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

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ABSTRACT

Reflecting on the myriad instances where juridical recognition demands a story, confession, testimony on suffering, or evidence of trauma – this essay 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 recognized testimony and evidence – I consider 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; W. G Sebald; Christina Sharpe.

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, *Spring* (2020), 229.

INTRODUCTION

In this essay 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 traumatized 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.[ii]

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-authorized auto-nomos 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.[iii] 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 authorization. In a formulation that I will extend in this essay, Marx proclaimed that 'people make their own history but not under conditions of their own choosing' (Marx, 1852).[iv] These haunting conditions of human and non-human existence undo any pretense 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, 143-51), and in what W.G Sebald termed a 'natural history of destruction' (Sebald, 2004). Perhaps too ambitiously, then, this essay attempts to recast the fictive constitution of the legal person and the autonomy/heteronomy of law as an archival problem.

The Greek etymological root of person is *persona*. It connotes 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, 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 essay I seek to de-center 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, Ch 9 & 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 recognized by truth commissions or to qualify for compensation (Kennedy, 2001; and Kennedy, 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-centered 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 instrumentalizing 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 essay is part of a wider project to promote a less human-centered 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 essay, 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* (2006) (IRSSA), 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" (*Fontaine*, 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, 233-34). 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" (*A-G of Canada v. Larry Fontaine*, 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* judgment. 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). (*Fontaine*, 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.[v] 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 was already charting and lamenting these transformations in 1936 when he wrote "The Storyteller" (Benjamin, 1999, 83-107).[vi] 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, 1999, 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, 1999a).[vii] Benjamin also comments on the solitary narrator who emerges with the novelist who has "isolated himself" (Benjamin, 1999, 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, 1999, 87). To write a novel "means to carry the incommensurable to extremes in the representation of human life" (Benjamin, 1999, 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 16th 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, dramatizes transformations in the mode of communicating ethical and political problems. Moving from the localized 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.[viii]

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 *In the Wake: On Blackness and Being* (Sharpe, 2016). Sharpe begins in a biographical register, giving an account of deaths in her own family and the experience of being black in the United States (Sharpe, 2016, Ch 1). 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 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 (Sharpe, 2016, 3). The wake is also about a condition of wakefulness, of consciousness (Sharpe, 2016, 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'.[ix] 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, 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 said of

Walter Benjamin's thought – he deployed metaphor to get as near as possible to the real:

> For a metaphor establishes a connection which is sensually perceived in its immediacy and requires no interpretation, while an allegory ... must be explained before it can become meaningful, a solution must be found to the riddle it presents … . (Arendt, 1968, 19).

Metaphor has the ability to convey meaning without further explanation. The sensuous immediacy of the ship invokes the afterlife of slavery.

Along with the 'wake', Sharpe deploys the 'Trans*' as a concept, notation, and metaphor to open a route to thinking the 'unthought' black body:

> So I've been thinking about shippability and containerization and what is in excess of those states. What I am therefore calling the Trans*Atlantic is that s/place, condition, or process that appears alongside and in relation to the Black Atlantic but also in excess of its currents. I want to think Trans* in a variety of ways that try to get at something about or toward the range of trans*formations enacted on and by Black bodies. The asterisk after a word functions as the wildcard, and I am thinking the trans* in that way; as a means to mark the ways the slave and the Black occupy what Saidiya Hartman calls the "position of the unthought" (Hartman and Wilderson 2003). The asterisk after the prefix "trans" holds the place open for thinking (from and into that position) (Sharpe, 2016, 30).

The notion of Trans*, just like wake, has different meanings that it can invoke today (on gender, transatlantic slavery, shippability), but at the same time retain the character of being an 'afterlife' of the 'unthought'. The Asterisked Human (Trans*) is a way of opening up heteronomy in our thinking. That which is seemingly erased and unthought returns through this signification which is in sensuous contact with the shippability of human 'cargo' in the Mediterranean and other seas and oceans today. This heteronomous hold of the past on the present is the other law that determines humans and non-humans.

It is important, for my purposes, to emphasize the contrast between the constitution of autonomous subjects through *auto*-biographic narratives, and the multivalence of heteronomous accounts that connect humans to their mineral, material, and juridical antecedents. Living in the wake involves an attentiveness to multiple remainders and to what endures in time (see also, Baraitser, 2017, Ch. 5). Moving the emphasis from autonomy to heteronomous co-determinants of existence can remove the need to instrumentalize individual trauma and experience as we observed in the *Fontaine* case. Individual evidence and testimony is then one among many registers for encountering the past.

In the Wake: On Blackness and Being recovers traces of meaning from speechless beings. In doing so, Sharpe enacts what Shoshana Felman, following

Benjamin, called a "speechless connection between history and trauma" (Felman, 2002, 33). Speechlessness, as Felman points out, "remains out of the record". As we observed in *Fontaine*, the archival record may be silenced precisely because of the scale of the trauma, or the acuteness of the suffering. Erasing the archive may be a means of respective the wishes of the survivors who must not be forced to speak beyond the terms of their address. But this is far from a suspension of history:

> History (to sum up) is thus inhabited by a historical unconscious related to – and founded on – a double silence: the silence of "the tradition of the oppressed", who are by definition deprived of voice and whose story (or whose narrative perspective) is always systematically reduced to silence; and the silence of official history - or victor's history – with respect to the tradition of the oppressed. According to Benjamin, the hidden theoretical centrality of this double silence defines historiography as such (Felman, 2002, 34).

The raw wound of the survivor – the event of silence - may then be seen as a historiographical event. The pressing question is what 'meaning' may be drawn from this event of silence. Sharpe's attentiveness to the non-human traces of historical events provides access to the heteronomous determinants of the present.

What would it mean for an archive to preserve and access silence at the same time? This is a question that is often posed in the context of literature, and Derek Attridge offers an insight to it that enables us to return to the sensuous immediacy of metaphor, or to put it another way, what it would mean to dwell in the event of singularity and alterity presented in literature (Attridge, 2005). He draws a distinction between literary and allegorical readings, recognising that all readings involve an element of familiarity with the genre, and the ways in which meanings can be derived from a shared experience of culture, and indeed from one's own personal history and experience. He goes on to add:

> At the same time, I respond emotionally to these meanings as I engage with my own stores of knowledge and memory. In some reading experiences however there seems to be more to what happens: I register a strangeness, a newness, a singularity, an inventiveness, an alterity in what I read. When this happens I have two choices (putting a complicated matter very crudely): I can deploy reading techniques that will lessen or annul the experience of singularity and alterity – and this will usually involve turning the event into an object of some kind (such as a structure of signification) – or I can seek to preserve the event as an event, to sustain and prolong the experience of otherness, to resist the temptation to close down the uncertain meanings and feelings that are being evoked. In both cases I am concerned with "meaning", but in the first case I understand it as a noun, in the second as a verb. I can, one might say *live* the text that I read. This is

> what I mean by a literal reading. […] an equally apt term for literal reading, in this sense, is literary reading (Attridge, 2005, 40).

Attridge's position "Against Allegory" considers J.M. Coetzee's novels *Waiting for the Barbarians* and *Life & Times of Michael K.* While he agrees that there can be important and instructive allegorical readings of these novels, his argument is that these texts place reading allegorically itself into question. In a similar way I have been exploring how the archive, including destruction of what may constitute the archive (in the *Fontaine* case), needs to be read as an event that puts the archive into question.

DESTRUCTION AS ARCHIVE

The destruction of the archive may also be considered in the context of a history or tradition of such destructions. W.G Sebald explored this history and tradition in his reflections on the relative silence of German writers, chroniclers, and novelists in tackling the suffering of Germans during WWII (Sebald, 2004). In "Air War and Literature: Zürich Lectures", Sebald opens a consideration of a relatively unthought trauma - the bombing unleashed by the Allied Powers on German cities such as Dresden, Hamburg, Frankfurt am Main, and Halberstadt (Sebald, 2004, 3-105). Indeed, the refusal by Germans to address their victimisation and collective uprooting from homes and cities was turned into apparent virtues of restlessness, energy, insensibility, and a craving for travel (Sebald, 2004, 12, 34). The catalyst for German economic dominance is:

> the stream of psychic energy that has not dried up to this day, and which has its source in the well-kept secret of the corpses built into the foundations of our state, a secret that bound all Germans together in the postwar years, and indeed still binds them, more closely than any positive goal such as the realization of democracy ever could (Sebald, 2004, 13).

The project of creating a greater Europe is one that has failed twice, and Sebald warns that it is worth remembering the wider context of repressed memory as Europe expands and the influence of the Deutschmark "seems to extend almost precisely to the confines of the area occupied by the Wehrmacht in the year 1941" (Sebald, 2004, 13).

Sebald's approach to the silence about German suffering during the total destruction of the Air War is to open what he terms a 'natural history' of destruction, addressing the limits of an 'open book' of human history, and the deficiencies of materialist epistemologies. The perception, after Marx, was that the history of industry (and we may add capitalism) is "how the "history of *industry* and the now *objective* existence of industry have become the *open* book of the *human consciousness*, human *psychology* perceived in sensory terms" (Sebald, 2004, 1-18).[x] In contrast, Sebald asks:

> Can materialist epistemology or any other such theory be maintained in the

> face of such destruction? Is the destruction not, rather, irrefutable proof that the catastrophes which develop, so to speak, in our hands and seem to break out suddenly are a kind of experiment, anticipating the point at which we shall drop out of what we have thought for so long to be our autonomous history and back into the history of nature? (Sebald, 2004, 66)

Interrupting the autonomous history of humans in the context of the bombing of German cities involved observing how quickly their natural order changed. There was an immediate increase in the number of "parasitical creatures thriving on the unburied bodies" (Sebald, 2004, 34). Rats and flies "frolicked in the streets" – an "image of the multiplication of species that are usually supressed in every possible way is a rare documentary record of life in a ravaged city" (Sebald, 2004, 35). You could also "tell the date of a building's destruction from the plants growing among the ruins" (Sebald, 2004, 39). It is not only the flora and fauna that feature in this natural history of destruction. Sebald points to and reproduces photographs of the tattered footwear worn by Germans which show the degradation in concrete terms. There is also another phenomenon that Sebald terms 'natural' – the remarkable speed with which 'social life' returns: "people's ability to forget what they do not want to know, to overlook what is before their eyes, was seldom put to the test better than in Germany at that time. The population decided – out of sheer panic at first – to carry on as if nothing had happened" (Sebald, 2004, 41).

The phenomenology of nature and natural history deployed by Sebald requires further attention and research. He was gripped by vertiginous visions as he wandered between the dead-ends of amnesia and melancholia. The proliferating 'new materialisms' have already opened productive paths into the nature of matter (Coole & Frost, 2010). This new materialist thinking has displaced human-centred ontologies and promoted the vibrancy and enchantment of objects. We now need a philosophy of history that reorients modern accounts of nature, trauma, and memory. That task can be enabled by the conceptual distinction between autonomy/heteronomy.

THE AUTONOMY AND HETERONOMY OF LEGAL PERSONS

Who or what is proper to a place is cast through fictions. Legal personality is one such fictive form that determines whether bodies are distinguished from things and assigned a legally mediated place in the world. The assurances of legal personification are tenuous and fluid. Slaves in 19th Century U.S law, for example, were cast as both persons and things. A slave could be person-enough to be held criminally responsible if they committed homicide, but at the same time be a thing that could be used, abused, and traded (Hartman, 1997, Ch 3).

The primacy of persons, although more longstanding in legal history, is sharpened by modern accounts of autonomy. Indeed, from Hobbes to the contemporary legal positivists, the autonomy of the individual and the autonomy of the legal system have mirrored each other. The autonomy of law, for theorists who assert it, is a projection of the autonomy of the individual subject. The assumption of individual autonomy is the underlying connection that unites liberal political philosophy and legal positivism. One way to challenge this underlying unity of liberalism and positivism is to interrogate the figure of the autonomous person. I propose we do this by understanding law through the tension between *autonomy* and *heteronomy*. The contrasting accounts that undergird autonomy and heteronomy open legal analysis to a historical register, and to a set of concerns about what it means to represent, receive, and hear stories from the past as the heteronomous determinants of law.

Autonomy and heteronomy are two dominant forms of giving an account of the legal person and of law. They are emblematic terms in a narratives of what law is. Autonomy – for a state, institution, or person – denotes the capacity to give oneself one's own law by one's own means, to be independent, to be by and for oneself. Heteronomy is necessarily more wide-ranging, with the *hetero* (other, different), denoting the presence of an external or different law: of myth, extraneous forces, drives, legal institutions, and history. Both terms (autonomy and heteronomy) sit in tension with each other, and manifest philosophical contestations about what law is.

Characterizing laws, persons, or political formations through the register of autonomy/heteronomy has a long trajectory. As Neil MacCormick explained in an influential essay reflecting on these terms in the debates among legal positivists:

> "autonomy and heteronomy are understood to be primarily qualities of human beings as moral and practical agents, either conforming to norms that they will for themselves … [autonomy] ... or to norms that others will for them … [heteronomy]. This is historically the original sense of the terms, but it is no longer the only, or perhaps even the most, common sense ascribed to the terms in contemporary discussions of law (MacCormick, 1995, 69).[xi]

MacCormick acknowledged that the Kantian notion of practical reason on which this characterization of ethics and morality rested is a controversial one. A contrasting approach would often pitch community and tradition as the source of values and virtue (MacCormick, 1995, 70). For legal positivists, nonetheless, morality and law, the individual's moral decisions and institutional norms are distinct:

> Thus law and morality are conceptually distinct. Autonomous morality is autonomous. Law is not. They must be conceptually distinct. To summarize, law is institutional where morality is controversial and

> personal; law is authoritative, settling questions by acts of authority, where morality is discursive, always open to fresh argument on equal terms by any interested participant in the discourse; finally, law is heteronomous, binding us from without, where morality is autonomous, binding us by our own reflective Judgement and will. Heteronomy is also a feature of professional ethics where that is delegated to professional corporations or their disciplinary tribunals or ethics committees for decision in problem cases. Professional ethics so understood is also institutional, authoritative, and heteronomous (MacCormick, 1999, 170-71).

On this liberal account, autonomy is internal (morality) and heteronomy (law) is external to the individual. This mode of understanding autonomy/heteronomy, however, does not help us to determine whether the survivor's story in *Fontaine* is either hers to will its preservation or destruction, or whether those interests must bow to the wider Canadian community's archival future as represented by the A-G for Canada. On MacCormick's account the decision of the Supreme Court is heteronomous. On the other hand, the fact that the Supreme Court in *Fontaine* decided to protect the confidentiality of individual stories can be understood as a re-enforcement of traditional liberal notions of individual autonomy, and protection of a 'bargain' about confidentiality between survivors and the state. However, it is not difficult to imagine a court making the opposite decision, where the perceived interests of the state persist over that of the individual. In such instances – and now moving away from MacCormick's paradigm of autonomy/heteronomy - the communal memory may be understood as heteronomous to the interests of the individual. To cut what would need to be a longer analysis short, the account of autonomy/heteronomy offered by positivist jurisprudence – where morality is internal to the person, and law is external and thus heteronomous - offers limited assistance.

Etienne Balibar helps to push the paradigm of autonomy/heteronomy beyond MacCormick's liberal terms and limits (Balibar, 2002, 1-20). Working from the premise that 'equal liberty' stated in revolutionary terms has a logic that contains a 'self-refutation of its negation', Balibar argues that autonomy is only possible through the unfolding of a universalization of the claim to autonomy. For instance, in the Marxist tradition the demand for emancipation was articulated through the universalisation 'the people of the people', the 'universal class'. The politics of autonomy which is first a negation of oppressive conditions, must then present as a 'negation of the negation', thus becoming an absolute. Famously, Marx gave an account of subjects' agency as 'politics under conditions not of their choosing'. For Marx, writing in the "Eighteenth Brumaire of Louis Bonaparte", "human beings make there own history, but they do not make it arbitrarily in conditions chosen by themselves, but in conditions always already given and inherited from the past" (Marx cited in Balibar, 2002, 8). Balibar offers a persuasive account of the agency of the individual subject that can be derived from the 'conditions of history' as the

heteronomous condition of the individual subject's agency and politics. History as heteronomy – 'the conditions not of their choosing' for Marx – must then sit alongside, or provide the backdrop to the claim to autonomy based on the negation of its opposite. What is 'given and inherited from the past' has its own conditions of emergence. Putting this contingent inheritance - which is not always accessible or self-evident - into question is central to the history work of law.

The social and structural contingency of autonomy must also be understood in terms of the psychic life of the individual. Freud associated autonomy with consciousness (the *Ego*) and heteronomy with the unconscious (the *Id*) (Castoriadis, 1987, 102). The *Id* as the "origin and place of drives ('instincts')" are not "pure', however (Castoriadis, 1987, 102). What is at issue, Castoriadis argues, is the "interminable, phantasmatic, and fantastic alchemy" of the unconscious forces of "formation and repression, the super-ego and the unconscious Self" (Castoriadis, 1987, 102). Here the autonomy represented in the self-legislation of the conscious ego is opposed to the heteronomy of another – that is, the "legislation and regulation by another" - but another that is "in me" (Castoriadis, 1987, 102). The alienation that arises from the tension between autonomy and heteronomy *within* the individual is mirrored in the social world:

> Beyond the 'discourse of the other' lies that which gives it its unshiftable weight, limiting and rendering almost futile all individual autonomy. This is manifested as a mass of conditions of privation and oppression, as a solidified global, material and institutional structure of the economy, of power and of ideology, as induction, mystification, manipulation and violence. No individual autonomy can overcome the consequences of this state of affairs, can cancel the effects on our life of the oppressive structure of the society in which we live. (Castoriadis, 1987, 109)

Castoriadis is primarily a thinker of autonomy and sought an autonomous society. However, combining the psychoanalytic account with the socio-structural, Castoriadis offered a far richer analysis of the relation between autonomy/heteronomy than the positivist jurisprudence of MacCormick.

As we have seen, there are different approaches to understanding the legal person through the varied accounts of autonomy/heteronomy: a) as an isolated moral agent both hemmed in and enabled by external legal norms (MacCormick, 1999); b) a revolutionary agent of history (Marx/Balibar, 2002); or, c) a subject divided from within (Castoriadis, 1987). I tend towards an individual subject as agent of moral judgment, but always under conditions and through registers and normative frameworks not of their choosing. Additionally, this subject often acts for reasons and motivations that are opaque to their own self – driven as they are by unconscious and contingent drives and circumstances. In other words, autonomy is always folded in with heteronomy.

This account of the autonomy/heteronomy of the subject needs to be distinguished from the multivalency of the legal person in Roman law. Drawn from the Greek origins of persona (*prosōpon*, meaning dramatic mask), the original meaning of 'person' as a masked being enables a multiplication of the presence of the individual subject. Mussawir and Parsley explain how Roman Law received this Greek notion and developed a set of very functional techniques in relation to the person (Mussawir & Parsley, 2017, 44). These functional techniques, legal fictions, and technical devices enabled various aspects of social and economic life. For example, Roman law could deploy a variety of fictions to treat slaves as property, on the one hand, but with the capacity to be distinguished from their status as a thing for particular purposes. With these techniques and fictions a slave could make a contractual promise on behalf of their owner. As Mussawir and Parsley elaborate, a slave can be jointly owned, but be distinguished through a legal fiction in order to be capable of making a contractual promise enforceable between the same joint owners. There is a presumed functional neutrality and technical 'purity' in their treatment of Roman law. They argue that the technicity of the Roman law of persons has been adulterated and contaminated by notions of sociological context, power relations, and metaphysical ideas about the person. They impugn this politically driven search for the 'concrete person'. Mussawir and Parsley argue that we are losing something if we let go of the technical formations that Roman Law enabled. In what way might the fact that these techniques enabled the institution of slavery matter for the purposes of our discussion?

The argument Mussawir and Parsley make, drawing on Yan Thomas and Alain Pottage, is that the fictional malleability of the person was highly enabling, and that this has been lost as the person has become imbued with transcendental and moral concerns as an ethical or natural subject. Roman Law was able to 'fictionalise biology' (Alain Pottage) and allowed different kinds of transactional personae that were invented for the purposes of a transaction. For Mussawir and Parsley, the modern person is too readily equated with a natural subject, when in fact it may be a corporation, a river, or stretch of land. This fictional attribution of personhood to a wide variety of animate and inanimate forms is part of the legal functionality enabled by the techniques of Roman Law:

> Roman jurisprudence gives an important priority to the technical register in which it fashions its 'persons', and that register doesn't … have any necessary hold on the psychic life of individuals or on the ontological structure of the human being' (Mussawir and Parsley, 2017, 50-51)

This is an endorsement of rivers and other non-human formations being granted legal personality; a potential advantage in a legal framework where such personality is an *a priori* condition of legal recognition.

However, a legal technique is not merely a technical form or device. My

contention is that this line of argument repeats the gestures usually found in positivist discourses on legal autonomy where affective dimensions are marginalized in favor of formal rationality. As Saidiya Hartman has put it:

> In the arena of affect, the body was no less vulnerable to the demands and the excesses of power. The bestowal that granted the slave a circumscribed and fragmented identity as person in turn shrouded the violence of such a beneficent and humane gesture. Bluntly stated, the violence of subjection concealed and extended itself through the outstretched hand of legislated concern. The slave was considered a subject only insofar as he was criminal(ized), wounded body, or mortified flesh. This construction of the subject seems rather at odds with a proclaimed concern for the "total person" (Hartman, 1997, 94).

Of course the technical functionality of a malleable notion of the 'person' *may* be deployed to support politically progressive determinations from trans-gender identities, recognition of indigenous laws and customs, and protecting the environment. But we also know that it *has* been deployed to sustain the institution of slavery. A law of persons must, therefore, be considered in relation to the psychic life of humans and the ontological conditions of human and non-human beings. The autonomy of legal technique needs to be considered in relation to the heteronomy of psychic life (Castoriadis, 1987); subjects making history in 'conditions not of their choosing' (Marx/Balibar, 2002); and the 'universalisation of the claim to autonomy' (Balibar, 2002) that constitutes political life.

CONCLUSION

In the preceding discussion we have seen that the autonomy of legal persons, and the heteronomic determinations that constitute them have been given varied accounts in liberal, positivist, Marxist, and post-Marxist accounts. We have considered just some of these in the context of the *Fontaine case* which sharply posed the tension between the autonomy that is constituted in and through the conditions under which a story is told and shared, and the wider archival and social demands that are made on that narrative. A subject already split from within faces the prospect of being externally divided by accounts that reenact the separation thesis of positivist jurisprudence – that is, that there is one internal will and morality, and another external level of authority and legitimation. Displacing this implausible bifurcation, we have considered accounts of persons that chart an alternative philosophy of history that moves through the 'wake' – an approach suggested by Sharpe as a method to open narrative forms that decenter the human in historical accounts. This analysis is consistent with the recent strands of new-materialist thinking and attention to *affect* in legal studies. We have also observed – through the work of Sebald - that destruction may curate its own archive. The

conceptual framework of autonomy/heteronomy that I have set out here offers a theoretical orientation for this new archival work to take place.

Undoing the privileges and conceits which assert that autonomy emanates from, and is solely located within the human subject is an urgent priority. In this essay I have identified this to be an archival problem that can be addressed by opening heteronomic accounts of human and non-human phenomena. My suggestion is that an expansion of the category of 'person' to non-humans as we have observed recently with respect to rivers and forests is not the answer to growing environmental catastrophes. Appreciating the co-constitution of life and non-life, as Elisabeth Povinelli has argued, is one way to address the privileged status of the former over the latter (Povinelli, 2016). At a normative level, heteronomic formations understood through multiple archives must be brought to bear on a range of legal problems from colonial violence to environmental catastrophe.

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[ii] See Shoshana Felman's discussion of Claude Lanzmann's epic, *Shoah*. Lanzmann describes *Shoah* as something other than a historical film about the holocaust, and characterizes it as an "incarnation" and a "resurrection". In the film a historian, Hilberg, reads the diary of a Jewish leader of the Warsaw Ghetto, Czerniakow, who committed suicide. The diary is read to Dr Grassler, the former Nazi commissioner of the Warsaw Ghetto. Felman claims that the role of the historian here is "less to narrate the history" but rather to "embody, to give flesh and blood to, the dead author of the diary". This incarnation and resurrection is worth bearing in mind as a distinct register of what it means for the dead to speak: Shoshan Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History*. (New York: Routledge, 1992). pp. 214-16.

[iii] I am grateful to Peter Goodrich for drawing my attention to the person as 'impersonator' which he pursues through the work of Esposito. I have dealt with the fictions and pretentions of the state through the notion of 'as if' in *Archiving Sovereignty: Law, History, Violence* (Ann Arbor: University of Michigan Press, 2018).

[iv] "Man makes his own history, but he does not make it out of the whole cloth; he does not make it out of conditions chosen by himself, but out of such as he finds close at hand", Karl Marx, *The Eighteenth Brumaire of Louis Bonarparte* [1852] (2008) (New York: Cosimo Classics). 1.

[v] My thanks to Rebecca Johnson of the University of Victoria, B.C., for pointing this out to me when the first draft of this paper was presented at the Interrupting the Legal Person Symposium, 26th June, 2019.

[vi] Walter Benjamin, "The Storyteller: Reflections on the Work of Nicolai Leskov" in Benjamin, *Illuminations* (London: Pimlico, Random House, 1999). 83-107.

[vii] See Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction", in Benjamin, *Illuminations* (London: Pimlico, Random House, 1999). 211.

[viii] I expand on this point below.

[ix] Sharpe discusses the The *Zong* Massacre of 1781 which is recorded in *Gregson v Gilbert* (1783) – the court case on insurance for jettisoned "cargo": 'The *Zong* was first brought to the awareness of the larger British public through the newspaper reports that the ship's owners (Gregson) were suing the underwriters (Gilbert) for the insurance value of those 132 (or 140 or 142) murdered Africans. Insurance claims are part of what Katherine McKittrick calls the "mathematics of black life" (McKittrick 2014), which includes that killability, that throwing overboard. "Captain Luke Collingwood thus brutally converted an uninsurable loss (general mortality) into general average loss, a sacrifice of parts of a cargo for the benefit of the whole" (Armstrong 2010, 173)'. *In the Wake*, 35.

[x] Sebald quoting Alexander Kluge, in Neue Geschuchten, Hefte 1-18, "Unheimlichkeit der Zeit" (Frankfurt an Main, 1977), Kluge's emphasis. 102 in "Air War and Destruction", 66.

[xi] Neil MacCormick, "The Relative Heteronomy of Law" (1995) 3:1 *European Journal of Philosophy* 69-85 at 69. See also, Neil MacCormick, "*The Concept of Law* and The Concept of Law" in Robert P. George (ed.) *The Autonomy of Law: Essays on Legal Positivism* (OUP, 1999). 163.

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