Evidence from the Archive: Implementing the Court Information Act *in NSW*

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Abstract

The *Court Information Act* 2010 (NSW) attempts to achieve transparency and accountability under the framework of an 'open justice' system. The Act aims to make court information more accessible to members of the public and media organisations, and to achieve this consistently across all of the NSW jurisdictions. In effect, the Act opens the judicial archive, making court records accessible to the public. By making this material accessible, the legislation has the potential to put evidence into a fresh context, after the facts have been resolved in litigation. This article considers several examples from Australia and abroad in which evidence from legal proceedings was put to unexpected uses — either by artists, curators or scholars — giving rise to ethical challenges to how we think about evidence after the conclusion of legal proceedings. Re-contextualising evidence carries with it the risk of harm, humiliation, and the exposure of sensitive and secret material. This article will argue that the Act cannot address the dangers of misuse of evidence without adopting an archival sensibility. It sets out some of the theories and practices adopted by archivists that could guide us before we open the evidentiary archive.

* Associate Professor, Faculty of Law, University of Technology Sydney. An early version of this paper was presented at '21st Century Challenges in Evidence Law: International and Comparative Perspectives', Sydney Law School, 24–25 September 2010. The author is grateful to the participants for their generous and critical feedback, and to David Hamer and Miiko Kumar for their encouragement. I also thank the many colleagues and friends who listened patiently as I worked through these ideas, and gave their advice and suggestions, in particular: Michelle Arrow, Shaunnagh Dorsett, Laila Ellmoos, Nicole Graham, Helen Groth, Jason Harris, Claire Hooker, Paul McCartan, Andrew Mowbray and Lesley Townsley.

> Yes, every one 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, or tears so swiftly dried. This magistracy, is History.
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> Jules Michelet (1798–1874).[1]

Evidence is the title of a book published in 1977 by San Francisco photographers Mike Mandel and Larry Sultan,[2] and *Evidence* is also the name of their exhibition shown in the same year at the San Francisco Museum of Modern Art ('SFMoMA').[3] *Evidence* comprises 59 photographs they found during three years spent searching the archives of more than 100 US government agencies, scientific laboratories and corporations. Sandra S Phillips, Senior Curator of Photography at SFMoMA, accurately describes *Evidence* as 'uproariously funny and desperately sad' with 'a kind of melancholic and bizarre resonance'.[4] Without captions or narration, the images all appear to document scientific experiments or processes which are facilitated by unexplained technologies: a young man in strange underwear is connected by electrodes to a wall clock; a robot does push-ups; five men wearing space suits are crowded into a box; a gloved hand restrains a monkey; a group of men wearing helmets walk knee-deep in foamy bubbles. There are explosions, burns, wires; most images defy simple description. Seeing the list of institutions from which they were gathered,[5] the viewer is variously amused, appalled or mystified that anyone thought to conduct these experiments and, what is more, photograph them. *Evidence* is the ironic title of this work, as the viewer is unable to answer the

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1 Jules Michelet, 'Jusqu'au 18 Brumaire' in *Oeuvres Complètes* (Flammarion, first published 1872–74, 1982 ed) vol 21, quoted in Carolyn Steedman, *Dust: The Archive and Cultural History* (Rutgers University Press, 2002) 39. (The translation is Steedman's.)

2 Larry Sultan and Mike Mandel, *Evidence* (Distributed Art Publishers, 2003). (Reprint of the 1977 edition with commissioned essay by Sandra S Phillips and unpublished 'outtakes' chosen by Mandel and Sultan.)

3 SFMoMA has an image from *Evidence* in its holdings: Larry Sultan and Mike Mandel, *Untitled, from the Installation Evidence* (1977) San Francisco Museum of Modern Art <http://www.sfmoma.org/artwork/8374>. See also Larry Sultan and Mike Mandel, *Selections from 'Evidence'* (2 June 2004) Stephen Wirtz Gallery, San Francisco <http://www.wirtzgallery.com/exhibitions/2004/2004_06/sultan/sultan_2004_frame.html>.

4 Sandra S Phillips, 'A History of the Evidence', in Sultan and Mandel, above n 2.

5 A representative sample includes: California Highway Patrol, Sacramento; Jet Propulsion Laboratories, Pasadena; United States Department of Health, Education and Welfare, Food and Drug Administration, San Francisco; Veterans Administration Hospital, Palo Alto.

question, 'What do these photographs prove?' Veering into curatorial prattle, Phillips goes on to write:

> The shape of the book, its cover, and the choice of typography all indicate a kind of legal authority and detachment, as though to assure the reader that the perpetrators are speaking the language of truth, which documentary photography is reputed to represent.[6]

Evidence is also the title of the acclaimed and much-cited book published in 1992 by the photography writer Luc Sante.[7] It is the result of Sante's research in the New York Municipal Archives, where a fragment of the Police Department's photo collection had been salvaged after the bulk of the archive was dumped in the East River. This *Evidence* consists of 55 photographs taken by police photographers at crimes scenes, most of them depicting murder victims. Men lie sprawled in pools of blood; a woman has fallen across a kitchen table; many of these people have been killed in bed. We see the bodies of people who were murdered on staircases, in hallways, in the street. There is a dead dog. Three children lie together in bed, covered with a quilt, dead. What kind of 'evidence' is this?

Sante writes:

> As evidence, [these photographs] are mere affectless records, concerned with details, as they themselves become details in the wider scope of police philosophy, which is far less concerned with the value of life than with the value of order. They are bookkeeping entries, with no transfiguring mission, and so serve death up raw and unmediated.[8]

It is a view of evidence which confronts the evidence law scholar as somehow askew. It seems that he has confused the 'record' with the 'system' from which it emerged, and the 'document' with 'proof'; he says that 'evidence' is 'raw and unmediated', which every lawyer knows is not true.[9] Yet Sante's approach to 'evidence' cannot be dismissed. While he was not the first to re-present crime images in an artistic context, his *Evidence* was the influential harbinger of what are now well-established curatorial and publishing genres. Finding images that were once intended for use in litigation, and re-

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6 Phillips, above n 4.

7 Luc Sante, *Evidence* (Farrar, Straus and Giroux, 1992).

8 Ibid 60.

9 Archivists, too, challenge this assumption. Terry Cook and Joan M Schwartz, 'Archives, Records, and Power: From (Postmodern) Theory to (Archival) Performance' (2002) 2 *Archival Science* 171, quoted in John Ridener, *From Polders to Postmodernism: A Concise History of Archival Theory* (Litwin Books, 2009) 124–5, write: 'records emerging from the creation process are anything but natural, organic, innocent residues of disinterested administrative transactions. Rather they are value-laden instruments of power.'

contextualising them — as art, as museum exhibits, in critical scholarship, as expensively-produced gift books — is now widely practised, and relies in part upon Sante's conflation of 'evidence' and the 'archive'.

The prologue of Sante's *Evidence*, titled 'Archive', states his aim: 'I offer this work as a memorial to these dead',[10] and reminds us that the purpose of the archive is to preserve memory but, like the memorial, it does so with formality, seriousness and deliberation. This article questions what happens to evidence after the conclusion of the trial. Motivated by the enactment of the *Court Information Act 2010* (NSW) ('the Act'), this article examines the way evidence is archived and, more importantly, asks whether and how the evidentiary archive may be accessed, by whom, and for what purposes. It asks whether the formalities of the trial endure or whether, in law's archives, evidence might provide the basis for experimentation, speculation or entertainment.

During a trial, evidence is adduced to prove disputed facts. The laws of evidence provide rules on the admissibility and use of evidence in court. But the laws of evidence do not operate outside the courtroom door, nor after the conclusion of proceedings. Where the laws of evidence run out, the Act proposes a method for dealing with evidence, or what it terms 'information'. This article will argue that the Act creates an archival mechanism without adopting an archival sensibility, and that the Act could better resolve difficult claims to access by considering archival principles.

The *Court Information Act 2010* (NSW), which (as of June 2011) has yet to be proclaimed,[11] is the result of reports and studies conducted by the New South Wales Law Reform Commission,[12] the Supreme Court of New South Wales,[13] and the New South Wales

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10 Sante, above n 7, xii.

11 The news media reported that commencement of the Act was delayed because 'its practical implementation [is] a needlessly difficult task'; 'court registries in NSW are already under immense pressure'; and the 'painstaking and time consuming job of redacting personal information on court documents' requires additional staff and funding, 'an expense that might easily have been spared had the legislation been properly drafted in the first place': Nicola Shaver, 'How privacy hobbles push for open justice', *The Australian*, 3 June 2011, 33–4; <http://www.theaustralian.com.au/business/legal-affairs/how-privacy-hobbles-push-for-open-justice/story-e6frg97x-1226068265856>.

12 New South Wales Law Reform Commission, *Contempt by publication*, Report No 100 (2003).

13 The Supreme Court of New South Wales conducted community consultation in 2004, following the release of its discussion paper 'Non-Party Access to Court Records' (22 April 2004), then referred the matter to the New South Wales Attorney General's Department for further investigation.

Attorney General's Department.[14] It begins with the assumption that 'open justice' brings together the desirable qualities of accountability, transparency, free speech, and a public right to scrutinise court proceedings.[15] Initially anticipated to respond to concerns from established media organisation, the reports and Act accommodate both the media and members of the public. Reports leading up to its enactment acknowledge that access needs to be balanced against legitimate reasons for restriction, which might include privacy,[16] personal or sensitive information,[17] improper use,[18] and concerns about material of specific kinds, for instance video footage,[19] police fact sheets,[20] or malicious pleadings unsupported by admissible evidence.[21] When the Bill was introduced into Parliament it received unanimous support.[22]

Under the Act, court information is classified as either 'open' or 'restricted', accessible or not, and the Act attempts to facilitate its aspirations towards achieving 'open justice' through implementing this system of classification. But an archivist might anticipate that records can be simultaneously one thing *and* another, and that their value lies in their *use*. John Ridener, an American archival theorist and librarian, explains:

> Because archivists work with materials that are designated as official evidence, the type of information contained in records can either be used to refute power or enforce it. As [Eric] Ketelaar argues, sometimes records can do both. The power of proof is still subject to interpretation.[23]

The Act facilitates *access* to the archive without acknowledging that the user is, in fact, motivated by interpretation. Further, the Act identifies the primary seekers of access as 'the public', 'news media organisations', and parties to proceedings.[24] The challenges posed by artists, curators, scholars and others, are not anticipated by the Act in its objects. The methods by which the Act facilitates disclosure of court information cannot hope to regulate the ways these challengers seek to

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14 Attorney General's Department of NSW, *Review of the Policy on Access to Court Information* (April 2006); Attorney General's Department of NSW, *Report on Access to Court Information* (June 2008).

15 *Contempt by publication*, above n 12, [11.1].

16 *Review of the Policy on Access*, above n 13, 21.

17 Ibid 31.

18 Ibid 37.

19 *Contempt by publication*, above n 12, [11.27]; *Review of the Policy on Access*, above n 13, 42.

20 *Report on Access*, above n 14, 17.

21 *Contempt by Publication*, above n 12, [11.59]—[11.61].

22 New South Wales, *Parliamentary Debates*, Legislative Council, 18 May 2010, 22800–4 (Michael Veitch).

23 Ridener, above n 9, 130.

24 *Court Information Act 2010* (NSW) s 3.

extract evidence from the archive to put it to fresh, new purposes. The Act appears to assume that groups such as 'the public' and 'news media' are distinct. Okwui Enwezor, curator of the art exhibition titled 'Archive Fever', shown at the International Center of Photography in New York in 2008, points out that these groups are no longer separate, and that archives are no longer sought out solely by scholars and reporters, writing:

> we have witnessed the collapse of the wall between amateur and professional, private and public, as everyday users become distributors of archival content across an unregulated field of image sharing.[25]

This article presents several examples where such challenges were posed, demonstrating that some evidence has an enduring capacity to harm, and that such harm might be more sensitively measured if an archivist's sensibility to what the Act calls 'court information'[26] is adopted.

Under the Act, 'open' information is available to anybody who requests it, and the Act defines what is 'open' in both criminal and civil proceedings.[27] 'Restricted' information refers to everything else, and is available subject to the court's leave. There are also restrictions placed upon certain categories of information that would otherwise be 'open'; for example, where pleadings have been struck out, or where information is contained in a victim's impact statement, or letter of comfort, or proceedings on the voir dire.[28] In determining whether to grant leave to access 'restricted' information, the court may consider a range of factors.[29] Anything defined in the Act as 'personal identification information' is not available. This includes things like bank account numbers, passport and drivers licence numbers, and material of that sort.[30] News media organisations, as defined,[31] have much wider access to information than members of the public,[32] except for parties to proceedings, who can access any court information

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25 Okwui Enwezor, *Archive Fever: Uses of the Document in Contemporary Art* (Steidl, 2008) 13.

26 *Court Information Act 2010* (NSW) s 4(1).

27 'Open access information in criminal proceedings' is set out in the Act s 5(1). 'Open access information' in civil proceedings is set out in s 5(2).

28 Under s 6(1) of the Act: 'Any information that is not open access information is restricted access information'. Section 6(2) places restrictions upon certain categories of information that would otherwise be regarded as 'open access information.

29 Section 9(2) of the Act sets out matters a court may take into account in deciding whether to grant leave to access restricted access information.

30 Ibid s 4.

31 Ibid s 10(5) defines 'new media organisation' to mean 'a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium'.

32 Ibid s 10 sets out the access that is available to news media organisations that is otherwise unavailable.

relating to their proceedings, unless a court orders otherwise.[33] This new regime aims to create uniformity across all New South Wales jurisdictions, removing discretion from individual courts and registrars, and speeding up both access and decision-making where members of the public or journalists seek court information.

The Act opens the judicial archive. Archivists have long since dispensed with the 19th century view that archives are primarily preserved for historians in the distant future, and historians no longer approach archives with the view that they are — in any epistemological or legal sense — evidentiary. By facilitating access to judicial records that were previously hard to obtain, the Act, and the judicial officers whom it guides, become archive-keepers of judicial records. The Act recognises that court records may be of use while they are still fresh, and anticipates that the primary seekers of access will be journalists rather than historians. But the Act seems oblivious to a much broader cultural sensibility, one to which it leaves court information vulnerable. This is what Ann Laura Stoler has termed the 'archival turn',[34] Hal Foster has called 'the archival impulse',[35] and Jacques Derrida diagnosed as 'archive fever':[36] none of which describe precisely the same phenomena, but which might simply be described as the process by which we create a fetish of the stored document.[37]

Legal scholarship, as well as legislative provisions, already allow for the stored document to be imagined contextually and for its proposed *use* to govern its definition. Legal scholar and magistrate, Roger Brown, examines the judicial interpretations made of the terms 'document' and 'record', finding that neither statute nor case law offer exhaustive or consistent definitions. Sometimes, Brown observes, a document becomes a record because there is deliberation behind its creation.[38] Sometimes, a record requires contemporaneity, reliability and originality, in the sense that an historian would regard it as a

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33 Ibid s 11 allows parties and their legal representatives access to any court information relating to their proceedings, unless a court orders otherwise, or unless a court imposes conditions on access.

34 Ann Laura Stoler, 'Colonial Archives and the Arts of Governance' (2002) 2 *Archival Science* 87, 95.

35 Hal Foster, 'An Archival Impulse' (2004) 110 *October* 3.

36 Jacques Derrida, *Archive Fever: A Freudian Impression* (Eric Prenowitz, trans, University of Chicago Press, 1995) [trans of: *Mal d'Archive: une impression freudienne* (first published 1995)].

37 For another perspective on the fetish of the archive, and archivists, see also Cathy Alter, 'Eat the Document' at < http://www.mcsweeneys.net/1999/12/14document.html>.

38 Roger Brown, *Documentary Evidence: The Laws of Australia* (Thomson Reuters, 2009) 19 [16.5.180], citing *R v Tirado* (1974) 59 Cr App R 80, 90 (Widgery LCJ): 'A cash book, a ledger, a stock book: all these may be records because they contain information deliberately entered in order that the information may be preserved'.

'primary source'.[39] He offers another non-exhaustive definition of 'record' as

> a compilation of facts supplied by those with direct knowledge of the facts which is preserved in writing or other permanent form, in order that it is not evanescent, and which will serve as an original source or memorial or register of those facts and thus be evidence of them or of the transaction to which the document gives effect.[40]

However, he offers another view in which the record does not require permanence, so long as it is 'not evanescent'.[41] These various definitions of 'record', drawn from English courts, take the dominant view that selected 'documents' may have the status of a 'record'. This is in contrast with definitions of 'document' under the uniform Evidence Acts in force in several Australian jurisdictions. Here, 'document' is defined as 'any record of information',[42] of which Brown writes:

It is clear that the legislature saw documents as a subset of 'records'.[43] Drawing together the legal doctrine, he says 'the logical result would be that the term 'record' and the term 'document' are co-extensive, since each class would be a subset of the other.[44]

The slippery definition exceeds the boundaries of the law. For journalists, artists, curators and scholars, the document in the archive has the attributes of authenticity, contemporaneity, and some other rare quality that is difficult to anticipate, but will be familiar to the archival researcher: days of fruitless searching, poring over pages of illegible handwriting, the long paths of inquiry abandoned, the breathless moment of hope that turns to nothing. And sometimes, but only sometimes, whether it creeps up or arrives all of a sudden, the 'find' that changes everything. Jules Michelet, 19th century French historian, immersed himself in records: 'as I breathed their dust, I saw them rise up'.[45] Luc Sante remembers, '[t]he pictures made me gasp'.[46] The

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39 Brown, above n 38, 20 [16.5.180], citing *H v Schering Chemicals Ltd* [1983] 1 WLR 143, 146 (Bingham J).

40 Ibid 20 [16.5.180], citing *R v Iqbal* [1990] 1 WLR 756, 764 (Watkins LJ, Nolan and Ward JJ).

41 Ibid 19 [16.5.180], citing *R v Jones* [1978] 1 WLR 195, 199 (Lane LJ).

42 *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), *Evidence Act 2008* (Vic), Dictionary part 1, (definition of 'document'), see also part 2, cl 8; *Evidence Act 2001* (Tas), s 3(1) (definition of 'document').

43 Brown, above n 38, 20 [16.5.180].

44 Ibid.

45 Jules Michelet, 'Histoire de France: Livres I–IV: Examen des remaniements du texte de 1833 à travers les rééditions par Robert Casanova' in *Oeuvres Complètes* (Flammarion, first published 1833, 1974 ed) vol 4, quoted in Carolyn Steedman, *Dust: The Archive and Cultural History* (Rutgers University Press, 2002) 27. (The translation is Steedman's.)

46 Sante, above n 7, x.

'archive fever' describes both the urge to enter the archive, as well as its consequence. Carolyn Steedman distinguishes the scholarly impulse that Derrida termed 'archive fever' from what she calls 'Archive Fever Proper'; multiple cases of actual sickness in which the scholar was infected by the archive, and its dust and toxins.[47] The changed nature of records themselves has necessitated changes in archival practices of appraisal, conservation, storage and policy. Archival theory has also responded to contemporary cultural shifts — the archival turn, in which documentary proof is demanded almost as a socio-cultural instinct whenever we have reason to doubt — and the Act now offers an opportunity to reflect seriously upon how shifting archival sensibilities might transform our relationship with court records.

The historian of colonisation, Ann Laura Stoler, wrote 'Transparency is not what archival collections are known for'.[48] She was making the point that the archive is only really accessible to the scholar who possessed formal knowledge of administration, history, colonisation, archival practice, and also the informal kind of 'common sense' that guides the scholar through the records. Significantly, Stoler — whose deft manoeuvres and disciplinary challenges have transformed the scholarly use of documents — is a specialist in Dutch colonial records. And the Dutch, as John Ridener explains,[49] were the first to consolidate and standardise the 19th century practice of state record-keeping. Their *Handleiding voor het Ordenen en Beschrijven van Archieven* (1898) (*Manual for the Arrangement and Description of Archives*, or 'Dutch Manual') is the basis for all Western government administrators.[50] Whereas the *Court Information Act* responds to the liberal democratic goal of 'transparency', Ridener explains that it is archiving itself that inaugurated the political possibility of transparency.[51] Further, Ridener notices that the social shift by which we have come to embrace institutional practices of accountability and transparency has changed the nature of archival practice. Knowledge of, and access to, official records has transformed the type and volume of records that archivists now keep. Appraisal theory, by which the archivist assigns evidentiary, historical and/or cultural value to records, has had to accommodate these shifts. Ridener describes it generally as a

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47 Steedman, above n 1, 17–37

48 Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press, 2009) 8.

49 Ridener, above n 9, ch 3.

50 Samuel Muller, Johan A Feith and Robert Fruin, *Manual for the arrangement and description of archives* drawn up by direction of the Netherlands Association of Archivists (Arthur H Leavitt, trans of 2nd ed) (H W Wilson and Co, 1968). [Original edition published as *Handleiding voor het Ordenen en Beschrijven van Archieven*, 1898.]

51 Ridener, above n 9, 137.

shift from a power-based structure of records to a memory-based structure; from the state to the individual.[52]

At the same moment that an 'archival turn' transformed the humanities and creative arts, archival theory and practice experienced a 'linguistic turn', described as a move that 'holds poetics in equal esteem with a scientific approach'.[53] A poetics of archiving, identified with North American archivist Brien Brothman, and informed by poststructuralist philosophy, warns against privileging an administrative focus upon records, and demands an openness to cultural practices.[54] This new archival paradigm demands a shift away from the archivist as 'disinterested keeper of records',[55] or the 'administrative records manager'.[56] Cook and Schwartz, drawing upon the writing of Judith Butler, argue for a 'transgressive performance' amongst archivists,[57] to evade old habits in which established archival practices can only yield established modes of history and historiography, failing to address more recent challenges to historicity itself.[58]

However, Stoler writes that the nature of the archives was always capable of undermining what we understand of both history and historiography. She argues that the state achieves sovereignty by retaining the power to designate social facts as matters of state. It designates arbitrarily, by which she does not mean randomly but discretionarily, and this process separates the social fact from its proper context. Further, it demands that the social fact be bolstered by further evidence, resulting in a substantial cache of documentation, all of which the state reserves the power to restrict, or to keep secret.[59] Stoler notes: 'State secrets excite expectations …For we often covet that which the state conceals…But we also know that codes of concealment are the fetishes of the state itself'.[60] She comes to the position, similar to that articulated by postmodern archival scholars, that we ought to regard archives as 'epistemological experiments rather than as sources'.[61] Derrida arrives at a similar point, but by way of Freudian psychoanalytic theory. 'Archive fever', for Derrida is 'a compulsive, repetitive, and nostalgic desire for the archive, an irrepressible desire to

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52 Ibid 112.
53 Ibid 119.
54 Ibid 118.
55 Ibid 125. Ridener attributes this quality to Jenkinson, below n 77.
56 Ibid 130. Ridener attributes this quality to Schellenberg below n 79.
57 Ibid 123.
58 Ridener makes the argument that postmodern and post-structural critiques were behind the challenge to historicity, and he identifies Fredric Jameson, Jean-Francois Lyotard and Hayden White as key thinkers behind this shift. However, equally significant challenges to the discipline of history have been made by feminist, postcolonial, economic, queer and race theorists.
59 Stoler, above n 48, 26.
60 Ibid.
61 Stoler, above n 34, 87.

return to the origin, a homesickness, a nostalgia for the return to the most archaic place of absolute commencement'.[62] Since he's talking about Freud, the search for origins is, in large part, the point. Steedman says it is really 'foundations fever'.[63] She writes, 'And 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'.[64] As with Freudian studies of desire, our perpetual failure to locate the source of our trouble motivates us to continue seeking it in perpetuity, and justifies the perpetual production of records that will feed our desire. The death drive, on the other hand, is the urge that pushes us to destroy our desires in order to break the cycle of unfulfilment. Derrida notices that the death drive 'never leaves any archive of its own. It destroys in advance of its own archive, as if that were in truth the very motivation of its most proper movement'.[65] Derrida calls it *anarchivic* or *achiviolothic*.[66] These competing impulses — to hoard everything, to destroy all traces; to search for origins, to start anew — are apparent when we consider recent instances in which court records have been accessed and then used for an unanticipated purpose.

Desiring and destroying the archival record is not only a Freudian analogy but a closely-reasoned response to the archive's challenge to matters of privacy, secrecy and sensitivity. Here a discussion of the artwork *Tearoom* (1962/2007) explains how classifications of 'open' or 'restricted' are inadequate for resolving difficult claims for access or, more importantly, transgressive *uses* of official sources. *Tearoom*, (described below), is an artwork that has its origins in the legal archive.[67] Yet its exhibition in museums led to calls, from some viewers, for its destruction: 'The film should never have been made. It should be destroyed. The historical value is not greater than the dignity these men lose every time the film is viewed'.[68] Here, the concept of 'dignity' is introduced to challenge the desire to open the archive. For the artist, William E Jones, one of the motivations for opening — or exhibiting — the archival material relates to the Freudian notion of a search for origins; Jones is interested in the foundations of

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62 Derrida, above n 36, 91.
63 Steedman, above n 1, 40.
64 Ibid 45.
65 Derrida, above n 36, 10.
66 Ibid.
67 A slideshow of stills from the film is available at William E Jones, *Tearoom: A Document Presented by William E Jones* (1962/2007) <http://www.williamejones.com/ collections/view/11/>.
68 The artist has collected a range of responses to the public release of his films: William E Jones, *Refuse and Rubble Unpacked upon the Release of Various Films by William E Jones* <http://www.williamejones.com/collections/about/24>.

homophobia in his home state of Ohio around the time of his birth in 1962.[69]

Tearoom, which is sub-titled 'A document presented by William E Jones', is made from 56 minutes of covert surveillance footage filmed in 1962 by police officers in a men's public toilet in Mansfield, Ohio, much of which captures secret and anonymous homosexual sex acts. Over the course of two weeks, two police officers concealed themselves behind a two-way mirror in the toilet and filmed this footage. It led to 38 arrests, and the identification of a further 30 offenders, and secured at least 31 convictions for sodomy, which at the time carried a mandatory minimum prison sentence of 12 months in a State penitentiary.[70]

Images from *Tearoom* published with permission from William E Jones.

After the convictions were secured, the evidence was re-edited into a police training film titled 'Camera Surveillance of Sex Deviates', and a voice-over commentary was added. That film ended up in the garage of former Police Chief, John Butler and, assisted by another film director, Jones got a copy of it. He removed the voice-over commentary, and moved the final reel (in which police officers are setting up their surveillance operation) to the beginning of the film. He added the title *Tearoom*, which is archaic American slang for what in Australia we call a 'beat', and what in the UK is called a 'cottage'. He added his own name, 'William E Jones' as the artist, and *his* permission is required before the film, or stills taken from it, can be screened or reproduced.[71] Within the domain of 20th century art, *Tearoom* is an act of 'appropriation', where a 'found' or 'readymade' object is re-contextualised by the artist, and thus given fresh meaning and a new audience. Within the domain of the criminal trial, these criminal proceedings were public, the defendants were convicted and

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69 Felicia Feaster, 'William E. Jones: The Secret History' (2008) *Creative Loafing*, <http://clatl.com/atlanta/william-e-jones-the-secret-history/Content?oid=1272210>.

70 William E Jones, *Tearoom* (2nd Cannons Publications, 2008). For further detail, see Katherine Biber and Derek Dalton, 'Making Art from Evidence: Secret Sex and Police Surveillance in the Tearoom' (2009) 5*Crime Media Culture* 243.

71 It should be noted that Jones has, to date, generously granted this permission to the author whenever sought, without cost or conditions.

imprisoned, and they experienced the full weight of the trauma and humiliation of having their sexual secrets exposed. But neither of these established domains resolves the problems of extracting this film from the archive now, and exhibiting it in the manner Jones does.

Jones, in his own writing about his artwork,[72] and his supporters in the queer and arts press,[73] say that this footage teaches us a lot: about 'the closet', about the policing of gay sexuality, about what sex looked like before mass pornography. For Jones, these important lessons outweigh the dangers identified by the artwork's critics. Watching *Tearoom* today, for some viewers including myself, seems wrong. It seems to compound the humiliation of the film's subjects. Watching the film is not erotic, not implicitly interesting, and feels incredibly sad. While watching it, my regrets about doing so began to accrue. I had started from a position of feeling *entitled* to look at these images, knowing they had come from evidentiary sources, and knowing they had been exhibited at the 2008 Biennial Exhibition at the Whitney Museum of American Art in New York.[74] I had contacted Jones, explained my scholarly interest in artworks with legal archival origins, and he generously sent me a copy of the film. Upon viewing it, I wished I had not seen it. The furtive nature of the couplings, the sense of paranoia, the many scenes in which nothing happens, the banality of waiting, and the degraded quality of the footage, all remind the viewer that these acts were intended to disappear into history. Notwithstanding that these acts were public and criminal, these were *secrets*, and watching this footage today feels like a breach of trust.

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72 Jones, above n 70. See also the artist's website < http://www.williamejones.com>.

73 Feaster, above n 69. See also Christy Lange, 'Editors Blog: In the *Tearoom*… Not Really What I expected' (2008) *Frieze Magazine*, available at <http://www.frieze.com/blog/ entry/in_the_tearoom_not_really_what_i_expected>; Nicholas Weist, 'From Gulag to Gallery: How William E. Jones Made High Art from a '60s Sex Sting" (2008) May, *Out* 9; Ryan Lee, 'Jailbait: *Tearoom* Exposes Hidden, Persecuted Gay Oasis in 1962' *Southern Voice* (Atlanta, Georgia) 15 February 2008, 23; Richard Knight, 'Queercentric: "William E. Jones" "Found Document" is Mesmerising', *Windy City Times* (Chicago) 14 May 2008, 17; Skot Armstrong, 'Bunker Vision: William Jones' *Artillery* 45 (Los Angeles), January 2008; Fred Camper, 'Critic's Choice: *Tearoom'*, *Chicago Reader* (Chicago), 15 May 2008, 78; Chris Chang, 'In Flagrante Delicto: William E Jones Collaborates with the Police in *Tearoom'* (2008) 44(4) *Film Comment* 17; Michael Sicinski, *Tearoom (William E Jones)* (April 2007) <http://academichack.net/ reviewsApril2007.htm#Tearoom>

74 To date, *Tearoom* has been exhibited at the 2008 Biennial Exhibition, the Whitney Museum of American Art, New York; the Andy Warhol Museum, Pittsburgh; the Festival Internacional de Cine Independiente de Buenos Aires, Argentina; the Yerba Buena Center for the Arts, San Francisco; the InDPanda International Short Film Festival, Hong Kong; Eyedrum, Atlanta; White Light Cinema, Chicago; Cinémathèque française, Paris; Filmforum, Los Angeles; Outfest, Los Angeles; Pornfilmfestival, Berlin; Mix Brasil, São Paulo; *Smell It!*, Kunsthalle Exnergasse, Vienna, Austria; the ar/ge kunst Galleria Museo, Bolzano, Italy; and the Anthology Film Archives, New York.

In effect, Jones' supporters and critics both respond differently to the same observation. *Tearoom is* a powerful and shocking document; it *was* probative of illegal sex acts in 1962 Ohio; it *did* ruin the lives of its subjects. The debate, then, is whether, for all of these reasons, it should be accessed from the judicial archive and screened in popular art institutions, or not. This debate mirrors a debate within archival theory about how to deal with the power of archival records. The archival scholar, Eric Ketelaar, calls this 'double power', a concept discussed further by Ridener:

> Depending on the point of view of the user, the power of records can be freeing or damning. The evidence in a record can liberate the oppressed or be interpreted as a means of further repression. Records can also illustrate evidence of oppression and the means through which past oppression can be corrected. Since records contain information that is released through interpretation, there are always many possibilities for many uses of records.[75]

Of significance here is the archivist's acceptance that records, and the information contained within them, are only meaningful when they are put to some purpose by a user. The Act, focused though it is upon 'information' and 'records', does not have a framework or process for sorting the various *uses* to which the information it opens might be put.[76] Yet legal scholars, as earlier shown in the work of Brown, have accepted that it is *context* which enables both classification and judgment to be conducted.

The first century of archival theory and practice was dominated by attempts to define what was meant by an 'archive' or a 'record' and these questions were resolved, in large part, because of the challenges made upon archivists by shifting historical forces and events. Sir Hilary Jenkinson, author of *A Manual of Archive Administration* (1922),[77] needed to create a new archival theory that would enable him to collect and organise records of the First World War, and defining archives was central to his mission. Ridener explains:

> He defines archives as a substitute for memory... . For Jenkinson, the definition of archives also includes their continued custody in archival institutions and the fact that records in archives are interrelated and dependent on context for meaning.[78]

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75 Ridener, above n 9, 127.

76 The closest the Act comes to examining the proposed *use* of court records is s 9(2)(f) which permits, but does not oblige, the court, when deciding whether or not to grant leave to restricted access information, to consider 'the reasons for which access is sought'.

77 Sir Hilary Jenkinson, *A Manual of Archive Administration* (Percy Lund Humphries, first published 1922, 1966 ed).

78 Ridener, above n 9, 146

Theodore R Schellenberg had the role of archiving US records after the Second World War, and for that purpose needed to create a new archival paradigm to replace Jenkinson's. His book *Modern Archives: Principles and Techniques* (1956)[79] urged archivists to determine the value of records from their character and, in order to do so, engage in their selection. Whereas Jenkinson thought that archivists should not be involved in appraisal, for Schellenberg, the ability and willingness of the archivist to make appraisal decisions would reduce the number of records presented for inclusion. His approach allowed for increased subjectivity in the shaping of the archive.[80] Schellenberg's focus was on managing records, matching the expanding bureaucracy of the administrations he was serving.[81]

Ridener explains that 'the record is the smallest unit of organization in the archive'.[82] The record is also 'the main source of information considered during appraisal'.[83] He writes, '[r]ecords in archives become valuable because they begin as information and, in part through the appraisal process, become archival records'.[84] The value of the record is *because* it originates in the archive; not only does the information in the record require interpretation, but its interpretation is affected by its inclusion in the archive. This raises a question about Jones' project. As he explains in his book, *Tearoom*,[85] the 'document' he presents was *not* formally appraised, nor was it conserved, nor stored by the state. A filmmaker colleague of his found it in a retired policeman's garage. Significantly, after they made copies of it for themselves, they then lodged it with the Kinsey Institute, fully aware of the importance of such a film to the collection's holdings on the history of sexual behaviour. In so doing, they were conferring archival power upon this artefact, and conferring upon themselves the dual status of archivist and archive user. This act coincided with a paradigm shift within archival theory and practice known as 'questioning', which emerged after the 1960s and 1970s, in which archivists began pro-actively to solicit materials for archives, and also to collaborate with state institutions in collecting records and creating record-keeping protocols. They began archiving, actively.[86] By making the archive themselves, they participate in the promise of memorialisation offered by the archive. Also, as Enwezor has observed in other instances of artworks made from archival images, they are

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79 Theodore R Schellenberg, *Modern Archives: Principles and Techniques* (Chicago University Press, 1956).
80 Ridener, above n 9, 148.
81 Ibid 149.
82 Ibid 124.
83 Ibid 125.
84 Ibid 136.
85 Jones, above n 70.
86 Ridener, above n 9, 151.

'giving the…document the aura of an anthropological artefact and the authority of a social instrument'.[87]

Carolyn Steedman, in her warning against using Derrida's *Archive Fever* for understanding archives 'proper', writes that Derrida, who was thinking about Freud, was writing about memory, and not memorialisation. Steedman wrote:

> an Archive is not very much like human memory, and is not at all like the unconscious mind. …The Archive is not potentially made up of *everything*, as is human memory; and it is not the fathomless and timeless place in which nothing goes away that is the unconscious. The Archive is made from selected and consciously chosen documentation from the past and also from the mad fragmentation that no one intended to preserve and that just ended up there.[88]

Steedman cautions against assuming that Derrida is using the term 'archive' in its natural sense:

> Indeed, the *arkhe* appeared to lose much of its connection to the idea of a place where official documents are stored for administrative reference, and became a metaphor capacious enough to encompass the whole of modern information technology, its storage, retrieval and communication.[89]

As Ridener agrees, '[t]heorists such as Foucault and Derrida understand the archive to be a metaphorical construct, a place to discuss human knowledge, memory, power, and justice'.[90] Alongside this interpretation, and together with the notion of the archive as a physical place one might visit, the archive is also a *system* of administration. Not only for its contents but for its organisational principles, the archive invites us to imagine the state from the perspective of the state's self-memorialising apparatus. Ann Laura Stoler reminds us that archives are not only sources but themselves 'cultural artefacts of fact production, of taxonomies in the making'.[91] These are the documents and the materials that the state itself selected to make, retain, catalogue and then create a system for providing (or withholding) access. Embedded within the state's systems for record-keeping are assumptions about the accuracy and reliability of systems,[92] assumptions which may also affect the admissibility of

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87 Enwezor, above n 25, 13.
88 Steedman, above n 1, 68.
89 Ibid 4.
90 Ridener, above n 9, 127.
91 Stoler, above n 34, 91.
92 See, for example, *Archives Act 1983* (Cth) and *State Records Act 1998* (NSW).

evidence derived from such systems.[93] Enwezor writes that '[a]rchival returns are often conjoined with the struggle against amnesia and anomie',[94] and so the archive's very existence, as well as its contents, become self-validating icons of institutional memory, legitimacy and transparency.

Questions about transparency repeat themselves throughout Peter Doyle's *City of Shadows* project. From its title to its images, and in the findings of Doyle's research, *City of Shadows* reminds us that, within the artefacts in the archive, many secrets remain; much of what we see cannot be made out. Doyle is a crime novelist and a musician, and teaches journalism at Macquarie University. He spent years living with over four tonnes of filthy and uncatalogued photographic negatives and plates taken by NSW Police between the 1912 and 1948. The archive, before it was rescued by the Museum, had been moved from one premises to another, barely surviving a flood, vermin and the ravages of time. The photographic plates had become separated from the documents and files that once might have explained them. This photographic archive had become untethered from the legal archive, losing with it its systems of classification and order. Doyle's project is to understand what these photographs mean: why they were taken, what crimes they sought to solve, and what else we might learn about the world from which they came.

Between 2005 and 2006, the Sydney Justice and Police Museum exhibited *City of Shadows*, curated by Doyle, accompanied by a large-format book containing hundreds of the images.[95] A second book, titled *Crooks Like Us*,[96] continues in that vein, reproducing many more images, with some commentary. Both books won awards commending their physical presentation or production.[97] These books are clear examples of a burgeoning genre, in the 'art' or 'gifts' category, lavishly illustrated volumes of historical mug shots, crime scene photographs,

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93 For instance, in the uniform Evidence Acts, s 69 provides an exception to the rule against the admissibility of evidence for a hearsay use. The exception operates because record-keeping systems in businesses provide a 'safeguard' derived from the strong incentive within businesses for accuracy in record-keeping. See Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 9th ed, 2010), 285 [1.3.2800] quoting Australian Law Reform Commission, *Evidence (Interim Report)*, Report No 26 (1985) [702]–[705].

94 Enwezor, above n 25, 37.

95 Peter Doyle with Caleb Williams, *City of Shadows: Sydney Police Photographs 1912-1948* (Historic Houses Trust of NSW, 2005). See also Katherine Biber, 'Review of Peter Doyle's *City of Shadows*' (2006) 3 *History Australia* 55.1.

96 Peter Doyle, *Crooks Like Us* (Historic Houses Trust of NSW, 2009).

97 *City of Shadows* won the 2006 National Trust/Energy Australia Heritage Award for Interpretation and Presentation, in the Corporate and Government division. *Crooks Like Us* received the 2010 Australian Publishers Association design award in the Best Designed Specialist Illustrated Book category.

and a third category which could be described as evocative curiosities.[98]

In the *City of Shadows* exhibition, some of the photographs appeared as a slide show, accompanied by Doyle's voice-over commentary. His narrative manages to convey his sense of wonder at what he has found, as well as his painstaking research and his careful speculation. He teaches us about notorious incidents in particular locations; we learn about the history of police photography; the changes in criminal conduct in response to changes in drug use; experiments in criminal investigation; the surprising histories of now-quiet suburbs. Sometimes he reports a scholarly dead-end, itself evidence of something. For instance, he says of one photograph: 'Bedroom in a respectable house. No idea what happened here.'[99]

Bedroom interior, probably late 1930s, photographer unknown.

Image from New South Wales Police Forensic Photography Archive, Justice & Police Museum, Historic Houses Trust.

One of Doyle's aims is to compare the nature of photography and the nature of crime. Doyle is reminding us to look at the photographs not only as evidence of human malice or misfortune, but as haunting memories of times, places and people. The context in which he found these pictures — the police archive — already tells us that these pictures are a form of criminal evidence. But Doyle is showing us another way of looking at them: these pictures represent the minutiae of the way people lived: housekeeping practices, products on shelves, private habits. Once the facts in issue have been lost in time, these photographs can become evidence of something else, and Doyle seems to have exercised some judgment about when to solve a mystery, and when to keep it a secret. It is the research, detail and judgment that

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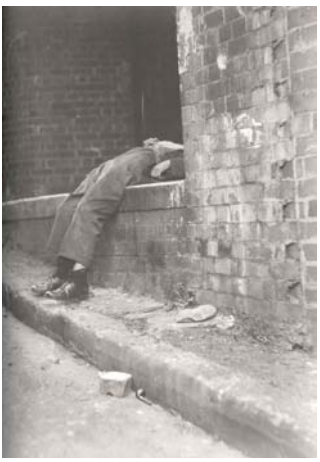
98 Other examples from this expanding genre include Michael Lesy, *Wisconsin Death Trip* (University of New Mexico Press, 2000); Bruce Jackson, *Pictures from a Drawer: Prison and the Art of Portraiture* (Temple University Press, 2009); Luc Sante, *Low Life: Lures and Snares of Old New York* (Farrar, Straus and Giroux, 2003); Sean Tejaratchi and Katherine Dunn, *Death Scenes: A Homicide Detective's Scrapbook* (Feral House, 2000); William J Bratton, James Ellroy and Tim B Wride, *Scene of the Crime: Photographs from the LAPD Archive* (Harry N Abrams, 2004).

99 Peter Doyle's voice over to photograph in Peter Doyle, *City of Shadows* exhibition.

distinguishes *City of Shadows* as an example of ethical use of the judicial archive, from *Tearoom* as a deliberate act of artistic and socio-political provocation.



Left: Mug shot of Neville McQuade (18) and Lewis Stanley Keith (19), North Sydney Police Station, early June 1942, photographer unknown.

Right: Unidentified corpse, partly obscured, lying in loading dock, location unknown but presumably inner Sydney, late 1920s, photographer unknown.

Images from New South Wales Police Forensic Photography Archive, Justice & Police Museum, Historic Houses Trust.

Luc Sante's *Evidence* is an obvious inspiration for Doyle, and Sante is invoked by Caleb Williams, curator of Sydney's Justice and Police Museum, who wrote a chapter in the *City of Shadows* book. Williams writes of the 'pioneering effort and influence' of Sante, whose *Evidence* 'did so much to establish crime archives — both their twisted poetry and blank factuality — as a locus for late 20th century postmodern meditation'.[100] While Doyle's project is careful to situate crime's horrors and humiliations into a substantial historical context, drawing upon exhaustive and meticulous research, the same cannot be said for Henry Bond.

Henry Bond is an English photographer, a scholar of psychoanalysis and the author of *Lacan at the Scene*.[101] He visited the British National Archive and looked at English murder files from 1955 to 1970 in which the perpetrator was convicted. He had the idea that, although these murders were 'solved' in the judicial sense, there were

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[100] Caleb Williams, 'The Forensic Eye: Photography's Dark Mirror' in Peter Doyle and Caleb Williams, *City of Shadows: Sydney Police Photographs 1912–1948* (Historic Houses Trust of NSW, 2005) 20.

[101] Henry Bond, *Lacan at the Scene* (MIT Press, 2009).

extra 'clues' that could be subjected to Lacanian analysis, and which might yield some fresh, unanticipated view of these crimes. Bond's book seems to be situated within cultural studies scholarship, and includes a foreword by Slavoj Žižek. Žižek describes Bond's project as taking existing texts (by which he means the closed murder case files), reading them through another apparatus (by which he means Lacanian theory), and 'making them readable in a totally new way'.[102]

Bond's methodology is to use Jacques Lacan's diagnostic model — in which the patient is either neurotic, perverse, or psychotic — to classify these murders and their perpetrators, and to find within the police photographs evidence of this diagnosis.[103] In a footnote within his book Bond writes, '[t]here should be a warning note on the front cover of this book' so that the 'casual viewer' is 'prepared' for the images therein.[104] Despite this, the book has no such warning, and it is difficult to see how anyone could be prepared for the abject and degrading manner in which the book's photographs reflect the crimes' victims. These photographs are shocking, heartbreaking and unforgettable, and Bond's failure to warn his reader represents a serious violation of trust between author and reader, making it almost impossible to warm to his enterprise.[105] His footnotes are crammed with meretricious taunts, for instance: 'Do you not… gentle reader, feel a little *dirty* as you browse the lurid images? You may also notice that my version of this conscious justification is that I present the photographs as part of a Freudo-Lacanian study'.[106]

Bond makes passing reference to the tangible nature of his archival experience, mostly to episodes of bureaucratic absurdity familiar to any archival historian. But he demonstrates no awareness that his book operates as an uncritical celebration and as pornography of extreme sexual violence. His writing and, of course, his reproduction of hundreds of these images, shows he has not even begun a process of thinking ethically about opening the archive. For instance, Bond reproduces photographs from a 1960 rape and murder of a woman in

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[102] Slavoj Žižek, 'Series Foreword', in Bond, ibid ix.

[103] For more detail about Bond's book, see Katherine Biber, 'Neurotic, Perverse and Psychotic: *Lacan at the Scene*' (2010) 62 *Source: Photographic Review* 64.

[104] Bond, above n 101, 202 n 47 (emphasis in original).

[105] Luc Sante, too, offers a kind of warning to his readers: 'The photographs on the following pages may inspire horror, as well as pity, and maybe morbid fascination and dull voyeurism. This is unavoidable, but it is not intended. I am presenting them because of their terrible eloquence and their nagging silence. I cannot mitigate the act of disrespect that is implicit in the act of looking at them, but their power is too strong to ignore; they demand confrontation as death demands it. I offer this work as a memorial to these dead, named and anonymous, as well as to their now equally dead photographers: John Golden, Clement Christensen, Arthur DeVoe, Frederick Zwirz, Charles Abrams, Charles Carsbrer, and perhaps unrecorded others', in Sante, above n 7, xi-xii.

[106] Bond, above n 101, 197 n 104.

Newcastle, Staffordshire. An eyewitness watched through her window in a nearby presbytery as a man attacked the woman. Running outside, the eyewitness found the victim already dead. According to the police file, after she alerted the monsignor, she then 'arranged the clothing on the body so as to cover the exposure of the private parts'.[107] Of particular interest to Bond is the relationship between the body and the window at which the eyewitness stood. He draws upon Lacan's formulation of the 'gaze', theorised as a location of power, wherein the look, or the eye, of the watcher commands a presence, eventually inviting a performance for its own pleasure. It is a theory much used by Žižek in his appreciation of the cinema of Alfred Hitchcock,[108] and also influential in some feminist film criticism.[109] Yet Bond's point — he describes the eyewitness's re-arrangement of the victim's clothing as 'almost farcical'[110] — is to classify this crime's perpetrator as a 'pervert', under a Lacanian schema, because the photographs allow Bond to infer that he 'staged' his crime for this eyewitness. He writes:

> The deceased seems to parody erotic exhibitionism, with the body in an obscene position — legs spread wide apart, skirts pulled up. Here a distinctive dialogue emerges whereby the woman's exposed body functions as if it were a lewd message, one that is explicitly sexual/vulgar only *when seen from the house*…: this was the place, it seems, at which this criminal aimed his message.[111]

There is no evidence in the police file to support this line of reasoning; Bond's psychoanalysis of these images is conducted for its own sake, as a kind of speculative play. His inferences seem entirely oblivious to the fact — clear to anyone who views the appalling images he reproduces from this police file — that this was a violent and dreadful crime, that its victim was followed, attacked, violently raped, and then killed, that she died in a stranger's front yard, and was left in a humiliating state of undress. For Bond to reproduce these awful images, and then to theorise that this is farce, performance and exhibitionism, seems a wilful provocation, a failure of his scholarly enterprise, and an abuse of his access to the public archive. Again and again throughout his book, we are confronted with photographs of dead women who have been raped, accompanied by Bond's Lacan-lite musings. For example, on the page immediately after the Stafford murder is dealt with, we read about a woman who was raped and murdered on a train in 1965, travelling between Sussex and Surrey. The

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107 Ibid 52.

108 Slavoj Žižek, *Looking Awry: An Introduction to Jacques Lacan through Popular Culture* (MIT Press, 2002).

109 The landmark work in this area is Laura Mulvey, 'Visual Pleasure and Narrative Cinema' (1975) 16(3) *Screen* 6, which inaugurated the field of psychoanalytic feminist theory in cultural criticism.

110 Bond, above n 101, 52.

111 Ibid.

following pages reproduce the photographs, just as awful as the others in the book. We learn that the victim snubbed the perpetrator's sexual advances during the train journey, which Bond describes as an 'inversion' of the 'romantic notion of the chance encounter with a stranger on a train'.[112] Before he launches into a psychoanalytic reading of some graffiti he finds on the train carriage,[113] Bond says, demonstrating that he has failed to grasp the seriousness of homicidal sexual harassment: 'finally these strangers *did* form a lasting relationship, but only as perpetrator and deceased'.[114]

A final example, from my own scholarship, asks how legal scholars might undertake an ethical engagement with judicial archives. Leading up to the publication of my book *Captive Images*,[115] a crimino-legal study of the High Court's decision in *Smith v The Queen*,[116] I went through a lengthy process to gain access to photographs from the court records which had been admitted into evidence at Smith's trials. Smith was on trial for armed robbery of a bank; some of the evidence against him came from surveillance photographs taken during the robbery.[117] In the absence of a legislative framework offering me access to court records, throughout my research I had relied upon friendships and favours to gain access to copies of these images, as well as other primary materials and information. However, once publication was imminent, I sought access to the original images, for their higher quality, and also sought permission to reproduce those images in the book.

After a lengthy process, I found myself on the telephone with an officer from the New South Wales District Court registry. She had the *Smith* file open in front of her. I asked her to describe the photographs on the file and she said, 'Well, you can see the victim in both photos.' I asked her, 'Which victim?' She replied, 'Well, he's next to a big box and he's got a cap on in one photo and a hood on in the other'. I asked, 'Why do you say he's a victim?' She said, 'Well, isn't he?' I said, 'No,

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112 Ibid 53.
113 Ibid 57.
114 Ibid 53.
115 Katherine Biber, *Captive Images: Race, Crime Photography* (Routledge-Cavendish, 2007).
116 (2001) 206 CLR 650.
117 Mundarra Smith's original trial in 1997, in the District Court of New South Wales, saw evidence adduced from two police officers who testified that they recognised him in a series of surveillance images taken from the robbery. Smith was convicted. His appeal to the New South Wales Court of Criminal Appeal (*R v Smith* [1999] NSWCCA 317) was dismissed. His appeal to the High Court of Australia (*Smith v The Queen* (2001) 206 CLR 650) was allowed on the grounds that the police testimony was irrelevant, under s 55 of the Evidence Act 1999 (NSW) and should not have been admitted. At Smith's re-trial, in the District Court of New South Wales in 2002, he was acquitted.

he's alleged to be the perpetrator. He's alleged to be robbing a bank'. 'Oh', she replied, 'he doesn't look like that'.

Her remarks prompted me to recall what Mundarra Smith himself had said, when a police officer had confronted him with these photographs during the investigation.

Officer:	Can you tell me who that person is?
Smith:	No, I can't. His face is all scrunched up. Looks like he's cryin'…
Officer:	Well, I suggest to you that the person in that photograph is in fact yourself. What can you tell me about that?
Smith:	Doesn't look like me.[118]

Seeing, for the first time, the high-quality photographs in the court files shocked me. The images bore no resemblance to my expectations. The hooded figure *didn't* look like a bank robber. He *did* look like he was crying. Knowing that Smith had been acquitted at a re-trial, I had no way of knowing who this man was. Originating in a surveillance camera at a crime scene, and now filed in a court registry, this image seemed traumatic and dangerous. It immediately brought to mind something said by the photographer Diane Arbus: 'A photograph is a secret about a secret'.[119] The NSW criminal process had been unable to unlock the secret of the bank robber's identity. For this reason, although the Court gave me the photographs, and the National Australia Bank gave me permission to reproduce them, I made the decision not to include those two high-quality images. I made the decision spontaneously and I can't say that I followed any particular ethical pathway; reproducing this image just seemed so obviously fraught and wrong. Whilst the principles of 'open justice' enable justice to be *seen* to be done, I was left in no doubt that these pictures should now be hidden from view. The rules of evidence had run out; these photographs were probative of nothing. Having again begun from the position of feeling entitled to see these images, I was surprised by the regret I felt having seen them. It isn't possible to imagine a classification system that could account for how I feel. Should these images be 'open' or 'restricted', published or concealed? Now consigned to the judicial archive, I believe that an archivist's methodology might allow for complexities and sensitivities to be addressed.

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[118] Police record of interview, 22 July 1997, reproduced in *Mundarra Smith v The Queen*, S233/2000 and S234/2000, High Court of Australia, Joint Appeal Book, 2 volumes, 282.

[119] Diane Arbus, 'Five Photographs by Diane Arbus' (1971) 9 *Artforum* 64.

Archival theory has already begun this work, by recognising the significance of contexts and relationships amongst archival records. For instance, a once-fundamental concept within archival practice — *respect des fonds* — demanded the maintenance of the original arrangement of the records, with no inter-mixing of records from different sources, this foundation has begun to shift. Ridener says that *respect des fonds* was thought to be a 'circumstantial guarantee…of reliability in terms of evidence',[120] but new work by Heather MacNeil re-states the principle for contemporary archiving, preferring a process that 'involves the separating out of the various contexts of documents' creation in order to better reveal their relations to one another'.[121] A similar shift might be seen amongst some legal scholars. Iacovino has written that evidence laws emphasise the importance of records as part of a system.[122] The existence of a system satisfies queries about the reliability and authenticity of the documents created and retained by the system. Iacovino writes that the law tends to think about the record as a 'corporeal thing', amenable to custody, possession and ownership.[123] However it is the 'incorporeal' qualities of the document, 'the record's nature as a representation of an act',[124] for which we need a theoretical – and now, following the assent of the Act, an administrative – framework.

So much of what we might find in the archive is ambiguous, and dependent upon context. Stoler laments that 'archival labour tends to remain more an extractive enterprise than an ethnographic one';[125] and that ''mining' for treasures' is an 'expedient research mode'.[126] This may be true: many of us may approach the archive compelled by the promise of a 'find'. The archive, however, no longer exists for historians alone; it is no longer the case that formal disciplinary knowledge and serious historiographic deliberation will prevent violations of trust, needless intrusions or insensitive exposures. The archival visitor, whether lawyer, artist, journalist or historian, needs to form an ethical relationship with archival 'finds'. Long and tedious hours in the archive remind us of the rarity of the treasure, and the giddy pleasure of the 'find' may tempt us away from good judgment, but sometimes we need to learn how to keep secrets.

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120 Ridener, above n 9, 128.

121 Heather MacNeil, 'Archival Theory and Practice: Between Two Paradigms' (1994) 37 *Archivaria* 6, quoted in Ridener, above n 9, 128.

122 Livia Iacovino, 'The Nature of the Nexus between Recordkeeping and the Law' (1998) 26 *Archives and Manuscripts* 216.

123 Ibid 239. On the materiality of the archive, the experience of touch, the inhalation of dust, see Steedman, above n 1. Also on 'touching' in archives, see Maryanne Dever, Sally Newman and Ann Vickery, *The Intimate Archive: Journeys through private papers* (National Library of Australia, 2009) 32. For an example of the archive as amenable to proprietary control, see *State Records Act 1998* (NSW) s 6.

124 Iacovino, above n 122, 239

125 Stoler, above n 34, 90.

126 Stoler, above n 48, 48.