

Evidence and the Archive

Ethics, aesthetics and emotion

Edited by
Katherine Biber and Trish Luker



ROUTLEDGE



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Evidence and the Archive

This collection explores the stakes, risks and opportunities invoked in opening and exploring law's archive and re-examining law's evidence. It draws together work exploring how evidence is used or misused during the legal process, and reused after the law's work has concluded by engaging with ethical, aesthetic or emotional dimensions of using law's evidence. Within sociolegal discourse, the move towards 'open justice' has emerged concurrently with a much broader cultural sensibility, one that has been called the "archival turn" (Ann Laura Stoler), the "archival impulse" (Hal Foster) and "archive fever" (Jacques Derrida). Whilst these terms do not describe exactly the same phenomena, they collectively acknowledge the process by which we create a fetish of the stored document. The archive facilitates our material confrontation with history, historicity, order, linearity, time and bureaucracy. For lawyers, artists, journalists, publishers, curators and scholars, the document in the archive has the attributes of authenticity, contemporaneity and the unique tangibility of a real moment captured in material form. These attributes form the basis for the strict interpretive limits imposed by the rules of evidence and procedure. These rules do not contain the other attributes of the archival document, those that make it irresistible as the basis for creative work: beauty, violence, surprise, shame, volume and the promise that it contains a tantalising secret. This book was previously published as a special issue of *Australian Feminist Law Journal*.

Katherine Biber is a legal scholar, historian and criminologist and Professor of Law at the University of Technology Sydney. She researches in the field of evidence, criminal procedure, visual culture and documentation. She is the author of *Captive Images: Race, Crime, Photography* (2007) and the forthcoming, *In Crime's Archive: The Cultural Afterlife of Evidence* (2017). She is a co-editor of *The Lindy Chamberlain Case: Nation, Law, Memory* (2009), and an editor of the *Oxford Research Encyclopedia of Crime, Media and Popular Culture* (forthcoming).

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Evidence and the Archive: Ethics, Aesthetics and Emotion

Katherine Biber and Trish Luker

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Affecting Evidence: Edith Thompson's Epistolary Archive

Rosanne Kennedy

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Chapter 2

Unsettled Explorations of Law's Archives: The Allure and Anxiety of Solomon Islands' Court Records

Rebecca Monson

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But I Want to Speak Out: Making Art from Women's Testimonies

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Heather Roberts

Australian Feminist Law Journal, volume 40, issue 1 (June 2014) pp. 147–162

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INTRODUCTION

EVIDENCE AND THE ARCHIVE: ETHICS, AESTHETICS AND EMOTION

Katherine Biber and Trish Luker

During her lifetime, Susan Sontag sent 17,198 emails. Today they are kept in the Department of Special Collections at the Charles E. Young Research Library at University of California Los Angeles (UCLA), where researchers can read them on a special laptop. The emails reveal the minutiae of her friendships, her appointments, and the small, forgotten details of everyday life. Sontag's official biographer, Benjamin Moser, has written about the 'queasiness' he felt as he read them, 'unease, sometimes verging on nausea', as he was drawn into his subject's sex life, her finances, medical records, failures, disappointments, and difficulties.¹ Sontag's email archive is stored on two small hard drives, each labelled with a Post-it note.

Sontag was born in 1933, so most of the Susan Sontag archive is on paper. The Sontag papers run across 132 linear feet, filling 264 boxes, 67 oversize boxes and one oversize map folder. They include letters sent to and from Sontag, arranged alphabetically, including correspondence with artists and writers, personal correspondence, and love letters. Her opera programmes, political activism, teaching materials, notes and manuscripts relating to her published and unpublished works are there, and also juvenilia — crayon drawings on newsprint made when she was aged around six, and writing practice in pencil from around the same time² — her spelling and school workbooks, junior high school projects, exam papers and course

¹ Moser Benjamin 'In the Sontag Archives' *The New Yorker* blog 30 January 2014. Available at: <http://www.newyorker.com/online/blogs/books/2014/01/in-the-sontag-archives.html?> (Accessed 15 July 2014).

² Susan Sontag papers (Collection Number 612) Department of Special Collections, Charles E Young Research Library, University of California Los Angeles. Juvenilia (ca 1939) Box 295 Folders 1 and 2.

notes from her undergraduate and graduate studies.³ The collection is augmented by her library of 20,000 books, many of them annotated or inscribed.⁴

The collection is probative of Sontag's auto-archiving practices, evident since her early childhood, and it was purchased directly from her in two tranches, with archivists aspiring to maintain Sontag's own systems for organising and arranging her records.⁵ Whilst all archivists are familiar with the effects of time and climate upon paper records, Moser writes about the challenges faced by UCLA archivists in protecting Sontag's digital files against the ravages of 'bit rot', the instability of computer storage drives, and the threats of technological obsolescence; documents she created around 1995 on a PowerBook 5300 need to be preserved using new software and equipment enabling researchers to view these materials as Sontag would have seen them.⁶ UCLA archivists have used techniques developed by law enforcement to ensure that the documents are preserved in their original format, with subsequent viewers leaving no digital traces upon them.⁷

Although Moser knows he is consulting records that Sontag deliberately intended for public access, he nevertheless describes 'the feeling of creepiness and voyeurism that overcame me' as he read Sontag's emails, imagining her 'thinking and talking in real time'.⁸ Despite the accessibility of this vast archive, and the intimate insights it provides into her life and affairs, there are two boxes of Sontag's journals which are restricted until 2029, 25 years after her death.⁹

Researchers who use archival sources form various ethical, aesthetic, and emotional relations with their sources. These arise regardless of how they may conceive of the 'archive'. Contributions to this special issue of *Australian Feminist Law Journal* investigate the material and conceptual traces of law, and explore how scholars from different disciplines imagine themselves as working 'archivally'. This may involve engagement with the archive as a site, a repository of sources; it may also be a research subject in itself, invoking distinct methods, discourses, and aesthetics.

1.0 WORKING WITH ARCHIVES

Questions and concerns about working with archives often turn upon matters of access, use, and interpretation. When accessing an archive, one might be visiting an official state record-keeping institution, perusing a private collection, searching online, or doing something else entirely. Some access is obtained legitimately, sometimes it is serendipitous, and at times it is illicit. For instance, the historian and folklorist Bruce Jackson includes in his book *Pictures from a Drawer* photographs

³ As above Junior High School (ca 1943–45) Box 146 Folders 10 and 11; High School (1947–49) Box 117 Folder 4 and Box 146 Folder 12; Undergraduate (1949–51) Box 146 Folders 13–15 and Box 147 Folders 1–5; Graduate (1953–57) Box 147 Folders 6–11, Box 148 Folders 1–8, Box 149 Folders 1–8, Box 150 Folders 1–8, Box 151 Folders 1–9, and Box 152 Folders 1–8.

⁴ Books from the Library of Susan Sontag (Collection Number 892) Department of Special Collections, Charles E Young Research Library, University of California Los Angeles.

⁵ See 'Processing History' in Finding Aid for the Susan Sontag papers (ca 1939–2004). Available at: <http://www.oac.cdlib.org/findaid/ark:/13030/kt2489n7qw/admin/#did-1.2.1> (Accessed 15 July 2014).

⁶ Moser above note 1.

⁷ As above.

⁸ As above.

⁹ Susan Sontag papers above note 2 at Boxes 136 and 137.

taken of prisoners at Cummins Prison Farm in Arkansas which were taken at the time of their admission.¹⁰ Jackson discovered a drawer full of extra photographs whilst conducting fieldwork in the prison and describes how he furtively stole 98 photographs, and then stored them in a cigar box for years until he came to produce the book.¹¹

Does the mode of his acquisition constitute an unethical research practice? Does the book's publication by a prestigious academic press recuperate his crime, and somehow transform it into legitimate scholarship?¹² Does the acknowledgment that the photographs are haunting and compelling outweigh the methods by which they were obtained? Conversely, the photographer and psychoanalytic scholar Henry Bond acquired archival photographs through a legitimate process, during his research into criminal case files in the British National Archive. However, his use of these images, in a project wherein he attempts to 'diagnose' perpetrators of sexual homicide according to a Lacanian schema by looking for 'clues' in crime scene photographs, has been subjected to criticism as an instance of *mis*-use of archival sources. His book *Lacan at the Scene*¹³ has been described as 'a depraved and degrading celebration of sexualized homicide',¹⁴ with Bond 'revel[ling] in the provocative and scandalous nature of his project'.¹⁵ Are there ethical limits upon what might be done with archival sources, and what kind of ethical precepts or responsibilities are engaged by archival access?

In another example, the artist William E. Jones retrieved criminal evidence — a surveillance film made by Ohio police in a 1962 operation investigating homosexual public sex — from a retired detective's garage. He kept a copy for himself and sent the original 16mm film to the Kinsey Institute, thereby 'archiving' the found object.¹⁶ Whereas the original film was used to prove criminality in legal proceedings, Jones uses it as evidence of another kind: in his artwork *Tearoom* (1962/2007), the film is screened in silence, mostly unaltered, and the footage becomes evidence of gay intimacy, gay sexual practices, cruising, and policing. Jones, simply by re-presenting archival footage in an art space, transforms it from probative evidence into an aesthetic and political artefact.¹⁷ Must archival sources be interpreted according to their original contexts, or can significance or meaning change over time, or wherever the archival visitor is motivated to advance new interpretations?

¹⁰ Jackson Bruce *Pictures from a Drawer: Prison and the Art of Portraiture* Temple University Press Philadelphia 2009.

¹¹ As above at 19.

¹² Biber Katherine 'Review Essay: *Wanted: The Outlaw in American Visual Culture; Capturing the Criminal Image: From Mug Shot to Surveillance Society; Pictures from a Drawer: Prison and the Art of Portraiture*' (2011) 35(4) *History of Photography* 439 at 441.

¹³ Bond Henry *Lacan at the Scene* MIT Press Cambridge MA and London 2009.

¹⁴ Biber Katherine 'In Crime's Archive: The Cultural Afterlife of Criminal Evidence' (2013) 53(6) *British Journal of Criminology* 1033 at 1036.

¹⁵ Carrabine Eamonn 'Seeing Things: Violence, Voyeurism and the Camera' (2014) 18(2) *Theoretical Criminology* 134 at 152.

¹⁶ Jones William E *Tearoom* 2nd Cannons Publications Los Angeles 2008.

¹⁷ See Biber Katherine and Dalton Derek 'Making Art from Evidence: Secret Sex and Police Surveillance in the Tearoom' (2009) 5(3) *Crime Media Culture* 243.

Whilst archives might be collections of facts, processes, or events, archives can also be emotional repositories. When Lindy Chamberlain was in Berrimah Prison following her conviction for the murder of her baby, Azaria, thousands of people sent her letters and cards. After her acquittal and release from prison, thousands more wrote to her. In total, Lindy received 20,000 letters from strangers, some of them addressed to her as 'Lindy at Ayers Rock', 'the Darwin courthouse', or simply 'Darwin'.¹⁸ With the assistance of her parents and her then-husband Michael Chamberlain, she collected and arranged the letters according to her own system. For instance, hostile letters, which were usually anonymous, might be classified as 'nasty' or 'nut'.¹⁹ Later, Lindy sold all of the letters, together with her personal papers relating to her miscarriage of justice, to the National Library of Australia, which sought to retain the letters and also her distinctive classifications.²⁰ The Chamberlain papers fill 70 boxes, and their first archivist, Adrian Cunningham, asserts that they 'reveal the depth of emotional involvement in the Chamberlain case experienced by countless thousands of ordinary Australians';²¹ the Chamberlain papers are a literal archive of feelings.

The Chamberlain papers also provide evidence of Lindy's personal relationship with her archive. Cunningham explains that prior to Azaria's death, Lindy was 'only a marginally more retentive recordkeeper than the average person' but her experiences 'transform[ed] her into an obsessive recordkeeper'.²² Michael Chamberlain, however, was a professional member of the Australian Society of Archivists, and Cunningham speculates on the role he may have played in instigating Lindy's auto-archiving practices.²³ One of the collection's independent valuers wrote:

The style and spirit of its ordering are such that it offers an unusual degree of completeness. It has been assembled in a fashion so rigorous that it is almost impossible to imagine an instance of conscious or willing exclusion.²⁴

While, of course, Lindy's ongoing accumulation of papers relating to Azaria, a discipline she continues today, is motivated by her desire to remember and honour her daughter, Cunningham writes that her persistent collecting, and the decision of the Chamberlain family to sell their papers to a public institution, responds to their knowledge of the 'symbolic significance' of their litigation in Australian collective

¹⁸ Howe Adrian 'Writing to Lindy — "May I call you Lindy?"' in Staines Deborah, Arrow Michelle, and Biber Katherine (eds) *The Chamberlain Case: Nation, Law, Memory* Australian Scholarly Publishing North Melbourne 2009 p 221 at 223; Staines Deborah 'Textual Traumata: Letters to Lindy Chamberlain' (2008) 5(1) *Life Writing* 97.

¹⁹ Howe above at 223.

²⁰ See Papers of Lindy Chamberlain (1944–2010) National Library of Australia catalogue record. Available at: <http://catalogue.nla.gov.au/Record/1475359?lookfor=lindy%20chamberlain&offset=6&max=74> (Accessed 15 July 2014). Note that a large portion of the Lindy Chamberlain papers are not available for research.

²¹ Cunningham Adrian 'Icons, Symbolism and Recordkeeping: The Lindy Chamberlain and Eddie Mabo Papers in the National Library of Australia' in Staines et al above note 18 at 263.

²² As above at 264.

²³ As above.

²⁴ Cited in Staines et al above note 18 at 264.

memory.²⁵ As a collection, it demonstrates many of the themes we have invited contributors to explore in this special issue.

2.0 WHAT IS AN ARCHIVE?

An archive might be an official repository of state records, it might be a private collection of papers, or it may be a means of bringing together materials related to a specific group or agency. It might be easily accessible, for instance, freely available online, or it might require that visitors make some effort, or travel some distance, to view its contents. It might be restricted to certain people, or it might be closed altogether, whether permanently or for a defined period. Visitors might require permission or documentation to access it, they might be obliged to conform to certain protocols, or they might use an online search facility.

The archivist John Ridener writes that ‘archives hold singular information not duplicated elsewhere’.²⁶ Alternatively, the historian Antoinette Burton defines an archive as ‘traces of the past collected either intentionally or haphazardly as “evidence”’.²⁷ For the curator Charles Merewether, what distinguishes an archive from a library or a collection is that the archive ‘constitutes a repository or ordered system of documents and records, both verbal and visual, that is the foundation from which history is written’.²⁸ As art theorist Sven Spieker explains, since the late twentieth century, ‘there seems to be little consensus as to what an archive is, [and] how it might be distinguished from other types of collections’.²⁹ He argues against the conception of the archive as ‘a giant filing cabinet at the center of a reality founded on ordered rationality’.³⁰

Historically, the notion of an archive has repeatedly reformed itself around new administrative, technological, or ideological demands. Early efforts to consolidate processes for state record-keeping were driven by the desire of Dutch colonial administrators to preserve evidence of their endeavours. Later, new techniques were demanded to collect documentation relating to the First and Second World Wars, where records needed to be drawn together from many different sources, each with their own record-keeping protocols and technologies. With the gradual emergence of discourses of transparency and accountability, citizens issued new demands upon archives. Rather than recording the workings of government, the rationale for archives shifted to recording the nature and incidence of governance, from a power-based institution to a memory-based structure, reflecting a shift from the subject of administration to its substance.³¹

²⁵ As above at 265.

²⁶ Ridener John *From Polders to Postmodernism: A Concise History of Archival Theory* Litwin Books Duluth MN 2008 at 4.

²⁷ Burton Antoinette ‘Introduction: Archive Fever, Archive Stories’ in Burton Antoinette (ed) *Archive Stories: Facts, Fictions and the Writing of History* Duke University Press Durham NC & London 2005 p 1 at 3.

²⁸ Merewether Charles ‘Introduction: Art and the Archive’ in Merewether Charles (ed) *The Archive* Whitechapel Gallery London & MIT Press Cambridge MA 2006 p 10 at 10.

²⁹ Spieker Sven *The Big Archive: Art from Bureaucracy* MIT Press Cambridge MA & London 2008 at 4–5.

³⁰ As above at 1.

³¹ Ridener above note 26 at 111.

Whether accumulated for posterity and history or responding to ideologies of open government and accountability, the creation of archives suggests that somebody will one day seek access. For archivists, the smallest unit of archival organisation is the 'record'.³² It is through the process of archival appraisal and organisation that information becomes a 'record'; records are valuable not only for the information they contain, but simply because of their retention in the archive. Records anticipate a future archival user, somebody who might be interested in the information they contain, and the context from which they emerged. What counts as a 'record', however, has been subject to ongoing disciplinary wrangling, much of which may be cancelled by radical technological change.

However, even without a future visitor, an archive might come into being, thereby fulfilling Burton's 'archive logics', wherein the past is brought into contact with the present, and perhaps the future.³³ Indeed, the creation of an archive may be the fulfilment of a desire — the desire to accumulate, to arrange, or to store. An archive which is accumulated for its own sake is not stored in anticipation of future access. In this way, gathering, collecting, gleaning, hoarding, sorting, ordering, arranging, and re-arranging might all be labelled archival practices.

But can any accumulation of materials be regarded as an 'archive'? Burton describes the anxieties of some scholars that 'everything' might be an archive, 'everywhere and hence nowhere',³⁴ and which might be a consequence of democratisation, where individuals and non-government groups now also frequently inaugurate archival projects. Spieker, writing in the context of art production, explains that, to some extent, the term has to be surrendered:

artists will call 'archives' whatever they want. ... The term has its own history already in the discourse of art, and I suppose one simply has to accept that. ... [But] one has to be very careful not to void it of any specific meaning.³⁵

As these theorists demonstrate, the notion of the 'archive' has been claimed and contested within cultural and critical discourse in the humanities. However, in calling for contributions to this special issue, we were motivated by a specific interest in exploring how scholars have deployed the term within *legal* inquiry. In particular, we were interested in whether legal evidence could be imagined archivally. We invited contributors to explore the types of uses to which evidence is put after the conclusion of court proceedings, and also to examine the ethical, aesthetic, and affective implications of drawing upon this material. Given the interest in contemporary cultural theories to invoke the notion of the archive discursively, we were also motivated to explore the mode of 'archival thinking' in relation to legal discourse.

Evidence — the material adduced by parties to support their claims in litigation — might include documents, witness testimony or real evidence, including objects,

³² As above at 124.

³³ Burton above note 27 at 11.

³⁴ As above at 5.

³⁵ Spieker Sven *Un-knowing, Getting Lost, Linking Points in Space: The New Archival Practice* paper presented at Artists & Archives: A Pacific Standard Time Symposium, Getty Research Institute 12 November 2011. Proceedings accessible at <http://www.youtube.com/watch?v=NVKTtyr6dBk> Part 1 of 3 at around 1.02.00 – 1.05.12. (Accessed 15 July 2014).

places, experiments, or demonstrations. Increasingly, evidence also includes photographic or digital visual materials. During the legal process, evidence is governed by strict rules and processes limiting the ways it might be tendered, used, and interpreted. However, after the conclusion of proceedings, these rules no longer apply, and evidentiary material returns to a notional archive, where it may or may not be subject to archival regulations.

Does an evidentiary afterlife continue in the archive? Indeed, evidence continues to live, being accessed and reanimated for an ever-growing range of purposes and projects. Some of the contributors to this special issue explore the evidentiary archive by testing the limits of archival thinking, with creative works enabling scholars to investigate some of the claims made upon archives, conceptually, for the advancement of their own projects.

In ‘Rotten Prettiness? The Forensic Aesthetic and Crime as Art’, Rebecca Scott Bray describes the art practice of four contemporary artists who rely upon the *aesthetics* of the criminal archive. She explains how art photography might appropriate legal evidence and documentation for its aesthetic effects, and its indexicality — that it might refer to something outside of itself.³⁶ In some of the work discussed, the artists construct their own crime ‘archives’, accumulating traces of past events and re-presenting them as evidence of something beyond crime. These contemporary artists are engaged in abstractions and translations of the concept of an archive, drawing upon the aesthetic qualities of legality and forensics, and making new demands upon discourses of crime as spectacle.

Whereas Scott Bray writes about wilful accumulation as an archival practice, it is accidental accumulation which is the subject of the contribution by Prudence Black and Peta Allen Shera, ‘Out, Damned Spot! The Stained Cloth of Kennedy, Lewinsky, and Margiela’. The authors investigate accidental stains on garments, and the probative and affective nature of these inadvertent ‘archives’. By identifying specific instances of contamination and fascination, their article draws our attention to the notion of accumulation itself, as a site of anxiety and abjection. In this way, they test the limits of the concept of an archive by associating it with the notion of the evidentiary trace.

3.0 ARCHIVES AS OFFICIAL RECORDS

Legal historians have long recognised that legal archives, such as court records, contain valuable information which may not be available elsewhere. Records of court proceedings, including transcripts and other evidentiary materials, are unique archival sources because they are the official record of a legal system. Such documents have distinctive characteristics, including their potential sensitivity and confidentiality, which must be considered when transferring them into archival records so that they can be used for research purposes. Certain principles, policies, and practices govern public access to court records which are intended to balance the sometimes competing interests of open courts and individual rights to privacy.³⁶

³⁶ Shepard C J ‘Court Records as Archival Records’ (Summer 1984) 18 *Archivaria* 124; Bellis Judith ‘Public Access to Court Records in Australia: An International Comparative Perspective and Some Proposals for Reform’ (2010) 19 *Journal of Judicial Administration* 197.