

Cree Law and the Duty to Assist in the Present Day

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I. INTRODUCTION

The world's first ever joint degree in both common law and Indigenous legal orders is now in its second year of operation at the University of Victoria Law School. It is a four-year law degree program where students take early year transsystemic law courses that expose them to both fundamental areas of Canadian law (e.g. constitutional, criminal, property) and laws originating from several different Indigenous legal orders, as well as field school courses where they are exposed to law as lived experiences in Indigenous communities. Another mandate of the program is for faculty to engage in research that explores laws originating from Indigenous legal orders and their possible use in contemporary communities.¹

This article is the first attempt, on my part, to engage with that particular stream of scholarship. There is a particular facet of Cree law that I wish to explore. Sylvia McAdam uses the term 'pastamowin' to describe laws against causing harm to other people.² She is also clear that the law not only prohibits overt actions that cause harm, but also allowing harm to happen by not helping somebody who needs it.³ She describes it, while offering a contract with Canadian common law, as follows:

It is also important to state that silence and non-action do not exempt any human being from breaking the laws. It's considered a *pastamowin* to remain silent or take no action while a harm is being done to another human being or to anything in

¹ "Joint Program in Canadian Common Law and Indigenous Legal Order: UVic's Proposed Indigenous Law Program: An Overview" (last visited 28 February 2020), online (pdf): *University of Victoria Law* <www.uviclss.ca/blog/wp-content/uploads/2016/02/JID-Scope-and-Components-26-January-2016-1.pdf> [perma.cc/D2GV-QQYK].

² Sylvia McAdam, *Nationhood Interrupted: Revitalizing nēhiywa Legal Systems* (Vancouver: UBC Press, 2015).

³ *Ibid* at 40.

creation. In common law it is called acquiescence; acquiescence is compliance, or when you are silent it is considered consent from a reasonable person. In other words, if a person is getting assaulted and you do nothing to stop or assist, then you have committed a *pastamowin* because you failed to prevent or protect another human being.⁴

The common law does not impose a general duty to help others, but instead only requires assistance when there is a specific legal (not moral) duty to do so. The reasons for this preference include, but are not limited to, a hesitancy to force citizens to take the risks of potentially dangerous situations on themselves and potential difficulties with enforcing such laws.

Self-determination for Indigenous communities is, in truth, a variegated and relative concept. There may be instances when Indigenous communities are still able to use their own legal principles to resolve conflicts and tense situations, entirely outside the Canadian legal system. But this kind of exercise in self-determination often depends on Canadian authorities, such as police officers, who may otherwise want to formally lay charges under the *Criminal Code*,⁵ unaware of the situations that communities are trying to resolve it on their own.⁶

In other instances, there may be an agreement between Canadian authorities and Indigenous peoples that provides allowances for Indigenous approaches to justice. But, the extent to which such agreements could be called self-determination may be limited. Such agreements often limit Indigenous approaches to summary (less serious) offences.⁷ As another example, there is an agreement between the James Bay Cree and the Province of Quebec for the administration of justice. The agreement provides extensive funding, starting at \$13 million annually and with yearly increases to account for inflation, for programs administered by the Cree.⁸

⁴ *Ibid.*

⁵ *Criminal Code*, RSC 1985, c C-46.

⁶ For an academic discussion of a Mi'kmaq Indigenous legal order operating in such a fashion, see Leslie Jane McMillan, *Koqqwaja'ltimk: Mi'kmaq Legal Consciousness* (PhD Dissertation, University of British Columbia, 2002) [unpublished] at 74. For judicial recognition that Indigenous legal orders often try to resolve conflicts outside the Canadian legal system, and with reference to the Inuit in Nunavut, see *R v Itturiligaq*, 2018 NUCJ 31 at paras 119–20.

⁷ For two examples, see *Sechelt Indian Band Self-Government Act*, SC 1986, c 27; *Tsawwassen First Nation Final Agreement Act*, SBC 2007, c 39 (38th Sess), Bs 133–36.

⁸ *Agreement Concerning the Administration of Justice for the Crees Between Le Gouvernement Du Québec and The Grand Council of the Crees (Eeyou Istchee) and the Cree Regional Authority*, 7 February 2002, online: <[www.autochtones.gouv.qc.ca/relations_autochtones/entent](http://www.autochtones.gouv.qc.ca/rerelations_autochtones/entent)>

I do not wish to devalue the good that the programs may accomplish, but it is open to question to what degree such an agreement does amount to self-determination. The agreement makes numerous references to matters such as programs for incarcerated Indigenous persons, court sessions, conditional sentences, suspended sentences, and interim detention of Indigenous persons.⁹ The programs themselves account for Indigenous perspectives during what fundamentally remains as Canadian criminal processes, with Canadian criminal sanctions as the end results. And it is surely the case that substantive Canadian criminal law continues to define what are the sanctionable offences.¹⁰

These efforts at exercising jurisdiction, while they may realize benefits for some Indigenous communities, are also limited in scope. The agreements between Indigenous communities and either federal or provincial governments tend to preserve the continuing application of Canadian state criminal law with narrow allowances for Indigenous approaches. The 'under the table' efforts, in particular, may be happenstance in what they can accomplish. Perhaps self-determination in its truest sense can only be realized through a fulsome implementation of Call to Action 42 from the final report of the Truth and Reconciliation Commission.¹¹ It reads:

We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in November 2012.¹²

If the Call to Action is fully implemented, it would mean that Indigenous exercises of self-determination would, to a very real degree, no longer depend on happenstance or be confined to narrow parameters by restrictive state agreements. That, in turn, means that Indigenous legal orders could freely use laws grounded in their traditions, including substantive criminal law that defines what is or what is not sanctionable conduct, even if those laws differ markedly from Canadian law.

es/cris/entente-justice-en.pdf> [perma.cc/C3DH-DKA6].

⁹ *Ibid* at paras 5, 8.

¹⁰ *Ibid* at para 5.

¹¹ *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at no 42, online: <trc.ca/assets/pdf/Calls_to_Action_English2.pdf> [perma.cc/2BCN-VXVX].

¹² *Ibid*.

The question entertained by this paper is to what extent the law that required helping fellow community members can be a law that is used in full force as a part of Cree self-determination. It could be that the law is alive and well in some Indigenous communities and that it continues to guide life in Cree communities to this day. Although, the extent to which that is the case remains uncertain and undocumented. A possible merit of implementing Call to Action #42 is that it guarantees a legal space for the Cree law to operate without external constraints, where otherwise it could end up suppressed or driven 'under the table' by Canadian state law. And, for purposes of the discussion in this paper, that state law is decidedly against imposing a general duty to assist.

Another distinct possibility is that, in some instances, colonialism may have led to a loss of connection with traditional laws that had been part of Indigenous legal orders, although that loss may not necessarily be permanent or place traditional laws beyond recovery. Carol LaPrairie explains this with reference to the James Bay Cree:

Residential schools, the decline of traditional activities, the emergence of the reserve system which binds people together in unnatural ways, and the creation of band government which locates power and resources in the hands of a few have dictated the form of reserve life across the country and have profoundly affected institutions such as kinship networks, families, as well as the unspoken rules of behaviour in traditional societies. The lack of respect for others, and the absence of shame about one's bad behaviour and about harming another or the community were, to many Cree for example, the most troubling aspects of contemporary life.¹³

Another potential merit of implementing Call to Action 42 is that it enables the recovery or revival of past laws that, in some Cree communities, may have fallen into disuse.

There is some merit to the application of laws requiring assistance or giving warning in Indigenous communities, as Indigenous peoples are victimized far out of proportion to non-Indigenous Canadians. And yet there may be concerns, especially as the law deals with a situation where the selfish choice that disobeys the law may frequently be the easier choice. The crucial point is whether members of a Cree community can sufficiently internalize (or have internalized) that law, such that it becomes a meaningful and persuasive guide to conduct.

¹³ Carol LaPrairie, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future" (1992) 34:3 Can J Crim 281 at 287 [footnotes omitted].

Various bodies of legal theory provide insights on when and how law can be internalized. A desire to remain in the esteem of society, and a parallel avoidance of stigma, can provide powerful incentives to comply with the law. That may be especially the case in smaller Indigenous communities where everybody knows everybody. Demands to accept adverse consequences, even physical danger, present a powerful obstacle against internalizing the law. The normalization of violence in many Indigenous communities may augment those concerns considerably.

My argument is therefore that Cree communities, at least those troubled by normalized violence, may find it advisable to embark on one of two courses if they wish to revive the law that requires assistance to those in danger. One route is to first reshape the values of the community through gradual persuasion to internalize coming to the aid of others prior to enacting a law enforced through sanctions. The other approach is to proceed with a law, but one that relies on more lenient sanctions in an effort to encourage internalization. The paper begins with an overview of Canadian law on omissions.

II. CANADIAN LAW AND THE DUTY TO ASSIST

Whether or not the law should criminalize a passive state, in particular an omission to aid somebody who is in a distressing situation, is a question that continues to generate controversy and debate. The answer in common law jurisdictions, including Canada, is clear. The law does not criminalize an omission to act unless there is a specific (not general) legal duty to act and the accused fails to act in accordance with that duty. A classical statement on the issue comes from the Supreme Court of Canada case, *Dunlop & Sylvester v The Queen*.¹⁴ The case involved the sexual assault of a teenaged girl by several members of a motorcycle crowd. She could positively identify only Dunlop and Sylvester among the group as having been there.¹⁵ She also testified that they participated in the sexual assault by numerous members of the club. However, she also conceded during cross-examination that neither accused had been among the initial group that approached her and restrained her.¹⁶ What led to the case taking on a lengthy history of appeals was when the trial judge also instructed the jury to consider whether

¹⁴ *Dunlop & Sylvester v The Queen*, [1979] 2 SCR 881, 99 DLR (3d) 301 [*Dunlop & Sylvester*].

¹⁵ *Ibid* at 886–87.

¹⁶ *Ibid* at 886–88.

the two accused were, aside from the original sexual assault charges, guilty of aiding the other members of the club in carrying out the sexual assaults under subsection 21(2) of the *Criminal Code*.¹⁷

What the Court found especially problematic was this section of a recharge given to the jury by the trial judge:

But when you are considering what I have said, going back to that middle section of the definition I read, everyone is a party to an offence who does or omits to do anything for the purpose of aiding another person to commit it, I should say the phrase omitting to do anything, that phrase, omitting to do anything means intentionally omitting to do something for the purpose of aiding another to commit an offence, that if it had been done, would have been prevented or hindered the person from committing an offence. Intentionally omitting to do something for the purpose of aiding another to commit the offence, that if it had been done, would have prevented or hindered the person from committing the offence.¹⁸

One issue with the recharge was that it implied that the accused could be convicted for aiding an offence under section 21 on the basis of an omission to act.¹⁹ The Court provided this well-known excerpt in response:

Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch on enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.²⁰

The Court ultimately entered a verdict of acquittal. Courts of appeal often send cases back to retrial as the usual remedy but in this instance, the Supreme Court concluded that after two previous retrials, that was enough jeopardy for the two accused to face.²¹

There are examples of legal duties to assist in specific situations. For example, there is a common law duty to rectify a dangerous situation that the accused has personally created. That duty does not extend to addressing a dangerous situation that somebody else has created.²² Specific duties to assist can also be created by statute. For example, section 14 of British Columbia's *Child, Family and Community Service Act* reads:

¹⁷ *Ibid* at 888; *Criminal Code*, *supra* note 5, s 21(2).

¹⁸ *Dunlop & Sylvester*, *supra* note 14 at 899 [emphasis added].

¹⁹ *Ibid*.

²⁰ *Ibid* at 891.

²¹ *Ibid* at 900.

²² *R v Miller*, [1983] 2 AC 161, [1983] 1 All ER 978 (HL (Eng)).

14 (1) A person who has reason to believe that a child needs protection under section 13 must promptly report the matter to a director or a person designated by a director.

(2) Subsection (1) applies even if the information on which the belief is based

(a) is privileged, except as a result of a solicitor-client relationship, or

(b) is confidential and its disclosure is prohibited under another Act.

(3) A person who contravenes subsection (1) commits an offence.

(4) A person who knowingly reports to a director, or a person designated by a director, false information that a child needs protection commits an offence.

(5) No action for damages may be brought against a person for reporting information under this section unless the person knowingly reported false information.

(6) A person who commits an offence under this section is liable to a fine of up to \$10 000 or to imprisonment for up to 6 months, or to both.

(7) The limitation period governing the commencement of a proceeding under the *Offence Act* does not apply to a proceeding relating to an offence under this section.²³

Note that a failure to report is subject to punishment including a maximum fine of \$10,000 or a maximum jail term of 6 months.²⁴ These duties are limited and represent exceptions to the general rule that there is no general criminal liability for an omission to act, including not rendering assistance to somebody else. It is a different matter in several other jurisdictions.

Continental jurisdictions in Europe tend to have what are known as bad Samaritan laws. That means that laws that make it a criminal offence not to help someone who is danger or is being victimized. Examples include Belgium, Czechoslovakia, Denmark, France, Germany, Holland, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Switzerland, and Turkey.²⁵ In France, as an example, the failure to assist is subject to five years imprisonment and a maximum 75,000 Euros fine.²⁶

²³ *Child, Family and Community Service Act*, RSBC 1996, c 46.

²⁴ *Ibid*, s 14(6).

²⁵ Ken Levy, "Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism" (2010) 44:3 *Georgia L Rev* 607 at 613, 616.

²⁶ Art 113-10 C pén, art 223-6 (2005).

A few American state jurisdictions have themselves adopted bad Samaritan laws. Examples include Minnesota,²⁷ Rhode Island,²⁸ Vermont,²⁹ and Wisconsin.³⁰ Other states have adopted what can be thought of as halfway measures. What is involved are laws that require at least contacting emergency assistance authorities (e.g. police or paramedics) that are trained to handle situations where someone may need help, but without requiring the caller to directly immerse themselves in the situation. Examples include Florida,³¹ Hawaii,³² Massachusetts,³³ Ohio,³⁴ and Washington State.³⁵

Certainly, the fact that the laws of different nation-states can yield such different answers on the same subject matter indicates a great deal of subjectivity. And it turns out that there is a great deal of academic debate about whether a general duty to assist should be enforceable through criminal law, with numerous arguments both for and against.

A. Arguments For and Against

1. *Moral Enforcement*

One of the most obvious arguments in favour of bad Samaritan laws is that human life itself should be held sacred and preserved whenever possible:

And while our intuition is that failing to attempt to rescue is not as morally blameworthy as actively attempting to kill, the former still exhibits a fundamental disregard for the victim's life. To this extent, to the extent that bad Samaritanism fails to respect and promote the premium that we place on human life, especially innocent human life, it conflicts with the value that motivates our laws against homicide and manslaughter. And because bad Samaritanism conflicts with this very same value, it too should be deemed a serious criminal offense. Call this the "Life Is Sacred Argument."³⁶

²⁷ Minn Stat Ann, § 604A.01 (West 2000 & Sup 2008).

²⁸ 2 RI Gen Law, § 11-1-5.1 (2002).

²⁹ VT Stat Ann tit 12, s 519 (2002).

³⁰ Wis Stat Ann, § 940.34 (West 2005).

³¹ Fla Stat Ann, § 794.027 (West 2007).

³² Haw Rev Stat, § 663-1.6 (1993).

³³ Mass Gen Laws Ann, c 268, § 40 (West 2008).

³⁴ Ohio Rev Code Ann, § 2921.22 (West 2006 & Supp 2009).

³⁵ Wash Rev Code Ann, § 9.69.100 (West 2003).

³⁶ Levy, *supra* note 25 at 613. See also Miriam Gur-Arye, "A Failure to Prevent Crime: Should It Be Criminal?" (2001) 20:2 Crim Justice Ethics 3 at 6-7.

That a citizen may not help another who is danger can certainly upset some peoples' notions of right and wrong. For example, former Hartford Police Chief Daryl Roberts stated this in response when several people did nothing after witnessing what was ultimately a fatal running over of Angel Arce Torres:

This is a clear indication of what we have become when you see a man laying in the street, hit by a car and people drive around him and walk by him.... At the end of the day, we have to look at ourselves and understand that our moral values have now changed. We have no regard for each other.³⁷

Deterrence is one of the classic justifications for criminal punishment.³⁸ And one could suggest that there is a utilitarian justification for bad Samaritan laws. The aspiration is to minimize needless deaths and injuries by force of legal compulsion.³⁹ And indeed, Miriam Gur-Arye raises the question of whether the absence of a bad Samaritan law would encourage people to neglect to render assistance.⁴⁰ However, much of the dialogue around whether there should be bad Samaritan laws focuses less on the utilitarian and more on the question of morals and values.

Another function of criminal law is denunciation, to affirm and announce to the public at large what is acceptable behaviour and what is not.⁴¹ The question could of course be raised as to whether one comes before the other, law or societal values. Does law shape society's morals over time through the consistent punishment and public condemnation of prohibited behaviours? Or does law change and reshape itself to reflect society's morals?⁴² It is certainly conceivable, even likely, that each informs the development of the other.

³⁷ Daneen L. Brown, "The Psychology of Apathy: Is our indifference a learned behavior or an instinct?", *The Houston Chronicle* (20 July 2008), online <www.chron.com/life/article/The-psychology-of-apaty-1760171.php> [perma.cc/G3UA-Q9SA].

³⁸ Paul H Robinson & John M Darley, "The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best" (2003) 91:5 *Geo LJ* 949.

³⁹ Levy, *supra* note 25 at 626-27; Damien Schiff, "Samaritans: Good, Bad, and Ugly: A Comparative Law Analysis" (2005) 11:1 *Roger Williams U L Rev* 77 at 119-21.
⁴⁰ *Supra* note 36 at 13-14.

⁴¹ Max Lowenstein, "Towards an Understanding of Judicial Denunciation: Relating Theory to Practice by Comparing the Perceptions of English and Danish Lower Court Judges When Sentencing Minor Theft Offenders" (2013) 13:1 *Criminology & Crim Justice* 21.

⁴² Tom R Tyler & John M Darley, "Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account when Formulating Substantive Law" (1000) 28:3 *Hofstra L Rev* 707. See also Joshua

A possible objection is that an omission to help is a rarity, so much so that it may not be worth the trouble of enacting and enforcing a bad Samaritan law.⁴³ Proponents of bad Samaritan laws have at least two responses to that contention. One is that proving the rarity of omissions to assist is elusive.⁴⁴ The other reply is that the infrequency of given conduct does not correlate with its moral blameworthiness (with murder perhaps being a case in point).⁴⁵

Ken Levy sees a moral enhancement value in enacting a bad Samaritan law.⁴⁶ Such a law would, in his view, serve a function of putting society on notice that aiding one another is to be the expectation.⁴⁷ It would send the message that not rendering aid is morally unacceptable and affirm the values behind laws against homicide.⁴⁸ To take it further, he does not see other parts of the legal system as up to the task of inculcating an ethos for people to aid each other when needed.⁴⁹ For example, addressing omissions only through torts does not utilize criminal law's power to deliver a public message to society at large.⁵⁰ Furthermore, tort law invites complicated questions about how much a person's life and safety is worth in quantifiable monetary terms. In other words, tort law may treat a person's life and safety in equivocal terms to the often condemnatory function inherent in criminal punishment.⁵¹ Likewise Qingxiu Bu is of the opinion that there is a real problem of moral apathy in Chinese society.⁵² He sees enforcing a bad Samaritan law as desirable, with the purpose of providing moral guidance and improvement to the Chinese population.⁵³

Amelia Ashton offers a different argument. She suggests that enforcing a bad Samaritan law may actually have an effect contrary to what is

Kleinfeld, "Three Principles of Democratic Criminal Justice" (2017) 111:6 Nw UL Rev 1455.

⁴³ Anthony Woolley, "A Duty to Rescue: Some Thoughts on Criminal Liability" (1983) 69:7 Va L Rev 1273 at 1277; Levy, *supra* note 25 at 676-78.

⁴⁴ Levy, *supra* note 25 at 682-83.

⁴⁵ *Ibid* at 683-84.

⁴⁶ *Ibid* at 663.

⁴⁷ *Ibid* at 662-63.

⁴⁸ *Ibid* at 628.

⁴⁹ *Ibid* at 661-65.

⁵⁰ *Ibid* at 688-89.

⁵¹ *Ibid* at 688-89.

⁵² Qingxiu Bu, "The Good Samaritan in the Chinese Society: Morality vis-a-vis the Law" (2017) 49 Intl J L, Crime & Justice 46 at 157.

⁵³ *Ibid* at 135-36.

intended.⁵⁴ When one person helps another, it actually ends up losing its moral dimensions if a bad Samaritan law is in the background. That is because one person helps another out of legal compulsion and not so much out of free moral choice.⁵⁵

2. *Questions of Risk*

Much of the debate focuses on questions of individual liberty vis-a-vis the state and questions of risk, and the two sets of questions are often bound up with each other. The decision of whether or not to legally compel assistance to others is inherently tied up with the tension between individual autonomy and community solidarity.⁵⁶ There is the frequent libertarian objection which holds that the decision of whether to rescue should be left to the individual's own moral choice.⁵⁷ Proponents of bad Samaritan laws, in turn, argue that no society is so fundamentally libertarian that it refuses to criminalize any and all omissions.⁵⁸ For example, Woozley argues that there are plenty of other instances where, if there is a moral imperative to do something (e.g. answer to a witness subpoena) or not do something (e.g. kill another), the law takes it further and provides a legal imperative as well. There should be no real obstacle to enacting a bad Samaritan law when European democracies do it as well.⁵⁹

The tension becomes more complex when it gets tied up with the question of risks faced by the person who may be in a position to assist another.⁶⁰ As Damien Schiff states: "In summary, although duties to rescue are not completely at odds with human behavior, to be effective they must

⁵⁴ Amelia Ashton, "Rescuing the Hero: The Ramifications of Expanding the Duty of Rescue on Society and the Law" (2009) 59:1 Duke LJ 69 at 69–71.

⁵⁵ *Ibid* at 69–71, 89, 100. See also Woozley, *supra* note 43 at 1292–93; Sally Kift, "Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law" (1997) 1:2 MacArthur L Rev 212 at 218–19.

⁵⁶ Diego Pol Longo, "Are We Bad Samaritans? A Comparative Analysis of Duty to Rescue Legislation and Cadaveric Organ Donation Systems in Spain and the United States" (2011) 39:1 Syracuse J Intl L & Com 55.

⁵⁷ Levy, *supra* note 25 at 656–58; Schiff, *supra* note 39 at 114–19; Gur-Arye, *supra* note 36 at 8–9; Woozley, *supra* note 43 at 1274, 1293–96; Peter M Agulnick & Heidi V Rivkin, "Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law" (1998) 8 Touro Intl L Rev 93 at 96–97.

⁵⁸ Levy, *supra* note 25 at 661–62.

⁵⁹ Woozley, *supra* note 43 at 1299–1300.

⁶⁰ Gur-Arye, *supra* note 36 at 7–8.

take into account various human inadequacies and fears."⁶¹

Some proponents of bad Samaritan laws argue that libertarian concerns can be addressed adequately by minimizing the risks involved with rendering assistance. Levy argues that the libertarian objection can be dealt with by insisting that bad Samaritan laws should be limited to easy nearby rescues.⁶² In his view, a cost-benefit analysis that maximizes benefits through saving others from death or injury while minimizing costs by lessening the risks to the rescue tips the utilitarian equation in favour of a bad Samaritan law that insists on easy rescues.⁶³

The repugnancy that can be felt when somebody does not provide assistance in a situation of low risk can perhaps be found in the story of Glenda Moore. She was out with her two young sons, Conner aged four and Brandon aged two, when flood waters hit Staten Island on account of Hurricane Sandy.⁶⁴ She tried desperately to bring them to her sister's house in her Ford Explorer SUV, but the flood waters forced her vehicle into a watery ditch.⁶⁵ She managed to get her boys out of their seats and bring them along as she sought shelter.⁶⁶ She knocked on the door of a man who thereafter would only identify himself as Allen, but he refused entry.⁶⁷ She attempted to break in through his back door using a flowerpot but did not succeed.⁶⁸ A wave of water then tore the boys from her grip and she desperately sought help from other neighbours to search for the boys, but none would come to her aid.⁶⁹ The boys' lifeless and drowned bodies were found the next day.⁷⁰ Allen replied to the subsequent public furor that followed in these words: "It's unfortunate. She shouldn't have been out though. You know, it's one of those things... I'm not a rescue worker... If I would have been outside, I would have been dead."⁷¹ These words might

⁶¹ *Supra* note 43 at 113–14.

⁶² *Supra* note 25 at 659–60.

⁶³ *Ibid* at 660.

⁶⁴ Kirsten West Savali, "Hurricane Sandy's 'Kitty Genovese Moment': The Ugly Side of Humanity", *News One* (3 November 2012), online: <newsone.com/2072946/hurricane-sandy-kitty-genovese-glenda-moore/> [perma.cc/SB56-EGSZ].

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

suggest that he felt that there was a real risk involved with helping. On the other hand, an editorial was dismissive towards Allen as follows:

He didn't have to leave the comfort of his home. He didn't have to lift a branch or build a bridge. He simply had to open his door to a woman and two small children in the middle of the most powerful storm ever to impact the Atlantic Coast – and he couldn't even be bothered to do that.⁷²

For proponents of bad Samaritan laws, occurrences like with Glenda Moore (if you dismiss Allen's voiced objections) can beg the question of why the law cannot compel coming to the aid of another when there is little to no risk involved. Gur-Arye, for example, argues in favour of a broad duty to assist law, but with broad exceptions where it would be unfair to expect the accused to affect a rescue or intervene (i.e. the risk to the accused would be too much).⁷³

In fact, it could be suggested that the reason that some American states have been willing to experiment with duty to report laws is that their appeal lies in an even further minimization of risk. They do not even require a citizen to directly affect a rescue, even an easy one with no apparent risk to the rescue. Any perceived risk is minimized even further by requiring no more than a phone call to report the situation, so that trained personnel can address it directly instead.⁷⁴ Schiff concludes that a law that requires no more strikes the right balance between the competing concerns.⁷⁵

However, detractors suggest that questions of risk and obligation are more complicated than what may come across from the arguments of the proponents. The contrary arguments suggest that there is actually a definite amount of uncertainty in how to gauge the appropriate level of risk to take on, even when somebody is faced with a situation where society at large may feel that they should have helped another.⁷⁶

This reality can perhaps be seen in the story of David Cash and Jeremy Strohmeyer. David Cash made minimal efforts to stop his friend, Jeremy Strohmeyer, from strangling a seven-year-old girl to death, who had wandered away from her father, in the ladies' washroom of a Las Vegas

⁷² *Ibid.*

⁷³ Gur-Arye, *supra* note 36 at 23.

⁷⁴ Levy, *supra* note 25 at 621.

⁷⁵ *Supra* note 43 at 134–35. See also Gur-Arye, *supra* note 36 at 7.

⁷⁶ FJD Feldbrugge, "Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue" (1965) 14:4 Am J Comp L 630 at 632–33.

casino.⁷⁷ The pair went to other casinos afterwards.⁷⁸ Strohmeyer avoided the death penalty and was sentenced to life imprisonment without parole.⁷⁹ His plea for allowing the possibility of parole was denied by a Nevada state court judge in July of 2018.⁸⁰

Cash himself was never charged, since he did not directly participate in either the sexual assault or murder and there was no law in force at the time that obliged him to act against Strohmeyer.⁸¹ That did not stop stigma or societal condemnation from hounding him afterwards. He attended the University of California, Berkeley shortly after the murder.⁸² Numerous students waged a campaign of public shaming and social ostracization to try and persuade him to leave campus.⁸³ Nevada enacted a bad Samaritan law soon after the case concluded, precisely in response to Cash's lack of assistance to the victim.⁸⁴

Part of the picture is the close friendship between the pair. Cash, as a stereotyped high school 'nerd', previously had few friends among his peers.⁸⁵ Strohmeyer became the tough and rebellious friend that he looked up to.⁸⁶ One could of course object that Cash still had a responsibility to separate friendship from moral obligation and intervene against Strohmeyer, and therefore the situation was not truly all that ambiguous. However, there remains a definite ambiguity in the whole situation when you factor in that Cash, given the reasons that he looked up to Strohmeyer in the first place, apprehended a danger to himself. During an interview, he expressed

⁷⁷ Nora Zamichow, "The Fractured Life of Jeremy Strohmeyer", (19 July 1998) *Los Angeles Times*, online, <www.latimes.com> [perma.cc/G3G3-GJRX].

⁷⁸ *Ibid.*

⁷⁹ David Ferrara, "Judge denies new sentence for man who killed girl at Nevada casino" (23 July 2018), online: *Las Vegas Review-Journal* <www.reviewjournal.com/crime/courts/judge-denies-new-sentence> [perma.cc/33ZR-9ATE].

⁸⁰ *Ibid.*

⁸¹ "Berkeley students remain in uproar over David Cash", *Las Vegas Sun* (1 October 1998), online: <lasvegassun.com/news/1998/oct/01/> [perma.cc/UFZ4-AZ3L].

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Rachel Crosby, "In Strohmeyer case, 'bad Samaritan' David Cash led to new law" (19 May 2017), online: *Law Vegas Review-Journal* <www.reviewjournal.com/crime/homicide/s/in-strohmeyer-case-bad-samaritan-david-cash> [perma.cc/A4NT-6VRH].

⁸⁵ Zamichow, *supra* note 77.

⁸⁶ *Ibid.*

resentment towards the notion that he should put himself at risk for a girl that he did not know personally.⁸⁷

Indeed, Steven Heyman notes that there have frequently been instances where good Samaritans have been shot or stabbed while trying to stop crimes in progress.⁸⁸ Another fairly frequent occurrence is drowning during attempted rescues, even in situations that involve relatively calm bodies of fresh water (e.g. a lake). A study of 88 news reported incidents of failed rescue attempts in Turkey, in a period running from 2005 to 2008, found that 60 primary drowning victims and 114 rescuers had died during the incidents.⁸⁹ More than one scenario can manifest during a failed drowning rescue. One is that sometimes a real risk may be apparent (e.g. a rushing current that took the primary victim with it or the primary victim had sunk deeper into the water) and the would-be rescuer knew of the risk and accepted it. Another scenario is that the level of risk involved can be fatally underestimated. The latter scenario suggests that trying to evaluate the level of risk remains an exercise fraught with error and uncertainty. For the law to try and demarcate between a level of risk that is too high to demand intervention and a lower acceptable level of risk where the law can compel and oblige a rescue, is a doomed enterprise for the critics of bad Samaritan laws.

Keep in mind that these events frequently occur even without the pressure of a legal compulsion to attempt rescue. And so, opponents of bad Samaritan laws argue that calling upon the force of the law to provide additional pressure to affect rescues would only increase the occurrences of tragedy.⁹⁰ Levy, however, counters that there is no empirical evidence to support the claim that such occurrences would increase as a result of bad Samaritan laws.⁹¹ He further adds the hope that bad Samaritan laws can encourage citizens to educate themselves on how to affect a rescue and when not to attempt a rescue that is too dangerous.⁹²

The critics may suggest that it is unreasonable to expect someone to provide assistance when that person perceives a distinct and tangible danger

⁸⁷ *Ibid.*

⁸⁸ Stephen J Heyman, "Foundations of the Duty to Rescue" (1994) 47:3 Vand L Rev 673 at 678-79, 713-14.

⁸⁹ Adnan Turgut & Tefvik Turgut, "A Study on Rescuer Drowning and Multiple Drowning Incidents" (2012) 43:2 J Safety Research 129.

⁹⁰ Levy, *supra* note 25 at 678-79.

⁹¹ *Ibid* at 685.

⁹² *Ibid* at 685-86.

to their person. There may be an additional phenomenon whereby a person may, even if subconsciously, overestimate the risk of providing assistance. That psychological phenomenon is known as the bystander effect, whereby a person finds it more difficult to assist when there are other persons in the vicinity who are also in a position to help but do not take the first initiative.⁹³ The incident that triggered the naming of the bystander effect and its subsequent study was the murder of Kitty Genovese in New York City, by Winston Mosely on March 13, 1964.⁹⁴ Initial news reports estimated that at least 38 persons witnessed the initial attack that involved multiple stab wounds in the early hours of the morning.⁹⁵ There has since been some debate over whether the witnesses numbered as much as 38 and if all of them actually saw the attack or heard her screams.⁹⁶ What is apparent is that at least several people either saw the attack or heard it and chose neither to provide physical assistance or even call for help.⁹⁷ Mosely drove away for about ten minutes, during which Genovese managed to stumble to the back entrance of her apartment building.⁹⁸ Mosely returned and inflicted several more stab wounds while she in the back stairwell of the building.⁹⁹ Genovese died en route to a hospital.¹⁰⁰

Subsequent studies have since revealed various dynamics that inform the bystander effect. For example, the larger the number of passive bystanders, the more likely the bystander effect will prevent intervention.¹⁰¹ Persons who possess greater skills relevant to the rescue situation are more likely to intervene compared to those who possess less relevant skills.¹⁰² The bystander effect is decreased when it involves harm to something or someone that is known and valued by the person (e.g. littering in a well-

⁹³ Greg Rutkowski, Charles Gruber & Daniel Romer, "Group Cohesiveness, Social norms and Bystander Intervention" (1983) 44:3 J Personal & Soc Psychology 545.

⁹⁴ Rachel Manning, Mark Levine & Allan Collins, "Kitty Genovese and the Social Psychology of Helping: The Parable of the 38 Witnesses" (2007) 62:6 American Psychologist 555 at 555-56.

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at 557-58.

⁹⁷ *Ibid* at 555-58.

⁹⁸ *Ibid* at 558.

⁹⁹ *Ibid.*

¹⁰⁰ "Kitty Genovese" (last modified 21 August 2018), online: *History* <www.history.com/topics/crime/kitty-genovese> [perma.cc/S23S-MK24].

¹⁰¹ Rutkowski, Gruber & Romer, *supra* note 93.

¹⁰² Robert Cramer et al, "Subject Competence and the Minimization of the Bystander Effect" (1988) 18:13 J Applied Social Psychology 1133.

known park in a small local neighbourhood) but remains noticeable when the subject (e.g. graffiti on a large mall that is used generally by the public) is less known and valued by the person.¹⁰³ Ironically, a lower risk situation is more likely to result in the bystander effect than a high risk situation. The reason appears to be that a higher risk situation is more likely to trigger an acute awareness that the other person is in a perilous situation and in need of help.¹⁰⁴ What is known of the bystander effect is that it can effectively block an aiding response, very often in situations where bad Samaritan laws would demand that response (e.g. deemed lower-risk situations). If that is the case, is it fair of bad Samaritan laws to insist on the response when it may be at odds with human nature?

Lastly, another potential risk is the exposure to legal liability if the rescue goes awry. However, proponents of bad Samaritan laws argue that exceptions based on attempting assistance in good faith adequately address such concerns.¹⁰⁵

3. *A False Distinction?*

There is also considerable debate around whether the distinction between actions and omissions is a sound one. A key objection to bad Samaritan laws is that there is a fundamental difference between actually doing something and allowing it to happen.¹⁰⁶ Bad Samaritan laws would, therefore, violate the *actus reus* requirement.¹⁰⁷ But, Levy points out that punishing omissions does not necessarily mean punishing only negative thoughts.¹⁰⁸ Criminal law in common law jurisdictions frequently criminalize certain categories of omissions.¹⁰⁹

Proponents of bad Samaritan laws question whether positive action can truly be distinguished from omissions.¹¹⁰ It can perhaps be hard to tell one apart from the other.¹¹¹ The distinction becoming blurry can perhaps be

¹⁰³ Peggy Chekroun & Markus Brauer, "The Bystander Effect and Social Control Behavior: The Effect on the Presence of Others on People's Reactions to Norm Violations" (1992) 32:6 *European J Soc Psychology* 853.

¹⁰⁴ Peter Fisher, "The Bystander Effect: A Meta-Analytic Review on Bystander Intervention in Dangerous and Non-Dangerous Situations" (2011) 137:4 *Psychological Bulletin* 517.

¹⁰⁵ Wozzley, *supra* note 43 at 1276.

¹⁰⁶ Levy, *supra* note 25 at 648-49.

¹⁰⁷ *Ibid* 663-64.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* at 664-65.

¹¹⁰ *Ibid* at 629-38.

¹¹¹ Wozzley, *supra* note 43 at 1299.

seen in this notorious photograph, taken during the 1993 Sudan famine, by South African photojournalist, Kevin Carter:



Figure 1 “Famine in Sudan” (photograph) Kevin Carter/Sygma Premium via Getty Images, USA, 587828802 (1 March 1993).

The young boy in the picture has collapsed from exhaustion while trying to reach a feeding centre. The vulture is obviously waiting for the boy to expire in order to begin feeding. Carter waited 20 minutes in the hope that the vulture would spread its wings and thereby provide an artistically better photograph.¹¹² He left the scene without helping the child reach the feeding centre, which was mere metres away, when it became apparent that the vulture would not ‘cooperate’; although he claims to have chased away the vulture.¹¹³ The child survived that incident, but died of malaria 14 years afterwards.¹¹⁴ Carter won a Pulitzer Prize in 1994 for the picture, which had been published in the *New York Times*, although he did not enjoy it.¹¹⁵ He

¹¹² “Starving Child and Vulture” (last visited 11 June 2020), online: *Time*, 100 Photos <100photos.time.com/photos/kevin-carter> [perma.cc/KJM7-BHNF].

¹¹³ Scott MacLeod, “The Life and Death of Kevin Carter” (24 June 2001), online: *Time Magazine* <content.time.com/time/magazine/> [perma.cc/5H3T-YA33].

¹¹⁴ “Starving Child and Vulture”, *supra* note 112.

¹¹⁵ *Ibid.*

committed suicide by carbon monoxide poisoning three months after winning the prize.¹¹⁶

To be fair, Carter and other photojournalists had been instructed beforehand not to touch any civilians suffering from the famine due to concerns of spreading the disease.¹¹⁷ That did not stop people from questioning his sense of ethics or morality. For example, Reenah Shah Stamets wrote in a Florida newspaper: "To many who see the picture, there is only one way to respond to such a tragedy: Go, pick up the girl, make sure she's safe, make sure she's fed. Otherwise, the man adjusting his lens to take just the right frame of her suffering might just as well be a predator, another vulture on the scene."¹¹⁸ For the sake of discussion, if one assumes the very worst about Carter, the scenario itself can be suggestive of a mixture of exploitative action and passive inaction.

Whether the distinction is truly tenable leads into other, interrelated debates. One such debate is whether someone who fails to assist can also be considered as causing, even if indirectly, harm to the person who was in danger.¹¹⁹ A theoretical concept that is used to describe criminal law is what is known as the 'harm principle'; that the criminal law strives to avoid tangible forms of harm to citizens, such as bodily harm or even damage to property.¹²⁰ An objection to bad Samaritan laws can be based on the harm principle; that it was the actual perpetrator who caused the harm, not the bad Samaritan. Levy, however, points out that criminal law does not always base offences on the harm principle.¹²¹

Arthur Leavens regards the distinction between positive actions and omissions as untenable.¹²² In his view, a better foundation for criminal

¹¹⁶ Blessy Augustine, "The vulture in the frame" (13 October 2017), online: *Hindu Business Line* <www.thehindubusinessline.com/blink/watch/the-vulture-in-the-frame/article9901741.ece> [perma.cc/D8U4-89HD]; Stephan Roget, "The Pulitzer Prize-Winning Photo So Emotionally Devastating, The Photographer Took His Own Life" (16 January 2020), online: *Ranker* <www.ranker.com/list/vulture-and-little-girl-photo-story/stephan-roget?page=2> [perma.cc/8U66-XMYL].

¹¹⁷ Roget, *supra* note 116.

¹¹⁸ Reenah Shah Stamets, "Were his priorities out of focus?", *Tampa Bay Times* (14 April 2005), online: <www.tampabay.com/archive/1994/04/14/were-his-priorities-out-of-focus/> [perma.cc/59BQ-XF7Y].

¹¹⁹ Levy, *supra* note 25 at 649–52.

¹²⁰ *R v Malmo-Levine*; *R v Caine*, [2003] 3 SCR 571.

¹²¹ *Ibid* at 665–66.

¹²² Arthur Leavens, "A Causation Approach to Criminal Omissions" (1988) 76:3 Cal L Rev 547 at 551–52, 562–63.

liability is a holistic analysis of the causal relationship between the accused and the victim.¹²³ This theory contemplates that not rendering aid can be a causal contributor to the harm suffered by the victim, therefore justifying convicting the accused for a crime.¹²⁴ But Schiff argues that result does not necessarily equate with causation and, therefore, it is a flawed foundation for a bad Samaritan law.¹²⁵

An argument can be made that the bad Samaritan, through a complex chain of causation, shares causal responsibility for the harm.¹²⁶ Feldbrugge in particular argues:

There is ultimately no fundamental difference between intentional homicide and failure to rescue committed intentionally; the second offense is essentially nothing but the least serious form of the first. It is, however, convenient under the present circumstances to retain a special offense of failure to rescue. Where acts which would avert the death of the victim, and which it is homicide not to perform, involve a certain measure of inconvenience or danger to the potential rescuer, where the chance of averting the death of the victim seems small, or where the causal connection between the offender's inactivity and the death of the victim is not abundantly clear, it appears preferable to punish the offender under a provision less strict than that governing intentional homicide.¹²⁷

Whether the distinction is tenable also raises questions about degrees of blameworthiness and proportionality in punishment. Is it proportionate to equally punish both the murderer and somebody who did not render aid?¹²⁸ Levy, for example, supports a bad Samaritan law so long as the omission to render aid receives significantly less punishment than the direct punishment of a crime.¹²⁹ It has been noted that common law crimes based on omissions are based on a breach of trust in certain relationships (e.g. doctor-patient).¹³⁰ Alison McIntyre is likewise supportive of bad Samaritan laws with lesser punishments, and her position includes a critique of existing law that only criminalizes omissions in the context of particular relationships.¹³¹ Why should criminal law severely punish an omission in

¹²³ *Ibid* at 552.

¹²⁴ *Ibid* at 572-83, 591.

¹²⁵ *Supra* note 39 at 125-27.

¹²⁶ Levy, *supra* note 25 at 666-70.

¹²⁷ *Supra* note 76 at 651.

¹²⁸ Levy, *supra* note 25 at 644.

¹²⁹ *Ibid* at 670-72.

¹³⁰ Gur-Arye, *supra* note 22 at 8-13.

¹³¹ Alison McIntyre, "Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes" (1994) 23:2 *Philosophy & Public Affairs* 157 at 159, 161, 186-89.

the context of a recognized relationship and yet visit no consequence where severe harm occurred, but there was no legally recognized special relationship?¹³²

However, a general duty to assist that is enforced through relatively lesser sanctions can itself invite criticism. Is the bad Samaritan less blameworthy simply because he allowed someone to die instead of overtly killing someone?¹³³ Does reprehensibility increase when the bad Samaritan benefits from allowing someone else to die?¹³⁴ If the moral difference between the bad Samaritan and the primary actor is only slight, does that justify significantly different punishments?¹³⁵ Damien Schiff is of the view that a bad Samaritan law that provided only minor punishments would be contrary to the proportionality principle, since any degree of blameworthiness between the primary actor and the bad Samaritan is minor.¹³⁶ There are also pragmatic concerns tied to conviction with trying to prosecute bad Samaritan cases.

4. *Questions of Enforceability*

One possible objection is that proving failure to assist can be difficult, particularly since it involves proving a relatively passive state in comparison to prosecuting offences that are based on overt actions of the accused.¹³⁷ Proponents of bad Samaritan laws will of course insist that any difficulties in proof are not reasons to refrain from criminalization. It could also be asserted that some instances will be easy to prosecute.¹³⁸

Concerns over proof and enforceability can become even more acute in instances where numerous people pass by a situation and do not assist. Can you identify all of the individuals who could have rendered assistance but did not? Even if you could, would you be able to prove the lack of assistance beyond a reasonable doubt for all of them?¹³⁹ And indeed, a concern that has been raised with respect to trying to deter a lack of assistance to others

¹³² *Ibid.*

¹³³ Levy, *supra* note 25 at 638–40.

¹³⁴ *Ibid* at 640–46.

¹³⁵ *Ibid* at 644–46.

¹³⁶ *Supra* note 39 at 687–88.

¹³⁷ Levy, *supra* note 25 at 675; Woolley, *supra* note 43 at 1277.

¹³⁸ Levy, *supra* note 25 at 681.

¹³⁹ *Ibid* at 672–75; Leon Sheleff, *The Bystander: Law, Behavior and Ethics* (Lexington, Massachusetts: Lexington Books, 1978) at 14–23.

in need is that it only accomplishes pushing such instances of apathy underground.¹⁴⁰

The dynamics can perhaps be seen in the infamous torture-murder of then 23-year-old, Ilan Halimi, a Jewish man living in Paris until his death on January 20, 2006.¹⁴¹ Halimi had been working as a mobile phone salesperson when he met a woman of Iranian descent who called herself "Audrey".¹⁴² They agreed to meet at an apartment for what he understood to be a date. It was a lure, as waiting for him in the apartment was a self-styled gang of "Barbarians", many of whom were Muslims of African descent with anti-Semitic beliefs.¹⁴³ After abducting him, they proceeded to torture him for 24 days with cuts and burns that covered at least 80% of his body, while demanding a ransom of \$540,000 from his family (although the amounts were decreased over the course of the ordeal).¹⁴⁴ At the end, he was found naked and handcuffed, dying mere minutes after an ambulance began to transport him to a hospital.¹⁴⁵

A total of 16 people were convicted for direct participation in the torture and murder.¹⁴⁶ The gang leader, Youssouf Fofana, was sentenced to life imprisonment with parole ineligibility for 22 years.¹⁴⁷ The woman who lured Halimi was sentenced to nine years.¹⁴⁸ The other participants received a wide array of sentences ranging from eight months to 18 years.¹⁴⁹

What is also apparent is that numerous people in the neighbourhood observed the torture while it was in progress, but no one reported it to authorities.¹⁵⁰ There is a question of whether not reporting the torture to

¹⁴⁰ Levy, *supra* note 25 at 683.

¹⁴¹ Michael Gurfinkiel, "Tale of Torture and Murder Horrifies the Whole of France", *The New York Sun* (22 February 2006), online: <www.nysun.com/foreign/tale-of-torture-and-murder-horrifies-the-whole/27948/> [perma.cc/YRC7-7PCH].

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ "Court Sentences 16 Over Murder of Ilan Halimi: Appeals court near Paris hears appeals of defendants already convicted by a lower court into the slaying of Halimi", *Haaretz* (17 December 2010), online: <www.haaretz.com/jewish/1.5094848> [perma.cc/9PY5-5KUJ].

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ "The Rising Tide of Anti-Semitism", *The Washington Post* (2 April 2006), online: <www.washingtontimes.com> [perma.cc/KP4T-SY2H].

authorities, at least when residents were safely at a distance from the “Barbarians” gang, would have contravened French criminal law.¹⁵¹ Only one person was ever convicted of a failure to report. Alcino Ribeiro learned that his son, Jerome Ribeiro, had initially participated in at least the confinement of Halimi but left after six days. Alcino counselled his son not to tell anyone about what was going on.¹⁵² He was sentenced to eight months, but even then, the sentence itself was ultimately suspended.¹⁵³

It is entirely possible (though not certain) that Ribeiro was prosecuted, but not the bystanders in the neighbourhood, because proof was possible for the former but not the latter. If that is indeed the case, it may illustrate the difficulties of proving cases when prosecuting numerous bystanders, not all of whom may even be identified. Proponents of bad Samaritan laws will of course insist that enforceability issues are not necessarily a bar to criminalization.¹⁵⁴ But, even if French authorities could identify all of the neighbourhood bystanders so as to pursue prosecution, the situation is still not free of difficulties. Prosecutors will make public policy decisions as to who to prosecute (i.e. who is particularly blameworthy).¹⁵⁵ Would such decisions be arbitrary and unfair though?¹⁵⁶ Would a decision to prosecute only some of the bystanders who observed Halimi's torture and not others be open to such criticisms? Or, if the authorities prosecuted all of the offenders, would it exacerbate already uneasy ethnic tensions involving Muslims in France?¹⁵⁷

Even if the state can gather enough evidence and bring forward a case for prosecution, there may still be concerns. There is a concern about the prospect of jury nullification; that juries may sympathize with the bad Samaritan and be predisposed towards a not guilty verdict, no matter how strongly the prosecution may prove the necessary elements of the offence.¹⁵⁸ Perhaps members of a jury may sympathize with a bad Samaritan accused

¹⁵¹ *Supra* note 26.

¹⁵² “Procès en appel du Gang des Barbares, La cruelle loi du silence” (26 November 2010), online: *Justice for Ilan Halimi* <justicepourilhanparradioj.unblog.fr/2010/11/26/proces-en-appel-du-gang-des-barbares-la-cruelle-loi-du-silence/> [perma.cc/T7QK-VTZ4].

¹⁵³ *Ibid.*

¹⁵⁴ Levy, *supra* note 25 at 680.

¹⁵⁵ *Ibid.*

¹⁵⁶ Wozzley, *supra* note 43 at 1290–91.

¹⁵⁷ Karima Laachir, “France's ‘Ethnic’ Minorities and the Question of Exclusion” (2007) 12:1 *Mediterranean Politics* 99.

¹⁵⁸ Levy, *supra* note 25 at 675–76.

under the realization that it could be difficult for themselves to begin a rescue in similar situations. And indeed, it has been found that a willingness to help may depend on the perception of the person in need of help. People are more likely to assist those that they do not deem to be responsible for their own predicament¹⁵⁹ and are more likely to rescue when they perceive the victim as dependent on another.¹⁶⁰ What if the jury perceives that the victim brought the situation upon themselves? What if the jury perceives the victim as previously being relatively healthy and self-sufficient? Proponents of bad Samaritan laws counter that jury nullification is a prospect for any offence, such that it is not a reason not to criminalize. Nor is there proof that jury nullification would be frequent.¹⁶¹ Criminal law should still serve its symbolic functions aside from pragmatic objections.¹⁶² It is now time to explore how Cree law approaches matters.

III. CREE LAW AND THE DUTY TO ASSIST

A. *Mi-she-shek-kak* (The Giant Skunk)

Cree law, unlike common law legal systems, did impose a general duty to either assist, if it was within one's own capabilities, or to at least warn others of danger if addressing a dangerous situation that was beyond one's capabilities. The primary antagonist of the Swampy Cree legend of *Mi-she-shek-kak* was the Giant Skunk. The Giant Skunk was mortally feared because of its great size and smell. It also eats other animals.¹⁶³ It is important to situate the narrative in the broader concept of Cree law. The *Wetiko* is an important concept in both Cree law, as well as numerous other Indigenous legal orders. Hadley Friedland notes that the *Wetiko* has often been tied to stereotypical notions of cannibalism and mental health disorder.¹⁶⁴ But Friedland maintains that *Wetiko* is a broad legal category meant to describe anyone who has become a danger to those around them, in contravention

¹⁵⁹ Schiff, *supra* note 39 at 111; Feldbrugge, *supra* note 76 at 639–40.

¹⁶⁰ Viola Brady, “The Duty to Rescue in Tort Law: Implications of Research on Altruism” (1980) 55:3 *Ind LJ* 551 at 552–53.

¹⁶¹ Levy, *supra* note 25 at 682.

¹⁶² *Ibid* at 684.

¹⁶³ Louis Bird, *Telling Our Stories: Omushkego Legends & Histories from Hudson Bay* (Toronto: University of Toronto Press, 2011) at 69–70.

¹⁶⁴ Hadley Friedland, *The Wetiko Legal Principles: Cree and Anishnabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018) at 23–24, 33.

of the community's social norms, and to such a degree that the community is obliged to address the danger in one way or another.¹⁶⁵

The Giant Skunk, although it is not explicitly called a *Wetiko* in a written version of the legend provided by a Swampy Cree Elder, Louis Bird, is effectively a *Wetiko* for the purposes of the narrative. The danger that the Giant Skunk poses is so great that all the other animals of the land gather together into a council to discuss how to address its threat.¹⁶⁶ The preliminary step of a council meeting resonates with Friedland, relating it to an essential first legal response to a *Wetiko*; which was for the community to gather together for collective deliberations and decision-making.¹⁶⁷ It should be noted that such collective discussions not only focused on how to manage the danger presented by a *Wetiko*, but they also explored how the *Wetiko* could be aided to become better and cease being dangerous to him or herself and others.¹⁶⁸ The council decides to kill it if an opportunity arises. But for now, all other animals are to avoid crossing its trail to avoid getting its attention.¹⁶⁹ And indeed, this choice also resonates with Friedland, describing how avoiding the *Wetiko* and separating him or her from the collective, even if temporarily, was the preferred approach before, and relative to, dealing with a *Wetiko* in a more violent fashion.¹⁷⁰

The narrative takes a dramatic turn when Weasel takes a shortcut, underneath the snow that crosses the Giant Skunk's trail, to get home and eat earlier. Weasel admits to his wife after supper what he had done but is sure that the Giant Skunk will not notice. Weasel's wife is concerned that the Giant Skunk will realize that his trail has been crossed.¹⁷¹ The Giant Skunk does notice and feels insulted. He decides to pursue and kill the other animals.¹⁷²

Weasel, meanwhile, flees his home with his family and warns the other animals.¹⁷³ The other animals decide to continue their policy of avoidance and flee for the mountains. But they are forced to reweigh their options when their children and elderly are becoming tired. It is obvious that the

¹⁶⁵ *Ibid* at 58–61, 70–73.

¹⁶⁶ Bird, *supra* note 163 at 70.

¹⁶⁷ Friedland, *supra* note 164 at 83–85.

¹⁶⁸ *Ibid*.

¹⁶⁹ Bird, *supra* note 163 at 70.

¹⁷⁰ Friedland, *supra* note 164 at 100–01.

¹⁷¹ Bird, *supra* note 163 at 70–71.

¹⁷² *Ibid* at 71–72.

¹⁷³ *Ibid* at 72.

Giant Skunk will catch up. The animals hold another council and decide that they have to make a stand in a large valley lake in the mountains.¹⁷⁴ Friedland explains that executing a *Wetiko* was a possibility, but only when the alternatives turned out to be insufficient to protect the community.¹⁷⁵

The animals make no effort to hide their trail in order to lure the Giant Skunk into a trap.¹⁷⁶ The women, elderly, and children are led away further into the mountains. Only the adult males participate in the coming battle.¹⁷⁷ Recall that one of the key reasons for common law systems not imposing general duties to assist is a hesitancy to engage in potentially complex risk analyses. What the narrative shows is that Cree law embraces the risk analysis in this context. Those with diminished physical capacity, the women, children, and elderly, are exempted from participating in the struggle to come. The healthy adult males are fully expected to take very real and potentially mortal risks upon themselves.

The other animals go to Big Cat for help in killing the Giant Skunk, but Big Cat initially does not want to get involved. He just wants to rest in his cave, but he does eventually decide to help.¹⁷⁸ Big Cat agrees to help on the condition that the other animals prepare a place from which he can jump onto the Giant Skunk.¹⁷⁹

Giant Skunk tries to provoke the other animals into an argument so that he has an excuse to kill them. The other animals initially avoid it. Wolverine, however, as part of the plan to start the fight, insults the Giant Skunk by calling him “Bulgy Cheek”.¹⁸⁰ Giant Skunk starts to turn around and begin the fight. Wolverine jumps on Giant Skunk’s anus and holds his tail down to prevent him from using his spray. The other animals jump down on Giant Skunk to try and kill him.¹⁸¹ They finally succeed when Big Cat, albeit reluctantly and taking his time to do so, jumps on Giant Skunk’s neck.¹⁸²

¹⁷⁴ *Ibid* at 73.

¹⁷⁵ Friedland, *supra* note 164 at 101–03.

¹⁷⁶ Bird, *supra* note 163 at 73–74.

¹⁷⁷ *Ibid* at 74.

¹⁷⁸ *Ibid* at 72.

¹⁷⁹ *Ibid* at 74.

¹⁸⁰ *Ibid* at 74–75.

¹⁸¹ *Ibid* at 75.

¹⁸² *Ibid* at 75.

Wolverine lets go of the anus but without first putting down the tail. He gets hit by Giant Skunk's spray and ends up in pain.¹⁸³ Wolverine cannot wash off in nearby lakes and rivers since the animals drink from them. He washes off in Hudson Bay and James Bay, which is why the waters in both are now salty and undrinkable. 'Winnipeg' means "dirty (salted) water".¹⁸⁴

B. *Mistacayawasis*

The legend of the Giant Skunk is an example of when members of the community act in accordance with the law and, therefore, the narrative itself does not contain a punishment for failure to act. How about when somebody fails to act on the duty? A Rock Cree narrative called *Mistacayawasis* speaks to that particular point.

The main characters are two sisters who are married to a pair of brothers. The older sister became a *Wetiko*. She murdered and ate the two young sons and husband of the younger sister. The older sister's husband comes home and realizes what she had done. He overpowers her and has the chance to kill her, but then he decides that he has nothing left to live for, letting her kill and eat him. The sisters move to a nearby camp. The younger sister provides no warning to the camp, for she fears that the older sister would kill her. The older sister proceeds to murder two more boys. The second murder was witnessed by one of the men in the camp after he became suspicious following the disappearance of the first boy. The members of the camp ambush the sisters and fire arrows at them. The younger sister dies immediately during the volley. The older sister survives and kills her sister's assailants. She afterwards comes to a realization of what she has become and finds the lone survivor of the camp, a young boy named *mistacayawasis*. He kills her on her instructions, through the only method possible for her, by cutting off the finger which contained her heart.¹⁸⁵

The written narrative put together by Robert Brightman includes references such as "[t]he younger sister was not able to say anything because she thought her older sister would kill her[,].... [s]till there was nothing that her younger sister could do[, and]... [t]here was nothing that the younger sister could say."¹⁸⁶ However, the camp was itself convinced that the younger

¹⁸³ *Ibid* at 76.

¹⁸⁴ *Ibid* at 76–78.

¹⁸⁵ Robert A Brightman, *ācaoōhkīwina and ācimōwina: Traditional Narratives of the Rock Cree Indians* (Regina: University of Regina Press, 2007) at 99–101.

¹⁸⁶ *Ibid* at 100.

sister could have done something and, therefore, they deemed her just as worthy of execution as her older sister. The narrative states that "[t]hey killed her because she always stayed with that *wītikōw* woman and they thought this about her, '[s]he also is a *wītikōw*."¹⁸⁷ The camp as a community was likely of the view that the younger sister could have ceased to remain in the company of the older sister when she first started to manifest *Wetiko* behavior, and that she could have warned the camp about the older sister on their arrival. For them to say that the younger sister was also a *Wetiko* meant that, in their eyes, she was just as responsible for the deaths of the two boys from their camp as the older sister.

Her outcome makes it clear that Cree law could mandate punishment for those who did not act on their general duty to render aid or at least give warning when fellow community members were in danger. However, the Swampy Cree *Legend of We-mish-shoosh* makes it clear that Cree law could show leniency towards what would otherwise be sanctionable acts when it was known that they were done out of fear of another. The legend itself involves a powerful chief who is, for all intents and purposes, a serial killer. The chief's two daughters aid him by luring young men into his camp so that he can kill them and take their possessions. The chief is ultimately bested and killed by a gifted young medicine man as a matter of justice. The chief is given the fate that he has brought upon himself, but the daughters are free to go without consequence in recognition that they lived in terror of their own father.¹⁸⁸

This nuance also shapes the contours of duties to assist and warn. Friedland suggests that the duty to assist and intervene directly in a dangerous situation was operative when the person in question possessed the capabilities to do so.¹⁸⁹ However, if it was clear that the situation itself was beyond the capabilities of the person in question, the law could require, at a minimum, that they warn others of the danger and no more than that.¹⁹⁰ The *Mistacayawsis* narrative may not necessarily have demanded that the younger sister act directly against her sibling, but it does regard the younger sister's fate as just for not even observing the minimum duty to warn.

¹⁸⁷ *Ibid* at 100.

¹⁸⁸ Bird, *supra* note 163 at 107–123.

¹⁸⁹ Hadley Friedland, "Accessing Justice and Reconciliation: Cree Legal Summary" (2012) at 32–34, online (pdf): *University of Victoria, Indigenous Legal Research Unit* <www.indigenousbar.ca/indigenouslaw.pdf> [perma.cc/66V4-PBWH].

¹⁹⁰ Friedland, *supra* note 164 at 93–96.

The next question becomes, even if Cree law mandated a general duty to assist in the past, should it do so in the future as an exercise of self-determination? One can perhaps see a real social need for it. Statistics on criminal victimization of Indigenous peoples are glaring. An assessment of the 2014 General Social Survey on Victimization reveals that Indigenous peoples (28%) are more likely to be the victims of crime in comparison to non-Indigenous peoples (18%).¹⁹¹ Indigenous peoples were more than twice as likely to be violently victimized (163 incidents per 1,000 people) than non-Indigenous peoples (74 incidents per 1,000 peoples).¹⁹² The picture is even more alarming for Indigenous women, who are violently victimized (220 incidents per 1,000 people) at rates that were approximately double those suffered by Indigenous men (110 incidents per 1,000 people), almost triple that of non-Indigenous women (81 incidents per 1,000 people), and more than triple that of non-Indigenous men (66 incidents per 1,000 people).¹⁹³ Indigenous police services are also underfunded. They have complained that underfunding in comparison to mainstream police services has meant aging and defective equipment, while Indigenous gangs concentrate their activity on reserves because they know that inadequate funding has turned those reserves into law enforcement vacuums.¹⁹⁴

The victimization is itself often a result of compounded vulnerabilities. Certainly, there is a degree to which Indigenous peoples victimize each other, which is recognized through a phenomenon that is termed ‘intergenerational trauma’. Those Indigenous children who attended the residential schools were left without the skills or qualifications to pursue livelihoods; with low self-esteem as Indigenous persons; in an angry and traumatized state of being and vulnerable to substance abuse, violence, and other behaviour issues. Those children would take out their pain and problems on those nearest to them: their own family members. The next

¹⁹¹ Statistics Canada, *Victimization of Aboriginal people in Canada, 2014*, by Jillian Boyce, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 June 2016) at 3, online: <www150.statcan.gc.ca> [perma.cc/5FSW-QRAN].

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ Elias Abboud, “Lack of funds for policing turning Indigenous communities into organized crime hubs, Quebec hearing told”, *CBC News* (22 March 2018), online: <www.cbc.ca/news/canada/montreal/> [perma.cc/4NER-2D9Q]; Morgan Lowrie, “Indigenous police chief urges governments to take action on underfunding”, *The Globe & Mail* (5 June 2019), online: <www.theglobeandmail.com/canada/article-indigenous-police-chief-calls-urges-governments-to-take-action-on/> [perma.cc/9A9M-YFZC].

generation of children are subjected to physical and sexual violence in their home environments and, therefore, develop the same issues as the previous generation. And so, the seeds planted by the residential schools pass on trauma from one generation to the next.¹⁹⁵ There is also recognition that a significant degree of victimization comes from racism directed towards Indigenous peoples by non-Indigenous peoples. The fact that Indigenous women are either murdered or go missing at rates that far exceed those of non-Indigenous women, so much so as to necessitate a national inquiry on that very issue, surely indicates a very real problem of racialized violence against Indigenous peoples.¹⁹⁶

Perhaps a Cree community may decide to enact a general legal duty to assist in reducing victimization in communities, whatever the source of that violence is. Perhaps such a law can mark a shift towards a greater communal preservation of safety, taking at least some of the onus away from strapped law enforcement agencies. It is far from given that reviving Cree law to assist and warn could accomplish those objectives in contemporary circumstances, laudable as they may seem. Nor can one assume that every Cree community would see a traditional law to render assistance or give warning as an answer. For example, some Cree communities may decide for themselves that a police force resembling municipal police forces in mainstream Canada is sufficient. Whether the use of Cree law to assist or warn is possible or advisable is the subject of the following discussions.

IV. SHOULD THE CREE LAW BE REVIVED?

A. The Need for Internalization

It is, of course, one matter to enact a law. It can be quite another to expect it to have any meaningful societal impact or effect. It is inevitable that not everyone will comply with a given law all of the time. But there can be instances or situations that raise the question of whether there is any

¹⁹⁵ Peter Menzies, “Developing an Aboriginal Healing Model for Intergenerational Trauma” (2013) 46:2 *Intl J of Health Promotion & Education* 41; Lloyd Hawkeye Robertson, “The Residential School Experience: Syndrome or Historic Trauma” (2006) 4:1 *Pimatisiwin* 1.

¹⁹⁶ Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a (Gatineau, Quebec: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019), online: <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a.pdf> [perma.cc/8HYS-WLLM].

significant point served by having that law in the first place. For example, Québec has its own provincial *Charter of Human Rights and Freedoms*.¹⁹⁷ Article 2 of that *Charter* requires people to render assistance albeit without risk to themselves.¹⁹⁸ Québec, as a province, cannot prosecute refusals to help since it would be an intrusion on federal jurisdiction over criminal law.¹⁹⁹ A failure to help, however, could expose one to civil liability under Québec law. In 2001, several people ignored the plight of a beaten girl, found unconscious near Metro Vendome Station for three hours, by simply walking past her without rendering any aid or even calling for help.²⁰⁰

In contrast, a teenaged girl of Saanich descent saved three men from drowning in the Gorge Waterway in Victoria after she dived in “without a second thought”.²⁰¹ She barely made it back to the docks with the people she rescued, as her own body started to give out.²⁰² She had to be taken to the hospital for hypothermia after paramedics arrived.²⁰³ It is unclear from the news story whether she was acting on her own individual moral compass or whether she was acting on ingrained Saanich legal principle. The story nonetheless illustrates that there is potential in Indigenous communities, Cree communities included, for a law requiring assistance to others to take hold and have positive effects.

The potential is there, and perhaps that point is demonstrated by the efforts of the Cree community of *Asuniwuche Winek* near the town that is now known as Grand Cache, Alberta. The community continued to use its own traditional laws to resolve disputes, relatively unnoticed by mainstream justice, even into the 1970s.²⁰⁴ The community, in consultation with Hadley Friedland, began the development of a justice program grounded in Cree

¹⁹⁷ *Charter of Human Rights and Freedoms*, CQLR c C-12 [Charter].

¹⁹⁸ *Ibid*, art 2.

¹⁹⁹ See the distribution of legislative powers, including criminal law, under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

²⁰⁰ “Vigil held for Montreal teen ignored after beating”, *CBC News* (21 May 2001), online: <www.cbc.ca/news/canada/vigil-held-for-montreal-teen> [perma.cc/HAT3-H7R3].

²⁰¹ April Lawrence, “‘I feel proud’: 17-year-old Saanich girl jumps into ocean to save three strangers”, *CHEK News* (16 March 2018), online: <www.cheknews.ca/i-feel-proud-17-year-old-saanich-girl-jumps-into-ocean> [perma.cc/T2PW-JH8V].

²⁰² *Ibid*.

²⁰³ *Ibid*.

²⁰⁴ Hadley Friedland, *Reclaiming the Language of Law: Exploring the Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD Dissertation, University of Alberta, 2016) [unpublished] at 201–02.

legal principles.²⁰⁵ Cree law was to be the authority for assessing whether harmful behavior had occurred that necessitated community intervention and for guiding the process and outcomes for addressing harm.²⁰⁶ The feedback process for developing the program included the theme that safety for the broader community and all its members was to be the responsibility of the community and its members.²⁰⁷ That included the right of vulnerable members of the community to expect help when they needed it and for those capable of providing assistance to provide it when needed.²⁰⁸

But it is not a given that any and every Indigenous community can get to that point. The intergenerational trauma that troubles many Indigenous communities often goes hand in hand with another recognized phenomena, the normalization of violence, which will be explored in more detail below. Whether an Indigenous community can reach a point where it can apply a law that requires assisting others is necessarily a complex question.

Perhaps the complexities can be summarized as a question of whether a law can be sufficiently internalized by its subjects, such that it would have a real and meaningful power to guide the behaviour of its subjects.²⁰⁹ Québec had a law requiring assistance and it was supported by the prospect of civil liability. Despite this, those who passed the beaten girl by had not sufficiently internalized that law so as to act in accordance with it. Using the traditional law that requires assistance or giving warning may be problematic in some Indigenous communities, especially those overtaken by the normalization of violence. These scenarios may be examples of where the law is not sufficiently internalized and thus, it has no meaningful effect.

We must, of course, be careful to avoid depicting all Indigenous communities according to broad stereotypes. Perhaps the *Auniwuche Winek* community is an example of where the Cree law has already been internalized, provides a meaningful guide to shaping community conduct,

²⁰⁵ *Ibid* at 200–28.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid* at 230.

²⁰⁸ *Ibid* at 252–55.

²⁰⁹ Anthony J Sebok, “Is the Rule of Recognition a Rule?” (1997) 72 *Notre Dame L Rev* 1539; Melvin A Eisenberg, “The Concept of National Law and the Rule of Recognition” (2002) 29:4 *Fla St UL Rev* 1229; Larry Alexander & Frederick Schauer, “Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance” in Matthew D Adler & Kenneth Einar Himma, eds, *The Rule of Recognition and the United States Constitution* (London: Oxford University Press, 2009) 175.

and thereby renders the ensuing discussions mute insofar as the *Asuniwuche Winek* community is concerned. Perhaps the Saanich girl had internalized Saanich law so as to rescue the three men from drowning without any hesitation. The discussion now considers several theoretical perspectives on the internalization of law.

B. Legal Theory and Internalization

Two significant and contrasting bodies of legal theory are natural law theory and legal positivism. The former holds that human laws such as statutes and customs fundamentally reflect an underlying moral foundation that society and its members adhere to, even if subconsciously. The latter views law as an artificial creation of humanity that serves expedient social ends and is not necessarily constrained by an underlying moral foundation.²¹⁰ I do not wish to fully canvass the theoretical debates between these two bodies, which is extensive and has been ongoing for decades. I instead wish to glean from them the rich insights that they offer on the internalization of law. They share remarkable similarities with each other, even as they are articulated from quite different conceptual views of the law.

One of the earliest and still most important theorists of legal positivism is H.L.A. Hart. His theories were, in part, a reaction to conceptions of law that had been articulated by John Austin. According to Austin, a sovereign command backed up by the threat of a sanction are necessary components of law.²¹¹ Without the threat of forceful sanction, any commands are reduced to simply requests by the sovereign.²¹² Hart argues that there is nothing to distinguish Austin's conceptions of law as sovereign commands from other interactions that are resolved by nothing more than the application of brute physical force (e.g. armed robbery).²¹³ What distinguishes law from such raw physical interactions is the acceptance of the law by its subjects. It is now known as Hart's internal point of view that the citizen makes an internal reasoned choice to accept the law as binding on his or her own behaviour.²¹⁴ Hart describes the internal point of view as follows:

²¹⁰ Edward S. Adams & Torben Spaak, "Fuzzifying the Natural Law: Legal Positivist Debate" (1995) 43:1 *Buff L Rev* 85.

²¹¹ John Austin, *The Province of Jurisprudence Determined*, 5th ed by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995).

²¹² *Ibid* at 13, 18-25.

²¹³ HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) at 78.

²¹⁴ *Ibid* at 56.

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought' 'must' and 'should', 'right' and 'wrong'.²¹⁵

But this process of reflection and acceptance is not to be mistaken for a natural law theorist's idea that acceptance means acceptance of an underlying morality behind the law. Hart relates that internal acceptance of law can happen for numerous and variegated reasons:

[I]t is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so ... their allegiance to the system may be based on many different considerations: calculations of long-term self-interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.²¹⁶

Internalization of law is also an important concept for natural law theorists. In *The Morality of Law*, Lon L Fuller argues that law is subject to an internal morality consisting of eight principles: (1) the rules must be expressed in general terms; (2) the rules must be publicly promulgated; (3) the rules must be (for the most part) prospective in effect; (4) the rules must be expressed in understandable terms; (5) the rules must be consistent with one another; (6) the rules must not require conduct beyond the powers of the affected parties; (7) the rules must not be changed so frequently that the subject cannot rely on them; and (8) the rules must be administered in a manner consistent with their wording.²¹⁷ All of these eight principles speak, on some level, to internalization. Principles one, two, four, five, and seven speak to accessibility to the subjects as a prerequisite to the choice to internalize. Principles three and eight speak to fairness in application to maintain at least a minimum baseline of legitimacy before the subjects can internalize the law as an accepted guide to behaviour. The sixth point, and the one of particular interest to my discussion, is the idea that the law

²¹⁵ *Ibid.*

²¹⁶ *Ibid* at 198–99, 203.

²¹⁷ Lon L Fuller, *The Morality of Law* (New Haven, Connecticut: Yale University Press, 1964) at 39.

cannot impose an unreasonable degree of cost or risk on the subjects if there is to be any hope that the subjects will internalize the law.

Rodriguez-Blanco argues that, to a certain degree, Hart's social normativity cannot exist without, and is ultimately parasitic on, the justified normativity inherent in natural law theory.²¹⁸ When a person decides whether or not to comply with the law, the person's own internal reasonings hinge not just on whether they personally accept that law as valid, but also on references to the significant societal/social consensus that may be underlying that law. The person has a social stake in remaining compliant with the law.²¹⁹ What is implicit in that argument is that the fear of stigma and being ostracized may itself be a powerful incentive to comply with the law.

The positivist and natural law theorists recognize, on some level, the dynamics that inform a decision as to whether or not to obey and internalize a law. Rodriguez-Blanco articulates a stake in adhering to societal consensus as an impetus to internalize a law.²²⁰ Hart himself alludes to "demands for conformity" and "the mere wish to do as others do" as impetuses towards internalizing a law.²²¹ On the other hand, Fuller recognizes that a law can make demands of citizens that become unreasonable so that, on the balance, even risking societal stigma and disobeying the law may become the preferable choice for some people.²²²

Socioeconomics uses social norms as a lens for viewing the degree to which people will comply with or internalize the law. It can imply a utilitarian choice on whether or not to comply with the law, and a social norm that is strongly internalized within a community can present a significant cost for disobedience, as expressed through stigma and ostracization.²²³ The positivists and natural law theorists recognize some of the practical dynamics that inform a decision as to whether or not to obey the law, and yet that recognition is but a component of larger theoretical models that they concern themselves with. Socioeconomics theory takes

²¹⁸ Veronica Rodriguez-Blanco, "Social and Justified Legal Normativity: Unlocking the Mystery of the Relationship" (2012) 25:3 Ratio Juris 409 at 409, 411, 430.

²¹⁹ *Ibid* at 422-24.

²²⁰ *Ibid*.

²²¹ *Supra* note 213 at 56, 86, 191, 203.

²²² *Supra* note 217 at 39.

²²³ Cass R Sunstein, "Social Norms and Social Roles" (1996) 96:4 Columbia Law Rev. 903 at 935.

that recognition to the next level and makes it the explicit focus of utilitarian cost-benefit analyses.

Grasmick and Appleton argue that the threat of criminal punishment as deterrence may be more effective by reason of the prospect of social stigma rather than the actual physical consequences realized through incarceration.²²⁴ Robert Ellickson offers an even more specific insight. He argues that social norms have an especially strong hold on small communities, where its members constantly (even if informally) encourage each other to live up to those norms and where transgressions can result in an especially severe stigma.²²⁵

Sometimes that fear of stigma and stake in compliance can be powerful enough to persuade people to engage in behaviour that they otherwise would not in the absence thereof. Tom Tyler and Yuen Ho argue that if people view the legal system as legitimate, they are more willing to obey the law out of a sense of obligation to the collective in comparison to a reliance on deterrence and punishment.²²⁶ That can even translate into actions that sacrifice self-interest for the sake of the collective.²²⁷

The theoretical insights on how the stake in adhering to collective values can lead to an internalization of the law also aligns with empirical research on how the bystander effect can be attenuated. Two experiments conducted by Marco van Bommel and others gauged the level of responsiveness to online pleas for aid.²²⁸ One experiment “introduced an accountability cue by making participants’ screennames more salient”, should they choose to offer or withhold aid, while the other “used a webcam”.²²⁹ Both cues had the result of reversing the bystander effect, which was observed in the responses before the cues were introduced.²³⁰ Another study found that the bystander effect was attenuated by increased familiarity

²²⁴ Harold Grasmick & Lynn Appleton, “Legal Punishment and Social Stigma: A Comparison of Two Models” (1977) 58:1 Soc Science Q 15.

²²⁵ Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1994) at 167.

²²⁶ Tom R Tyler & Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russell Sage Foundation, 2002) at 102, 159–60.

²²⁷ *Ibid.*

²²⁸ Marco van Bommel et al, “Be Aware to Care: Public Self-Awareness Leads to a Reversal of the Bystander Effect” (2012) 48:4 J Experimental Soc Psychology 926.

²²⁹ *Ibid* at 926.

²³⁰ *Ibid* at 926–29.

and relationships between the members of a group.²³¹

One can perhaps see these dynamics at play in the Giant Skunk story. Part of common law's hesitation to impose a general duty to assist is a reluctance to force citizens to take very real risks upon themselves. That could be a reflection of Fuller's point that the law cannot demand conduct beyond the powers of the subjects.²³² In fact, Cree law may also reflect a hesitancy to impose unreasonable risks on those who are incapable of taking them on, but with quite different results. Note that in the Giant Skunk story, the women, children, and elderly were exempted from participating in the battle. The *Mistacayawsis* may not necessarily have expected the younger sister to physically confront her sibling, who had become powerful and all but invincible, but it did expect her to at least warn the village of the danger that her sibling presented.

Cree law, beyond the exemptions, obliged the acceptance of very real and mortal risks in the battle against Giant Skunk, and yet every healthy adult male animal willingly threw themselves into the fray. Does each individual animal fear stigma before the others if they stay out of the conflict? The Weasel warns the other animals of what he did after heeding advice from his wife and reconsidering the possibility that Giant Skunk knew his trail had been crossed. What if Giant Skunk, without warning, started to slaughter the other animals and it came out amongst the survivors that Weasel did not reveal the cause so that they could prepare? Would Weasel have been shamed and casted out by the survivors? What stigma would Wolverine face had he not performed the crucial role of holding down Giant Skunk's anus? Big Cat initially did not want to get involved but became willing to help when he was assured of a secure place from which he could jump onto Giant Skunk's neck. Did Big Cat also implicitly relent (even if not explicitly stated in the narrative) for fear of stigma, should the survivors remember his refusal to help?

If one applies the insights provided by the natural law and positivist theorists, and the cost-benefit analysis of the socioeconomic theorists, the equation leads to definite and identifiable results. Common law systems have, for the most, part decided that the real risks that can result from rendering assistance are too much for the legal system to force on citizens.

²³¹ Mark Levine & Simon Crowther, "The Responsive Bystander: How Social Group Membership and Group Size Can Encourage as Well as Inhibit Bystander Intervention" (2008) 95:6 *J Personal & Soc Psychology* 1429.

²³² *Supra* note 217 at 39.

There may be a degree of societal stigma for not helping, as the stories of Kevin Carter and Glenda Moore illustrate, but perhaps it was attenuated by a realization that the risks involved introduce a degree of moral complexity such that the law should not force the point. Failure to help in accordance with Cree law and values would definitely countenance a pronounced stigma to follow. That stigma takes on considerable strength on account of the collective good being such an integral objective of Cree law, and it becomes much more keenly felt in smaller Cree communities where everyone would know if a member did not live up to the law's expectations. Such was the strength of the stigma when almost everyone in the village, without hesitation, killed the younger sister in the *Mistacayawsis* narrative for a perceived failure to give warning that the older sister had become a dangerous *wetiko*. That stigma may have been powerful enough to oblige individual members of a Cree community to accept considerable physical risks on themselves.

For historical Cree communities, the utilitarian cost-benefit equation, on the balance, landed squarely in favour of a legal obligation to help others in danger, at least for those who had the physical capacity to provide assistance. If helping others could involve real physical dangers for Cree people in the past, it was outweighed by the loss of place in the community and stigma if the legal obligation to help was not adhered to. The equation played out in certain ways for historical Cree communities. It is not a given that the equation would play out in the same way in contemporary and present circumstances. And there is more than one reason why it may play out differently. Some Cree communities may decide that dedicated professional services may be an adequate and alternative way of addressing community safety, although I have previously pointed out there are problems with the lack of resourcing for Indigenous police forces. Another reason may be that in some communities, a recognized phenomenon known as the normalization of violence may present a very significant obstacle.

C. Normalization of Violence and its Repercussions

The cost-benefit analysis played out a certain way in historical Indigenous communities, with the result of general obligations to assist being entrenched in parts of their legal orders. We now live in different times, during which colonialism has wrought damage against Indigenous peoples. One unfortunate effect of colonialism has been the erosion and suppression of traditional Indigenous legal orders, at least for some

communities. The concerns are exacerbated by colonialism introducing a troubling new phenomenon in Indigenous communities, the normalization of violence.

A report on Indigenous domestic violence from the Aboriginal Healing Foundation indicates:

While it is generally acknowledged that family violence and abuse did occur prior to European contact, both the historical and anthropological records indicate that it was not a normal feature of everyday life. Indeed, in many Aboriginal societies, an abusive man would soon be confronted by his male relatives (or the relatives of the victim) and, if the abuse continued, the abuser could face dire consequences, including banishment, castration and death.²³³

Colonialism has been especially harmful to Indigenous women. Colonial processes, such as the Residential schools, that introduced intergenerational trauma into Indigenous communities and the imposition of patriarchal band and council systems, through the *Indian Act*, have devalued and eroded the valued place that Indigenous women used to enjoy in their societies. It has been replaced with a warped culture that has accepted the worst of Western patriarchal influences. Where family and sexual violence had previously been prohibited by Indigenous legal orders, the new warped culture normalizes violence against Indigenous women and children.²³⁴ Indigenous women are three times more likely than non-Indigenous women to be subject to family violence.²³⁵

Anne McGillivray and Brenda Comaskey point out that the problem of domestic violence in Indigenous communities may be of such a severity that it forces many Indigenous women to migrate from their reserve

²³³ Michael Bopp, Judie Bopp & Phil Lane, *Aboriginal Domestic Violence in Canada* (Ottawa: Aboriginal Healing Foundation, 2003) at 11, no 7, online: <www.ahf.ca/downloads/domestic-violence.pdf> [perma.cc/F3R4-TA7Q].

²³⁴ Anne McGillivray & Brenda Comaskey, *Black Eyes All The Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999); Lisa J Udel, "Revision & Resistance: The Politics of Native Women's Motherwork" (2001) 22:2 *Frontiers: A J Women Studies* 43; Jennifer Kwan, "From Taboo to Epidemic: Family Violence in Aboriginal Communities" (2015) 2:1/8 *Global Socialfare* 1; Pertice Moffitt et al, "Intimate Partner Violence in the Canadian Territorial North: Perspectives From a Literature Review and a Media Watch" (2013) 72 *Intl J of Circumpolar Health* 1.

²³⁵ Statistics Canada, *Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009*, by Shannon Brennan, Catalogue No 85-002-X (Ottawa: Statistics Canada, 17 May 2011), online: <www150.statcan.gc.ca/n1/en/pub> [perma.cc/X6KH-V4C9].

communities to urban centres.²³⁶ Resources that are available for abused women, like domestic violence shelters, are simply unavailable to many abused Indigenous women.²³⁷ This reflects, in part, the lack of serious community support for victimized women and children.²³⁸ The resources and political structures remain firmly in control of a unique brand of Indigenous patriarchy that has been spawned under the *Indian Act* band and council system.²³⁹ Many Indigenous women find themselves compelled to migrate to urban centres for fear of their own personal safety and the safety of their children.²⁴⁰ The normalization of violence can also mean the corruption of Indigenous justice initiatives. Bruce Miller relates that such abuses of power have plagued the South Vancouver Island Justice Education Project.²⁴¹ Elders, often from powerful families, would try to convince female victims to acquiesce in lighter sanctions for offenders under the project, rather than going through the usual justice system.²⁴² Their tactics included attempts at laying guilt trips, attempted persuasions in favour of dropping the allegations, the threat of witchcraft to inflict harm, or threatening to send the abuser to use physical intimidation.²⁴³ Some women felt that the problem was exacerbated by the fact that some of the elders were themselves convicted sex offenders, which left them wondering how seriously their safety and concerns would be addressed.²⁴⁴ The ultimate result was that the project was terminated in 1993.²⁴⁵

These developments mean that the cost-benefit analysis will yield a fundamentally different equation and result. The past likely saw a stigma for not only causing harm to fellow community members but also failing to either give warning or come to the aid of somebody who was in danger of harm. Normalization of violence in many contemporary Indigenous communities means a lack of stigma for causing harm and implicitly, a lack of stigma for not coming to the assistance of another. There is little benefit

²³⁶ *Supra* note 234 at 134.

²³⁷ *Ibid.*

²³⁸ *Ibid* at 132–34.

²³⁹ *Ibid* at 22.

²⁴⁰ *Ibid* at 133–34.

²⁴¹ Bruce G Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln, Nebraska: University of Nebraska Press, 2001) at 175–200.

²⁴² *Ibid* at 198–99.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

to gain by trying to adhere to past standards that may have been substantially eroded.

In contrast, the normalization of violence also heightens considerably the costs that may stem from trying to come to aid of others. The concern is that if violence is so normalized in a given Indigenous community, would trying to come to the aid of another itself expose the person who renders aid to very real danger? Certainly, Cree law often asked at least those who possessed the physical capability to render aid to accept very real levels of physical risk to answer to their obligations to the community. But does the normalization of violence elevate the levels of risk to a degree of harm that may not have been contemplated by historical Cree law? That may be the case. In other instances, the law required, at most, giving warning from those who may have been less capable. But would even requiring that invite danger and retaliation in a community beset by the normalization of violence?

As McGillivray and Comaskey point out, many Indigenous women migrate to urban centres with their children out of fear for themselves and their children after repeated victimization.²⁴⁶ That decision to migrate may also be implicitly informed by a perception that few, if any, people in their own reserve communities would ever have come to their assistance. In the past, a member of a Cree community could expect many of the other community members to come to their aid. The normalization of violence has turned the social fabric upside down in many communities. Many of the community members that a person would expect to come to their aid will now be the perpetrators, tied to the perpetrators and helping them instead, or otherwise apathetic or disinclined towards rendering any kind of assistance.

A person in danger in a contemporary community may now encounter a phenomenon that goes beyond an apathetic bystander effect. Those who may be in a position to help or at least provide warning may be hesitant to do so not just on account of any sort of psychological discomfort described by the bystander effect but may themselves become fearful for their safety, stemming from the normalization of violence. The bystander effect may be overtaken by a perceived self-endangerment effect. Sharon McIvor, a Lower Nicola First Nations woman and an advocate against violence against Indigenous women, participated in efforts to shut down justice initiatives

²⁴⁶ *Supra* note 234 at 134.

in Vancouver Island.²⁴⁷ She discussed how reporting domestic abuse or sexual assaults frequently resulted in reprisal assaults and death threats from the perpetrators.²⁴⁸ And the problem was exacerbated by the perpetrators enjoying connections and support from *Indian Act* band council members, or Elders who controlled the justice initiatives.²⁴⁹

Certainly, past Cree law that demanded assistance could demand acceptance of a very real level of physical risk for those who are physically capable of rendering assistance. But perhaps demanding that acceptance of risk has now become unreasonable since the normalization of violence in many Indigenous communities promises danger and risk to a severity that perhaps past Cree law did not account for. Now, it must be acknowledged that Cree law, in some instances, required no more than providing a warning, at least for those who were less capable. But would there still be danger and risk associated with outing oneself in a community where violence has been normalized? Recall McIvor's account of how even reporting to authorities has been met with retaliation.²⁵⁰

Imagine that Cree community leaders try to revive the law to help others but the community itself suffers from a normalization of violence. Also imagine that someone is prosecuted for failing to help someone or to give warning in accordance with that law and yet the reason for withholding help was fear of harm and retaliation. Now recall the fate of the younger sister in the *Mistacayawsis* narrative, where the younger sister's death was regarded as just for not even taking the minimal step of providing a warning. Perhaps the prosecution for failure to assist or give warning can end up harsh or even unjust because the community member was forced between a rock and a hard place. The demand is either render aid or give warning, and face certain and severe danger, or refuse to give aid or a warning and face prosecution. It is not to say that all Indigenous communities, Cree communities included, are beset by the normalization of violence. But for those that are suffering from normalization of violence, what does that mean for any efforts to revive a law requiring aid to those in danger? Is it a potential cure, or is it a cure that would become worse than the disease?

²⁴⁷ Indigenous Peoples Solidarity Movement Ottawa, "Sharon McIvor - Seeking Justice for Missing and Murdered Indigenous Women" (1 January 2011), online (video): *YouTube* <www.youtube.com/watch?v=TfqVcCvVGRg> [perma.cc/8N3Y-LULD].

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

V. WAYS FORWARD

It may be that in some Indigenous communities, the ethos of coming to the aid of others in danger, or at least provide warning, may be internalized enough so that the cost-benefit equation means that those communities can now use past laws that required aid. Other Indigenous communities, especially those beset by the normalization of violence, may yield different results from the equation such that reviving past laws requiring aid may not be workable in the foreseeable future. And it could be that some of those communities may decide to never attempt the revival of such laws. Self-determination does, after all, involve the freedom to choose to be free of external colonial interference.

That is not to say that the possibility will be permanently foreclosed for such communities. Amitai Etzioni points out that social norms are not fixed and static; they are dynamic fields.²⁵¹ Social norms may, at some point, reflect peoples' initial inclinations or be inherited through historical transmissions over generations.²⁵² But, communities and people can and do change their social norms over time through various processes, such as reflecting on previous norms, evolving them to better suit contemporary needs, or altering them when there are tangible incentives to do so.²⁵³ How about those communities that may be interested in reviving past laws requiring aid but where an honest application of the cost-benefit analysis presents troubling implications? There may be more than one way to go about matters.

One possible approach is to try to encourage community members to internalize the values underlying a law that requires aid but before actually reviving and applying the law that requires aid. Richard McAdams offers the insight that societal internalization has to be in place before a law based on prescription and punishment can have any meaningful purchase.²⁵⁴ Laws are much more likely to be complied with and obeyed when the law's goals and objectives are congruent with the social norms internalized by the

²⁵¹ Amitai Etzioni, "Social Norms: Internalization, Persuasion, and History" (2000) 34:1 *Law & Soc'y Rev* 157.

²⁵² *Ibid* at 157.

²⁵³ *Ibid* at 166, 175-76.

²⁵⁴ Richard H McAdams, "The Origin, Development, and Regulation of Norms" (1997) 96 *Mich L Rev* 338.

community's members and certainly more so in comparison to laws that rely on little else besides the brute force of punishment.²⁵⁵

Robert Cooter also theorizes that in order for law to be effective, it must be internalized by citizens.²⁵⁶ He notes that if the costs of compliance with the law come across as too high for citizens, frequent disobedience results as a matter of course.²⁵⁷ State law relies on the classic formula of criminal punishments to try and make the costs of disobedience exceed the perceived costs of compliance.²⁵⁸ However, such a tried formula does not work so well in encouraging what he terms civic virtues: actions where a citizen invests time and energy into behaviours that further the public good such as volunteer work for charities or voting in elections.²⁵⁹ The reason is that cultivating civic virtues requires intimate knowledge of each citizen's behaviour, which is simply beyond the capacity of the state to accumulate.²⁶⁰ That intimate knowledge is only possessed by the citizen's immediate circle of friends, family, and associates.²⁶¹ Therefore, the state should strive to channel those relationships and knowledge bases of character by using different methods such as public advertising that extols the benefits of civic acts or reintegrative shaming that allows a wrongdoer to change their behaviour in gentler, more welcoming ways.²⁶² The state can thereby align law with morality, and achieve the legal system's underlying objectives, but in ways that do not rely on the classic punishment doled out in response to transgression.²⁶³

Applying McAdams²⁶⁴ and Cooter's²⁶⁵ insights to Indigenous communities and law may mean that it is a matter of putting the cart before the horse. It amounts to trying to undo the internalization of normalized violence and replacing it with Indigenous values that involve looking out for fellow community members. And, by extension, it almost amounts to trying to alter the equation so that the cost-benefit analysis yields different

²⁵⁵ *Ibid* at 380–81.

²⁵⁶ Robert Cooter, "Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms" (2000) 86:8 *Va L Rev* 1577 at 1581–94.

²⁵⁷ *Ibid* at 1581–1601.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid* at 1597.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid* at 1597–98.

²⁶³ *Ibid.*

²⁶⁴ *Supra* note 254.

²⁶⁵ *Supra* note 256.

results that are more amenable to reviving past laws requiring aid. There have been efforts in Indigenous communities to undo the normalization of violence that have relied on gentle persuasion instead of legal obligation, although they did not have the revival of a past specific laws as their objective.

The municipality of Cotachachi in Ecuador has seen staggering levels of domestic and sexual violence against Indigenous women.²⁶⁶ The response was the Statute of Buena Convivencia.²⁶⁷ One of its measures was the use of both male and female trained promoters who worked to promote non-violent Indigenous masculinities amongst community members.²⁶⁸ There is, as of yet, no empirical validation of its success.²⁶⁹

Beverly Shea, Amy Nahwegahbow and Neil Anderson performed a systematic review of numerous studies of Indigenous family violence prevention programs.²⁷⁰ Themes in those programs included counselling for at risk families, trying to reduce risk factors for family violence (e.g. substance abuse), and trying to inculcate traditional Indigenous values among clients.²⁷¹ The authors could not find any empirical evidence of a reduction in family violence, but they noted that some of the studies provided quantitative evidence not directly tied to domestic violence, such as apparent acceptance of teachings by the clients and positive rapport between counsellors and clients.²⁷²

As another example, a study conducted in northern Saskatchewan shows that Cree and Dene elders' approaches to counselling and healing were effective in both reducing beatings against domestic violence victims and mitigating the trauma and symptoms experienced by victims after abuse.²⁷³ The utility of these developments to the present discussion is

²⁶⁶ Rachel Sieder & Maria Teresa Sierra, "Indigenous Women's Access to Justice in Latin America" (2010) CMI: Chr Michelsen Institute Working Paper No 2010:2 at 30–31, online: <www.cmi.no/publications/file/3880-indigenous-womens-access-to-justice-in-latin.pdf> [perma.cc/9548-663Q].

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ Beverly Shea, Amy Nahwegahbow & Neil Anderson, "Reduction of Family Violence in Aboriginal Communities: A Systematic Review of Interventions and Approaches" (2010) 8:2 *Pimatisiwin* 35.

²⁷¹ *Ibid.* at 1–2, 5, 15.

²⁷² *Ibid.* at 4, 9, 17–23.

²⁷³ Chassidy Pachula et al, "Using Traditional Spirituality to Reduce Domestic Violence

admittedly limited. Empirical evidence of success has not been established for all but one of the them. Nor did any of the initiatives have the revival of a past specific law as their ultimate objective. The initiatives, particularly the Cree and Dene example, may still illustrate that there is at least some merit to the idea of trying to reverse damaged normativities without calling upon forceful legal sanction to realize it. And it may be a preferable course to reviving a past law if a community is clearly not ready for it.

There is empirical research that validates that position. Daphna Lewinsohn-Zamir's conducted questionnaire experiments, each involving ninety-six students at the Hebrew University of Jerusalem.²⁷⁴ In one experiment participants were presented with 12 different scenarios of how a citizen would respond to a new law that made recycling mandatory.²⁷⁵ The scenarios were as follows:

- 1) The citizen recycled before the law was enacted, but the law offered a lower negative incentive (e.g. smaller fine if caught) to recycle.
- 2) The citizen did not recycle before the law was enacted, but the law offered a lower negative incentive (e.g. smaller fine if caught) to recycle. The citizen initially recycled to avoid the fine but now understands the importance of recycling.
- 3) The citizen did not recycle before the law was enacted, but the law offered a lower negative incentive (e.g. smaller fine if caught) to recycle. The citizen recycles just to avoid the fine.
- 4) The citizen recycled before the law was enacted, but the law offered a higher negative incentive (e.g. larger fine if caught) to recycle.
- 5) The citizen did not recycle before the law was enacted, but the law offered a higher negative incentive (e.g. higher fine if caught) to recycle. The citizen initially recycled to avoid the fine, but now understands the importance of recycling.

Within Aboriginal Communities” (2010) 16:1 J Alternative & Complementary Medicine 89.

²⁷⁴ Daphna Lewinsohn-Zamir, “The Importance of Being Earnest: Two Notions of Internalization” (2015) 65:2 UTLJ 37 at 64.

²⁷⁵ *Ibid* at 64-65.

6) The citizen did not recycle before the law was enacted, but the law offered a higher negative incentive (e.g. smaller fine if caught) to recycle. The citizen recycles just to avoid the fine.

7) The citizen recycled before the law was enacted, but the law offered a lower positive incentive (e.g. chance to win a small lottery) to recycle.

8) The citizen did not recycle before the law was enacted, but the law offered a lower positive incentive (e.g. chance to win a small lottery) to recycle. The citizen initially recycled for a chance to win the lottery but now understands the importance of recycling.

9) The citizen did not recycle before the law was enacted, but the law offered a lower positive incentive (e.g. chance to win a small lottery) to recycle. The citizen recycles with the motivation to try and win the lottery.

10) The citizen recycled before the law was enacted, but the law offered a higher positive incentive (e.g. chance to win a larger lottery) to recycle.

11) The citizen did not recycle before the law was enacted, but the law offered a higher positive incentive (e.g. chance to win a larger lottery) to recycle. The citizen initially recycled for a chance to win the lottery, but now understands the importance of recycling.

12) The citizen did not recycle before the law was enacted, but the law offered a higher positive incentive (e.g. chance to win a larger lottery) to recycle. The citizen recycles with the motivation to try and win the lottery.²⁷⁶

These scenarios were organized into four groupings on the basis of the type of incentive offered (e.g. low negative incentive, high negative incentive, low positive incentive, high positive incentive).²⁷⁷ Within each grouping is the *ex-ante* scenario where the citizen already recycled beforehand, where the citizen recycles because they now appreciate the importance behind the new law (i.e. preference change), and where the citizen recycles only because of the incentive involved (i.e. behaviour

²⁷⁶ *Ibid* at 65, 82–84.

²⁷⁷ *Ibid* at 65.

change).²⁷⁸ Participants were asked to rate each scenario on a scale of one to nine based on what degree they assessed the citizen as making an independent, free will decision to recycle (with nine signifying that it was completely of their own free will).²⁷⁹ Within each grouping, the *ex-ante* scenario always rated higher than the preference change scenario which, in turn, always rated higher than the behaviour change scenario.²⁸⁰ The key finding is that any sub-grouping from the positive incentive scenarios always scored higher than their counterparts in the negative incentive scenarios.²⁸¹ For example, the *ex-ante* low positive scenario scored higher than the *ex-ante* low negative scenario, the preference low positive scenario scored higher than the preference low negative scenario, the behaviour high positive scenario scored higher than the behaviour high negative scenario, and so on.²⁸²

The second experiment involved questionnaires based on three different scenarios, whereby each could be resolved by a more coercive, direct remedy and a less coercive, indirect remedy.²⁸³ One scenario involved a disagreement between a car owner and a mechanic who performed repairs over the amount owing to the mechanic.²⁸⁴ The direct remedy was the Court ordering the car owner to pay the outstanding amount to the mechanic and the indirect remedy was the mechanic exercising a possessory lien over the car until the owner paid the outstanding amount.²⁸⁵ The second scenario involved defamation, with the direct remedy being court-ordered damages and the indirect remedy being the slanderer making a voluntary payment of damages, under legal advice, to the defamed party in anticipation of reducing damages.²⁸⁶ The third scenario involved a leak in a rented apartment.²⁸⁷ The direct remedy is the Court ordering the landlord to fix the leak and the indirect remedy is the tenant exercising a right to rent abatement until the landlord fixes the leak.²⁸⁸ Participants again always rated

²⁷⁸ *Ibid* at 82–84.

²⁷⁹ *Ibid* at 65, 67.

²⁸⁰ *Ibid* at 67.

²⁸¹ *Ibid*.

²⁸² *Ibid* at 64–66.

²⁸³ *Ibid* at 76–78.

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid*.

²⁸⁶ *Ibid* at 76–80.

²⁸⁷ *Ibid* at 73, 77, 80.

²⁸⁸ *Ibid*.

the indirect remedies as more reflective of a free and independent decision on the part of the party having to make good on the remedy.²⁸⁹

Lewinsohn-Zamir connects her experiments to a substantial body of law and psychology literature that suggests that laws that rely heavily on coercive measures only succeed in suppressing behaviour, especially when people would prefer to engage in that behaviour absent the law.²⁹⁰ Ultimately, it does not succeed in changing peoples' preferences or getting them to appreciate the values or objectives underlying the law.²⁹¹ And a great deal of that literature utilized similar experiments to gauge responses to coercive or less coercive legal measures. It is when the law utilizes less intrusive, more nuanced measures that it can actually shape peoples' preferences, even if they had previously been different.²⁹²

It could be that a Cree community makes the duty to assist legally enforceable but relies on more lenient sanctions like small fines or restitution to the person who needed aid (and certainly not incarceration). Now, imagine that the expectation to aid others in danger becomes a settled expectation over time. The community may now be ready to elevate the harshness of available sanctions, possibly including incarceration. On the other hand, the community may remain content with the more lenient range of sanctions. Another Cree community may decide not to revive a duty to assist law in any form. Self-determination does, after all, mean the freedom of a people to make their own choices about what laws to use and what laws not to use.

²⁸⁹ *Ibid* at 76–80.

²⁹⁰ *Ibid* at 51–52, 57, 61.

²⁹¹ *Ibid* at 78–81.

²⁹² *Ibid* at 54–63. The literature she is referring to includes Daryl J Bem, “An Experimental Analysis of Self-Persuasion” (1965) 1:3 *J Experimental Soc Psychology* 199; Richard M Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London, UK: Allen and Unwin, 1970); Justice Richard Eiser, *Social Psychology: Attitudes, Cognition and Social Behavior* (Cambridge, UK: Cambridge University Press, 1986) at 84; Dan M Kahan, “Trust, Collective Action, and Law” (2001) 81 *BUL Rev* 333; Uri Gneezy & Aldo Rustichini, “A Fine Is a Price” (2000) 29:1 *J Legal Stud* 1; Edward L Deci & Richard M Ryan & Richard Koestner, “A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation” (1999) 125:6 *Psychological Bulletin* 627; Bruno S Frey & Reto Jegen, “Motivation Crowding Theory: A Survey of Empirical Evidence” (2001) 15:5 *J Economic Surveys* 589; Cass R. Sunstein & Richard H. Thaler, “Libertarian Paternalism Is Not an Oxymoron” (2003) 70:4 *U Chicago L Rev* 1159.

VI. CONCLUSION

There may be some merit to the idea of allowing Cree communities to use duty to assist and duty to warn laws as a part of Indigenous self-determination. Common law refuses to impose a general duty to assist out of numerous concerns, particularly those relating to enforceability and forcing risks on citizens. And yet, critics hold that the bystander effect is not a kind of behaviour that the law should condone or even encourage. Cree law fundamentally viewed the bystander effect or otherwise not coming to the aid of somebody in danger, or at least giving warning of danger, as not living up to their responsibilities to the community and its members.

It is a contestable issue whether such laws can and should be used in at least some contemporary Cree communities. Such laws could perhaps provide a counter against Indigenous peoples being victimized at rates that well exceed those of non-Indigenous communities. And yet, the normalization of violence in some, but not all, communities may render such an endeavour ill-advised.

The crucial issue is whether members of a Cree community can sufficiently internalize the values underlying duty to assist and warn laws, so as to make their use tenable. Natural law, positivist, and especially socioeconomic theories of law provide insights on the relevant dynamics of internalization. The need to conform with the community's values and a corresponding avoidance of stigma for failing to do so can present powerful incentives to comply with duty to assist laws. That may be especially true for smaller Indigenous communities with a more intimate sense of community, where everybody more or less knows everybody else. But the normalization of violence can demand a greater cost of compliance than many community members can reasonably be expected to take upon themselves.

Some Cree communities, even if they did have self-determination, may not be ready to proceed with such laws. Internalization amongst broad community memberships may need to be in place as a prerequisite. There are two possible routes to obtain the foundation of internalization. One is to inculcate the values of responsibility to community and assisting others through education and other forms of mass persuasion but without forcing the point through legal sanctions. Another is to enact the law but call upon a more lenient set of remedies or sanctions for the time being. If either can, over time, encourage the needed internalization, a true criminal law that

imposes duties to assist and warn may be tenable, if communities choose to go in that direction.