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Michael Bryant
Bryant University

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Canaries in the Mineshaft of American Democracy: North American Settler Genocide in the Thought of Raphaël Lemkin

Michael Bryant

Bryant University

Smithfield, Rhode Island, USA

The Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians...reflects the rise and fall in our democratic faith.

- Felix Cohen (1953)

We all want to think well of ourselves. This truism applies to societies as well as to their individual citizens. In the United States, belief in American exceptionalism has sometimes produced outlandish assertions, as when the US solicitor general, in blithe disregard of centuries of slavery and the annihilation of Indian tribes, proclaimed in 1952 that "genocide has never existed in this country. Under our form of government, it can never exist."¹ For rosy optimism, this verdict far transcends even Whiggish history, which for all its faith in the march of progress nonetheless concedes the existence of evil, if only as a minor pothole along an improving road. The Panglossian cheerfulness of the solicitor general is not unusual in US history. Similar attitudes abound in every era of the American past, nourished by a "bardic tradition"² of historical writing that glorifies European expansion across the North American continent while ignoring or minimizing its human cost. Thus, two of the leading historians of the USA, George Bancroft and Arthur Schlesinger, each writing at moments separated by 158 years, could extol the country's settlement as a victory over "feeble barbarians" (Bancroft in 1834) and "primitive tribes" (Schlesinger in 1992). In 2008, former US officials in the Clinton administration, including ex-Secretary of State Madelaine Albright, wrote with eyes firmly clenched shut on American history that genocide "threatens not only our values, but our national interests."³

Reluctance to confront national crimes is not unique to the USA. Despite the aim of the Canadian Museum for Human Rights of "exploring human rights with a special reference to Canada," and despite endorsing Canada's recognition of five genocides in world history, the Museum does not consider the colonization of Canada genocidal. Native American critics of its view like Phil Fontaine, the ex-grand chief of the Assembly of First Nations, have not budged the Museum from its position.⁴ The tendency of Canadian officials to deny the occurrence of genocide on their own soil has recently surfaced in the debates over the report on missing and murdered indigenous women. In response to the extraordinary numbers of Indian women and girls who have been either murdered or have disappeared in Canada between 1980 and 2012, the Canadian government appointed a "National Inquiry into Murdered and Missing Indigenous Women and Girls" in 2016 to investigate the matter. In their report of June 3, 2019, the four commissioners who formed the National Inquiry charged that "state actions and inactions rooted in colonialism and colonial ideologies"⁵ had enabled mass murder and were tantamount to genocide, an accusation greeted with pushback from government officials. Neither Prime Minister Justin Trudeau nor Premier François Legault were willing to call the government's sins of omission and commission "genocide." Legault bluntly rejected the term as applied to the murders and disappearances. While admitting the government had failed in its

¹ "US Statement on the Civil Rights Congress Publication We Charge Genocide!" American Jewish Archive, 60/4/7, quoted in Anton Weiss-Wendt, *The Soviet Union and the Gutting of the U.N. Genocide Convention* (Madison: University of Wisconsin Press, 2017), 228.

² Andrew Woolford et al., introduction to *Colonial Genocide in Indigenous North America*, in *Book Title*, ed. Andrew Woolford et al. (Durham and London: Duke University Press, 2014), 8.

³ *Ibid.*

⁴ *Ibid.*, 7.

⁵ National Inquiry into Murdered and Missing Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Murdered and Missing Indigenous Women and Girls*, Vol. 1a, 54, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a.pdf (accessed August 12, 2019).

duties to protect native victims, he hastened to add that “genocide is something else,” and went on to equate genocide with sensational government-initiated and administered mass killings like the Rwandan and Nazi holocausts. Conceding the seriousness of the violence as well as governmental nonfeasance in responding to it, Legault insisted the crimes did not fulfil the legal definition of genocide under international law: “A genocide is when someone wants to systematically cause a nation to disappear. I don’t think we’re talking about that.”⁶

Remarkably, we sometimes encounter such attitudes among Holocaust and genocide scholars in their views on whether Euro-American treatment of native peoples was genocidal. Advocates of the view that it was genocide include Alfred Cave, Benjamin Madley, Ben Kiernan, Gray Whaley, Tasha Hubbard, and most recently Laurelyn Whitt and Alan W. Clarke;⁷ among the dissenters are Guenter Lewy, Gary Clayton Anderson, Joseph Gone, and Steven Katz.⁸ Indigenous scholars also stake out antipodal positions on the issue of North American genocide. Some are chary of attaching the label of “genocide” to Euro-native relations for fear that this act of naming will deprive indigenous peoples of agency, reducing them to passive victims of overwhelming European aggression.⁹ The word’s connotation of merciless death-dealing obscures native people’s “survivance”¹⁰ of Euro-American mistreatment and the sustained efforts to destroy their cultures. The ability of indigenous people to withstand such assaults is a subject of pride for many of them today. To quote a line from William Faulkner’s Nobel Prize acceptance speech, native Americans “have not only endured but prevailed.”¹¹

In virtue of the legal origins of genocide as a crime under international law, debates over the applicability of the term to the North American frontier and Euro-American expansion quickly become legalistic. This is strikingly evident in Steven Katz’s refusal to treat settler-Indian relations as an instance of genocide. For Katz, the disappearance of the native peoples of the Americas was attributable to epidemic disease, a force of depopulation that was “unwitting” and at variance with

⁶ “MMIWG: Legault promises swift action based on report’s recommendations,” accessed August 12, 2009, <https://montrealgazette.com/news/quebec/mmiwg-legault-promises-swift-action-based-on-reports-recommendations>. As will become clear in the course of this article, the participants in the recent Canadian debate might be astonished by Raphaël Lemkin’s willingness, were he alive today, to consider events like unofficial attacks on indigenous women and girls as genocide even when they do not satisfy the strict elements of the offense under the Genocide Convention.

⁷ Alfred A. Cave, *Lethal Encounters: Englishmen and Indians in Colonial Virginia* (Santa Barbara: Praeger, 2011); Benjamin Madley, “Reexamining the American Genocide Debate: Meaning, Historiography, and New Methods,” *American Historical Review* 120, no. 1 (2015), 98-139; Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2009), 310-363; Gray H. Whaley, “American Folk Imperialism and Native Genocide in Southwest Oregon, 1851-1859,” in *Colonial Genocide in Indigenous North America* (Durham and London: Duke University Press, 2014), 131-148; Tasha Hubbard, “Buffalo Genocide in Nineteenth-Century North America: ‘Kill, Skin, and Sell,’” in *Colonial Genocide in Indigenous North America* (Durham and London: Duke University Press, 2014), 292-305; Laurelyn L. Whitt and Alan W. Clarke, “Bringing it Home: North American Genocides,” *The Journal of Gender, Race & Justice* 20 (2017), 263-348.

⁸ Guenter Lewy, “Were American Indians the Victims of Genocide?,” *Commentary*, no. 2 (2004), 55-63; Gary Clayton Anderson, *Ethnic Cleansing and the Indian: The Crime that Should Haunt America* (Norman: University of Oklahoma Press, 2014); Joseph P. Gone, “Colonial Genocide and Historical Trauma in Native North America: Complicating Contemporary Attributions,” in *Colonial Genocide in Indigenous North America*, ed. Andrew Woolford et al. (Durham and London: Duke University Press, 2014) 273-291; Steven V. Katz, “The Pequot War Reconsidered,” *New England Quarterly* 64, no. 2 (1991), 206-224; idem, “The uniqueness of the Holocaust: the historical dimension,” in *Is the Holocaust Unique? Perspectives on Comparative Genocide*, ed. Alan S. Rosenbaum (Boulder: Westview Press, 1996).ims of Genocide?ans the Vic: 20, no. 1, y, and New Methodser LeAlfred Cave, Benjamin Madley, on whether the nt of Indians.

⁹ See e.g., Chris Gosden, *Archaeology and Colonialism: Cultural Contact from 5000 B.C. to the Present* (New York: Cambridge University Press, 2004), 25; Scott Trevithick, “Native Residential Schooling in Canada: A Review of Literature,” *Canadian Journal of Native Studies* 18/1 (1998), 49-86. Both sources are cited in Woolford et al., introduction to *Colonial Genocide in Indigenous North America*, 12.

¹⁰ “Survivance” is a term used by the Anishinaabe writer Gerald Vizenor in *Manifest Manners: Narratives on Postindian Survivance*. It means “an active sense of presence, the continuance of native stories, not a mere reaction, or a survivable name. Native survivance stories are renunciations of dominance, tragedy and victimry.” Gerald Vizenor, *Manifest Manners: Narratives on Postindian Survivance* (Lincoln: Nebraska, 1999), vii. See also Woolford et al., ed., introduction to *Colonial Genocide in Indigenous North America*, 12.

¹¹ “William Faulkner Banquet speech,” *The Nobel Prize*, December 10, 1950, accessed January 16, 2019, <https://www.nobelprize.org/prizes/literature/1949/faulkner/speech/>.

the “expressed and self-interested will of the white empire-builder or settler.”¹² Katz buttresses his view with the insistence (found in his discussion of the Pequot War) that the American colonists harbored no genocidal intention during or after conflict with native peoples.¹³ The issue of intent, along with protected class, is a touchstone in parsimonious interpretations of genocide because it is an essential element of the crime as set forth in the UN Genocide Convention of 1948. If the accused neither attacked a protected group (racial, religious, ethnic, or national) nor possessed the specific intent to destroy “in whole or in part” the members of the group, then no genocide may be said to have occurred.

The refusal of Katz and other skeptics to acknowledge genocide in Euro-American/Indian relations seems still more enigmatic when the context of these relations is considered. That context was settler colonialism, a distinctive type of European colonialism in which the potential for genocide is always present. As genocide scholar John Docker has noted, the term “settler colony” is less common in US than in non-US historiographies. It signifies “a colonial society where the indigenous population was reduced to a small or tiny proportion of the overall population, whose majority population becomes composed of colonizers/migrants.”¹⁴ Docker classifies South Africa, Australia, New Zealand, Canada, and the USA as settler colonies. For Whitt and Clarke, settler colonies simmer with the potential for genocidal eruptions.

Unlike colonialism, “settler colonialism is a resilient formation that rarely ends.” [citing Edward Cavanagh & Lorenzo Veracini] Settler colonizers “come to stay.” While within colonialism, the Indigenous colonized population is indispensable, most commonly as a source of exploitable labor, within settler colonialism, the Indigenous population is not only imminently dispensable, but pressingly so as an obstacle to land acquisition. ...This is a “winner-take-all project whose dominant feature is not exploitation but replacement...”¹⁵

“The logic of this project,” according to Whitt and Clarke, can and often does lead to genocide. In seeking the removal of the indigenes and their supersession by European settlers, settler colonialism inevitably provokes resistance from native peoples. At this point, the process of dispossession enters a period of “crisis,” and the new tense phase of the colonial project may slide toward radical solutions. Native resistance elicits counter-insurgency in the form of massacres and exterminatory wars supplemented with removals, imprisonment, starvation, allotment, boarding schools, and other techniques of cultural liquidation.¹⁶ The triad of domination, resistance, and genocide is a veritable natural law of settler genocides, a pattern that structures nearly every instance of violence against native peoples in settler-colonial societies.

¹² Katz, *The uniqueness of the Holocaust*, 21. Similarly, genocide scholars Michael McDonnell and A. Dirk Moses argue that disease was decisive in the annihilation of the American Indian. Michael McDonnell and A. Dirk Moses, “Raphael Lemkin as historian of genocide in the Americas,” in *The Origins of Genocide: Raphael Lemkin as a historian of mass violence*, ed. Dominik J. Schaller and Jürgen Zimmerer (London and New York: Routledge, 2009), 73. For a critique of the disease hypothesis, see Whitt and Clarke, *Bringing it Home*, 273.

¹³ Katz, *The Pequot War Reconsidered*, 291. Katz, as well as noted Holocaust historian Yehuda Bauer, are strenuous defenders of the “uniqueness” thesis that the Holocaust was incomparable, thereby privileging the Holocaust as the preeminent genocide in world history. For a discussion of the uniqueness thesis in relation to the debate over North American genocide, see Woolford et al., *Introduction to Colonial Genocide*, 11-12.

¹⁴ John Docker, “Raphaël Lemkin’s History of Genocide and Colonialism,” (unpublished paper, Washington, D.C., February 26, 2004), US Holocaust Memorial Museum, Center for Advanced Holocaust Studies, accessed October 17, 2018, <https://www.ushmm.org/m/pdfs/20040316-docker-lemkin.pdf>.

¹⁵ Whitt and Clarke, *Bringing it Home*, 271-272.

¹⁶ *Ibid.*, 273. Whitt and Clarke quote Patrick Wolfe’s observation that settler colonialism is not invariably genocidal; rather, its genocidal potential is unleashed when the process of depriving indigenes of their ancestral lands and transferring them to civilian-settlers is “put under pressure and is in crisis.” See Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (December 2006), 402. McDonnell and Moses trace the approval of mass killing as an appropriate response to native resistance to the Spanish and (later) to the English political philosopher John Locke, who wrote that indigenous rebels had “declared war against all mankind, and therefore may be destroyed as a lion or tiger, one of those wild savage beasts with whom men can have no society or security.” John Locke, *Two Treatises on Civil Government* (London: Routledge, 1884), 196-197, quoted in McDonnell and Moses, *Raphaël Lemkin*, 69.

Other scholars have documented this pattern in North America. Genocide historian Benjamin Madley helpfully reminds us that the prolonged and internecine Modoc wars were launched when a party of forty white trappers invited the Modoc to a feast in 1840. The “feast” was in reality an ambush: as the Modoc sat eating, the trappers detonated a cannon, killing many of their native guests. As Madley concludes, the trappers’ gratuitous and unprovoked massacre “primed the Modoc to resist incursions.” This primal murder, in other words, was seared into the hearts and minds of the Modoc during an early stage of their contact with Euro-Americans, embittering their attitudes toward the newcomers and steeling their resistance. Modoc reprisals then became a justification for their genocide. By the fall of 1855, Californians were openly demanding the total eradication of the Modoc.¹⁷

Raphaël Lemkin believed settler colonialism was intimately connected with genocide. Although it is often assumed that Lemkin devised his concept of genocide to cover Nazi atrocities during World War II, in fact the elements of the offense, as Lemkin construed it, predate his systematic elaboration of genocide in *Axis Rule in Europe* (1944).¹⁸ Furthermore, it is clear from both chapter 9 of *Axis Rule* and his unpublished writings, composed between the mid-1940s and his death in 1959, particularly the notes he and his research assistant prepared for a never-completed world history of genocide, that Lemkin intended his definition to apply to other mass exterminations, including Euro-American interactions with North American Indians. In the exposition of his concept of genocide, he was not bound by a narrow statutory formula. Despite his training as a jurist, Lemkin would kick himself loose from the constrictive hermeneutics of legal formalism in favor of a broad and allusive understanding of genocide. As we will see, at the heart of Lemkin’s concept was a concern with the integrity and preservation of unique cultural forms—the very phenomena under threat from civilian settler colonialism. Lemkin’s surprisingly non-legalistic conception of genocide is rooted less in 20th century legal developments than in the European Romanticism of Johann Gottfried Herder and Friedrich Karl von Savigny. While law was the integument of his concept, the urge to protect cultural ways of being in the world was its life-blood.

Lemkin’s Concept of Genocide: from Madrid to *Axis Rule in Europe*

Barbarity and Vandalism

While Lemkin would over time extend his conception of genocide beyond Nazism, Hitler’s persecution of German Jews in the months following his appointment as chancellor was the impetus to Lemkin’s first major public statement on a proposed type of international crime that clearly foreshadowed his subsequent definition of genocide. In his autobiography, he wrote that he and his colleagues at the Association Internationale de Droit Pénal (AIDP) were concerned that Hitler would transform his anti-Semitic rantings in *Mein Kampf* into policy, now that the Nazis had seized power in Germany. Lemkin continued: “Now was the time to outlaw the destruction of national, racial and religious groups.”¹⁹ In the fall of 1933, he drafted a proposal to be delivered at the 5th Conference for the Unification of Penal Law in Madrid, Spain. His proposal identified five “new types of crimes”²⁰ under international law; of the five, two of them, “barbarity” and “vandalism,” are relevant for us here.

¹⁷ Benjamin Madley, “California and Oregon’s Modoc Indians: How Indigenous Resistance Camouflages Genocide in Colonial Histories,” in *Colonial Genocide in Indigenous North America*, ed. Andrew Woolford et al., 107.

¹⁸ Dominik Schaller and Jürgen Zimmerer contend that the destruction of the Armenians during World War I was the stimulus to the young Lemkin’s belief in the need for an international law criminalizing “the wholesale extermination of ethnic and religious groups.” Schaller and Zimmerer, introduction to *The Origins of Genocide: Raphael Lemkin as a historian of mass violence*, ed. Dominik J. Schaller and Jürgen Zimmerer, (London and New York: Routledge, 2009), 1-8.

¹⁹ Quoted in Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2017), 45.

²⁰ The five proposed crimes were: “a) acts of barbarity, b) acts of vandalism, c) provocation of catastrophes in international communications, d) intentional interruption of international communications, e) propagation of human, animal or vegetable contagions.” Raphaël Lemkin, “Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations,” in *Actes de la Vème Conférence Internationale Pour l’Unification du Droit Pénal*, ed. Jimenez de Asua, et al. (Paris: A. Pedone, 1935), accessed October 17, 2018, <http://www.preventgenocide.org/lemkin/madrid1933-english.htm>.

For Lemkin, barbarity was a crime that attacked individuals for the purpose of harming the “collectivity” to which they belonged. Hence, barbarity does harm not only to the person but to his or her group. It consists of “acts of extermination directed against the ethnic, religious or social collectivities, whatever the motive (political, religious, etc.); for example, massacres, pogroms, actions undertaken to ruin the economic existence of the members of a collectivity, etc.” Because such acts “endanger both the existence of the collectivity concerned and the entire social order,” Lemkin urged the international community to criminalize them by means of an international convention.²¹

The second kind of collective assault Lemkin called vandalism. Where barbarity tended to focus on physical attacks on persons based on group membership, vandalism was a “systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and literature.” The interest Lemkin sought to protect by criminalizing vandalism was “world culture,” insofar as individual cultures made unique contributions that enriched all of humankind. When these cultures and their artifacts were destroyed, “it is also all humanity which experiences a loss by this act of vandalism.”²²

What bound together the crimes of barbarity and vandalism in Lemkin’s early thinking about genocide was the nature of the attack: in both cases, the assault was directed against a cultural entity, at either a physical (barbarity) or spiritual/cultural (vandalism) level. Physical extermination was one technique of annihilating a group. However, even in this incipient stage of Lemkin’s thought, the physical act of killing was simply one way to achieve a more insidious end—the obliteration of a unique collectivity and its culture. The legal good that Lemkin exhorted the world community to protect, by recognizing barbarity and vandalism as international crimes, was the manifold and intricate life of a culture. He advised the world community to criminalize these offenses because the destruction of cultures robbed human civilization of the invaluable and, indeed, irreplaceable riches that only these aggregates of human sociality might provide.

The Influence of European Romanticism on Lemkin: The Defense of Particularity

I would suggest that in his paramount concern with the well-being and continuance of group identities, Lemkin was inspired less by the criminal-legal dogmatics of his era than by a strain of European thought rooted in Romanticism, particularly the thought of the German philosopher Johann Gottfried von Herder. In Lemkin’s Madrid paper and his later exposition of genocide in chapter 9 of *Axis Rule*, his deep appreciation for the incommensurability of cultures evokes Herder’s defense of cultural heritage as the highest good in human history. For Herder, as for Lemkin, the defense of culture was not restricted purely to its Western forms; rather, it extended to the indigenous civilizations encountered by the West, which had already become the victims of European domination starting in the 16th century. According to intellectual historian Isaiah Berlin, from Herder’s belief in every culture’s *Schwerpunkt* (center of gravity) sprung his “passionate concern with the preservation of primitive cultures which have a unique contribution to make, his love of almost every expression of the human spirit, work of the imagination, for simply being what it is.”²³

For Herder, the teeming customs, languages, and folkways of humankind contributed to the realization of “a common *Humanität*” (humanity) that enriched everyone’s lives by enabling all people to become more fully human. Humanity, in other words, was not a static suppositum, the sum total of persons bearing unalterable traits, but a dynamic, evolving, and emergent phenomenon that achieves more fully human qualities over time and with each contribution rendered to it by the various cultures in the world. Hence, cultures must not be tampered with; they should be allowed to grow naturally and organically. Berlin contends that Herder’s belief in cultural inviolability—his “relativistic passion for the individual essence and flavor of each culture”—cast a wide net of

²¹ Ibid.

²² Ibid.

²³ Isaiah Berlin, *The Proper Study of Mankind: An Anthology of Essays* (New York: Farrar, Straus and Giroux, 1997), 254.

influence over modern European thought.²⁴ One thinker caught in that net was Raphaël Lemkin, whose mature concept of genocide as it takes shape in chapter 9 of *Axis Rule in Europe* evinces a distinctly Romantic commitment to the local and specific.

Lemkin's Mature Concept of Genocide in Axis Rule (1944)

Genocide scholar Douglas Irvin-Erickson has argued that the destruction of *culture* per se was not genocide in Lemkin's estimation. Rather, it was the destruction of *nations* that fulfilled his definition of genocide—nations understood as “aspects of consciousness that took on a social reality as a ‘family of mind’ between individuals...”²⁵ The destruction of culture might facilitate the nation's destruction and thus become a technique of genocide, but it was not in itself an instance of genocide. Specifically, Irvin-Erickson writes, “genocide was the destruction of the family of mind.”²⁶ While Irvin-Erickson's assertion is well-taken, passages of Lemkin's *chef d'oeuvre*, *Axis Rule in Europe*, strongly suggest that it was indeed individual cultures—including those of indigenous peoples imperiled by civilian settlers in North America—which Lemkin was striving to protect. In order to grasp the nature of what Lemkin wanted to preserve through the criminalization of genocide, we must examine in some depth his development of the concept in chapter 9 of *Axis Rule*.

An arresting feature of Lemkin's concept of genocide in both 1933 and 1944 is its independence of the physical act of killing. As he wrote in *Axis Rule*, genocide is “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.”²⁷ The aim of group destruction might be accomplished through mass killings of group members, but such direct physical attacks were neither a necessary nor a sufficient condition of genocide. This may seem surprising to those familiar with the UN Genocide Convention's definition, which interprets genocide almost entirely in terms of the physical destruction of group members. By contrast, it is the annihilation of a group's way of life that chiefly interests Lemkin.²⁸

Lemkin's paramount concern with attacks on a group's way of life, committed with the intent to eradicate it, emerges from “the phases” into which he organizes the process of genocide. In the first phase, we witness the destruction of the “national pattern of the oppressed group.” In the second, we encounter “the imposition...of the national pattern of the oppressor.” Lemkin contends that such “imposition” may be inflicted on an oppressed group allowed to remain in the conquered territory, or it may occur after the oppressed group has been removed from the land and the newly acquired territory has been colonized with the oppressors' own citizens. Lemkin's schematization of genocide into these two phases already assumes a situation of military conflict: an outright war between different states, a civil war in which a dominant group seeks to exterminate a minority group, or a colonial war involving a colonizer that attacks indigenous peoples, either ejecting them from their land and re-filling it with the colonizers' own nationals or allowing the vanquished to remain, but only on the condition that they accept the colonizers' “national pattern.”²⁹

²⁴ *Ibid.*, 255.

²⁵ Irvin-Erickson, *Raphaël Lemkin*, 221.

²⁶ *Ibid.*, 222. Irvin-Erickson writes that “culture, in Lemkin's definition, was a functional, structural force that integrated individuals into social groups to provide for people's basic needs.” *Ibid.*, 221-222. How this definition operationally differs from the construal of nations as a “family of mind” remains obscure in Lemkin's thinking, at least for this writer. I will suggest in the present essay that it was to culture and its defense that Lemkin ultimately rallied. The integrity of the individual culture and its preservation in the face of exterminatory attack were the “legal good” (*Rechtsgut*) Lemkin sought to vindicate.

²⁷ Raphaël Lemkin, *Axis Rule in Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79.

²⁸ Lemkin's capacious understanding of genocide invited criticism early on from his colleagues Vespasian V. Pella and Henri Donnedieu de Vabres, both of whom worked with Lemkin on the draft of what became the UN Genocide Convention. Pella and de Vabres regarded Lemkin's cultural theory of genocide as an ill-conceived embellishment on the concept. Moreover, they differed with Lemkin's view that forced assimilation was genocide (although they agreed on the genocidal character of forcible transfers of a group's children into another group). Schaller and Zimmerer, ed., introduction to *The Origins of Genocide*, 5.

²⁹ Lemkin, *Axis Rule in Europe*. Note that the last of these military situations conducive to genocidal outcomes resembles the plight of North American Indians, particularly after 1871.

The elimination of a “national pattern” and its replacement by the pattern of the dominant group may be effected through several techniques. In Chapter 9 of *Axis Rule*, Lemkin explicitly links these techniques to German occupation policy. However, it is equally clear that they are also applicable to settler relations with North American Indians—a connection Lemkin will draw in the years following publication of *Axis Rule* as he researched his planned treatise on genocide in world history. Perpetrators of genocide use these techniques to install the oppressor’s “national pattern” in the fields of politics, society, culture, the economy, biology, “the physical,” religion, and morality. In politics, Lemkin considered Germany’s abolition of local governmental structures in occupied Europe and their replacement by “a German pattern of administration” a genocidal action. In society, the Germans had sought to reconfigure Poland and Slovenia by combing each nation of its intelligentsia and clergy—i.e., those most able to organize resistance to Nazi rule—and sending them to Germany as forced laborers. In the cultural sphere, the Germans forbade the Poles and other nations under the Nazi yoke from either teaching or publishing in their native language. For the national pattern of an indigenous language, the Nazis substituted the commandment that only German could be used as the “language of instruction” in the schools of some of the nations they occupied. The national patterns of these countries would be further disrupted by the assignment to their schools of German instructors who were obliged to promote Nazi ideals in their pedagogy.³⁰

In the economy, the Germans adopted policies to expropriate Jews and Poles and transfer their wealth into German hands, with the aim of slashing their standard of living and raising obstacles to their “fulfilling cultural-spiritual requirements.” Because citizens of Luxembourg were considered racially compatible with Germans, they were given the opportunity to work on behalf of the Nazi occupation; if they declined to cooperate, their property was confiscated and redistributed to compliant Luxembourgers. In the “biological” realm, the Nazis strove to prevent non-German population growth in the occupied territories while encouraging the reproduction of ethnic Germans. They deterred non-Aryan procreation by breaking up the families of disfavored groups and deporting the men to slave labor. Harsh rationing imposed on these groups led to malnourishment of the parents and a concomitant increase in infant mortality. At the same time, subsidies were awarded to ethnic German families with at least three children in Poland; in the Netherlands and Norway, “Aryan” women impregnated by German soldiers also received additional support.³¹

In Lemkin’s taxonomy, the physical aspect of genocide closely resembles his discussion of the biological field. Here we encounter again efforts to annihilate national groups by means of “racial discrimination in feeding.” At the top of the food pyramid were, of course, the Germans, who received 100% of their pre-war calories, followed by national groups entitled to food allocation based on their racial affinities with the Germans. On the lowest rung of the consumption ladder were the Jews, who received 27% of the carbohydrates, 20% of the proteins, and 0.32% of the fat they had consumed before the war. “Racial feeding” was the first subcategory of physical genocide; the second was “endangering of health,” e.g., seizing warm clothes and blankets from persecuted groups or denying them access to firewood and medicine during the winter, and the third, “mass killings” (such as the liquidation by firing squads of the intelligentsia in Poland, Bohemia-Moravia, and Slovenia). In religion, the Nazis undermined the national life of the nations they occupied through persecution of the Catholic Church. Finally, the Nazis assailed the moral foundations of the Polish nation by “creat[ing] an atmosphere of moral debasement within this group.” Their purpose was “to weaken the spiritual resistance” of the Poles to German domination. Lemkin claims that the Germans imposed pornographic movies and media on them and encouraged their consumption of alcohol. A Pole could avoid strict Nazi curfew laws by presenting a casino ticket to a German policeman. For Lemkin, in fastening their attention on “base instincts,” the Poles were “diverted from moral and national thinking.”³²

³⁰ Lemkin, *Axis Rule in Europe*, 83-84.

³¹ *Ibid.*, 86-87.

³² *Ibid.*, 89-90.

Within these eight types of genocide, direct physical killing appears consistently in only one of them, the “physical” category and its subtype “mass killings.” Religious forms of genocide may also involve direct killing, such as the murder of priests in concentration camps, but just as frequently, they express themselves in non-homicidal practices like encouraging Polish youth to renounce their Catholic faith. The point of our analysis is that Lemkin in his 1944 book, thought of genocide in terms well beyond mass killing. When winnowed down to its essence, genocide for Lemkin has to do with destroying the conditions that make group identity possible. Certainly, the Gordian knot of identity may be cut by simply murdering the members of the group. Although the Germans committed mass murder on a scale rarely glimpsed in world history, physical killing was only one means employed in furtherance of a greater aim: the liquidation of groups *en masse* whom the Nazis considered inferior. Their assault on racial “enemies” is so shocking to us because it displayed a malignant ingenuity in the choice of techniques to erase entire peoples and their folkways from the face of the earth. To borrow a phrase from journalist Ron Rosenbaum, at the heart of Nazi evil is a “demonic connoisseurship”³³ that targeted entire national, religious, ethnic, and racial groups for annihilation, most infamously the Jews but also the Poles, the mentally handicapped, the Roma, homosexuals, Jehovah’s Witnesses, and many others. What is crucial for Lemkin is the destruction of the national pattern of these groups and its replacement by the pattern of the Nazi occupiers.

Elimination of a group’s pattern and its supersession by another: this is the whorled fingerprint of genocide, the unique quality that, for Lemkin, distinguished the “crime of crimes” from other atrocities in human history. Construing genocide in this fashion, Lemkin was able to extend his model beyond Nazi criminality to identify other events that bore the telltale fingerprint of genocide. Among them was the centuries-long conflict between Euro-American settlers and the indigenous peoples of North America. That conflict, as Lemkin’s world genocide research indicates, unleashes the genocidal potential within democratic societies when native peoples stand between a colonizing majority and coveted lands. In short, not only repressive or totalitarian societies committed genocide. Under the proper circumstances, democracies might also commit it—not because the people mindlessly obey an overpowering authority but because the people will it.

Genocide Beyond Nazism: Lemkin’s Concept as applied to Settler – Indian Relations on the North American Frontier

*Lemkin’s World History of Genocide*³⁴

In the years following *Axis Rule in Europe* until his death in 1959, Lemkin embarked on an ambitious project that, had it been completed as planned, would likely have eclipsed *Axis Rule* as the crowning scholarly achievement of his life. The project was a three-volume exploration of genocide in world history. He was planning the book as early as fall 1947 (in November he received a letter discouraging his application to secure funding for the project from the Rockefeller Foundation).³⁵ The purpose of his treatise, in Lemkin’s own words, was “to prove that genocide is not an exceptional phenomenon, but that it occurs in intergroup relations with a certain regularity, like homicide takes place in relations between individuals.”³⁶ Eventually, Lemkin acquired a term position teaching criminal law at Yale University Law School. In addition to his salary, he received financial support from Yale in the form of an office, typing facilities, and a research assistant.

³³ Ron Rosenbaum, *Explaining Hitler: The Search for the Origins of his Evil* (New York: HarperCollins, 1999), 218.

³⁴ The research for this section of the article is based on the digitized primary source materials from the Raphaël Lemkin Collection available through the Center for Jewish History/American Jewish Historical Society’s website, accessed August 13, 2019, http://digital.cjh.org/R/D4FB5FQNMX2ANLMCTAU9EU873PRVJYYKLENL4PFUDU9NP4PPNTC-02337?func=collections-result&collection%5Fid=1661&pds_handle=GUEST.

³⁵ Box 8, Folder 10, American Jewish Historical Society, Center for Jewish History - Raphael Lemkin Collection, [subsequent refs. AJHS], Roger F. Evans to Raphael Lemkin, November 6, 1947, http://digital.cjh.org/view/action/nmets.do?DOCCHOICE=394987.xml&dvs=1565729633399~120&locale=en_US&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?&DELIVERY_RULE_ID=2&divType=©RIGHTS_DISPLAY_FILE=ajhs-copyrightnotice-01 (accessed August 13, 2019).

³⁶ AJHS, Lemkin to Paul Fejos, July 22, 1948.

Buoyed with this infusion as well as a subvention from the Viking Fund, Lemkin began his research on March 1, 1948.³⁷

At this stage of his research, Lemkin had gathered materials “on the following genocide cases:”

1. The Early Christians
2. The Jews in the Middle Ages; the Jews in Tsarist Russia
3. The Morescos [sic] in Spain
4. The Indians in Latin America
5. The Valdenses [sic]
6. The Armenians
7. The Huguenots [sic]
8. The Greeks in Turkey
9. The Turks under Greek occupation in 1922
10. The Indians in North America (in part)

In his collection of data, Lemkin was guided by “headings covering physical, biological and cultural genocide”—that is, categories of genocide he had analyzed only three years previously in chapter 9 of *Axis Rule*. His plan was to focus “upon the role plaid [sic] by governments, groups and individuals in the commission of the crime,” as well as on “the psychological and sociological factors.”³⁸

Although North American Indians appear at the end of Lemkin’s list of genocide cases, the work of his research assistant in the spring of 1948 indicates the importance Lemkin attached to the North American case study in his future history of genocide. At the end of May 1948, Lemkin’s assistant summarized his research into Euro-American/Indian relations in North America, which included:

- Liquor sales to native peoples and Indian slavery
- Genocide committed on the Plains Indians and California Indians
- Land cessions “and its genocidal aspects”
- The aftermath of “southern removal cases” [presumably, Cherokee and Choctaw removal]
- General Amherst’s alleged efforts to distribute smallpox-infested blankets to the Indians
- Indian responses³⁹

The sub-topic of “genocide against the Plains Indians and the California Indians” invites further scrutiny. Under Plains Indians, Lemkin’s research assistant subsumed the Sand Creek massacre; the Washita massacre; the Wounded Knee massacre; the targeted annihilation of the buffalo “to starve Indians;” banning “tribal culture” on reservations; depriving native peoples of food; and the practice of allotting land to Indians qua individuals so as “to destroy tribal life.” Under California Indians, he listed the expulsion by force of native peoples into “barren mountains where I[ndians] starved” and “wanton murder and militar[y] action against Indians who refused to leave, rebelled or returned occasionally to get food.” While some aspects of these subtopics involve federal or state governmental policies, others relate directly to civilian-settler genocide against indigenous peoples. This is particularly true for the genocide of California Indians in the latter half of the nineteenth century.

³⁷ AJHS, Report on the preparation of a volume on Genocide, March-May 1948; Paul Fejos to Lemkin, May 10, 1948.

³⁸ AJHS, Report.

³⁹ AJHS, Research assistant to Lemkin, May 25, 1948.

Settler Genocide in California

In California, the annihilation of native peoples was more a local than a federally guided event. California governors beginning in January 1851 warned that further Indian depredations on settlers would lead to a “war of extermination...waged between the races until the Indian race becomes extinct.” One governor, employing the language of criminal extortion, threatened the Indians with “extermination” if they did not surrender their lands. California newspapers echoed the drumbeat of genocide. An 1856 editorial published in a San Francisco newspaper recommended “extermination” as “the quickest and cheapest remedy” for Indian mischief.⁴⁰

The California example illustrates the impossibility of cleanly separating government from settler-instigated genocide. In fact, in California, the two levels of action were braided and mutually supportive. A California governor might hurl threats of extirpation at Indians, but we should recall that he was elected by civilian-settlers, and the resonance of his threats in newspaper editorials both expressed and shaped the attitudes of these settlers in their conduct with native peoples. When California legislators in 1850 declared the forced indenturement of Indian children legal, they were acting in accordance with the wishes of the population who had elected them. The enslavement of California Indians proved to be a potent force in their destruction. Operating in a zone of near total impunity for crimes against Indians, settler-slavers murdered native parents and abducted their children, who were then sold into slavery. By 1860, the California legislature had enlarged the period of forced indentures and extended them to native adults. The upshot was an enslavement of some 10,000 California Indians. The entire juvenile population of some Indian tribes in northern California was abducted and indentured.⁴¹

Along with enslavement, the mass killing of California Indians decimated their numbers. Although federal troops perpetrated the inaugural two massacres of natives (the first killing 120-200 Yana Indians in 1846, the second 135-200 Pomo in 1850), local militia groups and volunteers accounted for the lion’s share of Indian deaths after 1849. Yet, in the mass killings of California Indians by local settler groups, the interaction of center and periphery, again, acquired a lethal synergy. Under the 1855 Bounty Land Law, the US government granted 160 acres of land to both federal and private soldiers involved in military conflicts, including “the survivors of the militia, or volunteers, or State troops of any State or Territory” who received federal money and participated in combat.⁴² Wittingly or not, the US Congress had incentivized the physical destruction of California’s native population. Between passage of the bounty law and 1868, some northern California tribes were almost completely exterminated. Hardly any of the 2 to 3,000 Yana Indians remained after a wave of settler-militia attacks reduced their number to 100 survivors. Over the course of a decade (1854-64), the Yuki population was thinned from 12,000 to 600. Genocide scholar Ben Kiernan quotes a settler’s recollection of killing sorties he and other settlers conducted against the Yuki: “...[I]n 1856 the first expedition by the whites against the Indians was made...there were so many of these expeditions...we would kill on average fifty or sixty Indians on a trip...frequently we would have to turn out two or three times a week.” The ubiquitous pattern of genocide replayed in California much as it did throughout the North American continent: settler encroachments on Indian lands led to Indian raids on settler livestock, which invited the indiscriminate killing of Indian men, women, and children by settler militias. The *Petaluma Journal* of April 1857 reported on one such episode: “[W]ithin the past three weeks, from 300 to 400 bucks, squaws, and children have been killed by the whites.” Two years later, the commander of the local garrison described Euro-American settler reaction to a Yuki killing of two settlers in September 1859: “The whites have waged a relentless war of extermination against the Yukas, making no distinction between the innocent and the guilty. They have relentlessly massacred men, women and children...”⁴³

Euro-Americans dressed up these mass killings of indigenous peoples in the language of licit warfare. Such martialization of noncombatant slaughter has a dispiritingly long pedigree in Western

⁴⁰ All quotes are from Kiernan, *Blood and Soil*, 351-352.

⁴¹ *Ibid.*, 352.

⁴² Cited in Kiernan, *Blood and Soil*, 352-353. The law further awarded benefits to wagon masters and teamsters or their heirs.

⁴³ Quoted in Kiernan, *Blood and Soil*, 353.

colonialism. Benjamin Madley compares the California Modoc wars to similar episodes in Africa, Australia, and throughout the Americas. On all these continents, the colonizers denominated as “wars” the armed conflicts arising from native resistance to colonial domination. For Madley, the misleading nomenclature conceals their true nature as “both genocides and wars of resistance.” As his sobering anatomy of the seven anti-Modoc campaigns between 1851-73 suggests, the term “war” hardly befits the retaliatory killing of native men, women, and children for offenses they had little or nothing to do with. Indiscriminate massacre extended even to Modoc delegates invited by the whites to a peace conference in 1852. The delegates, who had voluntarily disarmed as a token of good will, were subsequently gunned down by their hosts. The settlers thereafter referred to the murder of the unarmed peace delegates as a “battle.” Grotesque misrepresentations like this one camouflage genocide with the linguistic cover of military operations.⁴⁴

As the nation edged toward the Civil War, the mass murder of California Indians became rampant. When an Indian was alleged to have killed a horse in 1859, the Euro-American bounty hunter H. L. Hall mounted a settler posse to exact retribution, murdering 240 native men, women, and children. The killings of women and children were deliberate and calculated and reposed on Hall’s justification that “a nit would make a louse” (that is, Indian children had to be killed to prevent the future reproduction of more unwanted Indians). Before the expedition was mounted, Hall interviewed volunteers, rejecting any who voiced compunction about killing Indian women and children. He later said about the massacre that “all the squaws were killed because they refused to go further. We took one boy into the valley, and the infants were put out of their misery, and a girl ten years of age was killed for stubbornness.” By 1860, California’s superintendent of Indian Affairs could relate that “the killing of Indians is a daily occurrence,” and the following year, the new superintendent reported that Indians “are now being hunted down like wild beasts and killed” by settlers in actions like the December 1862 massacre of 108 native people.⁴⁵

Settler-indigenous interactions in Oregon reflected an analogous pattern. The August 1853 death of a miner in southwestern Oregon became the occasion for settler resolutions demanding (as a contemporary observer wrote) “the Extermination of the Indian race.” The head of a speculators’ group, named Miller, coveted land on the south bank of the Chetko Indians’ land. When the Chetko denied him his request, he and his posse attacked and killed fifteen Chetko and torched their villages. Because the Chetko were not legally qualified to testify against Miller in court, he was able to consolidate his claim to the south bank land. With their backs pressed against the wall, the Chetko conducted winter raids simply to stay alive, in the course of which eleven Chetko had been killed by 1854. These and similar raids by Oregon’s indigenous population bolstered the settlers’ calls for outright annihilation of native populations. Much as in the case of the Modocs, all indigenous persons were targets of extermination whether or not they posed a threat to the lives of whites. Local militias killed not only Indians accused of raiding livestock but “friendly Indians” (in this case, natives living under peace treaties with the federal government). The cold-blooded murder of as many as 106 friendly Indians had the predictable effect of provoking war with other native groups. In short, as historian Gray Whaley has observed, the local militias and their civilian supporters did not want amicable relations with native peoples; they “wanted extermination, not treaty settlements,” and their indiscriminate attacks on native men, women, and children fomented military conflict with them.⁴⁶

For Whaley, the concept of “settler colonialism” has limited explanatory value. He instead prefers the term “settler folk imperialism,” which furnished the “ideological framework” within

⁴⁴ Madley, “California and Oregon’s Modoc Indians,” 102-103, 120. The fateful linkage between war and genocide has been decisively proven: in the 20th century genocides involving the Armenians, European Jews, Bosniaks, and Tutsis, military conflict was the major trigger and enabler of mass death. So far as humanitarian crimes are concerned (i.e., crimes having nothing to do with military objectives), the terminology of warfare is frequently used to legitimize mass killing. The Nazis are an example par excellence of this linguistic perversion. Well before the invasion of the USSR they had identified Jewish noncombatants on Soviet territory as military targets, then later conflated them with anti-German partisans and saboteurs. See the discussion in Herbert Jäger, *Verbrechen unter Totalitären Herrschaft: Studien zur nationalsozialistischen Gewaltkriminalität* (Freiburg i.B.: Walter Verlag, 1967), 352-379.

⁴⁵ Quoted in Kiernan, *Blood and Soil*, 353-354.

⁴⁶ Whaley, *American Folk Imperialism*, 136-137, 139.

which white settlers came to accept the genocide of native peoples as an option preferable to assimilation. The ideology of folk imperialism offered an influential rationale for genocide, holding that total eradication of native peoples would serve the well-being of settler communities. Stoked with this folk imperialism, local militia leaders and their men, the Oregon press, and state politicians all clamored for the extermination of Oregon's native population. When the US Army opposed this policy (the federal government supported assimilation of native peoples), Oregon newspapers renewed their demands for physical annihilation, berating the army for its softness and issuing pleas to President Franklin Pierce to sack the Commanding General of US forces in the Oregon Territory, John Wool, who had proven a vocal critic of militia attacks on Indians.⁴⁷

By 1860, California's Indian population had declined from 100,000 to 32,000 under the pressures of slavery and mass murder. Even then, genocide continued to engulf Native Americans. Bounties for Indian scalps advertised in local newspapers launched new waves of mass murder from 1859 to 1861 as claimants brought mountains of their grisly relics to the state legislature for redemption. Nor were friendly Indians, like the Wiyots on Indian Island, safe from extermination: in an unprovoked attack, settler volunteers murdered nearly all of the Wiyot women and children. Although these and other assaults on Indians were often committed by settlers, federal troops (who had refused to support militia actions against native peoples in Oregon) sometimes intervened—in support of Indian killing. A federal investigator wrote that “[U.S.] troops were sent out to aid the settlers in slaughtering the Indians.” He continued:

By means of mounted howitzers, muskets, Minie rifles, dragoon pistols, and sabers, a good many were cut to pieces. But on the whole, the general policy of the government was pacific. It was not designed to kill any more Indians than might be necessary to secure the adhesion of the honest yeomanry of the state.⁴⁸

While we cannot prove it from the scant documentary evidence at our disposal, it seems likely that Lemkin had such incidents in mind as he pondered his study of genocide in world history. His research assistant's reference to the “forceful eviction from fertile valleys into barren mountains where I[ndians] starved” assuredly alludes to the widespread practice in California of native eviction from ancestral lands into areas inhospitable to agriculture or hunting/gathering.⁴⁹ When starving native peoples raided settler livestock in a desperate effort to survive, they were butchered in droves by settler militias. Similarly, the “wanton murder and milit[ary] action against Indians who refused to leave, rebelled or returned occasionally to get food” mentioned in the memorandum to Lemkin implicates civilian-settlers in the genocide of native peoples.

A Closer Look at Lemkin's Thinking about Settler Genocide in North America

The “southern removal cases (aftermath),” “failure...to protect reservations against white intrusion,” and “land cessions” referenced in the research memo all involve contributions by civilian settlers to Native American extermination. Unlike the example of the California and Oregon Indians, however, the perpetrators in the actions above frequently used techniques of genocide other than physical killing. Lemkin derived these techniques from his taxonomy of genocide in chapter 9 of *Axis Rule*, transferring them from Nazi occupation policy to the North American frontier. The “southern removal cases” demonstrate the inextricable relationship between federal authorities, state governments, and settler demands for Indian land in the process of Native American extermination. Reflecting an amalgam of Lemkin's political, physical, and economic techniques of genocide, southern governments acting on Congress's Federal Indian Removal Law of 1830—a law passed, in President Andrew Jackson's words to the Choctaws, “to sustain the States in the exercise

⁴⁷ Whaley, *American Folk Imperialism*, 140-141.

⁴⁸ Quoted in Kiernan, *Blood and Soil*, 354. In this last sentence the writer implies that mass killing of Indians by federal troops extended only so far as was necessary to placate the settlers, an assertion that, if true, highlights the deadly plexus of federal-state-settler interaction for native peoples.

⁴⁹ See e.g., Brendan C. Lindsay, *Murder State: California's Native American Genocide, 1846-1873* (Lincoln: University of Nebraska Press, 2015).

of their right” to seize native lands—nullified tribal governments, laws, and elective bodies. They imposed taxes on Indian communities, deprived them of the right to vote or testify at trial, and sold Indian land to white settlers. The memorandum sent to Lemkin by his research assistant cites the “aftermath” of removal as a special focus of the planned chapter on North American genocide. The aftermath, of course, was mass death of Indians evicted from their lands on the trek westward, in the course of which 20% of the Choctaw nation and as much as 25% of the eastern Cherokees perished. 700 of the 3,000 Creeks expelled from Alabama died during their forced march. Many Indian victims succumbed to the harsh conditions of the journey to Oklahoma, while others were carried away by cholera outbreaks; however, thousands were killed by federal troops and militia members during roundups.⁵⁰

Direct killing of native peoples during roundups preparatory to expulsion falls within the physical type of genocide identified by Lemkin in *Axis Rule*, i.e., genocide by means of “endangering of health” and “mass killings.” The abolition of tribal government and law, however, would match his description of political genocide. Seizure of and expulsion of native peoples from their ancestral lands, on the other hand, meet the criteria of the economic form of genocide (“the destruction of the foundations of the economic existence of a national group [that] necessarily brings about a crippling of its development”).⁵¹ In short, as he planned his three-volume history, Lemkin was mapping his categories of genocide from *Axis Rule* onto the interactions between Euro-Americans and native peoples.⁵²

The nexus between land policy and genocide is particularly complex in Lemkin’s approach to the American frontier. In his assistant’s memo, we read the following summary of research conducted:

Obtained material on land-cessions and its genocidal aspects (on cards).
Comparison of land policies of various colonial powers
Land policy of US. – Treaty-making and breaking. Failure to provide for uprooted Indians, to protect reservations against white intrusion. The legal fiction.⁵³

What did Lemkin’s assistant mean by “the legal fiction?” The phrase appears again on a handwritten notecard, ostensibly prepared by this same researcher, on which we read:

Indians (non-Spain)
Policy towards I[ndians] – post colonial
Treaties – were made as in colonial period
U.S. gov’t recognizing I[ndian] land titles. [99]
Congress had jurisdiction over all Indian affairs.
In 1871 – *fiction of Indian nationhood abandoned*. Thereafter “agreements” not treaties were made. [see p. 100 for examples of treaties].
By 1890 most Amer. land was in white hands [107].
Land cessions left no provision for settlement of displaced I[ndians] [107].⁵⁴ (emphasis added)

What the author of the notecard refers to is the decision by Congress in 1871 to deprive Indians of their status under law as nations eligible to negotiate treaties with the federal government. The

⁵⁰ Anthony F. C. Wallace, *The Long, Bitter Trail: Andrew Jackson and the Indians* (New York: Hill and Wang, 1993), 77-83; James Wilson, *The Earth Shall Weep* (New York: Grove Press, 2000), 166; Kiernan, *Blood and Soil*, 332-333.

⁵¹ Lemkin, *Axis Rule*, 82-85.

⁵² As one of the reviewers of this article perceptively noted, Lemkin may also have interpreted colonial genocide as a crucial step toward the Nazi Holocaust of the war years. Here, I have followed a strict chronology that situates Lemkin’s Madrid presentation and *Axis Rule* as influences on his world genocide project. The influence, of course, could be in the other direction, much as Hannah Arendt had argued in *The Origins of Totalitarianism*.

⁵³ AJHS, Research assistant to Lemkin, May 25, 1948.

⁵⁴ AJHS, Indians (non-Spain), undated.

text of the law reads: “[H]ereafter no Indian nation or tribe...shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”⁵⁵ As a result, the federal government was able to seize native lands without their consent (which would have been required if Indians enjoyed legally protected rights as sovereign nations). Legal scholar William Bradford relates the fate of native peoples in the aftermath of this Congressional decree:

Scores of tribes, their numbers reduced by war, disease, and starvation, were forced onto land reservations in the 1870s and 1880s. The surviving three hundred members of the last belligerents, the Chiricahua Apache, surrendered unconditionally in 1887 after the murder of three thousand of their number.⁵⁶

At the same time, as tribes like the Chiricahua were decimated and forced onto reservations, Indian territory disappeared into the hands of Euro-Americans avid for cheap land. In 1887, 138 million of the 2 billion acres of the US landmass were tribal lands. By 1934, Indian holdings had declined by 90 million acres in a process that Bradford calls “legal theft.”⁵⁷ Lemkin was unquestionably aware of this context of expropriation leading to the destruction of native patterns of existence as the substance of his three-volume world history ripened in his mind, nor can there be much doubt that he regarded land cession in North America as genocidal.

We ought not lose sight of the fact that abandonment of the “legal fiction of Indian nationhood,” while effected by federal law at the center, was driven by civilian-settlers at the periphery. So long as settlers voted in national elections, they could influence Washington’s policies. This was certainly the case in the destruction of native peoples in California, where federal troops reinforced settler militias in their wars against Indian men, women, and children. It was equally true as a propulsive force behind the Congressional Act of 1871 stripping Indians of their status as sovereign nations. Passage of the Homestead Act of 1862 (giving 160 acres of public land to adult US citizens who were heads of households for a nominal fee) could not blunt the ravenous demands of settlers for more land, which would now come at the Indians’ expense. Settler pressure eventuated in passage of the 1871 Act and further plunder of native holdings. This history exposes as an untenable falsehood the 1953 statement of the U.S. solicitor general that genocide “has never existed in this country” because it was impossible “under our form of government.” As Lemkin himself understood, genocide not only *could* happen in the USA, it *did* happen there, and precisely *because* of democratic pressures that induced the federal government and state governments to bow to the expressed will of the people. In Lemkin’s view by the late 1940s if not before, American democracy was sometimes genocidal.

Conclusion

Several conclusions follow from the argument of this essay. First, it is clear that Lemkin’s concept of genocide existed in embryo as early as 1933 and that, while the racist chauvinism expressed in *Mein Kampf* and Nazi persecution of German Jews were significant stimuli of it, the essential features of Lemkin’s idea were not exclusive to Nazism. Second, both Lemkin’s Madrid paper and chapter 9 of *Axis Rule* limned a concept of genocide in which the destruction of a group’s national pattern, rather than the physical killing of its members, was the decisive factor. Third, when we read these two sources in juxtaposition with Lemkin’s notes for his treatise on the world history of genocide, his belief that Euro-American treatment of native Americans was genocidal is manifest. Fourth, the conduct Lemkin identified as evidence of genocide in the notes for his uncompleted study often involved the actions of civilian-settlers on the frontier, who were able to

⁵⁵ Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566, accessed October 18, 2018, <https://www.law.cornell.edu/uscode/text/25/71>.

⁵⁶ William Bradford, “Beyond Reparations: An American Indian Theory of Justice,” *Ohio State Law Journal* 66, no. 1 (2005), 24n124, accessed October 18, 2018, https://kb.osu.edu/bitstream/handle/1811/70996/OSLJ_V66N1_0001.pdf.

⁵⁷ Bradford, *Beyond Reparations*, 26. An accelerant to expropriation was the “General Allotment Act of 1887,” which partitioned communally-owned native lands into parcels doled out to individual Indians for their private use. According to Bradford, “allotment abolished Indian reservations as autonomous and integral sociopolitical entities.” Bradford, *Beyond Reparations*, 25.

harm native peoples through their own violent attacks or by proxy, such as importuning federal and state authorities to do their bidding. From this premise, we may infer that Lemkin believed civilian-settlers committed genocide on the North American frontier.

What was the harm these civilian-settlers did? As legal scholar David Luban argues, and as Lemkin putatively thought, the harm inflicted by genocide exceeds “the loss of the slaughtered individuals” but represents “an attack on human group plurality itself.” Genocide is the “crime of crimes” for a reason: it “diminishes humanity” by robbing it of a group’s “ways of life, imaginative visions of the good worked out collectively...”⁵⁸ As Lemkin himself wrote in *Axis Rule*, “the destruction of a nation...results in the loss of its future contributions to the world.”⁵⁹ The victim, then, is as much the world community as the shattered group itself. Douglas Irvin-Erickson identifies the legal good Lemkin was striving to defend as “national-cultural diversity” or “people’s ability to freely exercise their subjectivity.”⁶⁰ Irvin-Erickson quotes Lemkin’s remark that “world culture is like a subtle concerto” that “is nourished and gets life from the tone of every instrument.”⁶¹ This conception of the interest at stake in the criminalization of genocide—namely, cultural diversity, freely expressed subjectivity, the nourishing of world culture through the individual cultures constituting it—reveals Lemkin as an intellectual scion of the great nineteenth century German historicists, Herder and (in jurisprudence) Friedrich Karl von Savigny.⁶² Like them, Lemkin wanted to protect the distinctive ethos of cultures (the *Volksgeist*, or “spirit of a people,” as Savigny termed it), which were singular and irreducible. North American settlers laid under siege this inestimably precious good.

For genocide scholar Patrick Wolfe, settler colonialism was not inevitably genocidal; it tended to become so only when the dispossession of native peoples was “in crisis.”⁶³ Whitt and Clarke suggest, by contrast, that settler colonialism *was* inherently genocidal.⁶⁴ So long as Indians occupied land that settlers coveted, the antagonists tended to move with mounting velocity toward genocidal outcomes. According to Gray Whaley, on the Oregon and California frontiers the assimilationist policy of a relatively weak federal authority yielded to a crudely utilitarian folk imperialism, one marked by an ideology of absolute destruction of native peoples.⁶⁵ Settlers had arrived at the belief that genocide was desirable if it served their interests.

A dynamic internal to settler colonialism seems to push it toward genocide. Lemkin understood—perhaps with an eye on Tolstoy’s dictum (in *Anna Karenina*) that “every unhappy family is unhappy in its own way”—that every genocide developed its own constellation of motives, in which hatred toward the victims might be incidental. “Lemkin’s point,” writes Irvin-Erickson, “was that often it was the benefits gained through genocide—not primordial hatred—that led people to support a genocide, to commit a genocide, or even to develop group hatreds and kill. This, of course, meant that every individual who participated in a genocide did so for a different reason.”⁶⁶

⁵⁸ David Luban, “Calling Genocide by Its Rightful Name: Lemkin’s Word, Darfur, and the UN Report,” *Chicago Journal of International Law* 7 (2006), 309-310, cited in Whitt and Clarke, *Bringing it Home*, 274-275.

⁵⁹ Lemkin, *Axis Rule*, 91.

⁶⁰ Irvin-Erickson, *Raphaël Lemkin*, 246.

⁶¹ *Ibid.*

⁶² While Lemkin was looking backward at a European historicist tradition, his thinking was anything but reactionary or derivative. Historian Dan Stone defends the originality and prescience of Lemkin’s thought, which anticipated the connections between colonialism, genocide, and the Holocaust decades before these linkages became objects of scholarly inquiry. Dan Stone, “Raphael Lemkin on the Holocaust,” in *The Origins of Genocide: Raphael Lemkin as a historian of mass violence*, ed. Dominik J. Schaller and Jürgen Zimmerer, (London and New York: Routledge, 2009), 102. The amplitude of Lemkin’s conception of genocide in the final decade of his life also pushes outward the boundaries of scholarship after Lemkin that constricted the analysis of genocide around the Holocaust as the “prototype.” See Woolford et al., ed., introduction to *Colonial Genocide in Indigenous North America*, 10.

⁶³ See *supra*, n. 16.

⁶⁴ As does John Docker in a follow-up article to his presentation to the US Holocaust Memorial Museum. John Docker, “Are Settler-Colonies Inherently Genocidal? Re-reading Lemkin,” in *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. A. Dirk Moses (New York: Berghahn, 2008), 81-101.

⁶⁵ Whaley, *American Folk Imperialism*, 143.

⁶⁶ Irvin-Erickson, *Raphaël Lemkin*, 242-243.

While there is much truth in Lemkin's assertion, settler violence toward Indians usually involved the desire for something the Indians possessed: land, resources, game, water, or—much later, in a sadly neglected episode in this elegiac history—oil. The journalist David Grann has recently told the story of the serial murder of Osage Indians in 1920s Oklahoma.⁶⁷ When oil was discovered beneath their land, the Osage for a time became one of the wealthiest groups in the world. Their new-found prosperity invited murderous schemes to wrest their property from them. The story Grann narrates is important; however, it should be set within the wider context of the fraud, kidnapping, and homicide that befell native peoples in "Indian country" long after the frontier was closed in 1890.⁶⁸ According to historian Angie Debo, "forgery, embezzlement, criminal conspiracy, misuse of notary's seals, and other crimes against Indian property continued with monotonous regularity, but these grosser and slightly more dangerous forms of swindling were not as common as...investing Indian money in worthless real estate, padding guardians' accounts, and allowing excessive fees to guardians and attorneys."⁶⁹ In the midst of such predation, murder, too, became a commonplace of modern Indian life. Legal scholar Rennard Strickland has referred to the use of the law to destroy native lives and cultures as "genocide-by-law,"⁷⁰ an appellation with which Lemkin would likely have been in agreement. Debo writes:

Some spectacular crimes occurred, such as the dynamiting of two Negro children as they slept, in order that the conspirators might secure title to their Glenn Pool [oil] property by forged deeds; and many sinister stories were told of Indians who died under suspicious circumstances after bequeathing their property to white men. An epidemic of such deaths broke out among aged Choctaws..., and the Federal officials became convinced of an organized plot whereby the Indian made out a will to the land dealers in return for a ten-dollar monthly pension for the remainder of his life. A suspicious fatality followed the making of such wills, and in several cases carbolic acid or ground glass was found on the premises. Several prominent real estate dealers were arrested, but the mystery of the Choctaw murders was never solved.⁷¹

Is it too much to see in this appalling chronicle of human evil the spoor of the frontier settler? I don't think so. The mentality of Euro-American settlers coalesced through a good century or more of interaction with Indians, during which settlers in one generation after another seized Indian possessions for themselves, often doing so violently and with impunity. This mindset did not vanish when the frontier closed. Instead, it persisted well into the 20th century in the form of the ghastly abuses Debo retails.

Lemkin never finished what would likely have been his magnum opus, his three-volume world history of genocide. He died of a massive heart attack on 42nd Street in New York City on August 29, 1959, leaving behind only the fragmentary outlines and notecards of his chapter devoted to genocide on the North American frontier. Six years before Lemkin's death, another figure interested in the historical mistreatment of the American Indian (and one who, like Lemkin, died far too young) penned the words appearing as an epigraph to the present essay. Felix Cohen, the architect of the "Indian New Deal" of the 1930s and the creator of modern Federal Indian Law as a disciplinary field, was a fierce advocate of Native American rights. He likened the Indian in American life to the Jews in Nazi Germany. For Cohen, the Indian was a "miner's canary" much

⁶⁷ David Grann, *Killers of the Flower Moon: the Osage Murders and the Birth of the FBI* (New York: Vintage 2018).

⁶⁸ The destruction of native American lives continues at the time of this writing, which coincides with the release on June 3, 2019, of the Canadian government's report on missing and murdered indigenous women and girls. In their report, the authors refer unequivocally to the murders as a "Canadian genocide." "Decades of missing Indigenous women a 'Canadian genocide' – leaked report," <https://www.theguardian.com/world/2019/may/31/canada-missing-indigenous-women-cultural-genocide-government-report>.

⁶⁹ Quoted in Strickland, "Genocide-at-Law: An Historic and Contemporary View of the Native American Experience," *University of Kansas Law Review* 34 (1986), 733.

⁷⁰ Strickland, *Genocide-at-Law*, 713-755.

⁷¹ Quoted in Strickland, *Genocide-at-Law*, 734.

like the German Jew: how each was treated was a measure of a society's political health.⁷² The sickening of the miner's canary betokened that society's loss of faith in democracy.

Genocide in North America as Lemkin understood it opens Cohen's metaphor in a different direction. Rather than the sign of a flagging commitment to democracy, settler genocide shows that popular government—government of the people, by the people, and for the people—can be as repressive of minority groups as authoritarian or totalitarian systems, particularly in societies with inadequate safeguards for their rights. Gray Whaley's verdict about civilian genocide in Oregon applies more generally to Euro-American encounters with native peoples: "The case of Oregon... suggests that even a system premised on the natural rights of man could foster genocide when 'the people' wield democratic values against those defined as outside the protection of those rights."⁷³ In a word, settler genocide reveals how *illiberal* democracy has sometimes been in the past and, without vigilant legal protections for minority groups, may yet become in the future.

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⁷² Felix Cohen, "The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy," *Yale Law Journal* 62 (1953), 349, quoted in Strickland, *Genocide-at-Law*, 719.

⁷³ Whaley, *American Folk Imperialism*, 143.

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