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# Law, ‘presentist’ agendas, and the making of ‘official’ memory after collective violence

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## Abstract

This article interrogates how law is used to make ‘official’ memory in transitional justice (TJ) contexts. It posits that law performs three key roles in the ‘making’ of memory after conflict and authoritarianism: visibility, definition, and judgement. Using insights from existing academic literature that has addressed TJ processes and mechanisms across geographical sites and time frames, it argues that law is central to memory making by rendering certain harms, victims, and victimizers either ‘seen’ or ‘unseen’, by categorizing certain actors and timeframes into binary groupings, and by judging particular actors and actions to be either morally good or morally bad. The decisions that law makes on each of these fronts, it is argued, are ultimately determined by how the prevailing post-conflict state wishes to have the divisive past understood in the present.

## 1 | INTRODUCTION

The relationship between law and memory has been explored in an increasing body of socio-legal scholarship on ‘memory laws’.<sup>1</sup> Existing since the 1980s, but gaining purchase with the rise

<sup>1</sup> B. Bevernage and N. Wouters (eds), *The Palgrave Handbook of State-Sponsored History after 1945* (2018); Y. Gutman, ‘Memory Laws: An Escalation in Minority Exclusion or a Testimony to the Limits of State Power?’ (2016) 50 *Law & Society Rev.* 575.

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of French Holocaust denial laws in the 2000s,<sup>2</sup> these laws explicitly seek to regulate the public remembrance of a divisive past.<sup>3</sup> As an area of study concerned with legal and non-legal attempts to address the legacy of human rights abuse,<sup>4</sup> transitional justice (TJ) shares this interest in the representation of contested pasts within post-conflict and/or post-authoritarian societies. The expansion of TJ scholarship ‘beyond legalism’<sup>5</sup> has birthed a rich literature on diverse mechanisms and processes, including lustration, criminal trials, amnesties, truth commissions, and public inquiries.<sup>6</sup> Though invariably ‘creatures of law’,<sup>7</sup> these mechanisms and processes are intrinsically involved in ‘memory making’ through documenting the abuses of the past in various ways and to various degrees.

Memory making, Martha Minow argues, demands a balance between ‘too much memory and too much forgetting’.<sup>8</sup> Instead of seeking this balance, the interplay between law and memory can be used to support what Barry Schwartz calls the ‘presentist’ agenda of pursuing contemporary socio-political interests following collective violence.<sup>9</sup> Depending on the particular context, ‘presentist’ agendas might necessitate that law is used to censor, rather than simply record, the past.<sup>10</sup> This is not to say that TJ mechanisms and processes ‘invent’ the past,<sup>11</sup> but rather that they ‘embellish’ it so that it is ‘consistent with present or future objectives’.<sup>12</sup> A deliberately selective account of the past that serves present interests is thus created and then subsequently packaged as an apolitical ‘official’ memory.

While this raises pertinent questions about the selectivity of, motivation for, and degree of reception attained by ‘official’ memory in TJ contexts, the matter nonetheless remains neglected in existing scholarship. Granted, a growing literature on memory laws does exist, and a burgeoning

<sup>2</sup> N. Kopolov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (2018).

<sup>3</sup> I. Markovits, ‘Selective Memory: How the Law Affects What We Remember and Forget about the Past: The Case of East Germany’ (2001) 35 *Law & Society Rev.* 513.

<sup>4</sup> N. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes (Vol. 2)* (1995); L. Stan and N. Nedelsky (eds), *Encyclopedia of Transitional Justice (Vol. 1)* (2013); R. Teitel, *Globalizing Transitional Justice: Contemporary Essays* (2015).

<sup>5</sup> K. McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34 *J. of Law and Society* 411; P. Lundy and M. McGovern, ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up’ (2008) 35 *J. of Law and Society* 265.

<sup>6</sup> See P. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2011, 2<sup>nd</sup> edn); G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2002); K. McEvoy and L. Mallinder, ‘Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy’ (2012) 39 *J. of Law and Society* 410; M. Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (2010); L. Laplante, ‘Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes’ (2009) 49 *Virginia J. of International Law* 8; L. Laplante and K. Theidon, ‘Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru’ (2007) 29 *Human Rights Q.* 228; M. Osiel, *Mass Atrocity, Collective Memory and the Law* (1997); M. Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair* (2002).

<sup>7</sup> McEvoy, *op. cit.*, n. 5.

<sup>8</sup> M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998) 4.

<sup>9</sup> B. Schwartz, ‘The Social Context of Commemoration: A Study in Collective Memory’ (1982) 61 *Social Forces* 374.

<sup>10</sup> S. Felman, *The Juridical Imagination: Trials and Traumas in the Twentieth Century* (2002) 84.

<sup>11</sup> E. Hobsbawm and T. Ranger, *The Invention of Tradition* (2012).

<sup>12</sup> R. Lemarchand, *Burundi: Ethnic Conflict and Genocide* (1994) 19.

literature on memory and TJ has also taken root.<sup>13</sup> Yet this scholarship only provides a limited insight into the interplay between law and memory in *specific* TJ processes and mechanisms. A more expansive critique of the interplay between law and memory *across* TJ mechanisms, processes, and geographical sites remains conspicuous by its absence. Even if existing scholarship tells us how memory laws in one site make ‘official’ memory, it has not broadened its lens of inquiry to draw parallels with how law is similarly used to make ‘official’ memory through prosecutions, truth commissions, and institutional reform elsewhere.

This article draws together the literature on law, memory, and TJ to conduct a theoretical overview of law–memory interplay in multifarious TJ contexts. Its original contribution lies in synthesizing these existing studies in a way that transcends a narrow mechanism or site-specific empiricism *and* in theoretically framing this within the matrix of the ‘fourth generation’ of TJ scholarship that interrogates how TJ interventions conceal power dynamics, ideological agendas, and continued structural exclusion.<sup>14</sup> As a piece of critical ‘fourth-generation’ TJ scholarship, the article sees its remit as asking ‘nagging questions’ about where TJ mechanisms, processes, and discourses have *come from* and are *heading to*.<sup>15</sup> A compelling case exists for asking such questions about law–memory interplay; while TJ has traditionally exhibited ‘a faith in the power of law’,<sup>16</sup> it has been slower to ‘understand that memory can be and is shaped by law’.<sup>17</sup> Grappling with the ‘nagging questions’ of how law *has been* and *continues to be* used to shape ‘official’ memory in TJ contexts, the article responds to recent calls within the literature to ‘problematise and politicise the law of TJ’.<sup>18</sup>

Two caveats are expressly spelt out at this introductory juncture. First, the article accepts that socio-legal scholarship *should not* fixate on whether or not law *should* be used to make memory,<sup>19</sup> but *should* instead critically analyse what the law *does* in practice to make memory.<sup>20</sup> As Austin Sarat and Thomas Kearns argue, we should not necessarily ask whether it is right that law is intentionally used to create collective memory, but rather *how* and *why* it is so used.<sup>21</sup> Attention, then, focuses on how law, via legal processes, legal archiving, and legal institutions, works to make ‘official’ memory.<sup>22</sup> While law can be understood as concepts, rules, and practices in normative theory terms,<sup>23</sup> this article adopts a ‘law in society’ approach that acknowledges the significance of human intervention in reasserting or challenging these norms to configure or challenge the

<sup>13</sup> A. de Brito et al. (eds), *The Politics of Memory and Democratization: Transitional Justice in Democratizing Societies* (2001); N. Wouters (ed.), *Transitional Justice and Memory in Europe (1945–2013)* (2014); F. Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (2013).

<sup>14</sup> D. Sharp, ‘What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice’ (2019) 13 *International J. of Transitional Justice* 570.

<sup>15</sup> M. Mutua, ‘What Is the Future of Transitional Justice?’ (2015) 9 *International J. of Transitional Justice* 1.

<sup>16</sup> D. Sharp, *Rethinking Transitional Justice for the Twenty-First Century: Beyond the End of History* (2018) x.

<sup>17</sup> L. Lixinski, *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice* (2021) 2.

<sup>18</sup> A. Panepinto, *Truth and Transitional Justice: Localising the International Legal Framework in Muslim Majority Legal Systems* (2022) 17.

<sup>19</sup> Gutman, *op. cit.*, n. 1.

<sup>20</sup> N. Henry, *War and Rape: Law, Memory and Justice* (2011) 26.

<sup>21</sup> A. Sarat and T. Kearns, ‘Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction’ in *History, Memory, and the Law*, eds A. Sarat and T. Kearns (2002) 1, at 12.

<sup>22</sup> K. Campbell, ‘The Laws of Memory: The ICTY, the Archive, and Transitional Justice’ (2013) 22 *Social & Legal Studies* 247.

<sup>23</sup> R. Cotterrell, ‘The Sociological Concept of Law’ (1983) 10 *J. of Law and Society* 241.

social order.<sup>24</sup> The term ‘law’ refers in this article to a broad set of phenomena that includes the criminal sanction of ‘memory laws’ as much as it does to the administrative aspects of lustration or to the archiving of testimony given in court. ‘Seeing’ law both in terms of how it is *constructed* and how it is *used* in pursuit of ‘presentist’ interests echoes Alice Panepinto’s recent argument that in TJ contexts ‘it would be absurd to consider law as detached from its social, political and economic contexts, as much as it would be misleading to reduce law to official, positive, written law’.<sup>25</sup>

Second, critical analysis across different temporal ‘waves’ of TJ and across different geographical sites experiencing different forms of TJ is not to fallaciously compare proverbial ‘apples and oranges’. The *substance* of any account of the past is, of course, naturally shaped by the *context* within which it is being constructed and mediated.<sup>26</sup> That context, in turn, determines the ‘presentist’ agenda.<sup>27</sup> For instance, at different points across the different temporal waves of TJ, the ‘presentist’ agenda has been embedding the principles of international law and improving inter-state relations, post-Cold War nation building, and fostering victim-centredness and anti-impunity.<sup>28</sup> Likewise, the ‘presentist’ agenda is shaped by the form of transition in, and specific history of, the particular site. A cursory glance at some of the examples cited in this article shows as much: ‘victors’ justice’ in Rwanda used ‘victimological memory’ to absolve those coming to power of wrongdoing,<sup>29</sup> paradigmatic transition from minority to majority rule in South Africa demanded a nation-building programme of reconciliation to legitimize the new ‘Rainbow Nation’,<sup>30</sup> non-paradigmatic transition in Northern Ireland (NI) forced the United Kingdom (UK) government to disguise the nature and extent of its role in past violence,<sup>31</sup> ‘failed transition’ in Palestine/Israel resulted in a return to old patterns and structures of violence,<sup>32</sup> ‘belated’ TJ saw France address a history of collaboration and colonialism from a safe temporal distance,<sup>33</sup> and ‘post-transitional justice’ has seen Spain (re)address legacies of historic human rights abuse through new normative lenses.<sup>34</sup> However, while context (in other words, the timing and type of

<sup>24</sup> J. Shklar, *Legalism: Law, Morals and Political Trials* (1986); D. Galligan, *Law in Modern Society* (2006).

<sup>25</sup> Panepinto, *op. cit.*, n. 18, p. 22.

<sup>26</sup> K. Hearty, *Critical Engagement: Irish Republicanism, Memory Politics and Policing* (2017) 55.

<sup>27</sup> P. de Greiff, ‘The Future of the Past: Reflections on the Present State and Prospects of Transitional Justice’ (2020) 14 *International J. of Transitional Justice* 251.

<sup>28</sup> R. Teitel, ‘The Law and Politics of Contemporary Transitional Justice’ (2005) 38 *Cornell International Law J.* 837.

<sup>29</sup> R. Lemarchand, ‘Genocide, Memory and Ethnic Reconciliation in Rwanda’ in *L’Afrique des Grands Lacs: Annuaire* (2007) 21.

<sup>30</sup> R. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001); N. Aiken, *Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies* (2013).

<sup>31</sup> C. Bell et al., ‘Justice Discourses in Transition’ (2004) 13 *Social & Legal Studies* 305; C. Campbell et al., ‘The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland’ (2003) 66 *Modern Law Rev.* 317; Lundy and McGovern, *op. cit.*, n. 5; Hearty, *op. cit.*, n. 26; L. Mallinder, ‘Metaconflict and International Human Rights Law in Dealing with Northern Ireland’s Past’ (2019) 8 *Cambridge International Law J.* 5; B. Rolston, ‘Ambushed by Memory: Post-Conflict Popular Memorialisation in Northern Ireland’ (2020) 14 *International J. of Transitional Justice* 320.

<sup>32</sup> R. Dudai, ‘“Does Any of This Matter?” Transitional Justice and the Israeli–Palestinian Conflict’ in *Crime, Social Control and Human Rights: From Moral Panics to States of Denial*, eds D. Downes et al. (2011) 339; B. Browne, ‘Transitional Justice and the Case of Palestine’ in *Research Handbook on Transitional Justice*, eds C. Lawther et al. (2017) 488.

<sup>33</sup> S. Loytomaki, ‘Law and Memory’ (2012) 21 *Griffith Law Rev.* 22.

<sup>34</sup> P. Aguilar, ‘Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case’ (2008) 13 *South European Society and Politics* 417.

transition) is undoubtedly important in determining *what* the ‘presentist’ agenda is in each site and *why* ‘official’ memory must support this, it does not detract from commonality in *how* this is done across these contexts. The contention is, then, that *how* law constructs ‘official’ memory to support ‘presentist’ agendas in the aftermath of collective violence ‘travels’ across time and space.<sup>35</sup> Though limiting the discussion to *any* one of the TJ sites discussed herein would offer helpful insights into how the law–memory nexus maps onto ‘presentist’ agendas, this would impose an unnecessary parochialism on our understanding of a macro-level phenomenon. By balancing awareness of the localized context with sufficient acknowledgement of how ideas ‘travel’, the article transcends the ‘micro politics’ and minutiae of the TJ process in the relevant sites to develop a general theoretical critique.<sup>36</sup>

Through synthesizing existing literature on law, memory, and TJ, and critiquing this through a ‘fourth-generation’ lens, this article posits that law makes ‘official’ memory following collective violence via three distinct functions: *visibility*, *definition*, and *judgement*. That is, law can be leveraged to render particular harms, perpetrators, and victims either visible or invisible (visibility); then to organize these harms, perpetrators, and victims into neat categories (definition); and finally to make normative conclusions about these same categories (judgement). The article further argues that these roles are evident at both a *practical* and a *discursive* level; they can influence how ‘official’ memory making is both *done* and *presented and interpreted as being done* during TJ processes. At the same time, however, the article acknowledges that memory is driven by contestation,<sup>37</sup> meaning that ‘official’ memory can paradoxically spark subaltern counter-memory. Any ‘official’ memory can be challenged through ‘vernacular’ memories opposed to the ‘presentist’ agenda,<sup>38</sup> as is evidenced by the growth in memory activism ‘from below’.<sup>39</sup> The article concludes with some tentative thoughts on the ‘nagging question’ of how emerging post-colonial critiques and the evolution beyond the paradigmatic transition will further challenge ‘official’ memory making in TJ contexts.

## 2 | THE INTERPLAY OF LAW, MEMORY, AND TJ

Law creates a space that is both ‘legal’ and ‘permanent’ in which collective memory can be constructed.<sup>40</sup> Sarat and Kearns note that law’s memorializing function is essentially two-fold: an archival function that preserves documents, testimony, and judgements for future reference (in other words, the ‘permanent’ space) and a declarative function that injects a particular meaning into the archived past (in other words, the ‘legal’ space).<sup>41</sup> Law sets about producing and preserving a certain body of knowledge and then using that to influence how the events of the past under

<sup>35</sup> K. McEvoy, ‘Travel, Dilemmas and Non-Recurrence: Observations on the “Respectabilisation” of Transitional Justice’ (2018) 12 *International J. of Transitional Justice* 185.

<sup>36</sup> B. Jones and T. Brudholm, ‘Introduction: Rethinking Resistance to Transitional Justice’ (2016) 2 *Conflict and Society* 68; J. Sarkin and T. Davi, ‘Examining the Criticisms Levelled against Transitional Justice: Towards an Understanding of the State of the Field’ (2017) 11 *Human Rights and International Legal Discourse* 7.

<sup>37</sup> M. Kammen, *Mystic Chords of Memory: The Transformation of Tradition in American Culture* (1991) 13.

<sup>38</sup> J. Wertsch, *Voices of Collective Remembering* (2002).

<sup>39</sup> Rolston, *op. cit.*, n. 31.

<sup>40</sup> M. Halbwachs, *The Collective Memory* (1980) 140.

<sup>41</sup> Sarat and Kearns, *op. cit.*, n. 21, p. 13.



examination are to be subsequently understood.<sup>42</sup> Legal institutions and legal processes therefore shape collective memory by influencing what justice is taken to mean,<sup>43</sup> by amplifying the human stories performed to a multitude of audiences,<sup>44</sup> and by having a resonance beyond law itself.<sup>45</sup> This makes law a natural candidate for (mis)shaping the collective memory of pasts that remain contested today.<sup>46</sup>

The fact that law can be leveraged to validate one particular interpretation of the past exposes the fundamental tensions that characterize its relationship with collective memory. Law's institutional logic – which is built on individual behaviour, evidentiary constraints, and a binary approach of either absolving or convicting – limits its ability to write a more nuanced historical record; it reduces multi-causal and complex events to individual culpability as provable beyond reasonable doubt.<sup>47</sup> The memory of an event constructed in the courtroom, then, differs from the memory of that event constructed in other spheres that are not hamstrung by these logics and procedures.<sup>48</sup> Law, as Catherine Turner argues, needs 'the certainty of one agreed narrative rather than the uncertainty of a number of competing accounts of the conflict'.<sup>49</sup> Memory, on the other hand, is multiple and contested, not consensual or singular, and is not a 'mirror' of the past but an imperfect representation of it.<sup>50</sup> Law strives for finality and judgement,<sup>51</sup> whereas memory is – consciously or otherwise – constantly open to revision and reinterpretation across time and space.<sup>52</sup> For Lucy Bond, memory and law are based on 'antithetical foundations':

[W]hilst the law aims to pass judgement on the past, memory opens it up to contrasting interpretations; whilst the law simplifies historical events to their barest fundamentals (innocence and guilt), memory acknowledges their complexity; whilst the law seeks objective truth, memory admits the coexistence of numerous perspectives.<sup>53</sup>

The 'official' memory produced through legalistic processes 'from above' therefore differs from the 'vernacular' memory produced through memory projects, arts, and performance 'from below' and the 'embodied' memory of those with lived experience.<sup>54</sup>

<sup>42</sup> A. Houge, 'Narrative Expressivism: A Criminological Approach to the Expressive Function of International Criminal Justice' (2019) 19 *Criminology & Criminal Justice* 297.

<sup>43</sup> T. Kelly and M. Dembour, 'Introduction: The Social Lives of International Justice' in *Paths to International Justice: Social and Legal Perspectives*, eds M. Dembour and T. Kelly (2007) 1.

<sup>44</sup> P. Gewirtz, 'Narrative and Rhetoric in the Law' in *Law's Stories: Narrative and Rhetoric in the Law*, eds P. Brooks and P. Gewirtz (1996) 2.

<sup>45</sup> S. Karstedt, 'Introduction' in *Legal Institutions and Collective Memories*, ed. S. Karstedt (2009) 1, at 2.

<sup>46</sup> Markovits, *op. cit.*, n. 3.

<sup>47</sup> M. Drumbl, *Atrocity, Punishment, and International Law* (2007) 173.

<sup>48</sup> J. Savelsberg and R. King, *American Memories: Atrocities and the Law* (2011) 25.

<sup>49</sup> C. Turner, 'Transitional Justice and Critique' in Lawther et al. (eds), *op. cit.*, n. 32, p. 52, at p. 69.

<sup>50</sup> J. Olick, *The Politics of Regret: On Collective Memory and Historical Responsibility* (2007).

<sup>51</sup> L. Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (2001) 4.

<sup>52</sup> P. Nora, 'Between Memory and History: Les lieux de memoire' (1989) 26 *Representations* 7.

<sup>53</sup> L. Bond, *Frames of Memory after 9/11: Culture, Criticism, Politics and Law* (2015) 159.

<sup>54</sup> P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (1990); S. Felman, 'Forms of Judicial Blindness: Traumatic Narratives and Legal Repetitions' in Sarat and Kearns (eds), *op. cit.*, n. 21, p. 26.

Law's willingness and ability to deem one particular interpretation the 'official' memory speaks more fundamentally to its role in the creation of official discourse. Disguising the power dynamics that allow official discourse to decree what is or is not the 'truth' or to determine how particular phenomena are 'seen' or 'unseen',<sup>55</sup> law accords to 'official' memory a benign taken-for-grantedness. In reality, however, law seeks to pronounce how certain things should be understood and remembered through reinforcing particular worldviews and definitions and by suppressing any alternatives.<sup>56</sup> Gendered, class-based, and decolonial critiques all highlight law's ability to impose outlooks on, rather than reflect those of, marginalized communities.<sup>57</sup> The latter critiques have directly attributed law's centrality in TJ to the 'moral imagination' of Western liberalism that pervades the field.<sup>58</sup> The pursuit of a codified 'global TJ project' by the United Nations (UN) has seen TJ discourse and practice dominated by the West at the expense of expertise and experience within the non-West that may sit uneasily with formal legalism.<sup>59</sup> Unsurprisingly, then, non-Western scholars have cautioned that TJ interventions that are premised on Western legalism rather than local customs and norms mask ongoing power imbalances reflective of colonialism.<sup>60</sup> The rootedness of legal reasoning, legal language, and legal procedure in these power dynamics ultimately means that law 'sees' through a particular institutional prism.<sup>61</sup> More often than not, this is one that overlooks the experiences of particular constituencies.<sup>62</sup> Whether law places the accent on 'remembering' or 'forgetting', which mirrors its decision to either 'see' or 'unsee', influences the nature of 'official' memory and determines how it can and will be used.<sup>63</sup> This 'official' memory is not confined to the legal sphere but is reasserted at a societal level through school curricula, textbooks, and state-sponsored museum exhibitions.<sup>64</sup>

The problem with using law to determine what is remembered and seen, and what is conversely forgotten and unseen, is more acute in societies that are transitioning out of prolonged collective violence. First, certain aspects of the past will always remain contested in transitioning societies. No collective memory, whether 'official' or 'vernacular', will be able to capture the multitude of different perspectives. Even today, some in South Africa regard the Apartheid state as a bulwark

<sup>55</sup> M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (1995); M. Foucault, *The Politics of Truth* (1997).

<sup>56</sup> L. Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Rev.* 886.

<sup>57</sup> C. Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (1984); S. Engle Merry, 'Resistance and the Cultural Power of Law' (1995) 29 *Law & Society Rev.* 11; T. Krever, 'International Criminal Law: An Ideology Critique' (2013) 26 *Leiden J. of International Law* 701; C. Schwobel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (2014); B. Brown, 'The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit' (2017) 31 *Temple International & Comparative Law J.* 145.

<sup>58</sup> Sharp, *op. cit.*, n. 16, p. viii.

<sup>59</sup> Mutua, *op. cit.*, n. 15.

<sup>60</sup> H. Yusuf, 'Colonialism and the Dilemmas of Transitional Justice in Nigeria' (2018) 12 *International J. of Transitional Justice* 257; A. Jamar, 'The Crusade of Transitional Justice: Tracing the Journeys of Hegemonic Claims in Violence and Democracy' in *Violence and Democracy* (2019) 53; K. Moyo, *Postcolonial Transitional Justice: Zimbabwe and Beyond* (2019).

<sup>61</sup> J. Shklar, *The Faces of Injustice* (1990); M. Douglas, *How Institutions Think* (1986).

<sup>62</sup> Henry, *op. cit.*, n. 20, p. 122.

<sup>63</sup> G. Della Morte, 'International Law between the Duty of Memory and the Right to Oblivion' (2014) 14 *International Criminal Law Rev.* 427.

<sup>64</sup> L. Johnson, 'Why Dead Bodies Talk: An Introduction' in *Body Politics: Death, Dismemberment and Memory in Latin America*, ed. L. Johnson (2004) 1.



against the ‘evils’ of communism,<sup>65</sup> while others still hold a similar view of military juntas in Latin America.<sup>66</sup> These perspectives are not captured in ‘official’ memory, or indeed for that matter in the ‘vernacular’ memory of victims. Second, in contexts of collective violence, blame, responsibility, and victimhood become complicated.<sup>67</sup> Law, however, fails to recognize this complexity by pursuing a reductively simplistic ‘official’ account of the past in accordance with the selective ‘remembering’ and deliberate forgetting required by the ‘presentist’ agenda. As discussed earlier, this has particular relevance where that agenda involves entrenching ‘victors’ justice’ (such as in Rwanda), obfuscating state violence (such as in NI), concealing the continuation of deprivation and exclusion (such as in South Africa), or disguising continued opposition to the state’s existence (such as in Palestine/Israel).

Either way, differences about interpretations of the past that lie outside the ambit of law become contested through the medium of law.<sup>68</sup> Law is used in a ‘top-down’ manner to enforce the ‘official’ account of a contested past, yet at the same time it is also used to challenge this ‘from below’.<sup>69</sup> A struggle thus ensues between ‘deformed legalism’, whereby ‘bad law’ facilitates ‘too much forgetting’, and ‘transcendent legalism’, according to which law should rise above the demands of ‘presentist’ agendas.<sup>70</sup> As this struggle plays out, the question remains as to whether law’s biggest contribution to memory making is to reinforce or to challenge the dominance of ‘official’ accounts.<sup>71</sup>

### 3 | LAW AND (IN)VISIBILITY

Law’s initial role in the making of ‘official’ memory is to determine what is to be included in or excluded from the memory-making process. That is, law makes particular aspects of the past *visible* (seen) or it renders them *invisible* (unseen) in accordance with how neatly they map onto the ‘official’ past. To attain hegemony for this ‘official’ memory, law either invites society to remember or punishes remembrance that challenges the ‘official’ past. The first approach is *prescriptive* in that it says to society ‘We need to remember’, while the second is *proscriptive* in that it says ‘We need to remember in this way’.<sup>72</sup> In this way, law lays down ‘memory tracks’ to ‘steer’ our understanding of the past towards certain interpretations and away from others.<sup>73</sup> At the same time, however, law can also be used by marginalized groups to expose past abuses omitted from ‘official’ memory.<sup>74</sup> Law’s constitutive function, then, can have practical implications for memory

<sup>65</sup> Aiken, *op. cit.*, n. 30, p. 72.

<sup>66</sup> R. Teitel, *Transitional Justice* (2000) 85.

<sup>67</sup> J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (2004).

<sup>68</sup> Gutman, *op. cit.*, n. 1.

<sup>69</sup> A. Hegarty, ‘The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland’ (2003) 26 *Fordham International Law J.* 1148.

<sup>70</sup> G. Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (2007) 14–19.

<sup>71</sup> C. MacKinnon, ‘Law’s Stories as Reality and Politics’ in Brooks and Gewirtz (eds), *op. cit.*, n. 44, p. 232, at p. 234.

<sup>72</sup> E. Fronza, ‘The Punishment of Negationism: The Difficult Dialogue between Law and Memory’ (2006) 30 *Vermont Law Rev.* 609.

<sup>73</sup> Markovits, *op. cit.*, n. 3.

<sup>74</sup> B. Leebaw, ‘The Irreconcilable Goals of Transitional Justice’ (2008) 30 *Human Rights Q.* 95.

making,<sup>75</sup> whether through highlighting or hiding a particular event, through amplifying or muting certain voices, or through granting or restricting access to information in the ‘permanent space’.

### 3.1 | Prescriptive and proscriptive remembering

Law can ‘steer’ memory *towards* particular interpretations of the past by literally making certain events, persons, or interpretations more visible than others. Memory laws pertaining to memorialization and commemoration are an obvious example. For instance, Law 95 of 1997 in Romania established the Sighet Memorial – including a museum collection of testimonies and documents relating to communist repression – as an official site of memory.<sup>76</sup> In this example, a memorial offering one interpretation of the past was erected and then afforded official status under legislation. This shows law functioning through prescription; it makes certain events, victims, and interpretations visible and then asks society to duly remember them. Other events, victims, and interpretations are, by contrast, hidden and forgotten. Prescription can also take more implicit and subtle, yet nonetheless effective, forms. It might involve, for example, state funding for certain tourism initiatives that propagate a particular version of the past,<sup>77</sup> thus ‘steering’ memory more discreetly than through openly prescriptive memory laws. Marginalized groups can, of course, still offer their own interpretations ‘from below’ through ‘dark tourism’ that is not officially endorsed or funded by the state.<sup>78</sup>

Simultaneously, law can be proscriptive, ‘steering’ memory *away* from particular understandings of the past. It can do this either by restricting access to information about a particular event or by restricting what can be said about that event.<sup>79</sup> Obvious examples are laws on denial and negationism that use the sanction of criminal law to promote one interpretation over all others.<sup>80</sup> For instance, Israel has adopted proscriptive remembering, with more critical scholars arguing that its protective approach to the ‘official’ memory of the Israeli state represents ‘memoricide’ designed to destroy any discordant memories harboured by Palestinians.<sup>81</sup> This proscriptive remembering counters the long-standing Palestinian ‘right of return’ discourse which, by its very nature, challenges the territorial integrity of the contemporary Israeli state.<sup>82</sup> The ‘Nakba Law’ reduces state funding or support to any institution that rejects the existence of Israel as a ‘Jewish and democratic state’ or that involves itself in commemorating the founding of that state as ‘a day of mourning’. This provision suggests that there is only *one* interpretation of the 1948 war when there are, of

<sup>75</sup> U. Belavusau and A. Gliszczynska-Grabias, ‘Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice’ in *Law and Memory: Towards Legal Governance of History*, eds U. Belavusau and A. Gliszczynska-Grabias (2017) 1, at 15.

<sup>76</sup> M. Ciobanu, ‘Criminalising the Past and Reconstructing Collective Memory: The Romanian Truth Commission’ (2009) 61 *Europe-Asia Studies* 313.

<sup>77</sup> S. McDowell and M. Braniff, *Commemoration as Conflict: Space, Memory and Identity in Peace Processes* (2014) 174.

<sup>78</sup> Rolston, op. cit., n. 31.

<sup>79</sup> A. De Baets, ‘Laws Governing the Historian’s Free Expression’ in Bevernage and Wouters (eds), op. cit., n. 1, p. 39, at p. 40.

<sup>80</sup> Fronza, op. cit., n. 72.

<sup>81</sup> H. Rashed et al., ‘Nakba Memoricide: Genocide Studies and the Zionist/Israeli Genocide of Palestine’ (2014) 13 *Holy Land Studies* 1.

<sup>82</sup> Y. Peled and N. Rouhana, ‘Transitional Justice and the Right of Return of the Palestinian Refugees’ (2004) 5 *Theoretical Inquiries in Law* 317.

course, at least *two*; for those behind the provision, that war might represent independence, yet for Palestinians it marked the beginning of seemingly interminable dispossession and displacement.<sup>83</sup> While the Nakba Law is undoubtedly proscriptive in operation, it does not, however, criminalize commemoration of the Nakba per se. Rather, it ‘steers’ memory by having far-reaching financial consequences for any group that remembers outside the permitted parameters. In effect, it can dictate what is and is not publicly remembered by using retrospective financial penalty to close down the space for Nakba commemorations.<sup>84</sup> Without expressly prohibiting commemoration of the Nakba, the Israeli state nonetheless uses legislation to achieve this same result by less overt means.<sup>85</sup>

However, legislating for proscriptive remembering does not guarantee it. The Nakba Law has not eradicated collective or public commemoration of the Nakba; on the contrary, it has been the catalyst for renewed Palestinian ‘memory activism’.<sup>86</sup> The further irony is that the controversy surrounding the provision has had the unintended effect of actually bringing the counter-narrative to the attention of a Jewish Israeli audience.<sup>87</sup> A provision designed to hide a problematic interpretation of the past had thus inadvertently brought that interpretation into the public consciousness.

### 3.2 | The visibility/invisibility binary of prosecution and amnesty

Prosecutions for past wrongdoing further reveal law’s ability to determine (in)visibility in the memory-making process. The fact that a trial has taken place can give a particular atrocity sufficient exposure to embed itself in collective memory,<sup>88</sup> and can even enable victims to contribute to the historical record.<sup>89</sup> However, one can question how comprehensive any memory ‘made’ here is likely to be. At a practical level, M. Cherif Bassiouni and Peter Manikas point out that memory can only be ‘made’ through witness testimony if there are surviving witnesses, if such witnesses can adequately recollect what happened, and if they actually testify despite fears over their safety.<sup>90</sup> Moreover, just because victims are telling their stories within the formal legal setting of a trial does not change the fact that this storytelling practice is itself a ‘moral chameleon’ that can hide certain problematic pasts as much as it can expose others.<sup>91</sup> At best, then, any account of the past forged through victim testimony during criminal prosecutions constitutes a ‘selective memory’ premised on choosing certain victims to testify, and, as a natural consequence, certain harms to magnify.<sup>92</sup>

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<sup>83</sup> Y. Gutman, *Memory Activism: Reimagining the Past for the Future in Israel–Palestine* (2017).

<sup>84</sup> J. Bracka, “From Banning Nakba to Bridging Narratives”: The Collective Memory of 1948 and Transitional Justice for Israelis and Palestinians’ in Belavusau and Gliszczynska-Grabias (eds), op. cit., n. 75, p. 348, at p. 367.

<sup>85</sup> Y. Gutman, ‘Looking Backward to the Future: Counter-Memory as Oppositional Knowledge-Production in the Israeli–Palestinian Conflict’ (2017) 65 *Current Sociology* 54.

<sup>86</sup> Gutman, op. cit., n. 83.

<sup>87</sup> Id.

<sup>88</sup> Savelsberg and King, op. cit., n. 48, p. 169.

<sup>89</sup> Minow, op. cit., n. 8.

<sup>90</sup> M. C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996).

<sup>91</sup> P. Brooks, ‘The Law as Narrative and Rhetoric’ in Brooks and Gewirtz (eds), op. cit., n. 44, p. 14, at p. 16.

<sup>92</sup> Henry, op. cit., n. 20.

This selectivity manifests itself in two ways: the decision over *who* should be prosecuted and for *what* harms. The decision reached is determined by factors that are both political and practical. On the one hand, ‘victors’ justice’ determines which side is or is not prosecuted. On the other hand, it is not feasible to prosecute every single person from the losing side.<sup>93</sup> Whether at Nuremberg or in Rwanda, prosecutions can be criticized for delivering a politicized ‘victors’ justice’ *and* for holding only a small number of perpetrators legally accountable.<sup>94</sup> More recent criticism has centred on the failure to bring Western powers and their allies before the International Criminal Court while it continues to focus disproportionately on Africa.<sup>95</sup>

Yet the problem is not simply one of getting enough perpetrators into the dock. More fundamentally, any memory ‘made’ during a criminal trial invariably reflects the institutional logic of the legal sphere. This individualizes guilt and relies on evidential rules and procedures that exclude consideration of larger social forces of the time.<sup>96</sup> Criminal trials thus limit the parameters of memory by unnaturally decoupling human rights violations from the structural causes of violence.<sup>97</sup> Post-World War II tribunals, after all, created many more ‘false innocents’ than officially guilty culprits.<sup>98</sup> In doing so, they spared collective memory from having to visit what Mark Drumbl calls ‘a more embarrassing place’ that recognizes the culpability of beneficiaries, bystanders, and so on.<sup>99</sup> While the dominant memory of World War II acknowledges the culpability of the officially guilty perpetrators, it has not similarly recognized the varying degrees of culpability borne by these ‘false innocents’.

Amnesty, the binary opposite of prosecution, is similarly problematic for memory making after collective violence. Amnesty represents a general pardon from criminal or civil liability for a politically motivated offence committed in the past.<sup>100</sup> Though the decision to either punish or pardon is ultimately influenced by a number of socio-political factors,<sup>101</sup> making the choice either way significantly influences memory making.

Some amnesty provisions are clearly predicated on deliberate forgetting. Examples of this are early amnesty laws emanating from Latin America, such as the Full Stop Law in Argentina and the Expiry Law in Uruguay.<sup>102</sup> Framed as necessary to facilitate peaceful transition from military dictatorship, these blanket amnesties effectively shut down debate over human rights violations by drawing a line under the past. Amnesties of this nature are, however, largely considered illegal under international law today, as they preclude the delivery of any ‘effective remedy’ to victims,

<sup>93</sup> Bass, *op. cit.*, n. 6.

<sup>94</sup> Minow, *op. cit.*, n. 6, p. 20; L. Olson, ‘Provoking the Dragon on the Patio: Matters of Transitional Justice: Penal Repression vs Amnesties’ (2006) 88 *International Rev. of the Red Cross* 275.

<sup>95</sup> M. Mamdani, ‘Responsibility to Protect or Right to Punish?’ (2010) 4 *J. of Intervention & Statebuilding* 53.

<sup>96</sup> Savelsberg and King, *op. cit.*, n. 48, p. 9.

<sup>97</sup> M. Osiel, ‘The Banality of Good: Aligning Incentives against Mass Atrocity’ (2005) 105 *Columbia Law Rev.* 1814.

<sup>98</sup> H. Steinert, ‘Fin de Siècle Criminology’ (1998) 1 *Theoretical Criminology* 111.

<sup>99</sup> Drumbl, *op. cit.*, n. 47, p. 173.

<sup>100</sup> J. Clark, ‘Northern Ireland: A Balanced Approach to Amnesty, Reconciliation and Reintegration’ (2008) 88 *Military Rev.* 37.

<sup>101</sup> L. Huyse, ‘Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past’ (1995) 20 *Law & Social Inquiry* 51.

<sup>102</sup> M. Popkin and N. Bhuta, ‘Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?’ (1999) 13 *Ethics & International Affairs* 99.

prioritize impunity rather than accountability, and operate to the detriment of the emerging ‘right to truth’.<sup>103</sup>

However, amnesty laws can also encourage a fuller remembering,<sup>104</sup> particularly when used to incentivize disclosure of information about past harms.<sup>105</sup> This approach is built into the logic of the South African Truth and Reconciliation Commission (TRC).<sup>106</sup> An amnesty provision in the 1993 Interim Constitution evolved into a conditional amnesty for those prepared to make ‘full disclosure’ about ‘proportionate’, ‘politically motivated’ offences.<sup>107</sup> By contrast, the ongoing threat of prosecution can limit buy-in to the memory-making process. This applies not only to ‘official’ memory produced by truth commissions, but also to ‘vernacular’ memory created through other storytelling initiatives. Referring to the seizure by the authorities of interview tapes with former combatants participating in an oral history project in NI, Anna Bryson argues that potential prosecutions can create a ‘chill factor’ that prevents the telling of experiences ‘from below’.<sup>108</sup> Within the particular context of NI, stifling accounts ‘from below’ in this way helps to further minimize the state’s role in past conflict.

The practical usefulness of amnesties is not, however, limited to truth commissions. Lauren Dempster shows how amnesty provisions can further ‘quiet’ TJ that goes on through other mechanisms and processes that operate outside the public limelight.<sup>109</sup> In illustrating this point, she cites the Northern Ireland (Location of Victims’ Remains) Act 1999, which grants ‘use immunity’ to anyone providing information to the Independent Commission for the Location of Victims’ Remains (ICLVR) about the whereabouts of those disappeared by non-state armed groups. It was the work of this body, aided considerably by information brought forward under the immunity provision, that helped the issue of enforced disappearance to be seen in NI.<sup>110</sup>

### 3.3 | Law as access and law as obstruction

As well as eliciting undisclosed information, law can also regulate access to existing information within the ‘permanent space’. State files, as a link between the secret and the public, and the open and the hidden,<sup>111</sup> are the most relevant example. Destroying and/or withholding files can allow the wrongs committed by certain parties to be ‘forgotten’ in ‘official’ memory, as Kirsten Campbell

<sup>103</sup> T. Hadden, ‘Punishment, Amnesty and Truth: Legal and Political Approaches’ in *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies*, ed. A. Guelke (2004) 196; L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008); M. Klinker and H. Davis, *The Right to Truth in International Law: Victims’ Rights in Human Rights and International Criminal Law* (2020).

<sup>104</sup> Della Morte, op. cit., n. 63.

<sup>105</sup> Mallinder, op. cit., n. 103.

<sup>106</sup> Hayner, op. cit., n. 6.

<sup>107</sup> H. van der Merwe and A. Chapman (eds), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (2008); A. du Bois-Pedain, *Transitional Amnesty in South Africa* (2007).

<sup>108</sup> A. Bryson, ‘Victims, Violence, and Voice: Transitional Justice, Oral History, and Dealing with the Past’ (2016) 39 *Hastings International and Comparative Law Rev.* 299.

<sup>109</sup> L. Dempster, “‘Quiet’ Transitional Justice: “Publicness”, Trust and Legitimacy in the Search for the “Disappeared” (2020) 29 *Social & Legal Studies* 246.

<sup>110</sup> L. Dempster, ‘The Republican Movement, “Disappearing” and Framing the Past in Northern Ireland’ (2016) 10 *International J. of Transitional Justice* 250.

<sup>111</sup> Karstedt, op. cit., n. 45, p. 8.

argues in relation to the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>112</sup> The issue therefore becomes one of both *preserving* and *accessing* the ‘permanent space’.

Law has involved itself with both these tasks. In Rwanda, for instance, Article 4 of the Law of September 2003 imposes a prison sentence on ‘anyone who has concealed or destroyed the evidence’ of the genocide.<sup>113</sup> A number of laws in various states also legislate for access to state files, the most widely discussed being the Stasi Records Act of December 1991. This allows individuals in Germany to request access to files held on them by the Stasi. These transpired to be of varying length, depth, and quality, ranging from a few pages with limited evidence of surveillance through to substantial files that amounted to a complete biographical account of individual lives.<sup>114</sup> This shows a potential tension between what should in theory emerge from access to files and what is in fact practically possible; while law may in theory facilitate a fuller memory by permitting access to files, it cannot legislate for the quality or depth of what is actually contained within those files.

In other cases, such as NI, ‘national security’ may operate to the detriment of collective memory by allowing the state to legally withhold significant bodies of information relevant to a fuller understanding of its role in the conflict.<sup>115</sup> Victims of state violence in NI have, however, used law to successfully pursue the release of state files through the courts.<sup>116</sup> In this context, the law–memory nexus descends into a struggle between deformed legalism firewalling the ‘permanent space’ from scrutiny and transcendent legalism intent on opening it up to a fuller exploration.

#### 4 | LAW AND DEFINITION

After selecting the sum parts for ‘official’ memory, law is then used to categorize these through applying labels that are grounded in drawing simplistic distinctions that suit the ‘presentist’ agenda. Law’s definitional remit thus becomes one of reducing real-world complexity to readily consumable binaries, which perhaps only reflects the ‘antinomies’ and ‘binary oppositions’ on which TJ discourse is premised.<sup>117</sup> Through the medium of ‘legal messaging’,<sup>118</sup> these binaries become the dominant frames through which society is encouraged to interpret the past. The most instructive examples are where law is used to make a distinction between different actors and between different timeframes.

In the aftermath of conflict, who is a hero and who is a villain, who was right and who was wrong, and who is blameworthy and who is blameless are all open to interpretation, contestation, and change.<sup>119</sup> As a normative language meant to distinguish between right and wrong, innocence and guilt, and victim and perpetrator, law postures as being able to give meaning to the

<sup>112</sup> Campbell, *op. cit.*, n. 22.

<sup>113</sup> Lemarchand, *op. cit.*, n. 29.

<sup>114</sup> R. Engelmann, ‘The “Stasi Records”, the Public, and Collective Memories: The Inspection of Personal Records’ in Karstedt (ed.), *op. cit.*, n. 45, p. 329, at p. 330.

<sup>115</sup> K. McEvoy et al., ‘Clause by Clause: The Reasoning in the Stormont House Agreement “Model Bill” on Dealing with the Past in Northern Ireland’ (2016) 67 *Northern Ireland Legal Q.* 37.

<sup>116</sup> G. Anthony, *Judicial Review in Northern Ireland* (2013, 2<sup>nd</sup> edn) 124.

<sup>117</sup> C. Turner, ‘Deconstructing Transitional Justice’ (2013) 24 *Law & Critique* 193.

<sup>118</sup> C. Campbell and I. Connolly, ‘Making “Wars on Terror”? Global Lessons from Northern Ireland’ (2006) 69 *Modern Law Rev.* 935.

<sup>119</sup> S. Cohen, ‘Unspeakable Memories and Commensurable Laws’ in Karstedt (ed.), *op. cit.*, n. 45, p. 27.



past,<sup>120</sup> yet in doing so it fallaciously tries to retrospectively make ‘black and white’ much of what was ‘grey’ during violent upheaval.<sup>121</sup> Likewise, law can also engage in memory making when it attempts to declare when a conflict started and when it ended. In designating a particular time-frame as problematic, law simultaneously contrasts this with what came before and after. Setting the boundaries for when a conflict started and ended can define the nature of that conflict itself, as well as disguising any ongoing discrimination, exclusion, and marginalization. Through its definitional remit, law can ‘fix’ how society should distinguish between temporal binaries of ‘then’ and ‘now’, and between actor binaries of ‘victim’ and ‘perpetrator’.

#### 4.1 | ‘Then’ and ‘now’

Law distinguishes between periods of conflict and transition through establishing a moment of rupture between a problematic ‘then’ and a seemingly better ‘now’. In some instances, the intention to do so is explicit; in other cases, it is more disguised. Vetting and lustration provisions are an instructive example. Their core premise is to provide the necessary break from the problematic past on which societal rebuilding is apparently dependent. This is done through either removing those implicated in past wrongdoing from certain influential positions or denying them future access to such positions.<sup>122</sup> These provisions are said to ‘break’ with a problematic ‘then’ by cleansing the polity and civil society of the malign influence of the *ancien regime*.<sup>123</sup>

The trials of former dictators, it has been argued, are a symbolic attempt to draw a line under a problematic past, while constitutional documents can provide myths of (re)founding by declaring the birth of the new post-conflict nation.<sup>124</sup> Symbolic though these acts are, they are nonetheless infused with legalistic discourse.<sup>125</sup> In Hungary, for instance, the Fundamental Law recognizes the first free elections of 1990 as the moment that the modern state was born. In doing so, it distinguishes between everything that followed this moment in time and the eras of Nazi occupation and Soviet control that preceded it.<sup>126</sup> Along similar lines, the National Unity and Reconciliation Act of 1995 was used in South Africa to promote the emerging political order in the post-Apartheid state. This provision, which set up the TRC, was premised on contrasting the violent and divisive past with the aspiration for a better and peaceful future in the new ‘Rainbow Nation’.<sup>127</sup>

Law conspires with memory in the state-building project through enshrining these founding moments and/or moments of rupture in legislation.<sup>128</sup> The continuation of exclusion and inequality during transition subsequently becomes obscured. The promotion of the new ‘Rainbow

<sup>120</sup> S. Loytomaki, *Law and the Politics of Memory: Confronting the Past* (2014).

<sup>121</sup> P. Levi, *Survival in Auschwitz: The Nazi Assault on Humanity* (1996); P. Levi, *The Drowned and the Saved* (2017); M. Drumbl, ‘Victims Who Victimise’ (2016) 4 *London Rev. of International Law* 217.

<sup>122</sup> C. Horne, ‘Transitional Justice: Vetting and Lustration’ in Lawther et al. (eds), op. cit., n. 32, p. 424.

<sup>123</sup> Ciobanu, op. cit., n. 76.

<sup>124</sup> Osiel, op. cit., n. 6, p. 4.

<sup>125</sup> McEvoy, op. cit., n. 5.

<sup>126</sup> M. Konczol, ‘Dealing with the Past in and around the Fundamental Law of Hungary’ in Belavusau and Gliszczynska-Grabias (eds), op. cit., n. 75, p. 246, at p. 259.

<sup>127</sup> A. Castillejo-Cuellar, ‘Historical Injuries, Temporality and the Law: Articulations of a Violent Past in Two Transitional Scenarios’ (2014) 25 *Law & Critique* 7.

<sup>128</sup> M. Humphrey, ‘Law, Memory and Amnesty in Spain’ (2014) 13 *Macquarie Law J.* 25.

Nation' in South Africa served to elide how structural exclusion, gendered violence, and ingrained inequality all persisted after the point of rupture.<sup>129</sup> Though unacknowledged by a 'presentist' agenda promoting reconciliation, this led to victims using law to (however unsuccessfully) subvert the status quo in the new 'Rainbow Nation'; the amnesty provision of the TRC was challenged by a number of victims,<sup>130</sup> including Steve Biko's family,<sup>131</sup> while others sought reparations from corporate beneficiaries who had retained Apartheid-era gains.<sup>132</sup>

## 4.2 | 'Victim' and 'perpetrator'

The second distinction that law makes is through applying, or conversely *not* applying, the labels of 'victim' and 'perpetrator' to particular actors and/or groups. While in reality such a neat distinction is usually impossible, and while victimhood is socially, politically, and culturally situated and contested, law nevertheless involves itself in formalizing blame by designating some as blameless ('victims') while simultaneously scapegoating others as blameworthy ('perpetrators').<sup>133</sup> This labelling is found in many legal and non-legal TJ processes, but the most glaring example is victims' legislation. The constraints of the legalistic approach mean that only those who satisfy the strict technical criteria demanded by victims' legislation are designated as victims. Others who do not meet these requirements can, of course, stake an officially unrecognized claim to victimhood.<sup>134</sup> Defining the 'victim' becomes a process of defining the violence through which they were victimized – ascribing a motivation for that violence, assigning responsibility for it, and writing this into the historical record.<sup>135</sup> If some of those victimized through conflict are placed outside the 'official' definition of victim, then the need to establish the motivation and responsibility for their victimization in the 'official' memory is removed. Hence, in non-paradigmatic cases where the state continues to downplay or deny its own role in past violence, such as in NI and the Basque Country,<sup>136</sup> leveraging the victim/perpetrator binary via various pieces of victims' legislation has invisibilized those victimized through state violence.

The wilful blindness to the messiness of conflict and to the deliberate politicization of victimhood in its aftermath is particularly pronounced in cases where entire collectives seek to acquire, and subsequently monopolize, the 'victim' label. The primary motivation, however, is not so much the label itself but rather the implied blamelessness that accompanies it. 'Victimological memory' can be used to 'fix' the victim identity of a particular group in a bid to avoid having to examine

<sup>129</sup> R. Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 *Third World Q.* 275.

<sup>130</sup> W. Le Roux and K. van Marle (eds), *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa* (2007).

<sup>131</sup> Steven Biko was a South African anti-Apartheid activist who died from injuries sustained from severe physical ill-treatment while in police custody in Pretoria in 1977. Teitel, *op. cit.*, n. 66.

<sup>132</sup> E. Naidu, 'Symbolic Reparations and Reconciliation: Lessons from South Africa' (2012) 19 *Buffalo Human Rights Law Rev.* 251.

<sup>133</sup> K. McEvoy and K. McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 *Social & Legal Studies* 498.

<sup>134</sup> T. Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims' (2010) 13 *J. of Human Rights Practice* 208.

<sup>135</sup> A. Alvarez-Berastegi and K. Hearty, 'A Context Based Model to Frame Political Victimhood: Experiences from Northern Ireland and the Basque Country' (2019) 25 *International Rev. of Victimology* 19.

<sup>136</sup> *Id.*

their possible involvement in the complexity of conflict.<sup>137</sup> Accordingly, when law subsequently casts certain groups as ‘victims’ and certain groups as ‘perpetrators’, it is really constructing, and then legitimizing, certain political interpretations of the past.<sup>138</sup>

Post-genocide Rwanda represents a notable example of legalistic ‘victimological memory’; ‘divisionism’ laws (re)classify different groups *not* in terms of ethnicity – Hutu or Tutsi – but in politicized notions of a victim group and a perpetrator group that correspond to post-conflict ‘winner/loser’ positions.<sup>139</sup> The Rwandan government have typecast the Hutu as perpetrators and the Tutsi as victims, and completely invisibilized the Twa, whose experiences do not fit this official framing of the genocide.<sup>140</sup> Access to post-conflict power can enable certain collectives to hegemonize their own version of the past in this way,<sup>141</sup> and then mediate it through TJ mechanisms that are purportedly pursuing a reconciliation agenda.<sup>142</sup> When law makes itself a willing accomplice of ‘victimological memory’, ideological and legal positions are thus intertwined with, rather than being divorced from, one another.<sup>143</sup>

## 5 | LAW AND JUDGEMENT

Having selected and neatly categorized the component parts for ‘official’ memory, law is then used to impose a particular meaning on them. In this regard, it purports to offer ‘moral clarity’ for society to rationalize the violent past.<sup>144</sup> The increasing turn towards ‘tribunality’ in transitioning societies<sup>145</sup> has amplified what Joel Feinberg terms law’s ‘expressivist function’.<sup>146</sup> Through this expressivism, law imparts particular moral judgements that influence how the past is understood; it communicates that a certain act was wrong, it disavows that act by suggesting that those expressing its wrongness were not involved, it asserts the righteousness of law, and it restricts responsibility to those being prosecuted. This expressivism enables law to influence collective memory by encouraging society to interpret a legal judgement of legal or illegal as a moral judgement of right or wrong,<sup>147</sup> and by restricting blame and responsibility to those on trial.

<sup>137</sup> E. Hoffman, ‘The Balm of Recognition’ in *Human Rights, Human Wrongs*, ed. N. Owen (1999) 247.

<sup>138</sup> Loytomaki, op. cit., n. 33.

<sup>139</sup> P. Clark, ‘Negotiating Reconciliation in Rwanda: Popular Challenges to the Official Discourse of Post-Genocide National Unity’ (2014) 8 *J. of Intervention & Statebuilding* 303.

<sup>140</sup> S. Thomson and R. Nagy, ‘Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda’s Gacaca Courts’ (2010) 5 *International J. of Transitional Justice* 11.

<sup>141</sup> Olick, op. cit., n. 50, p. 24.

<sup>142</sup> A. Betts, ‘Should Approaches to Post-Conflict Justice and Reconciliation Be Determined Globally, Nationally or Locally?’ (2005) 17 *European J. of Development Research* 735.

<sup>143</sup> Mallinder, op. cit., n. 31.

<sup>144</sup> Loytomaki, op. cit., n. 33.

<sup>145</sup> M. Kaminski et al., ‘Normative and Strategic Aspects of Transitional Justice’ (2006) 50 *J. of Conflict Resolution* 295.

<sup>146</sup> J. Feinberg, ‘The Expressivist Function of Punishment’ (1965) 49 *The Monist* 397.

<sup>147</sup> Loytomaki, op. cit., n. 120, p. 122.

## 5.1 | Site of moral judgement

Drumbl argues that criminal prosecutions in the aftermath of collective violence represent a focal point where retributivist, deterrent, and expressivist interests converge and overlap;<sup>148</sup> those prosecuted are on trial because they deserve to be punished for their past misdeeds, because punishing them will deter others from engaging in these harmful acts, and because punishing them expresses the immorality of their actions. The interplay between these interests means that at the same time that a criminal trial makes a moral judgement of past wrongdoing, it also creates a public record of that wrongdoing for future reference that should deter others from committing these same harms.<sup>149</sup> Though one may well question the very notion of ever being able to sufficiently punish mass-scale harms,<sup>150</sup> from an expressivist perspective the importance of prosecution is *not* to punish perpetrators per se but to define their actions as morally wrong for the sake of the future.<sup>151</sup> Two consequences arise; first, victims may find some solace in the fact that by bearing witness the morally wrongful nature of what happened to them has been subsequently acknowledged for future reference,<sup>152</sup> and second, those presiding over the trial can engineer a moral chasm between themselves and those on trial.<sup>153</sup>

At Nuremburg, this moral chasm helped to reassert the legitimacy of international law,<sup>154</sup> while at the same time also invisibilizing the harms caused by the victorious Allies now sitting in judgement of the vanquished Germans. Legal expressivism thus becomes central to ‘victors’ justice’; it defines the acts of the vanquished as morally wrong, it asserts the moral righteousness of the laws being used to punish them, and it exonerates the victors from moral wrongness by limiting blame and responsibility to those on trial. This allows ‘official’ accounts of the past to ‘ungrey’ the complex reality of conflict by entrenching ‘black and white’ understandings that impose moral wrongness on the vanquished and bless all others with moral righteousness.

Perhaps the most instructive example of a criminal trial being used to ‘ungrey’ the complexities of war crimes is that of Adolf Eichmann. Lawrence Douglas argues that it was premised on eradicating what Primo Levi called the ‘grey zones’ of varying levels and forms of victim complicity in Nazi crimes committed within the concentration camps. This was achieved by cultivating a ‘heroic memory’ that framed Jewish victims as resisters rather than as lambs led passively to the slaughter, and by attributing blame to Eichmann and the Nazis rather than to any of their victims.<sup>155</sup> This ‘heroic memory’ not only reinforced the moral wrongness of Eichmann and the moral righteousness of those who sat in judgement of him, but it also fed into the ‘presentist’ agenda of the then burgeoning state of Israel. At the same time, however, Jewish survivors of Nazism resident

<sup>148</sup> Drumbl, op. cit., n. 47, p. 149.

<sup>149</sup> K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011); C. S. Nino, *Radical Evil on Trial* (1998); Henry, op. cit., n. 20, p. 21.

<sup>150</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994).

<sup>151</sup> Houge, op. cit., n. 42.

<sup>152</sup> D. Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency” (2007) 1 *International J. of Transitional Justice* 10.

<sup>153</sup> Simpson, op. cit., n. 70, p. 89.

<sup>154</sup> R. Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights J.* 69.

<sup>155</sup> Douglas, op. cit., n. 51, p. 154.

outside of Israel, such as Levi and Hannah Arendt, continued to paint a more complex picture through their widely acclaimed writings.<sup>156</sup>

## 5.2 | Site of moral contest

Criminal trials may indeed be focal points for shaping collective memory,<sup>157</sup> but they can also become sites of contest that seek to subvert, rather than sustain, certain versions of the past. They possess a paradoxical ability to repress subaltern narratives but to also resist dominant discourses.<sup>158</sup> Rather than being a vehicle for setting the historical record straight, they can become a forum in which competing interpretations of the past can be articulated.<sup>159</sup> As law involves stories and performances, in addition to facts, rules, and procedures,<sup>160</sup> criminal trials possess a dramaturgical dimension.<sup>161</sup> This sees ‘sponsored storytellers’ performing during the trial by relaying their narratives to the court.<sup>162</sup> For law to successfully make ‘official’ memory, however, the narratives of these ‘sponsored storytellers’ have to chime with the preferred version of the past. This is not guaranteed because these actors can, deliberately or otherwise, depart from the established script.

Some storytellers might use the trial to make particular political points contrary to the preferred account of the past. For example, defence attorney and former Algerian activist Jacques Vergès used the trial of Klaus Barbie to turn the lens of scrutiny away from crimes committed in France during World War II and towards those committed by France in its colonies.<sup>163</sup> In doing so, he disrupted the logic of legal expressivism through blurring the lines between the actions of those being judged and of those sitting in judgement.

A more obvious challenge to legal expressivism occurs where defendants use their trials to denounce the court as ‘victors’ justice’. As the performance of Slobodan Milosevic at the ICTY showed, attempts to ‘fix’ a particular interpretation of the past can actually be subverted when those on trial challenge their accusers’ right to judge.<sup>164</sup> Milosevic portrayed himself as a victim of the international community and its legal processes, rather than as a perpetrator of war crimes, which cut against the apparent expressivist function of condemning the highest-ranking war crimes perpetrators.<sup>165</sup> Other defendants at the ICTY disrupted proceedings to decry the legitimacy of the court when being sentenced.<sup>166</sup> Trials thus provide a platform for sounding

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<sup>156</sup> Arendt, *op. cit.*, n. 150; Levi, *op. cit.* (1996), n. 121; Levi, *op. cit.* (2017), n. 121.

<sup>157</sup> W. J. Booth, ‘The Unforgotten: Memories of Justice’ (2001) 95 *Am. Political Science Rev.* 777.

<sup>158</sup> O. Kircheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (2015).

<sup>159</sup> S. Loytomaki, ‘The Law and Collective Memory of Colonialism: France and the Case of “Belated” Transitional Justice’ (2013) 7 *International J. of Transitional Justice* 205.

<sup>160</sup> A. Allo, ‘Marwan Barghouti in Tel Aviv: Occupation, Terrorism, and Resistance in the Courtroom’ (2017) 26 *Social & Legal Studies* 47; Houge, *op. cit.*, n. 42.

<sup>161</sup> M. Drumbl, ‘Collective Responsibility and Postconflict Justice’ in *Accountability for Collective Wrongdoing*, eds T. Issacs and R. Vernon (2011) 23.

<sup>162</sup> Gewirtz, *op. cit.*, n. 44, p. 7.

<sup>163</sup> Loytomaki, *op. cit.*, n. 159.

<sup>164</sup> Loytomaki, *op. cit.*, n. 120, p. 75.

<sup>165</sup> Teitel, *op. cit.*, n. 28.

<sup>166</sup> Houge, *op. cit.*, n. 42.

‘discordant notes’ that challenge the victors’ discourse.<sup>167</sup> While this assault on legal expressivism takes place in the courtroom, its ramifications extend beyond those confines to influence how certain constituencies remember the events at the heart of the trial. Rather than being collectively remembered as a triumph of ‘justice’ and the rule of law, the ICTY is instead remembered within certain constituencies as an injustice premised on victors’ justice.<sup>168</sup> The ‘official’ memory created through law therefore faces a challenge from a resistant ‘vernacular’ memory on the ground in impacted societies.<sup>169</sup> Thus, even if law can create an ‘official’ memory of past violence, it might not be able to make this correlate with what individuals with lived experience remember.<sup>170</sup> In non-Western sites, there might even be indifference among victims, who would prefer to have their everyday material needs addressed instead of rule of law interventions driven from afar.<sup>171</sup>

### 5.3 | From legal expressivism to legal ‘protectionism’

Faced with resistant ‘vernacular’ memories, law can seek to protect ‘official’ memory from challenge. Law’s core function thus moves from being one of expressivism to become one of ‘protectionism’. As such, memory laws will either criminalize denials of the past and/or outlaw certain statements said to justify the past.<sup>172</sup> Even if these provisions are given a victim-centric veneer,<sup>173</sup> they can nonetheless close down the discursive space for a more nuanced discussion about blame, responsibility, and wrongdoing. This is despite the fact that ongoing debate about certain aspects of the past is natural in transitioning societies, as has been reflected in the European Court of Human Rights (ECtHR) jurisprudence that has framed freedom of expression and political opinion in a way that allows taken-for-granted official versions of the past to be questioned.<sup>174</sup> The one notable exception to this is Holocaust denial,<sup>175</sup> which remains prohibited to prevent the spread of pernicious ideology stemming from distorted representations of the past. An unfortunate consequence of Holocaust denial laws is that while they prevent (or at least try to) racially and/or ideologically motivated denial of crimes against humanity perpetrated against Jewish victims, at the same time they further elide the war crimes committed by the Allies through magnifying Nazi atrocities.<sup>176</sup>

The legal protection afforded to this ‘victors’ justice’ can be seen in the Russian Criminal Code criminalizing any denial of the findings of Nuremburg. ‘Victors’ justice’ becomes layered through legal expressivism – first in terms of only punishing the Germans at the time, and then

<sup>167</sup> Simpson, op. cit., n. 70, p. 92.

<sup>168</sup> Campbell, op. cit., n. 22.

<sup>169</sup> Osiel, op. cit., n. 6, pp. 220–221.

<sup>170</sup> J. Winter and E. Sivan, ‘Setting the Framework’ in *War and Remembrance in the Twentieth Century*, eds J. Winter and E. Sivan (1999) 6, at 8.

<sup>171</sup> B. Oomen, ‘Donor-Driven Justice and Its Discontents: The Case of Rwanda’ (2005) 6 *Development & Change* 887.

<sup>172</sup> Kopusov, op. cit., n. 2, p. 7.

<sup>173</sup> P. Manning, ‘Recognising Rights and Wrongs in Practice and Politics: Human Rights Organisations and Cambodia’s “Law against the Non-Recognition of Khmer Rouge Crimes”’ (2019) 23 *International J. of Human Rights* 778.

<sup>174</sup> E. Brems, ‘Transitional Justice in the Case Law of the European Court of Human Rights’ (2011) 5 *International J. of Transitional Justice* 282.

<sup>175</sup> *Garaudy v. France*, App. No. 65831/01, ECtHR (24 June 2003).

<sup>176</sup> Belavusau and Gliszczynska-Grabias, op. cit., n. 75, p. 8.



subsequently of reinforcing this through criminalizing any attempt to retrospectively deviate from that decision. Article 354.1 on the Rehabilitation of Nazism amended the Russian Penal Code to criminalize ‘dissemination of knowingly false information on the activities of the USSR during the Second World War’.<sup>177</sup> This, again, reinforces the moral chasm between the Soviets and the Nazis established at Nuremberg – something that has become of increasing importance given that memory laws in formerly Soviet occupied states are now equating Soviet occupation under Stalin with previous Nazi occupations.<sup>178</sup> At the time, this moral chasm helpfully overlooked both the harms caused by the Allies and also the internal divisions among the victors,<sup>179</sup> yet today it serves a different ‘presentist’ agenda.

Memory laws that purport to prohibit the justification of past harms can also be (mis)used to reduce the scope for discussion about a difficult past that is not actually being denied but is being reinterpreted in a more nuanced way.<sup>180</sup> Though introduced under the guise of bringing society together after conflict, these laws can become a means of legitimizing a particular socio-political reality on which the new post-conflict state is reliant.<sup>181</sup> Rwanda is an instructive example. There, the *gacaca* courts were framed as a distinctly local TJ mechanism that would deliver post-genocide truth and reconciliation, yet even they became another forum for reinforcing ‘victors’ justice’. The Rwandan government controlled the process so that victims, perpetrators, and society could only narrate the past in officially approved typecast roles, while official *gacaca* policy prevented the prosecution of former Rwandan Patriotic Army personnel for revenge killings.<sup>182</sup> This was later reinforced through offences such as ‘divisionism’ and ‘trivialization’ that have made it impossible to have a more nuanced discussion about responsibility for genocide-related violence that would acknowledge Hutu victimhood and Tutsi responsibility for revenge violence; raising the issue and referring to these ethnic labels are now illegal.<sup>183</sup> Moreover, the 2013 amendments to the 2008 law on genocide ideology created offences of ‘supporting a double genocide theory’, ‘deliberately misconstruing the facts about genocide for the purpose of misleading the public’, and ‘stating or explaining that genocide against the Tutsi was not planned’. The problem here, as Pietro Sullo argues, is not simply one of how memory laws are used but of the poorly defined offences that they create.<sup>184</sup>

## 5.4 | From legal protectionism to legal ‘correctionalism’

The nexus between ‘official’ memory and ‘presentist’ agendas means that ‘official’ memory is ultimately subservient to present socio-political needs. If these needs change, even over time, then as a logical consequence ‘official’ memory must change too. Paradoxically, this means that while

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<sup>177</sup> N. Kuposov, ‘Defending Stalinism by Means of Criminal Law: Russia, 1995–2014’ in Belavusau and Gliszczynska-Grabias (eds), op. cit., n. 75, p. 293, at p. 293.

<sup>178</sup> Id., p. 301.

<sup>179</sup> Teitel, op. cit., n. 28.

<sup>180</sup> Fronza, op. cit., n. 72.

<sup>181</sup> Belavusau and Gliszczynska-Grabias, op. cit., n. 75, p. 6.

<sup>182</sup> Thomson and Nagy, op. cit., n. 140.

<sup>183</sup> Lemarchand, op. cit., n. 29.

<sup>184</sup> P. Sullo, ‘Writing History through Criminal Law: State-Sponsored Memory in Rwanda’ in Bevernage and Wouters (eds), op. cit., n. 1, p. 69, at p. 71.

law may protect ‘official’ memory, it can also ‘correct’ it if current socio-political needs necessitate that. Instead of *reinforcing* the moral judgement that it originally made, then, law *revises* that moral judgement.

Spain is a notable example of corrective memory laws, with the country having to belatedly address the problematic legacy of Francoism through ‘post-transitional justice’. The Francoist state used military tribunals, compensation schemes, and laws on memorialization to create an ‘official’ memory that celebrated and rewarded the Nationalist ‘victors’ of the Civil War and denounced the vanquished Republicans. While some of these difficulties were addressed following the death of Franco, and further upon Spain’s transition out of Francoism, it was not until the passing of the Ley de la Memoria Histórica (LMH) that a concerted attempt to legally correct the ‘official’ memory of Francoism took root. This took place within a climate where the legacy of Francoism and the meaning of Nationalistic symbols became contested against a backdrop of growing global concern for human rights and TJ,<sup>185</sup> eventually seeing places such as the Valley of the Fallen undergoing resignification from sites of Nationalistic triumph to sites of national conscience following the exhumation of Franco’s remains in 2019.

Article 2 of the LMH, for instance, condemns all violence committed for political or ideological reasons during the Civil War and Franco’s regime.<sup>186</sup> This stands in clear contrast to the public celebration of Nationalist violence during Francoism. Legal correctionalism does not stop here. While the provision might not expressly forbid any particular interpretation of the past as other memory laws do, it does engage in legal correctionalism in a number of ways, such as by annulling the judicial decisions of the Francoist Courts (Articles 2 and 3), regulating financial support to certain groups and victims, and removing Francoist symbols from, and forbidding political acts in, the Valley of the Fallen (Articles 15–17).<sup>187</sup> In doing so, the LMH has ‘recoded’ the ‘official’ past of Francoist Spain in line with human rights and TJ norms that stand in contrast to the norms that previously underpinned ‘official’ memory.<sup>188</sup> The ‘recoding’ of Francoism has not been absolute, however, as evidenced by far-right protests against the exhumation of Franco’s remains<sup>189</sup> and the increasing electoral success of the Vox party, who have promised to build a ‘patriotic alternative’ in Spain.<sup>190</sup>

## 6 | CONCLUSION

When current socio-political needs necessitate that collective memory should promote a particular version of the past, careful legal manipulation produces an ‘official’ memory that disguises particular harms, limits responsibility and blame, and perpetuates historical injustices. Though this ‘official’ memory manifests itself through the removal of certain persons from political office,

<sup>185</sup> A. Hepworth, ‘Site of Memory and Dismemory: The Valley of the Fallen in Spain’ (2014) 16 *J. of Genocide Research* 463.

<sup>186</sup> P. Burbridge, ‘Waking the Dead of the Spanish Civil War: Judge Baltasar Garzón and the Spanish Law of Historical Memory’ (2011) 9 *J. of International Criminal Justice* 753.

<sup>187</sup> A. Aragonese, ‘Legal Silences and the Memory of Francoism in Spain’ in Belavusau and Gliszczynska-Grabias (eds), *op. cit.*, n. 75, p. 175, at p. 184.

<sup>188</sup> Humphrey, *op. cit.*, n. 128.

<sup>189</sup> G. Hedgecoe, ‘Franco Exhumation: Dictator’s Move Stirs Fury in Divided Spain’ *BBC*, 24 October 2019, at <<https://www.bbc.co.uk/news/world-europe-50171253>>.

<sup>190</sup> G. Hedgecoe, ‘Spanish Election: How the Far-Right Vox Party Found Its Footing’ *BBC*, 11 November 2019, at <<https://www.bbc.co.uk/news/world-europe-46422036>> accessed 02/09/2020>.

the (non-)prosecution of certain actors, or the official public (non-)commemoration of certain victims, the invariable outcome is an approved interpretation of the past that has its roots in TJ mechanisms and processes. It is through these processes and mechanisms that law either grants harms, victims, and perpetrators the requisite visibility to be seen or provides a cloak of invisibility for them to remain unseen; that law defines certain actors as either blameworthy or blameless and certain timeframes as either problematic or settled; and that law dispenses its expressivist duties of ordaining certain actors as morally righteous and condemning others as morally corrupt.

'Official' memory, however, is not impervious to resistant 'vernacular' (counter-)memories. Whether it is through the discordant voices of obstreperous defendants in the court room, through granting access to the 'permanent space', through legal challenges to amnesty provisions, or through reinvigorating resistant memory activism, law can be turned against 'presentist' agendas. This has forced 'official' memory onto a protectionist footing of legally closing down the discursive space for public discussion of contested pasts. Far from achieving this aim, however, attempts to impose an 'official' memory have often sparked counter-memory activism 'from below'. On the one hand, this has seen marginalized constituencies excluded from 'official' memory mobilizing through memory activism to have their own experiences acknowledged;<sup>191</sup> on the other hand, it has provided a platform for those who yearn for a return to what Pablo de Greiff called 'the glories of yesteryear' to oppose new interpretations of the past.<sup>192</sup>

Looking forward, then, the key sites of contest within law-memory interplay identified in this article will remain relevant as the contours of TJ change. Further development of the 'right to truth' in international law is conducive to an enduring tussle between deformed legalism, which seeks to limit, if not completely prevent, legalistic fact finding, and transcendent legalism, which seeks to optimize it. NI could yet define this battle should the UK government proceed with their intention to legislate against future prosecutions for, and long-awaited inquests into, conflict-related deaths.<sup>193</sup> Likewise, the growing digitization and use of social media in grassroots memory activism pose an unprecedented challenge to proscriptive remembering. This has particular relevance where resistant grassroots memory activism, such as the Tamil campaign demanding accountability for Sri Lankan human rights violations,<sup>194</sup> is primarily driven by diasporic communities beyond the reach of the state. This is an actuality that those who devised, and subsequently relied on, old memory-law-style offences of denialism and divisionism could never have envisioned. Even if states pivot towards legislation on online hate speech as a corrective to this, it remains to be seen whether or not such a move would counter external challenges to 'official' memory from outside their jurisdiction.

Growing demands to decolonize the past mean that an increasing number of polities will have to choose between legal correctionalism or legal protectionism. A cursory glance at the post-Brexit UK suggests that there remains little appetite for a more critically reflective approach to the colonial past there. Despite a growing number of post-colonial critiques,<sup>195</sup> political discourse in the post-Brexit UK has been suffused with an imperial nostalgia of the kind seen in Trumpian

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<sup>191</sup> Rolston, *op. cit.*, n. 31.

<sup>192</sup> De Greiff, *op. cit.*, n. 27.

<sup>193</sup> A. Bryson et al., *Addressing the Legacy of Northern Ireland's Past: The Model Bill Team's Response to the NIO Proposals* (2021).

<sup>194</sup> R. Seoighe, 'Reimagining Narratives of Resistance: Memory Work in the London Tamil Diaspora' (2021) 9 *State Crime* 169.

<sup>195</sup> N. El-Enany, *(B)ordering Britain: Law, Race and Empire* (2020).

America.<sup>196</sup> Rather than follow the Spanish example of correcting problematic ‘official’ memories, the pendulum appears to have swung towards legal protectionism. Far from engaging constructively with calls to remove statues of imperial figures, the UK government instead responded with plans to increase the punishment for defacing or damaging such statues.<sup>197</sup> In making recourse to the ‘big stick’ of criminal sanction,<sup>198</sup> the UK government have demonstrated how attempts to insulate the ‘official’ memory of a contested past are *not* necessarily confined to societies recently emerged from collective violence. If anything, as TJ discourse and practice is extended in scope to address colonialism and its consequences, other settled polities will experience the contest between corrective and protective approaches to their colonial past. While this may somewhat blur the distinction between what is or is not a post-collective violence and/or TJ society, it nonetheless brings into sharp focus the invariable attraction of (mis)using law to (mis)shape the memory of a divisive past to further present interests.

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<sup>196</sup> D. Dorling and S. Tomlinson, *Rule Britannia: Brexit and the End of Empire* (2019); S. Fisher Franklin, ‘Nostalgia for a Fictive Past: Nation and Identity in a Post-Trump, Post-Brexit World’ in *Brexit and Beyond: Nation and Identity*, eds D. Keller and I. Habermann (2021) 271.

<sup>197</sup> H. Lock, ‘UK Votes in a Bill that Threatens the Right to Protest. Here’s What You Need to Know’ *Global Citizen*, 25 January 2022, at <<https://www.globalcitizen.org/en/content/police-crime-bill-uk-what-to-know-protesting/>>.

<sup>198</sup> R. Fuller, ‘Morals and the Criminal Law’ (1942) 32 *J. of Criminal Law & Criminology* 624.