
BEYOND SILENCE: DEBATE ON DUTY TO RESCUE IN CASES OF SEXUAL VIOLENCE IN INDIA

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ABSTRACT

The surge in bystander apathy during heinous crimes in India, notably the Belgavi incident and the brutal Delhi murder, has prompted a critical debate on the introduction of a "duty to rescue." This paper explores the comprehensive scope of this duty, encompassing obligations from reporting crimes to physically intervening. The focus is on rape and sexual assault cases due to their unique psychological impact and societal power dynamics.

Contrary to civil law traditions, common law countries like India resist incorporating duty to rescue, citing clashes with individualism. Critics argue against nonfeasance liability, emphasizing the challenge of defining culpability parameters. The paper counters these arguments, highlighting the societal approval and victim degradation perpetuated by bystander inaction.

Examining legal precedents, the paper challenges the misfeasance and nonfeasance distinction in sexual assault cases. It suggests adopting strict liability for bystanders to address knowledge gaps, emphasizing the compounding effect of their presence on victim harm. Recommendations include legislative changes and complementary measures, focusing on unexcused bystanders and varying mental states.

The proposal suggests a limited duty to rescue, drawing inspiration from European legislations. Research questions aim to establish standards for culpability, balancing justice for victims and fairness for bystanders. A tiered punishment system, psychological assessments, and awareness campaigns form integral components of the proposed reforms. Ultimately, the duty to rescue debate transcends legal discourse, representing a societal imperative toward justice, empathy, and responsibility in the face of sexual violence.

Keywords: duty to rescue, aggravated sexual assault, guilty bystanders, bystander effect, bad Samaritan laws

Introduction

The chilling incidents of bystander apathy in the face of egregious crimes have shaken the collective conscience of society, sparking a crucial debate on the introduction of a "duty to rescue" in India. The incident in Belgavi, where a 42-year-old woman faced public humiliation, stripped, and tied to an electric pole, while onlookers remained passive,¹ prompted the Karnataka High Court to term it as "collective cowardice" and noted, "what is most disturbing is...there were 50-60 (as per Police Records) persons who were standing as mute spectators. Not even one raised his voice nor the hand to protest".² This incident, along with others like the brutal murder of a 16-year-old girl, by her alleged boyfriend in a busy lane in Delhi in May this year. The onlookers and passersby watched the girl being stabbed more than 20 times, kicked repeatedly, and bludgeoned with a cement slab even after she fell to the ground,³ which begs the question of whether there should be a legal obligation for bystanders to intervene in heinous crimes.

Throughout this paper, the term "duty to rescue" encompasses a broad affirmative obligation to assist a victim of crime, ranging from reporting the crime to offering first aid or physically intervening, depending on the circumstances. The expansive definition underscores the myriad ways an ordinary citizen can mitigate harm associated with violent crime.

The need for a duty to rescue in India has become increasingly evident in the wake of disturbing incidents that unfold in broad daylight, with bystanders choosing silence over intervention. This article advocates for the introduction of a duty to rescue in cases of rape and aggravated sexual assault, specifically addressing the criminal liability of guilty bystanders. To provide clarity, the term "guilty bystanders" is categorized based on Zachary D. Kaufman's classification. As per him, excused bystanders comprise survivors who are living victims of crimes or crises, confidants who

¹Express News Service, *Belgavi stripping incident: Karnataka orders CID probe into Belgavi stripping incident; HC bars visitors without permission*, Indian Express (Dec. 18, 2023), <https://indianexpress.com/article/cities/bangalore/belgavi-stripping-incident-karnataka-hc-bars-visitors-without-permission-inspector-suspended-9071862/>.

²Rintu Mariam, *Belgavi Stripping Incident: Karnataka High Court slams bystanders for "collective cowardice"*, Law Street Journal (Dec. 20, 2023), <https://lawstreet.co/judiciary/belgavi-stripping-incident-karnataka-high-court-slams-bystanders-for-collective-cowardice>.

³Outlook Web Desk, *Explained: Delhi Teen Murdered As Bystanders Watched, Why Did No One Stop It?*, Outlook (May 30, 2023), <https://www.outlookindia.com/national/explained-delhi-teen-murdered-as-bystanders-watched-why-did-no-one-stop-it--news-290689>.

are asked by survivors not to report, unaware bystanders who do not perceive the true nature of the situation (reasonable person standard), minors, endangered bystanders and self-incriminators who would unconstitutionally incriminate selves in a crime if intervened. All other categories, such as abstainers who passively observe, engagers who actively engage in unhelpful, but not illegal, conduct (for example, mocking victims), and enablers who actively engage in harmful conduct (for example, deliberately facilitating crime or crisis) come within the scope of guilty bystanders.⁴

The bystander effect plays a pivotal role in incidents of rape and sexual assaults in public places. It is a psychological phenomenon that explains the reaction of bystanders at a crime scene. It refers to a phenomenon in which the greater the number of people there are present, the less likely people are to help a person in distress.⁵ Although the responsibility to act is present, it is shared amongst the numerous people present, thereby diminishing the pressure on each of the bystanders, also called diffusion of responsibility. Other than that, when people observe others omitting to act, individuals often take it as a signal not to intervene and leave it to the private lives of the criminal and the victim. This becomes more serious in the Indian context, where crimes against women reflect the power dynamics of a relationship.

This article also makes it clear the case for duty to rescue has been argued only for rapes and heinous offenses against women owing to the unique nature of these crimes which include psychological harm due to humiliation because of the audience of bystanders. It is also important to note that therefore this article shall refrain from arguing for the duty to rescue in other cases such as drowning or incidents of fire since they involve different considerations altogether. The duty to rescue in rape and sexual assault cases, as a criminal liability, should therefore be seen as an attempt to create an exception to the general rule.

Debate around the duty to rescue

In contrast to countries following civil law traditions, there has been a reluctance to introduce the

⁴Zachary D Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 Southern California Law Review 1376-1379 (2019).

⁵ Kendra Cherry, *How Psychology Explains the Bystander Effect*, VeryWellMind (July 7, 2023), <https://www.verywellmind.com/the-bystander-effect-2795899>.

duty to rescue as a part of criminal and/or civil liability in common law countries including India.⁶ This is because it is thought that the decision whether to help somebody who is in a situation of danger should be left as a matter of individual moral freedom and the law should not legislate morality.⁷

One prominent argument against the duty to rescue centers on its perceived conflict with the liberal concept of individualism and negative liberties.⁸ Critics contend that nonfeasance liability, holding individuals accountable for inaction, challenges the core tenets of personal autonomy upheld in common law traditions. The distinction between active misconduct and passive inaction, as exemplified by a deliberate act of murder versus the failure to provide sustenance in the absence of a recognized special duty, underscores the delicate balance between individual freedom and societal responsibility. Although passive inaction can be morally incorrect, it falls short of achieving the legal standard required to establish liability.

A major objection also revolves around the perceived low incidence of cases warranting Good Samaritan laws, deeming them unnecessary.⁹ Critics argue that the practical application of such legislation is limited, raising questions about its overall utility and whether the legal system should intervene in matters of moral responsibility.

A critical objection highlights the vagueness in defining the parameters of liability for bystanders. Not every passerby can be subjected to legal scrutiny, necessitating concrete definitions, such as those who may be unaware of the nature of an assault, mere onlookers, or individuals fearful of intervening due to potential harm. The need for precision in defining these terms becomes crucial to avoid arbitrary legal judgments. The diversity in individual responses to threats and crises poses a challenge to establishing a universal duty to rescue.

Another facet of the critique revolves around situations where victims may not desire intervention

⁶ Alison McIntyre, *Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes*, 23 *Philosophy & Public Affairs* 158 (1994).

⁷ A. D. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 *Virginia Law Review* 1274 (1983).

⁸ Renu Mandhane, *Duty to Rescue Through the Lens of Multiple-Party Sexual Assault*, 9 *Dalhousie Journal of Legal Studies* 6 (2000).

⁹ Woosley, *supra* note 7, at 1276.

due to shared familial or marital relationships with the abuser.¹⁰ The duty to rescue, if enforced rigidly, could inadvertently increase the vulnerability of victims, highlighting the need for nuanced considerations of victim autonomy.

Due to prolonged investigations and court proceedings, the practicality of sustaining legal involvement becomes a pertinent question.¹¹ The extended duration raises concerns about the feasibility of expecting sustained engagement from law enforcement, the judiciary, and even bystanders.

Why Duty to Rescue is important in rape cases?

The general principle stands that there is no duty to rescue or even duty to report without any explicit duty of care towards victims as recognized under the law. The landmark cases of *R v. Clarkson* and *R. v. Dunlop and Sylvester* concern the role and duty of bystanders in rapes and sexual assaults. In *R v Clarkson*, the defendant watched a woman be raped but did not stop it. The defendants did not encourage the rape, and there was no evidence that he intended to. The Court of Appeal ruled that intent and an act of encouragement must be proven, not just mere presence. In *R. v. Dunlop and Sylvester*, as well as Laskin C.J. and Spence, Dickson, and Estey JJ ruled :

Presence at the commission of an offense can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offend-er's intention to commit the offense or attendance for encouragement. In this case, there was no evidence that while the crime was being committed either of the accused rendered aid, assistance, or encour-agement to the rape of the complainant. There was no evidence of any positive act or omission to facilitate the unlawful purpose. One could infer that ... their presence at the dump was not accidental or like casual passers-by, but that was not sufficient. A person cannot properly be convicted of aiding and abetting in the commission of acts which he does not know may be or are intended. One must be able to infer that the accused had prior knowledge that

¹⁰ Anupriya Thakur, *Numbness of Bystanders is Fatal for Indian Law and Order!*, India Today (Mar. 22, 2023), [http://Woman abused on busy Delhi road says 'we patched up'. Why do victims go back to their abusers?](http://Woman%20abused%20on%20busy%20Delhi%20road%20says%20%27we%20patched%20up%27.%20Why%20do%20victims%20go%20back%20to%20their%20abusers%20?).

¹¹ Garima Kaushik, *Numbness of Bystanders is Fatal for Indian Law and Order!*, Medium (June 16, 2019), <https://garimakaushikk.medium.com/numbness-of-bystanders-is-fatal-for-indian-law-and-order-af756651242e>.

an offense of the type committed was planned, *i.e.* that their presence was with knowledge of the intended rape.¹²

Therefore additional arguments against introducing liability for bystanders in rape and sexual assault cases include (1) For any person to be convicted of criminal liability, two elements need to be satisfied- *actus reus* i.e. the criminal act and *mens rea* i.e. the mental element required to commit the act. For a bystander to be held guilty of failing to rescue, he should have the intention to encourage the assaulter for that particular unlawful act.¹³ Although the bystanders may be involved in the acts of voyeurism, this falls short of intention and therefore the mental element required. (2) The 'but for' test applied in the criminal liability to determine the causation fails in the case of bystanders, whose absence or presence at the crime scene is wholly immaterial to the happening of the crime and therefore the chain of causation between non-interference of the bystanders and crime breaks. (3) observers might not even have realized that they were encouraging the rapists and discouraging the victim, even if they were. Perhaps they were so wholly absorbed by the voyeuristic arousal that the effect of their presence may simply not have occurred to them, just as it may not have occurred to them that their non-intervention and nonreporting were shameful.

The lack of duty fails to capture the reality of the situation for sexual assault victims. In examining the dynamics of sexual assault, it becomes apparent that the crime goes beyond the infliction of physical harm; it involves the dehumanization of the victim.¹⁴ Unlike crimes with direct bodily harm, sexual assault is marked by the unique characteristic of degrading an individual. The responsibility of bystanders in such situations is a crucial aspect that demands careful consideration.

The failure to intervene not only perpetuates a sense of societal approval for the assailant but also exacerbates the victim's suffering. Rape is often more about power dynamics than the act itself. The victim is directly attacked, humiliated, and dehumanized. In a way then, most rapists are also directly interested in the victim's trauma.¹⁵ The element of masculine self-assertion is always

¹² Dunlop and Sylvester v. The Queen, 2 SCR 881 (Supreme Ct. Canada 1979).

¹³ R v. Clarkson, 1 WLR 1402 (Supreme Ct. Canada 1971).

¹⁴ Kurt Weis, *Victimology and Rape: The Case of the Legitimate Victim*, 8 Issues in Criminology 98 (1973).

¹⁵ Christopher Cowley, *Complicity and Rape*, 83 The Journal of Criminal Law 31 (2019).

multiplied by the group dynamic of performance and solidarity.¹⁶ When bystanders refrain from intervention, perpetrators interpret it as a societal endorsement, further emboldening them. The psychological impact on victims is magnified when sexual assaults occur in public spaces.¹⁷

The question arises: why do perpetrators choose to commit these crimes openly, in the presence of numerous witnesses? The answer lies in power dynamics, misogyny, and a desire to publicize the victim's suffering. The goal of the assailant is achieved through the passive stance of bystanders, who inadvertently contribute to the public spectacle and the degradation of the victim. The physical presence of bystanders becomes crucial for the full humiliation of the victim.¹⁸ Therefore, in a way, the bystanders directly contribute to the harm done and become liable. The bystanders who actively choose to stay at the crime scene then embark upon the journey of activity and voluntarily contribute to the suffering.

Ancillary thoughts on duty to rescue

Although the misfeasance and nonfeasance distinction is actively used as an argument to avoid the duty to rescue in common law countries, this line is blurred in cases of sexual assaults and rapes in public as well as multi-party assaults. This is because the group dynamics that exist in these situations directly cause positive harm to the victim by decreasing the likelihood of her escape as well as increasing the feeling of shame and victimization even when a bystander is 'merely' standing and observing. It is false to contend that these feelings of shame and disgust are not harmful.

In *Emperor vs Mt. Dhirajia*, it was held that some degree of knowledge must be attributed to every sane person. The degree of knowledge which any particular person can be assumed to possess must vary. For instance, we cannot attribute the same degree of knowledge to an uneducated person as to an educated person.¹⁹ This recognition of varying degrees of knowledge raises an important counterpoint to the judgment in *R. v. Dunlop and Sylvester*, particularly concerning the absence of knowledge on the part of bystanders who may unknowingly be encouraging an assault. This

¹⁶ *Id.* at 34.

¹⁷ Mandhane, *supra* note 8, at 2.

¹⁸ *Id.*

¹⁹ *Emperor v. Mt. Dhirajia*, 1 AIR 486 (Allahabad High Ct. 1940).

argument then opens up the issue of how to determine this knowledge in the absence of awareness in India and how fair it is then to attribute this knowledge to every sane person. This remains a question to be explored by both the judiciary and the legislature.

Once it is established as a part of criminal jurisprudence that voyeuristic bystanders play a role in the encouragement of the crime as well as its acceptance as well as worsening the condition of the victim of rape, it becomes simpler to establish causation. The 'but for' test argued in the section above has been applied to the incidence of rape. However, if we are to apply the 'but for' test to the encouragement, it becomes aptly clear that their presence not only facilitates the commission of the crime but also contributes substantially to the overall harm inflicted on the victim. Therefore, it is reasonable to assert that bystanders, through their encouragement and compounding impact, are integral to the causation of the harm suffered by the victim.

Way forward

The proposed recommendations aim to address legislative concerns, incorporating psychological insights, and ensuring a balanced approach towards both victim needs and the circumstances faced by bystanders. Advocacy for legislative changes should be accompanied by awareness campaigns to foster a more intervention-oriented and compassionate society.

Placed in these circumstances, therefore, it is important to advocate for the incorporation of concepts of liberty that go beyond traditional norms, emphasizing the protection of women's interests. It is submitted that the law should move towards incorporating concepts of liberty that do not fall neatly into the liberal tradition, but which more adequately serve the interests of women.²⁰ In a society working towards gender equality and advocating the role of law in ensuring justice delivery to women, the aim should be to provide survivors with legal recourse against those who witnessed their degradation. Perhaps this would have the effect of increasing survivors' faith in the criminal justice system by shifting the starting point of the inquiry from the male bystander to the female person who was invaded.

²⁰ Mandhane, *supra* note 8, at 11.

This section outlines a set of solutions designed to tackle existing gaps and challenges associated with the introduction of duty to rescue as a criminal liability. These recommendations are intended to be applied on the unexcused bystanders as identified above. Additionally, the solutions must grapple with varying degrees of rationality, fear, and mental states among bystanders. Acknowledging these physical and mental differences is crucial for accountability while ensuring a fair and just legal framework.

Further, a limited duty to rescue, focusing on providing reasonable emergency assistance to individuals in immediate peril, where intervention is feasible without risking harm or neglecting other duties should be introduced. This can be done under new legislation, such as 'knowingly causing additional humiliation' penalizing failure to assist or report a crime. Such legislation should leave open vast judicial discretion to conclude liability on a case- to- case basis.

For formulating standards under this duty, inspiration from existing European legislations on duty to rescue should be taken. It is not always true that bystanders do not care for those in distress. According to the research by John M. Darley and Bibb Latané, they also go into a series of deliberations before they decide whether or not to intervene. These decisions include noticing the attack, determining whether or not it is an emergency, gauging whether they are personally responsible for acting, deciding on how to approach or intervene and then, finally, to act on it. In most cases, the lack of even one of these causes the individuals witnessing an attack to hesitate and not intervene.²¹ Therefore, the liability carved out under the proposed legislation should be similar to the one accorded for the lenient and minor crimes under the criminal system.

A thorough research to identify crimes suitable for duty to rescue application is essential. Some of the research questions should include-

- How proximate would the bystander have to be in order to be culpable?
- How long would he/she have to remain at the scene of the primary offence to be charged?
- How long would a rescuer have to continue assistance and at what risk?

²¹ Outlook Web Desk, *supra* note 3.

- What if he/she was paralyzed by fear - would he/she still be guilty of failing to rescue? -
- How reasonable would his/her assessment of whether or not a criminal assault was occurring have to be? ²²

Although it is difficult to create workable standards when implementing criminal culpability in this regard, this is not a reason to allow morally reprehensible behavior to go unpunished.²³

It is also crucial for the lawmakers to strike a balance between the urgency to deliver justice to the victims while at the same time ensuring that the bystanders are not unfairly convicted. What is reasonable differs subjectively. The mind can react differently to different triggers to varying degrees.²⁴ There should be inclusion of psychologists during legal proceedings to assess the psychological state of bystanders facing prosecution, ensuring a nuanced understanding of their actions. Balancing punishment and rehabilitation forms the fulcrum of the Indian criminal system. Therefore, it suggested that a tiered punishment system, such as minimal fines or community service, accompanied by awareness sessions should be explored.

By-stander effect can be overcome with the help of raising awareness on the importance of intervening and adopting relevant strategies.²⁵ This should be campaigned to make the society a holistic place.

Conclusion

The paper emphasizes that the duty to rescue debate extends beyond legal discourse, representing a societal imperative toward justice, empathy, and responsibility in the face of sexual violence. The proposed reforms aim to bridge existing gaps, ensuring accountability for bystanders while fostering a society actively opposed to such crimes. As the discussion evolves, the hope is to shape

²² Mandhane, *supra* note 8, at 13.

²³ *Id.*

²⁴ Šimić, Goran et al., *Understanding Emotions: Origins and Roles of the Amygdala*, National Library of Medicine (May 31, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8228195/>.

²⁵ *What to know about the bystander effect*, Medical News Today (Sept. 1, 2023), <https://www.medicalnewstoday.com/articles/bystander-effect>.

a legal landscape that mirrors the values of justice, empathy, and responsibility, ultimately contributing to a safer and more compassionate society.