Bystanders v. Bullies

Author : Martha Chamallas

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Sarah L. Swan, Bystander Interventions, 2015 **Wis. L. Rev.** 975 (2015).

The Stanford rape case has given new prominence to the role of bystanders in sexual assault cases. Many have heralded the actions of the two Swedish graduate students who intervened to stop the sexual assault of an unconscious woman and forcibly detain her attacker until police arrived. However, in the world of tort law, attitudes towards bystanders and bystander intervention are ambivalent, at best.

To begin with, one of the most enduring tort doctrines is the no-duty-to-rescue rule. Its protection is so broad that it shields the most callous persons who refuse to provide assistance, even if they could easily prevent a serious injury to another at little risk to themselves. Bystanders, we are told, are under no legal obligation to act and are allowed to remain passive in the face of suffering and simply go about their own business. As an expression of fundamental values of personal autonomy and individualism, letting bystanders off the hook can appear natural and appropriate. Even the term “bystander” itself suggests lack of involvement and lack of interest. In *Bystander Interventions*, Sarah Swan cuts against this narrative, exploring the new world of bystander intervention strategies and making the case for reforming tort doctrine and other bodies of law to encourage “active” bystanders.

Swan’s focus is not on the classic tort rescue scenarios involving drowning victims or children poised dangerously close to busy highways, but on recent efforts by the government and activists to curb the “deeply entrenched social problems” of bullying in schools, sexual misconduct on college campuses, and workplace harassment. Citing the new federal mandate requiring colleges to include bystander intervention in their sexual violence prevention programs, Swan believes that bystander strategies have quickly become “the most popular proposed prescription to address these wrongs.” (P. 977.) As Swan sees it: “The idea behind bystander intervention is simple: many of these harms or the precursors to them occur in the presence of other people, and these witnessing individuals thus have the ability to disrupt or mitigate these harms.” (P. 978.)

Contrary to conventional wisdom that imagines rape and other incidents of aggression taking place in private, Swan notes statistics estimating that nearly eighty-five percent of bullying incidents are witnessed by other students, nearly one third of reported sexual assaults take place in the presence of third parties, and almost seventy percent of employed women report that they have observed incidents of sexual harassment. In these contexts, bystander intervention need not involve heroic acts but can be as simple as a college student “creating a distraction” by spilling beer on a potential offender who is about to steer a heavily intoxicated woman student away from the group, or a high school student posting a comment supportive of a classmate who is the target of cyberbullying.

Bystander intervention programs of this sort are all about culture change, attempting to stimulate a shift from a norm of non-intervention to a norm of intervention. Swan acknowledges that, given the newness of these programs, there are not yet reliable empirical studies documenting the efficacy of bystander intervention strategies. Instead, she devotes most of her article to exploring the legal and other impediments that threaten to undermine such efforts before they can take hold.

Swan locates the theoretical foundation for the current bystander intervention programs in the findings of social psychologists who first became interested in studying bystander behavior following the murder of Kitty Genovese in New York City in 1964, in which thirty-eight bystanders reputedly witnessed Genovese’s brutal stabbing but failed to call the police. The studies theorized a “bystander effect” that comes into play in situations of multiple bystanders: not

only are persons in such situations less likely to intervene, but they often interpret the inaction of others as a sign that "the situation must not be as dire as they originally perceived." (P. 986.) Moreover, even when bystanders in such situations conclude that there is a need for intervention, the presence of others results in a "diffusion of responsibility," allowing the bystander to remain passive yet not experience guilt. In this way, "passive bystanding sends a message of tacit approval" that tends to perpetuate the cycle of harm.

Compounding the bystander effect is a legal environment that largely discourages bystander intervention. A major contribution of Swan's article is her canvassing of various legal doctrines that inhibit bystanders from taking action, even if the doctrines do not directly prohibit or sanction their interventions. Swan is mainly interested in the expressive function of tort and other laws and their impact on norms creation. The major contest, as she sees it, is between bystander intervention programs which seek "to create a norm of intervention and foster a social responsibility norm," and the older legal doctrines with the opposite effect, setting up a "competing norms" or "contradictory prescription" problem. Swan believes that in such a competition the non-intervention camp will prevail, citing research indicating that when norms prescribe contradictory behaviors (action versus inaction), "individuals will be more likely to conform to the norm that liberates them from the more costly (or effortful) behavior with respect to their own self-interests." (P. 997.) Although we might all be better off in a world full of Good Samaritans, Swan is convinced that the immediate burden of intervention discourages bystanders from acting, particularly when legal norms generally favor non-intervention.

Number one on Swan's list of laws that prop up the competing norm of non-intervention is the no-duty-to-rescue-or-report rule that "reigns supreme" in the vast majority of states. Swan notes that only a small minority of states have legislatively imposed limited duties, such as a duty to report specified serious crimes or to rescue persons in danger of death or grievous bodily harm when the rescue can easily be accomplished without risk to the rescuer. Swan finds it telling that the catalysts for these rescuing and reporting laws have often been "horrendous high-profile events involving sexual assaults," such as the murder of Sherrie Ivernice, in which a person witnessed the offender sexually assault a young child in a casino restroom. With these notable exceptions, people who witness gang rapes or other sexual assaults, however, face no legal duty to do anything, sending the strong message that "people can and should 'stay out of other people's business.'"

Swan pays particular attention to how the law treats actors other than individual bystanders who fail to intervene to avert harm to others. Number two on Swan's list of legal impediments is the lack of a state duty to protect citizens, which "directly parallels the lack of duty individuals have to each other." The public duty doctrine and various immunities apply to ensure that the state generally has no enforceable duty to prevent private violence, which Swan asserts discourages bystander intervention by causing individuals "to wonder why they, as mere private citizens, should be asked to shoulder this burden." (P. 1004.) Swan reports that many of the notorious cases have involved police failure to protect women and girls from domestic violence and other gendered harms, culminating in the "defining case" of *Town of Castle Rock v. Gonzales*, in which the U.S. Supreme Court held that the police owed no duty to a woman for failing to enforce a restraining order against her ex-husband.

With respect to non-state actors, Swan asserts that the norm of non-intervention is supported by a general lack of legal accountability attaching to institutions and organizations with power or control over the offenders. For example, Swan is highly critical of the strict limitations on imposition of employer vicarious liability under Title VII and of Title IX's high threshold of proof for holding schools liable for sexual harassment. Under prevailing Title IX law, for example, to obtain relief against a school, a student must prove that the institution had "actual knowledge" of the violation and responded with "deliberate indifference," creating perverse incentives for schools to insulate themselves from knowledge of violations. Although the tide may now be turning with the Department of Education's more "victim-centered" administrative enforcement of Title IX during the Obama years, Swan believes that there is still widespread "institutionalized acquiescence" to the harms she targets and that "law has done little to elicit more responsive behaviors." (P. 1021.) In her lexicon, such institutional actors function as "silent bystanders," reinforcing the inaction of individual bystanders.

Finally, Swan points to the existence of laws and doctrines that impose liability on bystanders when they do intervene

and claims that “in the popular imagination, rescue is often associated with potential liability.” (P. 1023.) She asserts that the Good Samaritan statutes enacted in every state are so confusing and ambiguous that they have done little to reduce the perceived risks of intervention and cites the particular concern of college students who often decide not to report sexual assaults for fear of being charged with petty infractions such as underage drinking.

These numerous legal impediments to creating a climate conducive to bystander intervention lead Swan to recommend a number of legal reforms, some highly specific and others somewhat vague. On the specific side, Swan proposes that states adopt the same legal duty to rescue and report laws that now exist in a minority of states and that colleges adopt a Good Samaritan (or amnesty) policy to ensure that bystanders who intervene will not be penalized for underage drinking or other forms of minor misconduct. On the somewhat vague side, Swan urges that the state, as well as institutions such as schools, colleges, and workplaces, creatively explore ways to bring about a “community responsibility model of accountability,” without, however, pinpointing the changes to vicarious liability or other doctrines that courts should make.

What makes *Bystander Interventions* a highly imaginative piece is Swan’s ability to flip the frame and subtly place traditional tort law on the defensive. Importantly, her starting point is not the longstanding tort doctrines that generally resist imposing affirmative duties on individuals other than direct offenders, but the new bystander intervention strategies premised on a more communitarian philosophy that regards individuals as interdependent and as bearing some responsibility for the well-being of those in their physical proximity. Equally important to Swan’s analysis is her centering of pervasive harms – bullying, sexual assault, and harassment – that have long been at the margins of tort law and are rarely uppermost in people’s minds when they think about the no-duty-to-rescue rule. Swan is acutely aware that such harms not only inflict serious injuries on individual victims but also constitute “methods of creating and maintaining social hierarchies, including those of race and class, but in particular, those of gender.” (Pp. 989-90.) She sees these three harms not only as serious invasions of personal rights, but as functioning “to set the norms of gender and sexuality in society,” inflicting suffering on those who fail to conform. I read her article as an unapologetic progressive critique of tort and other bodies of law with the aim of curbing these serious problems, even if it entails changing some longstanding legal doctrines.

Despite her confident tone in *Bystander Interventions*, Swan is not always a proponent of the trend toward “third-party policing” by which “the state tries to deter unlawful conduct by persuading or coercing a third-party individual or organization to perform activities that may discourage a potential primary wrongdoer.” (P. 996.) In an earlier article[1], Swan was highly critical of ordinances that hold individuals responsible for the criminal acts of their family members or friends, such as “crime-free” ordinances that impose mandatory terms in rental housing leases requiring the eviction of tenants when their friends or family commit criminal acts on the premises. In these contexts, Swan is opposed to what she sees as neoliberal measures that exact punishment beyond the immediate offender, in large part because of their disproportionately harmful effects on poor and minority communities. To quote from Swan’s website description of her scholarship, she studies the complexity of “how third-party responsibility is leveraged in competing ways to promote social control on the one hand and social change on the other.” Of course, when it comes to the politically controversial measures Swan writes about, one person’s (harmful) social control may be another’s (positive) social change.

Swan’s support for bystander intervention for the harms she targets makes sense precisely because there is often a group element to the offenses themselves. For example, masculinities scholarship has demonstrated that men often harass women and other “outsiders” in the workplace to prove their masculinity to their male co-workers.[2] Disturbing recent incidents such as the Steubenville rape case in which bystanders videotaped the sexual assault of an unconscious teenage girl, as well as countless instances of cyberbullying, suggest that the presence of bystanders may be a crucial motivating factor driving the commission of the offense. At least with respect to these targeted harms, Swan makes a compelling case for modifying the no-duty-to-rescue rule and rethinking our common understanding of bystanders.

1. Sarah Swan, *Home Rules*, 64 **Duke L.J.** 823 (2015).
2. Ann C. McGinley, **Masculinity at Work: Employment Discrimination Through a Different Lens** (forthcoming 2016).

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