

Jurisprudence: the bystander to crime

by Claire Valier

The author raises questions about the predicament of a bystander to a serious crime who does not intervene to oppose it.

Our lives are such that we cannot always avoid wrongdoing, both our own and that of others. We find ourselves in situations in which, through no fault of our own, we are in a predicament, for there seems to be little or nothing we can do “for the best.” We may have to conduct ourselves in ways that, although not as we would have liked, leave us with a sense of regret. One such situation of quandary is that of the bystander to crime. He or she appears compromised by virtue of presence at the fact of the offence. If the decision is for action, what must he or she do? If instead the decision is for non-intervention, is the omission to act regrettable and, if so, is it culpable? This article considers the situation of the bystander who is present during the commission of a serious violent or sexual crime, but does not intervene to oppose it. The article raises some questions about the predicament of this bystander and poses some lines of thought upon them.

Common usage takes the bystander to be a non-participant spectator, one who is present at an event, but takes no part in it, as follows: “One who is standing by; one who is present without taking part in what is going on; a passive spectator” (*Oxford English Dictionary*).

However, the position of the bystander to crime is a difficult one that gives rise to some ambiguity. According to some this very presence at the scene of an unfolding crime implicates the bystander in the offence. It is the inaction of the “passive spectator”, it is said, that renders them partly responsible for the crime. Some have argued that the decision not to intervene, and thus to allow the crime to happen, is a form of complicity. Such was the view of Tunc, who had the following to say:

“From a philosophical point of view, it does not appear possible to distinguish between the man who does something and the man who allows something to be done, when he can interfere. . . . A stone does not bear any liability if a murder is committed beside it; a man does. By his decision not to interfere or to intervene, he participates in the murder” (Tunc 1981: 46).

A person is indeed not a stone; it would be uncontentious to hold that more can be required of him or her. But in what sense does the bystander, by choosing not

to intervene, *participate* in the crime? Can we say that their having *allowed* the crime to happen inculcates them in it in a way that makes them complicit? We may rather think that to stand idly by as a crime takes place is to be guilty of a regrettable and sometimes culpable omission, though it does not produce complicity in the actual offence.

To say that the omission to act is regrettable, is not to say that in every case the bystander’s conduct was culpable. This is because the bystander, although he or she would have done otherwise, may sometimes not have been able to do so. In such a case, we might think that the bystander is properly one who should feel regret over what happened, and over having been connected in some way with its occurrence. We may feel sorry for this bystander, and offer consolation rather than reproach. On the other hand, to hold a bystander fully accountable for a culpable omission is to say that this conduct was inexcusable. Even though he or she may not be the direct cause of the crime, as a bystander who could have done something to oppose it and didn’t, we may deem the omission more than regrettable. The bystander may answer us by saying “it wasn’t down to me” and “it was nothing to do with me,” which are not quite the same thing. If he or she claims to be untroubled by regret, we may find this galling. To say one has no regrets is to not accept one’s part in something as regrettable. Thus if the bystander says of the victim “she was nothing to me and there was no reason for me to get involved”, and “why should I lose sleep over someone else’s problem”, we may be indignant. We may find the bystander at fault, thinking that there was a good, and indeed compelling reason to have done otherwise and the possibility, however difficult, so to do.

IF ONLY...

Regret is that feeling in which one wishes that a state of affairs had been otherwise. “How much better if it had been otherwise”: this is the constitutive thought of regret in Bernard Williams’ (1981) “Moral Luck”. In this classic essay, Williams considers the phenomenon of moral luck, which obtains wherever the moral evaluation of a person, whether for praise or blame, is affected by circumstances beyond that person’s control. In the course of doing so, he

makes an important distinction between agent-regret and spectator's regret. Agent-regret is the first-personal kind of regret felt by one who considers themselves connected with a regrettable state of affairs having happened. The following is the salient part of what Williams has to say about this special kind of regret:

"there is a particularly important species of regret, which I shall call 'agent-regret', which a person can feel only towards his own past actions (or, at most, actions in which he regards himself as a participant). In this case, the supposed possible difference is that one might have acted otherwise, and the focus of the regret is on that possibility, the thought being formed in part by first-personal conceptions of how one might have acted otherwise... The sentiment of agent-regret is by no means restricted to voluntary agency. It can extend far beyond what one intentionally did to almost anything for which one was causally responsible in virtue of something one intentionally did. Yet even at deeply accidental or non-voluntary levels of agency, sentiments of agent-regret are different from regret in general such as might be felt by a spectator, and are acknowledged in our practices as being different. The lorry driver who, through no fault of his, runs over a child, will feel differently from any spectator... even a spectator next to him in the cab, except, perhaps to the extent that the spectator takes on the thought that he himself might have prevented it, an agent's thought." (Williams 1981: 27–28).

Williams assimilates spectator regret to general regret, the regret that might be felt by any unconnected individual who comes to hear of a regrettable state of affairs. He contrasts this with agent-regret. Yet Williams also recognizes an intermediate kind of regret, which I shall call "passenger regret." In Williams' example the passenger, who is along for the ride but not directing the vehicle, may feel regret over the perceived possibility of having been able to prevent the accident. It is possible to delineate yet another form, which may be called "bystander regret." The regret of both passenger and bystander is special rather than merely general, first-personal and agentic, although not quite the same as agent-regret itself.

In Williams' terms, the lorry driver is "causally responsible" for the injury in virtue of having been driving the lorry at the moment of collision. The special kind of regret felt by the driver issues from his unique contribution as direct causal agent. Even though the causal conduct itself is faultless, it is nevertheless the direct cause of the injury. Given that this is the case, whilst the injurious agency of the driver is "deeply accidental," we would not think his regret unreasonable. Our bystander to crime is not a direct cause in this way, indeed the direct cause of the injury to the crime victim lies with the agency of the perpetrator. Further, there is the question of intention. The lorry driver has no time for deliberation; he has no opportunity to do otherwise than run over the child. He is not in a quandary; due to the suddenness and unforeseeability of the accident,

he does not have the chance to decide upon what might be for the best.

The situation of the bystander to crime is different. He or she must decide, and decide quickly moreover, what if anything to do. One thing that the driver and the bystander have in common is that neither of them wants to cause injury. Despite this they are both involved, albeit in different ways, with the injurious event having happened. Williams (1981: 20) holds that "what is not in the domain of the self is not in its control, and so is subject to luck." A comprehensive treatment of the bystander problem requires an account of agency, contingency and autonomy that cannot be developed here. Nevertheless, some elements of such an account can be indicatively presented.

The quandary of the bystander involves what Scheffler (2004: 225) calls the responsibilities of causal position, in this case, "opportunities to intervene in causal processes we did not initiate, and which may be quite alien to our purposes." Recall that Williams allows that the regret of a spectator who thinks they may have prevented a regrettable state of affairs is agentic. That is not to say that it is agent-regret per se. This is a point of importance. One way of considering it is to think about primary and secondary manifestations of agency. Scheffler holds that failing to prevent someone from being harmed is a secondary manifestation of one's agency, and is thus something for which one is less responsible than those primary manifestations that are harms done to others. This holds true, Scheffler says, even when the harm to the other that one fails to prevent comes about due to the agency of another. Nevertheless this does not provide, he adds, that no responsibility whatsoever attaches to the conduct of one who fails to prevent a harm coming about:

"If one is in a position to prevent some disastrous chain of events from unfolding and does not do so, then the fact that one did not initiate the chain or make a direct causal contribution to it cannot be relied upon to provide one with an automatic justification or excuse. The norms of individual responsibility attach some weight to what we fail to prevent" (Scheffler 2004: 225).

Thinking about the predicament of the bystander to crime, we must consider whether there is a way in which this person is answerable for the wrong that he or she has *allowed to be done* by the other. We ought to note the gravity of the regrettable state of affairs that has come about, and maintain a careful line of thought on exculpatory and justificatory conditions.

PRESENCE, KNOWLEDGE AND INTENTION

Consider one who is a bystander to crime, present "at the fact." Here, immediacy to the occurrence of the criminal act suggests a connection of some kind. By virtue of being "there", the crime event is something with which the bystander is directly confronted. Ordinarily this close proximity should provide that there is specific knowledge,

that is, that the bystander is cognizant of the actual crime in progress. The question then becomes whether intent in this instance is a purposeful omission, a deliberate forbearance, a choice not to do some given act. To do nothing, one might say, is not necessarily to choose not to do any particular thing. In the moment that just passed I was not walking with lama in the Himalayas. Neither was I on the common walking my dog. This was not because I had chosen not to do these things. Rather it had not actually occurred to me at that moment to do them. The first of them, unprompted, would very likely never have occurred to me as something I would do. In bystander, this is not a case of something one doesn't do because it has not arisen as a likely course of conduct for one at that moment, as something one might do or must do, there and then.

In bystander conduct, the omission is an omission to do something that can be presumed to have come to the bystander's attention, to have become a pressing matter of deliberation. This is a situation of emergency, a dangerous state of affairs which happens suddenly and unexpectedly, and needs immediate action in order to avoid harmful results. It is also an emergency occasioned by the culpable, that is deliberate and faulty, conduct of another. Witnessing criminal injury is simply not something that is of no concern to the "decent" moral agent. It is not, as both immediate to one and what one might call dramatic, something that one does not notice, that does not become a "deliberative priority" (Williams 1985/1993: 186).

The bystander to crime, as a "passive *spectator*" is there looking on, seeing the commission of the crime, and presumably knowing it is a crime that is being seen. He or she, as a bystander, is a knowing spectator. It falls to the bystander to have to decide whether and how to act, simply because they are there. This is particularly and most clearly the case when there is only one bystander. Sometimes though there may be several onlookers and, indeed, a crowd. Where there is only one bystander, it especially falls to that person to have to decide what to do, for they are the only one there. Here, one might say, the quandary is heightened, for I alone can act to intervene. But, it doesn't follow that I need do nothing if there are others there with me. It falls to each and all to decide what to do. That said, some may consider themselves, and be considered, in a better position to do something than the others.

PRESENCE AND COMPLICITY

Recall that Williams identified as agentic the regret of one who considers themselves a participant in the occurrence of a regrettable state of affairs. In fact he appears to associate the participant with agent-regret itself. In the bystander to crime case, complicitous conduct is more than regrettable; it is culpable and indeed criminally liable, for in complicity one intentionally participates in the wrong of another. The genuine bystander would not ordinarily be deemed complicit in the crime. What kind of conduct need the bystander contribute in order to be

complicit? The key to this question resides with the notion of participatory intention, which Kutz (2000: 11) glosses as "a distinctive, individual, instrumental, intention to play one's part in joint act."

How does this kind of intention bear upon the culpability of the bystander to crime? Take the principle that mere presence during the commission of a crime is relevant but insufficient to establish complicity. This provides that one does not become a party to another's criminal conduct by merely being present when the crime that he or she commits occurs. It is necessary that the bystander be a "deliberate supporter" (*R v Bailey* [2004] EWCA Crim 2169). Merely standing by, even if by choice and with direct knowledge that the crime is taking place, does not of itself make a person party to the crime. The bystander's presence may in fact encourage the perpetrator, and moreover he may know that his mere presence works to so encourage. However, unless the person intends his presence to be an encouragement to the commission of the crime, he is not complicit. All this is not to say that presence is irrelevant though, for it may be a fact in drawing the inference of intentional encouragement. Presence by prior arrangement is strong material supporting the inference. In such a situation, presence is not accidental, for instance the person has chosen to be present at a crime (an illegal event, say) of which he or she had advance knowledge. This is not an accidental bystander, who just happened by at the moment when a crime took place, and thus presence can suggest approval of the offence.

What of the bystander who does happen upon the criminal event? He or she suddenly is in a situation of being an onlooker to a crime. There has been no prior arrangement, no advance knowledge. This person is *inadvertently* present, as an accidental spectator to a crime, having chanced upon the crime event. Is the bystander then involuntarily present, an unwilling spectator who is not assenting to the crime? The accidental character of presence does not of itself guarantee that the spectator is an unwilling onlooker to a crime that he or she does not want to happen. However, for complicity the subsequent conduct would then have to intentionally encourage the principal. In what respects may the bystander's inaction suggest a desire that the offence come about? There is the idea that the failure to oppose the crime is conduct amounting to encouraging commission of it. It has been suggested that failing to aid the victim translates innocent bystander into a form of complicity, for instance by Stewart (1998: 414–5). The idea here is that witnessing criminally caused injury creates a legitimate expectation of intervention. The subsequent failure to do anything at all to assist the victim looks bad, but only suggests complicity where there is intentional encouragement of the perpetrator.

Intentional encouragement of the crime is not only associated with failure to assist the victim. Indeed failure to

oppose the commission of the crime may be relevant to the inference that one encouraged it. Presence at the scene of the crime without dissociating oneself from it, that is, without overt rejection of any purpose to assist in the commission of the crime, may evidence intentional encouragement (*R v Coney and others* [1882] 8 QBD 534). Being *voluntarily and purposely present* witnessing the commission of a crime, offering no opposition or dissent, suggests that the bystander wilfully encouraged and so aided and abetted. So, omissive conduct can be deemed intentional encouragement, but this is not likely in the case of accidental presence. The apathetic bystander is not complicit then, but is this conduct regrettable, and is it culpable? Smith (1991: 38) envisages a general entitlement of the individual to not have to get involved in preventing an offence accidentally witnessed, because this would create a hazardous duty on one faced with the dilemma through no fault of their own. This will not serve as an answer to our problem, for it does not recognise the bystander's situation to be one of quandary. The bystander is accidentally present and then may face threatening behaviour from the perpetrator. This is most unlucky, in Nagel's (1979) sense of circumstantial luck, the luck of the "kind of problems and situations one faces." This ill luck, however, does not necessarily negative any reason to intervene, or possibility to do so.

THE CULPABLE AND THE EXCUSABLE

The bystander may say "I had to do as I did," or, "I knew not what I did." In some circumstances where this is genuinely the case, we might consider the omission regrettable but excusable. Recall what I had to say above about presence, knowledge and intention. There may be excusable ignorance. A genuine mistake of fact, that is, a substantially incomplete or faulty knowledge of what one is witnessing, may provide an excuse. The excuse only works however, if one is not at fault for the ignorance from which the conduct arises. Compulsion to inaction by threats may also provide an excuse. Consider the following scenario. The perpetrator points a gun at the head of the bystander and says "Stay out of it or else I will shoot you." This instruction that the bystander offer no opposition to the crime, it might be said, is a conditional threat that would render his or her subsequent failure to intervene not freely chosen and hence not culpable. Nevertheless, not every kind of threat can be taken to remove the agent's ability to act freely. In coercion there is a command that a person do or refrain from doing an act, or else an undesirable outcome will be visited upon them. Here Nozick's (1969/1997) seven conditions for coercion are suggestive, in which he describes a scenario of coercion into an omission:

Person R coerces person E into not doing A if and only if:

1. R threatens to bring about or have brought about some consequence if E does A (and knows he is threatening to do this).

2. A with this threatened consequence is rendered substantially less eligible as a course of conduct for E than A was without the threatened consequence.
3. R makes this threat in order to get E not to do A, intending that E realize he's been threatened by R.
4. E does not do A.
5. Part of E's reason for not doing A is to avoid (or lessen the likelihood of) the consequence which R has threatened to bring about or have brought about.
6. E knows that R has threatened to do the something mentioned in 1., if he, E, does A.
7. E believes that and R believes that E believes that, R's threatened consequence would leave E worse off, having done A, than if E didn't do A and R didn't bring about the consequence.

Central to Nozick's account is the condition that the coercer communicates a credible threat. Simply seeing a person committing a crime against another person does not ipso facto communicate a threat to the bystander. Merely being an onlooker to a crime, where the perpetrator does not address the bystander at all, materially differs from Nozick's conditions. Here, a threat has not been directly communicated. Anyway, whether the threat is directly communicated or only tacit it may not defeat the ability to act freely. In the coercion scenario, conduct becomes "less eligible." It is not actually made impossible, but is made less appealing to the coerced person. Even if there was threat, this only limits the person's prospects for action. It does not mean that he or she can only do nothing. Threat alone can not suffice to vitiate the ability to act freely. Indeed, according to Frankfurt (1973), threats can be effective but not coercive. This is the case because threats are only coercive when victims are incapable of defying them. Coercion violates its victim's autonomy only as "necessarily either moved in some way against his will or his will is in some way circumvented" (Frankfurt 1973: 80). Thus the bystander who is frozen by fear is coerced. The subsequent omission would be regrettable and reasonably leave the bystander regretful, but would be excusable. Here the omission remains wrongful, but in exculpation there is the idea that the bystander's predicament is understandably difficult and, although the omission is not justifiable, it is in this instance excusable. This is not a simple matter of exoneration however; indeed as Austin (1956-7/1961: 125) succinctly puts it, "few excuses get us out of it completely."

The bystander is unlucky. He is accidentally present at the fact. This is not a kind of ill luck that renders subsequent omissive conduct beyond his control. Even where there are threats from the perpetrator, this may not remove all possibility of any kind of intervention from the bystander. Where the bystander tries to intervene we might say that it was a good thing that he or she was there, and especially if the crime is successfully thwarted, but in any

case we would not likely say he or she was lucky to have been there.

TRYING AND ALLOWING

Recall the agentic regret of the passenger in the lorry, who supposes he or she might have prevented the accident. This person has failed to prevent the regrettable state of affairs, but we would hardly say that he or she allowed it to happen. The same cannot be said of the bystander to crime, who ordinarily does have the time for deliberation and the possibility to make some kind of intervention. What do we mean when we say that the bystander's omissive conduct allowed the crime to happen? You let X happen if and only if you refrain from causally preventing X from happening. If not-letting-happen requires causally preventing the crime from taking place, need the intervention be successful?

The answer is surely no. In this case, where the bystander has done nothing, what is counterposed to refraining is not succeeding in thwarting the crime's occurrence, but trying to do so. A genuine try is an attempt to intervene that one does despite the uncertainty of outcome. A failure to actually achieve thwarting the crime may be regrettable and leave one regretful. But a genuine, albeit unsuccessful, attempt would diminish culpability in a significant way. What kind of trying intervention would do? To intervene is to involve oneself in a situation so as to alter or hinder an action or development. Mere dissociation does not seem adequate. To look away, or walk away, might signal dissociation from the crime, but not do enough to substantially alter or hinder its course. Conduct that might alter or hinder the crime's coming about could include aiding the victim, shouting for help, making a citizen's arrest, or summoning the police. In this way, where one does what one can to oppose and hopefully alter the course of action such that one might succeed in thwarting the crime, it is to cast off complicity. It is also to avoid the charge of a culpable omission. Where the attempted intervention fails, the bystander may still regret that he or she did not do enough, or did not do the right thing, to successfully thwart the crime. But at least the bystander has done something and would hence not likely be spoken of as one who allowed the crime to happen.

CONCLUSIONS

As I have sketched it, the situation of the bystander to crime is indeed a predicament. It has been argued that the

genuine bystander is not complicit in the crime witnessed, absent the requisite kind of participatory intention. This person may, however, be responsible for a regrettable and sometimes culpable omission. I have ventured that the agent who is responsive to moral reasons can recognise sufficiently compelling reasons to try to intervene to oppose the crime. The bystander who intervened, even if in vain, can think 'at least I tried.' 

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