

**EPILOGUE****LAW AS PREJUDICE: CODIFYING THE OTHER****Isabella Spano\*****Abstract**

*Recalling the theme of the present Research Series Law and Prejudice, this closing article harnesses the conceptual framework proposed by Everett Zimmermann in his semantic analysis of “Pride and Prejudice” to examine the interplay between law, pride, and prejudice. In Zimmermann, “pride” and “prejudice” are both opposite and interconnected qualities, like communicating vessels characterized by the same egoistic “self” as their core. Transposing this analysis into the legal domain, the article explores how the law, akin to “pride,” can reproduce the latter’s characteristics of detachment and perceived superiority, ultimately facilitating attempts at codifying “prejudice.” In this dynamic, the law—through its normative power and façade of objectivity—can become an instrument of marginalization, segregation, and discrimination.*

*This article contends that the law’s supposed objectivity and normative authority transform it into a tool of superiority, not unlike pride in Zimmermann. By examining this dynamic, the article reveals how the law has been used numerous times to justify and normalize prejudice, creating the paradigm of “law as prejudice,” beyond “law as pride.” Through the lens of “othering,” the article illustrates how the law segregates by codifying the differences between “the Self” and “the Other,” sometimes under the guise of protection or benevolence, thereby justifying exclusion and discrimination. The analysis is anchored in the case study of the Canadian settler policies of assimilation of Indigenous Peoples, which show the destructive normative power of the “law as prejudice” paradigm. The article offers insights into the complex relationship between law, pride, and prejudice, and the pivotal role of the egoistic Self as “lawmaker of othering.”*

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**Keywords:** Pride; Prejudice; Othering; Codification; Indian Act; Indian Residential Schools; Colonization; Genocide.

### *Résumé*

*Rappelant le thème de la présente collection de recherche Droit et Préjugés, cet article de clôture exploite le cadre conceptuel proposé par Everett Zimmermann dans son analyse sémantique d'« Orgueil et préjugés » pour examiner l'interaction entre le droit, l'orgueil et les préjugés. Selon Zimmermann, l'« orgueil » et les « préjugés » sont à la fois des qualités opposées et interconnectées, comme des vases communicants caractérisés par le même « soi » égoïste en tant que noyau. Transposant cette analyse dans le domaine juridique, l'article explore la manière dont le droit, proche de l'« orgueil », peut reproduire les caractéristiques de détachement et de supériorité perçue de ce dernier, facilitant finalement les tentatives de codification des « préjugés ». Dans cette dynamique, le droit, par son pouvoir normatif et sa façade d'objectivité, peut devenir un instrument de marginalisation, de ségrégation et de discrimination.*

*Cet article soutient que la prétendue objectivité et l'autorité normative du droit le transforment en un outil de supériorité, un peu comme l'orgueil pour Zimmermann. En examinant cette dynamique, l'article révèle comment la loi a été utilisée à de nombreuses reprises pour justifier et normaliser les préjugés, créant le paradigme de la « loi comme préjugé », au-delà de la « loi comme orgueil ». À travers le prisme de l'« altérisation » (othering), l'article illustre comment le droit opère une ségrégation en codifiant les différences entre « le soi » et « l'autre », parfois sous le couvert de la protection ou de la bienveillance, justifiant ainsi l'exclusion et la discrimination. L'analyse est ancrée dans l'étude de cas des politiques canadiennes de colonisation visant à l'assimilation des peuples autochtones, qui montrent le pouvoir normatif destructeur du paradigme de la « loi comme préjugé ». L'article donne un aperçu de la relation complexe entre la loi, l'orgueil et le préjugé, ainsi que du rôle central du « soi » égoïste en tant que « législateur de l'altérisation ».*

**Mots-clés :** Orgueil ; Préjugés ; Altérisation; Codification ; Loi sur les Indiens ; Pensionnats indiens; Colonisation; Génocide.

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### **Introduction: Why Law as Prejudice?**

In his analysis of the title of the famous 1813 Jane Austen novel “Pride and Prejudice,”<sup>1</sup> Everett Zimmermann claims that these two terms are both opposite and interconnected, creating tension and interaction of meanings.<sup>2</sup> On the one hand, if “pride” is detachment from others, “prejudice” is the obsessive involvement in their existence. As Zimmermann puts it, “[in pride] *the self* is not seen as involved with *others* but as superior to them,” while “[in prejudice] *the self* is completely involved with *others*, and everything is interpreted as it affects [it].”<sup>3</sup> However, on the other hand,

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<sup>1</sup> Jane Austen, *Pride and prejudice* (Open Road Media, 2016).

<sup>2</sup> Everett Zimmermann, “Pride and Prejudice in *Pride and Prejudice*” (1968) 23:1 *Nineteenth-Century Fiction* 64–73 DOI: <10.2307/2932317>.

<sup>3</sup> *Ibid* at 65–66. My emphasis.

pride and prejudice are not simply opposites; rather, they could be seen as communicating vessels that feed into one another and contain the same core ingredient—the egoistic “self.”<sup>4</sup>

In the theme of this Research Series—*Law and Prejudice*—“law” substitutes “pride” in the famous alliteration, coming itself in tension with prejudice. However, if, in this phrase, pride disappears from the eyes of the reader, it arguably lingers in the shadow of its substitute: the *law*. This short article, closing the series, reflects, on the one hand, on how the law can inherit the detachment and superiority characteristic of pride—particularly through the “objectivizing” and sterilizing effects of codification—and, on the other end, on its subsequent interactions with prejudice.

Then—one might ask—why “law as prejudice”, rather than “law as *pride*”?

Reconsidering the interconnectedness of pride and prejudice in Zimmerman, the title of this article encapsulates the final moment of the dynamic relations observable among law, pride, and prejudice. This piece will argue that “prideful” law is characterized by a peculiar normative power, which has historically been used as an authoritative tool to create and normalize prejudice in the many forms of marginalization, segregation, and discrimination. Therefore, to reach the titular “law as prejudice” paradigm, the law *must first become* pride’s normative vessel. In this metamorphosis, the law turns into an instrument of logical regulatory authority and normative detachment to enact the identitarian superiority of pride’s core egoistic self. The presumption of the truthful and objective nature of the law makes it a useful medium to justify and normalize prejudice through codification. And it is through the codification of prejudice that the prideful law, at last, also becomes prejudice’s vessel. Hence, the concept of “*law as prejudice*” emerges, not

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<sup>4</sup> *Ibid* at 66. (“Both qualities, pride and prejudice, result in a severe limitation of human vision and are essentially selfish in that they start from an egoistic attitude; one either severs oneself from others or limits one’s concern for them to narrow self-interest.”)

unlike the communicating vessels that are “pride” and “prejudice,” with each element—law, pride, and prejudice—necessary to the existence of the titular paradigm. While the title focuses on the final moment of this dynamic, once the pivotal “law as prejudice” is reached, both “law as pride” and “law as prejudice” coexist and feed into one another, like communicating vessels.

This article seeks to demonstrate the consequences of the finalization of the “law as prejudice” paradigm through the analysis of a case study in which the law codifies “the Other,” normatively separating it from “the Self,” the first inferior to the second.<sup>5</sup> This phenomenon, known as “othering,” is the process of marginalization of one group, often with the goal of reaffirming the dominant group’s superiority or reinforcing its identity. In the dynamic of othering through lawmaking, the law serves to reinforce the identity and superiority of the prideful Self, in tension with the identity of the subordinate Other.

While recognizing the existence of a vast array of potential case studies embodying the paradigm of “law as prejudice,” this article makes the decision to limit its scope to the analysis of a case of Canadian law codifying “otherness.” The focus of this analysis is the legal framework created by Canadian settler authorities to assimilate Indigenous Peoples, in particular, the Indian Act and its 1920 Amendment, which made the attendance of Indigenous children to either day or residential schools mandatory. As concluded in the final report of the Truth and Reconciliation Commission of Canada, this amendment contributed to and systematized the cultural Genocide of Indigenous Peoples. As this article will argue, the settler lawmakers weaponized a rhetoric of “benevolence” to justify the assimilation of Indigenous Peoples, appropriating Indigenous youth,

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<sup>5</sup> In this article, the Self/Other dichotomy refers to those creating and codifying prejudice (also referred to as “lawmakers of othering”) as “the Self,” and to those whose identity is codified as “the Other.” This dynamic is characterized by a stark power and privilege imbalance, where normative power is a prerogative of the egoistic Self alone. To refer to the “categories” of the Self and the Other, the article will use the pronoun “it.”

and silently condemning Indigenous cultures to obscurity and erasure. This plan of “salvation” clearly codified the inferiority of Indigenous identities (the Other) to the superior Euro-Canadian settler identity (the Self), a “charitable and benevolent” lawmaker of othering. Here, the “law as prejudice” paradigm normalized and justified Indigenous Peoples’ death by assimilation through the codification of otherness.

In Part 1, the article will define the concept of othering, laying down different forms that othering through codification can take. Then, the Indian Act, its 1920 Amendment and other relevant policies will be introduced, analyzing the rhetoric of the “charitable and benevolent” lawmaker and its aim to assimilate Indigenous Peoples within the Euro-Canadian settler identity. Part 2 focuses on the consequences of policies of othering, reporting the experiences of survivors as evidence to unmask the normative lies of “benevolent othering.” To conclude, the article looks back at the paradigm of “law as prejudice” through the lens of the case study. It also includes considerations of the intergenerational consequences of othering codified and mandated by law. In the cyclical nature of systems of othering, the groups selected to be the Other—through space and time—are selected to be the *Agnus Dei* (sacrificial lamb) to reaffirm the identity of the Self.

## **Part 1. Codifying the Other: A Canadian Case Study**

### *1.1. Understanding Othering*

Othering has been described as “the social and/or psychological ways in which one group excludes or marginalizes another group.”<sup>6</sup> In the construction of the Other (the “dominated”), the Self (the “dominant”) seeks the reaffirmation of its own identity. This dynamic sees the Self as anything the

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<sup>6</sup> Bill Ashcroft, Gareth Griffiths & Helen Tiffin, *Postcolonial Studies: The Key Concepts*, 3rd ed (London: Routledge, 2013) at 188.

Other is not and vice versa, in complementarity. Hence, as proposed by Marissa Sonnis-Bell, the Self/Other dichotomy is part of a whole, “inherently intertwined and involved in the progress of identity formation. Defining the Other, we also define the Self, and in defining what is not of ‘us’ we are better equipped for self-preservation.”<sup>7</sup> However, if the process of identity formation sees a complementarity between the Self and the Other, the power imbalance in the determination of both identities favours the Self to the detriment of the Other’s self-determination and agency. And so, othering becomes a tool of the powerful Self to encase the othered ones in a “taxidermy of identity,”<sup>8</sup> where a solid identitarian construct is fixed upon the Other, whose understanding of its own identity is confined to a “persona,”<sup>9</sup> or a caricature created by the dominant Self.

Othering and its codification can take different forms and be supported by different justificatory mechanisms. However, different othering processes have common characteristics, such as the necessary differentiation of the Other from the Self, a justifying argument to support one’s inferiority to its counterpart, and the ultimate goal of eliminating the Other through segregation or death—be it a civil death, a physical death, or another.

In certain cases, otherness is codified and justified by arguments for the protection of the Self from the Other. The Self, in this logic, fears for itself and establishes mechanisms for safeguarding its own people from the harms of the “malicious” Other. In these cases, victims of othering are attributed labels—such as “foreigners,” “illegal aliens,” and “terrorists”—to categorize them as dangerous enemies seeking to subvert the status quo and eliminate the

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<sup>7</sup> Marissa Sonnis-Bell, “Introduction: Arbitrary Constructions and Real Consequences of the Self and Others” in Marissa Sonnis-Bell, David E Bell & Michelle Ryan, eds, *Strangers, Aliens, Foreigners: The Politics of Othering from Migrants to Corporations* (Leiden: Brill, 2019) 1 at 2.

<sup>8</sup> Fred Dervin, “Discourses of Othering” in *The International Encyclopedia of Language and Social Interaction* (John Wiley & Sons, Ltd, 2015) 1 at 2.

<sup>9</sup> Here, the use of the word “persona” hints at its Latin meaning, “mask” or “character.” In the dynamics of othering, the persona—the character—is imposed on the Other, who is reduced to a mask of itself. See e.g., Frantz Fanon, *Black Skin, White Masks*, translated by Charles Lam Markmann (London: Pluto Press, 2008).

“innocent” Self.<sup>10</sup> Another form of othering looks at a (pseudo-)scientific and “biological” differentiation of the Other from the Self. This is the case of eugenics and pseudo-scientific arguments being used to justify acts of segregation, and sometimes even Genocide.<sup>11</sup> The proposed motivation rests on the dehumanization and objectivized inferiority of the Other, through the creation of hierarchies based on identity markers, such as nationality, ethnicity, race, and so on. Lawmakers of othering can also justify the exclusion and segregation of othered people through the lens of a so-called saviour narrative. In these instances, differences and differential (discriminatory) treatments are codified to allegedly “help” the Other—to whom the othering narrative ascribes stereotyped needs (e.g., needing to be “civilized;” needing religious salvation)—

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<sup>10</sup> One example is the case of the Rohingya people who have been rendered stateless by Burmese law and persecuted for years. Rohingya people’s existence itself has been denied (see e.g., Hannah Beech, “No Such Thing as Rohingya’: Myanmar Erases a History”, *The New York Times* (2 December 2017), online: <<https://www.nytimes.com/2017/12/02/world/asia/myanmar-rohingya-denial-history.html>>.) Burmese authorities have categorized Rohingya people as illegal aliens from Bangladesh, labelling them with the epithet of “Bengali Muslims.” As a consequence, Rohingya people have been denied citizenship and civil rights. Moreover, Rohingya people—labelled foreign, illegal aliens and even terrorists—have been the victims of systemic violence, ethnic cleansing, and genocide, leading to hundreds of thousands of deaths and displacements. On the treatment of Rohingya people in Myanmar, Yasmin Ullah, a Rohingya human rights activist, said, “Being a Rohingya itself is a crime, it seems.” (Musée de l’Holocauste Montréal, “Yasmin Ullah Human Rights Tool” (18 February 2019) at 00h:02m:19s, online (video): <<https://www.youtube.com/watch?v=QmMLp3FFD2o&t=8s>>.) For more on the history of persecution of the Rohingya people see, e.g., Ronan 1976- Lee, *Myanmar’s Rohingya genocide: identity, history and hate speech* (London: I.B. Taurus, 2021); Azeem Ibrahim, *The Rohingyas: inside Myanmar’s hidden genocide* (London: Hurst & Company, 2016). On the form of othering of identity denial of Rohingya people see, Sakhawat Sajjat Sejan, “Strategic Denial of Rohingya Identity and Their Right to Internal Self-Determination” (2022) 59:3 *International Studies* 234–251.

<sup>11</sup> One example of such a dynamic of othering is the Holocaust, which saw eugenics being used by Nazi propaganda to normalize and justify the segregation and Genocide of European Jews. See e.g., United States Holocaust Memorial Museum, “The Biological State: Nazi Racial Hygiene, 1933–1939”, online: *Holocaust Encyclopedia* <<https://encyclopedia.ushmm.org/content/en/article/the-biological-state-nazi-racial-hygiene-1933-1939>>. Another example of justification of othering through eugenics is the creation and crystallization of ethnic identities by settler Belgium in Rwanda, separating Hutus, Tutsis, and Twas on the basis of pseudo-scientific theories of phrenology and craniology. This differentiation was used to justify the exclusion of Hutus (and Twas) from public office, education and more, on the basis of their “genetic” inferiority to the Tutsis. These were preferred by the colonizer and given positions of power, access to services, and education. These crystallized identities would later be the underlying cause for Tutsi persecution in independent Rwanda and, ultimately, the 1994 Genocide of the Tutsis. See e.g., Alison Liebhafsky Des Forges, *Leave none to tell the story: genocide in Rwanda* (New York; Paris: Human Rights Watch; International Federation of Human Rights, 1999). On the role of science and pseudo-sciences in genocide, see, e.g., Heike Becker, “Auschwitz to Rwanda: the link between science, colonialism and genocide”, *The Conversation* (26 January 2017), online: <<http://theconversation.com/auschwitz-to-rwanda-the-link-between-science-colonialism-and-genocide-71730>>.

through the creation of identity-specific policies. These frameworks are created *ad hoc* by the “benevolent” Self for an infantilized and “inferior” Other.

This article will focus specifically on this latter example, which will be referred to as “benevolent” othering. The following sections will analyze the rhetoric of “settler saviourism” and the intergenerational consequences of the codification of otherness, in the case of Canadian settler authorities and their policies to regulate relations with Indigenous Peoples.<sup>12</sup>

### *1.2. Through the Eyes of the Self: The Lies of Benevolent Othering*

Lawmakers of othering have justified their actions as a form of altruism throughout history. In this logic, the Self seeks to “help” the targeted group—the Other—to either integrate within society, to achieve a predetermined potential or to meet arbitrarily attributed needs, all imagined through the identitarian lens of the Self. The justifying argument of “benevolent” othering permeates the dialectic that surrounds codification throughout its processes, from design to implementation. This attitude of benevolence and saviourism can be observed in Canadian policies regulating the relations between settlers and Indigenous Peoples.<sup>13</sup> Among these policies, it is possible to include the 1920 Amendment to the Indian Act of Canada (hereafter, “the 1920 Amendment”),<sup>14</sup> which mandated the attendance of all Indigenous children between the ages of seven and fifteen to “day, industrial or boarding schools.”<sup>15</sup>

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<sup>12</sup> While this article uses the terms “Indigenous” and “Indigenous Peoples,” cited sources may instead use the terms “Indian(s)” or “Aboriginal(s).” In particular, while the term “Indian” used in Canadian settler policies refers to First Nations, the term “Indigenous” chosen for this article seeks to encompass and recognize the experiences of First Nations, Inuit and Métis who have all suffered from the policies of assimilation that will be analyzed. This choice is also based on the language used by the UN Declaration On The Rights Of Indigenous Peoples.

<sup>13</sup> On the paradigms of “saviourism” and “benevolence” in Canadian colonial history see, e.g., Andrew John Woolford, *This benevolent experiment: Indigenous boarding schools, genocide, and redress in Canada and the United States* (Winnipeg: University of Manitoba Press, 2015).

<sup>14</sup> *Indian Act*, SC 1876, c 18, as amended by SC 1919-20, c 50 [1920 *Indian Act*].

<sup>15</sup> *Ibid* at s 10(1). The terms “industrial school” and “boarding schools” refer to different types of residential schools.

Adopting the point of view of the benevolent Self—if only for a moment—one might argue that the 1920 Amendment appears to be an innocuous provision to support the right to education of Indigenous children. It appears to be a good law from a benevolent lawmaker, who is trying to raise children from a condition of poverty and give them “an opportunity.” Shouldn’t these children, families, and communities be grateful? After all, the Amendment provides the establishment of schools dedicated to Indigenous children,<sup>16</sup> the attendance of which would be facilitated by the organization of government-funded transportation.<sup>17</sup> The 1920 Amendment also provided the creation of quality standards for buildings, staff, and teachings, which would all undergo official inspections.<sup>18</sup> Moreover, it even allowed the possibility for Indigenous representatives, such as Chiefs, to inspect the schools.<sup>19</sup>

Then why would such an *apologia* be misplaced? Is this not the norm? After all, it is normal for children to attend school. Is it not?

What the one-sided point of view of the Self fails to show the audience is much deeper than what transpires on the surface of this legal text. As suggested in this section’s title, othering comes with lies, and just like othering has normative power, so do its lies: lies that seep through social consciousness, blinding the observer. These same lies will be harnessed, as analyzed in the following sections, to promote settler authorities’ propaganda normalizing the violent but silent and hidden eradication of Indigenous identities and cultures through the appropriation of Indigenous youths and identities. In this rhetoric, the “charitable” settler Self saves the

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<sup>16</sup> *Ibid* at s 9(1).

<sup>17</sup> *Ibid* at s 9(3).

<sup>18</sup> *Ibid* at s 9(4).

<sup>19</sup> *Ibid* at s 9(5).

“uncivilized” and infantilized Indigenous Other by administering a benevolent death by assimilation.

### *1.3. Developing the Rhetoric of Benevolence: Before the Indian Act*

Residential and day schools for Indigenous children were already present in nineteenth-century Canada,<sup>20</sup> when a series of legislations, ultimately seeking to assimilate Indigenous Peoples, were adopted by settler authorities. Assimilation, however, had not always been the official goal of settler policies. According to historian John L. Tobias,<sup>21</sup> later endorsed by the 1995 Giokas report,<sup>22</sup> Canadian policies relating to Indigenous Peoples have historically followed three different goals—protection, civilization, and assimilation—all of which rested on the justifying quality of the settler Self’s benevolence and charitability.<sup>23</sup> According to Tobias:

These goals were established by governments which believed that Indians were incapable of dealing with persons of European ancestry without being exploited. Therefore, the government of Canada had to protect the person and property of the Indian [...], which meant that the Indian was to have a special status [...]. However, the legislation by which the governments of Canada sought to fulfil their responsibility always had as its ultimate purpose the elimination of the Indian’s special status. The means to achieve this goal was by training, that is, “civilizing” the Indian in European values[...]. Eventually, through this training, the Indian identity and culture would be eradicated, and the Indian would be assimilable [...].<sup>24</sup>

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<sup>20</sup> One notable example of an early day/residential school for Indigenous children is the Mohawk Institute, which operated first as a day school when it opened in 1828 and later as a residential school when it started boarding children in 1834. See Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The History, Part 1, Origins to 1939*, The Final Report of the Truth and Reconciliation Commission of Canada (McGill-Queen’s University Press, 2015) at 69–71.

<sup>21</sup> John L. Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy” in *Sweet promises: a reader on Indian-white relations in Canada* (Toronto: University of Toronto Press, 1991) 127.

<sup>22</sup> *The Indian Act Evolution: Overview and Options for Amendment and Transition*, by John Giokas (Royal Commission on Aboriginal Peoples, 1995).

<sup>23</sup> For considerations on the chronological development of these goals, see Tobias, *supra* note 21.

<sup>24</sup> *Ibid* at 127.

The final goal of assimilation was clearly stated by John A. Macdonald, the first prime minister of Canada, who claimed that “the great aim of [Canadian] legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit for the change.”<sup>25</sup> These policies also had the objective of codifying the identity of Indigenous Peoples as an inferior infantilized Other while upholding the superiority of the settler Self. This rhetoric was meant to justify the elimination of the identity of the Other and its metamorphosis into an idealistic construct of the Self for the Other’s own good as a charitable concession of the settler lawmaker of othering.

In 1857, the then-British Province of Canada passed the Gradual Civilization Act,<sup>26</sup> introducing and encouraging voluntary enfranchisement—the loss of one’s Indian status once deemed “fit” to be a member of the Canadian-settler society.<sup>27</sup> In order for an Indigenous man,<sup>28</sup> to become enfranchised, the Gradual Civilization Act required him to be literate in either English or French, to be free of debt, and to be deemed to have good moral character.<sup>29</sup> This legislation, as argued by Tobias, “set standards for acceptance that many, if not most, white colonials could not meet, for few of them were literate, free of debt, and of high moral character. The ‘civilized’ Indian would have to be more ‘civilized’ than the Euro-Canadian.”<sup>30</sup> Arguably, the requirements to be met

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<sup>25</sup> House of Commons, “Return to an Order of the House of Commons, dated 2<sup>nd</sup> May 1887”, *Sessional Papers*, No 20b (1887) at 37.

<sup>26</sup> *Act to Encourage the Gradual Civilization of the Indian Tribes in the Province, and to Amend the Laws Respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26 [*Gradual Civilization Act*].

<sup>27</sup> For more literature on “enfranchisement” and related critical concerns, see, e.g., *Ongoing Indian Act Inequality Issues: Enfranchisement*, by The Native Women’s Association of Canada (1995); Martin Cannon, “Revisiting Histories of Legal Assimilation, Racialized Injustice, and the Future of Indian Status in Canada” in *Aboriginal Policy Research: Moving Forward, Making a Difference* Aboriginal Policy Research Series (2013) 35; Robin Brownlie, “‘A better citizen than lots of white men’: First Nations Enfranchisement - an Ontario Case Study, 1918-1940” (2006) 87:1 *The Canadian Historical Review* 29–52 DOI: <10.1353/can.2006.0007>.

<sup>28</sup> Only men could be voluntarily enfranchised. The 1857 policy provided the automatic enfranchisement of “[t]he wife, widow, and lineal descendants of an Indian enfranchised[.]” *Gradual Civilization Act*, s. VIII.

<sup>29</sup> John S Milloy, “The Early Indian Acts: Developmental Strategy and Constitutional Change” in *The Early Indian Acts: Developmental Strategy and Constitutional Change* (University of British Columbia Press, 2007) 56 at 58.

<sup>30</sup> Tobias, *supra* note 21 at 130.

by Indigenous men looking to be enfranchised suggest an idealization of Euro-Canadian settler identity, which is the Self of this case study. The enfranchisement project launched by settler authorities was greatly unsuccessful, with only one Indigenous man obtaining enfranchisement under the 1857 law.<sup>31</sup> Settler authorities blamed the failure of enfranchisement policies on Indigenous leaders, leading to attacks on traditional Indigenous government systems portrayed by settlers as an obstacle to civilization.<sup>32</sup>

After the failed experience of the 1857 policy, the newly confederated Dominion of Canada passed the Gradual Enfranchisement Act in 1869.<sup>33</sup> The new policy integrated the antagonization of Indigenous government, with settler authorities believing that “[i]f the various systems of development were ever to produce the civilized Indian amenable to enfranchisement, then native self-government had to be abolished. It had to be shouldered aside and replaced by new institutions allowing unchallengeable departmental control.”<sup>34</sup> After 1869, the goal of settler policies shifted more clearly from civilization to assimilation, while maintaining a clear rhetoric of benevolence and charitability.<sup>35</sup>

#### *1.4. The Indian Act and its 1920 Amendment*

With its adoption, the 1876 Indian Act was meant to systematize settler policies regulating Indigenous Peoples in one text. As pointed out by the Truth and Reconciliation Commission of Canada (hereafter, TRC or “the Commission”), “[p]oliticians justified the Indian Act as a necessary instrument for protecting First Nations people from exploitation while civilizing them, but, in

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<sup>31</sup> Milloy, *supra* note 29 at 61.

<sup>32</sup> *Ibid.*

<sup>33</sup> *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6 [Gradual Enfranchisement Act].*

<sup>34</sup> Milloy, *supra* note 29 at 61.

<sup>35</sup> Tobias, *supra* note 21 at 131.

reality, it was a tool for the autocratic administration of their lives.”<sup>36</sup> In its initial phases, the Indian Act did not yet make specific reference to either day or residential schools. However, the pressure from religious institutions to require compulsory attendance for these schools soon influenced settler lawmakers, leading to the 1920 Amendment.<sup>37</sup>

As previously mentioned, the 1920 Amendment is responsible for the introduction of compulsory attendance to either day or residential schools for Indigenous children between the ages of seven and fifteen. The fundamental difference between day and residential schools was that the former allowed children to return to their families at the end of the school day. Residential schools, instead, required children to stay within the institutions, often without seeing their families for months or even years. The new policy was positively received by settler society, which had often shown impatience for the “slow” process, first of civilization and then assimilation.<sup>38</sup> Targeting Indigenous Peoples from a young age was deemed an effective strategy to reach communities through their youths. In particular, residential schools promised a more “clean cut” separation of children from their families and cultures, making it easier to “educate them” in the ways of Canadian settlers.<sup>39</sup>

The rhetoric of benevolent assimilation echoes throughout the report of the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, for the year 1920.<sup>40</sup> Scott

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<sup>36</sup> Truth and Reconciliation Commission of Canada, *supra* note 20 at 109.

<sup>37</sup> *Ibid* at 278.

<sup>38</sup> See e.g., Giokas, *supra* note 22 at 25–26.

<sup>39</sup> See e.g., Macdonald on day schools in reserves being less efficient in assimilating Indigenous children: “When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.” (*House of Commons Debates*, 5-1, vol 14 (9 May 1883) at 1107-1108 (John A. Macdonald).)

<sup>40</sup> House of Commons, “Annual Report of the Department of Indian Affairs for the year ended March 31, 1920”, *Sessional Papers*, No 27 (1921).

commented positively on the 1920 Amendment, praising the new text of the Indian Act in which “the best interests of the Indians are promoted and fully protected.”<sup>41</sup> In the same report, Scott reinforced the goal of assimilation<sup>42</sup> and reaffirmed the inferiority of Indigenous Peoples,<sup>43</sup> while also highlighting the protective and charitable role of the settler authorities in helping “worthy” subjects in their “development.”<sup>44</sup> The 1920 Amendment would become a turning point for the Canadian policies of benevolent othering, which would further systematize the annihilation of Indigenous cultures and identities through forced assimilation and indoctrination. The Indigenous Other was to be eliminated in a plan of salvation, which would only end with the Other’s metamorphosis into the settler Self.

## **Part 2. Death by Assimilation: Unearthing Truth**

### *2.1. Surviving Othering: The Arduous Path to Justice*

The pervasive effects of othering are clearly observable in the decades-long struggle of Indigenous Peoples to find venues to obtain recourse for their victimization in residential schools. The TRC itself is the result of Indigenous Peoples’ fight to obtain justice—a long and strenuous path that saw many survivors’ claims rejected. The process of othering continued in the settler justice system, where civil Courts were unable “to hear claims regarding loss of culture, family, or language.”<sup>45</sup> Often, civil claims over damages for survivors’ abuses in residential schools were

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<sup>41</sup> *Ibid* at 13.

<sup>42</sup> *Ibid* (“[T]he ultimate object of our Indian policy is to merge the natives in the citizenship of the country.”)

<sup>43</sup> For instance, when describing the incidence of the use of traditional garments by Indigenous Peoples: “It may be conceded that the typical Canadian Indian is the hunter and trapper, and, when one thinks of him, buckskins and beadwork and feathers are still cloaking him with a sort of romance. But these are rarely seen, except in pageants and on holidays when the superior race must be amused by a glimpse of real savages in war-paint.” *Ibid* at 7.

<sup>44</sup> See e.g., *ibid* at 8 (“in the civilized tribes [...] people have long ago proved their worth, and only need to develop and mature under protection until they, one and all, reach their destined goal, full British citizenship.”)

<sup>45</sup> Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The History, Part 2, 1939 to 2000*, The Final Report of the Truth and Reconciliation Commission of Canada (McGill-Queen’s University Press, 2015) at 560.

affected by statutes of limitations, with only sexual abuse cases being the usual exception.<sup>46</sup> Survivors were retraumatized by having to relive and recount their abuses, which was worsened by the fact that civil proceedings proved to be particularly slow venues to obtain redress.<sup>47</sup> Moreover, during civil cases, survivors often had to face the federal government's attempts to discredit them and question their credibility in order to limit the damages awarded by the courts.<sup>48</sup>

After failed attempts at alternative recourse venues, such as the Alternative Dispute Resolution Process (ADRP),<sup>49</sup> survivors and their communities started resorting to class action lawsuits, which later resulted in negotiations between Indigenous associations, the federal government, and church organizations. This process led, in 2006, to the signing of the Indian Residential Schools Settlement Agreement, which “compensated residential school Survivors for individual acts of abuse, as well as for the collective impacts of the schools on Aboriginal people and communities.”<sup>50</sup> Moreover, the agreement “created the Truth and Reconciliation Commission of Canada, and provided funding for commemoration initiatives and the Aboriginal Healing Foundation.”<sup>51</sup> The mandate of the TRC, officially established in 2008, was “to tell Canadians about the history of residential schools and the impact those schools had on Aboriginal peoples and on Canada, and to guide a process of reconciliation.”<sup>52</sup>

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<sup>46</sup> *Ibid.*

<sup>47</sup> The TRC mentions the Blackwater case “arising out of the Alberni, British Columbia, school, took nine years from the filing of the statement of claim to the Supreme Court’s final decision on liability.” *Ibid.*

<sup>48</sup> *Ibid.* at 561–562.

<sup>49</sup> The ADRP was greatly criticized, particularly by the Assembly of First Nations, which in its 2004 report highlighted all the shortcomings of the project (*Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*, by Assembly of First Nations (Ottawa: Assembly of First Nations, 2004).) A similarly negative conclusion was made by the Standing Committee on Aboriginal Affairs and Northern Development of the House of Commons in a 2005 report on the ADRP (*Study on the Effectiveness of the Government Alternative Dispute Resolution Process for the Resolution of Indian Residential School Claims*, by Standing Committee on Aboriginal Affairs and Northern Development (House of Commons, 2005).)

<sup>50</sup> Truth and Reconciliation Commission of Canada, *supra* note 45 at 551.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at 578–579.

The 2015 six-volume final report of the TRC gives detailed accounts of the history and consequences of residential schools, which led—among other suffering—to Indigenous Peoples’ ongoing intergenerational trauma.<sup>53</sup> Among other findings, the TRC recognized that the government of Canada and the religious denominations that aided in the administration of residential schools have taken part in cultural Genocide, by leading efforts to eradicate Indigenous Peoples and their traditions, identities, and cultures.<sup>54</sup> Moreover, thousands of Indigenous children have died in residential schools, many of whom are yet to be identified or uncovered.<sup>55</sup> Reportedly, these children’s primary cause of death was tuberculosis, which was exacerbated by gross negligence and lack of appropriate care, as well as by their weakened health due to underlying conditions, such as malnutrition.<sup>56</sup>

Survivors of residential schools have been able to record their experiences in the reports of the TRC, recalling the many systemic psychological, physical, and sexual forms of abuse they underwent.<sup>57</sup> Among other ways to suffocate and eradicate their identity, Indigenous children were punished for speaking their native languages,<sup>58</sup> and underwent corporal punishment for not knowing English or French, even if they had never been exposed to the languages before.<sup>59</sup> Their

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<sup>53</sup> All six volumes of the TRC final report were made available by the National Centre for Truth and Reconciliation (NCTR) at: <<https://nctr.ca/records/reports/>>. For the official summary of the TRC’s findings see Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission of Canada, 2015).

<sup>54</sup> Truth and Reconciliation Commission of Canada, *supra* note 20 at 3–5.

<sup>55</sup> On the ongoing efforts to uncover and honour the memory of Indigenous children who died in residential schools, see, e.g., Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: Missing Children and Unmarked Burials*, The Final Report of the Truth and Reconciliation Commission of Canada (McGill-Queen’s University Press, 2015). See also National Centre for Truth and Reconciliation, “Memorial (National Student Memorial Register)”, online: <<https://nctr.ca/memorial/>>.

<sup>56</sup> Canadian Public Health Association, “TB and Aboriginal people”, online: <<https://web.archive.org/web/20210614001012/https://www.cpha.ca/tb-and-aboriginal-people>>.

<sup>57</sup> Truth and Reconciliation Commission of Canada, *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (2015).

<sup>58</sup> *Ibid* at 47–58.

<sup>59</sup> *Ibid*.

hair was cut,<sup>60</sup> they were stripped of their Indigenous names and given Euro-Canadian ones,<sup>61</sup> and they were prohibited from performing Indigenous traditional rituals or professing any faith other than the ones imposed by the Christian settlers.<sup>62</sup> In order to reinforce this systemic plan of identity eradication, Indigenous traditions were vilified and demonized,<sup>63</sup> causing children to be ashamed of their identities and feel inferior to the idealized settler identity.<sup>64</sup> Survivors also recall the habitual separation of siblings, which further isolated and alienated them. Some were even subjected to extreme acts of physical abuse for simply speaking to their siblings.<sup>65</sup> This system of abuse and violence was made possible by the process of othering itself, which, among other things, depicted the Indigenous Other as untrustworthy, ungrateful, and in need of discipline, whatever the cost.

## 2.2. *Unmasking the Lies of Benevolent Othering*

While, on its face, the 1920 Amendment and other laws regulating Indigenous Peoples' lives were meant to appear charitable, they were anything but. With each subsequent policy, the settler lawmakers removed agency from Indigenous families, communities, and children. Any potential safeguard system provided for by the law would fail and inevitably lead to more othering and more

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<sup>60</sup> Haircuts were a systemic procedure, upon children's arrival at residential schools, which did not take into consideration the spiritual significance of hair for Indigenous Peoples. Campbell Papequash, a survivor, recalled: "I had nice beautiful long hair and they were neatly braided by mother before I went to residential school, before I was apprehended by the residential school missionaries. [...] [T]hey cut off my beautiful hair. You know and my hair, my hair represents such a spiritual significance of my life and my spirit. [...] I cried and I see them throw my hair into a garbage can, my long, beautiful braids. [...] And I was shaved, bald-headed." (*Ibid* at 32.)

<sup>61</sup> A survivor recalled how a nun instructed him to "'Write your names,' [...] so they don't get lost. But I wrote on my scribbles in Cree syllabics. And so I got the nun really mad that I was writing in Cree. And then I only knew my name was Ministik from the first time I heard my name, my name was Ministik. So I was whipped again because I didn't know my name was Peter Nakogee." (*Ibid* at 48.)

<sup>62</sup> See e.g., Truth and Reconciliation Commission of Canada, *supra* note 20 at 164–166.

<sup>63</sup> See, for instance, the experience reported by Sarah McLeod, a residential school survivor, recalling how she was forced to throw away the birthday gift given to her by a family member—a miniature totem pole—because it represented the "devil." (Truth and Reconciliation Commission of Canada, *supra* note 57 at 56.)

<sup>64</sup> Numerous survivors reported to the TRC that their experience in residential schools made them feel ashamed of being Indigenous. See e.g., *Ibid* at 56–57, 104–105.

<sup>65</sup> *Ibid* at 91–94.

suffering. Parents who tried to shelter their children from abuse were criminalized and their concerns were ignored.<sup>66</sup> Settler authorities, prejudiced against Indigenous Peoples, would either ignore or deem the plights of survivors of systematic violence as false.<sup>67</sup> The extent to which residential school administrative bodies, church authorities, law enforcement, and other governmental authorities failed to prevent, investigate, and prosecute the acts of abuse have been categorized by the TRC. Numerous instances of sexual abuse reports were dismissed as lies, with the non-isolated example of a 1944 case of an Indian Affairs official discrediting Indigenous Peoples' abuse complaints.<sup>68</sup> In other cases, residential school administrations would either take no legal or disciplinary action against abusers and predators—allowing them to freely continue their violence—or merely fire them without ever contacting authorities.<sup>69</sup> When even law enforcement was made aware of cases of abuse, police showed disinterest in investigating claims and deemed the dismissal of abusers from schools sufficient.<sup>70</sup>

It has also been documented that residential school administrations often failed to perform appropriate screening before hiring staff, with several cases of convicted sexual abusers being hired and having direct access to vulnerable children.<sup>71</sup> Furthermore, the TRC reports that there is no evidence that residential schools ever implemented support measures for students who had

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<sup>66</sup> The 1920 Amendment introduced criminal sanctions—a fine or imprisonment, or both—for Indigenous parents who refused to send children to these schools (*1920 Indian Act*, s. 10(3)). A survivor, Isaac Daniels, recalled going to residential school for fear of his father going to jail (“I’m going to residential school, ’cause I didn’t want my dad to go to jail.”) *Ibid* at 13. The TRC recognized that “in the face of such coercion, parents often felt helpless and ashamed.” *Ibid* at 14.

<sup>67</sup> Survivors of sexual abuse who reported their abuses could be punished for being “liars,” and blamed for their own abuse, suffering revictimization. See e.g., Truth and Reconciliation Commission of Canada, *supra* note 57 at 161–162.

<sup>68</sup> Truth and Reconciliation Commission of Canada, *supra* note 45 at 413.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid* at 414.

<sup>71</sup> *Ibid*. According to the TRC, “[t]he government of Canada was reluctant to press the churches to put appropriate screening and monitoring processes in place, out of respect for the churches’ need for ‘flexibility.’”

suffered abuse, or for their parents and communities, painting a picture of abandonment and disinterest for survivors.<sup>72</sup> The TRC clearly concludes that:

By 1940, no one in authority could claim that they were not aware that residential schools might attract sexual predators as employees. They were well aware of the opportunities they were creating for abuse. Yet, the evidence is clear that, in numerous instances, the government and the churches failed in their responsibilities to students and their parents.<sup>73</sup>

Despite the 1920 Amendment providing, in theory, the creation of quality standards, inspections, and oversight, the reality was much different. For instance, most residential school deaths from tuberculosis were caused by inadequate infrastructure, lack of appropriate care, malnutrition, inappropriately ventilated buildings and more.<sup>74</sup> In fact, settler authorities were made aware of the many inadequacies of residential schools before the 1920 Amendment, thanks to the early 1900s reports of Dr. Peter Bryce. In his 1909 report, Bryce was able to calculate that the annual death rate of children in residential schools—for all causes—was 8,000 deaths per 100,000. Compared to the 1901 national annual death rate, the figure was almost twenty times higher.<sup>75</sup> The benevolent lawmaker who even promised travel-related funding for Indigenous children was the same that underfunded schools to the point where children were constantly hungry,<sup>76</sup> even being fed rancid food and violently abused if they were unable to stomach it.<sup>77</sup>

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid* at 412.

<sup>74</sup> Canadian Public Health Association, *supra* note 56.

<sup>75</sup> Truth and Reconciliation Commission of Canada, *supra* note 20 at 410.

<sup>76</sup> A survivor, Doris Young, recalled: “I was always hungry. And we stole food. I remember stealing bread. And they, the pies that [...] I remember stealing were lined up on a counter[...], and they weren’t for us to eat, they were [...] for the staff.” Truth and Reconciliation Commission of Canada, *supra* note 57 at 72.

<sup>77</sup> See, e.g., Jorge Barrera, “The horrors of St. Anne”, *CBC* (29 March 2018), online: <<https://newsinteractives.cbc.ca/longform/st-anne-residential-school-opp-documents>>; Ian Mosby & Erin Millions, “Canada’s Residential Schools Were a Horror”, *Scientific American* (1 August 2021), online: <<https://www.scientificamerican.com/article/canadas-residential-schools-were-a-horror/>>.

Every step of the way, othering has accompanied the experience of Indigenous Peoples, moulded by the hands of Canadian settler authorities. The repercussions are felt to this day, through the crystallization of racist stereotypes and systemic discriminatory practices resting on the identity constructed for the Indigenous Other by the settler Self. Lawmakers of benevolent othering count on many lies, often codifying them as they codify otherness. These lies include, first, that the Other needs to be saved; second, that the Self can and wants to save the Other because the Self is “good”; and third, that the Other who dies or suffers in the “care” of the Self has only itself to blame.

Ultimately, the residential school system was designed to break the spirit of Indigenous children, families, and communities, by administering them death by assimilation with the skewed promise of rebirth and salvation in their new Canadian Christian-settler identity. With the 1920 Amendment, the settler lawmaker of othering successfully codified an intergenerational death sentence for the Indigenous Other, to ensure the prosperity of the settler Self.

## **Conclusion**

This article has explored the complex interplay between law, pride, and prejudice, drawing on Everett Zimmermann’s analysis of Jane Austen’s “Pride and Prejudice” to frame its analysis. The concept of “law as prejudice” emerges not merely as a theoretical construct, but as a living and breathing reality in the historical and ongoing experiences of Indigenous Peoples in Canada. The legal framework which, through the years, has normalized and promoted their assimilation in settler society, analyzed through the lens of othering, reveals how law can be instrumentally used to codify prejudice. The codification of otherness not only reinforces existing societal biases but actively contributes to the systemic marginalization and eradication of targeted groups: the Other(s) of the world. In the Canadian case, codification of otherness has facilitated and

normalized the victimization, intergenerational trauma, and cultural genocide of Indigenous communities. These repercussions, observable to this day, will long reverberate through the years while the reconciliation process is yet but in its infancy.

The case study of the Canadian settler authorities' policies towards Indigenous Peoples—especially compulsory attendance to residential school—stands as a clear example of how law, wearing a mask of benevolence and civilizational duty, can hide a desire for prevarication and violent destruction. These legal instruments, purportedly designed for the protection and advancement of Indigenous Peoples, in reality, served as tools for their cultural assimilation and erasure. The normative power of law, when intertwined with the prejudicial attitudes of the dominant group, i.e., the Self, creates a mechanism for perpetuating and legitimizing systemic inequality and injustice. This mechanism is motivated by the reaffirmation of the identity of the Self, which thrives on the reiteration of its superiority over the inferior Other. The law of othering becomes “pride” and embodies “prejudice”, serving as a tool of violence, supported by the presumptions of objectivity and fairness.

While this article does not claim that all law embodies the paradigm of “law as prejudice” analyzed here, it reinforces the critical need to understand the relationship that can develop between law and prejudice. One could say that the law is as biased as those who make it. Hence, this study challenges the perception of law as an inherently neutral or objective entity and reassesses law's potential to become a vehicle for societal biases and inequalities. The concept of “law as prejudice,” thus, serves as a cautionary tale and reminder of the law's power and potential.

To conclude, it is important to recognize that the paradigm of “law as prejudice” and the codification of otherness are not confined to historical examples alone, be they the assimilation of Indigenous Peoples in Canada, the Holocaust, the racialization of Hutus and Tutsis by Belgian

settlers—which contributed to the 1994 Rwandan Genocide—or the imposition of statelessness used to justify the Rohingya Genocide in Myanmar. This paradigm remains a relevant and cyclical phenomenon in contemporary and future legal and social contexts. As nationalist movements rise again like the tide, the concerns for codification of othering should remain at the forefront of legal and interdisciplinary scholarship.