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]"

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#2, withdrawn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Withdrawn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].

(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

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* 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].

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

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

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

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

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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."

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* 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.

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

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(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

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. 1980).*

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