

INTERRUPTING THE LEGAL
PERSON

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INTERRUPTING THE LEGAL PERSON

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CHAPTER 1

REFRAMING COLONIAL LAW'S CRIMINALLY ACCUSED PERSONS

George Pavlich

ABSTRACT

This chapter studies a political rationale by which colonial law forged socially assigned individuals as criminally accused persons. Focussing on archived documents of a preliminary examination that took place in 1883 in the North West Territories (now Alberta), it highlights how an accused person was moulded as a culpable individual. Arranged by a justice of the peace, and member of the North West Mounted Police, the investigation in this case reveals how colonial law unleashed an individualising force that obscured power relations behind the settlement it aimed to further. The unequal ways in which certain distinctions of person were legally recognised and individualised may be traced to long-standing western uses of social hierarchies as 'masks' from which law unequally recognised persons. Challenging such approaches to personhood, the analysis works off Naffine's 'legalistic' ideas of persons as fictions, calling for a retelling of the fictions around accused persons. By pointing out the possibility of accusing relational rather than individual constructions, it concludes with a brief insinuation of legal forms directed at 'collective persons', interrupting a key political logic of colonial criminal law with allied promises of social justice beyond colonisation.

Keywords: Criminal accusation; legal persons; colonial criminalisation; settler-Colonial Law; postcolonial justice; indigenous law

INTRODUCTION

The disproportionate numbers of Indigenous people in Canada's criminal justice institutions, signalling an enduring colonial legacy, has been well documented (e.g., [Cunneen & Tauri, 2016](#); [Monchalin, 2016](#)). What is less well known is how such an inequality might be related to a persistent political logic at opening socio-cultural instants of criminalisation, at moments where selected persons are hailed into being as criminally accused individuals. Forming these subjects echoes an ancient Greek use of the word 'accuse', which was related to *kategoria* and debates over how best to categorise happenings ([Antaki, 2017](#)); but it also connotes the Latin *crimen* that suggests (among other senses) a 'calling to account' ([Ayto, 2011](#)). The importance of accusatory openings to colonial law's ways of calling subjects to account is nicely captured in a courtroom drama described in J. M. Coetzee's *Schooldays of Jesus*. Readers encounter an accused individual standing before a court, blithely declaring his acceptance of its accusations and charges of guilt. The judge responds with a vigorous reproach:

You say further that you do not want to save yourself. But your salvation is not a matter that rests in your hands. If we, your judges, do not do our best to save you, following scrupulously the letter of the law, then we will have failed to save the law ... we have a responsibility to society, a grave and onerous responsibility But we have an equal responsibility to save you the accused from yourself, in the event that you are or were not yourself as the law understands being oneself to be. Am I clear? (Coetzee, 2016, Kindle Loc 2063–2068)

Thus, law is 'saved' so long as it maintains concepts of the persons it accuses and targets, and upon which its gaze alights. Forging such persons is a foundational – if fictional – matter for law, and one that starts with procedures that mould accused persons to face particular kinds of legal scrutiny. This is why Agamben insists that, 'what defines the trial is neither guilt (which is unnecessary in archaic law) nor punishment but rather the accusation'; that is, 'the accusation is perhaps the juridical "category" par excellence (*kategoria* means "accusation" in Greek), without which the whole edifice of law would fall apart' ([Agamben, 2011](#), p. 23). Hence, from this vantage, criminal law is founded on the accusations that categorise and shape 'persons' who are called to account in law, with implications for the criminal justice institutions that such processes unevenly populate.

With this approach in mind, the following chapter discusses an 1883 case in which a 'preliminary examination' in the Dominion of Canada's North West Territories (NWT) is highlighted, focussing on a governmental logic that targeted individual persons at accusatory thresholds to a colonial criminal law. Although this law's local deployment was explicitly designed to foster Dominion capitalist settlement, the idea of 'settler colonialism' ([Veracini, 2014](#)) was here still very much in process – following the arrival of the North West Mounted Police (NWMP), and the making of Treaties 6 (in 1876) and 7 (in 1877). Even so, emerging prejudices, identities, and divisions congruent with contested migrations from Eastern Canada, Europe, etc., are reflected by attempts to unleash Dominion criminal law to secure its visions of a settled order ([Nettelbeck, Smandych, Knafla, & Foster, 2016](#)). Further, the selected case exemplifies local practices of criminalisation in the making, reminding us that the NWT relied on

preliminary examinations rather than grand juries to fix accused bodies as individuals who could confront an unfolding criminal law. Specifically, at thresholds to criminalisation, as arranged by commissioned justices of the peace, preliminary examinations materialised around a politics of masking that first imputed group membership to avowers and then relied on 'individual' testimony when judging whether to send an accused to trial. Colonial criminalisation was thus initiated by recognising specific kinds of persons in society before focussing that gaze on the *individual* persons it cast as the accused.

Although these notions of legal persons have immediate roots in imperialising English common law, their colonial appearance simultaneously traced western discursive genealogies of personhood. With a passing look at this rich lineage, the discussion highlights how threshold entryways to colonial criminal law required accused subjects to don socially ordered 'masks', or *personas*, when facing its examinations as individuals. Embracing the contingency of such masking, the chapter turns to Naffine's (2003, 2009) analyses of 'legalistic' approaches to persons as historical fictions (rather than metaphysical realities). The analysis then explores the possibility of retelling law's individualising narratives, thus reaching for different legal objects. It alludes to qualitatively different versions of accusation that focus law around collective rather than individual persons, thereby amending its objects and surrounding socio-legal processes. The concluding allusions imply altered incarnations of law, accusation, and different promises of (social) justice.

AN EXAMPLE: CRIMINALLY ACCUSING AN INDIVIDUAL PERSON

On a cold eighth day of February 1883, near of Calgary, a man described as a 'rancher', Joseph Moss, laid an information and complaint to a commissioned justice of the peace, and officer of the NWMP (named McIllree). Less than a decade previously, in 1874, this police force had embarked on a marathon route march from Fort Garry (Winnipeg) to assert its jurisdiction over criminal matters throughout the Dominion defined NWT.¹ Emerging as a colonial institution capable of receiving crime-related information, it 'heard' Moss's accusation that a man named as 'Cutlip' – and described as a 'Sarcee Indian' on the charge form – had stabbed him in the back.² The colonial misnaming of Tsuut'ina Nation as 'Sarcee' may reflect a legal requirement to reference a social position without a concomitant obligation to ensure fidelity to those named. Regardless, a month later, McIllree convened a preliminary examination to determine whether there was sufficient evidence to send the matter to trial.³ Eclipsing long traditions of Indigenous legal pluralism, the Dominion of Canada championed these localised arrangements as *the* legitimate law of the day, thus responding to calls to bring so-called 'civil law' to lands identified for western migration, and to enforce its law on what was misconstrued – given established Indigenous laws (Borrows, 2010) – as a 'lawless' place (W. F. Butler, 1878; Robertson-Ross, 1872). Its rhetoric to

‘enforce the law’ championed ‘European settlement’ that by its reasoning meant bringing ‘civilization’, socio-cultural, and economic ‘advancement’ (Harring, 2005; Macleod & Rollason, 1997; Nettelbeck et al., 2016; Nevitt & Dempsey, 2010).

One-hundred-and-forty years later, with echoes of Kafka, I sit before an archived instance of that Dominion law, proclaimed through faded scrawls on edge-torn pages. Alert to Derrida’s (1996) caveats about the work of governors (*archons*) in what is archived, however, my limited aim is to fuse meaning horizons of now and then as a gesture towards an unfolding political logic; namely, how colonial law’s criminalising gaze brought certain accused individuals into focus. Making anachronistic sense of that gaze through a local instance of a preliminary examination, one glimpses contours of a target: an accused person with presumed social ties is called to account as an individual – thus averting legal scrutiny of the dispossessing collective structures that colonial law upheld (Nettelbeck et al., 2016; Pavlich, 2019). The following engagement with an example, then, aims to illustrate how *individually* conceived accused persons, located in social hierarchies, were shaped into being by the preliminary examination of a colonial criminal justice paradigm. Rather than approaching this case as a sampled representation, though there are many similar stories of examinations, the methodology is an interpretative one. Akin to Foucault’s (1995) use of the panopticon to signal disciplinary powers, it analyses out of a case (Forrester, 2016) which is viewed as an example of a wider political paradigm (Agamben, 2009). The aim is to engage an unfolding colonial political logic whereby a criminally accused individual could be called to account alone for a criminal act at a gateway to colonial criminalisation. Such a move highlights what Nietzsche called the ‘lowly beginnings’ of criminal justice, and points to an often-eclipsed politics of accusation that feeds today’s vast and unequal crime control arenas (e.g., Alexander, 2010; Cunneen & Tauri, 2016; Monchalín, 2016; Wacquant, 2009).

One might note that despite the grandeur of the rhetoric, the Dominion’s political capacity to call subjects to account for crimes rested on the deployment of a few hundred police officers across a vast area of land, spreading from Manitoba to the Rocky Mountains. Even if seldom emphasised, preliminary examinations lay at the centre of its unfolding criminal law. It is here that criminalisation in the name of a colonial sovereign was initiated. So it was that a justice of the peace (McIllree), following an accusation by Moss, claimed a legitimate capacity to call an individual, formally (mis)named as ‘Cutlip’, to account for ‘grievous bodily harm’. Through I did not encounter case records to indicate the accused man’s worldviews, one might imagine how his familiar meaning horizons were disrupted as the police arrested him from everyday life, calling him to account as one accused of ‘grievous bodily harm’ under the omniscient threat of its force – no doubt indicating the complex motivations, from arrest to indictment, by which colonial law’s powers swamped his altered world. Furthermore, if the English language spoken was unfamiliar to the accused, the inflected legal idioms might have been even more so; translations too were problematic with radically different vocabularies at play (Harring, 1998).

It was perhaps foreseeable that incoming colonising voices would dominate the examination's legal narrative (the legal authorities and witnesses were not indigenous to the land) with no overt attempts to hear multivocal stories or entertain diverse procedures. A legal guidebook of the day made this clear by requiring justices only to 'hear' and collect evidence by transcribing verbal utterances 'as near as possible in the words of the witness ...' (Lewis, 1884, p. 7), and prescribed these procedures:

After the evidence of a witness has been taken down in writing it should be read over to him and then signed by himself and the Justice or Justices, who shall write (Sworn before me (or us) this day of 188_). before his or their names The evidence must be taken in presence of the accused, and he must have an opportunity to ask the witnesses any questions he may think necessary. (Lewis, 1884, p. 7)

Colonial law thus anchored itself to individuals who swore (or in the case of some Indigenous people 'affirm') oaths to tell, 'the whole truth and nothing but the truth, so help you God' (Lewis, 1884, p. 7; see also Clarke, 1872).

On this note, one might recall Foucault's (2014) lectures when thinking about the sort of truth-telling (avowing) demanded by these juridical practices and the limited roles assigned to actors in preliminary examinations. Along these lines, justice McIllree transcribed the accuser Moss's words, under oath, as follows:

I was coming home to my dinner on Thursday 8th Feb last about 2 pm. When I got in sight of the house ... I saw two Indians at the door, one with a white and the other with a black blanket. They appeared to be tampering with the door

His archived scrawl relates further that Moss searched the 'prisoner' and found some of his belongings, and that 'the prisoner kept bothering me wanting to shake hands, and I pushed him away from me several times ...'. Thereafter, Moss is said to have looked for the 'other Indian' along the river, but was surprised by the accused man:

I did not hear or see him coming until he stabbed me in the back ... he ran with the knife in his hand down the bank. I ran after him until I got too weak to run further ... I used no malice towards the prisoner further than by pushing him. The knife was as far as I could judge a larger butcher's knife. I am certain that the prisoner is the man who stabbed me.

The persistent use of the first person in a staccato-like transcription of the accusation alerts us to this law's idioms – genres of storytelling – and how it thereby forged criminally accused persons. To begin with, justices of the peace were obliged to write down the names of subjects who stood before the law, and to describe their social standing as understood by authorised officials. They thereby provided overtones of how to 'read', and what weight to assign to specific people's testimony (see Jones, 1889; McGuire, 1890). So, the examination assigned the name 'Cutlip' to a biopolitically ordered 'Sarcee Indian', while 'Joseph Moss' was economically recognised as a 'rancher'. These nomenclatures probably rang loud cultural bells among local settlers and contoured their perceptions of what veracity weighting to assign to statements made by whom (Harring, 1998; Morgensen, 2011).

Relatedly, and reading between the lines of Moss's information, one can identify injurious conflicts and presumed entitlements as indicated by: a denigrating

racism surrounding blinkered references to ‘the other Indian’; the arrogance of illicitly searching the accused; a stated and then quickly dismissed allusion to the cultural insult of ‘pushing aside’ an extended hand of friendship; information that the accused once worked for his accuser; and so on (Byrd, 2011). Simultaneously with allusions to social standing, the accuser, accused, witnesses, and even the mediating justice were framed as individual persons whose delimited stories formed a ‘fact-based truth’ of unfolding events. The references to the accused’s purported social position – names and variously understood social positions – served as a basis for describing different sorts of individual persons as colonial law deemed them to be (Estes, 2020). An overriding logic of this criminal law was then clarified: to assign culpability to an individual person and to divert attention away from the suggestion that imposed colonial relations could be behind conflicts of this kind.

The procedural powers that forged colonial law’s individually accused persons through preliminary examinations were buttressed by imputed first- and second-person legal narratives. We can detect elaborate protocols for ‘hearing’ sworn verbal utterances from single voices, transcribing ‘facts’, reading them back, signatures and counter signatures (with Xs or not). All insinuated the appearance of a priori individual beings. However, the performances themselves shaped legally recognisable accused individuals – the constructs that it needed to realise its concepts of ordered settlement. In other words, the very demand for responses from individually imagined accusers and accused (and witnesses) forged specific kinds of targets and shaped this law. It was not simply a matter of individuals appearing before a justice, but a more basic coappearance by which persons, processes, and outcome emerged through encounters presented as ‘the law’. In this sense too, the unfolding law claimed a monopoly over legal truth. Yet, we should not lose sight of its fictional character, for the colonial craft of law-making was a storytelling instrument: it used legal vocabularies to reduce complex social process to proselytise individualised stories of criminal culpability. Referring to the continued influence of this individualising political logic, Fassin’s (2018) analysis of punishment echoes the point:

Both the liability of the offender and the individualization of the sanction therefore contribute to a narrowing of retribution on the individual held liable, who is deemed solely accountable for the act he allegedly committed and those he might commit in the future. (pp. 109–110)⁴

With that narrowing complex in mind, one might wonder how this law produced the muted voice demanded of its ‘accused individuals’. What might ‘Cutlip’ behind that named mask have experienced as he listened (through translation) to the examination’s accusations and witness statements? We cannot know but might point to a long tradition of resistance to such colonial impositions (Estes, 2020). Regardless, contemporary guidebooks for justices did not dwell on such concerns, preferring an emphasis on procedure:

The information is first read over to the accused, but Justices must bear in mind that this is merely for the purpose of showing the accused what he is charged with (Lewis, 1884, p. 7)

At one point, however, McIllree trained his legally authorised gaze squarely upon the accused man, formally recognising – and so shaping – him through an

imposed colonial name that also depicted him as an individual person charged with the 'aforementioned crime'. To repeat: this logic categorised him biopolitically (see [Morgensen, 2011](#)) as 'a Sarcee Indian', but called him to account alone as a criminally accused individual.

Thus, on a standardised 'Statement of the Accused' form, the justice was required to recognise, name, and so forge, an individual accused of a specifically worded charge or indictment of an offence, with date time, place, and so on. McIlree's charge in this case claimed that, 'Cutlip did attack one Joseph Moss thereby causing grievous bodily harm on the eighth day of February last'. It noted too that 'the said charge' was 'being read to the said Cutlip and the witnesses for the prosecution being so freely examined in his presence' and further that the accused was 'addressed by me as follows: "having heard the evidence do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you at your trial"'. With that Miranda-like warning, the justice transcribed a translated rendition of what he legally recognised as the accused individual's response, here quoted in full:

When Moss pushed me over he shook the knife in pushing me and it cut my leg. This made me mad and I stabbed him in the back. I had been working for Moss, but had not been there for some time when this happened.

This short, transfigured, though rare, glimpse of the accused 'Cutlip's' translated response is revealing. To begin with it calls upon him to account for himself not as a member of the Tsuut'ina Nation, but as 'Cutlip' the individual. Despite his statement's clear counter-accusations of Moss' initial 'cut', or the previous relationship between the men, the justice proceeded as if no statement were heard. And colonial criminal accusations linked an imputed social distinction of personhood (a category of 'Sarcee Indian') to criminal law's demand for a blameworthy, individualised person who could be accused of a crime. To be sure this case may appear to challenge the classifications in *The Indian Act* of 1876 that distinguished, for its purposes, 'persons' from 'Indians', rendering the latter dependents of the state.⁵ However, this Act also allowed for different 'constructions' of personhood, enabling this criminal law's claim to jurisdiction over any individual persons who transgressed Dominion defined crimes ([Nichols, 2020](#)). Thus, while McIlree's stories made reference to biopolitical distinctions drawn from unfolding social hierarchies of settlement, his examination centred on individually accused persons (as *per* [Morgensen, 2011](#)). As such, 'Cutlip' alone was 'Committed to stand trial at the first sitting of the Bow River Court, District no 4'. That judgement followed a contemporary guide by accepting that, 'an old rule of law that prisoners should receive the benefit of every doubt' did not 'apply to examinations' ([Lewis, 1884](#), p. 9).

In short, a colonial political logic at thresholds to local criminalisations fabricated accused individuals out of social distinctions of personhood. They could then be sent to trial and potentially held exclusively culpable for a criminal act ('grievous bodily harm'). A logic that accused singular persons of crimes rendered basic social conflicts, spawned by a local version of colonisation, as

unrecognisable to law. Individuals alone could be held criminally culpable.⁶ Returning to Coetzee's story, we might say that by so forging an accused individual at thresholds to criminalisation, colonial criminal law saved itself, and at the same time furthered the immense settlements envisaged by the Dominion it served. That logic has again proved to be historically durable, shaping the way criminal justice continues to operate (Pavlich, 2018). As de Lagasnerie (2018) suggests:

The system of judgment first deploys an individualizing construction of events. It imputes actions to individuals. Only then can it begin to identify the eventual criminal responsibility of the subject behind the 'criminal act'. (Loc 1035–2693)

But how might we understand the seeming paradox of colonial law recognising social distinctions of personhood while simultaneously calling only accused individual persons to account? In many ways this lands us squarely in a politics of accusation, with malleable forms of legal recognition (Esposito, 2012a, p. 117); but a rich genealogy of legal persons as individuals highlights a wider logic at play.

ACCUSING SOCIALLY LOCATED INDIVIDUALS

One may point to a western politics of accusation that drew upon socio-culturally ideas of personhood to cast criminal law's individual persons (Carrithers, Collins, & Lukes, 1985; Esposito, 2015). This discourse worked out of a politics of masking situated in local, familiar, and assumed social categories. For instance, Roman law recognised ancient masks (*personas*) that symbolised different social privileges and positions accorded to families of standing (Esposito, 2012c, 2015; Parsley, 2010; Supiot, 2017). Such masks were never possessed by individuals, even though,

every individual was identified by a name that expressed his belonging to a *gens*, to a lineage; but this lineage was defined in turn by the ancestor's mask of wax that every patrician family kept in the atrium of its home. (Agamben, 2011, p. 46)

Moreover, as Supiot (2017, note 69) points out, the life of Roman persons was conditioned by the inheritance of ancestral death masks – the 'imagio' which literally contained the 'imprint of the face of the dead man', a remaining physical or metonymic 'trace of that person'. This mask symbolised a social position that had legal standing. As he explains:

In Ancient Rome, personality was assigned to the one entrusted with the *imagines* and the names of the ancestors: the *pater familias*. In Roman law, not all human beings had full personality: some were treated as things, while others simply partook of the personality of the *pater familias*. There was no generic concept of 'person' but rather degrees of personality, from slave to *pater familias* via freedmen, free sons and women, peregrines, and so forth. (Supiot, 2017, Kindle Loc 682 of 6991)

Accusation provided a way to connect assigned social positions and criminal law's persons. On the one hand criminal accusations drew upon, 'the place of the individual in the dramas and rituals of social life' (Agamben, 2011, p. 46), and on