"The past is a foreign country": official public memory in South African constitutional jurisprudence*

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Remember, remember the fifth of November,
the Gunpowder, treason, and plot,
I know of no reason why gunpowder treason
should ever be forgot.[1]

1 INTRODUCTION

In their graphic novel, *V for Vendetta*, Alan Moore and David Lloyd created an anarchist anti-hero called V who opposed a fascist regime in a futuristic England by blowing up government buildings. The film version of the novel features the same (anti-)hero and starts with him blowing up the Old Bailey (the Central Criminal Court in London) while the 1812 Overture booms from speakers all over the city. The film ends with the successful blowing up of the Houses of Parliament while the citizens look on in approval. Throughout the film viewers are reminded not to forget the fifth of November – the night in 1605 when a group of English Roman Catholics, led by Guy Fawkes, tried to blow up the Palace of Westminster in order to kill King James I. The plot was foiled and Fawkes was executed. The terrorist V also wears a mask that is reminiscent of a painting of Guy Fawkes.

It becomes clearer later on in the film that the fascist government portrayed in the film came to power after a series of biological terrorist attacks. It stepped in to restore law and order, but the citizens were subjected to draconian laws to maintain that law and order. This is a society gripped, and ruled, by fear. It also later becomes clear that the original attacks were engineered by the people who then stepped in with an antidote and, of course, the means to end the disorder and then took over the government. Interestingly enough, the government used the TV station and the courts to keep people in the dark and to fuel their fears. That is why the Old Bailey is blown up. Of course, this

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* The first line of Hartley LP *The go-between* (London 1953) reads: "The past is a foreign country: they do things differently there." This article is an extended version of a paper read at the conference on *Time, memory and oblivion*, held at Eshowe, South Africa, 9-10 October 2007.

1 Traditional rhyme associated with Guy Fawkes night in England. See http://en.wikipedia.org/wiki/Guy_Fawkes_Night .

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is a very familiar scenario for anyone who grew up in apartheid South Africa where the media and courts were also used to enforce and justify ideology.

The message of both the novel and the film described above is that, while history and the past must be remembered, it is also susceptible to distortion and reconstruction. And that is why the past often seems like a foreign country – one that bears little or no relation to one's own recollection.

South Africa has been concerned with that foreign country called the past for quite some time. In fact, it would be better to characterise that concern, in Jean Baudrillard's terms, as a perverse fascination with our own origins, "a collective attempt to hallucinate the historical truth of evil".[2] It is this idea of a historical truth that is the focus of this article, but in a very specific context. This article focuses on the way in which the South African Constitutional Court has been involved in the creation of what can be termed official public memory. To that end it will, first of all, examine Brian Havel's idea of official public memory, and then look at the way in which decisions of the Constitutional Court have been instrumental in creating the memory. Then the problems that resulted from this conception of "historical truth" will be examined.

2 OFFICIAL PUBLIC MEMORY

They flutter behind you, your possible pasts,
Some bright-eyed and crazy,
Some frightened and lost.
A warning to anyone still in command
Of their possible future, to take care.[3]

Brian Havel argues that official public memory is memory constructed by public law and policy in order to create a "collective national interpretive idiom".[4] The purpose of this official public memory, on the one hand, is social control and stability, and, on the other hand, to mask contestation in society. Official public memory has the following five characteristics:

- *Selectivity*: Official public memory determines what is to be remembered, and what is not, in an ideological sense. In a very real sense it means that the narrative blinds observers to certain histories and makes other histories obvious to them. In the film that was briefly described above, the government constantly reinforces the official story of its heroic rescue of the country from the brink of disaster and chaos. The history of resistance to their rule is ruthlessly repressed, and thus effectively forgotten.
- *Constructivism*: This means that claims are made about the past, not necessarily through historical research, but through law. This memory is created through legal instruments (like constitutions) and legal institu-

2 Baudrillard J *Screened out* (London 2002) 15.
3 Waters R "Your possible pasts" on *The final cut* (1983 © Harvest Records).
4 Havel B "In search of a theory of public memory: the state, the individual, and Marcel Proust" (2005) 16 *Indiana Law Journal* 605 608.

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tions (like the Constitutional Court and the TRC[5]). As Pierre Schlag says in the context of American law:

> "Hence it is that the work product of nine rather harried bureaucrats on Capitol Hill in Washington, DC, are routinely represented as the Constitutional decisions of the founding fathers, or even more grandly as decisions of 'We the people …'."[6]

- *Mythopoesis*: According to Havel, myths are created through a canonical master narrative about this selective memory. The canonical narrative is therefore, not some form of holy scripture, but a legal instrument, like a constitution. Therefore, constitutions fulfil the same role as, for example, the Bible or the Koran would in religious societies. In South Africa, for example, the myth of the reconciled "rainbow nation" was the result of the activities of the TRC and the Constitutional Court, as will become clearer in the course of this discussion.
- *Incorporation*: Following Marcuse, Havel uses this term to refer to the ways in which official public memory seeks to absorb contestation of the master narrative. It is what Baudrillard calls the "excision of difference", where dissenting voices are regarded with suspicion and disdain.[7] In the film briefly discussed above, the incorporation is assured by means of television programs (with the slogan "England prevails") and officially sanctioned "Fingermen" who enforce the party line. The similarities with apartheid South Africa are quite obvious, although the penalties for dissent were rather more serious.
- *Presentism*: Official public memory is also biased towards the present for the purposes of social cohesion and stability. This is obvious in the drive to create the memory, and then "be done" with the past.[8] In South Africa, too, there are constant calls to not rake over old coals.

In a sense this is, of course, historical engineering where access to the past is mediated through familiar and replicable structures. Havel illustrates this by referring to how Austria dealt with its own Nazi past, as well as to a number of Truth Commissions worldwide. His conclusion is that Austria, in particular, tried to whitewash and deny its part in the Nazi history by creating an official public memory of resistance and non-compliance with a hostile enemy (Germany). And this is, of course, only one version of the "possible pasts".

Havel argues that, traditionally, there are two alternatives to official public memory. The first is a reliance on historical fact, and, as he puts it, "(h)istory work …. is obsessional about discovering a 'true', as opposed to a 'canonical' past".[9] The problem with this kind of memory is, of course, that the goal

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5 The acronym TRC is used for the Truth and Reconciliation Commission that was supposed to heal divisions and reconcile various groups in South Africa.

6 Schlag P "The legal form of being" in *Laying down the law: mysticism, fetishism and the American legal mind* (1996) 146-159 153.

7 Baudrillard (see fn 2 above): "In every compulsion for resemblance, every excision of difference, in every case of things being contiguous with their own images or becoming confused with their own code, there is a threat of incestuous virulence, of a diabolical alterity, knocking the marvelous machine out of kilter."

8 Havel (see fn 4 above) 612-613.

9 Havel (see fn 4 above) 616.

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of "historical truth" implies endless contestation that cannot ground social control and stability. It is an interpretive fallacy to imagine that historians do not also alter history by looking at it. Gary Minda points out that, even in the natural sciences, the work of Kuhn and Feyerabend has shown that scientific theories are based in interpretation and the perspective of the scientist.[10]

But that also makes this kind of memory as dangerous as official public memory. This is the point George Orwell makes:

> "And if all others accepted the lie the party imposed – if all records told the same tale – then the lie passed into history and became truth. 'Who controls the past,' ran the Party slogan, 'controls the future: who controls the present controls the past.' And yet the past, though of its nature alterable, never had been altered. Whatever was true now was true from everlasting to everlasting."[11]

The other alternative to official public memory is French philosopher Maurice Halbwachs's idea of public or collective memory rooted in socially constructed groups whose multiple viewpoints on the past establish, what he calls, an affective community.[12] He states:

> "Our memories remain collective, however, and are recalled to us though others *even though only we were participants in the events or saw the things concerned*."[13]

The problem with Halbwachs's solution, according to Havel, is that it discounts individual memory in favour of collective memory. And this collective memory is as constructed as official public memory,[14] as the quote above clearly shows.

Havel argues that what we need is a kind of memory that is cognitively protected from the state.[15] The only kind of memory that is protected in that way is affective memory, as Marcel Proust illustrates with his example of tasting the Madeleine.[16] Proust's view of memory is one where a sense of memory (like tasting a Madeleine) can awaken a memory of events that is unmediated by the official version (or family version) of those same events. It is intensely personal, and can serve to undermine the official or sanctioned story about events. It is this notion of affectivity that separates individual memory from both official public memory and public collective memory. There is, therefore, a Proustian affective or transcendental memory that cannot be replicated by official public memory, and which is cognitively protected from state power.

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10 Minda G *Postmodern legal movements: law and jurisprudence at century's end* (1995) 79-80 (footnotes omitted): "By the early 1970's, Thomas Kuhn and Paul Feyerabend questioned the belief that scientific theory developed on the basis of objective description and instead demonstrated that 'scientific models were themselves partial interpretations, dependent upon the perspectives and disciplinary conventions of scientific observers'. …. (T)hose interpretive practices undermined the very possibility of an objective foundational theory for (history)." Minda is here talking about legal theory, but the argument also holds for historical research.

11 Orwell G *Nineteen eighty-four* (1984) 186.

12 Halbwachs S *The collective memory* (1980) 22-87.

13 Halbwachs (see fn 12 above) 23 (my emphasis).

14 Havel (see fn 4 above) 618.

15 Havel (see fn 4 above) 620.

16 Proust M *Remembrance of things past* vol I *Swann's way* (1949) 58: "No sooner had the warm liquid, and the crumbs with it, touch my palate than a shudder ran though my whole body … An exquisite pleasure had invaded my senses." At 61: "And suddenly the memory returns. The taste was that of the little crumb of Madeleine … my aunt Léonie used to give me …"

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This kind of memory cannot be excluded from the official memory, and, instead, must unmask the contestation inherent in official memory. It strips official memory of its normative and descriptive character.[17] Havel, therefore, reconstructs public memory as inherently contestable, although the contestation depends on emotional courage in the Proustian sense. He concludes:

> "If, indeed, there is no such thing as absolute historical truth, the mythmaking role of the State and its lawmaking apparatus can be rationally understood. It is easy to fathom that no State has yet come to a full reckoning with its past. …. (There is an) official agenda of rapid closure, the desire to build a new post-conflict society that is not overwhelmed by the burdens of memory."[18]

Havel thus argues that states, through law and legal institutions, try to create an official public memory for the purposes of social cohesion and control. The traditional alternatives to this (historical, researched "truth" and collective memory) are shown as not being viable. Both are subject to manipulation and, therefore, are not cognitively protected from state power. His alternative is the Proustian affective, individual memory that depends on sense perception, and is, therefore, protected from state power. It is by no means clear whether this is indeed a viable alternative, but that issue will only be dealt with later. In the next section the question that will be investigated is: whether the South African Constitutional Court has been involved in a process of creating official public memory.

3 SOUTH AFRICAN JURISPRUDENCE[19]

> History is as light as individual human
> life, unbearably light, light as a feather,
> as dust swirling into the air, as whatever
> will no longer exist tomorrow.[20]

In South African constitutional jurisprudence since 1994, Etienne Mureinik's idea of the Constitution as a bridge between an oppressive past and a democratic future[21] has been immensely influential.[22] According to him, in 1994 South Africa moved from a culture of authority in which the power of the state was absolute, to a culture of justification in which each exercise of power had to be justified by good reasons.[23] And, despite a number of theoretical concerns that have been raised about this metaphor,[24] it has been accepted by the Constitutional Court as a working method and approach. It has formed

17 Havel (see fn 4 above) 720.
18 Havel (see fn 4 above) 722-723.
19 This is not meant to be an exhaustive study of constitutional jurisprudence. The cases were selected to illustrate the central argument of this article.
20 Kundera M *The unbearable lightness of being* (Tr MH Heim)(1984) 217.
21 Mureinik "A bridge to where? Introducing the interim bill of rights" (1994) 10 *SAJHR* 31.
22 Mureinik has been quoted by the Constitutional Court on a number of occasions. A few examples will suffice: *S v Lawrence* 1997 (4) SA 1176 (CC) paras 39 and 42; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25; *Government of SA and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 20.
23 Mureinik (see fn 21 above) 127.
24 Van der Walt AJ "Modernity, normality, and meaning: the struggle between progress and stability and the politics of interpretation" (2000) 11 *Stell LR* 21 and 226.

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the basis for the Constitutional Court's role in the creation of official public memory in South Africa.

The Constitutional Court has made much of its supposed departure from the traditional textualist approach to interpretation to a *generous* or *purposive* approach. The canonical explanation of this is to be found in the death penalty case of *S v Makwanyane* (per Chaskalson P):

> "(The Court) gave its approval to an approach which, whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution. … I need say no more in this judgment than that section 11(2) of the Constitution must not be construed in isolation, but in its *context*, which includes the *history* and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part."[25]

This formulation has become a somewhat standard one in South African constitutional jurisprudence. The Court has committed itself to a contextual approach to interpretation, and to the fact that this context is a historical one.[26] The interesting point is, however, that the history the Court uses as the point of departure is a very specific and explicit one, namely, the past as the *apartheid* past. For example, in *Democratic Alliance and Another v Masondo and Another*[27] the Court (per O' Reagan J) states: "The *legacy of the apartheid era* therefore is that our towns are deeply divided."

In *Government of RSA and Others v Grootboom and Others*[28] *the Court (per Yacoob J) also links the right to equality to "our legacy of deep social inequality". And in First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services and Another*[29] section 25 of the Constitution (dealing with property rights) is linked (per Ackermann J) to "one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land". This same factor is also raised as the historical context in *DVB Behuising (Pty) Limited v North West Provincial Government and Another.*[30] This approach is echoed in countless other cases that take the "historical context" into consideration.[31]

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25 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 9 and 10. – (footnotes omitted, emphasis added).

26 De Vos "A bridge too far? History as context in the interpretation of the South African constitution" (2001) 17 *SAJHR* 1 7.

27 *Democratic Alliance and Another v Masondo and Another* 2003 (2) BCLR 128 (CC) para 57.

28 *Government of RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 25.

29 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services and Another* 2002 (4) SA 768 (CC) para 49.

30 *DVB Behuising (Pty) Limited v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 41.

31 For example: *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* (CCT 69/06); *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC); *African National Congress and Another v Minister of Local Government and Housing, Kwazulu-Natal and Others* 1998 3 SA 1 (CC); *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06); *Mashavha v President of the Republic of South Africa and Others* (CCT 67/03); *New National Party v Government of the Republic of South Africa and Others* 1999 3 SA 191 (CC); *Fedsure Life Assurance Ltd and Others v Greater Johannesburg TMC and Others* 1999 (1) SA 374 (CC); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).

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As these cases often deal with political issues, like land reform or local government, one might argue that this is not a strange occurrence. However, De Vos argues that the apartheid historical context has become a "grand narrative" or "super context" for interpretation in almost all cases. This grand narrative always deals, in the first place, with the past as the *apartheid* past, and, in the second place, with the *manner* in which the change came about, namely, in a negotiated settlement rather than through revolutionary change.[32] And this is now also the grand narrative for cases that have nothing to do with land reform or local government. To illustrate this, two examples can be mentioned.

The first example is the recently decided *Fourie* case in the Supreme Court of Appeal.[33] The case dealt with the common law definition of marriage, and specifically with the wording used in marriage ceremonies, as prescribed by section 30(1) of the Marriage Act 25 of 1961. The applicants argued that this did not make provision for same sex marriages and was, therefore, unconstitutional. The outcome is not important as it was overturned by the Constitutional Court. What is important is that, in deciding the case, the Court relied on the historical context described by De Vos above. In other words, it concentrated on the *apartheid* history that was turned around by a *negotiated* settlement.[34] For example, when Cameron JA deals with the historical context of the definition of marriage, he refers to "repressive colonial conceptions of race and gender".[35]

There are difficult questions to answer here. The most obvious is: what has the *apartheid* past to do with the definition of marriage? Certainly, there are historical factors to be considered here, such as, the traditional position of women in society, the long tradition of discrimination against gays and lesbians, the traditional preference for Christian notions of marriage and family, and so on. But in the judgment these are not even considered. The Court has allowed itself to see only one kind of history, and that is the apartheid history. Of course, this is an example of what Havel calls *selectivity* in the creation of official public memory.

The second example concerns the way in which the Court has dealt with the issue of the value of *ubuntu* in the death penalty case.[36] As with other issues, the historical context of *ubuntu* is of interest here. In the opinion of Madala J, the long tradition of taking extenuating circumstances into consideration when passing sentence is an example of how *ubuntu* has always been part of South African law.[37] Mokgoro J argues, as the point of departure, that the ideal of *ubuntu* is a "shared value and ideal that runs like a golden

32 De Vos (see fn 26 above) 11.
33 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA).
34 Paras 7 – 10.
35 Para 9.
36 I have previously dealt with the issue of values in constitutional interpretation and do not intend to repeat the arguments here. See Kroeze IJ "Doing things with values: the role of constitutional values in constitutional interpretation" (2001) 12 *Stell LR* 265-276, and Kroeze IJ "Doing things with values II: the case of *ubuntu*" (2002) 13 *Stell LR* 252-264.
37 *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 244.

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thread across cultural lines" in South African society,[38] and it is consistent with the "inherited traditional value systems of South Africans in general".[39] In Mokgoro's view, this is entirely consistent with values articulated in the American and Hungarian Constitutions, as well as the values contained in international human rights documents.[40]

What is important to note here is the Court's involvement in what Havel calls *mythopoesis*. It is creating the myth that not only is *ubuntu* a generally accepted and culturally neutral concept, *it has always been that*. The Court is engaging in a historical construction of a past that never happened, accompanied by the compulsion for resemblance and the excision of difference.[41] Schlag points out that the resort to "values" is often a way of denying very real and deep social divisions and problems.[42]

From the above it can be seen that the Constitutional Court is indeed engaging in the creation of official public memory. In Havel's terms there is definitely *selectivity,* in that the Court has chosen to remember the apartheid past even in cases where that is clearly not the only relevant history. The claims that are made about the past are not necessarily based in historical research, but on things like values and other legal concepts, thus satisfying the requirement of *constructivism*. As has been pointed out above, the Court is also involved in myth creation (*mythopoesis*) in its effort to reconstruct history. And that myth creation has the effect of *incorporation* in that it tends to stop all further debate about, for example, values.[43] And there is a strong emphasis on how much better things are here and now, regardless of the real situation, that Havel calls *presentism*.

4 THE CONSEQUENCES OF OFFICIAL PUBLIC MEMORY

> In the realm of totalitarian kitsch,
> all answers are given in advance and
> preclude any questions. It follows, then,
> that the true opponent of totalitarian
> kitsch is the person who asks questions.[44]

According to Havel, the purposes of official public memory are social stability and social control. And that is probably true of the South African project as well. This is particularly clear from the death penalty case. Every single Justice in the Constitutional Court at the time delivered a judgment, all con-

38 At para 307.
39 At paras 310-311. It is interesting to note that Mokgoro J is not claiming that *ubuntu* is a concept unique to African people – in her view it is a concept that is shared by all South Africans. This is a truly fascinating claim that she never substantiates.
40 At para 309.
41 Baudrillard (see fn 2 above) 2.
42 Schlag P "Values" in *Laying down the law – mysticism, fetishism, and the American legal mind* (1996) 42-59 54-55: " Values and value-talk can operate as a form of collective denial, a way of not taking into account the social or historical situation. … Values and value-talk can be a way of arresting troubling and disturbing inquiries."
43 This argument is developed further by Kroeze IJ.
44 Kundera (see fn 20 above) 247.

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curring that the death penalty was unconstitutional on the basis of the right to human dignity. And all of them relied on the creation of official public memory to construct a consensus amongst the general public about the values in the Constitution. Based on a triumphalist version of our history as a bridge between a violent and repressive past to a peaceful and democratic present and future, the values were invoked as immutable, debate-stopping certainties, without any apparent awareness of their ontological status as cultural artefacts. Nor is there a hermeneutic sensitivity regarding constitutional interpretation – it is as if the "interpretive turn"[45] in legal philosophy had not taken place. And this is not without consequences:

> "Once emancipated from their generative history, values tend to become the ethical equivalent of currency – endlessly recyclable, ready for appropriation by any force, ready to underwrite any end. The identities of values become uncertain, their roles indiscriminate."[46]

As has become clear from the discussion of *ubuntu* above, the Constitutional Court Justices tried to construct a moral consensus about the death penalty based on certain values that we all share and have supposedly always shared. They then argued that, because all South Africans share these values, they all share the abhorrence for the death penalty, and that *that* consensus can provide the moral grounding for declaring the death penalty unconstitutional. Subsequent events have proved them wrong.[47] The persistent calls for the re-introduction of the death penalty make a mockery of the supposed moral consensus, and have instead served to highlight the very real divisions and lack of consensus in society.[48]

The other example of the consequences of official public memory can be seen in the re-naming controversy currently going on. All societies and political systems, as Robert Cover said, begin in violence.[49] Sometimes that violence takes the form of revolution or war. In our case the violence took the form of repression and hate followed by resistance and, eventually, by change. So it is an illusion that our revolution was peaceful – the violence just

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45 Minda (see fn 10 above) 79-80: "The 'interpretive turn' in jurisprudence reflected developments in the social sciences and humanities that rejected the scientism and positivism of the social sciences and the conventional understanding of language and literary criticism. By the early 1970's, Thomas Kuhn and Paul Feyerabend questioned the belief that scientific theory developed on the basis of objective description and instead demonstrated that 'scientific models were themselves partial interpretations, dependent upon the perspectives and disciplinary conventions of scientific observers'. …. As legal scholars contemplated the interpretive turn in its fullest sense, they found themselves confronted with a dilemma. …(T)hey discovered that those interpretive practices undermined the very possibility of an objective foundational theory for law."

46 Schlag (see fn 42 above) 58.

47 For just one example, see http://www.athlone.co.za/community/opinions/pastpoll.php?pollid=5 (accessed on 3 April 2008).

48 See the contrasting views in http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2081009,00.html and http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20080308082810943C127976 (both accessed on 3 April 2008) as just two examples of differing views on the death penalty.

49 Cover R "Violence and the word" in Minow M, Ryan M and Sarat A (eds) *Narrative, violence and the law: the essays of Robert Cover* (1992) 203 203: "Legal interpretation takes place on a field of pain and death."

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took a different form. And then we tried to reconstruct that history to erase the memory of the violence.[50]

And here is the paradox – is not the renaming of towns, streets, parks, and so on, part and parcel of the creation of official public memory? Is it not an attempt to erase a part of our history because we do not like to be reminded that it **is** part of our, all our, histories? If you re-name Voortrekker Street Nelson Mandela Drive, are not you trying to collectively forget what happened, or to replace it with a different memory? If you re-name Pietersburg Polokwane, are you not trying to deny the existence of some historical figure? And if you re-name a city after some person who might or might not have existed, are you not taking part in a grand experiment of myth creation?

What we have here is what Baudrillard calls the whitewashing of history. We are trying to pretend that white colonisation never took place, the Voortrekkers were never here, 40 years of apartheid never happened. Then we can create a nice little history of peaceful co-existence and re-create a past that may or may not have happened. "(O)ur new democracy thrives on the aestheticization of the end of history."[51] The past has become a foreign country. One which many of us no longer recognise. That is because our affective memory lives on and makes the official public memory unbelievable.

5 CONCLUSION

Er schuilt altijd iets achter
De dingen zoals je ze ziet
En als jij daar doorheen kijk
Dan maak je van wanhoop muziek.[52]

De Vos points out that there are many more historical narratives out there than the apartheid one, and that it seems strange to privilege one over the others.[53] He argues that "(w)hat is required is not a rigid, exclusive and nationalistic version of history, but the fragile, self-reflexive and somewhat ironic history of the present".[54] This is much the same solution as the one offered by Havel, namely, a kind of memory that cannot be replicated by official public memory, and that unmasks the contestations inherent in official memory.

It is also important to realise that the re-naming saga is a desperate attempt to snatch a posthumous truth from history. We all too easily forget that our reality comes to us through the media. And historical truth is no exception.

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50 Fuller A *Scribbling the cat* (Picador 2005) 127: "Those of us who have escaped the horror of being turned … from people to machines that issue … a sentence of death are ill equipped to judge (let alone understand) anyone who has been a soldier. Our minds are still innocent of the stain of sanctioned murder."

51 Baudrillard (see fn 2 above) 14.

52 Bos S "De maan is niet eenzaam" on *De onderstroom* (1997 © HKM records). Translation: "Something always hides behind the things you can see, and if you can see them you make music from despair."

53 De Vos (see fn 26 above)14-15. See also Boshoff "Constitutional interpretation: between past and future" (2001) 12 *Stell LR* 357 358: "(T)he interpreter's own perspective on the past and future is not stable, but always vacillating and precarious."

54 De Vos (see fn 26 above) 33.

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Because our collective conscience is a media effect, the tools of historical intelligibility have disappeared.[55] And the end of history marks the beginning of myth. We are reconstructing a mythical past to make up for events we can no longer understand.

But this virtual history, or official public memory, has also resulted in a situation where the slightest criticism, the slightest radical negativity, is stifled by the virtual consensus about a history based on negotiation and reconciliation. But, by doing so, we become vulnerable to the slightest viral attack. A true democracy is no exception to the rule that systems always function better when running counter to their own rules and operating in spite of their own principles. Once we deny or make this contradiction impossible, we undermine the strength of the system. That is why respect for the system must always go hand-in-hand with justified contempt. Indeterminacy, anxiety and confusion are the other sides of choice, pluralism and democracy. They are all necessary.

And that is why we need to learn something from the English celebration of Guy Fawkes's attempt to blow up the Palace of Westminster. Only they can take an act of treason and turn it into a party. But, as the film version of *V for Vendetta* reminds us – there is something else behind this. Behind this is a basic need to remember your history, warts and all. Of course we were all scarred by apartheid and violence, but we are not defined by that alone. We are our history, but apartheid is not the only history we have.

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