, 'Anti-Communist Justice and Founding the Post-Communist Order: Lustration and Restitution in Central Europe', *East European Politics and Societies*, Vol 19 No 3, Summer 2005, pp379-405 (403).
[52] On the Polish transition to democracy see: George Sanford (ed.), *Democratization in Poland, 1988–90: Polish Voices*, Basingstoke: Macmillan, 1992; and Wiktor Osiatyński, 'The Roundtable Talks in Poland', in Jon Elster (ed.), *The Roundtable Talks and the Breakdown of Communism*, Chicago and London: The University of Chicago Press, 1996, pp. 21–68.
[53] See: Paul G. Lewis, 'Non-competitive Elections and Regime Change: Poland 1989', *Parliamentary Affairs*, Vol 43 No 1, January 1990, pp. 90–107.

communists were in a minority. Calhoun argues that the round table negotiations 'created a climate where the opposition acknowledged the communists as legitimate partners in building a democratic state' and by surrendering power peacefully, the latter 'earned the moral right to participate in the country's democratic politics'.[54] In so far as it was ever on the political agenda, the transitional justice issue should, therefore, have faded away fairly quickly.

Transition theories such as Huntington's were, therefore, quite helpful in predicting that Poland's new Solidarity-led democratic government would put the past behind it and focus on building the future, explaining why it chose not to pursue lustration in the months after the 1989 semi-free election. However, the key problem with these accounts, as with all those frameworks that try and explain such phenomena through historical and structural factors, is that, although they may account successfully for the lack of an *early* interest in lustration and pursuit of transitional justice in countries such as Poland, they are too static and have problems in accounting for and explaining what might have made the issue arise *subsequently* and the often quite radical changes of trajectory in the way that they dealt with it. This recurrence or 'meandering path' that lustration and transition justice sometimes take[55] flatly contradicts Huntington's prediction that the politics of transitional justice could only be pursued during a limited window immediately following the transition democracy.[56] As Nalepa points out theories such as Huntington's were derived from explanatory approaches based on politicians responding to electoral demand and echoed other, broader accounts of transitional justice in other contexts.[57] As noted above, these argued that public support for dealing with past oppressors was strongest immediately after the transition and that the other pressing issues confronting post-transition governments would dampen further demands for post-authoritarian retribution. However, by predicting that former autocrats would be held to account in the immediate aftermath of the transition or not at all, such theories failed to account for the specific timing of lustration in much of Central and Eastern Europe; including its late emergence in Poland.

Explaining recurrence through the 'politics of the present'

So what are the possible explanations for the recurrence of lustration and file access as issues in post-communist Poland? And how can examining the Polish case tell us more about lustration, transitional justice and post-communist politics in general, both in Poland and other central and East European states? It may of course simply have been the case that if a country did not tackle this issue of how to deal with the communist past it simply came back to haunt them, regardless of whether they tried to be forward-looking and adopted a 'forgive and forget' approach. However, there have been a number of attempts to try and explain the recurrence of lustration and file access as issues in countries like Poland in a more systematic way.

One of these is what might be termed the 'politics of the present' approach which stresses the role of post-communist party political competition as a key explanatory variable. For example, in a piece published in 1996, Welsh was one of the first analysts to make a crucial

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[54] See: Noel Calhoun, 'The Ideological Dilemma of Lustration in Poland', *East European Politics and Societies*, Vol 16 No 2, Spring 2002, pp494-520 (500).
[55] See: Nadya Nedelsky, 'Divergent responses to a communist past: Transitional justice in the Czech Republic and Slovakia', *Theory and Society*, Vol 33 No 1, February 2004, pp65-115 (104).
[56] See: 'Conclusion: Explaining country differences', p267.
[57] See: *Skeletons in Closet*, p22.

distinction between those factors that accounted for an *early* pursuit of transitional justice and lustration and those that may make it arise as an issue *subsequently*.[58] Welsh argues that instead of disappearing as time passed, as Huntington and others predicted, the issue could become even more salient if used by various post-communist politicians against their opponents in party competition. Like Moran and Huntington, Welsh recognises that nature of the previous communist regime - whether or not it remained consistently severe until its demise - and whether it was willing to negotiate and bargain the transition to democracy or resisted change until it was forced out were both critical explanatory factors. However, she posits a more intricate multi-casual model that recognises the potential importance of a range of different explanatory factors in various combinations at different times.

Moreover, Welsh also factors in what she terms the 'politics of the present' which, she argues, was as important for determining a country's willingness to push ahead with transitional justice as the 'politics of the past'. Central to this was early elite turnover, particularly the balance of power between the new political elites drawn from former dissident anti-communist circles who were willing to enact transitional justice measures, and the old elites who blocked efforts to deal with the communist past. Welsh focuses particularly on the question of whether or not the communists or their successor parties not only retained power during the transition but then also went on to perform well in (or rig) - and, therefore, remained in power after – the first free (or 'founding') elections which, for Welsh, was a proxy for the degree of elite turnover in the early post-communist period. Thus 'the weaker the electoral strength of the former communists, the easier it has been to move ahead with de-communisation efforts'.[59] According to Welsh, therefore, the necessary and sufficient pre-conditions for an *early* interest in lustration and a radical approach to dealing with the communist past were: the refusal of an orthodox communist regime to relax repression and bargain with the opposition until faced with mass protest and the communists' loss of influence on the policy agenda after failing in 'founding' competitive elections.

Precisely because the Polish transition was (as noted above) based on a high-level elite bargain and the May-June 1989 'founding' election was only partially free, there was low elite turnover and the communists were able to retain both a number of key positions and a considerable influence in the new parliament. In addition to the sizeable bloc of communist deputies in the so-called 'Contract Sejm' (that lasted until the first fully free elections of October 1991), communist appointees retained control of defence and internal affairs, the so-called 'power' ministries (and, therefore, of the army and the security services) until July 1990 and former communist leader General Wojciech Jaruzelski held the post of President until December 1990. In other words, none of the conditions that were assumed to be necessary for an early interest in lustration and transitional justice were present during the first period of non-communist rule in Poland so, as predicted, the country did not initially pursue lustration, de-communisation or other radical forms of transitional justice.

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[58] See: Helga Welsh, 'Dealing with the Communist Past: Central and East European Experiences after 1990' *Europe-Asia Studies*, Vol 48, No 3, May 1996, pp413-428.
[59] See: Ibid, p 422. Appell also mentions the political power of the former communists as a possible explanatory factor for the intensity of anti-communist programmes, arguing that the 'relationship between the strength of the successor communist party and the strength of lustration programmes is direct'. See: 'Anti-Communist Justice and Founding the Post-Communist Order', p403.

However, citing Bertschi's argument that '(w)hen political power is threatened the weapon of lustration can be wielded to gain sympathy and to quiet opposition',[60] Welsh goes on to argue that, as time passed, dealing with the communist past could become a tool in the struggle for political power and be exploited by some politicians to undermine their opponents, especially if former communists were able to reinvent themselves in the eyes of the public as they were in Poland and much of Central Europe. Drawing parallels with post-war France, Germany and Italy, Welsh argues that 'the past does not simply disappear with the passage of time and…troubling questions do resurface', also citing the case of post-authoritarian Argentina to show it can become 'a central political commodity'.[61] In the case of post-communist Central and Eastern Europe where former communists were able to rehabilitate themselves with the public, the issues of dealing with the past, she argues, 'never cease to be instrumental in the struggle for political power' and questions of how to deal with former communists and communist security service functionaries would 'probably continue to resurface as a pawn in the struggle for political power'.[62] Here Welsh builds on Bertschi's argument, based on his analysis of the Polish (and Bulgarian) case, that power politics was the primary motivation for lustration. Bertschi argues that while the aims and motives of those who pursued lustration may have been to preclude the corrupt from continuing in power in the democratic era, the practice and methods used to implement it suggested that it had been 'conjured to mask more common and base political goals'. Thus, for Bertschi, the 'primary cause of the failure of lustration in Poland' was that it 'was wielded clumsily as a political weapon by Olszewski and Macierewicz.' [63]

Given that it posits the possibility that the issue would not simply fade away with time, Welsh's multi-causal model is certainly extremely useful in helping to explain how lustration evolved as a political issue in Poland and why the country belatedly adopted, and then strengthened, lustration and file access laws. However, Welsh does not go on to elaborate and discuss *why and under what precise circumstances* the lustration and file access issue was likely to recur and attitudes towards the communist past become instrumentalised as part of the political game, and why it was likely to do so in some countries rather than others. Welsh's framework clearly requires some further elaboration here.

In my own analysis of the how the 1997 Polish lustration law in Poland was passed (and amended in 1998),[64] and in later co-authored, cross-country comparative papers (covering the Czech Republic and Hungary as well as Poland) with Williams and Fowler,[65] I build and elaborate upon Welsh's 'politics of the present' approach, by trying to identify the circumstances in which the lustration issue became instrumentalised in this way and by specifying the motives animating advocates of screening procedures. With my collaborators, I argue that, because of the pervasive networks of secret informers and the continuous political prominence of unrepentant communist leaders, many of the political divisions in the newly-democratising East European states were based upon attitudes towards the communist past which developed into an issue on which parties co-operated and competed. Our

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[60] See: 'Lustration and the Transition to Democracy', p447.
[61] See: 'Dealing with the Communist Past', p425.
[62] See: Ibid.
[63] See: 'Lustration and the Transition to Democracy', p447.
[64] See: 'Dealing with the Communist Past or the Politics of the Present?'
[65] See: Kieran Williams, Brigid Fowler and Aleks Szczerbiak, *Explaining Lustration in Eastern Europe: 'A Post-communist politics approach'*, Sussex European Institute Working Paper No 62, March 2003, Brighton: Sussex European Institute; and 'Explaining Lustration in Central Europe: A "Post-communist Politics" Approach', 2005.

conclusion is that the breakthrough that ensured the passage of lustration laws in Poland and elsewhere was achieved 'through rhetorical devices that removed lustration from the context of transitional justice, and thus relieved it of the expectations that accompany and often paralyse conventional judicial approaches to the past'. [66] The discourse of lustration was convincing because it responded to major events of the transition such as: the discovery of chaos in the archives, the extent and possible survival of surveillance networks, the hardship and confusion caused by profound economic change, and the return of former communists to power.

Lustration, we argue, resulted from: public scandals involving the security services, disillusionment with post-communist outcomes among elites, the political needs of the post-communist right, the impact of earlier lustration efforts, or a public demand for information. Whereas Huntington and Moran believed that the past decided the timing and strength of transitional justice, we noted that none of the five sources of the demand for lustration had much to do with the nature of the preceding regime or the exit from it. The passage of each lustration bill, and the sanctions contained therein, similarly reflected not so much the country's political history as: the parliamentary arithmetic of fluid party systems, trial and error, and learning from neighbours' recent experiences. Building on Welsh's argument that a key factor explaining the progress of transitional justice was the electoral strength of the former communists we, therefore, say that the variables determining lustration legislation in Central Europe were the differing access of former opposition groups to power and their ability to put together a coalition supportive of lustration. We also argue that the story of lustration was one of post-communist political competition and legislative coalition-building and should be told with emphasis on the rhetoric, moves and compromises that competition and coalitions required. The adoption of a lustration bill depended on the ability of its advocates among former anti-communist opposition politicians to put together a heterogeneous coalition supportive of lustration; if necessary by modification to secure a secure a parliamentary majority.

Explaining recurrence through blending structural and post-communist factors

Another approach to explaining the extent and recurrence of the lustration and transitional justice issue in countries like Poland involves trying to return to and refine historical-structural and transition-type approaches, sometimes by supplementing and blending them with 'politics of the present' type explanations. For example, in a sophisticated account Nedelsky attempts to draw a link between the nature of the previous regime and later developments [67] and, doing so, argues against Williams, Fowler and my claim that the dynamics of competition between the and new party elites over the lustration issue had 'little to with the nature of the preceding communist regime'.[68] She argues that the continuities in the various elites' views of the previous regime from the communist to post-communist periods indicated that lustration debates and struggles over transitional justice issues should not be considered exclusively, or even primarily, 'the politics of the present' or as 'the

[66] See: 'Explaining Lustration in Central Europe', 2005, p39.
[67] See: 'Divergent responses to a communist past: Transitional justice in the Czech Republic and Slovakia'.
[68] See: Ibid, p81. The reference is to an earlier iteration of our 2005 *Democratization* paper, see: *Explaining Lustration in Eastern Europe,* 2003.

politics of the past' but rather that they were influenced by the legacy of communist regime-society relations.[69]

For Nedelsky, thus, the strongest determinant of the nature and level of transitional justice in a country was 'the level of the preceding regime's legitimacy as indicated during the communist period by levels of societal co-optation, opposition or internal exile and, during the post-communist period by levels of elite re-legitimation and public interest in "de-communization"'.[70] The orientation of societal groups towards the previous communist regime was shaped by their experiences of it and this set the context for their response in both the communist and post-communist periods. Thus, Nedelsky claims, the 'politics of the past and the politics of the present are linked' in the sense that 'the previous regime's legitimacy is directly relevant to societal support for transitional justice because it addresses a central question: did the people find it unjust?'[71] Nedelsky's core theoretical assumption is, therefore that: 'the extent and progress (of transitional justice) is at least partially shaped by the levels of the previous regime's legitimacy'.[72] Thus, the higher the society's view of the previous regime's legitimacy, the less likely it is that the new elites will want to pursue transitional justice and the more likely it is that old elites will return quickly to political influence which, in turn, further reduces the likelihood of vigorous transitional justice. On the other hand, a lower view of the former regime's legitimacy was likely to produce an anti-communist counter culture and electorally popular opposition counter-elites - who would, in turn, probably pursue a vigorous approach to dealing with the past.

Nedelsky develops her framework by examining two cases, the Czech Republic and Slovakia, which, despite sharing a communist regime as part of Czechoslovakia, adopted different approaches to transitional justice once they became independent states (at least initially) as the Czechs continued with the radical Czechoslovak lustration law while the Slovaks left it to expire. She argues that the explanation for this lay in the fact that 'the lower levels of regime repression in Slovakia both reflected and produced a higher level of (communist) regime legitimacy than existed in the Czech lands' which 'contributed to a lesser interest in transitional justice'[73] and dis-satisfaction with early post-communist rule, while the Czechs attitudes towards the previous regime meant that they viewed the post-communist government as more legitimate.

Nedelsky goes on to test her theory in countries with different kinds of communist regimes and applies her framework explicitly to Poland (as well as Hungary and Romania) to try and explain the extent of transitional justice that was applied. She argues that the Polish case displayed conflicting impulses as far as the legitimacy of the communist regime was concerned but that that it nonetheless tended to support her theory that this factor played a role in the post-communist lustration policy, so that 'while various factors may have shaped

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[69] Although it is difficult to find anyone who would argue these debates and struggles were *exclusively* in the domain of present-day politics. Rather this was a debate whose contours depended on a number of factors, some of which were to be found in the past. Indeed, together with my collaborators, I agreed with Welsh that the nature of the communist regime explained an 'early' interest in lustration and transitional justice.

[70] See: 'Divergent responses to a communist past: Transitional justice in the Czech Republic and Slovakia', p65. Although, notwithstanding the problematic definition of 'legitimation' and the way that its existence is inferred from other factors, together with problem of constructing a causal chain linking this to an interest, or lack of it, in transitional justice, there are dangers of tautology with the last two factors.

[71] See: Ibid, pp107-108.

[72] See: Ibid, p88.

[73] See: Ibid, p81.

the outcome of power struggles, controversies over lustration reflect(ed) the legacy of regime-society conflicts of the communist past'. [74] On the one hand, Polish communist leaders' 'flexibility and willingness to reform during certain periods' meant that the regime 'may not have engendered the depth of antipathy that more rigid and repressive ones'[75] (such as the Czech) did and the communist successor party, the Democratic Left Alliance, was, as discussed above, able to re-establish its legitimacy fairly quickly and win elections. On the other hand, the breadth and depth of organised societal opposition to communism in Poland went far beyond anything experienced in the rest of the Soviet bloc so that not only was the regime 'not highly legitimate'[76] but 'a very substantial anti-communist counter-elite existed in the country and, after the transition, it dominated positions of political influence for the first years in the post-communist period'[77] and subsequently, in the form of Solidarity Electoral Action, defeated the communist successors electorally four years after they returned to office. This, she argued, produced a '"bi-polar tendency" with regard to "Communist-purging" and "Communist-forgiving" orientations'[78] which, she implied, was what led to the issue being contested and moving up and down the political agenda during the post-communist period.

Another attempt to try and blend historical-structural factors with 'post-communist politics'-type approaches came in a piece by Moran co-authored with Eva Jaskovska where with his collaborator, he develops a further iteration of his 'psychological' model, that they term the 'pressure cooker approach'.[79] Although the empirical foci of their piece are the Baltic states, in developing the revised model Moran and Jaskovska acknowledge the shortcomings of his earlier explanatory framework by accepting that it did not conform to the empirical outcome in Poland. Moran and Jaskovska point out that Poland was, as discussed above, a 'transplacement' country in terms of Huntington's transition type in which 'voice' was allowed to be exercised during the communist period so should have adopted a forgiving orientation according to both psychological and transition-type explanations. However, Moran and Jaskovska acknowledge that the 'perennially paradoxical' Polish case represented a 'significant anomaly' for both of these explanatory models given that, as discussed above, the country enacted lustration laws in which former communist security service agents were subject to screening procedures.[80]

In the revised iteration of the psychological model, Moran and Jaskovska argue that his original pressure cooker analogy still provided the best point of departure for identifying the determinants of post-communist transitional justice and return to the 'exit' and 'voice' themes in his earlier approach. However, in addition they also posit three possible additional

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[74] See: Ibid, p102. Nedelsky only examines the period up to the early 2000s and states incorrectly that the passage of a lustration law had to await the return to office of post-Solidarity parties at the end of 1997. Although, as noted above, while the lustration law was not operational until 1999 it was actually passed in the previous 1993-97 parliament dominated by regime successor parties.

[75] See: Ibid, p101.

[76] See: Ibid.

[77] See: Ibid, p102.

[78] See: Ibid.

[79] See: Eva Jaskovska and John P. Moran, 'Justice or Politics? Criminal, Civil and Political Adjudication in the Newly Independent Baltics', *Journal of Communist Studies and Transition Politics*, Vol 22 No 4, December 2006, pp485-506.

[80] Although, in my view, they mis-characterise lustration as automatically involving exclusion from office by describing it as a process in which 'if they (former communists) were found to be significantly involved in the gross violation of human rights, their participation in the political system could be curtailed for a certain period of time'. See: Ibid, p488.

'release valves' from the post-communist period, namely: the high political legitimacy of the previous communist regime (acknowledging Nedelsky); the replacement of communism by nationalism as the dominant form of political legitimacy in the post-communist period (as was seen in, for example, the former Yugoslavia); and the disappearance of the compromised members of the previous regime through death or exile. Unless one of these valves operated to relieve the pressure, the country would, they argue, arrive at a point at which some form of criminal, civil or political transitional justice measures would be realised. Continuing the analogy, Moran and Jaskovska argue that the 'fuel' that heats up the political pressure cooker had to be derived from an untainted non-communist political elite who were not simply converted communists so that '(o)nce this "fuel" has been found, and finds itself in power, the pressure cooker will heat up, exerting greater and greater pressure to prosecute and punish the former communist torturers'.[81]

To put it another way, they argue that a 'double transition' had to occur in many countries and, unless one of the release valves operated to relieve the pressure, the country would then arrive at the point at which prosecutions, would be realised. In order for this analogy to operate in Poland (and Hungary), they also take into account my 'politics of the present' explanation arguing that if a post-communist state had, as in the Polish case, a large reformed communist successor party that could legitimately contend for power and re-emerged successfully as the ruling party, the temptation for non-communist opposition forces to use calls for lustration as a political weapon greatly increased the likelihood of transitional justice being pursued. This, they argue, was precisely what happened in Poland after the Democratic Left Alliance and Peasant Party won the 1993 Polish parliamentary election, so that non-communist politicians had a political incentive to use the issue of lustration for political purposes, unlike in the cases where communist successors did not pose a threat.

Another notable attempt to synthesise and bring together 'historical', 'transition type' and 'politics of the present' type explanatory approaches to explain the scope and pace of transitional justice efforts, and why some countries re-examined and condemned their past sooner and more comprehensively than others, is developed by Stan.[82] Stan's empirical base is a very broad survey of all post-communist states from 1989-2007 examining the adoption of transitional justice legislation in the areas of lustration, court proceedings and secret service file access. In a similar approach to Nedelsky's, Stan argues that three factors - the relationship between the regime and opposition during the communist and pre-communist periods, the legitimacy of the communist (and post-communist) elites, and the relative political power of communist successor parties and their former opposition - were, in combination, the strongest predictors in explaining the comprehensiveness and stringency of transitional justice efforts. This is measured by the groups targeted by lustration and file access laws and the implications for those encompassed by them, together with the number of trials against former communist officials and security service functionaries. Stan argues that, in a clear pattern across the region, former communists voted against lustration and file access laws while parties emerging from the anti-communist opposition provided the impetus for them. The outcome of this struggle was strongly influenced by three interrelated factors: the country's pre-communist level of experience with pluralism; the composition, orientation, and strength of the opposition, both before and after 1989; and the communist regime's dominant methods of ensuring societal compliance with its rule through repression and/or co-

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[81] See: Ibid, p500.
[82] See: 'Conclusion: Explaining country differences'.

option. Critiquing other theories, she argues that they draw too sharp temporal distinctions between different time periods - namely, the (pre-communist and communist) past, the transition to democracy or the post-communist present - suggesting that one particular period was of greater importance - and, therefore, neglect the integral relationships between them. Rather, she claims the past and the present were closely linked so that '(t)he national specificity of the communist past led to a particular type of transition which, in turn led to a specific post-communist political constellation that facilitated or prevented transitional justice'.[83]

Thus, in countries like Poland (but also the Czech Republic, Hungary and the Baltic states) that had a pre-communist history of strong multi-party politics, and where the opposition to the communist regime comprised a combination of dissidents, mass movement members and internally exiled technocrats, a well-organised, well-educated, potentially powerful alternative elite emerged in the post-communist period.[84] These counter-elites were able to gain sufficient electoral strength to adopt transitional justice legislation such as lustration. However, their orientation towards communism's legitimacy was, according to Stan, grounded in their experience under that regime, so that transitional justice in countries like Poland (and even more so Hungary), where the communist regime relied more on co-optation and allowed some level of reform, was less stringent than in those countries (such as the Czech Republic, East Germany and the Baltic states) where communist rule was enforced primarily through repression and ideological rigidity.

Explanatory models such as these that try to blend and synthesise communist and post-communist (and, in Stan's case, pre-communist) factors to explain variations in transitional justice - and specifically why, in cases such as Poland, progressively more radical lustration and file access legislation was introduced - are ambitious and often produce complex explanatory frameworks. However, they are vague in explaining the precise mechanisms involved in how exactly and why particular historical legacies in a country like Poland produced *particular lustration outcomes* at *particular times;* in other words why the issue recurred *in the way that they did* and *at the point in time that it did.* Here, much more contingent 'agency' factors still come into play and not all of these can be traced back to historical-structural causes. In particular, these models do not take into account that the ebb and flow of lustration in cases such as post-communist Poland may have been due to the fact that political elites actually changed their stance on the issue. Interestingly, although Stan argues that 'it (history) matters a lot', at the end of her account she also acknowledges that it 'is not destiny' and that the 'individual personalities of politicians assuming leading roles in speeding up or slowing down the transitional justice process, and awareness of developments and problems in neighbours make an imprint on how national elites approach the politics of memory';[85] in other words, an acknowledgement that 'agency matters' too.

Explaining recurrence through party elite strategies

One of the key issues that arises when trying to explain with more precision and identify why the transitional justice recurs at particular times and in particular forms is the extent to which

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[83] See: Ibid, p269.

[84] This stood in contrast to countries where the organised opposition to communism was very weak due to little pre-communist experience with political pluralism, and there was harsh repression of any counter-elites and/or their successful co-optation

[85] 'Conclusion: Explaining country differences', p269.

political strategy and calculation or ideological and programmatic motives are the key drivers of (late) lustration and truth revelation. One particular variant of the 'politics of the present' approach, that might be termed the *political elite strategy explanation,* is based on the notion that political actors responded rationally to impulses such as (actual or anticipated) popular and societal demand to further their own partisan interests. Although this angle was not developed explicitly in my own collaborative work with Williams and Fowler, and our analysis left open the possibility that lustration may have been motivated by ideological conviction, the clear implication as it built on Welsh's framework was that the issue was, to some extent at least, instrumentalised as an element of inter-party competition.

A more recent attempt to develop such a political elite strategy explanation for late lustration by Nalepa is rooted in a much more explicitly rational-choice framework and based on the idea that, when determining their strategic choices, supporters of lustration used the issue in a calculating way for party advantage.[86] Based on a combination of elite interviews, archival evidence and statistical analysis of survey experiments conducted in the Czech Republic and Hungary as well as Poland, Nalepa tries to tackle two key puzzles regarding the specific timing of transitional justice in post-communist states, particularly in cases such as the Polish one where pacted, peaceful transitions to democracy were followed by delayed lustrations. Firstly, why did the anti-communist opposition not pursue retributive justice immediately after the transition in spite of the prevailing incentives to do so but later when popular support for its adoption had (apparently) dampened? Secondly, why did transitional justice get adopted in some countries when communist successor parties, who had initially insisted that they should be immune from such measures as part of the (implicit) price for their negotiating liberalisation and democratisation, were in office; again such as (Nalepa argues was the case in) Poland?

Nalepa's answers to the both of these questions are based on what she terms a 'skeletons in the closet' argument which models the incentives of former dissidents from the anti-communist opposition and regime functionaries. Given that former dissidents, who comprised a considerable part of the new democratic elite, were uncertain about the extent to which the opposition groups of which they were previously members were infiltrated by communist security service informants, they exercised restraint in introducing lustration and transitional justice procedures fearful that this would have exposed the 'skeletons' in their own 'closet'. This uncertainty she argues, acted as the former regime elites' insurance against possible transitional justice policies because it meant that, at the beginning of the roundtable negotiations, they had a distinctive 'informational advantage' over the opposition[87] and thus made the anti-communist opposition's commitments to amnesty credible. The former regime elites knew, she argues, the extent to which members of the various dissident groups had been engaged in collaboration and could successfully use this information to their advantage. On the other hand, the risk-averse opposition preferred to keep these 'skeletons in the closet' even if there were fewer of them than the communists led them to believe.

In terms of tackling the second puzzle - why did former communists apparently behave in a seemingly irrational way and 'self-lustrate'? - Nalepa develops an agenda setting model where the critical parameters are electoral turnover and restrictions of procedures for

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[86] See: *Skeletons in Closet*. The main arguments in the book are reprised in summary version in: Monika Nalepa, 'Captured Commitments: An Analytical Narrative of Transitions with Transitional Justice', *World Politics*, Vol 62 No 2, April 2010, pp341-80.

[87] See: *Skeletons in Closet*, p228.

parliamentary decision-making. She argues that communist successor parties such as the Democratic Left Alliance passed mild lustration bills because they anticipated that they would lose power to anti-communist forces; as, indeed, they did in Poland 1997. Arguing that 'accepted lustration proposals in one legislative term form the status quo of the succeeding term' the ex-communists thus tried to appease a pivotal median political party in order to 'set the future status quo strategically' in a way that prevented harsher legislation in the future by reducing 'the future win-set of the future median party' and thus 'the room for the new proposing party - the anti-communists - to shift policy in the extreme (harsher) direction'.[88] In other words, the reformed communists' seemingly irrational behaviour was rational because initiating (less punitive versions of) transitional justice was 'part of a pre-emptive strategy to avoid brutally harsh transitional justice policies'.[89] So while the timing of the lustration law may have been influenced heavily by the timing of a future election, which they anticipated losing, it was not introduced to respond to electoral demands but rather to eliminate electoral competition. For Nalepa, thus, the former communists' support for lustration was not the result of a desire for an honest re-examination of the communist past, but a pre-emptive strategy designed to protect their political careers from more radical policies.

In terms of the Polish case, Nalepa also attempts to explain why the issue of truth revelation re-surfaced again in the mid-2000s so many years after the transition to democracy and specifically why the lustration law was amended and strengthened after Law and Justice came to office in 2005. She argues that this was due to the rise of political elites that emerged from anti-communist opposition groupings that had not been infiltrated by communist security services and, therefore, had fewer collaborators in their ranks and were untainted by collaboration with the previous regime. Lustration, Nalepa says, had distributive effects and Law and Justice had all the pre-requisites of a party that would have benefited from it. She maintains that earlier in their political careers Law and Justice leader Jarosław Kaczyński and his twin brother Lech (who was elected as the Law and Justice candidate for President of Poland at the same time as the party came to office in 2005) knew that the party leadership was free from security service informers.[90] Nalepa claims that they had this knowledge as a result of Lech Kaczynski holding the posts of head of the Supreme Audit Office (Najwyższa Izba Kontroli: NIK) between 1992-95 and justice minister in the Solidarity Electoral Action-led government between 2000-1, which allowed him to survey the files of party members and locate hidden 'skeletons'.[91] Armed with this knowledge of who would probably be the most affected by lustration, and having a parliamentary caucus comprising very young members and those with a background in opposition groups that maintained low profiles before the transition, Law and Justice was, therefore, not afraid that lustration would uncover skeletons in its own closet. Moreover, she goes on to claim that the Kaczyński brothers changed their party organisation four times providing them with 'an opportunity to purge party ranks of known collaborators' which, she argues, they 'took liberal advantage of'.[92] In other words: 'by belonging to low-profile underground groups prior to the transition, enjoying access to secret information about which parties were infiltrated with former secret police agents, and

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[88] See: Ibid, pp227-228.
[89] See: Ibid, p29.
[90] See: Ibid, p85.
[91] See: Ibid, p18.
[92] See: Ibid, p19.

purging known collaborators from party ranks when reinventing party labels, the Kaczyński brothers reached a point at which they were certain they would benefit from lustration'.[93]

There are, however, problems both with Nalepa's explanation of the Polish case specifically and her explanatory framework more generally. Firstly, her assertion that 'the opposition's preferences over transitional justice were shaped by its beliefs about its degree of infiltration'[94] is based mainly on conjecture and assumption and is suggestive rather than conclusive. Her only firm supporting evidence for her claim that opposition politicians undertook this 'skeletons in the closet'-type calculus are 13 anonymised interviews with no direct quotes from any of the individuals concerned.[95] Nalepa herself admits that she cannot 'test directly the hypothesis about how the type of dissident groups in which ECE (East-Central European) parties originated explains attitudes towards lustration' as this 'require(d) data on (the) pre-transition activities of politicians',[96] but this does not prevent her making bold claims that 'skeletons' were distributed among the post-opposition parties in the way that she suggests. Her argument also ignores that fact that many, if not most, members of anti-communist democratic opposition groups were not, in fact, secret service infiltrators; indeed, it is contradicted somewhat by her quotation from one of her interviewees from the communist successor elites that the opposition representatives in the round table agreements where those who could not be broken by the secret police.[97]

In terms of her explanation of why former communists chose to 'self-lustrate', there are a number of empirical problems with this in the Polish case, the most serious of which is the fact that, although the Democratic Left Alliance and President Kwaśniewski proposed lustration measures in parliament, they did so in 1996: well before the next parliamentary election was due and at a time when the Polish pro-lustration right was actually weak, divided and at a low ebb politically. At the time when they might have acted in anticipation of a possible election defeat, in April 1997, the communist successor party actually voted *against* the lustration law in parliament; although, for various reasons (discussed above), Mr Kwaśniewski chose not to veto the legislation and signed the law in July. Moreover, while there may have been an element of pre-emption in both the Democratic Left Alliance and Mr Kwaśniewski's behaviour - proposing lustration bills in 1996 and, in the President's case, signing the new legislation in July 1997 to head off more radical proposals - that was not the reason why they were passed in parliament in April 1997. This was, as noted above, due to the emergence of a 'lustration coalition' comprising two opposition parties and the communist successor's junior coalition partner, the Peasant Party (admittedly a regime successor grouping, but not the communist successor party). Mr Kwaśniewski may well have acted strategically in approving the 1997 lustration bill to pass into law but this could have been as much about *political positioning* as *pre-emption* to prevent the subsequent emergence of more radical proposals. Specifically, the President's actions may have been part of a broader political calculation that involved trading off passing a law that he was uncomfortable with and trying to distance himself from his political base as part of a longer-term political strategy of attempting to portray himself as a non-partisan 'President of all Poles'. Moreover, as Calhoun speculates, it may well have been that 'with parliamentary elections quickly approaching, he (Mr Kwaśniewski) did not want his party to appear to be

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[93] See: Ibid.
[94] See: Ibid, p53.
[95] See: Ibid, p141.
[96] See: Ibid, p150.
[97] See: Ibid, p134.

concealing or justifying the errors of the past'.[98] In fact, the degree of uncertainty about the outcome of 1997 election was actually much higher than Nalepa indicates and it was far from clear to the Democratic Left Alliance that they would lose their dominant position in the new parliament. Finally, it is questionable whether, when considering what kind of lustration law to introduce and support, Democratic Left Alliance legislators really acted like amateur political scientists factoring in the latest (as noted above, far from conclusively negative in any case) opinion polls, trying on the basis of this to anticipate the position of the median member of the new parliament, and then drafting appropriate legislation in accordance with this. Again, Nalepa does not really provide any hard evidence of this and even admits herself (albeit rather cryptically) that 'conclusive inferences cannot be drawn by projecting the results of elections onto expectations about losing power'.[99]

The empirical basis for Nalepa's explanation for why the lustration law was amended and strengthened in 2006-7 is also rather flimsy and contains some factual errors. Contrary to what Nalepa argues, it was not Law and Justice that 'promised to make public all of the documentation collected by the dreaded secret police'.[100] Rather it was Civic Platform (and especially, Jan Rokita, the then head of the party's parliamentary caucus and prime ministerial candidate in the 2005 elections) that pushed hardest for a policy of completely opening up the security service files but this call was restricted to politicians; and Lech Kaczyński actually opposed the idea during the 2005 election campaign.[101] Indeed, the 2006-7 lustration law was passed with broad cross-party support, except for the Democratic Left Alliance. This included Civic Platform, many of whose leaders were, of course, once prominent figures within the Freedom Union and its predecessor the Democratic Union (Unia Demokratyczna: UD) who, as heirs to the opposition politicians involved in the round table negotiations, would, according to Nalepa's logic, have been among the political groupings most infiltrated by the communist-era security services. It is far from clear that the post of head of the Supreme Audit Office and justice minister really gave Lech Kaczyński the access to security service files that Nalepa implies. She does not provide any evidence for her claim that those parties pushing for the strengthening of the lustration law, like Law and Justice, comprised new political elites and very young parliamentarians together with those who had a background in low profile opposition groups which had not been infiltrated by the communist security services - and, therefore, contained fewer collaborators. Her claim that the Kaczyński brothers changed party organisations four times and that, among former anti-communist dissidents, they 'were probably those who most frequently terminated one party and created another' is incorrect.[102] She also provides no real evidence that they 'took liberal

[98] See: 'The Ideological Dilemma of Lustration in Poland', p515.
[99] See: *Skeletons in Closet*, p178.
[100] See: Ibid, p17.
[101] See: Paweł Wroński, 'Teczki dzielą PO i PiS', 13 June 2005, www.gazeta.pl (accessed 13 June 2005). Although Jarosław Kaczyński later clarified that it was Law and Justice policy to support opening up politicians' security service files and only opposed making public *all* security service documentation, claiming that the latter was the policy that Lech had in fact opposed. See: Paweł Wroński, 'PO-PiS drobna korekta poglądów brata', 14 June 2005, www.gazeta.pl (accessed 14 June 2005); and Piotr Śmiłowicz, 'Pogodzili się w sprawie teczek', *Rzeczpospolita*, 14 June 2005.
[102] See: *Skeletons in Closet*, p19. Although they were involved in a number of broader electoral coalitions, the Kaczyńskis were only associated with two actual parties: the Centre Agreement (Porozumienie Centrum: PC) and Law and Justice, and their degree of organisational turnover was by no means unusual for those on the post-Solidarity right in the 1990s.

advantage of this' to 'purge party ranks of known collaborators'.[103] Indeed, there was much contrary evidence, that Law and Justice was actually dominated by an 'old guard' from the Centre Agreement party whom Jarosław Kaczyński trusted on the grounds that he enjoyed long-standing collaborations with them and that they remained loyal to him even at the end of the 1990s when the twins found themselves in the political doldrums. The Kaczyński brothers did not (as Nalepa claims) join Lech Wałęsa's Non-party Bloc to Support Reforms (Bezpartyjny Blok Wspierania Reform: BBWR), which did not (as she also claims) win parliamentary elections and help Mr Wałęsa broaden the powers of the presidency. By 1993 when the Bloc was formed, the Kaczyński brothers had broken away from the then President's political camp and were deeply hostile to him. Nor did they then break with the Bloc to form the Centre Agreement, this political grouping was formed three years earlier in May 1990. The Kaczyński brothers and the Centre Agreement party did, as Nalepa claims, support the Solidarity Electoral Action electoral conglomerate which won the 1997 parliamentary election and then abandoned it to form Law and Justice; although Jarosław Kaczyński actually stood as an independent on Jan Olszewski's Movement for Poland's Reconstruction (Ruch Odbudowy Polski: ROP) party list not for Solidarity Electoral Action in 1997 and the Centre Agreement split over whether or not to remain part of the latter, with the pro-Kaczyński faction choosing to operate independently as early as 1999.

However, notwithstanding problems with Nalepa's account at an empirical and factual level, one of the biggest difficulties with her so-called 'skeletons in the closet' model - and, indeed (albeit more implicitly) some other variations of the 'politics of the present' explanatory framework that focus on strategic political and electoral factors (including, I must admit, my own previous work on this topic) - is that it posits the notion that the transitional justice issue was almost completely instrumentalised by strategic, office-seeking political elites. The difficulty with this approach is that it potentially under-estimates the importance of normative factors and extent to which the motives of those pushing for transitional justice may have been genuinely programmatically and ideologically driven rather than being rooted simply rooted in strategic considerations. Even those pro-lustration political actors and parties that saw the sponsorship of truth revelation procedures as a useful power tool to gain an advantage over their competitors were not necessarily solely (or even mainly) strategically motivated and may also have been committed to these policies for ideological and programmatic reasons. Stan is surely correct when she says, that 'it (is) difficult to argue that normative considerations of justice are entirely absent'[104] and that 'to reduce the complexity of the politics of memory to the level of recognizing it only as a manipulating tool used in the cut-throat battles waged by power-thirsty political parties or to relegate it to the grey zone of illusory and unattainable myths ignores the Eastern Europeans' need to know the truth about the communist regime, to confront their own personal history, and to obtain justice and absolution.'[105]

Explaining recurrence through ideological-programmatic factors

Indeed, another approach to accounting for different patterns of post-communist lustration and transitional justice - including the recurrence of debates and changes of trajectory, as in

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[103] See: Ibid, p19. Other than an un-substantiated claim from constitutional law professor Jerzy Osiatyński (whom she wrongly describes as a 'Western journalist[s]') that, when they set up Law and Justice, the Kaczyński brothers 'turned to young people on the far right'. See: Ibid, p130.
[104] See: 'Conclusion: Explaining country differences', p269.
[105] See: 'Introduction: Post-communist transition, justice, and transitional justice', p4.

the Polish case - places greater emphasis on precisely such ideological-programmatic factors. These accounts are based on the idea that political elites believed, or came to believe, that a more radical approach to such issues was both necessary and desirable from a normative perspective. They also envisage scenarios where some elites who always believed that lustration was necessary came to subsequently find themselves in a position where they were able to implement it. There are a number of examples in the literature on post-communist transitional justice that suggest that a greater emphasis should be placed on such normative considerations in explaining the recurrence of debates on lustration and truth-revelation procedures in countries such as Poland.

For example, in an analysis of the lustration debate in Poland published at the beginning of the 2000s (and, therefore, not really taking into account post-1997 developments and failing to foresee the problems with the 1997 law and subsequent attempts to amend it), Calhoun tries to explain the remarkable ability of the issue to endure, which the Polish case exemplified.[106] She argues that what she termed the 'power politics' explanation - which, she claimed, 'Polish scholars and politicians tend to accept as the most fitting one'[107] - does not account sufficiently for changes of trajectory on the lustration issue because it ignores why post-Solidarity liberals in parties such as the Freedom Union (a key member of the 'lustration coalition' that secured the passage of the 1997 law) and its fore-runners the Democratic Union and Liberal Democratic Congress (Kongres Liberalno Demokratyczny: KLD) opposed rather than supported this form of transitional justice for several years after the transition began. Rather, Calhoun tries to explain this pattern of lustration by arguing that it was not simply 'power politics' that shaped Poland's approach to transitional justice but rather that liberal democratic ideology provided a guiding, constraining and justificatory framework for debates and political action surrounding the issue. Post-Solidarity liberals strongly opposed rather than promoted lustration for several years after the transition began because it 'violated liberal democratic principles' even though (in contrast to Nalepa's later argument) they 'seemed to have few ulterior motives in adopting this position, and it certainly did not enhance their electoral prospects (to avoid advancing it)'.[108] Calhoun argues that liberal democratic ideology provided the conceptual framework for debates on the issue of lustration in Poland so that they focused on legal procedures not historical justice and truth.[109]

Liberal democratic ideology also constrained the range of acceptable policy options by: stressing the importance of political inclusion, condemning collective punishment, preventing the law from working retroactively by only allowing punishment of acts that were legally proscribed at the time, and providing defendants with full prosecution protection. It thus, as Calhoun puts it, gave 'birth to the very idea of an orderly process of lustration rather than a spree of revolutionary violence'.[110] Post-Solidarity liberals created a political identity for

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[106] See: 'The Ideological Dilemma of Lustration in Poland'.
[107] See: Ibid, p496.
[108] See: Ibid, p502.
[109] Although my own analysis of the 1997/98 lustration law debates found that they also encompassed: a citizen's 'right to know', protecting democracy from blackmail of former functionaries, and some elements of historical justice. See: Aleks Szczerbiak, 'Dealing with the Communist Past or the Politics of the Present?', pp563-565.
[110] See: 'The Ideological Dilemma of Lustration in Poland', p497. Although some writers, such as Ackerman, argue that the legal hurdles in the civil law context of lustration were very low with the rule of law imposing few constraints (as the functionary in question did not enjoy the full protection of due process, the ban on retroactivity and equality before the law) and thus recommend it as the preferred form of coming to terms with

themselves linked to this liberal democratic ideology, and 'they were willing to stick with it even if it did not always yield the most popular results'.[111] However, at the same time liberal democratic ideology gave the former communists opportunities to enter procedural debates about lustration with confidence and an opportunity to offer good public reasons to argue against a process that they were naturally inclined to oppose anyway, as well as allowing them to forge an un-expected alliance with post-Solidarity liberals that prevented lustration in Poland during the early years of the transition.

Drawing our attention to the fact that the 1997 lustration law (and, indeed, the 2006-7 amendments to it) was supported by political elites who, for various reasons, had (apparently) changed their minds on this issue, Calhoun goes on to argue that its later adoption came about through the fact that, over time, many post-Solidarity liberals started to appreciate the subtleties of the relationship between lustration and liberal democracy. At the same time, the ability of individuals linked to the former regime to take advantage of communist-era networks to turn their old political power into economic power prompted many Poles, including some post-Solidarity liberals, to question the virtues of the 'amnesty but not amnesia' option. Consequently, Calhoun argues that Polish lustration debates grew more nuanced as party politicians from the post-Solidarity liberal milieu learned from their own experiences, especially the botched attempt at lustration in 1992, and increasingly weighed other considerations against the civil rights of the accused. These included the importance of the truth and the fact that their constituents had the 'right' to know a political candidate's character. They also concluded that the absence of lustration led to 'un-official' screening of individuals, thereby creating instability, and that clear procedures were needed to assess the validity of these accusations. By setting up a hierarchy of values, liberal democratic ideology thereby facilitated political learning as throughout the post-communist period Polish political leaders from across the spectrum professed that democracy and individual rights were primary values; but over time post-Solidarity liberals and ex-communist leftists drew different conclusions about whether or not lustration would best promote these values. These post-Solidarity liberals also learned new ideological lessons from international experience as to how to design lustration in order to respect the principles of the rule of law and liberal democracy, both by drawing upon examples from neighbouring countries such as Germany and through explicit guidelines from international organisations like the Council of Europe.

Building on Calhoun's arguments that lustration arose out of an ideological commitment to a new liberal order and 'a way to prevent past political iniquities form polluting or contaminating the new society and polity',[112] Appel also discusses the ideational motivations behind what she terms 'anti-communist programmes', exploring 'how ideas and beliefs shaped the development of programmes of retrospective justice'.[113] Arguing that 'ideas matter' or 'may matter', she highlights the fact that, due to the methodological challenges of measuring and comparing non-material variables, previous research tended to focus on

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past injustices. See: Bruce Ackerman, *The Future of Liberal Revolution*, New Haven, Conn: Yale University Press, 1992, p96.

[111] See: 'The Ideological Dilemma of Lustration in Poland', p502. Although Calhoun also acknowledges that this strong commitment to liberalism helped to differentiate these parties from the post-Solidarity centre-right and, thus, formed part of their overall electoral and ideological appeal. So there may well have been other 'ideological'/non-strategic reasons for them adopting this stance, such as simply feeling that this was not a priority and a distraction from other pressing issues such as economic reform.

[112] See: 'Anti-Communist Justice and Founding the Post-Communist Order', p400.

[113] See: Ibid, p379.

interests or narrow partisan power calculations and concerns rather than the under-studied areas of broad normative values and conceptions of justice, and thereby 'misses the greatest motivation behind the adoption of these programmes'.[114]

Appel acknowledges that a 'skeptic might find politicians' ideational or ethical motivations suspect'[115] especially given the problems with the implementation of lustration which was, at times, used as a political weapon and 'given its frequent abuse and exploitation…it is easy to…assert that lustration was supported not for reasons of historical justice or anti-communism but for its political utility'[116] Nonetheless, she argues that anti-communist programmes were much more than this, citing the work of Weber, Goldstein, Keohane, Blyth and Ackerman to draw attention to the fact that ideas and interests are not necessarily mutually exclusive as causal factors. Appel claims that, although they may have served the political interests of some leaders, this did not refute the fact that such programmes had ideational or ethical dimensions. She points out correctly that '(i)n social science analysis…it is always easier to reduce human motivation to self-serving materialist behaviour' and '(p)erhaps it even seems naïve to attribute lofty goals to politicians or policies'[117] but argues that in national debates on anti-communist programmes proponents and opponents discussed them explicitly in ideational and even moral terms claiming that '(d)espite its misuse, lustration nevertheless did arise out of ethical and normative concerns'[118] as a 'way of protecting the inchoate liberal democratic order'.[119]

Truth revelation and post-communist democratisation

A good example of how an academic explanatory debate about the timing of lustration becomes linked with more normative approaches is Horne's argument that the emergence of late lustration was linked to efforts to improve the quality of post-communist democracy.[120] This directs our attention to the important point that in many countries, such as Poland, examining political discussions about lustration separately from other political developments under-estimates the extent to which these issues have often become entwined with other, broader post-communist democratisation discourses on questions such as: the public's right to information about the backgrounds of its public representatives, officials and authority figures, and the need to tackle corruption. These relate as much to the relationship between transitional justice and the perceived failures of post-communist democratisation as they do to questions of historical justice and dealing with the communist past, with lustration posited as a project designed to implement democratic renewal and enhance the quality of democracy in these states. This is interesting because the normative literature on post-communist transitional justice has often posited liberal democratic legal-ethical arguments both for and against adopting a radical approach to lustration: counter-posing questions of securing historical justice and allowing freedom of information on the one hand, with concerns about ascribing collective guilt and retroactive justice on the other.

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[114] See: Ibid, p380.
[115] See: Ibid, p395.
[116] See: Ibid, p399.
[117] See: Ibid.
[118] See: Ibid.
[119] See: Ibid, p400.
[120] See: Cynthia Horne, 'Late lustration programmes in Romania and Poland: supporting or undermining democratic transitions', *Democratization*, Vol 16 No 2, April 2009, pp344-376.

In the Polish case, the specific focus for this approach was the so-called 'Fourth Republic' project, based on a radical critique of post-communist Poland as corrupt and requiring far-reaching moral and political reform. Originally an idea and critique that enjoyed quite broad political support (including from politicians and intellectual milieu associated with Civic Platform), the 'Fourth Republic' came to be associated primarily with the 2005-2007 Law and Justice-led governments.[121] Broadening the scope of lustration came to be seen as a key element of such a renewal. Specifically, as noted above, the notion that political life in the post-communist period was manipulated by the former (but still influential) communist-era security services - and, more broadly, the perceived ability of elites linked to the former regime to take advantage of their communist-era networks to turn their old political power into economic power[122] - prompted many Poles to question the virtues of the so-called 'thick line' approach towards transitional justice.

Building on this notion that 'there is a collective sense that the past actively affects the political and economic reality of the present'[123] Horne thus, sees the fact that countries like Poland embarked upon late lustration programmes as an expression of the perceived need to deepen the democratisation process. The objective of these programmes was to expand the scope of transparency measures associated with transitional justice such as lustration to include those in 'positions of public trust' in both the public and private sectors including journalists, academics and business leaders. As Horne puts it, 'lustration is resonating with a symbolic and institutional sense that something about the democratic transitions in incomplete'.[124] Horne rejects what she calls the 'dominant explanation' that 'lustration is…a (tool of party politics and) threat to democratic consolidation' and draws a distinction between lustration laws that were 'politically *motivated*' (which, she argues, they all were) and those that were 'politically *manipulated*' (emphasis added) or 'elite driven' and 'wielded against political parties for personal gain' leading to 'personal advantaging of the party in power' rather than advancing a reform-agenda.[125] She goes on to argue that the evidence of late lustration in Poland supported neither a strong 'revenge hypothesis' nor a 'limited hypothesis that the laws were timed and designed for direct political party advantage'.[126] Rather, she claims that late lustration was both linked to and driven by legitimate social, economic and political concerns.[127] Thus post-communist governments – not just in Poland but in other post-communist states such as Latvia, Macedonia, Slovakia and even those that

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[121] The concept was first developed by political scientist Rafał Matja in a niche conservative journal at the end of the 1990s, although it actually came to prominence in public discourse when the Civic Platform-linked academic (and future parliamentary deputy) Paweł Śpiewak used it in the wake of the Rywin affair. See: Rafał Matyja, 'Obóz Czwartej Rzeczypospolitej', *Debata*, 1998, No 3; and Paweł Śpiewak, 'Koniec złudzień', *Rzeczpospolita*, 23 January 2003. For a good summary of the debate on this concept, see: Rafał Matja, 'Druga..., trzecia..., czwarta..., czyli o państwie Polaków', 4 August 2004 at http://www.e-fakt.pl/artykuly/artykul.aspx/Artykul/30956 (accessed on 19 December 2005). For more on the Fourth Republic project see: Aleksander Hall, 'IV Rzeczpospolitej raczej nie będzie,' *Rzeczpospolita*, 27 October 2005; Janusz Reykowski, '3 razy 60 proc.' *Polityka*, 29 October 2005; Paweł Śpiewak, 'Pięć lat po czwartej', *Polityka*, June 26 2010; and Ryszard Bugaj, 'Osierocona idea IV RP', *Rzeczpospolita*, July 6 2010.
[122] See, for example: Maria Los and Andrzej Zybertowicz, *Privatizing the Police-State: The Case of Poland*, Basingstoke: Palgrave Macmillan, 2000.
[123] See: 'Late lustration programmes in Romania and Poland', p357.
[124] See: Ibis, p366. She also considers the argument that lustration policies may have been a response to external cues from international audiences such as the EU, but largely rejects this explanation.
[125] See: Ibid, p351.
[126] See: Ibid, p366.
[127] Although it is not clear, of course, how exclusive this was to 'late' lustration and it could well be argued that 'early' lustration also tapped into concerns that were legitimate, or at least appeared to be to the public.

instituted transitional justice measures early in the transition such as the Czech Republic – continued to grapple with the issue and, in some cases, used late lustration as a means to further and correct some of the problems associated with post-communist transitions by addressing public concerns about issues such as corruption, distrust and inequality. The new lustration laws were thereby re-structured and packaged with other reform measures, specifically anti-corruption programmes.

Horne, as well as Calhoun and Appel, are right to draw our attention to the fact that one cannot assume *a priori* that lustration is used simply for political manipulation, which some of the 'politics of the present' approaches have a tendency to imply. However, in rejecting 'power politics'-type explanations Horne may have gone too far to the other extreme by accepting the arguments of lustration proponents at face value.[128] Her argument often seems to rest on setting out what a lustration programme driven by legitimate concerns would *look* like and then assuming that if these are the kinds of arguments and justifications that are in place then her case is proven. An example of this is when she says that '(l)ate lustration laws (in these countries) *look* like reformist tools, designed and framed by the government as a way to create an institutional and symbolic break with the past in order to further the democratic transition.' (emphasis added).[129] Although she acknowledges initially that these two explanatory frameworks, power politics and ideological-programmatic, are 'not mutually exclusive',[130] she then goes on to discuss them as if they were. Moreover, while the proponents of late lustration may have presented and justified their proposals as being driven by legitimate concerns about the progress of democratisation and correcting problems associated with post-communist transition, this did not, of course, necessarily mean that these were the actual reasons why they were proposing them, and certainly not the only ones. For example, Horne presents the fact that there were 'opponents of lustration (who) have changed their mind'[131] as evidence that late lustration was genuinely motivated by programmatic-ideological concerns and it does suggest *prime facie* that that may well be the case. However, if, in the Polish case, she is referring to politicians linked to Civic Platform (she does not specify this) then an equally plausible explanation would be that this apparent change of heart by the party's leaders was motivated as much by political manoeuvring as it was by ideological-programmatic concerns.

In other words, calls for lustration and greater file transparency may have been part of a political positioning exercise and it is difficult in practice to separate these 'strategic' motives out from more 'ideological-programmatic' and 'democratic' ones. Apart from the fact that the idea that lustration was driven by 'legitimate' concerns about the progress of democratisation rather than being politically manipulated is highly contestable, the division between these sets of motives that Horne posits is arguably simply too Manichean in the real world. Politicians were likely to have had a variety of motivations and justifications and addressed a range of concerns which were very difficult to separate out for analytical

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[128] It is also a shame that her empirical discussion, especially the account of the passage of the 2006-7 Polish law, lacks Polish (and, indeed, Romanian) language primary sources such as parliamentary debates, which would have helped her to get at the 'declared' motives of legislators, at least.

[129] See: 'Late lustration programmes in Romania and Poland', p359. Indeed, Horne's article itself highlights the need for drilling down into much more detail at key points in the argument based on a more grounded study of the Polish case, perhaps comparing the relevant parliamentary, political and media debates on the 1992, 1997, 1998 and 2006-7 Polish lustration and file access laws.

[130] See: Ibid, p347.

[131] See: Ibid, p366.

purposes. Horne's argument that 'the party initiating the reforms was adversely impacted by the lustration programmes which works against a traditional argument that lustration laws are tools of party politics designed to confer direct political advantage on the initiating party'[132] ignores the fact that, while some party members may have suffered from such programmes, the overall effect for the party may have been beneficial - or that other parties might have suffered more. Moreover, even a genuinely motivated political move could also have been used for the purposes of political manipulation. Indeed, such moves were likely to have been motivated by a mix of concerns with political positioning possibly being the dominant one while ideological-programmatic considerations were used simply as a justificatory narrative. Lustration laws were thus bundled together with other concerns and as part of a broader political framework for purely instrumental reasons. Or both sets of concerns might have been equally important in law-makers considerations.

Nonetheless, the way that calls for greater lustration and file access, and transitional justice more generally, may have become bound up with other issues, particularly critiques of post-communist democratisation, as part of a broader policy package may also help to explain why the introduction of more radical lustration procedures may have been demand- as well as supply-driven, even though some commentators have argued that the issue was of low salience to most voters in countries like Poland. For example, in her explanation of why the truth revelation issue recurred Nalepa claims that 'lustration laws are not…a response to popular demand for holding various members of the ancient regime accountable for human rights violations'. Rather, she argues, lustration laws were 'supplied by political elites who stood to gain from having lustration laws in place'.[133] To support her claim, Nalepa presents statistical analysis that, she argues, shows 'little support for the hypothesized correlation between voters' support for lustration and their willingness to elect politicians who adhere to a lustration platform'. Indeed, 'even voters who would like to see former collaborators exposed' she claims 'appear unwilling to make their vote depend on this preference.'[134] Moreover, Nalepa also claims out that the harshest lustration laws were introduced when public support for radical transitional justice had actually declined.[135]

For sure, polling on Polish public attitudes towards transitional justice issues suggests that lustration and file access did not seem to be issues that, on their own, determined election outcomes and there was no conclusive evidence of a linear relationship between voter demand and transitional justice supply. While most Poles favoured a radical approach to the issue - and there was certainly popular support for, for example, making access to communist secret service files widely available together with radical lustration based on vetting those holding in a wide range of public offices - they also did not consider it to be an important or salient issue.[136] However, notwithstanding the fact that Nalepa's data focuses on a series of snapshots from which it is difficult to discern clear trends, looking at the issue this way may be misleading because it under-estimates the extent that citizens might have considered questions of lustration and file access to be of much greater (and even crucial) importance, when considered in conjunction with other issues and policy packages. Moreover, even if voters did not see these issues as a priority, politicians may have *perceived* that there was

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[132] See: Ibid.
[133] See: *Skeletons in Closet: Transitional Justice in Post-Communist Europe*, p126.
[134] See: Ibid, p28.
[135] See: Ibid, p105.
[136] See: 'Dealing with the Communist Past or the Politics of the Present?', pp558-562; and Aleks Szczerbiak, 'Civilised Lustration? Evaluating the Polish Model', *Studia Polityczne*, Vol 14, 2003, pp35-72 (68-71).

greater support for and interest in lustration and file access than there actually was. In other words, the relationship between political supply and voter demand for truth revelation procedures may have been more complex and inter-active than commentators like Nalepa give credit for and voter demand for transitional justice may have been one (even if not necessarily the most important) contributory factor in determining whether or not politicians decided to pursue this policy.

Historical justice or the 'politics of history'?

Finally, issues of lustration and file access have also become embroiled in what might be termed the 'politics of history' as much as they have the 'politics of historical justice'. In Poland, the former concept was associated with a group of young conservative academics closely linked with the 'Fourth Republic' project who were influential upon the Law and Justice governments and especially the late President Lech Kaczyński (although most of them drifted away out of the party's orbit after his death in 2010). Its main objective was to present historical events and narrative in a way that strengthened Poland's national unity and cohesion internally and thereby helped to ensure that its interpretation of history (on issues such as the expulsion of Germans from Polish territory after the Second World War) was widely accepted in international circles. However, one can also apply this concept to the way that contemporary history, particularly the communist past, was used to legitimate certain political actors and de-legitimate their opponents. Interestingly, this process was evident not just in debates between political figures linked to the former communist regime and the democratic opposition but also *between different groups of former oppositionists*. A prime example of this kind of dispute, which ran throughout the entire post-1989 period, was the different attitudes towards and interpretations of the spring 1989 round table negotiations which led to the semi-free elections that precipitated the end of the Polish communist regime. Critics of the round table agreements saw them as fatally flawed, allowing the former ruling elites to make a smooth transition into the new political and economic system, and entrench their power and influential positions within it.

This differs from the way that the existing literature posits the lustration issue as being used to gain strategic advantage through, for example, presenting political opponents as being insufficiently (or too) radical in terms of their approach to vetting, or calculating that revealing or not revealing files about individual politicians is likely to support a particular party and/or damage its political opponents. It is more about using the contents of communist secret files, and the debates surrounding them, to locate that party within a particular historical narrative that it considers advantageous. An example of the way in which the process of political self-legitimation and de-legitimation of political opponents became entwined in debates about lustration and how to deal with the communist past, were divisions within the post-Solidarity elite over whether or not Lech Wałęsa had collaborated with the communist secret services as an informer in the early 1970s. These came to a head in June 2008 when, as noted above, amid huge public interest the Institute of National Remembrance published a book written by two of its historians. Although the accusations themselves were not new, they claimed to have found previously unknown communist security service files which contained strong circumstantial evidence that linked Mr Wałęsa to a very active collaborator codenamed 'Bolek' who informed to the secret police on his fellow Gdańsk shipyard workers in the early 1970s. The authors also claimed that Mr Wałęsa had accessed, tried to doctor, removed, and even destroyed some of the incriminating documents among his archived files while President from 1990-95.

Mr Wałęsa, who was involved in several court cases against former Solidarity colleagues who accused him of being 'Bolek', denied accusations that he had ever been an agent and claimed that the documents incriminating him were forgeries. He cited as evidence the fact that he was cleared by a court of having submitted a false lustration declaration during the 2000 presidential election campaign and in 2005 was given access to his security service files by the Institute of National Remembrance as someone who fell into the category of being persecuted under communism. Moreover, the former President's reputation was defended by Civic Platform who argued that the publication of the Institute of Public Remembrance book was the latest move in a political war waged being against Mr Wałęsa by the Law and Justice party. Having helped to run his 1990 presidential election campaign and then worked in his presidential chancellery, Lech Kaczyński and his twin brother Jarosław, who went on to form and lead the Law and Justice party, had been in a bitter dispute with Mr Wałęsa since the early 1990s and accused him of being a communist security service agent from the time that these allegations first emerged following the publication of the 'Macierewicz list' in 1992. Civic Platform argued that, by attacking Mr Wałęsa (whom they claimed symbolised Poland's international reputation as being in the forefront of a historical struggle for political freedom in the former Soviet bloc) Law and Justice was damaging an important Polish trade mark, or 'positive myth', and thus the country's image abroad.

In fact, for his part Mr Wałęsa supported Civic Platform against Law and Justice in the bitter struggle that these two parties had been engaged in since they came to dominate the Polish political scene in 2005. The former President played an important role in helping to legitimate Civic Platform in the eyes of many Poles who identified with the Solidarity tradition and, to the extent that he was discredited as a symbol of the anti-communist democratic opposition, he was, of course, less well able to perform this function for the party. Given the way that Mr Wałęsa thereby became an important element of Civic Platform's 'politics of history', his apparent 'un-masking' by historians linked to the Institute of National Remembrance thus ensured that the issue of lustration and file access once again became entwined in party political conflicts. In fact, as noted above, claiming that the Cenckiewicz-Gontarczyk book demonstrated that the Institute was being used by Law and Justice as a tool in its political battles, its publication prompted the Civic Platform-led government to introduce legislation (eventually passed in 2010) that reformed the way that its leadership was selected in the hope of preventing further publications of this kind.

Conclusions

Lustration is one of (if not the) most important and controversial means of dealing with the communist past. Post-communist Eastern Europe was the first region that embraced it and it has remained an important method of transitional justice, so much so that many commenters have used it to measure progress in this area in post-communist states more generally. There is some debate and disagreement in the academic literature as to whether the term lustration should include just those who worked for or collaborated with the secret police or those who held senior positions within the party-state bureaucracy more generally, as well as whether it encompasses exclusion from, or limiting of access to, certain offices, or simply vetting individuals for these links without any such consequences flowing automatically. Here, as in previous papers that I have written or co-written on this topic, I have defined lustration as 'actions directed against former functionaries of and collaborators with the state security apparatus' that can include 'simply vetting or screening individuals for past associations with

the communist security services without any sanction necessarily following.' However, lustration depends a great deal on access to the secret archives compiled by the communist-era political police so one can only get to grips with it properly by studying it both as a 'personnel system' but also more broadly as a 'truth-revelation procedure' in conjunction with the issue of security service file access.

Poland is an archetypal case of the phenomena of late and recurring lustration. Although it began with a communist-forgiving approach and an initial avoidance of the issue, lustration and file access retained a remarkable ability to endure and remain on the political agenda when one might have expected them to fade from public memory. Subsequent years were punctured by various attempts to renew efforts at lustration with belated mild lustration and file access laws being adopted and, after some delay, becoming operational at the end of the 1990s and then more radical laws being approved (although not fully enacted) in 2007. This significant delay - and, more broadly, the recurrence of the issue in political debates - is one of the most striking features of Polish lustration and one that needs explanation and analysis. It thus provides us with an excellent basis for developing frameworks to explain the phenomenon of 'late' lustration.

The key problem with frameworks that try and explain such phenomena through historical and structural factors is that, although they may have successfully predicted the lack of an 'early' interest in lustration and transitional justice in countries such as Poland, they are too static and have problems in accounting for and explaining the re-emergence of the issue and the often quite radical changes of trajectory. Explanatory models that try to blend and synthesise communist and post-communist (and sometimes pre-communist) factors to explain variations in transitional justice - and specifically why, in cases such as Poland, the issue recurred strongly and progressively more radical lustration and file access legislation was introduced - are ambitious, and the frameworks that they produce are complex and neat. However, they are vague in explaining the precise mechanisms involved in how exactly particular historical legacies in a country like Poland caused *particular outcomes* at *particular times*. In other words, they struggle to explain how and why the transitional justice and truth revelation issues recurred *in the way that they did* and *at the point in time that they did.* In particular, these models do not take into account the fact that the ebb and flow of the transitional justice issue in cases such as post-communist Poland may have been due to political elites actually *changing their stance*.

Many of the attempts in the literature to tackle changes in lustration trajectory divide between: those who focus on the political and electoral-strategic drivers of its protagonists and those who ascribe more ideological-programmatic motives to them. My own position on this question - set out in my own writings and developed in co-authored work with colleagues working on other countries (Williams and Fowler) - and those of others adopting the so-called 'politics of the present' approach was that the issue recurred because it had become instrumentalised as an element of the power struggle, or a power tool, in post-communist politics. However, on reflection this approach may need to be modified because it fails to fully grasp the extent to which the motives of those pushing for lustration and transitional justice were, in part at least, programmatically and ideologically driven and not motivated purely and simply by partisan interests and instrumental imperatives to gain a strategic advantage over political competitors.

At the same, as this paper shows, the lesson from the Polish case is that lustration and file access have clearly become bundled up with other discourses and political developments in post-communist politics which one needs to understand in order to make sense of the issue. This paper has identified two such areas which could form the basis for more detailed, grounded research both on the Polish case specifically and exploring other cases of 'late lustration' more generally. Firstly, the idea of pushing forward with more radical lustration and file access as an element of broader concerns about the need to deepen and improve the quality of post-communist democracy; particularly linked to a perceived need to tackle corruption and satisfy the public's 'right to know' the backgrounds of its public officials and authority figures. In the Polish case, this has often been bound up with the notion that officials linked to the former communist regime had taken advantage of communist-era networks to turn their old political power into economic power, which prompted many citizens and political elites to question the virtues of the 'amnesty but not amnesia' option. Lustration, therefore, became entwined with broader discourses on post-communist democratisation, specifically the radical 'Fourth Republic' critique of post-1989 Poland as corrupt and requiring far-reaching political and moral renewal. Indeed, it is precisely the fact that the issue of lustration and transitional justice needs to be viewed in conjunction with such other factors which explains why polling data, showing Poles supporting a radical approach to the issue but not considering it to be a priority, could be misleading when evaluating the salience of this issue. Secondly, the lustration and file access issue also became embroiled in what might be termed the 'politics of history' as a means of questioning the legitimacy of political opponents. A prime example of this phenomenon in the Polish case relating to the question of lustration and file access was how different assessments of the historical role of Lech Wałęsa became entwined in party political struggles.

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