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## Reopening the Archive: From Hypomnesis to Legal Ontology

For some time now, there has been a quietly flourishing literature on the theoretical question of ‘law and the archive’; and yet it is lamented<sup>1</sup> that perhaps the most important homage to the archive by a ‘juridical thinker’<sup>2</sup> has been underused to date in legal circles. *Archive Fever*, Derrida’s 1994 address to the Freud Society, finds itself consigned, or at least subject to the threat of consignment, to an encompassing legal forgetfulness. And perhaps there is good reason – even an injunction? – *not to forget* that address, even when it is being dispensed with. It will be the unfulfilled objective of this essay to furnish such an injunction with some justification, by asking two ancillary questions: how might the relationship between law and archive be rethought following a particular reading of *Archive Fever* – one in which the deconstruction of the Freudian archive is excavated for its legal potential? And, secondly, might this particular approach allow some form of *engagement with* – which is not the same thing as a ‘deconstruction of’ (there is plenty of this) – the project of modern law? Not only insofar as the latter must, I think, be defined by its unceasing effort to establish a legal ontology; but also because any juxtaposition of precisely these entities (‘law’ and ‘the archive’) must necessarily beg the same question.

### Recalling Law and the Archive

In *Files*, the late Cornelia Vismann’s beautiful genealogy of the law, there emerges a history of the archive, in its various manifestations, as a supplement to the law. Investigating “how files control the formalization and differentiation of the law,” how they “process the separation of the law into authority and administration,”<sup>3</sup> Vismann posits a theory of the archive as the constant and constitutive barrier that is always situated “before the law” in the Kafkian sense: prohibiting access to, and yet compelling us towards, the hollow, often cavernous recesses which contain, disguise and *suggest* the ambiguous power of the law. As Thanos Zartaloudis explains, this investigation places the archive not only before the law, but also beside it, to the extent that the ‘para-legal’ archive invites an analogy with Giorgio Agamben’s development of theological *oikonomia*<sup>4</sup>. The latter envisions a vacancy at the centre of sovereign power, which is nevertheless exercised through governmental apparatus in a bipolar system in which the being and praxis of sovereign power are separated but functionally articulated in an *economy*<sup>5</sup>. Likewise, Vismann’s archive performs the ministerial function through which, despite its intangible and inaccessible nature, the law is be glimpsed, or suggested: files “lay

the groundwork for the validity of law, they work toward the law, they establish an order that they themselves do not keep”<sup>6</sup>. This ministerial function – which takes its form in the preamble, the barrier and the chancery – is possessed of a powerful ambiguity: it is a “legal twilight zone” in which the violence of the law is carried out, and in which “the law encounters writing and decides about the distinctions that are performed in the symbolic”<sup>7</sup>. Importantly, this placing of the law *beside* the archive contemplates (while, of course, problematising) a distinction between law on one hand and archive on the other:

“[the law] works with them [files] and creates itself from them...it operates in a *mode of difference* that separates it from the varying formats of files”<sup>8</sup>

This ‘difference’, however, flies in the face of Derridean *différance*; and Vismann’s genealogy of law and files sits uneasily beside Derrida’s ‘juridical’ archive. While Vismann is aware of *Archive Fever*, she makes only sparse reference to Derrida’s essay in *Files*. In a later piece<sup>9</sup>, however, she will address the essay more directly, making the observation that Derrida’s grammatical account of the *archive* is “indifferent to the history of archives”<sup>10</sup> and, by extension, her own earlier genealogy.

Vismann’s point of departure here is Derrida’s reliance, early in the essay, upon the Greek word *arkhé* (commencement), in light of which he explores the etymological similitude of *archons* (those with authority to interpret the law) and *arkheia* (archives). Such a similitude is suggestive of a nexus between the interpretive commencement of the law and the form of the archive. [Linking example of Derrida’s thesis on law; similarity with archive as something which entails decision and precedent] “Derrida presents [the archive] as a *form of law*”<sup>11</sup>.

But this, Vismann argues, is to “disregard[...] something in the genesis of the rule of law from the archive which could be called the imperial factor”<sup>12</sup>. While Derrida, in Vismann’s reading, renders the interpretation of archives commensurate with ruling authority and thus invests the archive with the source of the law in the sense of the ‘rule of law’; a more comprehensive history of ‘law and the archive’ will reveal that it is not until the Imperial Roman tradition that we witness an “ascertainable moment in time when the archive becomes the rule of law”<sup>13</sup>. To begin with, the Greek *arkhé* does not coincide with any habitual practice of consulting archives as *sources* of law; moreover, explains Vismann, there is a telling *event*, in the 6<sup>th</sup> century, when Justinian “ordered a complete review of the archives’ legal texts so that no lawyer after him would have to refer to the archives ever again” – in short, it is at this point that “[t]he archive had become text” and “[t]he archive texts summarized in codified form

became the law”<sup>14</sup>. “From a legal historical perspective,” Vismann concludes, “the conjunction of rule and law begins *after* reference to archived texts has been abolished”<sup>15</sup>: as a result, the possibility of referring to a beginning that is *endowed* with law (the possibility, that is, of law being founded upon a *legal* rule as opposed to more the simple political authority that invests *archons* with the right of interpretation) depends precisely on the historical moment in which the archives are *consolidated*, transformed into the rule of law but losing in the process their ‘archival’ character. Derrida is in error, then, when he equates the archive with the law, and when he reads *both* ‘rule’ and ‘law’ into the concept *arkhé*.

For Vismann, this equivalence of law and archive could only have taken its cue from the law *of* the archive, namely that “it precedes”<sup>16</sup>. From the observation that the archive and the law are similar in structure and function, we are led to the apparently contentious conclusion that “[t]he abstract law is nothing but a virtual archive; it precedes the individual case just as the archive texts precede current ones”<sup>17</sup>. It would appear, then, that the structure of “precedent” is not a sufficiently juridical motif with which to justify the “convergence of law and archive”, precisely where history indicates, to the contrary, their mutual exclusion in the Justinian *event*. This event notwithstanding, however; surely an ontological, if not a Foucaultian, anxiety must niggle at this thread of reasoning: for surely this history is only possible on the basis of an apparent distinction between “law” and “archive” in the first place; and (to further compound the issue) between “law” and something called “abstract law” in the second. What, one might ask, is the status of this “law” that is neither “abstract” nor commensurate with “archive”?<sup>18</sup>

Any demand for a *legal* ontology is overshadowed by the more pressing matter of methodology in this later essay (if not in *Files*). Importantly: it is not that *Archive Fever* is without value, for Vismann; but that it is one of at least two available methods. To the science of *arkhé*-logy, “the science of the commencement” which, seemingly more appropriately in Heideggerian fashion “reads a beginning (*arkhé*) back into the origins and thus arrives unmistakably at the rule of law,” she opposes (and is a proponent of) “an archive archaeology” which “steps out of the symbolic order” referring to “that which does not speak, the space of the archive...”<sup>19</sup>. Putting aside for the moment the fact that Derrida had, long before *Archive Fever*, addressed the problems inhering in any archaeology of silence<sup>20</sup>, the justification for this opposition for Vismann appears to lie in the grammatical incapacity to grapple with the “[m]aterial conditions, such as lack of space and fired clay” that dictate the relationship of archives to the law; but which are precisely conditions “fall[ing] outside the perception of a juridical thinking of the archive.”<sup>21</sup>. Too much law, then; and too little materiality – this is the

sacrifice undertaken by a grammatological account of the archive. By contrast, Vismann's genealogy would reveal point of emergence of the 'rule of law', which is to say, the self-perpetuating, self-containing capacity of rules upon which the very existence of the modern law now relies and over which its postulates must agonise: the journey through archival materiality thus pre-emptively usurps the quest for legal ontology.

In what remains of this essay, I will consider precisely these two, related, problems – legal ontology and 'materiality' – in contemplation of the juridical archive of *Archive Fever*. In the first place, the archival structure, I will argue, is necessary to, and prefigured in, the law, in its modern (and arguably only) incarnation<sup>22</sup>: a self-generating and self-referential system of norms perpetuated in accordance with the rule of law, with the ever-present possibility of referring 'back' and writing anew. To establish this point is to turn Vismann's critique on its head: we must determine the archival nature of "the law" *first*, if we are to use it at all – let alone to investigate its coexistence with media. Incidentally, to follow a path through *deconstruction* to the question of archival-legal ontology is all the more pressing since it stands in the shadow of the already-identified achievement of *Files* in providing an (Agambian) *oikonomic* model of the differentiated, yet economically coupled, law-and-archive, in which "the formal self-generativity of the so-called modern form of law ... reproduces further the myth of self-emergence through the apparatuses of its recording devices"<sup>23</sup>.

Secondly, moreover, I am mindful that the very point of deconstruction's 'juridical thought' is to distinguish *law*, the "programmable application or unfolding of a calculable process" which "might be legal" but "would not be just"<sup>24</sup> from *justice*: that which awaits us and commands us under pain of urgency to decide on the particular, and yet which is therefore only approximated in the (im)possible decision to "go through the ordeal of the undecidable", something "foreign to the order of the calculable and the rule"<sup>25</sup>. What avenue of inquiry could possibly remain in respect of this calculable order, which exists only as a generative antithesis to 'deconstruction as justice'? Both of these points, I think, might find some comfort in the development in *Archive Fever*, and related Derridean texts, of something of a rejoinder to association of archival science and 'materiality'. It is necessary to begin again, not with *arkhé*, but with another, similarly complex term – *hypomnesis* : "[I]et us never forget," Derrida warns, "this Greek distinction between *mneme* or *anamnesis* on the one hand, and *hypomnema* on the other. The archive is hypomnesic"<sup>26</sup>. In doing so, I will endeavour to revive a theme that has been forgotten in the extant discourse; and which shall have *already* 'justified' the re-opening of Derrida's archival text<sup>27</sup>.

## Death Drive, or ‘the Violence of Forgetting’

If the legal discourse addressing *Archive Fever* is sparse, the acknowledgement in that discourse of the psychoanalytic theme of the essay is virtually non-existent<sup>28</sup>. This is surprising. Admittedly, Derrida says, Freud had no ‘concept’ of the archive any more than we do<sup>29</sup>; but nevertheless “Freudian psychoanalysis proposes a new theory of the archive; it takes into account a topic and a death drive without which there would not in effect be any desire *or any possibility for the archive*”<sup>30</sup>. This is to state matters quite boldly; but it is further surprising that legal discourse does not associate this ‘death drive’ which makes the archive possible with the question of the law, particularly of legal violence. Renisa Mawani, for example, delivers a “material reading of law as archive” which, she explains, “requires a reading of Derrida’s... meditations on the archive alongside and through ‘Force of Law’”<sup>31</sup>. Mawani’s point here is to identify the ‘double logic of violence’ inherent in the archive as she reads it – a reading that would align the archival function of the law with the memorial or ideological function of the State, in particular the colonial State. While my assimilation of law and archive will be narrower and independent from State theory (which, epistemologically, is to complicate things somewhat), this is an appropriate analogy. Derrida explicitly says of the archive that “it has the force of law”, and the Benjaminian *Critik der Gewalt* provides a gloss to that force, even in *Archive Fever*, which is concerned with “the violence of the archive itself, *as archive, as archival violence...*”:

“...every archive...is at once *institutive* and *conservative*. Revolutionary and traditional. An *eco-nomic* archive in this double sense: it keeps, it puts in reserve, it saves, but in an unnatural fashion, that is to say in making the law (*nomos*) or making people respect the law...”<sup>32</sup>

In essence, archival violence reflects the interplay between the legal violence of Benjamin’s critique: one must preserve the archive in order to make an ‘initial’ authoritative interpretation; and such an interpretation is always slightly out of line with hitherto recorded precedent, a fresh interpretation and a new inscription each time. And this double violence is set in motion in *memory* as for law according to precisely the same deconstructive spirit that animated *Force of Law*: namely, the rejection of logocentrism, of ‘presence’. Just as there is no authorisation, by any ‘anterior legitimacy’ of the originary violence that founds the law, there is no possibility in the psychoanalytic context of a *spontaneous memory*, no possibility of gaining access to the origin of memory, to the lived experience:

“the archive, if this word or this figure can be stabilized so as to take on a signification, will never be either memory or anamnesis as spontaneous, alive and internal experience. On the contrary: the archive takes place at the place of originary and structural breakdown of the said memory”<sup>33</sup>.

The absence of the internal experience, like the absence of the legal origin, necessitates an incessant procedure whereby the archive is ‘selected’, imprinted, its material recalled. Notably, this is not a question of straightforward recall: although “the word and the notion of the archive seem at first, admittedly, to point towards the past, to refer to the signs of consigned memory, to recall faithfulness to tradition,”<sup>34</sup> the archive, presumably for want of origins, operates differently: “[i]t is a question of the future, the question of the future itself, the question of a response, of a promise and of a responsibility for tomorrow”<sup>35</sup>. Another parallel, then, with the promise (“perhaps”) of justice that comes with the deconstruction of the law; but one in which it is now the *past*, and not justice to the particular, that may, one day, be redeemed; and aside which we place the interpretive force of the archivist-*archon*, always both falling short of true *mnesis* and acting upon this responsibility to execute every archival inscription regardless.

But what is it, then, that compels this interplay of archival violence, of past and future? It is this question, I think, that ushers in the commensurability of ‘archive’ and ‘law’; and I think that the key can be found in Derrida’s conjuring, at the same time as analysing archival violence, of the pseudo-Freudian ‘death drive’. In *Beyond the Pleasure Principle*, Freud finally capitulated to theories of a death instinct (advanced in its most sophisticated form by Spielrein<sup>36</sup> some decade earlier), stating that “*the aim of all life is death*” and that the human instinct is to “return to the inanimate state”<sup>37</sup>. This instinct stands opposite the conservative instincts in a seemingly contradictory fashion, owing to the drive of the organism to die ‘in its own way’<sup>38</sup>. Importantly, for Derrida, the death drive is mute:

“It is at work, but since it always operates in silence, it never leaves any archives of its own. It destroys in advance its own archive, as if that were in truth the very motivation of its most proper movement. It works to *destroy the archive: on the condition of effacing* but also *with a view to effacing* its own “proper” traces... It devours it even before producing it on the outside.”<sup>39</sup>

Although it is nowhere stated in the text, this drive that leaves nothing behind is precisely in line, not with law-preserving or law-founding violence, but with the divine violence of Benjamin's Critique: a non-legal violence that leaves no trace. Likewise is the death drive in relation to the archive:

“This drive... seems not only to be anarchic, anarchotic...: the death drive is above all *anarchivic*, one could say, or *archiviolithic*. It will always have been archive-destroying, by silent vocation.”<sup>40</sup>

The violence which threatens law with wholesale destruction is therefore similar to an archiviolithic death drive, an archive-destroying drive; and this is precisely so because the instinct towards death is also an instinct towards *forgetting*:

“As the death drive is also, according to the most striking words of Freud himself, an aggression and a destruction... drive, it not only incites forgetfulness, amnesia, the annihilation of memory, as *mneme* or *anamnesis*, but also commands the radical effacement, in truth the eradication, of that which can never be reduced to *mneme* or to *anamnesis*, that is, the archive, consignation, the documentary or monumental apparatus as *hypomnema*...”<sup>41</sup>

Thus, says Derrida, the death drive “threatens every principality, every archontic primacy, every archival desire. It is what we will call... *le mal d'archive*, “archive fever”...”<sup>42</sup>. Indeed, there is “no archive fever without the threat of this death drive”; no archive desire “without the possibility of a forgetfulness which does not limit itself to repression”<sup>43</sup>. The drive of death and forgetting, which here threatens conscious memory with the obliterating force of forgetfulness, is one part of an aporetic double. The other part is the libidinal, creative repetition compulsion: the desire with which the psychical apparatus ‘creates archives’. In other words, “archive fever” signifies the paradoxical threat to the archive from *within* the archive; and the simultaneous yearning iteratively to *produce* archives:

“We are *en mal d'archive*: in need of archives... to be *en mal d'archive* can mean something else than to suffer from a sickness... it is to burn with a passion. It is never to rest, interminably, from searching for the archive right where it slips away. It is to run after the archive, even if there's too much of it, right where something in it anarchives itself. It is to have a compulsive,

repetitive, and nostalgic desire to return to the origin, a homesickness, a nostalgia for the return to the most archaic place of absolute commencement”<sup>44</sup>

Let us leave the detail of the text for now, and pause on that ‘nostalgic desire to return to the origin’. Just as Kafka’s *Before the Law* introduces the demi-myth of a door that lies open ‘only for us’ and that therefore *beckons* to us<sup>45</sup>, calling us by name and summoning us towards the law; likewise the threat to the archive by the archiviolithic instinct for forgetting instigates a compulsion towards the lost origin: one which cannot be satisfied and which is transferred instead to the production of *hypomnemic* archives – always less than memory, always a substitute for the origin. Even more than a yearning – this compulsion is described in the latter pages of the essay even as an *injunction*: Derrida speaks of an “injunction to remember the future”; an “archontic injunction to guard and to gather the archive”<sup>46</sup>. In the form of the injunction, the death drive propagates an internalised order, something in the form of a command from within.

The relationship of this interplay of the violence of forgetting and *hypomnesis* with the modern law is precisely this: the law is threatened by the forgetfulness of its origin, and issues to itself an injunction to recall the same. The continuous invocation of legal origins, which is a continuous appeal to memory; together with the impossibility of a return to the now-necessary origin (in the form of the rule of law) – all of this *menaces the law from within*, threatening it with the force of destruction, which is the same as the force of forgetting. In a wholesale forgetfulness of its origins, law is indistinguishable from command or violence or politics<sup>47</sup> and must continuously re-inscribe an inadequate memory into every normative moment.

Now, in some respects, this is deconstruction as usual, which in turn is nothing that an interlocutor like Vismann does not already know. But it seems that there is an important caveat here when it comes to “the law”. Usually, deconstructive accounts of legal phenomena gravitate to the critical or exceptional moments of law: the violence of the decision when presented with the particular<sup>48</sup>; or the act of signing, in the name of the People, the constitutive text of legal and political authority<sup>49</sup>. Not so with the archive. And the reason is this: there is an *urgency* that drives deconstruction as justice, as it is presented to us in *Force of Law*: “*the urgency that obstructs the horizon of knowledge*”<sup>50</sup>. “Justice,” Derrida tells us, “doesn’t wait”: and this is just because of what the (im)possible instance of justice *is* (or, more precisely, *might become*). The plane of calculability that sits opposite justice yet in relation to it – the plane of the law – is not subject to that compulsion. However, I would suggest that *internally* to the law, there is a determinate *need* to state the origin. This is what renders something like “the law”

commensurate with the archive: the need to recall, not just what has gone before, but the very possibility of origins, which is the verso of the blank space presented to us by the radical absence of origin; and of the continuous threat to precarious *hymponnemata* of prior norms or rules: that we might forget these substitutes where they are occluded by politics, violence or sovereign command.

And, of course, in circumstances similar to the inability of the psychoanalytic process to gain true access to spontaneous memory or lived experience in psychoanalysis, the law must nevertheless *refuse* to persist without memory of its origins; it must issue, and respond to, an *injunction*. For Derrida,

“The injunction [to remember/against forgetting], even when it summons memory or the safeguard of the archive, turns incontestably toward the future to come. It orders to promise, but it orders repetition, and first of all self-repetition, self-confirmation...”<sup>51</sup>

Likewise, the iterative self-confirmation of the law is carried out in the re-inscription of the origin at every stage of rule-making in positive legal systems (the Kelsenian and Hartian models, for example). The content of the norm is separated from its form in positivism; and it is precisely this formal structure that allows legal rules to summon an origin that is, as we saw in *Force of Law*, neither truly anterior nor ever guaranteed, but which demonstrates the logic of the archive. And just as the “prosthesis” of the *hymponnemic* substrate forms (as we shall see) the basis of the *hypomnesic* recollection in Freud’s analysis of the *Wunderblock*, so too does the law subsist on the basis of a falsified, or simulacral memory of origins – Derrida reminds us in *Force of Law* of Montaigne, for whom the lack of appeal to any natural law forces legal positivism to invent its fictitious supplement, like “women who use ivory teeth...forge [some] with some foreign material”<sup>52</sup>.

To address the dual problematic I raised at the conclusion of the previous section, then: deconstruction may easily pertain to the quotidian, *internal* structure of the law<sup>53</sup>; and moreover, given the inability of the latter to look for grounding authority outside of its own ‘unconscious’ or repressed memories of origin, the “law” properly so-called, or at least the version of the modern law that exists in tension with justice, is *archival*. The domain of approximated legal origins is reflected, then, in the first movement in which *hypomnesis* emerges in relation to the archive – as something less than memory. Again placing responsibility for the “concept of the archive” in the hands of the father of psychoanalysis, Derrida says:

“...Freud made possible the idea of an archive properly speaking, of a hypomnesic or technical archive, of the substrate or the subjectile which, in what is already a psychic *spacing*, cannot be reduced to memory: neither to memory as conscious reserve, nor to memory as remembrance, as an act of recalling. The psychic archive comes neither under *mneme* nor under *anamnesis*.”<sup>54</sup>

If the law becomes *hypomnetic* in its desire for, and falsification of, a memory of origins which it is forbidden nonetheless to forget; then it is also the case that there must be a method of falsification, a distancing of “the law” from the *idea* of the law. *Hypomnesis* invokes not simply an approximated memory, but also precisely the ‘substrate’ which is always in excess of memory. As for the *nature* of that excess – that which is always falsified, like ivory teeth, in place of the origin – we find a felicitous *analogy* in the prosthesis, the substrate which most prominently accompanies *hypomnesis*.

### **Writing, Substrate and Non-Being**

In *Archive Fever*, Derrida refers back to an earlier piece<sup>55</sup> in which he examines Freud’s note on the *Wunderblock*. Much like a sophisticated palimpsest, this Victorian recording device consists in a piece of celluloid paper over a wax tablet. An inscription made upon the paper, without the use of ink, leaves an impression on the underlying wax, and it will show upon the paper until the paper and wax are pulled apart and placed together again, blank and ready to begin anew. Not only does this apparatus allow for infinite use of its topmost surface – which always returns to its pristine form: the inscription is each time retained permanently on the wax – if we remove the topmost layer, it is possible to view every historic inscription at once, ‘under certain lights’. Thus we find a “double system contained in a single apparatus”<sup>56</sup> of recording and erasure. This system is, to Freud’s apparent delight, wholly analogous to the psychical apparatus: the “becoming-visible which alternates with the disappearance of what is written would be the flickering-up... and passing-away... of consciousness in the process of perception”<sup>57</sup>; while the wax that retains every inscription despite the refreshing of the topmost layer of the *Wunderblock* is analogous to the unconscious – which is precisely what psychoanalysis aims to take out and view, ‘under a certain light’.

It is not coincidental that this “materiality” of wax and topsheet makes its way into Vismann’s genealogy of “files”: in the act of ‘cancelling’, the command to delete is also a

command to displace the cancelled item with a fresh topsheet; while the development of wax inscription allows for an ever-more proximate relationship (due to the speed and immediacy of wax writing) of the record and the lived event. This appears to indicate, then, that the accompaniment of *hypomnesis*, as well as the law, is irreducibly ‘material’. Meanwhile, deconstruction is not a study of material *things* – and cannot possibly permit itself to be construed as such<sup>58</sup>. What does this suggest for the so-called ‘ontology’ of law? How might the archive, and more specifically *hypomnesis*, if it is of the same nature as the law, help to define the *ontology* of the law, other than to differentiate the latter from itself as force or idea is differentiated from materiality?

In *Dissemination*, Derrida elaborates upon a fable within a fable: the legend of the god Theuth (in Derrida’s extension, “Thoth”) as it emerges in the *Phaedrus* under the heading *The Inferiority of the Written to the Spoken Word*. Theuth had offered King Thamus a number of inventions, among which the function of writing was held out as “an accomplishment... which will improve both the wisdom and the memory of the Egyptians”<sup>59</sup>. Thamus rebukes this extollation of writing, however, since what Thoth has discovered “is a receipt for recollection, not memory”, in the application of which “pupils will have the reputation for [wisdom] without the reality”; they will be “thought very knowledgeable when they are ... quite ignorant”<sup>60</sup>. Opposed to writing is speech, which “behaves like someone attended in origin and present in person”. *Unmediated*, speech is intimately connected to the thought of the speaker, and capable of announcing truth and lived experience. It is guaranteed, in other words, by presence; whereas writing is only the simulacrum of memory, which can only be false: *hypomnesis*.

While there is not space here to analyse the path that Derrida traces from Socrates’ speech *back* to the supplement of the text<sup>61</sup>, what is interesting for the question of ‘materiality’ is Derrida’s further investigation of this figure of Theuth/Thoth. In the Socratic formulation, speech is attended by presence and thus, “[l]ike any person, the *logos-zoon* has a father”<sup>62</sup>, a *Pater* that is the chief, the capital and the good. But since is “no more possible to look [these paternal things] in the face than to stare at the sun”<sup>63</sup>. Socrates (so Derrida tells us) will “evoke only the visible sun, the son that resembles the father, the *analogon* of the intelligible sun...”<sup>64</sup>: that which we find by looking at reflections in the water “or some analogous medium”<sup>65</sup>; that which exists in the “*analogous* order of the sensible or visible”<sup>66</sup>. This order, however, is never the thing in itself; but (as Giles Deleuze<sup>67</sup> will tell us) the sum of so many planes of *exteriority*.

Writing, apparently orphaned, has no access to the protection or guarantee of its author. And yet the Egyptian god of writing is also the god of the Moon, owing precisely to his patrilineage, which “puts Thoth *in Ra’s place* as the moon takes the place of the sun. The god

of writing thus supplies the place of Ra, supplementing him and supplanting him in his absence and essential disappearance”<sup>68</sup>. Secondly, then: what difference is there, if any, between the *analogous* domain of water, the visible and the sensible, and the substitutive movement of the moon<sup>69</sup>? The sun withdraws each time, and escape from the play of substitution seems impossible. Finally, if speech is superior to writing because it is the unmediated sound of the “living breath”, “it goes without saying that the god of writing must also be the god of death”<sup>70</sup>. But ‘death,’ far from being simple nonexistence or cessation of life, is the “prerequisite, or even the experience, of that face-to-face encounter”<sup>71</sup> with the paternal sun, God the father.

This figure determines the nature, the materiality, of writing: for writing is the supplement of the living voice, of memory and truth; and while “the supplement *is* not, is not a being (*on*)”, it is also, and “nevertheless not a simple nonbeing (*me on*), either... [i]ts slidings slip it out of the simple alternative presence/absence. *That is the danger*”<sup>72</sup>. The supplement *defies* the opposition of being and non-being: “dangerous” in Rousseau’s formulation ‘dangerous supplement,’ because it “is the image and the representation of Nature... neither in nor out of nature...” and thus “dangerous for...the natural health of Reason”<sup>73</sup>. And it is dangerous *here* because writing, the hypomnetic *pharmakon*, is a poison for memory, which it displaces with a simulacrum that allows repetition, but also forgetfulness and impotence, since the textual substrate is always alienable from true knowledge and wisdom<sup>74</sup>.

The play of absence and presence in the supplement of writing is replicated in the archive, despite its ‘material’ appearance. In fact, Derrida tells us, in the note on the *Wunderblock* “Freud does not explicitly examine the status of the “materialized” supplement which is necessary to the alleged spontaneity of memory”<sup>75</sup> but that, with these several layers – topsheet, wax, inscription – and thus “[t]aking into account the multiplicity of regions *in* the psychic apparatus, this model [the Mystic Pad] also integrates the necessity, inside the *psyche* itself, of a certain outside, of certain borders between insides and outsides”<sup>76</sup>. Memory and repression cannot interact without a “domestic outside”: domestic because it is interior to the *psyche* but ‘outside’ the function of consciousness. Thus Freud has introduced an “*internal* substrate, surface, or space”; “the idea of a psychic archive distinct from spontaneous memory, of a *hypomnesis* distinct from *mneme* and from *anamnesis*: the institution, in sum, of a *prosthesis of the inside*”<sup>77</sup>. And not only in the psychic apparatus:

“There is no archive without a place of consignation, without a technique of repetition, and without a certain exteriority. No archive without outside.”<sup>78</sup>

Of course, a differentiation of law and archive would say the same thing: the archive is *exterior* to the law. What ‘domesticates’ the substrate, however, is the capacity of the latter to infect the *logos*: as with the psychic archive, so too with writing:

“The “outside” does not begin at the point where what we now call the psychic and the physical meet, but at the point where the *mneme*, instead of being present to itself in its life as a movement of truth, is supplanted by the archive... the space of writing, space *as* writing, is opened up in the violent movement of this surrogation, in the difference between *mneme* and *hypomnesis*. The outside is already *within* the work of memory.”<sup>79</sup>

Once again, however: isn’t this something already well known to those who would ontologically separate – with a view to functionally recoupling – “law and the archive”? Vismann is right, for example, to distinguish Derrida’s ‘textual’ treatise from her own ‘material’ genealogy. But a methodological impasse is not the same as an indictment; and it seems that we still lack a sufficient description of any coterminous, synonymous relationship of archive and law<sup>80</sup>. What, then, might this interior exteriority, this (n)on-tology add to the wider issue? Does it breach the shores of its methodological confinement?

If the matter admits of a solution, it is not only because of the priority of deconstruction to philosophy and to any possible jurisprudence: it is not even necessary to make that commitment, only to concede the force of the contradictions it unearths (excavates?) from time to time. Of course, Derrida’s strategy is often to accuse metaphysicians of their own textual dependency: in *Plato’s Pharmacy*, for example, Socrates is a pharmacist-magician, even while he speaks; and his student Plato *needs* writing (*hypomnesis*) even to put forward something like dialectics – which cannot therefore already exist ‘inscribed in the soul’. More apropos still for our purposes: for Plato, writing is emphatically necessary to the law:

“This necessity [of repetition to remember] *belongs to the order of the law* and is posited by the *Laws*. In this instance, the immutable, petrified identity of writing is *not simply added* to the signified law or prescribed rule like a mute, stupid simulacrum: it assures the law’s permanence and identity with the vigilance of a guardian. As another sort of guardian of the laws, writing guarantees the means of returning at will, as often as necessary, *to that ideal object* called the law. We can thus scrutinize it, question it, consult it, make it talk, without altering its identity”<sup>81</sup>

*And so on*: what follows this passage is a meticulous lineage of law and writing in Platonic discourse. Vismann never considers these greco-centric pages in *Dissemination* while dispensing with Derrida's pseudo-Roman "Imperial" thesis, and we must wonder at what difference, if any, their inclusion might have made.

### **Intersection: Law is Archival**

Since "the law" and "the archive" share, under the pain of forgetting, a *hypomnetic* existence, they become not only inseparable, but commensurate. It is not simply that the archive is a juridical structure; but that the law itself is, and can only be, *archival*: with its hypomnetic, compulsive iteration of lost origins – memories of, to misuse Agamben, "that which has never been"<sup>82</sup>. But also with its *strange* ontology, modern law is *nothing more or less than its archival structure*: guaranteeing, if not its origins, then the possibility of its perpetual effort to return to ever-further iterated supplements of the origin, which proliferate internally to, and not beside, "the law".

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<sup>1</sup> See Mawani “Law’s Archive”, 349. There is also an oblique reference to the work in Van der Walt, “Interrupting the Myth of Partage”, 290

<sup>2</sup> In “The Archive and the Beginning of Law” (41), Cornelia Vismann opens with the following: “In any attempt to describe Jacques Derrida’s mode of thinking, the word juridical comes to mind.”

<sup>3</sup> Vismann, *Files*, xii

<sup>4</sup> Zartaloudis, “The Archival Work of the Law”, 138

<sup>5</sup> See Agamben, *The Kingdom and the Glory*

<sup>6</sup> Vismann, *Files*, 13

<sup>7</sup> *Ibid.*, 29

<sup>8</sup> *Ibid.*, 13 (emphasis mine)

<sup>9</sup> Vismann, “The Archive and the Beginning of Law”

<sup>10</sup> *Ibid.*, 44

<sup>11</sup> *Ibid.*, 52 (emphasis mine)

<sup>12</sup> *Ibid.*, 44

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 43

<sup>17</sup> *Ibid.*, 44

<sup>18</sup> We may contrast Vismann’s differential relationship of law and archive to a more recent article by Renisa Mawani, in which she queries the underdevelopment of the state of legal discussion of *Archive Fever* and asserts, moreover, that “the law *is* the archive” (Mawani, “Law’s Archive”, 351, emphasis mine)

<sup>19</sup> Vismann, “The Archive and the Beginning of Law”, 51

<sup>20</sup> See Derrida, “Cogito and the History of Madness”; and Rob Boyne’s illuminating analysis of this issue in *Foucault and Derrida*

<sup>21</sup> Vismann, “The Archive and the Beginning of Law”, 52

<sup>22</sup> There is not sufficient space here to discuss the idea that modern law alone is ‘law’ insofar as it claims to have freed itself from power, violence or politics – of course, this is an ideological lietmotif, rather than an actual achievement of the law, and I do not suggest that we take seriously any notions of a ‘primitive law’ or a ‘pre-legal state’ in contradistinction to

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modernity. Rather, and to be Foucaultian (again), I am of the view that it is with a practiced *epoche* that we must approach this fable, in order to grasp our subject at last. See, e.g., Dreyfus and Rabinow, *Beyond Structuralism and Hermeneutics*.

<sup>23</sup> Zardaloudis, “The Archival Work of Law”, 136

<sup>24</sup> Derrida, “Deconstruction and the Possibility of Justice”, 24

<sup>25</sup> *Ibid.*,

<sup>26</sup> Derrida, *Archive Fever*, 11

<sup>27</sup> I am drawing a parallel here with the Freud of Derrida’s text who ‘pretends to worry’ about the potentially wasteful expenditure of material in putting to the press his thesis on the death drive. It is precisely because of its destructive force that such expenditure finds its justification and, as I shall explain, the death drive has everything to do with forgetfulness and law. See Derrida, *Archive Fever*, 8-12

<sup>28</sup> The same problem is not, apparently, encountered in other disciplines. There are many examples, but to cite only two: an interdisciplinary forum including speakers from political science, anthropology, archive studies, history, medicine and literature culminated in the edited collection Hamilton, C et. al. (eds) *Refiguring the Archive*, in which psychoanalysis is a recurring theme. Likewise, in the field of literature scholarship, Cathy Carruth analyses *Archive Fever* in its psychoanalytic context in *Literature in the Ashes of History*.

<sup>29</sup> In *Archive Fever*, Derrida indicates that “[w]e have no concept, only an impression... “Archive” is only a *notion*...”; this notwithstanding that he will later ask if there is already a “concept of the archive” (33); and that he will elaborate three theses “to do with the concept of the archive” (91). Verne Harris has commented on this point that “Not only are there numerous competing concepts associated with the word [“archive”] but from within the word itself... there is a troubling of meaning. However we understand the word ‘archive’, it remains true to say that all Derrida’s work is, in a sense, about the archive...” Harris, “A Shaft of Darkness: Derrida in the Archive”, 61.

<sup>30</sup> Derrida, *Archive Fever*, 29

<sup>31</sup> Mawani, “Law’s Archive”, 357

<sup>32</sup> Derrida, *Archive Fever*, 7

<sup>33</sup> *Ibid.*, 11

<sup>34</sup> *Ibid.*, 33

<sup>35</sup> *Ibid.*, 36

<sup>36</sup> See Spielrein, “Destruction as the Cause of Coming into Being”

<sup>37</sup> Freud, *Beyond the Pleasure Principle*, 71

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<sup>38</sup> *Ibid.*, 72

<sup>39</sup> Derrida, *Archive Fever*, 10

<sup>40</sup> *Ibid.*,

<sup>41</sup> *Ibid.*, 11

<sup>42</sup> *Ibid.*, 12

<sup>43</sup> *Ibid.*, 19

<sup>44</sup> *Ibid.*, 91

<sup>45</sup> For Derrida, the openness of the gate to an inaccessible law “fuels desire for the origin”. See Derrida, “Before the Law”, 197

<sup>46</sup> Derrida, *Archive Fever*, 77

<sup>47</sup> As with Schmitt, or H.L.A. Hart in his critique of John Austin

<sup>48</sup> As in Derrida, “Force of Law” (N.B. in this essay I am using the version published as “Deconstruction and the Possibility of Justice”)

<sup>49</sup> As in Derrida, “Declarations of Independence”

<sup>50</sup> Derrida, “Deconstruction and the Possibility of Justice”, 26

<sup>51</sup> Derrida, *Archive Fever*, 79

<sup>52</sup> Derrida, “Deconstruction and the Possibility of Justice”, 12

<sup>53</sup> I am not, of course, the first to suggest that this is the case: see Couzens Hoy, “Dworkin’s Constructive Optimism v Deconstructive Legal Nihilism”

<sup>54</sup> Derrida, *Archive Fever*, 91-92

<sup>55</sup> Derrida, “Freud and the Scene of Writing”

<sup>56</sup> *Ibid.*, 280

<sup>57</sup> *Ibid.*, 282-3

<sup>58</sup> Derek Attridge reminds us that: “Although sometimes misrepresented in this way, Derrida’s claims about writing do not refer to its “materiality” or physical and visible substance; on the contrary, such a notion of language, dependent as it is on the opposition between the sensible and the intelligible, is a longstanding metaphysical one” (see Attridge, “Introduction” to *Acts of Literature*, 9, n.11). Indeed, Derrida says of writing that “written traces no longer even belong to the order of the *physis*, since they are not alive” (*Dissemination*, 105) – indeed, the intimate relationship of death and writing thus prohibits the straightforward, sensible existence of the latter.

<sup>59</sup> Plato, *Phaedrus*, 96

<sup>60</sup> *Ibid.*

<sup>61</sup> But the literature is wide: the already-cited work by Rob Boyne is a case in point.

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<sup>62</sup> Derrida, *Dissemination*, 80

<sup>63</sup> *Ibid.*, 82

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, 84

<sup>66</sup> *Ibid.*, 83

<sup>67</sup> For example, his elaboration of the ‘visible’ and the sensible in *Foucault*

<sup>68</sup> *Ibid.*, 89

<sup>69</sup> “Nevertheless, between *mneme* and *hypomnesis*, between memory and its supplement, the line is more than subtle; it is hardly perceptible. On both sides of that line, it is a question of repetition. Live memory repeats the presence of the *eidos*, and truth is also the possibility of repetition through recall” (Derrida, *Dissemination*, 111)

<sup>70</sup> *Ibid.*, 91

<sup>71</sup> *Ibid.*, 92

<sup>72</sup> *Ibid.*, 109

<sup>73</sup> Derrida, “...That Dangerous Supplement...”, 89

<sup>74</sup> See Derrida, *Dissemination*, 110

<sup>75</sup> Derrida, “Freud and the Scene of Writing”, 286 (cited in *Archive Fever*, 14)

<sup>76</sup> Derrida, *Archive Fever* 19

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, 11

<sup>79</sup> Derrida, *Dissemination*, 109

<sup>80</sup> See my earlier comments regarding Mawani’s contextualisation of archive as law around the State

<sup>81</sup> Derrida, *Dissemination*, 113 (emphasis mine)

<sup>82</sup> See Agamben, “Philosophical Archaeology” in Agamben, *Theory of the Signature*