SUBJECT TO SURVEILLANCE: GENOCIDE LAW AS EPISTEMOLOGY OF THE OBJECT

TAWIA ANSAH*

ABSTRACT

This article analyzes the discourse on genocide from two angles: the legal genesis of the term in the 1940s and subsequent legal "capture" of the concept of genocide, and a recent socio-political critique of the legal meaning of genocide. The article suggests that a cross-disciplinary critique of genocidal violence not only describes the event and the victim, but also produces knowledge of them as discursive "objects." The key issue is the "surveillance" role of the outside observer, also produced as such in discursive relation to the object. At stake in this view of genocide law as epistemology is the capacity to reimagine law in order to help us make hard choices about how, whether, and when to intervene in events that may be characterized as genocide.

INTRODUCTION: ELEMENTS OF MEANING

The French philosopher Alain Badiou begins his book, *The Century*,[1] with a quotation from Jean Genet. Badiou asks: "What is a century? I have in mind Jean Genet's preface to his play, *The Blacks*.[2] In it, [Genet] asks ironically: 'What is a black man?'

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*LL.B. (Toronto), Ph.D. (Columbia). Visiting Professor, Case Western Reserve School of Law. Professor of Law, New England Law | Boston. I thank the Board of Trustees at New England for a summer stipend. My thanks to Colin Perrin, Jessie Hill, Kenneth Ledford, Ana Dopico, Patrick Deer, and Robert Clark, and the faculty at Case Western, for sharing their thoughts on an earlier version of this article. I thank the student editors at WUJR, whose edits improved the prose.

[1] ALAIN BADIOU, THE CENTURY (Alberto Toscano trans., Polity Press 2007) (2005).

[2] JEAN GENET, THE BLACKS: A CLOWN SHOW (Bernard Frechtman trans., Grove Press 1960).

Adding at once: 'And first of all, what colour is he?'"[3] Badiou assumes Genet asks the question ironically, as if the answer should be obvious, and he poses the question through Genet because the meaning of "a century" would seem to be obvious too, at first appearance. But of course, it is not.

This semantic query is the point of departure for the current analysis of genocide law. The meaning of the term would seem to be obvious; indeed, at a recent conference, when mention was made of the current undertaking, the response was: "But everyone knows the meaning of genocide. The question is whether or not legally it applies to the facts, isn't it?" This article suggests that what seems obvious about genocide is in fact the very thing that is deceptive. Genocide as the name and specification of a category of violence provides us with a kind of knowledge, an epistemology, about the world and about ourselves that hides certain truths.

This article will argue that genocide law—the legal nomination of forms of violence as genocide and what we mean by that nomination—has engendered a discourse on global violence. This discourse, I suggest, reinforces ways of separating the world into political subjects and apolitical objects. The former reside within a world where the violence of genocide is deemed to be radically absent. The latter live with the constant threat of genocidal violence; put otherwise, the objects of the discourse are susceptible to genocidal violence. Genocide describes the state of violence or anomie within whose proximity they live.

The argument goes further to suggest that genocide as a discourse—much like the concept of race at the height of Western imperialism in the nineteenth century that genocide discourse inherits—maintains this division between humans at an almost immutable level. Indeed, race discourse has reinforced the normative underpinnings of genocide; as Badiou puts it, "we cannot but recognize, the unceasing burden of questions of race" when considering some of the central issues that animated the last century's movements and innovations, from law and politics to morality and economics.[4] The reinforcement of this division between subjects and objects operates at an institutional level (i.e. through domestic and international juridical bodies) as a political form of governance. The law axiomatically enforces the maintenance of political forms. The law on genocide is itself, as epistemology, a political form of governance.

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[3] BADIOU, *supra* note 1, at 1.

[4] BADIOU, *supra* note 1, at 15.

This article describes and analyzes the origins of the law on genocide[5] from an interdisciplinary perspective. It looks at the genesis of the term as a legal, political, sociological, and cultural event. The word's origins will be examined with a view to outlining the legal and other elements of meaning that have come to characterize the subsequent discourse. My aim is to show the production of those elements as the *knowledge* of genocide within its historically situated moment.

The first task will be to think about what the "inventor" of the term, Raphael Lemkin, meant by the term he coined. In undertaking that analysis, I deploy something like a linguistic or genealogical methodology to look at three things: first, what Lemkin says about the term; second, how Lemkin's words are generic, in the sense that they reflect certain cultural strains specific to the time and the context (mid-twentieth century Europe, the World War, the backdrop of European imperialism, and so on); and third, the interpretation of Lemkin's words or intentions with respect to the meaning of genocide from a modern, post-legal perspective. The latter, in its management of the latent and suppressed cultural-historical strains within Lemkin's formulation, highlights the policing elements of the discourse on genocide.

As noted earlier, the law on genocide polices the categorization of humans in relation to violence; the primary division is between the political subject and the apolitical object of the discourse. Within the latter half of the twentieth century, that division coalesced around a dichotomy between the global North and South in their relationship to violence (and to each other). Genocide discourse, as epistemology and representation, produces a sense of the object and a way of knowing the world. Interrogating that sense and that production will help us to make the hard legal and political choices about whether, how, and when to intervene in a global crisis event.

I. LEMKIN: GENOCIDE AS LAW

The term genocide, as noted earlier, was coined by Raphael Lemkin in his book, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*.[6] Here is the passage that defines and explains the meaning of the term:

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[5] Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), U.N. Doc. A/RES/260III[A-C] (Dec. 9, 1948).

[6] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (1944).

> New conceptions require new terms. By "genocide" we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formulation to such words as tyrannicide, homocide [sic], infanticide, etc. Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.[7]

Lemkin's book is a compilation and analysis of "the texts of laws and decrees of the Axis Powers, and of their puppet regimes, issued for the government of areas occupied by their military forces in Europe."[8] Lemkin discusses a little-considered example of the concept of genocide as destruction, rather than simply mass killing: in the case of Alsace-Lorraine, Lemkin notes that "[i]n other countries, especially in Alsace-Lorraine and Luxembourg, genocide in the economic field was carried out . . . ."[9] Lemkin did not distinguish between incorporated and occupied territories under the Nazis, except with respect to the techniques of genocide. Lemkin named several means by which genocide was effectuated: political, social, cultural, economic, biological, physical, religious, and moral.[10] Otherwise, the laws of occupation per se entailed the practice of genocide throughout Europe.

Lemkin's definition, then, seems to emphasize a process rather than simply an end result or product (death). It is a process whose aim is destruction of a group that Lemkin conceives of as a national entity. But the definition deploys various tropes that are embedded within the words Lemkin uses. That is, these words have their own historical, mythical or narrative implications: *genos* as "race, tribe," for instance, and the idea of a "new" term to

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[7] *Id.* at 79 (italics in original).
[8] *Id.* at 82.
[9] *Id.* at 86.
[10] *Id.* at 82-90.

describe an "old" experience in its "modern" form. Indeed, the form that the word struggles to define is itself a "reversion."

Lemkin's definition is progressivist in that it invites the perception that legal definition—of a form of violence that seemed to have marked the conflicts of his time—is the means of a progression or escape from that form of violence: from tribalism to nation, from (mere) death, implying arbitrary violence, to destruction and its coordinated processes. But the very progressivism of the definition suggests also an inner ambivalence. It is as if Lemkin saw the law and the legal specification and calibration of violence as salvific. Lemkin's definition of genocide, the "new" term, held the promise of hope for the end of this form of violence, not just its juridical management (i.e. as a form of justice).

The element of salvation (law as salvific) may also be seen in the reading of genocide's generic[11] meaning as related to identity. That is, Lemkin's conception of law as generically salvific—or within the genre of salvation discourses—is evident at various points within his text. For instance, invoking the traditional division of the world into civilized nations and barbarous races, Lemkin seems to have some difficulty conceptualizing the Germans who are, after all, a civilized (and civilizing) people. The dilemma is resolved in the dream of positive law *as* law only when expressive of morality, and further resolved through a strict and essentialist moral hierarchy between the belligerents on the basis of identity.

Of the Allies, Lemkin notes in his preface that, "the author feels that such evidence [of the laws of occupation] is especially necessary for the Anglo-Saxon reader, who, with his innate respect for human rights and human personality, may be inclined to believe that the Axis regime could not possibly be as cruel and ruthless as it has been hitherto described."[12] In the same vein, he collects all Germans together and insists that the issue of war and the abuses committed are "the responsibility of the German people treated as an entirety,"[13] since all have benefited: "Indeed, all

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[11] By "generic" I mean conventional, but this also indexes "genocide" as constitutive of other generic discourses specific to the time: on race, tribalism, barbarism, violence, imperialism, the law, and so on. For an analysis of genre as discourse, see, e.g., JOHN FROW, GENRE (Routledge 2006) and TZVETAN TODOROV, GENRES IN DISCOURSE (Catherine Porter trans., Cambridge 1990).

[12] LEMKIN, *supra* note 6, at ix.

[13] *Id.* at xiii.

groups of the German nation had their share in the spoils of occupied Europe."[14]

In contrast to the "innate" morality of the Anglo-Saxon, he characterizes the Germans' militarism as "the most virulent because it is based upon a highly developed national and racial emotionalism . . . ."[15] Lemkin then suggests that "[t]he United Nations in the present war are faced with a tremendous task: to destroy this amalgamation of master-race mythology and aggressive technology which makes of the German people a kind of technified myth that stupefies the world . . . . [T]he Germans will be impelled to replace their theory of master race by a theory of a master morality, international law, and true peace."[16]

Traversing the legal conception of the new crime of genocide is this morality play with its mythic archetypes: the morally innocent Anglo-Saxon and the militant Teuton. It may well be that Lemkin's characterization here, a minor rhetorical aside in an otherwise dispassionate and detailed account of the German laws of occupation, was motivated by a flattering appeal to his (Allied) readership.[17] But these marginal references nonetheless express stereotypes of the time: the Anglo-Saxon is "innately" moral, notwithstanding the ravages of Britain's imperial wars, which are rationalized as the duty of empire and the "white man's burden"[18] and, as such, not militaristic in the pejorative sense. And the Germans had, after all, twice in the same century "stupefied" the world with the arrogance of their martial ambitions in the East. Thus, the conception of genocide imports, through these marginal references, a way to resolve the projection of a civilized nation as militaristic: the practice of genocide is the reversion[19] of the civilized nation to an ancient barbarism in modern, technified form.

It is possible to see here the intimation of a division between civilization and state violence (displaced, on one level, by calling it "barbarism"), as well as between the law's morality (moral content) and law's other. The myth's stupefying power, within the text, inheres in an implicit denial of a *barbaric* violence ascribed to the modern nation-state, even as there is a repressive strain

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[14] *Id.* at xiv.
[15] *Id.*
[16] *Id.*
[17] I am grateful to Kenneth Ledford for this observation.
[18] Rudyard Kipling, *The White Man's Burden*, *in* THE WHITE MAN'S BURDENS: AN ANTHOLOGY OF BRITISH POETRY OF THE EMPIRE (Chris Brooks & Peter Faulkner eds., Exeter 1996) (1899).
[19] *Id.* at 80.

attributed to the law's civilizing narrative: to destroy, to impel. The generic story of moral innocence elides or suppresses that strain. Thus, Lemkin's text harbors the law's own self-repression of its violence, deflected as the barbarism of a militant other, or militancy as other to law. The boundary between the law, expressed by the moral and liberatory forces of the Allies, and its other expressed in the "German juggernaut," is enforced through archetypes of innocence: the Anglo-Saxon is untainted here by the idea of a militant master-race "myth" of his own.

The price paid for this innocence of the modern nation-state is to dehistoricize the very idea of state violence. Hence, Lemkin notes that "[i]t required a long period of evolution in civilized society to mark the way from wars of extermination, which occurred in ancient times and in the Middle Ages, to the conception of wars as being essentially limited to activities against armies and states.[20] As examples of "wars of extermination," Lemkin cites to the "special wholesale massacres" of Genghis Khan and the "odious scourges of Tamerlane [sic]," as well as the destruction of Jerusalem by Titus in AD 72.[21] As a throwback to this period, genocide seems strangely otherworldly and out of time. The effect of this is also to locate the legal origins of the law's dominion over violence, or at least that of genocide, in the farthest reaches of history, or, like myth, within a timeless frame. At once, therefore, the violence of this war is conceived within the legal framework, as *generic* discourse, as out of time and of history.

Lemkin goes on to describe genocide as the aim to destroy a nation or group through a two-tiered process: first, the destruction or eradication of the "national characteristics" of the group, and second, the imposition of the "national characteristics" of the oppressor or occupier[22]. It is noteworthy that the target group be a nation, or have some national status: the definition of genocide (quoted above) conceives of a progression from tribal to national violence. Thus, although in its content it is an ancient form of violence, in form—or in formal legal terms—genocide could occur only after the rise of the nation-state within European history. If we imagine the beginning of the rule of law to be the beginning of history, as suggested by Paul W. Kahn,[23] and the beginning of

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[20] *Id.* at 80.
[21] *Id.* at 80 n.3.
[22] *Id.* at 80.
[23] PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 17 (Univ. of Chi. Press 1999) ("History begins with a communal act of will, imposing a reasonable order on self and polity. This is the beginning of law's rule.").

history to be the rise of the nation-state, as argued by Michael Hardt and Antonio Negri,[24] then the idea that genocide is a phenomenon of the nation-state rehistoricizes this hitherto barbaric and ancient form of violence; that is, genocide occurs within history, specifically modern history, and occurs within the rule of law.

The idea of genocide as temporal and historical is further reinforced in another footnote where Lemkin suggests that "[a]nother term could be used for the same idea [as genocide], namely, *ethnocide*, consisting of the Greek word 'ethnos'—nation—and the Latin word 'cide.'"[25] A connection, then, is forged between the ideas of race and nation. The latter takes on some of the originary, tribal sense of the former. As such, ancient wars of extermination and modern genocide are seen as continuous, linked together as "blood wars," yet severed temporally by the advent of law. There may have been "wars of extermination" in the past, but genocide could only occur in a culture determined by laws, with the nation-state marking both the inauguration of the civilized order, the break with a primitive world and, at the same time, marking the origins of the possibility of genocide.

But as with all generic discourse, there is within this original formulation of genocide a paradox: on the one hand, genocide is a modern phenomenon, nation against nation; on the other hand, the civilized nation reverts to an ancient practice from which primitive state it has long since evolved. In the former, genocide represents the people as nation (*ethnos*); in the latter, genocide indexes the people as tribe (*genos*). Reversion itself thus suggests something ancient, even atemporal, about the nation-state. This leads to a legal resolution of the paradox. Coupled with the story of innocence—of the Allies, through the elision of their own myths of racial and moral superiority—two things are reinforced by the idea of genocide as reversion. One is that the link between nation and race suggests continuity, in that some nations (the Allies) are inherently incapable of the barbarism to which others (the Germans, in this instance) naturally, militaristically, revert. The other thing reinforced is this idea of something original, even cosmic, about the struggle in Europe, which emphasizes the timeless, ahistorical sense in which this original conception of genocide is framed.

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[24] MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 4 (Harvard Univ. Press 2000) (history of the modern nation-state began with the Peace of Westphalia).

[25] LEMKIN, *supra* note 6, at 79 n.1.

Once more, therefore, the genre of legal discourse on violence, indexed in the margins of Lemkin's text, enables an escape from the apparent contradiction of a link between a civilized order and mass, exterminatory violence by displacing that violence—and as such, the nation as civilized self—outside of time. The "nation" is by definition incapable of destructive violence on this scale.

In the space vacated by law's violence we see the operation of a progressive yet static (timeless) idea of law, a regime that precipitated the end of ancient barbarism. Barbarism is thus the law's ab initio as well as its other, but always outside the gates (*dehors* the text). Maintaining this narrative of law's innocence as a function of the law against genocide means that we repose in the law the relinquishment of an apparent contradiction of the nation as indexed by the violence (barbarism) that inaugurates, attends, and perpetuates the nation-state, and the rule of law itself.

The originary framing of genocide depends upon a *cordon sanitaire*. The conception requires a moral boundary that essentializes the difference between "them" and "us." The original conception of genocide as new law is thus invested with an "inherent" moral authority that is backed by the power of the nation-state's own discourse on violence, and vice versa. In this sense, the legal conception is disciplinary, following the dictates of formal or positive legal analysis and reform. It is not critical, in the sense of an awareness that the marginal but conventional tropes, metaphors, categories and elements of meaning reassert the problems that attend the disciplinary conceptualization of violence: the problem, for instance, of a suppressed reinscription of the law's own violence.

None of this, of course, is to critique Lemkin's own efforts—quite the contrary. In the midst of total war and massive human destruction and suffering, Lemkin's innovation reflects a deep faith in the human capacity for transcendence. But the articulation of that faith is, as with all else, historically contingent. As genocide inherits its discursive history from the genres of race, imperialism and militarism, so too the post-war discourse on genocide subtends the genealogy of the term's original conceptualization. The central argument of this article involves what this means for how we think of and deploy genocide as a legal term of art.

This, then, is the frame within which genocide is conceived in the mid-twentieth century. Modern history begins with the nation-state; therefore genocide as "ethnocide" is the violence of extermination perpetrated within modern history. At the same time, genocide as reversion to ancient barbarism is a discursive irruption within the narrative stasis of state (legal) discourse. Thus, within

the story of a severance between the nation-state and genocidal violence, the normative frame cannot contain this irruption, which threatens to spill out and eradicate the border. The legal signification of genocide indexes a desire for containment and the need for a fixed (inherent) moral borderline between the "self" of the nation-state and the violence of the self suppressed and displaced onto the barbaric foreigner. This element of containment—including, as I hope to show in the following, the containment and control of disciplinarity as such (the *discipline* of genocide knowledge and discourse)—constitutes a principal characteristic of the discourse on genocide as, following Lemkin, a legal category and a legal event.

Thus far, I have attempted to understand the initial conception of genocide both through what Lemkin says in his text and what he implies within the tropes and metaphors he deploys to express his intention. This intention is both conventional and disciplinary with respect to the overlapping terrains of law, politics, and morality. Whilst the text of *Axis* outlines the elements and criteria to define the "new" crime of genocide, the marginal framework for conceptualizing the violence invokes and (re)animates old narratives and ideas about race, imperialism, tribe, blood, myth, and identity. The (inter)textual projection is true to a discipline of law (positive law) as the vehicle for categorizing and controlling the relationship between these older strains or narratives and modern, "technified" violence. Hence, the legal conception of genocide imagines the law itself as a border that protects the subject, within the present, from the suppressed intimations of its own violence. In effect, within this initial formulation, the subject as index of the nation-state is incapable, innately and essentially, of perpetrating the (modern) form of an atavistic violence conceptualized as genocide. As such, the legal conception suggests a disciplinary reading of violent conflict and the reformist ambitions of law.

As a specific, historical intervention within the larger juridical discourse on violence, the text and its subtexts disclose how the law operates, and is deployed, in relation to massive violent events that precipitate the search for new forms of expression and legal control. In effect, the conception of genocide as a legal event discloses the meaning of law itself, both in its self-reflection as an *ex post* form of knowledge about the world, and through critique as an *ex ante* disciplinary operation that creates and polices the world through the event it construes as juridical.

Thus, the original conception of genocide involves at its core the idea of law as an operation to separate, suppress, and police the

boundary between humans arranged on a political and moral grid. The metaphor that captures this sense of law is that of the border. The law is the border that performs three disciplinary operations in relation to violence. First, the border specifies a distinction between a civilized political subject that is not barbarous, i.e., that is incapable of militarism, the violence of the other. The border encapsulates nonviolence inasmuch as the border, as law, saves the other from the other's violence. But the border is a moral imposition, anenforcement: it "impels" its moral order and, through war, does so in a violent way. The border is itself a form of violence. The second operation of the border, then, is to elide this element of its own violence by displacement. Violence thus displaced, the border has enabled a separation between the subject and the object. The third operation of the border is to police that separation. In order to effectuate this operation, the border must maintain the innocence of the subject (and, as such, the "political subjectivity" of the subject is a posit of innocence) by separating the subject from any implication in this form of violence, defined as genocidal.

The three aspects of the law as border—separation, suppression/displacement, and policing—become evident from a discursive analysis of the concept of genocide. But the discourse on genocide, including genocide literature, genocide studies, the legal and political deployments of and debates around the term, and the term's historical and sociological evolution, replicates the same tropes and effects of the law as border. Within the larger schema, following Edward Said, this operation of law as border, i.e., what *we* do with the term and its meaning irrespective of authorial intent, may be a function of "dominating, coercive systems of knowledge"[26] produced—at specific historical moments—by the discursive subject concerning the object, of which genocide law as epistemology, as disciplinary legal knowledge, is an example. In the next section, the translation of the concept of genocide from law to sociology, and from law to politics, plays out—and is therefore limited in the same ways by—the effects of genocide legal discourse as a coercive system of knowledge that polices the border between subject and object *as* different categories of the human in relation to violence.

[26] Edward Said, *Orientalism Reconsidered*, 27 RACE & CLASS 14 (1985)

II. SHAW: GENOCIDE AS WAR

In the previous section, I analyzed the conceptualization of genocide as law, or the production of legal knowledge of violence as genocide (genocide discourse), through the metaphor of the border whose operation is threefold: separation of kinds or forms of knowledge, primarily of the subject from a knowledge of its own violence; suppression of this knowledge of violence (and displacement of this knowledge onto the genocidal other); and policing the separation. The consequence of the policing operation of the border is twofold: to keep the subject from knowing itself, and to perpetuate the "knowing" of the other as intrinsically violent. In other words, the law as border manages a separation internal, as it were, to the subject; by maintaining the subject in its role as observer of the world, it divorces the subject from the capacity to realize its own political subjectivity. As observer of the world, the subject maintains its hegemony over the object of the discursive operation. Thus, the second consequence of the policing operation of the border is to permit the dominance of the subject over the object of the discourse: the other is "objectively" genocidal and, thereby, precluded from its own access to political subjectivity, to subject-hood.

In the following, I argue that the discursive operation of the border as creating a split within the subject and between the subject and object of the discourse on genocide extends beyond the legal conceptualization of genocide as disclosed within Lemkin's original formulation. It extends also to other domains that replicate the border's indicia and operation. In other words, it is the *discourse* on genocide, or how we think about violence of this kind, and not any particular disciplinary field of inquiry, that creates the border and thereby precludes access to political subjectivity. To show how this works, as well as to underline its preclusive normativity, I turn to a recent book by Martin Shaw, a sociologist, that attempts to divorce the conceptualization of genocide from its "capture" within law. Because the attempted recapture remains disciplinary, it does not escape the discursive operation of the border. However, the consequences within the real world are serious, as I hope to show in relation to Shaw's analysis of the situation in Darfur, Sudan.

Shaw's recent book, *What is Genocide?*[27], provides a comprehensive analysis of the concept of genocide. In some ways the book is a watershed: in its critique of the legal discourse on

[27] MARTIN SHAW, WHAT IS GENOCIDE? (2007).

genocide, it encapsulates all the thinking within other discursive domains—historical, sociological, political, and ethical—from Lemkin to the present on the subject of genocide. A principal aim of the book is to sever as far as possible genocide's link to the law as conceptually definitive of this form of violence. Shaw states: "The legal concern with *individual* responsibility of perpetrators meant that legal means were an indirect way of getting at the more fundamental issues involved. The constraints of legal standards of proof meant that law was hardly the most satisfactory discipline in which to come to balanced judgments about historical episodes, let alone creative theoretical interpretations."[28] He therefore suggests that "'genocide' probably has a more promising future as a *sociological* and *political* than as a legal concept."[29]

Shaw's analysis of genocide is disciplinary. My critique of his approach will therefore lead to the conclusion that despite Shaw's success in moving "genocide" from the domain of positive law to the sociological and political domains, the discourse on genocide that evolves from this conceptual translation effectuates the same result. That is, genocide as a sociological and political concept functions discursively as a border, much as did genocide as a legal concept: it separates the subject from a "self-knowing" of its own violence, suppresses that not-knowing, and polices the threat of its return. Indeed, genocide's translation—Shaw considers it a return—to the sociological and political domains operates as an extension of a legal mandate over a broader classification of violence. As such, genocide as a sociological and political concept increases the potential for law's violence—manifested, for example, in the form of military intervention to prevent and punish genocide. It increases the policing apparatus of the discourse on genocide.

For Shaw, genocide is first and foremost a social phenomenon—it happens to and within societies—and so its proper understanding should be sociological. Shaw posits the adoption of "a critical theoretical approach"[30] to genocide: the first part of his book is historical analysis, the second attempts to "understand the main terms of genocide debates in the light of sociological theory; how we should develop social theory itself to take account of genocide's challenges; and how we should begin the task of explanation."[31] His aim is to clarify a conception of

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[28] *Id.* at 8 (emphasis in original).
[29] *Id.* (emphasis in original).
[30] *Id.* at 13.
[31] *Id.*

genocide that is "relevan[t] for anti-genocidal action."[32] In the result, Shaw attempts to wrest the concept of genocide from law and relocate it firmly within sociology and politics because these domains are more instrumental to understanding, and therefore preventing, genocide.

For this task he turns to Lemkin. Shaw reads Lemkin through a disciplinary lens: the original conception of genocide is in fact both sociological and legal. Only within its subsequent history did the law take over and "capture" the "terms of the genocide debate." Shaw's return to Lemkin attempts to resuscitate the sociological element of the original conception, and to elaborate further on that conception in the light of subsequent historical events and efforts at legally reforming the meaning of the term.

Of Lemkin's definition within *Axis*, Shaw finds two salient aspects to genocidal violence: one is "destruction," the other is "killing." The latter is merely one aspect of a concerted whole:

> The nuances of the key word, 'destruction', were indicated here by the difference between 'immediate destruction' of a nation and 'destruction of essential foundations' of its life. Lemkin was clear that genocide refers *generally* to the latter; 'immediate' destruction in the sense of 'mass killings of all members of a nation' was a specific type but did *not* define genocide.[33]

In short, Shaw takes from Lemkin a sociological conception of genocide: "Genocide, like barbarity, was *a comprehensive concept of the social destruction of national groups*, and Lemkin believed that it had very wide applicability."[34]

Unfortunately, "[w]hile Lemkin offered a socio-historical conception of genocide, his conceptualization was heavily influenced by the legal tradition."[35] Shaw finds that this influence narrows the meaning and thereby creates problems for the conception and meaning of genocide. For instance,

> [b]oth Nuremberg and the Convention laid stronger emphasis than Lemkin on *physical and biological* destruction, and less on broader *social destruction.* This difference is largely explicable because the

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[32] *Id.*
[33] *Id.* at 19 (emphasis in original).
[34] *Id.* at 21 (emphasis in original).
[35] *Id.* at 23.

> former were designed to apply and define genocide law: killing and physical harm were the sharpest ends of the destructive processes and thus obvious legal foci.[36]

With the creation of the new law to criminalize this newly conceptualized violence, the sociological aspect of the phenomenon gets left behind. Shaw catalogues and analyzes the genocide literature[37] that both recognizes and bemoans this discursive loss, since it represents a loss of understanding in the meaning of genocide and, with it, the capacity to properly act against genocidal violence.

Shaw must do three things in order to resuscitate and vindicate a broader, socio-political conception of genocide. First, he must find, as noted above, that the sociological and political meanings of the term precede the legal meaning: they are more originary, thereby laying claim to greater epistemological authority. Second, since it was "first"[38] within law that genocide was clearly defined, Shaw must show how law is less faithful (and by implication less authoritative) than the sociological and the political to understanding the violence of genocide. Shaw does this by integrating law to theory, in a broad sense, and characterizing both as ideal forms of knowledge. As such, they are deemed less relevant to the search for practical, instrumental forms of knowledge to counter the scourge of genocide. The dethroning of law (and theory) toward the development of an anti-genocidal knowledge is hastened also through the linkage, even fusion, between legal meaning and the perpetrator's perspective.[39]

The third thing Shaw must do in order to vindicate a socio-political and, thereby, a broader definition extends from the first two gestures: not only is a socio-political conception more

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[36] *Id.* at 22.

[37] The list of scholars includes most of the well-known names in genocide studies, such as Helen Fein, Barbara Harff, V. Dadrian, Michael Levene, Israel Charny and Ben Kiernan in sociology. In law, Shaw mainly depends upon the studies of William Schabas and Michael Mann.

[38] SHAW, *supra* note 27, at 7. ("[I]t was in law that genocide had first been defined (by Lemkin and the Genocide Convention) and it was in the legal field that the most urgent challenges of new episodes were felt.")

[39] *Id.* at 4 ("Above all, this book argues that genocide studies are stuck at the preliminary stage of concept formation, defining genocide primarily in terms of the 'intentions' of the 'perpetrators,' rather than looking at the *structure of conflict* within which attempts to destroy populations and groups are played out. I aim, therefore, to construct a more sociologically adequate concept of genocide . . . .").

authoritative (as originary), it is also more useful; that is, Shaw must assert the superiority of instrumental over abstract and philosophical knowledge. Perhaps in part because of this, or because of his dependence upon a social-scientific framework to the exclusion of a critique or knowledge of its own foundations[40]—to the exclusion of a critical *self-knowing* of the sociological subject—his ethical and prescriptive conclusions, as I hope to show, fall prey to the problems of disciplinarity, of coercive hegemonic knowledge, outlined above with respect to the original legal conception of the term. In short, Shaw concludes his sociological and political conception of genocide, through genocide's amalgamation with war, in what Said calls a subjective and disciplinary "statement of power"[41] in relation to the objects of genocide.

The first move in the dethroning of law[42] is to suggest that it is primarily concerned with death and, as such, is opposed to a political-sociological view of genocide that is primarily concerned with destruction. The difference Shaw draws is between individual death and social destruction: the latter encompasses the former, and the former is merely one, albeit extreme and pervasive, aspect of a social conflict described as genocide. Also, genocide is a social event that implicates political conflicts and fractures; the law's fixation on death is a criminal matter and its paradigm is the murder of the individual. From this essential error, law reveals

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[40] On the human sciences more generally, see MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (LES MOTS ET LES CHOSES) 345-46 (Vintage Books 1973) (1966) ("Hence that double and inevitable contestation: that which lies at the root of the perpetual controversy between the sciences of man and the sciences proper—the first laying an invincible claim to be the foundation of the second, which are ceaselessly obliged in turn to seek their own foundation, the justification of their method, and the purification of their history, in the teeth of 'psychologism,' 'sociologism,' and 'historicism'; and that which lies at the root of the endless controversy between philosophy, which objects to the naïveté with which the human sciences try to provide their own foundation, and those same human sciences which claim as their rightful object what would formerly have constituted the domain of philosophy.").

On the origins of one human science, history, see also Said, *supra* note 26, at 11. ("[I]n the methodological assumptions and practice of world history—which is ideologically anti-imperialist–little or no attention is given to those cultural practices, like Orientalism or ethnography, affiliated with imperialism, which in genealogical fact fathered world history itself.")

[41] Said, *supra* note 26, at 8.

[42] SHAW, *supra* note 27, at 27 ("While law often informs as well as reflects social debate, it is highly unusual for a major concept to be so strongly defined by a legal document. Thus moving out of the restrictive legal framework is a major issue for the sociology of genocide.").

itself to be insufficient to provide "a complex, situational account"[43] of genocide, specifically genocidal intent.

The second move, the isolation of law from the socio-political domain—and indeed, all subsequent moves—flows from this original error. The separation of law from the political is articulated in two modes: first, the severance of genocide from war (and law's integration of genocide to the individual murder paradigm); and, related to that, the distinction between specific and general intention. Shaw notes that "[t]he most striking fact about the process that produced the [Genocide] Convention was its separation of genocide from war."[44] What Shaw understands this to mean is that the law on genocide is radically severed from an engagement with social processes as such, and is only concerned with the result. War stands in for the political domain, the polis and its procedures, conflicts, evolutions, and so on; law stands outside this political and social dimension in its fixation on the end result of these processes. Law sees this end through the lens of "intentionality"; hence, the third move from the moment of error is in the separation between what law means by "intent" and what the political dimension means by "intent."

Law's paradigm, then, is the individual murder case. Applied to a multilayered event such as genocide, the law so conceptualized is inadequate. The core of Shaw's argument for this inadequacy is in the legal requirement that the perpetrator of genocide, like the murderer, be proven to have the criminal *mens rea*, the state of mind—knowledge and intention—to commit the crime. "However," Shaw cautions, "the legal understanding of 'intent' is narrow: the reference to 'intent' in the text indicated that the prosecution needed to go beyond establishing that the offender meant to engage in the conduct, or to cause the consequence. The offender must also be shown to possess a 'specific intent' (*dolus specialis*)."[45] Shaw notes that "[c]riminal law presumes that an individual intends the consequences of his or her acts, in effect deducing the existence of the *mens rea* from proof of the physical act itself."[46] Shaw suggests further that "the legal idea moves

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[43] *Id.* at 84 (noting that the "intent" requirement of law is too "singular" and thus demands a complex, situational account to give it meaning).
[44] *Id.* at 28.
[45] *Id.* at 82 (emphasis in original).
[46] *Id.* at 83.

'intent' beyond its ordinary meaning, in ways that unnecessarily restrict understanding."[47] Furthermore, Shaw notes,

> [t]he emphasis on intention inherited from international law derived originally from the fact that genocide was seen in the same way as war crimes, which were recodified at Geneva around the same time as the Genocide Convention was drafted. The idea of intentionality in genocide follows that of 'wilful intent' in war.[48]

As such, given the necessity for proof, Shaw suggests that,

> [t]ypes of acts that constitute genocide—killing and other harm against civilians—also occur in war, where they may not always be criminal, or, if they are, they may be [sic] easily be seen as war crimes or crimes against humanity. This is another reason why the law of genocide has been encumbered with the idea of 'special intent.'[49]

The special intent requirement of law as a narrowing of genocide's meaning does two things: it represents "only perpetrators' intentions" and avoids an understanding of genocide as, following Weber, the subjective "'meaning-complexes' of genocidal action."[50] That is, the legal conception of genocide takes genocide out of its political context, outside of war. In effect, Shaw suggests that, "*[t]he prevailing idea of genocide*—action informed by an intention to destroy social groups as such—*is precisely a pure, ideal-typical representation of the subjective meaning involved in a general class of actions*."[51] This "ideal" of the rationale for genocide takes only one point of view, whereas the sociological view would be more relational: "A sociologically adequate concept of genocide needs to build understandings of types of action and relationships into a general account. This will take us still further from the subjective meaning for perpetrators."[52]

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[47] He continues: "This tight concept of intention is sometimes reinforced by sociologically unrealistic concepts of *collective* intention." SHAW, *supra* note 27, at 83.
[48] *Id.* at 84.
[49] *Id.* at 85.
[50] *Id.* at 86.
[51] *Id.* at 87.
[52] *Id.* at 91.

As such, a more complex relational picture of genocide would include the subjective meanings of victims as well as bystanders. Citing to Weber, Shaw notes that, "[t]he term 'social relationship' will be used to denote the behaviour of a plurality of actors in so far as, in its meaningful content, the action of each takes account of that of the others and is oriented in these terms."[53] Hence, "[r]ecognizing the relational character of genocide moves us towards an account of the kind of *structure* that it involves."[54]

By "structure," Shaw understands the "recurring patterns of social action. . . reproduced . . . . Genocide is therefore a structural phenomenon in the sense that it is *a recurring pattern of social conflict, characterized by particular kinds of relationships between actors, and with typical connections to other conflict structures in society*."[55] In short, genocide is a kind of war.[56] Shaw makes this explicit ("genocide's character as 'conflict' and 'war,'"[57]) in his "more precise sociological definition: *genocide is not only a form of social conflict, but also a form of war.*"[58] He notes that, "*[t]he difference [between genocide and typical war] lies in the construction of civilian groups as enemies, not only in a social or political but also in a military sense, to be destroyed.* Genocide," therefore, "remains as Lemkin first categorized it, an extreme form of war that departs from the ideal-typical form of war in this fundamental sense."[59]

Shaw extends Lemkin's original formulation by, in essence, amalgamating genocide to war. He suggests that "modern warfare, in both its interstate and guerrilla-counterinsurgency forms, should be seen as *degenerate war*,"[60] whereupon genocide is a further projection of this form of war. Ostensibly there is a distinction between genocide and war: in modern warfare, "the 'enemy' civilian population was targeted as a means towards the defeat of a

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[53] *Id.* at 94 (citing MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 118).
[54] SHAW, *supra* note 27, at 95.
[55] *Id.* at 96.
[56] *Id.* at 36 ("War involves political, economic and ideological as well as military power; so too genocide. Physical destruction is the ultimate manifestation of the destructive process of war, but it is not what is going on most of the time in most wars; so too in genocides. Thus genocide, like war, involves much more than the mass killing through which we most easily recognize its destructiveness. Just as war can occur without large-scale killing, genocide too can occur where this element is not extensively carried out.").
[57] *Id.* at 96.
[58] *Id.* at 111.
[59] *Id.*
[60] *Id.*

state and army" (hence, Dresden or Hiroshima are properly understood under "the rubric of war,"[61]). However, in contrast, genocide "*constructs unarmed civilian populations as the objects in their own right, of the types of armed violence normally applied only to armed enemies.*"[62] Despite this distinction and the analytical importance of distinguishing between genocide and war, Shaw notes:

> Yet it is also important to understand the usually intimate *relationships* between these different types of campaign. *War and genocide are often woven together in the same campaign, so that, to describe it as a whole, it is inadequate to talk only of 'war' or of 'genocide'. Instead, we need to use the concept of genocidal war that I introduced above: two distinct types of policy integrated in a single campaign.*"[63]

What is the meaning of this amalgamation of genocide and war? It has required Shaw to attenuate and then sever the link between genocide and law, first by locating genocide's legal origins within the laws of war and then by specifying law's fixation on death (only one of several consequences of genocide understood as social conflict), and intentionality (specific with respect to only one party to genocidal conflict) as productive of an "ideal-typical" knowledge of the genocide perpetrator that leaves incomplete an apprehension of genocide's relational aspects, i.e., genocide as political conflict. It has required him, then, to make a distinction between law as an atomistic, or individuating, form of knowledge, and war, which is part of the relational, political process. In a sense, law is purified of "genocidal violence," in the way law is conceptualized to posit a certain kind of "ideal" knowledge of the violence. Violence is the purview of the political process: the decision to wage war, the policy to attack civilians either as combatants or "as such" (genocidal acts of war).

What, then, is Shaw's conceptualization of the political as such? Violence pervades the category of the political; the question becomes one of hierarchy. And it is within the development of a hierarchy of political violence that Shaw submits a hierarchy of violators, so to speak. Thus, genocide (genocidal war) is endemic

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[61] *Id.* at 111-12.
[62] *Id.* at 112.
[63] *Id.* at 148.

to some societies, whereas other societies are incapable of this form of violence.[64] Within Lemkin's subtext, the separation of genocidal and non-genocidal polities is rationalized within a legal conception. With Shaw, the same separation occurs, and is in fact reinforced and policed, within the political domain. I have argued that the original legal conception was disciplinary, inasmuch as it projected the operation of a border (separation, suppression/displacement, and policing) between the subject and the object of genocide. Here also, Shaw's sociological and political conception of genocide performs the same operation: that of a border that separates and hierarchizes genocide's subject-observer and object. This suggests that the integration of genocide within the political, viz. genocide as war, involves a specific conceptualization of the political domain itself.

Shaw's idea of the political ratifies a division within the world between genocidal and non-genocidal geopolitical regions. Shaw defines genocide as "acts" of violence, to escape from the emphasis (at law) of the perpetrator's intent: "we also need the concept of *genocidal action* (or genocide *as action*, a sense closer to previous understandings)...Thus genocide is a type of unequal social conflict between two sets of actors, which is defined primarily by the type of action carried out by the more powerful side."[65] By insisting upon political conflict within his definition, he escapes or takes a "radical break"[66] from the "ideas of 'one-sidedness' and 'helplessness'"[67] characteristic of other definitions.

But paradoxically, because his approach "gives genocide a broader scope than is often allowed" by defining genocide as "not restricted to a very few big, successful mass murders," it is also more ubiquitous within some societies than others and "[i]t is, lamentably, more common than those preoccupied with the peculiarities of the Holocaust imagine."[68] In the result, genocide as war—especially the "total war" model—first eliminates law and its fixation on mass death, the "big" event. Second, war in the developed West has been largely abolished, and with it, genocide (or genocidal actions): "Ethnic conflicts are rarely very violent within the West not only because democracy has been normalized, but also because state power has been internationalized and interstate wars abolished."[69] Where the West does engage in war it

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[64] *Id.* at 135, 158-62.
[65] *Id.* at 154.
[66] *Id.* at 155.
[67] *Id.*
[68] *Id.* at 157.
[69] *Id.* at 59.

is not genocidal.[70] Third, war (total war) is pervasive within the South: "In contrast, deep, institutionalized, internationalized pacification has hardly developed in non-Western regions: major 'nation-states' are quasi-imperial and this is why their 'imperial fringes' are dangerous. The way of war envisaged by major non-Western states remains much closer to total war . . . ."[71]

Shaw's conceptions both of genocide as war and of war as social conflict within which occurs a collection of actions (some genocidal, some not, depending upon "specific combinations in particular cases")[72], enable both a more pervasive model of genocide and its specification as normative to certain political arrangements or geopolitical realities. The border-metaphor applies to the division between political arrangements. Essentially, the border is the return of the law, to wit: "since genocide is an illegitimate variety of the generally legitimate social activity of war, understanding genocide in this way enables us to see the *connections*—as well as the difference—between this kind of anti-civilian violence and the more common kind perpetrated both intentionally and unintentionally in warfare."[73]

The metaphor of the border-operation suggests that Shaw's understanding of the political domain as such is on a continuum of violence. The border (law) separates states and regions and suppresses a "self-knowledge," so to speak, of the potential violence of the Western subject—a sense of the continuum of violence itself, between objective manifestation (actions) "out there" and subjective power arrangements and surveillance over here. Finally, the border polices the political division between regions by specifying a distinction between an "active" (violent) South, and a passive-observatory North.

Pushing the border metaphor further, this policing operation is not inconsequential with respect to the subject: the border separates the subject itself from its own "political subjectivity," its own access to subjecthood. As such, while it must be said that Shaw's sociological and political conception of genocide is both comprehensive, intuitive, and thus persuasive as an empirical account of genocidal violence within the last century, his analysis hinges upon a conception of the political category that denies access to political subjectivity for both subject and object. The observer's role in relation to wars, thanks to "[w]estern global dominance, market and production integration, international law

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[70] *Id.* at 158 ("new US-led occupations are not genocidal.").
[71] *Id.* at 159.
[72] *Id.* at 156.
[73] *Id.* at 154.

and mass media,"[74] is one of "global surveillance."[75] This role is antithetical to "genocidal actions," and ostensibly "inhibits" wars.[76] The implication of the "surveillance mechanism"[77] as a passive or at best benign[78] enterprise—it inhibits interstate wars, it benefits victims—also impliedly separates the observer from the potentiality of violence, as it were, inherent to the gaze. This is an element of the separation of the subject from its own political subjectivity, its own sense, if you will, that surveillance is active and constructive. Shaw concedes only that the West's passive surveillance or benign intervention may inadvertently have an effect on those under the gaze, or those who receive it: "in reality, life risks are transferred to them," i.e., to the "Southern war-zone civilians."[79]

In the result, Shaw's conception of the political coheres with what might be considered a normative perspective on how Western power conceives of itself: according to its own disciplinary practices and the production of knowledge about violence within the world. For instance, Shaw notes—in response to Michel Foucault's theory of bio-power (modern sovereign exercises a right of death through the "function of administering life,"[80])—that, "[g]enocide is practised by regimes and armed groups that hardly have totalitarian ambitions or capabilities; conversely, today's Western states certainly 'manage life' but they do not practise genocide."[81] It is the way we think of the world, the way we see it; genocide is not simply a problem of totalitarianism or fascism, but of failed, rogue, degenerate states, non-states, and non-state actors. Genocide discourse where, as here, the concept of genocide is sociological and political rather than legal, ratifies the normative sense of this world view.

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[74] *Id.* at 159.
[75] *Id.* at 160.
[76] *Id.*
[77] *Id.* ("The twenty-first-century context of war is one of global surveillance, by Western states, the United Nations system, non-governmental organizations and social movements, all working through and reflected in global networks of media coverage.").
[78] At worst, "[e]ven where international intervention is substantial, it may often become part of the conditions for genocide. Proto-genocidists may see international pressure for power-sharing as a threat, prompting drastic action against 'enemy' groups, as in Rwanda." SHAW, *supra* note 27, at 160.
Notice how this mutes any *active* role attributable to the observer. Compare this passive view with, for example, ANDREW WALLIS, SILENT ACCOMPLICE: THE UNTOLD STORY OF FRANCE'S ROLE IN THE RWANDAN GENOCIDE (2006).
[79] SHAW, *supra* note 27, at 159.
[80] *Id.* at 135.
[81] *Id.*

Indeed, the conception of this world view, within Shaw's schema, as norm becomes evident in the challenge posed to the view by the theory of bio-power posited by Foucault. Furthermore, its normativity—i.e., that this view seems "obvious" to us—is reinforced by the return of law; purified of its own violence, law authorizes and legitimates the political conception of the world as conceived within a socio-political discourse on genocide through the disaggregation of "legitimate" and "illegitimate" war.

Foucault enters Shaw's text like a rupture of the surface normativity of genocide discourse and is quickly cauterized and removed. This is because Foucault offers an alternative conception of the political category as such. Shaw looks to Foucault for the answer to specific questions: "Are there general reasons why the phenomenon of genocide has developed? Can certain features provide the principal elements of explanation for all particular episodes?" Shaw concludes with: "In what follows I evaluate explanatory frameworks bearing in mind these questions . . . ."[82]

Shaw finds unhelpful, however, Foucault's theory of modern power and why it should have led to the occurrence of genocide. "For Foucault," he notes,

> genocide represented a manifestation of modern *bio-power*, reflecting the fact that 'life and its mechanisms' had been brought 'into the realm of explicit calculations and made knowledge-power an agent of transformation of human life.' The corollary of the state's management of life forces was a new management of death: 'One might say that the ancient right to *take* life or *let* live was replaced by a power to *foster* life or *disallow* it to the point of death.'[83]

Shaw then notes: "Foucault had clearly absorbed the experiences of total war and totalitarian genocide."[84] Shaw's next citation to Foucault underlines both the integration of genocide with modern war[85] and the link within the bio-political sovereign between the power over life and over death, to wit: "'massacres have become vital . . . the existence in question is no longer the juridical existence of sovereignty; at stake is the biological existence of a

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[82] *Id.* at 133.
[83] *Id.* at 134 (citations omitted).
[84] *Id.*
[85] *Id.* ("Wars are no longer waged in the name of a sovereign who must be defended; they are waged on behalf of the existence of everyone . . . .").

population . . . .'"[86] There, however, Shaw and Foucault part ways, and it is at the level of conceptualizing the political that they seem to disagree.

First, Shaw reproduces the passage in Foucault that contains the only instance in which Foucault makes a "direct mention of genocide."[87] It is both an interesting passage and the locus of Shaw's interpretation of Foucault and, by extension, his own definition of the political as such: "'[i]f genocide is indeed the dream of modern powers,'" writes Foucault, "'this is not because of a recent return of the ancient right to kill; it is because power is situated and exercised at the level of life, the species, the race, and the large-scale phenomena of population.'"[88] Recall Shaw's questions posed in the first instance to Foucault and others in the section of the book entitled "Explanations." Shaw seeks a kind of knowledge about genocide that will explain its source: what, empirically, objectively, can we locate as the "general reasons" for the occurrence of genocide? Does Foucault's theory of biopower help in this regard? Shaw finds that Foucault's theory does no more than locate the source of genocide within totalitarianism and the instantiation, within modernity, of "total war."[89] Furthermore:

> Foucault's explanation that genocide is the *other side* of the modern state's "function of administering life," replacing capital and corporal punishment with correction, seems insufficient. Why should state forms that increasingly eschew capital punishment resort to the "orgies" of destruction and murder that characterize genocide? Foucault's relatively unexamined idea of genocide appears over-influenced by particular pseudo-scientific, eugenic strands of genocidal thought and the exceptionally rationalized murder of the extermination camps.[90]

As such, since genocide perpetration has not empirically been limited to totalitarian states or leaders, and since "Western states

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[86] *Id.*
[87] *Id.* at 134.
[88] *Id.* (citing MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME 1: AN INTRODUCTION 137 (Robert Hurley trans., Vintage Books ed. 1990) (1978)).
[89] *Id.*
[90] *Id.* at 135.

certainly 'manage life' but they do not practice genocide," Shaw concludes that "Foucault's linkages were suggestive but they didn't explain the rise of genocide or why genocides are initiated."[91]

Although Foucault discusses the nature of modern war and links it to genocide, his language intimates a different conception of the political than that suggested by Shaw's analysis. In the above passage where he mentions the word genocide, Foucault calls it the "dream of modern powers," not the right (of the sovereign) to kill that is "the reverse of the right of the social body to ensure, maintain, or develop its life."[92] Furthermore, in a passage immediately preceding the "genocide" quotation, Foucault notes that, as with atomic warfare, "the power to expose a whole population to death is the underside of the power to guarantee an individual's continued existence."[93] I read this to mean not the "other side," detached and other to the "function of administering life"[94] but, rather, continuous with that function, its legitimating basis. The idea of genocide as an underwriting *exposure* legitimates power "exercised at the level of life, the species, the race, and the large-scale phenomena of population."[95]

Shaw is right that Foucault's analysis is "general" (he dismisses it as "too general,"[96]) and "suggestive."[97] There is something generalizing, immanent, and pervasive about a conception of violence, in relation to power (its underside), not as ideologically specific, but as fragmentary and as hard to locate as a dream or an exposure. This is language that speaks to the systemic relationship between power and violence, and of the knowledge this relationship produces. It speaks less to a description of genocide as specific actions, to what Shaw describes as a "manifestation of the general 'power over life'."[98] As such, the reduction of Foucault to explanatory causes and effects (his linkages do not "explain the rise of genocide or why genocides are initiated"[99])—to an idea of genocide limited to the "total wars" of recent history and the manifestations of ideology (totalitarianism), to genocidal violence as "'orgies' of destruction and murder"[100]—

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[91] *Id.*
[92] FOUCAULT, *supra* note 88, at 137-38.
[93] *Id.* at 137.
[94] *Id.* at 138.
[95] *Id.* at 137.
[96] SHAW, *supra* note 27, at 135.
[97] *Id.*
[98] *Id.* at 134.
[99] *Id.*
[100] *Id.*

says, in effect, that as disciplinary knowledge, Foucault's theory fails. This failure is further underlined by suggesting that Foucault's political formulations on the relationship between power and violence are based upon pseudo-science[101] and are "over-rationalized."[102]

But it is precisely as non- or failed-disciplinary knowledge, or as a form of knowledge critical of disciplinarity, that Foucault's theory intervenes within the discourse on genocide. As Foucault puts it,

> If there is one approach that I do reject, however, it is that (one might call it, broadly speaking, the phenomenological approach) which gives absolute priority to the observing subject, which attributes a constituent role to an act, which places its own point of view at the origin of all historicity—which, in short, leads to a transcendental consciousness. It seems to me that the historical analysis of scientific discourse should, in the last resort, be subject, not to a theory of the knowing subject, but rather to a theory of discursive practice.[103]

Foucault's point of departure is not, then, what he as observing subject "sees"—violence on this scale is "totalitarian"[104]—but rather "the rules that come into play in the very existence of such discourse,"[105] i.e., the form of thought behind the disciplinary knowledge produced by the scientist (sociologist, in this case).

Seen in this light, Shaw's reduction of Foucault's approach to a failed disciplinary knowledge or conception of genocide seems more clearly an instance of the separation, suppression and policing—by the discourse on genocide—of the ways it is possible to know genocide. And this policing operation is in fact normative to the discourse; it is one of the "rules of formulation."[106] Thus, Shaw argues for the sociological and political conceptions of genocide as normative to how we know what genocidal violence is. In effect, genocide is (normatively) a political and sociological problem, and the sociological and political forms of knowledge, these particular human sciences, are "normative" in relation to

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[101] *Id.* at 135.
[102] *Id.* at 136.
[103] FOUCAULT, *supra* note 40, at xiv.
[104] SHAW, *supra* note 27, at 135.
[105] FOUCAULT, *supra* note 40, at xiv.
[106] *Id.* at xi.

genocidal violence. So if one thinks of knowledge as a kind of geographical terrain, with "genocide" and "the political" superimposed upon one another, the question is: how much of the one covers the other? More to the point: how does the discourse—the ways we think and speak about genocide—construct the overlap between the political and the violence described as genocidal?

Genocide, Shaw insists, is a non-Western phenomenon. And yet, the West is "political" in the broad sense. Thus, genocidal violence ("degenerate"[107] war) and the West ("legitimate" war) subtend along a plane of the discursive understandings of violence. Along the political spectrum, genocide represents degenerate, failed, or indeed the non- or apolitical "object." It is only at this end of the spectrum that Foucault's theory of bio-power as the management of life has value for Shaw. In short, according to the metaphor of superimposed terrains, genocide is *dehors* the political. It sits at the end of a theoretical political continuum but is in fact merely a simulacrum of the political. This is the construct of the political as posited by the discourse on genocide, in its socio-political amalgamation to war. It is this concept of the political that is normative, whereupon the political "subject" is non-genocidal, and the genocidal "object" is non- or apolitical. And it is to this normative, intuitive concept that Foucault's theory represents a break, fusing each end of the spectrum into a single conceptualization of the extension of modern (bio-) power, not at the level of manifestation but of knowledge: what is known and knowable by the ways power and violence are explained, articulated, and understood discursively.

Foucault's theory, in short, challenges the role of the observer and, thereby, the subject's distance from the object of observation. It brings the ostensibly non-political object of the scientistic, sociological gaze into proximity with the political subject-observer. Shaw's interpretation of Foucault attempts to reassert the disjuncture between observer and object. Shaw attempts to reassert the norm of an exclusion of this "self-knowledge," whereas Foucault's theory attempts to reinsert that knowledge as a challenge to normative, scientistic, disciplinary knowledge.[108] By

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[107] SHAW, *supra* note 27, at 111.

[108] *Id.* ("it [i.e., his history of science] describes the unconscious of science. This unconscious is always the negative side of science—that which resists it, deflects it, or disturbs it. What I would like to do, however, is to reveal a *positive unconscious* of knowledge: a level that eludes the consciousness of the scientist and yet is part of scientific discourse, instead of disputing its validity and seeking to diminish its scientific nature.").

showing, albeit in language that is suggestive and somewhat elusive (genocide as a "dream"[109] of power), the linkages between subject and object in relation to genocidal violence, his theory limits the discursive border and its operations: separation, suppression/displacement, and policing. It challenges the separation of observer as passive in its surveillance, and of the object as active/violent as such ("genocidal actions").

Foucault's theory of modern power, including the theory of the panopticon, is a direct challenge to this passive construction of power's exercise. In a passage that reads remarkably like the flip side of Shaw's conception of the political domain as merely passive surveillance, Foucault writes:

> Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary; that this architectural apparatus should be a machine for creating and sustaining a power relation independent of the person who exercises it; in short, that the inmates should be caught up in a power situation of which they are themselves the bearers.[110]

I read the "inmates" as both subject and object of surveillance, with similar effects of power produced in both by the border operation of the discourse. The point here, though, is not to suggest that the theory of the panopticon fits neatly on all fours with the whole global terrain under Western surveillance, but that the act of surveillance has active and activating effects that, within the discourse on genocide, are elided and suppressed. The norm that evolves from this suppression posits to us, axiomatically, that we within the liberal democracies do not "do" genocide, we merely watch from the sidelines.

In summary, Shaw's amalgamation of genocide to war is an attempt in the first instance to produce instrumental knowledge about genocide, knowledge that can inform the development of

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[109] SHAW, *supra* note 27, at 134.

[110] MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 201 (Alan Sheridan trans., Vintage Books ed. 1979) (1975)).

anti-genocide strategy and policy. He removes genocide from law by showing law's insufficiency as a conceptual basis for understanding genocide. The consequence is threefold: First, genocide as war expands the scope of genocidal violence—"genocide *as action*"—to a broad swath of forms and manifestations of power. Second, the law itself is rethought both as free of "genocide" and therefore as freely applicable to the political domain as the border dividing legitimate and illegitimate warfare and war actions. Third, this division, likewise, applies to the political category as such, to divide the world into geopolitical regions according to genocidal and non-genocidal manifestations of power. The West does not "manifest" its power in a genocidal way: its wars are not genocidal. The South, on the other hand, has the problem of pervasive genocidal violence; its conflicts are marked by frequent genocidal actions. In a word, the South is "genocidal." Within this bifurcated schema, the object of genocide "acts" (genocidal actions), the subject observes; the former is active, the latter passive.

What is most striking about Shaw's analysis, and therefore the reason it is useful for an analysis of how genocide knowledge is produced, is that it represents an innovation within the discourse on genocide, moving the debate from its "capture" within the limitative legal criteria under the Convention and toward a broader, more "coherent" sociological conception. And yet the analysis constructs the political domain as the mark and the reiteration of the discursive operation of the legal discourse; it reinforces an "ideal" of law itself as a border that authorizes a political disjuncture between subject and object. The law's reduction, separation and return also authorizes and legitimates a political reduction and separation within the subject itself: the subject is constructed as passive in relation to genocidal violence ("genocidal actions") out there in the chaotic, apolitical South. The subject's political subjectivity therefore is suppressed within this view of itself as observer. In the result, the discourse on genocide, both within its originary conception of genocide as a legal phenomenon, and within its successful reconceptualization as a sociological and political form of violence, remains captive to a normative ideal of global power as benign and salvific: its exercise "inhibits" the violence of the other, and its will is inherently legitimate. The subjects of the discourse—we, the observers—are tamed into passivity.

CONCLUSION

Genocide discourse centers on the law, both within the original formulation of the term by Lemkin and the subsequent definition of the term within the Genocide Convention of 1948. The story of the law's role in relation to the form of violence defined as genocide, however, is more complicated than simply providing a basis for definition and, thereby, a framework for subsequent debates. The discourse moves from the extreme of a strict and narrow understanding of this form of violence to the attempt to abandon legal criteria in determining the conceptual parameters and the meaning of the term "genocide" in relation to the form of violence.

Within this Article, I have charted three trajectories for the law pursuant to the meaning of genocide, or the knowledge of genocide produced by legal and nonlegal discourses. First, the law provided an originary basis for apprehending the violence. Second, the law was understood as merely one of several possible frameworks for apprehending the violence: the alternative sociological and political conceptualizations of genocide required the excision of law, its repudiation as adequate to produce a comprehensive, consistent and practical knowledge about genocide. The third movement of law was in its return, after the political decision,[111] to ratify and authorize the political meaning of genocide. Law was purified in order to perform an *ex post* legitimation, i.e., as law in a pure sense, freed from *ex ante* "political constraints."[112]

These three movements of law suggest that the discourse on genocide, and the object it produces, is inescapably juridical, even when the conceptualization of genocide is non-legal as such. Shaw's provocative and successful amalgamation of genocide with war is just such an attempt, clarifying the lineaments of the discourse on genocide beyond its "capture" within the legal framework. But just as Shaw's conception of the law's return to legitimize the political decision is in a sense a purified idea(l) of law, so also the political category is purified, pacified and,

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[111] SHAW, *supra* note 27, at 170.

[112] *Id.* (Shaw, following Reeves, suggests that the Commission of Inquiry on Darfur report was flawed on both the facts and the law: "The commission's factual distortions and logical failures could only be evidence, Reeves concluded, of the political constraints under which they were working." As such, law must be severed from the analysis of genocidal violence: "Clearly legal decisions will always have to be made on the basis of the Convention and its case law, but political decisions, at national and international levels, must respond to the ideas of genocide that are held within world society.").

counterintuitively, *de*politicized. The domain of the political is severed from the domain of genocidal violence; the former is agentic, the latter is not. The former is cast as observer, as a power of global surveillance, as delinked from genocidal violence, which occurs at the end limit of the political spectrum.

I have suggested that this movement of separation is also one of suppression: that the gaze of the observer, like Foucault's panopticon, is not passive but in fact constructive—even violent. This element, or self-knowledge, is both suppressed and policed by the discourse on violence. The policing ensures the denial of access to "the political," the subjectivity of the object of genocide. But it has the corollary effect of denying self-knowledge to the observer, i.e., access, for the subject, to its own political subjectivity. The passive subject cannot "act" within the world except as observer, because its active role in the construction of the world is denied by the discursive framework within which it sees the effects of its gaze only as the (objective) manifestations, or actions, of the other.

In the final analysis, and toward the point of this exercise, the depoliticizing of both law and politics has the effect of increasing the level of violence in the world and arrogating, to only one side, the concept of sovereignty. This is the dangerous consequence of the discourse on genocide and its border-operation. The amalgamation of genocide to war is in fact only to illegitimate war, degenerate and other to the warfare of the (Western) subject. Thus, both the legal and the political categories are purified of genocidal violence by the discursive segregation of this form of violence to the outside, away from the North.

Whereas law returns to authorize the political decision, the latter is operative, within the discourse on genocide, as observation, as description, and as passive in relation to genocide. In effect, the political decision as "objective" observation is purified of political subjective content. The result is that genocide becomes pervasive, requiring ever more vigilant surveillance. Shaw concludes: "*[i]f a broader, more sociologically coherent conception becomes accepted not just in academia, but in public debate, then decisions about intervention (political and humanitarian as well as legal and military) in genocidal crises will be less easily avoided by confusing legal references.*"[113] Once terrorist attacks become "genocidal massacres"[114] and "counter-

[113] *Id.* (emphasis in original).
[114] *Id.* at 162.

insurgency war" is collapsed into "genocidal war,"[115] the geopolitical border is policed not simply by a passive and anxious gaze, but by an increase in redemptive, "legitimate" violence: saving the object from itself. Under this discursive schema, the law's return is also the return of the sovereign as immanent use of force.

[115] Id. at 171.