

## The Role of Law in the Perpetration of Genocide: Legitimation and the Definition of “Deviance”

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Maureen S. Hiebert

Department of Political Science, University of Calgary

(maureen.hiebert@ucalgary.ca)

### Introduction

A small but growing literature has begun to explore the role of law not in the prevention of genocide, but in its perpetration. In this largely theoretical paper I seek to contribute to this discussion by drawing on critical socio-legal theories to understand how the law legitimates group destruction by rendering such practices “lawful” by classifying, and thus delegitimizing, targeted groups as “deviant”. I also confront the assertion, found in the works of some scholars, that the use of law in genocide seems to involve the non, or less violent, aspects of genocide (segregation, deportation, marking, revocation of citizenship etc.) while the more explicitly violent processes of destruction are usually “extra-legal”. This argument is largely accurate if we are referring only to mass violence genocides. In these circumstances, it would seem that while the law can be “bent” to play a role in creating the conditions for genocide, it cannot be “broken” to sanction exterminationist violence on a massive scale. But if we consider cases of cultural genocide in settler societies – more specifically the residential school system in Canada – we can see that law, without being “bent” or “broken”, plays a leading role in the entire process of destruction. Democratic governments wedded to the rule of law turn to the law itself to craft and enforce programs of forced assimilation legitimated as “lawful” against groups defined under these same laws as “deviant”.

This paper is a first cut at framing a much larger project in which I seek to explain why some genocides are perpetrated in whole or in part through the law while in other cases the law is largely absent. The literature suggests two ways in which the modern state uses the law to perpetrate genocide. One explanation argues that the modern state always uses the law as a power “resource” to make legal, and thus legitimate, the crime of genocide.<sup>1</sup> A second explanation suggests that the use of law by genocidal states occurs across a spectrum. At one end of the spectrum are states that over time change the legal system to “destroy the rule of law and separation of powers” and replace it with rule through executive powers. In the middle are states which retain legal systems that continue to be based on the separation of powers and some “semblance of the rule of law” that introduce “criminal legislation” to facilitate the process of destruction. At the other end are states that do not use the

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1. Alex Alvarez, *Governments, Citizens, and Genocide: A Comparative and Interdisciplinary Approach* (Bloomington, IN; University of Indiana Press, 2001), pp. 71-78.

law at all in the perpetration of genocide.<sup>2</sup> In the first explanation, the law plays a role in the entire process of destruction including the use of mass violence by assigning to the legally defined coercive institutions of the state (military, police, security services) the task of violently liquidating targeted groups. The second explanation backs away from this broad claim and suggests that throughout the spectrum there are no circumstances in which the law plays a direct role in the use of mass violence. Violence used in the service of genocide is always extra-legal; as Balint argues, “the law is never used to authorize murder”.<sup>3</sup> The law is used, albeit in a criminal bastardized version of itself, by states with a “weak” commitment to the rule of law, such as apartheid-era South Africa, to enact discriminatory and harmful “state crimes” aimed at specific groups.

This discussion of the role of law in the perpetration of genocide offers a very useful corrective to the liberal legal thesis that the law, particularly at the domestic level, always acts as a neutral arbiter between disputing parties or as a set of impartial rules applied equally and fairly to all. Drawing on the work of Austin Turk, Alvarez reminds us that the law can be used as a tool in social conflicts wielded by groups to gain advantages at the expense of their competitors. Groups that gain control of the state, the principle maker and enforcer of law in the modern era, attain a potent source of power to shape and implement the most criminal of policies.<sup>4</sup>

There are, however, a few problems with these arguments. First, there is little by way of explanation as to *why* (as opposed to establishing *that*) some perpetrator states use the law as part of what eventually becomes a program of genocide while others do not. Balint, to be fair, offers what she says is an explanation for why some states use the law up to, but not including, the mass violence phase of genocide, by linking the presence or absence of law and its role and function in the genocidal process to whether a perpetrator regime alters the legal system to remove the rule of law, the independence of the judiciary, and the separation of powers in favour of executive rule (e.g. Nazi Germany). In the latter instance the law drops out of the genocidal process or retains these features of the legal system although in a weak form (e.g. South Africa) thus allowing the state to commit crimes short of mass murder through legislation. No explanation, however, is offered for what drives these changes to the legal system at the hands of the state in the first place. Despite this problem Balint offers two key insights: that the law is not used to sanction genocidal mass violence and that states with at least some commitment to the rule of law – or in the case of authoritarian regimes what Ginsburg and Moustafa call “rule by law”<sup>5</sup> – use the law to commit criminal acts.

What is missing here is a theoretical account of the *boundaries* of the law and why the law can be bent to establish the framework and thus potential for genocide but cannot be broken beyond certain boundaries to authorize exterminationist violence. Also absent is the closely related issue of how we can account for why fidelity to the rule of law lays the foundation for the use of law to

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2. Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Abingdon, Oxon; Routledge, 2012), p. 35-36.

3. Balint, *Genocide, State Crime and the Law*, p. 34.

4. Alex Alvarez, *Governments, Citizens, and Genocide*, pp. 71-78.

5. Tom Ginsburg and Tamir Moustafa, “The Function of the Courts in Authoritarian Politics”, in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Tom Ginsburg and Tamir Moustafa (eds.) (Cambridge: Cambridge University Press, 2008), pp. 1-22.

perpetrate state criminality, particularly in democratic regimes with a very strong commitment to the rule of law. I will return to these two themes later.

Second, by focusing on either authoritarian regimes or hybrid semi-authoritarian states, the assumption is that genocides, whether perpetrated using the law or not, are only carried out by non-democracies. The fact that settler democracies conceptualized and implemented genocidal policies aimed at indigenous peoples is left out of the equation. As such, the literature fails to explain how and why settler democracies use the law through a variety of assimilationist policies, with and without overt violence, to destroy indigenous communities and ways of life.

Third, the exclusive focus on the state implies that all genocides are perpetrated by state actors, and that with respect to the law, only states avail themselves to or interact with the law in the pursuit of genocidal goals. Post-colonial genocide studies scholars have convincingly shown that settlers (e.g. farmers, ranchers, religious figures, teachers and the like) not only implement legally sanctioned genocidal policies, they also respond to and help shape the ways in which the colonial state frames the identity of the victims of genocide as deviants or criminals and take advantage of both the letter of the law and the silences of the law as “genocide entrepreneurs”.<sup>6</sup> While my paper admittedly focuses on the state as the primary unit of analysis for brevity’s sake, it is important to acknowledge that the role of law in the perpetration of genocide goes well beyond the state and its capacity to make and enforce law.

Finally, the literature is also limited to genocidal destruction carried out through the physical destruction of members of the victim group, that is, the mass violence genocides of the twentieth century and beyond. By excluding settler democracies and the multiple ways in which these regimes targeted indigenous populations for destruction through both violence and forced assimilation, the full scope of the role law plays in the genocidal process within and across regime types is not fully considered. I accept that settler democracies perpetrated genocide against indigenous populations. I argue that in cases where government lacks the will and/or capacity to use violence, while simultaneously maintaining a real commitment to upholding a formalistic version of the rule of law, the more central the law is to the genocidal process. Indeed in Canada and the Indian Residential School (IRS) system, the law was one of the primary instruments of destruction.

In the following I will begin by examining two theoretical issues that are key to understanding why the law does not sanction mass violence genocides but is fundamental to non (or less overtly) violent cultural genocide by constitutional settler democracies. The first issue involves establishing the boundaries of law through a discussion of legal validity (recognizing what is and is not a law). The second issue is how fidelity to legal formalism, particularly the rule of law grounded in democratic constitutionalism, allows for the content of law to be genocidal, albeit non-violent, in such a way that law-makers are blind to and are shielded from the genocidal nature of their own policies. Here the law functions to both legitimize destructive policies by making them lawful while rendering unlawful the behaviour and existence of indigenous peoples by labelling them “deviant”.

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6. See A. Dirk Moses and Dan Stone (eds.), *Colonialism and Genocide* (Abingdon: Routledge, 2007); A. Dirk Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (New York: Berghahn Books, 2008); Dan Stone (ed.), *The Historiography of Genocide* (New York: Palgrave Macmillan, 2008).

In the final section of the paper I will very briefly sketch out how this role of law in genocide manifested itself in the creation of the IRS system in Canada.

### **The Boundary Of Law**

For centuries one of the central areas of inquiry in western traditional legal theory has been legal validity. This involves determining theoretically the criteria for assessing what is a valid or “real” law and what is not law. Identifying theoretically what is law and what is not also establishes the boundary of law. Ranging from natural and new natural law, legal positivist, and mainstream socio-legal approaches to this question, traditional approaches agree that there is a boundary between law and other regulatory systems in society. Critical Legal and Critical Race theories of law leave aside the question of legal validity and instead interrogate the power structures and relationships embedded in the law and the legal system.

#### *Traditional legal theory*

The natural law answer to the question “what is law” is that law must be firmly grounded in custom, morality, or a conception of societal goods. Law cannot be just any command, any rule, or any proclamation from an individual, institution, or authority. For law created by a recognized sovereign to be truly valid – that is, considered by others to be a law – it must conform to an external normative standard of validity. For the ancient Greeks, this standard rested on both custom and morality with both Plato<sup>7</sup> and Aristotle<sup>8</sup> arguing that positive law should conform to prevailing customs and beliefs and be constrained by them. But for laws to be fully valid they also had to be grounded in accepted notions of morality. Doing so guarded against the creation of unjust laws wielded as weapons of naked power by unjust rulers driven by capriciousness or personal desire. While positive law came from rulers and legislators, the ultimate source of law and the morality upon which law rested was the gods. “Every law” Demosthenes claimed, “is an intervention and gift from the gods”<sup>9</sup> while for Aristotle law drawn solely from man added “an element of the beast”<sup>10</sup> to the polity. Using their capacity for human reason, rather than passion or emotion, human law-makers can discern what the laws ought to be, what the common good is, and what is just and unjust.

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7. Plato, *Crito*, in *The Broadview Anthology of Social and Political Thought, Volume One, From Plato to Nietzsche*, Andrew Bailey, Samantha Brennan, Will Kymlicka, Jacob Levy, Alex Sager, Clark Wolf (eds.) ( Peterborough, ON: Broadview Press, 2008), pp. 29-35.

8. Aristotle, *Nicomachean Ethics*, Book 5, in *The Broadview Anthology of Social and Political Thought, Volume One, From Plato to Nietzsche*, pp. 150-161.

9. *The Orations of Demosthenes, Against Aristogiton I*, Charles Rann Kennedy (trans.) (London: Henry G. Bohn, 1861), p. 60.

10. Aristotle, *Politics*, Book 3, in *The Broadview Anthology of Social and Political Thought, Volume One, From Plato to Nietzsche*, pp. 204-219.

The fullest expression of the natural law thesis evolved during the Medieval period. In a then thoroughly Christianized Europe, natural legal understandings of law revolved around Christian conceptions of morality and the role of the divine in laying down a universal moral order. For positive laws to be proper laws they must be just. To be just, laws must conform to natural law. Unjust laws, while they can be enforced through coercion by the sovereign, lack moral authority even when the sovereign has the proper political authority to make law. An unjust law St. Augustine famously claimed, “seems not to be a law”<sup>11</sup> and St. Thomas Aquinas called such laws “no longer law but rather a perversion of law”.<sup>12</sup> Natural law itself is said to be the law of creation contained within the natural world and human beings and is thus a reflection of God’s reason, although God’s reason on its own can never be known completely by human beings. Human beings can discern the precepts of natural law through the exercise of practical reasoning. By avoiding unbridled appeals to mysticism, superstition, or guess-work in determining the natural law, and instead engaging in the sustained application of practical reasoning given to humanity by God, natural law comes to constitute the moral foundation for and boundary of positive law. For contemporary new natural law scholars law is bounded less by the divine and instead through a conception of natural law defined in terms of basic societal goods. These goods, which include life, knowledge, friendship, religion, aesthetic experience, play, sociability, and practical rationality define the boundaries of what the law ought to be.<sup>13</sup>

With the rise and eventual dominance of legal positivism in the modern secular era, conceptions of the boundaries of law changed. The first major legal positivist thinker, John Austin, sought explicitly to divorce law from conceptions of morality and instead thought about law “scientifically” by analyzing what law actually is in the real world. This approach requires us to leave aside the normative question of what law ought to be since Austin believed that what constituted the moral foundation of the law could no longer be agreed upon in a world of increasingly divergent moral and cultural beliefs.<sup>14</sup> For Austin, law is simply “the commands of the sovereign” (however constituted) backed by the threat of coercion. The law, in short, is whatever the sovereign posits. Here we see the beginning of what legal positivists take to be the most important element of legal validity: that laws are real laws so long as they are created through recognized procedures and by authorities that have been given, through an agreed upon process, the right to make law. The content of law – whether it is just or unjust or conforms to societal customs or not – is not part of how we determine legal validity. It is because of this emphasis on the process by which laws are created, rather than their content, that legal positivism is closely associated with legal formalism.

Austin’s strongest critic and successor within the legal positivist tradition, H.L.A Hart, set the stage in the latter half of the twentieth century for how many scholars and practitioners

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11. Augustine, *On Free Choice of Will*, Book 1, para. 5, Thomas Williams (trans.) (Hackett Publishing Company: Indianapolis/Cambridge, 1993).

12. Aquinas, *Summa Theologiae*, in *The Broadview Anthology of Social and Political Thought, Volume One, From Plato to Nietzsche*, p. 309.

13. John Finnis, *Natural Law and Natural Rights*, Second Edition (Oxford: Clarendon Press, 2001).

14. John Austin, *The Province of Jurisprudence Determined* (Dartmouth Publishing, 1998).

conceptualize the law and its boundaries in the Anglo-American world to this day. Hart rejected Austin's notion of law as commands backed by force as too restrictively tied to criminal law and unreflective of many other forms of law (contracts, torts, administrative, and constitutional) that are either not commands and/or not enforced by coercion. Instead Hart conceptualized laws as rules,<sup>15</sup> while making it clear that society has all sorts of other kinds of rules that are not laws. The question then for Hart was, of all the kinds and sources of rules in society, which ones are laws?

As with Austin, how laws are created and enforced is the cornerstone of legal validity for Hart. Laws as rules are divided, Hart argued, into two categories: primary rules and secondary rules. All societies, be they modern or "traditional", democratic and not, have primary rules or what Hart called "primary rules of obligation". These are rules that tell us what we can do, what we cannot do, and of the things we can do how we can go about doing them. These rules on their own are not laws and polities that only have these kinds of rules are said by Hart to be "pre-legal".

For a polity to have a true legal system with rules that constitute valid laws, there must also exist a companion set of secondary rules that function as rules about how to make, change, and adjudicate primary rules. There are three kinds of secondary rules. The first set of secondary rules are "rules of recognition" which tell us that primary rules are only valid laws if they are created following a set of rules that establish who can make laws and by what process. The second set of secondary rules, "rules of change", set out how already existing valid laws can be changed or abolished and by whom, while the third set of rules, "rules of adjudication", establish how and by whom laws are to be applied and interpreted. All of these rules are contained in democratic constitutional documents that govern the legal structure and functions of the executive, legislative, and judicial branches of government. For Hart, Nazi Germany was the paradigmatic case of a pre-legal polity that functioned according to an extensive set of primary rules of obligation backed by coercion but which wholly lacked the necessary secondary rules of recognition, change, and adjudication to make these rules "laws". Thus for Hart the Nazis' rule-bound persecutions of enemies of the Reich, and particularly their genocidal project against the Jews, operated beyond what he thought could properly be considered law. Further, unlike Austin, Hart rejected the notion that law and morality are completely unrelated to each other, acknowledging instead that certain kinds of laws do indeed reflect moral principles, including moral wrongs that cause great harm to others.

### *Socio-legal theory*

While the classical sociological thinkers – Marx, Weber, and Durkheim – did not fashion distinct theories of law, there is contained within their writings conceptions of the law that indicate, albeit in a rather general sense, what the boundaries of the law are and more explicitly the function of law in society. Law is seen as a social structure that, along with other social structures, like religion and education as well as the economy and politics, constitute society and regulate social interaction. Like Hart, Weber and Durkheim were concerned with identifying what differentiates the law from other kinds of rules, customs, and conventions. Included as part of his conception of different kinds of

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15. H. L. A. Hart, *The Concept of Law, Third Edition* (Oxford: Oxford University Press, 2012).

authority, law in “modern” societies for Weber<sup>16</sup> is an expression of “rational-legal” authority in which the state and other bureaucratized institutions are structured around and function in accordance with a rational set of rules and roles rather than edicts promulgated by traditional or charismatic rulers or individuals within social organizations. Along with the legal positivist understanding of law, Weber’s rational-legal conception of law gives us the foundations for our contemporary understanding of the rule of law about which I will say more below. For Durkheim,<sup>17</sup> law reflects and reinforces the kind of “solidarity” present in a society. “Traditional” societies composed of small face-to-face communities in which economic and other roles in society are relatively undifferentiated are characterized by a mostly retributive set of laws that establish and reinforce a “mechanical” form of group solidarity based on a shared *conscience collective*. Complex “modern” societies, which exhibit an interdependent “organic” form of solidarity, are regulated by mostly redistributive and compensatory forms of law. Law for Weber appears to be mostly neutral in its conception and application while for Durkheim it is a positive source of social consensus.

Alone among the classical sociologists, Marx cast a critical eye on the law,<sup>18</sup> arguing that law, like the state that produces it, is a mechanism for creating and enforcing economic exploitation by the capitalist class that owns the means of production over workers who must sell their labour power. Under capitalism, law is fetishized as a set of prescriptions and proscriptions that turn the exercise of power and exploitation into something that is both rational and right. Law in this instance is neither neutral nor a foundation for equality or justice. It is, instead, a weapon of the powerful, its content a reflection of economic power relationships embedded in the structure of the economy translated by a compliant state into the laws of the land. It is with Marx that we begin to see a conception of law that bends the boundary of law to include the accumulation and projection of power by some which either consciously or unconsciously leads to discrimination against and the exploitation of subordinated “others”.

### *Rule of law*

With the exception of Marx, traditional legal theory and classical socio-legal conceptions of the law establish, as noted earlier, our understanding of the rule of law in democratic polities. Popularized by British jurist A. V. Dicey, the rule of law is rule within nations of law, not of individual rulers, or as Dicey put it “the rule of law, not of men”.<sup>19</sup> Under the rule of law the law must be applied in exactly the same way to all individuals to whom the law applies regardless of socio-economic or other status. Law, therefore, applies to both ordinary citizens and political elites alike; to those for whom law is made and to those who make the law. The law must also be “knowable” to all by making statutes and

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16. Max Weber, *Readings and Commentary on Modernity*, Stephen Kalberg (ed.) (Blackwell Publishing Ltd., 2005), pp. 179-198; pp. 238-244.

17. Emile Durkheim, *On Morality and Society: Selected Writings*, Robert N. Bellah (ed.) (University of Chicago Press, 1973), pp. 63-113.

18. Karl Marx, “On the Jewish Question” in *Karl Marx Selected Writings*, David McLellan (ed.) (Oxford, Oxford University Press, 1977) pp. 39-62.

19. Albert V. Dicey, *Introduction to the Study of the Rule of Law*, Roger E. Michener (ed.) (Liberty Fund Inc., 8th Revised Edition, 1982), pp. 179-201.

decisions by courts (i.e. the common law) public. Secret courts or tribunals that process legal disputes, indict individuals for criminal or political offences, decide the guilt or innocence of individuals accused in criminal cases, or impose punishments on those found guilty, are strictly prohibited. The use of violence by political actors and the agents of the state must be confined to ensuring the security and survival of the polity from external threats and acts of insurrection and should never be used for the doing of everyday politics. The rule of law, in other words, supersedes the rule of force. Finally, the rule of law is set out in and guaranteed by constitutional law and doctrine. Indeed the rule of law is said to be a central feature of democratic governance and constitutionalism.

From a traditional legal theoretical and socio-legal perspective, the strong commitment within a polity to the rule of law would seem to be a key prophylactic to genocidal destruction. But as I will argue later using Critical Legal and Critical Race conceptions of the content and effects of the law, even a strong commitment by democratic governments to the formalism of the rule of law does not prevent the law from being used to carry out genocidal policies through largely non-violent means.

### **Why The Law Does Not Sanction Mass Violence Genocide**

How can the preceding discussion help us understand why the law does not, according to traditional legal theories, sanction mass violence genocide (as opposed to limited acts of violence in genocide) and, more importantly, why *genocidaire* themselves do not use the law as their principle weapon during the mass violence phase of the overall genocidal process? By establishing in an admittedly very general way, the boundaries of the natural law, legal positivist, and classical socio-legal conceptions of the law and the rule of law, we can suggest that massive genocidal violence lies beyond the theoretical boundaries of the law. This in turn may help to explain why perpetrator elites engage in extra-legal activity and establish extra-legal rules to commit the crime of genocide. These actors, transgressive as their conceptions of the world and their actions may be, may have a sense that law has boundaries that cannot accommodate the extensive use of violence to destroy whole groups of people. This does not mean that genocide in all its forms and methods, always lies beyond the law and the rule of law.

From a natural law/new natural law perspective, the notion that law cannot accommodate the application of mass violence in the service of genocide is unsurprising given the explicitly moral foundations and boundaries of the law. Murder, particularly on a mass scale, is clearly a moral wrong. Genocide through mass violence is an even greater moral wrong. Since immoral acts or acts that violate basic societal goods cannot be considered law, law cannot make right or be employed (as opposed to other kinds of rules, orders, directives etc.) to execute such wholly immoral policies.

Genocide studies scholars, myself included, have argued however, that genocidal elites and low-level perpetrators operate within an altered moral universe.<sup>20</sup> The application of violence to destroy a targeted group is conceptualized as a moral right, even a duty, in order to safeguard the survival of the nation, the “race, the revolution and so on. If perpetrators themselves think that what they are doing is morally right, why do they not construct laws that reflect this altered morality? Could they not create legal regimes in which the law is based on a genocidal conception of the good – the physical extermination of a group or groups of people in whole or in part – that is reflected in the law? As I noted in the introduction, some scholars suggest this is exactly what authoritarian perpetrator states do. Law is used to legitimate physical genocide by virtue of using the institutions of the state legally sanctioned to use violence to implement mass violence genocidal policies. This argument confuses, however, the issuing of *orders* to institutions legally tasked with applying the use of force with the creation of *laws* that sanction the use of mass violence for the purpose of group extermination. And while it is a matter of some speculation on my part that requires empirical validation, it seems that perpetrators of mass violence genocide, even while they claim they are carrying out a program of destruction that is a moral good for the wider society, simultaneously, albeit rarely, imply that their actions are morally wrong. They often (but not always) take measures to conceal their plans, use euphemistic language when referring to on-going genocidal policies, and fear revenge and punishment should the job not to be completed.<sup>21</sup>

Austin’s crude legal positivist conception of law as the commands of the sovereign backed by force, devoid as it is of any inquiry into the making or content of law, would seem to fit with the suggestion that law can be used in some cases throughout the genocidal process. But for the more nuanced (and more widely accepted) Hartian form of legal positivism, we can only argue that primary rules of obligation are used to plan, organize, and implement mass violence genocide. We cannot classify the existence or use of such rules as valid laws. Absent genuine democratic constitutional laws governing rule-making, change, and adjudication, authoritarian polities like that of the Nazis, the Khmer Rouge, and the Hutu Power regime did not use real law and a real legal system to perpetrate violent genocide. They created and applied rules that allowed for and were backed by violence.

Legal positivist requirements for the existence of valid law do not on their own prevent, at least theoretically, violent genocidal regimes from using the law to perpetrate genocide. Although none of the cases I just referenced functioned in a way that fit Hart’s criteria for a true legal system, one could imagine that a system that includes clear and consistently followed secondary constitutional rules of recognition, change, and adjudication could fashion primary rules of obligation that make lawful mass violence genocide. That we haven’t seen this scenario, with the possible exception of the

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20. Maureen S. Hiebert, “The Three ‘Switches’ of Identity Construction in Genocide: The Nazi Final Solution and the Cambodian Killing Fields”, *Genocide Studies and Prevention: An International Journal*, Vol. 3, No. 1, Spring 2008, pp. 5-30; Herbert C. Kelman, “Violence Without Moral Restraint: Reflections on the Dehumanization of Victims by Victimizers”, *Journal of Social Issues*, Vol. 29, No. 4, 1973.

21. See for example the infamous “Speech by [Heinrich] Himmler Before Senior SS Officers in Poznan, October 4, 1943” (Document no. 161), in *Documents on the Holocaust, Selected Sources on the Destruction of the Jews of Germany and Austria, Poland and the Soviet Union* (Jerusalem: Yad Vashem, 1981), pp. 344-45.

“hybrid” American case of widespread violence and non-violent assimilation directed at Native Americans, is curious. Perhaps it is, again, because the perpetrators themselves knew that the law, while it could be used to persecute targeted groups in ways that made their later extermination (often not yet planned) easier, it could not make lawful and right something that was entirely wrong. Here we may see the substantiation of one of Hart’s rare points of agreement with his interlocutor Lord Patrick Devlin: that even from a legal positivist perspective, grievous harms against others, whether committed by individuals or by the state, ought to be labeled crimes because they are moral wrongs. The content of the law when it comes to serious harms to others is in this instance just as important as the form of law (i.e. its conformity with secondary constitutional rules) in determining what can be contained within the law, what cannot, and what must be prohibited by law. Genocide, as the ultimate harm, is an act that is prohibited by law, not an act that can be prescribed by law.

The classical sociologists, meanwhile, are concerned more with the structure and function of the law rather than its content, although Durkheim clearly harnessed the law to the dominant morality of a society be it the *conscience collective* in traditional societies or a need to accommodate interdependence in modernity. As a consensus sociological theorist, it is hard to imagine that Durkheim’s view of the law would allow for the deliberate use of law in social conflict generally or mass violence genocide specifically. Weber, while his rational-legal authority would seem to similarly preclude law as the facilitator and legitimator of atrocities, does open the door for a conception of law embedded in modern bureaucracy that can create what Balint calls the “deep structures” upon which violent genocidal destruction rests. Concerned about the logical extension of rational-legal authority within the bureaucratic institutions of the state, Weber cautioned that modern states risk becoming non-democratic and unthinkingly wedded to rules and procedures regardless of their content. Scholars have catalogued the ways in which modern bureaucracies psychologically and morally insulate bureaucratic functionaries from the eventual effects of their actions on real live people from whom they are institutionally removed.<sup>22</sup> But if we accept Hart’s thesis, it is not the case that all rules ought to be considered valid laws no matter how bureaucratic or rule-bound the state may be that produced them.

### **Why The Law Is The Foundation Of Cultural/Non/Less Violent Genocide**

The law, I have argued, does not theoretically or empirically seem to be associated with the application of widespread violence in the perpetration of the crime of genocide. The same cannot be said for cultural and/or less violent forms of genocide. Why is this the case? I suggest that the less violent a genocidal program, and the more the genocide is realized through policies of forced assimilation, the greater the likelihood that both the form and content of law will include genocidal policies aimed at specific groups. In this circumstance, the law is one of the principle instruments of genocide.

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22. See for example Zygmunt Bauman’s *Modernity and the Holocaust* (Ithaca: Cornell University Press, 1989).

To make this argument theoretically, and in the final section of this paper empirically, we need to recall that all of the theories of law I have just reviewed can accommodate non-violent forms of genocide through policies such as forced assimilation, or more accurately, assimilationist policies that are formally non-violent but whose implementation undoubtedly gives rise to abuse and violence. While natural law theory does not provide a foundation for mass violence genocide, it can and has in practice, sanctioned genocide via forced assimilation. Historically this has occurred through the framing of indigenous ways of life in the law and other mechanisms as “savage”, “non-modern”, unhealthy for both body and spirit, and in need to replacement by modern, Western, Christian beliefs and practices. What natural law required, what was considered to be basic goods for the benefit of newcomers and for indigenous populations, was attached to laws designed to replace indigenous ways of being and knowing with settler norms, values, and practices designed to help “save” indigenous peoples from themselves. As we will see later, the legal regime surrounding the creation and functioning of the residential school system in Canada rest in part on such notions of how both the law and the schools would effect this kind of “proper” change within Canada’s indigenous populations.

Just as important, legal positivism, with its emphasis on constitutionalized law-making and the rule of law created within (limited) democratic settler polities a system within which laws constructed as a “positive” effort in re-socialization, or as paternalistic, or even necessary for the survival of Aboriginal peoples, accorded both in content and form to democratic political and legal principles. This is particularly true in British North America in which the Royal Proclamation of 1763 made “Indians” and the use of “Indian lands” the prerogative of the British Crown. With Confederation this prerogative was transferred to the Canadian federal government as a constitutionally defined power under Section 92 of the Constitution Act 1867. Federal statutes, namely the Indian Act 1876 and its subsequent iterations, provided the statutory means by which the Canadian government formulated and implemented a conscious policy of forced assimilation.

### *Critical Legal and Critical Race Theory*

It is through Critical Legal Studies (CLS) and Critical Race Theory (CRT) that we find the most explicit understanding of the law and the legal system as reflecting and (re)producing inequality and discrimination in society. These two approaches to law are in part inspired by legal realism and its contention that the role of law in society can be discerned not simply by examining legal doctrines, statutes, and the common law but also the psychological and socio-economic context in which legal actors and institutions operate. Importantly, these schools of thought grew out of a critique of the nexus between law, politics, and society in established liberal democracies, not authoritarian regimes in which it is obvious that the law and legal institutions are politicized in ways that facilitate repression and abuse at the hands of the state. CLS and especially CRT are thus particularly useful for uncovering, theoretically, how the law in settler democracies became the handmaiden to cultural genocide.

As a Marxist-inspired approach, CLS seeks to deconstruct the mainstream “liberal legal” approach to law and the dominant legal order based on the rule of law to which it has given rise. CLS uncovers the ways in which the liberal legal principles of neutrality, formalism (the notion that law has its own form of rationality that can be applied in all legal cases to arrive at the “right” conclusion), impartiality (that the law is applied in exactly the same way to all individuals), abstraction (that all individuals must be treated as abstract decontextualized persons for the purposes of legal reasoning and the application of the law), respect for property, and individual rights, function in reality as the foundation for maintaining socio-economic privilege and power. Law is not, for CLS scholars, a neutral set of rules used impartially to process legal disputes between parties or to pass and implement legislation. Instead, laws reflect the moral and ideological preferences of the most powerful socio-economic actors in society. Legal reasoning is not a magical form of analysis that is shorn of conceptions of the good or ideological preferences, but rather is a reflection of such conceptions and preferences. Individual rights, meanwhile, are “malleable” in their content and application and thus do not, contrary to what liberal legalism argues, uphold person autonomy. The legal system, in short, “legitimizes a status quo characterized by vast inequalities of wealth and power”.<sup>23</sup> Individual rights in particular “legitimize society’s unfair power arrangements, acting like pressure valves to only allow so much injustice”<sup>24</sup> while simultaneously reinforcing a “soulless, alienating vision of society made up of atomized individuals whose only concern is to protect their own security and property”.<sup>25</sup> For the most radical of CLS scholars, the only hope of bringing about true emancipation for all is the complete removal of laws from society and their replacement with self-regulation by interdependent communities.

Critical Legal Studies’ emphasis on the socio-economic foundations of class exploitation and the unrelenting “trashing” or deconstruction of law are not without their critics. While the uncovering of power structures behind the creation, content, and enforcement of the law is instructive for this project, the singular place of class in CLS does not facilitate our ability to understand how the law has been used in liberal settler democracies to target indigenous populations for genocidal destruction through forced assimilation. Specifically, CLS does not confront, as its critics argue, the fundamentally racist foundations of settler societies in the Anglo-American world. First formulated in the 1980s by mostly African-American legal scholars and students as a response to the shortcomings of CLS and now a field with subdivisions including LatCrit, AsianCrit, and Critical Aboriginal Theory (or what in the United States is sometimes called TribalCrit), Critical Race Theory focuses its attention on the ways in which law and other political, economic, and social structures give rise to, reinforce, but also can at least partially help to overcome, the structural racism of Anglo-American settler societies. It is this approach to law that is most useful in revealing the structure, function, and content of law with respect to indigenous peoples and how these laws came to play a

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23. Anthony E. Cook, “Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King Jr.”, *Harvard Law Review*, 103, 1990, p. 986.

24. Richard Delgado, “The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?”, *Harvard C.L.-C.R. Law Review*, Vol. 22, p. 4.

25. Delgado, “The Ethereal Scholar”, p. 4.

central role in the genocidal process in polities characterized by a strong commitment to democracy, constitutionalism, and the rule of law.

Critical Race Theory provides an analysis of the intimate relationship between racism and law as well as revealing instances of resistance through the law to racist practices, social relationships, and social structures. Through the category of “historical race” – the racialization of specific groups in a society – CRT scholars examine the law “through the prism of historical racism, based upon the recognition that race-based subordination was legitimated by law in the past”.<sup>26</sup> Thus Matsuda argues, for example, that law “is both a product and a promoter of racism”<sup>27</sup> in which law “is born of racism and gives birth to racism”. At the same time law is “a locus of struggle” in which “[s]truggle can change law, and law can aid struggle”.<sup>28</sup> This approach explicitly rejects the liberal legal notion of colour-blind constitutionalism in which all individuals, regardless of group identity, are believed to be similarly situated and therefore are and must be treated the same under the law.<sup>29</sup> It also, by extension, suggests that racial discrimination can exist under a constitutionalized democratic political and legal system.

Critical Race Theory forces us to confront not only the history of discrimination, or worse, under the law directed at specific groups of non-whites (e.g. African Americans/Canadians, Aboriginal peoples) it also argues that the contextless, colour-blind application of formal legal rights can perpetuate inequality in ways that conform to a robust conception of the rule of law. What CRT demands is that we recognize the persistence of racism in the deep structures, perceptions, and practices of Anglo-American settler societies up to and including the present post-Civil Rights era. Only through revealing and recognizing the deep rivers of racism and its connection to the law and other structures in society can the law, the education system and the like be refashioned to take account of the on-going legacies of the explicitly racist policies of the past and the structural racism of the present. The former requires a self-critical historical and legal analysis of the role law has played in building the structures of racism. These structures can only be overturned by eschewing colour-blind constitutionalism in favour of policies that foster substantive, not just formal, equality.

For our current purposes, though, my focus is on how CRT explains the historical existence and use of laws that directly facilitated genocidal policies in Canada. What is important here is not merely establishing the fact that these racist and destructive laws existed, but in determining how these laws became part and parcel of a genocidal policy of forced assimilation.

Race, for CRT, is a social construct that generates and projects social ideas about supposed racial characteristics onto different groups in society. In this process, law plays a key role in the construction of group identity. Negative racialized constructions of specific groups reflected, or at

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26. Carol A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax, N.S.: Fernwood Publishing, 1999), p. 31.

27. Mari Matsuda, *Where is Your Body? And Other Essays on Race, Gender, and the Law* (Boston, M.A.: Beacon Press, 1996), p. 22.

28. Matsuda, *Where is Your Body?*, p. 52.

29. Cheryl I. Harris, “Equal Treatment and the Reproduction of Inequality”, 69 *Fordham Law Review* Vol. 69, 2001, pp. 1753-83; Devon W. Carbado, “Colorblind Intersectionality”, *Signs: Journal of Women in Culture and Society*, Vol. 38 No. 4, 2013, pp. 811-845.

times even defined in law, are created and perpetuated by dominant groups while simultaneously reflecting positive conceptions of the dominant group's own "race". In the latter instance, law establishes the "correct" way of being in terms of appearance, dress, language, religious practice, economic activity, family structure and practices, general social norms, and ways of knowing. The dominant group, or more specifically, the male members of the dominant group, serve as the template under law for the generic person. And because this generic person is the "correct" kind of person (white, male, likely Christian, straight, cisgendered, middle or upper-class etc.), those who do not conform to this correct/generic standard are constructed as "deviant". The farther away a group's members are from this regulative ideal of the correct/generic person, and by extension the correct group, the more deviant their identity. Deviance is attached to what is constructed as an "incorrect" version of the same kinds of characteristics that constitute the generic/correct group: colour, religion/beliefs, sexual orientation, gender/gender identity and expression, socio-economic class etc. Since the law makes certain actions lawful and others unlawful, the law legitimizes – that is, makes correct or right – certain kinds of behaviours associated with the dominant group which itself possesses the power to make and apply the law. At the same time, these and other laws label either implicitly or explicitly the characteristics, actions, and values of groups and individuals who fall outside of the dominant group as unlawful and thus illegitimate, deviant, and wrong.

The function of law in a non/less violent genocidal process is not to identify mortal threats to the wider society that must be eliminated through massive violence, although it often labels the supposed deviance of targeted groups as a non-existential threat to the wider society. Rather, the law identifies deviance that can, through law and other social processes (e.g. education), be corrected. This correction, however, involves the destruction of the cultural markers that constitute the groups in question. Through its social delegitimizing/legitimizing function, the law sanctions a harsh paternalism designed to remake targeted groups in the image of the dominant community through a process of forcible cultural deconstruction and reconstruction that strives to eliminate the targeted group in its current "deviant" form. Since the ways of being of the target group are identified by law as deviant, the law can also set the stage for abusive measures flowing from the implementation and enforcement of the laws governing the group. Those labeled "wrong" must be made "right" through the disciplining force of the law, and in the case of the IRS system in Canada, the schools created by the law.

## **Law, Constitutionalism, And Genocide: Creating The Residential School System In Canada**

To conclude, I will very briefly sketch out how government officials responsible for indigenous policy conceptualized the identities of indigenous peoples, particularly adults, as deviant parents from equally deviant communities unsuited to modern Canadian (i.e. settler) life. This conception was in turn constitutive of and reinforced by the laws governing indigenous peoples in Canada generally and the legal regime that created and governed the functioning of the residential school system specifically. This regime, and the program of genocidal destruction it put in train, existed lawfully

within a robust commitment of the rule of law and democratic constitutionalism. It was this very commitment to these two legal principles which ensured that the law would be the main facilitating structure underpinning cultural genocide. As such, government and other officials considered that what they were doing was right because it was lawful. Further, the laws governing indigenous peoples were conceived of as a justifiable form of paternalism necessary to “save” indigenous peoples so that they could make the necessary transition to modernity.

### *Constitutional Law, the Rule of Law, and Indigenous Peoples*

As first a set of colonies and territories within the British empire in British North America and then a self-governing dominion from 1867 onward, Canada legally and politically became a constitutionally governed federally structured settler democracy bound by the rule of law. Legal scholarship and constitutional jurisprudence has established that the preamble to the *Constitution Act 1867* set out these features of the Canadian political and legal system in the rather generally worded phrase “[w]hereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a Constitution similar in Principle to that of the United Kingdom”.<sup>30</sup> Further, Section 91(24) granted the federal government “exclusive Legislative Authority of the Parliament of Canada” over “Indians, and Lands reserved for the Indians”.<sup>31</sup> Beyond constitutional law, ordinary legislation governing almost all aspects of life for Aboriginal peoples, including the legal definition of who is a status and non-status Indian, the use of reserve lands, and the education of indigenous children, was codified in the federal Indian Act of 1876 and subsequent versions of the act up to the present day.

These laws were central to the transformation of indigenous nations from independent self-regulating communities with their own customary legal traditions, to subordinate groups of on-reserve status Indians under the legal authority of the Canadian federal government. Aboriginal peoples thus became legally and ideationally constructed as wards of the state. As a government that considered itself to have been created and bound by the rule of law now acting legally *in loco parentis* vis-à-vis Aboriginal peoples over a number of policy areas, the Canadian government deepened its legal paternalism in the most direct and intimate way possible: assuming control over the education and raising of Aboriginal children. This project was consciously assimilationist and thus genocidal in its intent and outcome, designed to “kill the Indian” in the child such that no “Indians” would be left in future versions of completely Canadianized indigenous communities. It was a project that was legitimated by the force of law, falling as it did within established principles of the rule of law and the constitutional division of powers.

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30. Preamble, *Constitution Act 1867*, A Consolidation of the Constitution Acts 1867 and 1982, Department of Justice Canada, Her Majesty the Queen in Right of Canada, represented by the Minister of Public Works and Government Services, 2012, <http://laws.justice.gc.ca/en/const/>.

31. Section 91, s. 24, *Constitution Act 1867*.

*Conceptions of Aboriginal Deviance: Children, Families and the Residential Schools*

The legal framework governing the creation of the Indian Residential School system (not to be specifically cited here for reasons of space) articulated and reified negative, paternalistic conceptions of indigenous peoples as deviant in two ways: as unsuited in their current state to full participation in the Canadian economy and society; and as a potential threat to the settler population and their economic interests. These two conceptions set the stage for the operation of residential schools in which children were subject to an unrelenting program of assimilation, consciously backed by punishment, operated in a system starved of resources that in practice gave rise to deprivation, physical and sexual abuse.<sup>32</sup> While the law did not itself call for the use of violence, the underlying conception of Aboriginal peoples embedded in these laws created a regulatory and ideational environment in which violence and abuse became widespread and systemic.

The narrative that indigenous peoples could not make the required transition to a modern Canadian (i.e. settler) life flowed from racist conceptions of indigenous identity and the desperate circumstances in which First Nations found themselves by the mid-nineteenth century. Seen by their very nature to be alternatively innocent or sinister “savages”, unbelieving and immoral heathens, and lacking in the capacity for the “industriousness” necessary for life in the new settler society and economy, indigenous people evinced in most aspects of their lives a deviance that law and the residential schools could and must correct. The material conditions of life for First Nations prior to, during, and after the treaty-making process, particularly in the west, served to reinforce the conception of Aboriginal peoples as unable to cope with the transition to modernity. These harsh conditions, of course, were not of their own making, but the outcome of economic policies, the creation of under-resourced reserves without sustainable economic foundations or adequate food and medicines, and population flows involving the movement of Aboriginal nations and European settlers. The knock-on effects of these dynamics were severe, including the extinction of the bison on the western plains, repeated exposure first to small pox and later tuberculosis (including bovine TB from newly introduced cattle), influenza and other communicable diseases that preyed on what had become immuno-suppressed population<sup>33</sup>. The putting of Aboriginal peoples and their lands under government control, the community’s regulation through the Indian Act, and finally the residential school system was seen by some government officials as a benevolent exercise in preventing the extinction of Canada’s indigenous populations. As historian John Milloy notes, officials believed that the settlement of the west left Aboriginal populations “destined...to die off”, unless as one official put it, “special measure” were taken “to force a change in his [the Indian’s] conditions”.<sup>34</sup>

This “extinctionist” view of Canada’s indigenous and Metis populations existed alongside a more sinister construction of Aboriginal peoples as threats to the new settler society. The on-going “Indian

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32. *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015, pp. 1-22; pp. 37-134; John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg, M.B.: University of Manitoba Press, 1999).

33. James Dashuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (University of Regina Press, 2013).

34. N.A.C. RG 10, Vol. 3647, File 8128, MR C 10113, M.A. Macrae to Indian Commissioner, Regina, 18 December 1886; quoted in Milloy, *A National Crime*, p. 27.

Wars” just across the border in the northwestern American territories, the hardships wrought by the extinction of the bison and the lack of economic opportunity, acute food insecurity, and illness that went with it, coupled with the Riel Rebellion of 1869-70 caused great concern among the non-Aboriginal population and leadership. The *Davin Report* that set the foundations for the residential school system reported that in Winnipeg it was evident that “[The Metis are] thoughtful if not anxious regarding the Government’s intentions regarding them, [and] among the Indians there is some discontent”. Such concerns “bespoke not a feeling of self-assured superiority in the face of Aboriginal culture but a fear of the unknown Other and of its disruptive potential”.<sup>35</sup> To neutralize this threat, Davin recommended the federal government create a country-wide system of industrial residential schools that would alleviate the desperate living conditions of Aboriginal children as well as instil in them the requisite level of modern industriousness which would overcome the threat of further rebellion by preparing young Aboriginals “to meet the necessities of the not too distant future; to welcome and facilitate...the settlement of the country; and to render its government easy and not expensive”.<sup>36</sup>

The most significant obstacle to this grand program of deconstructing and reconstructing indigenous youth rest with an even more fundamental manifestation of indigenous “deviance”: the supposedly pernicious influence that Aboriginal parents, family members, and communities had on their children. Widespread among non-Aboriginal officialdom both governmental and religious was the notion that Aboriginal adults, as the Khmer Rouge said in a different context, “could not be corrected”. They were relics of the past who were simply too wedded to their ways to be effectively assimilated. Worse, their insufficiently modern ways of being would inevitably undo the good work of the European-style industrial education of the younger generation, thus fatally undermining the entire assimilative project. For the destruction of the Indian child and the communities from which they came to be permanent, the intimate parent-child bonds, and those of the wider family and community, had to be severed for much of the child’s formative years (6-16 years of age). The reeducation of indigenous youth could only take place in residential schools far from home wherein the Church and the Canadian government directly assumed the roles of teacher and parent.

The Indian Residential School system, from the government and the Church’s perspective, rest firmly within the correct application of constitutional and statutory law. It was a project seen in turns as benevolent, righteous, and necessary to protect government, confessional, and economic self-interest. While by the letter of the law a program of education not extermination, it nonetheless rest firmly on the understanding that a strict paternalism would govern the operation of the schools. Children were to be fed and housed only “simply” and promptly punished for infractions, especially speaking indigenous languages. Despite the apparent importance of the assimilative project, the residential schools, like the reserve system, were to be run on a minimal budget. Conceptions of indigenous

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35. Milloy, *A National Crime*, p. 31.

36. N. A. C. MG 26A, Sir John A. Macdonald Papers, Vol. 91, *Report on Industrial Schools for Indians and Half-Breeds*, 14 March 1879, 35428-45, p. 10; quoted in Milloy, *A National Crime*, p. 32.

deviance, the punishment of this deviance, and the underfunding of the system created across the decades the schools were in operation, a perfect storm that amounted to legally sanctioned genocide.