introduction

“Who is to blame?” is the question at the root cause of decades-long pain. I was the last person to swim with my cousin Dani. I was 5; he was 14. I told him he can’t swim in the deep end (he had slight cerebral palsy.) My mom said she made me get out of the water and told my dad to watch Dani; my dad was reading. It is an open question if he heard her/responded to her. This has never been discussed in my family. When the time came to leave the pool, we looked for Dani; his twin brother, David, and I looked everywhere. Dani was found on the bottom of the pool. I recall like yesterday the race to the hospital. My dad drove behind the ambulance. How did they notify Dani’s father? There were very few phones in Israel in 1962. . . . There was a public service announcement on the one radio station asking my uncle to call my parents. He did. This is how he learned Dani died. The last picture of Dani alive was taken on Friday afternoon, the day before he died. In the picture? Dani and I. My uncle carried it with him, in his shirt pocket, every day of his life; it is framed on my desk, at home, and in my office. My uncle died 50 years to the day that Dani died. Saturday to Saturday. In October 2015—within four days of each other—Dani’s brother, David, and my father, Shonny, passed away. After all these years I still wonder: “Am I to blame?”
Running with M

I am a runner of modest achievement. I run in the wee hours of the morning. Nonrunners would call it the middle of the night. Over the years, I have participated in one marathon and a number of half marathons. I pride myself on dedication, determination, and the ability to grind.

Like thousands of other runners, I have self-imposed goals and am terribly disappointed when I fail to meet those goals. Fellow runners understand this dedication, bordering on obsession.

The act of running incorporates endless motion, occasional pain, and single-minded focus. It also provides an extraordinary time to think, reflect, and ponder. Some run alone, some run with a partner, others run in groups. I run either alone or with a partner.

With a partner, the pain seems less painful, the effort less daunting, and the opportunity to engage in conversation unique and welcome. The
fresh air, the predawn quiet, and mutual encouragement allow for a rare kind of openness.

When I shared with a wonderful running partner (I will call her M) that I was the only child of two Holocaust survivors, our runs became, for me, extraordinary opportunities to explore this subject.

We had many long and probing conversations. In many ways, those conversations were the beginnings of this book. I had too few answers for many thoughtful, insightful, painful questions.

Once, I shared with M an excerpt from an essay my mother wrote shortly after the death of her mother. After that, our runs seemed to take on added meaning and depth.

M—the mother of two small children—instinctively identified with my grandmother. She fully understood the rational, clear thinking under the most horrific circumstances.

My grandmother’s profound maternal instincts struck a chord. M, in awe of my grandmother’s remarkable composure when facing death, focused on her bravery and the actions, or inactions, of others.

She asked: “How the hell did this happen?”

At its core, that is the question when examining the Holocaust: How did 6,000,000 European Jews find their deaths in gas chambers, death squads, death marches, and beatings? The actions of governments and regimes have been studied and written about at great length, but M’s focus was not on political leaders but rather on broader society, a society made up of individuals.

The inactions, regardless of motivation, of institutions were never our focal point; we only discussed the individual who chose not to act. Focusing on the individual forced me to better understand—or at least confront—the question of the individual bystander.

This process individualized the dilemma for me. Rather than examining governments and the Catholic Church, I focused on individual responsibility and accountability. I am not interested in how nation-states acted and their rationalizations, motivations, and actions.

Although national leaders articulated and implemented policies that resulted in the murder of my grandparents, they are not germane to this book. Frankly, they did not interest me. The same is true for individual perpetrators: those who actually forced my grandparents onto the train
that took them to Auschwitz or those who sealed the doors of the gas chamber behind them ensuring their deaths.

People’s actions—or inactions—did not take place in a vacuum.

Studying the Holocaust required reading widely on broad themes, historical trends, and events during the years of the Third Reich. This was essential to understanding the individual actor. Of particular interest were Germany, Holland, and Hungary.

The reading, research, and interviewing had one specific purpose: to better understand the bystander. That is not to suggest sympathy for the bystander. Rather, to accurately portray and discuss the bystander, it is essential to understand conditions and circumstances. Doing so would facilitate answering the three questions below:

- How did neighbor turn on neighbor?
- How was so much suffering allowed by so many?
- To whom does society owe a duty if not to its most vulnerable?

**Duty to Act**

This book is about duty. It is not a history book.

Readers interested in historical analysis of the Holocaust and the Third Reich have unlimited material from which to choose.

I debated with others how much history to include; M was particularly incisive: “You can’t discuss the bystander in the Holocaust without discussing the Holocaust. But there is no need to provide a history of the Holocaust. That is not what this book is.” She is correct.

There are distinct voices in this book. There is the personal voice when discussing my family; there is the objective voice recounting particular events in the Holocaust; finally, there is the persuasive voice, hoping to convince the reader that my proposal is warranted and implementable.

Some sections are particularly conversational when I am seeking to talk with the reader. The historical summary is necessary to understand the legal argument. It is also necessary in an effort to convince the reader that history offers convincing proof that reliance on moral codes of responsibility is misbegotten.
I hope to convince the reader of the legitimacy and necessity of imposing on the bystander a legal duty to act when another individual is in harm’s way. That is the primary lesson I have learned from the terrible price my family paid. It is my answer to M’s question.

I define the “bystander” as an individual who observes another in clear distress but is not the direct cause of the harm. A “culpable bystander” is one who has the ability to mitigate the harm but chooses not to and must be held legally accountable for that inaction. The duty to act on behalf of the vulnerable victim I propose is a legal, not moral, obligation.

A third individual, the perpetrator, responsible for victim distress, is not essential to the duty discussion. The criminal law has sufficient provisions to address the perpetrator; law enforcement, prosecutors, defense attorneys, and judges have readily identified and articulated roles regarding the perpetrator.

The system regarding perpetrator responsibility and accountability is time tested; whether effective, efficient, and just are important points for consideration and discussion. They are, however, beyond our purview.

My sole motivation is imposing a legal duty—an obligation—on the bystander. I am not asking “whether”; the question is “how.” The answer is simpler than one imagines. Modern technology greatly facilitates implementation of the proposed legal obligation. The suggested requirement is less burdensome and onerous than perhaps imagined.

There is no demand for the bystander to actually physically intervene on behalf of the victim; calling for professional assistance meets the burden.

Failure to intervene on behalf of the victim is the essence of complicity. We join society because we seek security and protection. That is the core of the social contract between the individual and the state. The state protects the individual; in exchange, the individual willingly relinquishes certain liberties and freedoms. It is a quid pro quo.

However, what I am suggesting is that the duty-owed paradigm be extended beyond the state-individual relationship to the individual-individual relationship. That is particularly important when state organs are at their weakest and victim vulnerability is at its highest.
Nuance is essential to a full discussion regarding the bystander; different circumstances and conditions must be taken into consideration when articulating and implementing a duty to act paradigm.

Creating, or allowing, a wide range of exceptions to an agreed-upon rule facilitates unwarranted “wiggle room” that, ultimately, provides justification for a lack of intervention and involvement. The line is thin between acting and rationalization for not acting, between complicity and noninvolvement.

**Good Samaritan Laws**

Some U.S. states have Good Samaritan laws intended to minimize bystander liability if the intervention caused harm to the victim. The law, in essence, provides immunity for “doing the right thing” if rescue efforts had negative consequences. It seeks to protect the bystander whose efforts were, ultimately, harmful.

The law protects the well-intentioned bystander who does not owe a preexisting duty to the victim but, nevertheless, chose to do the right thing. The law makes sense. It is, however, no longer relevant, given my proposal.

If the bystander calls for professional assistance in a timely manner, providing appropriate officials with correct information regarding location, situation at hand, and assistance needed, then the duty-owed requirement is met. Immunity would no longer be necessary.

However, should the bystander choose not to seek assistance or not to bring the situation to the immediate attention of relevant officials, then a crime has been committed. The crime is failure to intervene, making the bystander complicit in ensuing harm that befalls the victim.

The test is binary and basic: Did you call or not?

If the bystander chose to act as demanded by the proposed law, then immunity provided by Good Samaritan laws would be superfluous. Conversely, failure to act would result in criminal prosecution—subject to prosecutorial discretion—devoid of protection afforded by Good Samaritan laws. Therefore, in the event the bystander acted in accordance with the recommended legislation, there is no need for immunity as obligations imposed by law have been met.
Impact of Runs

The many miles and the innumerable thoughtful, sometimes painful, exchanges brought into sharp focus the terrible combination of evil and passivity. Studying the Holocaust shines a harsh light on neighbors who turned on neighbors, acquaintances who did not offer assistance to acquaintances, and passersby who scurried on their way.

I read widely and broadly in an effort to better understand how such evil could be perpetrated. The willing collaboration of the Hungarians, the institutionalized accommodation of the Dutch, and the fervor and enthusiasm with which Germans responded to Hitler all shouted out to me from the books I read.

Little did I fully appreciate to what extent I would be impacted by our runs. They enhanced my understanding of the Holocaust, taught me a great deal about my parents, and inspired me to develop a legal model that would punish those who failed to protect the vulnerable. Writing this book required examining and coming to terms with dark moments in my parents’ lives.

While writing this book I asked my mother why they chose not to share their Holocaust experiences with me. Her answer was succinct: We wanted to spare you.

I am in awe of how they survived. It defies description.

Of my mother, probably the toughest, most resilient person I know, my children say: “If Hitler couldn’t kill her, no one can.” There is great truth in that phrase. My father’s survival of a death march owes much to luck, circumstances, and good fortune. There is no other rational explanation.

M’s questions were critical to my gaining a much better understanding of my parents’ struggles in the face of evil. They forced me to reflect on the profound questions: How did this happen? How can I make others consider the liability of those who stood by?

Legal Argument versus Moral Responsibility

Bystander complicity was essential to the “Final Solution.” I have come to view the bystander, who fails to act, as complicit in harm that befalls the victim. This is what compels me to create a workable legal requirement
The Crime of Complicity

whereby duty can be imposed on the bystander. The moral obligation model is, for me, tenuous and soft. Relying on the oft-repeated phrase that “people will do the right thing” is appealing and compelling.

It makes us feel good; we feel safe “knowing” someone will come to our assistance, someone will call the police, and someone will give us haven. After all, we would certainly do the same were we to see another in distress.

Certainly, that is our expectation of ourselves, for we are moral and act in accordance with our standards of morality. That is what we have been taught; those are the articulated ground rules of contemporary society. It sounds so simple, sounds so comfortably reassuring for there is something self-congratulatory about this approach; if we do good, others will, similarly, do good.

There is a powerful disconnect between the aspirational and reality. Although we would like to believe people will do the right thing, history suggests otherwise. The hope is not cost free. Quite the opposite. Unjustified reliance is an unnecessarily risky proposition. As was discussed at great length, during those early morning training runs, historical analysis offers convincing proof that hope is unrealistic and unwarranted. There is no justification in “hoping.”

Whether based on a lack of empathy or sympathy for the vulnerable individual is an open question. Clear are the consequences: enhanced victim harm. The unwillingness of the bystander to intervene greatly emboldens the perpetrator. The term “complicity” was not randomly chosen; it reflects the essence of the bystander. More than that: Bystander complicity significantly contributes to victim vulnerability.

If the consequences of nonintervention are actual injury, then the consequences of inaction must also be actual. Failure to intervene must be made a crime, prosecutable and punishable with the full force of the law. This is controversial because the bystander is not the initiator of the crime. However, failure to implement this recommendation fails victims of bystander complicity. It also ensures our individual and collective acquiescence in the face of violence and racism.

There is, of course, risk in legislating an individual be obligated to act when another is vulnerable. Readers of previous drafts and participants in various forums where I have discussed the book have made that risk clear
to me. It was obvious to me such a proposal would be heavily criticized and easily dismissed.

The primary concern is that imposition of a positive obligation to act on behalf of another suggests excessive government control and a distressing lack of clarity regarding standards and criteria by which duty is to be imposed. That is a legitimate concern. The question is how to create, and implement, a workable bystander intervention model. That will come in the pages ahead.

The additional, oft-voiced concern, is that the proposed recommendation creates a culture whereby reporting to the police is the operative byword; reporting rather than providing actual assistance to the vulnerable. There is a dilemma: Does the bystander physically help the victim or call for help? Does the bystander call for help or report that others are not helping? These questions have been continuously posed to me.

They reflect, I believe, understandable discomfort—if not uncertainty—regarding the essence of bystander legal obligation. The heart of the proposal is imposition to act. The actual degrees and manner of “acting” will be discussed in the chapters ahead.

The more we discussed, the more I understood both the calamity my parents were subjected to and the obvious need to suggest a mechanism whereby future perpetrators will not benefit from bystander complicity.

For me, that is the lasting impression of our runs: the direct—as compared to indirect—contribution of the bystander to the deaths of my family members. The questions M posed forced me to this conclusion.

The personal journey, which this book has become, has two distinct elements: examining my parents’ Holocaust experiences and proposing a model whereby bystander complicity does not go unpunished. By focusing on the first, I hope to convince the reader of the viability and justification of the second.

The journey has not been easy. Reading about the Holocaust, watching Holocaust-related film clips and documentaries, interviewing Holocaust survivors, traveling to Europe, and focusing intensely on the events of 75 years ago has become, for lack of a better term, an obsession.

This journey—this book—is, for me, a life project. It is intense, all encompassing, and painful. There is no happy story, with one exception:
My parents, somehow, survived. Or, as my mother says, they “won,” as she defines herself as a Holocaust victor rather than survivor.

While writing this book, as the refugee crisis was exploding, my mother called me. Our conversation was short and to the point.

She was overcome with emotion watching Hungary turn its back on people in dire straits; she was outraged watching history repeat itself.