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Complicity and the Bystander to Crime

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## **The bystander<sup>1</sup>**

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The guilt of passivity is different.  
Impotence excuses; no moral law  
demands a spectacular death...  
But passivity knows itself  
morally guilty of every failure,  
every neglect to act whenever  
possible, to shield the imperilled,  
to relieve wrong, to countervail.  
Karl Jaspers

### *Abstract*

Our lives are such that we cannot always avoid wrongs, both our own and those of others. We may come across the wrongdoing of others, seemingly unable to avoid being involved with it. In the circumstances we may conduct ourselves in ways that, although not as we would have liked, leave us with a sense of moral failure. One such predicament is that of the bystander to crime. He or she appears compromised in virtue of presence at the fact of the offence. This paper considers the bystander, an ordinary member of the public who finds themselves present at the scene of a perilous crime. Taking the conduct of the bystander, the paper is an initial attempt to think about what Jaspers called ‘the guilt of passivity’ and the questions of agency, responsibility and liability that it suggests.

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Common usage holds the bystander a nonparticipant spectator, one present at an event but who stands by, and takes no part in what goes on. This nonparticipant status is sometimes taken to distinguish the onlooker as uninvolved, and thereby simply an innocent. However, the position of the bystander to crime is a difficult one that gives rise to not a little ambiguity. According to some, rather than benefiting from a presumptive innocence, their very presence at the scene of an unfolding crime implicates the bystander in the offence. The inaction of the 'passive spectator', it is said, renders them partly responsible for the crime. Some have argued that the decision not to intervene, and to thus allow the crime to happen, is a form of complicity.<sup>2</sup> Whilst it is true that the conduct of the bystander to crime is not insignificant, it does not follow that non-intervention suffices to constitute complicitous conduct. Bystander conduct, whether for action or inaction, affects the course of events; it does make a difference to how things turn out. This is not only the case where the bystander acts, for it is not only action that makes a difference. The conduct of the bystander has been deemed 'pivotal' in some analyses. Perhaps this is an exaggeration. We should see the bystander to crime as an interested third party though, whose presence is a relevant part of what happens. This is not to presume that the bystander's conduct will be decisive of what happens. In what sense then is the bystander relevant to what goes on before him or her? Can we say with Tunc that the bystander, by choosing not to intervene, participates in the crime? Having allowed the crime, is the bystander implicated in it in a way that makes for complicity? We may rather think that to stand idly by as a crime takes place is to be responsible for a regrettable and sometimes culpable omission, though it does not generate complicity in the offence being witnessed.

I have spoken of the bystander as an interested *third party*. For the purposes of this paper he or she is a distinct party besides the perpetrator and victim. Firstly the bystander is not a victim, although may become one should the perpetrator proceed to victimize him or her. But, at least initially, the bystander is not a victim. The bystander does not find him or herself in a 'gray zone' in the sense given by Levi (1986/1988), in which victims become complicit in perpetrating on others the evils with which they themselves are threatened. The crime scene, unlike the camp, is not a total institution routinely employing extreme coercive conditions from which no escape can be had. The question is not equivalent to that posed by the survivors of the camps, viz, of whether the harms that one allows to be inflicted upon others in the pursuit of one's own survival are morally excusable. The bystander is not another victim; accordingly we do not make the same allowances for the bystander that we might for the victim. The bystander is instead a third party, neither perpetrator nor victim. He or she is an *interested* third party in the ordinary sense of being involved in, concerned with and liable to be affected by, what goes on. In deeming the bystander to be involved, and considering the respects in which he or she

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<sup>2</sup> 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 and it would be uncontentious to hold that more can be required of him or her, but we may not agree with Tunc that the bystander's nonintervention in murder necessarily creates complicity in the offence.

should be held liable, it is important to avoid the error of ‘overguilt.’ This is a general, indirect, unfocused kind of guilt-attribution that presumes mass inculcation and tends to attenuate the recognition of individual responsibility.<sup>3</sup> In this paper analysis will examine the way in which guilt may be attributed in respect of, and in proportion to, what individuals have done or omitted to do. This is not to dismiss out of hand questions about collective responsibility for omissions. Nevertheless, the focus here is on individual conduct and individual desert. Furthermore, in considering the bystander’s concern with the crime and how this issues in conduct we should avoid perfectionism, and require the bystander to be neither saint nor fool.

### **The guilty bystander**

Jaspers contends that ‘the guilt of passivity is different’ from the guilt of direct deeds. He further differentiates the guilt of passivity into moral and metaphysical guilt. Moral guilt is the guilt of those who survived whilst others were killed, thereby failing in their responsibility to do all that they might. Metaphysical guilt arises when the bystander couldn’t do anything, and anything done would have brought sure death. It is a guilt we feel on account of choosing to stay alive rather than perish in protest against the crime:

‘There exists a solidarity among men as human beings that makes each co-responsible for every wrong and every injustice in the world, especially for crimes committed in his presence or with his knowledge. If I fail to do whatever I can to prevent them, I too am guilty. If I was present at the murder of others without risking my life to prevent it, I feel guilty in a way not adequately conceivable either legally, politically or morally. That I live after such a thing has happened weighs upon me as indelible guilt. As human beings, unless good fortune spares us such situations, we come to a point where we must choose: either to risk our lives unconditionally, without chance of success and therefore to no purpose- or to prefer staying alive, because success is impossible’ (Jaspers 1947/2000: 26).

This will to unconditionally risk oneself in preventing crimes does not extend to all. Its confinement within the close ties of special relationships occasions the guilt (there are only these few people whom I decide I cannot live without).<sup>4</sup>

Jaspers deems failing to act to prevent crimes when one could have done so without certain death a kind of moral guilt:

‘each one of us is guilty insofar as he remained inactive. The guilt of passivity is different. Impotence excuses; no moral law demands a spectacular death... But passivity knows itself morally guilty of every failure, every neglect to act whenever possible, to shield the imperilled, to relieve wrong, to countervail. Impotent submission always left a margin of activity which, though not without risk, could still be cautiously effective. Its anxious omission weighs upon the individual as moral guilt’ (Jaspers 1947/2000: 63-4).

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<sup>3</sup> For a critical account of ‘overguilt’, see Elliott (1968).

<sup>4</sup> Here Jaspers’ account recalls Kierkegaard. The account of Samaritan duties in *Works of Love* (1847/1995) posits a nonreciprocal and unlimited duty toward *any* imperilled person we come across, regardless of preferential feeling and however hopeless.

The distinction between metaphysical and moral guilt turns on the question of whether the bystander could have intervened without strong risk of death and to some success. In moral guilt, one has not risked oneself enough, one has not taken due action within the margin of possibility. Jaspers includes wilful blindness and indifference as morally guilty kinds of bystanding. Notably he limits moral guilt within the horizons of possibility. He says in this respect 'morally we have a duty to dare, not a duty to choose certain doom' (Jaspers 1947/2000: 65). There is a duty to intervene with daring, but no duty to forsake one's life in intervening. The unconditional at the base of metaphysical guilt means that even if I do intervene, if the attempt is unsuccessful and the other is killed whereas I survive, I will feel guilt. If I have done all I could short of giving up my life, my guilt will be metaphysical and not moral; I will not have failed to act on my obligation. Metaphysical guilt, a guilt of being (still alive when I have not given my life in favour of the other), is not based on omission (i.e., it is not based on something I had a duty to do). Moral guilt is however; I have failed to do all that I ought to have done. The life of the other has meant too little to me.

For Jaspers the bystander's failure to act can be morally wrong. This was not the case however for Morris (1987), who emphasised the premise that moral guilt requires culpable responsibility for wrongdoing. He listed several conditions for moral guilt, viz: 'There must be a *doing*; it must be a *conscious* doing; it must be a *free* doing; there must be a *wrongdoing*; there must be a *moral* wrongdoing; it must be by a *person*; it must be by a *moral* person; this person must be *responsible* for the wrongdoing; the guilty person must be the *self-same* person as the one responsible for the wrongdoing; the person must be at *fault* with respect to wrongdoing' (Morris 1987: 225).

For Morris the culpable *doing* of a wrong is a necessary condition of moral guilt. In fact this is first and foremost. It is precisely what is absent from and definitive of nonmoral guilt. Morris thus calls survivor guilt a 'nonmoral guilt.' It is a guilt incurred by a specific failure to act, and thus to survive when others died. Morris says that this is a guilt that I am alive at the expense of others. Citing Jaspers' concept of metaphysical guilt, he says that survivor guilt pertains when one could have done nothing to save the other, and would have died in any attempt to do so. Morris is silent as to whether inaction where one need not have risked death in intervening can constitute moral guilt. Perhaps his first condition of moral guilt, that there be a doing, would exclude this.

The guilt of the inactive bystander to crime is not reducible to regret. Regret is that experience in which one wishes that a state of affairs had been otherwise, that is, that things had been done differently and so turned out differently. This entails a kind of counterfactual thinking, an imagining of states of affairs contrary to the actual, concerning what might have been, and particularly how things might have been both otherwise and better than they are. It is possible to feel regret over a state of affairs with which one is unconnected, that is not down to one in any way. There are also special kinds of regret peculiar to those personally connected with regrettable things, and these include bystander regret. Agent-regret is the first-personal kind of regret experienced by one who considers themselves to be causally connected, on account of their direct conduct, with a regrettable thing having happened:

‘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’ (Williams 1981: 27).

Williams writes that agent-regret is not limited to voluntary agency. Beyond things intentionally done, it can arise from those things for which one was causally responsible in virtue of what one intentionally did. Even where agency is deeply accidental or non-voluntary, agent-regret can appear. Even then agent-regret differs from the general regret that might be felt by any spectator:

‘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. It is apparent that Williams recognizes an intermediate kind of regret, the passenger’s regret. The passenger, who is along for the ride and not directing the vehicle, may feel regret over the perceived possibility of having been able to prevent the accident and not having done so. This kind of regret might be felt by a bystander to crime. It is special rather than merely general, first-personal and agentic, although not quite the same as agent-regret itself. But to regret one’s non-intervention is not to acknowledge that non-intervention in that instance was wrongful. With pure regret, duty has never been within the horizon of deliberation.

The guilt of the bystander may be thought to involve dereliction of what Scheffler (2004: 225) calls the responsibilities of causal position, and specifically ‘opportunities to intervene in causal processes we did not initiate, and which may be quite alien to our purposes.’ An opportunity is an occasion or situation which makes it possible to do something that one wants to do or *has to do*. Recall that Jaspers renders an obligation to act within the margin of possibility distinctive of moral guilt where there is a failure to intervene in crime. Still, this is not the same as the guilt of deeds. Scheffler is helpful on this point. He 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).

I would add that the notion of failure to act upon a causal opportunity to intervene suggests an expected action as a causal element. The idea of a specific expected action is pertinent to the evaluation of the inaction as causally relevant.

### **To do or not to do**

The bystander's predicament entails a quandary of deliberation over whether or not to act upon an opportunity to intervene. Bystanding conduct is advertent; it is done knowingly. Jaspers says that morally guilty bystanders are 'the ones who knew, or could know' and yet conducted themselves in culpable error (Jaspers 1947/2000: 57). The bystander's quandary is one of deliberation in a seeming situation of forced choice. The bystander must deliberate, that is, reason in view of some course of action, about what to do where there is a sense of alternative possible courses of action that must be decided between. The bystander is an agent who deliberates about which of two or more mutually excluding actions to perform. In deliberating, he or she discerns and considers reasons to pursue one course of conduct or another, and seeks to bring these considerations to bear as potential grounds for the decision that must be made. Inherent to the position of the bystander then is an experience of deliberation in which it is 'up to me' to decide what to do. This is also experienced as a weighty decision rather than a merely mundane instance of deliberation. It is also experienced as an urgent decision, and as a 'decision under uncertainty' (Nagel 1979: 29), in which the bystander cannot make an informed decision and count on acting in a way that will insulate from reproach. In some respects this is a fateful decision, and one experienced by the bystander as such.

Consider one who is a bystander to crime, inadvertently present 'at the fact.' This presence poses for the bystander an exacting moral test, that others who are not so present do not face. This testing situation may appear dilemmatic to the bystander, although ordinarily it will not pose truly competing moral obligations, both of which cannot be met. This moral test is likely not one that the bystander would like to face; it is something that he or she would rather not face, would rather not get caught up in. Nevertheless, it is experienced as urgent, compelling and not something that can be passed up. This set of claims, you will notice, entails an understanding that the bystander is involved in what happens, by virtue of mere presence. The bystander is there, and so what goes on is his or her business. The phenomenality of the predicament is not one of an inconvenient interference in the liberty of one who, as Smith (1984:88) put it, 'wishes only to mind his own business and let others get on with minding theirs.'

By virtue of this presence, the crime event is something with which the bystander is directly confronted. Ordinarily this close proximity to the commission of the offence should provide that there is specific knowledge, that is, that the bystander is cognizant of the actual crime in progress. I will say something about the situation where this knowledge is absent below. For the moment, let us assume this knowledge on the part of the bystander. I want to formulate the bystander's quandary as a responsibility of having to choose, to resolutely carry that choice through, and to live with it after. It falls to the bystander to have to decide whether and how to act, simply because they are there. The question then becomes whether an omission to intervene in this instance is a deliberate forbearance. Can this omission be ascribed to 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 has just passed I was not walking with lama in the Himalayas. Neither was I on the common walking with 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 likely never have occurred to me as something I would do. In the case of the bystander to crime, the omission to intervene cannot be considered something not done because it did not occur to the bystander as something to be done there and then.

In bystanding conduct, the omission to intervene is an omission to do something that can be presumed to have come to the bystander's attention. As a bystander to a violent crime, the possibility of intervening in some way is 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 a dangerous state of affairs occasioned by the criminal conduct of another, which further creates an awareness of the situation as urgent and as relevant to oneself (as a public and not a merely private wrong; for more on this, see below). All this provides that witnessing criminal injury is not something that the ordinarily 'decent' moral agent would not notice, and be concerned about. The bystander's being a knowing spectator of a crime that immediately threatens the vital interests of another is exactly the kind of situation in which the possibility of intervening becomes a 'deliberative priority' (Williams 1985/1993: 186). The point is that not everything that comes to my attention is attended to by me as a matter of moral deliberation. The awareness that a perilous crime is being committed right 'here' in front of me is attended to by me in this way. The question of whether and how to act in this situation does not appear morally indifferent. On some accounts my conduct, in how I act upon knowledge of this peril, matters to *me*, that is, the ethical question is tied up with an ontological one.

Construing an omission to intervene as deliberate, intervention too should be seen as deliberate conduct. Consider the distinction between the automatic and the actional. The conduct of one who does intervene should not ordinarily be considered spontaneous. This is not a case of what Mandelbaum (1955) characterised as a spontaneous reaction to what confronts one:

'I see a child in danger and catch hold of its hand; I hear a crash and become alert to help. Actions such as these... do not, at the time, seem to spring from the self: in such cases I am reacting directly and spontaneously to what confronts me...It is appropriate to speak of "reactions" and "responses", for in them no sense of initiative or feeling of responsibility is present' (Mandelbaum 1955: 48).

In spontaneous action, the feeling of responsibility is absent at the moment when the action is performed. Mandelbaum writes that in such a case we feel that 'the situation extorted that action from us.' He contrasts heteronomous determination of this kind to willed actions, in which one does experience the causal power of the 'I', that is, in which the action is felt as mine and the 'I' is experienced as being responsible for the action. The intentional stance, one might say, is a doxic positing of the deed as a possibility within my power, as something with which I can busy myself, and the simultaneous grasping of myself, doxically, as agent of the deed. Ricoeur (1967: 19) says:

'In making up my mind, I impute to myself the action- I place it in a relation to myself such that, from then on, this action represents me in the world; if it is asked: "Who did this?" I hold myself ready to respond: "It is I who did this...I anticipated in a certain way



the situation in which I will take the responsibility for the origin of that act before someone else; I answer for it. Thus I posit myself as the agent in the intending of the action to be done.’

There is a doxic positing of the action as an *option for me*, of *myself as possible agent* of it. There is also, following Ricoeur, the positing of it as *down to me*, and thus that for which I can be held responsible.

If this doxic positing that connects the agentic with self-reflexive imputation of responsibility is true of the experience of intention per se, it is surely heightened in situations of moral choice. In such situations we become aware not only of alternative possibilities for action, but also that we urgently must choose between them and must choose the morally right. The doxic has an element of belief that the action chosen will make some difference in the future, an ‘if x then y’. Doxic positing hence has an element of belief in a causal efficacy of self as agent in this particular situation. But, remember that this is decision under uncertainty. Whether one will make a substantial difference, or indeed achieve the particular kind of difference that one would like to make, does not appear as assured. Where there is a sense of duty we feel that one of the alternatives places a demand upon us, and feel bound to act for it. Here doxic positing partakes of the experience of moral demands, of their injunctive force. Following Jaspers, the doxic also entails thoughts about prudence and the limits of my duty. The bystander deliberates upon the likelihood of whether a particular action will prove fatal, and upon what is at stake for them in the death of the other. I hypothetically connect my vital interest with the fate of at least some others, those who matter to me most and particularly those who seem necessary to me.<sup>5</sup>

The bystander is responsible for making a choice, and for acting on it. This is especially the case when there is a sole bystander. Sometimes though there may be several onlookers, and indeed a crowd. Where there is only one, it particularly falls to that individual to have to decide what to do, for they are the only one who can intervene. Only this one person has the opportunity, one might say. Here the quandary is heightened, for I alone can act. 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. Bystander nonintervention in the crowd case may involve the disavowal of a sense of personal agency. This may be by diffusion or displacement of responsibility, but does not diminish the sense in which the duty of intervention is nondelegable. The obligation is not one that can be assigned to another.

### **The guilt of complicity**

Bystanding conduct is a guilt of passivity. Where it turns into participation in the commission of the crime, it becomes a guilt of deeds, albeit not the same as perpetration. The account of Jaspers equivocates somewhat on this matter, tending to assimilate complicit conduct to moral guilt rather than criminal guilt. Complicity entails a participatory intention, which Kutz (2000: 11) glosses as ‘a distinctive, individual,

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<sup>5</sup> Here Jaspers, in exempting self-sacrificial intervention from the domain of the obligatory, observes Kant’s tenet that the counsels of prudence involve necessity but a necessity which can only pertain under a contingent subjective condition.

instrumental, intention to play one's part in a joint act.' Here when thinking about deliberate conduct we can emphasise the intended jointness of the action and also evaluate each individual's particular contributions. We can also admit that while exercising this participatory intention, an agent can be to various extents alienated from the collective's activities. In any case the crime is a particular kind of multi-agentic venture. How does this kind of intention bear upon the culpability of the bystander to crime? Take the premise 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. 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. Unless the person intends their presence to be an encouragement to the commission of the crime, there is no complicity. All this is not to say that presence at the fact is irrelevant though, for it may be a telling fact in drawing the inference of intentional encouragement. Presence by prior arrangement is strong material supporting the inference. In such a case, 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 then, who just happened to go by at the moment when a crime took place, and thus presence can be taken to suggest approval of the offence.

What of the bystander who does happen upon the criminal act? Here there has been no prior arrangement and the person is inadvertently present, having chanced upon the crime event. It is not the case that this means they continue to be involuntarily present, or to be an unwilling spectator who does not assent to or encourage the commission of the crime. The accidental character of presence does not of itself guarantee that there is no complicity. But for there to be complicity the subsequent conduct of the bystander would have to intentionally encourage the principal. The bystander's inaction can be taken to suggest a desire that the offence come about and an encouragement of it. There is the idea that the failure to aid the victim translates innocent bystanding into a form of complicity (see Stewart 1998: 414-5). The notion here is that witnessing criminally caused injury creates a legitimate expectation of intervention and the subsequent failure to do anything to assist the victim constitutes complicity. This is not convincing. The omission to assist may look bad, and may be a dereliction of duty, but does not of itself produce complicity. Failure to oppose the commission of the crime may also be deemed relevant to the inference that one intentionally 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 be suggestive in this way. In sum, the omissive conduct of the bystander can sometimes be deemed intentional encouragement, but this is unlikely in the case of the accidentally present person who happens upon the crime and then does nothing.

The guilt of passivity is not the guilt of complicity then. The bystander's conduct is not an intentional taking part in a collective act that 'we' (perpetrator and complicit agent) do together. Instead the noetic content of the intentional experience of the bystander goes something like this:

knowingly choosing to not act to prevent something that you (the perpetrator) do, and that I do not want to be done, although I ought to try to prevent you doing it. The bystander is one who *suffers* a crime to be committed in their presence.

### **Impotence excuses**

Notably Jaspers never deems omissions to intervene justified, even when they are necessary to one's survival. Omissions are excused if there is an absolute certainty of one's death ensuing from any kind of intervention, but even then they are not justified and issue in metaphysical guilt. He renders other reasons for non-intervention credible explanations of inaction but does not render them exculpatory. The exception is genuine ignorance. 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 mistaken conduct issues. Conduct ought to be based on a reasonable mistake of fact if it is to be excused. This must not be wilful blindness.

Perhaps compulsion to inaction by threat of murder can excuse the omission to intervene. Suppose that the perpetrator points a gun at the bystander and says 'Stay out of it or else I will shoot you.' The instruction that the bystander offer no opposition to the crime, on pain of being shot, is a conditional threat. Is it a threat that would render a subsequent failure to intervene excusable? 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. Nozick (1969/1997) makes it a 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, where the perpetrator does not address the bystander at all. Even where a threat is directly communicated, this may not rule out the possibility of intervention. In coercion, conduct becomes 'less eligible'; it is not made impossible but is made less appealing to the coerced person. Threats limit a person's prospects for action, rather than negating all possibility of the specific (or indeed any other) action. Threats contract the margin of possibility, one might say.

An omission on the part of the bystander may be excusable when he or she has a conflict of duties that poses a true moral dilemma. Suppose that the bystander is faced with two victims being simultaneously attacked and cannot effectively oppose the commission of both crimes. One of them is the bystander's mother and the other is a stranger. If the bystander decides for the relative, the omission to oppose the crime against the stranger remains an unfulfilled duty.

### **The duty to dare**

According to Jaspers there is a duty to dare, but not a duty to doom oneself. This suggests a kind of trying that does not entail feats of daring-do, deeds of extreme daring. The duty cannot be a matter of do-or-die. Daring it is all the same. It must disregard inconvenience and overcome cowardice. It is obligatory and hence not heroic or supererogatory. The bystander must act on obligation albeit in the face of sensible danger. But one need not

dare all things. This is a matter of taking the opportunity to intervene within the limits of possibility.

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 opposing the occurrence of the crime, which Jaspers called 'countervailing.' This is a matter of seeking to hinder its commission, of trying to prevent it. A genuine try is an attempt to intervene that one makes despite the uncertainty of outcome. A failure to actually achieve thwarting the crime may leave one regretful. But a genuine, albeit unsuccessful, attempt would diminish culpability in a significant way. Again the notion of attempt to intervene arises from recognition of the predicament of the bystander. If there is an opportunity to intervene, its causal efficacy is not assured. If the decision to intervene is a decision under uncertainty, so is the attempt to intervene, and it may miscarry.

What kind of intervention would do? To intervene is to involve oneself in a situation so as to alter or hinder an action or development. The bystander is not free to simply quit the scene. Indeed one can posit a duty to remain in order to subsequently bear witness, to give testimony as to what was seen, as well as to take advantage of any opportunity to intervene that may arise. But the bystander also cannot merely stay and watch the commission of the offence. Furthermore, 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 thwart the crime, though with no guarantee of success, is to cast off complicity. It is also to avoid the charge of a culpable omission to intervene. How hard must the bystander try? The bystander must not make a half-hearted or faltering attempt to intervene. If an attempt is commenced it must not then be abandoned; it must be carried through to the best of the bystander's ability. Where the attempted intervention fails, the bystander may yet feel 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 not likely be spoken of as one who allowed the crime to happen. The duty to countervail has been satisfied; the crime has not gone unopposed.

### **Bystanders and the law**

The legally cognised status of bystander varies across jurisdictions. The duties that are attached in law to bystanders and the ways in which bystanders may call upon the law to recognise their unique status and take account of it in punishing criminals, awarding damages, et cetera, do vary. Firstly, consider the criminal liability of the bystander. There is not a general rule that bystanders need do nothing, or that they are simply uninvolved

as long as they are not complicit. It is the case that, legally speaking, one need not risk one's life to prevent the death of another. In some jurisdictions, one need do nothing to intervene in the crime against an imperilled stranger. In others, bystanders must rescue or summon aid for any imperilled person. This is a tremendous divergence. The account developed in this paper tends to support a limited criminal liability where the bystander does nothing, attaching whether the victim is stranger or friend. In support of this, one might say that crimes are public wrongs, and hence bystanders have a duty to countervail against all crimes they witness, within the limits of possibility. Recall that Jaspers evoked the 'solidarity among men as human beings that makes each co-responsible for every wrong.' His words do not work to suggest complicity of all in the perpetration of every crime, but rather that every person must do all they can in response when crimes occur. Bystanders have special duties and must intervene where possible. In those jurisdictions where a duty to intervene is recognised, it is a duty that 'stops short at the brink of danger' (Honore 1981:231). Perhaps this contracts the limits of possibility too narrowly. In terms of criminal sentencing, how grave is the omission to intervene? Clearly committing the crime is worse than any omissive conduct that allows it to happen. The crime of omitting to intervene would be less serious than an offence of commission and, on grounds of desert, would attract a lighter imposition of punishment.

An aspect of the bystander's attempt to intervene is the defence of another. Is this ever justifiably violent? The law sets limits on the permissible use of force, that is on justifiably forceful interventions to oppose the commission of a crime. The bystander's use of force against the perpetrator in the defence of the victim is only permitted as long as it was genuinely believed necessary in the circumstances by the bystander. The force used would also have to be reasonable in the circumstances. The intervention may rely on a reasonable use of force, which is justifiable both in the prevention of crime and in the defence of self or other. The use of force is only permissible when one or another is in imminent or extant danger. It is to pre-empt the coming about of greater danger and injury. Thus the use of force is not permissible once the assault on the victim or oneself is over and no peril remains. The necessity element is crucial. Here the bystander has a genuine belief that he or she must act defensively, and that such action must necessarily employ an act of force against the perpetrator. The bystander who witnesses violent crime may not use force for the sake of vigilantism or vengeance. These are actions of retaliation, and impermissible as unnecessary and disproportionate.

The bystander has a duty to dare, but if the perpetrator endangers him or her, this aggravates the crime. In some jurisdictions at sentencing in murder this is the case where the murderous act itself seriously endangers a third party. Knowingly occasioning a grave risk of death to an additional person than the victim is deemed an aggravating factor. This arises where the offender's conduct places the bystander within the zone of danger. Mere presence, even where there is the use of a weapon by the perpetrator, does not constitute the relevant endangerment. The third party must be directly endangered by the murderous attack on the victim. If the bystander intervenes to oppose the crime, say by jumping on the back of the offender who is attacking the victim, this can suffice to constitute the kind of endangerment in aggravation of sentence. Here the bystander's presence within the

zone of danger is by their own movement, but it can be reasonably expected that a bystander will intervene so culpability is aggravated.

The bystander, however daring, may be badly hurt by what goes on. How does the law respond to the question of whether injuries suffered by the bystander are compensable? The bystander, although a person of normal fortitude, may be badly affected mentally by having had to witness deliberately inflicted victimization, injury and suffering. In the case of violent crimes, the bystander may witness terrible scenes. In this respect the experience of being in the danger zone may be a harrowing one and may occasion post-traumatic illness. There is a question of whether the bystander to a distressing criminal act may benefit from state compensation, or act to recover damages from the offender, for a psychiatric injury sustained in virtue of this direct perception of the event. The bystander is ineligible for compensation for mental injury from most state schemes. May the perpetrator of the crime that the bystander witnesses be liable in tort for psychiatric injury to the bystander? It is foreseeable that the bystander to the commission of a violent crime will be adversely affected by exposure to the trauma of the event. In some jurisdictions the law provides that the bystander who is a stranger to the victim cannot claim, however horrific the incident. The law treats preferentially the bystander who acts as a rescuer, who may recover for psychiatric damages. Furthermore a bystander who sustains physical injury as a result of involvement in prevention of, or dealing with, an offence is usually eligible for the award of state compensation.

Some jurisdictions have legislated an immunity from tort liability for bystanders who in intervening act reasonably and in good faith. Often this is legislated as part of a 'duty to rescue' statute. In others tort immunity for the intervenor is related to the doctrine of justifiable defence. A recent statute in England provides that perpetrators cannot claim damages in civil proceedings from victims or bystanders who act reasonably and proportionately in self-defence or the defence of others, or to prevent the commission or continuation of crime. The statute allows proceedings for recovery only where the defensive actions of the victim or bystander were grossly disproportionate.

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