Thresholds of Accusation

This critical socio-legal history probes pretrial accusations through which colonial criminal law forged social orders for settler-colonialism across western Canada, focusing on Alberta, 1874–84. Following military intelligence, a North-West Mounted Police force was established to compel Dominion law. That force began by deploying accusatory theatres to receive information about crimes, arrest suspects, and decide via preliminary examination who to send to trial. George Pavlich draws on exemplary performances of colonial accusation to show how police officers and justices of the peace translated local social lore into criminal law. These performances reflected intersecting powers of sovereignty, disciplinarity, and biopolitics; they held accused individuals legally culpable for crimes and obscured social upheavals that settlers brought. Reflecting on colonial legacies within today's vast and unequal criminalizing institutions, this book proposes that we seek new forms of accusation and legality, learning from Indigenous laws that tackle individual and collective responsibilities for societal disquiet.

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Law and Colonial Order in Canada

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In memory of Colleen Price (Pavlich)

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Preface

Ever since moving to Edmonton (Amiskwaciy Waskahikan) as the present century dawned, amid fears of chaos that a Y2K computer bug did not bring, I have visited archives. City archives, provincial archives in Alberta and British Columbia, specialized collections like the Bruce Peel Special Collections library at the University of Alberta, and National Archives in Canada, Britain, and South Africa. Some have grown in place, some have moved or moved online, while others have retreated into obscurity. Change is nothing new to archives given their ancient role as preservers of what changeable 'archons' – governors – decided to keep. Arrogant or capricious rulers endlessly conjured ideas of how to project themselves into futures imagined from meaning horizons of yore. We are likely living through another archival reorganization, inviting reflection on preserved narratives and how these shape us.

To be sure, archived collections in musty stacks provide hushed sanctuaries for the hermeneutically inclined. This is so even as paper documents increasingly face the wrecking balls of digitized commerce – coming at a cost of far more than the money paid for digits that light up eager devices. Reading archived collections, in whatever medium, often compels readers to encounter meaning horizons in altered ways. But spending substantial time at archives animates interpretative forms of life. These are stirred by stories of long-passed writers who left chronicled traces of themselves behind. Transposing those traces in and for different meaning horizons promises to release semantic timbres that can help us to reappraise what happens today. Like imaginative composers who engage and rework melodic sounds, reflexive interpreters

may re-read surviving legal texts from within, but aiming to revise, extant social contexts.

Scrutinizing colonial legal texts and their socio-political contexts obliges such critical interpreters to reckon with the powers, reasons, and aleatory that may have conserved what lies before their eyes. With that obligation in mind, readers shaped by today's meaning horizons could reawaken documents from dusty torpors with specific purposes in mind. They might, say, use them to try to understand certain social and political concerns of contemporary contexts in different ways. For example, one might carefully read narratives that once animated lives of law in efforts to name legacies of fables that still animate our current legal fields. Such a project would surely emerge from an understanding that the stories by which we live nowadays are seldom fully divorced from privileged tales that prospered before. By acknowledging, and better naming, colonially driven undersides to current criminalizing narratives and apparatuses, my aim is to replenish an element of law's wide promise relentlessly to pursue just social forms.

One way or another, for over a quarter of a century, I have chased stories behind a pervasive settler colonial politics. That politics ruled through local versions of British criminal law and social order. The broad aim was to dominate legally plural contexts across the globe, intending to sideline age-old Indigenous legal fields and to implant dispossessing social orders through a rule by colonial law. My previous research into how law projected images of sovereignty at the Cape of Good Hope toward the end of the eighteenth century, for instance, led me to question attendant powers that alleged the supremacy of colonial legality, politics, and society. A socially and politically informed – socio-political – approach prompted research on how and why British colonialism invariably and superciliously heralded its legal fields as *the* premier 'authentic law' for so-called civilized societies.

With conceptual overlap, this book attends to political rationales and practices of colonial law in search of a racialized, gendered, and possessive social order in another context. It explores colonial law's attempt to order societies for migratory settlement – through the criminalization of disorder. I focus on the example of what is now commonly recognized as Alberta (a province of Canada, or what First Nations see as part of Turtle Island), circa 1874–84. The use of Dominion criminal law to secure dispossessing social orders began with rituals that first categorized who and what to accuse of crimes. As a student, I came to appreciate the challenge posed to state criminal law by several then novel

schools of thought – including the new deviancy school, interactionist and labelling theories, abolitionism, critical legal histories, neo-Marxist approaches to law and crime, legal pluralism, and so on. In different ways these approaches shook conventional discourses within the sociologies of deviance and law, legal anthropology, law and society, doctrinal criminal law, and criminology. As well, social histories of witchcraft highlighted for me the significance of accusation to the birth of crime (e.g., Douglas 2013; Ladurie 1987; Larner 2000). And over many years, I gradually tackled criminal law through what may be considered a historically informed sociology of accusation.

I did so despite the ebb of once flowing tides of critical discourse directed at criminal justice. Today we face an ethos far more enamoured with ideas of 'crime', 'criminals', and technical procedures that identify or manage distinctive beings who deserve punishment. This ethos tends to emphasize the discovery, representation, and management of such putative beings – often based on enumeration, ethnography, or mixes thereof. The resultant shift of emphasis sidelined, or worse inhibited, a basic question. What is the underpinning of state criminalization, and criminal laws directed to ideas of social order enunciated inversely by way of crime and criminals? The following account locates the foundations of criminal law beyond the routine discussions of legitimate state procedure, looking to the accusations that initiate criminalizing legal fields. It evokes a sociology of accusation to explore, by way of examples, how socio-political performances of criminal accusation in local contexts translate social happenings into categories of criminal law – thus transforming social lore and rite into dialects of law and right. Here, I tap into well-established 'law as performance' approaches, but now to understand accusation as a performative foundation of colonial law.

On this note, it is worth recalling that the etymology of the term 'accusation' evokes Ancient Greek roots in notions of 'charge' or 'categorize' with overtones of 'censure' and 'blame' (Antaki 2016: 49). In early Latin, *accusare* connoted a calling of 'someone to account for their actions' (Ayto 1991: 5), also suggesting 'to lay one's charge' (Pavlich and Unger 2016: 3; Skeat 1961: 72). As well, *crimen* suggests judgement, accusation, and the like, which leads one to the view, as taken up by some critical criminologists, that a *logos* of *crimen* (a *crimen*-ology) points to how we accuse, how we judge, and so how criminalizing processes generate crime and criminals. This focus is quite different from approaching the latter as if *a priori* beings. It turns us away from the

effects of state-centred criminalizing legal fields to the socio-political performances that form accusatory thresholds to criminalization. Some legal historians and sociologists are quick to declare the obviousness of claims that accusation provides an opening to many legal causes. I agree that this idea is right before our eyes; but it is then surprising that neither field should have provided a sustained focus on, let alone nurtured the critical study of, criminal accusation.

By way of redress, and looking to the nineteenth-century Alberta example, I offer a sociology focused on how particular accusatory thresholds set colonial criminalization on a distinctive course. Those thresholds formed around 'theatres of accusation' deployed and staged by a North-West Mounted Police established explicitly to enforce colonial law and order. By charting the socio-politics of such opening historical moments, one detects a complex lineage behind what now exists as a vast and unequally marginalizing criminal justice system. That system was born to the pursuit of a dispossessing colonial rule by law and order, responding to military 'intelligence' recommending a paramilitary and civil police force. The latter established theatres of accusation where trained police accusers and justices of the peace demarcated criminal disorder – starting with the creation of individually accused *personas* who could be held culpable for predictable social conflicts of settler colonialism. Criminal justice continues to reckon with the historical depth of tenacious colonial inequities (racist, patriarchal, poverty-generating, etc.) that affect both the governors of, and those governed by, rubrics of crime. This book's 'history of the present' highlights legacy traces of accusatorial performance by which a dispossessing colonial legal and social ordering banned individuals as criminal subjects. By so holding individuals culpable for legally framed disarray, colonial accusations began processes of criminalization that concealed dissociating and destructive communal deprivations unleashed by settler colonization.

Focusing attention on the socio-politics of pretrial performances allows us to rethink the very idea of accusation, and maybe even to divest it from today's hegemonic attachment to criminalization. With new ideas of accusation, one might enable performances that accuse collectively destructive forces (e.g., racism, misogyny, poverty-based marginalization, etc.). Calling these to legal account recognizes notions of collective responsibility. It also implies a need to invest in new accusatory thresholds and revised concepts of law, including resurgent Indigenous legal fields that accentuate both individual and collective responsibilities.

Working with accusations that recognize communal responsibilities for relational tribulations might assume rather than deny a plurality of legal fields, enlisting the strengths of various forms of law to border just social forms. Acknowledging the complexity of legal pluralism will likely involve attempts to forge reinvigorated ideas of democratic sovereignty and justice in whose name legal fields might labour. What follows is an overture to that important socio-political work.

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Over the past summer, for the first time, I took a leisurely float down the North Saskatchewan River, seeing my home city in Amiskwaciy Waskahikan (Edmonton) from fresh new angles, glinting through the bright overhead sun. Our knowledgeable guide pointed out elements of Indigenous history that took form through storied attachments to the land and water. This book's acknowledgement begins with a note of respect and gratitude, as it was largely written on Treaty 6 Territory, around the south shore of this river, on land that has for centuries hosted gatherings for diverse Indigenous Peoples including the Cree, Métis, Blackfoot, Nakota Sioux, Iroquois, Dene, Ojibway/Saulteaux/Anishinaabe, Inuit, and many First Nations. One pays tribute to the histories, languages, legal forms, and cultural presence of durable forms of life.

No book can be written without others. As a paradoxically isolated and social endeavour, many people have over years contributed – sometimes inadvertently – to the formulation of the following arguments, but the weaknesses are all mine. Let me start with a blanket 'thanks' to many colleagues who have listened and asked questions. Of special note though, key ideas took form through long walks with friends who refused to let me get away with ill-formed muses and declarations. A profound thanks for the encouragement and critiques of drafted sections provided by Amy Swiffen (who commented on the whole book), Ross Lambertson, Val Napoleon, Barry Skolnick, Matt Unger, Josh Nichols, Alan Norrie, Rebecca Johnson, Chris Anderson, Roger Epp, Amanda Wilson, Frank Tough, Bryan Hogeveen, and my friend of many decades, the late Peter Fitzpatrick. The ideas at various stages of development were presented

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