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Failing to Protect the Vulnerable: The Dangers of Institutional Complicity and Enablers

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Amos N. Guiora
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University of Utah - S.J. Quinney College of Law

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Abstract

Criminal liability has typically been reserved for those who have both actus reus and mens rea. Omission liability is infrequent in modern criminal codes. Despite wide public support for aiding those in peril, Western democracies have historically refused to impose any penalty upon those who fail to aid someone in danger.

However recent high profile abuse scandals—including those of the USA gymnastics team, University of Michigan and the Catholic Church have caused scholars and policymakers to rethink these assumptions. In recent years, some jurisdictions have slowly come to criminalize those who witness another in peril and fail to provide aid. However, governments remain silent on whether to punish actors not present, but who learn of ongoing peril to someone they have power to protect, but nevertheless choose to not act on their behalf. Indeed, unlike other threats to society, no legislation currently exists to effectively criminalize these enablers of crime.

What is more, the failure of governments to recognize omission as a crime has directly led to the phenomenon of institutional complicity. Institutional complicity, as defined in this Article, is where an individual turns a blind eye to abuse out of a sense of duty to an institution. This Article proposes a legal framework and definitional language to allow prosecution of actors who discover sexual assault, and yet fail to contact law enforcement. It also distinguishes between enablers and bystanders of crime and facilitates the consideration of these issues of omission by legislatures.

In examining the issue from the perspective of the person in peril, the article provides a path towards more effectively redressing the harms suffered by crime victims.

Keywords: enabling culture, crime of omission, criminalizing bystanders, criminalizing enablers, sexual assault, institutional complicity, crime victims

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