Guilt by (More Than) Association: The Case for Spectator Liability in Gang Rapes

Kimberley K. Allen*

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“‘If I think back about that period, I can see the group [of high school guys] getting stronger, closer, every time they got together and humiliated a girl . . . . What they enjoyed in common wasn’t football. This was their shared experience. For them, this was what being a man among men was.’”

—Father of a Glen Ridge High School student

INTRODUCTION

In 2009, a 15-year-old student left her homecoming dance to join a drinking session on school property. She quickly became intoxicated and, over the next two hours, was attacked by as many as ten assailants who “laughed and took photos as they took turns” raping her. Detective Ken Greco, who had been in law enforcement for 29 years, called the incident “‘the worst thing [he’d] heard of’” and a crime that “‘shocked the conscience of responding officers.’”

Equally shocking, however, is the fact that as many as two dozen bystanders witnessed the gang rape, but none called the police. Some onlookers took photos with their cell phones, which suggests that they viewed the gang rape as a spectacle. Finally, a woman several blocks away heard about the incident and notified authorities. When police arrived, they found the girl lying semiconscious under a picnic table.

The “‘extremely callous and brutal’” nature of the crime sparked outrage and “sent shockwaves throughout the nation.” At least one commentator called on lawmakers to hold onlookers responsible for failing to contact police in cases such as these. In response to cries for action, a California lawmaker proposed the Witness Responsibility Act, which would require a witness of a rape or

4. Id.
5. Id.
7. Lee, supra note 2.
8. Fagan, supra note 6 (quoting Deputy District Attorney Dara Cashman).
homicide to report the crime to police or else face a misdemeanor charge, punishable by up to six months imprisonment and a fine of $1,500.\textsuperscript{10}

Statutes such as the Witness Responsibility Act improve the status quo by requiring that witnesses report a rape. Even so, these laws fall short of bringing justice for victims of gang rapes because they fail to acknowledge that the audience does more than merely witness the gang rape.\textsuperscript{11} Though it is wrong to fail to contact police, the greater wrong is the decision to watch and, through that approving presence, to encourage the rape.

There is little doubt that individuals who affirmatively participate in the gang rape (for instance, through cheering on the perpetrators) are complicit in the crime.\textsuperscript{12} However, even the silent audience member, though perhaps not liable as an accomplice, plays an encouraging role worthy of criminal liability in some form. Properly understood, gang rapes involve all of the audience members, or “spectators,” who are intentionally present at the gang rape.\textsuperscript{13} Social science literature has recognized for decades that gang rape is inherently a group crime and is a medium for the group members, both the rapists and spectators, to interact with one another. Because the objective of a gang rape is to perform sexually in front of an audience, the audience is a key motivating factor in the crime.

It is this motivating role that justifies criminal liability for spectators. Even so, the law has hitherto failed to appreciate the unique group dynamic of gang rapes. The law does not touch the group member who intentionally watches and enjoys the gang rape; indeed, even aiders and abettors who cheer on the rapists, who snap photos, or who otherwise facilitate the gang rape, are rarely held accountable.\textsuperscript{14} In other words, the law ignores the motivating role that “spectators” play in gang rapes.

At the same time, the law recognizes the motivating role of spectators in other crimes—drag racing and dogfighting, for example. Forty-eight states have outlawed knowing and intentional presence at a dogfight, and three states and numerous municipalities have done the same for drag races. Spectator liability is far from a minority approach—it is a well-accepted form of criminal liability.


\textsuperscript{11} This Note draws a distinction between witnesses or bystanders, who see that a rape is occurring but do not involve themselves in the rape or choose to watch, and spectators, who knowingly and intentionally watch the rape. Witness reporting laws miss this distinction and lump both groups of nonparticipants together.

\textsuperscript{12} For a discussion of affirmative participation sufficient to sustain criminal liability, see infra text accompanying notes 111–19. For a discussion of complicity liability in gang rapes, see infra text accompanying notes 162–64.

\textsuperscript{13} Although there appears to be no data on the percentage of gang rapes that involve spectators, it is estimated as much as 26% of rapes involve two or more perpetrators. Sarah Ullman, A Comparison of Gang and Individual Rape Incidents, 14 VIOLENCE & VICTIMS 123, 123 (1999).

\textsuperscript{14} See infra text accompanying footnotes 120–29.
where the audience is part of the motivation for the crime.

This Note argues that states should adopt a new approach to gang rape that considers gang rapists’ motivations and recognizes the nature of the crime as one that involves a group. Much like drag racing and dogfighting, gang rape is an audience-oriented crime where rapists participate in the rape in order to prove their masculinity to the group. States can, without criminalizing “mere presence” at a gang rape, treat spectators at a gang rape the way that most states have treated spectators at drag races and dogfights—as individuals who actively choose to watch the rape and thus have the culpable mindset necessary to sustain criminal liability.

This Note is organized as follows. Part I establishes that gang rapes, like drag races and dogfights, are audience-oriented crimes; as such, the legal response to “spectators” at gang rapes should be the same as it is to spectators at drag races and dogfights. This Part first examines the role of spectators in drag races and dogfights to establish that spectator liability is justified where spectators are a key motivating factor in the crime. Part I then compares the role of these spectators to the role of group members in gang rapes in order to explain why criminal liability for group members as “spectators” is similarly justified.

Part II examines “spectator” laws and the concern that these laws criminalize “mere presence”—that is, that these laws ensnare unwitting passersby who happen to be at the scene of the crime. This Part dissects the reasoning of two Pennsylvania “spectator” cases and establishes three important principles: first, spectators have the culpable mindset necessary to be convicted of a crime, because being a spectator, by definition, requires knowledge and intent; second, laws criminalizing presence as a “spectator” at a gang rape are not unconstitutionally vague; and third, knowing and intentional presence at a gang rape is “participation” in the gang rape.

Part III then lays out other justifications for “spectator” liability in gang rapes. First, criminal law has an important expressive function. The law communicates society’s values and reinforces societal norms. By criminalizing spectatorship, lawmakers would delegitimize and condemn the behavior. This legal judgment, in turn, would inform individuals’ moral judgment and, perhaps, influence their behavior. Second, spectator liability may deter some individuals from participating in gang rapes, either as spectators or as physical perpetrators. Third, because spectators are an important motivating factor in gang rapes,

15. This Note focuses on gang rapes where one or more members of the group do not engage in the rape itself (or otherwise physically participate by holding down the victim or blocking the victim’s escape) but are not merely passersby, either. Spectators often affirmatively participate by cheering, laughing, insulting the victim, or otherwise encouraging the crime. While those affirmative actions may be necessary for aiding and abetting liability, they are not required for the spectator to qualify for spectator liability. As will be shown, all that is required is knowing and intentional presence at the gang rape as a spectator. See infra Part II. This Note does not argue that spectator liability should supplant aiding and abetting liability, simply that spectator liability is another alternative where proof of affirmative participation is weak or where the spectator intentionally watched but did not otherwise contribute to the gang rape.
criminal liability for spectators is fundamentally just.

Part IV applies the principles of spectator liability to the well-known Glen Ridge gang rape case. Using the case as a backdrop, this Part outlines who should and should not be held liable as a gang rape spectator and provides a few recommendations to state legislatures on how to craft spectator liability legislation.

I. DRAG RACES, DOGFIGHTS, AND GANG RAPES AS AUDIENCE-ORIENTED CRIMES

Drag races, dogfights, and gang rapes are not crimes of solitary actors; they frequently involve spectators, and when they do, the spectators encourage and motivate the crime. This Part establishes that drag races, dogfights, and gang rapes are audience-oriented crimes—that is, crimes where the audience plays a motivating role. It is this motivating role that justifies criminal liability for spectators. Just as states have held spectators criminally liable in drag racing and dogfighting, so too should states extend spectator liability to spectators in gang rapes.

A. DRAG RACING

After the popular success of the movie *The Fast and the Furious* in 2001, cities across America saw a dramatic increase in illegal drag racing and drag racing deaths.\(^\text{16}\) The year 2001 saw 116 illegal drag racing deaths, which represented a 75% increase over the average from the previous 3 years.\(^\text{17}\) San Diego was disproportionately affected by an “epidemic” of street racing that resulted in 16 deaths and 31 injuries in 2001.\(^\text{18}\) As a result, illegal street-racing prosecutions in San Diego doubled between 1999 and 2001.\(^\text{19}\)

In attempting to address the problem, San Diego found that “using speed bumps, tow-away zones, street closures, and other means had not provided a lasting solution.”\(^\text{20}\) Undercover police officers attended street races and spoke with participants to better understand the nature of the problem and soon realized that “a motivating factor for the racers was the presence and reaction of the spectators.”\(^\text{21}\) Because existing laws did not adequately deter drag racing,


\(^{19}\) See id. (noting San Diego’s city attorney’s office “prosecuted 147 illegal street-racing cases in 1999, 161 in 2000, and 290 in 2001”).


San Diego took a novel “demand side” approach to the problem.22 Instead of stiffening penalties against the street racers alone, San Diego decided to target the audience. In 2002, San Diego became the first city to pass an ordinance making it illegal to be a spectator at a drag race.23 The San Diego City Attorney’s press secretary explained that the “aim of the ordinance [is] to target the hundreds of spectators that, by their mere presence, [fuel] the illegal races and exhibitions of speed.”24 Thus, San Diego recognized that spectators can be a motivating element in drag racing and determined that city ordinances should reflect the nature of street racing as an audience-oriented crime. In April 2003, San Diego followed up with a second ordinance, which permits forfeiture of vehicles used in illegal street races.25

The ordinances worked. The San Diego City Attorney touted the spectator ordinance as a success, noting that it “has had a huge impact on public health and safety which is saving lives.”26 In 2003, San Diego saw “a 99% reduction in organized illegal street racing activity . . . and a 79% improvement in illegal street racing involved crash mortality/morbidity.”27 A 2006 study analyzed the impact of the two ordinances on street racing casualties and found that the forfeiture ordinance had the most pronounced effect.28 Even so, the researchers found that the spectator ordinance had significantly lowered the incidence of street-racing arrests, which suggests “that perhaps both ordinances have yielded desired effects, depending on the outcomes of interest.”29

Other cities and states have recognized that spectators encourage street racing30 and have followed San Diego’s lead. For instance, Los Angeles passed Ordinance No. 174891, which makes it illegal to “be knowingly present as a spectator” at a drag race or at preparations for a drag race.31 Likewise, Arkansas specifically outlaws “observing a drag race as a spectator on a public highway,”32 and Pennsylvania courts have interpreted Pennsylvania’s drag racing statute, which criminalizes “participation” in drag races, to encompass being a spectator at a drag race.33 Additionally, Florida police, concluding that the “only

22. See Worrall & Tibbetts, supra note 18, at 533.
23. See id. at 531; see also SAN DIEGO, CAL., MUN. CODE § 52.5203 (2002).
24. Worrall & Tibbetts, supra note 18, at 531 (alteration in original) (emphasis added).
25. Id.
26. Id. at 532.
27. Id.
28. Id. at 542.
29. Id. at 543.
30. See, e.g., Jeremy Clar, Chapter 411: Putting the Brakes on the Dangerous Street Racing Phenomenon in California, 34 McGeorge L. Rev. 372, 374 (2004) (noting that California enacted Chapter 411, which was intended to “discourage the ‘sideshow’ of spectators that encourage street racers”).
32. ARK. CODE ANN. § 27-50-309(c) (Supp. 2009).
way to nab the drivers is to go after their audience,”34 successfully lobbied for a law criminalizing drag racing spectatorship.35 The chief of police of Hayward, California likewise advocated for a spectator ordinance, saying the laws “have achieved significant reductions in the number of street racing incidents” because “[i]n discouraging spectators, the act of organizing and participating in illegal street races will be discouraged” as well.36 In all, at least ten cities or counties and three states have criminalized participating in a drag race as a spectator.37 Tellingly, none of the state laws requires any affirmative participation such as cheering, purchasing a ticket, or placing a bet, and none requires the individual to have set out to attend the race, as opposed to stumbling upon it and then deciding to stay. The only participation required is knowing and intentional presence as a spectator at the drag race.

Together, state and local spectator laws evince a recognition by governments that drag racing is an audience-oriented crime, a fact that is demonstrated by the effectiveness of spectator ordinances in deterring drag racing activity. Because of the role spectators play in drag races, spectator liability is the appropriate legal response.

B. DOGFIGHTING

Much like drag racing, dogfighting is a sport that is fueled by the presence of spectators. Dogfighting spectator laws are, in part, a recognition that “‘[b]reed-ing animals to fight doesn’t happen in a vacuum.”38 The decision to fight dogs is influenced by more than the dog owners’ own personal entertainment—in fact, several motivating factors are centered around the spectators. One such motivation is profiting from the spectators’ admissions fees and wagers.39 Two

34. Hurish, supra note 16.
36. Ron Ace, Recommendation to the Mayor and City Council of the City of Hayward 2–3, (2009).
other motivations are non-monetary, however, and derive solely from spectators’ presence at the fights. John Goodwin, of the Humane Society of the United States, notes that the approximately 100,000 amateur dogfighters arrange fights for “street cred” or “bragging rights.”40 Because some street fighters receive no prize money, their only motivation for participating in fights is the “status” they achieve in the eyes of their spectators.41 A third more general motivation is the “sport” of the fights, because “[w]ithout the presence of spectators . . . much of the ‘sport’ in animal fighting would be eliminated.”42

Masculinity and group identity also play an important role in dogfighting. Dogfighting groups identify as “fraternities,”43 a term that underscores the group’s status as a brotherhood. The groups tend to be very close, with young dogfighters or “dogmen” looking up to and seeking to emulate older, more experienced dogmen.44 Although group members all share the same hobby, membership in dogfighting “fraternities” is about more than the group’s common interest. For men who “lack opportunities for expression of masculinity through occupational success,” dogfighting is a means of showing aggression and establishing a masculine identity within the group.45 It is the presence of other men that reinforces the masculine identity, not merely the dogfighting itself. Dogmen risk criminal liability because dogfighting allows them to maintain “a sense of belonging and solidarity with other men.”46 As one study found, “[i]t is this shared association and sense of group identity that holds the subculture of dogfighters together.”47 Without an audience, there would be no group identity, no status, and no validation of the dogmen’s masculinity within the group. Thus, dogfighting is merely the chosen method of asserting masculinity; it is the presence of others at a dogfight that is critical to establishing one’s masculinity with the fraternity.

Because spectators play an important motivating role at dogfights, most states have enacted dogfighting spectator statutes. Attending a dogfight as a spectator is illegal in forty-eight states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.48 Only Montana and Hawaii have not criminalized attendance at a dogfight. In twenty-seven states, attending a dogfight as a spectator is a felony on a first or repeated offense; in twenty-one states, it is a misde-

40. Williams, supra note 38.
43. Ortiz, supra note 41, at 12.
44. Id.
46. Id. at 834.
47. Id.
Because dogfighting laws are difficult to enforce, they may be less effective than the San Diego drag racing spectator ordinance was found to be. Dogfighters are rarely caught or prosecuted, and so the laws do not seem to deter dogfighting activity. Low prosecution rates are the result of numerous factors, including the cost of investigating and prosecuting dogfighting crimes, as well as the cost of housing dogs that have been seized. In addition, dogfights may be secretive or spontaneous, thus making them difficult to investigate or detect. Yet, despite their minimal effectiveness, dogfighting spectator laws remain on the books, arguably because of the role laws play in expressing society’s condemnation of animal cruelty and other objectionable behavior.

Whatever the effectiveness of dogfighting laws, such laws stand as a formal recognition that dogfighters are motivated in large part by the presence of spectators. Dogfighters use the dogfights to establish and assert their masculinity and to enhance their status among dogfighting fraternities, an exercise that would be futile without the presence of others to observe the fights. Thus, the spectators, by their presence, are important participants in the crime of dogfighting, such that criminal liability for presence at a dogfight is justified.

C. GANG RAPE AS AN AUDIENCE-ORIENTED CRIME

1. Differing Motivations for Different Rapes

Before discussing the similarities among gang rapes, drag races, and dogfights, it is important to displace the notion that all rapes are transposable. As A. Nicholas Groth, a clinical psychologist, has observed, “not all [rapists] are alike. They do not do the very same thing in the very same way or for the very same reasons.” Because all rapes do not result from the same motivations, “continued reliance on a single monolithic depiction of rapists hinders effective social and legal reform.”

In his famous studies on rapists, Groth identified three “patterns” of rape: “(1) the anger rape, in which sexuality becomes a hostile act; (2) the power rape, in

49. See id.
50. See Ortiz, supra note 41, at 26–39 (discussing problems with enforcing dogfighting laws); Worrall & Tibbetts, supra note 18, at 531 (noting that San Diego’s drag racing spectator law reduced drag racing activity by 99%).
51. See Ortiz, supra note 41, at 27.
52. Id. at 26–33 (“With regard to dogfighting, reasons for the low prosecution rate include differences in the values people place on prosecution, the costs involved in investigating cases, and the difficulties of proving the criminal violations.”).
53. Id. at 34–35.
which sexuality becomes an expression of conquest; and (3) the sadistic rape, in which anger and power become eroticized.\textsuperscript{57}

In the anger rape, the assault “becomes a means of expressing and discharging feelings of pent-up anger and rage”\textsuperscript{58} and a way to “retaliate for perceived wrongs or rejections [the rapist] has suffered at the hands of women.”\textsuperscript{59} Because the goal is to abuse and debase the victim, the anger rapist often uses more force than is necessary to subdue the victim and frequently batters the victim in a violent attack.\textsuperscript{60} The anger rapist is not primarily motivated by the sex and finds little gratification in the rape itself.\textsuperscript{61} The rape is simply the “ultimate offense” he could commit against the victim, the “ultimate expression” of his anger.\textsuperscript{62}

For power rapists, the critical motivation is the desire to dominate a victim in order to establish control over the victim.\textsuperscript{63} The rape is “a means for compensating for underlying feelings of inadequacy” and is an attempt to satisfy the rapist’s need for control and authority.\textsuperscript{64} The identity of the victim is particularly important, as the rapist seeks to assert control over this particular victim.\textsuperscript{65} The power motivation explains the high incidence of prison rapes, where establishing one’s place in a hierarchy can be crucial for prison survival.\textsuperscript{66} Likewise, this motivation plays into marital rape, where a husband seeks to assert control over a wife who defies his authority.\textsuperscript{67}

The rare case is the sadistic rapist. For these perpetrators, “[h]atred and control are eroticized.”\textsuperscript{68} The sadistic rapist “takes pleasure in [the victim’s] torment, anguish, distress, helplessness, and suffering.”\textsuperscript{69} Such rapes are often calculated and deliberate and can involve “grotesque acts, such as the sexual mutilation of the victim’s body.”\textsuperscript{70}

Others have expanded upon Groth’s work to identify motivations in non-traditional rapes. In some instances, rape is used to insult an enemy or to exert power over other men. During wars, for instance, men rape “not because they

\textsuperscript{57} Groth with Birnbaum, supra note 55, at 13. Because Groth limited his study to traditional forms of rape, some scholars believe that his typology oversimplifies the complexities of sexual crimes, but it is generally accepted that these three factors often motivate rapes. See, e.g., Katharine K. Baker, \textit{Once a Rapist? Motivational Evidence and Relevancy in Rape Law}, 110 Harv. L. Rev. 563, 608–09 (1997) (noting that Groth limited his studies to more traditional rapes and that other factors can motivate rapes as well).

\textsuperscript{58} Groth with Birnbaum, supra note 55, at 13.


\textsuperscript{60} Groth with Birnbaum, supra note 55, at 13–14.

\textsuperscript{61} Id. at 15.

\textsuperscript{62} Id. at 14.

\textsuperscript{63} Baker, supra note 57, at 609.

\textsuperscript{64} Groth with Birnbaum, supra note 55, at 25.

\textsuperscript{65} Baker, supra note 57, at 609–10.

\textsuperscript{66} Id. at 609.

\textsuperscript{67} Id. at 611.

\textsuperscript{68} Groth with Birnbaum, supra note 55, at 45.

\textsuperscript{69} Id. at 44.

\textsuperscript{70} Id. at 45.
want or need the good—i.e., the sex or the woman—but because the good belongs to a man whom they wish to insult.”71 At other times, men rape to enhance their masculinity by contrasting it with the weakness of the feminine victim. For these men, abusing women is “a repetition of cleansing the self of the inner, despised female.”72 Yet another form of rape, termed “corrective rape,” is intended to “‘cure’ lesbians of their nonconforming sexual orientation” or “nonconforming sexual identities” and is motivated by a “continued misunderstanding of and animus toward homosexuality.”73

Gang rapes are unlike each of these forms of rape, however. Although anger and power are often partial motivations in gang rape,74 other motivations for gang rape are distinctly different from a straightforward power or anger rape. Because not all rapes are alike, different rapes should receive different legal treatment, treatment that is tailored to the unique motivations that produce and shape the crimes.

2. The Audience as the Motivator in Gang Rapes

Each of gang rape’s purposes revolves around the group dynamic of the group and the presence of an audience. At times, the purpose of gang rape is to unite the men in the group, both co-offender and spectator, to each other and to “maintain[] or creat[e] images and roles within the group.”75 Gang rape can be intended to “foster feelings of rapport, fellowship, and cooperation among assailants” or can be a means of “prov[ing] [rapists’] virility or masculinity . . . by performing sexually in the presence of the group.”76 The rapist may seek to impress the group members, who he feels are “evaluating his performance.”77 In other instances, gang rape can also be used as a reinforcing mechanism for group membership.78 Or, as Bernard Lefkowitz observes, it is often a combination of all these factors:

74. See Groth with Birnbaum, supra note 55, at 60–61 (expressing their opinion that “[r]ape is always a combination of anger, power, and sexuality”).
75. Baker, supra note 57, at 606–07 (quoting Chris O’Sullivan, Acquaintance Gang Rape on Campus, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 140, 146 (Andrea Parrot & Laurie Bechhofer eds., 1991)).
77. Groth with Birnbaum, supra note 55, at 116.
The real goal is overcoming your own insecurities by impressing your friends with your sexual prowess. To achieve that goal, a guy needs an audience to witness his dominating performance. A group of appreciative and responsive buddies is essential to build a reputation for sexual control and domination.79

Similarly, Groth and Birnbaum note that the unique dimension of the gang rape is “the experience of rapport, fellowship, and cooperation with the co-offenders.”80 Gang rape is inherently a group activity and “a vehicle for interacting with the other men”—it is not merely “a series of single rapes on one victim in close temporal and spatial relationship to each other.”81 Whether the end goal is group membership or proving one’s masculinity in front of the other group members, the “unique group dynamic of a gang rape”82 is of particular importance because, as Katharine Baker notes, “having an audience is critical; intercourse is instrumental.”83

The foregoing demonstrates that gang rape is a crime that involves, and indeed requires, an audience. This is particularly true for a subset of gang rapists who rape only in the context of a group. Groth and Birnbaum have identified two categories of gang rapists: “instigators” and “followers.”84 The instigators are the ones who initiate the rape and who encourage the followers to participate.85 Instigators are more likely to rape in other contexts, such as in solitary rapes.86 Instigators benefit from the group dynamic of the rape by feeling a sense of control over the victim and the gang members, and by feeling “a sense of power from being the leader.”87

In contrast, “followers” participate in the rape because they are persuaded to and because the presence of others “diminishes their sense of personal responsibility” for the rape.88 The audience is the essential ingredient for the approximately forty-three percent of gang rapists who are “followers,” because followers only rape in a group context.89 The presence of others “enabl[es] [group members to] do something they might not have done individually.”90 That followers rape only in the context of a gang rape underscores the importance of the group as a motivation for participating in the crime. For the follower, the gang rape is intended to “confirm his masculinity, achieve recognition, and/or

79. LEFKOWITZ, supra note 1, at 244 (emphasis added).
80. GROTH WITH BIRNBAUM, supra note 55, at 115.
81. Id.
83. Trebon, supra note 78, at 67.
84. Baker, supra note 57, at 606.
85. See GROTH WITH BIRNBAUM, supra note 55, at 112–13.
86. Id. at 112.
87. See id. at 113.
88. Id.
89. Id.
90. Baker, supra note 57, at 607.
91. Trebon, supra note 78, at 68.
retain his acceptance with his co-offenders."\textsuperscript{92} Because followers participate in a gang rape to prove their masculinity to, or establish membership in, the group, the rape itself “may be of secondary or less than secondary importance in the motives of the followers.”\textsuperscript{93} In the words of one gang rapist, the rapes “didn’t seem to be about the sex at all. Like almost everything else we did, it was a macho thing. Using [black females] . . . was another way for a guy to show the other fellas how cold and hard he was.”\textsuperscript{94}

Thus, for both instigators and followers, the presence of others is a primary motivating force in committing the gang rape, perhaps even more so than the rape itself. Instigators enjoy the power they feel over other members of the group, and followers need the validation the audience provides, making the audience—whether they are physically engaging in the rape or not—critical.

Because the underlying goals of drag races, dogfights, and gang rapes are all audience-driven, the role that spectators play in gang rapes is no different from that of spectators in drag races and dogfights. Gang rape is, by any measure, a spectator sport. Much like dogfighters, who seek to establish their masculinity or achieve “fraternity” membership through dogfighting, gang rapists often rape to achieve some “status” or group membership or to prove their masculinity to other gang members. And, much like drag racers who race to perform for a crowd, gang rapists are motivated by a desire to perform sexually in front of their peers. In all three contexts, the audience provides the same validation and the same motivation for the crime.

3. Other Ways That Spectators Influence Gang Rapes

The presence of both participating and spectating gang members can influence the behavior of the participating gang rapists in other important ways. First, in a larger group, an individual often feels more pressure to conform to the group norm.\textsuperscript{95} Thus, the more members in a group, the more likely it is that each gang member will go along with the group. The tendency to conform is particularly pronounced in unstructured situations where individuals are uncer-

\textsuperscript{92} See Groth with Birnbaum, supra note 55, at 113.
\textsuperscript{93} Morris, supra note 76, at 721 n.256.
\textsuperscript{94} Nathan McCall, Makes Me Wanna Holler: A Young Black Man in America 50 (1994).
\textsuperscript{95} See, e.g., Solomon E. Asch, Opinions and Social Pressure, 193 Sci. Am. 31, 34 (1955). In Asch’s famous line-comparison experiment, subjects were placed in groups of up to sixteen people and asked to compare one line against three other lines of varying lengths and state which of the three lines it most resembles. \textit{Id.} at 32. All but one of the members of the group were confederates and were instructed to give unanimously incorrect answers. When all members of the group gave wrong answers, subjects also gave wrong answers 36.8\% of the time. \textit{Id.} at 33. Eighty percent of subjects gave at least one wrong answer, despite the obviousness of the correct answer. Anders Kaye, Does Situationist Psychology Have Radical Implications for Criminal Responsibility?, 59 Ala. L. Rev. 611, 630 (2008). The larger the group that gave a unanimously wrong answer, the more likely it was that a subject would also give a wrong answer—up to a point. With only one “opponent” giving a wrong answer, the subject gave a wrong answer 3.6\% of the time but with two and three “opponents,” this increased to 13.6\% and 31.8\%. The percentage of wrong answers peaked with seven “opponents.” Asch, supra, at 35.
tain about the right answer, and a group norm, once established, tends to persist even after the situation ends. Second, the presence of approving peers reassures rapists that their behavior is acceptable and even “normal.” Third, because the group as a whole is committing the rape, responsibility is diffused among all the group members, such that none of the rapists feels that he, individually, is accountable. This “diffusion of responsibility,” then, decreases the likelihood that a gang rapist will feel that he is obligated to stop the rape or to refuse to participate himself. A diminished sense of responsibility facilitates the gang rapists’ involvement in the rape where a rapist might otherwise have felt a sense of guilt or shame. Fourth, the presence of others may lead individuals to feel more anonymous; this, in turn, causes “deindividuation,” which is “the loss of self-awareness of one’s beliefs, morals, and standards in a group setting.” Deindividuation occurs when the individual’s identity becomes “submerged” in the identity of the group, such that the individual becomes “more likely to behave in accordance with” the norms of the group. It is because of deindividuation that individuals in groups such as mobs tend to commit worse acts than individuals acting alone. The feeling of anonymity in a group “reduces [individuals’] sense of personal accountability,” which can lead to “aggressive, disturbing, and antisocial behavior.” It follows that, because of deindividuation, a gang rape is likely to be more violent and sadistic than a solitary rape.

In sum, the presence of others at a gang rape is crucial in two regards. First,
the group context leads to behavior-impacting phenomena such as deindividuation, which allows the individual to commit acts that the individual would not commit alone. And second, gang rapists are uniquely motivated by the presence of others because gang rapists commit the rape to perform for the “audience.” Far from being mere passive witnesses to the rape, spectators create and contribute to group dynamic of the rape, thereby facilitating the commission of the crime.

For these reasons, gang rapes are similar to drag racing and dogfighting in that they are audience-oriented crimes where the presence of others is a key motivation in committing the crime. Just as this motivating element justifies criminal liability for spectators who knowingly and intentionally watch drag races and dogfights, the motivating presence of “spectator” gang members should also justify criminal liability against group members who participate in the gang rape by knowingly and intentionally watching the crime.104

II. SPECTATOR LAWS: THE LEGAL RESPONSE TO AUDIENCE-ORIENTED CRIMES

Although spectator laws are well-accepted and the most appropriate form of criminal liability where the audience motivates the crime, they are not without some controversy. Defendants frequently argue that spectator laws criminalize “mere presence” at the scene of a crime.105 Two Pennsylvania cases, as well as a long line of other state cases,106 roundly dismiss this argument and illustrate how spectator laws require a culpable mindset and are not unconstitutionally vague. Gang rape spectator laws that require a showing of knowledge and intent would similarly pass constitutional muster.

Despite spectator laws’ solid constitutional footing and wide acceptance, states may be slow to enact gang rape spectator laws. However, there is another avenue for attaching liability to culpable spectators. In states where “participation” in a gang rape is criminalized, like Pennsylvania, prosecutors can argue that being a “spectator” at a gang rape is “participation” in the crime. Where available, prosecutors should make this argument, though it is better for states to explicitly criminalize knowing and intentional presence as a spectator at a gang rape.

A. THE “MERE PRESENCE” HURDLE

Spectator laws are most vulnerable to the criticism that they punish “mere presence” at a crime. It is widely accepted that “mere presence” is insufficient to sustain criminal liability107 for three reasons: first, it fails to require that the

104. See supra sections I.A–B.
106. See infra section II.B.
107. See, e.g., 67 AM. JUR. 2D Robbery § 10 (2010) (“[U]nder the ‘mere presence doctrine,’ the fact that a defendant was present at the scene of the crime... does not make him or her guilty of the offense.”).
accused have a culpable mindset in order to be guilty; second, it does not require an affirmative act; and third, it is vague and fails to place individuals on notice of the conduct proscribed, as individuals cannot adjust their behavior to avoid inadvertent presence at the wrong place at the wrong time.

Although courts have found that a person can participate in a crime by being present at the crime, as when an individual’s presence is intended to be a “show of force,” courts generally still require some showing of “affirmative participation.” In most states, the standard for “affirmative participation” is minimal. In Missouri, for example, it is enough that the accused “encourag[ed] or excit[ed]” the principle actor “by words, gestures, looks, or signs, or . . . in any way or by any means countenanc[e]d or approv[e]d the same.” Similarly, a Georgia case held that a person could violate a dogfighting statute, which prohibited “allow[ing]” a dog to fight another dog (but did not, at that time, prohibit being a spectator), if the person encouraged the event by applauding or cheering, because such encouragement “contributes to the cause of a dogfight . . . or furthers the success of the enterprise.” Likewise, an Oregon court held that a crowd’s vocal encouragement of an assault constituted participation in the crime. In that case, the defendant and another gang member violently beat a member of a rival gang while seven or eight others stood in a circle and shouted encouragement. The defendant was convicted of the crime of “riot,” defined as “engag[ing] in tumultuous and violent conduct” “with five or more persons.” The court rejected the argument that, because the shouters were

108. See 21 Am. Jur. 2d Criminal Law § 172 (2010) (“The presence of the accused at the scene of the crime, by itself, is not enough for the accused to be liable as a participant in the crime, because inaction, knowledge, or passive acquiescence do not rise to the level of criminal culpability.”).
109. Id.; see also Reason v. State, 642 S.E.2d 236, 238 (Ga. Ct. App. 2007) (“Evidence of mere presence at the scene of the crime, and nothing more to show participation of a defendant in the illegal act, is insufficient to support a conviction.”).
110. See Lambert v. California, 355 U.S. 225, 228–29 (1957) (sustaining a due process challenge to a felon registration law, where the law did not require actual knowledge of the requirement to register, because it criminalized “mere presence in the city” and because a person “wholly passive and unaware of any wrongdoing” would not be able to “avoid the consequences of the law”).
111. See Milender v. State, 648 S.E.2d 777, 778 (Ga. Ct. App. 2007) (holding that the defendant was not merely present but that he participated in a robbery by acting as a lookout and as a show of force).
112. See State v. May, 71 S.W.3d 177, 183 (Mo. Ct. App. 2002) (“Any evidence that shows affirmative participation in aiding the principal to commit the crime is sufficient to support a conviction.”). Likewise, aiding and abetting liability or a conviction for rape in concert would require affirmative participation. See, e.g., People v. Lopez, 172 Cal. Rptr. 374, 376, (Cal. Ct. App. 1981) (sustaining a conviction for rape in concert where the defendant planned and aided the rape but was not physically present during its commission).
113. One treatise notes that “[o]ne may become an accomplice by acting to induce another through threats or promises, by words or gestures of encouragement, or by providing others with the plan for the crime.” WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2(a) (2d ed. 2003).
114. State v. Richardson, 923 S.W.2d 301, 317 (Mo. 1996) (quoting State v. Suidham, 305 S.W.2d 7, 15 (Mo. 1957)).
117. Id. at 894.
“mere spectators,” there were not five or more participants in the crime.\textsuperscript{118} Mere presence would have been watching “without taking part \textit{by word or deed},” but because the crowd “cheer[ed] on the attack,” it “encouraged the victim’s beating.”\textsuperscript{119} Thus, in most states, any affirmative conduct that encourages the crime is sufficient for criminal liability. What constitutes “mere presence” at a gang rape—as opposed to presence that provides assistance or encouragement to the perpetrator—is not a settled question. Prosecution practices in high profile cases indicate that prosecutors often do not consider anything short of direct, physical acts to be participation in the gang rape. For instance, in the Glen Ridge, New Jersey case involving a mentally handicapped girl who was lured into a basement by high school athletes, prosecutors never charged three athletes who chose to stay and watch the rape but were not proven to otherwise participate in the assault.\textsuperscript{120} In the New Bedford, Massachusetts gang rape trial, prosecutors alleged in their opening statement that “several men at the bar ‘were cheering like at a baseball game’” while watching the rape,\textsuperscript{121} but none of these spectators was charged for encouraging the crime.\textsuperscript{122} Despite public pressure to charge the spectators, the prosecutor determined that “[m]ere presence during a crime is not enough . . . You must have participated.”\textsuperscript{123} In this way, the prosecutor confused spectators’ active encouragement of the crime with a mere failure to report the crime. At least one commenter has argued that the spectators’ cheering in this case was sufficient for accomplice liability under Massachusetts law; even so, not one of them was charged under that, or any other, theory.\textsuperscript{124} In the Richmond, California gang rape of a high schooler outside her

\begin{itemize}
\item \textsuperscript{118} \textit{Id.} at 894–95.
\item \textsuperscript{119} \textit{Id.} at 895 (citing \textit{State v. Goodwill}, 581 P.2d 113, 115 (Or. Ct. App. 1987)).
\item \textsuperscript{120} See Elliot Regenstein, \textit{Identity and Equality: These Are the People in Your Neighborhood}, 97 \textit{Mich. L. Rev.} 1956, 1959 (1999) (reviewing \textit{Bernard Lefkowitz, Our Guys: The Glen Ridge Rape and the Secret Life of a Perfect Suburb} (1997)) (noting that “[w]hile there were thirteen boys in the room when Faber arrived, only the Scherzers, Archer, and Grober were fully prosecuted”); see also infra Part IV.
\item \textsuperscript{121} \textit{Trial in Gang Rape Case Opens in Massachusetts}, \textit{N.Y. Times}, Feb. 24, 1984, at A10. Fifteen or so men were in the bar at the time of the rape. \textit{Commonwealth v. Vieira}, 519 N.E.2d 1320, 1321 (Mass. 1988).
\item \textsuperscript{122} Six men were prosecuted as rapists, and four were convicted. Lynn S. Chancer, \textit{New Bedford, Massachusetts, March 6, 1983--March 22, 1984: The “Before and After” of a Group Rape, 1 Gender & Soc’y} 239, 240 (1987); see also \textit{Aric Press, The Duties of a Bystander, Newsweek}, Mar. 28, 1983, at 79 (noting that four alleged rapists and two witnesses who held down the victim were indicted). Curiously, one of the gang rape participants, Victor Raposo, put forward a defense that he was “merely present,” despite evidence that he held down the victim and told her they would let her go if she would be quiet. \textit{See Vieira}, 519 N.E.2d at 1321 (noting that Raposo restrained the victim); \textit{see also Commonwealth v. Cordiero}, 519 N.E.2d 1328, 1333, 1334 n.14 (Mass. 1988) (noting that Raposo put forth a “mere presence” defense and that he told the victim to be quiet). He was convicted of aggravated rape. \textit{Cordiero}, 519 N.E.2d at 1329. Although none of the spectators were prosecuted, their involvement in the crime was not ignored. Following the rape, a coalition of women’s groups protested throughout the Northeast carrying signs that read “Rape Is Not a Spectator Sport.” Chancer, \textit{supra}, at 239.
\item \textsuperscript{123} Press, \textit{supra} note 122, at 79.
\item \textsuperscript{124} \textit{See Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 Wash. U.L.Q.} 1, 20 n.94 (arguing that “some of the witnesses made their
homecoming dance, prosecutors have charged the seven men who participated in the rape itself or in the robbery of the girl but have ignored the approximately twenty onlookers who reportedly laughed and took pictures. Finally, in People v. Nelson, a woman named Swank, who encouraged a group of gang rapists and yelled profanities during the rape, admitted to being complicit in the victim’s rape and murder, pleaded guilty to second-degree murder, and received a reduced sentence in exchange for her testimony at trial. By contrast, a man named Wirick, who watched and photographed the entire rape and murder, was never charged. Indeed, I have found only one case that supposed, in dicta, that laughing and vocal encouragement of a gang rape could have been sufficient to sustain some form of criminal liability. But again, in that case, the spectators were not charged.

These cases suggest that prosecutors are not inclined to consider spectators’ encouraging presence or actions to be criminal, even where the actions should qualify as “affirmative participation” that encouraged the rape for purposes of accessorial liability. The double standard is hard to justify. Inexplicably, these spectators are treated as though they were merely present, like any other unwitting passer-by, at the scene of the gang rape.

B. DISTINGUISHING SPECTATORS FROM THOSE “MERELY PRESENT”

Two Pennsylvania cases evaluate the question of whether spectator laws impermissibly criminalize “mere presence.” In the first, Commonwealth v. Craven, the defendants were convicted under a statute that prohibited “attendance at an animal fight ‘as a spectator.’” The defendants challenged their convictions on the ground that the statute was overbroad because it criminalized mere presence and thus failed to put the defendants on notice of what conduct

acquiescence clear by cheering, which is sufficient to support a charge of accomplice liability under Massachusetts law.”.

125. See Demian Bulwa, 7th Suspect Charged in Richmond Rape, S. F. CHRON., Jan. 22, 2010, at C9 (noting that seven men have been charged in the rape); Henry K. Lee, 3 Charges for 6th Suspect, 21, in Richmond High Gang Rape, S. F. CHRON., Nov. 7, 2009, at C3 (noting sixth suspect was charged with sexual penetration of an intoxicated person, rape by foreign object in concert, and rape in concert); Henry K. Lee & Kevin Fagan, 5 Now in Custody in Richmond High Gang Rape, S. F. CHRON. (Oct. 29, 2009), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/10/29/MN621ABOF6.DTL (noting that three were arrested for rape in concert and penetration with a foreign object; one for robbery; one for rape in concert, rape by force, robbery, and assault with a deadly weapon causing great bodily injury).


128. See id.

129. See Arredondo v. State, 270 S.W.3d 676, 680 (Tex. Ct. App. 2008) (“[A]fter C.B. passed out, Arredondo raped her while everyone watched, laughed, and cheered him on. . . . This may be sufficient evidence to establish that the people who encouraged Arredondo or Maldonado committed some criminal activity, but we disagree that it is evidence that Arrendodo and Maldonado acted in concert to sexually assault C.B.”).

was forbidden. In a habeas proceeding, the trial court agreed that the defendants were entitled to have their convictions overturned on the ground that the law “sought to eliminate a mens rea requirement for culpability.” The Supreme Court of Pennsylvania reversed and held that the law did place the defendants on notice of the conduct proscribed. The court consulted Webster’s Third New International Dictionary Unabridged and distinguished “attendance at an animal fight ‘as a spectator’” from “‘presence’” because a spectator is “‘one that looks on or beholds,’” whereas “‘presence’” is “‘the state of being in one place and not elsewhere.’” Thus, the court held, the terms “presence” and “spectator” “are clearly distinct.” The court reasoned that, because attending an animal fight as a spectator is a conscious choice, “[a] spectator does more than a person who is merely present at a particular place by happenstance.”

A second Pennsylvania case, Commonwealth v. Holstein, applied the same reasoning to 75 Pa. Cons. Stat. § 3367, which stated that “no person shall in any manner participate” in a drag race. The defendant was convicted under the statute for attending a drag race as a spectator, though the statute did not explicitly define spectatorship as a form of participation. The defendant admitted that she had intended to view an illegal race but argued that being a spectator did not amount to participating in a drag race. The court rejected her argument and held that “knowingly attend[ing] an illegal drag racing event as a conscious and voluntary spectator” was a form of participation and was thus prohibited under the statute.

Thus, the Pennsylvania cases demonstrate three important principles: first, culpable spectators meet the mens rea requirement because knowingly being a spectator is an intentional and conscious decision, whereas “mere presence” is not; second, any law that criminalizes being a spectator gives the accused sufficient notice of the conduct proscribed and is thus not unconstitutionally vague; and third, knowingly being a spectator is participating in a crime, even where the crime does not explicitly define spectatorship as participation.

The Pennsylvania cases are not the first or only of their kind. For instance, in People v. Cumper, the Michigan Court of Appeals held that a statute that prohibited being “present as a spectator” at a dogfight did not criminalize merely being a witness; as such, the defendants had fair notice of the conduct

131. Id. at 453.
132. Id.
133. Id. at 454–55.
134. Id. at 454 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2188 (1993)).
135. Id.
136. Id.
138. Id. ¶¶ 1, 8.
139. Id. ¶ 4.
140. See id. ¶ 9.
141. Id. ¶ 13.
proscribed.142 Likewise, in *State v. Tabor*, the Supreme Court of Tennessee upheld a statute that prohibited knowingly being present as a spectator at a cockfight.143 The court specifically distinguished the statute at issue from an unconstitutionally vague Hawaiian ordinance that criminalized “presence” at a cockfight.144 Unlike the Tennessee statute, the Hawaii ordinance lacked a knowledge requirement and could have entrapped “innocent tourists harmlessly loitering upon the streets.”145 Numerous other published and unpublished opinions have held along similar lines.146

As these cases show, it is well-accepted that a spectator statute that requires proof of intent and knowledge meets the mens rea requirement, gives the accused fair notice of the conduct proscribed, and is not unconstitutionally vague. A handful of cases also support the argument that spectatorship, on its own, constitutes “participation” in a crime.

C. CRIMINALIZING INTENTIONAL PRESENCE AT A GANGRAPE

Applying the three principles established by the Pennsylvania cases described above, there is no constitutional obstacle to statutes punishing gang rape spectators. Indeed, as the cases reveal, such liability is acceptable and unexceptional. Criminalizing knowing and intentional presence at a gang rape does not violate our constitutional commitment against punishing “mere presence” at a crime scene. In addition, where states have not specifically criminalized spectatorship at a drag race or animal fight, knowing and intentional presence at a gang rape may be prosecuted as a form of “participation” in the gang rape.

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143. 678 S.W.2d 45, 48 (Tenn. 1984).
144. 678 S.W.2d 45, 48 (Tenn. 1984).
145. 678 S.W.2d 45, 48 (Tenn. 1984).
146. See, e.g., People v. Elder, 247 Cal. Rptr. 647, 647 (Cal. Ct. App. 1988) (upholding statute which the court interpreted to require knowing presence as a spectator at an animal fight); People v. Bergen, 883 P.2d, 532, 545 (Colo. App. 1994) (rejecting the argument that a statute that prohibited “knowingly attending a dogfight held for profit or entertainment” criminalized “mere presence”); Gonzalez v. State, 941 So.2d 1226, 1229 (Fla. Dist. Ct. App. 2006) (holding that “[t]he requirement that the conduct be done ‘knowingly’ . . . establishes a level of mens rea required under the statute . . .” and holding that the law was sufficiently clear so that the rule of lenity did not apply); State v. Arnold, 557 S.E.2d 119, 122 (N.C. Ct. App. 2001) (holding that statute which prohibited “participat[ing] as a spectator at an exhibition featuring the fighting or baiting of a dog” was not unconstitutionally vague); State v. Weeks, No. 91-A-1634, 1992 Ohio App LEXIS 1090, at *5–14 (Ohio Ct. App. 1992) (upholding a portion of a statute which prohibited “knowingly purchase[ing] a ticket of admission to [an animal fight] or . . . witness[ing] such a spectacle” but striking down a phrase in the statute that prohibited mere presence at such an animal fight); Edmondson v. Pearce, 91 P.3d 605, 637–38 (Okla. 2004) (rejecting facial constitutional challenge to law criminalizing knowing and intentional presence at a cockfight and dismissing the argument that the law would ensnare innocent passersby); Peck v. Dunn, 574 P.2d 367, 370 (Utah 1978) (upholding an ordinance that criminalized presence as a spectator at an animal fight because it did not criminalize being a “mere passersby”). But see, e.g., Greer v. State, 563 So.2d 39 (Ala. Crim. App. 1990) (holding that being a spectator at a drag race, without some further encouragement of the race, is mere presence); State v. Maravola, 198 N.E.2d 88, 89 (Ohio Ct. App. 1963) (holding that the voluntary presence of persons at a drag race did not constitute “rendering assistance” to a drag race under the statute).
1. Meeting the Mens Rea Requirement

First, knowing and intentional presence at a gang rape involves a conscious choice by the accused; as such, “spectators” at a gang rape meet the mens rea requirement. In the case of the mentally challenged girl from Glen Ridge, New Jersey who was gang raped in a basement, thirteen baseball players assembled in the basement, but six chose to leave. Of the seven who made a knowing and intentional decision to remain, three did not physically participate in the gang rape. Rather, they purposefully remained in the room to watch their comrades do it. They were not “merely present” at the gang rape—they did not happen to walk by and see it, and they were not merely aware that it was going on. Because the decision to watch the gang rape was a conscious choice, these men possessed a guilty mind, and they could have been prosecuted under a “spectator” law for their involvement as “spectators” in the gang rape.

Likewise, the New Bedford, Massachusetts spectators should have been charged. In characterizing the spectators’ involvement as “[m]ere presence,” the prosecutor missed the fundamental distinction between a bystander and a spectator and thereby confused a bystander’s failure to report a crime with a spectator’s encouragement of a crime. This distinction makes all the difference. Had the New Bedford gang rape been the New Bedford dogfight, the spectators would have been prosecuted for their role in the crime without controversy.

Although the circumstances surrounding a drag race or dogfight may differ from those surrounding a gang rape, prosecutors may be able to prove knowledge and intent in all three contexts. Spectators may be told in advance that a dogfight is about to occur, whereas gang rapes may happen more spontaneously or in a setting where individuals are more likely to stumble upon the rape. Advance knowledge could be sufficient to prove that a defendant had the requisite knowledge and intent to participate as a spectator. But evidence of prior knowledge is not necessary, as it is possible to prove mens rea in other ways. In a case where the defendant stumbled upon a gang rape and lingered on the scene, the jury would be entitled to infer that the defendant became a spectator. For instance, in State v. Arnold, the defendant had no plans to attend a dogfight—he was driven to a barn by friends and did not know why they were


148. Press, supra note 122, at 79.

149. I have found only one commentator who has recognized the distinction between witnesses and spectators at a gang rape. Tanya Horeck asks, in reference to the New Bedford gang rape: “But was looking at a spectacle of violence not a form of participation? . . . As report after report was to emphasize, the incident occurred in a public place; rape, a crime historically defined as ‘in its nature commonly secret,’ was opened into its collective dimensions as a public event in which the bystanders ‘spectated’ rather than ‘witnessed’ the assault.” Tanya Horeck, “They did worse than nothing”: Rape and Spectatorship in The Accused, 30 CAN. REV. AM. STUD. 1, 3 (2000). Ms. Horeck’s focus, however, was on the social implications of rape portrayal in film, not the legal implications of the distinction between spectators and witnesses. Id. at 2.
going there.\textsuperscript{150} The court held that, because the defendant was arrested after being present at the dogfight for ten minutes, there was sufficient evidence to prove that he knowingly attended the dogfight as a spectator.\textsuperscript{151} This same reasoning has been used to establish constructive possession of drugs\textsuperscript{152} and would apply to a gang rape, as well. If the defendant stumbled upon the scene of a gang rape, and remained there with his eyes fixed on the rape, it would be proper for a jury to find that he knew precisely what was taking place and that he chose to become a spectator to it.

2. Not Unconstitutionally Vague

Second, a law criminalizing knowing and intentional presence at a gang rape would provide sufficient notice of the conduct proscribed and would not be unconstitutionally vague. The Supreme Court has held that a criminal statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”\textsuperscript{153} An explicitly worded spectator statute would easily meet this standard. Because individuals covered under the statute would not be passersby or mere witnesses to the crime, they would be able to arrange their conduct so as to avoid criminal liability. Some may argue that gang rapes differ from drag races and dogfights in that spectators often purchase tickets or place bets. However, this distinction is illusory because none of the spectator statutes require the purchase of a ticket or any affirmative action other than a conscious choice to watch the drag race or dogfight\textsuperscript{154} (and, indeed, Iowa criminalizes spectating at a dogfight “regardless of whether the person paid admission to witness the contest event”\textsuperscript{155}). As such, there is no meaningful distinction. In each case, individuals have sufficient notice concerning what they must do to avoid criminal liability. Thus, such laws would meet the constitutional standard.

\textsuperscript{150} 557 S.E.2d 119, 121 (N.C. Ct. App. 2001).
\textsuperscript{151} Id. at 123.
\textsuperscript{152} See, e.g., Shipp v. State, 292 S.W.2d 251, 257 (Tex. Ct. App. 1988) (“If Allen knew that drugs were placed in a vehicle that he controlled while he had sufficient time to terminate that possession, but he failed to do so, he could be a joint possessor.” (emphasis added)). The Model Penal Code is in agreement: “Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.” MODEL PENAL CODE § 2.01(4) (2001).
\textsuperscript{153} Kolender v. Lawson, 461 U.S. 352, 357 (1983); see also Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (holding that a criminal statute “must be sufficiently explicit” so that a reasonable person of ordinary intelligence is capable of reading the statute and understanding what conduct is prohibited).
\textsuperscript{155} IOWA CODE ANN. § 717D.2(10) (West Supp. 2010).
3. Knowing and Intentional Presence as “Participation”

Third, in jurisdictions that do not adopt spectator statutes, law enforcement officers should treat those who make a conscious choice to watch a gang rape as participants in the crime. As discussed in section II.B, whether watching a drag race or dogfight constitutes “participation” is an unsettled question. In Commonwealth v. Holstein, the defendant was convicted under a statute that prohibited “in any manner participat[ing]” in a drag race, and court concluded that being a spectator was “participat[i.on].”156 In contrast, in State v. Maravola, the Ohio Court of Appeals held just the opposite.157 The case involved a statute which read that persons “rendering assistance in any manner” to a drag race “shall be equally charged as the participants” in the drag race.158 The court interpreted “assistance” to “connote some activity or some effort” and held that “mere passive presence, without allegation or proof of activity, or even of partisanship, is insufficient to warrant a conclusion of participation.”159 And in two companion cases, Moody v. State and Hargrove v. State, the Georgia Supreme Court interpreted a dogfighting statute that criminalized “allow[ing]” a dogfight to prohibit applause or cheering, actions typical of spectators.160 The court reasoned that “[t]he statute is aimed at those who intentionally participate on any level because without such participation the purpose of dogfighting... would not exist.”161 Thus, the court found that the statute was aimed at those who intentionally participate in dogfighting, and spectators who applaud or cheer could be such participants.

Because of courts’ ambivalence over what constitutes participation, it is possible but not likely that a statute that proscribes “participation” in a gang rape could be interpreted to cover gang rape spectators. Prosecutors should use this argument where states have not passed a gang rape spectator law. This is not the better of the two options, however; it would be preferable for states to explicitly proscribe knowing and intentional presence at a gang rape instead.

Where passive but intentional spectatorship is not “participation,” any active form of encouragement, such as cheering or taking photographs, should constitute “participation” sufficient for complicity liability. For instance, in Hargrove v. State, the Supreme Court of Georgia interpreted a statute prohibiting “causing or allowing a dog to fight another dog for sport or gaming purposes” to proscribe “paying an admission, providing a location or wagering,” or “encourag[ing] the event by applause or cheering.”162 In People v. Nelson, mentioned previously, a woman who encouraged a gang rape and yelled profanities admitted she was complicit in the rape and subsequent murder, and she pled

156. 2007 PA Super 184, ¶¶ 8, 11, 13 (quoting 75 PA. CONS. STAT. § 3367 (2006)).
158. Id. (quoting OHIO REV. CODE ANN. § 4511.251 (1960)).
159. Id.
162. 321 S.E.2d at 107 (quoting GA. CODE ANN. § 16-12-37 (1981)).
guilty to second-degree murder.\footnote{Nos. 283567–70, 2009 WL 2343168, at *2 (Mich. Ct. App. July 30, 2009).} In People v. Higa, the court held that a wife’s hand clapping and vocal encouragement during the rape of her daughter was insufficient to convict for first degree sexual assault under a statute requiring that the actor be “physically aided and abetted” but left open the possibility that on remand her behavior could be found to be sufficient under a complicity theory.\footnote{735 P.2d 203, 206 (Colo. App. 1987). Other Colorado cases similarly distinguish between “physically aided and abetted” liability, which requires that a second person physically assist in the rape, and complicity liability. See, e.g., People v. Osborne, 973 P.2d 666, 671 (Colo. App. 1998).} As these cases illustrate, any form of overt action in a gang rape may already be criminalized (even if rarely prosecuted). Thus, it is possible that the spectators who laughed and took photos at the gang rape of the Richmond high school student could have been held criminally liable, even absent an explicit statutory provision outlawing spectatorship.

In sum, spectator laws do not criminalize “mere presence” at a crime, nor are they unconstitutionally vague. In this way, spectator laws should be less controversial than witness reporting laws, which do target the hapless passer-by or the mere witness.\footnote{See, e.g., Sandra Guerra Thompson, The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory, 11 WM. & MARY BILL RTS. J. 3, 6, 7 (2002) (criticizing reporting statutes as unjustified under a causation theory and arguing for a higher standard of proof to prompt a reporting duty). But see, e.g., Justin T. King, Criminal Law: “Am I My Brother’s Keeper?” Sherrice’s Law: A Balance of American Notions of Duty and Liberty, 52 OKLA. L. REV. 613, 642–43 (1999) (addressing arguments against witness reporting laws).} In addition, where states do not enact gang rape spectator laws, knowing and intentional presence at a gang rape may be “participation” in the gang rape in the same way that being a “spectator” at a drag race or dogfight is “participation” under Pennsylvania and Georgia precedent. Even if spectatorship is not participation, however, any active encouragement of the gang rape should constitute participation. Thus, states have a range of avenues through which they can reach the culpable, but hitherto unaccountable, gang rape spectator.

III. THE EXPRESSIVE AND DETERRENT JUSTIFICATIONS FOR “SPECTATOR” GANG RAPe LAWS

As argued above, spectator gang rape laws are justified because spectators play an important motivating role in the crime. There are numerous other justifications, however. One is that the laws would express disapproval for participating in a gang rape as a spectator. Laws serve an important “expressive” function because laws communicate “a society’s values, what it esteems, what it abhors.”\footnote{Diane Marie Amann, Group Mentality, Expressivism, and Genocide, 2 INT’L. CRIM. L. REV. 93, 118 (2002).} As Cass Sunstein has argued, people often support a law not because of its ability to control conduct but because they “believe that [the law] is intrinsically valuable for the relevant ‘statement’ to be made.”\footnote{Sunstein, supra note 54, at 2026.} A law
criminalizing an act sends a clear statement that society views the act as wrong and worthy of criminal punishment. In other words, the law identifies the kinds of behavior that society is willing to accept and reject. This expressive function leads many to advocate for a law, such as a ban on flag burning or laws allowing capital punishment, regardless of the law’s actual effect on behavior.

Changing a law, however, does more than express approval or disapproval. Because the law carries moral weight, a change in the “statement” the law makes can also shift the social norms that ultimately affect behavior. In this way, the law can be used to “reconstruct existing norms and to change the social meaning of action through a legal expression . . . about appropriate behavior.” By legitimizing or delegitimizing certain conduct, the law can “work directly against existing norms and push them in new directions.” This, in turn, informs individuals’ expectations about the behavior of other people and leads them to conform their behavior to the perceived judgments of others.

Shockingly, the norm among certain groups of men is that gang rape, euphemistically called “pulling train,” is neither morally nor legally wrong. As one gang rapist put it, “few guys thought of [gang rape] as rape. It was viewed as a social thing among hanging partners, like passing a joint.” If men believe the gang rape itself is not wrong, they may have no qualms watching, enjoying, and encouraging the gang rape. By explicitly criminalizing this behavior, states would make a statement that this behavior is societally unacceptable, a statement which could eventually begin to inform and shape young men’s views on gang rape. It would make no difference that gang rape spectator laws may be difficult to enforce; these laws still have an expressive function and can reconstruct social norms by “inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm.”

168. Id. at 2031.
169. Id.
170. Id. at 2032.
171. See Lois G. Forer, Foreword to SHANDAY, supra note 72, at 23 (noting that fraternity members call gang rape “pulling train” and that they “consider this acceptable, indeed normal, conduct”); see also LEFKOWITZ, supra note 1, at 246–47 (noting that many people blame the victim while excusing the gang rapists and citing the statistic that forty-two percent of females believe that it is “legitimate and acceptable behavior” for a man to force sex on a woman if the man is aroused by the victim).
172. McCALL, supra note 94, at 44. McCall participated in his first gang rape at the age of fourteen. Id. at 45–47. Despite his belief that gang rape is no worse than passing a joint, he clearly sees the harm it causes:

        I always wondered what went on inside girls’ heads when that was happening to them.

        Most girls seemed to lose something vital inside after they’d been trained. Their self-esteem dropped . . . . That happened to a girl named Shirley, who was once trained by Scobe and so many other guys that she was hospitalized.

Id. at 45.
173. Sunstein, supra note 54, at 2032. But see Amann, supra note 166, at 120 (“Condemnatory pronouncements that carry no consequences initially may cultivate a norm; in time, however, chronic nonenforcement will strip the articulated norm of the moral authority on which effective criminal law
Once a baseline norm is established that spectatorship in gang rapes is both criminal and morally wrong, it would be possible to create a subsidiary norm, one that encourages potential spectators to intervene. Researchers are beginning to understand the power of bystanders in preventing, rather than motivating or encouraging, rapes. The key to a bystander’s willingness to intervene is the bystander’s own beliefs or attitudes toward rape.174 “[L]imited but promising” findings indicate that through changing bystander norms, it is possible to reduce the acceptance of rape myths, increase the incidence of bystander intervention in rapes, and consequently decrease the likelihood that rapes will occur.175 These programs demonstrate that, when would-be spectators possess the right norms—norms that are in no small part influenced by the law—bystander intervention can be “a powerful prevention tool to ultimately reduce the occurrence of rape.”176

A second justification for “spectator” gang rape laws is their potential deterrent effect. Because gang rapes tend to involve young men,177 a change in the “statement” of the law may have an even greater impact on gang rapes than it would on crimes that tend to involve older offenders. One study on the efficacy of witness reporting laws found that participants under the age of twenty-five were more likely to intervene and report a gang rape when the law required them to do so.178 The law influenced their behavior more than it influenced the behavior of older participants in the study. The authors explained that “younger persons are more responsive to law mandates” because they are still in the “conventional” stage of moral development, where individuals judge the morality of an action by comparing it with society’s views.179 During adolescence and early adulthood, individuals seek to “align [their] behavior in accordance to social depends.”). See generally Ryan Goodman, Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics, 89 CAL. L. REV. 643 (2001) (studying the social effects of unenforced sodomy statutes).

174. See Sarah McMahon, Rape Myth Beliefs and Bystander Attitudes Among Incoming College Students, 59 J. AM. C. HEALTH 3, 3–4 (2010) (“One of the factors that may influence whether bystanders intervene in situations involving sexual assault relates to their beliefs about rape and rape victims. Previous yet limited research suggests that an individual’s willingness to intervene may be impacted by their perception of rape victims’ ‘worthiness,’ responsibility for their own assault, and beliefs in other rape myths.”).

175. See id. at 4 (noting that one program called The Men’s Program has “demonstrated long-term changes in men’s attitudes and behavior, including decreases in rape myth acceptance and likelihood of raping, increases in empathy towards rape victims, increased willingness to curtail sexist comments, and a greater likelihood to offer support to rape victims”).

176. Id. at 3.

177. One study found that seventy-seven percent of convicted gang rapists fell between the age of seventeen and twenty-seven. The average age of offenders was twenty-three. GROTH WITH BIRNBAUM, supra note 55, at 111.


179. Id.; see also id. at 720 n.45 (noting that at the conventional stage of moral development, which includes stages three and four, “moral judgment is concerned with earning the approval of others by . . . conforming one’s behavior to the majority’s stereotypical expectations” and by showing “respect for law and order, established authority, and existing moral imperatives”).
expectations and norms”—expectations that are informed, in part, by the law. Thus, by criminalizing presence as a spectator at a gang rape, states can shift societal expectations and norms—norms that will inform young men’s senses of moral judgment and, perhaps, influence their behavior accordingly.

Even if spectator liability does not appreciably reduce the occurrence of gang rapes, the laws would still serve the important function of expressing society’s moral opprobrium. If that is the case, spectator laws would be no different than a number of other criminal laws. For instance, dogfighting laws are difficult to enforce, and dogfighting is rarely prosecuted, which may make such laws less effective; nevertheless, the laws remain on the books. This is perhaps because the laws still serve the important function of expressing condemnation for animal cruelty.

A final justification is that “spectator” gang rape laws would help to bring about justice for the victims of gang rapes. It seems fundamentally unjust that the law ignores individuals who play such an important motivating role in the gang rape, even as the law recognizes this same role in much less heinous crimes such as drag races and dogfights. By themselves, spectators inflict additional and unique harms on the victim, harms that are above and beyond those imposed by the rapists. Spectators increase the victim’s shame and humiliation, both by standing as living witnesses to the rape, and often by taking pictures, laughing, or making derogatory remarks. These additional psychological harms are likely to linger long after the physical pain has passed away. Spectators should be held liable for the substantial role they play in gang rapes, not only so that this behavior is deterred in the future, but also so that the blameworthy are punished and the victim’s suffering is fully avenged.

IV. A Case Study—The Glen Ridge Gang Rape

One infamous incident, the Glen Ridge gang rape, involved both gang rapists and spectators and demonstrates the principles outlined in this Note. In addition to delineating the three distinct classes of individuals described above—gang rapists, spectators, and individuals who chose not to remain and watch the rape—this case illustrates three important propositions: first, that it is possible to determine that a group member was a knowing and intentional spectator; second, that prosecutors did not believe that two of the seven gang members’ presence as spectators, in itself, was sufficient to trigger criminal liability; and third, that the gang members, including the spectators, interacted with each other through the rape and committed the rape as a group and even as a team.

A. FACTUAL BACKGROUND

On March 1, 1989, a mentally retarded girl (called “Leslie Faber” by an
author retelling the story) was invited by high school junior Chris Archer to join a “party” in a basement. Leslie, who had an IQ of 49, was highly manipulable and eager to please anyone she thought of as a friend. Chris led her to the basement, where thirteen male athletes were congregating. Some of the boys began to set up a line of folding chairs facing the sofa—in Leslie’s words, as though “they were getting ready to ’watch a movie.’” Chris Archer led her to the sofa, where she sat down next to Bryant Grober. Before long, Bryant pulled his pants down and, with his hand on the back of her head, forced her to perform oral sex. Chris Archer asked her to remove her clothes; she looked puzzled, but complied (a jury later found that she was so mentally handicapped as to be incapable of saying “no”). Six of the thirteen athletes in the basement began to feel uncomfortable. At least one of them knew Leslie was “’slower’”; he saw Leslie’s confused expression and sensed that “[s]omething wasn’t right there.” Finally, one athlete said, “’Let’s get out of here.’” Six athletes began to leave; one of them said to Paul Archer, “’It’s wrong. C’mon with me.’” Paul said nothing and chose to stay, along with the other six in the basement.

After removing her clothes, Leslie was raped with a broomstick, the wide end of a baseball bat, and a small stick. Kyle Scherzer covered the bat and broomstick with a plastic bag coated in Vaseline, then gave the broomstick to his brother, Kevin, who inserted the stick into Leslie’s vagina. Richard Corcoran encouraged Kevin to “[g]o further, go further.” After Kevin finished with the broomstick, Kyle handed the vaseline-coated bat to Chris Archer, who inserted it into Leslie’s vagina. Leslie began to cry; the physical trauma was so severe that she urinated blood the next day. Richard Corcoran went last and raped Leslie with the small stick. All throughout, the boys laughed, snickered, encouraged one another to go further, and called her a whore.

When it was all over, Leslie’s attackers warned her not to tell anyone.

182. LEFKOWITZ, supra note 1, at 17.
183. Id. at 163.
184. Id. at 18, 20.
185. Id. at 19.
186. Id.
187. See id. at 374–75.
188. See id. at 317, 407.
189. Id. at 317.
190. Id. at 20.
191. Id.
192. Id.
193. Id. at 303, 345–46.
194. Id. at 345.
195. Id.
196. Id. at 346.
197. Id. at 21, 376.
198. Id. at 346.
199. Id. at 21.
200. Id.
Then the boys joined their hands in a circle, one on top of the other, as if they had just performed as a team in a sports match. Leslie recalled later, “It was just like one-two-three win!”

Four of the seven gang members were prosecuted for their involvement in the rape. Kevin Scherzer and Chris Archer were prosecuted for penetrating Leslie with the bat and broomstick; Kyle Scherzer was prosecuted for preparing the bat with a plastic bag; and Bryant Grober was prosecuted for engaging in fellatio.

The other three participants were never prosecuted, despite evidence that they were actively involved in the rape. The charges against Richard Corcoran were dropped, probably because Leslie’s statements against him were too inconsistent. But the other two, Peter Quigley and Paul Archer, were not prosecuted because the prosecutor wanted to “just focus on the guys who actually did some type of penetration.” The jury indictment alleged that Peter Quigley “asked [Leslie] to masturbate him and she did” and that he laughed and cheered on Kevin and Chris as they raped her with the broomstick and bat. Leslie told prosecutors she had masturbated Paul Archer, as well, and Paul was indicted. Even with Leslie’s testimony, prosecutors could not corroborate Peter and Paul’s physical participation and did not believe that they could be held criminally liable otherwise.

B. ANALYSIS AND APPLICATION

The Glen Ridge case illustrates several key points. First, six of the thirteen athletes realized that something wrong was about to take place, and they chose to leave. The other seven made a knowing and intentional decision to remain in the basement, despite having a clear opportunity to walk out and despite other classmates’ encouragement to leave. This episode demonstrates that it is possible to separate those who made a choice to act as spectators from those who did not.

201. Id.
202. Id.
203. Id. at 300. Chris and Kevin were each convicted of two counts of first-degree aggravated sexual assault and one count of second-degree conspiracy; Kyle was convicted of first-degree and second-degree aggravated sexual assault and one count of second-degree conspiracy; Bryant was convicted of third-degree conspiracy to commit aggravated sexual assault and aggravated sexual contact. Id. at 406–07.
204. Id. at 427.
205. Id. at 281.
206. Id. at 273.
207. Id. at 283; see also State v. Scherzer, 694 A.2d 196, 209 (N.J. Super. Ct. App. Div. 1997) (noting that “a superseding indictment was obtained charging all eight defendants,” including Paul Archer).
208. See LEFKOWITZ, supra note 1, at 283. And besides, prosecutors knew Paul was a “dashing, handsome, baby-faced kid” with “soft brown eyes that could melt a stone”; putting him on trial “would not enhance the prosecution’s case.” Id. at 283–84. In the end, both Peter and Paul signed statements and pled guilty to endangering the welfare of an incompetent person, a “disorderly persons offense.” Scherzer, 694 A.2d at 209. Peter performed sixty hours of community service, and all charges were wiped from his record after six months. LEFKOWITZ, supra note 1, at 283.
Second, prosecutors did not believe that two of the seven gang members’ presence as spectators, without evidence of physical involvement, was sufficient to trigger criminal liability. Their position leaves an enormous void in gang rape prosecutions. It excuses gang rape spectators who intentionally watch and enjoy the rape, and it excuses gang rapists who physically commit the rape but whose acts cannot be proven. Here, prosecutors felt that it was unjust that Paul Archer and Peter Quigley would not be prosecuted, but the difficulty of corroborating physical acts left the prosecutors with nothing to hang their hats on. Had New Jersey criminalized knowing and intentional presence as a spectator at a gang rape, prosecutors would have had some avenue to pursue two clearly culpable individuals whose actions facilitated the crime.

Third, the fact that all seven boys circled around and put their hands together at the end of the rape illustrates the extent to which gang rapists commit the rape as a group and even as a team. It shows that a gang rape is not merely a succession of isolated, individual rapes but that it is a collective act by an entire group—that all the gang members, including the spectators, interact and participate with each other through the rape.

The Glen Ridge case illustrates one last key point. From this case, we can draw the defining lines for criminal liability in gang rapes into three classifications—the physical perpetrators of the rape, the spectators, and the witness who is “merely present,” who is either a mere passer-by or who chooses to not stay and watch. Those who perpetrate the rape itself—here, Kevin and Kyle Scherzer, Chris Archer, and Bryant Grober—should be prosecuted for rape, as they were in this case. Those who choose to leave at the beginning of the rape or who just happen to be walking by—here, the six athletes who knew something was wrong and left—should not be held criminally liable or should, at most, be held liable for failing to report the crime to police (in states that have witness reporting laws). These are the clear-cut cases, but leaving it here does not do justice for gang rape victims. The group members in the middle, the “spectators” who knowingly and intentionally watched the rape, should be held liable for more than failing to report the crime because that does not reflect the extent of their involvement. Where possible, they should be held liable as aiders and abetters; and in all cases, whatever their degree of complicity, they should be held liable as spectators of the gang rape.

As such, states should adopt legislation criminalizing knowing and intentional presence as a spectator at a gang rape. State legislatures could decide that the criminal penalties should not be as severe as penalties for physically perpetrating the rape, as the two crimes are not commensurate. But their participation as spectators in the gang rape should be formally recognized as a

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209. See id. (noting prosecutors’ feeling that dropping the charges against Paul “was wrong” but that prosecutors could not corroborate that Leslie had masturbated him).
210. In the context of dogfighting, it is a felony to fight dogs in all 50 states and a felony to possess dogs for fighting in 47 states, but it is a misdemeanor to be a spectator at a dogfight in 21 states and Puerto Rico. See The Humane Society of the United States, supra note 48.
crime. Even if spectators receive the same sentence as those convicted under witness reporting statutes, the label on the conviction matters. When required to disclose a prior conviction on job applications, it is one thing to disclose a conviction for failing to report a crime; it is quite another thing to disclose a conviction for participating in a gang rape as a spectator. Justice for the victims of gang rape will never fully be served until the law recognizes the essential role spectators play in gang rapes and holds spectators accountable for their acts.

CONCLUSION

The principal idea is elemental but far-reaching: spectator liability is a well-established form of liability that is particularly appropriate for audience-oriented crimes, and gang rape is one of those crimes. States have recognized that spectators are an important motivating factor in drag races and dogfights. Likewise, the audience in gang rapes is an important and even necessary component of the crime. “Followers” in gang rapes rape only in the context of a group, and the entire purpose of the gang rape is to perform sexually in the presence of others. Because the presence of an audience is a key motivation for those who perpetrate gang rapes, as it is with drag races and dogfights, punishment for culpable spectators is justified.

Although spectator laws are not entirely immune from criticism, it is well-accepted that these laws do not criminalize “mere presence,” nor are they unconstitutionally vague. By requiring that a spectator be knowingly and intentionally present at the gang rape, such laws satisfy the mens rea requirement and provide adequate, even ample, notice of the conduct that is proscribed. The knowledge and intent requirements ensure that the law does not punish people who are mere passersby but reaches only the individuals who are part of the group and, therefore, whose presence motivates or influences the physical perpetrators of the gang rape.

In addition to punishing the culpable, spectator laws would play an important expressive role and would, perhaps, deter future gang rape spectators or perpetrators. By criminalizing this behavior, the law would send a clear message that society finds the behavior reprehensible and worthy of punishment. This, in turn, would inform and shape individuals’ moral judgments and affect their behavior. The possibility of criminal punishment may deter the behavior, as well.

Finally, punishing gang rape spectators would bring about justice for the victims. The spectators are an integral part of the crime; they are not mere witnesses. Their presence encourages and enables gang rapists to do the unthinkable. In turning a blind eye to spectators’ involvement in gang rapes, the law has turned its back on the victims, as well. It is time for the law to fully redress the harm done to victims of gang rapes. It is time to hold spectators accountable for their wrongs.