

DIGITAL AGE SAMARITANS

ZACHARY D. KAUFMAN

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DIGITAL AGE SAMARITANS

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Abstract: Modern technology enables people to view, document, and share evidence of crimes contemporaneously or soon after commission. Electronic trans-

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mission of this material—including through social media and mobile devices—raises legal, moral, and practical questions about spectators’ responsibilities. In the digital age, will these actors be bystanders or upstanders? What role can and should the law play in shaping their behavior?

This Article argues that certain witnesses who are not physically present at the scene of a crime should be held criminally accountable for failing to report specified violent offenses of which they are aware. Focusing on rape, police brutality, and other misconduct, this Article demonstrates that recent technological innovations create new opportunities and challenges to pursue justice and accountability. Such culpability centers on “Bad Samaritan laws,” statutes that impose a legal duty to assist others in peril through intervening directly (also known as “the duty to rescue”) or notifying authorities (also known as “the duty to report”). Many of these antiquated laws, however, arguably apply only to witnesses who are physically present, which limits their potential effectiveness today.

Not all virtual witnesses should be subject to liability. This Article introduces a novel typology of bystanders and upstanders in the digital age to consider categories of actors that may warrant criminal punishment. This typology draws on an original case study of the first known sexual crime livestreamed in the United States by a third party, which more than 700 people viewed. Harnessing insights from that case study and other episodes, this Article recommends that legislators should modernize, refine, proliferate, and publicize Bad Samaritan laws, and that law enforcement should enforce these statutes or leverage them to obtain witness testimony. To that end, this Article proposes a model duty-to-report statute that applies to virtual presence and includes reasoned exemptions for noncompliance.

INTRODUCTION

Modern technology enables a potentially massive, distributed audience to view, document, and share evidence of crimes—including rape, police brutality, murder, terrorism, and genocide—contemporaneously or shortly after commission. Electronic transmission and receipt of this material through, for example, social media and mobile devices, raises legal, moral, and practical questions about spectators’ responsibilities. In “the digital age,”¹ what role can and should the law play in prodding would-be “bystanders”² to act instead as “upstanders”³?

¹ *Digital Age*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/digital-age> [<https://perma.cc/SBQ7-WKMM>] (“[T]he present time, in which many things are done by computer and large amounts of information are available because of computer technology.”).

² *Bystander*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/25640?redirectedFrom=bystander#eid> [<https://perma.cc/8PCT-TCDX>] (“One who is standing by; one who is present without taking part in what is going on; a passive spectator.”).

³ *Upstander*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/220189?rskey=Os8ejT&result=1#eid> [<https://perma.cc/SV4C-Z5C7>] (“A person who speaks or acts in support of a

Extant legal scholarship favoring bystander liability does not adequately address the digital context.⁴ This literature either argues that only in-person witnesses to particular crimes (such as rape⁵) should be required to notify police, does not sufficiently analyze nuances between or among online and offline bystanders,⁶ or considers only cyberbullying⁷ or tort law.⁸ In addition, although several academics have analyzed liability for online “platforms”⁹ (which is typically shielded by Section 230 of the Communications Decency Act of 1996¹⁰), there is a dearth of scholarship about culpability for their by-

cause, *esp.* one who intervenes on behalf of a person being attacked or bullied.”). For the history of this term, see Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1327 n. 42 (2019).

⁴ See *infra* notes 5–8 and accompanying text.

⁵ Kimberley K. Allen, Note, *Guilt by (More Than) Association: The Case for Spectator Liability in Gang Rapes*, 99 GEO. L.J. 837, 839 (2011) (advocating for statutes to require witnesses to report rape).

⁶ Patricia Grande Montana, *Watch or Report? Livestream or Help? Good Samaritan Laws Revisited: The Need to Create a Duty to Report*, 66 CLEV. ST. L. REV. 533, 551–58 (2018) (arguing for duty to aid statutes rooted in historical precedent); Sharon Yamen et al., *Am I My Brother’s Keeper? How Technology Necessitates Reform of the Lack of Duty to Rescue or Duty to Report Laws in the United States*, 28 B.U. PUB. INT. L.J. 117, 117–18 (2019) (examining Bad Samaritan laws and proposing a new statutory regime to address shortfalls).

⁷ See Heather Benzmillar, Note, *The Cyber-Samaritans: Exploring Criminal Liability for the “Innocent” Bystanders of Cyberbullying*, 107 NW. U. L. REV. 927, 927 (2013) (proposing that witnesses of cyberbullying be held liable under Bad Samaritan laws).

⁸ See Amelia J. Uelmen, *Crime Spectators and the Tort of Objectification*, 12 U. MASS. L. REV. 68, 68, 81–82, 110 (2017) (proposing a new tort for “mocking and maligning” someone in distress through filming or photographing them called “exploitative objectification of a person in need of emergency assistance”). Professor Amelia Uelmen’s proposed tort is limited to physical presence. *Id.* at 118–19. In comparison, this Article proposes criminal liability for witnesses who are both physically and virtually present.

⁹ *Platform*, OXFORD ENG. DICTIONARY, [https://www.oed.com/view/Entry/145374?rskey=7sr36r&result=1#eid \[https://perma.cc/2A7U-LGQN\]](https://www.oed.com/view/Entry/145374?rskey=7sr36r&result=1#eid [https://perma.cc/2A7U-LGQN]) (“A standard system architecture; a (type of) machine and/or operating system, regarded as the base on which software applications are run.”). For discussion of the legal issues surrounding platforms, see generally Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT’L L.J. 41 (2020) (discussing automated online content monitoring); Rebecca J. Hamilton, *Governing the Global Public Square*, 62 HARV. INT’L L.J. 117 (2021) (exploring the global public square and its implications); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1635–48 (2018) (analyzing rules for and methods of reactive online content moderation); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1355–56, 1361–62 (2018) (criticizing current content moderation regimes of social media companies).

¹⁰ 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”); *id.* § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”). For discussion of 47 U.S.C. § 230, see, for example, DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 170–77 (2014) (reviewing the history of § 230); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 519 n.490 (2002) (stating that § 230 “immunizes [internet services providers] not only from defamation liabilities, but also from tort actions arising from obscenity”); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Re-*

stander users.¹¹ This Article thus argues more comprehensively that certain witnesses who are not physically present at the scene of the crime should be held criminally accountable for failing to report specified violent offenses of which they are aware: murder, kidnapping, sexual assault, aggravated assault, and felonious assault.¹²

venge Porn, 49 WAKE FOREST L. REV. 345, 359 (2014) (stating that “[c]ourts have interpreted § 230 to largely immunize from liability website owners and operators for tortious material submitted by third-party users”); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 116 (2009) (arguing that “some courts read § 230 to grant sweeping immunity far beyond what its words and context supported”); Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1931 (2019) (arguing that, because of § 230, “the parties in the best position to minimize potential harm—content platforms—have no legal incentive to intervene, and plaintiffs cannot sue these giant corporations to provide them with a legal reason to bother”); Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1662&context=ucf> [<https://perma.cc/8E5J-U9MC>] (stating that legislators’ intent in enacting § 230 “was to incentivize, rather than penalize, private efforts to filter, block, or otherwise address noxious activity”); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 403 (2017) (arguing that “§ 230 immunity is too sweeping”); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 103 (2002) (arguing that “[t]orts in cyberspace are already being stymied by state tort retractions and federal piecemeal reforms like section 230”); Olivier Sylvain, *Recovering Tech’s Humanity*, 119 COLUM. L. REV. F. 252, 253 (2019), <https://columbialawreview.org/content/recovering-techs-humanity/> [<https://perma.cc/B6RT-BATN>] (arguing that, under the prevailing § 230 doctrine, “powerful companies like Facebook, Google, and Amazon do not have any legal obligation to block or remove user-generated content that they have no hand in ‘creat[ing]’ or ‘develop[ing]’” (quoting 47 U.S.C. § 230(f)(3))); Laura Cannon, Comment, *Indecent Communications: Revenge Porn and Congressional Intent of § 230(C)*, 90 TUL. L. REV. 471, 473 (2015) (arguing that § 230 “does not provide immunity for websites that encourage and aid in the development of involuntary porn by providing a platform dedicated to its promotion and dissemination”); Alexandra Lotty, Note, *Apps Too: Modifying Interactive Computer Service Provider Immunity Under Section 230 of the Communications Decency Act in the Wake of “Me Too,”* 93 S. CAL. L. REV. 885, 887 (2020) (arguing that “current interpretations of the scope of section 230 immunity wrongfully deny individuals who have been sexually harassed or assaulted an opportunity to hold online services accountable for causing or exacerbating their harms”).

¹¹ In an article published as this one was in the final editing stages, Professor Eldar Haber builds on previous scholarship by me and others, including attorneys Heather Benzmilller and Natalie Perrin-Smith Vance, to consider the culpability of online bystander users for violating Bad Samaritan laws. See Eldar Haber, *The Digital Samaritans*, 77 WASH. & LEE L. REV. 1559 (2020). In contrast to Haber’s contribution, which expresses opposition to applying existing Bad Samaritan laws in the digital context, *id.* at 1596, 1623, this Article finds the expansion of these statutes to be desirable in certain contexts and proposes ways to improve their application, see *infra* Part IV. Moreover, this Article provides more nuanced treatment of subcategories of online bystanders, upstanders, and enablers, in part because it considers both livestreams and recordings, whereas Haber’s interest is primarily in livestreams. Haber’s article offers helpful insights in its discussion of the potential liability of non-human bystanders (e.g., artificial intelligence) and related concerns about platform governance, topics this Article does not address. See generally Haber, *supra*.

¹² Some states, such as Ohio, distinguish between felonious and aggravated assault. Compare OHIO REV. CODE ANN. § 2903.11 (West 2020) (criminalizing felonious assault as a first- or second-

This Article is the second in a series of articles that I am writing about “Bad Samaritan laws”—statutes that “impose a legal duty to assist others in peril through intervening directly (also known as ‘the duty to rescue’) or notifying authorities (also known as ‘the duty to report’).”¹³ The first Article, *Proteectors of Predators or Prey*, was inspired by the #MeToo movement and focused on witnesses to sexual crimes in the United States, whether or not observers used modern technology.¹⁴ In that Article, I raised issues and questions regarding online bystanders (which I termed “fourth parties”), arguing that the advent of mobile devices and social media has complicated dynamics of addressing crime spectators.¹⁵ Since then, people’s increasingly online lives have made these complexities all the more pressing.¹⁶

degree felony), *with id.* § 2903.12 (criminalizing aggravated assault as a third- or fourth-degree felony).

¹³ Kaufman, *supra* note 3, at 1325 (defining “Bad Samaritan laws”). I am also writing a series of related essays and opinion pieces about bystanders, upstanders, enablers, and Bad Samaritan laws. See Zachary D. Kaufman, *Lessons from Rwanda: Post-Genocide Law and Policy*, 31 STAN. L. & POL’Y REV. ONLINE 1, 20–21 (2019), <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/08/2019.08.02-Lessons-from-Rwanda-Zachary-D.-Kaufman-1.pdf> [<https://perma.cc/6VQV-JUWP>] (arguing that one of ten lessons from the 1994 Genocide against the Tutsi in Rwanda is that “upstanderism is imperative”); Zachary D. Kaufman, *Give the Nobel Peace Prize Posthumously*, FOREIGN POL’Y (Oct. 5, 2017), <https://foreignpolicy.com/2017/10/05/give-the-nobel-peace-prize-posthumously/> [<https://perma.cc/H5P9-VDZS>] (arguing that Aung San Suu Kyi’s Nobel Peace Prize should be revoked and that such prizes should only be awarded posthumously); Zachary D. Kaufman, *Islam Is (Also) a Religion of Peace*, FOREIGN POL’Y (Aug. 4, 2016), <https://foreignpolicy.com/2016/08/04/islam-is-also-religion-of-peace-humayun-khizr-khan-trump/> [<https://perma.cc/LG9M-Z76P>] (discussing Muslim upstanders amid conflict, including genocide); Zachary D. Kaufman, Opinion, *No Cover for Abusers; California Must Close Gap in Its Duty-to-Report Law*, S.F. CHRON., June 23, 2019, at A15 [hereinafter Kaufman, *No Cover for Abusers*] (arguing that the California legislature should reform the state’s duty-to-report law); Zachary D. Kaufman, Opinion, *What Makes People Save Lives? Learning from Upstanders and Bystanders*, N.Y. DAILY NEWS (Oct. 27, 2020), <https://www.nydailynews.com/opinion/ny-oped-what-makes-people-save-lives-20201027-7h3fdmbfvey5oeqmjoclh6cyq-story.html> [<https://perma.cc/NM49-4KD8>] [hereinafter Kaufman, *What Makes People Save Lives?*] (analyzing positive and negative implications of celebrating purported upstanders); Zachary D. Kaufman, Opinion, *When Speaking Up Is a Civic Duty*, BOS. GLOBE, Aug. 5, 2018, at K6 [hereinafter Kaufman, *Speaking Up*] (proposing state and federal duty-to-report laws for sexual crimes).

For other recent discussion of Bad Samaritan laws and Good and Bad Samaritanism, see, for example, Travis Coon, *Hike at Your Own Risk: In Support of No-Rescue Wilderness Designations*, 124 PENN ST. L. REV. 529, 532–43 (2020) (addressing the context of Americans venturing into remote and wild areas); Itamar Mann, *The Right to Perform Rescue at Sea: Jurisprudence and Drowning*, 21 GERMAN L.J. 598, 599–600 (2020) (addressing the context of migration); Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. 619, 652–59 (2020) (same); Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1028–35 (discussing bystander intervention initiatives). For a list of additional scholarship on Bad Samaritan laws and Good and Bad Samaritanism, see Kaufman, *supra* note 3, at 1328 n.43.

¹⁴ See Kaufman, *supra* note 3, at 1330–35.

¹⁵ Specifically, that Article argued that technological advances of the digital age have increased awareness of emergencies, decreased justifications for not reporting them, and strengthened evidence of witnesses and their conduct. *Id.* at 1342. It further argued that fourth parties could become aware of

My research for this series of articles included compiling the most comprehensive global database of Bad Samaritan laws, encompassing U.S., foreign, and international statutes.¹⁷ These laws—which vary by subject matter, victims to whom they apply, and individuals who must comply—are controversial. *Protectors of Predators or Prey* addressed debates about the laws’ origins, operations, outcomes, and objections (constitutional and otherwise)¹⁸ and established that the statutes are far more prevalent and longstanding in the United States than scholars had previously recognized.¹⁹ Bad Samaritan laws in the United States date back to the eighteenth century.²⁰ Many were prompted by cases of bystanderism that shocked the public consciousness, particularly

emergencies contemporaneously or near-contemporaneously and that some of these individuals should shoulder a duty to report. *Id.* at 1372–73. Additionally, it contended that existing Bad Samaritan laws vary on whether the law’s subjects must be physically near the crime, that physical presence should not be an element of the crime of failing to report, and that such amended or reinterpreted statutes would introduce numerical and jurisdictional complications. *Id.* at 1390–91.

¹⁶ Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html> [<https://perma.cc/JGD3-MYPR>] (observing that “during the coronavirus pandemic . . . Americans have been spending more of their lives online”).

¹⁷ *Bad Samaritan Laws*, ZACHARY D. KAUFMAN, <http://www.zacharykaufman.com/bad-samaritan-laws> [<https://perma.cc/K5A5-TKZE>] [hereinafter Appendix].

¹⁸ See Kaufman, *supra* note 3, at 1335–42 (analyzing critiques of Bad Samaritan laws’ impetus, nature, consequences, and effectiveness).

¹⁹ *Id.* at 1326, 1345–46 (arguing that scholars undercount or mischaracterize Bad Samaritan laws in the United States).

²⁰ A federal statutory crime of misprision of felony was first enacted in 1790 and is currently codified at 18 U.S.C. § 4. Gabriel D.M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 721 (2003). This crime has been interpreted to require proactive concealment rather than mere failure to report or otherwise intervene. See 18 U.S.C. § 4; *United States v. Johnson*, 546 F.2d 1225, 1227 (5th Cir. 1977) (“The mere failure to report a felony is not sufficient to constitute a violation of 18 U.S.C.A. § 4.”). For discussion of this statute, see Ciociola, *supra*, at 721–23 (stating that the statute requires a “positive act of concealment”); Alison M. Arcuri, Comment, *Sherice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 474–76 (2000) (providing an overview, including the elements, of misprision of felony). See generally Royal G. Shannonhouse, III, *Misprision of a Federal Felony: Dangerous Relic or Scourge of Malfeasance?*, 4 U. BALT. L. REV. 59 (1974).

In 1870, Louisiana became one of the first three states to enact a misprision statute resembling the federal one, Act 120, Section 57, 1855 La. Acts 139, but this law was repealed in 1942. Ciociola, *supra*, at 723–24. Vermont later became the first state, in 1967, Act 309, Section 2, 1967 Vt. Acts & Resolves 273, to enact a genuine Bad Samaritan law—criminalizing only omissions—that remains in force. VT. STAT. ANN. tit. 12, § 519(a) (West 2021) (“A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or herself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.”); Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 55 (1972) (stating, at the time, that “the Vermont statute is unique in American law”).

involving sexual crimes.²¹ Today, twenty-nine states and Puerto Rico feature Bad Samaritan laws applying to most or all physically-present witnesses,²² and Congress enacted a narrow federal Bad Samaritan law in 2018.²³ Such statutes also exist in dozens of foreign countries and multiple subfields of international law.²⁴

Because enactment of most Bad Samaritan laws in the United States preceded the digital age,²⁵ legislators did not anticipate how evidence of crimes could be widely and rapidly shared electronically. Thus, the statutes' applicability to distant bystanders is ambiguous. For example, laws in Hawaii,²⁶ Massachusetts,²⁷ and Washington²⁸ apply only to individuals *at the scene* of the crime (which, if limited to *physical* presence at the scene, would exclude remote observers). Alternatively, California,²⁹ Florida,³⁰ and Texas³¹ laws apply to individuals who *observe* the crime (which, if such observation includes *vir-*

²¹ Kaufman, *supra* note 3, at 1337 (noting that reforms have “occasionally occurred after notorious, egregious cases of sexual misconduct”); Swan, *supra* note 13, at 1000 (citing the fatal sexual assault of Sherrice Iverson as an example).

²² Kaufman, *supra* note 3, at 1345–47 nn.150–52. The twenty-nine states are: Alaska, California, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.*; Appendix, *supra* note 17 (listing all Bad Samaritan laws in the United States, including Puerto Rico).

²³ Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318 (codified at 36 U.S.C. § 220542). The statute provides in part that “all adults authorized by such members [of a national governing body] to interact with an amateur athlete [shall] report immediately any allegation of child abuse of an amateur athlete who is a minor to . . . law enforcement.” 36 U.S.C. § 220542(a)(2)(A).

²⁴ Kaufman, *supra* note 3, at 1326, 1342–43; Appendix, *supra* note 17. Among other foreign countries, this database includes Albania, Algeria, Angola, Argentina, Armenia, Austria, Azerbaijan, Belgium, Belize, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Central African Republic, Chad, Chile, Comoros, Croatia, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Russia, Ukraine, and Uzbekistan. Appendix, *supra* note 17.

²⁵ See Appendix, *supra* note 17 (listing Bad Samaritan laws' years of enactment).

²⁶ HAW. REV. STAT. § 663-1.6(a) (2021) (imposing a duty to assist only upon persons “at the scene of a crime”).

²⁷ MASS. GEN. LAWS ch. 268, § 40 (2021) (imposing a duty to report to law enforcement officials only upon persons who are “at the scene of said crime”).

²⁸ WASH. REV. CODE § 9.69.100(1)(a)–(c) (2021) (imposing duty to notify public officials only upon persons “who witness[] the actual commission of” violent offenses or sexual offenses against children).

²⁹ CAL. PENAL CODE § 152.3(a) (West 2021) (imposing a duty to notify peace officers only upon people “who reasonably believe[] that [they] ha[ve] observed the commission” of the crime).

³⁰ FLA. STAT. § 794.027 (2020) (imposing a duty to report to law enforcement officers only upon a person “who observes the commission of the crime”).

³¹ TEX. PENAL CODE ANN. § 38.17(a)(1) (West 2019) (imposing a duty to stop or to report to peace officers or law enforcement agencies only upon a person who “observes the commission or attempted commission of [a specified] offense”).

tual observation, could include off-site witnesses). Still other laws, such as in Ohio,³² Vermont,³³ and Wisconsin,³⁴ apply to individuals who *know* of the crime (which could also include ex-situ spectators). Therefore, under existing statutes, *physically* present witnesses could be punished, even though their cost of action is high (because they are more likely to experience peril personally if they intervene).³⁵ Meanwhile, *virtually* present spectators may not be punished, even though their cost of intervention is low (because they are better able to alert authorities without criminals knowing).³⁶ To ensure that prosecutors could reach individuals who view crimes electronically, legislators should introduce or amend Bad Samaritan laws.

As considerations involving criminal duty-to-report statutes are so vast, other potentially relevant laws and policies are beyond the scope of this Article. For example, in some scenarios, witnesses could be charged with crimes other than violating a Bad Samaritan law, such as child pornography³⁷ and accomplice liability.³⁸ Bystanders could potentially be held civilly liable, a topic tort scholars have addressed.³⁹ Community programs that promote upstanderism, particularly in high-risk settings (such as college campuses), could

³² OHIO REV. CODE ANN. § 2921.22(A)(1) (West 2020) (imposing a duty to report to law enforcement authorities upon people “knowing that a felony has been or is being committed”).

³³ VT. STAT. ANN. tit. 12, § 519(a) (West 2021) (imposing a duty to assist upon a person “who knows that another is exposed to grave physical harm”).

³⁴ WIS. STAT. § 940.34(2)(a) (2020) (imposing a duty to aid or to report to law enforcement officers upon a person “who knows that a crime is being committed”).

³⁵ See *supra* notes 26–34 and accompanying text.

³⁶ See *supra* notes 26–34 and accompanying text.

³⁷ MacKenzie Smith, Note, *You Can Touch, but You Can't Look: Examining the Inconsistencies in Our Age of Consent and Child Pornography Laws*, 87 S. CAL. L. REV. 859, 864 (2014) (stating that “all fifty states, the District of Columbia, and the federal government have laws prohibiting child pornography,” defined as visual depictions of sexually explicit conduct involving a minor). Federal laws on sexual exploitation and other abuse of children are codified at 18 U.S.C. §§ 2251–2260A. One section criminalizes mere receipt of such material. 18 U.S.C. § 2252(a)(2) (applying to “[a]ny person who . . . knowingly receives . . . any child pornography”). The U.S. Supreme Court has unanimously held that child pornography is not protected under the First Amendment. *New York v. Ferber*, 458 U.S. 747, 765–66 (1982) (holding that “the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State”).

³⁸ See, e.g., 18 U.S.C. § 2(a) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); Lindsey Linder & Justin Martinez, *No Path to Redemption: Evaluating Texas’s Practice of Sentencing Kids to De Facto Life Without Parole in Adult Prison*, 22 SCHOLAR 307, 336 (2020) (“Nearly every state has an accomplice liability law that ensures culpable individuals are not absolved of crimes they helped commit even if they were not the primary perpetrators.”).

³⁹ Kenneth S. Abraham & Leslie Kendrick, *There’s No Such Thing as Affirmative Duty*, 104 IOWA L. REV. 1649, 1654 (2019) (clarifying that there is no general duty to rescue, absent some “affirmative dut[y]” exception to the general rule). Additionally, Professor Martha Chamallas considered whether the #MeToo movement “has the potential to accelerate and intensify the trend to hold third parties responsible in tort.” Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39, 45 (2018).

be strengthened and spread.⁴⁰ Finally, carrots, as well as sticks (the Bad Samaritan laws), could be used to incentivize upstanderism, a subject I have analyzed elsewhere.⁴¹

This Article proceeds in five parts. Part I provides an overview and examples of bystanderism and upstanderism in the digital age, including amid rape and police brutality.⁴² As this Part demonstrates, recent technology creates new opportunities and challenges to pursue justice and accountability.

As an illuminating (albeit harrowing) case study, Part II presents the first known instance of a sexual crime “livestreamed”⁴³ in the United States by a third party (the “Gates-Lonina case”).⁴⁴ In 2016 in Columbus, Ohio, a woman (Marina Lonina) broadcast in real time the rape (perpetrated by Robert Gates) of her supposed best friend.⁴⁵ Of the more than 700 viewers,⁴⁶ only one alerted the police.⁴⁷ To research this case, which involved a variety of bystanders and upstanders, I examined and generated numerous primary sources. By submitting a public records request to the Columbus Police Department (“CPD”), I obtained audio and video recordings of investigators’ interviews with Gates and Lonina, images of the crime scene, and the 150-page police file.⁴⁸ I also conducted the first comprehensive interviews with five key figures in the case: the lead prosecutor (Ron O’Brien), the assistant prosecutor (Jennifer Rausch), the lead detective (Brent Close), Lonina’s defense counsel (Samuel Shamansky), and the only upstander who alerted law enforcement (“the Reporter,”

⁴⁰ Swan, *supra* note 13, at 977–78 (noting that “schools, college campuses, military bases, workplaces, and other institutions have already implemented bystander intervention training programs”).

⁴¹ Kaufman, *supra* note 3, at 1396–1403 (advocating for identifying and incentivizing upstanders).

⁴² See *infra* notes 60–123 and accompanying text.

⁴³ *Live Stream*, LEXICO, https://www.lexico.com/en/definition/live_stream [<https://perma.cc/6AV6-NJSN>] (“A live transmission of an event over the internet.”); see also Grace Studer, Note, *Live Streaming Violence Over Social Media: An Ethical Dilemma*, 11 CHARLESTON L. REV. 621, 625 (2017) (describing “live streaming” as videos “uploaded to the Internet and disseminated instantaneously”).

⁴⁴ See *infra* notes 124–170 and accompanying text.

⁴⁵ Mike McPhate, *Teenager Is Accused of Live-Streaming a Friend’s Rape on Periscope*, N.Y. TIMES (Apr. 18, 2016), <https://www.nytimes.com/2016/04/19/us/periscope-rape-case-columbus-ohio-video-livestreaming.html> [<https://perma.cc/QWQ4-R2XD>] (describing the charges against Marina Lonina, who witnessed and streamed another man, Raymond Gates, raping Lonina’s friend).

⁴⁶ Skype Interview with the Anonymous Reporter in the Gates-Lonina case (June 5, 2020) (on file with author) [hereinafter Author-Reporter Interview 2] (noting that there were “706 or 707” people who viewed the rape video in real time).

⁴⁷ See *infra* notes 158–159 and accompanying text.

⁴⁸ I submitted the public records request to the Columbus Police Department (CPD) in February 2020. The following month the CPD mailed me three CDs, which contained: (1) an audio recording of Close’s attempted interview of Lonina on March 2, 2016; (2) a video recording of Close’s interrogation of Lonina the following day; (3) a video recording of Close’s interrogation of Gates on April 3, 2016; (4) twenty-five crime scene photos; and (5) the partially redacted 150-page police file.

who requested anonymity).⁴⁹ Through this extensive research, I uncovered information that incriminates more people involved in the Gates-Lonina case than were investigated, let alone charged, and that led me to two major conclusions. First, it may have been possible yet unnecessary and undesirable to charge Lonina herself with violating a Bad Samaritan law (because she was already charged with several other, more serious offenses).⁵⁰ Second, other people could have been so charged.⁵¹

Analyzing the Gates-Lonina case in legal scholarship is as unprecedented as the case itself. Most analysis of bystander liability relies on the same three case studies: the rape and murder of twenty-eight-year-old Catherine “Kitty” Genovese in Queens, New York, on March 13, 1964 (the “Genovese case”);⁵² the gang rape of twenty-one-year-old Cheryl Araujo in New Bedford, Massachusetts, on March 6, 1983 (the “Araujo case”);⁵³ and the rape and murder of seven-year-old Sherrice Iverson in Primm, Nevada, on May 25, 1997 (the “Iverson case”).⁵⁴ ⁵⁵ The more recent, technologically infused Gates-Lonina case is emblematic of contemporary opportunities and challenges for responding to crimes.

Building on the Gates-Lonina case study, Part III analyzes roles and responsibilities of third parties to crimes in the digital age.⁵⁶ This Part presents an original typology, which is designed to maximize generalizability to other crimes. This Part considers whether certain categories of actors (“Transmit-

⁴⁹ I received Institutional Review Board (IRB) permission to conduct these interviews. The IRB ID is: STUDY00002199. All interviews were conducted and recorded via video conference (through Zoom and Skype) and then transcribed.

⁵⁰ See *infra* note 256 and accompanying text.

⁵¹ See *infra* notes 292–296 and accompanying text.

⁵² David W. Dunlap, 1964 | *How Many Witnessed the Murder of Kitty Genovese?*, N.Y. TIMES (Apr. 6, 2016), <https://www.nytimes.com/2016/04/06/insider/1964-how-many-witnessed-the-murder-of-kitty-genovese.html> [<https://perma.cc/WTN7-6JTD>] (describing the 1964 murder of Kitty Genovese and related news reporting). Specifically, the victim was attacked three times in thirty-five minutes and was killed, during which more than thirty of her neighbors did not intervene. John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 926.

⁵³ Renu Mandhane, *Duty to Rescue Through the Lens of Multiple-Party Sexual Assault*, 9 DALHOUSIE J. LEGAL STUD. 1, 1 (2000) (describing the rape, during which “[m]any people simply watched as [the victim] was degraded while others yelled encouragement to the people assaulting her”).

⁵⁴ Andrew D. Kaplan, “Cash-ing Out”: *Regulating Omissions, Analysis of the Sherrice Iverson Act*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 67, 67 (2000) (reviewing the facts of the Iverson case and the subsequent legislative response).

⁵⁵ For additional sources on the Genovese, Araujo, and Iverson cases, see Kaufman, *supra* note 3, at 1328 n.43; Kaufman, *What Makes People Save Lives?*, *supra* note 13.

⁵⁶ See *infra* notes 171–398 and accompanying text.

ters”⁵⁷ and “Receivers”) should shoulder any legal duties. Transmitters are *physically* present at the scene and share evidence of a crime electronically, such as through email, social media, mobile devices, or landline phones. Receivers are *virtually* present at the scene as remote witnesses who see, hear, or otherwise observe live or recorded material from Transmitters and may further broadcast that evidence. Each category is broken down into smaller groupings. Specifically, I divide Transmitters across two dimensions (conduct and timing), each of which has multiple subtypes, and Receivers across four dimensions (conduct, interaction with Transmitters, timing, and contextual knowledge), each of which also has multiple subtypes. Generally speaking, subtypes within dimensions are mutually exclusive while subtypes across dimensions are not.⁵⁸

Harnessing insights from the Gates-Lonina case and other episodes, Part IV offers prescriptions for improving justice and accountability in the digital age.⁵⁹ This Part recommends that legislators modernize, refine, proliferate, and publicize Bad Samaritan laws and that law enforcement apply these statutes or leverage them to obtain witness testimony. To ensure that enforcement is reasonable and manageable, this Part suggests a hierarchy of liability within the typology. Recognizing that existing Bad Samaritan laws are ambiguous, anemic, or antiquated, this Part also proposes a model duty-to-report statute for the digital age that explicitly applies to virtual presence and includes reasoned exemptions for noncompliance.

The Article concludes by reflecting on lessons that modern instances of bystanderism and upstanderism teach. Where Bad Samaritan laws exist, legislators should ensure that they are effective, in part through implementing this Article’s model statute. Police and prosecutors should use this Article’s typology to distinguish and prioritize liability for violating such statutes. Encouragingly, even lone upstanders can make a significant difference—underscoring why the law should prod witnesses (whether physically or virtually present) to certain violent crimes to help.

⁵⁷ What Professor Uelman calls “engaged spectators” are essentially what this Article calls “Transmitters,” including “Bystander Transmitters.” Uelman, *supra* note 8, at 92 (describing “engaged spectators” as bystanders “who choose to lock their attention on the scene”). She argues that such individuals’ recording “directly engag[es] not only the scene of an accident or an assault, but also in some way the vulnerable person.” *Id.* at 104, 108. Uelman’s analysis, however, does not sufficiently address nuances *among* engaged spectators, whether Transmitters or Receivers. *See id.*

⁵⁸ For further discussion of mutual inclusivity and exclusivity among bystanders and upstanders, see Kaufman, *supra* note 3, at 1372.

⁵⁹ *See infra* notes 399–479 and accompanying text.

I. OBSERVATION OF CRIME IN THE DIGITAL AGE

In-person witnesses to crime are likely as old as crime itself.⁶⁰ Today, social media and mobile devices enable people to view, document, and share evidence in real time or soon thereafter. Indeed, an “[i]nternet subculture”⁶¹ has grown around these spectacles,⁶² which have occurred more frequently over time.⁶³ This Part uses examples of bystanderism and upstanderism in the digital age to illustrate the opportunities and challenges that these situations can pose, demonstrating that the Gates-Lonina case is representative of a recurring phenomenon.⁶⁴

A. Opportunities

Social media and mobile devices enable users to observe crimes, preserve evidence for potential investigations and prosecutions,⁶⁵ raise the public’s awareness of misconduct, and assist victims or police after or even during the commission of offenses. Prosecutors can benefit from these opportunities to obtain convictions in situations that would have been more difficult in the past. This Section illustrates these possibilities by drawing on examples domestically and abroad.⁶⁶

Some of the most notorious cases involving electronic transmission and receipt of evidence have involved sexual abuse. Four years before and in the

⁶⁰ Larry O. Natt Gantt, II et al., *Professional Responsibility and the Christian Attorney: Comparing the ABA Model Rules of Professional Conduct and Biblical Virtues*, 19 REGENT U. L. REV. 1, 58–59 (2006) (discussing biblical notions of criminal witnesses).

⁶¹ See John Herrman, *In the Land of Internet Subcultures, Try Not to Look Like a Tourist*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/insider/youtube-right-internet-subculture.html> [<https://perma.cc/MSS6-MB8T>] (describing areas online where “devoted audiences” meet, in which these “audiences get to know their hosts, and each other, developing those who form into fandoms while simultaneously experiencing ideological formation”).

⁶² Uelmen, *supra* note 8, at 77–78 (“The daily papers carry frequent accounts of bystanders gathering to snap cell phone pictures of assaults, rapes, and even murders, as well as more run-of-the-mill accidents. Recently, an Internet subculture has also developed in which those who witness violent assaults stand by to record the incidents without intervening, and then they post the videos on social media.”).

⁶³ Montana, *supra* note 6, at 535 (noting “an increase in both the livestreaming of crimes and the filming of accidents or disastrous events for posting online to boost traffic to personal social media sites”).

⁶⁴ See *infra* notes 124–170 and accompanying text. People who view crime via the news are not among the witnesses this Article considers. These onlookers, who could reasonably assume that authorities are aware, would—or at least should—be alleviated of any legal responsibility to intervene.

⁶⁵ Professor Rebecca Hamilton calls such evidence “user-generated evidence.” Rebecca J. Hamilton, *User-Generated Evidence*, 57 COLUM. J. TRANSNAT’L L. 1, 3 (2018) (defining “user-generated evidence” as that which is “recorded on a device . . . by an ordinary citizen . . . to help achieve legal accountability for wrongdoing”).

⁶⁶ See *infra* notes 67–90 and accompanying text.

same state as the Gates-Lonina case, two sixteen-year-old boys raped a girl of the same age while the culprits and others discussed the assault, shared photos and videos of it, and ridiculed the girl over text messages, YouTube, Twitter, and Instagram (“the Steubenville case”).⁶⁷ Nobody who was physically or virtually present called the police.⁶⁸ Alexandria Goddard, a former resident of the town where the crime was perpetrated and who, at the time, was in another state, did, however, intervene. She took screenshots of messages, photographs, and videos on social media to maintain them on her personal website.⁶⁹ Goddard then sent the evidence to a local police officer before it could be erased.⁷⁰ Indeed, the perpetrators and their friends had deleted many of the online posts about the crime before the victim’s parents reported the offense.⁷¹

More recently, in March 2020 in Providence, Rhode Island, a mother found a video on Facebook of multiple men sexually assaulting her unconscious sixteen-year-old daughter (“the Providence case”).⁷² The mother recorded the video and sent it to police.⁷³ But for Goddard’s⁷⁴ and the mother’s⁷⁵

⁶⁷ See Kaufman, *supra* note 3, at 1361–71 (reviewing the facts, news reporting, investigation and subsequent prosecution of the Steubenville case); Alexander Abad-Santos, *Everything You Need to Know About Steubenville High’s Football “Rape Crew,”* THE ATLANTIC (Jan. 3, 2013), <https://www.theatlantic.com/national/archive/2013/01/steubenville-high-football-rape-crew/317300/> [https://perma.cc/T4N4-P42S] (specifying that the victim did not even know of the attack until seeing details of it online because she was intoxicated at the time of the incident).

⁶⁸ Kaufman, *supra* note 3, at 1366 (“According to the *Cleveland Plain Dealer*, “[Police Chief William] McCafferty said what bothers him most about the case is the silence—both on the night of the incident and now.” (quoting Rachel Dissell, *Rape Charges Against High School Players Divide Football Town of Steubenville, Ohio*, CLEVELAND.COM (Sept. 2, 2012), http://www.cleveland.com/metro/index.ssf/2012/09/rape_charges_divide_football_t.html [https://perma.cc/MU7S-Q44D])).

⁶⁹ Kaelyn Forde, *How One Crime Blogger Helped Expose the Steubenville High School Rape*, INSIDE EDITION (Mar. 21, 2019), <https://www.insideedition.com/how-one-crime-blogger-helped-expose-steubenville-high-school-rape-51553> [https://perma.cc/9BP4-CK33]; Alexandria Goddard, *Meet the Blogger Who Allegedly Complicated the Steubenville Gang Rape Case*, GOOD MEN PROJECT (Mar. 20, 2013), <https://goodmenproject.com/ethics-values/meet-the-blogger-who-allegedly-complicated-the-steubenville-gang-rape-case> [https://perma.cc/A4GM-NYZ6]; Jennifer Preston, *How Blogger Helped the Steubenville Rape Case Unfold Online*, N.Y. TIMES: THE LEDE (Mar. 18, 2013), <https://thelede.blogs.nytimes.com/2013/03/18/how-blogger-helped-steubenville-rape-case-unfold-online/> [https://perma.cc/8CJ9-4VYX].

⁷⁰ Forde, *supra* note 69.

⁷¹ Dissell, *supra* note 68.

⁷² Michael Levenson, *Facebook Video of Assault, Found by Victim’s Mother, Breaks Open Case*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/09/02/us/Providence-sexual-assault-charges.html> [https://perma.cc/49G3-JJVU]. All eight men present at the crime were charged with failing to report the assault and some were also charged with sexual assault. Amanda Milkovits, *R.I. Grand Jury Indicts Eight Men in Gang Rape in Providence*, BOS. GLOBE (Nov. 10, 2020), <https://www.bostonglobe.com/2020/11/10/metro/ri-grand-jury-indicts-eight-men-gang-rape-providence> [https://perma.cc/KHY2-T3DT].

⁷³ Levenson, *supra* note 72.

⁷⁴ Steve Almasy, *Two Teens Found Guilty in Steubenville Rape Case*, CNN (Mar. 17, 2013), <https://www.cnn.com/2013/03/17/justice/ohio-steubenville-case/index.html> [https://perma.cc/8YFL-

quick interventions to record and report in the Steubenville and Providence cases, respectively, investigators and prosecutors may not have obtained sufficient evidence for the eventual rape convictions.

Although Goddard's and the mother's conduct aided investigations *after* the sexual assaults had already been completed, upstanders can make a difference even *while* a crime is in progress. Coincidentally, another crime was broadcast from the same location (Columbus, Ohio) and via the same platform (Periscope) just days before Lonina's livestreams.⁷⁶ On February 16, 2016, two men livestreamed themselves pledging to shoot up their neighborhood with an AR-15 if their broadcast attracted 100 views, then handing the loaded gun to a toddler.⁷⁷ As with the Gates-Lonina and Steubenville cases, a Receiver in a different state contacted police, who then arrested the perpetrators.⁷⁸

Opportunities for upstanderism in the digital age are not unique to the United States. In 2017, a man in Sweden livestreamed via Facebook two other men gang raping a woman for three hours.⁷⁹ Several of the roughly sixty to

GW3M] (describing the legal findings against the participants in the Steubenville case); Connor Simpson, *The Steubenville Verdict Is in, and These Boys Are Guilty*, THE ATLANTIC (Mar. 17, 2013), <https://www.theatlantic.com/national/archive/2013/03/steubenville-verdict-guilty/317295> [<https://perma.cc/S94L-7RQU>]. See generally Ariel Levy, *Trial by Twitter*, NEW YORKER (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/05/trial-by-twitter> [<https://perma.cc/W4T8-SHWX>] (describing the long-term impact of Goddard's intervention on the case and her life).

⁷⁵ Levenson, *supra* note 72.

⁷⁶ McPhate, *supra* note 45 (noting that the attack occurred in Columbus, Ohio). O'Brien, Rausch, and Shamansky all state that the commonalities between this crime and the Gates-Lonina case are purely coincidental. Zoom Interview with Ron J. O'Brien, Prosecutor, Franklin Cnty., Ohio (May 19, 2020) (on file with author) [hereinafter Author-O'Brien Interview]; Zoom Interview with Jennifer M. Rausch, Prosecutor, Franklin Cnty., Ohio (May 5, 2020) (on file with author) [hereinafter Author-Rausch Interview]; Zoom Interview with Samuel H. Shamansky, Crim. Def. Att'y (May 4, 2020) (on file with author) [hereinafter Author-Shamansky Interview 1].

⁷⁷ Joe Clark, *Men Charged with Live Streaming Their Threat to Shoot Up Neighborhood*, NBC (May 10, 2016), <https://www.nbc4i.com/news/men-charged-with-live-streaming-their-threat-to-shoot-up-neighborhood/> [<https://perma.cc/L6TM-7CG2>] (describing the arrests of Yusuf Suliman Conteh and Damon Andrew Rosmand after threatening their neighborhood online).

⁷⁸ Clark, *supra* note 77; McPhate, *supra* note 45.

⁷⁹ *Man in Sweden "Live-Streamed Gang Rape on Facebook,"* LOCAL SE (Swe.) (Jan. 22, 2017), <https://www.thelocal.se/20170122/three-in-sweden-live-streamed-gang-rape-on-facebook> [<https://perma.cc/3QSG-WZPL>] (describing the rape of the victim who was "close to unconscious" at the time); Christina Anderson, *Swedish Police Investigate Report of Rape on Facebook Live*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/23/world/europe/sweden-uppsala-facebook-live-rape.html> [<https://perma.cc/2MAF-5GSV>]; Jon Sharman, *Sweden Gang Rape "Live-Streamed on Facebook,"* THE INDEPENDENT (Jan. 22, 2017), <https://www.independent.co.uk/news/world/europe/sweden-uppsala-gang-rape-live-streamed-facebook-social-media-three-arrested-a7540176.html> [<https://perma.cc/22WA-4YYL>]; Yaron Steinbuch, *Suspects in Live-Streamed Gang Rape Are Afghan Immigrants*, N.Y. POST (Jan. 26, 2017), <https://nypost.com/2017/01/26/afghan-immigrants-busted-for-live-streamed-gang-rape/> [<https://perma.cc/WU32-MXLY>] (stating that the rape occurred for three hours); *Three Men Arrested in Sweden After Facebook Live "Gang-Rape,"* THE GUARDIAN (Jan. 23,

two hundred online spectators called the police, who stopped the crime as it was occurring and arrested the three men.⁸⁰

These cases exemplify how social media and mobile devices limit the burden on and risk to remote viewers in reporting crimes. If virtual observers know relevant details about the crime (such as its location or participants), then they are often better positioned than in-person witnesses, without alerting the criminals, to contact police, emergency medical services, or others who could help. Perpetrators are more likely to be able to identify witnesses who are physically present and attack them for potentially or actually alerting authorities. In-person witnesses may also be perilously drawn into the crime itself and become victims themselves.

Like Receivers, Transmitters can be impactful upstanders. Many of these examples occur amid police brutality.⁸¹ The Black Lives Matter movement has called attention to law enforcement abuses in part through sharing photos and videos over social media.⁸² In 2016, a Minnesota police officer fatally shot Philando Castile (an African-American man) while Castile's girlfriend livestreamed the encounter over Facebook.⁸³ The broadcast of Castile's killing sparked outrage and demonstrations, which led to a nearly three million dollar settlement for Castile's mother⁸⁴ and the firing of Castile's killer.⁸⁵ More recently, also in Minnesota, a police officer was recorded fatally kneeling on the

2017), <https://www.theguardian.com/world/2017/jan/23/three-men-arrested-sweden-facebook-live-gang-rape-uppsala> [<https://perma.cc/R46W-56XZ>].

⁸⁰ Compare Facebook Live "Broadcasts Gang Rape" of Woman in Sweden, BBC NEWS (Jan. 23, 2017), <https://www.bbc.com/news/world-europe-38717186> [<https://perma.cc/VTE4-CAJC>] (identifying Josefine Lundgren as one of the viewers who called the police and noting that she said she could see sixty other spectators), with *Swedish Police Arrest 3 for Broadcasting Rape Live to Facebook*, DEUTSCHE WELLE (Jan. 23, 2017), <https://www.dw.com/en/swedish-police-arrest-3-for-broadcasting-rape-live-to-facebook/a-37246056> [<https://perma.cc/6QA4-U3QU>] [hereinafter *Swedish Police Arrest*] (also identifying Lundgren and stating that she was among "[s]everal online viewers of the crime [who] alerted police"). The Swedish police also noted that local media reported that "[a]bout 200 people were logged into the closed Facebook group during the assault." *Swedish Police Arrest*, *supra*.

⁸¹ See *infra* notes 82–88 and accompanying text.

⁸² Kathryn Russell-Brown, *Critical Black Protectionism, Black Lives Matter, and Social Media: Building a Bridge to Social Justice*, 60 HOW. L.J. 367, 406 (2017) (citing the examples of Philando Castile, Eric Garner, Laquan McDonald, and Walter Scott).

⁸³ Matt Furber & Richard Pérez-Peña, *After Philando Castile's Killing, Obama Calls Police Shootings "an American Issue,"* N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html> [<https://perma.cc/457G-JRY9>].

⁸⁴ Mitch Smith, *Philando Castile Family Reaches \$3 Million Settlement*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html> [<https://perma.cc/ZPG2-46XC>].

⁸⁵ *City of St. Anthony Fires Yanez*, STAR TRIB. (June 17, 2017), <https://www.startribune.com/city-of-st-anthony-fires-yanez/428935523/> [<https://perma.cc/D26V-VAHV>] (describing the firing of Officer Jeronimo Yanez and a related separation agreement).

neck of George Floyd, another African-American man.⁸⁶ The video of Derek Chauvin killing Floyd went viral and ignited mass protests across the United States and beyond,⁸⁷ prompting calls for meaningful police reform.⁸⁸

Modern technology also facilitates investigations and prosecutions of both criminals and bystanders. Through their recorded actions, perpetrators provide incriminating (or self-incriminating) evidence.⁸⁹ And, because of social media and mobile device users' digital footprints, identifying witnesses may be even easier online than during the analog era.⁹⁰

B. Challenges

The new opportunities social media and mobile devices provide for confronting crime come with challenges. Some of these complications are legal, including statutory jurisdiction, prosecutorial discretion, law enforcement, and

⁸⁶ Matt Furber et al., *Fatal Encounter Wasn't First Time Paths Crossed*, N.Y. TIMES, May 30, 2020, at A1 (reporting that the "police officer pressed his knee into Mr. Floyd's neck in silence, staring toward the ground as his captive gasped repeatedly").

⁸⁷ Damien Cave et al., *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html?searchResultPosition=1> [<https://perma.cc/66KU-57NZ>] (describing protests in the wake of the Floyd killing in Australia, France, and Germany); John Eligon et al., *Appeals for Calm as Sprawling Protests Threaten to Spiral out of Control*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/george-floyd-protest-minneapolis.html> [<https://perma.cc/QZ8P-NPF2>] (describing demonstrations in more than thirty-six U.S. cities over Floyd's death).

⁸⁸ John Felipe Acevedo, Essay, *Reclaiming Black Dignity*, 99 TEX. L. REV. ONLINE 1, 7–8 (2020), <https://texaslawreview.org/reclaiming-black-dignity/> [<https://perma.cc/NV83-WAHA>] (advocating for the "dismantling of the current police state" and creating a police force "beholden to the communities they . . . serve"); Brandon Hasbrouck, Essay, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 203 (2020), <https://www.uclalawreview.org/abolishing-racist-policing-with-the-thirteenth-amendment/> [<https://perma.cc/GES9-7MQU>] (proposing abolition of the police to "protect black lives"); Brian Mogck, *A Proposal for Police Reform: Require Effective Accountability Measures in Police Union Contracts as a Condition of Tax-Exempt Status*, 2020 U. CHI. L. REV. ONLINE 1, 3–4, <https://lawreviewblog.uchicago.edu/2020/08/07/police-unions-mogck/> [<https://perma.cc/8F7Z-XJ4R>] (arguing that police unions' tax-exempt status should depend on accountability for wrongdoing); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 787 (2021) (supporting a power shift from police to policed communities); Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 585 (2020) (arguing for reform to the "reasonable officer" legal standard); Ashley Caldwell, Note, *A Force for Change: Effective Police Reform Through State-Level Initiatives*, 45 U. DAYTON L. REV. 597, 608–10 (2020) (arguing for new legislation to increase police accountability); Derek Hawkins et al., "Defund the Police" Gains Traction as Cities Seek to Respond to Demands for a Major Law Enforcement Shift, WASH. POST (June 7, 2020), <https://www.washingtonpost.com/nation/2020/06/07/protests-defund-police/> [<https://perma.cc/GY3A-JBHL>].

⁸⁹ Raymond Surette, *Performance Crime and Justice*, 27 CURRENT ISSUES CRIM. JUST. 195, 204 (2015).

⁹⁰ Montana, *supra* note 6, at 557 ("[I]dentifying witnesses . . . might not be as difficult as doing so would have been in the past."); Benzmillier, *supra* note 7, at 951 n.204, 957, 959.

criminal evidence.⁹¹ Others are broader, such as content verification, witness psychology, upstander risk, and vigilantism.⁹²

The legal challenges involve technical, ethical, or logistical issues. First, modern technology complicates the jurisdiction of Bad Samaritan laws. Digital transmission of criminal evidence implicitly raises choice of law questions that analog observation does not. For example, if a crime is committed in the *same* jurisdiction in which a Receiver observes it, then the relevant Bad Samaritan law is straightforward: any such statute within that jurisdiction could apply to the Receiver. If, however, a crime is committed in a *different* jurisdiction than the one in which a Receiver observes it, then the situation is murkier. When both jurisdictions have Bad Samaritan laws, which, if any, of the criminal statutes should be applied? The conflict of law would need to be resolved,⁹³ and criminal law has particular choice of law considerations and limitations.⁹⁴ What if only one of the jurisdictions has a Bad Samaritan law? On the one hand, a Bad Samaritan law in the jurisdiction in which the crime is committed would not necessarily apply to an out-of-state Receiver because judiciaries, including those of U.S. states, typically have jurisdiction only over offenses (presumably including violations of Bad Samaritan laws) committed within their territory.⁹⁵ On the other hand, a Bad Samaritan law in the jurisdiction in which the crime is witnessed could apply to the Receiver in that state if the law covers or could extend to observed out-of-state offenses.⁹⁶ Courts have not

⁹¹ See *infra* notes 93–104 and accompanying text.

⁹² See *infra* notes 105–121 and accompanying text.

⁹³ William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1422–29 (2020) (describing how U.S. states determine applicable law when those of multiple jurisdictions could apply).

⁹⁴ Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44, 46 (1974) (citing sovereignty and human rights issues arising in criminal choice of law determinations).

⁹⁵ LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 321 (1986); Gabriel J. Chin, *Policy, Preemption, and Pot: Extraterritorial Citizen Jurisdiction*, 58 B.C. L. REV. 929, 933 (2017) (“The usual basis for state criminal jurisdiction is territorial.”); Dodge, *supra* note 93, at 1405–13 (noting that twenty U.S. states have presumptions against extraterritoriality but that those presumptions are sometimes applied inconsistently); B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 625–26 (1966) (observing “the triumph of the rote of the territorial principle over the pragmatic needs of law enforcement”); Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 975 (2002) (“In common understanding, a state’s law governs its own territory . . . [And], in general, state criminal statutes are territorially limited.”).

⁹⁶ Some law, including some U.S. state law, can be applied extraterritorially. See, e.g., *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (determining that a U.S. state may “govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress”); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should

announced choice of law rules for these scenarios or resolved whether Bad Samaritan laws apply to offenses committed in other jurisdictions.

Second, prosecutorial discretion in the digital context is also fraught. Where a crime depicted online features multiple Transmitters or Receivers, prosecutors may need to prioritize which, if any, individuals to indict and the particular offenses they should charge. This prosecutorial discretion promotes efficiency,⁹⁷ but is also susceptible to abuse, including racial discrimination.⁹⁸

Third, enforcing Bad Samaritan or other laws against Transmitters and Receivers is similarly challenging. Police and prosecutors may lack the resources or time to investigate a potentially enormous number of such individuals. Policing and prosecuting crimes depicted online may require coordination among law enforcement agencies in multiple jurisdictions, domestic and abroad. This liaising can delay or disrupt justice, given differing protocols, policies, and priorities.⁹⁹

Fourth, even where Bad Samaritan law violations are investigated, evidence of bystanderism could be elusive. It may be difficult or even impossible to prove that the owner of a social media account or mobile device is the same person who observed crime through it.¹⁰⁰ Establishing motive in a Bad Samaritan case is especially challenging because it is more difficult to infer intent

succeed in getting him within its power.”); CHARLES DOYLE, CONG. RSCH. SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 20–23 (2016), <https://fas.org/sgp/crs/misc/94-166.pdf> [<https://perma.cc/9Q89-GP4V>] (discussing U.S. state criminal laws that apply overseas); Chin, *supra* note 95, at 933–35 (noting situations in which states may convict a person for out-of-state conduct, including when the defendant is a citizen of that state); Dodge, *supra* note 93, at 1413 (listing the seventeen U.S. states that do not have a presumption against extraterritoriality); George, *supra* note 95, at 621–28 (comparing state and federal extraterritorial application of law); Julie Rose O’Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1025 (2018) (observing that “United States courts currently recognize five principles justifying prescriptive jurisdiction: territoriality (subjective and objective), nationality, passive personality, protective, and universal jurisdiction”); Sean M. Thornton, *State Criminal Laws in Cyberspace: Reconciling Freedom for Users with Effective Law Enforcement*, 4 RICH. J.L. & TECH. 5, ¶ 1 (1997) (“[T]he doctrine of constructive presence has established a state’s authority to prescribe an out-of-state activity that has in-state effects.”).

⁹⁷ Montana, *supra* note 6, at 557 (emphasizing the use of prosecutorial resources in cases that send a positive message to the public about complying with Bad Samaritan laws).

⁹⁸ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869 (2009) (arguing that prosecutors “are often the final judges in their own cases . . . lead[ing] to gross abuses”); David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 456 (2018) (contending that prosecutorial discretion results in greater racial disparities in the United States).

⁹⁹ Donna Sedgwick & James Hawdon, *Interagency Cooperation in the Era of Homeland Policies: Are Agencies Answering the Call?*, 44 AM. J. CRIM. JUST. 167, 178–81 (2018) (discussing challenges to interagency activity, such as officials with reputations for being uncooperative).

¹⁰⁰ Author-O’Brien Interview, *supra* note 76; Author-Shamansky Interview 1, *supra* note 76.

from inaction than action.¹⁰¹ Similarly, it may be problematic to determine a Transmitter's or Receiver's mens rea,¹⁰² as a person's mental state can be hard to discern,¹⁰³ particularly for omissions.¹⁰⁴

In addition to these legal challenges in confronting crime, there are non-legal challenges associated with modern technology.¹⁰⁵ First, assessing the authenticity of electronic content is difficult. In an era of photoshopping, "deep fakes,"¹⁰⁶ and other digital alteration of audio and visual data, Receivers are understandably not always able to gauge genuineness. As a result of this uncertainty, Receivers often do not know whether to intercede or are perhaps apathetic about doing so. As forensic psychologist N.G. Berrill argues about social media: "No one has any way of knowing what's staged, what isn't staged, and in some ways they don't care."¹⁰⁷

Second, the psychological effects of social media and mobile devices are troubling. This technology may actually condition bystanderism. Legal schol-

¹⁰¹ Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971, 982 (2000) (observing that "[i]t is far harder to determine why a person does not act").

¹⁰² *Mens Rea*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime . . . [for example] the mens rea for theft is the intent to deprive the rightful owner of the property.").

¹⁰³ See Brandon Curtis, *Criminalizing Non-Evacuation Behavior: Unintended Consequences and Undesirable Results*, 2015 BYU. L. REV. 503, 523–24 ("Generally, mens rea is the most difficult element of a crime to prove—the higher the culpability, the more difficult it is to prove.").

¹⁰⁴ Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 600–07 (1958) (arguing that mens rea is especially hard to prove for omissions because the actor may be unaware that they have a duty to act).

¹⁰⁵ See *infra* notes 106–121 and accompanying text.

¹⁰⁶ "Deep fakes" are "the full range of hyper-realistic digital falsification of images, video, and audio." Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1757 (2019). For discussion of legal issues arising from deep fakes, see, for example, Marc Jonathan Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 62 (2018) (exploring First Amendment protections for false expression); Robert Chesney & Danielle Keats Citron, *21st Century-Style Truth Decay: Deep Fakes and the Challenge for Privacy, Free Expression, and National Security*, 78 MD. L. REV. 882, 885 (2019) (considering the role that the law should play in regulating deep fakes); Chesney & Citron, *supra*, at 1757–58 (discussing the creation and implications of deep fakes); Herbert B. Dixon Jr., *Deepfakes: More Frightening Than Photoshop on Steroids*, 58 JUDGES' J. 35, 38 (2019) (arguing that deep fakes could create a dangerous societal skepticism). See generally Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892 (2019); Riana Pfefferkorn, *"Deepfakes" in the Courtroom*, 29 B.U. PUB. INT. L.J. 245 (2020); Jessica Silbey & Woodrow Hartzog, *The Upside of Deep Fakes*, 78 MD. L. REV. 960 (2019); Russell Spivak, *"Deepfakes": The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339 (2019).

¹⁰⁷ Cole Kazdin, *Psychologists Weigh In on the Teen Who Live-Streamed Her Friend's Rape*, VICE (Apr. 25, 2016), https://www.vice.com/en_us/article/jpyw5k/psychologists-weigh-in-on-the-teen-who-live-streamed-her-friends-rape [<https://perma.cc/6ESL-2QZJ>] (quoting N.G. Berrill, a forensic psychologist and the executive director of the New York Center for Neuropsychology and Forensic Behavioral Science).

ars, psychologists, sociologists, and journalists argue that these voyeuristic tools have desensitized users (particularly adolescents and young adults), increased their need and opportunity to obtain validation, and warped their notions of consequences and entertainment.¹⁰⁸ Even worse, social media and mobile devices may foment crime. Some individuals violate laws, or at least do so in a performative way, precisely because they know they have an audience.¹⁰⁹ Rape, drag racing, dogfighting, and bullying are notorious examples of such circumstances.¹¹⁰ Even passive, silent spectators may implicitly encourage certain types of crime.¹¹¹

Third, witnesses who record or report crimes may incur risk, whether from perpetrators, victims, witnesses, or even uninvolved parties. The individ-

¹⁰⁸ Montana, *supra* note 6, at 536 (“As technology advances, relationships have become increasingly impersonal, thereby wearing at an individual’s connection to and compassion for others.”); Kazdin, *supra* note 107. Professor Patricia Grande Montana argues that “[s]ocial media dominates personal relationships and interactions with others and the community. Unsurprisingly, this dominance has influenced bystander behavior, leading to an increase in apathy when observing crimes online or witnessing tragedies firsthand.” Montana, *supra* note 6, at 558. Similarly, Uelmen argues that internet subculture “has become so desensitized to violence that observers barely flinch when taking out their cameras and hitting record,” and quotes a journalist’s observation that a viral video of an assault “serves as a perfect example of how violence becomes instant entertainment these days.” Uelmen, *supra* note 8, at 79–80 (quoting John Del Signore, *Police Seek 3 Men for Beating L Train Rider Who Scolded Them for Spitting*, GOTHAMIST (Nov. 16, 2011), <https://gothamist.com/news/police-seek-3-men-for-beating-l-train-rider-who-scolded-them-for-spitting> [<https://perma.cc/HCY9-6J3S>]). She concludes that “bystanders are extracting voyeuristic pleasure from another person’s pain and need for emergency assistance.” *Id.* at 80–81.

¹⁰⁹ ELIZABETH YARDLEY, SOCIAL MEDIA HOMICIDE CONFESSIONS 1 (2017) (defining “performance crime” as “a crime enacted for the camera”); Surette, *supra* note 89, at 199 (defining “[c]ontemporary performance crime” as “the spectacle of recording, sharing, and uploading crime in order to distribute the performance to new media audiences”); Kazdin, *supra* note 107 (quoting Director of the Media Psychology Research Center Pamela Rutledge’s statement that “[m]ost of the criminals who get caught for posting their crimes are exercising bravado to show their importance[,] a digital ‘nah nah nah—you can’t catch me’”).

¹¹⁰ Allen, *supra* note 5, at 839 (“Social science literature has recognized for decades that gang rape is inherently a group crime and is a medium for the group members, both the rapists and spectators, to interact with one another. Because the objective of a gang rape is to perform sexually in front of an audience, the audience is a key motivating factor in the crime.”); Katharine K. Baker, *Once a Rapist? Motivation Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 606 (1997) (“Men often rape women to demonstrate their strength, virulence, and masculinity to other men. For these men, having an audience is critical; intercourse is instrumental.”); Benzmilller, *supra* note 7, at 931, 952 (“Peer bystanders are important to the bullying dynamic because bullying is essentially a public display from which bullies derive power. . . . [B]ystanders by their very presence ‘act’ in the sense of providing support and encouragement to the bully.”). Attorney Kimberley K. Allen’s article specifically analyzes gang rapes, dog fighting, and drag racing as “audience-oriented crimes” that spectators “encourage and motivate.” Allen, *supra* note 5, at 841–51.

¹¹¹ Allen, *supra* note 5, at 839 (“Though it is wrong to fail to contact police, the greater wrong is the decision to watch and, through that approving presence, to encourage the rape.”); Benzmilller, *supra* note 7, at 931 (arguing that bystanders who are “merely passive observers . . . encourage bullying by providing attention”).

uals who filmed the police killings of George Floyd¹¹² and Eric Garner¹¹³ both suffered harassment. Worse yet, observers who have documented “atrocities crimes”¹¹⁴ in Syria have been arrested, injured, or killed.¹¹⁵ Given that police and other officials can and have escalated situations, sometimes fatally,¹¹⁶ witnesses may be understandably reluctant to alert authorities.

Finally, crimes depicted online may inspire “digital vigilantism,” or the “process where citizens are collectively offended by other citizen activity, and coordinate retaliation on mobile devices and social platforms.”¹¹⁷ These responses include investigating, “doxing,”¹¹⁸ or more directly intervening. For example, computer hackers associated with Anonymous and Knightsec interceded in the Steubenville case by publicly naming the suspected rapists and bystanders.¹¹⁹ Some digital vigilantes may be misguided or cause more harm than good, indicating that they are not altruistic or helpful upstanders. After the bombing at the Boston Marathon in 2013, for instance, Reddit and Twitter users wrongly accused Sunil Tripathi of being one of the suspects, damaging his reputation, inspiring threats against his family, and distracting from the real

¹¹² Elly Belle, *The Traumatized 17-Year-Old Who Filmed George Floyd’s Killing Is Already Being Harassed*, REFINERY29 (May 29, 2020), <https://www.refinery29.com/en-us/2020/05/9846485/darnella-frazier-filmed-george-floyd-death-harassment> [<https://perma.cc/UW7G-5YKE>] (noting that Darnella Frazier, the woman who filmed Floyd’s death, has faced online criticism since the event).

¹¹³ Josh Sanburn, *Behind the Video of Eric Garner’s Deadly Confrontation with New York Police*, TIME (July 23, 2014), <https://time.com/3016326/eric-garner-video-police-chokehold-death/> [<https://perma.cc/ZE3S-M3QE>] (describing how Ramsey Orta, who filmed Garner’s death, “says that officers have harassed him since the Garner video became public”).

¹¹⁴ See David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229, 229 (2006) (proposing the term “atrocity crimes” to collectively describe “genocide, crimes against humanity (including ethnic cleansing), and war crimes”).

¹¹⁵ BETH VAN SCHAACK, IMAGINING JUSTICE FOR SYRIA 390 (2020); Hamilton, *supra* note 65, at 37.

¹¹⁶ See, e.g., Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 FORDHAM URB. L.J. 615, 647 (2016) (describing the controversial police killing of Laquan McDonald, a black teenager); Matthew James Enzweiler, Note, *Swatting Political Discourse: A Domestic Terrorism Threat*, 90 NOTRE DAME L. REV. 2001, 2002, 2030 (2015) (describing “swatting” as “making fraudulent 911 calls and reporting threats or ongoing violent situations in order to draw a response from law enforcement, usually a SWAT team,” which creates “a substantial risk of a mistaken use of force” by the victim or law enforcement).

¹¹⁷ Daniel Trotter, *Digital Vigilantism as Weaponisation of Visibility*, 30 PHIL. & TECH. 55, 55 (2017) (defining “digital vigilantism” and advocating for research in this area).

¹¹⁸ “Doxing” refers to “the action of finding or publishing private information about someone on the internet without their permission, especially in a way that reveals their name, address, etc.” *Doxing*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/doxing> [<https://perma.cc/4Q8Y-TDY6>]. For discussion of legal issues arising from doxing, see, for example, Alexander J. Lindvall, *Political Hacktivism: Doxing & the First Amendment*, 53 CREIGHTON L. REV. 1, 2 (2019) (proposing anti-doxing statutes and arguing that they would survive First Amendment challenges); Julia M. MacAllister, Note, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 FORDHAM L. REV. 2451, 2454–55 (2017) (reviewing the merits of enacted and proposed anti-doxing legislation).

¹¹⁹ Kaufman, *supra* note 3, at 1367, 1378.

culprits.¹²⁰ Likewise, two years earlier, another group of self-appointed internet sleuths falsely accused Edward Jordan of killing kittens online; he committed suicide soon thereafter.¹²¹

Many of the opportunities and challenges for bystanderism and up-standerism in the modern era that this Part has described are illustrated in the Gates-Lonina case, which is summarized in the following Part¹²² and analyzed in Part III.¹²³

II. THE GATES-LONINA CASE

“I was having fun.”¹²⁴ So said the person who livestreamed the sexual assault of a third party in 2016,¹²⁵ in what was reportedly the first act of its kind (at least in the United States).¹²⁶ On February 27 of that year,¹²⁷ twenty-nine-

¹²⁰ Jay Caspian Kang, *Crowd-Sourcing a Smear*, N.Y. TIMES MAG., July 28, 2013, at 36–38 (detailing the online false rumor of Tripathi’s involvement in the Boston Marathon bombing and the subsequent harm this rumor caused).

¹²¹ Bill Jensen, *Animal Instinct: How Cat-Loving Sleuths Found an Accused Killer Sadist*, ROLLING STONE (Mar. 19, 2014), <https://www.rollingstone.com/culture/culture-news/animal-instinct-how-cat-loving-sleuths-found-an-accused-killer-sadist-111273/> [<https://perma.cc/6HUX-ZQH9>] (stating that, by January 8, 2011, internet sleuths believed the culprit was Jamsey Cramsalt Inhisass); Rod McPhee, *Game of Cat & Mouse*, THE SUN (Dec. 17, 2019), <https://www.thesun.co.uk/news/10574296/netflix-luka-magnotta-tracked-cat-lovers/> [<https://perma.cc/9N79-JWXV>] (describing the online vigilante investigation of Luka Magnotta that led to Jordan’s suicide); Teresa Y, *The Forgotten Man in “Don’t F**k with Cats: Hunting an Internet Killer,”* UNIV. OF MICH. SI 410 ETHICS & INFO. TECH. (Jan. 24, 2020), <https://si410.blogspot.com/2020/01/the-forgotten-man-in-dont-fk-with-cats.html> [<https://perma.cc/K9ZR-A4V9>] (noting on class blog that Jamsey was an alias for Edward Jordan).

¹²² See *infra* notes 124–170 and accompanying text.

¹²³ See *infra* notes 171–398 and accompanying text.

¹²⁴ Interview by Columbus, Ohio Div. of Police with Marina Lonina, (Mar. 3, 2016) [hereinafter CPD-Lonina Interview – Transcript].

¹²⁵ Columbus, Ohio Div. of Police, Case Report Number 163049068-001, Criminal Investigation Summary (Apr. 5, 2016) (on file with author) [hereinafter CPD Summary 2016.04.05]; (containing the CPD’s summary of the case); see also *Hot Girls Wanted: Turned On: Don’t Stop Filming* (Netflix Apr. 21, 2017) [hereinafter *Don’t Stop Filming*] (quoting Lonina).

¹²⁶ Close, Lonina, and O’Brien all believe that this case was the first of its kind, at least in the United States. See Peter Holley, *‘She Got Caught Up in the Likes’: Teen Accused of Live-Streaming Friend’s Rape for Attention*, WASH. POST (Apr. 19, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/19/she-got-caught-up-in-the-likes-teen-accused-of-livestreaming-friends-rape-for-attention/> [<https://perma.cc/6YY4-UNC4>] (quoting O’Brien’s statement); McPhate, *supra* note 45 (quoting O’Brien’s statement that, “I have never seen a case such as this where you would actually live-stream a sexual assault”); *Don’t Stop Filming*, *supra* note 125 (quoting Lonina stating: “As we were told, this is the first case in history,” and quoting O’Brien stating that, “[t]his was the first case that I was aware of involving the use of the Periscope app to record the actual commission of a crime”); Author-O’Brien Interview, *supra* note 76; Zoom Interview with Brent A. Close, Police Officer, Columbus, Ohio (May 13, 2020) (on file with author) [hereinafter Author-Close Interview] (stating that the Gates-Lonina case was the first time that authorities were alerted about a sexual crime livestreamed by a third party).

year-old Raymond Boyd Gates raped a seventeen-year-old girl identified in court documents as “D.B.”¹²⁸ The victim’s supposed best friend,¹²⁹ eighteen-year-old Marina Alexeevna Lonina, broadcasted the rape in real time via Periscope,¹³⁰ a live video-streaming application.¹³¹

Lonina did not call the police.¹³² Nor did she leave the scene of the crime to seek help. Rather, she recorded a video, which more than 700 people reportedly watched live.¹³³ During the incident, D.B. cried¹³⁴ and screamed¹³⁵ while Lonina smiled¹³⁶ and laughed.¹³⁷ Lonina pulled D.B.’s leg while the victim pleaded “no,” “stop,” and “help me.”¹³⁸ When D.B. requested that the two of them leave, Lonina told her that she wanted to smoke first.¹³⁹ Moreover,

¹²⁷ Columbus, Ohio Div. of Police, Case Report Number: 163049068-001, Case Report (Feb. 29, 2016) (on file with author) [hereinafter CPD Case Report] (indicating that the rape occurred on February 27, 2016).

¹²⁸ Indictment at 1, State v. Lonina, No. 16CR 1992 (Franklin Cnty. C.P., Apr. 12, 2016). According to the assistant prosecutor in the case, Jennifer Rausch, “D.B.” are the victim’s initials. Author-Rausch Interview, *supra* note 76.

¹²⁹ Multiple sources refer to Lonina and D.B. as friends. The victim called Lonina her friend. Columbus, Ohio Div. of Police, Case Report Number: 163049068-001, Informational Summary #1: Interview of Victim (Feb. 29, 2016) (on file with author) [hereinafter CPD-Victim Interview]. Lonina called the victim her “friend.” *Don’t Stop Filming*, *supra* note 125. The CPD also described the two individuals as friends. CPD Summary 2016.04.05, *supra* note 125. The Reporter characterizes Lonina and D.B. as “best friends.” Skype Interview with the Anonymous Reporter in the Gates-Lonina case (Apr. 13, 2020) (on file with author) [hereinafter Author-Reporter Interview 1].

¹³⁰ Periscope is a live video streaming app co-founded by Kayvon Beykpour and Joe Bernstein in 2014. Alyson Shontell, *What It’s Like to Sell Your Startup for ~\$120 Million Before It’s Even Launched: Meet Twitter’s New Prized Possession*, *Periscope*, BUS. INSIDER (Mar. 26, 2015), <https://www.businessinsider.com/what-is-periscope-and-why-twitter-bought-it-2015-3> [<https://perma.cc/RP86-6G5M>]; *About Us*, PERISCOPE, <https://www.periscope.tv/about> [<https://perma.cc/E23C-9QP6>]. Twitter acquired Periscope the following year. Shontell, *supra*.

¹³¹ McPhate, *supra* note 45. I have not personally viewed any recording or still images of Lonina’s livestreams on either February 26 or 27, 2016. Viewing such material, which constitutes child pornography, is criminal. Rather, I rely on descriptions in the police file and from my interviewees.

¹³² *Id.*

¹³³ Author-Close Interview, *supra* note 126 (quoting Close that “there were over 700 at one point”); Author-Reporter Interview 2, *supra* note 46 (quoting the Reporter that there were “706 or 707” viewers).

¹³⁴ Author-Reporter Interview 1, *supra* note 129; Author-Reporter Interview 2, *supra* note 46.

¹³⁵ Author-Close Interview, *supra* note 126 (“[T]he victim was screaming . . .”); Author-Reporter Interview 2, *supra* note 46.

¹³⁶ Author-Reporter Interview 1, *supra* note 129.

¹³⁷ Author-Reporter Interview 2, *supra* note 46. O’Brien stated: “For the most part [Lonina] is just streaming [the rape] on the Periscope app and giggling and laughing.” McPhate, *supra* note 45.

¹³⁸ Holley, *supra* note 126; McPhate, *supra* note 45; Author-Close Interview, *supra* note 126 (describing that, during the livestream, Gates “is on top of the victim and she clearly is telling him to stop,” saying “[n]o”); Author-Rausch Interview, *supra* note 76.

¹³⁹ Author-Reporter Interview 2, *supra* note 46.

Lonina posed for—and encouraged the audience to take—screenshots,¹⁴⁰ spurred spectators to recruit additional viewers,¹⁴¹ and prodded audience members to add her as a friend and follow her on Periscope.¹⁴² The incident has been characterized as “social media’s Kitty Genovese moment,”¹⁴³ a reference to the infamous 1964 Genovese case.¹⁴⁴ Unlike that tragedy, in which all witnesses were either passive or tried to help,¹⁴⁵ in the Gates-Lonina case the only physically present witness (Lonina) actively engaged in the crime (qualifying her as a perpetrator).

Gates committed the sexual assault against D.B. in Ohio,¹⁴⁶ one of the twenty-nine U.S. states with Bad Samaritan laws (then and now).¹⁴⁷ Indeed, Ohio is one of seven U.S. states that features *multiple* Bad Samaritan laws.¹⁴⁸

One of Ohio’s Bad Samaritan laws (“Ohio’s general Bad Samaritan law”) makes it a crime for anyone “knowing that a felony has been or is being committed, [to] knowingly fail to report such information to law enforcement authorities.”¹⁴⁹ This law required Lonina (and possibly others) to notify the police about the rape.¹⁵⁰ The relevant legislative history indicates that the Ohio legislature’s purpose in enacting this law was crime prevention and law enforcement.¹⁵¹ The drafters intended for the statute to be similar to but narrower than the common law crime of misprision of felony.¹⁵²

¹⁴⁰ Author-Reporter Interview 1, *supra* note 129; Author-Reporter Interview 2, *supra* note 46.

¹⁴¹ E-mail from the Reporter, to John Pietanza, N.Y. Police Dep’t Sergeant (Mar. 2, 2016) (on file with author) [hereinafter Reporter E-mail to Pietanza] (“[W]hen [the victim] was calling for help[,] her friend, Marina [Lonina], was saying ‘guys (viewers) call your friends! (to watch this video[.]).’”).

¹⁴² Author-Reporter Interview 1, *supra* note 129; Author-Reporter Interview 2, *supra* note 46.

¹⁴³ Stephen Marche, *We’re Witnessing Social Media’s Kitty Genovese Moment*, ESQUIRE (Apr. 21, 2016), <https://www.esquire.com/news-politics/news/a44153/marina-lonina-periscope-rape/> [<https://perma.cc/ZK9G-7BWE>].

¹⁴⁴ See *supra* note 52 and accompanying text. For discussion of the Genovese case, including its disputed facts and interpretations as well as its consequences, see Kaufman, *supra* note 3, at 1349–52.

¹⁴⁵ At least two people (Joseph Fink and Karl Ross) saw the crime occur, understood its true nature, and chose not to do anything until too late, and three people (Sophia Farrar, Samuel Hoffman, and Robert Mozer) tried to help. Kaufman, *supra* note 3, at 1350–51; Kaufman, *What Makes People Save Lives?*, *supra* note 13 (describing Farrar’s decision to leave the safety of her apartment to assist Genovese).

¹⁴⁶ McPhate, *supra* note 45.

¹⁴⁷ See *supra* note 22 and accompanying text.

¹⁴⁸ The other six states are: Alaska, Florida, Massachusetts, Rhode Island, Texas, and Washington. Kaufman, *supra* note 3, at 1347.

¹⁴⁹ OHIO REV. CODE ANN. § 2921.22(A) (West 2020).

¹⁵⁰ See *id.* In Ohio, rape is a felony. *Id.* § 2907.02(B) (designating rape as a felony of the first degree). None of the exceptions to this duty-to-report law applied to Lonina reporting Gates’s rape. See *id.* § 2921.22(G) (listing circumstances that “do not require disclosure of information,” including familial and clergy exceptions).

¹⁵¹ OHIO LEGIS. SERV. COMM’N, COMMITTEE COMMENT TO H 511 (1973) (“The rationale for requiring that serious crimes be reported is that effective crime prevention and law enforcement depend significantly on the cooperation of the public. The section covers, for example, the situation

The state's other Bad Samaritan law ("Ohio's specific Bad Samaritan law"), which is a "mandatory reporter law,"¹⁵³ makes it a crime for particular professionals (such as attorneys, physicians, and school employees) who are acting in an official or professional capacity not to report known or reasonably suspected abuse or neglect of any person under eighteen years of age or of a developmentally disabled or physically impaired individual younger than twenty-one years old.¹⁵⁴ That law required the listed specialists to report the abuse to a designated agency or peace officer.¹⁵⁵ Like mandatory reporter laws elsewhere,¹⁵⁶ the Ohio legislature designed its specific Bad Samaritan law to enhance cooperation between law enforcement and professionals most likely to detect mistreatment of particularly vulnerable people.¹⁵⁷

Only one viewer of Lonina's livestream—an eighteen-year-old in New York (the Reporter), who was Lonina's former best friend¹⁵⁸—notified law

where bystanders ignore a murder victim's pleas for help because they do not want to 'become involved.'").

¹⁵² *Id.* Specifically, the drafters stated:

The gist of misprision at common law was keeping silence or failing to attempt to apprehend the offender when one knew a felony had been committed. . . . Under this section, persons are required only to inform authorities of felonies of which they have knowledge, and are not required to attempt apprehension of the offender. Also, a number of relationships are privileged under this section which were not privileged at common law.

Id.; see also *supra* note 20 and accompanying text (discussing the history of misprision of a felony).

¹⁵³ Mandatory reporter laws (also known as "mandatory reporting laws") require certain people to report particular misconduct, including child abuse. Leonard G. Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. ONLINE: TOLLE LEGE 37, 37–38 (2013), <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3262&context=vllr> [<https://perma.cc/KS36-TSZT>] (describing the history of mandatory reporting laws in the context of child abuse). Such statutes have been enacted in all fifty U.S. states. Jonathan Todres, *Can Mandatory Reporting Laws Help Child Survivors of Human Trafficking?*, 2016 WIS. L. REV. FORWARD 69, 70, <https://repository.law.wisc.edu/s/uwlaw/media/80495> [<https://perma.cc/57PZ-U6U2>].

¹⁵⁴ OHIO REV. CODE ANN. § 2151.421. The crime in the Gates-Lonina case (rape) would qualify as this law's subject matter (abuse or neglect) and the victim's age (seventeen) would qualify for this law's victim age restriction. See *id.*

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., *id.* (requiring attorneys and other professionals to report abuse to peace officers); MASS. GEN. LAWS ch. 119, § 51A(a)–(b) (2021) (requiring mandated reporters, such as medical staff and members of school faculty, to report child abuse to the department of children and families).

¹⁵⁷ Mario C. Ciano, *Recent Legislation: Ohio's Mandatory Reporting Statute for Cases of Child Abuse*, 18 CASE W. RES. L. REV. 1405, 1407–08 (1967) (stating that Ohio's mandatory reporting law is similar to that of other states but is broader in scope than many states).

¹⁵⁸ The Reporter stated that she and Lonina were "best friends" while they were both first-year students at a high school in Brooklyn, New York. Author-Reporter Interview 1, *supra* note 129.

enforcement.¹⁵⁹ Police then arrested Lonina on March 3, 2016,¹⁶⁰ and Gates exactly one month later.¹⁶¹ Neither Lonina nor anyone else was charged with violating a Bad Samaritan law for the events of either February 26 or 27, 2016.¹⁶² Rather, prosecutors charged both Lonina and Gates with seven counts (all felonies): one count of kidnapping, two counts of rape, one count of sexual battery, and three counts of pandering sexually-oriented matter involving a minor.¹⁶³ Lonina was also charged with two counts of illegal use of a minor in nudity-oriented material or performance for images she took of D.B. the night before the rape,¹⁶⁴ during which Lonina livestreamed via Periscope D.B. partially naked.¹⁶⁵

Gates and Lonina both initially pleaded not guilty.¹⁶⁶ On October 12, 2016, Gates pleaded guilty to rape and was sentenced to nine years imprisonment.¹⁶⁷ Four months later, Lonina pleaded guilty to one count of pandering

¹⁵⁹ Holley, *supra* note 126 (“O’Brien said authorities became aware of the incident when a friend of the victim saw the images and alerted police.”); McPhate, *supra* note 45; Sade Strehlke, *How a Digital Bystander Intervened When She Saw a 17-Year-Old’s Rape Live Streamed on Periscope*, TEEN VOGUE (Apr. 14, 2016), <https://www.teenvogue.com/story/17-year-old-rape-live-streamed-periscope> [<https://perma.cc/JCX7-BD8Z>]; Telephone Interview by Columbus, Ohio Div. of Police with the Reporter (Mar. 13, 2016) (on file with author) [hereinafter CPD-Reporter Interview].

¹⁶⁰ Indictment, *supra* note 128, at 5; CPD Summary 2016.04.05, *supra* note 125; Columbus, Ohio Div. of Police, Case Report Number 163049068-001, Arrest Information – Marina Lonina (Mar. 3, 2016) (on file with author) [hereinafter CPD Arrest Information – Lonina]; Columbus, Ohio Div. of Police, Case Report Number 163049068-001, Progress of Investigation (Apr. 5, 2016) (on file with author) [hereinafter CPD Investigation Progress 2016.04.05].

¹⁶¹ Indictment, *supra* note 128, at 6; Columbus, Ohio Div. of Police, Case Report Number 163049068-001, Arrest Information – Raymond Gates (Apr. 3, 2016) (on file with author) [hereinafter CPD Arrest Information – Gates]; *see* CPD Summary 2016.04.05, *supra* note 125 (stating that Gates was arrested on April 3, 2016); CPD Investigation Progress 2016.04.05, *supra* note 160 (same).

¹⁶² Author-O’Brien Interview, *supra* note 76; Author-Rausch Interview, *supra* note 76; *see infra* notes 183–186 (describing how Lonina livestreamed a naked, vomiting, and intoxicated D.B. the day before the rape).

¹⁶³ Indictment, *supra* note 128, at 1–3; CPD Arrest Information – Gates, *supra* note 161; CPD Arrest Information – Lonina, *supra* note 160.

¹⁶⁴ McPhate, *supra* note 45.

¹⁶⁵ Indictment, *supra* note 128, at 3–4; CPD Summary 2016.04.05, *supra* note 125; Columbus, Ohio Div. of Police, Case Report Number 163049068-001, Informational Summary #6: Interview of Suspect Marina Lonina (Mar. 3, 2016) (on file with author) [hereinafter CPD-Lonina Interview – Summary]; Author-Close Interview, *supra* note 126; Author-Rausch Interview, *supra* note 76.

¹⁶⁶ *Marina Lonina Pleads Not Guilty*, N.Y. TIMES (Apr. 18, 2016), <https://www.nytimes.com/video/us/100000004336260/marina-lonina-pleads-not-guilty.html> [<https://perma.cc/5XNR-J5TE>]; Andrew Welsh-Huggins, *Ohio Teen Pleads Not Guilty to Livestreaming Friend’s Rape*, NBC NEWS (Apr. 19, 2016), <https://www.nbcchicago.com/news/national-international/ohio-teen-pleads-not-guilty-to-livestreaming-friends-rape/2003439/> [<https://perma.cc/8Y7A-XUDT>]; E-mail from Jennifer Rausch, Legal Dir., Hum. Trafficking Initiative, Ohio Att’y Gen.’s Off., to the Author (June 4, 2020, 11:27 AM) (on file with author).

¹⁶⁷ Judgment Entry at 1, *State v. Lonina*, No. 16CR 1992 (Franklin Cnty. C.P., Oct. 12, 2016), ECF No. 0A650-E32. The prosecution dismissed the other charges against Gates. *Id.*

sexually-oriented matter involving a minor, as amended to obstructing justice (a lesser included offense), and was sentenced to nine months imprisonment.¹⁶⁸ She has already served her sentence.¹⁶⁹

The Gates-Lonina case presents multiple puzzles that the next Part seeks to solve. Why did Lonina livestream her supposed best friend's rape? Why did one—but only one—of the hundreds of Receivers report the crime to police? Why was neither Lonina nor anyone else charged with violating either of Ohio's Bad Samaritan laws? Should or even could anyone else have been so charged? Because the Gates-Lonina case represents an increasingly common situation in the digital age, the episode reveals deficiencies in how Bad Samaritan laws are currently designed and operate and why the recommendations in Part IV¹⁷⁰ would help promote justice and accountability.

III. GOOD AND BAD SAMARITANS IN THE DIGITAL AGE

This Part identifies and analyzes two types of third parties in the digital age—Transmitters and Receivers (as well as their subtypes)—and the actors in the Gates-Lonina case who do or may qualify as each.¹⁷¹ The following Part will propose a hierarchy of liability within this typology.¹⁷²

A. Transmitters

This Section describes Transmitters generally and then analyzes the only Transmitter in the Gates-Lonina case: Lonina herself.

1. Transmitters Generally

Transmitters are witnesses who are physically present at the scene of a crime and share evidence of the offense electronically, such as through email, social media, mobile devices, or landline phones. This evidence may be sounds (including spoken words), written communication (for example, through text messaging, emailing, or commenting on social media), photographs, or videos (whether recordings or livestreams).

As illustrated in Figure 1, this Article's typology divides Transmitters across two dimensions (conduct and timing), both of which are further divided into subtypes. Transmitters may engage in any of three subtypes of conduct.

¹⁶⁸ *Id.*; see Entry of Guilty Plea, *Lonina*, No. 16CR 1992 (Oct. 12, 2016), ECF No. 0A650-D30. The prosecution dismissed the other charges against Lonina. Judgment Entry, *Lonina*, No. 16CR 1992 (Feb. 13, 2017), ECF No. 0A713-R84.

¹⁶⁹ Author-Rausch Interview, *supra* note 76.

¹⁷⁰ See *infra* notes 399–479 and accompanying text.

¹⁷¹ See *infra* notes 174–398 and accompanying text.

¹⁷² See *infra* notes 399–479 and accompanying text.

First, “Upstander Transmitters” intervene helpfully, for example, by attempting to assist the person in distress directly or by notifying authorities. Second, “Enabler Transmitters” intervene harmfully, for instance, by facilitating or exacerbating a depicted crime. Third, “Bystander Transmitters” do not intervene at all.

Additionally, there are two subtypes of Transmitters based on the timing of the Transmitter’s acts or omissions. First, “Contemporaneous Transmitters” share evidence of a crime as it is occurring. Second, “Delayed Transmitters” share evidence of a crime after it has taken place.

Transmitter subtypes within dimensions are mutually exclusive; a Transmitter can only be a Bystander, Upstander, or Enabler, and only Contemporaneous or Delayed. In contrast, subtypes across dimensions are not mutually exclusive; for example, a Transmitter could be an Upstander and Delayed (as in Figure 1’s cell 2).

FIGURE 1. Typology of Digital Age Samaritans: Transmitters*

| | | TIMING | |
|---------|------------------------------------|---|--|
| | | Contemporaneous (share evidence as the situation is occurring) | Delayed (share evidence after the situation occurred) |
| CONDUCT | Upstander (intervene helpfully) | 1 | 2 |
| | Enabler (intervene harmfully) | 3 | 4 |
| | Bystander (don’t intervene) | 5 | 6 |

Regardless of subtype, Transmitters may have different motives for their conduct. Those intentions—which bear on Transmitters’ culpability, as will be discussed¹⁷³—could be benevolent, malevolent, mixed, or neutral. Selflessly, Transmitters could be trying to prevent or stop a crime, or at least preserve evidence of it. Selfishly, Transmitters could be seeking attention, validation, excitement, or money.¹⁷⁴ Spitefully, Transmitters could be attempting to humiliate the victim.

*NOTE: Because some platforms do not reproduce images, we have archived all graphics herein at https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/62-4/kaufman_graphics-A1b.pdf [https://perma.cc/K8MS-Z2LD].

¹⁷³ See *infra* notes 194–249 (discussing the motives for transmitters and assessing Lonina’s motives for her conduct).

¹⁷⁴ For example, the executive director of the New York Center for Neuropsychology and Forensic Behavioral Science, N.G. Berrill, stated about Transmitters:

You can put it online immediately. People don’t feel like there are any repercussions In some sick way, there’s some satisfaction in having your ‘work’ be consumed by all these people, being told that they like it. Something terrible becomes another form of entertainment, even if it’s real and horrible.

In jurisdictions with Bad Samaritan laws, prosecutors could charge Transmitters with violations of those statutes. As such witnesses must be physically present to broadcast the event, they are likely aware of the crime.

Transmitters could mount various defenses against Bad Samaritan violation charges. First, they could claim to be what I have identified elsewhere as “Unaware Bystanders,” a type of bystander that does not act because they do not perceive the true nature of a situation as a crime.¹⁷⁵ This defense could be compelling in some cases, best demonstrated through an example. Consider a person livestreaming a walk through the woods. The person hears a rustling but does not suspect anything sinister. The mobile device, which the person was pointing in multiple directions, broadcasts audio and video of the disturbance: a murder. The Transmitter, who did not know the sound’s source, could qualify in this scenario as an Unaware Bystander.

Second, Transmitters could raise a defense by claiming that they were attempting to discourage an assailant or preserve evidence and that their conduct discharged any duty under the statute. These individuals may have trouble proving either intention or, where Bad Samaritan laws require reporting to specific individuals (e.g., law enforcement), that they fulfilled such a condition. In any case, the evidentiary or deterrent value of knowingly livestreaming, in particular, a sexual assault may not outweigh the societal interest in protecting the victim’s identity.¹⁷⁶

2. Marina Lonina as a Transmitter

In the Gates-Lonina case, Lonina qualifies as a Contemporaneous Transmitter because, while physically present when Gates raped D.B., Lonina livestreamed the crime.¹⁷⁷ Although Lonina pleaded guilty to obstructing justice, her actions (and omissions), mental state, and intent bear closer scrutiny to understand the role Transmitters may play, the culpability they may shoulder, and whether Lonina herself qualifies as a Bystander, Upstander, or Enabler Transmitter.¹⁷⁸ This subsection analyzes Lonina’s *actus reus*, *mens rea*, and

Kazdin, *supra* note 107. Transmitters may be rewarded with “the possibility of being instantaneously famous,” becoming an “automatic celebrity,” or, if the situation is violent or dangerous, boosting their “street cred.” Uelmen, *supra* note 8, at 80 (quoting Abby Phillip, *Worldstar and the Lure of Internet Fame That Drives Teens to Film Brutal Assaults*, WASH. POST (Mar. 17, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/16/worldstar-and-the-lure-of-internet-fame-that-drives-teens-to-film-brutal-assaults/> [<https://perma.cc/3FC7-V2NY>]).

¹⁷⁵ Kaufman, *supra* note 3, at 1376–78 (arguing that Unaware Bystanders should be excused from liability under a Bad Samaritan law).

¹⁷⁶ Author-Rausch Interview, *supra* note 76.

¹⁷⁷ McPhate, *supra* note 45 (stating that Lonina was present during the rape and livestreamed the event over Periscope).

¹⁷⁸ See *supra* note 166 and accompanying text (detailing Lonina’s guilty plea).

motive, and also why she was not charged with violating either of Ohio's Bad Samaritan laws.¹⁷⁹ The subsection concludes that Lonina was a Contemporaneous Enabler Transmitter.¹⁸⁰

*a. Actus Reus*¹⁸¹

Lonina's conduct in late-February 2016, as a constituent element of any offenses she committed during that time, compels closer inspection. Her actions and omissions suggest criminality, including probably violating Ohio's general Bad Samaritan law.¹⁸²

On February 26, 2016, the day before the rape, Lonina and D.B. initially met Gates, who gave them a bottle of alcohol to take home.¹⁸³ That evening, while Lonina and D.B. were at Lonina's home, Lonina livestreamed via Periscope D.B. naked and vomiting.¹⁸⁴ According to the Reporter, who watched the livestream, Lonina recorded herself undressing D.B. while the latter was intoxicated.¹⁸⁵ D.B. would not learn of this video until after Gates sexually assaulted her.¹⁸⁶

The following day, while Lonina and D.B. were at Gates's home, Lonina livestreamed Gates raping D.B.¹⁸⁷ Lonina and Gates both told police that Gates knew Lonina was recording their encounter.¹⁸⁸ During the broadcast, Lonina engaged with her audience by smiling, laughing, posing, and encouraging them to take screenshots and recruit additional viewers.¹⁸⁹ In addition, according to the Reporter, Lonina poured vodka into D.B.'s mouth while Gates was on top of her.¹⁹⁰

¹⁷⁹ See *infra* notes 181–277 and accompanying text.

¹⁸⁰ See *supra* Figure 1 (listing Contemporaneous Enabler Transmitters in cell 3).

¹⁸¹ Actus reus is “[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability; a forbidden act.” *Actus Reus*, BLACK’S LAW DICTIONARY, *supra* note 102.

¹⁸² See OHIO REV. CODE ANN. § 2921.22(A)(1) (West 2020) (“[N]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.”).

¹⁸³ CPD Summary 2016.04.05, *supra* note 125.

¹⁸⁴ Author-Close Interview, *supra* note 126; CPD-Lonina Interview – Summary, *supra* note 165.

¹⁸⁵ Author-Reporter Interview 1, *supra* note 129.

¹⁸⁶ Author-Close Interview, *supra* note 126.

¹⁸⁷ McPhate, *supra* note 45.

¹⁸⁸ CPD-Lonina Interview – Summary, *supra* note 165 (“[Lonina] asked [Gates] if he had an objection to her Periscoping their interaction. [Gates] stated that it was okay for her to Periscope.”); Interview by Columbus, Ohio Div. of Police with Suspect Raymond Gates (Apr. 3, 2016) (on file with author) (Gates “recounted that [Lonina] was in the room at the time” and stated “that he was aware that [Lonina] was video-recording[.]”).

¹⁸⁹ See *supra* notes 136–142 and accompanying text.

¹⁹⁰ Author-Reporter Interview 2, *supra* note 46.

Although Lonina did not call 911 or otherwise alert authorities about the crime, she did claim in a police interview to have done at least three things to try to help D.B. Specifically, Lonina stated that she asked D.B. “if she was okay,” which D.B. supposedly answered in the affirmative; Lonina allegedly also asked D.B. “if she needed help,” which Lonina claimed D.B. answered with “I don’t know” and otherwise “did not give [Lonina] a ‘straight answer;’” and Lonina said that she ultimately convinced D.B. to leave Gates’s home.¹⁹¹

Later, even Lonina dropped the pretense of having tried to help D.B. Lonina subsequently admitted “not doing anything . . . to stop” the rape.¹⁹² Likewise, O’Brien, the case’s lead prosecutor, stated that Lonina “did nothing to aid the victim.”¹⁹³

b. Motive and Mens Rea

Lonina’s motive and mens rea directly bear on whether she was an enabler, bystander, or upstander. Like her conduct, her intent and mental state suggest criminality, including probably violating Ohio’s general Bad Samaritan law.¹⁹⁴

Lonina’s defense attorney, Shamansky, alternated between portraying Lonina’s intentions and mental state as innocent and criminal. Initially, Shamansky claimed that Lonina was trying to aid D.B. by preventing or stopping the rape,¹⁹⁵ extricating the victim,¹⁹⁶ and preserving evidence of the crime.¹⁹⁷ (As such, Shamansky originally portrayed Lonina as an Upstander Transmitter.) Later, Shamansky acknowledged that Lonina had committed a felony, for which she should be—and was—punished.¹⁹⁸

¹⁹¹ CPD-Lonina Interview – Summary, *supra* note 165.

¹⁹² *Don’t Stop Filming*, *supra* note 125.

¹⁹³ William Cummings, *Teen Pleads Not Guilty to Livestreaming Friend’s Rape*, USA TODAY (Apr. 16, 2016), <https://www.usatoday.com/story/news/nation/2016/04/16/teen-charged-ivestreaming-rape/83117856/> [<https://perma.cc/2XT5-U427>] (quoting O’Brien). O’Brien also stated, “Based on the video that I saw it didn’t appear for the most part of it that [Lonina] was attempting to help the victim.” Holley, *supra* note 126.

¹⁹⁴ See OHIO REV. CODE ANN. § 2921.22(A)(1) (West 2020) (criminalizing knowing failure to report a felony to law enforcement).

¹⁹⁵ McPhate, *supra* note 45 (“Mr. Shamansky, who has viewed the Periscope video, said Ms. Lonina made ‘substantial’ efforts to thwart the attack, though he declined to specify them.”).

¹⁹⁶ Shamansky claimed: “We watched [the video Lonina made]. At various times, she’s trying to get her friend out of there.” *Marina Lonina Pleads Not Guilty*, *supra* note 166.

¹⁹⁷ Shamansky stated that, “[A]s [Lonina] immediately told the police, she was filming in order to preserve, not to embarrass or to shame or to titillate anybody.” McPhate, *supra* note 45.

¹⁹⁸ Shamansky conceded that Lonina committed a felony when “there was some degree of obstruction [of justice] with the videos maybe not turned over right away [by Lonina to investigators].” Telephone Interview with Samuel H. Shamansky, Crim. Def. Att’y (Jan. 11, 2021) (on file with author). Shamansky also stated: “We believe punishment is appropriate. We believe a felony is appropriate for this conduct.” *Don’t Stop Filming*, *supra* note 125. Lonina has served her nine-month im-

Lonina herself claimed all three of the explanations that her counsel did,¹⁹⁹ mirroring his initial suggestion that she was an Upstander Transmitter. She also claimed two other reasons: imprudence and ignorance. Lonina implied that poor judgment, rather than malice, led her to be passive, stating: “I was stupid for not calling anybody and for not doing anything . . . to stop it.”²⁰⁰ She also asserted that she did not think that Gates was raping D.B., effectively suggesting that her failure to report the crime did not satisfy the Ohio general Bad Samaritan law’s required mens rea of “knowing.”²⁰¹ More specifically, Lonina claimed that such assaults “always” happen in private.²⁰² In contrast, she argued, this situation was public, given the presence of Lonina and Gates’s roommate in the house and that Gates knew that she was livestreaming.²⁰³

Lonina’s argument fails on multiple grounds. First, she is factually wrong that rape can only occur in a private setting, either in Ohio or generally.²⁰⁴ Sec-

prisonment sentence and has been released without supervision. Author-Shamansky Interview 1, *supra* note 76.

¹⁹⁹ Kazdin, *supra* note 107 (quoting O’Brien’s statement about Lonina: “When she was interviewed by the police, she said originally she thought that by live-streaming or taping it, it would prevent the assailant from doing what he actually was doing before her very eyes . . .”); *Ohio Teen Claims She Livestreamed 10-Minute Rape for “Evidence,”* CBS NEWS (Apr. 19, 2016), <https://www.cbsnews.com/news/ohio-teen-claims-she-livestreamed-10-minute-rape-for-evidence/> [<https://perma.cc/3P49-SAUE>] (“Lonina told police she was trying to record the assault as evidence . . .”); McPhate, *supra* note 45 (“Ms. Lonina told the police that she filmed the encounter to gather evidence of a crime.”); CPD Lonina Interview – Summary, *supra* note 165 (Lonina claimed that she pulled D.B.’s leg “to get her away from [Gates.]”); CPD-Lonina Interview – Transcript, *supra* note 124 (Lonina claimed that she wanted Gates to be aware that she was on Periscope to make him afraid to do anything “crazy” and that Lonina “wanted to try to help” D.B.).

²⁰⁰ *Don’t Stop Filming*, *supra* note 125.

²⁰¹ OHIO REV. CODE ANN. § 2921.22(A) (West 2020).

²⁰² CPD-Lonina Interview – Transcript, *supra* note 124.

²⁰³ *Id.*

²⁰⁴ The definition of rape in Ohio does not include a requirement that the offense occur in private. See OHIO REV. CODE ANN. § 2907.02(A) (defining rape without distinguishing between public and private offenses). Rape can and does happen in public in the United States, as in the Genovese and Araujo cases. See Kaufman, *supra* note 3, at 1348–55; see also Allen, *supra* note 5, at 838, 863–64 (describing the public rapes of a mentally disabled seventeen-year-old girl in New Jersey in 1989 and a fifteen-year-old girl in California in 2009); Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 923–25 (2014) (discussing dynamics of public rapes); Per-Olof H. Wikström, *Preventing City-Center Street Crimes*, 19 CRIME & JUST. 429, 437–39, 456, 459–60 (1995) (same). Public rapes are notorious amid atrocity crimes. See, e.g., IRINA ASTASHKEVICH, *GENDERED VIOLENCE: JEWISH WOMEN IN THE POGROMS OF 1917 TO 1921*, at 38–54 (2018) (discussing mass rape of Jewish women as public spectacle); Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone*, 19 WM. & MARY J. WOMEN & L. 7, 10–11 (2012) (noting that both the Revolutionary United Front and the Armed Forces Revolutionary Council committed rape in public during Sierra Leone’s armed conflict); Susana Sà Couto, *Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes*, 10 GONZ. J. INT’L L. 49, 52 (2006) (noting that Tutsi women were raped in public during the 1994 Genocide against the Tutsi in Rwanda).

ond, using this misconception as an excuse would be invalid because ignorance or mistake of law is generally not a defense.²⁰⁵ Third, her claim is implausible given D.B.'s requests for help.²⁰⁶ Worst of all, it is possible that Gates, like some other criminals, was spurred to rape *because of*, not despite, his knowing that he had an audience of Lonina and her Periscope account viewers.²⁰⁷

Four aspects of Lonina's conduct are open to interpretation and bear on her motive.²⁰⁸ First, she chose to livestream the crime instead of or in addition to calling the police. A charitable explanation is that Lonina routinely livestreamed and simply did not break that habit when it came to a crime. Indeed, Lonina claimed she typically broadcasted via Periscope "several hours" per day.²⁰⁹ Lonina stated that, on the day of the rape itself, she and D.B. were "on Periscope the whole day" before going to Gates's home²¹⁰ and "that she was Periscoping her and [D.B.'s] travels to [the] residence," where Lonina then requested and received Gates's consent to Periscope their interaction.²¹¹ As Gates was focusing his attention on D.B., Lonina explained that she "was on Periscope because [she] was bored."²¹² Gates's awareness that his actions were being recorded could support an inference that Lonina was attempting to deter him, which both Close (the case's lead detective) and Rausch (the assistant prosecutor) doubt.²¹³ By Lonina's own admission, her supposedly benign or even benevolent motive to livestream the rape was soon overcome by more self-serving interests. According to Close, on the day of her arrest, Lonina told him:

²⁰⁵ *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); MODEL PENAL CODE § 2.02(9) (AM. L. INST. 2019) ("Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides."); JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 210–26 (8th ed. 2019) (discussing mistake or ignorance of law); *Mistake of Law*, BLACK'S LAW DICTIONARY, *supra* note 102 ("A mistake about the legal effect of a known fact or situation."); Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 127 (1997) ("It's axiomatic that 'ignorance of the law is no excuse.'"); Kit Kinports, *Heien's Mistake of Law*, 68 ALA. L. REV. 121, 134 (2016) ("[T]he courts in this country rarely allow criminal defendants to argue they made a mistake in interpreting the criminal statute they allegedly violated.").

²⁰⁶ See *supra* note 138 and accompanying text.

²⁰⁷ See *supra* notes 109–111 and accompanying text.

²⁰⁸ See *infra* notes 209–237 and accompanying text.

²⁰⁹ *Don't Stop Filming*, *supra* note 125.

²¹⁰ CPD-Lonina Interview – Transcript, *supra* note 124.

²¹¹ CPD-Lonina Interview – Summary, *supra* note 165.

²¹² CPD-Lonina Interview – Transcript, *supra* note 124.

²¹³ Author-Close Interview, *supra* note 126; Author-Rausch Interview, *supra* note 76.

[T]hat she believed that by Periscoping the incident, it would ensure that [Gates] did not do something that he wasn't supposed to do. However, after Ms. Lonina saw how many people were watching the live-streaming Periscope and how many comments and [how much] attention she was getting from the viewers, she got caught up in the excitement and did not stop videoing the incident.²¹⁴

Indeed, Lonina acknowledged to Close during the interrogation that she was “having fun” and “making fun,” and that she did “enjoy” the positive feedback so much that it was “really hard to stop” filming.²¹⁵ Close’s and Rausch’s own observations of a recording of the livestream bolsters that interpretation. While interrogating Lonina, Close stated about the video: “it definitely looked like you were having fun filming it. It didn’t look like you were worried about [D.B.] or trying to get her away.”²¹⁶ Close later added that Lonina “was really enjoying the attention” and that she was “an extreme attention seeker.”²¹⁷ Rausch says that her impression of Lonina while livestreaming the rape was “that she enjoyed what she was doing,” she “wanted people to like her,” she sought “attention,” and she was not “interested in helping her friend.”²¹⁸ Similarly, the Reporter believes that Lonina livestreamed the rape because “she always wanted to be famous, she loved the attention.”²¹⁹ O’Brien conceded that Lonina may have originally intended to be helpful but, echoing Close’s summary of his interrogation of Lonina,²²⁰ said that “[s]he got caught up in the likes,”²²¹ referring to her audience on Periscope giving “hearts”²²² and other positive feedback through comments in “chat.”²²³ Lonina may thus

²¹⁴ CPD-Lonina Interview – Summary, *supra* note 165; *see also* Author-Close Interview, *supra* note 126 (“[I]n the interview with Ms. Lonina, her comment, that because of how many comments and attention she was getting from the viewers that she got caught up in the excitement of it.”).

²¹⁵ CPD-Lonina Interview – Transcript, *supra* note 124 (also quoting Lonina responding, “[y]eah seriously” to Close’s assertion that she “got caught up in” the audience’s positive feedback of “likes,” “hearts,” and “jokes”).

²¹⁶ *Id.*

²¹⁷ Author-Close Interview, *supra* note 126.

²¹⁸ Author-Rausch Interview, *supra* note 76.

²¹⁹ Author-Reporter Interview 1, *supra* note 129.

²²⁰ CPD-Lonina Interview – Transcript, *supra* note 124; *see also supra* note 214 and accompanying text.

²²¹ McPhate, *supra* note 45 (“Mr. O’Brien . . . said Ms. Lonina had apparently hoped that live-streaming the attack would help to stop it, but that she became enthralled by positive feedback online.”); Author-O’Brien Interview, *supra* note 76.

²²² *How to Use Hearts and Chat on Periscope*, TWITTER, <https://help.twitter.com/en/using-twitter/hearts-and-chats> [<https://perma.cc/Y9A4-3LQ3>] (“Hearts are a way for you to share your support and enthusiasm with a broadcaster and fellow viewers. If you like what you’re seeing, you can tap the screen to give the broadcaster a heart on iOS or Android.”).

²²³ *Id.* (“Chat allows you to comment on live broadcasts. It’s an essential part of the Periscope experience because it’s a way for viewers and broadcasters to engage with one another.”).

have initially sought to help D.B. but then became distracted by her own ego and vanity. At best, then, according to Lonina herself and others familiar with the case, she was ultimately not trying to aid D.B. by livestreaming—or at least continuing to livestream—the assault.

A second aspect of Lonina's conduct that compels further consideration is the moment that Lonina pulled on D.B.'s leg while D.B. screamed for help. Lonina claimed in a police interview that she tugged on D.B. "to get her away from [Gates]." ²²⁴ According to O'Brien, however, Lonina's motive in jerking D.B.'s body was unclear and may thus not have been so altruistic. ²²⁵ The police and prosecution interpreted this act as evidence that Lonina sought to facilitate the rape by helping to hold D.B. down, spreading her legs, and, as she had done the previous night on camera, undressing her. ²²⁶ Close added that, "[w]atching the video, there is no way that you would believe that [Lonina] was trying to get [D.B.] away from [Gates]." ²²⁷ The Reporter concurs, emphasizing her observation about Lonina pouring vodka into D.B.'s mouth during Gates's assault of her. ²²⁸

A third aspect of Lonina's behavior that merits analysis is her laughing during the rape. During Close's interrogation of Lonina, she also laughed more than ten inappropriate times. ²²⁹ This conduct may suggest further that Lonina enjoyed watching and broadcasting the sexual assault. But Lonina's intent in this context is again unclear. Was Lonina laughing because she found the situation genuinely humorous or for another reason—such as nervousness ²³⁰ or to

²²⁴ CPD-Lonina Interview – Summary, *supra* note 165.

²²⁵ McPhate, *supra* note 45 (paraphrasing O'Brien saying that, "[i]t was not clear . . . that [Lonina] intended to help the victim" when she pulled D.B.'s leg).

²²⁶ Author-Close Interview, *supra* note 126; Author-O'Brien Interview, *supra* note 76; Author-Rausch Interview, *supra* note 76.

²²⁷ Author-Close Interview, *supra* note 126.

²²⁸ See *supra* note 189 and accompanying text.

²²⁹ CPD-Lonina Interview – Transcript, *supra* note 124.

²³⁰ Rather than an expression of amusement, nervous laughter is often an involuntary physical reaction to anxiety, fear, stress, tension, confusion, awkwardness, or discomfort. See, e.g., Courtney v. Oklahoma, 722 F.3d 1216, 1221, 1224 (10th Cir. 2013) (observing that laughter may be a sign of extreme nervousness); Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 389 (1994) (describing nervous laughter as "cover[ing] up a deep apprehension"); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCH. 371, 375 (1963) (observing that a "sign of tension" can be "nervous laughter" and that laughter does not necessarily mean enjoyment); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1926 (2005) (describing nervous laughter as a "physical manifestation[] of deep distress"); Walter Probert, *Courtroom Semantics*, 5 AM. JURIS. TRIALS 695, 696 (1966) (observing that "[a] nervous laugh is hardly intended"); Alex Lickerman, *Why We Laugh*, PSYCH. TODAY (Jan. 23, 2011), <https://www.psychologytoday.com/us/blog/happiness-in-world/201101/why-we-laugh> [<https://perma.cc/X7B2-GBPD>]. Sexual assault victims themselves sometimes display nervous laughter. See Lynn Hecht Schafran, *Medical Forensic Sexual Assault Examinations: What Are They, and What Can They Tell the Courts?*, 54 JUDGES' J. 16, 19 (2015).

try to convince Gates that she was an accomplice when she was really trying to help her friend? Lonina described audience comments of “help her, help her” as “jokes,”²³¹ suggesting that she interpreted the situation as comical. The Reporter, who viewed the livestream and knows Lonina well as her former best friend, believes, from her interpretation of Lonina’s laughing, smiling, and posing, that Lonina thought the whole situation was “funny” and that she was “enjoying it.”²³² Similarly, Close, who watched a recording of the livestream, described his impression of it to Lonina as: “you were having fun—it’s obvious that you were having fun, laughing on it.”²³³ Close later added that it was clear that Lonina was laughing “out of amusement.”²³⁴

A final aspect of Lonina’s actions that invites more exploration is that she repeatedly asked her livestream spectators: “What should I do now?”²³⁵ Shamansky cited these questions as partial evidence that Lonina “does everything possible to contain the situation.”²³⁶ It is unclear, however, how Lonina’s mere solicitation of audience input actually helped to prevent or stop the rape, especially because she did not then do anything personally to aid D.B. Others interpret these requests for instructions as a display of Lonina’s desire to appeal to her social media followers.²³⁷

Commentators, including psychologists, have seized on these four features of Lonina’s conduct as evidence of evil—or at least egocentric—intent.²³⁸ Some of these analysts argue that Lonina’s overall conduct demonstrates that her psychological need for approval and excitement outweighed whatever care she may have felt for D.B.²³⁹ Other specialists go further, contending either that the attention Lonina was enjoying online completely divorced her from

²³¹ CPD-Lonina Interview – Transcript, *supra* note 124.

²³² Author-Reporter Interview 1, *supra* note 129.

²³³ CPD-Lonina Interview – Transcript, *supra* note 124.

²³⁴ Author-Close Interview, *supra* note 126.

²³⁵ Holley, *supra* note 126 (quoting Shamansky describing Lonina’s behavior in the video).

²³⁶ *Id.* (quoting Shamansky).

²³⁷ Marche, *supra* note 143 (“[I]t is the ‘What should I do now? What should I do now?’ that is particularly jarring. It wasn’t just as a witness that Lonina acted; it was as a witness engaged with a live audience whom she wished to please.”).

²³⁸ See *infra* notes 239–240 and accompanying text.

²³⁹ The director of the Media Psychology Research Center, Pamela Rutledge, argued about the case:

You don’t film on Periscope to document a sexual attack. . . . You call 911 and hit the guy over the head with a chair. The fact that [Lonina] became an accomplice implies that her psychological need for approval and the thrill of the event were greater than her concern or empathy for her friend during a serious sexual assault.

Kazdin, *supra* note 107. Rutledge also suspects that Lonina may have derived a “perverse thrill” from watching D.B.’s victimization. *Id.*

reality or that she was actually deriving a “perverse thrill” from observing her then-best friend be assaulted.²⁴⁰

Further investigation of the case supports these commentators’ view that Lonina never intended to act altruistically when livestreaming the rape. The Reporter states that Lonina is a “psychopath” with a history of abusing and seeking to humiliate others, including the Reporter herself.²⁴¹ According to the Reporter, who says she was Lonina’s best friend before D.B. was,²⁴² Lonina created fake social media accounts where she posted “bad” pictures of her friends, and she spread rumors about and played cruel pranks on her friends (including the Reporter), such as spiking their drinks with laxatives.²⁴³ Rausch concurs that “there was something off” with Lonina, “something a little bit missing, in terms of her emotional response to the situation.”²⁴⁴ Likewise, Close felt from his interactions with Lonina that she was “cold” and had “no remorse.”²⁴⁵

Lonina also had recently mistreated D.B. Just the previous night, rather than help D.B. or leave her alone while she was ill from drinking, Lonina not only livestreamed her friend while she was visibly sick but also disrobed her in the process, making the scene even more salacious for her Periscope audience.²⁴⁶

Because Lonina pleaded guilty, it is impossible to know how a jury would have interpreted her motive and mens rea or whether—and, if so, on which of the nine charges—it would have convicted her.²⁴⁷ Still, multiple factors suggest that Lonina’s motive was not noble, that her actus reus and mens rea were criminal, and that she was therefore an Enabler Transmitter rather than a By-stander or Upstander Transmitter. Those factors include: (1) Lonina’s pattern of cruelty and humiliation towards her friends, including her former (the Reporter) and current (D.B.) best friends; (2) Lonina’s demeanor and behavior throughout the livestream; (3) Lonina’s and Shamansky’s acknowledgments about her motivations amid the broadcast; (4) Lonina’s admission that she did nothing to try to stop the rape; (5) Lonina’s implausible explanation of why she did not know that what she was witnessing was a crime; and (6) Lonina’s deci-

²⁴⁰ The executive director of the New York Center for Neuropsychology and Forensic Behavioral Science, N.G. Berrill, stated about Lonina: “She was enjoying the attention she was getting by presenting this for public consumption. The reality of what was going on was seemingly lost on her entirely—it’s scary.” *Id.*

²⁴¹ Author-Reporter Interview 1, *supra* note 129; Reporter E-mail to Pietanza, *supra* note 141.

²⁴² See *supra* note 158 and accompanying text.

²⁴³ Reporter E-mail to Pietanza, *supra* note 141.

²⁴⁴ Author-Rausch Interview, *supra* note 76.

²⁴⁵ Author-Close Interview, *supra* note 126.

²⁴⁶ See *supra* notes 184–186 and accompanying text.

²⁴⁷ Entry of Guilty Plea, *supra* note 168 (listing the nine charges for which Lonina was indicted).

sion not to proactively contact the police during or even after the offense. Summarizing Lonina's role in the rape, O'Brien referred to her as Gates's "accomplice" rather than a mere bystander.²⁴⁸ In particular, Lonina's pull on the victim's leg and admission that she got "caught up in" the positive feedback were significant for prosecutors, as these factors indicated that Lonina "went over the edge" from being a witness to a co-conspirator.²⁴⁹

c. Bad Samaritan Law Liability

Lonina could have been charged with violating Ohio's *general* Bad Samaritan law if sufficient evidence showed that she knew about the rape and that she knowingly declined to notify law enforcement authorities while the crime was in progress or sometime later.²⁵⁰ Lonina could not have been charged with violating Ohio's *specific* Bad Samaritan law because—although Lonina knew or should have reasonably suspected Gates's abuse of D.B. (who was then under eighteen years of age)—Lonina, as an eighteen-year-old high school student, did not hold any of the particular professional positions required to comply.²⁵¹

Although prosecutors charged Lonina with nine crimes, they did not charge her with violating Ohio's general Bad Samaritan law because they viewed that as unnecessary and undesirable.²⁵² Investigators and prosecutors in the Gates-Lonina case, who already seldom enforced Ohio's general Bad Samaritan law,²⁵³ prioritized their limited resources and time on addressing the underlying crimes: Gates's rape of D.B. and the facilitating and exacerbating role Lonina played in broadcasting that offense.²⁵⁴ Lonina was not charged with violating Ohio's general Bad Samaritan law (a low-level misdemeanor²⁵⁵)

²⁴⁸ Author-O'Brien Interview, *supra* note 76.

²⁴⁹ *Id.*

²⁵⁰ See OHIO REV. CODE ANN. § 2921.22(A) (West 2020) (stating Ohio's general Bad Samaritan law for reporting felonies).

²⁵¹ See *id.* § 2151.421(A)(1)(a) (requiring an official who "knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age . . . has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition" to report that knowledge or reasonable suspicion to specified authorities).

²⁵² See *infra* notes 253–258 and accompanying text.

²⁵³ Author-Close Interview, *supra* note 126 (stating that he has never "used" that law and is not aware of anyone else who has); Author-O'Brien Interview, *supra* note 76 (stating that Ohio's general Bad Samaritan law is "rarely used"); Author-Rausch Interview, *supra* note 76 (explaining that Ohio's general Bad Samaritan law "just wasn't a charge we used very often").

²⁵⁴ Author-O'Brien Interview, *supra* note 76; Author-Rausch Interview, *supra* note 76.

²⁵⁵ Violation of Ohio's general Bad Samaritan law is a misdemeanor of the fourth degree, OHIO REV. CODE ANN. § 2921.22(I), the second-lowest degree of misdemeanors in Ohio. Such a violation

because she was already charged with multiple other offenses—all of which, as felonies, were more serious and carried more severe punishment—and investigators and prosecutors were reasonably confident that she would be convicted of at least one of those felonies.²⁵⁶ Furthermore, charging Lonina with a misdemeanor in addition to the felonies would have introduced potential legal and logistical challenges. In Ohio's Franklin County, where the Gates-Lonina case was prosecuted, misdemeanors are addressed at the city level while felonies are addressed at the county level.²⁵⁷ Typically, prosecutors charging felonies in that county would not also charge misdemeanors for the same criminal context because doing so would lead to two separate cases in which the same witnesses could be called, which can cause problems if they provide inconsistent testimony.²⁵⁸

But there could have been a further reason not to charge Lonina with violating Ohio's general Bad Samaritan law: to avoid infringing her right against self-incrimination, protected under both the Ohio²⁵⁹ and U.S.²⁶⁰ constitutions. The importance of exempting potential self-incriminators from duty-to-report laws and drafting or amending Bad Samaritan laws to avoid self-incrimination—as I have proposed elsewhere²⁶¹—is underscored by U.S. jurisprudence on these statutes (including in Ohio itself) as well as a foreign incident that is eerily similar to the Gates-Lonina case.

can result in a jail term of not more than thirty days, *id.* § 2929.24(A)(4), and/or a fine of not more than \$250, *id.* § 2929.28(A)(2)(a)(iv).

²⁵⁶ Author-Close Interview, *supra* note 126; Author-Rausch Interview, *supra* note 76.

²⁵⁷ *Prosecution Resources Unit—Intake Section, Mediation, Check Resolution Programs*, CITY OF COLUMBUS, <https://city-attorney.columbus.gov/prosecution-pru.aspx> [<https://perma.cc/7NDV-2ZA2>] (“The Intake Section serves the citizens of Franklin County and the City of Columbus by processing criminal misdemeanor complaints. . . . Felony matters are investigated by the police and prosecuted by the Franklin County Prosecutor’s Office.”); FRANKLIN CNTY., OHIO CT. OF COMMON PLEAS: GEN. DIV., <https://www.fccourts.org> [<https://perma.cc/27RR-4KPK>] (“The Franklin County Court of Common Pleas - General Division has original jurisdictional authority over all felony cases and all civil cases in which the sum or matter in dispute exceeds \$15,000.”); Author-Close Interview, *supra* note 126; Author-O’Brien Interview, *supra* note 76; Author-Rausch Interview, *supra* note 76.

²⁵⁸ *Smith v. Goose*, 205 F.3d 1045, 1054 (8th Cir. 2000) (vacating convictions for murder and robbery because the prosecution presented conflicting testimony from same witness in separate trials); Author-O’Brien Interview, *supra* note 76; Author-Rausch Interview, *supra* note 76. In 2000, the U.S. Court of Appeals for the Eighth Circuit held in *Smith v. Goose* that due process “prohibits prosecutors from putting forth inherently factually contradictory theories to convict multiple defendants of the same murder.” 205 F.3d at 1054.

²⁵⁹ OHIO CONST. art. I § 10 (“No person shall be compelled, in any criminal case, to be a witness against himself . . .”).

²⁶⁰ U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself . . .”).

²⁶¹ Kaufman, *supra* note 3, at 1339, 1376–78, 1384–86. As defined in that article, “Self-Incriminator” are reporters who “[w]ould unconstitutionally incriminate [them]selves in a crime if [they] intervened.” *Id.* at 1376 tbl.2.

In 1985, in *State v. Wardlow*, the Ohio Court of Appeals reversed the conviction of a defendant for violating Ohio's general Bad Samaritan law because, the court ruled, the statute infringed upon the defendant's right against self-incrimination.²⁶² The defendant had not reported that her live-in boyfriend sexually assaulted her daughter.²⁶³ The court reasoned that compliance with the Bad Samaritan law would likely have led to the defendant's prosecution for welfare fraud (because, as a welfare recipient, the defendant was required to disclose a partner residing with her, which she had not) and child endangerment.²⁶⁴

Similarly, thirty-two years later, the Swedish Supreme Court reversed a conviction for a Bad Samaritan law violation after the defendant livestreamed a gang rape in Sweden via Facebook.²⁶⁵ In that case, the defendant was initially convicted by Swedish district and appeals courts of aggravated defamation and failure to report an ongoing rape,²⁶⁶ the latter of which is criminalized under both of Sweden's Bad Samaritan laws.²⁶⁷ The Swedish Supreme Court, however, ruled that because the prosecutor had initially also charged the man with aiding the crime, in order to avoid requiring self-incrimination the prose-

²⁶² *State v. Wardlow*, 484 N.E.2d 276, 277–79 (Ohio Ct. App. 1985) (per curiam) (“[A]ppellant’s privilege against self-incrimination was unconstitutionally infringed under the facts of this case *sub judice*.”).

²⁶³ *Id.*

²⁶⁴ *Id.* at 279.

²⁶⁵ See *supra* notes 79–80 and accompanying text.

²⁶⁶ Elin Hofverberg, *Sweden: Supreme Court Rules Live Broadcast of Rape Is Aggravated Defamation but Not Violation of Duty to Report Ongoing Rape*, LIBR. OF CONG. (Aug. 8, 2018), <https://www.loc.gov/law/foreign-news/article/sweden-supreme-court-rules-live-broadcast-of-rape-is-aggravated-defamation-but-not-violation-of-duty-to-report-ongoing-rape> [https://perma.cc/X6EP-Z6L5].

²⁶⁷ BROTTSBALKEN [BRB] [Penal Code] 6:15 (Swed.) (criminalizing “failure to disclose or prevent, rape, gross rape, rape of a child, gross rape of a child, gross exploitation of a child for sexual posing and gross procuring”). The Swedish Penal Code also criminalizes failure to report that is not limited to rape and related offenses:

A person who fails to report or otherwise disclose in time an offence that is imminent or in progress is, in cases specifically provided for, guilty of failure to disclose the offence and is sentenced according to the provision for a person who was only an accomplice to such an offence to a minor extent. . . . In cases specifically provided for, a person who did not have intent but ought to have realised that the offence was imminent or in progress is also guilty of failure to disclose an offence.

Id. at 23:6; see also ‘Facebook Rape Video’ Trio Sentenced to Prison, LOCAL SE (Swed.) (Apr. 25, 2017), <https://www.thelocal.se/20170425/facebook-rape-video-trio-sentenced-to-prison> [https://perma.cc/8Y73-H9AF] (stating that the man who filmed the rape was found guilty of failing to report rape and gross defamation).

cutor could not also have charged him with failing to report that offense.²⁶⁸ The Gates-Lonina case is similar to *Wardlow* and the Swedish case because, if Lonina had been charged with failing to report the crime in which she was accused of being involved, then a court may have ruled that these simultaneous charges would unconstitutionally violate her privilege against self-incrimination.²⁶⁹

Additionally, the prosecutor's charging decisions in the Gates-Lonina case reflect prosecutorial discretion more generally. Usually, prosecutors focus on investigating and charging the observed crime rather than the failure to report it or intervene.²⁷⁰ Moreover, even when prosecutors charge third parties, it is typically for accomplice liability and other alternate crimes.²⁷¹ However, in addition to offenses of commission, such as acting as an accomplice, third parties may also engage in acts of omission in which they fail to discharge a duty to rescue or to report the crime.²⁷² Had Lonina been a passive bystander rather than actively engage in ways that led prosecutors to charge her with multiple felonies, then a violation of Ohio's general Bad Samaritan law might have been the only charge they could bring against her.

What if, as part of her passivity, Lonina had wanted to call the police but was genuinely afraid to do so? Whether she would be excused from a Bad Samaritan law could depend on (1) what, exactly, she feared; (2) whether that fear was reasonable; and (3) whether the relevant Bad Samaritan law recognized such a reasonable fear as an exception to compliance. If, like the Reporter,²⁷³ Lonina had been afraid to contact the police out of intimidation and lack of familiarity with *law enforcement*, then that fear—reasonable or otherwise—would not excuse her under any Bad Samaritan law in the United States because none of these statutes excuses a bystander for fear of the police.²⁷⁴ If, however, Lonina had been frightened of *Gates* because she thought he might physically injure her if she contacted the police, then that fear, if reasonable,

²⁶⁸ Högsta Domstolen [HD] [Supreme Court] July 2, 2018 Ö 3552–17 (Swed.), <https://www.domstol.se/hogsta-domstolen/avgoranden/2018/35038/> [<https://perma.cc/75N4-G8WX>]; Hofverberg, *supra* note 266.

²⁶⁹ See Högsta Domstolen [HD] [Supreme Court] July 2, 2018 Ö 3552–17 (Swed.); 484 N.E.2d at 277–79.

²⁷⁰ Kaufman, *supra* note 3, at 1347–48.

²⁷¹ *Id.*

²⁷² *Id.*; see Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 396–97 (2007) (discussing accomplice liability and the general rule that “one must ‘aid and abet’ another’s commission of a crime in order to be guilty”).

²⁷³ See *infra* notes 340, 358–359 and accompanying text.

²⁷⁴ See Appendix, *supra* note 17 (compiling Bad Samaritan laws in the United States, none of which lists fear of the police as an excuse for non-compliance).

would be an excuse under many Bad Samaritan laws outside of Ohio.²⁷⁵ Although Ohio's general Bad Samaritan law lists six exemptions,²⁷⁶ fear—reasonable or otherwise—is not one of them.²⁷⁷ So, even if Lonina were scared of Gates, that would not necessarily have been a legitimate defense had Lonina been charged with violating Ohio's general Bad Samaritan law. Broadcasting a rape but not calling the police could thus theoretically be done out of goodwill but still not excuse the Transmitter from violating a Bad Samaritan law.

B. Receivers

This Section describes Receivers generally and then analyzes Receivers in the Gates-Lonina case overall, as well as five particular subsets of these Receivers.²⁷⁸ Although there were compelling legal and logistical reasons not to charge Lonina with violating a Bad Samaritan law, analysis of Receivers in the case suggests that some of them were better candidates for such charges, particularly if these statutes encompassed off-site spectators.

²⁷⁵ See *id.* (compiling Bad Samaritan laws in the United States, some of which list fear of physical injury as an excuse for non-compliance). For example, both of Alaska's Bad Samaritan laws—which divide duties to report violent crimes into separate statutes applying to victims who are children and adults—include fear of physical injury as an affirmative defense. ALASKA STAT. § 11.56.765(b)(1) (2020) (“[I]t is an affirmative defense that the defendant did not report in a timely manner because the defendant reasonably believed that doing so would have exposed the defendant or others to a substantial risk of physical injury.”); *Id.* § 11.56.767(b)(1)(A) (“[I]t is an affirmative defense that the defendant did not report as soon as reasonably practicable because the defendant reasonably believed that doing so would have exposed the defendant or others to a substantial risk of physical injury.”).

²⁷⁶ Ohio's general Bad Samaritan law's six exemptions include the following:

- (1) The information is privileged by reason of the relationship between attorney and client; physician and patient, . . . husband and wife
- (2) The information would tend to incriminate a member of the actor's immediate family.
- (3) Disclosure of the information would amount to revealing a news source
- (4) Disclosure of the information would amount to disclosure by a member of [an] ordained clergy . . . by a person seeking [their] aid or counsel
- (5) Disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a bona fide program of treatment or services for drug dependent persons or persons in danger of drug dependence
- (6) Disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a bona fide program for providing counseling services to victims of [certain] crimes . . . or to victims of felonious sexual penetration

OHIO REV. CODE ANN. § 2921.22(G) (West 2020).

²⁷⁷ See *id.*

²⁷⁸ See *infra* notes 279–398 and accompanying text.

1. Receivers Generally

Receivers are remote witnesses who see, hear, or otherwise observe live or recorded material from Transmitters. In contrast to Transmitters, who are *physically* present at the scene, Receivers are *virtually* present at the scene. When confronting a crime from afar, Receivers could engage in various actions or omissions, including: (1) passively observing; (2) actively engaging by providing feedback (positive, negative, or both) to the Transmitter or perpetrator through mechanisms the platform permits, such as comments, emojis, or emoticons; (3) further broadcasting the Transmitter's material; (4) reporting the situation to the platform or authorities; or (5) engaging in vigilantism, such as doxing the Transmitter or perpetrator.

As illustrated in Figure 2, this Article's typology divides Receivers across four dimensions (conduct, interaction with Transmitters, timing, and contextual knowledge), each of which is further divided into subtypes. This categorization is crucial for several reasons. First, it demonstrates that there are multiple kinds of Receivers. Second, it shows that Receivers' distinctions warrant different treatment under Bad Samaritan laws, as recommended in Part IV, Section A.²⁷⁹ Third, this framework indicates that those variations necessitate a modernized Bad Samaritan law, as proposed in Part IV, Section D.²⁸⁰

This Article's typology proposes three subtypes of Receivers based on their conduct. "Upstander Receivers" may intervene helpfully, for example, by attempting to assist the person in distress directly or notifying authorities. "Enabler Receivers" may intervene harmfully, for instance, by facilitating or exacerbating a depicted crime. "Bystander Receivers" do not intervene at all. Likewise, this typology presents two subtypes of Receivers based on their interaction with Transmitters. "Active Receivers" provide feedback—positive, negative, or both—to Transmitters. In contrast, "Passive Receivers" do not provide feedback.²⁸¹

Additionally, the timing and contextual knowledge dimensions each feature two subtypes. For timing, Receivers are either "Contemporaneous Receivers," if they observe evidence of a crime as it is occurring, or "Delayed Receivers," if they observe this evidence later. For contextual knowledge, "Familiar Receivers" possess such information about the situation, whereas "Unfamiliar Receivers" do not. Like the Transmitter subtypes, Receiver subtypes are

²⁷⁹ See *infra* notes 400–451 and accompanying text.

²⁸⁰ See *infra* notes 477–479 and accompanying text.

²⁸¹ Another legal scholar distinguishes between "pure bystanders" and "engaged spectators," which correspond to this Article's "Passive Receivers" and "Active Receivers," respectively. Uelmen, *supra* note 8, at 92. Uelmen differentiates these labels based on the person's level of engagement: a pure bystander "pass[es] by or disengage[s]" whereas an engaged spectator "lock[s] their attention on the scene." *Id.*

mutually exclusive within dimensions. For example, a Receiver cannot be both Active and Passive. Also like with Transmitter subtypes, Receiver subtypes across dimensions are not mutually exclusive. For example, a Receiver could simultaneously be a Bystander, Passive, Contemporaneous, and Familiar.

FIGURE 2. Typology of Digital Age Samaritans: Receivers

| | |
|-------------------------------|---|
| CONDUCT | Upstander (intervene helpfully) |
| | Enabler (intervene harmfully) |
| | Bystander (don't intervene) |
| INTERACTION WITH TRANSMITTERS | Active (provide feedback to Transmitters) |
| | Passive (don't provide feedback to Transmitters) |
| TIMING | Contemporaneous (observe evidence as the situation is occurring) |
| | Delayed (observe evidence after the situation occurred) |
| CONTEXTUAL KNOWLEDGE | Familiar (have contextual knowledge of the situation) |
| | Unfamiliar (don't have contextual knowledge of the situation) |

Although Transmitters are clearly subject to existing Bad Samaritan laws because they are physically present at the scene of the crime, the applicability of these statutes to Receivers is ambiguous.²⁸² Receivers could thus argue that a Bad Samaritan law is inapplicable because they were not physically present at the scene. Where the statute explicitly or implicitly requires physical presence as an element of a violation, then Receivers could claim that their omission did not satisfy that aspect of the law. This gap in existing Bad Samaritan laws indicates why a modernized version, including explicit applicability to witnesses who are virtually present, is necessary if the statutes are to unambiguously apply to Receivers.

Even if Bad Samaritan laws applied to Receivers, these remote witnesses could assert various defenses. First, certain Receivers could argue that even a Bad Samaritan law that encompasses virtual presence is inapplicable to them because they were neither physically nor virtually present at the scene. If a Delayed Receiver is so delayed in observing evidence of a crime that the offense is no longer in progress, then they are not present, even virtually.

²⁸² See *supra* notes 26–34 and accompanying text.

Second, Receivers could assert that, while their social media account or mobile device may have been used to view the proscribed material, they themselves were not the viewer.²⁸³ Charging Receivers with violating Bad Samaritan laws would pose evidentiary challenges because multiple people could have access to their digital devices.²⁸⁴

Third, in particular contexts, Receivers could contend that a Bad Samaritan law is substantively inapplicable because of its subject matter. For example, where Bad Samaritan laws apply only if the victim is under a certain age (as some do, but not in Ohio²⁸⁵), then a Receiver could justify non-intervention on the basis that the victim's age exceeded the statutory threshold. As D.B. was seventeen at the time of the crime,²⁸⁶ a Receiver subject to a Bad Samaritan law with a younger victim age restriction—such as in California and Nevada²⁸⁷—could have asserted D.B.'s age as a defense.

Finally, Receivers could claim a mistake of fact defense²⁸⁸ in attempting to negate the applicable Bad Samaritan law's required mens rea. Consider again Bad Samaritan laws that apply only if the victim is under a certain age.²⁸⁹ Receivers could assert that they incorrectly but reasonably thought that the victim was older. Alternatively, Receivers could claim that they did not comprehend that what they were observing was real.²⁹⁰ By asserting this ignorance, the Receiver could argue that they did not know that the situation qualified as any crime under the purview of a relevant Bad Samaritan law. Berrill, the forensic psychologist who commented on the Gates-Lonina case, argues that it is impossible to know whether a scene depicted via social media is

²⁸³ See *supra* note 100 and accompanying text.

²⁸⁴ Author-O'Brien Interview, *supra* note 76.

²⁸⁵ Compare CAL. PENAL CODE § 152.3(a) (West 2021) (applying to victims "under 14 years of age"), and NEV. REV. STAT. § 202.882.1 (2020) (applying to victims "12 years of age or younger"), with OHIO REV. CODE ANN. § 2151.421 (West 2020) (including no specific age restrictions on its Bad Samaritan law). Per a federal Bad Samaritan law, victims must be children. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115–126, § 101, 132 Stat. 318 (2018). For discussion of Bad Samaritan laws' victim age restrictions, see Kaufman, *supra* note 3, at 1388–89 (arguing that duty-to-report laws' victim age restrictions should be eliminated); Kaufman, *No Cover for Abusers*, *supra* note 13 (same); Kaufman, *Speaking Up*, *supra* note 13 (same).

²⁸⁶ CPD-Victim Interview, *supra* note 129.

²⁸⁷ See *supra* note 285 and accompanying text.

²⁸⁸ A mistake of fact defense is "[a] criminal defendant's claim that some factual error negates the mens rea necessary for a guilty verdict." *Mistake of Fact Defense*, BLACK'S LAW DICTIONARY, *supra* note 102.

²⁸⁹ See, e.g., CAL. PENAL CODE § 152.3(a) (requiring reporting to a "peace officer" of any rape, murder, or other specified crime against a child fourteen years old or younger); NEV. REV. STAT. § 202.882.1(a) (requiring reporting of any "violent or sexual offense" against a child who is twelve years old or younger).

²⁹⁰ Receivers could assert this defense regardless of their location, how accessible their social media account or mobile device is to other people, or the subject matter depicted in the broadcast.

staged.²⁹¹ But he is wrong. Receivers can *sometimes* determine if what they observe is—or is likely to be—real. Familiar Receivers may be able to surmise authenticity if they are sufficiently acquainted with one or more of the people involved or possess other knowledge about the situation.

2. Receivers in the Gates-Lonina Case Generally

In the Gates-Lonina case, because D.B. was a minor, any Receiver (including the specific Receivers described below) of either livestream—the February 26 broadcast of D.B. naked or the transmission of her rape the following day—arguably violated either or both of Ohio’s Bad Samaritan laws.²⁹² If a Receiver were in Ohio and did not report the rape, then they may have violated Ohio’s *general* Bad Samaritan law.²⁹³ If a Receiver were in Ohio, held the required positions, were acting in an official or professional capacity,²⁹⁴ and did not report the rape, then they may have violated Ohio’s *specific* Bad Samaritan law.²⁹⁵ If a Receiver were anywhere in the United States other than Ohio and did not report the rape, then they may have violated either the Bad Samaritan law in their jurisdiction or one or both of Ohio’s Bad Samaritan laws if those statutes applied extraterritorially.²⁹⁶

Several types of Receivers viewed Lonina’s Periscope broadcast. First, according to the Reporter, “a lot of” these spectators were former classmates with Lonina at their New York high school and knew at least Lonina’s name and the city from which she was transmitting.²⁹⁷ These observers would qualify as Familiar Receivers because they possessed contextual knowledge about the broadcast. Additionally, more than 700 Receivers watched the livestream via Periscope as the rape was occurring, making them Contemporaneous Receivers. Those who watched a recording of the video later via Periscope or another social media site, of which there is an unknown number, are Delayed Receivers.

At the time of Gates and Lonina’s arrest, a commentator predicted that “the vast majority of the people watching” would not be prosecuted.²⁹⁸ In fact, not a single Receiver was; no investigator or prosecutor even sought to deter-

²⁹¹ See *supra* note 107 and accompanying text.

²⁹² Compare OHIO REV. CODE ANN. § 2921.22(A) (West 2020) (stating Ohio’s general Bad Samaritan law), with *id.* § 2151.421(A)(1)(a) (stating Ohio’s specific Bad Samaritan law).

²⁹³ See *id.* § 2921.22(A).

²⁹⁴ See *supra* note 149 and accompanying text.

²⁹⁵ See OHIO REV. CODE ANN. § 2151.421(A)(1)(a).

²⁹⁶ See *id.* § 2151.421(A)(1)(a); *id.* § 2921.22(A); see also Appendix, *supra* note 17 (compiling Bad Samaritan laws among other U.S. states).

²⁹⁷ Author-Reporter Interview 2, *supra* note 46.

²⁹⁸ Kazdin, *supra* note 107.

mine who any of the Receivers were or whether they were in Ohio and thus unquestionably subject to the state's Bad Samaritan laws.²⁹⁹ O'Brien explained that one of the reasons Lonina herself was not charged with violating Ohio's general Bad Samaritan law is also one of the reasons that no officials pursued Bad Samaritan law charges against Receivers: a different office handles misdemeanors and that other office was not involved in this case.³⁰⁰ Close and Rausch noted that another reason Lonina herself was not charged with this offense—because investigators and prosecutors prioritized addressing the underlying crime of rape—also contributed to their decision not to pursue accountability for any of the Receivers.³⁰¹ Finally, Close adds that, because violations of Ohio's Bad Samaritan laws are such low-level offenses, the resources that would have been required to unmask the spectators would have exceeded the value in enforcing the laws.³⁰²

Had charges been brought against Receivers, they likely could not have asserted a successful mistake of fact defense based on a claim that they did not comprehend that they were observing an actual sexual assault. According to O'Brien, anyone watching "would conclude" that the situation was a rape, adding that it was clear "this young lady was under the influence and/or taken advantage of by" Gates.³⁰³ Similarly, Close states "that the average person" watching the video would "know that what was going on was not right" and that it would be "beyond a reasonable doubt" to any viewer that Gates's conduct was criminal.³⁰⁴ Thus, a Receiver's claim that they did not know they were witnessing a rape would strain credulity.³⁰⁵

While no Receivers in the Gates-Lonina case were prosecuted, implementing the recommendations in Part IV could promote justice and accountability in similar situations in the future.³⁰⁶ One of those recommendations—to institute a hierarchy of liability among Receivers—is informed by analyzing Receivers' distinctions in the Gates-Lonina case.

²⁹⁹ Author-Close Interview, *supra* note 126; Author-O'Brien Interview, *supra* note 76; Author-Rausch Interview, *supra* note 76.

³⁰⁰ Author-O'Brien Interview, *supra* note 76.

³⁰¹ Author-Close Interview, *supra* note 126; Author-Rausch Interview, *supra* note 76.

³⁰² Author-Close Interview, *supra* note 126. Specifically, the charges for violating Ohio's general Bad Samaritan law are misdemeanors. OHIO REV. CODE ANN. § 2921.22(I) (West 2020) ("Violation of [the general Bad Samaritan law] is a misdemeanor of the fourth degree."). In contrast, violation of Ohio's rape statute is a "felony of the first degree." *Id.* § 2907.02(B).

³⁰³ Author-O'Brien Interview, *supra* note 76.

³⁰⁴ Author-Close Interview, *supra* note 126.

³⁰⁵ *See id.*

³⁰⁶ *See infra* notes 399–479 and accompanying text.

3. Specific Receivers in the Gates-Lonina Case

This subsection analyzes five groupings of specific Receivers in the Gates-Lonina case. Only one Receiver—the Reporter—acted as an upstander who alerted authorities. Hundreds of others were aware of the crime and chose to be bystanders or enablers. At least one of these individuals—Lonina’s father—could have been charged with violating Ohio’s general Bad Samaritan law.³⁰⁷

a. The Reproducer(s)

One of many troubling aspects of the Gates-Lonina case was that a person or group of people (the “Reproducer(s)”) copied and disseminated the Periscope rape video.³⁰⁸ Copies of the February 27 livestream were uploaded to at least two social media sites: YouTube and VK.³⁰⁹ At least one person, but possibly multiple people, then republished these videos.³¹⁰ Because, at the time, Periscope automatically deleted videos after twenty-four hours,³¹¹ whoever posted those copies likely used a phone to record the livestream playing on another phone or computer and then uploaded the recording to the internet.³¹² The Reporter told police that her unnamed friend (not Lonina) video recorded the February 27 livestream as it was occurring and then posted that copy to YouTube,³¹³ but the Reporter said that she did not know who posted the copy to VK.³¹⁴ The Reporter subsequently claimed that she does not personally know any of the Reproducer(s) but that they were in Russia.³¹⁵ If Lonina was

³⁰⁷ See OHIO REV. CODE ANN. § 2921.22(A).

³⁰⁸ Author-Reporter Interview 1, *supra* note 129 (acknowledging that someone uploaded a video of the rape to YouTube). The Reporter claims that she did not know the person who uploaded it, contending that they were from another country. *Id.*

³⁰⁹ *Id.* VK is a Russian social media company based in Russia. See VK, <http://vk.com/> [<https://perma.cc/HWU7-NZQ5>]. VK is sometimes called the “Russian Facebook.” See, e.g., Samantha Chang, “Russian Facebook” VK Wants to Turn Its 100 Million Users into Crypto Fans, CCN (Mar. 31, 2019), <https://www.ccn.com/russian-facebook-vk-wants-to-turn-its-100-million-users-into-crypto-fans/> [<https://perma.cc/ZK32-5RKH>].

³¹⁰ Author-Reporter Interview 1, *supra* note 129.

³¹¹ In May 2016—three months after Lonina’s livestream on February 27 of that year—Periscope announced that broadcasts could be posted for longer than 24 hours. Mariella Moon, *Periscope #Saves Your Broadcasts Beyond 24 Hours*, ENGADGET (May 5, 2016), <https://www.engadget.com/2016-05-05-periscope-save-feature.html> [<https://perma.cc/HM3V-6W4Z>]. Since then, Periscope has provided users with the option of posting broadcasts indefinitely. *How to Save a Periscope Broadcast*, TWITTER, <https://help.twitter.com/en/using-twitter/save-broadcast> [<https://perma.cc/Y5AE-BBLS>] (providing instructions for users to save their broadcasts to their devices).

³¹² Author-Close Interview, *supra* note 126; Author-Reporter Interview 1, *supra* note 129.

³¹³ Author-Close Interview, *supra* note 126; CPD-Reporter Interview, *supra* note 159.

³¹⁴ Author-Reporter Interview 1, *supra* note 129.

³¹⁵ *Id.* Whether these Reproducer(s) could or should be subject to Russia’s own Bad Samaritan law is outside the scope of this Article. For Russia’s Bad Samaritan law, see UGOLOVNIY KODEKS ROSSII SKOF FEDERATSII [UK RF] [Criminal Code] art. 125 (Russ.) (“The deliberate abandoning with-

not the person who copied the livestream to VK, then none of the Reproducer(s) would qualify as Transmitters since they were not physically present at the scene of the crime. While at least the Reporter's friend who posted the video to YouTube was a Contemporaneous Receiver, it is possible that the person(s) who uploaded the broadcast to VK (and any other social media sites) were Delayed Receivers.

The Reproducer(s) in the Gates-Lonina case all qualify as Enabler Receivers because they compounded the crime by spreading the recording to more platforms. As Periscope automatically deleted videos within twenty-four hours at the time of the crime, the rape recording only survived because these individuals deliberately copied and posted it elsewhere. Indeed, the Reporter claims that copies of the recording can still be found on the internet today.³¹⁶ As further distribution of child pornography revictimizes the child,³¹⁷ D.B. continues to suffer from the actions of the Reproducer(s).³¹⁸

Like other Receivers in the Gates-Lonina case, anyone who copied and posted the February 27 livestream could be charged with violating any relevant Bad Samaritan laws.³¹⁹ These acts of reproducing and sharing alone, however, may not be sufficient for a conviction. Like other Receivers, the Reproducer(s) could assert various defenses, such as mistake of fact or not possessing the requisite mens rea.³²⁰ The Reproducer(s) could also contend that they were genuinely trying to help by preserving evidence of and publicizing the crime. Thus, the Reproducer(s) could argue that, even though they did not directly contact law enforcement, they were indeed attempting to alert and assist authorities.

out aid of person who is in a state of danger to human life or health, and who is deprived of the possibility of taking measures towards self-preservation . . . in cases where the convicted person had the possibility to render aid to this person and was obliged to take care of him, or who has put him in the state of danger to life and health, shall be punishable by a fine . . . or by obligatory labour . . . or by compulsory labour . . . or by an arrest . . . or by deprivation of liberty . . .").

³¹⁶ Author-Reporter Interview 1, *supra* note 129.

³¹⁷ See *New York v. Ferber*, 458 U.S. 747, 759 (1982) ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children . . . [because] the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."); Katherine M. Giblin, Note, *Click, Download, Causation: A Call for Uniformity and Fairness in Awarding Restitution to Those Victimized by Possessors of Child Pornography*, 60 CATH. U. L. REV. 1109, 1110 (2011) ("[A]s the Internet's convenience facilitates the child-pornography market, it correspondingly fuels the perpetual victimization of the depicted children."); Devon Ishii Peterson, Comment, *Child Pornography on the Internet: The Effect of Section 230 of the Communications Decency Act of 1996 on Tort Recovery for Victims Against Internet Service Providers*, 24 U. HAW. L. REV. 763, 771 (2002) ("Each time [child pornography] is republished, the child is re-victimized.").

³¹⁸ While the Reproducer(s) in this case exacerbated the crime, not all Reproducers would qualify as enablers. For example, activists who post videos of police brutality seek to raise awareness about the misconduct, not aggravate it. See *supra* notes 82–88.

³¹⁹ See Appendix, *supra* note 17 (listing Bad Samaritan laws in the United States and abroad).

³²⁰ See *supra* Part III.B.1.

b. The Responders

Rather than passively observing or, as the Reproducer(s) did, silently copying and posting the video, hundreds of people³²¹ responded to Lonina as they watched her livestream of the rape. These “Responders” are Active Receivers because they provided feedback to the Transmitter. They are also Contemporaneous Receivers because they did so in real time.

Hundreds³²² of Responders offered *positive* feedback, such as giving “hearts” (a demonstration, according to Periscope itself, of “support and enthusiasm”³²³) and writing comments prodding Lonina to continue broadcasting the crime for their amusement and to remove the bed cover so that the audience could better view the assault, both of which Lonina did.³²⁴ These Responders qualify as Enabler Receivers because they directly and explicitly encouraged Lonina’s broadcast, validated her actions and omissions, and prompted her to improve the viewers’ vantage. Also, because Gates knew Lonina was livestreaming, these Receivers may have indirectly and implicitly encouraged him to continue his assault.³²⁵

In contrast, other Responders presented *negative* feedback to Lonina by writing comments prodding her to help D.B. by contacting the police or a neighbor and expressing outrage about Gates’s conduct.³²⁶ These Responders qualify as Upstander Receivers because they attempted to assist a person in distress.

O’Brien stated that the video features a “constant” flow of Receiver input and that it was “mixed” between positive and negative feedback.³²⁷ The Reporter concurs, noting that the comments and hearts were “nonstop” and that, by her estimate, 60% of comments were positive while 40% were negative and that viewers gave thousands of hearts.³²⁸

Although giving hearts does not necessarily indicate that an Active Receiver understands the situation as genuine, certain comments—both positive and negative—could. For those Active Receivers who *do* demonstrate

³²¹ Author-Reporter Interview 1, *supra* note 129 (stating that “[a] lot of people were commenting”); Author-Reporter Interview 2, *supra* note 46 (stating that “hundreds” of people were commenting).

³²² Author-Close Interview, *supra* note 126 (stating that “hundreds” of people gave hearts); Author-Reporter Interview 1, *supra* note 129 (stating that “[l]ots of people” gave hearts).

³²³ *How to Use Hearts and Chat on Periscope*, *supra* note 222.

³²⁴ Author-Close Interview, *supra* note 126 (noting that the comments Lonina received gave her “affirmation” for continuing to livestream the rape); Author-Reporter Interview 2, *supra* note 46.

³²⁵ See *supra* notes 109–111 and accompanying text.

³²⁶ Author-Reporter Interview 2, *supra* note 46.

³²⁷ Author-O’Brien Interview, *supra* note 76.

³²⁸ Author-Reporter Interview 2, *supra* note 46. As a Periscope user can give unlimited hearts, the number of hearts can exceed the number of Active Receivers. *Id.*

knowledge of authenticity, it would be easier for prosecutors to prove their liability under any relevant Bad Samaritan laws as compared to Bystander Receivers who passively observe and thus do not convey comprehension.³²⁹

Even though negative feedback, such as merely prodding Lonina to stop broadcasting or to help D.B., is less incriminating than positive feedback, having provided negative feedback would not necessarily be a defense. Bad Samaritan statutes often mandate alerting specific individuals. For example, Ohio's general Bad Samaritan law³³⁰ requires reporting to law enforcement authorities to avoid liability. Active, Contemporaneous Receivers who are Upstander Receivers would not have discharged that duty just by unsuccessfully prompting Lonina to aid D.B. Ironically, then, Active, Contemporaneous Receivers who are Upstander Receivers but do not report may be among the most susceptible of *all* Receivers to being convicted of violating any relevant duty to report because of the knowledge they demonstrate while the crime is being committed.³³¹ If, however, Active, Contemporaneous Receivers who are Upstander Receivers had successfully persuaded Lonina to assist D.B. directly, then these individuals could argue that they discharged any relevant duty to rescue under an applicable Bad Samaritan law.

c. The Reporter

The Reporter watched Lonina's livestreams on both February 26 and 27³³² and took screenshots of both broadcasts.³³³ She was thus a Contemporaneous Receiver because she witnessed the events over the internet as they unfolded. Of the hundreds of viewers of the February 27 livestream (including the Reproducer(s) and the Responders), the Reporter (who was living in Brooklyn, New York, at the time³³⁴) is the only person identified as reporting the crime they witnessed.³³⁵ Indeed, the Reporter told at least four people: D.B.'s mother, the Reporter's high school counselor, and police officers where the Reporter was living (New York City) and where the crime was committed (Columbus, Ohio).³³⁶ Any one of these efforts—and certainly their aggregation—qualifies the Reporter as an Upstander Receiver. And her upstanderism

³²⁹ For example, under Vermont's Bad Samaritan law, the actor must "know[] that another is exposed to grave physical harm." VT. STAT. ANN. tit. 12, § 519(a) (2021). Making certain comments about the crime being witnessed may satisfy this knowledge requirement. *See id.*

³³⁰ *See supra* note 149 and accompanying text.

³³¹ Active, Contemporaneous, Enabler Receivers who do not report could also be highly susceptible to being convicted of violating any relevant duty to report.

³³² Author-Reporter Interview 1, *supra* note 129; CPD-Reporter Interview, *supra* note 159.

³³³ Author-Reporter Interview 1, *supra* note 129.

³³⁴ CPD-Reporter Interview, *supra* note 159.

³³⁵ Author-Close Interview, *supra* note 126.

³³⁶ *Id.*

was effective. O'Brien states that it would have been "unlikely that charges would have occurred but for the existence of video" the Reporter provided and that Gates would not have pleaded guilty.³³⁷ Close concurs, describing the Reporter's role in the investigation as "extremely important."³³⁸

First, on either the night of the rape (February 27) or the following day, the Reporter told D.B.'s mother through Facebook by using a friend's fake account to shield her identity.³³⁹ Through private messages, the Reporter described the livestream and provided the screenshots of the February 27 livestream.³⁴⁰ The Reporter explains that she notified D.B.'s mother about the rape because the Reporter thought that D.B.'s parents should know and also because the Reporter preferred that D.B.'s parents, rather than the Reporter herself, contact the police.³⁴¹

Second, three days after the February 27 livestream, the Reporter alerted her high school counselor about the incident.³⁴² The Reporter explains that she contacted the counselor for four reasons: (1) D.B.'s mother had not replied to her; (2) the Reporter was afraid of the police; (3) the Reporter did not know how to contact the police directly; and (4) the Reporter assumed the counselor would do so on her behalf.³⁴³

Third, after that counselor notified the New York Police Department (NYPD), law enforcement officers followed up with the Reporter.³⁴⁴ The Reporter provided the NYPD with the URL of the video copied to YouTube as well as screenshots of the video that Lonina livestreamed via Periscope.³⁴⁵

Fourth, the NYPD contacted the Columbus Police Department (CPD) and shared the evidence that the Reporter had collected.³⁴⁶ Close, of the CPD, then interviewed the Reporter over the phone, during which she explained how she knew Lonina and D.B. and confirmed the evidence she had provided to the NYPD.³⁴⁷

³³⁷ Author-O'Brien Interview, *supra* note 76.

³³⁸ Author-Close Interview, *supra* note 126.

³³⁹ Author-Reporter Interview 1, *supra* note 129.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² Author-Reporter Interview 2, *supra* note 46; CPD-Reporter Interview, *supra* note 159.

³⁴³ Author-Reporter Interview 1, *supra* note 129. Specifically, when D.B.'s mother did not respond, the Reporter stated: "I realized I had to go and tell someone else." *Id.*

³⁴⁴ CPD-Reporter Interview, *supra* note 159.

³⁴⁵ CPD Investigation Progress 2016.04.05, *supra* note 160; Author-Close Interview, *supra* note 126; CPD-Reporter Interview, *supra* note 159.

³⁴⁶ CPD Summary 2016.04.05, *supra* note 125 (stating that NYPD Sergeant John Pietanza "[o]btained copies of photographs and video from YouTube and sent them to CPD").

³⁴⁷ CPD-Reporter Interview, *supra* note 159.

The Reporter, who had maintained contact with Lonina through social media after Lonina moved from Brooklyn to Columbus,³⁴⁸ was in an unusual—possibly even unique—position among all Receivers of the February 27 livestream. As Lonina’s self-described former best friend, the Reporter knew Lonina’s history of cruelty to others, including the Reporter herself;³⁴⁹ Lonina’s real name (not just her alias on Periscope³⁵⁰); and the city in which the crime was perpetrated.³⁵¹ As the Reporter had watched the livestream from the previous night,³⁵² she was also familiar with Lonina’s history of cruelty specifically towards D.B. And, as the Reporter regularly watched Lonina’s livestreams (in which D.B. often appeared) and as Lonina had remotely introduced D.B. and the Reporter,³⁵³ the Reporter also knew D.B.’s real name and age and that D.B. (like the Reporter and Lonina) spoke Russian.³⁵⁴ Aggregating all of this data, the Reporter found D.B.’s mother’s Facebook account.³⁵⁵ The Reporter was thus a Familiar Receiver and was well-situated to be able to provide authorities with helpful details not available in the video itself.³⁵⁶

Because the Reporter was a Familiar Receiver, had she chosen *not* to report, she might have been a leading candidate for being charged with and convicted of violating any relevant Bad Samaritan laws.³⁵⁷ Even if she had been so charged, though, she could have asserted either or both of two defenses. First, the Reporter claims that she—and her parents—feared Lonina’s father (Alexey Lonin³⁵⁸) might physically harm the Reporter if she interceded.³⁵⁹ Most Bad

³⁴⁸ Author-Reporter Interview 1, *supra* note 129.

³⁴⁹ *Id.*

³⁵⁰ Warrant to Search, Franklin Cty. Ct. of Common Pleas (Apr. 6, 2016) (on file with author) (identifying Lonina’s alias as: “Gangster Sotnikova \$ @marina_in_the_sky”); Preservation Request, Columbus, Ohio Div. of Police (Mar. 1, 2016) (on file with author) (same).

³⁵¹ Author-Reporter Interview 1, *supra* note 129.

³⁵² *Id.*; Author-Reporter Interview 2, *supra* note 46.

³⁵³ Author-Reporter Interview 1, *supra* note 129.

³⁵⁴ Author-O’Brien Interview, *supra* note 76; Author-Reporter Interview 1, *supra* note 129.

³⁵⁵ Author-Reporter Interview 1, *supra* note 129.

³⁵⁶ The Reporter later said that, given all of her contextual knowledge, notifying authorities was “the right thing to do.” *Id.* O’Brien theorizes that it was the Reporter’s troubling history with Lonina that was “a motivating factor” to alert the authorities. Author-O’Brien Interview, *supra* note 76.

³⁵⁷ See *supra* notes 278–291 and accompanying text.

³⁵⁸ Lonina’s father’s first and last names are spelled differently in various sources. Some sources refer to him as “Alexsey Logun.” See, e.g., Columbus, Ohio Div. of Police, Case Report Number 163049068-001, Informational Summary #3: Interview of Witness (Feb. 29, 2016) (on file with author) [hereinafter CPD-Victim’s Mother Interview]. Other sources refer to him as “Alexey Lonin.” See, e.g., *Criminal Case Detail: Case Number 16 CR 001992*, FRANKLIN CNTY. CLERK OF CTS. (Mar. 3, 2016), <https://fedcfjcs.co.franklin.oh.us/CaseInformationOnline/caseSearch?IH3TaTnxXaD9D8NnPIDm> [<https://perma.cc/JV6E-WJHM>]. Given Russian naming conventions (that feminize family surnames by adding an “a”), it is more likely that “Lonin” is his last name given that his daughter’s last name is “Lonina.” E-mail from Samuel Charap, Senior Pol. Scientist, RAND, to the Author (June 4, 2020, 10:25 AM) (on file with author).

Samaritan laws explicitly excuse individuals who reasonably believe that intervening would physically imperil themselves or others.³⁵⁹ Thus, if the Reporter had not reported the crime and been charged with violating such a Bad Samaritan law, then the Reporter could have raised her fear of Lonin as a defense and that defense may have been successful if it were reasonable.³⁶¹ Second, the Reporter could have raised D.B.'s age as a defense.³⁶² One defense the Reporter could *not* have asserted is her own age at the time because she was eighteen years old.³⁶³

But could the Reporter, had she not reported, even have been charged with violating *any* Bad Samaritan law? The answer would depend on a court assessing relevant choice of law rules. New York (where the Reporter lived and viewed the February 27 livestream) does not have a Bad Samaritan law.³⁶⁴ Even if New York did, the law would only be relevant in the Gates-Lonina case if it applied extraterritorially to out-of-state crimes of which the person in New York was aware.³⁶⁵ Ohio's general Bad Samaritan law does not explicitly apply extraterritorially and no court has interpreted it as doing so.³⁶⁶ Moreover, there was (and is) no relevant *federal* Bad Samaritan law in the United States,³⁶⁷ as there are in some foreign countries.³⁶⁸

³⁵⁹ Author-Reporter Interview 1, *supra* note 129. It is for this reason that the Reporter contacted D.B.'s mother through a fake Facebook account and still wants to remain anonymous. Author-Reporter Interview 2, *supra* note 46.

³⁶⁰ See *supra* note 275 and accompanying text.

³⁶¹ Multiple perspectives suggest that the Reporter's fear of Lonin may have been reasonable: (1) Lonina told Close that her father frightened even her; (2) Close described Lonin as "abrasive" with police; and (3) Close characterized Lonin as "intimidating." Author-Close Interview, *supra* note 126; CPD-Lonina Interview – Transcript, *supra* note 124.

³⁶² See *supra* notes 285–287 and accompanying text. All Receivers, for any relevant Bad Samaritan law restricting covered victims to those younger than seventeen, could have raised this defense.

³⁶³ CPD-Reporter Interview, *supra* note 159; see also Kaufman, *supra* note 3, at 1377 (arguing that Bad Samaritan laws should exempt children). Even Bad Samaritan laws in the United States that exclude children would not necessarily exempt eighteen-year-olds. In the United States, Bad Samaritan laws in at least Florida and Nevada explicitly exempt children from a duty to report but would still apply to eighteen-year-olds. See FLA. STAT. § 39.205(2) (2020) (applying the state's duty to report child abuse or neglect law only to "a person who is 18 years of age or older"); NEV. REV. STAT. § 202.888 (2020) (exempting "a person who [i]s less than 16 years of age" from the state's duty to report law).

³⁶⁴ New York is not among the twenty-nine U.S. states that have Bad Samaritan laws applying to all persons. See Appendix, *supra* note 17 (compiling Bad Samaritan laws in U.S. states).

³⁶⁵ See *supra* note 96 and accompanying text (describing the extraterritorial application of states' laws).

³⁶⁶ See *supra* note 96 and accompanying text.

³⁶⁷ Kaufman, *supra* note 3, at 1326 ("U.S. federal law . . . do[es] not feature a general Bad Samaritan law . . .").

³⁶⁸ Some countries have adopted a general duty on all citizens to report crimes. See Appendix, *supra* note 17. In France, for example:

Despite qualifying as an Upstander Receiver for her four reports, the Reporter still could have done more, and sooner. The Reporter did not directly or immediately contact law enforcement authorities; her conversations with the NYPD and CPD occurred only after her high school counselor informed the police several days following the crime. The Reporter did not disclose to the police the identity of her friend who was one of the Reproducer(s). Nor did the Reporter relay her concerns about the broadcast to the platforms that hosted the original or copied livestream of the rape: Periscope, YouTube, and VK.³⁶⁹ The Reporter explains her decision not to alert any of these platforms by rhetorically asking: “I didn’t think that . . . was going to change anything What can they do?”³⁷⁰ But the platforms *could* have done something. Among other measures, the platforms could have asked Lonina and the Reproducer(s) to stop posting and remove their videos, halted the films themselves, disabled public access to the recordings and preserved them as criminal evidence (before Periscope’s automatic deletion at the time), suspended or banned Lonina and the Reproducer(s), or alerted authorities.³⁷¹ At least one recent decision, the 2020 Ohio Court of Appeals case *Godwin v. Facebook, Inc.*, rejected the claim that a platform was liable under the state’s general Bad Samaritan law for failing to report a felony.³⁷² So, even if the Reporter had notified the relevant platforms, they would not necessarily have complied or been charged with any crime for that omission.

Furthermore, if the Reporter had only notified two of the individuals she did, she still may have faced liability. The Reporter explained that she contact-

Any person who, having knowledge of a felony the consequences of which it is still possible to prevent or limit, or the perpetrators of which are liable to commit new felonies that could be prevented, omits to inform the administrative or judicial authorities, is punished by three years’ imprisonment and a fine of €45,000.

CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 434-1 (Fr.). For discussion of Sweden’s Bad Samaritan laws, see *supra* note 267 and accompanying text.

³⁶⁹ Author-Reporter Interview 1, *supra* note 129.

³⁷⁰ *Id.*

³⁷¹ Hamilton, *supra* note 9, at 25–29 (discussing the mechanics of content moderation); Klonick, *supra* note 9, at 1635–48 (describing types of “content moderation” that is ex ante or ex post, reactive or proactive, automatic or manual); Langvardt, *supra* note 9, at 1355–56, 1361–62 (discussing methods of “private censorship,” such as asking users to remove content, interrupting videos, blocking content from posting, and suspending or closing users’ accounts); Author-Close Interview, *supra* note 126 (stating that, in such a situation, the platform should notify law enforcement); Author-O’Brien Interview, *supra* note 76 (same); Author-Rausch Interview, *supra* note 76 (same).

³⁷² *Godwin v. Facebook, Inc.*, 160 N.E.3d 372, 375–77, 382–83 (Ohio Ct. App.). For commentary on the case, see Eugene Volokh, *Should Facebook Have a Duty to Report Us to the Police for Felonies Potentially Revealed in Our Posts?*, VOLOKH CONSPIRACY (Oct. 9, 2020), <https://reason.com/2020/10/09/should-facebook-have-a-duty-to-report-us-to-the-police-for-felonies-potentially-revealed-in-our-posts/> [<https://perma.cc/T3S4-66R3>].

ed her high school counselor in part because D.B.'s mother had not responded to the private, anonymous messages that the Reporter sent her via Facebook.³⁷³ In a hypothetical situation where (1) the Reporter had only notified D.B.'s mother and/or the Reporter's high school counselor and (2) a relevant Bad Samaritan law applied that required reporting to specific individuals (such as law enforcement authorities³⁷⁴), prosecutors might still charge the Reporter with violating the law because neither D.B.'s mother nor a high school counselor is a law enforcement authority.

Even in this scenario, though, the Reporter could cite Bad Samaritan law jurisprudence in Ohio itself in her defense.³⁷⁵ In *In re Stichtenoth*, an Ohio Court of Appeals in 1980 reversed a juvenile's conviction for violating Ohio's general Bad Samaritan law.³⁷⁶ The minor, who had witnessed a stabbing, told two adults to call police, denied knowledge of the stabbing when directly questioned by police, and claimed to have made anonymous phone calls himself to police later that evening.³⁷⁷ The appellate court reasoned that the law's requirement to "report" to law enforcement authorities "includes both notifying law enforcement officials and setting in motion events which will result in notification to these officials" and "does not proscribe a refusal to answer police questions once the police are aware of the crime."³⁷⁸ The court then found that "[r]eporting a felony to responsible people at a large public place constitutes setting in motion events which will result in notification of law enforcement officials."³⁷⁹ Applying the reasoning of *In re Stichtenoth* to the above-mentioned Gates-Lonina counterfactual,³⁸⁰ the Reporter could have argued that telling only D.B.'s mother or the Reporter's high school counselor—both of whom were or should have been responsible adults—set in motion the eventual notification of law enforcement officials.³⁸¹

d. Alexey Lonin

Alexey Lonin, Lonina's father, was another Receiver whose actions and omissions are relevant to the Gates-Lonina case.³⁸² According to the Reporter,

³⁷³ See *supra* notes 339–341 and accompanying text.

³⁷⁴ See *supra* note 149 and accompanying text.

³⁷⁵ See *In re Stichtenoth*, 425 N.E.2d 957, 958–59 (Ohio Ct. App. 1980).

³⁷⁶ *Id.* at 958.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ See *supra* notes 374–375 and accompanying text.

³⁸¹ See CPD-Victim's Mother Interview, *supra* note 358; *supra* note 344 and accompanying text. This argument would be supported by the fact that both D.B.'s mother and the counselor alerted authorities. See *supra* note 344 and accompanying text.

³⁸² Author-Reporter Interview 1, *supra* note 129.

during the February 27 rape, a teenager (“the Caller”) who was friends with Lonina called Lonin during the livestream “to tell him what’s going on.”³⁸³ Specifically, the Reporter states, the Caller told Lonin that his daughter was broadcasting a real-time rape.³⁸⁴ Lonin allegedly then called Lonina, during which, according to the Reporter, he repeatedly asked Lonina “are you out of your mind?” and told her to “stop doing whatever you’re doing.”³⁸⁵ According to Lonina herself, her father then implored her to leave the scene because he assessed that what was happening was “serious.”³⁸⁶ The paucity of available evidence makes definite conclusions about Lonin’s potential culpability impossible. If, however, Lonina told Lonin about the rape during their conversation, Lonin could hear D.B. through the phone screaming or pleading, or Lonin personally watched the livestream, then, because of Lonin’s conversation with his daughter during the crime, he could qualify as both an Active Receiver and a Contemporaneous Receiver. Alternatively, if the Caller’s description was the only information Lonin had that the situation may be criminal, then he would likely not qualify as any type of Receiver and may have even doubted the Caller’s veracity.

Additionally, Lonin’s position during the rape indicates that he may have been a Familiar Receiver. If Lonin actually knew or reasonably suspected that his daughter was filming the assault against D.B., he could have called the police. Instead or in addition, Lonin could have instructed Lonina to call the police or otherwise try to help D.B. Like the Reporter, Lonin was unusually well-situated to help, even remotely, because of the significant contextual knowledge he possessed.³⁸⁷ Thus, like the Reporter, Lonin may qualify as a Familiar Receiver. Lonin probably did not have as much contextual knowledge as the Reporter, however, because no evidence suggests that he watched or was even aware of the livestream the previous night (in which Lonina undressed an intoxicated D.B.) or knew of Lonina’s history of mistreating her friends.³⁸⁸ Nevertheless, Lonin was even better situated than the Reporter to help. Where-

³⁸³ *Id.*; Author-Reporter Interview 2, *supra* note 46.

³⁸⁴ Author-Reporter Interview 2, *supra* note 46.

³⁸⁵ Author-Reporter Interview 1, *supra* note 129; Author-Reporter Interview 2, *supra* note 46. According to the Reporter, this conversation was recorded in a version of the video that was posted to the Russian website, VK, and which was longer than the version the police possessed. Author-Reporter Interview 1, *supra* note 129; Author-Reporter Interview 2, *supra* note 46.

³⁸⁶ CPD-Lonina Interview – Transcript, *supra* note 124; CPD-Victim’s Mother Interview, *supra* note 358.

³⁸⁷ Specifically, Lonin knew his daughter’s identity; was familiar with D.B. and her mother, having recently dated the latter (which is how the teenagers initially met); and was aware that the rape was occurring in real time, in Columbus. Author-Close Interview, *supra* note 126; Author-Rausch Interview, *supra* note 76; CPD-Lonina Interview – Transcript, *supra* note 124; CPD-Victim’s Mother Interview, *supra* note 358.

³⁸⁸ Reporter E-mail to Pietanza, *supra* note 141.

as the Reporter was located in another state and her friendship with Lonina had deteriorated, Lonin knew that he was physically in the same city in which the crime was occurring and may have wielded influence over Lonina as her parent.³⁸⁹ Lonin himself acknowledges that he could—or perhaps even should—have done more to instill upstanderism in his daughter, admitting later: “It seems like I also made a mistake here” with regards to Lonina’s upbringing.³⁹⁰

But was Lonin’s “mistake” criminal? Possibly, if he meant he committed an error during Gates’s assault of D.B. Indeed, Lonin may have been the *only* individual who could have been charged with violating Ohio’s general Bad Samaritan law, as he may have been the only Receiver in that state.³⁹¹ Unfortunately, investigators and prosecutors were unaware of the conversation between Lonin and Lonina because it occurred outside the approximately ten minute recording they possessed³⁹² and they were unable to obtain a longer version.³⁹³ Regardless, it is too late now to consider charging Lonin with violating Ohio’s general Bad Samaritan law, as the statute of limitations for such an offense—two years³⁹⁴—has expired.

e. The Caller

The Caller may have been a Familiar, Contemporaneous, Upstander Receiver. According to the Reporter, the Caller, while watching the February 27 livestream, believed the video depicted a rape.³⁹⁵ The Caller also possessed contextual knowledge because she knew Lonina, the location of the crime, and Lonina’s parents’ contact information (including Lonin’s phone number).³⁹⁶ Thus, like the Reporter; some other, unknown Receivers; and possibly Lonin, the Caller was a Familiar Receiver. Furthermore, like the Reporter and some of the Responders, the Caller was an Upstander Receiver because she contacted

³⁸⁹ *Don’t Stop Filming*, *supra* note 125 (quoting Lonin).

³⁹⁰ *Id.*

³⁹¹ See OHIO REV. CODE ANN. § 2921.22(A) (West 2020).

³⁹² Author-Close Interview, *supra* note 126.

³⁹³ Author-O’Brien Interview, *supra* note 76; Author-Rausch Interview, *supra* note 76. If the prosecution had charged Lonin, they may have been able to present significant evidence that he violated OHIO REV. CODE ANN. § 2921.22(A). The Reporter stated that she told at least the NYPD and possibly also the CPD about the phone calls between the Caller and Lonin and then Lonin and Lonina. Author-Reporter Interview 2, *supra* note 46. Moreover, testimony from the Reporter and the Caller, phone records between the Caller and Lonin, phone records between Lonin and Lonina, the recording posted to VK, and interrogations of Lonina and Lonin about the calls might have been-useful evidence. Convicting Lonin may not have even required obtaining any information from Periscope.

³⁹⁴ OHIO REV. CODE ANN. § 2901.13(A)(1)(b) (“[A] prosecution [for violating Ohio’s general Bad Samaritan law] shall be barred unless it is commenced within . . . two years”); see *id.* § 2921.22(A).

³⁹⁵ Author-Reporter Interview 2, *supra* note 46.

³⁹⁶ *Id.* Lonina’s friends, of which the Caller had been one, had each other’s parents’ contact information. *Id.*

Lonin, ostensibly to encourage him to intervene.³⁹⁷ In addition, like at least one of the Reproducer(s), the Responders, the Reporter, and possibly Lonin, the Caller was also a Contemporaneous Receiver because she acted while the broadcast was ongoing.³⁹⁸ Unlike the Reporter, however, the Caller did not contact police. Thus, the Caller, despite her upstanderism in alerting Lonina’s parent (who may have been able to influence his daughter’s actions), was most similar to the Active Receivers who merely provided negative feedback because she did not comply with any Bad Samaritan law that would have required her to notify law enforcement.

Figure 3 displays the Receiver typology’s corresponding actors from the Gates-Lonina case.

FIGURE 3. Digital Age Samaritans in the Gates-Lonina Case: Receivers

| Receiver Sub-Type | The Reproducer(s) | The Responders | The Reporter | Alexey Lonin | The Caller | Hundreds of people | Unknown number of people |
|-------------------|-------------------|----------------|--------------|--------------|------------|--------------------|--------------------------|
| Upstander | | Some | X | | X | | |
| Enabler | X | Some | | | | | |
| Bystander | | | | | | X | |
| Active | | X | | Possibly | | | |
| Passive | | | | | | | Possibly hundreds |
| Contemporaneous | At least one | X | X | Possibly | X | > 700 | |
| Delayed | Possibly some | | | | | | X |
| Familiar | | | X | Possibly | X | | Possibly |
| Unfamiliar | Possibly | | | | | | Likely many |

IV. PRESCRIPTIONS FOR BAD SAMARITAN LAWS IN THE DIGITAL AGE

This Part offers prescriptions for Bad Samaritan laws in the digital age.³⁹⁹ Legislators should modernize, refine, proliferate, and publicize these statutes and law enforcement should enforce the laws or leverage them to obtain witness testimony. Aggregating these recommendations, this Part concludes by proposing a contemporary model Bad Samaritan law.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ See *infra* notes 400–479 and accompanying text.

A. Modernize and Refine Bad Samaritan Laws

When new Bad Samaritan laws are introduced or existing statutes are amended, they should be updated to reflect the modern era's reality and technology. These changes should include addressing physical presence, evidence preservation and reporting recipients, the scope of these laws, penalties for violation, and exemptions from compliance.⁴⁰⁰

1. Physical Presence

Physical presence, an element of some Bad Samaritan laws, should be addressed in two ways. First, any physical presence requirement should be removed from these statutes. Second, where the law is limited to individuals at the scene⁴⁰¹ or an element of the law requires observation,⁴⁰² legislators should amend those features either to mandate mere knowledge or to clarify that observation or presence can be physical *or* virtual.⁴⁰³ Given technological advancements that enable Receivers—particularly Familiar Receivers—to learn reliably of crimes contemporaneously or near-contemporaneously, physical presence should not be an element of the crime of failing to intervene.⁴⁰⁴ Arguably, France,⁴⁰⁵ Germany,⁴⁰⁶ Russia,⁴⁰⁷ and some U.S. states⁴⁰⁸ already extend such affirmative duties to those not physically present at the scene. Some U.S. courts adjudicating recent remote involvement in an emergency situation have validated the theory of virtual presence.⁴⁰⁹ Omitting physical presence as a requirement of Bad Samaritan laws would not make all Receivers potentially

⁴⁰⁰ See *infra* notes 400–451 and accompanying text.

⁴⁰¹ See, e.g., HAW. REV. STAT. § 663-1.6(a) (2021) (applying only to a person “at the scene of a crime”); MASS. GEN. LAWS ch. 268, § 40 (2021) (applying only to a person who “is at the scene of said crime”).

⁴⁰² See *supra* notes 29–31 and accompanying text.

⁴⁰³ Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 101–03 (2005) (reviewing French and German approaches to having a physical presence or knowledge requirement); see *supra* notes 26–34 and accompanying text.

⁴⁰⁴ For discussion of the relationship between physical proximity and Bad Samaritan laws, see Jeremy Waldron, *Who Is My Neighbor?: Humanity and Proximity*, 86 MONIST 333 (2003). Waldron's analysis, however, omits contemplation of virtual proximity. See *id.*

⁴⁰⁵ CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 223-6 (Fr.).

⁴⁰⁶ STRAFGESETZBUCH [StGB] [PENAL CODE], § 323c, https://www.gesetze-im-internet.de/stgb/_323c.html [<https://perma.cc/UP8V-JA4G>] (Ger.).

⁴⁰⁷ UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF] [Criminal Code] art. 125 (Russ.).

⁴⁰⁸ See *supra* notes 24–31 and accompanying text.

⁴⁰⁹ See, e.g., *Commonwealth v. Carter*, 52 N.E.3d 1054, 1056 (Mass. 2016) (holding that evidence was sufficient for finding probable cause that virtually present defendant caused victim's death). For a critique of the virtual presence theory in this case involving suicide encouragement, see generally Charles Adside III, *The Innocent Villain: Involuntary Manslaughter by Text*, 52 U. MICH. J.L. REFORM 731 (2019).

culpable, however, especially if the statutes did not apply extraterritorially⁴¹⁰ or included, as I propose in this Article, reasonable exemptions from reporting.⁴¹¹

2. Evidence Preservation and Reporting Recipients

Bad Samaritan laws should explicitly address situations where Transmitters and Receivers genuinely intend to preserve evidence of a crime or alert authorities. Although in the Gates-Lonina case Lonina unconvincingly claimed those objectives,⁴¹² it is possible other Transmitters and Receivers could make these assertions credibly.⁴¹³ After all, if the Reproducer(s) had not recorded Lonina's livestream, prosecutors may not have been able to hold Gates accountable.⁴¹⁴ Consider the following situations: (1) a Transmitter sends images of a crime to their own parent and asks that person to call the police; and (2) a Receiver tells their teacher about evidence of a crime they saw on social media and requests that the latter contact law enforcement. In both situations, these witnesses would not have directly discharged a duty to report to law enforcement authorities but could have done so indirectly. The holding in the 1980 Ohio Court of Appeals case *In re Stichtenoth*⁴¹⁵—that setting in motion events which will result in notification to law enforcement may satisfy Bad Samaritan laws—could be incorporated into these statutes to explicitly excuse from liability Transmitters and Receivers who intend to induce reporting to police, even if they do not directly alert authorities.⁴¹⁶

Alternatively, legislators could draft or amend Bad Samaritan laws in either of two ways to address Transmitters' and Receivers' temptations to alert individuals other than police. On the one hand, these statutes could, like one in Texas, explicitly exclude indirect reporting by stating that the witness "may not delegate to or rely on another person to make the report."⁴¹⁷ Prohibiting an actor from reporting indirectly may increase accountability. On the other hand, these laws, such as one in Washington, could reasonably expand the list of individuals beyond law enforcement authorities to whom reports must be made

⁴¹⁰ See *supra* note 96 and accompanying text.

⁴¹¹ See *infra* Part IV.A.5.

⁴¹² See *supra* notes 197–199 and accompanying text.

⁴¹³ See, e.g., Levenson, *supra* note 72 (describing case in which a sexual assault victim's mother found a video of the crime on Facebook, recorded the video on her computer screen, and sent the recording to the police).

⁴¹⁴ See *supra* note 337 and accompanying text.

⁴¹⁵ *In re Stichtenoth*, 425 N.E.2d 957 (Ohio Ct. App. 1980); see *supra* notes 376–379 and accompanying text.

⁴¹⁶ See Author-Close Interview, *supra* note 126; Author-Rausch Interview, *supra* note 76.

⁴¹⁷ TEX. FAM. CODE ANN. § 261.101(b) (West 2019).

to explicitly include certain other authority figures.⁴¹⁸ This latter option could list, for example, public school officials; as government employees, these personnel are presumably responsible authorities who have even greater duties than their private school counterparts. Victims' relatives, however, should not be included in an expanded list, as the 1985 Ohio Court of Appeals case *State v. Wardlow* demonstrates that family members may have conflicts of interests (such as affection for or allegiance to perpetrators) that discourage them from reporting crimes.⁴¹⁹ Whichever of these options legislators pursue for refining Bad Samaritan laws, they should also clarify in these statutes that neither mere copying of visual or audio data from social media nor mere republishing of this content to the same or a different platform—as the Reproducer(s) in the Gates-Lonina case did—is sufficient to discharge a legal duty to report.⁴²⁰

3. Scope of Bad Samaritan Laws

Legislators should also refine Bad Samaritan laws' ambit and reach. These statutes should be limited in scope to narrow police and prosecutorial discretion and encourage witnesses to focus on reporting serious offenses.⁴²¹ Bad Samaritan laws should thus apply only to specified violent crimes: the actual or attempted commission of murder, kidnapping, sexual assault, aggravated assault, and felonious assault. This approach follows the currently enacted Bad Samaritan laws in Alaska⁴²² and Massachusetts,⁴²³ and reflects how some other types of U.S. statutes are similarly limited to enumerated offenses.⁴²⁴ Where Bad Samaritan laws are not already so narrow, legislators should amend them.

While limiting Bad Samaritan laws' subject matter, legislators should broaden their geographic reach. As Receivers may observe evidence of a crime in another jurisdiction, Bad Samaritan laws should explicitly apply extraterritorially where some elements of the offense are committed within the jurisdic-

⁴¹⁸ WASH. REV. CODE § 9.69.100(1) (2021) (requiring reporting of violent crimes to “the prosecuting attorney, law enforcement, medical assistance, or other public officials”).

⁴¹⁹ *State v. Wardlow*, 484 N.E.2d 276, 277–79 (Ohio Ct. App. 1985) (reversing conviction for violation of Bad Samaritan law because it infringed defendant's right to self-incrimination).

⁴²⁰ Author-Reporter Interview 1, *supra* note 129.

⁴²¹ See *supra* note 98 and accompanying text.

⁴²² ALASKA STAT. §§ 11.56.765, 11.56.767 (2020) (applying to murder, attempted murder, kidnapping, attempted kidnapping, sexual penetration, and attempted sexual penetration).

⁴²³ MASS. GEN. LAWS ch. 268, § 40 (2021) (applying to “aggravated rape, rape, murder, manslaughter, [and] armed robbery”).

⁴²⁴ For example, U.S. federal and state wiretapping statutes are restricted to specified crimes. See, e.g., 18 U.S.C. § 2516 (restricting interception of wire, oral, or electronic communications only to enumerated offenses); MD. CODE ANN., CTS. & JUD. PROC. § 10-406 (West 2021) (authorizing wiretapping for murder, kidnapping, rape, and other enumerated crimes).

tion's borders and others are perpetrated elsewhere.⁴²⁵ Many criminal laws in the United States already apply beyond their state boundaries.⁴²⁶

Lastly, Bad Samaritan laws should not include a victim age restriction. Some duty-to-report laws mandate intervention only when victims are children or young teenagers.⁴²⁷ That D.B. was seventeen years old when Gates raped her in the Gates-Lonina case⁴²⁸ serves as a tragic reminder that adolescents and adults are crime victims, too, and could benefit from Bad Samaritan laws prodding assistance to them. While neither of Ohio's Bad Samaritan laws contains a victim age restriction,⁴²⁹ the limitation in California has had a negative consequence. In 2009, a sixteen-year-old girl was gang raped in Richmond, California, for at least two hours in the presence of ten to twenty people.⁴³⁰ Because California's duty-to-report law applies only to victims who are under the age of fourteen,⁴³¹ prosecutors could not charge bystanders to the crime with a violation or offer them immunity from that charge in exchange for testimony.⁴³²

4. Penalties for Violation

Bad Samaritan laws should not include imprisonment among potential sanctions. Alternative penalties (e.g., a fine, citation, probation, community service) could express moral revulsion towards unexcused bystanders without exacerbating the problem of mass incarceration.⁴³³

⁴²⁵ DOYLE, *supra* note 96, at 21–22 (stating that this scenario is “[p]erhaps the most common state statutory provision claiming state extraterritorial criminal jurisdiction”); George, *supra* note 95, at 622 (observing that state courts have penalized conduct that primarily occurred beyond the state's boundaries “whenever any act pertaining to the criminal transaction occurs or takes effect within the forum state, even though in fact the major activity took place elsewhere”).

⁴²⁶ DOYLE, *supra* note 96, at 21–23; George, *supra* note 95, at 621–28 (“[I]t is clear that, by means of one theoretical device or another, American state courts have penalized conduct which for all important purposes took place beyond the states' boundaries.”).

⁴²⁷ See, e.g., CAL. PENAL CODE § 152.3(a) (West 2021) (applying to victims “under 14 years of age”); NEV. REV. STAT. § 202.882.1 (2020) (applying to victims “12 years of age or younger”).

⁴²⁸ CPD-Victim Interview, *supra* note 129.

⁴²⁹ OHIO REV. CODE ANN. § 2921.22(A) (West 2020); *id.* § 2151.421.

⁴³⁰ Robert J. Lopez, *California: Crime Reporting Law Is Proposed; After a Richmond Teen's Rape, an Assembly Bill Would Require Witnesses to Call in Violent Crimes*, L.A. TIMES, Dec. 18, 2009, at A26; Sarah Netter & Emily Friedman, *Four Charged in California Homecoming Gang Rape*, ABC NEWS (Oct. 27, 2009), <https://abcnews.go.com/WN/police-arrest-richmond-california-gang-rape/story?id=8935918> [<https://perma.cc/585P-L26N>].

⁴³¹ See *supra* note 285 and accompanying text.

⁴³² *Should the Current Duty to Report the Commission of a Murder, Rape, or Specified Sex Offense of a Person Under the Age of 14 Be Extended to a Victim of Any Age?: Hearing on A.B. 984 Before the S. Comm. on Pub. Safety*, 2010 Leg., Reg. Sess. 2–3, 7 (Cal. 2010); Kaufman, *No Cover for Abusers*, *supra* note 13.

⁴³³ For discussion of penalties for violating Bad Samaritan laws, see Kaufman, *supra* note 3, at 1391–93 (stating that some states impose fines and others jail time). For discussion of the expressive

As it relates to the Gates-Lonina case, critics of carceral feminism would presumably support the view that unexcused bystanders to gender-based violence, such as Gates's rape of D.B., should not be jailed.⁴³⁴ According to Professor Aya Gruber, this strand of feminism has "played such a distinct role in broadening and legitimizing the unconscionable penal state" that "many feminists regret that feminist law-and-order policies contributed to a carceral regime that disserves marginalized people, including women."⁴³⁵ Thus, by imposing non-carceral penalties, Bad Samaritan laws could encourage assistance to crime victims without increasing the already enormous number of Americans under some form of correctional control.

While imprisonment should be excluded from available punishment for violating a Bad Samaritan law, these statutes should consider aggravating factors that warrant more severe punishment than mere passivity. Specifically, Bad Samaritan laws should address situations, such as in the Gates-Lonina case, in which a spectator not only violates the statute but also records the crisis and uploads that footage to social media. A failed bill in the Florida legislature sought to do just that. In 2017, five teenagers in the state recorded themselves mocking a man, Jamel Dunn, as he drowned and then posted the video to YouTube.⁴³⁶ Outraged by the spectators' callous response to this tragedy,⁴³⁷ a state senator introduced a Bad Samaritan law that would impose a more severe penalty for "a person who, in the course of committing a violation of [the required assistance], videotapes or otherwise electronically records the endangered person and uploads the recording to a social media or social networking website."⁴³⁸ While the bill died in committee,⁴³⁹ this initiative should be used

function of law, see generally Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

⁴³⁴ The phrase "carceral feminism," coined in 2007 by Professor Elizabeth Bernstein, is a theory that "describe[s] late twentieth-century feminism's commitment to law and order . . . [using] 'the carceral state as the enforcement apparatus for feminist goals.'" Aya Gruber, *#MeToo and Mass Incarceration*, 17 OHIO ST. J. CRIM. L. 275, 280 (2020) (quoting Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES: J. FEMINIST CULTURAL STUD. 128, 143 (2007)).

⁴³⁵ Gruber, *supra* note 434, at 275, 280, 283; see also AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* 1, 20 (2020).

⁴³⁶ Kaufman, *supra* note 3, at 1387–88.

⁴³⁷ Lorelei Laird, *Proposed Florida Law Resurrects the Debate Around the Legal Duty to Help Someone in Distress*, ABA J. (June 1, 2018), https://www.abajournal.com/magazine/article/florida_bad_samaritan_law [https://perma.cc/2RGR-7RCQ].

⁴³⁸ S.B. 516 (Fla. 2018), <https://www.flsenate.gov/Session/Bill/2018/516/BillText/Filed/HTML> [https://perma.cc/MHP4-3CQY] (noting that, while a violation of the Bad Samaritan law is a misdemeanor of the first degree, a person who makes and uploads a recording commits a felony of the third degree).

⁴³⁹ *SB 516: Duty to Provide Emergency Assistance, Bill History*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2018/516> [https://perma.cc/9EQZ-T8ZT] (noting that the bill died in the Criminal Justice Committee on March 10, 2018).

as a model for imposing greater misdemeanor sanctions on violators of Bad Samaritan laws who also make and share footage of the situation online.

5. Exemptions from Reporting

Reasonable exemptions, nine of which are included in the model statute below, should be common across all Bad Samaritan laws.⁴⁴⁰ First, many existing duty-to-report laws exempt individuals who reasonably fear that reporting would place themselves or someone else in danger of serious bodily injury or death.⁴⁴¹ If this exemption is not already part of the statute, as in Ohio's general Bad Samaritan law,⁴⁴² then legislators should amend such laws to include it.

Second, Bad Samaritan laws should not require civilians to report police brutality, at least not to police themselves. Otherwise, Transmitters and Receivers would be obliged to notify the very entity whose misconduct they observe. These witnesses would understandably be reticent to report for fear of retribution and doubt that reporting would be effective. Even if civilians were required to report police brutality instead to a prosecuting authority, such as a district attorney or state attorney general's office, these witnesses may still feel reluctant given the close relationship between prosecutors and police.⁴⁴³ Regardless, civilians already *can* document police abuses if they want, as U.S. courts have recognized a First Amendment right to film government officials, including police officers and subject to reasonable limitations, engaged in their duties in a public place.⁴⁴⁴ Conversely, police themselves should not be exempt from this duty to report their fellow officers' misuse of force, given that they are well-situated and equipped to do so. Indeed, some police duties to report or even intervene in these contexts already exist⁴⁴⁵ or have been introduced in the wake of Derek Chauvin killing George Floyd in May 2020.⁴⁴⁶

⁴⁴⁰ See *infra* notes 477–479 and accompanying text (proposing a Failure to Report Specified Violent Crimes Model Statute).

⁴⁴¹ See *supra* note 275 and accompanying text.

⁴⁴² See *supra* notes 275–276 and accompanying text.

⁴⁴³ See generally Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097, 1103 (2020) (documenting, expressing concern about, and proposing measures to mitigate “overly cozy relationships between police and prosecutors”).

⁴⁴⁴ See, e.g., *Turner v. Driver*, 848 F.3d 678, 690 (5th Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (holding that there is a “constitutionally protected right to videotape the police carrying out their duties in public”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁴⁴⁵ For example, the Bakersfield Police Department in California imposes on every member of the department a duty to intervene in and to report a colleague's unreasonable use of force. BAKERSFIELD POLICE DEP'T, BAKERSFIELD PD POLICY MANUAL § 300.2.1 (2020), http://docs.bakersfieldcity.us/web/0/edoc/1455482/300%20USE_OF_FORCE.pdf [<https://perma.cc/B2QD-TY59>]. The manual states that:

Third, as previously discussed, Bad Samaritan laws should exempt individuals who would incriminate themselves in the same or even an unrelated offense if they reported the crime.⁴⁴⁷ Fourth and fifth, as I have argued elsewhere, Bad Samaritan laws should not apply to individuals who reasonably do not perceive the offense or are children because they may not comprehend what they witness.⁴⁴⁸

Sixth, contrary to some existing Bad Samaritan laws,⁴⁴⁹ individuals who know or reasonably assume that the offense has already been reported to law enforcement authorities or other public officials should be excused from liability under a duty-to-report law. It would not necessarily be helpful—and, given the limited time and resources of police and prosecutors, could even be harmful—for authorities to receive and process multiple reports about the same crime. Bases for reasonable assumption in this context could include hearing another witness state that they are going to call 911 or seeing another witness speak to police during or immediately after the offense. Mere knowledge that other people witnessed the crime should not be considered a basis for reasonably assuming that the offense has been reported. Otherwise, anyone who

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law should promptly report these observations to a supervisor.

Id.

⁴⁴⁶ See Matt Furber et al., *supra* note 86 (describing the George Floyd killing). For example, in July 2020, four members of the Connecticut General Assembly introduced a bill mandating a police duty to intervene in and to report another officer's unreasonable, excessive, or illegal use of force. H.B. 6004, July Spec. Sess. § 30(a)(1)–(2) (Conn. 2020). The bill provides that:

Any police officer . . . who while acting in such officer's law enforcement capacity, witnesses another police officer use what the witnessing officer objectively knows to be unreasonable, excessive or illegal use of force, shall intervene and attempt to stop such other police officer from using such force . . . [and] shall report, as soon as is practicable, such use of force to the law enforcement unit . . . that employs the police officer who used such force.

Id.

⁴⁴⁷ See *supra* notes 259–268 and accompanying text.

⁴⁴⁸ Kaufman, *supra* note 3, at 1377 (“Individuals who do not perceive the true nature of a situation as a crime or crisis qualify as ‘unaware bystanders.’ Such misperception may be caused by, for example, mental illness, poor vision or hearing, intoxication, drowsiness, sleep, or unconsciousness.”). Similarly, “children may not understand the nature of a crime or crisis or have sufficient capacity to exercise sound judgment to act in such circumstances. Children also may not know what they could do to help or may be under parental (or other guardian) control.” *Id.*

⁴⁴⁹ See, e.g., KAN. STAT. ANN. § 38-2223(e) (2021) (“It is not a defense that another mandatory reporter made a report.”).

knows that they are among a crowd of people witnessing a crime could be exempted from reporting it.

Seventh, as I have argued elsewhere, Bad Samaritan laws should not apply to victims of the particular offense.⁴⁵⁰ Eighth and ninth, as I have also argued elsewhere, if the offense is a sexual assault, then Bad Samaritan laws should exempt any survivor of that type of crime or individuals who have been asked not to report it by a competent adult victim of that specific attack.⁴⁵¹

B. Proliferate and Publicize Bad Samaritan Laws Throughout the United States

The current patchwork of Bad Samaritan laws inhibits the legal system from addressing the realities of the digital age, in which Receivers increasingly witness evidence of crimes sent by Transmitters. Thus, legislators should proliferate and publicize these statutes sub-nationally and nationally to increase their applicability.⁴⁵²

Within the United States, legislators should expand the number of Bad Samaritan laws in the states and territories to address crimes that are committed and remotely observed in the same jurisdiction. Although twenty-nine states and Puerto Rico already have these statutes applying to most or all physically present witnesses,⁴⁵³ every state and territory should feature these laws. Legislators could introduce or amend, or courts could interpret, these laws to apply extraterritorially.⁴⁵⁴

Likewise, legislators should expand Bad Samaritan laws at the federal level to address two situations. First, these statutes should include crimes within the United States that are committed in one U.S. state or territory and are remotely observed in another, as occurred in the Gates-Lonina case.⁴⁵⁵ Because the crime observation occurs online, these situations implicate interstate commerce, which provides a jurisdictional hook for federal law enforcement.⁴⁵⁶ Second, these statutes should include specific federal offenses in their subject

⁴⁵⁰ Kaufman, *supra* note 3, at 1377, 1385 (arguing that victims sometimes favor keeping the crime private or may be too traumatized to disclose to law enforcement).

⁴⁵¹ *Id.* at 1377, 1385–86.

⁴⁵² See Swan, *supra* note 13, at 1029–33, 1046 (arguing that Bad Samaritan laws “should be expanded to more jurisdictions”).

⁴⁵³ See *supra* note 22 and accompanying text.

⁴⁵⁴ See *supra* note 96 and accompanying text.

⁴⁵⁵ In the Gates-Lonina case, the rape occurred in Ohio and was observed in at least one other state (New York). Author-Reporter Interview 1, *supra* note 129. Other scholars have similarly proposed creating federal laws in the digital context to address a patchwork of laws at the state and territory levels. See, e.g., Langvardt, *supra* note 9, at 1363–70 (proposing a federal law limiting content moderation practices).

⁴⁵⁶ Author-Rausch Interview, *supra* note 76.

matter. Congress should thus supplement its narrow, enacted Bad Samaritan laws (such as the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act⁴⁵⁷) and similarly restricted, proposed Bad Samaritan laws (such as the State Harassment and Assault Prevention and Eradication (SHAPE) Act⁴⁵⁸) with a broader law that applies to more crimes and spectators of them. This national legislation should feature a duty-to-report law that concerns (1) virtually witnessing from one U.S. state or territory certain local violent crimes (specifically, the actual or attempted commission of murder, kidnapping, sexual assault, aggravated assault, and felonious assault) that are committed in a different U.S. state or territory and (2) physically or virtually witnessing particular federal crimes (including sexual assault aboard aircrafts and in federal prison⁴⁵⁹ as well as human trafficking⁴⁶⁰ and terrorism⁴⁶¹).

While proliferating Bad Samaritan laws, legislators should also publicize them, for two reasons. First, if the existence of these statutes is unknown, then they are ineffective at prodding upstanderism.⁴⁶² Second, raising awareness of Bad Samaritan statutes would help counter lawbreakers' assertion that their convictions would violate due process because they had insufficient legal notice of their affirmative duties under the statutes.⁴⁶³

⁴⁵⁷ See *supra* note 23 (requiring the reporting of suspected child abuse, including sexual abuse, to certain adults who are authorized to interact with minor or amateur athletes at a facility under the jurisdiction of a national governing body).

⁴⁵⁸ H.R. 8465, 116th Cong. § 8 (2020) (requiring bystander intervention training for U.S. Department of State employees on sexual misconduct). Congresspersons Joaquin Castro, Eliot Engel, and Jackie Speier introduced the SHAPE Act on September 30, 2020. *Id.*; Jennifer Hansler, *Democrats Introduce Legislation to Strengthen Anti-sexual Harassment Protocols at State Department*, CNN (Sept. 30, 2020), <https://edition.cnn.com/2020/09/30/politics/shape-act-state-department/index.html> [<https://perma.cc/Q8RK-MZQ6>]. I contributed language to the statute that was incorporated into this section of the legislation.

⁴⁵⁹ 18 U.S.C. § 7 (defining U.S. special maritime and territorial jurisdiction); *id.* §§ 2241–2244 (criminalizing rape and sexual abuse under special maritime and territorial jurisdiction).

⁴⁶⁰ *Id.* §§ 2421–2429 (defining federal sex trafficking offenses).

⁴⁶¹ *Id.* §§ 2331–2339D (criminalizing use of weapons of mass destruction, national terrorism, and other similar offenses).

⁴⁶² See Kaufman, *supra* note 3, at 1404 (proposing that efforts to publicize Bad Samaritan laws “could be similar to, modeled after, and possibly even tied to the U.S. Department of Homeland Security’s ‘If You See Something, Say Something’ campaign”).

⁴⁶³ See, e.g., *Lambert v. California*, 355 U.S. 225, 226–27 (1957) (holding that provisions of a felon registration ordinance violated due process when applied to a person who had no actual knowledge of her duty to register and where no showing was made of the probability of such knowledge). This case is particularly relevant to a Bad Samaritan case because both involve omissions. *Id.* at 228 (“Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.”); Ken M. Levy, *Normative Ignorance: A Critical Connection Between the Insanity and Mistake of Law Defenses*, 47 FLA. ST. U. L. REV. 411, 432 (2020) (noting that there are at least four exceptions to the general maxim that ignorance of the law is no excuse, including that the defendant did not receive fair notice of the law).

C. Enforce or Leverage Bad Samaritan Laws

Bad Samaritan laws could help promote justice and accountability if they are actually applied. Punishing—or at least threatening to penalize—failures to report crime may incentivize more witnesses to intervene helpfully. The Gates-Lonina case exemplifies the lack of enforcement of Bad Samaritan laws. The fact that police did not investigate and prosecutors did not indict anyone in the Gates-Lonina case for violating a Bad Samaritan law is just the latest example of how infractions of these statutes are seldom charged or successfully prosecuted, at least in the United States. A counterargument against increased enforcement is the potential for police and prosecutorial abuse, perhaps especially in minority communities.⁴⁶⁴ However, given the discrepancy between how widespread these statutes already are⁴⁶⁵ and how rarely they are enforced,⁴⁶⁶ concern over discriminatory application may be overblown at present.⁴⁶⁷

Bad Samaritan law advocates—including, in the Gates-Lonina case, Close, O'Brien, Rausch, and Shamansky—often favor having these statutes on the books even if their purpose is just to symbolically convey ideal conduct amid crises.⁴⁶⁸ Despite having compelling reasons not to charge Lonina with a violation, no one from the CPD considered investigating, let alone charging, any of the hundreds of Receivers for violating a Bad Samaritan law, including Lonin and the Reproducer the Reporter told police she knew. Given their limited resources and time, police and prosecutors prioritized addressing the underlying crime of rape.⁴⁶⁹ Fortunately, one of the Receivers (the Reporter), without even being prodded by a positive or negative incentive, acted as an upstander. But other viewers did not know or could not assume that someone was going to report the crime or preserve evidence of it. Worse, some of those other viewers (the Enabler Receivers) proactively contributed to the crime, whether by offering Lonina positive feedback or recording the livestream and republishing it on another platform.

Three lessons about enforcing Bad Samaritan laws can be drawn from the Gates-Lonina case. First, as with other statutes,⁴⁷⁰ law enforcement often de-

⁴⁶⁴ Kaufman, *Protectors of Predators or Prey*, *supra* note 3, at 1341.

⁴⁶⁵ See *supra* note 22 and accompanying text (discussing the state of Bad Samaritan laws in twenty-nine U.S. states and Puerto Rico).

⁴⁶⁶ David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 685 (2006); Benzmillier, *supra* note 7, at 951, 957 (Bad Samaritan laws “have been only selectively enforced, with rare prosecutions and even rarer convictions”).

⁴⁶⁷ Kaufman, *supra* note 3, at 1341.

⁴⁶⁸ Author-Close Interview, *supra* note 126; Author-O'Brien Interview, *supra* note 76; Author-Rausch Interview, *supra* note 76; Author-Shamansky Interview 1, *supra* note 76.

⁴⁶⁹ Author-Close Interview, *supra* note 126; Author-Rausch Interview, *supra* note 76.

⁴⁷⁰ Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1719, 1722–40 (2006) (analyzing underenforcement of laws concerning “urban residents, prostitutes, undocumented work-

cides not to enforce duly enacted Bad Samaritan laws. In the Gates-Lonina case, the CPD's and prosecutors' choice not to charge violations of Ohio's Bad Samaritan laws substitutes their wisdom and wishes for that of the state's legislators. As Professor Alexandra Natapoff argues, such underenforcement weakens the rule of law and undermines democratic legitimacy.⁴⁷¹ Especially given the performative nature of some sexual and other crimes in which Transmitters' and Receivers' intervention could be helpful, underenforcement or outright nonenforcement of Bad Samaritan laws could exacerbate the related problem of underenforcing rape laws, leaving vulnerable groups as doubly victimized.⁴⁷² Future research should promote understanding of why police and prosecutors underenforce Bad Samaritan laws and whether, and how, they may be prompted otherwise.

Second, a hierarchy among Transmitters and Receivers, as illustrated in Figure 4, should guide enforcement of Bad Samaritan laws. Police and prosecutors should prioritize holding Transmitters accountable over Receivers. Precisely because they are physically present, Transmitters are better able than Receivers to gauge the authenticity of the situation and to report the location, date, time, and description of a crime. Nevertheless, Transmitters may be better able than Receivers to assert the defense that they reasonably feared for their physical safety if they were to intervene in any way, even just by recording what was occurring.

Police and prosecutors should also prioritize charging Enabler Transmitters and Receivers over their bystander and upstander counterparts. Enablers should be most liable of these three subtypes because their affirmative conduct⁴⁷³ demonstrates their knowledge of and involvement in a crime. Upstanders should be least liable of these three subtypes because, by seeking to intervene helpfully, they at least tried to render aid, even if the nature of that assistance did not fulfill the particular requirements of any relevant Bad Samaritan laws.

Furthermore, police and prosecutors should prioritize bringing to justice certain other Receiver subtypes. Active Receivers who provide positive feedback to Transmitters should be more liable than Passive Receivers because,

ers, and victims of domestic violence"); Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1291–92 (2016) (analyzing underenforcement of rape laws).

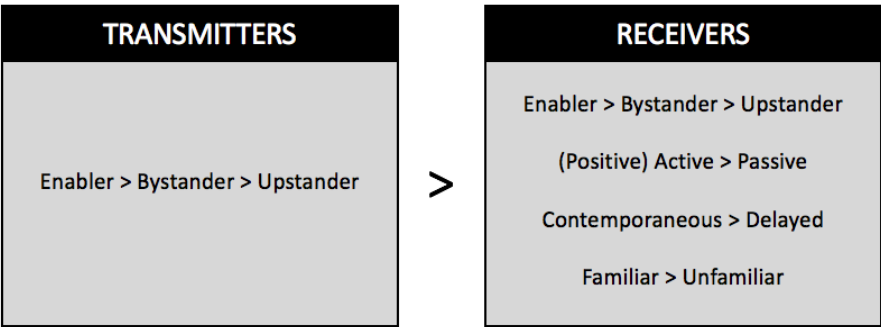
⁴⁷¹ Natapoff, *supra* note 470, at 1718, 1721.

⁴⁷² *Id.* at 1717 ("In practice, underenforcement is often linked with official discrimination, increased violence, legal failure, and the undemocratic treatment of the poor. Underenforcement can also be a form of deprivation, tracking familiar categories of race, gender, class, and political powerlessness."); Tuerkheimer, *supra* note 470, at 1327–28 (discussing the underenforcement of rape laws and how it may embolden criminals to commit sexual assaults).

⁴⁷³ For discussion of spectators' affirmative conduct justifying criminal liability, see Allen, *supra* note 5, at 851–54.

like with enablers, the former’s affirmative conduct demonstrates their awareness of and engagement in a crime. Contemporaneous Receivers should be more liable than Delayed Receivers because the latter may have more reason to believe that the crime has already been reported. Furthermore, Delayed Receivers that are so delayed in observing evidence of a crime that the offense is no longer in progress should face no liability because they are not present, even virtually. Familiar Receivers should be more liable than Unfamiliar Receivers because the contextual knowledge the former possess increases the likelihood that they can assess the scene’s authenticity and provide crucial information to investigators. Of course, digital manipulation could still fool Receivers who intimately know individuals who are ostensibly involved in a crime, leaving these witnesses with no greater insight than complete strangers.

FIGURE 4. Liability Hierarchy Among Transmitters and Receivers



Applying this hierarchy to the Gates-Lonina case, despite the police’s and prosecutors’ compelling reasons not to charge Lonina with violating Ohio’s general Bad Samaritan law, they should have at least investigated Lonin and the Reproducer whom the Reporter told police she knew.⁴⁷⁴

In other cases, this hierarchy could be complicated by potential overlap and fluidity between and among Transmitters, Receivers, and their various subtypes. For example, in certain scenarios, a Receiver could become a Transmitter and vice versa. In these cases, prosecutors should use their discretion to interpret the principles identified in this hierarchy to hold the most culpable parties to account.

Third, Bad Samaritan laws should actually be enforced or used as leverage against certain Transmitters and Receivers that qualify as “Unexcused Bystanders,” individuals who do not have reasonable excuses for remaining pas-

⁴⁷⁴ OHIO REV. CODE ANN. § 2151.421 (West 2020); *id.* § 2921.22(A).

sive and thus are not justified in refraining from acting as upstanders.⁴⁷⁵ Rather than charging violations of the laws, prosecutors could offer witnesses immunity in exchange for their testimony or other cooperation. O'Brien notes that investigators in Ohio use the state's general Bad Samaritan law in this way.⁴⁷⁶

D. Model Bad Samaritan Law for the Digital Age

Given the recommendations in this Article and my other scholarship on Bad Samaritan laws,⁴⁷⁷ the following is a model Bad Samaritan law for the digital age proposed for U.S. states and territories.⁴⁷⁸

Failure to Report Specified Violent Crimes

(A) Reporting Requirement:

- (1) Except as provided in division (B), any person who knows or reasonably should know about the actual or attempted commission of murder, kidnapping, sexual assault, aggravated assault, or felonious assault of another person and is present at the scene shall not knowingly fail to report that information to law enforcement authorities.
- (2) The report shall be made immediately but not later than 24 hours after the person knows or reasonably suspects that the crime was committed or attempted. If the person has no reasonable method for such reporting immediately or at least within 24 hours, then the person shall make the report as soon as reasonably practicable.
- (3) The actual or attempted crime of which the person knows or reasonably should know may occur anywhere in the United States.
- (4) The report shall include the reporter's name and contact information; details about how the reporter became aware of the attempted or completed crime; and, to the extent known by the reporter, the names, descriptions, and contact information of the perpetrator(s) and victim(s) as well as the date, time, location, and description of the attempted or completed

⁴⁷⁵ Kaufman, *supra* note 3, at 1378 (identifying three subtypes of Unexcused Bystanders: "Abstainers," "Engagers," and "Enablers").

⁴⁷⁶ Author-O'Brien Interview, *supra* note 76.

⁴⁷⁷ See *supra* note 13 and accompanying text.

⁴⁷⁸ For a model Bad Samaritan law exclusively focused on cyberbullying, see Benzmillier, *supra* note 7, at 952–53. For a model Bad Samaritan law addressing Transmitters but not necessarily Receivers, see Yamen et al., *supra* note 6, at 142–44. For a model duty-to-rescue statute, see Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 434–36 (1985).

crime. The report may include any other pertinent information.

- (5) Presence at the scene may be either physical or virtual. Virtual presence may be established when a person receives evidence of the crime electronically. For example, through virtual means (for instance, text messages, email, social media, phone applications, livestreams, or recordings), the person may hear words or sounds, read written words, or see photographs or videos.
- (6) The person may not delegate the duty to report to or rely on another person to make the report unless doing so is a reasonable means of expediting the report and the person knows that the other person makes the report.
- (7) Copying of visual or audio data from social media and republishing this content to the same or a different platform does not discharge this duty to report.

(B) Exemptions:

- (1): The following people are exempted from the reporting requirement in division (A):
 - (a) Individuals who reasonably fear that, by reporting, they would place themselves or someone else in danger of suffering serious bodily injury or death.
 - (b) Individuals whose report would concern police brutality if those individuals are not themselves employed by a law enforcement agency.
 - (c) Individuals who would incriminate themselves in the same or an unrelated offense if they reported the offense.
 - (d) Individuals who reasonably do not perceive the offense. This misperception may be caused by, for example, mental illness, poor vision or hearing, intoxication, drowsiness, sleep, or unconsciousness.
 - (e) Children, as defined by this jurisdiction's law.
 - (f) Individuals who know or reasonably assume that the offense has already been reported to law enforcement authorities or other public officials. Mere knowledge that other people witnessed the offense is not a basis for reasonably assuming that the offense has been reported.
 - (g) Individuals who were victims of the offense.
 - (h) If the offense is sexual assault:
 - (i) Individuals who are survivors of a sexual assault.
 - (ii) Individuals who have been asked not to report by any competent adult victim of this specific sexual assault.

- (2) The reporting requirement in division (A) shall not be construed to affect privileged relationships as provided by law.

(C) Penalties:

- (1) Any person (except those listed in division (B)) who knowingly fails to make a report required by this law shall be guilty of a misdemeanor punishable by a fine (of not more than \$500), citation, probation, or community service.
- (2) Any person (except those listed in division (B)) who (a) knowingly fails to make a report required by this law and (b) purposely records the scene and uploads that footage to a social media or networking website shall be guilty of a misdemeanor punishable by a fine (of not more than \$1000), citation, probation, or community service.

- (3) Imprisonment shall not be a punishment for (C)(1) or (2).

(D) Effect on Liability for Enumerated Crimes:⁴⁷⁹ Nothing contained in this Act shall alter existing law with respect to liability for murder, kidnapping, sexual assault, aggravated assault, or felonious assault.

CONCLUSION

The Gates-Lonina case illustrates choices that everyone may face in the digital age to be an enabler, bystander, or upstander. Of the more than 700 people who watched the rape, most did nothing to help. Lonina herself exacerbated the crime by livestreaming it, and hundreds of Receivers prodded her to continue doing so. Disappointingly, only one Receiver (the Reporter, who was not even in the same state) almost immediately reported the crime, ultimately notifying the police. Without the Reporter—who provided police with still images and a link to where a recording of the livestreamed rape could be found—investigators and prosecutors may not have obtained footage of the crime and their case against Gates would thus have been far weaker. Other Receivers (specifically, the Responders who provided Lonina with negative feedback and the Caller) also displayed upstanderism but neglected to notify law enforcement.

Although the Gates-Lonina case may have been unprecedented, it is emblematic of a broader phenomenon. Many more situations involving spectators to crimes have already occurred and will continue to arise.⁴⁸⁰ It is thus important to draw lessons from these episodes for bystanderism and upstanderism in the modern era.

⁴⁷⁹ For discussion of such a provision, see Silver, *supra* note 478, at 436, 443–44.

⁴⁸⁰ See *supra* notes 52–54, 67–76 and accompanying text.

First, Bad Samaritan laws should be modernized, refined, proliferated, publicized, and either enforced or leveraged to obtain witness testimony. Legislators should use this Article's proposed model Bad Samaritan law for the digital age to introduce new statutes or amend existing ones. Such laws, where they already exist but are not applied, raise the question of whether they at least hold symbolic weight.⁴⁸¹ If the laws do not carry this significance or if the laws' practical costs outweigh their symbolic benefits,⁴⁸² legislators should consider rescinding those laws or assuming that they have lapsed through desuetude.⁴⁸³

Second, there is a wide variety of bystanders, upstanders, and enablers, and modern technology complicates and expands that assortment. Consequently—and recognizing that police and prosecutors have limited time and resources—this Article recommends distinguishing witnesses' legal culpability so that law enforcement can prioritize their accountability. The original typology and hierarchy of Transmitters and Receivers described in this Article provides a guide for this process.

Finally, the cliché is true: one person *can* make a difference. This observation is all the more accurate in the digital age, when witnesses—such as the Reporter in the Gates-Lonina case—often have easy, speedy, low-risk access to technology to document, raise awareness about, and report crimes. Social media and mobile devices have generated new opportunities for users to prevent or stop offenses and preserve evidence for investigations and prosecutions. The law should incentivize such socially beneficial conduct. Recent examples of such upstanderism are a reminder that the worst of humanity can also bring out the best.

⁴⁸¹ For discussion of the symbolic significance of Bad Samaritan laws, see H.M. Malm, *Liberalism, Bad Samaritan Law, and Legal Paternalism*, 106 ETHICS 4, 15 n.21 (1995) (noting the potential value of “publicly enunciating the social judgment that persons have obligations to prevent harm to strangers,” which might help “define our common community and affect for the better our behavior in the long run” (quoting a reviewer of the journal)) [hereinafter Malm, *Liberalism*]; see also Heidi Malm, *Good and Bad Samaritanism*, in 4 THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS 2192, 2198 (Hugh LaFollette ed. 2013) (“[T]he strongest case for bad samaritan laws lies in their educative function. According to this view, even if bad samaritan laws are rarely enforced, having them ‘on the books’ sends an important educative message to us all. It tells us part of what we stand for as a community, what we expect of each other, and what we won’t, in principle, tolerate. Callously omitting to aid another is a serious act. Proponents of bad samaritan laws want to send that message through the criminal law.”).

⁴⁸² See Malm, *Liberalism*, *supra* note 473, at 15–16.

⁴⁸³ “Desuetude” is the common law doctrine that “laws that are hardly ever enforced . . . [have] lapsed, simply because they lack public support.” Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 49–50 (defining desuetude and discussing its application at common law).