SB

5

Senator Hollis French

Capitol Room 504
465-3892
465-6595 fax

MEMORANDUM

Date: February 21, 2007

To: Leg. Legal 2029

From: Cindy Smith 465-6641

RE: CS for SB5

Please prepare an as-passed Judiciary CS for SB5, Failure to Report a Crime, as follows:

Bill version 25-LS0097\M drafted by Luckhaupt on 1/22/07, with these amendments:

1. 0097\M.2 to page 2, line 11
   Delete "in a timely manner"
   Insert "as soon as reasonably practicable"

2. 0097\C.1 **(NOTE that this was drafted to an earlier version, so the line amended has changed) on page 2, line 15**
   Delete "class C felony"
   Insert new material to read:
   "(1) class C felony if the crime not reported is an unclassified felony; or
   (2) class A misdemeanor if the crime not reported is other than an unclassified felony."

3. Delete Section 1 of the bill. (Thomas It moved - no written amendment)

Thanks!

25-LS0097\M.2
Luckhaupt
1/31/07

AMENDMENT #1

OFFERED IN THE SENATE BY SENATOR MCGUIRE

TO: CSSB 5( ), Draft Version "M"

Page 2, line 11:

Delete "in a timely manner"

Insert "**as soon as reasonably practicable** [IN A TIMELY MANNER]"

moved

25-LS0097\M.1
Luckhaupt
1/31/07

AMENDMENT #2

OFFERED IN THE SENATE BY SENATOR MCGUIRE

TO: CSSB 5( ), Draft Version "M"

Page 1, line 7, following "victim":

Insert "**or a coconspirator or accomplice of another person who commits the crime listed in (1)(A) - (D) of this subsection**"

#2, withdrawn

25.LS0097\C.1
Luckhaupt
1/26/07

AMENDMENT #3

to the wrong version

OFFERED IN THE SENATE BY SENATOR FRENCH

TO: SB 5

Page 2, line 12: delete class C felony

Delete "~~class A misdemeanor~~"

Insert new material to read:

"**(1) class C felony if the crime not reported is an unclassified felony; or**

(2) class A misdemeanor **if the crime not reported is other than an unclassified felony**."

adopted

25-LS0097\C.2
Luckhaupt
1/30/07

AMENDMENT #4

OFFERED IN THE SENATE BY SENATOR WIELECHOWSKI

TO: CSSB 5( ), Draft Version "M"

Page 2, following line 12:

Insert a new bill section to read:

"* **Sec. 3.** AS 11.56.765(b) is amended to read:

(b) In a prosecution under this section, it is an affirmative defense that the defendant

(1) 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; [OR]

(2) acted to stop the commission of the crime and stopped

(A) the commission of the crime; or

(B) the completion of the crime being attempted**; or**

(3) reasonably believed that the crime had already been reported to a peace officer or law enforcement agency."

Renumber the following bill section accordingly.

Withdrawn

25-LS0097\M
Luckhaupt
1/22/07

CS FOR SENATE BILL NO. 5( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS MCGUIRE, Ellis, French

A BILL

FOR AN ACT ENTITLED

"An Act relating to reporting of certain crimes."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as Kiva's Law.

*** Sec. 2.** AS 11.56.765(a) is amended to read:

(a) A person, other than the victim, commits the crime of failure to report a violent crime [COMMITTED AGAINST A CHILD] if the person

(1) witnesses what the person knows or reasonably should know is

(A) the murder or attempted murder of a **person** [CHILD] by another;

(B) the kidnapping or attempted kidnapping of a **person** [CHILD] by another;

(C) the sexual penetration or attempted sexual penetration by another

(i) of a **person** [CHILD] without consent of the **person** [CHILD];

(ii) of a **person** [CHILD] that is mentally incapable;

(iii) of a **person** [CHILD] that is incapacitated; or

(iv) of a **person** [CHILD] that is unaware that a sexual act is being committed; or

(D) the assault of a **person** [CHILD] by another causing serious physical injury to the **person** [CHILD]; **and**

(2) [KNOWS OR REASONABLY SHOULD KNOW THAT THE CHILD IS UNDER 16 YEARS OF AGE; AND

(3)] does not in a timely manner report that crime to a peace officer or law enforcement agency.

*** Sec. 3.** AS 11.53.765(d) is amended to read:

(d) Failure to report a violent crime [COMMITTED AGAINST A CHILD] is a class **C felony** [A MISDEMEANOR].

25-LS0097\M
Luckhaupt
1/22/07

CS FOR SENATE BILL NO. 5( )

ADOPTED 1/3/07

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY

AMS 1,3,5 ADOPTED 1/3/07

Offered:
Referred:

Sponsor(s): SENATORS MCGUIRE, Ellis, French

A BILL

FOR AN ACT ENTITLED

"An Act relating to reporting of certain crimes."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as Kiva's Law.

* Sec. 2. AS 11.56.765(a) is amended to read:

(a) A person, other than the victim, commits the crime of failure to report a violent crime [COMMITTED AGAINST A CHILD] if the person

(1) witnesses what the person knows or reasonably should know is

(A) the murder or attempted murder of a <u>person</u> [CHILD] by another;

(B) the kidnapping or attempted kidnapping of a <u>person</u> [CHILD] by another;

(C) the sexual penetration or attempted sexual penetration by another

(i) of a **person** [CHILD] without consent of the **person** [CHILD];

(ii) of a **person** [CHILD] that is mentally incapable;

(iii) of a **person** [CHILD] that is incapacitated; or

(iv) of a **person** [CHILD] that is unaware that a sexual act is being committed; or

(D) the assault of a **person** [CHILD] by another causing serious physical injury to the **person** [CHILD]; **and**

(2) [KNOWS OR REASONABLY SHOULD KNOW THAT THE CHILD IS UNDER 16 YEARS OF AGE; AND

(3)] does not in a timely manner report that crime to a peace officer or law enforcement agency.

* Sec. 3. AS 11.53.765(d) is amended to read:

(d) Failure to report a violent crime [COMMITTED AGAINST A CHILD] is a class C felony [A MISDEMEANOR].

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 19, 2007

SUBJECT: The crime of "failure to report a crime"
(SB 5; Work Order No. 25-LS0097)

TO: Senator Lesil McGuire
Chair of the Senate State Affairs Committee
Attn: Marit Carlson-Van Dort

FROM: Tamara Brandt Cook
Director TBC

You have asked me to review and supplied me with a copy of a memorandum from Richard Svobodny, Chief Assistant Attorney General, to Senator Hollis French, Chair, Senate Judiciary Committee, a copy of a memorandum from Blair M. Christensen, Assistant Attorney General, OSPA Appellate Unit, a Legislative Research Report entitled "Mandatory Reporting of Violent Crimes."

What is my opinion on the problem of prosecuting a mandatory reporting offense when that crime conflicts with the 5th Amendment right against self-incrimination? (See also Art. I, sec. 9, Constitution of the State of Alaska)

The memoranda I reviewed did a good job of describing the problem posed when a witness to a reportable crime would expose himself or herself to potential prosecution for another crime if the witness complies with the reporting requirement, as when the witness could not have knowledge of the reportable crime without having been involved in criminal activity also. In cases in which the constitutional right against self-incrimination conflicts with the statutory requirement that a crime be reported, the right against self-incrimination will prevail. It is to be expected that whenever a statutory requirement conflicts with a constitutional right, the constitution will prevail, although the application of this principle may prove complicated indeed. I observe that many fact situations involving a mandatory reporting requirement do not involve a conflict with the right against self-incrimination.

Have conflicts between the constitutional right against self-incrimination and mandatory reporting statutes in other states arisen?

They have. Examples are discussed in the memoranda I reviewed. There are also some examples in the law review article cited in Mr. Blair M. Christensen's memorandum, Gabriel D. M. Ciociola, "Misprision of Felony and its Progeny," 41 Brandeis L.J. 697

(2003), copy enclosed for your reference. I note that the author of that law review article takes the position that "legislation imposing a mandatory affirmative duty to report violent criminal offenses, if property drafted and enforced, would serve the ends of justice."

Describe the application by courts of the current Alaska law related to reporting violent crimes against children and its potential conflict with the right against self-incrimination.

The statute you describe is AS 11.56.765. There have been no reported cases involving application of that statute. Indeed, in the only reported case containing a reference to that statute the court merely noted: "At the time of the events in this case, the offense of 'failure to report a violent crime committed against a child,' AS 11.56.765, had been enacted but had not taken effect." (Greinier v. State, 23 P.3d 1192 (Alaska Ct. App. 2001) page 1196, footnote 12)

TBC:ljw
07-085.ljw

Enclosure

LEXSEE 41 BRANDEIS L.J. 763

Summer, 2003

41 Brandeis L.J. 697

LENGTH: 30990 words

MISPRISION OF FELONY AND ITS PROGENY

NAME: Gabriel D. M. Ciociola *

BIO:

* Gabriel D. M. Ciociola, J.D., Harvard Law School 1996, is an associate at Litchfield Cavo in Lynnfield, Massachusetts.

SUMMARY:
... The starting point is common-law misprision of felony. ... Taking as correct the House of Lords' decision in Sykes that misprision of felony consists of mere failure to disclose knowledge about a felony, the court leaned heavily on P. R. Glazebrook's deft polemic against Sykes and the crime of misprision of felony contain in his article How Long Then, Is the Arm of the Law to Be? The court readily adopted Glazebrook's depiction of the policy considerations going against misprision of felony and the gaps in logic found in their Lordships' opinions in Sykes. ... Obviously, each individual must be guided by his own conscience; nevertheless, anyone who acts affirmatively to conceal a criminal undertaking could be committing the crime of misprision of felony. ... In contrast, the Rhode Island and Massachusetts statutes specify that the reporting duty arises only when one knows that another person is the victim of an enumerated violent offense. ... However phrased, any statute imposing a mandatory reporting duty will bear analogy to common-law misprision of felony. ... " As a solution, he proposes limiting the reporting duty to those crimes which were designated as felonies by the English common-law: murder, mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon. ...

TEXT:
[*698]

I. Introduction

This Article explores laws which criminalize an ordinary civilian's failure to volunteer information about a crime to the police or other authorities. The starting point is common-law misprision of felony. The history of the offense and its reception in foreign common-law jurisdictions is first considered, with special attention given to Sykes v. Director of Public Prosecutions, a crucial case that came before the House of Lords in 1961. Then, individual consideration is given to the handful of state cases in the United States passing on common-law misprision of felony. The approach of each jurisdiction is unique, so they are described separately. The Article then turns to misprision of felony in its statutory forms at the federal and state levels. The summary on the black-letter of general crime reporting duties concludes by examining current duty-to-report and duty-to-rescue state statutes. These statutes, drafted to apply only to witnesses of violent crimes or other serious emergencies, impose a more limited affirmative crime reporting obligation than does misprision of felony. The important distinction between a statute requiring aid to an imperiled person and a statute requiring a report of criminal conduct is addressed.

The Article next discusses the merits of legally obliging ordinary civilians to report crimes. It determines that a law resembling current duty-to-report statutes, with their application limited to witnesses of violent crimes, eschews the overbreadth and vagueness which makes traditional misprision of felony so intolerable in the contemporary setting.

Then the Article includes a short reexamination of three infamous exemplars of bystander indifference: the Kitty Genovese murder in New York City, the gang rape at Big Dan's Tavern in New Bedford, Massachusetts, and the Sherrice Iverson murder in Nevada. The facts of these incidents illustrate how a mandatory crime reporting duty, though consonant with principles of justice, could have undesired effects on criminal investigations and prosecutions.

[*699]

At the conclusion of this Article, the author submits that legislation imposing a mandatory affirmative duty to report violent criminal offenses, if properly drafted and enforced, would serve the ends of justice.

The focus of this Article is a general reporting duty imposed by the criminal law. Laws requiring that special groups of citizens (doctors, lawyers, schoolteachers, clergy) report certain crimes are beyond the scope of this Article. The imposition of civil liability for failure to report a crime is also beyond the scope of this Article.

II. Common Law Misprision Of Felony

A. Historical Background

Misprision: this is properly when anyone learns or knows that another has committed treason or felony, and he does not choose to denounce him to the King or to his Council, or to any magistrate, but conceals his offence; this is a misprision. n1

The eminent English lawyer and judge, Sir William Staunford, wrote this statement in his Treatise on the Pleas of the Crown, which first appeared in 1557. n2 The name 'misprision of felony' was thereby attached to a common-law misdemeanor making illegal the failure to disclose one's knowledge of the commission of a felony to the proper authorities. n3

Misprision's distinguishing feature is that it puts on the ordinary civilian an affirmative duty to report crime. n4 Mere passivity by one knowing of a felony, **[*700]** without more, suffices to establish criminal liability. n5 Some older authorities even include a duty to intervene to stop a felony or arrest a felon. n6 But modern English authorities do not accept this notion. n7 In the United States, however, definitions of the crime that imply a duty to intervene against a felony or apprehend a felon persist. n8 Yet, with one exception, n9 in all cases in which the **[*701]** facts are described, the prosecution for misprision of a felony has never proceeded against a defendant for his or her failure to stop a felony or arrest a felon; and contemporary American authorities acknowledge that the duty imposed by the offense is limited to disclosure of knowledge. n10

At least as far back as the late fifteenth century, the word 'misprision' was "used almost as synonymous with misdemeanour, that is to say, something less than felony which did not carry the death penalty." n11 Statutes enacted in the mid-sixteenth century termed the concealment or keeping secret of any high treason "misprision of treason." n12 Ergo:

[A]s various statutes stated that concealment of a person's knowledge of treasonable actions or designs should be regarded as misprision of treason, this term came to be used as the ordinary designation for such concealment. Hence it was often supposed that the word misprision itself expressed the sense of failure to denounce a crime. n13

[*702]

Staunford is taken to have made his statement about misprision in view of this statutory usage. n14 Over four hundred years later, a basic question about misprision of felony remains unsettled: Was Staunford correct in stating that such an offense existed at common-law?

In England, before the early seventeenth century, primary responsibility for law enforcement was not delegated to paid, full-time professionals; the community as a whole was obliged to combat crime. n15 Hence, "the traditional common law recognized an obligation - or rather a family of related obligations - to prevent criminal violence. [E]very subject had a legal duty to prevent a felony. This doctrine may be traced as far back as Bracton in the mid-thirteenth century." n16

Under medieval England's Frankpledge system, a tithing (which consisted of ten individuals together with their families) n17 was fined if one of its members committed a crime. n18 A hundred (which consisted of ten tithings) n19 was fined if it did not succeed in producing a criminal for trial. n20

For the individual, there was a "well-established liability for doing nothing about a felony committed in one's presence." n21 An adult male present when a **[*703]** felony was committed (or a dangerous wound inflicted or a dead body

discovered) was required by law to alert his neighbors by raising the hue and cry. n22 He had a further duty to arrest the perpetrator if possible. n23 Once the hue was raised, all the adult men were required to follow it and do their best to capture the felon. n24 In light of this historical context, cases of prosecutions for misprision of felony would be a logical feature of the criminal justice system then in place. n25

There remains a problem: the case law provides no precedent establishing the existence of the common-law offense of misprision of felony. n26 However, the treatise writers are virtually unanimous in averring to the existence of the crime. n27 This disparity between primary and secondary authority regarding misprision of felony is perturbing n28 and begs for an explanation.

[*704]

One possibility is that the institutional writers and those that followed them were simply wrong; there never really was a crime of misprision of felony at common law. n29 (This position was unsuccessfully urged upon the House of Lords in 1961). n30 The British legal scholar, P. R. Glazebrook, in an article entitled Misprision of Felony-Shadow or Phantom?, has given an in-depth account of how such an error was likely made and perpetuated. n31 He suggests that Staunford made a mistake in transcription when writing "treason or felony" ("treason au felony" in the original) which probably should have been emended to "treason and felony" ("treason et felony") since treason was commonly spoken of as "treason and felony" at the time. n32 Else Staunford was careless in his substantive analysis and made an overly broad generalization, treating the misprision concept as a general common-law rule applicable to both treasons and felonies rather than a specific statutory creation applicable to treason only. n33 After Staunford's treatise had run through several editions, his erroneous account of misprision was adopted by other treatise writers and, over time, elaborated upon. n34

Still, others regard the existence of the crime as "true enough for all but the pedant." n35 The persuasiveness of the mass of secondary authority (especially the institutional writers) has been noted n36 and some would go so far as to make it controlling, n37 even if incorrect. n38

[*705]

To blunt the argument that misprision of felony's existence is bottomed on the repetition of an error originally made by Staunford, the House of Lords equated misprision of felony with the duty to raise the hue and cry. n39 Staunford merely attached a name to a criminal omission already well-established by prosecutions for failure to raise the hue and cry in order to capture a felon. n40

However, P. R. Glazebrook counters by distinguishing the legal obligation set out in the hue and cry cases from misprision of felony, n41 the former being "both wider and narrower" than the latter. n42 He also points out that Staunford dealt with the concept of raising the hue and cry separately in a later chapter of his treatise, without any cross-reference to his chapter on misprision. n43

An answer to this puzzle that would resolve all doubts is probably lost to history, but Glazebrook's conclusion is more persuasive by virtue of his careful reasoning and attention to detail: "[c]onsiderable therefore as, in the later Middle Ages, the duties of private citizens to assist in the suppression of crime were . . . evidence of that general duty supposed by the crime of misprision of felony is wanted." n44

But if one is persuaded by the statements of the treatise writers regarding misprision of felony, a number of questions remain unanswered. As one British commentator put it, "[t]his crime is notable for its vagueness. A short description might run as follows: misprision of felony is the misdemeanor of failing to communicate to the proper authority one's knowledge of the [*706] commission of a felony; but this apparently simple statement bristles with uncertainties." n45 One would hope that the esteemed institutional writers would have resolved such uncertainties, but they did not. n46 An American author observed:

The commentaries . . . fail specifically to consider whether the defendant must have some evil motive in keeping quiet or whether an official request for information must be made; they simply assume that proof of such matters is unnecessary. Also noteworthy is their failure to consider what kind and degree of "knowledge" of a felony is necessary for guilt or exactly to whom disclosure of such "knowledge" should be made. Likewise ignored is the whole subject of privileged knowledge or communications, whether a lawyer or a priest gaining knowledge of another's felony in his professional capacities is guilty for failing to disclose or whether a husband would be guilty for failing voluntarily or even on official request to disclose his wife's felonious misdeeds or those of his minor sons and daughters. n47

Hence, in recent times, courts have been faced with the task of giving shape to an offense left nebulous by the commentaries.

B. Foreign Common Law Jurisdictions

Ironically, a number of courts outside of England generated authoritative precedents regarding misprision of felony before such precedent was set in England itself. n48 The 1955 Canadian case of Regina v. Semenick, n49 and the 1959 Australian case of R. v. Crimmins, n50 each involved a misprision of felony prosecution against a defendant who was the victim of an attempt on his own life but refused to tell the police the identity of the perpetrator. n51 The Canadian court refused to make misprision of felony part of Canadian criminal law [*707] because of "uncertainties and obscurities" attaching to the offense n52 and because of its inconsistency with Canada's statutory abolition of the distinctions between felony and misdemeanor. n53 The Australian court held that misprision of felony is good law n54 and that the mere failure to notify authorities of facts that might lead to the capture of a felon is sufficient grounds for conviction. n55 Among the handful of American jurisdictions that had ruled on common-law misprision of felony by 1960, there was a conflict of authority. n56

The House of Lords heard the case of Sykes v. Director of Public Prosecutions n57 in 1961. In 1960, Basil Landon Sykes had tried to arrange a transaction between the Irish Republican Army ("I.R.A.") and individuals in possession of guns stolen from a United States Air Force base. His contact with the I.R.A. turned out to be a police informant and he and his cohorts were arrested. The prosecution declined to charge Sykes as an accessory after the fact and a charge of receiving stolen goods was quashed. A jury acquitted Sykes of attempting to sell firearms but convicted him of misprision of felony. n58

On appeal, the House of Lords considered: "(1) Whether there is such an offence as misprision of felony. (2) Whether active concealment is an essential ingredient of the offence." n59 As indicated above, their Lordships unanimously affirmed on the first point. n60 On the second point, they unanimously held no affirmative act is required for the offense. n61 However, their opinions did not resolve the many questions left open by the common law commentators. n62

[*708]

Lord Denning identified knowledge and concealment as the two essential ingredients of misprision of felony. n63 As to the knowledge requirement, Denning set up an objective standard. There must be evidence that the accused had information and facts before him such that a reasonable man in his place would have known that a felony had been committed. n64 In addition, Denning would limit the duty to disclose to serious offenses. The accused need not know that the crime of which he is aware is a felony, but it must be "an offence which is of so serious a character that an ordinary law-abiding citizen would realise he ought to report it to the police." n65 If the crime was in fact a felony, that would be sufficient for misprision. As to concealment, the accused must take the first reasonable opportunity available to report to someone in lawful authority, such as the police or a magistrate, all material facts known to him relating to the crime. Denning also posited that the attorney-client privilege and the patient-doctor privilege would trump the duty imposed by misprision of felony, whereas friendships and familial relationships would not. n66

Denning did not think the offense overly broad because he felt certain that judges would impose just limitations on it as the need arose. n67 He also stated:

The arm of the law would be too short if it was powerless to reach those who are "contact" men for thieves or assist them to gather in the fruits of their crime; or those who indulge in gang warfare and refuse to help in its suppression. There is no other offence of which such persons are guilty save that of misprision of felony. n68

Lord Goddard offered a similar justification for the offense. n69 He too was not concerned about the great breadth of the offense because "[t]he law is nowadays administered with dignity and common sense" n70 and he suggests that it "should be sparingly prosecuted." n71 Nor did Goddard recognize an exception for family members. n72 His description of the crime does not include Denning's seriousness requirement:

[*709]

[A] person is guilty of the crime if knowing that a felony has been committed he fails to disclose his knowledge to those responsible for the preservation of the peace, be they constables or justices, within a reasonable time and having a reasonable opportunity for so doing. . . . A man is neither bound nor would he be wise to disclose rumours or mere gossip, but if facts are within his knowledge that would materially assist in the detection and arrest of a felon he must dis-

close them as it is a duty he owes to the state. The gist of the offence is concealment which may be passive, that is mere non-disclosure, or active in destroying or hiding evidence n73

Goddard also submitted misprision as an option for prosecutors with a weak case against an accessory. n74

Lord Morton also held that active concealment is not an ingredient of the offense and quoted a passage to that effect from R. v. Crimmins. He expressly refused to recognize a seriousness requirement in the offense, although the seriousness of the felony not disclosed would be relevant to the appropriateness of a prosecution for misprision. n75

Lord Morris describes misprision as "the mere failure and omission to report and disclose that which is actually known . . . ." n76 Like his peers, Lord Morris was unfazed by the breadth of the criminal liability the offense entails:

Situations and circumstances can be postulated in which it can be urged that it would seem to run counter to the fitness of things to acknowledge that the offence has been committed. On the other hand, situations and circumstances can also be contemplated in which a failure to disclose knowledge would be condemned as being outrageous. The fact that prosecutions have been, and doubtless will continue to be, infrequent demonstrates that the law is the handmaid of reason. n77

[*710]

Lord Guest also accepted misprision as a mere omission. He offered no limitations on the offense and explicitly rejected any suggestion that the accused's failure to report must be deliberate or willful. n78

Reactions of a number of commentators to the Sykes case were less than enthusiastic. n79 In 1967, Britain abolished by statute all distinctions between felony and misdemeanor, thereby eliminating misprision of felony. n80 Its demise has not been sorely lamented. n81

C. Common-Law Misprision of Felony in the United States

The courts of a number of states have had occasion to consider the common-law crime of misprision of felony. Their reception of the offense has been mixed. A brief chronological summary of the particular cases follows.

This author's research has found no report of a prosecution for common-law misprision of felony in the United States before the twentieth century. In the 1875 case of Wren v. Commonwealth, n82 the Court of Appeals of Virginia reversed a defendant's conviction as an accessory after the fact to a felony but remanded for a new trial to determine whether he was guilty of compounding a **[*711]** felony or misprision of felony. n83 "If knowing that a felony had been committed, he concealed it, then he is guilty of misprision of felony." n84

The Supreme Court of Vermont recognized the crime in the case of State v. Wilson, in 1907. n85 However, it included in the offense a mens rea requirement suggested by Joel Prentiss Bishop in his Treatise on Criminal Law. n86 The court stated: "[o]n the question of intent, we quite agree with Mr. Bishop that in principle the motive prompting the neglect of a misprision must be in some form evil as respects the administration of justice." n87

Misprision of felony was recognized in Delaware in the 1923 case of State v. Biddle. n88 The case involved an early instance of car-jacking. Steve Jankovicz, with some help from Irving Biddle, robbed a cabby and stole his vehicle, leaving him bound on the side of the road. Ida, Irving's wife, was present but there was no evidence presented that she took part in the crime. n89 The trial court instructed the jury that:

If . . . you believe . . . Steve Jankovicz was guilty of a felony . . . and that the defendant Ida Biddle was present when said felony was committed, but wilfully failed and neglected to make any effort to prevent its being committed, or if you believe that, knowing that it had been committed the said Ida Biddle wilfully failed and neglected to make any effort to prosecute the said Steve Jankovicz, and to bring him to justice for having committed said felony, your verdict should be guilty n90

[*712]

The court's instruction's apparently put a mens rea requirement of willfulness in the crime. n91 The extent to which willfulness under Biddle and evil intent under Wilson correspond is open to conjecture.

Then, in 1940, the Michigan Supreme court held that "[t]he old time common-law offense of misprision of felony . . . is not now a substantive offense . . . because wholly unsuited to American criminal law and procedure as used in this State." n92 The court stated broadly, "[i]n modern criminal law mere nondisclosure of crime committed by another is not misprision of felony nor any substantive crime." n93 Two of the eight justices dissented. n94

The case of Commonwealth v. Lopes, n95 was decided by the Supreme Judicial Court of Massachusetts in 1945. Its facts illustrate some of the myriad difficulties that can attach to an affirmative duty to report crime.

Ten-year-old Francis McGrath disappeared from her home on June 10, 1944. Three days later, Bertha Pina and the defendant, Joquin Lopes, two married persons having an adulterous affair with each other, went into a sparsely settled wooded area for a tryst and happened upon McGrath's body. They knew of the search for McGrath, but agreed with each other to keep quiet. Three days later, however, the defendant led police to the body. He first told police he went into the woods to relieve himself and was led to the body by its odor, but gave an accurate account of discovering the body a month later. [*713] Although there was medical testimony that McGrath had been raped, Pina and Lopes did not know what had happened to her. n96

The defendant was convicted of willfully intending to conceal information relating to an alleged murder and of conspiracy to obstruct the administration of justice by withholding knowledge of the whereabouts of the victim, n97 but the Supreme Judicial Court reversed. n98 The court stated:

We need not decide in this case whether misprision of felony is a common law crime in this Commonwealth. Neither need we decide whether, if it is, the possible suspicion of the defendant that the body was that of Francis McGrath and that she had met with foul play was sufficient knowledge of a felony to make his silence criminal under any circumstances. If misprision of felony exists in this Commonwealth, we think that the limitations stated in State v. Wilson apply, and that an evil motive to prevent or delay the administration of justice must be shown. In this case there was no evidence of any such motive. The only rational inference from the evidence was that the failure to disclose the finding of the body was motivated by fear of self incrimination, or at last [sic] by fear of exposure of a criminal purpose wholly unconnected with the body. Such a motive, as the trial judge told the jury, would not permit a conviction. n99

Misprision of felony was held part of Rhode Island's criminal law by the state's supreme court in the 1966 case of State v. Flynn. n100 However, the supreme court declined to decide whether the indictment of the defendant sufficiently and properly identified the offense because the trial court had improperly certified that question without formulating its own answer. n101 Hence, the court did not reach the question of the intent or motive requisite to the offense.

The facts of the 1974 Florida case of Holland v. State, n102 further illustrate the conundrums that an affirmative duty to report crime can generate. n103 The [*714] defendant, a city manager, went to the house of his assistant, Rutherford, and discovered marijuana plants in the back yard. He took a couple of leaves and contacted Captain T. W. Kelly of the local police department. After confirming the leaves were marijuana, the two confronted Rutherford and uprooted the flora in question, the quantity of which was sufficient to establish felony possession of marijuana. Rutherford resigned at the defendant's request and the defendant and Kelly informed the police chief, Ernest Van Horn, of the entire matter. The three agreed that, in order to spare the city and Rutherford and his family of any further adversity, the situation would be handled administratively, without criminal prosecution. Shortly thereafter, the defendant informed fourteen city government officials, a prominent clergyman, a newspaper editor and a reporter of the whole affair. Each made a sworn statement of knowing of the situation and agreeing that Rutherford should not be arrested. n104

The court proceeded on the premise that the common-law offense "was the bare failure of a person with knowledge of the commission of a felony to bring the crime to the attention of the proper authorities." n105 The court noted that, in light of the facts of the case, which were undisputed, it would be hard to maintain that the defendant's conduct would constitute misprision of felony. And if it did, then so would the conduct of the nineteen other individuals who knew of the crime but did not report it. n106 But the court wanted to "meet the question head- on" n107 and "chose to decide this case on the fundamental issue of whether misprision of felony is a crime in Florida." n108 Agreeing with other authorities "that the crime of misprision of felony is wholly unsuited to American criminal law" n109 it concluded:

While it may be desirable, even essential, that we encourage citizens to "get involved" to help reduce crime, they ought not be adjudicated criminals [*715] themselves if they don't. The fear of such a consequence is a fear from which our traditional concepts of peace and quietude guarantee freedom. We cherish the right to mind our own business when our own best interests dictate. Accordingly we hold that misprision of felony has not been adopted into, and is not a part of, Florida substantive law. n110

The Court of Appeals of Maryland (Maryland's court of last resort) handed common-law misprision of felony another defeat in the 1979 case of Pope v. State. n111 The complicated fact pattern is a harrowing account of madness culminating in fatal child abuse.

After a Friday church service, Angela Lancaster drove Melissa Vera Norris and her three month old son, Demiko, back to Norris's grandparent's house, where Norris was living. Norris was suffering from mental illness, lapsing in and

out of religious frenzies in which she claimed she was God. Under the delusion that her grandparents' house was on fire, she refused to enter it. Lancaster took the mother and child to the home of her sister, Joyce Lillian Pope, the defendant, who agreed to take Norris and the baby. Throughout the evening and the next day, Norris's spells and delusions continued. They became more pronounced on Sunday morning and, while loudly exhorting the devil to be gone, she anointed Pope's own children with oil, putting some in their mouths. n112 During a lucid period, Norris prepared to bathe Demiko, then broke into another frenzy. Under the delusion that Satan had entered her child's body, she ranted verbal exorcisms and savagely attacked the infant. According to expert medical testimony, the child died from its injuries fifteen minutes to several hours after they were inflicted. Pope, witnessing the awful scene, stood aghast but did nothing. Lancaster returned and saw the baby but Pope found herself unable to communicate what had happened. Pope, Lancaster and Norris departed with the child, first stopping at Norris's grandfather's house. n113 "Pope told him the child was dead, but he did not believe her because all three were acting so strangely. He refused to take or look at the baby." n114 The three then picked up a feilow parishioner of Lancaster and Norris and proceeded to the church, passing several hospitals, police stations, and rescue squads en route. At the church, a certain Mother Dorothy King summoned an ambulance, but when it arrived the child was already dead. **[*716]** The medical expert at trial gave no opinion as to whether a more timely report would have saved the child's life. n115

When questioned by police, Pope at first denied seeing Norris strike the baby; "She explained this untruth in subsequent statements to police: '[I]t was her body in the flesh, but it wasn't her, because it was something else.'" n116 The next day she gave a truthful account of what had transpired. n117

At trial, Pope was convicted of misprision of felony and child abuse. n118 The appellate court reversed the child abuse conviction but, relying upon the persuasive authority of Sykes, upheld the misprision of felony conviction. n119 The Court of Appeals upheld the appellate court on the child abuse count n120 and proceeded to decide the status of misprision of felony in Maryland. n121

The court noted Glazebrook's article, Misprision of Felony - Shadow or Phantom?, n122 but assumed arguendo that the crime was a valid common law offense in England and became part of Maryland law pursuant to the reception clause of the state constitution. n123 The court went on to consider whether the crime was still indictable. n124 Taking as correct the House of Lords' decision in Sykes that misprision of felony consists of mere failure to disclose knowledge about a felony, n125 the court leaned heavily on P. R. Glazebrook's deft polemic against Sykes and the crime of misprision of felony contain in his article How Long Then, Is the Arm of the Law to Be? n126 The court readily adopted **[*717]** Glazebrook's depiction of the policy considerations going against misprision of felony and the gaps in logic found in their Lordships' opinions in Sykes. n127

The court also suggested that the crime could conflict with the right against self-incrimination. n128 In conclusion, the court stated:

We are satisfied, considering its origin, the impractical and indiscriminate width of its scope, its other obvious deficiencies, and its long non-use, that it is not now compatible with our local circumstances and situation and our general code of laws and jurisprudence. Maintenance of law and order does not demand its application, and, overall, the welfare of the inhabitants of Maryland and society as enjoyed by us today, would not be served by it. If the legislature finds it advisable that the people be obligated under peril of criminal penalty to disclose knowledge of criminal acts, it is, of course, free to create an offense to that end, within constitutional limitations, and, hopefully, with adequate safeguards. We believe that the common law offense is not acceptable by today's standards, and we are not free to usurp the power of the General Assembly by attempting to fashion one that would be. We hold that misprision of felony is not a chargeable offense in Maryland. n129

Common-law misprision of felony was held good law by the Supreme Court of South Carolina in the 1980 case of State v. Carson. n130 In a tersely-worded opinion only ten paragraphs long, the court unanimously upheld the defendant's conviction for misprision of felony. Its reasoning did not extend beyond taking as unquestionable the existence of the offense at common law and a rigid reading of the state's reception statute as allowing no modification of common law rules except by clear and unambiguous legislation. n131

The facts of the case were succinctly put in the opinion:

Appellant, an eye witness to the murder and armed robbery of a Charleston shopkeeper, hastily left the scene upon the arrival of police. **[*718]** When later questioned by investigating officers concerning the events, appellant denied he was present when the crimes were committed or that he had any information about the offenses or the perpetrator. Po-

lice had information to the contrary from other sources that appellant was indeed at the scene of the crimes. As a result, he was subsequently arrested and indicted for conspiracy, murder, attempted armed robbery and misprision of felony.

While in custody, appellant sent word to the investigating officers he wished to make a statement. What followed was a purely exculpatory story, admitting appellant was present at the scene and witnessed the murder, but providing no evidence whatsoever of any complicity in the crimes or with the perpetrator.

At trial the state proceeded only on the misprision offense. Appellant was convicted and sentenced to a three-year term of imprisonment. n132

The court offered a definition of the offense that was lifted verbatim from Corpus Juris Secundum: "It is described as a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with, or subsequent assistance of, him as will make the concealer an accessory before or after the fact." n133

The court then stated that under the federal statute and the state statutes embodying the offense, mere passivity is not criminal and some affirmative act of concealment is required. n134

The court rejected the defendant's contention that the crime, by its very nature, conflicted with his privilege against self-incrimination n135 and stated the basis for upholding his conviction:

Here, there is no particular conflict with the proscription against self- incrimination shown. Appellant deliberately concealed important information when police first questioned him which, when later disclosed, fully exculpates appellant from the crimes he witnessed. The argument that his arrest demonstrates he was in an incriminating position overlooks the reason for his arrest. Appellant created a reasonable and probable cause to believe he was **[*719]** involved in the crimes by concealing information and denying he was present in the face of independent evidence obtained by the police that appellant was at the scene of the crimes. In fact, appellant was neither a principal nor an accessory before or after the fact, but merely a witness who concealed valuable information from the investigating officers. That in itself constitutes the common law offense of misprision of felony. n136

The opinion lends itself to different interpretations. n137 Was Carson convicted because he failed to come forward and tell his exculpatory story to the police in the first place? Or was his conviction based on the affirmative act of making false statements in response to questions put by the police? n138

Gathers v. Harris Teeter Supermarket, Inc., n139 cites Carson for the proposition that "[t]he only duty imposed upon a private citizen is to communicate such facts and information to a police officer as are necessary to allow the officer the opportunity to apprehend the offender." n140 But this does not resolve whether the communication must be volunteered or made only in response to inquiry by the police.

The uncertainty is heightened by state attorney general opinions inconsistent on the matter. Just two months after the Carson decision, the state attorney general cited Carson for the proposition that the "offense [of common-law misprision of felony] is not committed by mere silence or failure to come forward; there must be some positive act of concealment of the felony. . . ." n141 Then, in a 1982 opinion, the state attorney general responded to an inquiry about the legal duty of hospital personnel to notify law enforcement officials about possession or use of illegal drugs by patients discovered during the course of treatment. n142 The opinion stated:

[*720]

[A]s to the legal responsibility of hospital personnel to notify law enforcement officials upon discovery, please be advised that South Carolina recognizes the common law crime of misprision of felony, which is defined as "a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with, or subsequent assistance of, him as will make the concealer an accessory before or after the fact." State v. Carson. Under state law, the possession of controlled substances is a felony under certain circumstances such as the identity of the drug itself, the amount in possession, and any prior convictions. Under federal law, the unlawful possession of controlled substances is a felony under all circumstances. In any event, there would be a general duty on all hospital personnel to notify law enforcement officials of such criminal conduct, particularly when failure to do so would present the clear possibility of resulting injury or death to the patient or others in the hospital. n143

Then, in a 1990 opinion, the state attorney general responded to an inquiry about whether an individual participating in a research project is "obligated to come forward and report criminal activity, the knowledge of which the researcher acquires while accumulating data?" n144 The opinion stated:

The answer to this . . . question raises a moral as well as a legal dilemma. Obviously, each individual must be guided by his own conscience; nevertheless, anyone who acts affirmatively to conceal a criminal undertaking could be committing the crime of misprision of felony.

Misprision of felony is a common law offense of England. South Carolina . . . has adopted the common law of England. Misprision of felony has been specifically recognized in South Carolina. State v. Carson. In Carson, the South Carolina Supreme Court, discussing misprision of felony, [quoted the definition of the offense from Corpus Juris Secundum and] stated:

Under the federal and state statutes embodying the offense, mere silence or failure to come forward is not enough to constitute misprision; there must be some positive act of concealment of the felony. . . .

Thus it appears that the mere failure of a researcher to come forward, **[*721]** without some affirmative act to conceal, would not be misprision of felony. n145

One can only hope that the prosecuting authorities in South Carolina will honor this latest representation of the state of the law in their jurisdiction.

In any case, most states do not retain common law offenses n146 and "[i]t has long been settled that there are no federal common law crimes. . . ." n147 Axiomatically, in jurisdictions where common law offenses are not retained, common-law misprision of felony is not a crime. n148

III. Statutory Misprision Of Felony

A. The Federal Statute

There has been a federal statutory crime of misprision of felony since 1790. n149 It currently reads:

[*722]

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $ 500 or imprisoned not more than three years, or both. n150

The statute requires some positive act of concealment; mere failure to reveal one's knowledge of a federal felony is not made criminal by the statute. n151 The Tenth Circuit detailed how the statute was construed to require more than an omission:

It provides that there must be both a concealment and a failure to disclose in order to constitute a criminal offense. The language is "conceals and does not as soon as may be disclose." Some meaning must be given to the words "conceal and." If it should be held that a failure to disclose is itself a concealment, then a conviction may be had for failure to disclose without more, and the words "conceal and" are thus effectively excised from the statute.

Following settled rules of construction, we must assume that Congress intended something by the use of the words "conceal and." If any meaning is to be given them, an indictment must allege something more than mere failure to disclose-some affirmative act of concealment, such as suppression of the evidence, harboring the criminal, intimidation of witnesses, or other positive act designed to conceal from the authorities the fact that a crime has been committed. Furthermore, some such interpretation is necessary to rescue the act from an intolerable oppressiveness and to eliminate a serious question of constitutional power. Whatever may have been the case in 1790, when **[*723]** federal felonies were few, the act if otherwise construed would be but another unworkable and unenforceable law in latter days. n152

One frequently voiced aphorism about misprision of felony is that requiring an affirmative act of concealment makes the crime equivalent to the offense of being an accessory after the fact. n153 But this view is erroneous. Insofar as an accessory must assist the felon, n154 one who affirmatively acts to conceal a felony but not to assist the felon escapes accessorial criminal liability. n155 Thus, while misprision is no longer a criminal omission when it is interpreted to require an affirmative act of concealment, it remains conceptually distinct from the offense of being an accessory after the fact to a felony.

B. Repealed State Statutes

Three states-Louisiana, Maine, and New Jersey-enacted misprision statutes closely resembling the federal misprision of felony statute. All three have been repealed.

Louisiana's statute read:

If any person having knowledge of the commission of any crime punishable with death, or imprisonment at hard labor, shall conceal and not disclose it to some committing magistrate or district attorney, on conviction he shall be fined not exceeding three hundred dollars, and imprisoned at hard labor or otherwise not exceeding twelve months, at the discretion of the court. n156

[*724]

An authoritative interpretation of the duty imposed by the statute never emerged. n157 Two prosecutions for the crime reached the state's supreme court, one in 1938 n158 and one in 1940. n159 In both, the court disposed of the cases on jurisdictional grounds n160 and did not decide what would constitute concealment for purposes of the statute. The statute was repealed in 1942. n161

Maine had a misprision of felony statute which read:

Whoever, having knowledge of the actual commission of a felony cognizable by courts of this state, conceals or does not as soon as possible disclose and make known the same to some one of the judges or some officer charged with enforcement of criminal laws of the state shall be punished by a fine of not more than $ 500 or by imprisonment for not more than 3 years, or by both such fine and imprisonment. n162

In the 1955 case of State v. Michaud, the Supreme Judicial Court of Maine held that the state statute, like its federal counterpart, required an affirmative act of concealment, mere omission to disclose knowledge of the commission of a felony not being enough. n163

[*725]

The court reasoned that the word "and" as used in the phrase "conceals and does not as soon as possible disclose" in the federal statute and the word "or" as used in the phrase "conceals or does not as soon as possible disclose" in the state statute are convertible and not contradictory. The "or" was interpreted as being conjunctive rather than disjunctive and the statute thus required concealment in the active sense as well as nondisclosure. n164 The statute was repealed in 1976. n165

Unlike most every other jurisdiction in the United States, New Jersey classifies crimes not as felonies and misdemeanors but as high misdemeanors and misdemeanors. n166 Its statute, captioned 'concealment of crimes' in its criminal code, n167 read:

Any person having knowledge of the actual commission within the jurisdiction of this state of arson, manslaughter, murder, or of any high misdemeanor, who conceals and does not, as soon as may be, disclose and make known the same to a judge, a magistrate, prosecutor or police authority, is guilty of a misdemeanor. n168

In the 1878 case of State v. Hann, n169 the state supreme court upheld the defendant's conviction under an earlier version of the statute for failing to disclose his knowledge of a murder. n170 "All that he did was to see the offense committed and to remain silent. . . . To conceal his knowledge of such an act, and to remain passive and silent was, at the common law, a misprision of felony and which offence has been . . . specialized and defined [in the statute]." n171

[*726]

In a later case, the state supreme court overturned a conviction under the statute on evidentiary grounds, n172 but also suggested the crime would have been inapplicable to the defendant in any event because, at one point, he was himself accused of the allegedly concealed murder and prosecution under the statute would conflict with his privilege against self-incrimination. n173

A conviction under the statute was overturned on self-incrimination grounds in 1977. n174 The defendant was charged with both participating in a lethal firebombing as a co-conspirator and failing to disclose the same crime as required by the statute. He was acquitted of the former offense but convicted of the latter. The court reasoned that because the disclosure required under the statute could have furnished a link in the chain of evidence establishing the defendant's guilt as a participant in the crime in question, he could not be required to make such a disclosure without being forced to incriminate himself. n175 The statute was repealed in 1979. n176

C. Current State Statutes

Two states, South Dakota and Ohio, currently maintain the crime of misprision of felony in statutory form. n177 South Dakota's statute reads:

[*727]

Any person who, having knowledge, which is not privileged, of the commission of a felony, conceals the same, or does not immediately disclose such felony, with the name of the perpetrator thereof, and all facts in relation thereto, to the proper authorities, shall be guilty of misprision of felony. Misprision of felony is a Class 1 misdemeanor. There is no misprision of misdemeanors or petty offenses. n178

The author's research has found no authoritative pronouncement on the extent of the duty imposed by the statute. The word "or" in the phrase "conceals . . . or does not immediately disclose . . ." could be construed as it was in the repealed Maine statute by the court in the Michaud case. n179 "Or" could operate to conjoin the ideas of concealment and nondisclosure. Failure to disclose immediately would be a necessary but not sufficient part of concealment. Concealment would require some affirmative act. n180

On the other hand, the language of the statute lays emphasis on immediate disclosure of all facts relating to a felony. "Or" could operate in the disjunctive, and the statute would then make punishable either concealment or failure to disclose- establishing two independent grounds for criminal liability.

Perhaps it is relevant that the statute's application is expressly limited to persons having knowledge that is not privileged. If mere failure to disclose is reached by the statute, the limitation would serve to protect lawyers, clergy, and others having privileged knowledge (and persons having self-incriminating knowledge) from being arrested or prosecuted for not coming forward with their information. Then again, if the statute reaches only active concealment, the limitation would serve to keep persons having privileged knowledge from being arrested or prosecuted when they refuse to answer questions put by authorities that reach the privileged information, or if they destroy records of their conversations or correspondence with the persons imparting privileged information to them, or took other lawful steps to keep privileged communications confidential.

[*728]

As noted above, n181 the Court of Appeals of Ohio expressly stated in the 1966 case of State v. Young, that common-law misprision of felony was not part of the state's criminal law because common law offenses are not retained in Ohio. n182 However, Ohio has enacted misprision of felony in statutory form.

Ohio's statute is unambiguous in making criminal an omission to reporta felony. It states "No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities." n183 Violation of the statute is a misdemeanor in the fourth degree. n184 The legislature stated the reasoning behind the statute:

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. This situation covers, for example, the situation where bystanders ignore a murder victim's pleas for help because they do not want to "become involved." n185

The statute enumerates a number of exceptions. Attorneys, doctors, psychologists, and reporters are shielded from revealing privileged information. n186 Clergy are similarly protected. n187 Telephone operators, drug counselors, and rape counselors are also excepted from revealing information [*729] they get in the course of their work. n188 Persons need not reveal that which would incriminate members of their immediate family, n189 but the statute does not enumerate an exception for information that could result in self- incrimination. n190

However, in the 1985 case of State v. Wardlow, n191 the Court of Appeals of Ohio ruled that a defendant cannot be convicted under the statute when the duty imposed by the statute would conflict with the defendant's privilege against self-incrimination. The defendant's teenage daughter had been sexually assaulted by the defendant's live-in boyfriend on several occasions. The defendant was convicted of child endangerment and of failure to report a crime as required by § 2921.22(A). n192 The court held that the statute was not unconstitutionally vague because it "gives a person of ordinary intelligence fair notice that the conduct of failing to report a serious crime about which a person has knowledge is forbidden by statute." n193 But if Wardlow had made the disclosure mandated by statute, she would have exposed herself to prosecution for child endangerment and also for welfare fraud, since her boyfriend had been living in her home for over two years. Hence, the court overturned the conviction for violating the statute. n194

The appeals court had already set important limits on the extent of the duty to report felonies under the statute in the 1980 case of In re Stichtenoth. n195 The defendant, a juvenile, was one of a number of persons who had witnessed a stabbing in the parking lot of a skating rink. He went back to the rink and told the woman at the front desk to call and report the incident. He was the first to do so. He also told a second person to do the same, then returned to the parking lot. When police arrived on the scene and questioned him, he denied having knowledge of what happened. Later that evening, the authorities received several anonymous calls concerning the stabbing, which the defendant claimed [*730] he made. The defendant was found to have violated § 2921.22(A) and was adjudged a delinquent child. n196

The appellate court reversed, n197 stating its reasoning as follows:

Giving "report" its ordinary meaning, we conclude that it includes both notifying law enforcement officials and setting in motion events which will result in notification to these officials. The statute does not proscribe a refusal to answer police questions once the police are aware of the crime.

In this case it is uncontradicted that appellant requested two people to notify the authorities immediately after the stabbing. Reporting a felony to responsible people at a large public space constitutes setting in motion events which will result in notification of law enforcement officials.

Furthermore, it cannot have been the intent of the legislature to require a vain act, namely, to require a report of something law enforcement officials already patently knew. Once the police arrived at the scene and were clearly aware that a felony had been committed, there was no further need to report that fact. n198

IV. Statutes Imposing A Reporting Obligation Upon Eyewitnesses To Specific Crimes

There are a good many examples of statutes requiring specifically delimited groups of people to report certain crimes or circumstances indicating commission of a crime. n199 Many states have statutes requiring medical personnel who treat a person with wounds inflicted by deadly weapons or otherwise indicating violence to notify police. n200 Many states a' require auto repair garages to notify police of cars showing evidence of having been in [*731] accidents or struck by a bullet, although frequently no penalty for noncompliance is provided. n201

Statutes imposing a universal duty to report specific crimes are much less common, but a significant minority of states require anyone who has reason to believe a child has been subjected to abuse to report it to authorities. n202

A. Current Statutes

A trio of states-Massachusetts, Rhode Island and Washington-have enacted statutes requiring those who are present when certain violent offenses are committed to notify authorities. n203

Washington's statute, first enacted in 1970, currently provides:

(1) A person who witnesses the actual commission of:

(a) A violent offense . . . or preparations for commission of such an offense;

(b) A sexual offense against a child or an attempt to commit such a sexual offense; or

(c) An assault of a child that appears reasonably likely to cause substantial bodily harm to the child, shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance or other public officials.

[*732]

(2) This section shall not be construed to affect privileged relationships as provided by law.

(3) The duty to notify a person or agency under this section is met if a person notifies or attempts to provide such notice by telephone or any other means as soon as reasonably possible.

(4) Failure to report as required by subsection (1) of this section is a gross misdemeanor. However, a person is not required to report under this section where that person has reasonable belief that making such report would place that person or another family or household member in danger of immediate physical harm. n204

Massachusetts and Rhode Island enacted their statutes in direct response to the infamous Big Dan's rape case which occurred in New Bedford, Massachusetts, in 1982. n205 The two statutes impose very similar reporting obligations on the general public.

The Massachusetts statute provides:

Whoever knows that another person is the victim of aggravated rape, rape, murder, manslaughter, or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand five hundred dollars. n206

[*733]

The Rhode Island statute provides:

A person who knows that another person is a victim of sexual assault, murder, manslaughter, or armed robbery and who is at the scene of the crime shall, to the extent that the person can do so without danger of peril [sic] to the person or others, report the crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates the provisions of this section shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not less than five hundred ($ 500) nor more than one thousand dollars ($ 1,000). n207

The three statutes are more alike than not, but there are several important differences. Washington's law is in some ways 'tougher' than those of Massachusetts and Rhode Island: (1) Washington imposes a reporting duty on a broader range of offenses that Rhode Island or Massachusetts; n208 (2) Massachusetts and Rhode Island suspend the duty to report when there is danger to oneself or any other person while Washington suspends the duty to report only when there is danger to oneself or members of one's family or household; (3) the maximum penalties for violating the Washington statute ($ 5,000 fine and 1 year imprisonment) are substantially more severe that those under the Massachusetts statute ($ 2,500 fine only) or the Rhode Island statute ($ 1000 fine or six months imprisonment). On the other hand, Washington's statute specifies that (1) it does not curtail privileged relationships, (2) notification does not have to go directly to law enforcement authorities but can be given to providers of medical assistance, and (3) a timely attempt to provide notice by telephone or other means will suffice. The Massachusetts and Rhode Island statutes make no express provision for privileged relationships, notification which goes to providers of medical assistance, or reasonable attempts to provide notice, but a prudent interpretation of these laws would reach results similar to Washington's statute.

There is also a question of whether the Washington statute obliges a crime victim to report his or her own victimization. A person who witnesses the actual commission of a violent offense will often be the victim of that offense (although it is intuitively obvious that the law is directed at malingering bystanders and not silent victims). In contrast, the Rhode Island and [*734] Massachusetts statutes specify that the reporting duty arises only when one knows that another person is the victim of an enumerated violent offense. n209

There are no case reports of prosecutions under any of the three statutes.

B. The Levick Case

A macabre incident in Washington State illustrates the abrupt limits built into these eyewitness reporting laws. n210 Because the reporting duty applies only to those who are actually present when a crime is committed, the failure of after-the-fact witnesses to summon assistance for people who have been injured or otherwise endangered does not constitute a violation of the statutes.

On the night of June 1, 1996, twenty-one year old Joey Levick met two former high-school classmates, Jason Twyman and Jason Soler, at a Seattle dance club. At closing, the trio left for a private party. Sometime after 3:00 a.m., an argument broke out among the group as they drove down the highway in Soler's car. The vehicle was brought to a stop and a violent fight ensued. Levick ended up in a drainage ditch, grievously injured with broken bones and head trauma. Soler and Twyman fled the scene on foot. n211

Twyman returned to the scene with his brother. Later, Soler returned to the scene with Twyman's girlfriend, Joanne Laborde. All were aware that Levick was in the ditch and injured, yet Laborde was the only one to make a 911 call, and she declined to give dispatchers information needed to direct assistance to Levick. Soler returned to his home with Laborde and told his mother about Levick's dire circumstance. Soler's mother made several abortive attempts to ascertain from police and 911 dispatch personnel whether Levick had received assistance. When she finally got a police sergeant to visit the ditch, Levick was found dead. n212

Twyman was convicted of second-degree murder. n213 The conduct of Laborde and others who were aware of Levick's situation but failed to help him [*735] provoked much furor. n214 However, since no one but the assailants

actually witnessed the attack on Levick, no prosecution was possible under the language of the Washington crime reporting statute. n215

Prodded by the civic efforts of Mr. Levick's parents, Washington State legislators attempted to enact a criminal statute requiring persons to summon assistance for seriously injured parties in need of aid. n216 Other states already have this type of law as part of their criminal codes.

V. Mandatory Rescue Statutes

Some states have enacted statutes imposing an affirmative duty to act when one knows that another is endangered and one can call for help or otherwise render assistance without endangering oneself. n217 The specific provisions of these statutes vary substantially but, as to crime reporting, all (at least by their literal terms) would require a bystander to notify the authorities of criminal conduct whenever doing so could aid an individual imperiled by such criminal conduct.

A. Generalized Duties to Assist Persons in Danger

Three states-Vermont, Minnesota and Rhode Island-have statutes that, without specific reference to violent crimes, impose a general obligation to assist others who are in peril.

[*736]

Vermont enacted its statute in 1967. Known as the 'Duty to Aid the Endangered Act,' it provides:

(a) 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 without interference with important duties owed others, give reasonable assistance to the exposed person unless assistance or care is being provided by others....

(c) A person who willfully violates subsection (a) of this section shall be fined not more than $ 100.00. n218

The Supreme Court of Vermont, in the 1981 case of State v. Joyce, n219 stated that "[T]his statute does create a duty to aid endangered persons under some circumstances. It does not create a duty to intervene in a fight, however. Such a situation must present the 'danger or peril' to the rescuer which under the statute prevents a duty from arising." n220 It follows that, in the context of an [*737] ongoing violent attack, absent highly unusual circumstances, the statute could not require a bystander to do more than summon help from law enforcement. n221

Rhode Island enacted a very similar statute, with much more severe penalties, in reaction to the Big Dan's case. n222 It currently states:

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months or by a fine of not more than five hundred dollars ($ 500), or both. n223

Minnesota also enacted a statute very similar to Vermont's Duty to Aid the Endangered Act in response to the Big Dan's case. It states:

Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. Any person who violates this subdivision is guilty of a petty misdemeanor. n224

In 1991, Minnesota enacted a statute imposing a duty to render aid to shooting victims. It states:

[*738]

(a) A person who witnesses the discharge of a firearm and knows or has reason to know that the discharge caused bodily harm to a person shall:

(1) immediately investigate the extent of the injuries; and

(2) render immediate reasonable assistance to the injured person.

(b) A person who violates this subdivision is guilty of a crime and may be sentenced as follows:

(1) if the defendant was a companion of the person who discharged the firearm at the time of the discharge, to imprisonment for not more than one year or to payment of a fine of not more than $ 3,000, or both;

(2) otherwise, to imprisonment for not more than 90 days or to payment of a fine of not more than $ 700, or both. n225

"Reasonable assistance" is defined as "aid appropriate to the circumstances, and includes obtaining or attempting to obtain assistance from a conservation or law enforcement officer, or from medical personnel." n226 The statute further provides that:

It is an affirmative defense to a charge under this section if the defendant proves by a preponderance of the evidence that the defendant failed to investigate or render assistance as required under this section because the defendant reasonably perceived that these actions could not be taken without significant risk of bodily harm to the defendant or others. n227

B. Duties to Rescue or to Summon Assistance Applicable Only to Crime Victims

1. Violent Crimes Generally

Wisconsin, also acting in the wake of the Big Dan's Case, n228 enacted a statute imposing a duty to rescue that extends only to victims of violent crimes rather than endangered persons generally. It states "[a]ny person who knows that a crime is being committed and that a victim is exposed to bodily harm [*739] shall summon law enforcement officers or other assistance or shall provide assistance to the victim." n229 Certain limits on the duty imposed are enumerated:

A person need not comply with this subsection if any of the following apply:

1. Compliance would place him or her in danger.

2. Compliance would interfere with duties the person owes others.

3. [A]ssistance is being summoned or provided by others. n230

These exceptions to the duty imposed are affirmative defenses for which the defendant bears the burden of persuasion. n231

There is one case report of a prosecution under the statute. n232 On January 14, 1992, Karie La Plante and her boyfriend, Shelton Brooks, both twenty-one at the time, threw a party at La Plante's home. n233 A girl of fifteen named Monica Hendy was in attendance, as was one Tracy Moore. n234 Moore expressed to La Plante an intent to physically assault Hendy. Later, a scuffle ensued when Monica Hendy was fending off a male guest's unwanted advances. Moore pushed Hendy outside. There, while La Plante watched, Hendy was fiercely pummeled by a group of seven assailants. Hendy's friend then helped her to a neighboring house and summoned assistance. n235

A jury convicted the couple under the statute and they were sentenced to probation, community service, and payment of a fine. n236 La Plante appealed. n237 Before the Wisconsin Court of Appeals, she argued that the statute was unconstitutionally vague, but the court rejected this, finding that her conduct fell "squarely within the prohibited zone the statute." n238 She next argued that [*740] the statute violated the privilege against self-incrimination, but the opinion does not indicate what factual predicate she had for this contention, and the court rejected it, noting that she was free to render assistance herself or summon it anonymously. n239

Hawaii has a similar statute, enacted in 1984, which provides:

Any person at the scene of a crime who knows that the victim of the crime is suffering from serious physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person. Any person who violates this subsection is guilty of a petty misdemeanor. n240

There are no reported cases of prosecutions under the statute. The phrase 'scene of a crime' lends itself to different interpretations. Must one be at the scene when the crime is committed, or does it suffice to arrive some time after the fact and find the victim in distress? If a crime victim wanders some distance from the place where he or she was attacked before being discovered by potential rescuers, do the potential rescuers escape the obligation to summon assistance because they never actually went to the crime scene?

2. Sexual Offenses

In what can only be viewed as knee-jerk reaction to the Big Dan's rape case, n241 two states-Florida and Rhode Island-enacted legislation requiring bystanders to summon police assistance when they observe a victim being raped. Florida's statute mandates:

A person who observes the commission of the crime of sexual battery and who:

(1) Has reasonable grounds to believe that he or she has observed the commission of a sexual battery;

(2) Has the present ability to seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer;

[*741]

(3) Fails to seek such assistance;

(4) Would not be exposed to any threat of physical violence from seeking such assistance;

(5) Is not the husband, wife, parent, grandparent, child, grandchild, brother, or sister of the offender or victim, by consanguinity or affinity; and

(6) Is not the victim of such sexual battery

is guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083 n242

Clearly the drafters of this statute were trying to carefully specify and limit the obligation it imposes. The decision to exempt family members of the assailant is questionable but understandable. The rationale for exempting family members of the victim from having to report a rape in progress is much less clear. After the fact, when the crime is already committed, shame and sympathy with the victim's desire to keep quiet might motivate family members not to report. But if persons are presently witnessing the ongoing rape of one of their own family members, their obligation to summon assistance would be especially acute.

Rhode Island's statutory provisions are as follows:

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

No person shall be charged under [the statute] unless and until the police department investigating the incident obtains from the victim a signed complaint against the person alleging a violation of [the statute].

Any person who knowingly fails to report a sexual assault or attempted sexual assault as required under [the statute] shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or fined not more than five hundred dollars ($ 500) or both. n243

[*742]

This statute is superfluous in light of Rhode Island's recognition of common-law misprision of felony, n244 its duty to rescue statute, n245 and its other duty to report statute, n246 discussed above. There is no obvious reason why witnesses who fail to report a rape or attempted rape should be fined just as heavily and imprisoned twice as long as witnesses who fail to report a murder. Nor is it obvious why a complaint by a rape victim against malingering bystanders should lead to a doubling of the maximum prison sentence to which the bystanders are subject for their dereliction. n247 The statute also lacks a provision expressly suspending the duty when reporting would put oneself or other innocent persons in danger. Whatever the substantive merits of laws imposing a duty to report crimes, this particular statute is surplusage and should be repealed.

VI. Comparing The Duty To Rescue With The Duty To Report

While a statute mandating rescue or the rendering of assistance connotes direct intervention in an emergency, personal intervention in an emergency situation will often carry some non-negligible risk of danger to the rescuer, and this would be especially true in a case of criminal violence. Therefore, in the case of an imperiled crime victim, the duty to rescue and the duty to report largely overlap, both requiring that a rescuer or reporter summon assistance through official channels. n248

[*743]

In other contexts, the two duties do not overlap. Mandatory rescue and mandatory crime reporting have different purposes. n249 A duty to rescue focuses on aiding victims in peril, with only an incidental focus on criminal perpetrators. On the other hand, the duty to report crime focuses on apprehending criminal perpetrators with only an incidental focus on endangered persons. Each duty has built-in limits that can yield paradoxical results, as can be demonstrated by a couple of hypothetical examples.

Consider application of the duty to rescue to the case of a passerby who sees an assailant attack a person on the street. If the assailant severely wounded the victim but left him alive, the passerby would have an obligation to summon assistance for the victim. However, if the assailant instantly killed the victim, as by decapitation, no duty to rescue would arise for the passerby. Because the legal obligation entails rescuing victims and not informing on criminals, nothing need be done for a victim who, being already dead, is beyond help.

Now consider the application of the crime reporting duty to a man on a hike in the woods with a cellular phone is his hand. If this man watched another person being attacked by a malevolent stranger, he would be under an obligation to make a 911 call and report the situation to authorities. However, if this same man saw a person suffering equally serious injury due to an attack by a wild animal or the falling of a tree, he would be free to callously ignore the person's plight, since no crime was being committed. n250

These examples might be dismissed as "classroom hypotheticals," n251 but they are useful, because the duty to render assistance to endangered persons must not be confused with the duty of witnesses to inform upon criminal perpetrators. The two obligations are conceptually distinct and it could be [*744] misleading to portray a crime witness reporting duty solely as a humanitarian imperative to assist crime victims. Crime witness reporting is more accurately described as a duty directed at the apprehension of criminals. Its benefit to a crime victim under attack in the presence of bystanders would be most welcome, but such benefit may be characterized as secondary to or derivative of the duty to inform on a perpetrator. n252

The limits of mandatory crime witness reporting as a humanitarian tool is demonstrated with chilling clarity by the Levick case from Washington state. n253 A crime witness reporting statute's potential to bring timely assistance to crime victims is a vital benefit, but it must be recognized that legislation of more general applicability is required if the desired end is to wholly prohibit bystander indifference to persons in situations of peril.

With this caveat in mind, we turn to the merits of a crime reporting duty.

VII. Policy Considerations Regarding Imposition Of An Obligatory Crime Reporting Duty On The Public At Large

At this point, it should be clear that any discussion of imposing a general duty to report crime n254 cannot proceed by listing the merits and demerits of such a duty. The arguments for and against a general crime reporting duty (hereinafter a reporting duty) will vary with the specific terms of the duty in question.

The laws and legislative proposals on the subject run the gamut. At one extreme, there is simple misprision of felony, which in its broadest formulation makes criminal any failure to report what one knows of a felony.

[*745]

The overbreadth of misprision is plain. n255 A reporting duty with such broad sweep as traditional misprision would allow intolerable intrusions on personal liberty. n256 It would also give too much discretion to prosecutors. n257 Even among proponents of the common-law crime or a comparably broad reporting duty, endorsements are something less than ringing. n258

At the other extreme, there is the Florida statute singling out the eyewitness to rape as having an obligation to summon assistance while leaving the impassive eyewitness to murder or armed robbery unmolested. n259 The irrational narrowness of this statute is even plainer than misprision's overbreadth.

[*746]

Before deciding if imposing a reporting duty is wise, we must define the type of reporting duty for which we can make the strongest case. Put another way, we must discern which sort of reporting duty is least objectionable.

Let us take as given that any acceptable reporting duty must be set forth in a statute enacted by the legislature or by referendum, n260 since bringing forth the obscure and little-known common-law doctrine of misprision under a reception statute or state constitution's reception clause is patently unfair to a defendant. n261

As one commentator has observed, "[i]t is impossible to give statutory effect to the common-law crime of misprision without severely qualifying the elements of the offense." n262 The drafter of the statute or referendum question [*747] then has to decide what qualifications are in order. n263 One option is to make criminal liability turn on the defendant's subjective intent. Bishop's suggestion that an evil intent be made a part of misprision n264 hardly seems a workable standard for fixing criminal liability for an omission. The intent behind an affirmative act can be the most decisive factor in determining the actor's culpability. Intent distinguishes murder from manslaughter and manslaughter from negligent homicide. n265 Yet, "[f]ormulae that pass muster in determining the liability of one who engages in a dangerous course of conduct are not always suited to crimes of pure omission." n266 An open-ended inquiry into why a defendant chose not to report a crime is likely to be inconclusive. And prosecutions that target only those who have some demonstrably malevolent purpose for remaining silent will not affect those who neglect to report a crime out of sheer apathy or indifference. Making willfulness a requirement for conviction is unhelpful. While it is intuitively obvious that "silence should be a willful act since criminal punishment for mere negligence seems 'too harsh for man,'" n267 anyone who actually knows of a crime but freely chooses not to report it is being willful in the literal sense of the word. n268 Excusing 'mere negligence' in failing to report is just another way of saying that failing to detect a crime or a means of revealing it is not in itself criminal. If by 'willful' one means consciously hoping that one's silence will allow a crime to go undetected, 'willfulness' is just another synonym for 'evil intent.'

In delimiting an individual's duty to report crime, a statute should focus on concrete actions rather than subjective intentions. The citizen is entitled to a definite statement of what is required of him or her. n269 Specifically, the citizen should know (1) under what circumstances a duty to report a crime arises and (2) what actions will suffice to discharge the duty. n270

However phrased, any statute imposing a mandatory reporting duty will bear analogy to common-law misprision of felony. To violate the law, one [*748] would have to know of a crime, then fail to take a reasonable opportunity to disclose it to the authorities. n271

A. The Knowledge Requirement

What sort of knowledge or information must one have before being obliged to go to the police? The objective, 'reasonable man' standard articulated by Lord Denning in the Sykes case n272 is indefensible. An obtuse or limited individual who perceives no wrongdoing where a reasonable person would know a crime had been committed deserves no punishment. Blame attaches to one who actively imposes on another with one's ineptness or stupidity, but a person who cannot conform his behavior to the standard set by reasonable persons should at least be free to keep to himself. One commentator has suggested borrowing the subjective standard of knowledge applicable to the crime of receiving stolen property:

Under this standard a defendant would have sufficient knowledge for a conviction of misprision if he either: (1) knows that the crime is committed, (2) believes that a crime was committed, or (3) has his suspicions definitely aroused and refuses to investigate for fear he will discover that the crime has been committed. n273

P. R. Glazebrook's critique of this approach (made in reference to the Sykes case but applicable to any reporting duty) is hard to gainsay:

It is not very helpful simply to refer to the crimes of the accessory after the fact or the receiver of stolen property, where knowledge of the commission of a felony is an ingredient, for they concern positive acts, and it is, no doubt, reasonable to require a person who suspects that something is wrong to inquire further before embarking on some course of conduct, and to hold that he fails to do so at his peril. If this rule is applied to misprision two duties are imposed: a duty to disclose knowledge of a felony, and a duty also to make inquiries to resolve a suspicion concerning a felony. Are the English to become a nation of detectives as well as a nation of informers? n274

[*749]

In defining the knowledge requirement, a drafter could attach a reporting duty to any one of numerous gradations of certainty. The state statutes mandating duties to rescue endangered persons or report certain violent crimes have limited the obligation imposed to persons who actually witness a crime or emergency. Adopting this simple, bright-line standard would avoid the need for a searching inquiry into what a defendant knew or when he knew it. Axiomatically, one who actually witnesses the commission of a crime has the most incontrovertible first-hand knowledge of it. n275 Commentators proposing misprision-like statutes have embraced this approach to the knowledge requirement. n276 However, at least one writer has criticized it, saying it is myopic and "creates an unnecessarily narrow approach to the crime reporting duty." n277

Of course, it stands to reason that one who learns of a crime without witnessing it usually does so through communications with a victim, a perpetrator, or a witness to a crime. Any acceptable reporting duty should exempt crime victims, n278 and if a victim chooses not to notify authorities, [*750] penalizing another for respecting the victim's choice would be unduly harsh. If a perpetrator confides in an individual, applying the reporting duty to the individual puts him or her in the highly ambivalent position of the informant who betrays another's trust. n279 If the reporting duty arises every time one gets second-hand information about a crime, witnesses already under the onus of the duty would be able to extend it to others at will without limit. n280 The reporting duty would become a contagion.

None of these considerations is dispositive. One can imagine situations in which extending the reporting duty beyond witnesses would yield extremely desirable results. n281 But it is far from clear that the incremental benefits gained by extending the reporting duty beyond witnesses outweighs the benefit of having a fixed and certain rule making first-hand knowledge of a crime a prerequisite of the duty. n282

B. The Crimes Covered

An acceptable crime reporting statute should specify which crimes are covered by the duty. Whether a crime should be covered by a duty-to-report law largely turns on the gravity of the crime. n283 The overreaching of a rule [*751] requiring that all felonies be reported is manifest. n284 Currently, the demarcation of felonies from misdemeanors does not separate consistently major from minor crimes. n285

A number of methods for narrowing the scope of crimes that must be reported are plausible. One writer offering a proposed statute adopts the 'seriousness requirement' posited by Lord Denning in the Sykes case. n286 The reporting duty would apply to:

[A]ny crime which is punishable by more than one year in prison and of such a nature that a reasonable person in the same circumstances would know it to be a serious offense. This includes, but is not limited to, Murder, Robbery, Rape, Assault and Battery, Burglary and Auto Theft in all their degrees. n287

[*752]

Certainly the crimes enumerated are not trivial, but, in deciding whether a person knowing of other crimes should be penalized for pure inaction, it would be desirable to have a method more structured than a wide-open inquiry into the seriousness a hypothetical reasonable person would ascribe to the offense under a given set of circumstances. One's views on personal privacy, recreational drug use, or civilian gun ownership can vastly influence the seriousness one would attach to certain felonies, and reasonable persons can have radically different views on such matters. Another writer has acknowledged that society is constantly creating laws that large segments of the population dislike (such as alcohol prohibition and marijuana prohibition) and making the reporting of violations of those laws mandatory would be "demanding too much and would clearly be disregarding human nature." n288 As a solution, he proposes limiting the reporting duty to those crimes which were designated as felonies by the English common-law: murder, mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon. n289 Of course, a rule mandating the reporting of every felonious larceny would be severe. The writer suggests further limiting the reporting duty "to crimes which are so serious that a reasonable man would consider it his duty to inform the police." n290 But again, this notion of seriousness is a very fluid standard by which to judge the inaction of a person having knowledge of the commission of one of the enumerated crimes. In case of larceny, what factors, besides the value of the article stolen, must be considered? Does it matter that the thief was very young or desperately needy? Is stealing a given amount from a very wealthy victim any less serious than stealing the same amount from a very poor victim? These are questions upon which 'reasonable men' can differ. Other commentators have espoused limiting the reporting duty to crimes of the utmost gravity, n291 as specifically enumerated in proposed statutes. n292

[*753]

If there is to be a reporting duty at all, there can be little controversy about applying it to violent crimes that pose a significant danger of causing serious bodily injury to innocent persons. Extending the duty to report to property crimes is more debatable. n293 On the one hand, certain property crimes, like burglary and auto theft, can create serious breaches of the peace and easily precipitate physically dangerous situations (i.e., armed confrontations, high-speed pursuits). On the other hand, the problem of delineating the serious from the trivial property crimes with any comfortable degree of precision is probably insoluble.

Once a duty to report arises, a citizen needs to know how it can be discharged. The citizen should have the maximum flexibility consistent with the purpose of bringing the crime to the attention of the authorities rapidly.

C. Timeliness of a Report

Time is of the essence in efforts to apprehend criminals, and in the case of a violent crime in progress, a timely report can rescue the victim from injury or death. It is hard to improve on statutory provisions that a crime be reported as soon as "reasonably practicable" or "reasonably possible." n294 Requiring notification "immediately" ignores that immediate notification is not always feasible. n295 A specific time limit, such as requiring one to notify police "within twenty-four hours of [a crime's] commission," n296 would permit inexcusable delay.

Naturally, an individual should not be obliged to report a crime until such report can be made without endangering himself or other innocent parties. n297

[*754]

D. Party Notified

The ubiquitous 911 system greatly simplifies the task of notifying authorities of a crime or other emergency by telephone. n298 A report given to police or fire department personnel, rescue workers, or other persons in a similar official position of authority, personally or through a 911 dispatcher, would fulfill the reporting duty. n299 In addition, notice to a security guard, store detective, or any other person reasonably perceived as responsible for safety and security on certain premises should suffice to discharge a reporter's duty. n300

E. Content of a Report

Whether a statute requires one to report a crime, n301 to report one's knowledge of a crime, n302 or to report "all facts in relation to a crime," n303 the information needed by police remains the same. They need to know the nature of the crime and the place of its commission. In solving the crime, an identification or reliable description of the perpetrator and victim is useful, but will not always be available. The making of a timely report that contains this basic data is the end point of a citizen's action in compliance with his or her [*755] reporting duty. The advantage society gains from having mandated such action largely depends on the response of the authorities receiving the report. n304

F. Attempt to Report

Currently, only Washington's crime reporting statute expressly provides that the reporting duty is met by an attempt to provide public officials with notice of a crime. n305 In all fairness, one who makes a bona fide attempt to comply with a reporting duty should not be found in dereliction of that duty if notice is not actually received by authorities. n306

G. Exemptions

Apart from victims and persons shielded by the privilege against self- incrimination, who should be exempt from the reporting duty? Commentators tend to focus on how a relationship with the offender affects the obligation [*756] to report, n307 but a relationship with the victim can also affect the moral obligation to report a crime. n308 A reporting duty drafted to protect relationships traditionally recognized as confidential (attorney-client, doctor- patient, clergy-penitent, counselor-client, husband-wife, etc.) will avoid much hardship and conflict of loyalty, but will leave vulnerable other important relationships (such as those between siblings, friends, lovers).

Problems of privileged or otherwise confidential relationships impinged on by a reporting duty are most acute when a person is required to betray the trust another puts in him or her as a confidant. By limiting the duty to report to those who actually witness the commission of a crime (as opposed to extending it to anyone who learns of a crime), most of these problems can be avoided altogether. A rule that people must report crimes that occur in their presence does not implicate private communications. This in itself is a powerful reason for limiting the reporting duty to witnesses of the crime's commission.

A crime reporting law drafted to meet all of the considerations advanced above would closely resemble Washington's crime reporting statute. That kind of lucid, specific statute avoids most of the overbreadth and vagueness characteristics of traditional misprision of felony. n309 Further, by limiting the scope of the duty to report violent crimes, the potentially intrusive and overbearing applications of traditional misprision are largely obviated.

If we take the American misprision cases discussed above, and for those about which we have sufficient facts consider how they would turn out under a [*757] crime reporting statute similar to Washington's, we can see that the results would be quite tenable. Naturally, those shielded by the privilege against self-incrimination (Lopes, n310 Wardlow, n311 Conquest n312) would remain so. Mrs. Biddle would have to report the armed robbery she saw, but only

when it was safe to do so. n313 Ms. Michaud could not be prosecuted for failing to report adultery, n314 nor could Mr. Holland for being silent as to marijuana possession. n315 Mrs. Pope, if she was too scared to rescue little Demiko, could be expected to leave and seek help. n316 Mr. Carson would have a duty to report having witnessed a murder. n317 Stitchtenoth, having gotten a responsible person to notify police of the crime he witnessed, would have discharged his duty. n318

VIII. Empirical Cases

Three times in the past half-century, the issue of affirmative rescue or reporting duties has exploded into the public's attention. Each case has involved an extremely violent sex crime committed in front of strangers to the victims. These cases have achieved such prominence in the debate over affirmative rescue and reporting duties that they merit individual consideration.

A. Catherine Genovese's Murder

Catherine ("Kitty") Genovese, twenty-eight years old, was returning to her home in the Kew Gardens section of Queens, New York, in the early morning hours of Friday, March 13, 1964, when she was attacked and killed by a slender, soft-spoken clerical worker named Winston Moseley. n319

[*758]

Genovese parked her car in a lot near her apartment and got out when Moseley, who had been following her vehicle, gave chase on foot, caught her, and stabbed her in her back with a hunting knife. n320 Her screams for help awoke neighbors, who flicked on lights and looked out on the street to see Moseley standing over Genovese on the sidewalk. n321 From an apartment window, a man yelled at Moseley to leave his victim alone. n322 Moseley did not quite understand what was said, but decided to run back to his car and move it around the corner of the next block, where he waited about ten minutes. n323 Meanwhile, Genovese went to the opposite side of buildings on the street, leaving sight of the first witnesses, and was seen by another witness, slipping into an apartment foyer a few doors down from her own, where she collapsed at the bottom of the stairs. n324

Moseley, having heard no commotion and confident that no one was summoning help, put on a different hat and returned for his victim. n325 The first witnesses saw him return, but still did nothing. n326 He finally found Genovese in the apartment foyer, slashed her throat to stifle her cry, viciously stabbed her, and sexually assaulted her orally. n327 Persons in the apartments at the top of the stairs did not report the commotion. n328 One man, peering out of his doorway, got a glimpse of the grotesque scene n329 (though he later denied it to police). n330 Moseley fled n331 and this man, after much deliberation and delay, called police [*759] from another person's apartment. n332 Police arrived after two minutes, but Genovese died before reaching the hospital. n333

Police and reporters who interviewed the witnesses to the crime never got meaningful answers when they asked why no one called the police. n334 Perhaps a known legal duty to summon police would have motivated at least one of the witnesses to do so. n335

Moseley was apprehended in less than a week n336 and convicted of Genovese's murder on June 8, 1964. n337

B. The Rape at Big Dan's Tavern

On the evening of Sunday, March 6, 1983, a twenty-two year old mother of two n338 entered Big Dan's Tavern, a bar, in New Bedford, Massachusetts. n339 The milieu seemed hospitable enough while she ordered a drink and chatted with others in the bar. n340 Just as she was about to leave, however, the situation turned ugly; she was seized by a group of male customers, hauled onto a pool table, and savagely raped. n341 Contemporaneous accounts of the incident appearing in the press described a sickening mob dynamic in which the other men in the barroom became enthused spectators to the crime, cheering and [*760] applauding the perpetrators in flagrante delicto. n342 The victim finally escaped and was rescued by the occupants of a passing vehicle. n343

Six defendants were brought to trial in the nearby town of Fall River. n344 The proceedings were televised. n345 Four of the accused were convicted of aggravated rape and two were acquitted. n346

Discrepancies and lacunae in the trial testimony left open some pressing questions about the true actions of bystanders at the scene. n347 The victim and some witnesses recalled hearing men shouting "Do it!," but the record never fully bore out the initial accounts of an acclamatory throng atavistically savoring the attack. n348 Still, "the existence of

a crowd was never disproved" n349 and depictions of the incident as a 'spectator rape' inspired a handful of states to enact rescue or reporting laws. n350

[*761]

The case generated a blizzard of newsmedia attention and caused a furor of controversy in New Bedford's Portuguese community so intense that the victim relocated to Florida, where she met an untimely death in a car accident. n351

C. The Sherrice Iverson Murder

Recently, an especially disquieting case of murder and child molestation in Nevada has, once again, focused public attention on the issue of affirmative duties to report crime or rescue endangered persons, and, in a few jurisdictions, inspired efforts by lawmakers to enact crime witness reporting legislation. n352

The crime occurred in 1997 over Memorial Day weekend at a Nevada casino. n353 David Cash and Jeremy Strohmeyer, two high-school seniors from Long Beach, California, took a trip to Primm, Nevada, with Cash's father. n354 In the early morning hours of May 25, Cash and Strohmeyer were together in the video arcade of the Primmadonna Resort. n355 Strohmeyer was chasing about with some younger children. n356 At one point, he followed a seven-year-old girl [*762] named Sherrice Iverson into a ladies' restroom, and was in turn followed by Cash. n357

Inside the restroom, Sherrice unexpectedly delivered a trifling blow to Strohmeyer with a small plastic "wet floor" warning sign. n358 Strohmeyer reacted by grabbing Sherrice and carrying her into one of the toilet stalls. n359 Cash went to the adjacent stall and peered over the partition at Strohmeyer restraining Sherrice with his hands on her waist and mouth. n360 Strohmeyer threatened to kill Sherrice if she was not silent. n361 Soon thereafter, Strohmeyer sexually molested Sherrice and strangled her to death. n362

The particulars of Strohmeyer's predation are appalling, but it is the behavior of David Cash that the public found most shocking. n363 Cash and Strohmeyer gave different accounts of what Cash did after seeing Strohmeyer restrain and threaten Sherrice in the bathroom stall. Cash maintains that he tried unsuccessfully to signal Strohmeyer to leave with him, then walked out by himself before Strohmeyer inflicted any physical harm on the child. n364 When Strohmeyer later rejoined Cash, he confessed to how he had molested and killed the girl. n365

Strohmeyer's account, on the other hand, implicates Cash in witnessing the molestation. Strohmeyer contends that he brutalized and defiled Sherrice in a blind fury. n366 By the time he came to his senses, Sherrice was near death. n367 [*763] Mortified, he inflicted the coup de grace on her by strangulation, then rejoined Cash in the arcade. n368 It was Cash who told Strohmeyer how he had watched Strohmeyer sexually assault Sherrice, n369 actions about which Strohmeyer disclaims any independent recollection. n370 According to Strohmeyer, Cash was actually congratulatory towards him and conveyed taking a vicarious pleasure in the crime. n371

The two young men returned to California with Cash's father. n372

Cash's exact actions probably will never be known with certainty, and Strohmeyer's amnesia might be dismissed as self-serving, but two young men well acquainted with Cash and Strohmeyer have stated that Cash privately admitted to watching Strohmeyer digitally penetrate Sherrice. n373 On any view of the facts, Cash's behavior provided strong grist to the advocates of affirmative reporting and rescue duties. n374

IX. The Fifth Amendment Problem

In each of the empirical cases discussed above, onlookers failed to summon assistance in a timely manner for a crime victim, resulting in tragedy. However, in each case, these same onlookers ultimately provided crucial information to authorities when compelled to do so. Ironically, their belated disclosures [*764] proved instrumental in bringing to justice the assailants of the victims they failed to help. It is a further irony that, if these onlookers had been subject to an affirmative reporting or rescue duty when they failed to summon assistance, their usefulness as witnesses may have been fatally compromised.

To wit, in the Genovese case, police investigators collated thirty-eight descriptions of the killer from the eyewitnesses who were willing to talk. n375 The end product was quite vague, n376 but, despite its imprecision, it cued detectives when Winston Mosley Brown was arrested for an unrelated burglary. n377 Once interrogated, he placidly confessed to a series of crimes, including the murders of Genovese and another woman. n378 In the Big Dan's case, the tavern's bartender took the stand and described the rape which he had witnessed without interceding, and his testimony

lent invaluable corroboration to the fiercely calumniated victim's account of events, even though defense attorneys impugned his credibility by portraying him as "prone to hallucinations and speaking to 'devils.'" n379 In the Iverson case, David Cash was deliberately unhelpful to Sherrice Iverson and those trying to apprehend her killer, yet he willingly gave detailed testimony to a Nevada grand jury - testimony that depicted Jeremy Strohmeyer as a lucid, purposeful murderer. n380 This testimony tended to undermine Strohmeyer's description of himself as a delirious, drug-addled berserker at the time of the murder. n381

What would have happened if these witnesses were subject to the mandate of a duty-to-rescue or duty-to-report statute? Fear of criminal liability could [*765] have silenced more of Kitty Genovese's neighbors when police came knocking. Assurances of immunity, if necessary to elicit testimony from the bartender at Big Dan's, could have further tainted his credibility in the eyes of jurors. n382 And David Cash could have been less forthcoming before grand jurors in Nevada if he was not so confident that his heartless indifference to little Sherrice's fate was beyond the reach of the law. In each event, efforts to capture, indict, convict, or sentence the perpetrators of the crimes witnessed may well have suffered.

Herein lies the most subtle-and the most damning-defect in a crime reporting duty: whenever a person fails initially to discharge that duty, the information the person has about the crime becomes self-incriminating information. n383 Derelict witnesses may be inhibited from coming forward or from giving truthful information n384 or, on the advice of a lawyer, may demand a formal grant of immunity, which would compromise the credibility of their testimony. n385

Hence, the suggestion that duty-to-report laws be used as leverage to obtain testimony from reluctant witnesses is flawed. n386 It could have just the opposite [*766] effect, giving the malingering bystander both the motive and the means to later withhold information about crimes witnessed but not promptly reported. n387 This costly drawback to rescue and reporting legislation must be weighed carefully against its benefits.

X. Conclusion

The author concludes that the benefits to be gained from a well-crafted, properly enforced, and widely publicized crime reporting duty outweigh any attendant drawbacks, including the fifth amendment problem.

There are considerable benefits we might associate with an affirmative crime reporting duty. One benefit is imposing sanctions on persons who shirk the duty, thus abridging the impunity enjoyed by 'bad Samaritans' to the undying frustration of individual crime victims and society as a whole. This 'punitive' benefit comports with theories of criminal sanction that esteem [*767] retribution against lawbreakers and denunciation of lawbreakers on behalf of the law-abiding community. n388

Another benefit is to be gained by motivating persons to act in compliance with the crime-reporting duty, thereby improving the chances for apprehension of criminals (and, to some extent, assistance of crime victims). This 'practical' benefit comports with theories of criminal sanction that emphasize the empirical or utilitarian advantages of penalizing lawbreakers. n389

A. The Punitive Benefit

As to the first benefit, punishing the execrable conduct of bad Samaritans like David Cash fits well with current norms of justice and right. For obvious reasons, however, it is much more important to incapacitate and bring to justice the offenders who actually commit violent crimes than it is to punish passive, unhelpful witnesses to those crimes. The punitive benefit alone is not enough to offset the drawbacks of a reporting duty, especially the potential self-incrimination obstacles to extracting information from individuals who malingered while witnessing a crime.

B. The Utilitarian Benefit

The second benefit-that of motivating good civic behavior-is more compelling. A clear mandate of the criminal law, once known, reasonably may be expected to influence a bystander faced with a decision about whether or not to notify authorities of a serious violent offense against another person, and the bystander's instinct to remain uninvolved may be counterbalanced by the desire not to run afoul of the law. The law's power to influence prompt reporting by crime witnesses fits under the rubric of 'general deterrence.' n390 In turn, if compulsory crime reporting has the desired effect, violent criminal assailants [*768] will be removed from society more efficaciously, thus furthering the goal of perpetrator incapacitation. n391

We might summarize this utilitarian justification for a crime-reporting statute by saying that general deterrence of bystander inaction is the immediate goal, while incapacitation of violent criminals is the ultimate goal. Our society's

actual experience with mandatory crime-reporting statutes is very limited, and what experience it has is not terribly encouraging, so these goals are open to criticism for being infeasible or, at best, highly conjectural. Our society will not really know how attainable these goals are until it makes concerted effort to achieve them- something it cannot be said to have done at present. After lengthy consideration of the matter, as reflected in this Article, the author is persuaded that such an effort is now very much in order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesMisprision of FelonyElementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesMisprision of FelonyPenaltiesCriminal Law & ProcedureAppealsRemands & Remittiturs

FOOTNOTES:

n1 *Sykes v. Dir. of Pub. Prosecutions, [1962] App. Cas. 528, 577 (H.L. 1961)* (per Lord Denning) (citing a translation of Sir William Staunford, Plees del Coron, cap. 39 (London 1557)).

n2 See *id. at 553.*

n3 At least one commentator has mentioned the possibility that "misprision of felony" established itself as a legal term of art even before Staunford wrote. C. K. Allen, Misprision, *78 L. Q. Rev. 40, 53-54 (1962).*

n4 Note, Recent Case, *8 U. Chi. L. Rev. 338, 339 (1941)* ("[A] positive duty is placed on the citizen to reveal his knowledge of the commission of a crime to the proper authorities and otherwise to aid in bringing the felon to justice, and failure to do so constitutes the crime of misprision of felony."); Mere Failure to Report a Felony Not a Crime, *63 U.S. L. Rev. 621, 622 (1929)* ("It is true that under the English common law it was made the duty of every citizen to disclose any treason or felony of which he had knowledge and a person who did not fulfill this duty was guilty of a 'misprision of treason or felony' though no affirmative effort or attempt was made to conceal the crime.").

n5 E. Lee Morgan, Misprision of Felony, *6 S.C. L.Q. 87, 87 (1953)* ("[M]isprision is a bare concealment of a crime . . . ."); Recent Decision, *32 Va. L. Rev. 170, 170 (1945)* ("[A]ll that was necessary to constitute the common law offense was a mere failure to disclose."). Like Staunford, other common law commentators describe misprision in terms of concealment. William Blackstone, Commentaries on the Laws of England, [*121] (1754) ("[T]he concealment of a felony which a man knows, but never assented to . . . ."); Sir Edward Coke, The Third Part of the Institutes of the Laws of England, 139-140 (6th ed. 1680) ("[C]oncealment or not discovery of felony . . . [I]n case of treason, whether the treason be by the Common Law, or Statute, the concealment of it is misprision of treason. . . . And this is intended of a concealment or not discovery of his mere knowledge . . . ."); Sir Matthew Hale, Pleas of the Crown: a Methodical Summary, 129 (1678) ("By the Common Law a concealment of a Felony, or procuring of the concealing thereof."). In everyday modern parlance, 'concealment' or even 'concealment of knowledge' is not used as a synonym for 'not discovery' or mere failure to come forward and, without being asked, announce what one knows of a matter. Today, 'concealment' connotes actually hiding something, falsely answering questions, or other positive acts that deny someone information. See Webster's New Collegiate Dictionary 271 (9th ed. 1989).

n6 The formidable Lord Coke states, "[i]f any be present when a man is slain, and omit to apprehend the slayer, it is a misprision, and shall be punished by fine and imprisonment." Coke, supra note 5, at 139. See also infra note 27 (quoting Broeder); Steven J. Heyman, Foundations of the Duty to Rescue, *47 Vand. L. Rev. 673 at 686 n.48 (1994)* (noting that "[s]ome writers classified the failure to prevent a felony as a species of misprision of felony.") (citations omitted).

n7 Glanville Williams, Criminal Law: The General Part 422 (2d ed. 1961) ("According to the institutional writers it is a misdemeanour to forbear from preventing a felony, but this may be safely regarded as obsolete."). In *Sykes, [1962] App. Cas. 528,* the House of Lords was quite explicit in defining the crime as a failure to disclose knowledge and did not even hint at an obligation to stop a felony or arrest a felon; C. Howard, Misprisions, Compoundings and Compromises, Crim. L. Rev. 750, 752 (1959) ("Coke's example is faulty anyway, for the offence consists in failing to inform, not in failing to arrest."). See Robert E. Meale, Misprision of Felony: A Crime Whose Time Has Come Again, *28 U. Fla. L. Rev. 199, 208 (1975).* Staunford did not include such an obligation in his definition of the offense, although it would be consistent with the theory that the crime derives from medieval use of the hue and cry. See infra notes 39-43 and accompanying text.

n8 "Misprision . . . of a felony . . . is a criminal neglect, either to prevent it from being committed, or to bring to justice the offender after its commission . . . ." Joel Prentiss Bishop, A Treatise on Criminal Law, § 717 (9th ed. 1923). The same definition appears in Corpus Juris Secundum, 15A C.J.S. Compounding Offenses § 3 (2002), and is reiterated virtually verbatim in the opinion of every state court case holding common-law misprision of felony a part of its state's criminal law: *State v. Carson, 262 S.E.2d 918 at 920 (S.C. 1980); State v. Flynn, 217 A.2d 432 at 433 (R.I. 1966); State v. Wilson, 67 A. 533 at 533 (Vt. 1907); State v. Biddle, 124 A. 804 at 805 (Del. 1923).* Bishop's definition has been cited by two courts for the proposition that, under the common law, one had not only a right but a duty to use force, including deadly force if necessary, against a felon. *Suell v. Derricott, 49 So. 895, 900- 01 (Ala. 1909); Carpenter v. State, 36 S.W. 900 at 906 (Ark. 1896).* See also Morgan, supra note 5, at 91 ("At common law, and it is still true today, one was under a duty to prevent the commission of a felony about to be committed in his presence, or to arrest the felon after the commission of a felony within his presence. If he failed to do so, he was guilty of a misprision.") (footnotes omitted); *21 Am. Jur. 2d Criminal Law § 33* (2d ed. 1998) ("The offense known as misprision of a felony has been defined as the failure to act so as to prevent a felony from being committed . . . .") (footnote omitted).

n9 *Biddle, 124 A. 804.*

n10 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law vol. 2 § 6.9(b) (1986); Rolin M. Perkins & Ronald N. Boyce, Criminal Law, 572-73 (3d ed. 1982).

n11 *Sykes v. Dir. of Pub. Prosecutions, [1962] App. Cas. 528, 554 (H.L. 1961)* (per Lord Denning). See also P. R. Glazebrook, Misprision of Felony-Shadow or Phantom?, *8 Am. J. Legal Hist. 189, 194 (1964)* ("In the fourteenth and fifteenth centuries, then, misprision used in the wider sense, was one of a handful of words describing crimes less than felony-a category for which there was no one accepted name.").

n12 Allen, supra note 3, at 51. Morgan, supra note 5, at 88 ("Misprision of treason, which was a high misdemeanor and not a felony, was divided into two sorts: negative, which consisted in the concealment of something which ought to be revealed; and positive, which consisted of something which ought not to be done. Of the negative kind, bare knowledge and concealment of treason, without any degree of assent thereto, prior to the Statute 1 and 2 Phil. And Mary, c. 10, was a capital crime, but by the statute was made only a misprision.") (footnote omitted).

n13 Morgan, supra note 5, at 89 (footnotes omitted).

n14 *Sykes, [1962] App. Cas. 521 at 556-57* ("This offence-concealing or failing to report a felony-does not seem to have acquired a name for itself until 1557 when Staunford gave it one. At the time he wrote there had recently been enacted the statute of 1555 dealing with misprision of treason, which was the 'concealing or keeping secret of any high treason.' Staunford seems to have seen here a parallel with the common law offence of concealment of a felony."); Allen, supra note 3, at 51; Joseph Yahuda, Misprision of Felony, 106 Solic. J. 124 at 124 (1962) ("The term 'misprision of felony' was coined by Staunford to denote the common-law offense of concealment of felony, in adaptation of the wording in the then recent statute of 1555 (1 Ph. & M. c. 10) which

enacted that 'concealment or keeping secret of any high treason be deemed and taken only misprision of treason.'").

n15 Dale W. Broeder, Silence and Perjury Before Police Officers, *40 Neb. L. Rev. 63, 66 (1960)*; Glazebrook, supra note 11, at 197; Norvall Morris, An Australian Letter *[1955] Crim. L. Rev. 290, 292 (1955)*; Recent Case, supra note 4, at 340-41. The Norman conquest was a major impetus for the development of a system of communal responsibility to suppress crime. See Broeder, supra at 66; Recent Case, supra note 4, at 340-41.

n16 Heyman, supra note 6, at 685 (footnote omitted).

n17 See Black's Law Dictionary 1655 (4th ed. 1968).

n18 See Recent Case, supra note 4, at 341.

n19 See Black's Law Dictionary, supra note 17, at 874.

n20 Broeder, supra note 15, at 66; Recent Case, supra note 4, at 341. The General Eyre, a group of itinerant justices, penalized laxity in law enforcement duties. Recent Case, supra note 4, at 341.

n21 Glazebrook, supra note 11, at 293. "In addition, the mediaeval authorities also readily recognized that a presumption of guilt or complicity arose whenever a person knew of an offence and did not take steps to have the offender apprehended." Id. at 199.

n22 See id. at 199, 201-03; Heyman, supra note 6, at 687. The hue and cry is defined as being "[i]n old English Law, a loud outcry with which felons (such as robbers, burglars, and murderers) were anciently pursued, and which all who heard it were bound to take up, and join in the pursuit, until the malefactor was taken." Black's Law Dictionary 874 (4th ed. 1968).

n23 Glazebrook, supra note 11, at 199, 203-04; Heyman, supra note 6, at 687. Powers of private arrest were broad. Recent Case, supra note 4, at 341.

n24 Glazebrook, supra note 11, at 199-203. Heyman, supra note 6, at 687.

n25 Broeder, supra note 15, at 66-67; Recent Case, supra note 4, at 340.

n26 P. R. Glazebrook, How Long, Then, Is the Arm of the Law to Be?, *25 Mod. L. Rev. 301 at 306-07 (1962)* (Noting that at the time the House of Lords heard the case of Sykes, misprision of felony was "an offence which is not the subject of the ratio of a single decision."); United States v. Worcester, 190, F. Supp. 548, 566 (D. Mass. 1961) ("Most of the cases customarily cited to show that there was at common law such a crime as misprision of felony involve interference with officers of the law. . . . Or the early cases involve aid to a felon or active concealment of him.") (citations omitted);); *People v. Lefkovitz, 293 N.W. 642, 643 (Mich. 1940)* (Noting parenthetically that the existence of misprision of felony is "extremely doubtful because wholly unsupported by adjudications in England."); Broeder, supra note 15, at 67 ("The difficulty-and we are speaking now only of a simple failure to disclose another's felony where defendant has no ulterior motive and no official request for information has been made, misprision of felony, in other words, in its simplest form-is that none of the early English cases supports the existence of any such crime.") (footnote omitted).

n27 Broeder, supra note 15, at 65 ("[D]istinguished common law commentators . . . unqualifiedly asserted that a simple failure without any ulterior purpose to disclose another's felony to the authorities was punishable as a common law misdemeanor-known as misprision of felony -and that it was a misdemeanor even to stand by and watch a felony without at least attempting to prevent it and this latter apparently without regard to the by-stander's ability effectively to intervene."); Glazebrook, supra note 11, at 208 ("misprision of felony has come, since the seventeenth century, to be mentioned in most accounts of the criminal law[.]"); see *Sykes v. Dir. of Pub. Prosecutions, [1962] App. Cas. 528, 566 (H.L. 1961)* (per Lord Goddard) ("[F]or centuries there has been communis opino among all the writers . . . that there is such an offence . . . .").

n28 Broeder, supra note 15, at 102 (Noting the "irony of a total absence of early English precedent supporting the existence of misprision of felony as a common law offense as compared with the universal recognition of the offense in some form by common law commentators . . . ."); Glazebrook, supra note 11, at 299 ("The absence of a reported decision during the four hundred years since the offence first crept into a book is itself remarkable.") (footnote omitted).

n29 *Worcester, 190 F. Supp. at 565* ("Was there, indeed, any crime at common law if all that the defendant did was to observe another's wrong without actively concealing it, or hindering law enforcement officers? . . . [A] negative answer would appear to be sounder.") (citations omitted); *Lefkovitz, 293 N.W. at 643.*

n30 *Sykes, [1962] App. Cas. 528, 529-40.*

n31 Glazebrook, supra note 11.

n32 See id. at 288-91.

n33 See id. at 290.

n34 See id. at 291-94.

n35 Royal G. Shannonhouse, Misprision of a Federal Felony: Dangerous Relic or Scourge of Malfeasance?, *4 U. Balt. L. Rev. 59 at 59 (1974).*

n36 Carl Wilson Mullis, III, Misprision of Felony: A Reappraisal, *23 Emory L.J. 1095 at 1095-96 (1974)* ("By the sheer force of these authorities, it is apparent that misprision of felony was considered a valid and existing crime at common law." Id. at 1096.); Broeder, supra note 15, at 65 ("And such statements [by the common law commentators], particularly as regards the criminality of failing to disclose felonies to the authorities, have many times been repeated by later English and American commentators so as to give them almost the force and effect of law.") (footnote omitted); and at 66 ("[t]he early writers are legitimately entitled to great deference . . . ."). See also Heyman, supra note 6, at 685-86, 686 n.50 (1994) (stating that the treatise writers "provide considerable support for the view that the common law imposed a duty to prevent a felony").

n37 *Sykes v. Dir. of Pub. Prosecutions, [1962] App. Cas. 528 at 558 (H.L. 1961)* ("My Lords, if Staunford stood alone, it would suffice."); and at 559 ("What need we of any further authority? If Staunford, Coke, Hale, and Blackstone all say there is such an offence as misprision of felony, are we to say the contrary?").

n38 Allen, supra note 3, at 52 ("And, even if Staunford did commit a slip of the pen in so important a matter, it has been repeated so often and so clearly by authoritative writers that it may fairly be said to have become part of the law.").

n39 *Sykes, [1962] App. Cas. 528, 555-57.*

n40 See id.

n41 Glazebrook, supra note 11, at 201-04.

n42 Id. at 288.

n43 See id. at 288-89.

n44 Id. at 207 (footnote omitted).

n45 Howard, supra note 7, at 750 (1959) (footnote omitted) (referring to it also as "this vague and ancient offence").

n46 Glazebrook, supra note 11, at 298 ("It cannot even be said that the books tell a consistent story. Without any other authority on which to rely, the crown law writers could only borrow the misunderstandings of their predecessors and, while offering varying definitions of the offence, could only leave it, as Stephen complained, 'extremely vague.'") (footnote omitted).

n47 Broeder, supra note 15, at 67.

n48 See Glazebrook, supra note 26, at 302 n.16 (noting the absence of authoritative precedent in England establishing misprision of felony as a criminal offense as of 1960).

n49 [1955] 21 C.R. 202 [B.C.].

n50 (1959) V.R. 270.

n51 See id. at 270-71. The defendant Crimmins indicated to police that he planned to "attend to the matter himself." Id. at 271. Semenick, [1955] 21 C.R. 202 at 202 [B.C.].

n52 Semenick, [1955] 21 C.R. 202, 203-04 [B.C.].

n53 See id. at 204-05.

n54 *Crimmins, (1959) V.R. 270, 272.*

n55 See *id. at 272-74.* On later Australian decisions see Stanley Yeo, Case and Comment, 13 Crim. L. J. 345 (1989); David Lanham, Case and Comment, 8 Crim. L. J. 188 (1984).

n56 See infra Part II.C.

n57 *[1962] App. Cas. 528 (1961).*

n58 See *id. at 552-53.*

n59 *Id. at 554.* The issue of self-incrimination, though strongly implicated by the facts of the case, was not discussed. See Lionel H. Frankel, Criminal Omissions: A Legal Microcosm, *11 Wayne L. Rev. 367, 420 n.177 (1965).* Later British decisions did reach the question of the conflict between misprision of felony and the privilege against self- incrimination. See Case and Comment, *[1966] Crim L. Rev. 678 (1966);* Case and Comment *[1965] Crim. L. Rev. 237 (1965).*

n60 See supra notes 39-40 and accompanying text.

n61 See *Sykes, [1962] App. Cas. 528, 562-63, 569-72.*

n62 See supra notes 45-47 and accompanying text.

n63 *Sykes, [1962] App. Cas. 528, 563-64.*

n64 See *id. at 563.*

n65 Id.

n66 See *id. at 563-64.*

n67 See id.

n68 *Id. at 564.*

n69 See *id. at 569.*

n70 Id.

n71 Id.

n72 See id.

n73 Id.

n74 See id. ("[I]t may well be used when there is technical difficulty in framing a charge of being an accessory after the fact to a felony, and counsel who had acted for the prosecution told us that was the reason for using it in the instant case. . . . I would add that where it is thought possible and proper to charge a person as an accessory, it is preferable to do so rather than have recourse to the offence of misprision.").

n75 See *id. at 570-71.*

n76 *Id. at 571.* Note that the words 'actually known' suggest a subjective standard of knowledge, which would be different from the objective 'reasonable man' standard posited by Lord Denning. See supra note 64 and accompanying text.

n77 *Id. at 572.*

n78 See *id. at 572-73.* Sir Basil Nield, in his summing-up to the jury [at Syke's trial], incorporated in his definition of misprision of felony the conception of deliberate concealment which would suggest that the concealment must be wilful. There is, in my opinion, no sufficient justification in the authorities for limiting the offence in this way. The offence consists in a mere omission to disclose the felony. *Id. at 573.* Also, Lord Goddard, in rejecting dictum in a previous case suggesting concealment must be for the benefit of the concealer to be misprision of felony, stated "it matters not what induces the concealment. . . ." *Id. at 569-70.*

n79 See J. W. Cecil Turner, Russel on Crime 171 (12th ed. 1964); Allen, supra note 3, at 55-61; Olive Wood, Misprision of Felony, *4 Sydney L. Rev. 302, 303-07 (1963);* Case and Comment, *[1961] Crim. L. Rev. 714, 715-17 (1961);* Glazebrook, supra note 11; Glazebrook, supra note 26. But see George Goldberg, Misprision of Felony: An Old Concept in a New Context, *52 A.B.A. J. 148 (1966).*

n80 J. C. Smith & Brian Hogan, Criminal Law 26, 165 (7th ed. 1992).

n81 In response to efforts to impose a legal obligation of bank employees to report suspected money laundering, Derek Wheatley, a lawyer for British banks, has advocated resurrecting misprision of felony, thereby imposing a general duty to report crimes, instead of putting a special onus on banks. Derek Wheatley, QC, A Crimewatch by Banks, Financial Times, Dec. 11, 1986, at § 1 p.16; Frances Gibb, A Word in Your Ear About Fraud, The Times, Apr. 5, 1994, at 34 (Features section).

n82 *67 Va. (26 Gratt.) 952.*

n83 See *id. at 961-62.*

n84 *Id. at 961.* By 'concealing the felony' the court apparently meant "fail[ing] to make it known to the proper authorities . . . ." *Id. at 957.*

n85 *67 A. 533 (Vt. 1907).* The facts of the case are not stated in the opinion. The court sustained the defendant's demurrer to the prosecution's information charging misprision of felony but remanded because it was amendable. See *id. at 534.*

n86 "Intent. - it would seem in principle that the Intent. motive prompting neglect of a misprision should be in some form evil as respects the administration of justice; for example, to prevent the offender's punishment, or to withhold due aid from the government . . . [T]he suggestion of this section does not probably admit of being made precise." Bishop, supra note 8, at § 721.a (9th ed. 1923).

n87 *State v. Wilson, 67 A. 533 at 534 (Vt. 1907)* (citation omitted).

n88 *124 A. 804 (Del. 1923).* Delaware has since abolished common law crimes, thereby rendering the decision of the case nugatory. Del. Code. Ann. tit. 11, § 202 (1995).

n89 See *Biddle, 124 A. at 804-05.*

n90 *Id. at 805.* The language of the instruction embraces an obsolete or erroneous notion that the defendant had an obligation to try t stop the felony personally. See supra notes 6-10 and accompanying text. Under the

circumstances described in the case, this would hardly seem a realistic option for a lone female. Cf. supra note 27 (quoting Broeder).

n91 Compare Jack Wenik, Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime, *94 Yale L. J. 1787, 1793 n.46* and accompanying text (1985) (suggesting Biddle requires more than a simple failure to report) with John H. Hare, Criminal Law, *33 S.C. L. Rev. 53, 68 n.92* and accompanying text (1981) (citing Biddle as a case that did not attempt to limit the scope of the crime).

n92 *People v. Lefkovitz, 293 N.W. 642, 643 (Mich. 1940).* The defendant had pled guilty to failing to disclose his knowledge of an armed robbery. See *id. at 643-44.* For discussion of the case, see Recent Case, *54 Harv. L. Rev. 506 (1941)* (approving the result) and Recent Case, supra note 4 (discussing history of misprision and suggesting that recognizing the crime would further the ends of criminal justice).

n93 *Lefkovitz, 293 N.W. 642, 643 (1940).* The majority opinion also quoted relevant paragraphs from Coke's Third Institutes and posited that concealment as he used it "means something more than mere silence or failure to disclose, unless such, in purpose, is in aid of an offender and of such nature as to constitute one an accessory after the fact." Id.

n94 See *id. at 643-45.* The dissenters would have held misprision good law until the legislature said otherwise, but would have let the defendant withdraw his guilty plea and have a trial on remand.

n95 *61 N.E.2d 849 (Mass. 1945).* For a discussion of the case, see Recent Decision, supra note 5, at 172 (approving of the practical result of the case but stating that "the court . . . should have taken a more definite stand and rejected misprision of felony as a crime today.").

n96 See id. at 849-50.

n97 See id. at 849. Pena and Lopes were jointly indicted and were both found guilty.

n98 See id. at 852.

n99 Id. at 851-52 (citation omitted). To this day, adultery is a crime in Massachusetts, punishable by up to three years in prison or a $ 500 fine. *Mass. Gen. Laws Ann. ch. 272, § 14* (West 2000). The Supreme Judicial Court of Massachusetts upheld the statute as constitutional as recently as 1983. *Commonwealth v. Stowell, 449 N.E.2d 357 (Mass. 1983).*

n100 *217 A.2d 432.* The opinion does not relate the facts of the case.

n101 See *id. at 433* (R.I. 1966).

n102 *302 So. 2d 806 (Fla. Dist. Ct. App. 1974).* For a discussion of the case, see Michael Kelly, Misprision of Felony Not a Crime in Florida, *30 U. Miami L. Rev. 222 (1975)* (disapproving the reasoning and result of the court's opinion).

n103 "This very case. in fact, serves well to illustrate the potential mischief of the charge and the possible discriminatory, oppressive or absurd results thereof." *Holland, 302 So. 2d 806, 809.*

n104 See *id. at 807-08.*

n105 *Id. at 807* (footnote omitted). The court also stated "[w]e are unable to agree with the course followed in Wilson [adding a requirement of evil intent to the crime] because we think we should not alter the elements of common law misprision merely to make it coalesce with Florida law." See *id. at 810* (citations omitted) (footnote omitted).

n106 See *id. at 808-09.*

n107 *Id. at 810.*

n108 *Id. at 808.*

n109 *Id. at 810.*

n110 Id.

n111 *396 A.2d 1054 (Md. 1979).*

n112 See *id. at 1058-59.* The children soon left the house.

n113 See id.

n114 *Id. at 1059.*

n115 See *id. at 1058-60.*

n116 *Id. at 1060.*

n117 See id.

n118 See *id. at 1057.* Norris, charged and tried separately, was found not guilty by reason of insanity. See *id. at 1058 n.4.*

n119 See *id. at 1057, 1074.*

n120 See *id. at 1068.*

n121 See *id. at 1058.*

n122 See *id. at 1070.*

n123 See *id. at 1069.* In this, Pope differs from *Lefkovitz and Holland. People v. Lefkovitz, 293 N.W. 642 at 642 (Mich. 1940)* (stating "There is not now and never has been such a substantive crime in the state of Michigan" and it was not adopted by the reception clause in the state constitution) (emphasis added); *Holland v. State,*

302 So. 2d 806 at 810 (Fla. Dist. Ct. App. 1974) ("misprision of felony has not been adopted into, and is not part of, Florida substantive law.") (emphasis added).

n124 See *Pope, 396 A.2d at 1054.*

n125 See *id. at 1078.*

n126 See *id. at 1074* ("Glazebrook ably refuted Sykes, and we borrow extensively from him . . . .").

n127 See *id. at 1074-78.* These include the crime's overbreadth, the arbitrariness of the distinction between misdemeanor and felony, and the vagueness of the requirements of knowledge and disclosure.

n128 See *id. at 1077-78.*

n129 *Id. at 1078* (footnote omitted).

n130 *262 S.E.2d 918 (S.C. 1980).* For a discussion of the case, see John H. Hare, supra note 91, at 65-69 (1981) (advocating that the state supreme court, if given the opportunity, "should expressly limit the application of misprision by adopting any or all of the methods employed by other jurisdictions." Id. at 69.).

n131 See id. at 919-20.

n132 Id. at 919.

n133 Id. at 920.

n134 See id. (citations omitted). While this is true of the federal statute, it is not true of all state statutes. See infra Part III. For the quotation from the opinion, see infra text accompanying note 184.

n135 See id.

n136 Id. at 920.

n137 See Hare, supra note 91, at 67-68 ("The total absence of precedent in South Carolina for the prosecution of misprision leaves the scope of the crime undefined. Until the supreme court offers further definition, the status of the offense in other jurisdictions provides the only guidance.").

n138 See Wenik, supra note 91, at 1793 n.46 and accompanying text (construing Carson as upholding the defendant's conviction on the basis of the positive act of deliberately concealing information when questioned by police).

n139 *317 S.E.2d 748 (S.C. Ct. App. 1984).*

n140 *Id. at 753.*

n141 Re: *Responsibility of the Principal of a Corporation to Report Embezzelment, 1980 WL 121192,* at *1 (S.C. Op. Att'y Gen. Apr. 23, 1980).

n142 *198? WL 189192,* at *1 (S.C. Op. Att'y Gen. Mar. 1, 1982).

n143 Id. at *2 (citations omitted).

n144 1990 Ann. Rep. & Official Op. of the Att'y Gen. of the St. of S.C. 91 (Mar. 5, 1990) (Op. No. 90-28).

n145 Id. at 95 (citations omitted).

n146 Broeder, supra note 15, at 70 ("Most states simply do not permit common law criminal prosecutions."); Ira P. Robbins, Double Inchoate Crimes, 26 Harv. J. on Legis. 1 at 73-74 (1989) ("Most states have abolished the common law of crimes.") (footnote omitted). See also supra note 88 (regarding Delaware's abolition of common law crimes). Mississippi is one state that does retain common law crimes via a reception statute, but the attorney general of that state recently has issued an opinion stating "it is the opinion of this office that misprision of felony is not an offense that may be prosecuted in Mississippi." Re: *Misprision of Felony, No. 98-0019, 1998 WL 57438* (Miss. Op. Att'y Gen. Jan. 23, 1998).

n147 Lafave & Scott, supra note 10, § 2.1(c). "[I]f Congress has not by statute made certain conduct criminal, it is not a federal crime." Id.

n148 *State v. Young, 220 N.E.2d 146,151 (Ohio Ct. App. 1966)* ("Ohio has no common law crimes. Misprision is not a crime in Ohio."); *Moore v. State, 94 S.E.2d 80, 83 (Ga. Ct. App. 1956)* ("[T]here are in this state no common law offenses . . . . While at common law the concealment either actively or passively of certain crimes constituted the penal offense of misprision, mere concealment alone of a crime . . . constitutes no offense in this state.") (citations omitted). See also N.Y. Penal § 5.05(2) (Consol. 1998) (common law crimes abolished); *Schuster v. New York, 154 N.E.2d 534 at 544 (N.Y. 1956)* ("Our state does not put its residents under any duty to take steps either to prevent the commission of crime or to bring the offender to justice, after its commission. The common-law crime of misprision of felony, which made it criminal conduct not to prevent a felony from being committed or not to bring the felon to justice, has not been carried into our Penal law."); *18 Pa. Cons. Stat. Ann. §107(b)* (West 1998) (common law crimes abolished); *Disciplinary Counsel v. Shorall, 592 A.2d 1285 at 1291, 1292 n.6 (Pa. 1991)* (stating that misprision of felony is not a cognizable offense under Pennsylvania law).

n149 Shannonhouse, supra note 35, at 59. This article provides a thorough analysis of the statute and concludes that there is a strong case for its repeal. See id. at 79.

n150 *18 U.S.C. § 4* (West 2000). The phrase "and does not as soon as possible make known" replaced the phrase "and does not as soon as may be disclose and make known" used in an earlier version of the statute. Shannonhouse, supra note 35, at 69 n.75. Under federal law, offenses punishable by more than one year imprisonment are felonies, while those punishable by a year or less are misdemeanors. *18 U.S.C. § 3559*(a) (West 1999). Hence, federal misprision of felony is itself a felony, and not a misdemeanor as was the common-law crime.

n151 *United States v. Farrar, 38 F.2d 515, 517 (D. Mass. 1930)* ("[The statute] requires both concealment and failure to disclose. Under it some affirmative act toward the concealment of a felony is necessary. Mere silence after knowledge of the commission of the crime is not sufficient."). Hence, when David P. Schippers, Chief Investigative Counsel for the House Judiciary Committee during the Clinton impeachment scandal, stated "that the president may have engaged in misprision of Monica Lewinsky's felonies . . . both by taking affirmative steps to conceal those felonies and by failing to disclose the felonies," he could have been only half right at

best. David P. Schippers, Chief Investigative Counsel, Authorization of an Inquiry into Whether Grounds Exist for the Impeachment of William Jefferson Clinton, President of the United States: Meeting of the House Comm. on the Judiciary, 105th Cong. 64-65, 76-77 (1998).

n152 *Bratton v. United States, 73 F.2d 795, 797 (10th Cir. 1934).* One commentator states "[t]he possibility that such a requirement [of an affirmative act of concealment] was originally intended by Congress is rather slim since, by the date of the statute's first enactment, such a requirement had never before been applied to the crime." Mullis, supra note 36, at 1104. But see *United States v. Worcester, 190 F. Supp. 548, 566 (D. Mass. 1961)* ("Whatever may have been the Eighteenth Century meaning of 'conceal', in the Twentieth Century, the Sixtieth Congress, as a matter both of literary style and of sound policy, must have intended merely to reach an active concealment.") (citations omitted). Cf. supra note 5 (regarding modern connotation of the word 'conceal').

n153 Recent Case, supra note 4, at 339; Recent Decision, supra note 5, at 171-72; Goldberg, supra note 79, at 149; *State v. Michaud, 114 A.2d 352, 358 (Me. 1955)* (Webber, J., concurring in the result).

n154 See *18 U.S.C. § 3* (West 2000).

n155 See Mullis, supra note 36, at 1104, 1105; Shannonhouse, supra note 35, at 71-72; *Sykes v. Dir. of Pub. Prosecutions, [1962] App. Cas. 528, 561 (H.L. 1961).*

n156 *State v. Graham, 182 So. 711, 712 (La. 1938).*

n157 The supreme court did say that "in the modern acceptation of the term, misprision of felony is almost if not identically the same offense as that of an accessory after the fact." *Id. at 714.* It would be surprising if the legislature intended that a person who reported a crime to a policeman, but not a magistrate or district attorney, would be in violation of the law. Note that a violation of the statute was itself punishable with imprisonment at hard labor, and it would be surprising to make punishable failing to report a failure to report ad infinitum.

n158 See *id. at 711.* The allegedly concealed crime was murder. See *id. at 712.*

n159 *State v. Wells, 197 So. 420 at 420 (La. 1940).* The allegedly concealed crimes in question were robberies. *State v. Wells, 197 So. 419 at 419 (1940)* (companion case).

n160 *Graham, 182 So. 711, 714-15* (affirming the quashing of the bill of information charging misprision of felony because the crime allegedly concealed occurred in Mississippi and the statute "has reference only to concealment and failure to disclose the commission of a felony that was committed in Louisiana." Id. at 715.); *Wells, 197 So. 420, 422* (affirming a judgment quashing two counts of misprision of felony on grounds of improper venue because the defendant was being prosecuted in a parish different from the one in which the allegedly concealed crime was committed).

n161 Reporter's Comment, *La. Rev. Stat. Ann. § 14:131* (West 1986); Under Louisiana Law, There Is No Duty to Disclose Information About a Crime Where Failure to Do so Would Result in *Criminal Liability, 1983 WL 177161* at *1, No. 83-388, (La. Op. Att'y Gen., Sept. 20, 1983) (state attorney general opinion responding to query regarding health clinic employee's duty to disclose a patient's homicide confession).

n162 *State v. Michaud, 114 A.2d 352, 353 (Me. 1955).*

n163 See *id. at 354-55.* The defendant Irma Michaud was a woman allegedly involved in prostitution and the concealed felony in question was adultery committed by a woman named Simonne Lauze. See *id. at 353, 355.*

n164 See *id. at 354-55.* "The crime is to conceal and not disclose, because disclosure is not concealment." *Id. at 354.* In a concurring opinion, one justice disagreed with the court's interpretation of the state statute as requiring an affirmative act of concealment and argued that that approach of the Supreme Court of Vermont in the Wilson case, requiring that an evil intent motivate the failure to disclose, was the correct approach to misprision of felony. See *id. at 357-59* (Webber, J., concurring in the result).

n165 Historical Note, Me. Rev. Stat. Ann. tit. 17, §§ 901-03. (West 1983).

n166 See *N.J. Stat. Ann. § 2C:1-4* (West 1995); LaFave & Scott, supra note 10, § 1.6(a).

n167 N.J. Stat. Ann. § 2A:97-2 (West 1985).

n168 Id.

n169 *40 N.J.L. 228.*

n170 See *id. at 228.* The earlier version of the statute contained "identical language except for the officers to whom the disclosure is to be made. . . ." *State v. Conquest, 377 A.2d 1239, 1242 (N.J. Super. Ct. Law Div. 1977).*

n171 *Hann, 40 N.J.L. at 229.*

n172 *State v. Raymond, 78 A. 761 at 761 (N.J. 1909).*

n173 See *id. at 761-62.*

n174 *Conquest, 377 A.2d 1239.*

n175 See *id. at 1241-43.*

n176 N.J. Stat. Ann. § 2A:97-2 (West 1985).

n177 Colorado has in its criminal code a statute which provides: It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities. . . . This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any communication privileged by law. *Colo. Rev. Stat. Ann. § 18-8-115* (West 1999). The statute prescribes no penalty for nonfulfillment of the duty and a federal appeals court found that it imposed no general obligation to stop or report a crime being committed. *United States v. Zimmerman, 943 F.2d 1204, 1214 (10th Cir. 1991).* West Virginia has a statute in its criminal code which is captioned 'Compounding offenses and misprision; penalties', but it only deals with compounding and does not address or penalize misprision. *W. Va. Code § 61-5-19* (1997). The Virgin Islands has a misprision of felony statute which provides, "Whoever, having knowledge of the actual commission of a felony, willfully conceals it from the proper authorities, shall be fined not more that $ 500 or imprisoned not more than three years,

or both." *14 V.I. Code Ann. §13* (1996). Since the statute only criminalizes willful concealment and does not mention failure to disclose, it would appear to reach only affirmative acts of concealment.

n178 S.D. Codified laws § 22-11-12 (Michie 1988). The penalty for Class 1 misdemeanor is 1 year imprisonment in a county jail or $ 1,000 fine or both. S.D. Codified Laws § 22- 6-2(1) (Michie1988).

n179 See supra notes 162-165 and accompanying text.

n180 Cf. *In re Russel, 493 N.W.2d 715, 716 (S.D. 1992)* (Lawyer pled guilty to having violated the statute for having "assisted known fugitives from Florida in fleeing from authorities by lending money, furnishing a car, and providing his credit cards to them.").

n181 See supra note 148.

n182 *220 N.E.2d 146, 151 (Ohio Ct. App. 1966).* The court observed "[t]he imposition of an obligation under criminal penalty to inform upon other people involves difficult issues of policy. Failure to inform has not generally been recognized as a crime in American jurisdictions." Id.

n183 *Ohio Rev. Code Ann. § 2921.22(A)* (West 1997). The provision is not designated as misprision of felony for reasons explained in the documentation of the legislative history: [The statutory crime] is similar to, but narrower than the common law crime of misprision of felony . . . The gist of misprision at common law was keeping silence [sic] or failing to attempt to apprehend the offender when one knew a felony had been committed. . . . It was a passive offense. . . . Under this section, persons are required only to inform authorities of which they have knowledge, and are not required to attempt apprehension of the offender. *Ohio Rev. Code Ann. § 2921.22* (West 1997) (Committee Comment H 511). As noted above, the authority for including in the common-law crime an obligation to attempt apprehension of a felon is highly questionable. Supra notes 6-10 and accompanying text.

n184 *Ohio Rev. Code Ann. § 2921.22(I)* (West 1997). A misdemeanor of the fourth degree is punishable by thirty days imprisonment or a $ 250 fine. *Ohio Rev. Code Ann. § 2929.21(B)(4)*, (C)(4) (Anderson 1996).

n185 Id. § 2921.22 (Committee Comment to H 511).

n186 See id. §§ 2921.22(F)(1), (G)(3).

n187 See id. §§ 2921.22(F)(1), (G)(4).

n188 See id. §§ 2921.22(F)(1), (G)(5), (6).

n189 See id. § 2921.22(G)(2).

n190 In the Young case, the Ohio Court of Appeals observed "in some instances misprision could present complex questions under the modern application of the privilege against self-incrimination." *State v. Young, 220 N.E.2d 146, 151 (Ohio Ct. App. 1966).*

n191 *484 N.E.2d 276, 279 (Ohio Ct. App. 1985).*

n192 See *id. at 277-78.*

n193 *Id. at 279.*

n194 See *id. at 279-80.* The defendant's conviction for child endangerment was upheld but remanded for re-sentencing because the trial court imposed the maximum sentence without following statutory guidelines. See *id. at 279-80.*

n195 *425 N.E.2d 957 (Ohio Ct. App. 19[illegible]).*

n196 See *id. at 958.*

n197 See *id. at 958-59.*

n198 *Id. at 958.*

n199 See, e.g., *Neb. Rev. Stat. § 28-1226* (1995) (making punishable as a Class III misdemeanor the failure of any person who has knowledge of the theft or loss of explosive materials from his or her stock to report such theft or loss to the police within twenty-four hours of discovery); *Ariz. Rev. Stat. Ann. § 13-3009* (West 1989) (making punishable as a class 3 misdemeanor the intentional failure of telecommunications workers to report to prosecuting attorneys illegal wire-tapping coming within their knowledge).

n200 See, e.g., *Haw. Rev. Stat. Ann. § 453-14* (Michie 1998) failure to make report within twenty-four hours punishable by $ 50 to $ 500 fine); *Mich. Comp. Laws Ann. § 750.411* (West 1991) (failure to report immediately punishable as a misdemeanor).

n201 Compare *Haw. Rev. Stat. Ann. §291C-19* (Michie 1998 Replacement Volume) (failure to report accident or bullet damage carries no penalty) and *Mich. Comp. Laws Ann. § 257.623* (West 1990) (same) and *Ala. Code § 32-10-10* (1999 Replacement Volume) (same) with *Ind. Code Ann. § 9-26-5-1*, 9-26-5-2 (West 1992) (failure to notify police within twenty-four hours of receiving motor vehicle with bullet damage punishable as a Class C Infraction).

n202 See John E.B. Meyers, A Survey of Child Abuse and Neglect Reporting Statutes, *10 J. Juv. L. 1 at 11-27, 62-72 (1986)* (charts summarizing the obligations and penalties imposed by child abuse reporting statutes in all fifty states). Prompted by the murder of Sherrice Iverson, discussed infra Part VIII.C, Nevada enacted such a law in 1999. *Nev. Rev. Stat. Ann. § 202.882* (Michie Supp. 1999). For comment on recent legislative efforts in this vein, see Marcia M. Ziegler, Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome, *104 Dick. L. Rev. 525 at 545-47 (2000).*

n203 Illinois, as part of its "Bill of Rights for Victims and Witnesses of Violent Crime Act" has a statute making it the responsibility of victims and witnesses to aid in the prosecution of violent crime by (among other things) making a timely report of a violent crime. Ill. Stat. Ann. ch. 725, para. 120/7(a) (Smith-Hurd 1992). There is no penalty for noncompliance with the statute and its only obvious purpose is to express public policy.

n204 *Wash. Rev. Code Ann. § 9.69.100* (West 1998). The penalty for a gross misdemeanor in Washington is imprisonment for up to one year in county jail, or fine up to $ 5,000, or both. *Wash. Rev. Code Ann. § 9.92.020* (West 1998). "Some commentators have referred to this statute as a type of Good Samaritan law. However, from the text of the statute, the purpose appears to be catching the criminal, not aiding the victim." Sungeeta Jain, How Many People Does it Take to Save a Drowning Baby?: A Good Samaritan Statute in Washington State, *74*

Wash. L. Rev. 1181 at 1193-94 n.114 (1999). The distinction between catching criminals and helping their victims is discussed infra Part VI.

n205 Susan J. Hoffman, Statutes Establishing a Duty to Report Crimes or Render Assistance to Strangers: Making Apathy Criminal, *72 Ky. L. J. 827 at 839-40 (1984).* The Big Dan's case is discussed infra part VIII.B.

n206 *Mass. Gen. Laws Ann. ch. 268, § 40* (West 1990). Massachusetts has seen further egregious cases of bystander indifference to rape and murder. See J. M. Lawrence, Crime Stoppers Gather Force, Boston Herald, June 1, 1998 at 4 (a 1985 rape and a 1996 rape-murder shared the element of neighbors ignoring the crime as it occurred). But it appears that this statute was not enforced in those cases.

n207 *R.I. Gen. Laws § 11-1-5.1* (1994 Reenactment).

n208 The duty to report in Washington extends to, inter alia, arson, kidnaping, assault, and extortion as well as rape, murder, manslaughter, and robbery, and also includes attempts, conspiracies, or criminal solicitations to commit any of these crimes. See *Wash. Rev. Code Ann. § 9.94A.030(41)* (West Supp. 2000) (defining "Violent offenses").

n209 One could imagine a situation in which there is more than one victim of an enumerated violent crime and the Massachusetts and Rhode Island statutes, by their literal terms, would impose on each victim the duty to report, knowing that another was also a victim.

n210 Barry Siegel, Beyond the Reach of the Law, L. A. Times, Aug. 20, 1996 at A1 (detailed report of the incident).

n211 See id.

n212 See id.

n213 See Washington v. Soler and Twyman, Nos. 36068-0-I & 36179-1-*I, 1998 WL 300535* (Wash. Ct. App. June 8, 1998) (unpublished opinion). Soler was also convicted but was then granted a new trial because of the prosecutor's improper comments in closing argument. Id. at *4. Subsequently, he entered a plea agreement by which he was convicted of first-degree manslaughter. Jain, supra note 204, at 1195.

n214 See, e.g., Siegel, supra note 210; Nancy Bartley, Innocent Bystanders No More, Seattle Times, Dec. 13, 1996 at B1.

n215 It should also be noted that, if Levick had received his injuries from a wild animal or an accidental fall, not even a rule as broad as common law misprision of felony would require persons aware of his distress to summon assistance. See infra note 250 and accompanying text.

n216 Jim Brunner, Crime Laws Bear Names of Young Victims, Seattle Times, Mar. 31, 2000 at B4; Jennifer McCoy, Joey Levick's Bill a Call for Decency, Seattle Times, Jan. 30, 1997 at B3; Bartley, supra note 214.

n217 One writer has criticized duty-to-rescue statutes because they could be taken to endorse vigilantism. See Wenik, supra note 91, at 1794-97. Cf. David C. Biggs, "The Good Samaritan Is Packing": An Overview of the Broadened Duty to Aid Your Fellow Man, with the Modern Desire to Possess Concealed Weapons, *22 U.*

Dayton L. Rev. 225 (1997) (arguing that duty-to- rescue statutes and an armed citizenry are a dangerous combination, and concluding that the former should be expanded while the latter should be curtailed).

n218 *Vt. Stat. Ann. tit. 12, § 519* (1973). Note that, by its literal terms, the statute imposes an obligation of rescue not only on eyewitnesses to another's peril but also on those who learn of another's peril indirectly. See Jain, supra note 204, at 1192 (observing that Vermont does not limit the duty to rescue to persons at the scene of an emergency but extends it to "anyone who 'knows' of another in peril.").

n219 *433 A.2d 271 (Vt. 1981)*. The defendant Joyce was accused of kicking his son in the head repeatedly in front of witnesses. See *id. at 272*. The defense argued to the jury that any reasonable person would have done something to stop the defendant if he had actually been trying to seriously injure his son. See *id. at 273*. The trial judge instructed the jury that a person has no duty to try to stop a fight occurring in his presence. See id. The defense argued to the supreme court that the instruction was incorrect because the Duty to Aid the Endangered Act imposes such a duty. See id.

n220 *Id. at 273*. Cf. *Farrell v. People, 46 P. 841 at 843 (Colo. Ct. App. 1896)* (reversing conviction of defendant, who stood by and did nothing as a woman was robbed of her jewelry, under a repealed statute making "a person who stands by, without giving such help as may be in his or her power to prevent a criminal offense from being committed" an "accessory during the fact" because the indictment did not "set forth what act he failed to do which he might have safely done."). It might be in one's power to prevent the commission of a crime, but he might succeed at the cost of his own life. He might readily be willing to interfere, but fail to do so, because he has reason to believe that he could not act without exposing himself to danger. The law does not require him to hazard his personal safety. If he does what he can without endangering himself, he is guiltless. Id.

n221 That the statute would not require personal intervention in a fight makes perfect sense. However, the witnesses to the incident in the Joyce case did not try to summon assistance, either. *Joyce, 433 A.2d at 273*. The jury instruction, and the supreme court's interpretation of the statute, while technically correct, should have expressed the distinction between personally intervening in a fight and calling for help from the authorities.

n222 See Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, *71 Wash. U. L.Q. 1, 24 n.114* and accompanying text (1993); Jay Silver, The Duty to Rescue: A Reexamination and a Proposal, *26 Wm. & Mary L. Rev. 423 at 423, 426-27 (1985)*.

n223 *R.I. Gen Laws § 11-56-1* (1994 Reenactment).

n224 *Minn. Stat. Ann. § 604A.01* Subd. 1 (West 2000). Under Minnesota law, "'Petty misdemeanor' means a petty offense which is prohibited by statute, which does not constitute a crime and for which a sentence of a fine of not more than $ 200 may be imposed." Id. § 609.02 subd. 4(a) (West Supp. 2000).

n225 Id. § 609.662 Subd. 3 (West Supp. 2000).

n226 Id. § 609.662 Subd. 1 (West Supp. 2000).

n227 Id. § 609.662 Subd. 4 (West Supp. 2000).

n228 See Yeager, supra note 222, at 24 n.114 and accompanying text.

n229 *Wis. Stat. Ann. § 940.34(2)(a)* (West Supp. 1999). A violation is a Class C misdemeanor. See id. § 940.34(1)(a) (West Supp. 1999). A Class C misdemeanor is punishable by a fine not to exceed $ 500 or imprisonment not to exceed thirty days, or both. See id. § 939.51(3)(c) (West Supp. 1999).

n230 Id. § 940.34(2)(d) (West Supp. 1999).

n231 See *State v. La Plante, 521 N.W.2d 448, 451 (Wis. Ct. App. 1994)* (affirming conviction under the statute).

n232 See id.

n233 See *id. at 449;* see also Kristina M. Knapcik, Unlike Nevada, Witnesses Here Face Law, Milwaukee J. Sentinel, Sept. 9, 1998 at 7 (contrasting the Iverson murder).

n234 See id.

n235 See *La Plante, 521 N.W.2d at 449.*

n236 See Knapcik, supra note 233.

n237 See *La Plante, 521 N.W.2d at 448.*

n238 *Id. at 450-51.*

n239 See *id. at 452.*

n240 *Haw. Rev. Stat. Ann. § 663-1.6* (Michie 1995 Relacement Vol.) (captioned "Duty to assist"). The penalty for a petty misdemeanor is a fine up to $ 1,000 and imprisonment for up to thirty days. *Haw. Rev. Stat. Ann. §§ 706-640(5)* ("Authorized fines"), 706-663 ("Sentence of imprisonment for misdemeanor or petty misdemeanor") (Michie 1999 Replacement Vol.).

n241 See Hoffmann, supra note 205, at 841.

n242 *Fla. Stat. Ann. § 794.027* (West 2000). In Florida, a misdemeanor of the first degree is punishable by a definite term of imprisonment not exceeding one year or a fine not exceeding $ 1,000 or both. See id. §§ 775.082(4)(a) & 775.083(1)(d) (West 2000).

n243 *R.I. Gen. Laws § 11-37-3.3* (1994 Reenactment).

n244 See supra note 100 and accompanying text.

n245 See supra notes 222-223 and accompanying text.

n246 See supra note 207 and accompanying text.

n247 The perverse result of the Rhode Island legislative scheme is that a person who mutely witnesses a rape and murder is subject to a lesser penalty than a person who mutely witnesses a rape only, since a live victim can file a complaint while a dead victim cannot.

n248 See Yeager, supra note 222, at 28-29 ("The duty to rescue will most often require prompt reporting; thus, the two different types of laws [duty-to-rescue and duty-to-report] would have substantially the same application and effect."). See also, Heyman, supra note 6, at 747 ("the citizens duty to act [per a duty to rescue] would often be satisfied by calling for emergency assistance from the police, fire department, or rescue services. An individual would be required to intervene directly in an emergency situation only when there was no time to obtain governmental assistance."); Melody J. Stewart, How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability, *25 Am. J. Crim. L. 385, 413-14 (1998)* (observing that, in "situations involving imperiled strangers who are victims of crime," a statutory duty to rescue imposes no greater burden than a statutory duty to report).

n249 Hence, it is erroneous, or at least imprecise, to categorize both kinds of laws as "duty to aid" statutes. See Biggs, supra note 217, at 231. See also Stewart, supra note 248, at 413 n.142 ("it should be made clear that general duty-to assist laws are different from crime reporting laws.").

n250 See Jain, supra note 204, at 1193 (comparing the Wisconson statute with the Vermont and Minnesota statutes and noting that the former, unlike the latter two, would impose "no duty to aid a drowning baby or a stranger having a heart attack."). See generally John T. Pardun, Good Samaritan Laws: A Global Perspective, 20 Loy. L.A., Int'l & Comp. L.J. 591 at 594, 599-600 (1994) (noting the distinction between a general duty to assist and a duty to act only with regard to criminal conduct); Biggs, supra note 279, at 231, 244 (noting the distinction between statutes covering "Acts of God" and those covering acts of criminal agents); Jessica R. Givelber, Imposing Duties on Witnesses to Child Sexual Abuse: a Futile Response to Bystander Indifference, *67 Fordham L. Rev. 3169, 3192 (1999)* (same).

n251 See *Minnesota v. Carter, 119 S. Ct. 469 at 482 (1998)* (Ginsburg, J., dissenting).

n252 Still, a witness reporting duty specific to criminal violence is perhaps more likely to focus a witness to a crime in progress on his or her legal obligation to summon assistance than would be a generic rescue statute applicable to any emergency .

n253 See supra Part IV.B.

n254 It must be emphasized that the following discussion addresses the duty to report crime, not a duty to rescue victims of crime. Many other commentators have taken the reverse approach. See Ziegler, supra note 202, at 556-57 (proposing a statute to provide that "[i]t shall be a crime for witnesses to violent actions to deny assistance to victims of such actions."); Jennifer Bagby, Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should be Required to Call for Help, *33 Ind. L. Rev. 571, 585, 586* (stating that "[r]ather than focusing on the need to capture criminals, 'Bad Samaritan' statutes should direct attention to the plight of the victims of crime and the need to intervene in order to render assistance to those in danger"). *Id. at 586* (proposing a statute to require "bystander intervention by reporting specifically enumerated crimes in order to aid the crime victim.").

n255 See Howard, supra note 7, at 754 ("[T]he scope of misprision, if the traditional statements are taken literally, is absurd . . . ."). See also Williams, supra note 7, at 423 (calling the offense, as defined by authoritative commentators, "unreasonably wide"); P. R. Glazebrook, supra note 26, at 311 ("The long-standing criticism that misprision is an impracticably wide crime remains unanswered."); Mullis, supra note 36, at 1111- 12 (submitting that the common law crime of misprision, if applied to all felonies, makes difficult the protection of individual

rights and needs, and further venturing that appropriate limits on the felonies that must be reported would cure such difficulties).

n256 See Broeder, supra note 15, at 88-89; Gerald E. Lynch, The Lawyer as Informer, *1986 Duke L.J. 491 at 535 (1986).*

n257 See Case and Comment *[1961] Crim. L. Rev. 483 at 485 (1961)* ("[I]t is clear that many respectable persons and institutions-banks, schools, universities, trade unions, etc., and their officers-commit the crime regularly. It is no answer to such a point to say that it is only in exceptional cases that a prosecution will be brought. The law-abiding citizen should not have to depend on the benevolent exercise of a discretion for his freedom from prosecution."); Allen, supra note 3, at 58 ("[I]t is perturbing that the police have the right to institute prosecutions which would revolt common sense.").

n258 See, e.g., Norvall Morris, An Australian Letter, *1955 Crim. L. Rev. 290 at 293* ("Ultimately, the repression of crime is a community responsibility, and the existence and occasional prosecution of this offence expresses and underlines this truth."); Goldberg, supra note 79 at 150 ("[E]ven apart from its immediate practical consequences, its existence might renew a sense of communal responsibility, the present lack of which is a major element of our most pressing concerns."); Kelly, supra note 102 at 230 ("the possible harshness that the retention of the offense might cause is not sufficient justification for its abrogation. The harshness of the rule is more than alleviated by the benefits society would likely derive from its retention."); Frankel, supra note 59, at 419 ("[S]ociety must rely upon reports and information from private citizens. This being true, there are definite social advantages in a rule which declares a public obligation to give such information.") and at 421 ("One might ask, however, whether the advantages from threatening to punish are more than offset by the disadvantages in enforcing (or failing to enforce) the threat?"). Among the authorities endorsing abolition of misprision in favor of laws against crimes that require some affirmative act are Recent Case, *54 Harv. L. Rev. 506 at 506-07 (1941);* Recent Decision, supra note 5, at 172; Glazebrook, supra note 26, at 308.

n259 Cf. Hoffman, supra note 205 at 841 (criticizing the "unduly restricted scope" of the analogous Rhode Island statute because "other serious crimes pose an equally dangerous threat to society.").

n260 See Morgan, supra note 5, at 95 ("The citizen's duty set out in misprision is certainly of a high political and moral character, but any punishment for failure to carry out this duty would seem to be best determined by the legislative branch of government, rather than under common law rules which arose in answer to problems of a society very different from our own."). Cf. Glazebrook, supra note 26, at 308 (stating, in reference to the Sykes case, that a statutory provision "would have been preferable to the recognition of a vaguely defined common law offence embracing much misconduct which no Englishman finds reprehensible.").

n261 See Paul H. Robinson, Criminal Law Defenses: A Systematic Analysis, *82 U. Colo. L. Rev. 199 at 267-68 n.61 (1982).* In a jurisdiction retaining common law crimes, any court passing on misprision of felony in a case of first impression must make several preliminary determinations. First, it must decide if the crime existed at common law. Second, it must decide if the crime was adopted into the jurisdiction's criminal law by the reception statute or clause in force. Third, it must decide if the crime remains a valid indictable offense at the present time. Fourth, it must decide if willfulness or an evil intent (or even an affirmative act) is an essential part of the offense. There is a conflict of authority on each of these matters. Thus, the first prosecution for common law misprision of felony in a given jurisdiction is always a test case. The crucial issue is not the defendant's conduct but whether the court will hold the crime to be part of the jurisdiction's law. The court decides after the fact whether to embrace a doctrine which makes criminal the defendant's alleged omission. In substance, the prosecution asks the court to criminalize the defendant's omission ex post facto.

n262 Meale, supra note 7, at 212 (1975). A statute which encompassed the full breadth of the common law offense, recycling the oblique formulations of the crown law writers, would be impermissibly vague. See Hoffman, supra note 205 at 850; Wood, supra note 79 at 303 ("It has long been one of the fundamental principles of

the common law that the provisions of a penal law should be certain and clear, not couched in such vague terms that it constitutes a dragnet to entangle anyone a particular court and jury can be persuaded to envelop in it. It is submitted that the definition of misprision of felony propounded in Sykes v. D.P.P. is just such a dragnet type of law that, had it appeared in a penal statute, these same Lords would not have hesitated to criticize the draughtsmanship.") (footnotes omitted). Cf. Meale, supra note 7, at 202 n.17, 205, 206, 212 ("Reasonableness also requires greater specificity [in a misprision statute] in light of the characteristic vagueness of the crime of misprision.").

n263 A skeptic might ask: under what circumstances is it just to penalize someone for steadfastly minding his or her own business?

n264 See supra note 86 and accompanying text.

n265 See Model Penal Code §§ 210.2(1), 2.210.3(1), 2.210.4(1) (Official Draft 1962).

n266 Glazebrook, supra note 26, at 316.

n267 Mullis, supra note 36, at 1117 (footnote omitted).

n268 See Webster's New Collegiate Dictionary 1350 (9th ed. 1989).

n269 See Glazebrook, supra note 26 at 316 ("[I]f a man is to be punished for not doing something, he ought to know precisely what is expected of him.").

n270 See id. at 313 (considering, as per common law misprision of felony, when the duty to reveal a felony arises and how such duty may be discharged).

n271 Cf. Yeager, supra note 222, at 30 (comparing current crime reporting statutes to common law misprision of felony).

n272 See supra notes 64-65 and accompanying text.

n273 Mullis, supra note 36, at 1117.

n274 Glazebrook, supra note 26, at 313 (footnote omitted).

n275 One might witness actions in the execution of a crime (burglars disguised as furniture movers clearing out a house) without actually gaining knowledge of a crime. A person, who failed to report such activity does not violate a duty to report crime any more than a person who unwittingly gives a victim a drink another has laced with poison, commits murder. Witnessing a crime is conceptually distinct from witnessing suspicious criminal activity. Cf. Silver, supra note 222, at 431 n.56 ("Our police should be called to investigate not only unambiguous instances of criminal activity, but also situations in which there is reasonable suspicion that a crime is occurring."). A rule extending the reporting duty to witnesses of suspicious activity would be quite cumbersome.

n276 See Wenik, supra note 91, at 1800 ("By limiting its application to those persons who have actually witnessed a felony, the proposed statute avoids the potential for overbroad coverage."); Meale, supra note 7, at 212 ("[I]t is necessary that any rational misprision statute demand that the reporter's knowledge of the crime be

the result of direct, personal observation, in order to guarantee greater accuracy in reporting as well as to avoid placing too burdensome a duty on the would-be reporter.").

n277 Hoffman, supra note 205, at 842.

n278 See Lynch, supra note 256, at 523-27 (approving of existing law for not requiring the victim to make an unsolicited report of a crime); Glazebrook, supra note 26 at 311 ("It is, furthermore, particularly difficult to defend a law which indiscriminately adds to the injuries of the victim of a crime the penalties of the criminal law should he or she wish to forgive and forget."). The dilemma of a rape victim compelled to make a report can be particularly acute. See Hoffman, supra note 205, at 843. ("[A] crime reporting statute should clearly exempt a rape victim from the statutory duties of a witness."). Cf. Howard, supra note 7, at 755 (offering hypothetical example involving rape victim to illustrate the difficulty of circumscribing the crime). However, the same concerns extend to victims of other crimes, as well. See Lynch, supra note 256, at 523 n.126 and accompanying text.

n279 See Lynch, supra note 256, at 527-28. See also Glazebrook, supra note 26, at 311 ("X says to B: 'I stole some money yesterday; will you help me repay it?' B is a friend of X; he wished to know nothing of X's misdeeds; and yet he is to be a criminal if he does not betray him.").

n280 Cf. Glazebrook, supra note 26, at 311 ("A says to B 'Did you know that X stole a book from the library last week?' Adding appropriate circumstantial details . . . . [T]he duty to act arises not because of willing assumption of responsibility, the occupation of an office, or the ownership of property but because of the mere possession of certain knowledge-knowledge possessed accidentally and undesired knowledge which may indeed have been acquired through some malevolent person.").

n281 Consider the case of an individual who, without witnessing a crime, hears a killer's confession exonerating a wrongly accused person.

n282 A duty to summon help for injured or otherwise endangered persons in circumstances such as those presented by the Joey Levick case, discussed supra Part IV.B, is a different matter, most appropriately addressed by a duty-to-rescue statute of the type enacted in Vermont, Rhode Island, and Minnesota. See supra Part V.A.

n283 Cf. Frankel, supra note 59, at 421 (1965) ("Is it then a matter of sound policy to expect citizens to inform authorities concerning other people's crimes? The answer would seem to depend, as the Law Lords [in the Sykes case] recognize, upon the nature of the crime. Certainly, we are incensed by the failure to prevent or report violent and other serious crimes which result in injuries to other persons or demonstrate that the criminal is a continuing threat to the public.") (footnotes omitted). See also Lynch, supra note 256, at 532-34 (observing that one's view of an informant's actions depends in large part on the gravity of the offense disclosed).

n284 See Mullis, supra note 36, at 1111-12 ("It seems then, that the common law crime of misprision should no longer exist if it is applied to all citizens and to all felonies, as has traditionally been the case." Id. at 1112.). See also Broeder, supra note 15, at 90 ("And who but one knowledgeable in the law can in most cases draw the line between felony and misdemeanor and know with some assurance even if he recognizes what conduct theoretically constitutes a felony whether one has in fact and in law been committed?"). Even writers who are favorable to common law misprision of felony obliquely concede the preferability of a more limited reporting duty. See Goldberg, supra note 79, at 150 ("If limited by its terms to serious crimes, perhaps only serious crimes against the person, few injustices are likely to result.") (footnote omitted). A writer criticizing the Holland decision for giving insufficient weight to strong policy considerations favoring retention of common law misprision makes no attempt to justify the crime's application to drug felonies, as was the case in Holland. Instead, he invokes the famous Kitty Genovese incident (discussed infra Part VIII.A) and posits that a known duty to inform police could operate to save victims in similar situations. Kelly, supra note 102, at 229-30. This line of reasoning supports a reporting duty applicable to crimes against the person, but not a rule embracing all felonies.

n285 Shannonhouse, supra note 35, at 61-62 ("If one further contemplates that state laws classify many serious crimes a misdemeanors and many relatively petty offenses as felonies, the limitation of misprision to felonies seems indefensible.") (footnote omitted); see also Glazebrook, supra note 26, at 312 ("There may be crimes where the protection of the public requires that each offender be brought to justice however reluctant his victim, his friends, or those who have him in their care, may be to do so, but the line which separates them from all other offences is not the line which separates felonies from misdemeanors."). *Pope v. State, 396 A.2d 1054 at 1075 (Md. 1979)* (quoting Glazebrook and adding "this is particularly true with respect to Maryland where the distinction between felony and misdemeanor is a hodgepodge following neither rhyme nor reason.").

n286 See supra text accompanying notes [illegible]-66.

n287 Wenik, supra note 91, at 1800 n.100. Wenik considers reporting laws limited to violent crimes to be "too narrowly drawn" because "such important categories of crime as burglary and auto theft are not within their ambit." Id. at 1804.

n288 Mullis, supra note 36, at 1111.

n289 See id. at 1112. "These crimes are of such a basic nature that it is difficult to conceive of anyone having any moral quandaries about them." Id.

n290 Id. "Thus, a two-fold limitation on the crimes to which misprision would apply is suggested-the crime must be one of the English common law felonies and it must be of such a serious nature that a reasonable man would consider it his duty to inform the police. By limiting misprision in this manner, the crime would be manageable enough to warrant a definite reappraisal of its potential usefulness." Id. at 1113 (footnote omitted).

n291 See Meale, supra note 7, at 212 ("It is also necessary to limit the crimes capable of concealment under the statute to only the most serious.").

n292 See id. at 213 ("Murder arson, kidnaping, robbery, burglary or aggravated assault"); Hoffman, supra note 205, at 864 ("murder, rape, kidnaping, robbery, or arson").

n293 Cf. John H. Scheid, Affirmative Duty to Act in Emergency Situations - The Return of the Good Samaritan, 3 J. Mar. J. of Prac. And Proc. 1 at 13 ("A's duty to act for B's protection should not be extended to property. A new rule should be addressed only to the most pressing problem, the most flagrantly immoral.").

n294 See supra text accompanying notes 204, 206-207.

n295 See supra text accompanying note 242 (Florida's rape reporting statute limits its application to persons with "the present ability to seek assistance for the victim or victims . . . .").

n296 Hoffman, supra note 205, at 843, 864.

n297 A statute or proposal considering only the danger to the reporter personally or his family or household is too narrow. See, e.g., *Wash. Rev. Code Ann. § 9.69.100(1)* (West 1998); Meale, supra note 7, at 212, 213; Wenik, supra note 91 at 1800 n.100. The reporting duty should be suspended until a report can be made without endangering oneself or other innocent persons. See, e.g., *Mass. Gen. Laws Ann. ch. 268, § 40* (West 1990); *R.I. Gen. Laws § 11-1-5.1* (1994 Reenactment).

n298 After decades of ever-expanding usage across the country, "911" became the officially established universal emergency telephone number throughout the United States by congressional enactment in 1999. Wireless Communications and Public Safety Act of 1999 § 3(a), *47 U.S.C. § 251*(e)(3) (West Supp. 2000).

n299 See *Wash. Rev. Code Ann. § 9.69.100(1)(c)* (West 1998).

n300 Cf. *In re Stitchtenoth, 425 N.E.2d 957, 958 (Ohio Ct. App. 1980)* (bystander notified person at the front desk of a skating rink of a stabbing on the business premises). A person trying to make a report of a crime may retreat to a place open to the public and ask an employee there to call authorities or allow access to a telephone for the purpose of making the call. Employees who refuse to cooperate with a person trying to discharge his or her reporting duty should be held civilly liable to the victim of the crime in question, together with the employer. Cf. *Soldano v. O'Daniels, 190 Cal. Rptr. 310, 311-12, 315-17 (Cal. Ct. App. 1983)* (reversing summary judgment dismissal of a wrongful death complaint against a bar owner whose bartender allegedly refused to allow a good Samaritan access to a telephone to notify police of a threat made against the life of a patron in another bar later murdered by the issuer of the threat). For discussion of Soldano, see Beverly Ann Seagraves, The Duty to Rescue in California: A Legislative Solution?, *15 Pac. L. J. 1261 at 1273-75 (1984)*; Hoffman, supra note 258, at 835-37. See also Ziegler, supra note 202, at 541-42.

n301 See Mass. Gen. Laws. Ann. ch. 268, § 40 (West 1990).

n302 See *Ohio Rev. Code Ann. § 2921.22(a)* (West 1997).

n303 *S.D. Codified Laws § 22-11-12* (Michie 1988).

n304 Police nonfeasance is a risk that no reporting duty can eliminate. See, e.g., *Estate of Sinthasomphone v. Milwaukee, 838 F. Supp. 1320, 1322-24 (E.D. Wis. 1993), Estate of Sinthasomphone v. Milwaukee, 785 F. Supp 1343, 1345 (E.D. Wis. 1992)* (police, summoned by a 911 caller in a phone booth to help a naked, bleeding boy reeling down the street, instead returned the youth to the clutches of a cannibalistic serial killer posing as his companion and threatened to arrest good Samaritans who attempted to inform them of the truth of the situation). For an account of an especially galling episode of futile crime reporting, see Bryn Freedman & William Knoedelseder, In Eddie's Name: One Family's Triumph over Tragedy, 56-57, 59, 61, 65 (Faber & Faber, 1999). In 1994, a gang of armed teenagers rampaged through a Philadelphia neighborhood, killing one youth and injuring others. Id. at 172. At least fourteen 911 emergency calls reporting the riot were logged, but the city's superannuated dispatch system delayed a police response for more than two hours. Id. at 65, 130-32.

n305 *Wash. Rev. Code Ann. § 9.69.100(3)* (West 1998).

n306 Cf. Shannonhouse, supra note 35, at 67-69 (discussing whether or not an ineffective attempt to communicate knowledge of a felony to authorities should be a good defense under the federal misprision statute). However, the old maxim "if at first you don't succeed, try, try again" retains its force. A person who has been unable to get through on a telephone should not ignore the chance to personally notify a passing patrolman. Id. at 68.

n307 See, e.g., Lynch, supra note 256, at 527-32, 533. Among writers who have considered the question, there is a general agreement that those who fail to inform against close family members should not suffer criminal sanctions. Broeder, supra note 15, at 88-89; Glazebrook, supra note 26, at 316-18; Meale supra note 7, at 212, 213 (statutory proposal for reporting duty would exempt the "spouse, parent, child, brother, sister, grandparent, or grandchild of the actor"). Cf. Shannonhouse, supra note 35, at 76 (discussing applicability of the interspousal privilege to prosecutions under the federal misprision statute).

n308 See, e.g., *Ohio Rev. Code Ann. § 2921.22(F)(6)* (West 1997) (exempting rape counselors from the crime reporting duty). 1989 Md. Att'y Gen. Ann. Rep.128 (July 18, 1989) (responding to inquiry as to whether a rape crisis center employee must report to police knowledge of a sex crime committed against an adult).

n309 As one writer observed: [A] vague rule compelling action would tend to compel action far beyond the borders of the rule since people would tend to act in all doubtful cases in order to be on the safe side of the law. This danger is compounded because of the "aura effect" of any criminal mandate or proscription. Any criminal law which is effective in deterring crime also has the effect of deterring conduct not criminal, but bordering on the fringe of criminality. . . . The aura effect is the principle factor in making misprision offenses socially disadvantageous. Although the ordinary citizen certainly can be expected to know what he should do when he has information about a crime, he still must speculate on what constitutes such information, e.g., mere suspicion or guess. To be safe from prosecutions and to obey the law, citizens would have to resolve their doubts in favor of informing and the conscientious citizen would be acting in a manner indistinguishable from the intermeddling snoop. Frankel, supra note 59 at 425-26.

n310 See *Commonwealth* v. *Lopes, 61 N.E.2d. 849, 850-52 (Mass. 1945);* see also *Commonwealth v. Stowell, 449 N.E.2d 357 (Mass. 1983).*

n311 See *State v. Wardlow, 484 N.E.2d 276, 277-80 (Ohio Ct. App. 1985).*

n312 See *State v. Conquest, 377 A.2d 1239, 1240-43 (N.J. Super. Ct. Law Div. 1977).*

n313 See *State v. Biddle, 124 A. 804 (Del. 1923).*

n314 See *State v. Michaud, 114 A.2d 352 (Me. 1955).*

n315 See *Holland v. State, 302 So.2d 806, 807-10 (Fla. Dist. Ct. App. 1974);* Kelly, supra note 102, at 222.

n316 See *Pope v. State, 396 A.2d 1054, 1058-60 (Md. 1979).*

n317 See *State v. Carson, 262 S.E.2d 918, 919-20 (S.C. 1980).*

n318 See *In re Stichtenoth, 425 N.E.2d 957, 958-59 (Ohio Ct. App. 1980).*

n319 The account of the crime most often cited is that given by the New York Times shortly after the fact, Martin Gansberg, 37 Who Saw Murder Didn't Call Police, N.Y. Times, Mar. 27, 1964, at 1, and elaborated upon by the paper's then- Metropolitan Editor in a small book, A. M. Rosenthal, Thirty- Eight Witnesses (1964). This account has Mosley making three separate attacks on Genovese, retreating and returning twice before delivering the fatal wounds. Id. at 29-40. But see id. at 78-79 (describing attacker as retreating and returning only once). However, a later and apparently more accurate account appears in a book by a former Chief of Detectives for the New York Police Department, who was a deputy inspector in Queens at the time of the murder. Albert A. Seedman & Peter Hellman, Chief! 109-46 (1974). It describes only two attacks, with Mosley leaving and returning only once. A recounting of the crime consistent with this latter version appeared in the New York Times in a piece about the twentieth anniversary of the crime. Maureen Dowd, The Night that 38 Stood by as a Life Was Lost, N.Y. Times, Mar. 12, 1984 at B1.

n320 See Seedman, supra note 319, at 115-16, 133; *Moseley v. Scully, 908 F. Supp. 1120, 1124 (E.D.N.Y. 1995)* (recounting Moseley's trial testimony).

n321 See Seedman, supra note 319, at 116, 133.

n322 See *Moseley, 908 F. Supp. at 1124;* Seedman, supra note 319, at 116.

n323 See *Moseley, 908 F. Supp. at 1124;* Seedman, supra note 319, at 116, 133.

n324 See Seedman, supra note 319, at 117.

n325 See *Moseley, 908 F. Supp. at 1124;* Seedman, supra note 319, at 117, 133.

n326 See Seedman, supra note 319, at 117-18.

n327 See id. at 134; *Moseley, 908 F. Supp. at 1124.*

n328 See Seedman, supra note 319, at 118; *Moseley, 908 F. Supp. at 1124.*

n329 See Seedman, supra note 319, at 135.

n330 See id. at 120.

n331 See id. at 135.

n332 See id. at 118; Rosenthal, supra note 319, at 37, 74-75.

n333 See Seedman, supra note 319, at 118; Rosenthal, supra note 319, at 36, 69.

n334 See generally, Rosenthal, supra note 319, at 27- 29, 40-45, 72-73. Although the crime predated the advent of the 911 system, the witnesses could have reached the police simply by dialing "0" for operator. Id. at 40, 59, 67.

n335 See Kelly, supra note 102, at 121-23; Rosenthal, supra note 319, at 42, 79, 80, 82.

n336 Rosenthal, supra note 319, at 37, 79.

n337 See Seedman, supra note 319, at 145.

n338 Although the victim is deceased, the author respects the judgment of others well-acquainted with the case to leave her name unstated, even though it is by now a matter of public record. Helen Benedict, Virgin or Vamp: How the Press Covers Sex Crimes 119 n* (1992); interview with the Honorable William G. Young, United States District Court for the District of Massachusetts (Feb. 1999) (then presiding state court judge at criminal proceedings).

n339 See Thomas Farragher, Widely Watched Mass. Trial Reshaped Society's Attitude Toward Rape Victims, The Boston Globe, Oct. 18, 1999, at A1 ("Crimes of the Century" series); Benedict, supra note 338 at 91; Videotape: Excerpts from the Big Dan's criminal trial (on file with the Harvard Law School Audiovisual Department).

n340 See Benedict, supra note 338; Videotape, supra note 339.

n341 See *Farragher, supra* note 339; Videotape, supra note 339; Benedict, supra note 338.

n342 See Benedict, supra note 338, at 93-94. See, e.g., The Tavern Rape: Cheers and No Help, Newsweek, Mar. 21, 1983 at 25 ("As she struggled - screaming 'Stop . . . I want to get out,' and pleading for help from others at the oval bar - several of them reportedly lifted her onto the pool table and raped her again and again to the cheers and applause of the other bar patrons.").

n343 See Benedict, supra note 338; Videotape, supra note 339.

n344 See Benedict, supra note 338.

n345 See *Farragher, supra* note 339; Interview with Judge Young, supra note 339.

n346 See *Commonwealth v. Vieira, 519 N.E.2d 1320 (Mass. 1988); Commonwealth v. Cordeiro, 519 N.E.2d 1328 (Mass. 1988);* Melinda Beck, Rape Trial: 'Justice Crucified'?, Newsweek, Apr. 2, 1984 at 39; *Farragher, supra* note 339; Videotape, supra note 339. The Supreme Judicial Court of Massachusetts unanimously affirmed all of the convictions.

n347 See Benedict, supra note 338, at 137-39; *Farragher, supra* note 339.

n348 See *Farragher, supra* note 339.

n349 Benedict, supra note 338, at 139. Some patrons may have departed before police arrived. Id. at 138.

n350 See Heyman, supra note 6, at 678 n.17 & 689 n. 66. It is not clear that a rescue or reporting law would have been apposite to the situation at Big Dan's. Some among the accused perpetrators may have, by intimidation, prevented others at the scene from calling for help. Videotape, supra note 339. Interview with Judge Young, supra note 338; telephone interview with the Honorable Robert Kane, Massachusetts District Court Judge (Mar., 1995) (prosecuting attorney at criminal trial). See also Benedict, supra note 338, at 93, 125 (bartender indicated that his fear of the perpetrators prevented him from alerting the authorities). What is more, verbal encouragement of a crime is an affirmative act, making one liable as a criminal accessory. See *Anderson v. State, 516 S.E.2d 315, 316 (Ga. Ct. App. 1999)* (verbal encouragement of a shooting). See generally, Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 6.7(a) (1986) ("One may become an accomplice . . . by words or gestures of encouragement . . . .") (footnote omitted).

n351 See *Farragher, supra* note 339; Benedict, supra note 338, at 140-41.

n352 See Good Samaritan Law Sought, Chi. Trib., Sept. 16, 1998, at 3 (Michigan); Stacy Finz, Killing of Girl, 7, in Casino Spurs Good Samaritan Bills, S. F. Chron., Dec. 9, 1998, at A21 (California). See also Patrick McGreevy, City: Punish 'Bad Samaritans', L. A. Daily News, Sept. 16, 1998, at 3 (California). The U.S. Congress considered a bill called the "Sherrice Iverson Act," which would have conditioned a state government's re-

ceipt of certain federal funds in the future on enactment and enforcement of a generally applicable duty to report sexual abuse of a child. S. 793, 106th Cong. (1999). The press reported on these legislative efforts with pronounced skepticism. See Maura Dolan, Good Samaritan Laws Are Hard to Enact, Experts Say, L. A. Times, Sept. 9, 1998, at A1. Dan Reed, Experts Warn About Impact of Proposed Good Samaritan Laws, Dallas Morning News, Sept. 6, 1998, at 44A. Cf. Caren Benjamin, Lawyers Say Care Needed in Writing Good Samaritan Law, Las Vegas Rev.-J., Sept. 13, 1998 at 1B (discussing potential problems with mandatory child abuse reporting laws proposed after the murder of Iverson).

n353 See Joshua Hammer, Shunned at Berkeley, Newsweek, Oct. 19, 1998, at 70; Norma Zamichow, The Fractured Life of Jeremy Strohmeyer, L. A. Times, July 19, 1998, at A1.

n354 See Hammer, supra note 353, at 70; Zamichow, supra note 353. The two young men were regarded as high achievers in school, but together they manifested an ugly predilection for lawless mischief. See also Caren Benjamin, Friend: Cash Witnessed Sex Assault, Las Vegas Rev.-J., Sept. 17, 1998, at 1B; Zamichow, supra note 353, (Cash and Strohmeyer participated in assaults, vandalism, and binge drinking).

n355 See Hammer, supra note 353, at 70; Zamichow, supra note 353; 60 Minutes: The Bad Samaritan (CBS television broadcast, Sept. 27, 1998).

n356 See Zamichow, supra note 353. He recounts being impaired by a combination of prescription amphetamines and alcoholic beverages. 20/20: A Murderous Encounter (ABC television broadcast, Oct. 30, 1998); Las Vegas Rev.-J., Documents of Record: Jeremy Strohmeyer Statement, available at <http://www.lvrj.com/lvrj home/news/packages/ strohmeyer/statement.html> [hereinafter Strohmeyer Statement] (visited Aug. 29, 2000).

n357 See Las Vegas Rev.-J., Documents of Record: Grand Jury Testimony <http://www.lvrj.com/lvrj home/news/packages/strohmeyer/transcrip t.html> (testimony of surveillance officer) (visited Aug. 29, 2000). Cash would reemerge in two minutes but Stromeyer would not exit for almost twenty-four minutes and Sherrice never came out alive. Id.

n358 See Las Vegas Rev.-J., Documents of Record: Grand Jury Testimony <http://www.lvrj.com/lvrj home/news/packages/strohmeyer/transcrip t2.html> (testimony of David Cash) (visited Aug. 29, 2000); 20/20, supra note 356, Zamichow, supra note 355.

n359 Las Vegas Rev.-J., supra note 356. Strohmeyer says he became enraged, 20/20, supra note 356. Cash says he registered only a moderate pique. Las Vegas Rev.-J., supra note 356.

n360 Las Vegas Rev.-J., supra note 356; Hammer, supra note 353; 60 Minutes, supra note 355.

n361 Las Vegas Rev.-J., supra note 356; Hammer, supra note 353.

n362 Las Vegas Rev.-J., supra note 357 (testimony of county coroner medical examiner).

n363 See Ziegler, supra note 202, at 526-27 ("Across the country, letters in opinion columns, editorials in newspapers, and magazine articles have called for David Cash to be formally prosecuted for his behavior.") (footnote omitted); Cynthia Tucker, Everyone Should Be Accountable for Children's Safety, Atlanta J.-Const., Sept. 6, 1998, at R5 (editorial).

n364 Las Vegas Rev.-J., supra note 356; 60 Minutes, supra note 355.

n365 Las Vegas Rev.-J., supra note 356; Hammer, supra note 353.

n366 20/20, supra note 356; Strohmeyer Statement, supra note 356.

n367 See id.

n368 See id.

n369 See id.

n370 See id.

n371 See id.

n372 Days later, Strohmeyer was arrested shortly after attempting a suicidal overdose. Zamichow, supra note 355. His stomach was pumped, and he gave police an account of the crime that included details of the sexual molestation. Caren Benjamin, Officer Testifies About Strohmeyer's Constitutional Rights, Las Vegas Rev.-J., Jan. 28, 1998 at 2B; Caren Benjamin, Doctor Testifies Strohmeyer Was Lucid as He Confessed, Las Vegas Rev.-J., Jan. 6, 1998 at 1B; Las Vegas Rev.-J., Documents of Record: Jeremy Strohmeyer Arrest Report http://www.lvrj.com/lvrj home/news/packages/strohmeyer/stroh/one. html (visited Aug. 29, 2000). He skewed his confession to conceal Cash's presence. 20/20, supra note 356; Strohmeyer Statement, supra note 356. He maintains that he still had no genuine recollection of these details, but simply improvised a narrative from the information he got from Cash, news reports, and leading questions from his interrogators. 20/20, supra note 356; Strohmeyer Statement, supra note 356.

n373 Norma Zamichow, Strohmeyer Friend Saw Him Molest Girl, Classmates Say, L.A. Times, Sept. 16, 1998 at A1.

n374 Cash has furthered the cause by demonstrating a callousness about Iverson's death bordering on the pathological. Ziegler, supra note 202, at 526; Hammer, supra note 353; Zamichow, supra note 353; 60 Minutes, supra note 355.

n375 Seedman, supra note 319, at 122.

n376 Id. ("slender man of 120 to 140 pounds who could have been black or white").

n377 Id. at 125-26, 131. See also Rosenthal, supra note 319, at 42 (Police were able to "piece together what happened-and capture the suspect-because residents furnished all the information when dectectives rang doorbells during the days following the slaying.").

n378 Seedman, supra note 319, at 131-37.

n379 Mark Starr, Gang Rape: The Legal Attack, Newsweek, Mar. 12, 1984 at 38; Aric Press, Rape and the Law, Newsweek, May 20, 1985 at 60; Interview with Judge Young, supra note 350; Benedict, supra note 338, at 125; Vidoetape, supra note 339.

n380 Las Vegas Rev.-J., Documents of Record: Grand Jury Testimony http://www.lvrj.com/lvrj home/r s/packages/strohmeyer/transcript 2.html (testimony of David Cash) (visited Aug. 29, 2000).

n381 Before accepting a plea bargain to avoid the risk of a capital sentence, Strohmeyer's legal team worked at formulating a defense based on his mental condition. See Caren Benjamin, Natural Born Killer?, Las Vegas Rev.-J., Aug. 30, 1998 at 1A; Tim Dahlberg, Guilty Plea in Vegas Casino Killing, Associated Press, Sept. 8, 1998, available in *Westlaw, 1998 WL 6719627*. Strohmeyer has since made an unsuccessful collateral attack on the plea agreement. See Peter O'Connell, Justice Unchanged for Killer, Las Vegas Rev.-J., Feb. 10, 2000 at 1A.

n382 In fact, the victim specifically blamed the bartender for not helping her and she did try to impose civil liability on him through a lawsuit. Videotape, supra note 339; Benedict, supra note 338 at 125.

n383 See Broeder, supra note 15, at 90 ("And if one is in fact required to [report a crime] and does not, his knowledge of another's felonious misdeeds then becomes sacred and inaccessible because of the privilege against self-incrimination. Requiring him to testify concerning his knowledge after he has failed affirmatively to come forward would violate the privilege. . . ."). See also Givelber, supra note 250, at 3197 (observing that the threat of prosecution for failure to comply with a rescue or reporting statute may interfere with obtaining information from witnesses); Lynda Gorov, Proposed Samaritan Law Comes Under Fire, Boston Sunday Globe, June 20, 1999 at A3 (reporting on California attorneys' concern that, under a proposed child abuse reporting statute, "witnesses worried about their own prosecution [for failing to report] would be entitled to plead self-incrimination to avoid testifying.").

n384 See Austin Wehrwein, 'Samaritan' Law Poses Difficulties, Nat. L. J., Aug. 22, 1983 at 5; Seagraves, supra note 300 at 1283-84. See also Caren Benjamin, Lawyers Say Care Needed in Writing Good Samaritan Law, Las Vegas Rev.-J., Sept. 13, 1998, at 1B (quoting District Attorney Stewart Bell, a prosecutor in the Iverson case, as saying "[i]t may be difficult for prosecutors to get people to testify as witnesses to a crime if they believe they will be charged for not reporting it while it was going on").

n385 Telephone interview, supra note 350; Yeager, supra note 222, at 37-38. See also Gorov, supra note 383 (reporting on California attorneys' concern that, under a proposed child abuse reporting law, witnesses who failed to come forward promptly would demand immunity in exchange for their testimony).

n386 See, e.g., Yeager, supra note 222, at 37-38; Hoffman, supra note 205, at 845; Saul Levmore, Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations, *72 Va. L. Rev. at 897 n.47 (1986)*. It is also wrong to think that a duty-to report law could be used to ensnare those suspected of participating in a crime without having to prove their participation beyond a reasonable doubt at trial, because such use of the law would be invalid on self-incrimination grounds. Cf. Yeager, supra note 222, at 32-34 (reporting that a small number of prosecutors have used duty-to-report statutes as a basis for plea agreements "[d]espite the Fifth Amendment self-incrimination problems endemic to a law that requires witnesses to report criminal activity in which they might have some involvement . . . .") (footnote omitted); Glazebrook, supra note 26, at 310, 311 ("[E]ven misprision can hardly embrace one who conceals knowledge of another's felony for fear that in revealing it he will incriminate himself.") (footnote omitted). It would be an abusive application of the law, as well. Frankel, supra note 59, at 420. If prosecutors treat a reporting law simply as a trap for accomplices who deny active involvement in a crime, ordinary citizens cannot be expected to regard the law seriously as a mandate for taking affirmative steps against a crime occurring in one's presence.

n387 The idea of using a reporting statute as a threat in order to obtain testimony is premised on the assumption that the threatened person will be ignorant of his legal rights. Prosecutors will have to bluff a witness with threats of prosecution for violation of a reporting duty and hope the witness does not call the bluff by invoking the fifth and fourteenth amendments. In any case, such coercion will tend to impair the credibility of whatever testimony is extracted from the witness. See Gorov, supra note 383 (reporting on California attorneys' concern that, under a proposed child abuse reporting statute, "credible testimony could be tainted in jurors' eyes

if it appears witnesses were intimidated, either by police or by their own fear of prosecution."). Cf. *State v. Freeman, 473 A.2d 1149 at 1152-54 (R.I. 1984)* (defendant had a right under the sixth amendment to show that the witness had a motive to change her story and accuse him of a crime because she had been arrested and notified by police that she was suspected of misprision of a felony).

n388 See Ronald J. Rychlack, Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment, *65 Tul. L. Rev. 299, 325-29, 331-36 (1990).*

n389 *Id. at 322-23.*

n390 See *id. at 309-10 & nn. 33, 34.* The 'general deterrent' effect of a crime reporting statute bears upon bald inaction rather than positively antisocial behavior, but it is deterrence all the same. The other practical advantages commonly associated with criminal sanctions have little or no relevance to bystander indifference. There is no logical sense in which a passive witness to crime can be 'incapacitated,' see *id. at 313- 14,* and it is more than a little na ve to think that a cowardly or callous crime witness can be transformed into a good Samaritan through 'specific deterrence' or 'rehabilitation.' See *id. at 309-12.*

n391 In addition to helping incapacitate dangerous offenders, citizen compliance with a crime reporting duty can bring timely assistance to victims of crime. It was noted above that this humanitarian benefit to crime victims is really a secondary effect of a duty to inform on criminals and that the objective of bringing help to endangered persons would be served more completely by a generalized duty to rescue. See supra Part VI. A crime-witness reporting statute, however, may serve the same objective to an important degree. The author submits that this humanitarian consideration further tips the balance in favor of well-crafted crime witness reporting legislation.

A Failure

2 of 2 DOCUMENTS

Caution
As of: Jan 31, 2007

THE STATE OF OHIO, APPELLEE, v. WARDLOW, APPELLANT

Nos. C-840516, C-840517

Court of Appeals of Ohio, First Appellate District, Hamilton County

20 Ohio App. 3d 1; 484 N.E 2d 276; 1985 Ohio App. LEXIS 9236; 20 Ohio B. Rep. 1

March 20, 1985, Decided

DISPOSITION: [***1]

Judgment accordingly.

HEADNOTES:

Criminal law -- Court must consider R.C. 2929.22 factors before imposing maximum consecutive sentences for misdemeanor violations -- R.C. 2921.22 not unconstitutionally void for vagueness -- Conviction of R.C. 2921.22 unconstitutional where reporting crime would have incriminated defendant -- Violation of R.C. 2919.22 (endangering children) established, when.

SYLLABUS:

1. It is error for the trial court to impose consecutive maximum sentences of imprisonment without stating its consideration of the required factors enumerated in *R.C. 2929.22.*

2. *R.C. 2921.22* is not unconstitutionally void for vagueness, as it gives a person of ordinary intelligence fair notice that the conduct of failing to report a serious crime about which he has knowledge is forbidden.

3. *R.C. 2921.22* is unconstitutional as applied in a case where, by virtue of reporting the crime, the person would have given information which would tend to incriminate herself or lead to her own prosecution.

4. Where a minor daughter reports to her mother that the latter's live-in boyfriend has raped her on more than one occasion, and the mother fails to remove either the daughter or the [***2] boyfriend from the household, the mother has violated *R.C. 2919.22* by creating a substantial risk to the safety of the child by violating a duty of care, protection and support.

COUNSEL:

Richard A. Castellini, city solicitor, *Paul J. Gorman* and *Stephen J. Fagel,* for appellee.

Kenneth J. Koenig and *Hamilton County Public Defender's Office,* for appellant.

JUDGES:

KEEFE, P.J., DOAN and HILDEBRANDT, JJ., concur.

OPINION BY:

PER CURIAM

OPINION:

[*1] [**277] This cause came on to be heard upon the consolidated appeal from the Municipal Court of Hamilton County.

This timely consolidated appeal follows appellant's bench trial convictions of child endangering, a violation of *R.C. 2919.22,* and failure to report a [*2] crime, a violation of *R.C. 2921.22(A).* Appellant was sentenced as appears of record.

The record reveals that appellant's thirteen-year-old daughter was the victim of a rape on January 22 or January 23, 1984 and of an attempted rape or sexual imposition on January 28, 1984. Both incidents were perpetrated by the appellant's live-in paramour, Joe Watson. After learning of the offenses on January 28, 1984, ap-

pellant instructed her daughter not to "go upstairs" [***3] when appellant was not in the house and Watson was present. Appellant reported to her mother, Carol Bennett, that the child had been "molested" by Watson. Appellant explained that she had talked to him and her daughter, and that these steps [**278] would prevent any further activity. On April 21, 1984, appellant was told by her daughter, who was then fourteen years old, that Watson had attempted to rape her on two occasions in March 1984. Further, appellant's daughter told appellant that she had in fact been raped by Watson on April 21, 1984. Appellant informed her mother of the recent offenses on April 21, 1984. Appellant's mother indicated they would talk it over and decide on a course of action the next day, April 22, 1984, following Easter church services. Appellant failed to attend church services on April 22, 1984, and her mother telephoned appellant, informing her that she was going to report the matter to the police. Appellant protested, but her mother did in fact call the police.

Appellant's first four assignments of error, which are set forth below, pertain to the conviction of failure to report a crime on April 21, 1984, in violation of *R.C. 2921.22*:

1 [***4]

"The judgment of conviction by the trial court is contrary to law since there was insufficient evidence presented to establish beyond a reasonable doubt each and every element of the offense of failure to report a crime."

2

"The judgment of conviction of the offense of failure to report a crime is against the manifest weight of the evidence."

3

" *R.C. 2921.22* is unconstitutional in that it is void for vagueness and thus violative of Article I, Section 16 of the Ohio Constitution and of the Fourteenth Amendment to the United States Constitution."

4

" *R.C. 2921.22* is unconstitutional as applied in this case, and on its face, in that it purports to require any person to report knowledge of a felony which is being or has been committed, which is violative of Article I, Section 10 of the Ohio Constitution and of the Fifth Amendment to the United States Constitution."

R.C. 2921.22 provides in pertinent part:

"(A) No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.

"* * *

"(E) Division (A) or (D) of this section does not require disclosure of information, when any of the following [***5] applies:

"* * *

"(2) The information would tend to incriminate a member of the actor's immediate family."

The first and second assignments of error are without merit as a review of the record discloses that after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, the trier of fact could have found that all the essential elements of the offense had been proven beyond a reasonable [*3] doubt. n1 *State* v.. *Eley* (1978), *56 Ohio St. 2d 169 [10 O.O.3d 340]*. Further, we find that the jury did not clearly lose its way and create a manifest miscarriage of justice requiring reversal. *State* v.. *Robinson* (1955), *162 Ohio St. 486 [55 O.O. 388]*; *State* v.. *Petro* (1947), *148 Ohio St. 473 [36 O.O. 152]*. Appellant's first and second assignments of error are overruled.

n1 We distinguish the matter *sub judice* from *In re Stichtenoth* (1980), *67 Ohio App. 2d 108 [21 O.O.3d 420]*, for the reason that the appellant in the instant case did not set in motion through an intermediary, the actual reporting of the crime within a reasonable possible time under the existing circumstances in relationship to the time she knew of the offense.

[***6]

We overrule appellant's third assignment of error alleging that *R.C. 2921.22* is unconstitutionally void for vagueness. The essence of the offense is knowingly [**279] failing to report a serious crime. *R.C. 2901.22(B)* provides:

"A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

We hold that *R.C. 2921.22* gives a person of ordinary intelligence fair notice that the conduct of failing to report a serious crime about which a person has knowledge is forbidden by statute.

Appellant's fourth assignment of error alleging the unconstitutionality of *R.C. 2921.22* as applied in this case has merit. The Fifth Amendment of the Constitution of the United States and Article I, Section 10 of the Constitution of the state of Ohio provide that a person may not be compelled to be a witness against herself or give information which would tend to incriminate herself. It is obvious, by virtue of her prosecution for the offense of child endangering under *R.C. 2919.22*, that appellant's [***7] reporting of the April 21, 1984 rape of her daughter by Watson would have led to her own prosecution. Additionally, we perceive that such disclosure by appellant would have led to appellant's prosecution for welfare fraud in that Watson had been a permanent resident of the household for over two years. Thus, appellant's privilege against self-incrimination was unconstitutionally infringed under the facts of the case *sub judice*. See *In re Groban* (1957), *352 U.S. 330 [3 O.O.2d 127]*. Appellant's fourth assignment of error is well-taken.

Appellant's fifth and sixth assignments of error, as set forth below, relate to her conviction of child endangering in violation of *R.C. 2919.22*:

5

"The judgment of conviction of endangering children, in violation of *R.C. 2919.22*, is contrary to law since there was insufficient evidence presented to establish beyond a reasonable doubt each and every element of the offense."

6

"The judgment of conviction of endangering children, in violation of *R.C. 2919.22*, is against the manifest weight of the evidence."

The elements of *R.C. 2919.22* require for conviction that a parent of a child under eighteen years of age create a substantial [***8] risk to the safety of such child by violating a duty of care, protection, or support. The record discloses that as of January 28, 1984 appellant knew of the offenses perpetrated by Watson against her thirteen-year-old daughter. Appellant thereafter had the duty of protecting her child from any subsequent reoccurence of such offenses. The trier of fact was more than justified in concluding that appellant [*4] created a substantial risk to the safety of her child by failing to remove either Watson or the child from the residence. Appellant's argument that she told her daughter not to go upstairs with the alcoholic paramour when appellant was not in the house and that she counselled with her own mother regarding the problem does not, under the circumstances of the matter *sub judice*, rise to the duty of care imposed upon appellant by *R.C. 2919.22*. Appellant's fifth and sixth assignments of error are overruled.

Appellant's seventh and final assignment of error asserts that the trial court violated *R.C. 2929.22* in that the trial court did not consider the factors required by the statute prior to imposition of consecutive maximum sentences of imprisonment. The record of the [***9] sentencing proceedings reveals that the court did not have the benefit of a presentence investigation report. The court did hear representations from defense counsel, concurred in by the prosecutor, as to appellant's age, motherhood, unemployment and receipt of aid to dependent children, and the absence of a prior criminal record. There is no statement by the trial court as to his consideration of the required factors enunciated in [**280] *R.C. 2929.22*. Further, the record contains no statement by the trial court as to his reasoning for the sentences imposed and no indication of even a minimal consideration of the required factors under *R.C. 2929.22*. The only reference regarding appellant's sentence was made by the trial court prior to its imposition of sentence, at which point the court said, "Well, Ms. Wardlow, I don't know what to say to you." This very truncated sentencing procedure does not reasonably meet the spirit of the requirements of *R.C. 2929.22*. Cf. *Cincinnati v. Clardy* (1978), *57 Ohio App. 2d 153 [11 O.O.3d 137]*. Appellant's seventh assignment of error is meritorious.

This cause is reversed and appellant is discharged as to the offense of failure [***10] to report a crime in violation of *R.C. 2921.22*. Appellant's conviction of child endangering in violation of 2919.22 is affirmed; however, the cause is remanded to the Hamilton County Municipal Court for resentencing only on the child endangering conviction, in accordance with law and with this decision.

Judgment accordingly.

MEMORANDUM

STATE OF ALASKA

Department of Law – Criminal Division

To: Senator Hollis French
Chair, Senate Judiciary Committee

Date: January 26, 2007

Tel. No.: 465-3428

From: Richard Svobodny
Chief Assistant Attorney General

Subject: Senate Bill 5

To hear Lisa Sommer testify about the death of her daughter Kiva Friedman leaves a footprint on the heart of any civilized person. It calls out for action. Unfortunately, Senate Bill 5 is not the right action. The consequence of making it a offense for a bystander to fail to report a crime, like the one perpetrated by Jerry McClain, is that it is more difficult for the state to prosecute and convict people who commit similar crimes.

If a witness to a crime can be prosecuted, then it is likely that the witness will not speak with investigators or prosecutors, or testify, because they might incriminate themselves. If a bystander to a crime failed to report the crime and is called to testify, the bystander can invoke his or her Fifth Amendment right not to testify. There is a process under AS 12.50.101 where a court can compel a person to testify if the state grants the person transactional immunity. Transactional immunity protects a person completely from prosecution of the crime and any other crime about which they testify. The problem with the process of immunizing witnesses is that the state can only guess whether the person is exercising the Fifth Amendment privilege for the crime of failure to report a crime, involvement in the underlying crime, or for some other offense that may be even more serious than the one on trial. I am the Attorney General's designee for granting immunity. I have been a prosecutor for over 30 years and frankly these decisions are among the most difficult that I have been required to make. The judge tells me only two things: 1) that the witness may have a Fifth Amendment privilege; and 2) the crime for which the witness has the privilege is a felony, a serious felony, or a misdemeanor.[1] Frankly, I live in fear of granting immunity, and then the witness takes the stand and confesses to an unrelated more serious offense, or untruthfully says he did the crime to get the defendant off. When the state grants immunity, the testimony of the witness is much less persuasive than it would be otherwise. This is because the defense lawyer can cross-examine the witness casting doubt on his or her veracity, because the testimony is being given in exchange for a promise of immunity, or in street vernacular "you got a deal". The defense attorney can argue to the jury that the testimony is less worthy of belief because the witness only testified to save his or her own skin.

What I have discussed so far is the problem Senate Bill 5 creates for police in getting interviews and the tactical disadvantage the bill will place on prosecutors. Next I will discuss the federal

---

[1] It is possible to expand the in camera hearing that the judge conducts to include written findings on how the witness would tend to incriminate themselves and these findings be provided to me under the secrecy that now exists in the statute. This would help in realizing the desire for SB 5.

case law on the crime of misprision of a felony 18 USC § 4 and Alaska law that may affect the constitutionality of Senate Bill 5.

Federal law has one additional element for misprision of a felony than the elements in Senate Bill 5. The elements under federal law are 1) a felony was committed; 2) the defendant knows the crime was committed; 3) the defendant does not notify law enforcement that the crime occurred; and 4) the defendant took an affirmative act to conceal the crime.[2] It is element 4 that is not found in Senate Bill 5.

Even with the additional element of doing an affirmative act to conceal the crime, federal courts have been concerned about the Fifth Amendment issue. In *State v. King* 402 F.2d 694 (9th Cir. 1968) the person charged with misprision of a felony had heard several conversations with people who talked about committing a bank robbery. They subsequently committed the robbery and the defendant again heard them discussing the crime. The court said that if the defendant reported the robbery "a constitutional question is then presented concerning defendant's privilege against self-incrimination, guaranteed by the Fifth Amendment." *Id.* at 697. The court elaborated that if the defendant had reported the robbery, "he necessarily would have attracted police attention to his own association with the principals" at the meetings about the robbery and "would thus have risked being charged as an aider and abettor, or as an accessory after the fact." *Id.* Because reporting the bank robbery could lead to his prosecution as an aider and abettor, or an accessory, the *King* court held that the Fifth Amendment privilege against self-incrimination precluded conviction.

After the King decision other federal courts expanded on the ruling.
United States v. Jennings, 603 F.2d 650, 652-54 (7th Cir. 1979) (reporting narcotics sale to appropriate authorities could have provided link in chain of evidence which could have led to defendants' prosecution for criminal acts, so misprision conviction would violate self-incrimination privilege); *United States v. Pigott*, 453 F.2d 419 (9th Cir. 1971) (reversing misprision conviction where defendant was simultaneously involved in bank robbery at the moment when her duty to report the crime arose and reasoning that Fifth Amendment must prevail in collision with misprision statute); *United States v. Graham*, 487 F.Supp. 1317, 1319-20 (W.D.Ky.1980) (Fifth Amendment prohibited misprision prosecution where, at the time duty to report arose, defendants were engaging in what they could reasonably believe to be criminal conduct, such that notification of authorities "would compel defendants to give information which might tend to show they had committed a crime"); *United States v. Warters*, 885 F.2d 1266, 1275 (5th Cir.1989) ("successful prosecution for misprision of one guilty of the underlying offense will usually be impossible because of the defense that the failure to make known was an exercise of the constitutional right to refrain from self-incrimination").[3]

---

[2] Hindering Prosecution AS 11.56.770 and 780 is the Alaska law that makes it a crime to take an affirmative action to conceal a crime. These statutes are very restrictive and can be expanded to reach the same goal of SB 5.

[3] OVR in testimony referred to *U.S. v. Weekley* 389 F. Supp 2, 1293 (Dist. Ct Alabama 2005) as a case where an indictment was not dismissed based upon a claim of Fifth Amendment privilege. Actually this case stands for the opposite proposition. The case was not dismissed because Weekley had waived the privilege. The case stands for the proposition that an indictment for misprision should be dismissed unless there are unusual circumstances like a waiver.

Turning to Alaska cases, in *Hazelwood v. State* 836 P.2d 963 (AK App. 1992) the Court of Appeals dealt with one way the issue of immunity and Fifth Amendment privileges interplay. Twenty minutes after the Exxon Valdez ran aground, Captain Hazelwood radioed to the Coast Guard saying:

> ...we've fetched up, ah, aground north of, ah, Goose Island off Bligh Reef. And ah, evidently, ah leaking some oil...

Hazelwood was required to report an oil discharge under 33 USC 1321, just as Senate Bill 5 requires the reporting of a crime. This federal statute said that the reporter would have "use, derivative use" immunity for this report. Hazelwood argued that his radio call triggered the investigation of the oil spill and all evidence found after the radio call, that is everything, should not be allowed to be used against him at trial. The three judges of the Alaska Court of Appeals agreed.[4] In *Hazelwood* the court drew no distinction between testimony and speaking with the Coast Guard. In other words, no judge or prosecutor made the decision to overcome Hazelwood's Fifth Amendment privilege. Hazelwood gave himself immunity by following the law that required reporting the spill. The Alaska Supreme Court in a 3 to 1 decision overturned the Court of Appeals, saying that the state would have inevitably discovered the spill and hence could use the evidence that would have been discovered independently of Hazelwood's report. *State v. Hazelwood*, 866 P.2d 827 (Alaska, 1993).[5]

In *Gudmundson v. State*, 822 P.2d 1328 (Alaska 1991) the Alaska Supreme Court reversed a conviction saying that it would be a violation of due process of law to allow a defendant to be convicted when he had to choose between two contradictory laws. In *Gudmundson* the choice was between wanton waste of game versus transporting illegally killed game. Senate Bill 5 often will place a person in the same dilemma of choosing between a constitutional right, the Fifth Amendment right not to speak to police or testify at trial, and the reporting requirements of Senate Bill 5.

In conclusion, Senate Bill 5 creates unanticipated consequences and limitations on investigation and prosecution of serious crimes. Senate Bill 5 does not have the overt act requirement of federal law and yet many federal cases show that the Fifth Amendment prohibits prosecution of most of these offenses. Third, Alaska case law requires transactional immunity. *Hazelwood* stands for the proposition that reporting of an offense may give the reporter immunity.
For the reasons discussed in this memorandum, the department has serious questions about the wisdom of Senate Bill 5. We would be happy to work with you in searching for another

---

[4] The grant of immunity was built into the statute. This may be a way of distinguishing *Hazelwood*. The Alaska Supreme Court in State v. Gonzales 825 P.2d 920, 923 (AK App. 1992) aff'd 853 P.2d 526 (Alaska, 1993) has concluded if a person is immunized, the Alaska Constitution creates a greater protection than use/derivative use immunity and requires transactional immunity. This is an even greater grant of immunity than the Court of Appeals envisioned in *Hazelwood*.

[5] It is interesting to note that between the two appellate court decisions there were four votes (three from the Court of Appeals and one dissenter with the Supreme Court) that Hazelwood should have been completely excused of his crime because of his radio call giving him immunity, and three votes to allow a prosecution because the evidence would have been inevitably discovered. Fortunately, the three votes were on the Supreme Court.

approach to the problem.

MEMORANDUM

State of Alaska

Department of Law/Criminal Division

TO: Richard A. Svobodny
Chief, Assistant Attorney General
Office of Special Prosecutions & Appeals

THRU: Douglas H. Kossler
Supervising Assistant Attorney General
OSPA Appellate Unit

FROM: Blair M. Christensen
Assistant Attorney General
OSPA Appellate Unit

SUBJECT: Good Samaritan/Mandatory Reporting of a Felony Legislation

I have researched the constitutionality and practical repercussions of my understanding of the proposed legislation, which is that it could possibly impose a duty to not only report crimes to the appropriate authorities, but also impose a duty to intervene and assist a victim during the course of the crime or generally help a person that has or will suffer substantial injury. I have not researched the duties of specific groups of people, like healthcare professionals, to report specific incidents.

Generally, the law criminalizes a person's attempt or commission of acts that cause positive harm. MODEL PENAL CODE § 2.01(a). Omissions are typically punishable only when a person has an affirmative duty to act. MODEL PENAL CODE § 2.01(c) ("Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law"). A duty can arise based upon a relationship, contract, statute, voluntary assumption, duty as a land owner, or duty by creation of peril. *See, e.g., Massachusetts. v. Welansky*, 55 N.E.2d 902, 909 (Mass. 1944) (holding that defendant had "a duty of care for the safety of business visitors invited to premises which the defendant controls"). However, a person cannot be criminally liable for an act if he or she is not capable of performing it. AS 11.81.600(a).

The majority of states do not prosecute the common law crime of misprision (failure to report a felony) because they do not enforce common-law crimes and because courts have been reluctant to criminalize a person's mere moral obligation to act. *See People v. Lefkovitz*, 293 N.W. 642, 643 (Mich. 1940) (holding that "[t]he old-time common-law

offense of misprision of felony, short of an accessory after the fact . . . is not now a substantive offense and not adopted by the Constitution, because [it is] wholly unsuited to American criminal law and procedure as used in this State"). The sentiment is best summarized by the Florida Court of Appeals when it held:

> While it may be desirable, even essential, that we encourage citizens to 'get involved' to help reduce crime, they ought not be adjudicated criminals themselves if they don't. The fear of such a consequence is a fear from which our traditional concepts of peace and quietude guarantee freedom. We cherish the right to mind our own business when our own best interests dictate.

Holland v. State, 302 So.2d 806, 810 (Fla. App., 1974) Furthermore, it appears that the majority of states do not impose a statutory duty to assist a person or to report a crime for the same reasons.

There are several different approaches to statutes that impose either a duty to assist or a duty to report. There are statutes that broadly impose a duty to assist anyone exposed to or who has suffered grave physical harm. A statute may limit the duty imposed to the duty to assist victims of either any crime or violent crimes. One statute allows a person to choose between assisting the person, calling for assistance, or calling law enforcement. Some states merely make it a crime to fail to report a felony with no duty to assist or to call for assistance. Some jurisdictions that have a duty-to-report statute have included a requirement that there be a positive act of concealment. Also, punishments for violations of these different statutes differ drastically.

Vermont and Minnesota: duty to assist

Two states, Vermont and Minnesota, have enacted broad statutes imposing a duty to rescue someone who has suffered or who is in danger of suffering grave physical harm. *See* Minn. Stat. § 604A.01 (West 2006) (imposing a duty to give reasonable assistance to any person at an emergency scene known to have been exposed or who has suffered grave physical harm); VT. STAT. ANN. tit. 12, § 519 (2005) (imposing a duty to give reasonable assistance any person known to be exposed to grave physical harm). There are no criminal cases interpreting these statutes.

Wisconsin: choice between assisting, calling for assistance or calling law enforcement

Wisconsin enacted a statute imposing a duty on "any person who knows that a crime is being committed and knows that the victim is exposed to bodily harm [to] either call for a law enforcement officer, call for other assistance or provide assistance to the victim." *Wisconsin v. LaPlante*, 521 N.W.2d 448, 451 (Wis. App. 1994) (referring to WIS. STAT.

ANN. § 940.34). In *La Plante*, the only case interpreting the Wisconsin statute, the defendant was convicted of violating the Wisconsin statute after failing to call the police or render assistance to a woman that was savagely beaten during a party at the defendant's home while the defendant and other party guests looked on. *Id.* at 449.

The Wisconsin Court of Appeals held that the statute was not unconstitutionally vague and did not violate the defendant's right against self-incrimination because the defendant was not required to provide her name or any information as to why the victim was harmed. *LaPlante*, 521 N.W.2d at 452. The defendant only had to call for help or render it herself. *Id.* It should be noted that the defendant in *LaPlante* does appear to have been a landowner who invited the victim onto her property, creating one the original common-law duties to aid the victim. Furthermore, it does not appear that any of the other party guests that watched the beating were charged with violating the Wisconsin statute.

One law review article noted that Vermont, Wisconsin and Minnesota rarely enforce their statutes and that the statutes were mainly symbolic; all three being enacted after extremely horrendous and well-publicized incidents in which witnesses watched without assisting or notifying authorities in time to help the victim. Sungeeta Jain, *How Many People Does It Take to Save A Drowning Baby?: A Good Samaritan Statute In Washington State*, 74 Wash. L. Rev. 1181, 1190-93 (1999).

Washington: duty to call for assistance

Washington state enacted a statute after a particularly shocking murder that makes it a crime to fail to call for assistance in certain circumstances. WASH. REV. CODE ANN. § 9A.36.160 (WEST 2006). Washington's statute requires a person to summon assistance if the person is present while a crime is committed against another person, knows the person has suffered substantial bodily injury, can reasonably summon assistance without danger to themselves, and no one else has summoned assistance. WASH. REV. CODE ANN. § 9A.36.160 (West 2006). There are no cases interpreting this statute.

Ohio and other states: duty to report felonies

Ohio has a statute making it a fourth-degree misdemeanor if a person, "knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities." OHIO REV. CODE ANN. § 2921.22(A) (Banks-Baldwin 2006). The Ohio statute also requires that a person report the death of another person if the reporter has discovered the body of or has first-hand knowledge the death. OHIO REV. CODE ANN. § 2921.22(C) (Banks-Baldwin 2006). The reporter also has to provide "any facts within the person's knowledge that may have a bearing on the investigation of the death." OHIO REV. CODE ANN. § 2921.22(D) (Banks-Baldwin 2006). *See also* MASS. GEN. LAWS ANN. ch. 268, § 40 (West 2000) (making it a crime to fail to report rape, aggravated rape, murder,

manslaughter and armed robbery to the extent a person can do so without danger to themselves, as soon as reasonably practicable); R.I. Gen. Laws § 11-1-5.1 (2005) (same). In contrast, both the federal failure-to-report statute and South Dakota's failure-to-report statute require a positive act of concealment in order to be criminally charged for failing to report a felony. 18 U.S.C. § 4 (2006); S.D. CODIFIED LAWS § 22-11-12(West 2005). The act of concealment does not have to be in furtherance of the crime, it merely has to be an act to conceal the fact that the person failed to report the felony to the proper authorities.

The Ohio Court of Appeals interpreted the Ohio statute in *Ohio v. Wardlow*, 484, N.E.2d 246 (Ohio App. 1985), in which the defendant was charged with failing to report that her daughter was repeatedly raped by the defendant's live-in boyfriend. *Id.* at 279. While the court held that the statute was not unconstitutionally vague, it did hold that the statute unconstitutionally violated the defendant's Fifth Amendment right against self-incrimination as evidenced by the defendant's prosecution for child endangerment. *Id.*

The Ohio statute brings up the interesting point that requiring reporters to give information may violate a reporter's right against self-incrimination as applied in many situations. However, if the statute does not require the reporter to give their name and some other pertinent information, then the statute would be difficult to enforce. *See In re Stichtenoth*, 425 N.E.2d 957, 958-59 (Ohio App. 1980) (reversing adjudication of delinquency against defendant for violating Ohio statute when he requested that two people notify authorities immediately of felony and claimed to have made several anonymous calls to authorities because the appellate court found the defendant's actions to be sufficient). Violating a person's right against self-incrimination is, by far, the biggest legal impediment to duty-to-report laws.

Another interesting point about the Ohio statute is that it makes an explicit exception for all of the common law privileges, as well as an exception for failure to report a felony that would incriminate an immediate family member. This is particularly interesting because, as several of the privileges are defined in the Alaska Rules of Evidence, it is at the very least unclear as to whether they would apply in the context of a failure-to-report statute. For instance, it definitely seems questionable whether the spousal immunity privilege or the confidential marital communications privilege would apply in many cases to protect one spouse from having to report on the other.

It would also have to be determined if it is good public policy to expect a father to report his son to police because he knows his son is in possession of drugs. The family may be trying to get the son help and forcing a family to decide between getting the son help and possibly alerting authorities to the crime or not getting the son help seems like a difficult position to put families in. An exception for immediate family members may be appropriate.

Also, aside from those discussed above, there are a myriad of problems with enforcement of a failure-to-report statute. First, reporting obvious felonies like a grisly murder are easy but there are many situations where it will be questionable whether a lay person knew a felony was committed. An interesting example is attempted murder. It is sometimes hard for attorneys to determine when a person has taken sufficient overt action to constitute attempted murder. A failure-to-report law could put prosecutors' in the middle of dilemmas like: should the defendant's girlfriend have known that, when the defendant said "I'm going to kill him," he meant it?

Second, as noted in Susan's email and probably the reason that the states that have a failure-to-report statute rarely use it, witnesses who violated the statute would be reluctant to come forward for fear of criminal charges. In all of the highly-publicized, horrendous crimes that resulted in passage of the statutes discussed above, the convictions were based on the testimony of witnesses that failed to assist the victims, failed to summon help, and failed to report the crimes. However, when the cases went to trial, these were the witnesses that testified. Gabriel D. M. Ciociola, "*Misprision of Felony and its Progeny*," 41 BRANDEIS L.J.697,763-66 (2003).

Third, any failure-to-report statute would likely have to be harmonized with AS 11.56.800, criminalizing the making of false reports, to provide some sort of reasonable mistake defense.

Issues arising with laws imposing a duty to assist

John's email indicates that the proposed law would require "a person at a beach to get out of his lawn chair to fish out of [two] feet of water a drowning [two] year old child." That is an easy duty to impose; almost any witness could aid that victim. Would the proposed law impose a duty on a person to stop a husband from beating his wife? What if the witness was a man that was 5'9" and weighed 185 pounds and the husband was 6'3" and weighing 220 pounds?

Other problems lie in limiting the crimes to which a witness is required to provide assistance. Is the proposed law going to use some sort of violent-crime structure as the test for when a person is required to assist another or is the proposed law going to make it a crime to fail to aid another in need of assistance (*i.e.*, John's example of the drowning two-year-old)? Is the proposed law going to provide a defense (both civilly and criminally) to a person who commits an assault (or other crimes like trespass) when she mistakenly thinks that she is assisting a victim of a crime but, in fact, no crime has been committed?

From: Blair Christensen
To: Anne Carpeneti
Date: 10/9/2006 2:50:35 PM
Subject: Re: good samaritan legislation

Hi Annie,

John wasn't available this morning to talk like we scheduled, so I am a little late with the information and I had to get the research to Doug before noon. Sorry. Here is the scoop:

There were three witnesses that defendant, Jerry McClain, called that night on their cel phones. One was his brother Jesse. They said he called them and just generally said "come over, I need you." He didn't tell them about the beating.

Once they got there, they stood at the front door and they said they never went into the house. The witnesses said they really can't remember exactly what her condition was but she is definitely in bad shape. They said that the victim was lucid and she said "get out of here, you don't want to be a part of this." The three guys asked McClain if he is going to call 911 and get an ambluance or police over there to get her some help and he said he was. They leave but they called him and to check to see if he called 911. McClaim said he was going to.

All of the witnesses cooperated with police and the DA's office. They showed for pre-trial interviews. McClain's brother, Jesse had since moved to Wisconsin but always agreed to come for trial and was cooperative in the interstate subpoena process. It is hard to reconstruct the series of events that night, so all we really had is what the witnesses and the defendant told us that happened. John mentioned that he thought they would take the 5th if it went to trial because he thought they were involved in the beating but he also said they were always cooperative.

John stated that the crime scene investigators could not pin down how long she was beaten or the chronology of events, so the witnesses would have been our only source of that information. Plus there was a lot of pretrial motion work on dimished capacity and incompetency but the witnesses verified that McClain asked them to come over because he was feeling remorse for how badly he had beaten the victim and he wanted them to beat him up or, alternatively, console him. This information undermined his competency and dimished capacity arguments.

We never ended up needing the witnesses but it seems that they were very cooperative and were important sources of information.

Let me know if you would like more info on anything.

-Blair

>>> Anne Carpeneti 10/09/06 1:03 PM >>>
Thanks for the research.

It would help if you let me know what Novak says about the witnesses in McClain. If they did cooperate with the investigation, and if their information was important to the investigation, etc.

Thanks. annie

Alaska State Legislature
Senate Bipartisan Working Group

Sponsor: Sen. Lesil McGuire
Current Version: CSSB 5 (JUD)
Contact: Marit Carlson Van Dort, 465-3579

Fact Sheet for: Senate Bill 5

Short Title: AN ACT RELATING TO THE REPORTING OF CERTAIN CRIMES

Summary:

- Makes it a felony for someone to not report a violent crime.
- Excludes the victim of the violent crime.
- Permits the law to be known as "Kiva's Law."

Benefits:

- Creates another layer of protection for potential victims of violent crime.
- Sends the message that citizens have a role in preventing and stopping violent offenses.

Background:

In 2003, Kiva Friedman suffered unspeakable abuse at the hands of her boyfriend, Jerry McClain. Before she died, three men stopped by Friedman's house and witnessed the abuse she was suffering. The three men left the residence and never reported it to authorities. Kiva's Law amends state statutes so anyone who witnesses a violent crime is legally obligated to notify the authorities.

adn.com
Anchorage Daily News

Brutal murder leads to victims' aid effort

By REP. LESIL McGUIRE

(Published: November 21, 2006)

The recent sentencing of Jerry D. McClain for the torture and murder of Kiva Friedman has once again brought to the forefront a gaping hole in our criminal justice system.

The crimes committed against Kiva Friedman by McClain are in and of themselves horrific and abominable, but the circumstances surrounding her death are made even more tragic by the fact that three witnesses failed to call police or paramedics.

Kiva Friedman was alive and conscious, although badly injured, when two of McClain's friends and his brother stopped by Friedman's house at the request of Jerry McClain. They saw her, saw the extent of her injuries and did nothing to help her or save her life. It was not until three hours after the three men left and the victim was dead that Jerry McClain called police and summoned help. Three hours in which her life could have been saved. Three hours in which she instead continued to suffer and her life continued to slip away.

Jerry McClain will spend the rest of his life in prison, and rightfully so. But those three men who had the opportunity to perhaps save Kiva Friedman's life and instead turned their backs on her were not charged with any crime. In Alaska, there is no mandate to call police or to render aid.

While it is not the position of the state to legislate morality, under certain circumstances, such as in the case of Kiva Friedman, there should be criminal liability for those who do not either report or aid a victim of a violent crime. This case has continued to incite outrage not only for her murder, but for the inaction of the three men who chose to let her die. Public outcry has spurred me to pre-file legislation to address this issue.

During the 21st Alaska Legislature, then Rep. Fred Dyson, R-Eagle River, introduced a bill relating to the crime of failure to report the commission or attempted commission of certain crimes against children. This legislation made it a class A misdemeanor offense if a person, other than the victim, commits the crime of failure to report in a timely manner a violent crime or an attempted violent crime including murder, kidnapping, rape and assault.

It is my intention to take this legislation a step further to include violent crimes against adults as well as children under Alaska Statute 11.56.765(a). My legislation would preserve the defensible presumption that a report may have not have been made by a witness out of fear of physical injury to themselves.

In other states around the country there is a wide range of mandatory reporting laws. This bill will be introduced in the same vein as the recent material witness legislation that I sponsored during the last special session.

As this new bill is being drafted, I look to Alaskans to provide input and give me feedback on how they would like to see this legislation framed. It is my opinion, that while we live in a free society, we are privileged to reside in our community and the great state of Alaska. With this privilege

comes civic responsibility, including the basic responsibility of helping a victim of a violent crime by repo.ting it.

Kiva Friedman died a terrible death. Her brutal murder has opened my eyes and compelled me to improve our laws. We are too late to save Kiva Friedman's life, but it is not too late to perhaps save another. This legislation will ensure that her death will not have been in vain, and her legacy will not be just as a victim, but an inspiration to change Alaska for the better.

Rep. Lesil McGuire represents Anchorage's Sand Lake area in the state House. She was elected to the area's Senate seat in November.

Print Page | Close Window

ALASKA STATE LEGISLATURE

Session
State Capitol Building, Room 125
Juneau, Alaska 99801-1182
Phone (907) 465-2995
Fax (907) 465-6592

Interim
716 West Fourth Avenue, Suite 430
Anchorage, Alaska 99501
Phone (907) 269-0250
Fax (907) 269-0249

Chair
Senate State Affairs
Administrative Regulation Review

Member
Senate Judiciary Committee
Senate Resources Committee

SENATOR LESIL MCGUIRE

MEMORANDUM

To: Senator Hollis French
Senate Judiciary Committee Chair

From: Senator Lesil McGuire

Date: January 17, 2007

Re: Request for hearing, SB 5 – Failure to Report Crimes

I respectfully request that SB 5 *"An Act relating to reporting of certain crimes"* be scheduled for a hearing at your earliest convenience. Attached you will find the bill packet containing the most current version of the bill, sponsor statement, sectional analysis and background information. A fact sheet is forthcoming.

If you have any questions or concerns please feel free to contact me personally, or my staff, Marit Carlson–Van Dort at x3579. Thank you for your time and consideration.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 17, 2007

SUBJECT: Sectional Summary - SB 5 (Work Order No. 25-LS0097\C)

TO: Senator Lesil McGuire

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 amends AS 11.56.765(a) by expanding the offense from applying just to failures to report violent crimes committed against children to applying to failures to report any violent crime, regardless of whether the victim is an adult or a child.

Section 2 makes a conforming change to the change made in sec. 1.

GPL:ljw
07-012.ljw

To: Honorable Judge Wolverton

Re: Victim's Impact Statement
In the Superior Court for the State of Alaska at Anchorage
State of Alaska v. Jerry D. McClain
Case No. 3AN-03-4320CR
Defendant's DOB: 1/30/76

From: Lisa Sommer, Victim's Natural Mother

Date: August 17, 2006

On April 26, 2003, the phone rang in my home near Atlanta, Georgia and I heard; "Lisa, I have terrible, awful news for you. Kiva is dead, she has been murdered." From that moment on my world, as I knew it, was forever more changed. My body trembling, my heart racing, and with tears flowing uncontrollably, I was taken to the airport to try to get on a plane to Anchorage, Alaska.

I found the process waiting in long lines, all the noise, and trying to get on a same day flight from Atlanta to Anchorage overwhelming. Surely, this could not be so difficult. I could barely speak and I was disoriented. As I took the long walk to the terminal, with the help of a ticket agent, I knew that I was not getting onboard a flight for business or vacation. Instead, as I sat down and buckled my seatbelt, tears streaming down my face, I began the first leg of many flights to Alaska into a journey from hell. Leaning back as the plane had just taken off, I closed my eyes and I remembered . . . . . .

I remember an early Saturday morning on July 8, 1967 in Santa Barbara, California; I am holding a tiny newborn baby girl. "Hello, Kiva, welcome to the world." I am choosing the name Kiva as I want this baby girl to have a name that is truly unique and special. Kiva, a name that no one has ever been named before. As I am holding her and gazing at this tiny precious life, I am aware that I am a mother for the first time and I am responsible for this new life. I find myself in a whole different world – the world of motherhood.

MOTHERHOOD, aah yes! Yet, I never imagine motherhood will encompass the life of my child being tortured and raped and beaten to death. YES, TO DEATH. N. , . . . motherhood is not this, it could not be, not this.

Kiva was a happy child, a beautiful child. She had golden curls, big blue eyes and a magical smile. As unique and special as her name, so was she. From early childhood, Kiva was deeply sympathetic to those less fortunate. She embraced nature and all of its creatures. She was kind, not only to human beings, but to animals as well. She was creative and had a great sense of humor. She was popular because she was tenderhearted

and kind. She was respected because she was sincere, outgoing, courageous, and loving. She saw no social class. Kiva had an indomitable spirit and energy.

When the opportunity to go to Alaska came, Kiva was drawn to go. She thought Alaska would be a place where she could make immeasurable contributions. Kiva loved living in Alaska – a land filled with adventure and tradition. I supported her choice to go.

Kiva grew to become a woman with a life and career of her own in Anchorage. In the 5 years she had lived there, Kiva had bought her first house, had been promoted to Assistant Manager at Home Depot, and began developing her most unique and incredible artistic painting style. Kiva's artwork showed a profound understanding of the human soul and of people and things as they really are. Kiva's paintings, huge, and on large pieces of sheetrock or old doors, are flooded by light, color and brilliance—balanced and intensified by shadows. Kiva's art is truly unique and special.
Yes, Kiva had her art, her friends and her flower gardens. When Kiva was not working, she could be seen tenderly working in her garden beds, planting hundreds of bulbs that created color and magic in her yard as they came up. They are still coming up to this day. I was so proud of her.

But Kiva's life was cut short. Cut short by a man with none of these qualities. He did not just put a gun to her head and pull the trigger. What he did to Kiva is that of a futuristic nightmare. Jerry McClain did everything possible to humiliate and torture Kiva. All because of a phone call left on Kiva's answering machine.

Kiva's murder was a horrendous crime involving sadistic brutality and torture. It was horrible suffering, humiliation, and pain over long hours. The defendant intentionally inflicted emotional distress on Kiva , rendering her helpless by punching her in the nose, breaking it, then binding her so she could not move, choking and gagging her, then stripping her naked, cutting off her long beautiful hair, and shaving part of her head to the scalp and shaving her pubic hair. Her breast and nipples were pinched and torn with an object similar to pliers. Objects were inserted into her vagina and she was raped and sodomized. Kiva was made to look into a mirror to humiliate her. He deliberately kept her conscious for this. She was beaten again and again with a baseball bat until her shoulder blades were broken along with her ribs and several other bones. The cellulite in her thighs became liquid from the force of the bat. Her spleen ruptured from the blows. She bled internally and finally died.

What's more, during the long hours of torturous and brutal pain he inflicted on Kiva while raping and beating her, the defendant stopped and called his brother and two friends over to the house while Kiva was still alive. When they arrived they found her naked, and gagged, badly beaten with extensive injuries and lying on her living room floor; ALIVE, yes, ALIVE. The defendant took the time; I REPEAT, took the time, to stop, make a call, and wait for the arrival of his brother and friends. Discussions were

exchanged; the phone message (from the male caller on Kiva's answering machine) was played for them to hear again and again, while Kiva was ALIVE and laying there.

It is not right, that the brother and friends left and did not help her or call 911. It just is not right. They supposedly broke no law. If that is the case, in the great state of Alaska, then the laws must be changed.

The images of this brutal, torturous murder of my child keep coming back. It has been 3 1/2 years since that phone call and my life being transformed overnight. But time has not melted my pain. I have lost the sense of who I am and what I stood for. I have trouble resting, or falling asleep. I am alive, but I am not living life. There is a stabbing pain, a burning numbness in my heart that won't go away. These symptoms create huge gaps of time where I have been unable to work productively and make a living as I have always done. I have had to travel a long distance to attend a victims' of homicide support group to help with the bereavement and trauma symptoms I have been experiencing.

The emotional impact of being thrown into the criminal legal system has changed me as well. Learning the legal language was new and confusing; learning the technical details of the steps between the prosecution, the court, and the defense took its toll on me. It took great concentration to try to learn and remember this language. Great concentration was something I had very little of because this was about my child. They are talking about Kiva! She is Case Number 3AN-03-4320CR! Now, Kiva, my child, is a case number.

As I learned how long and drawn out this process would be, I was overwhelmed, frustrated, and immobilized. So many times I would reorganize my work schedule to allow me to travel to Anchorage. So many times I would reorganize my home life so I could be gone for several weeks. I would pack my bags and be ready to get on a plane to Anchorage for the trial of Kiva's case, when a resulting phone call would change that plan. "We are not going to trial, it has been pushed out." How many years would this go on?

Finally, after three and a half years, a change of plea and an Evidentiary Hearing. Now, here I stand in the middle of the criminal legal system of the State of Alaska. The defendant has not looked at the crime scene photos, nor the pictures from the Medical Examiner and the SART Nurse showing the extensive and brutal injuries he inflicted on Kiva.

I am 59 years old and self-employed. I set my business aside to assume the complex aftermath of my daughter's death. No parent should have to spend days waiting for her child's tormented and disfigured body to be released from authorities. No parent should be faced with this. Yet, this is what I faced. Now, for the rest of my life, I will go to bed each night and wake up each day with the painful knowledge that my child was brutally,

horrifically murdered.

I hope and pray that maximum sentencing for this unpredictable and cruel man will bring some closure to this chapter of my pain and bring justice for my child.

Not only have I lost Kiva, society has lost Kiva. Your community has lost Kiva. - Lost a beautiful person with a warm, tender and loving heart and a great sense of humor. Kiva was a productive and caring worker and manager. She had a strong work ethic. She contributed to society.

There is no place in our society for a person such as this defendant. His behavioral patterns are pervasive in his history. He will not change. While in confinement where boundaries are very solid and clear, he will be a model prisoner. Yet, he will NOT be able to manage his life on his own should the boundaries be taken away. He will NOT be able to manage his emotional volatility. He will always be dependent on the strictest of limits and boundaries in order to control himself. Other people, especially women, should he become attached to one, will be at risk if he is ever allowed out of prison.

With respect to the defendant's prior criminal history, Kiva was not the first woman he had tried viciously to control from leaving him. He has used harassment, breaking and entering, violence, and strangulation on another woman he called his girlfriend. She came very close to death. (see a Domestic Violence restraining order filed by C.R. on July 18, 2000). In addition, the defendant was convicted of Harassment on Dec. 8 2000. The defendant was also charged and convicted of Assault and threatening a family member on July 31, 2000. Only 23 days later. This was all in the year 2000 well before his fall while in a physical fight with his brother in 2003. Most likely this pattern developed in his teen years. His history shows this.

According to the new Webster's Dictionary the definition of TORTUE is: EXTREME PAIN; AGONY; TO CAUSE PAIN TO EXTREMITY.

The definition of TORMENT is EXTREME PAIN; TORTURE; THAT WHICH GIVES PAIN.

Surely there can be no doubt Kiva was tortured, tormented, raped and sodimized with objects, and violently, with a baseball bat, beaten to death.

Therefore, based on the aggravating circumstances of these horrific acts committed by this defendant, I respectfully request that the maximum sentence allowable under Alaska Law be given. The defendant is a WORST OFFENDER. I strongly object to his release from confinement. He should never receive a sentence from which he could eventually be released.

Your Honor, regarding the right to restitution, please see the attached itemized expenses.

I, Lisa Sommer, have been impacted beyond comprehension. I am a mother and Kiva was my child. I miss her so. I can only describe my feelings with these words that are part of a poem that I wrote as a pledge to my child shortly after her murder. Here is an excerpt from the poem, A MOTHER'S PLEDGE, (by Lisa Sommer)

I saw you last in Alaska, my child; grown and creating a life of your own.
A world full of friends, flowers and beautiful art,
With a job that had finally put you on top.
You had succeeded in completing what some never do.
You had stepped across life's threshold from child to full bloom.
And this should NEVER have been taken away from you.

I miss you so much and wonder if you know
That LOVE IS ETERNAL and can only grow.
Why can't I hold you or see you smile,
Or hear your laugh and just talk and visit for a while?
These gifts of life are now denied,
Because of a brutal homicide.

I LOVE YOU, MY KIVA. I LOVE YOU SO.
I feel your spirit. I feel your soul.
I will FIGHT FOR YOU
No matter how tired, no matter how old I grow.
Love, Mom (April,2003)

Respectfully,

Lisa Sommer

CC; John Novak
Kathryn Luth

adn.com
Anchorage Daily News

No leniency for torture, murder

Jerry McClain killed his girlfriend over the course of several hours

By TATABOLINE BRANT
Anchorage Daily News

(Published: September 22, 2006)

Lisa Sommer brought her murdered daughter to court Thursday to hear a judge sentence her killer to 99 years in prison.

Sommer waited three long years to see justice done to the man who raped and beat her daughter, Kiva Friedman, to death in April 2003. When the moment finally arrived, she held up a small pink box.

"Within this box are the ashes of my child," she said to Superior Court Judge Michael Wolverton and his packed courtroom.

Defendant Jerry McClain should get life in prison for torturing and killing Kiva, Sommer said.

McClain, 30, pleaded no contest in April to first-degree murder for killing Friedman over hours in her Nunaka Valley home. Friedman, 35 when she died, was his girlfriend. The only open question was how much time he should get.

If prosecutors could prove Friedman was tortured, the judge was bound by law to lock McClain away for life, said prosecutor John Novak. If not, McClain faced anything from 20 to 99 years.

The two sides went head to head during a hearing in May. The defense argued that McClain suffered a traumatic brain injury, and that while the murder was horrendous, what he did to Friedman did not amount to torture.

About 25 people packed into Wolverton's courtroom Thursday to hear the judge's decision. Friedman's mother, uncle, and a friend read statements to the court first.

Sommer, who lives in Georgia, explained how her life had become a "journey from hell" since getting a phone call about her daughter's death. Her voice was soft as she described how Friedman loved to garden and help others. She had just been promoted to a management position at Home Depot and bought her first home.

Sommer's voice turned angry as she detailed all the things that were done to her daughter in the hours before she died. McClain

Mother Lisa Sommer and stepfather Brian Radkiewicz brought Kiva Friedman's ashes with them Thursday for the sentencing of Jerry McClain. McClain was sentenced to 99 years in prison without the possibility of parole for the 2003 torture and murder of Friedman. *(Photo by BOB HALLINEN / Anchorage Daily News)*

McClain accepted responsibility but blamed the medical system for failing to help him. *(Photo by BOB HALLINEN / Anchorage Daily News)*

raped, sodomized and beat Friedman with a bat, court records say. He tied her up, shaved her head and made her look in the mirror at her disfigured face, telling her "Do you think any man will want you now?"

"The cellulite in her thighs became liquid from the blows from the bat," Sommer said.

Sommer and her brother, Kimpton Sommer, both fumed about the fact that three people -- McClain's brother, Jesse McClain, and two friends, Luther Livingston and Brian Sims -- came by Friedman's house on the night she was killed and did nothing to help her. She was lying on the floor, naked and bloody.

"They found her alive -- yes, alive!" Lisa Sommer said.

"These accessories to murder could have stopped it -- but they did nothing," said her brother.

The three men were never charged. Prosecutors have said they committed no crime, that there are no laws in Alaska requiring people to help others or call police in such situations.

"If that is true, then in the great state of Alaska, the laws are going to be changed," Sommer told the judge.

After the hearing she said the Alaska Office of Victims' Rights is working with her to create a new law, named after her daughter.

McClain sat quietly at the defense table throughout the hearing, at one point crying when Sommer gave the judge a picture of her daughter, approaching the high bench cradling Friedman's ashes and a red rose in her arms.

When his turn to speak came, McClain told the judge he never wanted Friedman's mom to see the graphic pictures of her daughter's injuries or for the proceedings to be as drawn out as they were.

"Whatever time you think I deserve, I'll accept it, your honor," he told Wolverton.

But, he said, a medical system that refuses to help people like him when they ask for help has to share some of the blame for what happened. "This was a preventable crime, your honor," McClain said.

Before the murder, said defense attorney John Bernitz, McClain fell on a bolt in his father's shop and punctured his skull -- an injury that affected his ability to control his emotions. McClain said he worried about changes in his own behavior and tried to get help but couldn't.

Wolverton told the courtroom he believed McClain felt real remorse for what he'd done and credited him for being so up front with investigators. (McClain called 911 after he killed Friedman and later described the killing in detail to doctors and investigators, court documents show.)

But Wolverton's decision about the sentence ultimately came down to whether McClain inflicted "substantial physical torture" on Friedman before she died. And on this Wolverton had no reservations:

"I simply find that there is no way around it. This is just as bad as it gets," he said.

Wolverton said he has 30 years experience with crime and criminals, and has dealt with cases involving things as gruesome as dismemberment. What was done to Friedman, he said, "shocks

the conscience."

Wolverton said the defense offered a thoughtful argument about what constitutes torture but that he could not escape the details of the crime. McClain made Friedman look in the mirror at herself, he said.

"She had a sock stuck in her mouth when she was put through this hell on earth."

Wolverton sentenced McClain to 99 years in prison without the possibility of parole.

Daily News reporter Tataboline Brant can be reached at tbrant@adn.com or 257-4321.

America's Newspapers

Paper: Anchorage Daily News (AK)
Title: Man makes deal on murder charge -
BEATING DEATH: Jerry McClain's plea agreement sets up mini-trial.
Date: April 11, 2006

Three years after he called 911 to say he'd beaten his girlfriend to death, Jerry McClain, now 30, pleaded no contest in Anchorage Superior Court Monday to first-degree murder.

McClain's plea is part of a deal with the state that leaves sentencing open and sets the stage for what promises to be a hard-fought, two-day mini-trial next month. He can get anything from the mandatory minimum of 20 years with parole after about 14 years, to the maximum of 99.

Prosecutor John Novak wants McClain to go away for 99 years with no possibility of parole under a little-used law mandating that sentence for murders involving torture.

Public defender John Bernitz plans to argue that McClain was brain-damaged by a head injury before the April 26, 2003, attack on Kiva Friedman and was not able to form the criminal intent required for either first-degree murder or the enhanced sentence.

The plea deal ended plans to begin jury selection this week for McClain's trial. A grand jury indicted him in May 2003 on murder, assault, rape, kidnapping and tampering with evidence charges. All but one count of murder go away in return for his plea.

When Anchorage police first arrested McClain, they filed with the court a narrative of Friedman's uncommonly brutal death.

Friedman was 35. Who she was and the details of her relationship with McClain are unclear. The narrative just calls her his girlfriend.

McClain began beating her after he found a message for her on his phone answering machine from a man who said he had found Friedman a new boyfriend. The caller made disparaging remarks about McClain's sexual prowess, the charging documents say.

Over several hours that night, McClain tied up Friedman, cut her hair off, shaved her head, beat her with his fist and a baseball bat, the charges say.

At about 4 a.m., McClain called his brother, Jesse, who lived nearby. When Jesse McClain showed up, he found Friedman lying on the living room floor naked, tied up, bloody and badly injured, one leg apparently broken.

He also found two of his brother's friends on the scene. Luther Livingston and Brian Sims later told police they neither participated in nor interfered with the assault. They explained that they urged Jerry McClain to call an ambulance and didn't call for one themselves because he promised he would.

Friedman was alive when they left, they said.

They were not charged with any crime.

While the brother, Jesse McClain, was at the murder scene, Friedman regained consciousness briefly, and told him he should leave, that bad things were happening and he didn't want to get involved, he told police.

About three hours passed. Shortly after 7 a.m., when Jerry McClain finally dialed 911, Friedman was dead.

"I killed my girlfriend last night," he told the emergency operator.

The three-year legal battle from then to now did not revolve around McClain's admission. Instead, defense attorneys argued that McClain should not be held fully responsible because he suffered from the after-effects of a severely fractured skull sustained in a garage accident about three months before the attack.

Under Alaska law, first-degree murder is separated from lesser degrees of homicide by the intent to kill. Defendants sometimes argue, for instance, that they were too drunk to form a deliberate intent to kill and should be found guilty of second-degree murder or manslaughter. It's called "diminished capacity" and the goal is a lesser sentence.

This debate would seem to be moot, given that McClain has already pleaded to first-degree. But Bernitz said he will present the argument again, with experts to support it, to convince Judge Mike Wolverton that his client did not intend to torture or kill Friedman.

"It's an organic problem," Bernitz said Monday. "He sought help and didn't get it. ... He feels horrible about this."

The special evidence hearing has been set for what would have been the third week of trial, when all the experts were already scheduled to appear, Novak said. "It comes down to a mini-trial."

"He will be able to tell his story," Bernitz said.

Sheila Toomey can be reached at stoomey@adn.com or 257-4341.
Caption:

McClain
Caption:

Photo 1: jerry_mcclain_041106.jpg

Author: SHEILA TOOMEY Anchorage Daily News Staff
Section: Alaska
Page: B1

Paper: Anchorage Daily News (AK)
Title: Letters from the people
Date: October 1, 2006

Venezuela's largesse an indictment of our sense of Alaska stewardship

The generosity of Hugo Chavez of Venezuela to provide fuel to our Alaska villages is very impressive, albeit questionably motivated ("Venezuelan firm will buy fuel oil for Alaska villagers," Sept. 20). The fact that his money may be tainted by various words and deeds is overshadowed by the question of why he would have to send it in the first place.

Alaska is reportedly one of the wealthier states in the United States, and yet here we have a foreign country offering to give aid to our villages. At $7 per gallon for heating fuel, it is a wonder that these villages could survive at all.

If I understand the good old Alaska spirit, part of that spirit is the stewardship of the land and its people. What a glaring indictment of this sense of stewardship to be perceived as a state with poverty needing outside intervention. The fact of the matter is that if we don't take care of our own people, then outsiders will -- and so much for Alaska independence.

If a village is a drain on state coffers, let the villages, their Native corporations and the state government work out a better and more self-sustaining economy. If state and federal laws demand and dictate costly services, then they do have an obligation to subsidize those services if they expect a village to meet these mandates.

For the immediate needs of this winter, maybe our own oil industry up here in Alaska could pitch in.

-- Pat Wendt

Anchorage

Important part of our candidates is what they can do, not their gender

I am a longtime Tony Knowles supporter. However, I am infuriated by the insulting tone of letters opposed to Sarah Palin. Charles Wohlforth ("No time for on-the-job training for the next governor of Alaska," Sept. 22) compares her to his 5-year-old? Give me a break. I met Palin a few years ago. She was bright and articulate, she listened and she's no wimp. She is more than qualified for the job.

Wohlforth says her advisers don't inspire confidence. Former Gov. Wally Hickel doesn't inspire confidence? Get real.

As far as her ability to negotiate with the oil companies, I have no doubts. She won't roll over and give away the farm like Gov. Frank Murkowski did.

I think all of the candidates are qualified for the job. So let's get past this "She's a girl" mentality and get serious.

Let's focus on the issues and find out where these candidates truly stand. Let's hear their vision for the state and make our decision based on their positions. That is what's most important to Alaskans and Alaska.

-- Michael Tavella

Anchorage

Those who served Veco rather than voters should be purged from power

Thanks to Michael Carey's Sept. 10 opinion piece ("That flushing sound is Veco influence"), we now have a better idea of what the Corrupt Bastards Club has been up to. I am heartened by his revelations. Like so many others in Alaska, I have known about Veco's undue corrupting influence on the majority of our politicians' lives. And, similarly, I have felt powerless and infuriated as a result.

Carey's example of Fairbanks Sen. Ralph Seekins as the most corrupt, arrogant and indifferent of all our politicians in Juneau

should prompt even his supporters to think twice about his bid for re-election in November. No doubt about it, Seekins is in the deep pockets of Bill Allen and Veco. It's no wonder he and Allen sat down together in the Baranof Hotel bar one day after a Judiciary Committee (of which Seekins is the chairman) hearing on a lobbying bill to restrict the activities of the likes of Veco and laughed together at the hearing, trivializing what responsible lawmakers were trying to do. Needless to say, Allen got his way and the bill was so watered down everyone called it the "Bill Allen bill."

Carey's analogy of Seekins and Allen to pot smokers is appropriate. They are so stoned on their arrogance, they suffer the illusion that their behavior will be neither noticed nor questioned.

This November, let's throw these who are corrupt out of Juneau once and for all.

-- Frank Keim

Fairbanks

Blood of torture victim marks three who ignored her agony and terror

Lisa Sommer, the mother of murdered **Kiva Friedman**, is undertaking a great service to all Alaskans as she works to create laws so that those guilty of failing to report torture/capital murder or assist the victim can be prosecuted ("No leniency for torture, murder," Sept. 22). All Alaskans should be deeply ashamed that we lack a law with which to prosecute the three men named in the article who witnessed **Friedman's** torture and murder and did nothing. We are not some Third World country. A willing witness to torture and capital murder is a conspiracy and a sharing of the guilt and responsibility. In the meantime, the three -- Jesse McClain, Luther Livingston and Brian Sims, identified in court records -- should be identified on a list similar to that used to identify child molesters to warn neighbors and co-workers of their presence.

The protestations of the local defense attorneys, claiming that such a law would be too hard to enforce, underestimate the integrity of Alaska juries, who will surely do the right thing, given the chance.

-- Thomas Petersen

Anchorage

Fair wages are always reliable lures to hook best and brightest teachers

Fifteen percent raises for state nurses. Raises for state political appointees. Why? The need to attract and retain quality employees. There are more than 50 unfilled teaching positions in the Anchorage School District. What's wrong with this picture?

Support teachers' rights to fair salaries. Cost of living plus recognition for experience and further education is not too much to ask. We need to attract and retain the best educators in the country for your children and our future leaders. Alaska's children deserve the best and brightest.

-- Jody Viscardi

Anchorage

EDITOR'S NOTE: The writer is an Anchorage School District teacher and on the board of directors of the teacher union.

Lawmakers voted for the Iraq war because their constituents wanted it

Nazi Marshall Hermann Goering said that people do not want war, regardless of what kind of government their country may have. He asked: "Why would some poor slob on a farm want to risk his life in a war when the best that he can get out of it is to come back to his farm in one piece?" He said that it is the leaders who set policy and who drag the people after them into war.

It would be more accurate to say that the people drag their leaders into war. That is why the U.S. Congress voted overwhelmingly to invade Iraq, even though many of its members knew that President George Bush is not a credible person. Had they voted against it, the people would have voted them out of office. Of course, once the parade begins there are those leaders who want to be the drum majors, even though the parade, for many who are in it, is a march into oblivion.

-- Elvin Brudie

Anchorage

It's easy enough to prevent conflicts of interest: Kill all work on the side

The problem: Legislators elected to work for their constituents also work for someone else on the side and often for lots more money. It's a guaranteed conflict of interest in which the public loses every time.

The solution: Outlaw all lobbying and outside consulting work of any sort for any amount by legislators. Ipso facto, problem solved, over, done with, and no more smarmy "consulting" against the public interest. A real no-brainer, which makes you wonder why such a law is not already in effect.

Any legislator wishing to lobby or perform outside consulting work can resign their office to do so, but with an appropriate interval of time between jobs, of course. That should put an end to such things as the Corrupt Bastards Club. There is no excuse for such arrogance in elective offices.

But we will continue to have that unless the public -- the ones who hired them -- demands a no-nonsense law with real teeth in it. We cannot afford to let the foxes continue to rule the hen house.

Get in touch with your representative or senator and demand strong ethics reform now. And let them know we will kick them out of office if we don't get it.

-- Erik Lie-Nielsen

Juneau

Anchorage teachers' salaries lag far behind rising living expenses

"If you don't like being a teacher (for $36,000 a year), leave," says Anchorage resident Steve Carson ("Teachers should get what's fair, not use children for bargaining," Sept. 23). Unfortunately, that is exactly what is happening. Anchorage teachers are moving to the Valley, Fairbanks and Outside for better teaching positions and a better quality of life, and there is a shortage of teachers in Anchorage. Principals cannot find enough qualified teachers for Anchorage's classrooms. Many excellent teachers are leaving the teaching profession entirely because they cannot support their families, and they can make half again to twice as much in other fields here in Anchorage. This exodus of talent is hurting quality education in Anchorage.

The reality is that the cost of living has gone up significantly over the last 10 years. A four- bedroom house that cost $150,000 10 years ago costs $300,000 now. The price of gasoline has doubled in five years. Ten years ago it was difficult to get a teaching job here because of the high number of applicants. The district offered competitive salaries with an attractive retirement program, and the cost of living was significantly less. Now, we have teachers who qualify for food stamps because they do not make enough to support their small families.

You may call it greed, sir; I call it economic survival.

-- Anne Adasiak-Andrew

Anchorage

EDITOR'S NOTE: The writer is an Anchorage School District teacher.

Author: Commentary
Section: Ideas
Page: J4

Sec. 11.56.765. Failure to report a violent crime committed against a child.

(a) A person, other than the victim, commits the crime of failure to report a violent crime committed against a child if the person

(1) witnesses what the person knows or reasonably should know is

(A) the murder or attempted murder of a child by another;

(B) the kidnapping or attempted kidnapping of a child by another;

(C) the sexual penetration or attempted sexual penetration by another

(i) of a child without consent of the child;

(ii) of a child that is mentally incapable;

(iii) of a child that is incapacitated; or

(iv) of a child that is unaware that a sexual act is being committed; or

(D) the assault of a child by another causing serious physical injury to the child;

(2) knows or reasonably should know that the child is under 16 years of age; and

(3) does not in a timely manner report that crime to a peace officer or law enforcement agency.

(b) In a prosecution under this section, it is an affirmative defense that the defendant

(1) 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; or

(2) acted to stop the commission of the crime and stopped

(A) the commission of the crime; or

(B) the completion of the crime being attempted.

(c) In this section,

(1) "incapacitated" has the meaning given in AS 11.41.470;

(2) "mentally incapable" has the meaning given in AS 11.41.470;

(3) "sexual act" has the meaning given in AS 11.41.470;

(4) "without consent" has the meaning given in AS 11.41.470.

(d) Failure to report a violent crime committed against a child is a class A misdemeanor.

History -

(Sec. 1 ch 62 SLA 1999)

LEGISLATIVE RESEARCH REPORT

JANUARY 17, 2006

REPORT NUMBER 07.036

MANDATORY REPORTING OF VIOLENT CRIMES

PREPARED FOR SENATOR LESIL MCGUIRE

BY PATRICIA YOUNG, RESEARCH MANAGER

You asked for examples of state laws imposing upon a witness to a crime a duty to report the incident. You noted that you are particularly interested in laws addressing this type of assistance for victims of violent crimes.

As you probably know, individuals in this country typically have no duty to act or to provide assistance to persons in need, on the notion that such requirement would be an infringement on personal liberty. Exceptions have long been made for individuals sharing certain special relationships, such as the owner or occupant of property and a guest, a school official and a student, or the driver of a vehicle and a passenger. In the last few years, however, in response to several widely publicized incidents wherein witnesses stood by while appalling events unfolded or crimes were committed, at least ten states have broadened the exceptions by imposing a duty upon witnesses to report to authorities under certain circumstances.[1]

Table 1 provides details of laws requiring certain witnesses to report certain crimes in those ten states—Alaska, California, Florida, Massachusetts, Nevada, Ohio, Rhode Island, Texas, Washington, and Wisconsin. As you will see, three—Alaska, California, and Nevada—limit the duty to report to crimes committed against children.[2] Texas and Wisconsin broaden the duty to reporting to law enforcement or assisting the victim.

---

[1] All states have *Good Samaritan* laws that protect volunteers who in good faith give aid in emergency situations. The term has been expanded to include laws imposing a duty to assist an injured or endangered person and those requiring the reporting of crimes. States that impose a duty to report to authorities or otherwise seek assistance for victims of certain crimes are Alaska, California, Florida, Massachusetts, Nevada, Ohio, Rhode Island, Texas, Washington, and Wisconsin.

[2] Alaska House Bill 34, enacted as Chapter 62 SLA 1999, is codified at AS 11.56.765. The same year, Senate Bill 5, misprision of felony, died in the Senate Rules Committee without reaching a floor vote. Various committee minutes reflect concerns over implementation and unintended consequences, even after the scope was narrowed to include only the crimes of murder in the first and second degrees, kidnapping, sexual assault in the first degree, sexual abuse of a minor in the first degree, and arson in the first degree.

As Attachment A, we provide a copy of "Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws a Good Idea?"3 Part III of this article describes several of these state laws in more detail and discusses the downfall of one such law in Colorado. Attachment B contains copies of the bill history and committee minutes associated with SB 5, Misprision of Felony, in 1999.

Attachment C is the text of mandatory reporting laws in each state other than Alaska.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

---

[3] Angela Hayden, "Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws a Good Idea?" New England School of Law's *Journal of International and Comparative Law*, Volume 6, 2000.

Alaska	Alaska Stat. § 11.56.765	report to law enforcement	certain crimes against children under 16	does not apply if reasonable belief in a substantial risk of physical injury to self or others or acted to stop the crime	in a timely manner
California	Cal Penal Code § 152.3	notify peace officer by phone or any other means	certain crimes against children under 14	does not apply if reasonable fear for safety of self or family; duty does not apply to persons related to victim or offender	not specified
Florida	Fla. Stat. §794.027	report	sexual battery	applies to those who have ability but fail to seek assistance even without exposure to physical violence; does not apply to victim or near relative of victim or offender	immediately
Massachusetts	ALM GL ch. 268 § 40	report to law enforcement	certain crimes	applicable to persons at the scene who know of the crime and can report without danger to self or others	as soon as reasonably practicable
Nevada	Nev. Rev. Stat. Ann. § 202.876 - .884	report to law enforcement by voice or phone or any reasonably swift and reliable means	violent or sexual offenses against children 12 and under	does not apply to children under 16; close relatives by blood or marriage of either victim or offender; persons with reasonable belief in a substantial risk of imminent danger of bodily harm to self, relative, or housemate; those suffering from mental or physical impairment or disability that would make reporting impracticable; those who became aware of the offense through certain privileged communications,	as soon as reasonably practicable, but not more than 24 hours after knowing of the offense
Ohio	ORC Ann. 2921.22	report to law enforcement	felony	does not apply if the information is privileged; the information would tend to incriminate a member of the actor's immediate family	not specified
Rhode Island	R.I. Gen. Laws §11-37-3.1	report to state or local police	first degree sexual assault or attempted first degree sexual assault	applies to any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his or her presence	immediately
Texas	Texas Penal Code § 38.17	assist or report to law enforcement	assault or sexual assault of a child under 14	does not apply if assistance or immediately reporting would put the actor in danger of serious bodily injury or death	immediately
Washington	Rev. Code Wash. § 9.69.100	notify prosecuting attorney, law enforcement, medical assistance, or other public officials	certain violent offenses or a sexual offense against or assault of a child	does not affect privileged relationships as provided by law	as soon as reasonably possible
Wisconsin	Wis. Stat. § 940.34	summon law enforcement or other assistance or provide assistance; notify law enforcement (detectives and security personnel)	a victim exposed to bodily harm	does not apply if compliance would place him or her in danger or interfere with duties owed to others; if assistance is being summoned or provided by others; detectives and security personnel need not notify law enforcement until after summoning or providing assistance	promptly (notify law enforcement)

Source: State Statutes on LEXIS.

Attachment A

Angela Hayden, "Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws a Good Idea?" New England School of Law's *Journal of International and Comparative Law*, Volume 6, 2000

IMPOSING CRIMINAL AND CIVIL PENALTIES FOR FAILING TO HELP ANOTHER: ARE "GOOD SAMARITAN" LAWS GOOD IDEAS?

Angela Hayden*

> DEBBIE will never forget the gun held to her face, or the warm, dizzy feeling after the baseball bat slammed into her head, or the kicks that jolted her ribs as she lay on her Woodbridge driveway convinced that playing dead was the only way to stay alive.
>
> And Debbie will never forgive the three men who sat back and waited as their two friends beat her bloody in a failed attempt to steal her Acura Integra in the steamy, early-morning darkness of Aug. 18.[1]

I. INTRODUCTION

We are repeatedly dismayed at such repugnant displays of apathy on the part of witnesses to crimes as was evidenced in the case of a New Jersey woman who was nearly beaten to death during the course of a carjacking.[2] At the same time, many people are indignant to the suggestion that our society impose a legal obligation to help others in need, claiming that such an obligation severely limits individual liberty.[3] The popular television series "Seinfeld" brought national attention to statutes criminalizing an omission, or failure to help another.[4] Despite vocal opposition, what happened to the characters in the final episode of "Seinfeld"[5] could happen to just about anyone if state

---

* Angela Hayden is an associate with Brickley, Sears & Sorett, Boston, MA. She received her J.D. from the New England School of Law in 1999.

[1] Lilo Stainton, *Victim Pleads for "Good Samaritan" Law*, ASBURY PARK PRESS (Neptune, N.J.), Sept. 17, 1998, at A14.

[2] *See id.* Time and again the public becomes outraged at a particularly offensive incident in which a witness watches a violent crime or terrible accident and does nothing to prevent it or assist the victim. *See infra* Part III and accompanying text for accounts of such stories.

[3] *See* John 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, 871 (1991). *See also e.g.*, *Public Forum, Compelling Witnesses to Intervene During Crimes is Hazardous*, DAILY NEWS L.A., Sept. 19, 1998, at N18.

[4] The popular NBC sitcom, "Seinfeld" concluded its run with an episode in which the characters were arrested, tried, and convicted for failing to help a man during a mugging.

[5] For the readers who did not view the final episode of "Seinfeld", which aired

legislators respond to the current public outcry for "good Samaritan" laws.[6] In the aftermath of the death of Princess Diana[7] and the appalling murder of Sherrice Iverson,[8]

---

in May, 1998, the four main characters, Jerry, Kramer, Elaine, and George were arrested, tried, and convicted in Latham, Massachusetts for failing to help a victim of a violent mugging. The four cheered on the attacker while Kramer videotaped the assault, excited at the prospect of getting "good stuff" on tape.

[6] The term "'good samaritan' laws" is intended to apply to laws that impose an affirmative duty on individuals to help, assist, or aid a crime or accident victim, or to report a crime or accident. Most states have "good samaritan" laws that relieve medical professionals or emergency medical technicians of liability for injuries caused during the course of providing emergency medical assistance. *See, e.g.*, ALA. CODE § 6-5-332 (1993); CONN. GEN. STAT. § 52-557b (West 1991 & Supp. 1996); FLA. STAT. ANN. § 768.13 (West 1986); LA. REV. STAT. ANN. § 37.1731-.1732 (West 1988 & Supp. 1996); MINN. STAT. ANN. § 604A.01 (2) (West Supp. 1997); MISS. CODE ANN. § 73-25-38 (1995); N.J. STAT. ANN. § 2A:53A-13 (West 1987); N.C. GEN. STAT. § 90.21.14(a), (b) (1996); N.D. CENT. CODE § 32-03.1 (1996); OKLA. STAT. ANN. tit. 76, § 5 (West 1995); 42 PA. CONS. STAT. ANN. § 8331 (1982); TENN. CODE ANN. § 63-6-218 (1990 & Supp. 1996); TEX. CIV. PRAC. & REM. CODE ANN. § 74.001-.002 (West 1986 & Supp. 1997); UTAH CODE ANN. § 78-11-22 (1996).

Currently, only four states have "good samaritan" laws that impose a general duty to assist a crime victim or injured person, or to report a witnessed crime. *See* Rudy Larini, *Jersey Looking to Prosecute Passivity: States Rarely Invoke "Good Samaritan" Law*, THE STAR-LEDGER (Newark), Oct. 19, 1998 at 1. Minnesota, Rhode Island, Vermont, and Wisconsin have general duty to assist laws. *See* MINN. STAT. ANN. 604A.01 (West 1997); R.I. GEN. LAWS § 11-56-1 (1997); VT. STAT. ANN. tit. 12, § 519 (1997); WIS. STAT. ANN. § 940.34 (West 1997). Massachusetts and Florida require observers to report sexual assaults to authorities. *See* FLA. STAT. ANN. § 794.027 (West 1998); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1998). Ohio and Washington have laws that require individuals to report felonies in certain situations. *See* Jack Wenick, Note, *Forcing Bystander to Get Invoived: Case for Statute Requiring Witness to Report Crime*, 94 YALE L.J. 1787, 1803-04 (1985).

[7] *See* Keith Dovkants, *Paris Judge Will Decide if Death Crash Was a Crime*, THE EVENING STANDARD (London), Sept. 2, 1997, at 4. Following the death of Princess Diana in September, 1997, French authorities investigated and prosecuted photographers on the scene of the fatal car accident for violating France's duty to act statute. *See also. infra* § II B for further discussion of the French duty to act law.

[8] *See* Stacy Finz, *Killing of Girl, 7, in Casino Spurs Good Samaritan Bills*, SAN FRANCISCO CHRONICLE, Dec. 8, 1998, at A21. Sherrice Iverson was a seven-year-old girl who was stalked in a Nevada casino by eighteen-year-old Jeremy Strohmeyer. *See id.* Strohmeyer followed Iverson into the women's restroom of the casino, after playing a game of "hide and seek", where Strohmeyer assaulted and murdered the girl. *See id.*

the media and public have focused attention on states that require ordinary citizens to come to the aid of accident or crime victims.[9] At least four states have introduced bills that would impose a duty to act where none existed previously under the common law.[10] These statutes have received both criticism and praise from politicians, the media, and the public.[11] An often voiced criticism is that such statutes are contrary to our established social mores, requiring us to act in ways that are not in accord with our traditional notions of the obligations owed to strangers, and that unnecessarily violate individual liberty.[12] The popularity of duty to act laws draws from the multitude of incidents of indifference that people often find repugnant to those same mores.[13] Contrary to popular belief, these laws are based on a solid historical foundation,[14] and have many counterparts in European countries.[15]

There exists the potential for both great benefit and detriment in the implementation of "good Samaritan" statutes, and the established European models provide examples that American legislators should examine while constructing new laws. This Article provides a discussion and analysis of the European "good Samaritan" statutes in Part II.[16] Part III identifies the American states that have already passed duty to act laws and the penalties that the laws provide.[17] As a result of many recent events widely publicized by the media, some states have proposed "good samaritan" laws, which will also be addressed in Part III. Part IV includes a discussion of the debate surrounding enactment of duty to act laws, examining the benefits and drawbacks to such laws in the context of European and American laws.[18] Part IV also postulates a model statute for

---

Strohmeyer's friend, David Cash, knew of the incident and failed to report it to the authorities, yet did not commit any acts to conceal or aid the crime. *See id.* Thus, Cash was not and could not be prosecuted for any crime. *See id. See also* infra note 1 and accompanying text for a further discussion of this case.

[9] *See id.*

[10] Legislation has been introduced in New Jersey, California, Florida, and Nevada for duty to act laws. *See* Stainton, *supra* note 1; David Karp, *Bill Compels Witnesses to Report Crimes*, ST. PETERSBURG TIMES (Florida), Sept. 26, 1998, at 3B.

[11] *See e.g.* Adler, *supra* note 3.

[12] *See infra* § IVA for a discussion of criticism against imposing duties to act.

[13] *See infra* § IV.A for discussion of support for "good samaritan" laws.

[14] *See* Public Forum, *supra* note 3 (arguing that duty to act laws shock the conscience of Americans). *See also infra* notes 20 - 153 and accompanying text for a discussion of the historical background of duty to act laws throughout the world.

[15] *See* F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966).

[16] *See infra* notes 20 - 43 and accompanying text.

[17] *See infra* notes 44- 121 and accompanying text.

[18] *See infra* notes 122- 150 and accompanying text.

American states that are considering imposing a statutory duty to act where none existed previously.[19] This article concludes in Part V.

II. EUROPEAN "GOOD SAMARITAN" LAWS

A. Historical Background

During World War II, European countries began to pass duty to act laws.[20] Since World War II, many European criminal codes have identified failing to assist a crime victim or injured person as a criminal offense.[21] Under the German-controlled Vichy government in France, the French enacted their "good samaritan" law in an effort to "stem terrorism against the German army."[22] The Germans thus sought to ensure their unimpeded progress in their quest to conquer the world by forcing French citizens to report each other to the government or face stiff penalties. Many other Western European countries enacted "good samaritan" laws around the same time as the French law.[23] It would therefore seem that the Germans had a significant influence on those countries as well. Many Eastern European countries, including former Czechoslovakia, Bulgaria, Poland, Hungary, and Ukraine, enacted "good samaritan" laws in the 1950s and 1960s, at the height of Soviet domination.[24] It would appear that the Soviet Union may have exerted pressure on these countries to pass such laws to force citizens to "rat each other out", much as the Germans did during World War II. Thus, so-called "good samaritan" laws may not have all been instituted to serve good purposes.[25]

There is no significant historical background to reveal the motivation behind enactment of "good samaritan" laws in the Scandinavian countries, the Netherlands, and old Russia in the nineteenth century.[26] It is certainly possible, however, that the church pressed the governments to include these provisions for the good of all, or to remind individuals that the moral lessons taught by the church are important and relevant in everyday life. The Russian Criminal Code of 1845 did include an ecclesiastical penalty

---

[19] *See infra* notes 151- 153 and accompanying text.

[20] *See* Feldbrugge, *supra* note 15. *See also* John Pardun, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L. J. 591, 592 (1998).

[21] *See* Feldbrugge, *supra* note 15, at 631. In 1966, at least 23 European countries had some type of "good samaritan" law in effect that imposed a general duty to assist a person in need. *See id.* at 655-57.

[22] *See* Pardun, *supra* note 20, at 593 (citation omitted).

[23] *See* Feldbrugge, *supra* note 15, at 655-57.

[24] *See id.*

[25] *See* Pardun, *supra* note 20, at 593.

[26] *See* Feldbrugge, *supra* note 15, at 655-57.

for violation of the duty to act law, which would support the theory that the church was behind this early movement to require people to help others in need. But even these early laws had historical precedents.

Ancient Indian and Egyptian law required people to help others who were in danger or injured.[27] Later Greek and Roman scholars eschewed this requirement, instead developing bodies of law that recognized the importance of free will and acting because one chooses to act.[28] Duty to aid or assist requirements were absent from the codified law globally until the mid-nineteenth century, when the Russian Criminal Code of 1845 required people to help others in danger.[29] Soon after Russia instituted its duty to act law in the 1845 Code, Tuscany,[30] the Netherlands,[31] and Italy[32] followed suit.

B. European Countries That Have "Good Samaritan" Laws

As of 1966, at least 21 European countries had some form of a duty to act law.[33] These laws can be broken down into a number of categories, including laws that require the danger be: 1) immediate or imminent;[34] 2) evident;[35] 3) real,[36] and; 4) harmful.[37]

---

[27] *See id.* at 630.

[28] *See id.*

[29] *See id.* Feldbrugge notes that he does not believe that the Russians were more "enlightened" than other Europeans of the time, but rather that the Russians were secluded from Western Europe and therefore did not subscribe to the same theories of "liberalism and freedom of the individual" that were present in Europe during the eighteenth and nineteenth centuries. *Id.* In 1845, however, the year Russia's duty to act law first appeared, Nicholas I was the ruling tsar. *See* S. Frederick Starr, *Russian Art and Society1800-1850, in* ART AND CULTURE IN NINETEENTH-CENTURY RUSSIA 99 (Theofanis George Stavrou ed., (1983)). Nicholas I is considered to have taken "the arts more seriously than did any other Russian tsar with the exception of Catherine II, [and to have] . . . demonstrated considerable knowledge and up-to-date judgment." *Id.* During this period in Russia, the country was experiencing tremendous Western influence in literature, art, architecture, music, and culture, and embraced openly the French culture. *See id.* at 87. It was also during this period that Russian literature and culture underwent its "Golden Age". *See id.* It therefore seems that Feldbrugge's conclusion is shortsighted and not based on facts or knowledge of the Russian culture of the time.

[30] *See id.* at 631. Tuscany implemented its statute in 1853.

[31] *See id.* The Netherlands included a duty to act law in its 1881 criminal code.

[32] *See* Feldbrugge, *supra* note 15, at 631. Italy's Zanardelli Code of 1889 included a duty to act law.

[33] *See id.* at 655-57. As of the writing of Feldbrugge's article, Albania, Belgium, Bulgaria, former Czechoslovakia, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, the Netherlands, Norway, Poland, Romania, Russia, Spain, Turkey, Ukraine, and former Yugoslavia. *See id.*

[34] *See id.* at 632.Hungary, the Netherlands, Poland, and former Yugoslavia have

Some laws include the additional requirement that the victim, or potential victim, actually be helpless or in need of assistance.[38]

The penalties differ greatly,[39] with some laws requiring as little as a fine or community service and others allowing up to five years in prison.[40] While prosecutions under these laws are uncommon, it seems that Europeans are happy to have the laws available to prosecute the most egregious offenders.[41] Europeans view the laws as a tool to punish undesirable conduct, namely, failing to help another human when there is little risk or inconvenience to oneself.[42] The use of duty to act laws in Europe has not led to serious "encroachments on personal liberty" as feared by American critics of "good samaritan" laws.[43] Rather, the European "good samaritan" laws, despite the numerous variations, provide Americans with models to use in developing a similar, ideal American statute.

III. AMERICAN "GOOD SAMARITAN" STATUTES

A. Historical Background – Duty to Act under the Common Law

Under common law, individuals do not have a duty to take affirmative action to help a person in need.[44] The common law imposes neither civil nor criminal liability for

---

such a provision.

[35] *See id.* Denmark, Norway, Spain, and Russia specifically require that the danger be evident.

[36] *See* Feldbrugge, *supra* note 15 at 633The Finnish and French laws require that the danger be real, as opposed to "presumed".

[37] *See id.* Former Czechoslovakia, Poland, Romania, Hungary, Turkey, German, and France all either explicitly require, or have determined through judicial interpretation, that the danger must present danger of physical harm to the victim.

[38] *See id.* at 633. Bulgaria, Russia, the Netherlands, Italy, France, Germany, and Spain require that the victim be in need of assistance before the duty to assist attaches.

[39] *See id.* at 646-7.

[40] *See id.* The French statute carries the most severe penalty, which allows up to five years in prison and a fine of up to approximately $80,000.00 (current figure). *See id.* The French statute is often used to prosecute individuals involved in crimes who do not take affirmative acts that rise to the level of criminal culpability. *See id.* at 647.

[41] *See* Feldbrugge, *supra* note 15, at 654. *See also, e.g.*, Lara Marlowe, *Establishment Turns on Photographers*, THE IRISH TIMES, Sept. 3, 1997, at 7 (indicating that the French judge assigned to investigate the death of Princess Diana planned to investigate photographers on charges of violating France's duty to act law).

[42] *See* Feldbrugge, *supra* note 15, at 654.

[43] *See id.*

[44] *See* RESTATEMENT SECOND OF TORTS §314 (1977). There is no liability for

failing to take action to help another.[45] There are, however, seven limited exceptions to the general rule.[46] First, the existence of certain special relationships between individuals creates a duty to act under common law.[47] Second, when one has caused harm to another, then the one who caused the harm must help the other or be subject to civil liability.[48] Third, if a person begins to render aid to an injured person or crime victim, but for some reason discontinues that aid, then the person will be held accountable for the injuries if the victim is left in a worse position.[49] Thus, once a person "takes charge and control of the situation, he [or she] is regarded as entering voluntarily into a relation which is attended with responsibility. Such a [person] will then be liable for a failure to use

---

nonfeasance, that is, the failure to take affirmative action to assist another. *See id.*

[45] *See id.* One common law crime, misprision of felony, required persons who had some role, even a slight one, in a crime to report the knowledge they had to authorities. *See also* Wenick, *supra* note 6, at 1791. In the United States, there has been a federal misprision of felony statute that requires individuals to report knowledge of felonies for nearly ninety years. *See* 18 U.S.C.A. § 4 (1982). U.S. attorneys have considered this rarely recognized law a useful tool in prosecutions. The statute provides that:

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

18 U.S.C.A. § 4 (West 1998).

[46] *See* David C. Biggs, *"The Good Samaritan is Packing": An Overview of the Broadened Duty to Aid Your Fellow Man, With the Modern Desire to Possess Concealed Weapons*, 22 DAYTON L. REV. 225, 228 (1997). *See also infra* notes 47-56 and accompanying text.

[47] *See* DAN DOBBS, TORTS AND COMPENSATION 479 (1993). Special relationships include: common carrier-passenger; innkeeper-guest; innkeeper-stranger (a duty to protect a stranger from injury by a guest); employer-employee; ship-crewman; shopkeeper-business visitor; host-social guest; jailer-prisoner; school-pupil; drinking companions; landlord-trapped trespasser; safety engineer-laborer; physician-patient; psychologist-stranger (a duty to protect a stranger from harm at the hands of the psychologist's patient); manufacturer-consumer; landlord-tenant; parole board-stranger (a duty to protect strangers from a released prisoner); husband-wife; parent-child; and tavern keeper-patron. *See also* Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 899 (1986).

[48] *See* South v. National Railroad Passenger Corp., 290 N.W.2d 819 (N.D. 1980).

[49] *See* Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976).

reasonable care for the protection of the plaintiff's interests."[50] A number of states have codified this common-law doctrine, some going so far as to criminalize such behavior.[51] Fourth, a special relationship between a non-acting third party and a party causing harm or injury to another.[52] For example, a parent may be held responsible for the harmful actions of his or her child.[53] Fifth, property owners may be held criminally liable for injuries sustained by a person on the premises.[54] Sixth, statutory obligations, such as "good samaritan" laws, may require action that is not mandated by common law.[55] Seventh, and last, contractual obligations, such as for security guards or lifeguards, may require one to take affirmative action to protect or assist another in need.[56] The most

---

[50] W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984.)

[51] At least two states, Massachusetts and Minnesota, statutorily require that one who causes harm to another must determine the extent of the other person's injuries and immediately render assistance. *See* MINN. STAT. ANN. 609.662 (West 1997). The Minnesota statute encompasses the limited situation of when a person discharges a firearm and causes harm to another, imposing penalties based upon the injuries sustained by the victim. *See id.* §609.662 (2). MINN. STAT. ANN. 609.662 (2)(b) penalizes offenses as follows:

> if the injured person suffered death or great bodily harm as a result of the discharge, to imprisonment for not more than two years or to payment of a fine of not more than $4,000, or both;
>
> if the injured person suffered substantial bodily harm as a result of the discharge, to imprisonment for not more than one year and one day or to payment of a fine of not more than $3,000, or both;
>
> otherwise, to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

Minn. Stat. Ann. 609.662 Subd. 2 (2)(b)(1)-(3) (West 1997).

Other states, such as Utah, require individuals involved in motor vehicle accidents to stop at the scene and assist any injured persons, if possible. *See* UTAH CODE ANN. § 41-6-29 (1998).

[52] *See* Biggs, *supra* note 46, at 229.

[53] *See id.*

[54] *See id.* (citing Commonwealth v. Welansky, 55 N.E.2d 902 (Mass. 1944) (convicting a bar owner of manslaughter when he had ordered the bar's fire exits locked and the bar burned to the ground causing several people to die because someone else mishandled a light source inside the bar)).

[55] *See id. See also infra* notes 57-121 and accompanying text for a discussion of such statutes.

[56] *See id.* at 228.

important exception to the common law in the context of this Article is the statutory obligation exception, as legislators can create a common law exception through passing "good samaritan" law. .

B. States That Currently Have "Good Samaritan" Statutes in Effect

While currently nine states have some form of "good samaritan" law in effect,[57] very few prosecutions have been made under these laws.[58] The fact is that prosecutors are already overworked and under compensated, and few district attorneys can afford to expend insufficient resources pursuing people who violate these statutes. The nine "good samaritan" statutes can be classified into three different groups. There are those that impose a general duty to help injured persons, those that require assisting victims of certain crimes through reporting the offenses, and those that require only reporting of crimes.

Minnesota, Rhode Island, and Vermont all have statutes that impose a general duty to assist an injured person, whether that person is injured as a result of an accident, crime, or other circumstances.[59] Wisconsin also imposes a general duty to help, but applies it only to crime victims.[60] Florida requires one to assist a victim of a sexual battery in the form of reporting the crime to authorities,[61] while Massachusetts and Washington mandate reporting violent crimes in general.[62] Ohio has established a duty to report knowledge of felonies,[63] and Colorado requires reporting of all crimes.[64] While the statutes apparently seek different objectives ranging from retribution to education,[65] they each contain elements that may be significant in formulating a model statute for all states to implement.

---

[57] In this context, the term "good samaritan" law is to include both those laws that impose a general duty to assist an injured or endangered person and those that require reporting crimes.

[58] *See* Larini, *supra* note 6, at 13.

[59] *See infra* notes 66 - 80 and accompanying text.

[60] *See infra* notes 81 - 87 and accompanying text.

[61] *See infra* notes 88 - 90 and accompanying text.

[62] *See infra* notes 91 - 99 and accompanying text.

[63] *See infra* notes 100 - 104 and accompanying text.

[64] *See infra* notes 105 - 111 and accompanying text.

[65] *See* NEWSWEEK, Mar. 21, 1983, at 25. Massachusetts and Wisconsin enacted their laws in response to an incident that took place in New Bedford, Massachusetts in 1983. *See id.* Attackers in the incident repeatedly raped a woman on a pool table while numerous witnesses watched and cheered the attackers. *See id.* None of the witnesses reported the attack, although it lasted for over an hour and fifteen minutes. *See id.* The events were depicted in the motion picture "The Accused".

1. Minnesota

Minnesota's duty to act law[66] requires that "[a] person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall . . . give reasonable assistance to the exposed person." The Minnesota statute does not, however, require that people report crimes they have witnessed.[67] Minnesota's "good samaritan" law can be broken down into six components that identify the requirements under the law. There must be 1) "a person at the scene of an emergency who" 2) "knows that" 3) "another person is exposed to or has suffered" 4) "grave physical harm", and that person must 5) "without danger or peril to self or others" 6) "give reasonable assistance to the exposed person."[68] The statute does qualify seeking aid from the police or medical professionals as "reasonable assistance."[69] It is clear under the Minnesota law that one is obligated only to help an injured or endangered person, so long as help can be administered without creating a risk to oneself or others. Violation of the law is considered a petty misdemeanor, and therefore carries a small penalty.[70] The Minnesota law creates a general duty to assist.[71]

2. Rhode Island

Rhode Island's "good samaritan" law is nearly identical to subdivision 1 of the Minnesota statute.[72] It consists of the same elements as the Minnesota law, and imposes the same requirements.[73] The Rhode Island law does not, however, define what constitutes "reasonable assistance", but it does, unlike the Minnesota statute, set the maximum penalty for violations of the law at six months in prison or five-hundred dollars fine, or both.[74] The Rhode Island law imposes a general, affirmative, statutory duty to assist others in need.[75] This statute does not include a reporting requirement.[76]

---

[66] MINN. STAT. ANN. 604A.01 §1 (West 1997).
[67] *See id.*
[68] *Id.*
[69] *See id.*
[70] *See id.*
[71] MINN. STAT. ANN. 604A.01 §1 (West 1997).
[72] *See* R.I. GEN. LAWS § 11-56-1 (1997).
[73] *See id.*
[74] *See id.*
[75] *See id.*
[76] *See id.*

3. Vermont

The Vermont statute[77] is quite similar to both the Minnesota and Rhode Island laws with two significant differences – Vermont specifically does not require individuals to assist an injured person if other assistance is already being provided or if providing assistance would interfere with "important duties owed to others".[78] Critics of "good samaritan" laws often argue that requiring *all* individuals to provide assistance to persons in need is foolish because it only creates chaos at the accident scene. The Vermont statute overcomes this criticism by making it clear that once reasonable assistance is initiated, other onlookers are relieved of responsibility.[79]

Considering that the maximum penalty under the Vermont law is a fine of $100.00,[80] it would seem that Vermont is not interested in prosecuting the most egregious offenders, but rather is interested in raising awareness about the issue.

4. Wisconsin

Wisconsin's duty to act law[81] is the only one in the country that requires individuals both to assist crime victims and to report crimes they have witnessed.[82] The Wisconsin statute is noteworthy for not requiring individuals to assist another in just any emergency situation, which would encompass accidents or numerous other non-criminal situations, but rather it mandates assistance to crime victims only.[83] In this way the Wisconsin differs greatly from the Minnesota, Rhode Island, and Vermont "good samaritan" laws.[84] Another significant difference in the Wisconsin law is that it mandates first summoning law enforcement officers, presumably immediately so as to allow them to provide the necessary assistance, or, in the alternative, providing assistance personally to the crime victim.[85]

The scope of the Wisconsin law, while creating a *general duty* to assist crime victims, is therefore more limited than that of the Minnesota, Rhode Island, and Vermont laws, in that it applies only to crime victims, and requires individuals to summon authorities first.[86] While it is a subtle distinction, it could turn out to be a significant one under certain circumstances. For example, if a person who has received CPR training

---

[77] *See* VT. STAT. ANN. tit. 12, §519 (a) (1999).
[78] *See id.*
[79] *See id.*
[80] *See id.* at §519 (c).
[81] *See* WIS. STAT. ANN. § 940.34 (West 1997).
[82] *See id.* at 2(a).
[83] *See id.*
[84] *See supra* notes 66-80 and accompanying text.
[85] WIS. STAT. ANN. § 940.34(2)(a) (West 1997).
[86] *See id.*

were to come upon an injured person in a well-populated area in Wisconsin, he or she would be obligated to summon authorities *or* provide reasonable assistance.[87] If the same situation happened in Minnesota, Rhode Island, or Vermont, then he or she would be obligated to provide reasonable assistance to the victim, *which may include* summoning authorities. A judge or jury in the latter three jurisdictions could conceivably find that, if the CPR- trained person chose to summon the authorities in order to assist the victim when there were other people in the immediate area who were willing and able to help, then the person violated the statute *because reasonable assistance* would have been personally tending to the injured victim. Again, it may be a subtle distinction, but it could be significant. In fashioning a model statute, it is important to determine the goal sought.

5. Florida

Florida requires reporting of sexual battery, but does not impose a general duty to assist any injured person or crime victim.[88] The primary focus of the Florida statute is to have sexual crimes reported, as evidence by paragraph 2 of the statute.[89] The scope of the Florida law is clearly restricted to sexual battery, based on both the title and language of the statute.[90]

6. Massachusetts

Massachusetts imposes a duty to report certain crimes that, unlike the Florida duty to report law, encompasses virtually all violent crimes.[91] The Massachusetts statute,

---

[87] Assume for purposes of this hypothetical that the person trained in CPR was not a physician and owed the victim no other special duty.

[88] *See* FLA. STAT. ANN. § 794.027 (West 1998).

[89] *See id.*

[90] FLA. STAT. ANN. § 794.027 Duty to report sexual battery; penalties.

[91] *See* MASS. GEN. LAWS ANN. ch 268, § 40 (West 1998):

> Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

Id.

as compared to the Florida statute, seems overly broad and sweeping in its language.[92] While it attempts to impose an affirmative obligation to report crimes, it would likely be difficult to convict an offender because of the inexact language used.[93] This law also limits its application unnecessarily by requiring individuals only to report crimes that they know occurred.[94] This leaves it open to debate as to what kind of knowledge must be obtained; need it be first-hand knowledge? While the statute also requires that a person be at the scene of the crime, it does not specify that the person need witness the crime.[95] This statute is problematic in that it does not clearly define the offense. Not surprisingly, there have been no convictions for violations of this law.[96]

7. Washington

Washington imposes an affirmative duty on witnesses of crimes against children or violent offenses to report the crime as soon as possible to authorities or medical professionals.[97] It places limits on the duty when reporting information would violate privileged communications or put the reporter or his or her family in danger of immediate physical harm.[98] The Washington statute is interesting in that it requires reporting knowledge of preparations for violent crimes or crimes against children, not just knowledge of a crime already committed.[99]

8. Ohio

Ohio expands its reporting requirement to encompass all felonies.[100] The Ohio statute also requires reporting discovery of a corpse or first-hand knowledge of a death.[101] It does not, however, impose any duty to assist the victims of the crimes.[102] While the Ohio law does not require disclosure of privileged information, it does, interestingly, absolve persons reporting privileged information regarding felonies from liability

---

[92] *See id.*

[93] *See id.*

[94] *See id.*

[95] *See id.*

[96] *See* Larini, *supra* note 6.

[97] *See* WASH. REV. CODE ANN. § 9.69.100 (West 1998).

[98] *See id.*

[99] *See id.*

[100] *See* OHIO REV. CODE ANN. § 2921.22 (Banks-Baldwin 1998). The statute reads in relevant part: "(A) No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities." *Id.*

[101] *See id.* at § 2921.22 (C).

[102] *See generally id.*

associated with violation of the confidence.[103] The law does not, however, and cannot relieve an attorney of ethical obligations pertaining to confidential communications when the communications concern a crime already committed.[104]

9. Colorado

Colorado attempted to create a statutory duty to report a crime when there exist reasonable grounds to believe a crime has been committed.[105] The effect of the statute was undermined, however, by *U.S. v. Zimmerman*,[106] in which the United States District Court ruled that the Colorado law did not create an affirmative duty on the part of witnesses to report crimes.[107] In *Zimmerman*, however, the government was arguing that an attorney had an obligation under the statute to disclose information within his knowledge regarding a crime.[108] The court's decision regarding the reporting statute focused greatly on whether a state could force a person to disclose information otherwise protected by privilege, here the attorney-client privilege.[109] The court answered the question with a resounding no, but perhaps too broadly, as the opinion clearly states that the statute does not impose a duty on a witness to stop or report the crime without qualifying it in the context of confidential communications.[110] Thus, the Colorado statute

---

[103] *See* § 2921.22 (H).

[104] *See* Model Rules of Professional Conduct, Rule 1.6 (1998).

[105] *See* COLO. REV. STAT. ANN. § 18-8-115 (West 1998).

Duty to report a crime – liability for disclosure

It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities. Notwithstanding any other provision of the law to the contrary, a corporation or person may disclose information concerning a suspected crime to other persons or corporations for the purpose of giving notice of the possibility that other such criminal conduct may be attempted which may affect the persons or corporations notified. When acting in good faith, such corporation or person shall be immune from any civil liability for such reporting or disclosure. This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any con munication privileged by law.

Id.

[106] 943 F.2d 1204 (10th Cir. 1991).

[107] *See id.* at 1214.

[108] *See id.* at 1205.

[109] *See id.*

[110] *See id.* at 1214.

merely eliminates liability for disclosure or reporting of information.[111] The *Zimmerman* decision effectively took away the "bite" of the Colorado statute's mandatory reporting requirement, which demonstrates that careful wording of a statute is essential to its survival.

C. States that have proposed statutes.

At least four states have recently proposed "good samaritan" laws, all inspired by specific instances of witness apathy towards victims. California and Nevada lawmakers introduced legislation requiring people to report crimes against children in response to the Sherrice Iverson incident.[112] Florida and New Jersey are seeking to punish witnesses who fail to report violent crimes against children or adults.[113] The Florida bill "would make it illegal to witness a violent crime and not report it."[114] New Jersey seeks the same result as Florida, with the addition that the witness must report it "'as soon as reasonably practicable.'"[115]

New Jersey plans to impose a penalty of up to 18 months or $10,000.00, or both.[116] All expect to include the caveat that no person need put him or her self in danger to help another. New Jersey, in particular, hopes to be able to use the law to prosecute so-called "passive participants" – companions of criminals who witness violent crimes but do nothing to stop them, escaping criminal liability because they took no affirmative action to facilitate or conceal the crime.[117] Some New Jersey lawmakers have dubbed this bill the "Seinfeld Bill".[118]

A federal bill has also been introduced, which, like the California and Nevada proposed laws, focuses on crimes against children.[119] The bill, proposed by U.S. Senators Barbara Boxer of California and Nick Lampson of Texas would eliminate funding for child abuse prevention programs to states that did not enact laws requiring witnesses of crimes against children to report the crimes.[120] This bill, however, has

---

[111] *See id.*

[112] *See* Caren Benjamin, *Lawyers Say Care Needed in Writing Good Samaritan Law*, LAS VEGAS REVIEW-JOURNAL, Sept. 13, 1998, at 1B.

[113] *See* Karp, *supra* note 10. *See also* Stainton, *supra* note 1.

[114] *See* Karp, *supra* note 10.

[115] *See* Mike Kelly, *Of Seinfeld and Sherrice*, THE RECORD (Bergen County, NJ), Oct. 8, 1998, at A03.

[116] *See id.*

[117] *See id.*

[118] *See id.*

[119] *See* Finz, *supra* note 8.

[120] *See id.*

received some criticism because it focuses only on crimes that victimize children and does not include adults.[121]

IV. RESOLUTION OF THE AMERICAN DEBATE OVER DUTY TO ACT LAWS

A. The Debate For and Against Duty to Act Laws.

The debate over imposing an affirmative duty to act has gone on in the American legal community for over eighty years.[122] Both sides have presented lengthy and persuasive legal and social arguments, but the public currently seems to be supporting the enactment of "good samaritan" statutes.[123] One of the strongest sentiments expressed by proponents of "good samaritan" laws is that such laws will provide needed retribution against egregious violators of the law.[124] Another point argued by supporters is that our legal system consistently reflects accepted morality, and, despite the fact that most laws prohibit certain acts, "good samaritan" laws are simply a reflection of our own morality, but happen to require us to act in certain ways when confronted with limited circumstances.[125] But the most distressing argument is that, while our own morality dictates that we should help others in need, people simply do not do so; therefore, we must legislate to educate and remind people of our societal and moral obligations to each other.[126] It is this goal that most supporters of "good samaritan" laws hope to achieve.

Opponents of these laws often argue that they will lead to vigilantism,[127] restrict personal liberty by dictating what action we must take in emergency situations, thereby limiting the choices we make,[128] or that the statutes will be selectively enforced.[129] What the opponents fail to consider, however, is the benefit to be gained by society through

---

[121] *See* Beverly Pekala, *When We Save Others, We Save Ourselves*, CHI. TRIB., Sept. 27, 1998, at 9.

[122] *See* Adler, *supra* note 3, at 867.

[123] *See generally id.*

[124] *See* Samuel Freeman, *Symposium: Act & Crime: Act & Omission: Criminal Liability and the Duty to Aid the Distressed*, 142 U. PENN. L. REV. 1455, 1457 (1994).

[125] *See generally id.* at 1483.

[126] *See* Larini, *supra* note 6.

[127] *See* Wenick, *supra* note 6, at 1787-88.

[128] *See* Freeman, *supra* note 124, at 1478-79.

[129] *See* Wenick, *supra* note 6, at 1804-05. Selective enforcement is problematic only if a defendant "successfully proves that: 1) others similarly situated were not subjected to enforcement, and 2) the selection of the defendant was based on invidious discrimination (race or religion) or in retaliation for the exercise of constitutional rights." *Id.* at 1805.

such laws. They also fail to consider other laws that also restrict our individual choices, such as property rights, trespassing laws,[130] and blue laws that prohibit purchasing alcohol at certain times or on certain days.

B. Specific Cases of Witness Apathy

While the instances of witnesses failing to aid an injured victim are innumerable, a few examples stand out as particularly egregious. For example, the Sherrice Iverson case grabbed national attention,[131] possibly becoming the most significant catalyst for public support of duty to act laws since the Kitty Genovese incident in 1964.[132] On May 25, 1997, twenty-year-old Jeremy Strohmeyer followed seven-year-old Sherrice around a Las Vegas casino while her father was gambling.[133] Strohmeyer played hide and seek with Sherrice, eventually following her into the ladies' bathroom at about 4 a.m..[134] It was there that Strohmeyer proceeded to rape and murder the little girl.[135] Strohmeyer's friend, David Cash, was with him at the casino that night.[136] Cash saw Strohmeyer follow the girl into the bathroom, and even followed him in later, only to see Strohmeyer struggling with the girl in a stall in the bathroom, attempting to subdue her.[137] Cash returned every few minutes to check on his friend; Strohmeyer later told Cash that he had killed the girl.[138] Cash did not report this to anyone.[139]

Strohmeyer subsequently pled guilty to the charges in order to escape the death penalty.[140] Cash, on the other hand, was not charged with any crime since he did not take any affirmative action to cover up the crime.[141] Cash has made public statements indicating that he feels no remorse, that he worries about himself first, and that all of the

---

[130] *See* Freeman, *supra* note 124, at 1478.

[131] *See e.g.* Editorial, *Girl Needed "Good Samaritan," Got Man Who Turned His Back*, SUN-SENTINEL (Ft. Lauderdale), Sept. 14, 1998, at 18A.

[132] *See* N.Y. TIMES, Mar. 27, 1964, at A1. Kitty Genovese was a young woman who was brutally attacked and stabbed to death on her own street. *See id.* Thirty-eight of her neighbors watched the attack over thirty-five minutes, yet not one of them called the police until after the attack had ended, and even then, only one person reported the incident to police. *See id.* This is possibly the most infamous failure to act case in the United States, although the Sherrice Iverson incident is gaining.

[133] *See* Pekala, *supra* note 121.

[134] *See id.*

[135] *See id.*

[136] *See id.*

[137] *See id.*

[138] *See id.*

[139] *See* Pekala, *supra* note 121.

[140] *See id.*

[141] *See id.*

media attention has helped him get dates.[142] The public has become incensed at his blatant disregard for human life, and many seek to institute "good samaritan" laws so that crime witnesses such as Cash can be punished, and so that the families of Sherrice Iverson can seek retribution against those who had an opportunity to stop the crime.

There are countless other stories besides the Sherrice Iverson tale. One man recalls seeing the body of a child alongside a Florida canal and another man standing near the body.[143] The other man stated that he was a good swimmer, but he let the boy drown; in fact, he had looked over his shoulder to make sure nobody saw the boy drowning.[144] He said he did it because he hated all whites, even children, because of how he had been treated.[145] A thirteen-year-old girl was tied to a pole and fondled on a crowded public train in Boston while ten of her fellow students watched and giggled.[146] None of the adults acknowledged the attack, no reports were made.[147] That same week, an eight-year-old boy found his mother dead in her bedroom and wandered to a nearby halfway house in his underwear for help.[148] While the residents called the police, nobody attempted to find out what had happened, or to take the boy home, despite his statement that "something is wrong with my mommy."[149]

And who can forget the tragic death of Princess Diana, when, after the car she was traveling in crashed, photographers swarmed about, taking the last snapshots of the dying princess?[150] It was this incident which first brought duty to act laws to the attention of the American public.

C. Suggestions for a Model Statute

The ideal "good samaritan" law should be as clear, specific, and detailed as possible to ensure its use. In order to develop an adequate statute, one should look to the American and European examples, incorporating the important elements of each to draw a statute that best serves American interests and needs, and that serves the purposes of "good samaritan" laws. Like the European models, the ideal statute should require that a

---

[142] *See* Editorial, *supra* note 131.

[143] *See* Martin Dyckman, *Standing By Can Be a Crime*, ST. PETERSBURG TIMES (FL), Sept. 6, 1998, at 3D.

[144] *See id.*

[145] *See id.*

[146] *See* Beth Daley, *T Attack latest Case to Test Public Role: Some Say Fear, Not Apathy, Keeps Us from Intervening in Violent Crimes*, BOSTON GLOBE, Oct. 20, 1998, at B5.

[147] *See id.*

[148] *See id.*

[149] *See id.*

[150] *See* Gregory Katz, *Diana's Driver Believed Drunk; Alcohol Levels High, Officials Say*, DALLAS MORNING NEWS, Sept. 2, 1997, at 1A.

victim be in imminent or perceived imminent danger of physical harm.[151] The statute should encompass all emergency situations that could pose a risk to another person, rather than be limited to just criminal acts. An objective standard should be applied to the potential defendant, requiring a showing that the defendant knew or should have known that the victim was in danger. Some European statutes require that the defendant did know, thus applying a subjective standard. As in negligence law, application of a subjective standard precludes certainty in the judicial rule, and would likely encourage a defendant to lie about his or her state of mind. An objective, reasonable person standard should therefore be applied to the defendant.

The "good samaritan" should definitely be absolved of civil liability for any harm inflicted while engaging in reasonable efforts to help or assist a victim, much as medical professionals are today. Additionally, "good samaritans" acting in good faith should be reimbursed for any injuries or damages incurred while providing assistance efforts. Ideally, a state fund should be established through collection of fees from a criminal restitution project to cover these costs.

There should also be defenses available and enumerated in the statute itself. If it is apparent (again, apply a reasonable person standard to determine this) that effective assistance is being provided by others, then a would-be "good samaritan" should be absolved of liability. Liability should also be excused when an actor would put him or her self in danger or at risk of harm by rendering assistance to the victim. When a person already owes an important duty to another and when that other person is also in danger, liability should also be precluded, lest individuals feel obligated to overlook important special relationships in order to avoid criminal liability.

The ideal statute should include a reporting requirement. This requirement must be construed especially narrowly, or be subject to the same downfall as the Colorado statute.[152] It must be clear that mandatory reporting does not override confidentiality considerations when privileges exist at law.

Finally, to obtain the results desired by the public that advocates in favor of "good samaritan" laws, the ideal statute should include penalties that are in accord with the *mens rea* and the level of participation in infliction of the injury. For example, if a defendant witnesses a terrible accident, sees numerous people surrounding the victim, and assumes, incorrectly, that somebody is providing assistance, then the penalty imposed should be minor, if any at all. If, however, as in the Sherrice Iverson case, a defendant sees the crime being committed, knows what is going on, has ample opportunity and time to summon help or physically intervene (subject to the putting oneself at risk defense), then that defendant should be punished more severely. The recommended maximum sentence would be five years imprisonment, as borrowed from the French statute, and a fine of up to $10,000.00.

---

[151] *See supra* notes 20-43 and accompanying text.

[152] *See* COLO. REV. STAT. ANN. § 18-8-115. *See also supra* notes 105-111 and accompanying text.

V. CONCLUSION

The arguments against adopting "good samaritan" laws are weak, and even the stronger points are easy to circumvent. A narrowly constructed law will hold accountable those who fail to render assistance when it would cost nothing for them to do so. The fact that few people will be prosecuted for violating these laws does not alone provide a valid reason against adopting duty to act laws, as many laws currently in place go unenforced except for the most egregious cases. Drunk driving, seat belt, and perjury laws are just a few examples of statutes that raise awareness but provide few convictions.

Imposing an obligation to act does little to restrict the freedom of individuals, but rather encourages active participation in our society. Those individuals who have no morality and do not wish to participate in society are the ones who will be most likely to violate duty to act laws, and those individuals should be penalized. Too many cases of onlooker apathy demonstrate that this country needs to enact "good samaritan" statutes to encourage and remind people to do what they ought to feel obligated to do. Kitty Genovese, Sherrice Iverson, Princess Diana, they all could have been saved if the witnesses to the crimes against them had taken immediate action. Few can argue that it is immoral to help another, therefore, legislators should ensure that our laws accurately reflect our morality. And if just one victim benefits from a "good samaritan" law, then it can be nothing but a good idea.

Attachment B

1999, SB 5 Bill History and Committee Minutes

Bill History/Action Display

H

BILL: SB 5

SHORT TITLE: MISPRISION OF FELONY

BILL VERSION: SSSB 5

CURRENT STATUS: (S)RLS

STATUS DATE: 03/16/99

SPONSOR(s): SENATOR(S) PEARCE

TITLE: "An Act relating to the crime of misprision of felony."

Bill Root: Display Bill Root | Next Bill

Full Text | Fiscal Notes

Bill History

Jrn-Date	Jrn-Page	Action
01/19/99	0014	(S) PREFILE RELEASED - 1/8/99
01/19/99	0014	(S) READ THE FIRST TIME - REFERRAL(S)
01/19/99	0014	(S) JUD, FIN
01/27/99	0099	(S) SPONSOR SUBSTITUTE INTRODUCED-REFERRALS
01/27/99	0099	(S) JUD, FIN
02/03/99	Text	(S) JUD AT 1:30 PM BELTZ ROOM 211
02/03/99	Text	(S) HEARD AND HELD
02/03/99	Text	(S) MINUTE(JUD)
02/24/99	Text	(S) JUD AT 1:30 PM BELTZ ROOM 211
02/24/99	Text	(S) HEARD AND HELD
02/24/99	Text	(S) MINUTE(JUD)
03/03/99	Text	(S) JUD AT 1:30 PM BELTZ ROOM 211
03/03/99	Text	(S) MOVED CS (JUD) OUT OF COMMITTEE
03/03/99	Text	(S) MINUTE(JUD)
03/05/99	0422	(S) JUD RPT CS 2DP 1NR SAME TITLE
03/05/99	0422	(S) NR: TAYLOR; DP: TORGERSON, DONLEY
03/05/99	0423	(S) INDETERMINATE FNS (ADM-2, LAW, COURT,
03/05/99	0423	(S) COR)
03/05/99	0423	(S) INDETERMINATE FNS TO CS (LAW, COR)
03/16/99	0561	(S) FIN RPT CS(JUD) 6DP 2NR

03/16/99	0561	(S) DP: TORGERSON, PARNELL, PHILLIPS, WILKEN
03/16/99	0561	(S) LEMAN, DONLEY; NR: GREEN, ADAMS
03/16/99	0561	(S) INDETERMINATE FN (COURT)
03/16/99	0561	(S) PREV INDETERMINATE FNS (ADM-2, LAW, COR)
03/16/99	0561	(S) REFERRED TO RULES
03/16/99	Text	(S) FIN AT 9:00 AM SENATE FINANCE 532
03/16/99	Text	(S) MOVED OUT OF COMMITTEE
03/16/99	Text	(S) RLS AT 11:55 AM FAHRENKAMP 203
03/16/99	Text	(S) MINUTE(FIN)
03/16/99	Text	(S) MINUTE(RLS)

Similar Subject Match or Exact Subject Match
CRIMES
CRIMINAL PROCEDURE

Bill Root: Display Bill Root | Next Bill

To Report Problems with Basis Inquiry

Live KTOO Streams

Return to Basis Main Menu (21 Legislature)

Return to Legislature Home Page

Senate JUDICIARY Minute

Feb 03, 1999

SB 5 - MISPRISION OF FELONY

SENATOR DRUE PEARCE, prime sponsor of SB 5, explained the bill arose out of a case in Nevada where a seven-year-old girl was raped and murdered. The definition of misprision is to witness or to have knowledge of a felony crime against a person and fail to report that crime immediately to a peace officer or a law enforcement agency. SENATOR PEARCE said this is sometimes referred to as "the Good Samaritan Law."

SB 5 makes it a class C felony if the unreported crime is a violent felony (as described in AS 11.41) or first degree arson. If the unreported crime is any other felony offense, it is a class A misdemeanor.

SENATOR PEARCE recognized that the focus of SB 5 may need to be narrowed and perhaps the bill should apply only to the witnessing of crimes such as murder, kidnaping, fist degree assault and arson in the first degree. However, SENATOR PEARCE would also like the bill to apply to sexual crimes against children.

SENATOR PEARCE noted there has been concern about the word "immediate" within the bill and suggested it might be changed to require the reporting of crimes "within a reasonable time."

SENATOR PEARCE also asked the committee to consider including in the bill a defense for a battered wife who does not report battery against her child ou of fear for her life.

SENATOR PEARCE concluded SB 5 creates a tool that should be available to law enforcement. SENATOR PEARCE said SENATOR DONLEY had agreed to work on the legal issues of this bill in subcommittee.

Number 082

MS. ANNE CARPENETI, representing the Criminal Division of the Department of Law, testified in support of the idea behind the bill as it applies to the most serious crimes. However, the bill could cause problems if applied to other types of crimes and may have unintended negative consequences. MS. CARPENETI explained that the current sponsor substitute covers property and drug crimes. Under this bill, someone who signs a neighbor's Permanent Fund dividend application with the knowledge their neighbor has been away for longer than the allotted amount of time would be guilty of a class A misdemeanor. Also, a parent of a child with a serious drug habit would be guilty if they did anything other than report their child to the police. MS. CARPENETI concluded it is simply not always best for the situation to compel a person to report a crime, and she cited rape victims as an additional example. Even in the case of sexual abuse of a child, parents should have options for

treatment and not be mandated to report to law enforcement.

MS. CARPENETI proposed that even in cases of other serious crimes, a law like this may affect the prosecution of perpetrators by making witnesses unwilling to offer testimony at a later date or to correct inaccuracies in their initial testimony.

MS. CARPENETI stated a concern that SB 5 may create some imbalances when compared with other statutes. There is a law on the books right now that makes it a class C felony to "hinder prosecution in the first degree." This means anyone helping a felon hide his or her crime, avoid criminal responsibility, or profit from his or her crime, is guilty of a C felony. This crime seems more serious than misprision to MS. CARPENETI. MS. CARPENETI concluded this is a good idea for more serious crimes but bears examination for others.

Number 168

SENATOR HALFORD recalled a television documentary he had recently seen which told the story of an 8-year-old boy and his mother who were murdered as a result of the boy being a witness to a prior murder. SENATOR HALFORD said this boy was a victim of the judicial system and to make a felon out of someone who does not believe the State can protect them is terrible, and compounds the failure of the criminal justice system to protect victims and witnesses. SENATOR HALFORD agrees with the intent but sees "awful problems with implementation."

MS. CARPENETI agreed with SENATOR HALFORD. SENATOR HALFORD stated that the Nevada case was horrible and there should be some accountability, but, even for a good cause, SENATOR HALFORD thinks this bill goes too far.

Number 208

MS. CARPENETI again agreed with SENATOR HALFORD and expressed her hope that everyone will do the right thing and report crimes but suggested they should proceed cautiously with this legislation. MS. CARPENETI observed that this law would criminalize common teenage behavior.

SENATOR TORGERSON asked MS. CARPENETI if including an act of concealment within the definition of SB 5 would be a better approach. MS. CARPENETI replied this would narrow the scope of the bill a bit but explained there is a similar law in statute now.

Number 226

SENATOR DONLEY asked if the bill only included unclassified felonies and arson in the first degree whether it would have covered the Nevada case. MS. CARPENETI did not know enough about the case to answer definitively, but she believed it would have. She told SENATOR DONLEY she would find out.

SENATOR HALFORD said he would like to know of any other ways to attack this that might not create so many problems. He agreed the restriction of misprision to unclassified felonies is less

problematic, but said even in our large cities citizens may be endangered by reporting crimes that they may not be able to stop. SENATOR HALFORD proposed adding a defense for people who do not report crimes out of fear. He asked MS. CARPENETI to prepare a list of existing law that could be used to prosecute this type of case.

Number 254

MS. CARPENETI replied that she would be happy to; she listed the prohibition of solicitation of crime, aiding and abetting the commission of a crime and other laws that prohibit this type of behavior that occurs after the commission of a crime. MS. CARPENETI remarked she believes that the sponsor is trying to get at the person who merely witnesses a crime or learns about it after and does not report it. This, she believes, cannot be criminalized.

SENATOR HALFORD asked what constitutes the crime of accessory before the fact. MS. CARPENETI replied it requires knowledge of a crime before the fact and some degree of complicity.

Number 270

SENATOR DONLEY suggested dropping the penalty for misprision to a misdemeanor in order to fit with existing statute, limiting the crime of misprision to unclassified felonies and first degree arson, and adding an affirmative defense for people who do not report crimes due to perceived personal danger.

MR. BLAIR MCCUNE, Deputy Director of the Alaska Public Defender Agency, spoke to the problems he sees with the bill. He directed attention to a handout from a legal textbook. The text cited a similar statute adopted in South Dakota and MR. MCCUNE argued that this law would only affect witnesses "pure as the driven snow," as a person with any degree of culpability would be able to invoke the privilege against self-incrimination afforded by the U.S. Constitution. MR. MCCUNE said this privilege against self-incrimination "would kind of trump this statute."

MR. MCCUNE said other privileges, such as the husband/wife privilege might also apply to cases like this. MR. MCCUNE stated there are statutes listed in AS 11.56 that deal with this type of crime, and "accessory" and "complicity" statutes would also apply, as well as the recently passed "conspiracy" laws.

Number 339

CHAIRMAN TAYLOR commented he was struck by a phrase used in the article cited by MR. MCCUNE:

> "While it may be the duty of a citizen to accuse every offender and to proclaim every offense which comes to his knowledge, the law which would punish him in every case for not performing this duty is too harsh for man."

CHAIRMAN TAYLOR observed this quotation comes from a centuries-old document; he proposed that misprision is a question that has been under debate for quite some time.

CHAIRMAN TAYLOR announced he would set up a working group to further consider SB 5.

Number 350

SENATOR HALFORD observed that it seems the privilege against self-incrimination would be absolute and a person accused of misprision would only have to invoke this privilege "and from there on, it is silence." He concluded SB 5 may not work in the face of this privilege, saying an accused person would not even have to invoke the privilege in front of a jury, but he or she could simply not answer questions. MR. MCCUNE agreed with SENATOR HALFORD. He said if a reasonable possibility of self-incrimination exists, the privilege can be asserted.

SENATOR HALFORD said he would be interested in reviewing cases of any successful prosecution, anywhere in the U.S., under this type of statute in the last decade.

CHAIRMAN TAYLOR, noting there were no further witnesses to testify, appointed a subcommittee consisting of SENATOR DONLEY, SENATOR HALFORD and himself, CHAIRMAN TAYLOR. He said the matter would be back before the committee within a few weeks.

Senate JUDICIARY Minute

Feb 24, 1999

SB 5 - MISPRISION OF FELONY

SENATOR DAVE DONLEY presented a work draft for SB 5 that establishes the crime of misprision and makes it applicable to unclassified felonies and felony crimes against a person. The bill makes the crime of misprision a class A or B felony, depending on the severity of the crime witnessed. This version adds an affirmative defense for witnesses who do not report a crime in a timely manner out of fear they may be in danger if they do so, and specifies that the state need not prove a person knew the class of felony they witnessed in order to be prosecuted under this statute.

Number 052

SENATOR DONLEY moved the adoption of work draft M(Luckhaupt) as the committee substitute. Without objection, the committee substitute was adopted.

MR. BLAIR MCCUNE, Deputy Director of the Alaska Public Defender Agency, said the bill conflicts with the privilege of self-incrimination, which gives any person who fears they may be charged with an offense the right not to report the crime. SB 5 may result in requiring a person who has nothing to do with an offense being required to report it, while a person with some involvement in a crime would not.

MR. MCCUNE proposed Alaska has other statutes, such as "hindering prosecution," with which to prosecute a person who renders assistance to a criminal by providing transportation, money, or concealment.

Number 100

SENATOR PEARCE asked how Alaska would prosecute the Nevada case in which a young man witnessed, but did not participate in a crime. MR. MCCUNE replied in that case the young man provided transportation to the perpetrator.

CHAIRMAN TAYLOR expressed concern that the intent of this bill is to criminalize behavior similar to "abetting" a criminal, or being an accessory to a crime, without actually participating in the crime.

MR. MCCUNE explained to aid or abet a criminal involves complicity in the crime and criminal intent. A person convicted as an accessory can be punished in the same manner as the principal perpetrator. CHAIRMAN TAYLOR asked if the hindering prosecution statute requires intent and MR. MCCUNE replied it requires intent to hinder the apprehension or prosecution of a criminal. CHAIRMAN TAYLOR commented that the level of intent in SB 5 is one level lower than that.

SENATOR PEARCE indicated her concern with situations of abused women and children where there is knowledge and implicit support of the abuse by family and community members. Part of her intent with SB 5 is to see these cases prosecuted. She said she has no answer to the self-incrimination question, but this is a widespread problem within Alaska and, "I'm not convinced that we could use 'hindering prosecution' for the sorts of cases that I am thinking about . . . "

SENATOR PEARCE remarked that it is unfair to allow children to be abused because of a protection from self-incrimination. "I don't care what the Constitution says in this particular case - it doesn't work for me in this case."

CHAIRMAN TAYLOR said authorities are often constrained by a pattern within dysfunctional families that keeps abuse from being reported. He asked, "Are we going to be imprisoning moms because they didn't go forward earlier?" SENATOR PEARCE replied the language on lines 12-14 of page 1 was inserted to provide an affirmative defense for most of those cases, but it does not cover cases in which both parents should be prosecuted. She said, "If either parent stands by and watches while the other parent abuses the child, as far as I am concerned, both parents should be prosecuted in some manner."

CHAIRMAN TAYLOR mentioned SENATOR HALFORD'S concern about personal safety. SENATOR PEARCE said language had been inserted into the bill to deal with that "fear factor."

Number 288

SENATOR HALFORD explained there is another factor; the children themselves do not come forward for fear of losing one of their parents, despite how deviant that parent may be. He said he did not want to force the loss of both parents or compel the family to go to court, instead of getting counseling. SENATOR PEARCE did not dispute this point, but said, "We have to put some faith in the prosecutors' . . . ability to decide which cases should be prosecuted and which ones shouldn't." She said SB 5 would provide a method to prosecute those who should be prosecuted. SENATOR HALFORD concluded this is a difficult area of discussion.

SENATOR PEARCE agreed this is a difficult subject, but emphasized she appreciated having a full discussion on the bill. She proposed that in some cases those who should be prosecuted are family members but not necessarily the parents of the abused child.

CHAIRMAN TAYLOR asked how the bill will affect counselors, preachers, police officers and school teachers; the bill has a wide sweep. SENATOR HALFORD said the bill only exempts lawyers.

Number 365

MS. ANNE CARPENETI, representing the criminal division of the Department of Law, thanked the committee for the work done on the bill in response to the concerns of the Department.

MS. CARPENETI reported the bill is still too broad and requires victims of rape and domestic violence as well as spouses of child abusers to report these crimes or be subject to a criminal violation. The bill forces parents to report spouses to the criminal justice system, rather than allowing them the choice to pursue counseling or seek another solution. She suggested limiting the offenses covered by SB 5 to murder, attempted murder, kidnaping, arson and maybe first-degree sexual abuse of a minor. The nature of these crimes offset some of the concerns raised because these are the most serious crimes where victims are unable to be heard.

SENATOR TORGERSON asked how a victim of domestic violence or rape could be prosecuted if the victim's testimony would be the evidence of the crime. MS. CARPENETI said a person is required to report an offense unless he or she is the perpetrator and therefore covered by the right against self-incrimination. SENATOR HALFORD said parents who know their child is being abused are probably violating present law but they are protected by the privilege against self-incrimination. Consequently, "If they are the good parent, who didn't know and now finds out and goes to a psychological professional . . . and takes their advice . . . you can't claim self incrimination - so the self-incrimination only protects the guilty; it doesn't protect the parent who is truly operating in the best interests of the child."

SENATOR PEARCE testified the intent of SB 5 is not to compel a rape victim to make a report, but to require a witness of such a crime report it.

SENATOR PEARCE suggested there has to be a way to get at recidivist pedophiles and protect "the next child, or the next child or the next child." She said it seems the committee is considering sexual abuse of a child by a non-parent a worse crime than sexual abuse by a parent. She does not think anyone subscribes to this view but said, "That is what happens if we don't somehow deal with the parent - they are just as culpable . . . "

Number 479

SENATOR HALFORD cited a real life example to illustrate his point that, "it is very, very difficult to make a parent take an action against their child for the protection of the future."

SENATOR DONLEY asked if deleting the portion of SB 5 relating to class B felonies would give the bill a better focus. ANNE CARPENETI said yes.

Number 525

SENATOR DONLEY moved Amendment #1: insert the phrase, "other than a victim" on page 1, line 5 after the word "person." After some discussion, he modified his motion to insert the phrase after the word "person" on line 4, page 1. Without objection, the amendment was adopted.

SENATOR DONLEY moved Amendment #2: delete from page 1, line 6, and

page 1, line 8, and page 2, line 7 "or class B felony," to focus the bill on very serious crimes.

Number 557

SENATOR HALFORD suggested that the bill should specify the exact crimes covered rather than use the statutory reference. He asked how many crimes would fall under the scope of the bill. After discussion, the consensus of the sponsor, the Department and the committee was that the list of crimes would not be too long to specifically name them in the text of the bill. SENATOR PEARCE stated that her concerns would be covered if the bill encompassed unclassified felonies.

TAPE 99-12, SIDE B
Number 592

SENATOR DONLEY withdrew Amendment #2. He suggested the committee consider a conceptual amendment to limit the bill to unclassified felonies and first-degree arson, and list the offenses specifically in the text of the bill. SENATOR HALFORD moved SENATOR DONLEY's idea as Amendment #3. Without objection, Amendment #3 was adopted.

SENATOR ELLIS asked how the new requirement for "timely" reporting in the bill would compare with the previous requirement for immediate reporting. SENATOR DONLEY observed that the requirement for timely reporting allows for a more flexible application. MS. CARPENETI agreed.

Number 553

CHAIRMAN TAYLOR reflected that the crime created in this bill is difficult to differentiate from conspiracy and accessory. He said the committee will work on another draft of SB 5.

Senate JUDICIARY Minute

Mar 03, 1999

SB 5 - MISPRISION OF FELONY

SENATOR TORGERSON moved the adoption of the work draft (version N dated 2-24). Without objection, the work draft was adopted.

SENATOR DONLEY said he had reviewed the work draft and it appears to be what the committee asked for.

Number 015

SENATOR TORGERSON moved CSSB 5(JUD) out of committee with individual recommendations. Without objection, it was so ordered.

Senate FINANCE Minute

Mar 16, 1999

CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 5(JUD)
"An Act relating to the crime of misprision of felony."

PAT CARTER, aid to Senator Drue Pearce testified. He told the committee this bill was drafted in response to an incident in Nevada where a seven-year old girl was raped and murdered in a casino rest room. A college student witnessed his friend committing the crime and he walked away and didn't report it. The witness was not punished because Nevada didn't have a Good Samaritan.

He explained that a person would commit the crime of misprision if he or she witnessed a felony committed against another person and failed to immediately report it.

The bill had gone through thorough discussion and alteration in the Senate Judiciary Committee. With the assistance of Senator Dave Donley, several changes were made. Initially it was too broad in language and was narrowed to only apply to the witness of the most heinous crimes, making the failure to do so a Class A misdemeanor. These would be: murder in the first and second degrees, kidnapping, arson in the first degree, sexual assault in the first degree and sexual assault of a child in the first degree. There was discussion about the word, "immediately" as applied to the timely reporting requirement. The bill was amended to read, "in a timely manner." There was also consideration given to a self-defense clause such as in a battered wife scenario. Language was inserted in Section B Paragraph 1 that addressed that situation by giving a reasonable but affirmative defense if the person reasonably believed that they would be put as substantial risk of physical injury by reporting the witness of the crime.

Senator Randy Phillips wanted a reaction from the sponsor to an idea to delete "in a timely manner" and replaced with "within 48 hours" on page 1 line 11. He felt the language was too vague. Pat Carter offered Senator Dave Donley who participated in the discussion in the Senate Judiciary Committee. He gave an example of the consideration given for the case of a rape. There was a possibility of charging a rape victim for not reporting the rape by placing a time frame in the bill. There was discussion in the Senate Judiciary Committee on the placement of this particular language. Senator Dave Donley agreed that was the most persuasive example and said there could be others where a witness remained in the immediate danger of harm from the perpetrators within the 48-hour period.

Senator Randy Phillips suggested a defense attorney could argue what the timely manner meant to his or her client. Pat Carter said that was why it was determined that it was better to leave it up to the discretion of the judge as it applied to individual cases. Senator Randy Phillips questioned whether that was wise. Senator Dave Donley responded that it would actually the trial of fact and would also be up to the jury. Since it was a subjective finding rather than strictly a matter of law, he doubted a judge would take that away from the jury. He felt there needed to be some flexibility when seeking to criminalize this type of action. This bill would criminalize what would otherwise be innocent behavior. What made a person culpable would be their failure to report a crime, not the commission of an actual crime.

Senator Randy Phillips assumed other states had similar statutes. Pat Carter affirmed that some did. Senator Randy Phillips asked how they defined this portion relating to "timely manner". Pat Carter answered that this bill was drafted in the essence of other states. He did not know of another state that had an actual time constraint.

Senator Lyda Green if there was a disincentive for someone who witnessed a heinous crime and without personal involvement, was scared to report. If they later decided to report, would they be punished? Pat Carter called it the guilty conscious factor. He couldn't answer, and said it would be the discretion of the court.

Senator Loren Leman referred to other statutes regarding the hindering of prosecution of the second degree and asked how this bill would interact with that.

Senator Al Adams noted there was a subcommittee that Co-Chair John Torgerson and Senator Dave Donley served on. He wanted to know if the subcommittee considered the impact of the legislation on the Department of Corrections, Department of Law and other agencies that might be financially impacted. Co-Chair John Torgerson said each department submitted indeterminate fiscal notes that explained their positions that they could not determine what the fiscal impact would be since there had never been a similar law for historical reference.

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law, came to the table at the request of the committee. Senator Sean Parnell referred to Section B, page 1 line 12: affirmative defense. It said it would be a affirmative defense "if the defendant did not report in a timely manner because the defendant reasonably believed that doing so would have exposed the defendant to a substantial risk of physical injury." He noted this bill applied to two different types of witnesses, an innocent bystander and a companion of the perpetrator. He was concerned that the language regarding

the exposure of the defendant to physical injury could be used as a defense. If a perpetrator was harming a victim, he or she could just as easily harm the witness. That would be Senator Sean Parnell's defense if he were in that situation. He wanted to understand if the affirmative defense would gut the statute or if it had limits.

Anne Carpeneti attempted to explain saying the defense was suggested by Senator Rick Halford who was concerned about cases like one in New York were a mother and small boy were killed before they could testify to witnessing a serious crime. Senator Rick Halford didn't want to require people in that position to expose themselves to harm if they were innocent of any wrongdoing. It was an affirmative defense so that a person raising it would have to prove by a preponderance of evidence that he or she had a reasonable belief that reporting it would subject him or her to substantial physical injury.

Senator Sean Parnell asked if prosecutors could use this as leverage for dealing with accomplices. Anne hadn't thought about it but knew that in order to prove accomplice by ability there had to be guilty intent. Senator Sean Parnell pointed out that would not be required under this bill.

Senator Loren Leman understood that there was an interaction with Section 780. He felt it was reasonable clear to him. Anne Carpeneti said that to prove the crime of hindering prosecution in the first or second degree there had to be some intent to hide or help the perpetrator. Her understanding of the misprision statute was that the witness just had to be at the crime fail to report it. It was not something that was criminalized in the past so this would be a new step.

Senator Al Adams asked how the statute would define "witness". Anne Carpeneti replied that was a good question and that it should be defined. The best approach in her opinion, would have the definition as being present when the offence occurred where perhaps there would be the right to make a citizens arrest of the perpetrator. She also suggested the definition include seeing, hearing or otherwise be in the proximity where it would be happening in the witness' presence.

Senator Al Adams asked where was the responsibility to assist and protect the person being harmed rather than just reporting it. He argued that if someone saw a rape being committed that person should go try to stop it. "Was this addressed elsewhere?" he wanted to know. Anne Carpeneti answered no, that there was no duty to prevent a crime that the witness did not participate in. Senator Al Adams wanted to know if other states had statutes stipulating a duty to assist if a person witnessed a crime in progress. Anne Carpeneti was unaware of any but offered to research the issue. She explained that misprision was an old fashioned legal term that had its roots in England but was

never really adopted in the United States. She felt the intent of this legislation was just failure to report a crime.

Co-Chair John Torgerson asked if the department supported the bill. Anne Carpeneti was grateful for the assistance they received from the sponsor. She felt that the legislation was good for very serious crimes such as murder, kidnapping and arson.

Recess (approximately one minute).
However, Anne Carpeneti had some reservations about the inclusion of sexual assault or sexual abuse. If a parent learned of abuse of their child, and chose to take other action rather than reporting the abuse to the authorities, she felt the parent should not be charged with a crime if that parent believed he or she was acting in the best interest of the child.

Senator Dave Donley said Senator Loren Leman had asked him a question about the consistency of the punishments set out in the bill. Senator Dave Donley expressed to him that a lot of progress was made in the Senate Judiciary Committee to address the specific concern of hindering prosecution punishments. The crime of hindering prosecution in the second degree was listed as a Class B Misdemeanor, while the crime of misprision under this bill would be a Class A Misdemeanor. Senator Dave Donley explained that the hindering prosecution in the second-degree charge was applied to incidences where a misdemeanor crime was committed, the crime of misprision would only be applied to cases where a serious, unclassified felony was committed and witnessed. He wondered if the Department of Law wanted to comment on the relationship to the penalties for hindering prosecution.

Anne Carpeneti responded that the department had suggested that the provision in the original bill for the punishment of a Class C Felony did not fit with the scheme of the other statutes. Hindering prosecution in the first degree, which meant aiding or abetting in some way a felony was more serious conduct than simply witnessing and not reporting a crime.

Senator Loren Leman offered a motion to move CS SS SB 5 (JUD) from committee with accompanying indeterminate fiscal notes. Without objection, it was so ordered.

Senate RULES Minute

Mar 16, 1999

SENATOR LEMAN moved to calendar all versions of SENATE BILL NO. 5(JUD) "An Act relating to the crime of misprision of felony."

SENATOR ELLIS objected and asked whether any changes were incorporated into the bill after it passed out of the Senate Judiciary Committee.

SENATOR PEARCE confirmed that no changes were made to the Senate Judiciary Committee version in the Senate Finance Committee. She clarified that the Senate Judiciary Committee version allows for an affirmative defense if the defendant does not report for fear of substantial risk or physical injury, and the classification of the crime of misprision of felony was lowered to a class A misdemeanor. She noted the bill contains no fix for the "catch-22" concern that a person has the right to not incriminate him/herself, however all other concerns, including those of Anne Carpeneti, were addressed.

SENATOR ELLIS maintained his objection. The motion to calendar all versions of SB 5 carried with Senators Miller, Pearce, Leman, and Kelly voting "yea," and Senator Ellis voting "nay."

Attachment C

Cal Penal Code § 152.3
Fla. Stat. §794.027
ALM GL ch. 268 § 40
Nev. Rev. Stat. Ann. § 202.876 - .894
ORC Ann. 2921.22
R.I. Gen. Laws §11-37-3.1
Texas Penal Code § 38.17
Rev. Code Wash. § 9.69.100
Wis. Stat. § 940.34

Cal Pen Code § 152.3 (2006)

§ 152.3. Child Victim Protection Act

(a) Any person who reasonably believes that he or she has observed the commission of any of the following offenses where the victim is a child under the age of 14 years shall notify a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2:

(1) Murder.

(2) Rape.

(3) A violation of paragraph (1) of subdivision (b) of Section 288 of the Penal Code.

(b) This section shall not be construed to affect privileged relationships as provided by law.

(c) The duty to notify a peace officer imposed pursuant to subdivision (a) is satisfied if the notification or an attempt to provide notice is made by telephone or any other means.

(d) Failure to notify as required pursuant to subdivision (a) is a misdemeanor and is punishable by a fine of not more than one thousand five hundred dollars ($1,500), by imprisonment in a county jail for not more than six months, or by both that fine and imprisonment.

(e) The requirements of this section shall not apply to the following:

(1) A person who is related to either the victim or the offender, including a husband, wife, parent, child, brother, sister, grandparent, grandchild, or other person related by consanguinity or affinity.

(2) A person who fails to report based on a reasonable mistake of fact.

(3) A person who fails to report based on a reasonable fear for his or her own safety or for the safety of his or her family.

HISTORY:

Added Stats 2000 ch 477 § 2 (AB 1422).

NOTES:

Note

Stats 2000 ch 477 provides:

SECTION 1. This act shall be known as, and may be cited as, the Sherrice Iverson Child Victim Protection Act.

Hierarchy Notes:

Pen Code Note

Pt. 1, Tit. 7 Note

Pt. 1, Tit. 7, Ch. 7 Note

Fla. Stat. § 794.027 (2006)

§ 794.027. Duty to report sexual battery; penalties

A person who observes the commission of the crime of sexual battery and who:

(1) Has reasonable grounds to believe that he or she has observed the commission of a sexual battery;

(2) Has the present ability to seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer;

(3) Fails to seek such assistance;

(4) Would not be exposed to any threat of physical violence for seeking such assistance;

(5) Is not the husband, wife, parent, grandparent, child, grandchild, brother, or sister of the offender or victim, by consanguinity or affinity; and

(6) Is not the victim of such sexual battery

is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

HISTORY: s. 3, ch. 84-86; s. 1226, ch. 97-102.

Massachusetts—ALM GL ch. 268, § 40 (2006)

§ 40. Failure of Witness to Report Aggravated Rape, Rape, Murder, Manslaughter, or Armed Robbery; Penalty.

Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

HISTORY: 1983, 597, § 2.

NOTES:

Jurisprudence

15A Am Jur 2d, Compounding Crimes § § 1-4.

31A Am Jur 2d, Extortion, Blackmail, and Threats § § 20, 21, 25, 27-32, 38, 40, 45-47.

Annotations

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes. 100 ALR3d 431.

Law Reviews

Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue.* 84 Tex. L. Rev. 653 (February, 2006).

Ciociola, *Misprision of Felony and Its Progeny.* 41 Brandeis LJ 697 (Summer, 2003).

Bagby, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help* . 33 Ind L Rev 571, 2000.

Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law.* 65 La. L. Rev. 49 (Fall, 2004).

Thompson, *Prosecuting White-Collar Crime: The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory.* 11 Wm & Mary Bill of Rts J 3 (December 2002).

Nev. Rev. Stat. Ann. § 202.870 (2006)

202.870. Definitions.

As used in NRS 202.870 to 202.894, inclusive, unless the context otherwise requires, the words and terms defined in NRS 202.873; and 202.876 have the meanings ascribed to them in those sections.

HISTORY: 1999, ch. 631, § 8, p. 3521.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

202.873. "Law enforcement agency" defined.

"Law enforcement agency" means:

1. The office of the attorney general or the office of a district attorney within this state and any attorney, investigator, special investigator or employee who is acting in his professional or occupational capacity for such an office; or

2. Any other law enforcement agency within this state and any peace officer or employee who is acting in his professional or occupational capacity for such an agency.

HISTORY: 1999, ch. 631, § 9, p. 3521.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

202.876. "Violent or sexual offense" defined.

"Violent or sexual offense" means any act that, if prosecuted in this state, would constitute any of the following offenses:

1. Murder or voluntary manslaughter pursuant to NRS 200.010 to 200.260, inclusive.

2. Mayhem pursuant to NRS 200.280.

3. Kidnaping pursuant to NRS 200.310 to 200.340, inclusive.

4. Sexual assault pursuant to NRS 200.366.

5. Robbery pursuant to NRS 200.380.

6. Administering poison or another noxious or destructive substance or liquid with intent to cause death pursuant to NRS 200.390.

7. Battery with intent to commit a crime pursuant to NRS 200.400.

8. Administering a drug or controlled substance to another person with the intent to enable or assist the commission of a felony or crime of violence pursuant to NRS 200.405; or 200.408.

9. False imprisonment pursuant to NRS 200.460, if the false imprisonment involves the use or threatened use of force or violence against the victim or the use or threatened use of a firearm or a deadly weapon.

10. Assault with a deadly weapon pursuant to NRS 200.471.

11. Battery which is committed with the use of a deadly weapon or which results in substantial bodily harm pursuant to NRS 200.481.

12. An offense involving pornography and a minor pursuant to NRS 200.710; or 200.720.

13. Solicitation of a minor to engage in acts constituting the infamous crime against nature pursuant to NRS 201.195.

14. Intentional transmission of the human immunodeficiency virus pursuant to NRS 201.205.

15. Open or gross lewdness pursuant to NRS 201.210.

16. Lewdness with a child pursuant to NRS 201.230.

17. An offense involving pandering or prostitution in violation of NRS 201.300; , 201.320; or 201.340.

18. Coercion pursuant to NRS 207.190, if the coercion involves the use or threatened use of force or violence against the victim or the use or threatened use of a firearm or a deadly weapon.

19. An attempt, conspiracy or solicitation to commit an offense listed in subsections 1 to 18, inclusive.

HISTORY: 1999, ch. 631, § 10, p. 3521.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

202.879. "Reasonable cause to believe" and "as soon as reasonably practicable" defined; authorized manner of making report and communicating information.

For the purposes of NRS 202.870 to 202.894, inclusive, a person:

1. Has "reasonable cause to believe" if, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, a reasonable person would believe, under those facts and circumstances, that an act, transaction, event, situation or condition exists, is occurring or has occurred.

2. Acts "as soon as reasonably practicable" if, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, a reasonable person would act within approximately the same period under those facts and circumstances.

3. May make a report by telephone or, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, by any other means of oral, written or electronic commu-

nication that a reasonable person would believe, under those facts and circumstances, is a reliable and swift means of communicating information to the person who receives the information.

HISTORY: 1999, ch. 631, § 11, p. 3522.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

202.882. Duty to report violent or sexual offense against child 12 years of age or younger; penalty for failure to report; contents of report.

1. Except as otherwise provided in NRS 202.885; and 202.888, a person who knows or has reasonable cause to believe that another person has committed a violent or sexual offense against a child who is 12 years of age or younger shall:

(a) Report the commission of the violent or sexual offense against the child to a law enforcement agency; and

(b) Make such a report as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that the other person has committed the violent or sexual offense against the child.

2. A person who knowingly and willfully violates the provisions of subsection 1 is guilty of a misdemeanor.

3. A report made pursuant to this section must include, without limitation:

(a) If known, the name of the child and the name of the person who committed the violent or sexual offense against the child;

(b) The location where the violent or sexual offense was committed; and

(c) The facts and circumstances which support the person's belief that the violent or sexual offense was committed.

HISTORY: 1999, ch. 631, § 12, p. 3523.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

Cross references.

As to immunity from civil liability for reporting threat of violence against a school official, employee or pupil, see NRS 388.880; and 394.177.

202.885. Limitations on prosecution or conviction for failure to report.

1. A person may not be prosecuted or convicted pursuant to NRS 202.882 unless a court in this state or any other jurisdiction has entered a judgment of conviction against a culpable actor for:

(a) The violent or sexual offense against the child; or

(b) Any other offense arising out of the same facts as the violent or sexual offense against the child.

2. For any violation of NRS 202.882, an indictment must be found or an information or complaint must be filed within 1 year after the date on which:

(a) A court in this state or any other jurisdiction has entered a judgment of conviction against a culpable actor as provided in subsection 1; or

(b) The violation is discovered,

whichever occurs later.

3. For the purposes of this section:

(a) A court in "any other jurisdiction" includes, without limitation, a tribal court or a court of the United States or the Armed Forces of the United States.

(b) "Convicted" and "conviction" mean a judgment based upon:

(1) A plea of guilty or nolo contendere;

(2) A finding of guilt by a jury or a court sitting without a jury;

(3) An adjudication of delinquency or finding of guilt by a court having jurisdiction over juveniles; or

(4) Any other admission or finding of guilt in a criminal action or a proceeding in a court having jurisdiction over juveniles.

(c) A court "enters" a judgment of conviction against a person on the date on which guilt is admitted, adjudicated or found, whether or not:

(1) The court has imposed a sentence, a penalty or other sanction for the conviction; or

(2) The person has exercised any right to appeal the conviction.

(d) "Culpable actor" means a person who:

(1) Causes or perpetrates an unlawful act;

(2) Aids, abets, commands, counsels, encourages, hires, induces, procures or solicits another person to cause or perpetrate an unlawful act; or

(3) Is a principal in any degree, accessory before or after the fact, accomplice or conspirator to an unlawful act.

HISTORY: 1999, ch. 631, § 13, p. 3523; 2003, ch. 284, § 40, p. 1483.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

Effect of amendment.

The 2003 amendment, effective July 1, 2003, deleted "guilty but mentally ill" following "a plea of guilty" in subdivision 3(b)(1).

202.888. Persons exempt from duty to report.

The provisions of NRS 202.882 do not apply to a person who:

1. Is less than 16 years of age;

2. Is, by blood or marriage, the spouse, brother, sister, parent, grandparent, child or grandchild of:

(a) The child who is the victim of the violent or sexual offense; or

(b) The person who committed the violent or sexual offense against the child;

3. Suffers from a mental or physical impairment or disability that, in light of all the surrounding facts and circumstances, would make it impracticable for the person to report the commission of the violent or sexual offense against the child to a law enforcement agency;

4. Knows or has reasonable cause to believe that reporting the violent or sexual offense against the child to a law enforcement agency would place the person or any other person who is related to him by blood or marriage or who resides in the same household as he resides, whether or not the other person is related to him by blood or marriage, in imminent danger of suffering substantial bodily harm;

5. Became aware of the violent or sexual offense against the child through a communication or proceeding that is protected by a privilege set forth in chapter 49 of NRS; or

6. Is acting in his professional or occupational capacity and is required to report the abuse or neglect of a child pursuant to NRS 432B.220.

HISTORY: 1999, ch. 631, § 14, p. 3524.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

The Legislative Counsel, in subdivision 4, substituted "in the same household as he resides" for "in the same household as him."

202.891. Immunity from civil or criminal liability; presumption that report was made in good faith.

1. If a person who is required to make a report pursuant to NRS 202.882 makes such a report in good faith and in accordance with that section, the person is immune from civil or criminal liability for any act or omission related to that report, but the person is not immune from civil or criminal liability for any other act or omission committed by the person as part of, in connection with or as a principal, accessory or conspirator to the violent or sexual offense against the child, regardless of the nature of the other act or omission.

2. If a person is not required to make a report pursuant to NRS 202.882 and the person makes such a report to a law enforcement agency in good faith, the person is immune from civil or criminal liability for any act or omission related to that report, but the person is not immune from civil or criminal liability for any other act or omission committed by the person as part of, in connection with or as a principal, accessory or conspirator to the violent or sexual offense against the child, regardless of the nature of the other act or omission.

3. For the purposes of this section, if a person reports to a law enforcement agency that another person has committed a violent or sexual offense against a child, whether or not the person is required to make such a report pursuant to NRS 202.882, the person is presumed to have made the report in good faith unless the person is being prosecuted for a criminal violation, including, without limitation, a violation of the provisions of NRS 207.280.

HISTORY: 1999, ch. 631, § 15, p. 3524.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

202.894. Report deemed report of abuse or neglect of child made pursuant to NRS 202.882.

If a person reports to a law enforcement agency that another person has committed a violent or sexual offense against a child, whether or not the person is required to make such a report pursuant to NRS 202.882, and the violent or sexual offense against the child would constitute abuse or neglect of a child, as defined in NRS 432B.020, the report made by the person shall be deemed to be a report of the abuse or neglect of the child that has been made pursuant to NRS 432B.220 and:

1. The appropriate agencies shall act upon the report pursuant to chapter 432B of NRS; and

2. The report may be used in the same manner as other reports that are made pursuant to NRS 432B.220.

HISTORY: 1999, ch. 631, § 16, p. 3525.

NOTES:

Editor's note.

Acts 1999, ch. 631, § 26 provides: "The amendatory provisions of this act do not apply to a person who violates NRS 200.5093; or 202.882 before October 1, 1999."

Ohio—ORC Ann. 2921.22 (2006)

§ 2921.22. Failure to report a crime or knowledge of a death or burn injury

(A) No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.

(B) Except for conditions that are within the scope of division (E) of this section, no physician, limited practitioner, nurse, or other person giving aid to a sick or injured person shall negligently fail to report to law enforcement authorities any gunshot or stab wound treated or observed by the physician, limited practitioner, nurse, or person, or any serious physical harm to persons that the physician, limited practitioner, nurse, or person knows or has reasonable cause to believe resulted from an offense of violence.

(C) No person who discovers the body or acquires the first knowledge of the death of a person shall fail to report the death immediately to a physician whom the person knows to be treating the deceased for a condition from which death at such time would not be unexpected, or to a law enforcement officer, an ambulance service, an emergency squad, or the coroner in a political subdivision in which the body is discovered, the death is believed to have occurred, or knowledge concerning the death is obtained.

(D) No person shall fail to provide upon request of the person to whom a report required by division (C) of this section was made, or to any law enforcement officer who has reasonable cause to assert the authority to investigate the circumstances surrounding the death, any facts within the person's knowledge that may have a bearing on the investigation of the death.

(E) (1) As used in this division, "burn injury" means any of the following:

(a) Second or third degree burns;

(b) Any burns to the upper respiratory tract or laryngeal edema due to the inhalation of superheated air;

(c) Any burn injury or wound that may result in death;

(d) Any physical harm to persons caused by or as the result of the use of fireworks, novelties and trick noisemakers, and wire sparklers, as each is defined by section 3743.01 of the Revised Code.

(2) No physician, nurse, or limited practitioner who, outside a hospital, sanitarium, or other medical facility, attends or treats a person who has sustained a burn injury that is inflicted by an explosion or other incendiary device or that shows evidence of having been inflicted in a violent, malicious, or criminal manner shall fail to report the burn injury immediately to the local arson, or fire and explosion investigation, bureau, if there is a bureau of this type in the jurisdiction in which the person is attended or treated, or otherwise to local law enforcement authorities.

(3) No manager, superintendent, or other person in charge of a hospital, sanitarium, or other medical facility in which a person is attended or treated for any burn injury that is inflicted by an explosion or other incendiary device or that shows evidence of having been inflicted in a violent, malicious, or criminal manner shall fail to report the burn injury immediately to the local arson, or fire and explosion investigation, bureau, if there is a bureau of this type in the jurisdiction in which the person is attended or treated, or otherwise to local law enforcement authorities.

(4) No person who is required to report any burn injury under division (E)(2) or (3) of this section shall fail to file, within three working days after attending or treating the victim, a written report of the burn injury with the office of the state fire marshal. The report shall comply with the uniform standard developed by the state fire marshal pursuant to division (A)(15) of section 3737.22 of the Revised Code.

(5) Anyone participating in the making of reports under division (E) of this section or anyone participating in a judicial proceeding resulting from the reports is immune from any civil or criminal liability that otherwise might be incurred or imposed as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient relationship is not a ground for excluding evidence regarding a person's burn injury or the cause of the burn injury in any judicial proceeding resulting from a report submitted under division (E) of this section.

(F) (1) Any doctor of medicine or osteopathic medicine, hospital intern or resident, registered or licensed practical nurse, psychologist, social worker, independent social worker, social work assistant, professional clinical counselor, or professional counselor who knows or has reasonable cause to believe that a patient or client has been the victim of domestic violence, as defined in section 3113.31 of the Revised Code, shall note that knowledge or belief and the basis for it in the patient's or client's records.

(2) Notwithstanding section 4731.22 of the Revised Code, the doctor-patient privilege shall not be a ground for excluding any information regarding the report containing the knowledge or belief noted under division (F)(1) of this section, and the information may be admitted as evidence in accordance with the Rules of Evidence.

(G) Divisions (A) and (D) of this section do not require disclosure of information, when any of the following applies:

(1) The information is privileged by reason of the relationship between attorney and client; doctor and patient; licensed psychologist or licensed school psychologist and client; member of the clergy, rabbi, minister, or priest and any person communicating information confidentially to the member of the clergy, rabbi, minister, or priest for a religious counseling purpose of a professional character; husband and wife; or a communications assistant and those who are a party to a telecommunications relay service call.

(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, privileged under section 2739.04 or 2739.12 of the Revised Code.

(4) Disclosure of the information would amount to disclosure by a member of the ordained clergy of an organized religious body of a confidential communication made to that member of the clergy in that member's capacity as a member of the clergy by a person seeking the aid or counsel of that member of the clergy.

(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, which program is maintained or conducted by a hospital, clinic, person, agency, or organization certified pursuant to section 3793.06 of the Revised Code.

(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 crimes that are violations of section 2907.02 or 2907.05 of the Revised Code or to victims of felonious sexual penetration in violation of former section 2907.12 of the Revised Code. As used in this division, "counseling services" include services provided in an informal setting by a person who, by education or experience, is competent to provide those services.

(H) No disclosure of information pursuant to this section gives rise to any liability or recrimination for a breach of privilege or confidence

(I) Whoever violates division (A) or (B) of this section is guilty of failure to report a crime. Violation of division (A) of this section is a misdemeanor of the fourth degree. Violation of division (B) of this section is a misdemeanor of the second degree.

(J) Whoever violates division (C) or (D) of this section is guilty of failure to report knowledge of a death, a misdemeanor of the fourth degree.

(K) (1) Whoever negligently violates division (E) of this section is guilty of a minor misdemeanor.

(2) Whoever knowingly violates division (E) of this section is guilty of a misdemeanor of the second degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 136 v H 750 (Eff 8-26-75); 136 v S 283 (Eff 11-26-75); 137 v H 1 (Eff 8-26-77); 137 v S 203 (Eff 1-13-78); 138 v H 284 (Eff 10-22-80); 142 v H 273 (Eff 9-10-87); 143 v H 317 (Eff 10-10-89); 144 v S 343 (Eff 3-24-93); 145 v H 335 (Eff 12-9-94); 146 v H 445 (Eff 9-3-96); 146 v S 223 (Eff 3-18-97); 149 v S 115. Eff 3-19-2003.

NOTES:

Not analogous to former RC § 2921.22 (125 v H 308), repealed 134 v H 511, § 2, eff 1-1-74.

The provisions of § 4 of SB 115 (149 v --) read as follows:

SECTION 4. Section 2921.22 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 445 and Sub. S.B. 223 of the 121st General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

1974 Committee Comment to H 511

This first part of this section is similar to, but narrower than the common law crime of misprision of felony. The second part of the section retains a requirement in former law that doctors and others report injuries patently caused by criminal violence.

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. There was only one exception: a wife was not bound to report her husband's crimes. It was a passive offense, i.e., if any active aid was given to the offender, the aider became an accessory to the crime, after the fact.

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. These include: attorney and client; doctor and patient; licensed psychologist and client; priest and penitent; clergyman and parishioner; husband and wife, and other immediate family members; newsmen, with respect to confidential news sources; and those engaged in authorized drug treatment or counseling programs.

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 where bystanders ignore a murder victim's pleas for help because they do not want to "become involved." The rationale for the exceptions is that, in each case in which a privilege is applicable, the considerations favoring keeping silence override the general policy considerations requiring serious crimes to be reported.

This section also requires doctors, limited practitioners, nurses, and others who give aid to the sick or injured, to report gunshot and stab wounds, and other serious injuries which they know or have reasonable cause to believe resulted from a crime of violence, such as the "battered child syndrome." The reporting requirement under this part of the section is absolute, i.e., no privilege attaches in the cases covered.

The section explicitly states that no disclosure of information under the section can give rise to any cause of action or recrimination of any kind for breach of privilege or confidence. This includes disclosure of information which is privileged under the section, and which the person disclosing it is therefore not required to divulge.

Failure to report a crime is a misdemeanor of the fourth degree when the failure is to report a felony of which one has knowledge. Failure of a doctor, nurse, or person giving aid to the sick or injured to report wounds resulting from criminal violence is a misdemeanor of the second degree.

CROSS-REFERENCES TO RELATED STATUTES

Penalties, RC § 2929.21.
Contracts for private operation and management of correctional facilities, RC § 9.06.
Report of escapes, RC § 9.07.
County jails, duty to give notice of escape and apprehension of escapee, RC § 341.01.1.
Department of rehabilitation and correction, notice of escapes, RC § 5120.14.
Disclosure of mediation communication, RC § 2317.02.3.
Felony defined, RC § 2901.02.
Form for reporting burn injuries, RC § 3737.22.
Knowingly defined, RC § 2901.22.
Law enforcement officer defined, RC § 2901.01.
Municipal jails, duty to give notice of escape and apprehension of escapee, RC § 753.19.
Negligently defined, RC § 2901.22.
Offense of violence defined, RC § 2901.01.
Privilege defined, RC § 2901.01.
Privileged nature of assisted communications at telecommunications relay service, RC § 4931.35.
Serious physical harm to persons defined, RC § 2901.01.

OHIO ADMINISTRATIVE CODE

State board of pharmacy --
Report of theft or loss of dangerous drugs, controlled substances, and drug documents: procedures. OAC 4729-9-15.
Report of theft or loss of nitrous oxide. OAC 4729-25-04.

CASE NOTES AND OAGS PRACTICE MANUALS AND TREATISES
Anderson's Ohio Manual of Criminal Complaints and Indictments § 2921.22 Failure to report a crime or knowledge of a death or burn injury

ALR
Attorney's disclosure, in federal proceedings, of identity of client as violating attorney-client privilege. 84 ALRFed 852.
Communications between spouses as to joint participation in crime as within privilege of interspousal communications. 62 ALR4th 1134.
Liability in tort for interference with attorney-client relationship. 90 ALR4th 621.
Who is "representative of the client" within state statute or rule privileging communications between an attorney and the representative of the client. 66 ALR4th 1227.

ANALYSIS
Constitutionality
Generally
Accountants
Child abuse
Civil liability
Employment separation agreement
Privileged communication
--Physicians
-- --Testimony
--Psychologists

CONSTITUTIONALITY.
Revised Code § 2921.22 is unconstitutional as applied in a case where, by virtue of reporting the crime, the person would have given information which would tend to incriminate herself or lead to her own prosecution: State v. Wardlow, 20 Ohio App. 3d 1, 484 N.E.2d 276 (1985).
Revised Code § 2921.22 is not unconstitutionally void for vagueness, as it gives a person of ordinary intelligence fair notice that the conduct of failing to report a serious crime about which he has knowledge is forbidden: State v. Wardlow, 20 Ohio App. 3d 1, 484 N.E.2d 276 (1985).

GENERALLY.
Revised Code § 2921.22 does not require that a felony be directly reported to the police or require a person to answer subsequent questions: In re Stichtenoth, 67 Ohio App. 2d 108, 425 N.E.2d 957 (1980).

ACCOUNTANTS.
An accountant cannot be disciplined by the accountancy board for reporting a felony pursuant to RC § 2921.22: Kelly v. Accountancy Bd., 88 Ohio App. 3d 453, 624 N.E.2d 292, 1993 Ohio App. LEXIS 3433 (1993).

CHILD ABUSE.
Revised Code § 2151.42.1 is not an exclusive listing of those persons who must report knowledge or suspicion of child abuse. A duty to report abuse can arise from a special relationship at law, irrespective of a statutory duty. Since a parent has a special relationship to the child, the duty of care, protection and support under RC § 2921.22(A) would create a duty to stop the alleged acts of abuse: Hite v. Brown, 100 Ohio App. 3d 606, 654 N.E.2d 452, 1995 Ohio App. LEXIS 868 (1995).

CIVIL LIABILITY.
Individual who knows that a felony has been committed, pursuant to RC § 2921.22(A), is required to report such information to law enforcement; the trial court properly granted summary judgment in a libel claim when, based on exist-

ing precedent, the trial court concluded that a privilege of statutory immunity applied to shield the bank from liability for statements made to the police. Lee v. City of Upper Arlington, 2003 Ohio App. LEXIS 6485, 2003 Ohio 7157, (2003).

EMPLOYMENT SEPARATION AGREEMENT.

An employment separation agreement clause is illegal per se when it purports to suppress information concerning the commission of a felony: Bowman v. Parma Bd. of Edn., 44 Ohio App. 3d 169, 542 N.E.2d 663 (1988).

PRIVILEGED COMMUNICATION.

--PHYSICIANS.

Revised Code § 2921.22(B) provides a statutory exception to the physician-patient privilege: State v. Jones, 90 Ohio St. 3d 403, 739 N.E.2d 300, 2000 Ohio LEXIS 2995, 2000 Ohio 187, (2000).

--TESTIMONY.

Where a physician is required by former RC § 2917.44 to report to a law-enforcement officer a gunshot wound or wound inflicted by a deadly weapon, the former may testify, without violating the physician-patient privilege, as to the description of the wounded person, as to his name and address, if known, and as to the description of the nature and location of such wound, obtained by examination, observation and treatment of the victim: (decided under former analogous section) State v. Antill, 176 Ohio St. 61, 197 N.E.2d 548 (1964).

--PSYCHOLOGISTS.

Under RC § 2921.22(F)(1), a licensed psychologist is not required to report a felony which has been or is being committed when such information is privileged under RC § 4732.19 due to the psychologist-client relationship: OAG No. 88-027 (1988).

Under RC § 2921.22(F)(1), those unlicensed supervisees of a licensed psychologist enumerated in RC § 4732.22(C), (D) and (E) are not required to report a felony which has been or is being committed when such information is privileged under RC § 4732.19 due to the psychologist-client relationship. OAG No. 88-027 (1988).

Under RC § 2921.22(G), those unlicensed supervisees of a licensed psychologist enumerated in RC § 4732.22(C), (D) and (E) who disclose privileged information to law enforcement authorities in reporting that a felony has been or is being committed are not subject to any liability or recrimination for breach of privilege or confidence for such disclosure: OAG No. 88-027 (1988).

Under RC § 2921.22(G), a licensed psychologist who voluntarily discloses privileged information to law enforcement authorities in reporting that a felony has been or is being committed is not subject to any liability or recrimination for breach of privilege or confidence for such disclosure: OAG No. 88-027 (1988).

R.I. Gen. Laws § 11-37-3.1 (2006)

§ 11-37-3.1. Duty to report sexual assault

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

HISTORY: P.L. 1983, ch. 268, § 1.

R.I. Gen. Laws § 11-56-1 (2006)

§ 11-56-1. Duty to assist

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not more than five hundred dollars ($ 500), or both.

HISTORY: P.L. 1984, ch. 416, § 1.

Texas Penal Code § 38.17 (2006)

§ 38.17. Failure to Stop or Report Aggravated Sexual Assault of Child

(a) A person, other than a person who has a relationship with a child described by Section 22.04(b), commits an offense if:

(1) the actor observes the commission or attempted commission of an offense prohibited by Section 22.021(a)(2)(B) under circumstances in which a reasonable person would believe that an offense of a sexual or assaultive nature was being committed or was about to be committed against the child;

(2) the actor fails to assist the child or immediately report the commission of the offense to a peace officer or law enforcement agency; and

(3) the actor could assist the child or immediately report the commission of the offense without placing the actor in danger of suffering serious bodily injury or death.

(b) An offense under this section is a Class A misdemeanor.

HISTORY: Stats. 1999 76th Leg. Sess. Ch. 1344, effective September 1, 1999.

LexisNexis (R) Notes:

CASE NOTES

1. No person could be convicted of perjury if proof that the person statement was false rested solely upon the testimony of one witness other than the defendant; the record contradicted defendant's assertion that one only person offered proof of the perjury, and a habeas corpus applicant did not possess a constitutional right to commit perjury in furtherance of that application. Lee v. State, 2004 Tex. App. LEXIS 1249 (Tex. App. Austin Feb. 12 2004).

2. No person could be convicted of perjury if proof that the person's statement was false rested solely upon the testimony of one witness other than the defendant; the record contradicted defendant's assertion that one only person offered proof of the perjury, and a habeas corpus applicant did not possess a constitutional right to commit perjury in furtherance of that application. Lee v. State, 2004 Tex. App. LEXIS 1249 (Tex. App. Austin Feb. 12 2004).

TREATISES AND ANALYTICAL MATERIALS

1. 20 Tex Jur CRIMINAL LAW § 1215, Texas Jurisprudence, Third Edition, Criminal Law, § 1215 Generally; definitions, Copyright 2003 West Group.

2. 20 Tex Jur CRIMINAL LAW § 1270, Texas Jurisprudence, Third Edition, Criminal Law, § 1270 Failure to stop or report aggravated sexual assault of child, Copyright 2003 West Group.

Rev. Code Wash. (ARCW) § 9.69.100 (2006)

§ 9.69.100. Duty of witness of offense against child or any violent offense -- Penalty

(1) A person who witnesses the actual commission of:

(a) A violent offense as defined in RCW 9.94A.030 or preparations for the commission of such an offense;

(b) A sexual offense against a child or an attempt to commit such a sexual offense; or

(c) An assault of a child that appears reasonably likely to cause substantial bodily harm to the child,

shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials.

(2) This section shall not be construed to affect privileged relationships as provided by law.

(3) The duty to notify a person or agency under this section is met if a person notifies or attempts to provide such notice by telephone or any other means as soon as reasonably possible.

(4) Failure to report as required by subsection (1) of this section is a gross misdemeanor. However, a person is not required to report under this section where that person has a reasonable belief that making such a report would place that person or another family or household member in danger of immediate physical harm.

HISTORY: 1987 c 503 § 18; 1985 c 443 § 21; 1970 ex.s. c 49 § 8.

NOTES:
SEVERABILITY -- EFFECTIVE DATE -- 1987 C 503: See RCW 74.14B.901 and 74.14B.902.

SEVERABILITY -- EFFECTIVE DATE -- 1985 C 443: See notes following RCW 7.69.010.

SEVERABILITY -- 1970 EX.S. C 49: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1970 ex.s. c 49 § 9.]

CROSS REFERENCES.
Abuse of children: Chapter 26.44 RCW.

JUDICIAL DECISIONS

PUBLIC POLICY.
A limited, albeit clear, public policy of encouraging citizens to cooperate with law enforcement when requested or required by law can be found in Washington's statutes. Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996).

SEATTLE UNIV. LAW REVIEW.
Murder by child abuse - Who's responsible after State v. Jackson? 24 Seattle U. L. Rev. 663 (2000).

Wis. Stat. § 940.34 (2006)

940.34. Duty to aid victim or report crime.

(1).

(a) Whoever violates sub. (2) (a) is guilty of a Class C misdemeanor.

(b) Whoever violates sub. (2) (b) is guilty of a Class C misdemeanor and is subject to discipline under s. 440.26 (6).

(c) Whoever violates sub. (2) (c) is guilty of a Class C misdemeanor.

(2).

(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.

(b) Any person licensed as a private detective or granted a private security permit under s. 440.26 who has reasonable grounds to believe that a crime is being committed or has been committed shall notify promptly an appropriate law enforcement agency of the facts which form the basis for this belief.

(c).

1. In this paragraph, "unlicensed private security person" means a private security person, as defined in s. 440.26 (1m) (h), who is exempt from the permit and licensure requirements of s. 440.26.

2. Any unlicensed private security person who has reasonable grounds to believe that a crime is being committed or has been committed shall notify promptly an appropriate law enforcement agency of the facts which form the basis for this belief.

(d) A person need not comply with this subsection if any of the following apply:

1. Compliance would place him or her in danger.

2. Compliance would interfere with duties the person owes to others.

3. In the circumstances described under par. (a), assistance is being summoned or provided by others.

4. In the circumstances described under par. (b) or (c), the crime or alleged crime has been reported to an appropriate law enforcement agency by others.

(2m) If a person is subject to sub. (2) (b) or (c), the person need not comply with sub. (2) (b) or (c) until after he or she has summoned or provided assistance to a victim.

(3) If a person renders emergency care for a victim, s. 895.48 (1) applies. Any person who provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance. This immunity does not apply if the person receives or expects to receive compensation for providing the assistance.

HISTORY: History: 1983 a. 198; 1985 a. 152, 332; 1987 a. 14; 1995 a. 461.

NOTES:

Notes supplied by the State of Wisconsin.

This section is not unconstitutional. For a conviction, it must be proved that an accused believed a crime was being committed and that a victim was exposed to bodily harm. The reporting required does not require the defendant to incriminate himself or herself as the statute contains no mandate that an individual identify himself or herself. Whether a defendant fits within an exception under sub. (2) (d) is a matter of affirmative defense. State v. LaPlante, 186 Wis. 2d 427, 521 N.W.2d 448 (Ct. App. 1994).

LexisNexis (R) Notes:

CASE NOTES

1. Wis. Stat. § 940.34 did not deny the prior existence of a parent's duty to protect a child; it merely provided the State with an option to prosecute a mother under former Wis. Stat. § 940.201 (now Wis. Stat. § 948.03(4)) or under Section 940.34, the "Good Samaritan" law, pursuant to Wis. Stat. § 939.65, for a knowing failure to protect a child from abuse. State v. Williquette, 129 Wis. 2d 239, 385 N.W.2d 145, 1986 Wisc. LEXIS 1807 (Wis. 1986), questioned by State v. Rundle, 176 Wis. 2d 985, 500 N.W.2d 916, 1993 Wisc. LEXIS 538 (Wis. 1993).

2. Individual's conviction for failing to summon or provide assistance to a victim of a crime in violation of Wis. Stat. § 940.34(2)(a) was upheld on appeal because contrary to the individual's argument, that statute was not unconstitutionally vague or ambiguous. State v. Brooks, 187 Wis. 2d 292, 523 N.W.2d 208, 1994 Wisc. App. LEXIS 942 (Wis. Ct. App. 1994).

3. Failure to aid statute, Wis. Stat. § 940.34, was not unconstitutionally vague and a conviction was proper where defendant, who was warned of an assault on the victim and witnessed it, knew that the victim would suffer bodily harm, within the definition of Wis. Stat. § 939.23(2), and was under an obligation to summon assistance and was not forced to provide information in violation of her right to remain silent. State v. La Plante, 186 Wis. 2d 427, 521 N.W.2d 448, 1994 Wisc. App. LEXIS 862 (Wis. Ct. App. 1994), review denied by 525 N.W.2d 733 (Wis. 1994).

4. Wis. Stat. § 940.34 did not deny the prior existence of a parent's duty to protect a child; it merely provided the State with an option to prosecute a mother under former Wis. Stat. § 940.201 (now Wis. Stat. § 948.03(4)) or under Section 940.34, the "Good Samaritan" law, pursuant to Wis. Stat. § 939.65, for a knowing failure to protect a child from abuse. State v. Williquette, 129 Wis. 2d 239, 385 N.W.2d 145, 1986 Wisc. LEXIS 1807 (Wis. 1986), questioned by State v. Rundle, 176 Wis. 2d 985, 500 N.W.2d 916, 1993 Wisc. LEXIS 538 (Wis. 1993).

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB005-DOA-PD-1-23-07 (1)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to reporting of certain crimes
RDU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Senator McGuire
Requester:
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services	•	•	•	•	•	•
Travel	•	•	•	•	•	•
Contractual	•	•	•	•	•	•
Supplies	•	•	•	•	•	•
Equipment	•	•	•	•	•	•
Land & Structures	•	•	•	•	•	•
Grants & Claims	•	•	•	•	•	•
Miscellaneous	•	•	•	•	•	•
TOTAL OPERATING	•	•	•	•	•	•
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	•	•	•	•	•	•
1005 GF/Program Receipts	•	•	•	•	•	•
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	•	•	•	•	•	•

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill creates the crime of failure to report a violent crime when a person, other than a victim, witnesses certain crimes against a person and fails to report the crime in a timely manner. It is not possible to reliably predict the fiscal impact this legislation would have on the Agency. The Agency, therefore, submits an indeterminate fiscal note.

Prepared by: Quinlan Steiner
Phone 907-269-3501
Division: Public Defender Agency - Director
Date/Time 1/23/07 / 11:30 AM
Approved by: Melanie Millhorn, Deputy Commissioner
Date 1/23/2007
Agency: Administration

(Revised 9/18/2006 OMB)

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB013-DOA-APOC-1-23-07
() Publish Date:

Revision Date/Time (Note if correction):
Dept Affected: Administration

Title: An Act prohibiting a legislator from providing consulting service to a person in the private...
RDU: AK Public Offices Commission
Component: AK Public Offices Commission

Sponsor: Senator Stevens
Requester: Senate Judiciary Committee
Component No: 70

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill prohibits a legislator from providing consulting services to a person in the private sector or from agreeing to accept consulting fees from a person in the private sector. It will not result in additional costs to the Public Offices Commission.

Prepared by: Brooke Miles, Executive Director
Phone 465-2200
Division: Alaska Public Offices Commission
Date/Time 1/23/2007 8:30 a.m.
Approved by: Melanie Millhorn, Deputy Commissioner
Date 1/23/2007
Agency: Department of Administration

(Revised 9/18/2006 OMB)

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB005-DOA-OPA-1-23-07
() Publish Date:

Revision Date/Time (Note if correction):
Dept Affected: Administration
Title: An Act relating to reporting of certain crimes
RDU: Legal and Advocacy Services
Component: Office of Public Advocacy
Sponsor: Senator McGuire
Requester:
Component No.: 43

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services	•	•	•	•	•	•
Travel	•	•	•	•	•	•
Contractual	•	•	•	•	•	•
Supplies	•	•	•	•	•	•
Equipment	•	•	•	•	•	•
Land & Structures	•	•	•	•	•	•
Grants & Claims	•	•	•	•	•	•
Miscellaneous	•	•	•	•	•	•
TOTAL OPERATING	•	•	•	•	•	•
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	•	•	•	•	•	•
1005 GF/Program Receipts	•	•	•	•	•	•
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	•	•	•	•	•	•

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill creates the crime of failure to report a violent crime when a person, other than a victim, witnesses certain crimes against a person and fails to report the crime in a timely manner. Atlhough it is not possible to accurately predict the fiscal impact this legislation would have on the Agency, the creation of a new crime, which may involve multiple persons charged out of a single incident, has the potential to increase Agency costs. Because we represent indigent defendants with whom the Public Defender Agency has a conflict, where the Public Defender Agency may represent only one person from a single incident, we could represent multiple defendants from that same incident. This means, for example, in a gang related crime, where there are multiple non-reporting witnesses, OPA may be required to represent many defendants. Therefore, the Agency submits an indeteminate fiscal note.

Prepared by: Joshua P. Fink
Phone 907-269-3501
Division: Office of Public Advocacy - Director
Date/Time 1/23/07 2:00 p.m.
Approved by: Melanie Millhorn, Deputy Commissioner
Date 1/23//07
Agency: Administration

(Revised 9/18 2006 OMB)

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB5-DPS-AST-1-23-07
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title "An Act relating to reporting of certain crimes "
RDU Alaska State Troopers
Component Alaska Bureau of Investigations
Sponsor Senator McGuire
Requester Senate Judiciary
Component No. 2744

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill expands the crime of failure to report a violent crime from crimes committed against a child to include violent crimes committed against a person. Passage of this legislation will have no impact on the Department of Public Safety.

Prepared by: Captain Hans Brinke
Phone 907-465-5505
Division Alaska State Troopers
Date/Time 1/23/07 3:50 PM
Approved by: Walt Monegan, Commissioner
Date 1/23/2007
Agency Department of Public Safety

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB005-DOA-AS-1-23-07
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to reporting certain crimes
RDU: Violent Crimes Compensation Board
Component: Violent Crimes Compensation Board
Sponsor: Senator McGuire
Requester:
Component No.: 2694

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

A penalty for not reporting certain crimes will reasonably increase the number of violent crimes reported. An increase in reporting violent crimes will reasonably increase the number of crime victim compensation claims since all law enforcement statewide are statutorily required to provide information to potential Board claimants.

* It is not possible to provide accurate estimates of increased costs.

Prepared by: Susan L. Browne
Phone 907-465-5525
Division: Violent Crimes Compensation Board
Date/Time 1/22/2007 9:00 a.m.
Approved by: Kevin Brooks, Deputy Commissioner
Date 1/23/2007
Agency: Department of Administration

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB005-Courts-1-23-07
() Publish Date:

Revision Date/Time (Note if correction):
Dept Affected:
Title: Failure to report crimes
RDU: Alaska Court System
Component: Trial Courts
Sponsor: Senator McGuire
Requester:
Component No.:

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0 0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The court system does not anticipate any fiscal impact from the passage of SB 5.

Prepared by: Doug Wooliver, Administrative Attorney — Phone 463-4750
Division: Alaska Court System — Date/Time 1/23/2007 @ 8:30 a.m.
Approved by: Doug Wooliver for Stephanie Cole, Administrative Director — Date 1/23/2007
Agency: Alaska Court System