INTERRUPTING THE LEGAL PERSON

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INTERRUPTING THE LEGAL PERSON

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CHAPTER 1

MY STORY, WHOSE MEMORY: NOTES ON THE AUTONOMY AND HETERONOMY OF LAW

Stewart Motha

ABSTRACT

Reflecting on the myriad instances where juridical recognition demands a story, confession, testimony on suffering, or evidence of trauma – this chapter considers the role of storytelling and narrative in constituting the legal person, their persona, and relationship they have to a community or the state. What are the forces that drive the demand to give an account of oneself? What are the reasons for, and implications of, resisting the injunction to reveal all? Going beyond the usual bounds of juridically recognised testimony and evidence – the author considers how memory moves across time and space in human and non-human material formations. These questions are posed to open discussion of a wider concern about the autonomy and heteronomy of law. Looking beyond the separation of law and morality in positivist jurisprudence – the autonomy/heteronomy distinction is a means of getting at the co-constitution of the human and non-human. The discussion thus ranges across the philosophies of history that constitute autonomy/heteronomy – examining the tension between confidential stories of those who have suffered abuse, and the state's archival drive to preserve such material; literary and metaphorical devices for narrating the past; and a consideration of nature and destruction where the human plays an infinitesimal part in making history.

Keywords: Autonomy; heteronomy; legal person; *A-G of Canada* v. *Larry Fontaine* [2017] 2 S.C.R 206; colonial violence; slavery; philosophy of history; Walter Benjamin; Cornelius Castoriadis; Neil MacComick; W. G Sebald; Christina Sharpe

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My mother told me,
they'll want you to tell them your story, the girl said.
My mother said, *don't. You are not anyone's story*.
Ali Smith (2020, p. 229)

INTRODUCTION

In this chapter, I explore the legal and political means by which experiences of trauma are received, dissimulated, and archived by juridical institutions. These archival processes are a means of constituting and regulating the legal person. What are the forces that demand speech, writing, and the recording of individual testimony? What are the different ways of evading archival enterprises that force the traumatised to speak? In addressing these questions, I explore the conceptual and literary devices that help the past to be accessed without demanding more from the wounded or the dead.[i]

Constituting the legal person through stories and narratives discloses a wider problem, as I will go on to explain, manifesting the tension between autonomy and heteronomy in law. To be *autonomous* is to give oneself one's own law by one's own means. Giving oneself law also involves telling a story – for instance, the biography of a legal subject who asserts autonomy in the face of competing structures of governance and authority. Autonomy, the self-authorised autonomos of law (*ipseity*), is a conceit that applies to the individual and the state alike. Autonomy is often instantiated through elaborate tales assembled and reiterated over time – an *impersonation* of independence practiced by individuals and the state.[ii] In contrast to the legal fiction of the autonomous individual or state, *heteronomous* accounts of a person, class, and community open to another law – the law as other, law as coming from another place. Hetero-nomic law is the law of the other, law as history, memory, and various theological understandings of the source of authority and authorisation. In a formulation that I will extend in this chapter, Marx (1852) proclaimed that 'people make their own history but not under conditions of their own choosing'.[iii] These haunting conditions of human and non-human existence undo any pretence to absolute autonomy asserted by the individual or state. Indeed, a history that places the individual and the state to one side may be encountered in transhistorical mytho-poetic narratives (Motha, 2018, pp. 143–151), and in what W. G Sebald (2004) termed a 'natural history of destruction'. Perhaps too ambitiously, then, this chapter attempts to recast the fictive constitution of the legal person and the autonomy/heteronomy of law as an archival problem.

The etymological root of person is *prosopon* (Greek) and *persona* (Latin). They connote a theatrical mask which manifests the 'duality' of a façade separated from that which is behind it; and a 'duplicity' that enables actors to interpret their role differently from one performance to another (Esposito, 2015, p. 30). The category of 'person' may apply to humans, non-humans such as

corporations, and is being extended to other inanimate phenomena such as rivers and forests. A person may be cast as inside, outside, or liminal to sociality depending on the juridical recognition they receive. Carrying these multiple meanings of separation and ruse, the legal person is an ambivalent construct. While some would regard this flexibility and malleability of the 'person' as a welcome addition to the 'toolkit' of legal techniques – this fluidity has facilitated distinctions that were central to the institution of slavery (Hartman, 1997); and has enabled the artifice of the corporation to shield individuals from responsibility for taxes and many other forms of social and economic harm (Bakan, 2005). In this chapter, I seek to de-centre juridical personification as a mode of recognition by extending narrative and archival encounters to non-human material. Thus, my objective is not to extend instances of the legal person, but to open new registers for recalling and encountering human and non-human histories of the present.

At a relatively benign level, giving an account of oneself creates a subject and category of legal person through autobiography. But stories are also aligned to various identities and structures of governance and are often demanded in testimonial and evidentiary processes of the law. Citizen, subject, native, woman, refugee, or non-binary trans figures are framed by stories in political and juridical modes of recognition. Raced and gendered beings are invited to share their experiences of discrimination so institutions can clean up their act and comply with regimes regulating equality. Refugees and displaced persons are regularly forced to testify to their suffering and abject lives. Their scars and wounds are asked to speak as a precursor to state recognition of their legal status as persons with a well-founded fear of persecution (Fassin & Rechtman, 2009, chapters 9 and 10). That the conditions of fear are not always written on the body, or that recounting trauma does its own damage, are concerns set aside in legal and bureaucratic processes. Mechanisms of transitional justice and reconciliation have had testimony of victims and perpetrators at the heart of their processes. Similarly, survivors of violence in colonial reservations and residential schools are asked to disclose the details of sexual abuse in order to have these recognised by truth commissions or to qualify for compensation (Kennedy, 2001, 2011). In other instances, courts and tribunals that adjudicate on native title litigation and indigenous land claims are having their storerooms reconstituted as national archives (Genovese, Luker, & Rubenstein, 2019). These multiple demands to disclose, preserve, and disseminate testimony manifest an archival drive that assembles and constitutes the legal person and their communities. However, these practices of recognition privilege human-centred narratives, and they place an undue burden on those who have experienced violence to recount their experiences. As we will see, the conditions under which testimony on violence is archived risks instrumentalising accounts of trauma to serve the reconciliation projects of nations and societies. In this context, building encounters with non-human archival sites and objects such as ships, oceans, minerals (Sharpe, 2016); and processes of transformation in animal and plant populations in landscapes of destruction (Sebald, 2004), may build new configurations and experiences of violence.

This chapter is part of a wider project to promote a less human-centred jurisprudence. One task associated with this is to chart transhistorical formations and material manifestations of violence where the human is only one part of being lawful and subject to legal mediation in the world. I begin with a discussion of *A-G of Canada* v. *Larry Fontaine* [2017]. This case involved the terms and conditions of archiving and giving public access to the confidential evidence of survivors of sexual abuse and other violence in Indian Residential Schools in Canada. The litigation manifests the tensions and contradictions of juridical recognition of historical abuse and violence. Here, the constitution of the subjectivity and experience of individuals come into conflict with what are projected as the interests of communities and states seeking to reconcile their future with a violent past. I deploy the *Fontaine* case to highlight the archival orientations of liberal legal institutions which promote autonomous subjectivities while at the same time projecting national and social institutions as heteronomous determinants of the uses of historical narratives. A far richer approach to archiving historical violence can be found, I suggest, in the wake-work undertaken by Christina Sharpe on slavery and the shippability of bodies. In this vein, I also discuss the post-human accounts and encounters of the German writer W. G Sebald in his treatment of the reluctance and reticence of Germans to address their experience of the fire-bombing and destruction of cities and populations during WWII. He provides yet another instance of an archive constituted by an assemblage of objects, animals, and plants. Sebald also offers insights into the return of sociality that happens despite, and even by the repression of, destruction. The phenomenology of objects and nature that Sharpe and Sebald respectively offer stand in stark contrast to what I suggest is the central conceptual architecture of modern jurisprudence: the distinction between autonomy and heteronomy where the autonomous subject is set apart from heteronomous institutions of law.

This chapter, as I have already stated, is a preparatory moment in what is a much larger task of expanding what is understood to be the heteronomy of law. Moving beyond the law/morality dichotomy set up by much liberal jurisprudence, I chart the richer history of ideas on heteronomy as a means of inaugurating a post-human archive of violence.

INDIVIDUAL STORIES AND COLLECTIVE MEMORIES

The Canadian Supreme Court recently decided an application brought by survivors of sexual and other abuse in Indian residential Schools who wished to have the confidentiality of their testimony respected and protected. They had given evidence to the Independent Assessment Process (IAP) (*A-G of Canada* v. *Larry Fontaine*, 2017). The IAP arose out of the *Indian Residential Schools Settlement Agreement* (IRSSA, 2006), enabling survivors of violence and abuse in residential schools to settle a class action seeking compensation. The Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat had requested directions from the Ontario Superior Court of Justice that the IAP documents be subjected to a 15 year retention period during which claimants could elect to have them

preserved and archived. If such consent was not forthcoming in that period, the records would be destroyed. These orders and directions were granted.

In response, the Attorney-General of Canada and other parties including the Truth and Reconciliation Commission (TRC), and the National Centre for Truth and Reconciliation (NCTR) argued on appeal that the IAP documents – documents that disclosed sensitive accounts of sexual abuse, recordings of testimony, transcripts, and electronic files – are 'under the control of a government institution' (IAP), and thus subject to preservation under the *Access to Information Act,* the *Privacy Act*, and the *Library and Archives of Canada Act*. A further concern of the state of Canada was that the destruction of testimony would diminish its capacity to defend itself in potential future litigation. Archiving evidence in this case was thus a means of future-proofing the state of Canada. The A-G of Canada, TRC, and NCTR were also seeking to preserve a historical record for a state mandated form of commemoration and memorialisation – an archival imperative that exists in tension with the privacy promised to those subject to abuse in residential schools when they agreed to participate in the IAP process.

The Court dealt with the tension between national commemoration and the 'conscription' of the survivors of abuse in the following way:

> The position taken by the TRC, and later by the NCTR, that these documents should be transferred to the National Archives and eventually shared with the NCTR, would defeat the principle of voluntariness underlying the IAP. Irrespective of the claimants' intentions or wishes, their stories – which, it bears reiterating, include accounts of abuse ranging from the monstrous to the humiliating, and of harms ranging from the devastating to the debilitating – would in time be disclosed to the NCTR (and, by extension, to the public), to be applied to its project of commemorating and memorializing the residential schools system. In other words, *highly sensitive and private experiences would be conscripted to serve the cause of public education*. But this is plainly not what the parties *bargained* for. We agree with the majority at the Court of Appeal that 'the IRSSA put the survivors, not Canada and not anyone else, in control of their own stories'. (*Canada (A-G)* v. *Fontaine* [2017] 2 S.C.R 208 at 244.) (Emphasis added)

The National Chief of the Assembly of First Nations at the time of the IRSSA's negotiation testified that strict confidentiality of the IAP was intended as part of the agreement so that 'nobody except the survivor would have access to the story of the survivor' (Affidavit of Larry Philip Fontaine, 2017, pp. 233–234). This view was supported by other IAP claimants 'who tendered affidavits attesting to their understanding that information disclosed within the IAP would not be shared outside of that process' (*Canada* v. *Larry Fontaine*, p. 234). Some of the sexual violence and abuse was committed by student-on-student in the residential schools. An added concern, therefore, was the potential for retaliatory violence and discord within First Nations communities if privacy and confidentiality was not preserved. The survivors' disclosure of abuse, and obtaining the cooperation of religious organisations that administered residential schools, were greatly aided by strict confidentiality.

Where the stories of abuse and violence are part of a colonial history of genocide and dispossession – a plurality of subjects, institutions, and times make claim to the narratives. In this way, individual testimonies call forth a heterogeneity of time and memory. To the extent that a story is produced in the context of judicial proceedings or quasi-juridical inquiries – a legal persona is called forth and

constituted by the law. It is also interesting to note the language of a 'bargain' in the *Fontaine* judgement. Part of what is at stake in cases such as this is the possibility of renewing a social contract or creating respectful sociality for the first time.

Larry Fontaine's assertion that 'nobody except the survivor would have access to the story of the survivor' expresses a determination to maintain a story as stubbornly singular; a secret not to be shared beyond the purpose and context of its original disclosure. On the other hand, national institutions charged with developing 'collective knowledge' and assembling the 'historical record' assert imperatives that project an archival future beyond the 'raw wounds' of the individual survivor. Thus, the NCTR was concerned that the destruction of IAP documents would:

> 'deny future generations … the collective knowledge and history essential to healing' (R.F., at para. 119). In its view, we are not now in a position to know how important the IAP Documents may be to 'future healing', since the concerns over the potential negative ramifications of disclosure were expressed at a time when the wounds inflicted by residential schools are still 'raw'. (transcript, at pp. 59–60) (*A-G of Canada* v. *Larry Fontaine*, p. 245)

What bearing does 'future healing' have on the rawness of today's wounds? On first blush it seems eminently sensible that the Supreme Court of Canada dismissed the claims of the NCTR and refused to allow survivors to be 'conscripted' to serve the priorities of 'healing' future generations. It permitted the applicants to control the preservation or destruction of their stories, and left them to deal with their wounds as they wished. But is this all there is to this complex question of who owns a story?

A-G of Canada v. *Larry Fontaine* signals a tension between the individual agency of survivors and the archival demands of communities and nation-states. In addition to avoiding the harms that would be compounded if confidentiality were not maintained, there is an important aspect of the autonomy and dignity of the survivor associated with controlling their own story. The consent to make the story accessible through an archive is theirs to give or refuse. However, this is only one part of the picture as communities, families, and kinship structures may assert that the experience of one member be deemed to be that of a wider group or collective.[iv] What, then, is to be done with testimonies of trauma and evidence of violation? My suggestion is that thinking about the conceptual regimes and histories of legal person can assist in addressing this question. This inquiry also opens to the wider problem of the tension between the autonomy/heteronomy of law.

The mode of telling a story has transformed in fundamental ways in the age of mechanical reproduction and the rise of digital communication technologies. Walter Benjamin (1999a) was already charting and lamenting these transformations in 1936 when he wrote 'The Storyteller' (pp. 83–107). For Benjamin, the stories told by the 'resident tiller of the soil' and the 'trading seaman' drew on their 'experience' to recount tales and legends that contained the wisdom of traditions and people they had encountered (Benjamin, 1999a, p. 84). This era of storytelling came to an end most drastically with WWI when the human body came in

to contact with the destructive machinery of a total capitalist war. The stories told of this war and the biographies that it produced were full of 'information' rather than the mutually constituted narratives of the erstwhile storyteller whose enigmatic tales were delivered face-to-face with the listener. A generation that travelled to school, the farm, or the mine in a horse-drawn cart would encounter massive technological transformations which included the mechanically reproduced means of conveying the story (Benjamin, 1999b, p. 211). Benjamin (1999a) also comments on the solitary narrator who emerges with the novelist who has 'isolated himself' (p. 87). With the novel comes the 'solitary individual, who is no longer able to express himself by giving examples of his most important concerns, is himself uncounseled, and cannot counsel others' (Benjamin, 1999a, p. 87). To write a novel 'means to carry the incommensurable to extremes in the representation of human life' (Benjamin, 1999, p. 87). Benjamin methodologically countered these developments through the use of the 'dialectical image' as means by which past and present are juxtaposed so that knowledge can reveal itself in a 'flash'; where the past is not sublated and subsumed by what supersedes it, but returns to reveal its coexistence with the present.

Benjamin projects an Eurocentric romanticism about the era before WWI in an account that pays no attention to the destruction visited on indigenous communities around the world by rapacious imperial expansion from the sixteenth century onwards. Nonetheless, his attention to the conditions of storytelling, and especially the vernacular mode of oral transmission compared to the technologically mediated forms of disseminating stories, dramatises transformations in the mode of communicating ethical and political problems. Moving from the localised individual sharing a story face-to-face, to the recording and dissemination of narratives to serve 'public education' opens questions about the relation between autonomous and heteronomous forms of existence.[v]

Larry Fontaine's imperative to curtail access to the survivor's story seeks to preserve a circumscribed instance of telling a highly sensitive story. Defending the original conditions of storytelling involves asserting the autonomy of the agent that consented to tell the story for one purpose and no other. Fontaine challenges the machinations and machinery of nation-building archives as adequate reason for appropriating the individual survivor's story. Preserving the confidentiality of the survivor is one way of holding the exigencies of socio-national encroachment at bay. The demand by the Canadian Government and truth and reconciliation institutions for access to Fontaine's and other survivors' stories manifests the tenets of historicity – the sense that the story comes from a discrete time and place, and that it can be preserved and passed on as *collective memory*. History is then the accessibility of a particular experience 'back then' that can be preserved, retrieved, and reproduced for the instrumental purpose of 'public education' and for healing future generations. The future is placed in a linear and teleological relationship with the past. This linear temporality of historicity says: 'your story is too raw for you to make sense of now; but we will know what to do with it in the future'. Benjamin usefully points out how the incommensurability of the individual story, which he impugns with reference to the novelist, can make its own way into the future. It will 'jut' into the future-present and be exposed in a 'flash'.

The legal contest in the *Fontaine* case manifests an opposition of wider juridical and political significance: that between *autonomy* and *heteronomy*. In one sense *Fontaine* involved the autonomy of subjects(s) asserting the confidentiality of their story and the uses to which they may be put. This can be contrasted with the heteronomic demand of state archives and institutions of reconciliation which asserted that these stories are a social memory that should be preserved and accessible for future use. In what follows I will begin to explore a more complex relationship between historical events and collective memory; and the relation between history, politics, and the psychic life of individuals.

LIVING IN THE WAKE

An approach that overcomes the autonomic orientation of law and legal technique can be found in Christina Sharpe's (2016) *In the Wake: On Blackness and Being*. Sharpe (2016, chapter 1) begins in a biographical register, giving an account of deaths in her own family and the experience of being black in the United States. While that seems to repeat the autonomic orientations of modernity, she surpasses that in exploring the conditions under which black people live and die. To be black is to live with the impunity with which black lives are killed in increasing numbers today; deaths that reverberate around black families and communities, and increasingly across the world through movements such as Black Lives Matter. According to Sharpe, to be black is to live in a continuous wake, and to live in the time of the shippability of black bodies. Sharpe (2016) deploys the notion of the *wake* in multiple ways: that which comes after; the trace left on the water's surface by a ship; and a disturbance caused by a body moving through air or water (p. 3). The wake is also about a condition of wakefulness, of consciousness (Sharpe, 2016, p. 4).

Sharpe turns the notion of 'wake' into a historical method. It is an approach that combs the archive of whom and what cannot directly testify regarding itself, but is present all around – such as the legal techniques of maritime insurance that are derived from the transportation of slave 'cargo'.[vi] This expands the archive to include the non-human, materiality, and legal processes and practices. The bodies that remain shippable, and the ledgers that record the trade in humans, open questions such as:

> Is Ship a reminder and/or remainder of the Middle Passage, of the difference between life and death? Of those other Haitians in crisis sometimes called boat people? Or is Ship a reminder and/or remainder of the ongoing migrant and refugee crises unfolding in the Mediterranean Sea and the Indian and Atlantic Oceans? (Sharpe, 2016, p. 46)

This attention to the ship, legal techniques, waters, oceans, and objects – still graspable and reachable in the present – produces a sensuous immediacy that retrieves a past that is manifested in the present. To that extent Sharpe's deployment of the 'wake' contains a philosophy of history. This philosophy of history involves deploying the wake as a metaphor. As Hannah Arendt (1968) said of Walter Benjamin's thought – he deployed metaphor to get as near as possible to the real: