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

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

n264 See supra note 86 and accompanying text.

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

n266 Glazebrook, supra note 26, at 316.

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

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

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

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

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

n272 See supra notes 64-65 and accompanying text.

n273 Mullis, supra note 36, at 1117.

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

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

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

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

n277 Hoffman, supra note 205, at 842.

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

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

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

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

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

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

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

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

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

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

n288 Mullis, supra note 36, at 1111.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

n324 See Seedman, supra note 319, at 117.

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

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

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

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

n329 See Seedman, supra note 319, at 135.

n330 See id. at 120.

n331 See id. at 135.

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

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

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

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

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

n337 See Seedman, supra note 319, at 145.

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

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

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

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

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

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

n344 See Benedict, supra note 338.

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

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

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

n348 See *Farragher, supra* note 339.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

n367 See id.

n368 See id.

n369 See id.

n370 See id.

n371 See id.

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

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

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

n375 Seedman, supra note 319, at 122.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

n389 *Id. at 322-23.*

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

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

A Failure

2 of 2 DOCUMENTS

Caution
As of: Jan 31, 2007

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

**Nos. C-840516, C-840517**

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

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

**March 20, 1985, Decided**

**DISPOSITION:** [***1]

*Judgment accordingly.*

**HEADNOTES:**

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

**SYLLABUS:**

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

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

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

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

**COUNSEL:**

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

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

**JUDGES:**

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

**OPINION BY:**

PER CURIAM

**OPINION:**

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

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

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

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

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

1 [***4]

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

2

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

3

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

4

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

*R.C. 2921.22* provides in pertinent part:

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

"* * *

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

"* * *

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

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

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

[***6]

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

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

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

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

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

5

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

6

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

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

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

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

*Judgment accordingly.*

# MEMORANDUM

**STATE OF ALASKA**

*Department of Law – Criminal Division*

**To:** Senator Hollis French
Chair, Senate Judiciary Committee

**Date:** January 26, 2007

**Tel. No.:** 465-3428

**From:** Richard Svobodny
Chief Assistant Attorney General

**Subject:** Senate Bill 5

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

approach to the problem.

# MEMORANDUM

# State of Alaska

**Department of Law/Criminal Division**

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

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

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

SUBJECT: Good Samaritan/Mandatory Reporting of a Felony Legislation

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

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

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

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

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

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

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

Vermont and Minnesota: duty to assist

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

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

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

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

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

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

Washington: duty to call for assistance

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

Ohio and other states: duty to report felonies

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

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

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

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

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

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

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

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

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

Issues arising with laws imposing a duty to assist

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

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

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

Hi Annie,

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

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

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

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

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

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

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

-Blair

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

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

Thanks. annie

# Alaska State Legislature
## Senate Bipartisan Working Group

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

**Fact Sheet for: Senate Bill 5**

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

**Summary:**

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

**Benefits:**

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

**Background:**

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

adn.com
Anchorage Daily News

# Brutal murder leads to victims' aid effort

By REP. LESIL McGUIRE

*(Published: November 21, 2006)*

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

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

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

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

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

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

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

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

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

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

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

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

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# ALASKA STATE LEGISLATURE


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Senate Resources Committee

## SENATOR LESIL MCGUIRE


MEMORANDUM

To: Senator Hollis French
Senate Judiciary Committee Chair

From: Senator Lesil McGuire

Date: January 17, 2007

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

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

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

**LEGAL SERVICES**

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**MEMORANDUM** January 17, 2007

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

**TO:** Senator Lesil McGuire

**FROM:** Gerald P. Luckhaupt
Legislative Counsel

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

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

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

GPL:ljw
07-012.ljw

To: Honorable Judge Wolverton

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

From: Lisa Sommer, Victim's Natural Mother

Date: August 17, 2006

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

horrifically murdered.

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully,

Lisa Sommer

CC; John Novak
Kathryn Luth

adn.com
Anchorage Daily News

# No leniency for torture, murder

**Jerry McClain killed his girlfriend over the course of several hours**

By TATABOLINE BRANT
Anchorage Daily News

*(Published: September 22, 2006)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

After the hearing she said the Alaska Office of Victims' Rights is working with her to create a new law, named after her daughter.

McClain sat quietly at the defense table throughout the hearing, at one point crying when Sommer gave the judge a picture of her daughter, approaching the high bench cradling Friedman's ashes and a red rose in her arms.

When his turn to speak came, McClain told the judge he never wanted Friedman's mom to see the graphic pictures of her daughter's injuries or for the proceedings to be as drawn out as they were.

"Whatever time you think I deserve, I'll accept it, your honor," he told Wolverton.

But, he said, a medical system that refuses to help people like him when they ask for help has to share some of the blame for what happened. "This was a preventable crime, your honor," McClain said.

Before the murder, said defense attorney John Bernitz, McClain fell on a bolt in his father's shop and punctured his skull -- an injury that affected his ability to control his emotions. McClain said he worried about changes in his own behavior and tried to get help but couldn't.

Wolverton told the courtroom he believed McClain felt real remorse for what he'd done and credited him for being so up front with investigators. (McClain called 911 after he killed Friedman and later described the killing in detail to doctors and investigators, court documents show.)

But Wolverton's decision about the sentence ultimately came down to whether McClain inflicted "substantial physical torture" on Friedman before she died. And on this Wolverton had no reservations:

"I simply find that there is no way around it. This is just as bad as it gets," he said.

Wolverton said he has 30 years experience with crime and criminals, and has dealt with cases involving things as gruesome as dismemberment. What was done to Friedman, he said, "shocks

the conscience."

Wolverton said the defense offered a thoughtful argument about what constitutes torture but that he could not escape the details of the crime. McClain made Friedman look in the mirror at herself, he said.

"She had a sock stuck in her mouth when she was put through this hell on earth."

Wolverton sentenced McClain to 99 years in prison without the possibility of parole.

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Daily News reporter Tataboline Brant can be reached at tbrant@adn.com or 257-4321.

**Paper: Anchorage Daily News (AK)**
**Title: Man makes deal on murder charge -**
**BEATING DEATH: Jerry McClain's plea agreement sets up mini-trial.**
**Date: April 11, 2006**

Three years after he called 911 to say he'd beaten his girlfriend to death, Jerry McClain, now 30, pleaded no contest in Anchorage Superior Court Monday to first-degree murder.

McClain's plea is part of a deal with the state that leaves sentencing open and sets the stage for what promises to be a hard-fought, two-day mini-trial next month. He can get anything from the mandatory minimum of 20 years with parole after about 14 years, to the maximum of 99.

Prosecutor John Novak wants McClain to go away for 99 years with no possibility of parole under a little-used law mandating that sentence for murders involving torture.

Public defender John Bernitz plans to argue that McClain was brain-damaged by a head injury before the April 26, 2003, attack on Kiva Friedman and was not able to form the criminal intent required for either first-degree murder or the enhanced sentence.

The plea deal ended plans to begin jury selection this week for McClain's trial. A grand jury indicted him in May 2003 on murder, assault, rape, kidnapping and tampering with evidence charges. All but one count of murder go away in return for his plea.

When Anchorage police first arrested McClain, they filed with the court a narrative of Friedman's uncommonly brutal death.

Friedman was 35. Who she was and the details of her relationship with McClain are unclear. The narrative just calls her his girlfriend.

McClain began beating her after he found a message for her on his phone answering machine from a man who said he had found Friedman a new boyfriend. The caller made disparaging remarks about McClain's sexual prowess, the charging documents say.

Over several hours that night, McClain tied up Friedman, cut her hair off, shaved her head, beat her with his fist and a baseball bat, the charges say.

At about 4 a.m., McClain called his brother, Jesse, who lived nearby. When Jesse McClain showed up, he found Friedman lying on the living room floor naked, tied up, bloody and badly injured, one leg apparently broken.

He also found two of his brother's friends on the scene. Luther Livingston and Brian Sims later told police they neither participated in nor interfered with the assault. They explained that they urged Jerry McClain to call an ambulance and didn't call for one themselves because he promised he would.

Friedman was alive when they left, they said.

They were not charged with any crime.

While the brother, Jesse McClain, was at the murder scene, Friedman regained consciousness briefly, and told him he should leave, that bad things were happening and he didn't want to get involved, he told police.

About three hours passed. Shortly after 7 a.m., when Jerry McClain finally dialed 911, Friedman was dead.

"I killed my girlfriend last night," he told the emergency operator.

The three-year legal battle from then to now did not revolve around McClain's admission. Instead, defense attorneys argued that McClain should not be held fully responsible because he suffered from the after-effects of a severely fractured skull sustained in a garage accident about three months before the attack.

Under Alaska law, first-degree murder is separated from lesser degrees of homicide by the intent to kill. Defendants sometimes argue, for instance, that they were too drunk to form a deliberate intent to kill and should be found guilty of second-degree murder or manslaughter. It's called "diminished capacity" and the goal is a lesser sentence.

This debate would seem to be moot, given that McClain has already pleaded to first-degree. But Bernitz said he will present the argument again, with experts to support it, to convince Judge Mike Wolverton that his client did not intend to torture or kill Friedman.

"It's an organic problem," Bernitz said Monday. "He sought help and didn't get it. ... He feels horrible about this."

The special evidence hearing has been set for what would have been the third week of trial, when all the experts were already scheduled to appear, Novak said. "It comes down to a mini-trial."

"He will be able to tell his story," Bernitz said.

Sheila Toomey can be reached at stoomey@adn.com or 257-4341.
Caption:

McClain
Caption:

Photo 1: jerry_mcclain_041106.jpg



*Author: SHEILA TOOMEY Anchorage Daily News Staff*
*Section: Alaska*
*Page: B1*

**Paper: Anchorage Daily News (AK)**
**Title: Letters from the people**
**Date: October 1, 2006**

Venezuela's largesse an indictment of our sense of Alaska stewardship

The generosity of Hugo Chavez of Venezuela to provide fuel to our Alaska villages is very impressive, albeit questionably motivated ("Venezuelan firm will buy fuel oil for Alaska villagers," Sept. 20). The fact that his money may be tainted by various words and deeds is overshadowed by the question of why he would have to send it in the first place.

Alaska is reportedly one of the wealthier states in the United States, and yet here we have a foreign country offering to give aid to our villages. At $7 per gallon for heating fuel, it is a wonder that these villages could survive at all.

If I understand the good old Alaska spirit, part of that spirit is the stewardship of the land and its people. What a glaring indictment of this sense of stewardship to be perceived as a state with poverty needing outside intervention. The fact of the matter is that if we don't take care of our own people, then outsiders will -- and so much for Alaska independence.

If a village is a drain on state coffers, let the villages, their Native corporations and the state government work out a better and more self-sustaining economy. If state and federal laws demand and dictate costly services, then they do have an obligation to subsidize those services if they expect a village to meet these mandates.

For the immediate needs of this winter, maybe our own oil industry up here in Alaska could pitch in.

-- Pat Wendt

Anchorage

Important part of our candidates is what they can do, not their gender

I am a longtime Tony Knowles supporter. However, I am infuriated by the insulting tone of letters opposed to Sarah Palin. Charles Wohlforth ("No time for on-the-job training for the next governor of Alaska," Sept. 22) compares her to his 5-year-old? Give me a break. I met Palin a few years ago. She was bright and articulate, she listened and she's no wimp. She is more than qualified for the job.

Wohlforth says her advisers don't inspire confidence. Former Gov. Wally Hickel doesn't inspire confidence? Get real.

As far as her ability to negotiate with the oil companies, I have no doubts. She won't roll over and give away the farm like Gov. Frank Murkowski did.

I think all of the candidates are qualified for the job. So let's get past this "She's a girl" mentality and get serious.

Let's focus on the issues and find out where these candidates truly stand. Let's hear their vision for the state and make our decision based on their positions. That is what's most important to Alaskans and Alaska.

-- Michael Tavella

Anchorage

Those who served Veco rather than voters should be purged from power

Thanks to Michael Carey's Sept. 10 opinion piece ("That flushing sound is Veco influence"), we now have a better idea of what the Corrupt Bastards Club has been up to. I am heartened by his revelations. Like so many others in Alaska, I have known about Veco's undue corrupting influence on the majority of our politicians' lives. And, similarly, I have felt powerless and infuriated as a result.

Carey's example of Fairbanks S- ı. Ralph Seekins as the most corrupt, arrogant and indifferent of all our politicians in Juneau

should prompt even his supporters to think twice about his bid for re-election in November. No doubt about it, Seekins is in the deep pockets of Bill Allen and Veco. It's no wonder he and Allen sat down together in the Baranof Hotel bar one day after a Judiciary Committee (of which Seekins is the chairman) hearing on a lobbying bill to restrict the activities of the likes of Veco and laughed together at the hearing, trivializing what responsible lawmakers were trying to do. Needless to say, Allen got his way and the bill was so watered down everyone called it the "Bill Allen bill."

Carey's analogy of Seekins and Allen to pot smokers is appropriate. They are so stoned on their arrogance, they suffer the illusion that their behavior will be neither noticed nor questioned.

This November, let's throw these who are corrupt out of Juneau once and for all.

-- Frank Keim

Fairbanks

Blood of torture victim marks three who ignored her agony and terror

Lisa Sommer, the mother of murdered **Kiva Friedman**, is undertaking a great service to all Alaskans as she works to create laws so that those guilty of failing to report torture/capital murder or assist the victim can be prosecuted ("No leniency for torture, murder," Sept. 22). All Alaskans should be deeply ashamed that we lack a law with which to prosecute the three men named in the article who witnessed **Friedman's** torture and murder and did nothing. We are not some Third World country. A willing witness to torture and capital murder is a conspiracy and a sharing of the guilt and responsibility. In the meantime, the three -- Jesse McClain, Luther Livingston and Brian Sims, identified in court records -- should be identified on a list similar to that used to identify child molesters to warn neighbors and co-workers of their presence.

The protestations of the local defense attorneys, claiming that such a law would be too hard to enforce, underestimate the integrity of Alaska juries, who will surely do the right thing, given the chance.

-- Thomas Petersen

Anchorage

Fair wages are always reliable lures to hook best and brightest teachers

Fifteen percent raises for state nurses. Raises for state political appointees. Why? The need to attract and retain quality employees. There are more than 50 unfilled teaching positions in the Anchorage School District. What's wrong with this picture?

Support teachers' rights to fair salaries. Cost of living plus recognition for experience and further education is not too much to ask. We need to attract and retain the best educators in the country for your children and our future leaders. Alaska's children deserve the best and brightest.

-- Jody Viscardi

Anchorage

EDITOR'S NOTE: The writer is an Anchorage School District teacher and on the board of directors of the teacher union.

Lawmakers voted for the Iraq war because their constituents wanted it

Nazi Marshall Hermann Goering said that people do not want war, regardless of what kind of government their country may have. He asked: "Why would some poor slob on a farm want to risk his life in a war when the best that he can get out of it is to come back to his farm in one piece?" He said that it is the leaders who set policy and who drag the people after them into war.

It would be more accurate to say that the people drag their leaders into war. That is why the U.S. Congress voted overwhelmingly to invade Iraq, even though many of its members knew that President George Bush is not a credible person. Had they voted against it, the people would have voted them out of office. Of course, once the parade begins there are those leaders who want to be the drum majors, even though the parade, for many who are in it, is a march into oblivion.

-- Elvin Brudie

Anchorage

It's easy enough to prevent conflicts of interest: Kill all work on the side

The problem: Legislators elected to work for their constituents also work for someone else on the side and often for lots more money. It's a guaranteed conflict of interest in which the public loses every time.

The solution: Outlaw all lobbying and outside consulting work of any sort for any amount by legislators. Ipso facto, problem solved, over, done with, and no more smarmy "consulting" against the public interest. A real no-brainer, which makes you wonder why such a law is not already in effect.

Any legislator wishing to lobby or perform outside consulting work can resign their office to do so, but with an appropriate interval of time between jobs, of course. That should put an end to such things as the Corrupt Bastards Club. There is no excuse for such arrogance in elective offices.

But we will continue to have that unless the public -- the ones who hired them -- demands a no-nonsense law with real teeth in it. We cannot afford to let the foxes continue to rule the hen house.

Get in touch with your representative or senator and demand strong ethics reform now. And let them know we will kick them out of office if we don't get it.

-- Erik Lie-Nielsen

Juneau

Anchorage teachers' salaries lag far behind rising living expenses

"If you don't like being a teacher (for $36,000 a year), leave," says Anchorage resident Steve Carson ("Teachers should get what's fair, not use children for bargaining," Sept. 23). Unfortunately, that is exactly what is happening. Anchorage teachers are moving to the Valley, Fairbanks and Outside for better teaching positions and a better quality of life, and there is a shortage of teachers in Anchorage. Principals cannot find enough qualified teachers for Anchorage's classrooms. Many excellent teachers are leaving the teaching profession entirely because they cannot support their families, and they can make half again to twice as much in other fields here in Anchorage. This exodus of talent is hurting quality education in Anchorage.

The reality is that the cost of living has gone up significantly over the last 10 years. A four- bedroom house that cost $150,000 10 years ago costs $300,000 now. The price of gasoline has doubled in five years. Ten years ago it was difficult to get a teaching job here because of the high number of applicants. The district offered competitive salaries with an attractive retirement program, and the cost of living was significantly less. Now, we have teachers who qualify for food stamps because they do not make enough to support their small families.

You may call it greed, sir; I call it economic survival.

-- Anne Adasiak-Andrew

Anchorage

EDITOR'S NOTE: The writer is an Anchorage School District teacher.



*Author: Commentary*
*Section: Ideas*
*Page: J4*

Sec. 11.56.765. Failure to report a violent crime committed against a child.

(a) A person, other than the victim, commits the crime of failure to report a violent crime committed against a child if the person

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

(A) the murder or attempted murder of a child by another;

(B) the kidnapping or attempted kidnapping of a child by another;

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

(i) of a child without consent of the child;

(ii) of a child that is mentally incapable;

(iii) of a child that is incapacitated; or

(iv) of a child that is unaware that a sexual act is being committed; or

(D) the assault of a child by another causing serious physical injury to the child;

(2) knows or reasonably should know that the child is under 16 years of age; and

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

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

(1) did not report in a timely manner because the defendant reasonably believed that doing so would have exposed the defendant or others to a substantial risk of physical injury; or

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

(A) the commission of the crime; or

(B) the completion of the crime being attempted.

(c) In this section,

(1) "incapacitated" has the meaning given in AS 11.41.470;

(2) "mentally incapable" has the meaning given in AS 11.41.470;

(3) "sexual act" has the meaning given in AS 11.41.470;

(4) "without consent" has the meaning given in AS 11.41.470.

(d) Failure to report a violent crime committed against a child is a class A misdemeanor.

History -

(Sec. 1 ch 62 SLA 1999)

# LEGISLATIVE RESEARCH REPORT

JANUARY 17, 2006

REPORT NUMBER 07.036

## MANDATORY REPORTING OF VIOLENT CRIMES

PREPARED FOR SENATOR LESIL MCGUIRE

BY PATRICIA YOUNG, RESEARCH MANAGER

You asked for examples of state laws imposing upon a witness to a crime a duty to report the incident. You noted that you are particularly interested in laws addressing this type of assistance for victims of violent crimes.

As you probably know, individuals in this country typically have no duty to act or to provide assistance to persons in need, on the notion that such requirement would be an infringement on personal liberty. Exceptions have long been made for individuals sharing certain special relationships, such as the owner or occupant of property and a guest, a school official and a student, or the driver of a vehicle and a passenger. In the last few years, however, in response to several widely publicized incidents wherein witnesses stood by while appalling events unfolded or crimes were committed, at least ten states have broadened the exceptions by imposing a duty upon witnesses to report to authorities under certain circumstances.[1]

Table 1 provides details of laws requiring certain witnesses to report certain crimes in those ten states—Alaska, California, Florida, Massachusetts, Nevada, Ohio, Rhode Island, Texas, Washington, and Wisconsin. As you will see, three—Alaska, California, and Nevada—limit the duty to report to crimes committed against children.[2] Texas and Wisconsin broaden the duty to reporting to law enforcement or assisting the victim.

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[1] All states have *Good Samaritan* laws that protect volunteers who in good faith give aid in emergency situations. The term has been expanded to include laws imposing a duty to assist an injured or endangered person and those requiring the reporting of crimes. States that impose a duty to report to authorities or otherwise seek assistance for victims of certain crimes are Alaska, California, Florida, Massachusetts, Nevada, Ohio, Rhode Island, Texas, Washington, and Wisconsin.

[2] Alaska House Bill 34, enacted as Chapter 62 SLA 1999, is codified at AS 11.56.765. The same year, Senate Bill 5, misprision of felony, died in the Senate Rules Committee without reaching a floor vote. Various committee minutes reflect concerns over implementation and unintended consequences, even after the scope was narrowed to include only the crimes of murder in the first and second degrees, kidnapping, sexual assault in the first degree, sexual abuse of a minor in the first degree, and arson in the first degree.

As Attachment A, we provide a copy of "Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws a Good Idea?"3 Part III of this article describes several of these state laws in more detail and discusses the downfall of one such law in Colorado. Attachment B contains copies of the bill history and committee minutes associated with SB 5, Misprision of Felony, in 1999.

Attachment C is the text of mandatory reporting laws in each state other than Alaska.

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I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

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[3] Angela Hayden, "Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws a Good Idea?" New England School of Law's *Journal of International and Comparative Law*, Volume 6, 2000.

| | | | | | |
|---|---|---|---|---|---|
| Alaska | Alaska Stat. § 11.56.765 | report to law enforcement | certain crimes against children under 16 | does not apply if reasonable belief in a substantial risk of physical injury to self or others or acted to stop the crime | in a timely manner |
| California | Cal Penal Code § 152.3 | notify peace officer by phone or any other means | certain crimes against children under 14 | does not apply if reasonable fear for safety of self or family; duty does not apply to persons related to victim or offender | not specified |
| Florida | Fla. Stat. §794.027 | report | sexual battery | applies to those who have ability but fail to seek assistance even without exposure to physical violence; does not apply to victim or near relative of victim or offender | immediately |
| Massachusetts | ALM GL ch. 268 § 40 | report to law enforcement | certain crimes | applicable to persons at the scene who know of the crime and can report without danger to self or others | as soon as reasonably practicable |
| Nevada | Nev. Rev. Stat. Ann. § 202.876 - .894 | report to law enforcement by voice or phone or any reasonably swift and reliable means | violent or sexual offenses against children 12 and under | does not apply to children under 16; close relatives by blood or marriage of either victim or offender; persons with reasonable belief in a substantial risk of imminent danger of bodily harm to self, relative, or housemate; those suffering from mental or physical impairment or disability that would make reporting impracticable; those who became aware of the offense through certain privileged communications, | as soon as reasonably practicable, but not more than 24 hours after knowing of the offense |
| Ohio | ORC Ann. 2921.22 | report to law enforcement | felony | does not apply if the information is privileged; the information would tend to incriminate a member of the actor's immediate family | not specified |
| Rhode Island | R.I. Gen. Laws §11-37-3.1 | report to state or local police | first degree sexual assault or attempted first degree sexual assault | applies to any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his or her presence | immediately |
| Texas | Texas Penal Code § 38.17 | assist or report to law enforcement | assault or sexual assault of a child under 14 | does not apply if assistance or immediately reporting would put the actor in danger of serious bodily injury or death | immediately |
| Washington | Rev. Code Wash. § 9.69.100 | notify prosecuting attorney, law enforcement, medical assistance, or other public officials | certain violent offenses or a sexual offense against or assault of a child | does not affect privileged relationships as provided by law | as soon as reasonably possible |
| Wisconsin | Wis. Stat. § 940.34 | summon law enforcement or other assistance or provide assistance; notify law enforcement (detectives and security personnel) | a victim exposed to bodily harm | does not apply if compliance would place him or her in danger or interfere with duties owed to others; if assistance is being summoned or provided by others; detectives and security personnel need not notify law enforcement until after summoning or providing assistance | promptly (notify law enforcement) |

Source: State Statutes on LEXIS.

# Attachment A

Angela Hayden, "Imposing Criminal and Civil Penalties for Failing to Help Another: Are "Good Samaritan" Laws a Good Idea?" New England School of Law's *Journal of International and Comparative Law*, Volume 6, 2000

# IMPOSING CRIMINAL AND CIVIL PENALTIES FOR FAILING TO HELP ANOTHER: ARE "GOOD SAMARITAN" LAWS GOOD IDEAS?

Angela Hayden*

> DEBBIE will never forget the gun held to her face, or the warm, dizzy feeling after the baseball bat slammed into her head, or the kicks that jolted her ribs as she lay on her Woodbridge driveway convinced that playing dead was the only way to stay alive.
>
> And Debbie will never forgive the three men who sat back and waited as their two friends beat her bloody in a failed attempt to steal her Acura Integra in the steamy, early-morning darkness of Aug. 18.[1]

## I. INTRODUCTION

We are repeatedly dismayed at such repugnant displays of apathy on the part of witnesses to crimes as was evidenced in the case of a New Jersey woman who was nearly beaten to death during the course of a carjacking.[2] At the same time, many people are indignant to the suggestion that our society impose a legal obligation to help others in need, claiming that such an obligation severely limits individual liberty.[3] The popular television series "Seinfeld" brought national attention to statutes criminalizing an omission, or failure to help another.[4] Despite vocal opposition, what happened to the characters in the final episode of "Seinfeld"[5] could happen to just about anyone if state

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[1] Lilo Stainton, *Victim Pleads for "Good Samaritan" Law*, ASBURY PARK PRESS (Neptune, N.J.), Sept. 17, 1998, at A14.

[2] *See id.* Time and again the public becomes outraged at a particularly offensive incident in which a witness watches a violent crime or terrible accident and does nothing to prevent it or assist the victim. *See infra* Part III and accompanying text for accounts of such stories.

[3] *See* John Adler, Relying upon the Reasonableness of Strangers: Some Observations about the Current State of Common Law Affirmative Duties to Aid or Protect Others, 1991 WIS. L. REV. 867, 871 (1991). *See also e.g.*, *Public Forum, Compelling Witnesses to Intervene During Crimes is Hazardous*, DAILY NEWS L.A., Sept. 19, 1998, at N18.

[4] The popular NBC sitcom, "Seinfeld" concluded its run with an episode in which the characters were arrested, tried, and convicted for failing to help a man during a mugging.

[5] For the readers who did not view the final episode of "Seinfeld", which aired

legislators respond to the current public outcry for "good Samaritan" laws.[6] In the aftermath of the death of Princess Diana[7] and the appalling murder of Sherrice Iverson,[8]

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in May, 1998, the four main characters, Jerry, Kramer, Elaine, and George were arrested, tried, and convicted in Latham, Massachusetts for failing to help a victim of a violent mugging. The four cheered on the attacker while Kramer videotaped the assault, excited at the prospect of getting "good stuff" on tape.

[6] The term "'good samaritan' laws" is intended to apply to laws that impose an affirmative duty on individuals to help, assist, or aid a crime or accident victim, or to report a crime or accident. Most states have "good samaritan" laws that relieve medical professionals or emergency medical technicians of liability for injuries caused during the course of providing emergency medical assistance. *See, e.g.*, ALA. CODE § 6-5-332 (1993); CONN. GEN. STAT. § 52-557b (West 1991 & Supp. 1996); FLA. STAT. ANN. § 768.13 (West 1986); LA. REV. STAT. ANN. § 37.1731-.1732 (West 1988 & Supp. 1996); MINN. STAT. ANN. § 604A.01 (2) (West Supp. 1997); MISS. CODE ANN. § 73-25-38 (1995); N.J. STAT. ANN. § 2A:53A-13 (West 1987); N.C. GEN. STAT. § 90.21.14(a), (b) (1996); N.D. CENT. CODE § 32-03.1 (1996); OKLA. STAT. ANN. tit. 76, § 5 (West 1995); 42 PA. CONS. STAT. ANN. § 8331 (1982); TENN. CODE ANN. § 63-6-218 (1990 & Supp. 1996); TEX. CIV. PRAC. & REM. CODE ANN. § 74.001-.002 (West 1986 & Supp. 1997); UTAH CODE ANN. § 78-11-22 (1996).

Currently, only four states have "good samaritan" laws that impose a general duty to assist a crime victim or injured person, or to report a witnessed crime. *See* Rudy Larini, *Jersey Looking to Prosecute Passivity: States Rarely Invoke "Good Samaritan" Law*, THE STAR-LEDGER (Newark), Oct. 19, 1998 at 1. Minnesota, Rhode Island, Vermont, and Wisconsin have general duty to assist laws. *See* MINN. STAT. ANN. 604A.01 (West 1997); R.I. GEN. LAWS § 11-56-1 (1997); VT. STAT. ANN. tit. 12, § 519 (1997); WIS. STAT. ANN. § 940.34 (West 1997). Massachusetts and Florida require observers to report sexual assaults to authorities. *See* FLA. STAT. ANN. § 794.027 (West 1998); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1998). Ohio and Washington have laws that require individuals to report felonies in certain situations. *See* Jack Wenick, Note, *Forcing Bystander to Get Invoived: Case for Statute Requiring Witness to Report Crime*, 94 YALE L.J. 1787, 1803-04 (1985).

[7] *See* Keith Dovkants, *Paris Judge Will Decide if Death Crash Was a Crime*, THE EVENING STANDARD (London), Sept. 2, 1997, at 4. Following the death of Princess Diana in September, 1997, French authorities investigated and prosecuted photographers on the scene of the fatal car accident for violating France's duty to act statute. *See also. infra* § II B for further discussion of the French duty to act law.

[8] *See* Stacy Finz, *Killing of Girl, 7, in Casino Spurs Good Samaritan Bills*, SAN FRANCISCO CHRONICLE, Dec. 8, 1998, at A21. Sherrice Iverson was a seven-year-old girl who was stalked in a Nevada casino by eighteen-year-old Jeremy Strohmeyer. *See id.* Strohmeyer followed Iverson into the women's restroom of the casino, after playing a game of "hide and seek", where Strohmeyer assaulted and murdered the girl. *See id.*

the media and public have focused attention on states that require ordinary citizens to come to the aid of accident or crime victims.[9] At least four states have introduced bills that would impose a duty to act where none existed previously under the common law.[10] These statutes have received both criticism and praise from politicians, the media, and the public.[11] An often voiced criticism is that such statutes are contrary to our established social mores, requiring us to act in ways that are not in accord with our traditional notions of the obligations owed to strangers, and that unnecessarily violate individual liberty.[12] The popularity of duty to act laws draws from the multitude of incidents of indifference that people often find repugnant to those same mores.[13] Contrary to popular belief, these laws are based on a solid historical foundation,[14] and have many counterparts in European countries.[15]

There exists the potential for both great benefit and detriment in the implementation of "good Samaritan" statutes, and the established European models provide examples that American legislators should examine while constructing new laws. This Article provides a discussion and analysis of the European "good Samaritan" statutes in Part II.[16] Part III identifies the American states that have already passed duty to act laws and the penalties that the laws provide.[17] As a result of many recent events widely publicized by the media, some states have proposed "good samaritan" laws, which will also be addressed in Part III. Part IV includes a discussion of the debate surrounding enactment of duty to act laws, examining the benefits and drawbacks to such laws in the context of European and American laws.[18] Part IV also postulates a model statute for

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Strohmeyer's friend, David Cash, knew of the incident and failed to report it to the authorities, yet did not commit any acts to conceal or aid the crime. *See id.* Thus, Cash was not and could not be prosecuted for any crime. *See id. See also* infra note 1 and accompanying text for a further discussion of this case.

[9] *See id.*

[10] Legislation has been introduced in New Jersey, California, Florida, and Nevada for duty to act laws. *See* Stainton, *supra* note 1; David Karp, *Bill Compels Witnesses to Report Crimes*, ST. PETERSBURG TIMES (Florida), Sept. 26, 1998, at 3B.

[11] *See e.g.* Adler, *supra* note 3.

[12] *See infra* § IVA for a discussion of criticism against imposing duties to act.

[13] *See infra* § IV.A for discussion of support for "good samaritan" laws.

[14] *See* Public Forum, *supra* note 3 (arguing that duty to act laws shock the conscience of Americans). *See also infra* notes 20 - 153 and accompanying text for a discussion of the historical background of duty to act laws throughout the world.

[15] *See* F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966).

[16] *See infra* notes 20 - 43 and accompanying text.

[17] *See infra* notes 44- 121 and accompanying text.

[18] *See infra* notes 122- 150 and accompanying text.

American states that are considering imposing a statutory duty to act where none existed previously.[19] This article concludes in Part V.

## II. EUROPEAN "GOOD SAMARITAN" LAWS

### *A. Historical Background*

During World War II, European countries began to pass duty to act laws.[20] Since World War II, many European criminal codes have identified failing to assist a crime victim or injured person as a criminal offense.[21] Under the German-controlled Vichy government in France, the French enacted their "good samaritan" law in an effort to "stem terrorism against the German army."[22] The Germans thus sought to ensure their unimpeded progress in their quest to conquer the world by forcing French citizens to report each other to the government or face stiff penalties. Many other Western European countries enacted "good samaritan" laws around the same time as the French law.[23] It would therefore seem that the Germans had a significant influence on those countries as well. Many Eastern European countries, including former Czechoslovakia, Bulgaria, Poland, Hungary, and Ukraine, enacted "good samaritan" laws in the 1950s and 1960s, at the height of Soviet domination.[24] It would appear that the Soviet Union may have exerted pressure on these countries to pass such laws to force citizens to "rat each other out", much as the Germans did during World War II. Thus, so-called "good samaritan" laws may not have all been instituted to serve good purposes.[25]

There is no significant historical background to reveal the motivation behind enactment of "good samaritan" laws in the Scandinavian countries, the Netherlands, and old Russia in the nineteenth century.[26] It is certainly possible, however, that the church pressed the governments to include these provisions for the good of all, or to remind individuals that the moral lessons taught by the church are important and relevant in everyday life. The Russian Criminal Code of 1845 did include an ecclesiastical penalty

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[19] *See infra* notes 151- 153 and accompanying text.

[20] *See* Feldbrugge, *supra* note 15. *See also* John Pardun, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L. J. 591, 592 (1998).

[21] *See* Feldbrugge, *supra* note 15, at 631. In 1966, at least 23 European countries had some type of "good samaritan" law in effect that imposed a general duty to assist a person in need. *See id.* at 655-57.

[22] *See* Pardun, *supra* note 20, at 593 (citation omitted).

[23] *See* Feldbrugge, *supra* note 15, at 655-57.

[24] *See id.*

[25] *See* Pardun, *supra* note 20, at 593.

[26] *See* Feldbrugge, *supra* note 15, at 655-57.

for violation of the duty to act law, which would support the theory that the church was behind this early movement to require people to help others in need. But even these early laws had historical precedents.

Ancient Indian and Egyptian law required people to help others who were in danger or injured.[27] Later Greek and Roman scholars eschewed this requirement, instead developing bodies of law that recognized the importance of free will and acting because one chooses to act.[28] Duty to aid or assist requirements were absent from the codified law globally until the mid-nineteenth century, when the Russian Criminal Code of 1845 required people to help others in danger.[29] Soon after Russia instituted its duty to act law in the 1845 Code, Tuscany,[30] the Netherlands,[31] and Italy[32] followed suit.

### *B. European Countries That Have "Good Samaritan" Laws*

As of 1966, at least 21 European countries had some form of a duty to act law.[33] These laws can be broken down into a number of categories, including laws that require the danger be: 1) immediate or imminent;[34] 2) evident;[35] 3) real,[36] and; 4) harmful.[37]

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[27] *See id.* at 630.

[28] *See id.*

[29] *See id.* Feldbrugge notes that he does not believe that the Russians were more "enlightened" than other Europeans of the time, but rather that the Russians were secluded from Western Europe and therefore did not subscribe to the same theories of "liberalism and freedom of the individual" that were present in Europe during the eighteenth and nineteenth centuries. *Id.* In 1845, however, the year Russia's duty to act law first appeared, Nicholas I was the ruling tsar. *See* S. Frederick Starr, *Russian Art and Society1800-1850, in* ART AND CULTURE IN NINETEENTH-CENTURY RUSSIA 99 (Theofanis George Stavrou ed., (1983)). Nicholas I is considered to have taken "the arts more seriously than did any other Russian tsar with the exception of Catherine II, [and to have] . . . demonstrated considerable knowledge and up-to-date judgment." *Id.* During this period in Russia, the country was experiencing tremendous Western influence in literature, art, architecture, music, and culture, and embraced openly the French culture. *See id.* at 87. It was also during this period that Russian literature and culture underwent its "Golden Age". *See id.* It therefore seems that Feldbrugge's conclusion is shortsighted and not based on facts or knowledge of the Russian culture of the time.

[30] *See id.* at 631. Tuscany implemented its statute in 1853.

[31] *See id.* The Netherlands included a duty to act law in its 1881 criminal code.

[32] *See* Feldbrugge, *supra* note 15, at 631. Italy's Zanardelli Code of 1889 included a duty to act law.

[33] *See id.* at 655-57. As of the writing of Feldbrugge's article, Albania, Belgium, Bulgaria, former Czechoslovakia, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, the Netherlands, Norway, Poland, Romania, Russia, Spain, Turkey, Ukraine, and former Yugoslavia. *See id.*

[34] *See id.* at 632.Hungary, the Netherlands, Poland, and former Yugoslavia have

Some laws include the additional requirement that the victim, or potential victim, actually be helpless or in need of assistance.[38]

The penalties differ greatly,[39] with some laws requiring as little as a fine or community service and others allowing up to five years in prison.[40] While prosecutions under these laws are uncommon, it seems that Europeans are happy to have the laws available to prosecute the most egregious offenders.[41] Europeans view the laws as a tool to punish undesirable conduct, namely, failing to help another human when there is little risk or inconvenience to oneself.[42] The use of duty to act laws in Europe has not led to serious "encroachments on personal liberty" as feared by American critics of "good samaritan" laws.[43] Rather, the European "good samaritan" laws, despite the numerous variations, provide Americans with models to use in developing a similar, ideal American statute.

## III. AMERICAN "GOOD SAMARITAN" STATUTES

### *A. Historical Background – Duty to Act under the Common Law*

Under common law, individuals do not have a duty to take affirmative action to help a person in need.[44] The common law imposes neither civil nor criminal liability for

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such a provision.

[35] *See id.* Denmark, Norway, Spain, and Russia specifically require that the danger be evident.

[36] *See* Feldbrugge, *supra* note 15 at 633The Finnish and French laws require that the danger be real, as opposed to "presumed".

[37] *See id.* Former Czechoslovakia, Poland, Romania, Hungary, Turkey, German, and France all either explicitly require, or have determined through judicial interpretation, that the danger must present danger of physical harm to the victim.

[38] *See id.* at 633. Bulgaria, Russia, the Netherlands, Italy, France, Germany, and Spain require that the victim be in need of assistance before the duty to assist attaches.

[39] *See id.* at 646-7.

[40] *See id.* The French statute carries the most severe penalty, which allows up to five years in prison and a fine of up to approximately $80,000.00 (current figure). *See id.* The French statute is often used to prosecute individuals involved in crimes who do not take affirmative acts that rise to the level of criminal culpability. *See id.* at 647.

[41] *See* Feldbrugge, *supra* note 15, at 654. *See also, e.g.*, Lara Marlowe, *Establishment Turns on Photographers*, THE IRISH TIMES, Sept. 3, 1997, at 7 (indicating that the French judge assigned to investigate the death of Princess Diana planned to investigate photographers on charges of violating France's duty to act law).

[42] *See* Feldbrugge, *supra* note 15, at 654.

[43] *See id.*

[44] *See* RESTATEMENT SECOND OF TORTS §314 (1977). There is no liability for