

# The Crime of Complicity: The Bystander from the Holocaust to Today

Amos N. Guiora

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## A) Biography

Amos N. Guiora is a professor at the University of Utah's S.J. Quinney College of Law. Professor Guiora is a nationally recognized scholar on national security and terrorism. He teaches criminal procedure, international law, global perspectives on counterterrorism, and religion and terrorism—incorporating innovative, scenario-based instruction to address national and international security issues and dilemmas. Guiora earned his AB in history from Kenyon College, his JD from Case Western Reserve University School of Law, and his PhD from Leiden University.

## B) Course Description

If you are a bystander and witness a crime, should intervention to prevent that crime be a legal obligation? Or is moral responsibility enough? In his book, *The Crime of Complicity: The Bystander in the Holocaust* (Ankerwycke 2017), Professor Guiora addresses these profoundly important questions and the bystander-victim relationship from a deeply personal and legal perspective, focusing on the Holocaust and then exploring cases in contemporary society.

Sharing the experiences of his parents, who were Holocaust survivors, and his grandparents, who did not survive, and drawing on a wide range of historical material and interviews, Guiora examines the bystander during three distinct events: death marches, the German occupation of Holland, and the German occupation of Hungary. He explains that while the Third Reich created policy, its implementation was dependent on bystander non-intervention.

Bringing the issue of intervention into current perspective, he examines sexual assault cases at Vanderbilt and Stanford universities, as well as other crimes when bystanders chose whether or not to intervene, and the resulting consequences.

## C) Course Outline

### *Introduction*

1. What-Who is a Bystander: Observes Another in Clear Distress but is not Direct Cause of the Harm
2. Bystander-Victim-Perpetrator
3. Why Intervene / Why Not Intervene
4. Conscious Decision by Bystander
5. What is Complicity
6. Imposing Legal Duty: Obligation Rather than Moral
7. Legislative Efforts

### *The Bystander and The Victim*

1. Complicity and Social Media
2. Actions Required of the Bystander, One-to-One Relationship (Not Abstract) with the Victim and Capability to Provide Assistance
3. Victim Expectation, Bystander Obligation

### *The Crime of Complicity: Duty Owed*

1. The Crime of Complicity
2. Bystander as Complicit (Legally, Not Morally)
3. When-How-Why Require Intervention, Cost-Benefit
4. Perps Distinguished from Bystanders
5. Intervention v. Non-intervention
6. Importance of Physicality
7. Clarity of Situation
8. Bystander Capability
9. Prosecution: Risks?
10. Consequences of Non-intervention
11. Essence of Legal Obligation
12. Legal v. Moral Obligation

### *Moving Forward: The Bystander as Crime*

1. Stanford University
2. Vanderbilt University
3. David Cash
4. Duty to Aid / Report A Crime
5. Legislation
6. Why Punish?

### *Wrap-Up/Conclusion*

## D) The Bystander and Bystander Laws: Overview of the Issue

Amos N. Guiora

The question of the duty of the bystander is complex and controversial. It highlights dilemmas regarding man's relationship to his fellow man and the extent to which human relationships can be regulated by legislation. In other words, is it realistic to posit that the "duty to provide assistance" can be both legislated and enforced consistently and effectively?

My book *The Crime of Complicity: The Bystander in the Holocaust* has led to local, national and international talks, including an all-day symposium. It was at this symposium that Utah Minority House leader Representative Brian S. King was introduced to the concept of duty to act legislation. Motivated by what he learned, Representative King introduced a "Duty to Assist in an Emergency" bill to the Utah legislature during the current 2018 session.

Over the past several months I worked with Representative King on the bill addressing the legal consequences of a bystander who fails to notify law enforcement/first responders regarding the peril faced by another individual. The bill, which was introduced in January, imposes on a bystander the duty to act; failure to do so would be a misdemeanor. *See the proposed bill enclosed.*

I testified before the Utah House Judiciary Committee, in which the bill passed in a 9-3 vote. *See my testimony enclosed.* Ultimately the bill was defeated on the Utah House floor. This defeat did not diminish the Representative's belief in the need for the law. King is already putting plans in place for reintroducing the bill next year.

During the 2018 legislative sessions, three other states—Arizona, Colorado, and Michigan—introduced similar duty to assist bills that all failed at different stages of the process. In Utah, Representative King believes there were five points that led to the bill's defeat, which were:

1. fear of prosecutorial abuse/over-reach leading to increase in either/both prison population and citizens with criminal records,
2. Libertarian fear of government,
3. fear that this law will lead to civil suits,
4. fear of overwhelming the 9-1-1 system, and
5. sentiment in the Utah legislature that "we, the people of Utah, are good people and don't need this law."

While this year's bills were unsuccessful, duty to assist laws are not legislative fiction. There are currently 10 states with some version of duty to assist laws. Vermont was the first state to pass a broad bystander duty to assist legislation in 1967, and nine other states were quick to follow.

The costs of bystander inaction are readily apparent in today's society (e.g., Nasser, Weinstein, Lauer).

In 1997 seventeen-year-old David Cash watched his friend sexually assault and murder a seven-year-old girl. In 2013 college student Mack Prioleau feigned sleep on the top bunk fully aware that his roommate and two friends were raping and sodomizing an unconscious woman right below

him. In 2017 a group of teens in Florida mocked and videotaped a man as he drowned. These are only a few examples of bystanders who ignored the horrors they were watching and did nothing to help. They never faced charges for their inaction.<sup>1</sup>

The legislature can no longer be a bystander in allowing such heinous inaction to go on without any consequences under the law. “Duty to Act” legislation fills a clear need, both from the perspective of the vulnerable victim and from a larger societal perspective. The two perspectives are interconnected: ensuring assistance be provided to a vulnerable individual reflects a society that embraces the concept of duty to a person in peril and the interconnectedness of citizens that, in part, defines a self-governed state.

The victim—whether at the hands of a perpetrator or as a result of an unfortunate accident—deserves better than laws presently provide. Currently, with the exception of limited jurisdictions, no duty is owed to the victim; the exceptions are very specific and limited. In the majority of jurisdictions, the bystander can walk away and bear no legal burden. By making such inaction criminal, duty to act laws will provide witnesses with the incentive and clarity to act quickly in coming to the aid of the victim, giving the victim a better outcome than being provided with no assistance. Whether the person has moral, legal, or theological reflections is beyond the purview of legislation and the criminal code.

I am involved in this effort, in large part, because of my book, *The Crime of Complicity: The Bystander in the Holocaust* (crimeofcomplicity.com). In researching my parents’ Holocaust experiences and their remarkable survival—my mother was in hiding in Budapest, my father survived two Death Marches—I came to examine the role of the bystander in their travails. The book, however, is not a history book: rather, it concretely examines the bystander in contemporary society, with a particular—and detailed—focus on sexual assaults.

While researching my book and after its release, it has become patently clear to me that, through inaction, the bystander helps facilitate the harmful acts of perpetrators. In some tragic cases, the victim is in peril because of an accident, not preyed upon by a perpetrator. The proposed legislation addresses both situations.

A casual glance at daily headlines highlights, tragically, the role of the bystander and the resulting harm to the victim. The proposed law in Utah comes in the shadow of these crimes—many of them involving egregious sexual misconduct—and reflects recognition of the bystanders’ facilitation in the harm caused and the need to penalize that inaction. Important to note, the decision not to alert law enforcement-first responders is a conscious decision.

Imposing a duty to act obligation on the bystander would minimize victim vulnerability.

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<sup>1</sup> The teens in Florida later faced charges for not reporting a dead body—a state statute usually reserved for medical examiners. They were not charged for anything related to their inaction while the man drowned.  
[https://www.huffingtonpost.com/entry/florida-teens-mock-film-man-drowning-disability\\_us\\_597229f3e4b00e4363df267c](https://www.huffingtonpost.com/entry/florida-teens-mock-film-man-drowning-disability_us_597229f3e4b00e4363df267c)

**Representative Brian S. King** proposes the following substitute bill:

**DUTY TO ASSIST IN AN EMERGENCY**

2018 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Brian S. King**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill relates to the duty to assist in an emergency.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
  - ▶ makes it a class B misdemeanor to fail to provide assistance in the event of a crime or another emergency subject to certain exceptions;
  - ▶ prohibits a prosecutor from basing charges for commission of an offense other than the offense created in this bill on an individual's failure to provide assistance;
  - ▶ amends provisions of the Good Samaritan Act to provide immunity from liability to a person who provides assistance in accordance with the requirements of this bill;
- and
- ▶ makes technical changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**



26 AMENDS:

27 **78B-4-501**, as renumbered and amended by Laws of Utah 2008, Chapter 3

28 ENACTS:

29 **76-9-1101**, Utah Code Annotated 1953

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31 *Be it enacted by the Legislature of the state of Utah:*

32 **Part 11. Failure to Provide Assistance**

33 Section 1. Section **76-9-1101** is enacted to read:

34 **76-9-1101. Failure to provide assistance.**

35 (1) As used in this section:

36 (a) (i) "Assistance" means contacting paramedics, fire protection, law enforcement, or  
37 other appropriate emergency services.

38 (ii) "Assistance" does not include action that places the individual taking the action, or  
39 another individual, in danger.

40 (b) "Emergency" means that an individual is suffering from serious bodily injury and is  
41 in need of assistance.

42 (c) "Serious bodily injury" means injury that involves a substantial risk of death,  
43 unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted  
44 loss or impairment of the function of a bodily member, organ, or mental faculty.

45 (2) An individual is guilty of a class B misdemeanor if the individual:

46 (a) observes that a crime has occurred or is occurring or that an emergency is  
47 occurring;

48 (b) has personal knowledge that another individual has suffered serious bodily injury  
49 resulting from a crime or emergency;

50 (c) is able to provide reasonable assistance to the individual described in Subsection  
51 (2)(b); and

52 (d) fails to provide reasonable assistance to the individual described in Subsection  
53 (2)(b).

54 (3) An individual is not guilty of violating Subsection (2) if another individual has  
55 already provided or is providing reasonable assistance to the individual described in Subsection  
56 (2)(b).

57 (4) Notwithstanding any contrary provision of state law, a prosecutor may not use an  
 58 individual's violation of Subsection (2) as the basis for charging the individual with another  
 59 offense.

60 (5) Subsection (2) does not apply to the extent that an individual is prohibited from  
 61 providing assistance by a statutory or common law privilege.

62 Section 2. Section **78B-4-501** is amended to read:

63 **78B-4-501. Good Samaritan Act.**

64 (1) As used in this section:

65 (a) "Emergency" means an unexpected occurrence involving injury, threat of injury, or  
 66 illness to a person or the public, including motor vehicle accidents, disasters, actual or  
 67 threatened discharges, removal, or disposal of hazardous materials, and other accidents or  
 68 events of a similar nature.

69 (b) "Emergency care" includes actual assistance or advice offered to avoid, mitigate, or  
 70 attempt to mitigate the effects of an emergency.

71 ~~[(+)]~~ (2) A person who renders emergency care at or near the scene of, or during, an  
 72 emergency, gratuitously and in good faith, or as required under Section 76-9-1101, is not liable  
 73 for any civil damages or penalties as a result of any act or omission by the person rendering the  
 74 emergency care, unless the person is grossly negligent or caused the emergency. ~~[As used in~~  
 75 ~~this section, "emergency" means an unexpected occurrence involving injury, threat of injury, or~~  
 76 ~~illness to a person or the public, including motor vehicle accidents, disasters, actual or~~  
 77 ~~threatened discharges, removal, or disposal of hazardous materials, and other accidents or~~  
 78 ~~events of a similar nature. "Emergency care" includes actual assistance or advice offered to~~  
 79 ~~avoid, mitigate, or attempt to mitigate the effects of an emergency.]~~

80 ~~[(2)]~~ (3) A person who gratuitously, and in good faith, assists governmental agencies or  
 81 political subdivisions in the activities described in Subsections ~~[(2)]~~ (3)(a) through (c) is not  
 82 liable for any civil damages or penalties as a result of any act or omission unless the person  
 83 rendering assistance is grossly negligent in:

84 (a) implementing measures to control the causes of epidemic and communicable  
 85 diseases and other conditions significantly affecting the public health, or necessary to protect  
 86 the public health as set out in Title 26A, Chapter 1, Local Health Departments;

87 (b) investigating and controlling suspected bioterrorism and disease as set out in Title

88 26, Chapter 23b, Detection of Public Health Emergencies Act; and

89 (c) responding to a national, state, or local emergency, a public health emergency as  
90 defined in Section [26-23b-102](#), or a declaration by the President of the United States or other  
91 federal official requesting public health-related activities.

92 [~~3~~] (4) The immunity in Subsection [~~2~~] (3) is in addition to any immunity or  
93 protection in state or federal law that may apply.



**F) Professor Amos N. Guiora, SJ Quinney College of Law, University of Utah**

Testimony Before the House Judiciary Committee Regarding Representative  
Brian King's Proposed Bill—HB 125 | Utah House of Representatives | *January 30, 2018*

Mr. Chairman, it is a privilege to appear before this committee to address Representative King's bill, The Duty to Assist in an Emergency.

Over the years, I have testified before the US Congress, the United Nations, and the Dutch Parliament.

Although it was a privilege to testify before them, today is different.

Today I am here both in my capacity as a Professor of Law and as the only child of two Holocaust survivors whose suffering was exacerbated by bystander inaction.

My mother was in hiding in Budapest and my father survived two death marches.

In both cases, bystanders saw my parents' travails and turned their backs, both literally and figuratively.

As the Talmud, the body of Jewish civil and ceremonial law, tells us, "whoever saves a life, it is considered as if he saved an entire world." Representative King's legislation, from the victim's perspective, seeks to save their entire world.

My recent book, *The Crime of Complicity: The Bystander in the Holocaust*, addresses the consequences of the bystander in the Holocaust, as well as the effect of bystander inaction today – particularly regarding sexual assault.

I have come to the conclusion that the law can no longer remain a bystander to victim suffering.

There are far too many examples of bystanders failing to mitigate victim suffering, by the simplest of acts.

I share only a small fraction of them with you now. However, I can provide links to these and other examples.

In 2017, a handicapped adult male drowned while a group of teens mocked him and filmed him on their cell phones.

In 2013, a college student, Mack Prioleau, feigned sleep on the top bunk in his dorm room while his roommate and three others raped and sodomized an unconscious woman. After the rape was over, the student climbed down from his top bunk and left the room to sleep in another room. He never checked on the welfare of the woman who remained unconscious in his room, nor did he call the authorities once he had left.

In 1997, in Las Vegas, 19-year-old David Cash Jr. watched his friend rape a 7-year-old girl in a public restroom. When Cash later asked his friend what happened to the child, his friend said he had killed her.

Cash never reported the rape and murder of the child.

None of the bystanders in these cases faced legal consequences for their callous indifference.

The mother of the seven-year-old child begged that Cash be held legally accountable for his inaction. She speaks on behalf of the victims whose harm was exacerbated by bystander inaction.

The district attorney of Nevada stated that, regrettably, she could not hold Mr. Cash accountable in a court of law; only, the court of public opinion could render judgment.

Representative King's bill ensures that individuals like David Cash can, and will, be held accountable under the law for their inaction.

**Our focus must be on the victim.** Under no condition can we engage, as some of have suggested, in victim shaming. No. The horrific actions of the perpetrator were facilitated and enabled by the bystander.

It is to the victim—and their peril—that the bystander owes a duty. The recent, literally overwhelming accounts of sexual assault at Michigan State University are astonishing. And beyond deeply disturbing.

Over 160 victim impact statements graphically—and poignantly—illuminate the extraordinary harm emanating from bystander complicity. That harm can be mitigated by Representative King's legislation.

Representative King's legislation does not impose on the bystander the obligation to be a hero, to provide CPR, to break up a fight or put themselves in harm's way.

Quite the opposite: the proposed legislation, which I fully endorse, imposes a very low bar and can be easily summarized in the following sentence:

**Just dial 9-1-1**

One final comment: I respectfully suggest to this Distinguished Committee that we cannot lose sight of the harm caused to victims by bystander inaction. The voices of the victims of sexual assault speak loudly.

That is in direct contrast to my paternal grandparents whose voices were never heard. When I think of my paternal grandparents, standing in the selection line at Auschwitz, I cannot but reflect on their neighbors who were complicit in the awful fate that awaited them.

Mr. Chairman, thank you for granting me this opportunity to appear before the Committee.

I welcome any questions you and members of the committee may have.