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INTRODUCTION: A Counter-Archival Sense

The demand for recognition, responsibility, and reparations is regularly invoked in the wake of colonialism, genocide, and mass violence. There can be no recognition without victims, no responsibility without perpetrators, and no justice without reparations – or so it seems from law’s limited repertoire for assembling the archive after the “disaster”. Law’s memorial function harbours the problem of legal systems founded on violence. Law as archive serves to delimit a violent past, and seeks to inaugurate the future. In modernity, there are social and political expectations that acts of violence will be adjudicated by law: that “evil” acts will be declared unlawful, that responsible perpetrators will be punished and injured victims will be compensated. Transitional justice processes have sought new forms of addressing ‘extraordinary’ acts of violence,^[1] increasing law’s jurisdictions. Law’s role here is necessarily bound up with state power and state violence.^[2] These processes are central to the constitution of law’s archive of harms.

The archive has been theorised by writers from Walter Benjamin to Jacques Derrida, and has recently been subject to a resurgence of interest in law and humanities scholarship as a way to approach law’s failures in judging and responding to historical and contemporary violence. The essays gathered here build on critical legal scholarship in the area of transitional justice, as well as conversations regarding the role of representation, affect, memorial practices, and imagination in the ongoing relationship of law and sovereign violence.^[3]

The archive traditionally delineates the site from which the law is drawn, and manifests the space of law’s authority. From its root in *arkheion*, the residence of the *archons* or superior magistrates, the archive is also where official documents were deposited. As Derrida reminds us, the *archons* had the power to make, represent, and interpret the law (1995, p. 2). In contexts of transitional justice, law serves as a repository or “storehouse” of what needs to be gathered and recognised. Legal decisions performatively produce the archive of sovereign violence when they distinguish a legal order from an unjust past, and reorient the law in the wake of histories of violent sovereign impositions. Law’s command and commencement is intimately associated with sovereign appropriations of space. Archival and memorial practices are thus central to contexts where transitional justice, addressing historical wrongs, or reparations are at stake.

The essence of this collection is to refuse to take law’s archive for granted, and to thereby interrogate the teleological narratives of progress that law constitutes after violent events. The book moves beyond a thematic exploration of the archive to question its constitution, boundaries and materiality. This is achieved by considering the logics and practices of representation through which the archive is established. The task of this book is, then, to locate the multiple forms, genres, sites and practices that manifest law’s *counter-archive*. We examine law’s implicit assertions of authority in staking out domains of adjudication through the constitution of archives of violence. What unfolds is a ‘sensibility’,

as Jennifer Culbert so aptly puts it, which uncovers the richness of events or 'happenings' that can remain 'strange' while 'interrupting or even challenging prevailing wisdom'.

The essays gathered here are drawn from multiple jurisdictions and address the following questions: which forms of violence and suffering resist being archived, and what is their political significance? what spaces and practices of memory – conscious and unconscious – undo legal and sovereign alibis and confessions? and what narrative forms expose the limits of responsibility, recognition, and reparations? The counter-archival strategies deployed here show the failure of universalised categories, such as “perpetrator”, “victim”, “responsibility”, and “innocence” posited by the liberal legal state, to fully adjudicate violence and suffering.

Counter-archival practices disrupt the linear unfolding of time, and the delimitation of space (as jurisdiction or community) that law inscribes when it deals with historical crimes or mass violence. Counter-archives function as critical intervention within and beside legal processes. They challenge established forms of representing and responding to violence.

Archival Forms

The form of the archive has been discussed in a number of disciplines. The anthropologist Ann Laura Stoler (2009) promoted a move beyond the conventional view of the archive as a collection of documents no longer in use. In attending to what is 'not written', Stoler is not seeking a hidden message, but instead distinguishing between 'what was “unwritten” because it could go without saying and “everyone knew it”, what was unwritten because it could not yet be articulated, and what was unwritten because it could not be said' (Stoler 2009, p. 3). The unwritten 'looms largest', however, in 'making colonial ontologies themselves' (Stoler 2009, p. 3). Drawing on Ian Hacking's *Historical Ontologies*, Stoler refers to 'ontology' as the:

ascribed being or essence of things, the categories of things that are thought to exist or can exist in any particular domain, and the specific attributes assigned to them. Ontologies... refer to 'what comes into existence with the historical dynamic of naming' (2009, p. 4, citing Hacking 2002, p. 26).

Pursuing such historical ontologies involves the 'identification of *mutating* assignments of essence and its predicates in specific time and space' (Stoler 2009, p. 3). And, colonial ontologies of racial difference, for instance, show that “essences” are 'protean, not fixed, subject to reformulation again and again' (Stoler 2009, p. 3).

Stoler suggests that we attend not only to colonialism's archival content, but to the principles and practices of governance lodged in particular 'archival forms' (Stoler 2009, p. 20). By 'archival forms', she means: 'prose style, repetitive refrain, the arts of persuasion, affective strains that shape “rational” response, categories of confidentiality and classification, and not least, genres of documentation' (Stoler 2009, p. 20). She focuses on 'archives-as-process' rather than 'archives-as-things' (Stoler 2009, p. 20). Archives are regarded as 'condensed sites of epistemological and political anxiety rather than as skewed and biased sources'; with colonial archives serving 'transparencies on which power relations were inscribed and intricate technologies of the rule in themselves' (Stoler 2009, p. 20). Taking these provocations seriously, we have sought to multiply the sites of the archive with particular attention to opening up what is regarded as archival *material*. What emerges is not only a sense that the archive is a technology of rule, but that the problem of archiving violence is closely tied to the deeper root of technology as *techné*. The counter-archival move is then informed by a sensibility of the archive as art, fiction, and fabrication.

For Verne Harris, the work of recordkeeping is 'justice and resistance to injustice' (2007, p. 256). Drawing on Derrida, justice, like democracy, is open and always to come. The work of justice cannot be enclosed. Harris draws an analogy between this notion of justice and the archive: '[t]he call of justice resists the totalization of every such enclosure. It resists, if you like, what is traditionally regarded as the fundamental archival impulse – contextualization. It is open to the future and to every “other”' (Harris 2007, p. 257). Harris argues that:

justice requires us to re-imagine archival contextualization. Conventionally understood, contextualization has to do with the disclosing of all relevant contextual layers. That is to pin down meaning and significance. But [...] context is infinite, ever-changing, and permeable to 'text', so that

contextualization can only ever be about a preliminary and highly selective intervention, in which pinning down is not a possibility (2007, p. 257).

The accessibility of the context of a past event is a major frontier of dispute about what it means to do justice to the past. Many historians argue that all that can be done in relation to the past is not “justice”, but a gradual revealing of the “context” in which particular social, economic, and political struggles took place.^[4] There is then no “justice” to be done in relation to the past – only partial truths to be revealed now. We resist this historicist impulse of the contextualist approach.

As part of Derrida’s investigations into the nature of the archive, he considers certain figures of responsibility that create and protect the archive, and considers, too, the ways in which the archive mediates responsibility of these guardians towards others. This question of the relation between authority and archive was raised by Derrida in his essay, ‘Scribble (writing power)’ (1979) which describes the archival violence of the hoarding actions by archival priests. The priests concealed the codes they curated from view, and in their concealment, in their guarding, the priests not only preserved knowledge, but also derived power:

...for custody of meaning, the repository of learning and the laying out of the archive—encrypts itself becoming secret and reserved, diverted from common usage, esoteric. Naturally destined to serve the communication of laws and the order of the city transparently, a writing becomes the instrument of abusive power, of a caste of ‘intellectuals’ that is thus ensuring hegemony, whether its own or that of special interests: the violence of a secretariat, a discriminating reserve, an effect of scribble and script (Derrida 1979, p. 124).

Law can be found ‘*there* where men and gods *command*, *there* where authority, social order are exercised, *in this place* from which order is given’ (Derrida 1995, p. 9). It is the *archons* (‘men and gods’) who have the power to interpret the archive (Derrida 1995, p. 9). The *archons* are those who ‘possess the right to make or to represent the law’ (Derrida 1995, p. 10). Law’s archive determines the possibilities and limitations of ‘legitimate’ legal violence; it determines forms of legal and social relation.

However, the key to understanding the relation of archive to law and to legal relation, is to acknowledge that the archive is not somewhere over “there” but rather “here,” now. State law is an implicated archive, and we are ‘implicated subjects’ in relation to it. Michael Rothberg’s term ‘implicated subject’ (2014) is an attempt to think through a subject position, politics and ethics beyond the binary figures of perpetrator and victim in the imaginary of responsibility for violence (Rothberg 2014; see also Sanders 2002). The term ‘implication’ marks the ways in which we belong to legal contexts of injustice—not as criminally responsible perpetrators, but not as innocent bystanders, either. Rather, we are the inheritors and beneficiaries of legal, economic and social systems. This means thinking beyond the archive as object or even site, to include our relation to it and our role in its constitution and powers. This collection is concerned with the archives of legal violence proximate to such implication. It examines the ethics of encounters or spacings between subjects and violence.

On the Counter-Archive

Derrida’s *Archive Fever: A Freudian Impression* (1995) ranges from the origins of psychoanalysis to the implications of new technologies such as the internet and email for archiving. Derrida identifies a malady, a fever, which is associated with a destructive drive – the death drive. The desire to go back, to repeat, is a compulsion towards death (Steedman 2001, p. 6). The desire for origins, for going back, and repetition are all aspects of a psychoanalytic process that seek the pre-linguistic and pre-representational. As Derrida puts it, we have no ‘concept’ of the archive (Derrida 1995, p. 9); in the archive we confront an *aporia*, the impossibility of saying in advance what is the archive, what is archiving, and what is archivable. The archive relates to the future – it is an address to the future. In this dialectic of remembering and forgetting, how are we to conceive of the archive, and indeed the counter-archive? Let us begin by recalling Derrida’s influential response to this question.

Derrida is concerned with the entropic and doomed search for origins. Archive fever is ‘a compulsive, repetitive, and nostalgic desire for the archive, an irrepressible desire to return to the origin, a homesickness, a nostalgia for the return to the most archaic place of absolute commencement’ (Derrida 1995, p. 91). Archive fever also signifies the relation of the archive to “*le mal radical*” (Derrida 1995, p. 13), with evil itself. These two arguments are intertwined. Derrida’s essay investigates *mal* as the

doomed “fever” of archival origins, and also the *mal* that refers to the archiving and adjudication of violence. This second meaning tracks the significance of the archive’s imbrications with law’s heightened interest in adjudicating violence.

Assertions of exclusivity are key to law’s assertion of authority. State law speaks with one voice and one authority, guarding its singularity. Derrida explains the protection of this singularity within the archive through the metaphor of the exterior and interior, and by the ways in which the boundary between them is guarded from intrusion: there is ‘no archive without outside’ (1995, p. 11), and the archive is a ‘place of election where law and singularity intersect in *privilege*’ (1995, p. 10). Law’s insistence on its singularity, and its singular authority, are at the core of its archival violence: the ‘power’ of ‘consignation’ lies in the act of ‘*gathering together signs*,’ in the coordination of ‘a single corpus,’ refusing heterogeneity (Derrida 1995, p. 10). The singularity of this technique is crucial to ways in which the legal archive is vested with authority and uniqueness, law refusing to engage with other authorities (Aboriginal, ‘international,’ ‘refugee’).

Carolyn Steedman opens a different register in relation to *Mal d’archive*. She suggests that ‘fever’ has a ‘faintly comic’ connotation in English, whereas the French ‘mal’ (with the aid of an insert in the French edition of *Mal d’archive*) evokes ‘trouble, misfortune, pain, hurt, sickness, wrong, sin, badness, malice, and evil’ (Steedman 2001, p. 9). The insert to the French edition pointed to:

The disasters which mark the end of the millennium, are also *archives of evil*: hidden or destroyed, forbidden, misappropriated, ‘repressed’. Their usage is at once clumsy and refined, during civil or international wars, during private or secret intrigues (Steedman 2001, p. 15).

More than feverish attention to origins, Steedman emphasises ‘real’ maladies – anthrax and other diseases conveyed by ‘dust’ in the archive. She finds a different sickness, and also a different magistrate. This magistrate is none other than History – the history of the ‘resurrectionist historian’ who exhumes the dead (Steedman 2001, p. 38). The Magistrate effects the resurrection through the work of history – here citing Jules Michelet (1982, p. 268):

Yes, everyone who dies leaves behind a little something, his memory, and demands that we care for it. For those who have no friends, the magistrate must provide that care. For the law, or justice, is more certain than all our tender forgetfulness, our tears so swiftly dried. This magistracy, is History. And the dead are, to use the language of Roman law, those *miserabiles personae* with whom the magistrate must preoccupy himself. Never in my career, have I lost sight of that duty of the historian (Steedman 2001, p. 39).

Rather than Derrida’s Greek *archon*, Steedman suggests that Michelet’s 1872-74 image of ‘History, (or the Historian or both)’ are charged with care of the forgotten and the dead. Derrida’s Magistrate, for Steedman, is the wrong one (2001, p. 40).

French inquisitorial judges of the late 18th and 19th century, and English judges in their petty sessions charged with administering Poor Laws, assembled the ‘real archive’ – not the archive of *Archive Fever* which is reduced to a repository of documents (Steedman 2001, p. 45). These were ‘enforced autobiographies,’ and Steedman associates them with the emergence of the notion of literary character. The counter-archive is then produced by the French and English magistrate of the 18th and 19th centuries through the stories gathered as inquisitor, mediator, and amanuensis of the poor. This archive is never just the repository of official documents. And importantly, ‘nothing starts in the Archive, nothing, ever at all, though things certainly end up there. You find nothing in the Archive but stories caught half way through: the middle of things; discontinuities’ (Steedman 2001, p. 45). The emphasis on “stories” gathered “halfway through” is important, but surely it is precisely the “auto” (of autobiography) that is lacking if the magistrate becomes the amanuensis of everyday life? The essays in this volume focus on stories gathered from a variety of fragments, state practices, and affective responses to violence. These are only sometimes found in courts and other sources of state records. Our interest is less the source and rather the sensibilities through which they become cognisable, audible, and visible.

The interrupted stories caught “halfway through” that Steedman alluded to are not without benefit to historians. Foucault observed that ‘discontinuity’ has changed in status and become one of the fundamental elements of historical analysis (1998, pp. 299-300). It used to be that when events were

recognised as scattered and discontinuous, the task of the historian was to repress this. Historians now practice the 'systematic introduction of discontinuity' (1998, p. 300). The identification of 'rupture' becomes a practice of the historian. For Foucault, our concern should be 'how is it that this statement appeared rather than some other one in its place' (1998, p. 307). Such statements are events and they have a singular specificity. What are the conditions under which those statements appear in a given society at a given time? How do statements appear, circulate, get repressed, forgotten, destroyed and reactivated? (Foucault 1998, p. 309). An *archive* is:

...not the totality of texts that have been preserved by a civilization or the set of traces that could be salvaged from its downfall, but the series of rules which determine in a culture the appearance and disappearance of statements, their relation and their destruction, their paradoxical existence as *events* and *things*. To analyze the facts of discourse in the general element of the archive is to consider them, not at all as documents (of a concealed significance or a rule of construction), but as *monuments*, it is – leaving aside every geological metaphor, without assigning any origin, without the least gesture toward the beginnings of an *archē* – to do what the rules of the etymological game allow us to call something like an *archaeology* (Foucault 1998, p. 309).

Foucault's *Madness and Civilization* (1961), *The Birth of the Clinic* (1963) and *The Order of Things* (1966) all embody this problematic. They ask what the relation is among and between statements. What are counter-archival statements, and where are they encountered? The essays in this volume approach this question by developing a counter-archival sense.

A Counter-Archival Sense

What encounters or events engender a counter-archival sense? Jennifer Culbert provides an account of Hannah Arendt's counter-archival sensibility. Arendt's 'Reflections on Little Rock' (1959) was inspired by what caught her eye in a photograph of a Negro girl in a bus on her way home from a school integrated in the wake of *Brown v Board of Education of Topeka*, [347 U.S. 438](#) (1954). It is not facts and context that inform Arendt's analysis, but the 'ambiguous character of the phenomenon' that prompts her to write. Culbert points to the features of Arendt's phenomenological approach – a concern not for ascertainable facts, material, or the 'real thing' – but rather the *sense* to grasp 'flickering events' or 'happenings'. A counter-archival approach seeks to cultivate this sensibility. Arendt was not trying to establish the 'truth' of what happened in that bus in Little Rock, but to draw on the fragment or shard of history that is the photograph to fashion a story. Arendt's narrative dismayed the emerging "good sense". Drawing on Walter Benjamin, Culbert emphasises that the power of the photograph was not what it disclosed, but the very power of its *citation*. Torn from its context, the photograph enabled Arendt to disrupt the self-satisfaction of the present. This counter-archival sensibility harbours the possibility of natality – 'a spontaneous inaugurating act, an uncaused commencing, an initiating deed that starts something'. Although the archive has been identified as the site of command and commencement, what the essays in this collection seek are instances of this 'uncaused commencing'.

Narratives of violence are thus revealed to be a problem of time, audience, and ways of seeing, hearing, and listening. Jill Stauffer argues that 'some injustices are made of a failure of hearing,' and that these failures occur in the very 'institutions *designed* for hearing'. Stauffer draws on examples of the reception of testimonials by survivors of the Holocaust, from Truth and Reconciliation Commission proceedings and of inmates subjected to solitary confinement in the United States. While acknowledging that 'the hearer of testimony may have reasons for not hearing well' – she may be constrained to adhere to facts, laws and procedures that silence some stories; 'may have a political interest in a restorative discourse'; 'may be overwhelmed by how far the demand for help exceeds her capacity to offer assistance'; or she may be protecting herself from 'the trauma of hearing' – Stauffer calls for an ethics and politics of reparative responsibility in acts of listening. If we think of listening as a site of responsibility, Stauffer argues, 'as the duty to respond or to be responsive,' then other possibilities, beyond existing forms of law, may present themselves. These new forms require us 'to learn how to hear better what is being said' and so transform law's archives.

This volume demonstrates the vitality of archival genres of law, literature, music, ethnography, and political theory drawn from multiple geographical sites. Spatialising time through multiple aesthetic genres is a key contribution the book makes to interdisciplinary studies on law, violence and memory. While transitional justice archives link wrongs and failures with reconciliation and apology, Sara Ramshaw and Paul Stapleton turn to improvised musical practice as counter-archival practice. Musical

improvisation provides an allegory and counter-point to modes of transitional justice. In improvised musical space, they argue, 'mistake in improvisation does not necessitate apology' but rather points to future accountability, and to words rather than deeds – 'un-remembering rather than re-inscribing'. This flexibility is offered as a radical alternative to the tired, existing forms of transitional justice. Abolishing the need for apology, an archive of a different kind might be created. What is at stake in this exploration of law *as* improvisation is the refusal to depict legal decision-making 'as uncreative and static, as a kind of necessary deadness or dead archive.' Ramshaw and Stapleton offer a depiction of the creative life of law as a 'dynamic social phenomenon,' enacted in non-linear time – law informed by the aesthetics of 'surprise'.

Legal time is usually found in a variety of official papers and files. Several essays in the collection seek to reorient the nature of the file. These essays build on the groundbreaking work of Cornelia Vismann (2008). The work of Judy Watson, who uses documents from the archive of colonial assimilation as the basis of a material critique, and who has provided the cover image to this collection, instantiates this practice. Taking a materialist approach to law's archive, Trish Luker, inspired by the artwork of Judy Watson, presents us with a counter-archive of artifacts previously undetected in their performance as "objective" sources of evidence in legal proceedings, and encourages us to read in ways that attend to 'the possibility of documents as having performative capacity in the production of knowledge practices'. Rather than considering archival sources as documentary text or representation, Luker argues, they are better understood from an ethnographic perspective – as 'imprints or inscriptions of the human on the page.' Reading one of the key exhibits in the Stolen Generations case of *Cubillo v Commonwealth* [[2000\] FCA 1084; \(2000\) 174 ALR 97](#), alongside Watson's artwork, Luker offers a counter-archive of legal evidence, re-locating it instead as 'evidence of the symbolic and material force of colonial rule and the assertion of sovereignty' over Indigenous peoples.

Mayur Suresh provides an ethnography of the life-cycle of legal files amassed in Delhi courts in the trial of Mohammed Hanif^[5] and 21 other co-accused, charged with setting off explosive devices. Suresh follows the ways in which these files are constantly copied, transcribed, translated and reorganised. Through his reading, the files are revealed to have a disturbing agency, as well as a dense materiality:

Reams of paper of different colours and thickness, printers, paper punchers, empty files, balls of string to bind files, pens of various colours and pencils all point to the crucial position that paper occupies. It is as if the very structure and layout of the court is premised around paper and the production and maintenance of files. In most courts throughout India, the digital world stops at the courtroom doors. Paper jealously guards its primary position in the judicial process – it alone can record what happens inside a courtroom.

The file has a material presence that is 'world absorbing and world creating'. Suresh questions the 'movement between the file and the world,' and the file's power over the world. Suresh describes the way in which the defence strategy in the trial 'involves bringing in more and more of the world into the file'. The file is thus not only an archive *of* the world, it also produces unforeseen counter archives *to* the world, and to legal practices.

A variety of memorial processes re-inscribe and re-claim the meanings attached to familiar violent events, and less well-known incidents. The 'countering' response to these sensibilities can be surprising: interruptions, discontinuities and ruptures of national narratives. Karin van Marle, in her interpretation of the metaphors of post-apartheid memory in South Africa, draws on the work of Svetlana Boym and offers 'reflective nostalgia' and 'memorial remembering' as resistant counter-archival practices and politics: 'nostalgia and remembrance that do not celebrate what they long for and remember, but are embodied and embedded in disappointment'. Since 1994, many metaphors have come to play a role in post-apartheid discourses on memory, such as memory as a process of drawing and redrawing, memory as the interplay between narration and authorship, and memory as the movement between memorial and monument. A critical approach to memory, through nostalgia and remembering, van Marle suggests, may serve to surpass the limits of the invention of the legal archive, which presents a master narrative derived from a selective past. These processes provide the possibility of a counter-archive, made from 'the same narratives, memories and symbols', but which tell different stories through critical readings and reflections. Van Marle ends with a case, 'a jurisprudential archive of sorts', the case of *Baphiring Community v Tshwaranani Projects* [[2013\] ZASCA 99; \(2014\) 1 SA 330](#)], considering what kinds of nostalgia and remembrance might be at play, and what can be made of

the community's refusal to accept compensation in exchange for their land. The issue of land reform is considered within the broader discourse on the shifts and changes required for political, social and legal transformation in South Africa. In these contexts, reflective nostalgia can be seen as a politics of resistance by going against the grain; it neither opposes change nor avoids responsibility. And, 'in contrast to restorative nostalgia it does not seek for a homecoming, but remembers the past with irony and in a way that does not stand in the way of transformation'.

Stacy Douglas takes up the constitution, which is so often reified as a foundational document of nation states, and also as a common site of critique by legal scholars concerned with community in post-conflict societies. Douglas argues that what is missed in privileging the constitution in critical analyses is the role of other sites, such as museums: 'museums, when paired with constitutional reform, can act as law's counter-archive, helping to create imaginations of political community that resist simple narratives of "community" amidst contested histories'. While the cultural site of museums can also be colonial and imperialist, their forms and structures offer a 'reflexivity' of the communities they represent; these possibilities are inherently more constrained through constitutional forms, whose tasks are to 'delimit community'. Thus the museum can serve as law's counter-archive, doing the 'interruptive work of community' that is not available through the constitutional form. Douglas examines the District Six Museum in Cape Town, South Africa, as one such example, which attempts to re-imagine the country as anti-apartheid and anti-capitalist, by re-considering the very categories of politics, language and meaning through which South Africans have been taught to think.

This collection reveals how state violence arises through adjudications in ways that are not available through law's own accounts. As Sara Kendall describes it in the context of her study of the inscription of victimhood within the International Criminal Court, legal *techné* transforms the lived experience of suffering into something stripped of its texture and rich meanings, as 'data to be contained and managed in relation to juridical time'. Kendall argues that international criminal law's restorative turn is limited at those sites in which law introduces the figure of 'the victim' within a fundamentally punitive field—the abstract victim is invoked to shore up the authority of international criminal law, while the victim's corporeal body 'is subjected to a calculus that will include or exclude based upon categories that appear arbitrary from outside the legal frame'. Kendall considers how this inscription of victimhood arises through the genre of the application form, which is then filed and adjudicated, and which either bestows the category of 'victim' upon the applicant, or denies them of that status. Kendall then turns to the 'emblematic wound', an outgrowth of juridical logics, as a way to unsettle this archive through revealing its biopolitical implications. She also considers a letter of withdrawal from a large group of court-recognised victims, which, she argues, contests the form of justice carried out in their name.

Başak Ertür examines the 'conspiratorial imagination' of the "deep state" in trials concerning the assassination of Armenian-Turkish journalist Hrant Dink in 2007 and the Ergenekon trial of 2008-2013. The "deep state" refers to 'a network of illegitimate alliances beyond the official state structure, crisscrossing the military, the police force, the bureaucracy, the political establishment, the intelligence agency, mafia organisations and beyond; lurking menacingly behind the innumerable assassinations, bomb attacks, disappearances, provocations, death threats, disinformation campaigns, psychological operations, and dirty deals of the past several decades in Turkey'. The Dink and the Ergenekon trials, both concerning the extra-legal activities of the state and its crimes, each implicate the "deep state" in entirely different ways. But the cases reveal the problem of producing knowledge about the deep state, as well as the performative production of the state through these trials. The legal archive hides the truth of the state's violence:

Beyond all the noise and commotion, the accusations and counter-accusations of conspiracy, this consensus produces the 'deep' state as something of a fetish in the scene of the trial. The state is co-produced and reproduced through the case file that functions as a conspiracy archive.

Ertür argues that a counter-conspiratorial practice is required to overcome this conspiratorial imagination:

The counter-conspiracy works with and against law: rather than staking claims on the legal spectacle and therefore allowing it to fulfill or frustrate (and thus orchestrate and co-opt) the desire for truth and justice, it mobilises law's archive against itself. The aim is not only to seek the truth of past violence but

also to discern the traces of the forces, patterns, imaginaries and affective investments that facilitate the perpetuation of particular forms of violence.

The manufactured sense of transparency in the trial hides more than it reveals.

Miranda Johnson re-examines and reinterprets the role and significance of testimony provided by Canadian Dene leaders in the early 1970s concerning land treaties made in the early twentieth century. In 1973 Dene leaders in the Northwest Territories brought their first-ever legal case claiming treaty and aboriginal title rights. The case drew on and enlarged what Johnson terms a 'treaty archive' that was being created by a Dene organisation in the context of land rights, economic development, and political activism in Canada. The archive had two major purposes: to counter assumptions of the Canadian government that Dene people had no customary rights, and to enhance Dene self-determination and peoplehood. The treaty archive is both a historical artefact and, Johnson contends, a repository from which new historical narratives can be made. The treaty archive offers a number of narrative possibilities – inaugurating a new present while preserving some aspect of the past. Further, the treaty archive transformed law's archive by countering the official story of treaty-making told by the Canadian state about treaties with indigenous peoples, augmenting an Indian perspective of the treaties, gathering documents scattered across the country, and expanding on oral histories of Dene leaders.

Jacques de Ville provides a re-interpretation of the counter-archival sense within the context of constitutional theory. De Ville reads the work of Carl Schmitt and Jacques Derrida to investigate the self-destructive force of a counter-archive, calling for 'a certain "radicalisation" of the notion of counter-archive'. Schmitt contends in *Constitutional Theory* (1928) that the political component should guide the understanding of the constitution. Schmitt suggests the self, and by implication the concept of the political, is haunted by a force of self-destruction. For de Ville, at stake in the counter-archive is not 'something against, counter to, or opposed to the archive, which perhaps still remains too complicit in archive production, but perhaps rather some "thing" that is archive destroying'. He suggests that 'Constitutional theory, through its inevitable engagement with law and with the political, has no option but to navigate between the force fields of the preservation and the destruction of the archive'. On this account "Man" is malignant, the archive is but a reflection of this malignancy, and presents a double-bind of seeking archival authorisation and being free of it.

The essays gathered here find no freedom or justice in the archive. Partly interrupted and recovered stories create the possibility of commencing again, but always in the grip of traces of the past. A counter-archival sense fosters new proximities to violence and its aftermath – attentive to the space of being in memory and proximity to violence. There is a need to cultivate a jurisprudence of sense not simply as instrumental modes of perception, but as the art of valuing. In this task, and in the archive, we are only ever halfway through.

Bibliography

Derrida, J. 1979, 'Scribble (writing power)', *Yale French Studies*, no. 58, pp. 117-147).

Derrida, J. 1995, *Archive Fever: A Freudian Impression*, University of Chicago Press, Chicago.

Felman, S. 2002, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*, Harvard University Press, Cambridge.

Foucault, M. 1961, *Madness and Civilization*, Union générale d'éditions, Paris.

Foucault, M. 1963, *The Birth of the Clinic*, Presses Universitaires de France, Paris.

Foucault, M. 1966, *The Order of Things*, Editions Gallimard, Paris.

Foucault, M. 1998, 'On the Archaeology of the Sciences: Response to the Epistemology Circle,' in J. Faubion (ed.), *Michel Foucault, Aesthetics, Method, and Epistemology: Essential Works of Foucault 1954-1984*, vol. 2, Penguin Books, London.

Harris, V. 2007, *Archives of Justice: A South African Perspective*, Society of American Archivists.

Kahn, P.W. 2008, *Sacred Violence: Torture, Terror, and Sovereignty*, University of Michigan Press, Ann Arbor.

Meister, R. 2012, *After Evil: A Politics of Human Rights*, Columbia University Press, New York.

Motha, S, 2015, 'As If – Law, History, Ontology', *UC Irvine Law Review*, vol. 5, pp. 327-348.

Reichmann, R. 2009, *The Affective Life of Law: Legal Modernism and the Literary Imagination*, Stanford University Press, Stanford.

Rothberg, M. 2014, 'Trauma Theory, Implicated Subjects, and the Question of Israel/Palestine', Profession, viewed 20 July 2015, <<http://profession.commons.mla.org/2014/05/02/trauma-theory-implicated-subjects-and-the-question-of-israelpalestine/>> .

Sanders, M. 2002, *Complicities: The Intellectual and Apartheid*, Duke University Press, Durham.

Sarat, A. (ed.) 2001, *Law, Violence and the Possibility of Justice*, Princeton University Press, Princeton.

Scott, D. 2014, *Omens of Adversity: Tragedy, Time, Memory, Justice*, Duke University Press, Durham.

Slaughter, J.R. 2007, *Human Rights, Inc.: The World Novel, Narrative Form, and International Law*, Fordham University Press, New York.

Stoler, A. L. 2009, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*, Princeton University Press, New Jersey.

van Marle, K. & Motha, S. (eds) 2014, *Genres of Critique: Law, Aesthetics and Liminality*, SUN Press and STIAS, Stellenbosch.

van Rijswijk, H. 2012, 'Neighbourly Injuries: Proximity in Tort Law and Virginia Woolf's Theory of Suffering', *Feminist Legal Studies*, vol. 20, pp. 39-60.

Vismann, C. 2008, *Files: Law and Media Technology*, trans G. Winthrop-Young, Stanford University Press, Stanford.

Cases

Baphiring Community v Tshwaranani Projects [\[2013\] ZASCA 99](#); [\[2014 1 SA 330\]](#).

Brown v. Board of Education of Topeka [347 U.S. 438](#) (1954).

Cubillo v Commonwealth [\[2000\] FCA 1084](#); [\[2000\] 174 ALR 97](#).

[1] On the roles of legal and literary modernism in responding to the harms of modernity, see Manderson, D. 2012, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* Routledge, London; Reichmann, R. 2009, *The Affective Life of Law: Legal Modernism and the Literary Imagination*, Stanford University Press, Stanford; Felman, S. 2002, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*, Harvard University Press, Cambridge; and van Rijswijk, H. 2012, 'Neighbourly Injuries: Proximity in Tort Law and Virginia Woolf's Theory of Suffering', *Feminist Legal Studies*, vol. 20, pp. 39-60..

[2] For readings of law's relation to violence, see Sarat, A. (ed.) 2001, *Law, Violence and the Possibility of Justice*, Princeton University Press, Princeton; and Kahn, P.W. 2008, *Sacred Violence: Torture, Terror, and Sovereignty*, University of Michigan Press, Ann Arbor.

[3] See Slaughter, J.R. 2007, *Human Rights, Inc.: The World Novel, Narrative Form, and International Law*, Fordham University Press, New York; Meister, R. 2012, *After Evil: A Politics of Human Rights*, Columbia University Press, New York; and van Marle, K. & Motha, S. (eds) 2013, *Genres of Critique: Law, Aesthetics and Liminality*, SUN Media and STIAS, Stellenbosch.

[4] For a critique of such historicism in legal and political thought, see Motha, S. 2015, 'As If – Law, History, Ontology', *UC Irvine Law Review*, vol. 5, pp. 327-348.

[5] The names of places and persons have been changed by the author to maintain confidentiality.

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