All It Takes for Evil to Triumph is for Good Men to Do Nothing: Modifying the Model Penal Code to Prosecute Passive Bystanders to Sexual Assault

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I. INTRODUCTION

Nearly every woman I know has experienced some form of sexual assault. It is impossible to overstate the seriousness of the crime. There is also no way to overstate the level of confusion surrounding the law regarding sexual assault—every state has different definitions of what they consider sexual assault; every state has different sentencing requirements and guidelines. And this does not begin to scratch the surface when it comes to the expectations that states may or may not have of bystanders to crimes of sexual assault.

In the realm of criminal law, there is a theory called "nonconsequentialism" that justifies punishment for committing crimes.[1] The theory proclaims that actions are morally right or wrong in and of themselves.[2] The primary theory of punishment in nonconsequentialism is called retributivism, which typically involves looking back at the harm caused by a crime and adjusting the punishment to match.[3] Say, for example, Person A saw Person B being

[1] CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 6 (W. Acad. 3rd ed. 2014) (2005).

[2] *Id.*

[3] *Id.* at 6–7.

sexually assaulted, but Person A refused to intervene and chose not to report the sexual assault to the authorities. If someone were to look at Person A's inaction through a retributive lens, they would come to the conclusion that there should be some sort of punishment assigned to Person A to match the harm done to Person B. However, most states in the United States do not have laws in place to facilitate this type of prosecution, and most states do not have laws criminalizing nonintervention.

This Note will address why courts across the United States should have the ability to prosecute these passive bystanders to sexual assault, regardless of the age of the victim or their identity, and will discuss how the Model Penal Code (MPC) should be modified with a narrowly tailored provision in order to facilitate these prosecutions. The purpose of this Note is not simply to explain *why* this section of the MPC should be updated, but to propose *how* it should be updated. The MPC should be changed so that it contains a provision that will require bystanders to either report instances of sexual assault (including rape) to the local authorities, or take immediate action to intervene or assist the victim so long as a reasonable person would believe that taking action would not imperil themselves or the victim. These modifications to the MPC would help protect potential victims and could theoretically reduce the number of sexual assaults committed in this country.

II. BACKGROUND

The first part of this section will cover basic statistics about sexual assault in America. These statistics will show how often sexual assault occurs and the methodology of how that data was collected. These statistics will also help explain how victims rarely come forward to report instances of sexual assault, followed by a brief explanation of two different cultural phenomena that contribute to the fear victims have of coming forward to report a sexual assault along with the stigma that can be associated with being considered a "victim."

The second part of this section will describe the facts of several cases where bystanders were present but failed to take action during a sexual assault, followed by two cases where the actions of bystanders prevented further harm from befalling the victims. There is an important caveat in each of the latter cases, that the bystanders were all fully aware that the sexual assaults were taking place. Some of these cases involve minors, both as the victims of the assault and as the perpetrators, and the locations of the assaults range from a motel room to a dark high school courtyard. The third part of this section will explain city ordinances, state statutes, and federal statutes that impose a general duty on bystanders to report a crime or assist victims in emergency situations.

A. Statistics on Sexual Assault

The National Crime Victimization Survey (NCVS) is the primary source of information on the nature of criminal victimization incidents.[4] The NCVS is an annual data collection led by the U.S. Census Bureau for the Bureau of Justice Statistics (BJS).[5] The NCVS's data is obtained each year on the frequency, characteristics, and consequences of criminal victimization in the United States, and the information is taken from a nationally representative sample of about 134,690 households and 224,520 persons.[6] The NCVS collects information on nonfatal personal crimes, including rape and sexual assault, both reported and not reported to police.[7]

According to the NCVS, in 2014 only 33.6% of rapes and sexual assaults were reported to the police, while in 2015 the percentage of rapes and sexual assaults reported to the police was 32.5%.[8] Those numbers may seem large to some, but to give a comparative number, in 2014 the percentage of robberies reported was 60.9%, the number of burglaries reported was 60.0%, and the number of motor vehicle thefts reported was 83.3%.[9]

The Rape, Abuse & Incest National Network (RAINN), the nation's largest anti-sexual violence organization, reported that a sexual assault occurs every seventy-three seconds in the United States.[10] RAINN offers more statistics on the effects that sexual assault and rape can have on women in particular: 94% of women who are raped experience symptoms of post-traumatic stress disorder (PTSD) during the two weeks following the rape; 30% of women report symptoms of PTSD nine months after the rape; 33% of women who are raped contemplate suicide; 13% of women who are raped attempt suicide.[11] Roughly 70% of rape/sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.[12] And of every 1000 rapists, only five will end up in prison.[13]

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[4] Bureau of Justice Statistics, *Data Collection: National Crime Victimization Survey*, OFF. JUST. PROGRAMS, [https://perma.cc/T6AK-63DX] (last visited Apr. 29, 2020).

[5] *Id.*

[6] Rachel E. Morgan & Grace Kena, *Criminal Victimization, 2016*, BUREAU OF JUST. STATISTICS 14 (Dec. 2017) [https://perma.cc/XTS3-HUGH].

[7] Bureau of Justice Statistics, *supra* note 4.

[8] JENNIFER L. TRUMAN & RACHEL E. MORGAN, CRIMINAL VICTIMIZATION, 2015, at 6 (2018), [https://perma.cc/Z6KK-R6VJ].

[9] *Id.*

[10] *About RAINN*, RAINN, [https://perma.cc/G3HX-XQNK] (last visited Apr. 29, 2020).

[11] *Victims of Sexual Violence: Statistics*, RAINN, [https://perma.cc/P5G9-YRF9] (last visited Apr. 29, 2020).

[12] *Id.*

[13] *Id.*

1. Victim Blaming and the Bystander Effect

There are many reasons victims fail to come forward to report their experiences with sexual assault, including the fear that they will be blamed in some way for the crime that was committed against them.[14] This is a phenomenon called "victim blaming," and a common way to define this phenomenon is "a devaluing act where the victim of a crime, an accident, or any type of abusive maltreatment is held as wholly or partially responsible for the wrongful conduct committed against them."[15] This attitude can play into what is known as the "bystander effect," which is a social psychological phenomenon in which individuals are less likely to offer assistance to a victim in an emergency situation when other people are present.[16] The greater the number of bystanders, the more it discourages the individual from offering assistance.[17] If a bystander thinks that the victim of a sexual assault is somehow at fault for the crime, the bystander may be even less likely to put themselves forward to intervene in that situation.[18] Psychologists believe that the tendency to blame the victim may come from, paradoxically, a deep need to believe that the world is a safe and fair place, meaning that the tendency to blame the victim is ultimately self-protective.[19] Blaming a victim for their misfortune at the hands of others—saying the victim must have done something to bring their troubles on themselves—allows outsiders to reassure themselves that, because the world is a good place, nothing bad will happen to *them*.[20] Victim blaming acts as a mental security blanket for some people, because while they logically know that bad things do happen to good people, they cannot face the idea that those bad things may randomly befall them at any time.[21] The problem is that victim blaming sacrifices one person's well-being for another person's peace of mind; "it overlooks the reality that *perpetrators* are to blame for acts of crime and violence, not victims."[22]

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[14] David B. Feldman, *Why Do People Blame the Victim?*, PSYCHOL. TODAY (Mar. 2, 2018), [https://perma.cc/EW3W-UTL7].

[15] *Victim Blaming Law and Legal Definition*, US LEGAL, [perma.cc/X7YE-XS45] (last visited Apr. 29, 2020).

[16] *Bystander Effect*, PSYCHOL. TODAY, https://www.psychologytoday.com/us/basics/bystander-effect (last visited Apr. 29, 2020).

[17] *Id.*

[18] *See* Ruth Marcus, *Alleged Rape in Barroom Troubles New Bedford*, WASH. POST (Mar. 21, 1983), [perma.cc/PQ9V-2UX3].

[19] Feldman, *supra* note 14.

[20] *Id.*

[21] *Id.*

[22] *Id.*

B. Cases Lacking Bystander Intervention

This section will discuss several cases in which bystanders to sexual assault have failed to immediately take action to either intervene in a sexual assault or alert authorities about the occurrence of a sexual assault. Each case in this section has reached various levels of public prominence across the nation. Each case involved at least one bystander, at least one victim, and at least one perpetrator, though often there are multiple bystanders and perpetrators. Every victim in the following examples was female, but they fall across a wide range of ages.

1. The Rape and Murder of Kitty Genovese

The mythos surrounding the term "bystander effect" can be traced to a case that has been called the prime example of the apathy, moral decay, and urban despair of American society.[23] This case introduced the term "bystander effect" to the mainstream American vocabulary when the word "apathy" could not quite define the phenomenon that led to the gruesome rape and murder of Kitty Genovese.[24] Catherine "Kitty" Genovese was a twenty-eight-year-old woman living in Queens, New York.[25] On March 13, 1964, at about three A.M., she was attacked by Winston Moseley, a resident of Queens and a serial rapist.[26]

There have been many varied accounts of the attack. The *New York Times* article that originally covered the incident has been debunked in several ways, particularly regarding the number of witnesses who actually *saw* the attack as opposed to *hearing* it.[27] However, the bare bones of that original coverage are accurate: the incident occurred at Genovese's apartment complex, and people heard her screaming as Moseley, a stranger, attacked her with a knife.[28] During that first attack, someone yelled out the window "let that girl alone" which scared Moseley away for a brief period of time.[29] Injured, but not

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[23] Alexander Nazaryan, *The Lie of Kitty Genovese's Murder Lives on as Allegory of Urban Despair*, NEWSWEEK (May 29, 2016, 9:00 AM), [https://perma.cc/LCB6-262H].

[24] Angus Johnston, *Don't Look Now*, NEW INQUIRY (Mar. 27, 2014), [https://perma.cc/D8UN-7C3A].

[25] Neta Alexander, *Kitty Genovese Didn't Die Alone: Debunking the Murder Myth That Shaped New York*, HAARETZ (Jan. 22, 2017), [https://perma.cc/J89J-QGTH].

[26] *Id.*

[27] *See* Martin Gansberg, *37 Who Saw Murder Didn't Call the Police; Apathy at Stabbing of Queens Woman Shocks Inspector*, N.Y. TIMES (Mar. 27, 1964).

[28] Johnston, *supra* note 24.

[29] Stephanie Merry, *Her Shocking Murder Became the Stuff of Legend. But Everyone Got the Story Wrong.*, WASH. POST (June 29, 2016), [https://perma.cc/6XUA-L22U].

fatally, Genovese managed to get inside a vestibule of one of the buildings, but Moseley came back and raped and fatally injured her.[30]

The original *New York Times* article did not cover the fact that Genovese's friend and neighbor, Sophia Farrar, came running down the stairs to be with her and held Genovese as she died.[31] This moment was later captured by Genovese's brother, who said "[a]ll five-foot-nothing of her went flying down the stairs at 3:30 in the morning . . . She doesn't know what she's going to come upon. She hadn't given a second thought to whether the guy was still there or not."[32] There were also two men present that night, Joseph Fink and Karl Ross, both of whom could have immediately done something to help Kitty Genovese.[33] But that did not happen. Fink, a doorman at an apartment building across the street from where the first attack occurred, sat at his post for several minutes and watched Moseley attack and stab Genovese.[34] He watched, did nothing, and went to bed.[35] Later, during the second attack in the vestibule of the apartment building, Ross was the only one who could hear it as it happened.[36] "He hesitated, then opened the door to his apartment," and saw Moseley stabbing and raping Genovese "just a flight of stairs away."[37] He allegedly "looked into her eyes, and those of her attacker. And then he closed the door."[38]

But unlike Fink, Ross did not go to sleep; he called a friend and asked for advice on what he should do.[39] "When that friend told him to stay out of it, he called another . . . [and] that friend told him to come over to her house," which Ross did by climbing out his window to avoid going past Genovese and her attacker.[40] When Ross got to his friend's house, that friend called a third person, and that third person called the police.[41] When the *New York Times* reported on the rape and murder, Ross told police "I didn't want to get involved."[42] However, the *Times* did not say that Ross had a more personal

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[30] Nicholas Lemann, *A Call for Help: What the Kitty Genovese Story Really Means*, NEW YORKER (Mar. 3, 2014), https://www.newyorker.com/magazine/2014/03/10/a-call-for-help.

[31] Merry, *supra* note 29 .

[32] *Id.*

[33] Johnston, *supra* note 24.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Johnston, *supra* note 24.

[40] *Id.*

[41] *Id.*

[42] *Id.*

attachment to the case: "[h]e knew Kitty Genovese. They were friends."[43] There had been mutual recognition when he saw her being stabbed in his lobby, and by one account she had even called him by name while Ross turned away from the sight of Kitty's distress.[44] Even though Ross may have internally struggled over how to act more than the disinterested Fink, both Fink and Ross witnessed the attacks with their own eyes and did not immediately alert the authorities or immediately intervene, and as a result they allowed Moseley to rape and murder Kitty Genovese.[45]

2. The Sexual Assault and Murder of Sherrice Iverson

Many outraged Americans called for the prosecution of bystanders to sexual assault in the wake of a more recent case.[46] In a Nevada casino around 4 A.M. on May 25, 1997, high school senior Jeremy Strohmeyer forced seven-year-old Sherrice Iverson into a bathroom stall, where he molested her, slowly strangled her, and when he thought she might still be breathing, tried to snap her neck the way he had seen it done on television.[47] Then he stuffed her small body in the toilet and left.[48]

Strohmeyer's friend and fellow high school senior, David Cash, witnessed Strohmeyer force Sherrice into the stall.[49] Cash hoisted himself up, leaned over the stall, and saw Strohmeyer covering Sherrice's mouth with one hand and touching her with the other.[50] Cash tapped Strohmeyer on the head, but did nothing further to intervene.[51] Then, he left the bathroom.[52] When Strohmeyer finally exited the bathroom less than half an hour later, he

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[43] *Id.*

[44] *Id.*

[45] Johnston, *supra* note 24.

[46] Natalie Perrin-Smith Vance, *My Brother's Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes*, 36 CAL. W. L. REV. 135, 135 (1999).

[47] Rachel Crosby, *In Strohmeyer Case, 'Bad Samaritan' David Cash Led to New Law*, LAS VEGAS REV.-J. (May 19, 2017, 6:42 PM), [perma.cc/D64U-5N8J] [hereinafter Crosby, *Bad Samaritan*]; *Affidavit: Teen confessed to girl's assault, murder* LAS VEGAS SUN (June 3, 1997 11:32 AM) https://lasvegassun.com/news/1997/jun/03/affidavit-teen-confessed-to-girls-assault-murder/.

[48] Michael Kelly, *'Somebody Else's Problems'*, WASH. POST (Sept. 9, 1998) [https://perma.cc/ETT7-R6EH].

[49] Crosby, *Bad Samaritan supra* note 47.

[50] Kelly, *supra* note 48.

[51] Rachel Crosby, *7-year-old Girl's Murder at Nevada Casino Still Haunts 20 Years Later*, LAS VEGAS REV.-J. (May 19, 2017, 12:17 PM), [perma.cc/8JRD-Q9R3] [hereinafter Crosby, *Murder at Nevada Casino*].

[52] *Id.*

admitted that he had molested and killed Sherrice.[53] Cash later said he was curious about why Strohmeyer had done those things, but had not planned on asking him about it.[54] Instead, Cash only put forth one query: he wanted to know if the little girl had become sexually aroused.[55]

Though Jeremy Strohmeyer was later tried and convicted for his crimes, David Cash was never charged, tried, or subjected to any legal repercussions.[56] There was no law in place that would allow prosecutors to charge him.[57] His high school, Woodrow Wilson High School in Long Beach, did ban "Cash from attending prom, his final days of class and graduation" after news of the crime broke.[58] Cash had a few thoughts to share on the matter: "I'm pretty (expletive) pissed off -- I think school officials have been a bunch of cowards," he said in an interview.[59] He further explained "I'll sue them eventually. They deprived me of two weeks of education. I figure I'll probably get a couple of million off that. I'm entitled to my education."[60]

Cash enrolled at the University of California, Berkeley in the fall of 1997, and critics lamented that the school had allowed him entry based on his grades while ignoring his lack of moral character.[61] He graduated in December 2001 with a bachelor's degree in nuclear engineering—but not without pushback from his fellow students, who tried and failed twice to have him thrown out.[62] During one particular incident, a twenty-four-year-old was arrested for misdemeanor battery after spitting in Cash's face.[63] When Cash was asked if he felt appalled by Jeremy Strohmeyer's actions, he responded "I'm not going to get upset over somebody else's life . . . I just worry about myself first. I'm not going to lose sleep over somebody else's problems."[64]

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[53] Cathy Booth-Berkeley, *The Bad Samaritan*, TIME (June 24, 2001), [https://perma.cc/9YV8-WJTW].

[54] Bill Gang, *Pal Detailed Strohmeyer's Play with Girl*, LAS VEGAS SUN (Aug. 15, 1997, 9:39 AM) [https://perma.cc/ZW9R-AVDD].

[55] Booth-Berkeley, *supra* note 53.

[56] Crosby, *'Bad Samaritan'*, *supra* note 47.

[57] *Id.*

[58] *Cashing in on Tragedy Illuminates Society's Problems*, DAILY BRUIN (Aug. 9, 1998, 9:00 PM), [https://perma.cc/Q44Z-VLG7].

[59] Cathy Scott, *Suspect's Friend to Sell Story*, LAS VEGAS SUN (June 18, 1997, 11:53 AM), [https://perma.cc/TG36-NT98].

[60] *Id.*

[61] *See Berkeley Students Remain in Uproar Over David Cash*, LAS VEGAS SUN (Oct. 1, 1998, 10:44 AM), [https://perma.cc/BWU5-PX8B]. *See also Cashing in on Tragedy Illuminates Society's Problems*, *supra* note 59 (arguing that David Cash's apathy towards the crime he witnessed demonstrates his lack of moral character).

[62] Crosby, *'Bad Samaritan'*, *supra* note 47.

[63] *Id.*

[64] Kelly, *supra* note 48.

When asked why he hadn't turned Strohmeyer in, he said he "didn't want to be the person who takes away . . . his last night of freedom."[65] He also indicated that Strohmeyer was still a friend because "[h]e didn't do anything to me."[66] "When he was asked if he felt worse for the dead girl or for her murderer . . . he said: 'Because I know Jeremy, I feel worse for him. I know he had a lot going for him.'"[67]

3. The Gang Rape of a Teenage Girl in a High School Courtyard in Richmond, California

In 2009, in Richmond, California, another egregious instance of bystander apathy occurred in a dark high school courtyard during a homecoming dance.[68] The victim, a sixteen-year-old girl, was subjected to sexual abuse by at least ten people. She was assaulted for more than two hours, in front of ten to twenty additional bystanders comprised of adult men and boys, before another girl heard about the attack and alerted local authorities.[69] By the time the police arrived, the victim was slumped under a picnic table, naked except for her homecoming dress bunched around her waist, unconscious, and covered in the DNA of roughly ten people.[70]

None of the bystanders could be charged because the California statute mandating the report of sexual abuse of a minor only applied to minors under the age of fourteen.[71] Because the victim was sixteen, she was considered too old for the bystanders to be prosecuted under that statute.[72] Richmond Police Lieutenant Mark Gagan said "[w]e do not have the ability to arrest people who witnessed the crime and did nothing . . . . [t]he law can be very rigid."[73] It did not matter that the victim was urinated on, kicked in the head, or

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Malaika Fraley, *Man Convicted in Richmond High Gang Rape Describes Sexual Assault*, MERCURY NEWS (June 20, 2013, 12:08 PM), [https://perma.cc/VY9H-7N9G] [hereinafter Fraley, *Man Convicted in Richmond High Gang Rape*].

[69] Malaika Fraley, *Richmond High Gang Rapists Receive 33-, 29-Years-to-Life Prison Terms*, E. BAY TIMES (Aug. 15, 2013, 10:08 AM), [perma.cc/S42T-B8VK] [hereinafter Fraley, *Richmond High Gang Rapists*]; *Police: As Many as 20 Present at Gang Rape Outside School Dance*, CNN (Oct. 28, 2009, 9:03 AM), [https://perma.cc/MFR5-9KF6].

[70] *Id.*; *Man Convicted in Richmond High Gang Rape*, *supra* note 69.

[71] CAL. PENAL CODE § 152.3 (West 2001).

[72] *Police: As Many as 20 Present at Gang Rape Outside School Dance*, *supra* note 69.

[73] *Id.*

violated with the antennae of a walkie-talkie.[74] It didn't matter that ten to twenty people had stood around and cheered.[75]

One sixteen-year-old witness spoke about what he saw when another bystander called him over to watch.[76] He said "[s]he was pretty quiet; I thought she was like dead for a minute but then I saw her moving around, I was like, 'Oh.'"[77] He said he watched the rape for fifteen to twenty minutes, but said he never called the police because he did not have a cell phone and he was afraid.[78] He also said "I really wanted to help her but I don't know, I just didn't . . . I feel like I could have done something but I don't feel like I have any responsibility for anything that happened."[79]

There are too many instances in which at least one person could have stepped in and either stopped a sexual assault or at least alerted the authorities about the incident, but did not. In cases like these, the bystanders felt no responsibility, and legally, they were not liable for allowing the attack to continue. That lack of feeling responsible is the exact sentiment that this Note seeks to combat.

C. Cases That Featured Bystander Intervention

This section will discuss several cases about bystanders to sexual assault who took steps to intervene in an assault or alert the authorities about an assault. Once again, each case involves at least one bystander, at least one victim, and at least one perpetrator, though often there are multiple bystanders and perpetrators. Every victim in the following examples was female, but they fall across a wide range of ages.

1. Commonwealth v. Vieira

In 1983, a case from New Bedford, Massachusetts involving a gang rape in a room full of bystanders made headlines and shocked the country.[80] *Commonwealth v. Vieira* became known as the Big Dan's rape case, named after the bar in which it took place.[81] On March 6, 1983, twenty-one-year-old Cheryl

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[74] *Man Convicted in Richmond High Gang Rape*, *supra* note 68.

[75] Michael B. Farrell, *Homecoming Rape: When do Bystanders Become Accomplices?*, CHRISTIAN SCI. MONITOR (Oct. 30, 2009), [https://perma.cc/Z4CH-WJF3]; *Police: As Many as 20 Present at Gang Rape Outside School Dance*, *supra* note 69.

[76] *Richmond Rape Witness Describes the Assault*, ABC 7 NEWS (Nov. 12, 2009), https://abc7news.com/archive/7111732/ [hereinafter *Richmond Rape Witness*].

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Commonwealth v. Vieira, 519 N.E.2d 1320, 1321–22 (Mass. 1988).

[81] *Id.* at 1321; Jay Pateakos, *After 26 Years, Brothers Break Silence*, WICKEDLOCAL.COM (Oct. 26, 2009, 9:26 AM), [https://perma.cc/3NKY-ZZBG].

Araujo went to Big Dan's to buy cigarettes and decided to stay for a drink.[82] While there, she briefly spoke with another woman and watched a pool game between John Cordeiro and Victor Raposo.[83] Shortly after the other woman left the bar, Cheryl tried to do the same, and when Cordeiro and Raposo offered to give her a ride home, she declined.[84]

It was at this point that Daniel Silvia and Joseph Vieira came up behind her, knocked her to the floor, and took off her pants as Cordeiro and Raposo tried to force her to perform oral sex.[85] Silvia and Vieira dragged and swung Cheryl, kicking and screaming, onto the pool table.[86] Silvia raped Cheryl while Cordeiro, Raposo, and Vieira held her down.[87] After Silvia was finished, he got off of her and held her by the hair as Vieira got on top of her, and while Cheryl was restrained on the pool table, Cordeiro again tried to force her to perform oral sex.[88] The four men took turns raping her and beating her for roughly two hours.[89] The part that shocked the public the most was fact that the bar was not empty: the bartender and a dozen other bystanders stood around and cheered, allegedly shouting "go for it" at the four men.[90]

Cheryl eventually managed to escape, run out of the bar, and flag down a passing truck.[91] Daniel Patrick O'Neill, his brother Michael, and their friend Bobby Silva were driving home from a night out when they saw Cheryl run into the street wearing nothing but a brown coat and a single sock.[92] Years later, Michael O'Neill would recall that "a bunch of guys . . . had come out of the bar after her . . . but they saw us and ended up going back into the bar."[93] Michael said he picked up a rod that was in the street and approached the men, and that he chased the men in his truck, but eventually he lost them.[94] Michael said he also went inside the bar afterwards, but the silence that met him was deafening.[95]

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[82] Id.

[83] *Vieira*, 519 N.E.2d at 1321.

[84] *Id.*

[85] *Id.*

[86] *Vieira*, 519 N.E.2d at 1321.

[87] *Id.*

[88] *Id.*

[89] Marcus, *supra* note 18.

[90] *Id.*

[91] *Vieira*, 519 N.E.2d at 1321.

[92] Pateakos, *supra* note 81.

[93] *Id.*

[94] *Id.*

[95] *Id.*

2. Yang v. Lewis

Yang v. Lewis contains the first example in this Note of a bystander who was physically present during the commission of a sexual assault and subsequently took action to assist the victims.[96] In Fresno, California, three young girls were gang raped in a motel by as many as twenty men and boys, many of whom were members of the gang Mongolian Boys Society (MBS).[97] Fourteen-year-old Maney, twelve-year-old Kia, and thirteen-year-old Kaoying had run away from home but later decided that they wanted to return to their families.[98] They got into a car with Maney's ex-boyfriend and several other men, all members of MBS, with the promise that they would get a ride home.[99] The car eventually pulled into a motel parking lot and someone in the car told the girls to go to room 115.[100] When they entered the room, other MBS members were already there, waiting.[101] Throughout the night each girl was raped by several men and boys, and the men threatened the girls with further rape and death if the girls did not continue to have sex with them—they also told the girls that they would sell them if they did not cooperate.[102] One boy, Louie, arrived later in the night and found Kaoying in the bathroom.[103] He asked her what was wrong, and she told him that she had been raped and wanted to go home—however, Louie was afraid of the other men and he told her he could not take her home.[104] He stayed in the bathroom with Kaoying for a while to keep the other men out.[105] Upon leaving the bathroom, Louie saw Kia having sex with someone in the hallway of the motel room, and assumed they were dating.[106] Louie left the motel and went home.[107]

The next night, Louie returned to the motel to see if Kaoying was still there.[108] When she saw him enter the room, Kaoying approached Louie and they walked into the bathroom, where Kaoying repeated that she wanted to

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[96] *See generally* Yang v. Lewis, No. 1:02-CV-06408 LJO JMD (HC), 2007 U.S. Dist. LEXIS 44881 (E.D. Cal. June 19, 2007) (explaining that Lu Vang, otherwise known as Louie, eventually called a family member of a victim of gang rape in order to help the victim escape).

[97] *Id.* at *3.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Yang,* 2007 U.S. Dist. LEXIS 44881, at *4.

[103] *Id.* at *5.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at *6.

[108] *Yang*, 2007 U.S. Dist. LEXIS 44881, at *7.

go home, giving him her family's phone number.[109] Kia and Maney joined them, also asking Louie to call their parents, and Louie memorized Maney's phone number after the girls decided that her parents were the most likely to be home.[110] Louie then left the bathroom, sat on the bed for a while so as not to arouse suspicion, and left.[111] After about twenty minutes, Louie called Maney's house and told Maney's brother where the girls were.[112] At about 12:30 A.M. on Tuesday, the police knocked on the door of room 115.[113] They had been called to the motel to locate possible runaways, particularly Maney, and after their arrival Maney's father came to pick them up.[114]

At first the girls lied about what had happened to them, due to fear of retaliation from their rapists, but eventually they told Maney's father and he called the police.[115] Elizabeth Mitchell, the prosecutor in charge of the Fresno County District Attorney's sex crimes unit, stated that the assault appeared to "have been planned from the get go," adding that "[i]t was anticipated that this was what the room was rented for."[116] According to Lee Ann Eager, the executive director of the Rape Counseling Service of Fresno at that time, there were thirty-six group rapes reported to the service in 1997, and 50% of them appeared to be gang-related, this case included.[117] Had Louie not interfered on their behalf, there is no telling how much worse the situation would become for the girls, especially with the looming threat of being sold to people out of state.[118] Louie provided bystander intervention in an environment that threatened his life and safety if his actions were discovered, and it is entirely probable that he saved three lives as a result.

3. People v. Turner

This case, otherwise known as the Stanford rape case, is one of the most famous sexual assault cases in recent memory and is the second example of bystander intervention.[119] In January of 2015, Jane Doe (Jane 1) attended a

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[109] *Id.* at *8.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at *9–10.

[114] *Yang*, 2007 U.S. Dist. LEXIS 44881, at *11.

[115] *Id.* at *11–12.

[116] Don Terry, *Gang Rape of Three Girls Leaves Fresno Shaken, and Questioning*, N.Y. TIMES (May 1, 1998), [https://perma.cc/LZ9K-PCUU].

[117] *Id.*

[118] *Yang*, 2007 U.S. Dist. LEXIS 44881, at *5–6.

[119] People v. Turner, No. H043709, 2018 Cal. App. Unpub. LEXIS 5406, *4–5 (Cal. Ct. App. Aug. 8, 2018) (explaining that two men on bicycles intervened during a sexual assault they witnessed in public).

party with her sister (Jane 2) and her sister's friends at the Kappa Alpha fraternity house at Stanford University.[120] Jane 2 first encountered Brock Turner when she went with her friends and her sister to drink beer on the patio outside the fraternity house.[121] Jane 2 did not remember having any conversation with Turner, but "out of the blue" he kissed her.[122] Jane 2 testified that she was confused and found it "extremely weird" that he had kissed her, but laughed it off and walked away.[123] Later, she said she had to stop him from kissing her a second time.[124] Turner testified that he thought she had been flirting with him by "look[ing] into [his] eyes" and denied having any memory of approaching her a second time.[125]

Jane 1 testified that her last memory of the night was of drinking beer on the patio while her sister was speaking to some young men.[126] Jane 1 called her boyfriend, Lucas, at 11:54 P.M., and later Lucas testified that during the call Jane 1 was slurring her words, that she did not respond to anything he said, and that the call ended after a couple of minutes because he could not successfully communicate with her.[127] Shortly after midnight, Jane 2 and her friend went to put one of their heavily intoxicated friends to bed, and at that point Jane 2 told her sister that she was leaving and would be right back.[128]

Jane 1 called Lucas again at 12:16 A.M., which he let go to voicemail, but after he listened to her message he became concerned because it sounded like she was alone.[129] He testified that he could only understand parts of what she said, there were long pauses and laughing, and her words were drawn out, as if she had difficulty forming them.[130] Lucas said he immediately called Jane 1 back with the hope of keeping her on the line until she found someone who could take care of her, but he said he must have fallen asleep because he did not recall how the conversation ended.[131] At 12:29 A.M., Jane 2 received a call from Jane 1, and Jane 2 said she could not make out what her sister was saying.[132] Jane 2 took an Uber back to the party, but when she got there she

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120 *Id.* at *1.

121 *Id.* at *2.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Turner*, 2018 Cal. App. Unpub. LEXIS 5406, at *10.

126 *Id.* at *2.

127 *Id.* at *2–4.

128 *Id.* at *3.

129 *Id.*

130 *Id.*

131 *Turner*, 2018 Cal. App. Unpub. LEXIS 5406, at *2.

132 *Id.*

could not find Jane 1, and after searching for her for an hour and calling and texting her without a response, she went home without her.[133]

Two Swedish students on bicycles were nearby that night.[134] Carl A. and Peter J., Stanford graduate students, were biking to the Kappa Alpha party.[135] As they drew closer to the fraternity house, they saw two people on the ground between a basketball court and a wooden shed.[136] Carl and Peter would later tell the authorities that they saw Turner on top of the victim "aggressively thrusting his hips into her."[137] Peter said that he noticed that the person on the ground was not moving and "decided to make sure everything was okay."[138] Both men got off their bicycles and walked towards the pair, and Peter asked loudly, "[h]ey . . . is everything all right here?"[139] The person on top, who Peter identified at trial as Turner, "looked at Peter, stood up, and backed away."[140] The woman, Jane 1, stayed where she was on the ground.[141] "Her arms and legs were spread out, her dress was hiked up around her waist, and she appeared to be asleep."[142] After he saw Jane 1's condition, Peter yelled "[w]hat the fuck are you doing? She's unconscious."[143] Turner turned away and ran.[144] Peter "chased, tackled, and sat on [Turner] to restrain him."[145] Peter later testified that Turner "smiled and tried to get free."[146]

While Peter chased Turner down, Carl checked on Jane 1.[147] He shook her and said "hey," and although she was breathing, she was unresponsive.[148]

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133 *Id.*

134 Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016), [https://perma.cc/Y9ZY-2JHR].

135 Turner, 2018 Cal. App. Unpub. LEXIS 5406, at *4.

136 *Id.*

137 *Student Who Helped Stop Stanford Sexual Assault Describes What He Saw*, CBS NEWS (June 7, 2016, 6:59 AM), [https://perma.cc/HFZ5-VTFE] [hereinafter *Student Who Helped Stop Stanford Sexual Assault*].

138 *Turner*, 2018 Cal. App. Unpub. LEXIS 5406, at *5.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144*Turner*, 2018 Cal. App. Unpub. LEXIS 5406, at *5.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

Carl then helped Peter to restrain Turner, who was still trying to get away.[149] Carl testified that at some point Turner insisted "I didn't do anything," and Carl noted that Turner was not slurring his words.[150] Carl and Peter restrained Turner for approximately ten minutes until campus police arrived.[151] When the police questioned the two men about what had happened, some outlets reported that Peter was crying so hard he could not speak because of what he had seen.[152]

Turner was tried for his actions and convicted; at sentencing, Turner could have faced up to fourteen years in prison.[153] However, Santa Clara County Superior Court Judge Aaron Persky sentenced Turner to just six months in prison and three years of probation.[154] Turner only served three months, and was released early.[155] Turner's father addressed the court, and in his statement he said of his son, "[h]is life will never be the one that he dreamed about and worked so hard to achieve. That is a steep price to pay for 20 minutes of action out of his 20 plus years of life."[156]

This case might have gone largely unnoticed by the public had it not been for the victim herself.[157] Jane 1, then aged twenty-three, read an emotional 7,000-word statement during Turner's sentencing, detailing the long-term impacts that the assault had on her life and the immediate horror she felt after the attack, including a striking statement about how she felt when she took a shower at the hospital.[158] In her words: "I stood there examining my body beneath the stream of water and decided, I don't want my body anymore. I was terrified of it, I didn't know what had been in it, if it had been contaminated, who had touched it."[159] She further explained "I wanted to take off my body like a jacket and leave it at the hospital with everything else."[160] Her statement quickly went viral.[161] It drew more than eleven million views within

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[149] *Id.*

[150] *Turner*, 2018 Cal. App. Unpub. LEXIS 5406, at *5.

[151] *Id.*

[152] Baker, *supra* note 134.

[153] Jacqueline Thomsen, *Judge in Brock Turner Sentencing Recalled*, HILL (June 6, 2018, 2:07 AM), [https://perma.cc/W6DM-GQWT].

[154] *Id.*

[155] *Id.*

[156] *Student Who Helped Stop Stanford Sexual Assault*, *supra* note 137.

[157] Augie Martin et al., *Voters Oust Judge Who Gave Brock Turner 6 Months for Sex Assault*, CNN (June 6, 2018, 5:54 PM), [https://perma.cc/ZJ6R-57R5].

[158] Tim Baysinger, *How BuzzFeed Became the Outlet That Made the Stanford Rape Victim's Letter Go Viral*, ADWEEK (June 7, 2016), [https://perma.cc/TLU5-Z6Z9].

[159] Baker, *supra* note 134.

[160] *Id.*

[161] Baysinger, *supra* note 158.

four days, and her words resonated with thousands of sexual assault survivors across the nation.[162] Additionally, at least in my personal experience, her statement helped people less familiar with the experiences of victims better understand the pain and horror of sexual assault, as well as providing them with an opportunity to understand the importance of bystander intervention. For as appalling as her experience was, Carl and Peter were there as bystanders and intervened as soon as they saw her, and they took action to prevent the attack from escalating further. Many victims are not so lucky.

D. State and Federal Statutes

Some states have Good Samaritan statutes, which provide immunity from liability to bystanders who elect to administer aid to individuals caught in emergency situations, particularly medical emergencies.[163] Many of these statutes apply to medical professionals and similarly oriented individuals, while others pertain to well-intentioned bystanders who act to assist victims in good faith.[164] In some states, this offering of immunity excludes people who act wantonly or recklessly in rendering assistance.[165] Looking to preexisting statutes on the subject of bystander intervention will provide useful examples of proper syntax to incorporate into the proposed update of the MPC, and it will help to avoid the potential pitfalls of incorporating vague or overbroad language by learning from these previous attempts.

1. Minnesota

Some states have more refined Good Samaritan statutes, which in addition to providing immunity from liability to bystanders, impose a duty of care on bystanders.[166] Minnesota's Good Samaritan law, in relevant part, reads:

> **Duty to assist.** A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.[167]

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[162] *Id.*

[163] *Good Samaritans Law and Legal Definition*, US LEGAL, [perma.cc/EU2D-NUCJ] (last visited Apr. 29, 2020).

[164] *Id.*

[165] *Id.*

[166] Angela Hayden, *Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws Good Ideas?*, 6 NEW ENG. INT'L & COMP. L. ANN. 27, 28 n.6 (2000).

[167] MINN. STAT. § 604A.01 (1994).

This Good Samaritan statute was created as a response to the outcry that followed the Big Dan's rape case after the coverage of the attack went national.[168]

2. Hawaii

A similar "duty to assist" statute, enacted in 1984, exists in Hawaii. It states:

> (a) Any person at the scene of a crime who knows that a victim of the crime is suffering from serious physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person. Any person who violates this subsection is guilty of a petty misdemeanor.[169]

3. Florida

There are a few states that decided to expand their Good Samaritan statutes even further, drafting them to specifically refer to individuals who witness instances of sexual misconduct and imposing a duty on those individuals to either render assistance to the victim or report the incident. Florida's law, in particular, contains a few more caveats than other statutes, including a provision allowing an exception to the duty to report for relatives of either the victim or the perpetrator.[170] That statute reads:

> A person who observes the commission of the crime of sexual battery and who: (1) Has reasonable grounds to believe that he or she has observed the commission of a sexual battery; (2) Has the present ability to seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer; (3) Fails to seek such assistance; (4) Would not be exposed to any threat of physical violence for seeking such assistance; (5) Is not the husband, wife, parent, grandparent, child, grandchild, brother, or sister of the offender or victim, by consanguinity or affinity; and (6) Is not the victim of such sexual battery is guilty of a misdemeanor of the first degree[.][171]

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[168] Gabriel D.M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 737 (2003).

[169] HAW. REV. STAT. § 663-1.6(a) (1984).

[170] FLA. STAT. § 794.027 (2019).

[171] *Id.*

4. Rhode Island

Rhode Island also has a statute that mandates the report of a sexual assault, and in a similar fashion to the Florida statute, it specifies in clear language that the victim is not mandated to report:

> Any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his or her presence shall immediately notify the state police or the police department of the city or town in which the assault or attempted assault is taking place of the crime.[172]

This more streamlined statute was also reportedly passed as a response to the Big Dan's rape case.[173] It differs from the Florida statute in that it does not provide an exception for family members of either the victim or the assailant. This distinction is important to consider when analyzing the significance of statutory language and identifying which statutes provide the best examples of how to draft the update to the MPC.

5. Misprision of Felony

There is a federal statute that holds bystanders accountable when they fail to disclose knowledge of a felony.[174] This statute, 18 U.S.C. § 4, better known as "misprision of felony," states in full:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[175]

The statute does not specifically pertain to any one particular type of felony, and as it is federal law can be invoked across the country.[176] Misprision of felony is considered one of the oldest federal crimes, and was first enacted in a "functionally identical" version as part of the Crimes Act of 1790.[177] In order to establish misprision of felony, the government must prove beyond a reasonable doubt "(1) that the principal . . . committed and

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[172] R.I. GEN. LAWS § 11-37-3.1 (1983).

[173] Ciociola, *supra* note 168, at 740.

[174] 18 U.S.C. § 4 (2018).

[175] *Id.*

[176] *Id.*

[177] Alexis E. Danneman, *9th Circuit Clarifies Elements of Misprision of Felony*, PERKINS COIE LLP (June 7, 2017), [https://perma.cc/2CUD-NDDU].

completed the felony alleged; (2) that the defendant had full knowledge of that fact; (3) that he failed to notify the authorities; and (4) that he took affirmative steps to conceal the crime of the principal."[178]

In the recent court case *United States v. Olson*, a Ninth Circuit panel clarified the knowledge element of that four-part test.[179] The panel held for the first time that "the government must prove not only that the defendant knew the principal engaged in conduct that satisfies the essential elements of the underlying felony, but also that the *defendant knew the conduct was a felony*."[180] The court then answered the question: "What does it mean to know conduct constitutes a felony?"[181] The Ninth Circuit held that the "government must prove the defendant knew the underlying offense was punishable by death or more than one year in prison."[182] The court further clarified that "[t]he defendant need not know the precise term of imprisonment authorized by law, but at least she must know the potential punishment exceeds one year in prison."[183] Judge Andrew Hurwitz separately concurred, agreeing with the ultimate holding but indicating that he personally would leave the determination of whether the government must prove "that the defendant knew the underlying offense was a felony . . . for another day, in a case in which it matters to the outcome."[184]

Misprision of felony is not limited to bystanders that have witnessed an emergency situation.[185] Bystanders do not necessarily have to see the crime with their own eyes, they just have to be aware that a crime has actually taken place, and choose not to say anything to the authorities.[186] This federal statute focuses more on punishing the active concealment of a felony than on punishing passive knowledge of a felony: if a bystander had knowledge of the commission of any type of felony, and they refused to disclose that knowledge to authorities, and took steps to *conceal* that commission of a felony, the government may exercise its ability to prosecute the bystander.[187]

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[178] United States v. Olson, 856 F.3d 1216, 1220 (9th Cir. 2017) (quoting Lancey v. United States, 356 F.2d 407, 409 (9th Cir. 1966)).

[179] *Id.* Though *Olson* only controls in the Ninth Circuit, this Note will interact with the language used in that decision as a broad stepping stone to discuss the pros and cons of clarifying the knowledge requirement in this way.

[180] *Id.* at 1218 (emphasis added).

[181] *Id.* at 1223.

[182] *Id.* at 1224.

[183] *Id.*

[184] *Olson*, 856 F.3d at 1220 (Hurwitz, J., concurring).

[185] 18 U.S.C. § 4 (2018).

[186] *Id.*

[187] *Olson*, 856 F.3d at 1220 (citing Lancey v. United States, 356 F.2d 407, 409 (9th Cir. 1966)).

E. The Model Penal Code

The Model Penal Code (MPC) is a set of laws drafted by the American Law Institute (ALI) in 1962 in an effort to homogenize the often fragmentary state criminal codes.[188] Section 213 of the MPC discusses crimes of a sexual nature, and though the ALI was forward-thinking at the time of the MPC's adoption, many of the provisions are now outdated and do not accurately reflect current societal understandings about sexual assault and rape.[189] The MPC is not binding on any state unless a state elects to adopt its provisions, but that does not mean that the MPC is not highly influential.[190] From 1962 to 1983, thirty-four states enacted new criminal codes, either taken directly from or influenced by the MPC, and some states dedicated more time and energy than others to create and then enact their revisions.[191] Since the MPC was published in 1962, many critics have sought to revise it, particularly in the areas of sentencing for criminal convictions and defining sexual assault and other related crimes.[192] However, as of the writing of this Note, none of the proposed revisions to Section 213 have included criminalizing passive bystanders to sexual assault.[193]

III. ANALYSIS

The Analysis section will address why bystanders to sexual assault should be prosecuted for failing to provide reasonable assistance when safely able to do so and explain why updating the MPC is the best avenue to allow those prosecutions. This section will further discuss why the language used in both the current MPC and the state statutes no longer serves the best interest of the public, and why certain parts of the previously mentioned state and federal statutes should be included or excluded in the new MPC provision. The selection of the statutory language will be paramount when updating the MPC. Finally, this section will explore some additional cultural and psychological challenges that the proposed update could face.

A. Why Existing State Statutes Are Not Enough

The statutes mentioned above are good examples of states taking the first step to enforce bystander liability. However, these statutes alone are

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[188] *See* Herbert Wechsler, *Foreword* to MODEL PENAL CODE OFFICIAL DRAFT AND EXPLANATORY NOTES xi (AM. LAW INST., Proposed Official Draft 1962) [hereinafter *Foreword*].

[189] MODEL PENAL CODE OFFICIAL DRAFT AND EXPLANATORY NOTES 213 (AM. LAW. INST., Proposed Official Draft 1962).

[190] Gregg D. Caruso, *The American Law Institute Revises the Model Penal Code*, PSYCHOL. TODAY (May 26, 2017), [https://perma.cc/ZY9R-5JLU].

[191] *Foreword*, *supra* note 188, at xi.

[192] MODEL PENAL CODE § 213.0–213.7 (Tentative Draft 2014), [https://perma.cc/N3GD-YQE9].

[193] *Id.*

insufficient to impose liability on those who caused harm by failing to report or stop a sexual assault. While some of the aforementioned statutes contain provisions made in a good faith effort to protect certain categories of people, their language actually does more harm than good in terms of holding bystanders accountable.

B. The Current Model Penal Code is Insufficient

The current version of MPC was first introduced in 1962, and while it is one of the most important developments in American law, it heavily reflects the problematic ideology of the time.[194] In the original iteration, the MPC did not recognize rape as an offense a husband could commit against his wife.[195] By contrast, as of 1993, all fifty states had laws making marital rape illegal, despite some troubling exceptions.[196] In order to establish rape by intoxication, the MPC requires that the perpetrator be the one who administered the intoxicant to the victim.[197] In the MPC's text, all pronouns associated with victims were female while all pronouns associated with perpetrators were male.[198] This does not reflect the modern understanding that a victim can be an individual of any gender, or that a perpetrator could also be of any gender. Furthermore, the drafters of the MPC felt the need to differentiate between rape as a first-degree felony and rape as a second-degree felony based on acceptable social norms of the time.[199] Rape was considered a second-degree felony if the victim was either a "voluntary social companion of the actor" at the time of the crime, or if the victim had "previously permitted him sexual liberties" at the time of the crime.[200] But if the victim was *not* a "voluntary social companion of the actor" and had *not* "previously permitted him sexual liberties" at the time of the crime, the rape was considered a first-degree felony.[201] By contrast, many states now have laws limiting the introduction of evidence regarding a victim's sexual history.[202]

The questions of whether or not a victim had previously been sexually intimate with their rapist and whether or not a victim had voluntarily chosen

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[194] Caruso, *supra* note 190.

[195] MODEL PENAL CODE OFFICIAL DRAFT AND EXPLANATORY NOTES, *supra* note 189, at § 213.1.

[196] Julie Carr Smyth & Steve Karnowski, *Some States Seek to Close Loopholes in Marital Rape Laws*, AP NEWS (May 4, 2019), [https://perma.cc/S45M-9KG6].

[197] MODEL PENAL CODE OFFICIAL DRAFT AND EXPLANATORY NOTES, *supra* note 189, at § 213.1

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] Deborah C. England, *In a Rape Case, Can a Defendant Bring up Their Accuser's Sexual History?*, NOLO, [perma.cc/2NN3-UWXF] (last visited Apr. 29, 2020).

to socialize with the rapist at the time of the attack should be immaterial in weighing the severity of a rape. The public's understanding of sexual assault, of who the potential victims can be, and the psychology involved has changed over time. Therefore, the MPC should be updated to reflect those changes. Furthermore, in the entirety of section 213 there is no mention of bystanders to incidents of sexual assault or rape.[203] Of the many problems with the original MPC, that lack of bystander accountability is the problem this Note aims to solve.

The practical way to hold apathetic bystanders accountable for their decision to avoid intervening to prevent a sexual assault is to include a new provision in the MPC's section on sexual offenses. Individual states can decide whether or not to adopt the provision and, if so, how to implement it in their own court systems. This would provide an avenue for states to avoid letting guilty bystanders go free. Modifying the MPC will be an effective way to standardize and implement what is currently a patchwork system of imposing bystander responsibility.

Creating and implementing an updated provision will not help all the states that decline to adopt the MPC either in full or in part, at least not directly. However, the unwillingness of some states to adopt the MPC is precisely why this is a good idea—trying to pass a federal law that would impose on the autonomy of all the states would be a nightmare, and the litigation that would arise out of an imposition by the federal government on states' rights would be costly and a waste of time and resources. Although some states have completely ignored the MPC, many other states have integrated portions of it into their criminal law, while still others have adopted the MPC almost in its entirety as their criminal law.[204] The benefits of creating this MPC provision far outweigh the detriments: passing it is relatively easy because it will not impose laws on unwilling states but the states that do want to adopt it will have the option to do so without having to make up provisions of their own. This will also create precedent for passing this type of law on a larger scale than scattered state statutes. This may prove influential in convincing other hesitant states to adopt this provision or create their own similar statutes.

C. The Importance of Statutory Language

The importance of statutory language in drafting an update to the MPC cannot be overstated. Any attempt to modify the MPC must be carefully thought through in order to prevent unwanted consequences. Narrowly tailoring the language used in the proposed provision will prevent overbroad

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[203] MODEL PENAL CODE OFFICIAL DRAFT AND EXPLANATORY NOTES, *supra* note 189, at §§ 213.1–213.6.

[204] *Foreword*, *supra* note 188, at xi to xii; *Model Penal Code's Mens Rea*, LAW SHELF EDU. MEDIA, [perma.cc/7YNQ-9BEK] (last visited Apr. 29, 2020).

interpretations that would affect the wrong types of bystanders, like those who actively choose to intervene, and careful word choice will prevent the use of language that is so narrow that the provision would rarely apply to anyone. The language used in current state and federal statutes provides a solid foundation that could help shape the new provision, but those statutes also contain language that must be abandoned to fashion a rule that will reasonably protect victims and hold bystanders accountable.

1. The Language of Misprision of Felony

The language used in the federal misprision of felony statute is confusing, as is the language used later in *Olson* when the Ninth Circuit tried to clarify the knowledge requirement of the four-part test.[205] The best way to illustrate the type of bystander targeted by this statute is to provide an example. Say Person A has murdered someone, which is a felony. Person B, the bystander, saw Person A commit the murder. In order for Person B to be charged with misprision of felony, the government must then prove that: (1) Person A actually committed the murder, (2) Person B had full knowledge of the murder, (3) Person B did not tell anyone about the murder, and (4) Person B took steps to hide the fact that Person A committed the murder.

That may already seem difficult enough, but when the Ninth Circuit panel in *Olson* added further stipulations to the knowledge requirement, the court made it even more difficult to convict bystanders under this statute.[206] If this interpretation of the knowledge requirement was applied broadly outside of the Ninth Circuit, it is fair to say that even more bystanders would be let off the hook. In that world, if the government wants to convict Person B under misprision of felony, the government must prove not only that Person B saw the murder, but also that Person B knew that the murder was a felony when they saw it happen.[207] The government would also have to prove that Person B knew the murder was punishable by death or more than one year in prison.[208] This may seem like a stretch to expect the average bystander to know the different prison sentences that correlate to different crimes, but the court sought to address this when they said that Person B wouldn't need to know the exact prison term authorized by law, stipulating that Person B would have to at least know that the potential prison term exceeded one year.[209]

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[205] Danneman, *supra* note 177.

[206] *See generally* United States v. Olson, 856 F.3d 1216 (9th Cir. 2017) (explaining that a bystander must have actual knowledge of the crime committed and that they must know the potential punishment for the crime exceeded one year in prison).

[207] Danneman, *supra* note 177.

[208] *Olson*, 856 F.3d at 1224.

[209] *Id.*

The court explained that this higher knowledge requirement was a way to protect innocent bystanders who may not know that the activity they are viewing is actually a felony.[210] Elaboration on this point may be necessary at the federal level because it may not be clear to most bystanders that they are unwittingly witnessing money laundering, or acts of espionage, or another difficult-to-recognize federal crime. However, the proposed update to the MPC specifically targets bystanders who witness sexual assaults. Sexual assault is usually a more blatant act than federal white-collar crimes.

In part, the knowledge requirement would be kept in the update to the MPC. The bystander would have to reasonably believe that they are witnessing an act of sexual assault. The court could find the bystander had the requisite knowledge in many ways, including an awareness that the victim was unconscious, struggling against the perpetrator, being restrained by the perpetrator and/or others, or that the victim was under the influence of alcohol or drugs. However, the requirement that the bystander have knowledge of potential prison sentences or knowledge of whether sexual assault is a misdemeanor or felony would be excluded from the MPC provision. The only thing that the bystander would have to know is that sexual assault is illegal. Passive bystanders could not escape justice on a technicality by claiming that that they had not known whether sexual assault was a felony or misdemeanor or that they had no knowledge of the length of a prison term for sexual assault.

The misprision of felony statute provides a federal precedent for language that imposes liability on individuals that conceal knowledge of a crime.[211] This provides some context for how entering the provision into section 213 of the MPC could look. However, another problem presents itself in the language used in the fourth prong of the four-part test that the Court uses to apply the statute: this prong demands that the defendant take "affirmative steps" to conceal the commission of a felony. [212] The affirmative step requirement would be excluded from the update to the MPC.[213] The goal of updating the MPC is to target passive bystanders who do nothing to prevent a sexual assault or assist the victim of a sexual assault. Requiring that they must take "affirmative steps" to conceal the sexual assault would effectively bar prosecution of the majority of these bystanders, since silence is not considered an affirmative step. Mere silence, without some affirmative act, is insufficient evidence.

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[210] *Id.* at 1222.

[211] 18 U.S.C. § 4 (2018).

[212] *Olson*, 856 F.3d at 1220.

[213] *Id.*

2. The Rhode Island Statute

Although Rhode Island's existing statute may influence the proposed addition to the MPC, the language of the MPC should not directly match the language used by Rhode Island. The Rhode Island statute contains a worrisome clause: "[n]o person shall be charged under § 11-37-3.1 unless and until the police department investigating the incident obtains from the victim a signed complaint against the person alleging a violation of § 11-37-3.1."[214] This means that a bystander cannot be convicted of failing to intervene unless the victim reports them for it. This appears to be in direct conflict with section 11-37-3.1, which specifies that the victim is not required to report their own sexual assault.[215]

This is problematic because there are a variety of scenarios where a victim may not be able to identify the perpetrators of their sexual assault, never mind bystanders who might have been nearby at the time. The victim could have been unconscious or so heavily intoxicated that it was difficult to recognize their surroundings, their attacker could have prevented them from seeing anything by blindfolding them or forcing them to hold their head a certain way, or it could have even just been dark at the time of their assault. This clause presents an even more serious problem: as in the cases of Kitty Genovese and Sherrice Iverson, there may not be a living victim left to sign a complaint after the attack.[216] Requiring the victim to sign a complaint against the bystander may seem practical at first glance, since the victims were physically present during the commission of the crime, and could therefore theoretically identify other individuals who were present, but the actual application of such a requirement allows a lot of bystanders to go free. It is also worth mentioning that if a bystander is unconscious while they are physically present for a sexual assault, they should not be held accountable under the new provision of the MPC.

3. The Hawaii Statute

The Hawaiian "duty to assist" statute, enacted in 1984, presents a different problem: as of 2002, no one has been prosecuted under the statute.[217] This problem derives directly from the language used in the statute, specifically the use of the phrase "scene of a crime."[218] This wording was left open to interpretation, raising the question of what it means to actually be at the scene of a crime—did the witness have to be physically present when the crime occurred, or could they happen upon the scene after the perpetrator

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[214] R.I. GEN. LAWS § 11-37-3.2 (2019).

[215] *See id.*

[216] *See* Lemann, *supra* note 30; Crosby, *'Bad Samaritan'*, *supra* note 47.

[217] Ciociola, *supra* note 168, at 740.

[218] *Id.*

was gone and the victim was still there?[219] If the victim wanders a short distance away from the place where they were attacked, but is still obviously in distress, are bystanders then relieved of any obligation to assist?[220] Kitty Genovese and Cheryl Araujo both technically changed locations after their initial attacks, so under the Hawaiian statute, it is possible that no bystanders would be held accountable for refusing to assist either of them.[221] The final version of the proposed MPC provision will exclude this type of easily misconstrued language in order to avoid confusion and prevent passive bystanders from escaping prosecution by simply waiting for the victim or the perpetrator to leave.

The Hawaii statute contains another important aspect: the legislators added the caveat that the bystander "knows that a victim of the crime is suffering from serious physical harm."[222] This is problematic because it could provide a loophole for bystanders if the victim of a sexual assault is unconscious or otherwise incapable of expressing that they are "suffering." Additionally, the word "knows" presents a problem in that it would be easy for a bystander to claim that they did not possess requisite knowledge of the suffering the victim may have been experiencing that would have mandated that the bystander report what they saw to the police or render aid to the victim. It is important to exclude vague phrases like these from the proposed MPC update.

4. The Florida Statute

The Florida mandatory reporting statute contains an exception for individuals who are family members of either the victim or the perpetrator of the assault.[223] The legislature included this as an effort to maintain the privacy of families, so that relatives would not be forced to report each other to the police in the event of an inter-family sexual assault. But it poses problems that could occur outside the home—suppose, for example, someone saw their brother sexually assaulting an unconscious girl at a party. Under this statute, the bystander would not be held accountable for keeping that information to themselves. It is a highly complex provision, and one that would not be included in the MPC provision this Note is proposing.

5. The Minnesota Statute

Despite some of the flaws within the different state statutes, the Minnesota statute does contain useful language when looking for examples to

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[219] *Id.*

[220] *Id.*

[221] Merry, *supra* note 29; Commonwealth v. Vieira, 519 N.E.2d 1320, 1322 (Mass. 1988).

[222] HAW. REV. STAT. § 663-1.6 (1984).

[223] FLA. STAT. § 794.027 (1984).

inspire drafts of future statutes or provisions. The legislators who drafted Minnesota's Good Samaritan statute made an excellent point about how the act of rendering assistance should only be attempted if taking that action would not imperil the bystander or others around them.[224] In *Yang v. Lewis*, Louie, the boy who eventually helped the girls escape, initially felt he could not help the victims because he was afraid of what the other men might do to him.[225] However, he came back the next night, memorized Maney's family phone number, and then, after carefully avoiding suspicion, he called for help.[226] Louie is a good example of a bystander that waited until he was reasonably sure his actions would not imperil himself or others before providing assistance. The new MPC provision would not punish bystanders like Louie who took reasonable precautions in order to avoid more harm.

While both the Hawaii and Minnesota statutes impose a duty on the bystander to act, one strength of the Minnesota statute is that it gives bystanders a wide range of activity to work with when deciding how best to intervene.[227] The Hawaii statute mandates that bystanders can only take specific action in an emergency situation by obtaining or trying to obtain help from law enforcement or medical professionals.[228] By contrast, the Minnesota statute explains that "[r]easonable assistance *may* include obtaining or attempting to obtain aid from law enforcement or medical personnel."[229] This allows bystanders to take actions other than calling the local authorities. This allowance for more expansive interpretation is practical in cases like *Yang v. Lewis*, where both the bystander and the victims fear retribution from perpetrators, harsh judgment from their community, and in all likelihood would prefer to avoid police involvement.[230]

6. Language Allowing Exceptions to the Proposed Solution

There should be limited exceptions to the proposed rule. It is necessary to include language specifying that victims cannot be punished for failing to come forward. These exceptions would be especially significant in *Yang v. Lewis*, where three minor girls were raped repeatedly by roughly a dozen

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[224] MINN. STAT. § 604A.01(2)(a) (1994). *See also* HAW. REV. STAT. § 663-1.6 (1984) (providing a similar rule that bystanders "shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person.")

[225] Yang v. Lewis, No. 1:02-CV-06408 LJO JMD (HC), 2007 U.S. Dist. LEXIS 44881, at *5 (E.D. Cal. June 19, 2007).

[226] *Id.* at *8.

[227] HAW. REV. STAT. § 663-1.6 (1984); MINN. STAT. § 604A.01 (1994).

[228] HAW. REV. STAT. § 663-1.6 (1984).

[229] MINN. STAT. § 604A.01 (1994) (emphasis added).

[230] *See generally Yang*, 2007 U.S. Dist. LEXIS 44881 (finding that the plaintiff's insufficiency of evidence of "in-concert" participation in the assault and of the use of "force of violence" claim fails).

members of the MBS gang.[231] None of the victims initially disclosed that they were raped for fear of retaliation from the men who assaulted them.[232] In the spirit of justice, it would be ludicrous to press charges against any of the three girls, despite the fact that they each witnessed multiple rapes of their friends, because they were victims themselves. Rhode Island's statute, in spite of its many problems, provides support for this exception: section 11-37-3.1 states that anyone who witnesses a sexual assault, "other than the victim," is required to report it to the relevant authorities.[233] While this is only one state's statute, it provides precedent for creating this type of statute in the American legal system, and thus creates an easier avenue to include this exception in the proposed update to the MPC.

It is equally necessary to mention that bystanders who reasonably believe there is a threat to their lives or physical safety if they decide to immediately intervene in an instance of sexual assault should not be punished either. Two bystanders illustrate the importance of this exception: the sixteen-year-old witness from the Richmond high school gang rape case, and Louie from *Yang v. Lewis*.[234] Both young men were afraid to do anything to stop the rapes they witnessed, and both young men ended up leaving without calling for help.[235] The Richmond bystander asserted that he did not call because he did not have a cell phone, but he also explained that he didn't feel any responsibility for what happened.[236] He did nothing at all to alert the authorities or render assistance to the victim once he had left the scene of the rape.[237] Louie also did nothing to alert the authorities when he initially became aware of the rapes in the motel room, and he left the scene without doing anything to intervene.[238] However, Louie's actions help clarify what could be a murky area of the law, because he did something the Richmond witness did not do: he came back.[239] Because Louie was reasonably afraid of the gang members around him when he witnessed the sexual assaults, his original refusal to take action to intervene would not result in his prosecution under the proposed update to the MPC.[240] It does not matter that Louie did not call the police because he helped the victims in another way. He called one girl's family and

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[231] *Id.* at *11.

[232] *Id.*

[233] R.I. GEN. LAWS § 11-37-3.1 (1983).

[234] *See generally Richmond Rape Witness*, *supra* note 76 (the young man who witnessed the assault was afraid to intervene during and after the assault); *Yang*, 2007 U.S. Dist. LEXIS 44881 (a young man named Louie was a bystander to a rape and obtained aid for the victims).

[235] *Richmond Rape Witness*, *supra* note 76; *Yang*, 2007 U.S. Dist. LEXIS 44881, at *6.

[236] *Richmond Rape Witness*, *supra* note 76.

[237] *Id.*

[238] *Yang*, 2007 U.S. Dist. LEXIS 44881, at *6.

[239] *Id.* at *7.

[240] *Id.* at *5.

reported the ongoing abuse.[241] There was a less noticeable moment when he rendered assistance to a victim of sexual assault: when Louie remained with Kaoying in the bathroom, he did not help her escape, and he did not call for help, but he did sit there with her for a while to keep the other men out.[242] That moment would be considered rendering assistance to a victim of sexual assault, because even if the assistance did not prevent further sexual abuse indefinitely, it did prevent sexual abuse in that moment. Louie recognized a way he could grant a reprieve from the abuse without causing further harm to either himself or the victim.

The goal of the proposed update to the MPC is to ensure bystanders either intervene to stop a sexual assault or aid the victim by calling the authorities or through other means, such as giving the victim a ride home or to a hospital, or providing other relief in situations where intervention is not feasible. Certainly, the best possible outcome is that bystanders will both intervene and call the authorities as they did in *People v. Turner*.[243] But there are potential gray areas when it comes to protecting bystanders who offered assistance to a victim. In the Big Dan's rape case, the O'Neill brothers would later admit that if they were given the choice to do things over again, they would have still helped Cheryl, but they would have avoided contact with the police. The O'Neill brothers were mocked for their involvement with the case, and received death threats over their testimony. They also felt that they were never thanked by the lawyers for their participation, that they were discarded after they helped to build the lawyers' careers. This presents a larger problem with American society and the justice system as a whole, particularly with how both tend to discourage victims and their allies from coming forward, and it is more than apparent that just updating the MPC to hold bystanders accountable will not fix this problem. Without the O'Neills' testimony it is likely that Cheryl Araujo's rapists would never have been brought to justice. However, even if they refused to speak to the police, the O'Neills still would have been exempt from prosecution under the proposed revision to the MPC based on their assistance to a victim of sexual assault.

D. Potential Problems Facing the Proposed Solution

Combatting apathy on the part of the American public can be a challenge. Even in situations where bystanders feel that they should do something, they often do not. Sometimes their hesitance to intervene is based on the reasonable fear of getting themselves hurt, but in other instances, it is based on the notion that they should mind their own business. Other times, bystanders do not intervene because of how other bystanders are reacting to

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[241] *Id.* at *8.

[242] *Id.* at *7–8.

[243] *See* People v. Turner, No. H043709, 2018 Cal. App. Unpub. LEXIS 5406, *4–6 (Cal. Ct. App. Aug. 8, 2018).

the situation. This subsection will discuss these different roadblocks that the suggested revisions to the MPC must overcome to be effective. These roadblocks primarily derive from the apathy that runs rampant in the psyche of most Americans. The most prevalent issues are the bystander effect and victim blaming.

1. The Bystander Effect

The bystander effect is a social psychological phenomenon in which individuals are less likely to offer assistance to a victim in an emergency situation when other people are present.[244] And the greater the number of bystanders, the less likely it is that a single bystander will offer assistance.[245] In the Richmond case, despite the fact that several people felt they should try to help the victim, no one did so, choosing instead to stand in a crowd of onlookers and later admit to feeling no sense of responsibility for the crime.[246] In the Big Dan's rape case, the barroom bystanders felt that they were not at fault for what happened, even after some openly encouraged the assailants.[247] All of this raises the question: why don't people care, and can we make them care?

This question plagued the minds of many, particularly after news first broke of the Kitty Genovese case. The story of her rape and murder sparked morbid curiosity and horror in the national community, especially in the minds of psychologists.[248] Two psychologists in particular, John Darley and Bibb Latané, tried to better understand why so many people failed to intervene during the attack.[249] The pair set up a series of controlled experiments to observe the different ways an individual would react to potentially dangerous situations, focusing on scenarios in which the subject was aware that other people were around.[250]

Their experiments revealed a number of things, including that groups of young children were more likely to intervene than groups of adults when the opportunity arose, but their primary finding was that the presence of other people tended to discourage intervention if none of the other bystanders did anything about the emergency.[251] Darley and Latané said that these passive

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[244] *Bystander Effect*, PSYCHOL. TODAY [https://perma.cc/5BXM-243S**]** (last visited Apr. 29, 2020).

[245] *Id.*

[246] *Richmond Rape Witness*, *supra* note 76.

[247] *Id.*

[248] Jason Marsh & Dacher Keltner, *We Are All Bystanders*, GREATER GOOD MAG. (Sept. 1, 2006), [https://perma.cc/ZM7J-JHCG].

[249] *Id.*

[250] *Id.*

[251] *Id.*

bystanders succumbed to what is known as "pluralistic ignorance," which is "the tendency to mistake one another's calm demeanor as a sign that no emergency is actually taking place."[252] When no one around an individual is troubled by something that the individual perceives to be an emergency, the individual will conform to this social norm because they do not want to be the only person feeling troubled. In the Kitty Genovese case, it is likely that because her neighbors did not perceive strong reactions from anyone else who heard what was going on, bystanders who otherwise might have called the authorities for help or otherwise intervened chose to do nothing instead.

Darley and Latané's experiments led them to the theory of "diffusion of responsibility" to explain the bystander effect.[253] This theory suggests that, during moments of perceived crisis, bystanders ask themselves "[w]hy should I help when there's someone else who could do it?"[254] Any responsibility that bystanders might have felt to try to offer help diffuses among the people present during a crisis, essentially meaning that our sense of responsibility weakens in the midst of a large group—anyone who has worked on a group project has probably felt the diffusion of responsibility. This theory is offered to explain why the bystander effect is so powerful and so common. It also offers an explanation why, when people believe they are the only one witnessing an emergency, they are more likely to step in and to offer assistance.[255]

2. Victim Blaming

Another issue that may make this provision less effective is the recurring problem of victim blaming in American society. A common way of defining victim blaming is "a devaluing act where the victim of a crime, an accident, or any type of abusive maltreatment is held as wholly or partially responsible for the wrongful conduct committed against them."[256] Victim blaming can occur in a variety of social contexts, and can come from people who are either total strangers or members of the victim's own family.[257] Victim blaming traditionally contains sexist and racist undertones, and studies have shown that

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[252] *Id.*

[253] Susan Krauss Whitbourne, *Why and How Do We Help?*, PSYCHOL. TODAY (Sept. 28, 2010), [https://perma.cc/MUP3-G94D].

[254] *Id.*

[255] *Id.*

[256] *Victim Blaming Law and Legal Definition*, US LEGAL, [perma.cc/9Q7L-E9X3] (last visited Apr. 29, 2020).

[257] Marcus, *supra* note 18; Terry, *supra* note 116.

people who identify as having strong moral values may indicate that a person is also more likely to view victims as blameworthy.[258]

Unfortunately, victim blaming is a behavior that affects people in every culture and socioeconomic class.[259] It can also be more frequent and harsher depending on the race of the victim and the ethnicity of their community: in *Yang v. Lewis*, the three little girls were of East Asian descent, specifically Hmong, and that appeared to be a motivating factor for this horrific crime.[260] In Hmong culture, girls who lose their virginity before marriage may be looked down upon by their own relatives, even if they are forcibly raped.[261] Lee Ann Eager, who at the time was the director of the Rape Counseling Service of Fresno, said that people had called her office asking if the little girls had been wearing sexy clothing and if the girls had done something to provoke the attack.[262] One man in particular felt the need to call the office and say that because the girls had willingly walked into the motel room, it was unfair to call what transpired "rape."[263] In an interview, Ms. Eager said she mentally counted to ten, and then to twenty, before responding: "The punishment for bad judgment is not rape, for three little girls or for anyone else."[264] Furthermore, Fresno County gang officials said that in addition to preying on the girls' youth, the MBS gang members preyed on the girls' fear of shaming their families.[265]

In the Big Dan's rape case, Cheryl Araujo was of Portuguese descent, and all four of her rapists were Portuguese nationals who had immigrated to the United States.[266] The New Bedford community was 60% Portuguese at the time of the rape, and members of that community felt they were being unfairly blamed by the media for the actions of only a few men, referencing how the newspapers seemed to be saying "it's Portuguese this, Portuguese that. They really want to get to the Portuguese, that's what it is."[267]

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[258] Lisa M. Calderón, *Rape, Racism and Victim Advocacy*, BLACK COMMENTATOR (July 8, 2004), http://blackcommentator.com/98/98_calderon_rape_racism.html; Laura Niemi, *Who Blames the Victim?*, PSYCHOL. TODAY (Aug. 18, 2016), [https://perma.cc/7LE9-EDJC] (referring to "binding" moral values, meaning that a person values loyalty, obedience to authority, and purity to an unusually high degree).

[259] Calderón, *supra* note 258.

[260] Yang v. Lewis, No. 1:02-CV-06408 LJO JMD (HC), 2007 U.S. Dist. LEXIS 44881, at *15–16 (E.D. Cal. June 19, 2007)

[261] *Indictment Charges 23 Hmong With Series of Rapes*, L.A. TIMES (Oct. 21, 1999, 12:00 AM), [https://perma.cc/45QD-75QA] [hereinafter *Indictment*].

[262] Terry, *supra* note 116.

[263] *Id.*

[264] *Id.*

[265] *Indictment*, *supra* note 261.

[266] Marcus, *supra* note 18.

[267] *Id.*

Many of those community members channeled their frustration into blaming Cheryl Araujo for what they perceived to be her responsibility in causing the attack.[268] The best example of this victim blaming surfaced during a lunch in a local café shortly after the incident. Local patrons, who refused to identify themselves, were discussing the event, and one man went so far as to tell the *Washington Post* "[s]he went there for one reason—not cigarettes," and "[s]he was asking for it," expressing a sentiment that was fairly common among the many patrons interviewed.[269] The unnamed patron went on to say "I know this group: they do crazy things, but nothing like this. For them to do it, she had to do something to them."[270] As for the bystanders who did nothing, he asked "[w]hy stop something that has nothing to do with you?"[271]

The perception of Cheryl Araujo by other members of the Portuguese community in New Bedford certainly played into the victim blaming levied at her. A short time after the rape occurred, Manuel Ferreira, then-editor of the *Portuguese Times*, suggested that this type of reaction reflected a "macho ethic" of Portuguese culture.[272] Ferreira elaborated on this view during an interview, saying "if a woman walks in by herself to a bar, automatically they assume she's no good. Even if a woman smokes, they think she's no good."[273] Ferreira went on to say that Big Dan's bar was "not the kind of place a woman walks into to buy cigarettes."[274] The overtones of sexism and slut-shaming laced through the community's commentary about Cheryl Araujo are blatant and provide further insight into why members of that community may not have felt the need to assist her during her assault.

Studies suggest that individuals are more likely to help others that they perceive to be similar to them, specifically individuals from the same racial or ethnic groups.[275] Generally, women are more likely to receive help than men, but this tends to vary in accordance with appearance: women who are perceived to be more attractive and femininely dressed tend to receive more help from bystanders, in all likelihood because they fit the gender stereotype of "the vulnerable female."[276] But the problem with victim blaming is that it may exert such a strong influence on bystanders that they choose to avoid intervening, regardless of whether the bystander perceives the victim to be

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[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] Marcus, *supra* note 18.

[273] *Id.*

[274] *Id.*

[275] Marsh & Keltner, *supra* note 248.

[276] *Id.*

similar to them.[277] There is still a strong cultural stigma surrounding sexual assault throughout the United States, despite the mitigating influence of social efforts like the #MeToo movement, and that stigma may be amplified by different community views of what constitutes proper behavior for potential victims.[278] That was certainly true for the victims in *Yang v. Lewis* and the Big Dan's rape case.

During the proceedings for *People v. Turner*, there were many instances of victim blaming.[279] During the trial, the attorney for Turner asked a plethora of questions designed to implicate the victim's culpability in her own sexual assault.[280] He included questions about what she was wearing that night, and used other questions to try and discredit her, asking her things like "[a]re you sexually active with [your boyfriend]?" and "[d]o you have a history of cheating?" followed by questions designed to illustrate her lack of memory from the night of the attack.[281] The attorney finished his round of questions with "[d]o you remember any more from that night? No? Okay, well, we'll let Brock fill it in."[282]

The most striking thing about that sentence, that "we'll let Brock fill it in," is that the attorney effectively handed the narrative power over to a man who sexually assaulted an unconscious woman next to a dumpster.[283] By uttering this phrase, the victim's voice is for all intents and purposes extinguished, and this undermining of victims' credibility and public erasure of their experience is exactly what prevents so many victims from coming forward. And for Turner's victim, this specific instance of victim blaming was in the context of a courtroom, the very place where victims are encouraged to bring their claims of sexual violence in order to receive justice and validation for the harm they have suffered. Granted, it is the defense attorney's prerogative to try and discredit the victim because the attorney's job is to win their case, but using this type of victim blaming behavior as an avenue to achieve that objective contributes to the toxic way society deals with victims of sexual assault and it sets a terrible example of what is considered acceptable behavior toward alleged victims.

Racial undertones affect not only the public's treatment of the victim, but the treatment of the perpetrator. Brock Turner's treatment in the media especially demonstrates the role of race in the portrayal of perpetrators: the

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[277] *Id.*

[278] *See About: History and Vision*, ME TOO, [perma.cc/ZN9X-9G5A] (last visited Apr. 29, 2020).

[279] *See* People v. Turner, No. H043709, 2018 Cal. App. Unpub. LEXIS 5406 (Cal. Ct. App. Aug. 8, 2018); Baker, *supra* note 134.

[280] Baker, *supra* note 134.

[281] *Id.*

[282] *Id.*

[283] *See id.*

media's initial coverage of Turner sparked outrage.[284] Many news outlets used Turner's yearbook photo and photos of him during swimming competitions instead of a mugshot; and even the first article that Turner's victim read about the attack finished its coverage of the story by listing Turner's swimming times.[285]

The same cannot be said for people of color who commit similar crimes, especially in the black community. Even prominent papers like the *Washington Post* printed the smiling yearbook photo for Turner, but used grim-faced mugshots for coverage of rapes perpetrated by black individuals.[286] Some critics of Turner's extremely light sentence noted that a similar case had been handled very differently: Corey Batey, a nineteen-year-old Vanderbilt University football star, was convicted on three felony counts of sexual assault and was sentenced to a minimum of fifteen to twenty-five years in prison for his crimes.[287] This sentence is 3,000% longer than the sentence Turner received for a comparable crime.[288] The only obvious difference between the two men is the fact that Turner is white and Batey is black.[289] And inferences can be drawn from all this information—that, based on his race, a more positive view of Turner may have caused people to view his victim more negatively. It is more than probable that his race made him seem more appealing, more sympathetic, less blameworthy: a thought process which could lead to less empathy for the victim of his crimes.

The unfortunate truth about victim blaming is that just changing the MPC will not eradicate the underlying social and racial factors that contribute to a culture that allows victim blaming to occur. However, changing the MPC provides a way to punish the most extreme victim blaming behaviors, especially when they are exhibited by people who actually witness a sexual assault but choose not to intervene based on their perception of the victim. This may not immediately change the ingrained social attitudes of the people who engage in victim blaming behaviors, but changing the MPC will provide a way to prosecute passive bystanders who exhibit those attitudes, and it will allow the country to take important legal steps toward eradicating the more dangerous types of victim blaming. Hopefully legal action taken against passive bystanders will create more public awareness about how people should

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[284] Lauren O'Neil, *Status and Race in the Stanford Rape Case: Why Brock Turner's Mug Shot Matters*, CBC NEWS (June 11, 2016, 1:52 PM), [https://perma.cc/38J6-XQTD].

[285] Baker, *supra* note 134.

[286] O'Neil, *supra* note 284.

[287] *Id.*

[288] *Id.* (quoting Shaun King, *Brock Turner and Cory Batey, Two College Athletes Who Raped Unconcious Women, Show How Race and Privilege Affect Sentences*, DAILY NEWS (June 7, 2016, 5:42 PM), [https://perma.cc/X46C-ZYAX])).

[289] *Id.*

act if they witness a sexual assault, and that awareness in turn will raise the number of people who actively take steps to prevent sexual assault.

3. Overcoming Victim Blaming

While changing the MPC will not automatically create sweeping change in American attitudes about victims of sexual assault, there are suggestions from experts about how to combat victim blaming on a more manageable, day-to-day level. Laura Niemi, PhD., described research that counterintuitively suggested that the employment of "language that focuses *less* on victims might lead to greater sympathy for victims."[290] Dr. Niemi described how the study "experimentally manipulated language focus by placing the perpetrator or the victim in the subject position in the majority of the sentences in vignettes in one experiment."[291] Dr. Niemi provided a specific example: the victim-focused "Lisa was approached by Bob" versus the perpetrator-focused "Bob approached Lisa."[292] The study found that when participants focused attention on the actions of the perpetrator, their responses to the question "[h]ow could the outcome of this situation have been different?" contained lower ratings of victim blame and victim responsibility, and any references to victims' actions significantly decreased.[293] If law enforcement agencies and news outlets discussed incidents of sexual assault while only using perpetrator-focused language, that would be a good first step towards cutting down on the cultural pervasiveness of victim blaming. The public nature of agencies like those would ensure that people who pay attention to the news or police reports would be exposed to that kind of language, which would help shape how those individuals think about and discuss the topic of sexual assault in the future.

The goal of updating the MPC is not to fully eradicate the bystander effect, implicit biases, institutionalized racism, or victim blaming, but what it is meant to do is offer a vehicle for the prosecution of passive bystanders to sexual assault. Massive social and cultural awareness campaigns are underway, including the #MeToo movement, and the bulk of the work that will need to be done to create lasting change in the minds of Americans about how to treat conversations about sexual assault will have to come from repeated exposure to the stories shared by the individuals involved in these efforts.

IV. CONCLUSION

Sexual assault is a crime that leaves a terrible impact on its victims. And while every state should do everything possible hold the perpetrators of those crimes responsible, the states should *also* hold bystanders who passively

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[290] Niemi, *supra* note 258.

[291] *Id.*

[292] *Id.*

[293] *Id.*

observe these crimes accountable. Currently, most state laws do nothing to hold bystanders responsible. And since there is currently no standardized way to prosecute passive bystanders, updating section 213 of the MPC with a narrowly tailored provision offers a solid avenue for states to decide whether or not they want to pursue this method of facilitating prosecution. This new provision should read as follows:

> a) Bystanders to sexual assault, including rape, who are present at the commission of a sexual assault are required to either:
>
> 1. immediately report the incident to the proper authorities, or
>
> 2. take immediate action to either intervene in the assault or render assistance to the victim,
>
> so long as a reasonable person would believe that taking either action would not endanger the lives of themselves or the victim, and
>
> b) should the bystander reasonably believe taking either action would endanger the lives or physical safety of themselves or the victim, they are required to report the incident to the proper authorities or render assistance to the victim as soon as they are reasonably able.

The MPC's influence on state law, especially in the realm of criminal law, is undeniable. Even if the states choose not to adopt this provision directly, the MPC's influence may still galvanize states into choosing to draft their own legislation based on the revisions. Since the goal is to crack down on passive bystanders to sexual assault, any law passed with an understanding of that goal would be a step in the right direction. The states have looked to the MPC for many reasons in the past, and there could be no timelier or more socially relevant reason than the unrelenting need to put an end to sexual assault in this country. Even if creating this provision alone will not fully erase the apathy of the American public, implementing this update to the MPC would help mitigate the more serious effects of victim blaming by punishing bystanders who refuse to assist a victim based on their perception of them, and it would help raise the demoralizingly low rates of reporting for sexually violent crimes. Even though there are some psychological and cultural reasons for why bystanders may choose not to intervene in cases of sexual assault, that does not provide a sound legal excuse for why the current laws should continue to allow this behavior on a broad scale. Creating this updated provision to the MPC will in turn provide the opportunity for the states to create a change for the better.