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## DUTY TO RESCUE THROUGH THE LENS OF MULTIPLE-PARTY SEXUAL ASSAULT

RENU MANDHANE†

In 1983, a woman in a Massachusetts bar was hoisted onto a pool table and sexually assaulted by several men for over an hour. Patrons of the bar did not offer assistance to the woman. Many people simply watched as she was degraded while others yelled encouragement to the people assaulting her.<sup>1</sup> While incidents of multiple-party sexual assault (or “gang rape”) are shocking, they are not anomalous. Essentially, multiple-party sexual assault is an extreme manifestation of the widespread gender-specific violence that appears to be overlooked and perpetuated in our society. For example, statistics suggest that thirty-nine percent of women in Canada experience some form of sexual assault during their lifetime, while only six percent of sexual assaults are ever reported to the police.<sup>2</sup> Indeed, gender-specific violence is a harsh reality in Canadian society. To make matters worse, female victims often do not report because they feel the legal system cannot help them.<sup>3</sup>

Unfortunately, this lack of faith in the Canadian criminal justice system is well founded. It is common to hear survivors of sexual assault characterize the Canadian criminal justice system as another form of victimization.<sup>4</sup> Women are forced to reveal intimate details regarding their sexuality and often feel as though they are on trial for ‘provoking’

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<sup>1</sup> R. A. Prentice, “Expanding the Duty to Rescue” (1985) 19 *Suffolk U. L. Rev.* 15 at 16 [hereinafter Prentice].

<sup>2</sup> Statistics Canada, *The Daily: Statistics Canada: The Violence Against Women Survey* (Ottawa: Ministry of Industry, Science and Technology, 18 November 1993) at 2, 6. [hereinafter Statistics Canada]. Unfortunately, these are the most recent statistics compiled by Statistics Canada relating to the impact of violence crime on women.

<sup>3</sup> *Ibid.*

<sup>4</sup> K. Gallivan and S. Bazilli, *Sexual Assault: A Guide to the Criminal System* (Toronto: Metropolitan Action Committee on Violence Against Women and Children, 1994) at 4.

the assault.<sup>5</sup> Finally, the legal principles surrounding criminal culpability often fail to take into account the victim's perspective. For example, in the scenario described above, while the men who sexually assaulted the woman and the people who yelled encouragement could be charged with sexual assault, the voyeurs would not be criminally culpable. This lack of culpability for bystanders fails to capture the reality of the situation for sexual assault victims. It is probable that the presence of bystanders causes further psychological harm to the victim.<sup>6</sup> Yet, the law allows bystanders to watch as a woman is dehumanized free from any obligation to help the victim.

The lack of culpability for voyeurs is morally reprehensible and suggests that traditional sexual assault analysis is inadequate for dealing with cases of multiple-party sexual assault. It is submitted that reform within the *Criminal Code* is necessary to ensure culpability for such morally repugnant acts.<sup>7</sup> One solution is to enact a duty to rescue provision for cases where the victim is in the midst of a violent criminal attack and the rescuer is able to assist without injury to him/herself.<sup>8</sup> While such a reform represents a large departure for Canadian law, this change is warranted to protect women and to make the justice system more accountable to female victims of multiple-party sexual assault. If the system becomes more aligned with the victim's perspective, it is probable that more women will report incidents of sexual assault and, in particular, incidents of multiple-party sexual assault.

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<sup>5</sup> *Ibid.*

<sup>6</sup> There are numerous psychological studies that suggest that posttraumatic stress disorder is more severe in victims of sexual assault who were degraded or dehumanized during the attack. See I. T. Bownes, E. C. O'Gorman, & A. Sayers, "Assault Characteristics and Posttraumatic Stress Disorder in Rape Victims" (1991) 83 *Acta Psychiatrica Scand* 27 at 27 [hereinafter Bownes]. See generally D. Silverman et al., "Blitz Rape and Confidence Rape: A Typology Applied to 1,000 Consecutive Cases" (1988) 145:11 *Am J Psychiatry* 1438.

<sup>7</sup> R.S.C.1985, c. C-34 [hereinafter the *Code*].

<sup>8</sup> Throughout this paper the term "duty to rescue" is used broadly to refer to any affirmative obligation to assist a victim of crime. Therefore, a duty to rescue may include such diverse acts as reporting the crime to the appropriate officials, giving first aid to the victim, or physically freeing the victim from his/her aggressor, depending on the circumstances. The breadth of the definition given to the term "duty to rescue" is meant to highlight the fact that there are many methods by which an ordinary citizen can decrease the harm associated with violent crime.

## I. THE SITUATIONS CONTEMPLATED

Before discussing the duty to rescue in more detail, it is instructive to present examples of situations where a victim of sexual violence would benefit from a positive duty to rescue. While the examples that follow relate to multiple-party sexual assault, the duty to rescue could also benefit women (and men) in situations of domestic violence, simple assault, murder, and other violent crimes.<sup>9</sup> Therefore, the multiple-party sexual assault scenario is intended as an extreme example, without suggesting that this is the only situation, where the duty to rescue would be beneficial.

### *i. R. v. Dunlop and Sylvester*

In the case of *R. v. Dunlop and Sylvester*,<sup>10</sup> the sixteen-year-old victim, Brenda Ross, and a friend went to a hotel in Winnipeg for a drink. At the club, Ross and her friend met various members of the motorcycle club the Spartans, including the accused, Dunlop. After Ross had consumed approximately five or six drinks, she and her friend agreed to go for a motorcycle ride with two members of the Spartans. The Spartans took the women to a secluded area outside of the city. Upon arrival, the group dispersed and Ross was left by herself. Soon, however, four other Spartans arrived. They took Ross by the arms and legs, carried her to a nearby creek and threw her on the ground; they were joined by a number of other men who ripped her clothes off. While Ross was pinned to the ground by two men, approximately eighteen others raped her. Other men stood around and watched. Ross claimed that the co-accused, Dunlop and Sylvester, were among the men who raped her; their story differed from hers. Dunlop and Sylvester contended that they had been sent to fetch beer for the group and had

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<sup>9</sup> It should be noted that the focus of this analysis is on the duty to rescue in relation to violent crimes. The issue of whether or not there should be a duty to rescue in response to natural threats such as drowning, and fire will not be addressed. The exclusion of discussion on natural threat is not intended to suggest that such a duty should not exist. Rather, it is a reflection of the fact that the rationale for a duty to rescue in response to natural threat would be quite different from the one put forward in this paper. For example, the issues of victimization and dehumanization relied on here to support a duty to rescue in relation to multiple-party sexual assault do not make intuitive sense in terms of a duty to rescue in natural threat situations.

arrived later than the rest. Upon their arrival, they claimed that they proceeded to the top of a hill. From this viewpoint, they saw Ross engaged in the act of sexual intercourse. Those standing around Ross yelled to the co-accused expressing their dissatisfaction at the lateness of the beer. Dunlop and Sylvester alleged that they left soon after.

Given this scenario and today's law, who would be culpable? The eighteen men who had sexual intercourse with Ross would be charged with sexual assault under s.271 of the *Code* and there can be little doubt that the men who held Ross down while the others abused her would be charged with sexual assault through s.21(b).<sup>11</sup> But what is the culpability of the men who simply watched while Ross was sexually assaulted including, for the sake of argument, Dunlop and Sylvester? Assuming that the co-accused and those who were by the creek were aware that Ross was being attacked, are they liable? As Canadian law stands today, they would not be guilty of any crime. In fact, quoting from an old criminal treatise, the Supreme Court stated that:

'...in order to render a person an accomplice and a principle in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary, and therefore if [the accused] happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth to prevent it, not apprehendeth the murderer,, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principle or accessory.'<sup>12</sup>

Thus, based on this well-established common law principle, Justice Dickson concluded that the accuseds in *Dunlop* were not parties to the offence as defined in s.21 of the *Code*. Moreover, since there is no legal duty to assist a person who is in the midst of intense victimization, neither Dunlop nor Sylvester were convicted of any crime relating to the assault.<sup>13</sup>

<sup>10</sup> [1979] 2 S.C.R. 881 [hereinafter *Dunlop*].

<sup>11</sup> Section 21(1) states that:

Everyone is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

<sup>12</sup> *Dunlop*, supra note 10 at 891.

<sup>13</sup> There are certain narrow exceptions to this rule that are discussed in more detail in Section II.

*ii. R. v. Clarkson and others*

*R. v. Clarkson and others* is an English case with facts similar to those in *Dunlop*.<sup>14</sup> The individuals accused were English soldiers serving in Germany. On the night in question, a German woman attending a party in the barracks was taken into a room by the accused fellow soldiers and sexually assaulted at least three times. The accused persons entered and watched as the assaults took place. While none of the accused had done any physical act or uttered any words, it is apparent that their presence in the room was not accidental. They had entered the room because they had been told that a rape was taking place, and it was obvious from the evidence that they remained as voyeurs.

Again, it is instructive to consider who is liable in this case. It is obvious that those who engaged in the act of intercourse with the victim would be charged with rape. However, would the “mere” voyeurs be guilty through aiding and abetting? The judge in *Clarkson* concluded that they were not guilty of rape through aiding and abetting because they did not engage in any positive acts to further commission of the offence. In particular, Megaw J. emphasized that:

It must be proved that the accused intended to give encouragement; that he *wilfully* encouraged. . . . [T]hat essential element should be stressed; for there was here at least the possibility that a drunken man with his self-discipline loosened by drink, being aware that a woman was being raped, might be attracted to the scene and might stay on the scene in the capacity of what is known as a voyeur; and, while his presence and the presence of others might in fact encourage the rapers or discourage the victim, he himself, enjoying the scene or at least standing by and assenting, might not intend that his presence should offer encouragement to rapers or would-be rapers or discouragement to the victim; he might not realise that he was giving encouragement; so that, while encouragement there might be, it would not be a case which . . . the accused person ‘wilfully encouraged’.<sup>15</sup>

Thus, by focusing on the strict common law principle that a party to an offence must ‘wilfully encourage’ the primary offender, the judgement elucidates the reasons why the law surrounding aiding and abetting fails

<sup>14</sup> (1971) 3 All E.R. 344 [hereinafter *Clarkson*].

<sup>15</sup> *Ibid.*, at 347.

to address adequately situations of multiple-party sexual assault.<sup>16</sup> That is, regardless of the accused's intentions, the fact remains that there is strength in numbers in multiple-party sexual assault scenarios and that the accused may have encouraged the rapists through their mere presence. However, by focusing on whether or not the accused wilfully encouraged the commission of the offence, Megaw J. is able to find the accused person not guilty.

Even if we disregard the problems associated with the definition of aiding in relation to sexual assault, the judgment is still troubling. Like the onlookers in *Dunlop*, the voyeurs in this case cannot be held criminally liable for any offence relating to the assault; while they enjoy sexual gratification from watching the dehumanization of the victim, they are not punished in any way. It is ironic that, while the depiction of dehumanizing sexual intercourse on videotape is illegal in Canada,<sup>17</sup> *Clarkson* and cases similar to it are followed in our jurisprudence.<sup>18</sup> Like the Supreme Court of Canada, English judges also refuse to recognize a positive duty to rescue in multiple-party sexual assault cases involving not-so-innocent bystanders.

## II. THE DUTY TO RESCUE IN ANGLO-CANADIAN LAW: RELUCTANCE TO IMPOSE A POSITIVE DUTY

As illustrated in *Dunlop* and *Clarkson*, the Anglo-Canadian common law has been traditionally reluctant to recognize or impose a duty to rescue. This reluctance is based on a variety of concerns that range from philosophical to practical in nature. This section outlines the major arguments made by those who oppose implementation of a duty to rescue. These arguments suggest that imposition of such a duty is contrary to the common law distinction between misfeasance and nonfeasance, stands in opposition to the liberal concept of individualism, misunderstands the concept of negative liberties and

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<sup>16</sup> There is a similar requirement in Canadian law; the accused must have intended the consequences that flowed from his aid. See *R. v. Greyeyes* (1997) 8 C.R. (5th) 308 (SCC) [hereinafter *Greyeyes*].

<sup>17</sup> *R. v. Butler* [1992] 1 S.C.R. 452 [hereinafter *Butler*].

<sup>18</sup> *Dunlop*, *supra* note 10 at 485. See also *R. v. Coney* (1882) 8 QBD 534.

rights, obscures the moral value of rescuing and, finally, is wrought with practical difficulties. Along with discussing each of these claims, an attempt has been made to formulate a coherent response to each of these allegations.

*i. The Misfeasance and Nonfeasance Distinction*

The main argument against a duty to rescue hinges on the traditional distinction between misfeasance and nonfeasance. By definition, misfeasance is “active misconduct that causes positive injury to another,” while nonfeasance is “inaction that represents a failure to take positive steps to benefit another.”<sup>19</sup> Liability cannot be imposed for a nonfeasance, such as a failure to rescue, because there is no general legal duty to confer benefits on others.<sup>20</sup> In practice, the Anglo-Canadian common law has maintained the misfeasance/nonfeasance distinction through reluctance to criminalize omissions, regardless of their moral blameworthiness.<sup>21</sup>

There are three arguments to counter those made by traditionalists. While traditionalists claim that there is a stark line between misfeasance and nonfeasance, in reality the boundary is blurred.<sup>22</sup> Consider the example of the onlookers in *Dunlop* and *Clarkson*. While none of the men watching the sexual assaults took active steps toward commission of the offence and, therefore, are not engaged in a misfeasance, it is false to say that they did not aid in the commission of the offence. While their failure to lend assistance to the victim could be characterized as a nonfeasance, this is clearly a reading of the facts that ignores the group dynamics of multiple-party sexual assault. Indeed, the fact that numerous men watched as the assaults occurred can be seen as a misfeasance. According to the adage “there is strength in numbers,” the onlookers caused positive harm to the victim by decreasing the likelihood that she would escape from her aggressors. Also, it is likely that the feelings of shame and victimization experienced by the victim of a multiple-party sexual assault is increased by the presence of voyeurs, it

<sup>19</sup> F. E. Denton, “The Case Against a Duty to Rescue” (1991) 4 Can. J. L. & Jur. 101 at 101.

<sup>20</sup> C. H. Shroeder, “Two Methods for Evaluating Duty to Rescue Proposals” (1986) L. & Contemp. Probs. 181 at 181. While Shroeder describes the legal tradition in the United States, his analysis, in this instance, is equally applicable to Anglo-Canadian law.

<sup>21</sup> *R. v. Instan* [1893] 1 Q.B. 450.

<sup>22</sup> Prentice, *supra* note 1 at 35.

is false to contend that these feelings are not harmful.<sup>23</sup> Moreover, it is possible that the presence of silent on-lookers encourages the aggressors and contributes to their feelings of power.<sup>24</sup> Thus, multiple-party sexual assault is an example of a scenario where the distinction between misfeasance and nonfeasance is blurred.

Anglo-Canadian law has already shown some willingness to depart from the traditional misfeasance/nonfeasance distinction. In particular, the courts have recognized a number of cases where a failure to act will be criminally culpable. For instance, omissions are culpable if there is a recognized relationship, such as parent-child or doctor-patient, between the non-actor and the victim.<sup>25</sup> Imposing a duty to rescue does not necessarily mean that the law will do away with the general rule that a person is not liable for omissions. Rather, such a duty simply establishes a new exception to the rule for cases where someone is faced with the prospect of a grave criminal attack and can be assisted without harm to the rescuer.

Finally, the misfeasance/nonfeasance distinction can still be maintained even with culpability for nonfeasance. That is, if someone is morally blameworthy in omitting to confer a benefit (a nonfeasance), they can still be held criminally liable *to a lesser degree* than the person who commits a misfeasance. This characterization maintains the misfeasance/nonfeasance distinction without allowing morally culpable actors to escape punishment. In practice, the onlookers in *Dunlop* and *Clarkson* would be charged with failure to rescue, with a conviction carrying a more lenient sentence than the primary offence of sexual assault.

## *ii. The Traditional Liberal Concept of Individualism*

Another frequent claim against imposing a duty to rescue arises from the traditional Western concept of individualism. This claim rests on the assumption that each person is capable of caring for themselves

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<sup>23</sup> Bownes, *supra* note 6.

<sup>24</sup> It is widely acknowledged in the literature surrounding sexual assault that the attacks are more about power than they are about sex; the perpetrator uses sex as a means of dominance over the victim. See the early work by L. Clark & D. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Coach House Press, 1977) at 27.

<sup>25</sup> B. A. Seagraves, "The Duty to Rescue in California: A Legislative Solution?" (1984) 15 Pacific L. J. 1261 at 1266 [hereinafter Seagraves], and *R. v. Russel* [1933] V.L.R. 59.

and is entitled to act, without obligation to others, in furtherance of his/her self-interest.<sup>26</sup> Extending this to the law, it is contended that duties to rescue infringe the personal autonomy of both the rescuer and the rescued. The rescuer is forced to pursue a goal that may be opposed to his/her inclination, while the rescued suffers a decrease in his/her ability to handle a situation independently.

Many feminists have criticized this concept of individualism as morally destructive and even mistaken. In fact, Held suggests that the paradigmatic autonomous relationship should not be that between rational, self-interested men but, rather, that shared by a mother and child.<sup>27</sup> If we take this suggestion seriously, autonomy is hinged on our interdependence, not on our ability to deny our responsibilities to others:

The whole tradition that sees respecting others as constituted by non-interference with them is more effectively shown up as inadequate. It assumes that people can fend for themselves and provide through their own initiatives and efforts what they need. This Robinson Crusoe image of 'economic man' is false for almost everyone.<sup>28</sup>

Therefore, if we reformulate our conception of individualism, a duty to rescue may actually promote autonomy. According to Nedelsky, it is our interdependence and personal link to other people that lies at the root of our own autonomy and allows us to increase the autonomy of others.<sup>29</sup>

Thus, a feminist would likely see a duty to rescue as a method of promoting autonomy through mutual responsibility.<sup>30</sup> Consider the situations illustrated by *Dunlop* and *Clarkson*. It is obvious that the victim's lack of autonomy in multiple-party sexual assaults is illustrated by her inability to protect herself. It would be false to say that her autonomy would have been infringed if a bystander had offered assistance, rather, the opposite is true. Similarly, it denies the concept of relational autonomy to suggest that the accused's right to stand by and watch as another person is degraded is fundamental to individualism and, yet, this is precisely what the Anglo-Canadian law says.

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<sup>26</sup> Prentice, *supra* note 1 at 36.

<sup>27</sup> V. Held, "Non-contractual Society: A Feminist View" in *Science, Morality and Feminist Theory* (Calgary: University of Calgary Press, 1987) 111 at 114 [hereinafter Held].

<sup>28</sup> *Ibid.*, at 129

<sup>29</sup> J. Nedelsky, "Reconceiving Autonomy: Sources, Thought and Possibilities" (1989) 1 Yale J. of L. and Feminism 7 at 9 [hereinafter Nedelsky].

<sup>30</sup> L. Bender, "Feminist Theory and Tort" (1988) 38 J. of Legal Education 3 at 34.

### *iii. Positive and Negative Liberties and Rights*

Another libertarian claim made in opposition to a duty to rescue is grounded in the distinction between positive and negative liberties and rights. Essentially, this argument suggests that,

a liberal political order is based on the protection of negative liberty (freedom *from* interference or coercion) rather than positive liberty (freedom *to*, or self-determination), and on the protection of negative rights (rights against interference by others) rather than positive rights (rights to receive something from others . . .).<sup>31</sup>

In short, the contention is that, “the imposition of an affirmative duty to rescue . . . violate[s] the liberal values at the core of our legal order.”<sup>32</sup>

The above critique represents a misunderstanding of traditional liberal theorists. For theorists such as Locke, the concept of liberty included both positive and negative elements: liberty is the freedom to act as one wishes, without interference from others.<sup>33</sup> One of the key aspects of liberty is positive in nature: people have the freedom to act in furtherance of their own self-interest; they have the right of self-determination. The protection of certain positive liberties in the traditional liberal framework makes it less problematic to advocate for a positive right such as a duty to rescue. A duty to rescue can simply be characterized as an extension of the positive elements inherent in the liberal concept of liberty.

Further, even if a duty to rescue would undermine the liberal values that lie at the core of our legal system, the duty should still be established in criminal law. Perhaps the law has traditionally chosen to protect only negative liberties and rights because it is a product of a male-dominated society and, therefore, represents notions of liberty that are essentially male. According to MacKinnon, “[t]he liberal state coercively and authoritatively constitutes the social order in the interests of men as a gender.”<sup>34</sup> By only protecting negative liberties and rights, the law

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<sup>31</sup> S. J. Heyman, “Foundations of the Duty to Rescue” (1994) 47 Vand. L. Rev. 673 at 708 [hereinafter Heyman]. For a more thorough discussion of positive and negative liberties see S. J. Heyman, “Positive and Negative Liberty” (1992) 68 Chic.-Kent L. Rev. 81.

<sup>32</sup> Heyman, *Ibid.*, at 707.

<sup>33</sup> J. Locke, *Two Treatises of Government*, 3d. ed., ed. Peter Laslett (Cambridge: Cambridge UP, 1988) vol.2 at s.4.

<sup>34</sup> C. MacKinnon, *Towards a Feminist Theory of the State* (Cambridge: Harvard UP, 1988) at 162.

suggests that people do not need the state to safeguard positive liberties and rights. While this may be the case for men, it is not the case for women.

For example, a man who is attacked by another man typically has a reasonable chance of defending himself without the aid of others. As the state protects the man's right to be free from interference from another person (a negative right), the man is able to act in self-defence against the aggressor without criminal culpability. Thus, the protection of negative liberty works to the attacked man's benefit. In contrast, a woman who is attacked by a man has almost no chance of escaping simply because he will be stronger and will physically overpower her. Unlike the man, legal protection of the woman's negative right to be free from interference and the corresponding right to act in self-defence does little to protect the woman. Rather, the woman only has a reasonable chance of escaping harm if someone else comes to her aid; something not required by law. In practice, then, the law does not protect female victims to the same extent that it protects male victims.<sup>35</sup> This failure to protect positive liberties and rights, such as a duty to rescue, allows men to perpetrate violent crimes against women more easily. Thus, the liberal political order, in this instance at least, ignores the perspective of female victims of crime.

Given the ideological weight of this argument, it seems that any society claiming to be egalitarian must re-evaluate the male-oriented concepts of liberty that underlie its legal system. 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. Such a concept of liberty would involve understanding and recognizing *in law* the relationships that we all share with one another and the rights that result from these interconnections.<sup>36</sup> This would involve giving weight to positive liberties and rights, and calling upon others to heed their responsibility to their fellow citizens.

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<sup>35</sup> *Ibid.*, at 164. MacKinnon states that:

[p]hilosophically, this posture [of judicial passivity or impartiality] is expressed in the repeated constitutional invocation of the superiority of negative freedom . . . over positive legal affirmations. . . . The state that pursues this value [of negative liberty] promotes freedom when it does not intervene with the social status quo.

<sup>36</sup> Nedelsky, *supra* note 29.

While this may seem to break with liberal theory, it is a departure that is needed in order to make the law more accountable to women.

*iv. Robbing Rescuers of Their Moral Virtue*

A further claim against imposition of a duty to rescue is that criminalization will rob the Good Samaritan of his/her claim to moral praise.<sup>37</sup> The fear is that with criminalization, society will fail to recognize the rescuer's actions as a free moral choice worthy of praise and emulation and, rather, will reduce his/her actions to attempts to avoid criminal culpability.<sup>38</sup>

While this argument may be of some philosophical interest, it is divorced from any real practical value. First, criminalization of a failure to rescue would hardly rob the Good Samaritan of the moral praise that he/she deserves. Just because a person could potentially face criminal culpability for failing to rescue does not imply that a rescuer's actions are any less moral.<sup>39</sup> Criminalization simply suggests that failing to rescue a person who is in the midst of intense victimization is wrong, and it is illogical to conclude from this that the actions of someone who does rescue are, as a result, less right. In fact, imposing a duty to rescue would actually reflect society's acknowledgment of rescuing as moral and good, so much so that people who did not act in this way would be recognized by society as criminally culpable.

Second, even if one concedes that implementing a duty to rescue would decrease the moral virtue of the rescuer's actions, this may not be wholly negative. As mentioned below, one of the benefits of a positive duty to rescue is that it characterizes the actions of rescuers as normal and rational, instead of extraordinary or irrational. When society holds a Good Samaritan up as a super-hero, they are implicitly suggesting that his/her actions are atypical or beyond the scope of normal human interaction. For example, if Dunlop or Sylvester would have intervened in the assault against Brenda Ross, it is likely that society would have deemed them heroes and would have been astonished at their bravery and compassion. Idealization of the Good Samaritan is not necessarily

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<sup>37</sup> A. D. Woosley, "A Duty to Rescue: Some Thoughts on Criminal Liability" (1983) 69 Virginia L. Rev. 1273 at 1292 [hereinafter Woosley] referring to the remarks of Elizabeth Wolgast, American Philosophical Association, Pacific Division, Meeting (March 1981).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

entirely positive. It suggests that “normal” people are not expected to help others. Perhaps imposing a duty to rescue through the *Code* would suggest that rational and normal people are expected to act to the benefit of people experiencing violence. This would have the effect of prompting more rescues and possibly reducing the harm associated with violent crimes.

Finally, the concrete benefits associated with a positive duty to rescue far outweigh philosophical claims regarding the deprivation of praise for the rescuer.<sup>40</sup> In short, who cares if the rescuer is robbed of his or her claim to moral virtue so long as there will be less harm associated with violent crime and the criminal justice system will be more accountable to female victims of violence? Focusing on the rescuer’s claim to moral recognition obscures the essential reason for imposing a positive duty to rescue: potential benefits for the victim.

#### *v. Practical Difficulties*

Finally, while some scholars seem prepared to concede the theoretical benefits associated with a duty to rescue, many see practical difficulty with its implementation.<sup>41</sup> 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? 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?

While these concerns are valid, they do not provide adequate justification for persistence of the no duty to act rule. Indeed, it is always difficult to create workable standards when implementing criminal culpability, but this is not a reason to allow morally reprehensible behaviour to go unpunished. It simply suggests that legislators must be careful when drafting a duty to rescue provision, and that a fact-based, case-by-case analysis of the issues must ensue.<sup>42</sup> Furthermore, it may be

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<sup>40</sup> The benefits associated with a positive duty to rescue are discussed in more detail in the following section. Mentioning some of the benefits associated with a duty to rescue is only meant to highlight the problematic nature of the claim being discussed.

<sup>41</sup> Seagraves, *supra* note 25 at 1256-65, n.205.

<sup>42</sup> A good example of a *Code* provision that has been clarified through a case-by-case analysis is s.21(1) *supra* note 10. For example, the word “purpose” in subsection (b) was

possible to rely on police discretion in determining when the accused's conduct is intended to be covered by the legislation.

Proof that such legislation is practicable may be seen in other jurisdictions. A statutory duty to rescue exists in many American states,<sup>43</sup> as well as European countries such as Italy,<sup>44</sup> Poland,<sup>45</sup> France,<sup>46</sup>

interpreted by the Supreme Court in *R. v. Hibbert*, (1995) 40 C.R. (4th) 141 and *Greeyes*, *supra* note 16. Further, the word "effect" in subsection (b) was interpreted in *R. v. Morgan*, (1993) 80 C.C.C. 9 (3d) 16 at 21.

<sup>43</sup> See *Emergency Medical Care Act*, 12 Vt. Ann. Stat. Tit. s. 519 (1967) [hereinafter Vermont] which states that:

- (a) A person who knows that another is exposed to grave physical harm shall to the extent the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.
- (b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts committed in the ordinary course of his practice.
- (c) A Person who willfully violates subsection (a) of this section shall be fined not more than \$100.00

See also *Good Samaritan Law*, 218 Minn. Stat. s.604.05 (1982) [hereinafter Minnesota] which states that:

Subdivision 1. Duty to assist. Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger to peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. Any person who violates this section is guilty of a petty misdemeanor.

Subd. 2. General immunity from liability. Any person who, without compensation or the expectation of compensation renders emergency care, advice, or assistance at the scene of an emergency or during transit to a location where professional medical care can be rendered, is not liable for any civil damages as a result of acts or omissions by that person in rendering the emergency care, advice, or assistance unless that person acts in a willful and wanton or reckless manner in providing the care, advice, or assistance . . .

See also 268 Mass. Gen. Laws. Ann. s. 40 (1983) [hereinafter Massachusetts] which provides that:

Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this

Denmark, Czechoslovakia, and Turkey.<sup>47</sup> Obviously, these jurisdictions felt that it was possible to create workable standards in regards to a duty to rescue.<sup>48</sup> For example, the French courts have clarified many aspects

section shall be punished by fine of not less than five hundred nor more than two thousand and five hundred dollars.

See also R.I. Gen. Law s.11-37-3.1 [hereinafter Rhode Island] which states that:

Duty to Report: Any person, other than the victim, who know or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his/her presence shall immediately notify the state police or the police department of the city or town in which said assault or attempted assault is taking place of said crime.

<sup>44</sup> *The American Series of Foreign Penal Codes: Italian Penal Code*, trans. E. Wise & A. Maitlan (Littleton: Rothman & Co., 1978) vol. 23 at 199. Article 592 of the Italian Penal Code states:

Failure to Render Assistance. . .

Anyone, finding a human body which is or appears to be lifeless, or a person who is wounded or otherwise in peril, who fails to provide necessary assistance or to give immediate notice to authorities, shall be subject to [imprisonment for up to three months or to a fine of up to 120, 000 lire].

If such behaviour on the part of the offender results in personal injury, the punishment shall be increased; if it results in death, the punishment shall be doubled.

<sup>45</sup> *The American Series of Foreign Penal Codes: The Polish People's Republic Penal Code*, trans. W. Kenney, & T. Sadowsky (South Hackensack: Rothman & Co., 1973) vol. 19 at 80. Article 164 of the Polish Penal Code states:

s.1. Whoever does not render assistance to a person who is in a situation threatening immediate danger of loss of life, a serious bodily injury, or serious impairment of health, when he could render assistance without exposing himself or another person to the danger of loss of life or serious harm to health, shall be subject to a penalty of deprivation of liberty for up to 3 years.

<sup>46</sup> J. Bell, S. Boyron, & S. Whittaker, *Principles of French Law* (Oxford: Oxford UP, 1998) at 219 [hereinafter Bell]. Article 223-6, al.2 of the French Criminal Code states:

Whoever voluntarily abstains from giving assistance to a person in danger is liable to [5 years in prison or a fine of 500, 000 F], if they could have done so without risk to themselves or to a third-party, either by personal actions or by summoning assistance.

<sup>47</sup> Seagraves, *supra* note 25 at 1281.

<sup>48</sup> Unfortunately, while many American jurisdictions have implemented a duty to rescue, there has not been much case law surrounding these statutes (see Seagraves, *supra* note 25 at 1276). The limited use that the American jurisdictions have made of their Good Samaritan laws is slightly problematic in that these laws have the real ability to capture morally repugnant acts such as those outlined in *Dunlop* and *Clarkson*, and should be used to impose criminal sanction in such situations. European jurisdictions have been more willing to charge those who fail to rescue and have, therefore, made more progress in clarifying the cases where a duty to rescue would apply.

of their duty to rescue legislation.<sup>49</sup> The danger that the victim faces must be of imminent death or serious injury in order for the potential rescuer to be culpable.<sup>50</sup> In this regard, the French courts have held that a person who does not rescue in the case of sexual assault is guilty of failing to rescue.<sup>51</sup> Further, while it has been clarified that the offender must be subjectively aware of the danger and know that their intervention is necessary, the intervention itself need not be heroic.<sup>52</sup> Analysis of the French case law suggests that it is possible to develop workable standards for a duty to rescue in order to clarify where such a duty would apply. There is no reason why the Canadian courts could not proceed also with a case-by-case analysis to overcome the practical difficulties of implementing a duty to rescue.

### III. THE CASE FOR A DUTY TO RESCUE

Like those who oppose a duty to rescue, those who advocate for its implementation have a range of arguments in support of their position. The main justification hinges on public policy considerations. A duty to rescue creates an incentive to help others and has the potential to decrease the harm associated with violent crime. Consider the cases of *Dunlop* and *Clarkson*: if any of the people in the vicinity of the assaults had been sympathetic to the victim's situation, a criminal statute imposing a positive duty to rescue may have been the last nudge forcing them to take positive action to help the victim. This would have decreased the psychological and physical harm associated with multiple-party sexual assault. Moreover, a positive duty to rescue would imply that rescues should not be viewed as unusual heroics but, rather, as autonomous, rational, and ordinary behaviour. Once people alter their perception of rescues as acts committed by super-heroes, it is possible that more "ordinary" people will undertake to help others who are being victimized.

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<sup>49</sup> Bell, *supra* note 46.

<sup>50</sup> *Ibid.*

<sup>51</sup> See Bourges, 21 June 1990, *Droit Penal* 1991, 135.

<sup>52</sup> Bell, *supra* note 46.

Further, a duty to rescue is more aligned with the current moral values of Canadian society. As mentioned above, *Butler* suggests that most Canadians would not tolerate other people watching people being degraded and/or dehumanized.<sup>53</sup> While *Butler* arose in the context of pornographic videos, it follows that most Canadians would be even more appalled at the possibility that someone would escape criminal liability for actually watching a multiple-party sexual assault, murder, or assault. Thus, a failure to rescue provision would more adequately represent the morality of Canadian citizens.

Moreover, a positive duty to rescue makes people accountable for their actions (or inaction) and, thereby forces people to take responsibility for their choices. The Good Samaritan's dilemma can be characterized in stark terms: had Dunlop rescued Ross, she may not have been harmed; but since he did not act, she was harmed.<sup>54</sup> Given that Dunlop chose not to help Ross, does it follow that he is partly responsible for the harm that resulted? The answer is yes, Ross's harm was a direct consequence of Dunlop's choice not to rescue. In effect, Dunlop *allowed* Ross to be victimized.<sup>55</sup> While this logic may seem overly simple, it is too clear to ignore. Why should criminal sanctions not follow for Dunlop's behaviour? Indeed, his inaction caused, or at least contributed to, Ross's harm in a real and tangible way.

Finally, a positive duty to rescue would more adequately account for the victims' perspective and would make the criminal justice system more accountable to survivors of violence. As mentioned above, in situations of multiple-party sexual assault it is highly probable that victims are deeply affected by the presence of bystanders and voyeurs.<sup>56</sup> Survivors of sexual violence should be able to use the law as a method of pursuing justice against those who watched as they were degraded. 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.<sup>57</sup> Indeed,

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<sup>53</sup> *Butler*, supra note 17 at 479.

<sup>54</sup> *Woozley*, supra note 37 at 1285. Note that the problem can also be more realistically characterized as follows: if Dunlop had rescued Ross, she would have been harmed less; but since Dunlop did not act, Ross was harmed more.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Bownes*, supra note 6.

<sup>57</sup> P. Hughes, "From a Women's Point of View" (1993) 42 U.N.B.L.J. 341 at 343.

imposing culpability on every person who was involved in the degradation of the victim would signal that the justice system takes seriously the reality of multiple-party sexual assault. It is possible that more women will report incidents of sexual assault if they knew that all of the people who were involved in their victimization would be criminally culpable. The increased reporting that would result from imposition of a positive duty to rescue would have a positive impact on society as a whole since more violent offenders would be brought to justice.

#### IV. FORMULATION OF THE RULE

##### *i. Criminal Culpability or Tort Liability?*

Despite the reluctance of Anglo-Canadian law to recognize duties to rescue, Parliament must implement such a duty in order to protect victims of violence and, in particular, victims of multiple-party sexual assault. While much of the academic literature surrounding duty to rescue centres on tort law, this paper has suggested implementing this duty through the *Criminal Code*.<sup>58</sup> Before proceeding with formulation of the proposed *Code* provision, it is helpful to explain the advantages associated with a criminal charge over civil liability in tort.

First, criminal law has a strong moral element that is lacking in tort law. Tort law is a method of balancing interests in society; the plaintiff's security interest is weighed against the defendant's freedom to act. In this way, there is no moralizing *per se* in tort law; one does not say that the tortfeasor was *wrong* but, rather, that the plaintiff deserves compensation.<sup>59</sup> As a result, potential liability in tort can be characterized as one of the many costs that must be considered when a

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<sup>58</sup> Under the tort rubric, the victim or the victim's family can bring a civil action against any person who did not offer reasonable assistance to the victim. If the victim or the victim's family wins the action, they are awarded damages. In contrast, a criminal charge is brought by the State. The victim is not a party to the action and does not usually receive any monetary compensation.

<sup>59</sup> R.F.V. Heuston & R. A. Buckley, eds., *Salmond and Heuston on the Law of Torts*, 21st ed. (London: Sweet and Maxwell, 1996) at 23. "The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done, not to inflict punishment for duty disregarded."

person decides to act in a certain way. In contrast, criminal law has a strong moral element. When you commit a crime, society condemns your actions as *wrong*. Watching women who are being repeatedly assaulted is a crime, not a tort. It is illogical to talk about balancing the legitimate interest of watching a woman being sexually degraded against the woman's interest in being rescued. In short, criminal law, as opposed to tort, is able to send a message to the voyeur that his actions will not be tolerated by society.

Second, criminal law has the advantage of being a public forum, while tort law is inherently private. The dispute between civil litigants is characterized as an individualized conflict, the plaintiff versus the defendant. In contrast, criminal charges are public; the Crown represents the interests of society. It is dangerous to portray voyeurism in multiple-party sexual assault (or other violent crimes) as an individualized conflict between the victim and the bystander. When a man watches a sexual assault and fails to offer assistance, he is doing more than just harming the victim. He is perpetuating the myth that women are objects for men to watch and derive pleasure from. Such behaviour is morally destructive to all members of society. More generally, women have battled long and hard to have issues of gender-specific violence addressed in the public sphere. If women are ever to attain equality within the Canadian society, issues involving gender-specific violence must continue to be addressed in a forum that is capable of sending a public message to potential offenders.

Third, as mentioned above, it is widely recognized that the Canadian criminal justice system is not accountable to female victims of sexual assault. A duty to rescue provision in the *Code* has the potential to make the system more aligned with women's interests. In turn, it may increase the percentage of women who report sexual assaults. In contrast, civil remedies are unlikely to result in increased reporting of sexual assaults to police; this is because women can bring tort actions for failure to rescue even if no criminal charges are laid.

The most persuasive argument in favour of a duty to rescue in tort is that there is potential for the plaintiff to receive monetary compensation from the tortfeasor. In contrast, there would be little or no compensation for the victim under a failure to rescue provision. While this is a compelling argument in favour of tort liability, it does not make up for the serious problems noted above, especially when we consider

that victims of crime can apply for compensation through legislation such as Ontario's *Compensation for Victims of Crime Act*.<sup>60</sup> Therefore, while it is tempting to argue for a tort of failure to rescue because of the possibility of monetary compensation, to do so would be to ignore the many disadvantages associated with tort liability. These disadvantages include the doctrinal framework of balancing of interests, the inherently private nature of tort disputes, and the fact that tort remedies do not necessarily increase the rate of reporting for sexual assault. Instead, a criminal provision should be enacted and victims be directed to seek compensation from existing victim's compensation statutes.<sup>61</sup>

### *ii. Guidance from other Jurisdictions*

As mentioned previously, there are many common law jurisdictions that have imposed a duty to rescue through their penal code. Analysis of a number of duty to rescue provisions in American jurisdictions indicates that formulation of such a rule must take into account a number of factors. First, the rule must be defined narrowly so as to only capture behaviour that is morally repugnant and worthy of criminalization, therefore, any proposed legislation should only impose liability for failing to rescue at the scene of a violent crime.<sup>62</sup> A person should not be penalized for failing to rescue in situations involving minor physical harm such as a small scuffle or the like. Of course, as with any criminal statute, one must rely on police discretion in charging. The police should bear in mind what sort of activity the statute is aiming to capture and lay charges accordingly.

Second, while the rule cannot be overbroad, it must still be effective enough to cover the acts contemplated in such cases as *Dunlop* and *Clarkson*. For this reason, the statute should require rescue where a reasonable person in the circumstances would know that a violent crime

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<sup>60</sup> R.S.O. 1990, c. C.24. This legislation allows for compensation up to \$25,000 for victims of violent crime who have been injured or killed. A claim must be filed within one year after the date of injury or death, and will be assessed before the Criminal Injuries Compensation Board. Similar legislation also exists in other provinces.

<sup>61</sup> It has been widely acknowledged that victim's compensation statutes do not provide adequate monetary compensation to victims of crime. While this is a valid criticism, it suggests that the government should allocate more financial resources into compensating victims, not necessarily that victims should turn to civil remedies.

<sup>62</sup> See Vermont, *supra* note 43; and Minnesota, *supra* note 43.

is taking place. It should not be possible for a person to be acquitted simply because he/she does not have the perceptions of a reasonable person. For example, it should not be open for accused persons such as those encountered in *Dunlop* or *Clarkson* to claim that they sincerely did not think that a multiple-party sexual assault was occurring and, rather, that they honestly believed that the victim was consenting to the repeated acts of intercourse.<sup>63</sup> Instead, the offender should be judged according to perceptions of a reasonable person in the circumstances.<sup>64</sup> Only an objective standard has the ability to punish those who fail to rescue in situations of multiple-party sexual assault. It does not allow offenders to hide behind, for example, outdated and patriarchal thinking regarding women, heterosexuality, and consent. Moreover, an objective fault element is more aligned with the victim's interests. Indeed, it is unlikely that it would make any difference to the women in *Dunlop* or *Clarkson* whether the men watching them honestly believed that they were engaged in consensual intercourse due to some outdated notion of women's sexuality, or because they actually knew that the women were being assaulted. The fact remains, these men watched while these women were being objectified and humiliated; their presence at the crime and their failure to act decreased the likelihood of escaping and increased the likelihood of harm.<sup>65</sup> Only an objective fault element allows the law to capture morally repugnant acts effectively while maintaining the integrity of the victim.

Third, the duty to rescue must take into account the volatile nature of violent situations and the risks facing potential rescuers.<sup>66</sup> A rescuer should only be under a legal duty to rescue if he/she could do so without harming him/herself in the process. Such a limitation makes sense for a number of reasons. Foremost, as a general rule, a statute should not

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<sup>63</sup> Problems associated with unreasonable but honest beliefs in consent have been encountered in such cases as *R. v. Pappajohn* [1980], 2 S.C.R. 120 and *Sansregret v. The Queen* [1985], 1 S.C.R. 570. For a feminist analysis of the *Pappajohn* rule see T. Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980) 30 U.T.L.J. 415.

<sup>64</sup> Traditionally, the reasonable person was equated to the man of ordinary prudence. The use of the word "man" is purposeful and suggests the gendered history of the term. Of course, when the term reasonable person is used in this paper it is meant to refer to a genderless person with ordinary sensibilities.

<sup>65</sup> Bownes, *supra* note 6.

<sup>66</sup> See Vermont, *supra* note 43; Minnesota, *supra* note 43; and Massachusetts, *supra* note 43.

compel a person to undergo physical harm, in fact, to do so likely would be a violation of s.7 of the *Charter of Rights and Freedoms*.<sup>67</sup> Furthermore, a rescue attempt is relatively useless if the rescuer is injured in the process of attempting to give aid, and this may even make matters worse. Therefore, the duty to rescue should be limited to situations where a rescue attempt will not harm the rescuer.

Fourth, the proposed statute should also acknowledge that attempts to rescue need not involve direct interference in the violent act.<sup>68</sup> It would be unreasonable to require a potential rescuer to use physical force to intervene in a multiple-party sexual assault. In fact, in the case of group violence, the rescuer could make the situation worse if he/she did intervene by inadvertently encouraging the aggressors or by becoming another potential victim. Instead, the statute should only call for reasonable assistance given the circumstances. Often times, this would simply mean calling 9-1-1, asking for help from passers-by, or administering first aid if possible. Thus, it would be relatively easy for a conscientious citizen to escape liability for failure to rescue; in fact, the actions required by the provision would often be what a reasonable person would do even if the legislation did not exist.

Fifth, given the growing amount of civil malpractice litigation, the legislation should follow many American jurisdictions and absolve the rescuer of all civil liability.<sup>69</sup> It only seems fair that a person who responds to the needs of another person who is in the midst of a criminal attack should not be faced with a potential lawsuit as a result of his/her actions. Moreover, the incentive to rescue would be diminished if a rescuer faced possible civil liability; many people may choose not to rescue and face criminal charges rather than exposing themselves to civil liability. Such a result counters one of the main purposes of a duty to rescue provision, which is to encourage socially useful behaviour that decreases the harm associated with violent crime.

Unfortunately, due to the nature of Canada's federalist state, it is not within federal jurisdiction to enact a provision that shields a person against civil liability. While criminal law does fall within federal

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<sup>67</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s.7 [hereinafter the *Charter*].

<sup>68</sup> See Minnesota, *supra* note 43; Massachusetts, *supra* note 43; and Rhode Island, *supra* note 43.

<sup>69</sup> See Vermont, *supra* note 43.

jurisdiction under s.91(27) of the *Constitution Act, 1867*, it is unlikely that a subsection which limited civil liability against a rescuer would be constitutional. While the Crown may try to argue that limiting civil liability is necessarily incidental to the federal scheme it is unlikely that this argument would be successful.<sup>70</sup> In short, limiting civil liability interferes too directly with existing common law and statutory provisions which fall exclusively within provincial jurisdiction to be considered necessarily incidental. Instead, it would be open to the provincial and federal governments to cooperate to absolve the rescuer of civil liability by allowing each province to volunteer to implement a policy package that falls within their jurisdiction. We can also hope that the judiciary would be sensitive to the defendant's case if a lawsuit was brought against him/her for negligence while rescuing the plaintiff. It seems that policy consideration would weigh against imposing liability in such a case.

Sixth, the proposed statute should attempt to respect the victim's rights as much as possible, especially in the instances of sexual assault.<sup>71</sup> There has been an attempt throughout this paper to recognize that women who are sexually assaulted often see the criminal justice system as a second form of victimization. While the proposal to implement a duty to rescue is intended to mark a positive change in the law towards incorporation of the victim's perspective, in some cases it may actually alienate the victim further. For example, a woman may be weary of being questioned on the witness stand and may want to focus on recovery. As a result, she may not wish to testify in connection with charges against those who failed to rescue. There is also the possibility that the person who watched her victimization may be a family member or ex-partner and she may not want to have him/her charged. In light of this paper's emphasis on the need for the criminal justice system to become more accountable to the victim, a woman's requests for certain people not to be charged under the proposed statute should be respected. While this sort of stipulation is unprecedented within our *Code*, it is

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<sup>70</sup> The necessary incidental doctrine was argued in *General Motors of Canada Ltd. v. City National Leasing* [1989] 1 SCR 641.

<sup>71</sup> See Rhode Island, *supra* note 43 at s.11-37-3.2 which provides that:  
No person shall be charged under s.11-37-3.1 unless and until the police department investigating the incident obtains from the victim a signed complaint against the person alleging a violation of s.11-37-3.1.

needed to accomplish one of the major goals of the statute, namely, to make the *Code* more accountable to women.

Finally, bearing in mind that the offence of failing to rescue would be less blameworthy than the underlying offence being committed, the punishment should be relatively lenient. For example, while a sexual assault conviction has a maximum sentence of ten years, the failure to rescue provision should have a considerably less severe sentence. The message sent to the offender should be that, while his/her actions are not as blameworthy as actually committing a sexual assault, he/she is still morally accountable. Moreover, the punishment should also be variable according to the moral blameworthiness of the accused. The situations of on-lookers in *Dunlop* and *Clarkson* are definitely more shocking than that of a stranger who witnesses a fistfight and decides not to inform the local authorities. The proposed failure to rescue provision should be able to accommodate these varying degrees of moral fault by being formulated as a hybrid offence. The police should have the discretion to charge the accused with an indictable offence or summary conviction. An indictable offence would reflect the repugnant acts of voyeurs in situations of multiple-party sexual assault, while a summary conviction may be appropriate in less morally repugnant situation.

### *iii. The Provision*

In light of all of the considerations outlined above, it is submitted that Parliament should enact a provision in the *Criminal Code* as follows:

- (1) **Failure to Rescue** – Every person commits an offence who is present at the scene of a violent crime where a reasonable person in the circumstances would know that another person is exposed to, or has suffered, grave physical harm, and fails to give reasonable assistance to that person.
- (2) **Meaning of “reasonable assistance”** – For the purposes of this section, reasonable assistance is that which can be given without danger or peril to the rescuer or others, and includes obtaining or attempting to obtain aid from law enforcement or medical personnel.

- (3) **Application** – Where the accused fails to give reasonable assistance to a person who was sexually assaulted, the complainant will be asked to consent to the charge against the accused before it will be laid.
- (4) **Punishment** – Every person who commits an offence under subsection (1) is guilty of:
  - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years;
  - (b) an offence punishable on summary conviction.

*iv. The Implications of the Proposed Statute*

After formulating a rule for the duty to rescue, it is interesting to apply the rule in the situations represented by *Dunlop* and *Clarkson*. Of course, to proceed with the analysis it must be assumed that both of the victims of the sexual assaults in these cases would consent to charges being laid against those who watched as they were assaulted. First, it would be up to the Crown to establish the *actus reus* for the offence. That is, the Crown must establish that the accused were present at the scene of a crime where someone was exposed to, or had suffered, grave physical harm, and failed to offer reasonable assistance. In *Dunlop*, it is obvious that the men who were standing near the creek while the victim was being held down and sexually assaulted can be said to have completed the *actus reus*. What about *Dunlop* and *Sylvester*? It could be forcefully argued that the fact that the sexual assaults were taking place within their view and that they did nothing to aid the victim establishes the *actus reus* of the offence. In *Clarkson*, the voyeurs who watched as the German woman was sexually assaulted are definitely within the scope of liability envisioned in this offence through their physical proximity to the events.

Having established the *actus reus*, we now turn to *mens rea*. The relevant question here is whether or not it can be established beyond a reasonable doubt that a reasonable person in the circumstances would have known that the woman being sexually assaulted was at risk of, or had suffered, grave physical harm. In the case of *Dunlop*, the surrounding factors in the case suggest that the *mens rea* is met. For example, the accused knew that the members of the Spartans had just

met Ross earlier in the evening. They also knew that alcohol was being consumed; in fact, they were responsible for delivering alcohol to the site of the sexual assault. Further, Ross was being held down as others were having intercourse with her. It can be inferred that a reasonable person in these circumstances would know that a multiple-party sexual assault was taking place, and that sexual assault has the potential to cause grave physical harm.

In *Clarkson*, the trial judge found that the onlookers were aware that the acts of intercourse they were witnessing were non-consensual and were, in fact, voyeurs.<sup>72</sup> A reasonable person in these circumstances would know that sexual assault has the potential to cause extreme physical harm to the victim, especially when more than one man is assaulting the woman. Therefore, the Crown could easily establish the *mens rea* requirement in *Clarkson*.

These two examples suggest that the proposed provision imposing a positive duty to rescue would likely make the morally reprehensible actions of those accused in *Dunlop* and *Clarkson* criminally culpable. This would mark a positive step forward for victims of multiple-party sexual assault. As illustrated, the new provision more adequately addresses the reality of the situations faced by victims and the blameworthy nature of the actions of bystanders in such situations. It does so by imposing criminal sanctions for such behaviour and, thereby, sending a message that such inaction will not be tolerated.

## V. POSSIBLE *CHARTER* CHALLENGES

### *i. Section 7: Life, Liberty and Security of the Person*

An accused in a situation similar to *Dunlop* and *Sylvester* today would likely argue that a failure to rescue provision is unconstitutional under s.7.<sup>73</sup> Section seven states that: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The accused may take the position that a positive duty to rescue violates s.7 by imposing an objective standard of fault coupled with possible

<sup>72</sup> *Clarkson*, *supra* note 14 at 347.

<sup>73</sup> *Charter*, *supra* note 67 at s.7.

imprisonment. The standard of fault is objective since the accused is required to rescue in cases where a “reasonable person in the circumstances would know that another person is exposed to, or has suffered, grave physical harm.” In *R. v. Vaillancourt*,<sup>74</sup> *R. v. Martineau*,<sup>75</sup> *R. v. DeSousa*,<sup>76</sup> and *R. v. Creighton*,<sup>77</sup> the Supreme Court of Canada confirmed its position that the mental element of a crime must correspond to its moral blameworthiness. In particular, the stigma and punishment associated with the offence must be considered when assessing the constitutionally required fault element.

In *Creighton*, the Court held that stigma is determined by the answer of two questions. First, is the conduct of “sufficient gravity to import moral opprobrium on the individual found guilty of engaging in such conduct”?<sup>78</sup> Second, what is the “moral blameworthiness not of the offence, but of the offender found guilty of committing it”?<sup>79</sup> In response to the first question, failing to rescue is not conduct that would likely be considered worthy of moral opprobrium since a failure to rescue involves peripheral harm to the victim (psychological harm through voyeurism) rather than direct harm (physical harm through sexual assault). In relation to the second question regarding the moral blameworthiness of the offender, most Canadians still regard rescuing behaviour as atypical and beyond the scope of normal human interaction. Therefore, it is likely that the typical Canadian would view the actions of the accused in *Dunlop* with a degree of sympathy; he/she might be repulsed by the actions of the accused but would pity the accuseds’ lack of heroism. The answers to the two questions regarding stigma suggest that, while there would be a slight stigma attached to a person convicted of failure to rescue, such a stigma would not approach the opprobrium suffered by those who knowingly and intentionally engage in the principle offence.

Finally, in determining the constitutionally required fault element, the court must consider the punishment associated with the provision in question. In this case, the punishment associated with a failure to rescue

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<sup>74</sup> [1987] 2 S.C.R. 636.

<sup>75</sup> [1990] 58 S.C.R. 633.

<sup>76</sup> [1992] 2 S.C.R. 944.

<sup>77</sup> [1993] 3 S.C.R. 3 [hereinafter *Creighton*].

<sup>78</sup> *Ibid.*, at 19.

<sup>79</sup> *Ibid.*

is hybrid and, therefore, variable depending on the moral blameworthiness of the particular circumstances. It is possible that in situations such as *Dunlop* and *Clarkson*, the accused would be charged with the indictable offence under the failure to rescue provision. However, in less extreme scenarios, an accused might only be charged with the summary offence. Therefore, subjective *mens rea* is not constitutionally required on this ground and, therefore, it is unlikely that the accused would be successful in arguing that objective fault was unconstitutional for failure to rescue.

Defence counsel may also argue that, since the failure to rescue provision requires the accused to undertake a positive act, it interferes with his/her liberty interest. The liberty interest protects a narrow sphere of personal autonomy in which individuals may make fundamentally and inherently private choices without state interference.<sup>80</sup> However, as argued in Section II, the right to standby as another person is victimized does not go to the very nature of freedom; this would be tantamount to saying that the onlookers in *Dunlop* and *Clarkson* had an inherent right to watch idly as a woman was sexually assaulted. Moreover, if we embrace feminist conceptions of autonomy, then taking responsibility for people who are in situations of victimization would not decrease one's autonomy, but enhance it.<sup>81</sup>

Section 7 of the *Charter* clearly states that the accused's right to liberty can be limited if required by the principles of fundamental justice. The accused would likely argue that the limitation of his liberty is not in accordance with the principles of fundamental justice because the failure to rescue provision is overbroad. In *R. v. Heywood* the Supreme Court suggested that, "the effect of overbreadth is that in some applications the law is arbitrary or disproportionate."<sup>82</sup> The defence would contend that, given that the main purpose of the provision is to reduce the harm associated with violent crime, the failure to rescue provision is overbroad since there are cases where those who do not have the ability to reduce the harm to the victim would remain criminally culpable.

It is difficult to see how this claim can be accepted. It is hard to contemplate a violent crime scene where a victim would not benefit to

<sup>80</sup> *Godbout v. Longueuil (City)* (1997), 219 N.R. 1 (S.C.C.).

<sup>81</sup> Nedelsky, *supra* note 29 at 11.

<sup>82</sup> [1994] 3 S.C.R. 761 at 793 [hereinafter *Heywood*].

*some degree* from being rescued, even if only to reduce the psychological trauma of the situation. Further, the failure to rescue provision only applies to a narrow set of circumstances that many of us will never even encounter; the duty is limited to violent crimes where a reasonable person would be aware of the threat of grave physical harm and faces no danger themselves. In *R. v. Heywood* the Supreme Court suggested that,

In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature . . . [it] must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if her or she has been the legislator.<sup>83</sup>

This legislation would reflect a policy decision and is constructed in fairly narrow terms and, thus, it is unlikely to be deemed overbroad.

Indeed, the Crown could make a much stronger argument to suggest that the limitation of the accused's s.7 right is actually in accordance with the principles of fundamental justice. In *R. v. Seaboyer*,<sup>84</sup> it was held that the principles of fundamental justice include broader societal concerns and that the legislation in question must conform to the fundamental precepts which underlie our system of justice. As outlined in Section III, the failure to rescue provision addresses two concerns that may qualify as principles of fundamental justice. First, the proposed legislation would decrease the harm associated with violent crimes in our society; and second, the failure to rescue provision will make the criminal justice system more accountable to victims of violence. It is hard to argue that deterrence of criminal behaviour and accountability of the legal system to victims are not fundamental to our system of justice. Therefore, it is unlikely that the failure to rescue provision would be deemed unconstitutional.

## *ii. Section 1: The Oakes Test*

Even though the above analysis makes it seem likely that the failure to rescue provision could pass *Charter* scrutiny, for the purposes of completeness it is helpful to consider what would happen if the

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<sup>83</sup> *Ibid.*

<sup>84</sup> (1991) 66 C.C.C. (3d) 321 (S.C.C.) at 385, McLachlin J.

provision was found to offend a substantive *Charter* right. In particular, it would remain to be seen whether it would survive under s.1 of the *Charter*, namely, the *Oakes* Test.<sup>85</sup> Section one states that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The *Oakes* test is the method for justifying limitations of *Charter* rights.<sup>86</sup>

Given that the failure to rescue provision would be legislated in the *Code*, one would have to consider whether the objective behind the provision was both pressing and substantial. That is, the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."<sup>87</sup> It seems that the objectives of decreasing the harm associated with violent crime and making the criminal justice system more accountable to victims are both pressing and substantial. These objectives go towards the protection of weaker parties in society, including women who are sexually degraded and dehumanized. Indeed, the court has already acknowledged this underlying goal as pressing and substantial in *Butler*.<sup>88</sup> In that case, Sopinka J. stated that:

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<sup>85</sup> *R. v. Oakes* [1986] 1 S.C.R. 103. The author has chosen to scrutinize the proposed failure to rescue provision through use of the strict *Oakes* test, however, it is possible that the Court would use a less-strict formulation of the *Oakes* analysis as outlined in *Edward Books and Art v. The Queen* [1986] 2 S.C.R. 713 [hereinafter *Edward Books*]. In *Edward Books*, Dickson C.J.C. suggested that the *Oakes* Test could be modified when the limitation of rights was due to respect for the inherent dignity of the individual, a commitment to justice and equality, and so on. In such cases, the "pressing and substantial objective" need only be an important objective, the "rational connection" need only be a reasonable connection and, finally, "minimal impairment" need only be satisfactory legislative effort. It seems that the justification of the failure to rescue provision may call for use of the modified *Oakes* analysis as envisioned in *Edward Books*. It is legislation aimed at criminalizing conduct that is dehumanizing to victims of violent crime and, thus, furthers respect for human dignity and a commitment to justice. In such a case, it would be significantly easier for the Crown to have the legislation upheld under s.1.

<sup>86</sup> It should be noted that the Supreme Court of Canada has never justified the limitation of a s.7 right through s.1 of the *Charter*. While this does not mean that the Court cannot do so in the future, it does suggest that the Court has traditionally been very reluctant to place limitations on s.7 rights. The only Supreme Court Justice to suggest that a s.7 violation could be upheld under s.1 was Justice McLachlin in her dissent in *R. v. Hess; R. v. Nguyen*, [1990] 2 SCR 906 at 946-56.

<sup>87</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 352.

<sup>88</sup> *Butler*, *supra* note 17 at 496-97.

there is a growing concern that the exploitation of women and children, depicted in publications and films can, in certain circumstances, lead to 'abject and servile victimization' . . . [and that] [m]aterials portraying women as a class of objects for sexual exploitation and abuse have a negative impact on 'the individual's sense of self-worth and acceptance.'<sup>89</sup>

In short, the majority of the Supreme Court believed that protecting women from the harm of sexual objectification was both pressing and substantial.

Second, the first element of the three-pronged proportionality criterion must be considered. Namely, the failure to rescue provision must be rationally connected to its objective: there must be a rational connection between the objective of the law and the means used to achieve it. As stated above, the objective of the failure to rescue provision is twofold: 1) to decrease the harm associated with violent crime and, 2) to make the criminal justice system more accountable to victims of violence. The failure to rescue provision furthers these objectives by, first, creating a responsibility in the *Code* for bystanders to help people who are exposed to violent crime, and thereby decreasing the likelihood of harm to the victim. And, second, by criminalizing the conduct of those who fail to offer reasonable assistance, the provision marks systemic recognition that victims of violence are harmed by the inaction of bystanders. This makes the system more accountable to victims.

Of course, critics may argue that this reasoning is too simplistic, that it suggests an easy cause-effect relationship where there may not be one. For example, it may be argued that the provision does not actually compel those who witness a violent crime to offer assistance but, rather, creates an incentive to flee in order to avoid criminal culpability. Furthermore, defence counsel may argue that it is impossible to assess how dangerous a rescue attempt may be at first glance. That is, while the rescuer may think that he/she can call the authorities with little or no risk to him/herself, he/she may be put at risk simply because he/she attempts to rescue. The attacker may attempt to inflict injury on the rescuer simply because he/she is calling the police and may be a cooperative witness in a future trial. Thus, the defence may argue that

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<sup>89</sup> *Ibid.* at 497, quoting from the decision in *R. v. Red Hot Video* (1985), 18 C.C.C. (3d) 1 at 8 (B.C.C.A.).

the failure to rescue provision may actually increase the harm associated with violent crimes by involving a second potential victim, the rescuer. While these arguments may sound compelling, it is difficult to assess their merit without social science/expert evidence in the arena of psychological responses to issues such fear, violence, threats of culpability, and threats of apprehension. As a result, whether or not the provision is rationally connected to its objective depends on the concrete evidence that each side presents. In any case, it would appear that there is a strong case to be made in the Crown's favour.<sup>90</sup>

Assuming that the provision is rationally connected to its objective, the third step of the proportionality test would require that the provision be minimally impairing. Minimal impairment suggests that the law cannot impair the *Charter* right any more than necessary to achieve its objective. It is likely that defence counsel would again try to argue that provision in question is overbroad and, therefore, not minimally impairing. This argument would have little success under the minimal impairment rubric for the same reasons that the overbreadth argument failed under the s.7 analysis; namely, the provision only captures conduct that goes towards its objective of decreasing the harm associated with violent crimes. Moreover, the ease by which an accused could dispel culpability for failing to rescue, for example by calling emergency services on a cell phone, illustrates the minute degree to which this provision impairs his *Charter* right.

The strongest argument in the defence's favour would be for counsel to suggest means of achieving the legislative objective that would be less impairing to the accused's *Charter* rights. In this case, it may be argued that one could encourage rescuing behaviour through avenues other than the *Code*. For example, society could encourage rescuing behaviour through the creation of incentives other than possible criminal culpability. This may include offering monetary rewards to those who rescue, conducting education programs on helping victims without endangering oneself, raising awareness of the

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<sup>90</sup> As suggested in note 85, *supra*, the Court may apply a more relaxed *Oakes* analysis. In that case, the rational connection criteria would be satisfied if the Crown established that there was a reasonable connection between the provision and its objective. It seems clear that there is a tenable connection between the failure to rescue provision and its two-fold objective of decreasing the harm to associated with violent crime and making the system more accountable to victims of violence.

psychological impact of voyeurism on victims, *et cetera*. These arguments are particularly strong since they are means of achieving the pressing and substantial objective without impairing *Charter* rights at all.

Unfortunately, these alternative programs are not likely to be as effective in encouraging rescuing behaviour as criminal culpability. There are already many reward and recognition programs in place for Good Samaritans, yet, the fact that we still encounter the situations represented by *Dunlop* and *Clarkson* suggests that these programs are ineffective. Perhaps this is because reward programs continue to characterize the rescuer's behaviour as atypical or superhuman. In short, the "ordinary" person does not aspire to win awards or recognition for being a Good Samaritan; in fact, by depicting the rescuer as a hero such programs allow regular people to continue to deny their responsibilities to others. Further, reward programs continue to be oriented towards the glorification of the rescuer, rather than focusing on the victim's needs. This fails to make the system more accountable to victims of violence. Finally, in most cases, it is not the reward that motivates the rescuer, it is his/her connection to the victim or some other factor. Thus, reward programs do not provide adequate incentives to be effective in promoting rescuing behaviour.

At present, there are already numerous educational campaigns regarding, for example, violence against women. It seems, however, that these campaigns have not been totally effective in reducing the incidence of gender-specific violence. In fact, as mentioned above, nearly one in four women experiences a sexual assault in her lifetime, despite the existence of numerous government-funded and private education programs.<sup>91</sup> It has not yet been shown that the harm associated with violent crime will be significantly decreased, or that the system will be made more accountable to victims of violence, through more education programs. Rather, many victims may see these programs as government attempts at shirking their responsibility to victims of violence. Only a criminal provision imposing a duty to rescue has the potential to truly reduce the harm associated with violent crimes, as well as making the justice system aligned with victim's interests.

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<sup>91</sup> Statistics Canada, *supra* note 2.

Finally, the Crown would have to show that the harmful effects of the legislation do not outweigh the benefits associated with the provision. The deleterious effect of the provision is that it compels people to act and, thus, may infringe their right to liberty. As noted above, the bystander's right to watch as other people are dehumanized and physically harmed does not go to the heart of the traditional concept of liberty. The minute infringement of one's liberty interest does not outweigh the tremendous positive aspects associated with a duty to rescue: namely, the decrease in harm associated with violent crime, as well as the increased accountability of the justice system to the victim. Therefore, it is likely that, even if the provision was deemed unconstitutional under s.7, there is a good chance that it would be upheld under s.1.

## VII. CONCLUSION

There were nearly 42,000 reported, and approximately 450,000 unreported, incidents of sexual assault in Canada in 1993.<sup>92</sup> These numbers suggests that Parliament must continue its attempts to make the *Criminal Code* more accountable to victims of gender-specific violence. In particular, there must be recognition that wider reforms are needed if victims of multiple-party sexual assaults, for example, are to be protected under the law. Our current sexual assault provisions, even when coupled with s.21, fail to account for the group dynamics of situations such as those encountered in *Dunlop* and *Clarkson*. Despite the criticisms of a duty to rescue, it is apparent that such a duty must be incorporated into Canadian criminal law. The proposed failure to rescue provision would mark a step forward in the recognition of the unique nature of multiple-party sexual assault and the culpable nature of those who watch as women are dehumanized. More broadly, the proposed provision would adequately address the morally reprehensible behaviour of those who watch as others are murdered and assaulted. It would also decrease the harm associated with violent crimes, and make the justice system more accountable to victims of violence. Making the

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<sup>92</sup> *Ibid.*

justice system more accountable to female victims may encourage more women to report incidents to the police. Indeed, through the lens of multiple-party sexual assault, it is clear that Parliament must implement a duty to rescue.