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# MISPRISION OF A FEDERAL FELONY: DANGEROUS RELIC OR SCOURGE OF MALFEASANCE?

Royal G. Shannonhouse, III†

*The federal crime of misprision of felony exists in the face of interpretive, enforcement and constitutional problems. This peculiar crime is analyzed in terms of its elements, related crimes and defenses. The author concludes that misprision of felony should not be permitted to continue in its present form.*

## I. THE CRIME ANALYZED

### *Origin and Purpose*

It seems a bit extreme to say that "there is and always has been an offense of misprision of felony,"<sup>1</sup> but it is true enough for all but the pedant, the crime being in existence for over 700 years and known by its present name since 1557.<sup>2</sup> The crime first found its way into United States law in 1790,<sup>3</sup> and has been re-enacted twice<sup>4</sup> without substantial change since then. Misprision, a felony,<sup>5</sup> is now defined as follows:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both.<sup>6</sup>

By 1934 this federal crime had appeared "before the courts but twice in the 144 years of its life"<sup>7</sup> and today may be found in less than two dozen cases. The punishment prescribed remains virtually unchanged since 1790.<sup>8</sup> A string of federal misprision cases between 1966

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1. *Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33, 40 (H.L.).

2. *Id.* at 36-37.

3. Act of April 30, 1790, ch. 9, §6, 1 Stat. 113. Misprision of treason, beyond the scope of this article, was also made a punishable offense. *Id.* §2, 1 Stat. 112.

4. Act of June 25, 1948, ch. 645, 62 Stat. 684, amending 18 U.S.C. §251 (1940) (codified at 18 U.S.C. §4, (1970)); Act of March 4, 1909, ch. 321, §146, 35 Stat. 1114.

5. "Notwithstanding any Act of Congress to the contrary: (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony." 18 U.S.C. §1 (1970).

6. 18 U.S.C. §4 (1970).

7. *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934).

8. Originally, the misprisoner was to be "imprisoned not exceeding three years, and fined not exceeding five hundred dollars." Act of April 30, 1790, ch. 9, §6, 1 Stat. 113. In 1909, this was changed to: "fined not more than five hundred dollars, or imprisoned not more

and 1971<sup>9</sup> denies the obsolescence of the crime (at least in the Sixth, Seventh, Ninth and Tenth Circuits) and the corruption scandals known collectively as "Watergate" should produce a renewed interest in this ancient offense.

The purpose of the federal misprision statute is presumably the same as that of its common law ancestor: to encourage citizens to report serious crimes so as to facilitate the suppression thereof.<sup>10</sup> Although it may shock many United States citizens to learn that there is a law-imposed duty to inform the government of the misconduct of one's fellows, the obligation of the citizen to do so is neither new nor anomalous. Such reports for over 100 years have been protected against discovery as privileged communications.<sup>11</sup> The citizen-informer's right to protection against violence for giving such information "arises out of the creation and establishment by the constitution itself of a national government, paramount and supreme within its sphere of action."<sup>12</sup> The duty to inform must derive from the same source. That there is such a duty is the clear implication of the statute itself.<sup>13</sup>

Perhaps a more satisfactory rationale for a statute compelling ordinary citizens to become police informers is that the "peace of the United States"<sup>14</sup> is secured to all of the people thereof by the law and that a government of, by and for the people means a government in which the people actively participate in the enforcement of the laws.<sup>15</sup>

### *The Elements—Felony*

A federal misprisoner must have "knowledge of the actual commission of a felony cognizable by a court of the United States. . . ."<sup>16</sup>

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than three years, or both." Act of March 4, 1909, ch. 321, §146, 35 Stat. 114. The punishment remains the same today. 18 U.S.C. §4 (1970).

9. *United States v. Pigott*, 453 F.2d 419 (9th Cir. 1971); *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970); *United States v. Norman*, 391 F.2d 212 (6th Cir. 1968); *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969); *United States v. King*, 402 F.2d 694 (9th Cir. 1968); *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966).

10. Ever since the day of hue and cry, it has been the duty of a man who knows that a felony has been committed to report it to the proper authority so that steps can be taken to apprehend the felon and bring him to justice.

*Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33 n.1 (H.L.).

11. *Vogel v. Gruaz*, 100 U.S. 311 (1884); *United States v. Rogers*, 53 F.2d 874 (D.N.J. 1931); *Worthington v. Scribner*, 109 Mass. 487 (1872).

12. *In re Quarles*, 158 U.S. 532, 536 (1895).

13. "To inform is a statutory duty. . . ." *United States v. Rogers*, 53 F.2d 874, 876 (D.N.J. 1931). Defendants' "duty to notify" was held nullified by the Fifth Amendment in *United States v. Pigott*, 453 F.2d 419 (9th Cir. 1971).

14. "That there is a peace of the United States . . . [is] too clear to need argument to prove [it]." *In re Neagle*, 135 U.S. 1, 69 (1890).

15. It is the duty and the right . . . of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States . . . . It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offense against those laws . . . .

*In re Quarles*, 158 U.S. 532, 535 (1895).

16. 18 U.S.C. §4 (1970).

Concealment of a misdemeanor is not punishable under this law.<sup>17</sup> The classification of the principal offense at the time of its commission determines whether its concealment is misprision, not the classification at the time of concealment or nondisclosure.<sup>18</sup>

Felonies subject to misprision include all violations of federal law which are punishable by "death or imprisonment for a term exceeding one year."<sup>19</sup> Misprisonable felonies presumably include all offenses upon federal reservations which are felonies according to the law of the surrounding state.<sup>20</sup> But misprision of a crime declared felony by state law is not subject to prosecution in a federal court unless it did occur upon a federal reservation or is also declared to be a felony by federal law.<sup>21</sup>

When one considers that, under federal law, an assault "by . . . wounding" is only a misdemeanor,<sup>22</sup> while one who "knowingly and fraudulently makes a false oath . . . in relation to any bankruptcy proceeding" is guilty of a felony,<sup>23</sup> the limitation of misprision to felonies seems questionable. If one further contemplates that state laws classify many serious crimes as misdemeanors and many relatively petty

17. *Presont v. United States*, 281 F.131 (6th Cir. 1922); *United States v. Venturini*, 1 F. Supp. 213 (S.D. Ala. 1931).

18. If the principal act, the concealment and the nondisclosure all occurred before the principal act was classified a felony, the misprision stature would not apply, because what was concealed was not a felony. It seems equally clear that if the principal act was no crime or only a misdemeanor when committed, was subsequently classified a felony, and then the concealment and nondisclosure thereof occurred, there would still be no misprision because there would be no "actual commission of a felony" by the principal. It is hornbook law that wrongful acts are subject to prosecution only according to the law in force at the time of the act and that neither the nature of the crime nor its punishment may be changed with retroactive effect. U.S. CONST. art. I, §9; *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (dictum). If the principal is not subject to prosecution for a felony, then one who concealed his crime should not be guilty of misprision.

19. 18 U.S.C. §1 (1970). Some felonies which currently seem particularly subject to misprision include: *id.* §201 (bribery); *id.* §610 (willfully accepting an illegal contribution to a Presidential election campaign); *id.* §1505 (trying to influence witness in any Congressional inquiry); *id.* §1510 (trying to prevent information reaching any federal criminal investigator); *id.* §§1621, 1623 (perjury); *id.* §1622 (subornation of perjury); *id.* §1902 (illegal disclosure of crop information); *id.* §2071 (concealing, mutilating or destroying records or documents filed or deposited in any public office).

20. Whoever within [the jurisdiction of the United States as defined in 18 U.S.C. §13 (1970)] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. §13 (1970). This law applies to crimes defined by state law subsequent to its enactment by Congress. *United States v. Sharpnack*, 355 U.S. 286 (1958).

21. *See United States v. Brandenburg*, 144 F.2d 656 (3d Cir. 1944).

22. "Whoever . . . is guilty of an assault shall be punishable as follows: . . . (d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than three months, or both." 18 U.S.C. §113 (1970). Any offense punishable by imprisonment for one year or less is a misdemeanor. *Id.* §1(2).

23. This offense is punishable by fine of not more than \$5000 or imprisonment for not more than five years, or both. 18 U.S.C. §1(52) (1970). A felony is a crime punishable by a term exceeding one year. *Id.* §1(1).

offenses as felonies,<sup>24</sup> the limitation of misprision to felonies seems indefensible.

Misprision, as so limited, fails to serve the community need for protection and the purpose for which it was created, to the extent that it is inapplicable to those who conceal and fail to make known the commission of serious offenses which happen to be classified as misdemeanors. Furthermore, to the extent that it makes one punishable for concealing and failing to disclose relatively petty offenses, it discourages vigorous enforcement. Finally, to the extent that this law provides a punishment for concealing and failing to report that which the ordinary citizen would not think serious enough to merit the attention of the police, it is unfair<sup>25</sup> and could be an unconstitutional violation of a citizen's right to due process of law.<sup>26</sup>

A better classification of crimes subject to misprision would seem to be one which would include only those "of so serious a character that an ordinary law-abiding citizen would realize he ought to report it to the police."<sup>27</sup> Reasonable minds might well differ on which crimes to include and which to exclude from the category of misprisonable offenses and it may well be that only a catalog of specifically misprisonable offenses will serve the purpose of this law.

### *Knowledge*

The federal misprision statute requires that one have "knowledge of the actual commission of a felony. . . ."<sup>28</sup> Knowledge has been defined as, "the fact or condition of knowing something with a considerable degree of familiarity gained through experience of or contact or association with the individual or thing so known."<sup>29</sup> Obviously, participation in a crime or being an eyewitness of it would give one "knowledge of the actual commission" of the crime. At the opposite extreme, unveri-

24. See, e.g., ALA. CODE tit. 1, §7 (1960) (defining felony); *id.* tit. 14, §34 (1959) (horsewhipping a person while armed with a deadly weapon: misdemeanor); *id.* §87 (breaking into an automobile to steal: felony); *id.* §§320, 322 (involuntary manslaughter: misdemeanor); *id.* §354 (beating a person to force a confession of guilt: misdemeanor); *id.* §357 (self-mutilation to gain sympathy: felony); CONN. GEN. STAT. §53a-61 (1972) (willfully causing physical injury to another person: misdemeanor); *id.* §53a-103 (entering or remaining unlawfully in a building—not a dwelling—with intent to commit a crime therein: felony); ME. REV. STAT. ANN. tit. 15, §451 (1965) (defining felony); *id.* tit. 17, §101 (adultery: felony); *id.* §451 (blasphemy: felony); *id.* §1055 (vivisection and experimenting upon a living animal in a public school: misdemeanor); MD. ANN. CODE art. 27, §388 (Supp. 1973) (manslaughter by grossly negligent operation of a motor vehicle: misdemeanor); *id.* art. 81, §455 (1969) (transporting non-taxpaid cigarettes: felony).

25. "[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." O. W. HOLMES, *THE COMMON LAW* 50 (1881).

26. See *Lambert v. California*, 355 U.S. 225, 229-30 (1957), wherein it was said: "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process."

27. *Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33, 42 (H.L.).

28. 18 U.S.C. §4 (1970).

29. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1966).

fied information obtained from one who was not involved in the crime would not give knowledge (as defined above) of the crime. The point between these extremes at which information becomes knowledge, within the meaning of the statute, may be described as the point at which hearsay is supplemented by direct observation of facts which tend to corroborate the hearsay.<sup>30</sup>

This concept of the knowledge required for guilt of misprision is not only appealingly practical, it is also consistent with the common law<sup>31</sup> and with the policy of encouraging citizen participation in law enforcement by punishing those who fail to report what they have reason to believe is a serious crime.<sup>32</sup>

It seems to be settled that knowledge does not include erroneous belief, however sincerely a person may think that he is concealing a felony.<sup>33</sup> Knowledge of "the actual commission of a felony" means that what the principal did must have been a felony, not a misdemeanor.<sup>34</sup> Thus a person who believes that a felony has been committed and thinks he knows who committed it, who fails to disclose the facts in his possession, and who acts to conceal evidence of the crime, is not guilty of misprision if he happens to be wrong about the classification of the principal offense.

Three cases have implied that ignorance that the principal's conduct is classified by law as a felony would be a defense to prosecution for misprision.<sup>35</sup> It is submitted that the defense of ignorance should be

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30. In *United States v. King*, 402 F.2d 694, 695 (9th Cir. 1968), three people discussed robbing a certain bank in the presence of the defendant. The next day, defendant heard a radio report that the bank had been robbed. The same three people told defendant that one of them had robbed the bank and one of them gave the defendant some of the money; the defendant accompanied two of them to another's apartment to get transportation out of town. Although reversing defendant's conviction of misprision on other grounds, the court discussed the elements necessary for conviction and concluded that defendant had "full knowledge" of the principals' felony. See also *Ormsby v. United States*, 273 F. 977 (6th Cir. 1921), where one who, on the basis of uncorroborated hearsay, reported that another had committed a felony was sued for libel and the duty to report felonies was held to be no defense to the allegation of malice.

31. "[T]here must be evidence that a reasonable man in his place, with such facts and information before him as the accused had, would have known that a felony had been committed." *Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33, 41 (H.L.) (after reviewing common law authorities).

32. "Misprision comprehends an offense which is of so serious a character that an ordinary law-abiding citizen would realize he ought to report it to the police." *Id.* at 42.

33. See *United States v. Brandenburg*, 144 F.2d 656 (3d Cir. 1944), knowingly harboring an interstate fugitive from state felony prosecution held not misprision because the state crime was not one within the contemplation of the federal Fugitive Felon Act; *United States v. Chapman*, 3 F. Supp. 900 (S.D. Ala. 1931), where knowingly receiving and concealing proceeds of embezzlement held not misprision because the principal's offense was construed by the court to be a misdemeanor, notwithstanding that under 18 U.S.C. §1 (1970) it would be a felony.

34. *United States v. Brandenburg*, 144 F.2d 656 (3d Cir. 1944); *United States v. Presont*, 281 F. 131 (6th Cir. 1922); *United States v. Chapman*, 3 F. Supp. 900 (S.D. Ala. 1931); *United States v. Venturini*, 1 F. Supp. 213 (S.D. Ala. 1931).

35. In *Neal v. United States*, 102 F.2d 643, 646 (8th Cir. 1939), a conviction of misprision was reversed for insufficient evidence of the act of concealment. The court enumerated the

rejected unequivocally. Apart from the ancient maxim, *ignorantia juris, quod quisque tenetur scire, neminem excusat*,<sup>36</sup> it seems fair enough that knowledge that conduct is criminal should carry with it the burden of ascertaining whether it is within the category of offenses the concealment of which is a crime. In other words, one who knows that he conceals another's crime surely should do so at the peril that it is classified a felony.

Whether knowledge of the identity of the principal felon is a prerequisite to conviction is an open question. Whether it is required as a matter of law, no case has been found in which a misprision defendant did not in fact know the identity of the principal. Perhaps for this reason, at least one court has implied that knowledge of the identity of the felon is an element of misprision.<sup>37</sup>

The statute on its face does not compel this interpretation, and it is submitted that knowledge of the identity of the felon should not be an element of misprision. If a bank customer, for example, concealed evidence relevant to the apprehension and prosecution of bank robbers, such as the note demanding money, and failed to report finding such evidence, there seems little doubt that such person should be deemed guilty of misprision, without proof that he was aware of the identity of the felons.

Eliminating knowledge of the identity of the principals as an element of misprision would not make otherwise innocent bystanders guilty of misprision for failing to report the commission of a federal felony by strangers, if they made no effort to conceal the crime or evidence thereof, because an affirmative act of concealment is an essential element of the offense.<sup>38</sup> Indeed, to convict bystanders for failure to report a federal felony committed openly, without other act of participation on their part, would almost certainly be unconstitutional.<sup>39</sup>

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elements of the crime as including: (1) that "the principal, had committed and completed the felony;" and (2) that "the defendant had full knowledge of that fact." This statement was later adopted in *United States v. King*, 402 F.2d 694, 695 (9th Cir. 1968) (dictum) and followed in *Lancey v. United States*, 356 F.2d 407 (9th Cir.), cert. denied, 385 U.S. 922 (1966).

36. "Ignorance of the law, which every one is presumed to know, excuses no one." BLACK'S LAW DICTIONARY 881 (4th ed. 1968). This "is as well the maxim of our own law, as it was of the Roman." 4 W. BLACKSTONE, COMMENTARIES \*27.

37. In *Lancey v. United States*, 356 F.2d 407, 410-11 (9th Cir. 1966), the court emphasized that, upon the happening of a certain event, "any lack of certain knowledge as to . . . who had committed [the felony] was laid to rest" and "we find clear and substantial evidence that [defendant] was proved to have knowledge of . . . the identity of the perpetrator. . . ."

38. See p. 66 *infra*.

39. [A]n indictment must allege something more than mere failure to disclose—some affirmative act of concealment, such as suppression of the evidence, harboring of the criminal, intimidation of witnesses, or other positive act designed to conceal from the authorities the fact that a crime had been committed. Furthermore, some such interpretation is necessary to rescue the act from an intolerable oppressiveness and to eliminate a serious question of constitutional power. . . . The bystander who saw a federal felony committed would become a felon if he did not promptly report it, although federal officers apprehended the

*Conceals*

It is well established that the phrase in the misprision statute, "conceals and does not as soon as possible make known"<sup>40</sup> creates two distinct elements of the crime of misprision; and that "conceals" means a positive act intended to prevent discovery of the felony or to hinder its prosecution.<sup>41</sup> The act need not be successful in concealing the felony in order to be punishable. (Indeed, the act must have failed to do so, as the Government must prove the commission of the felony as an element of misprision.)<sup>42</sup>

With respect to what does constitute a positive act of concealment, the courts have not created a model of consistency or clarity or formulated a definition of the word "conceals" in the context of the statute.

A misprision indictment has been laid on evidence that the accused merely received and kept embezzled funds with intent to aid the principal in avoiding detection and arrest,<sup>43</sup> but the Ninth Circuit has held that merely receiving part of the proceeds of a bank robbery is not an affirmative act of concealment,<sup>44</sup> while the Tenth has held that knowingly receiving *and spending* bank robbery loot supports a conviction for misprision.<sup>45</sup>

A Ninth Circuit dictum states that if part of the proceeds of a bank robbery was paid to a person to buy his silence and such person "had this purpose in mind in receiving the money," then "the receipt of the money . . . would be an affirmative act fulfilling the fourth essential element of misprision."<sup>46</sup> The Tenth Circuit reached the diametric conclusion, saying that "consideration paid [i.e., received] is the motive for, and not an act of, concealment."<sup>47</sup>

It would seem that the bare act of knowingly receiving stolen money or goods is no more an act of concealment of the theft than the bare act of knowingly purchasing contraband is a concealment of the sale.<sup>48</sup>

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criminal on the spot. . . . An interpretation leading to such an intolerable conclusion should not lightly be imputed.

Bratton v. United States, 73 F.2d 795, 797 (10th Cir. 1934).

40. 18 U.S.C. §4 (1970).

41. United States v. Daddano, 432 F.2d 1119 (7th Cir. 1970); Lancey v. United States, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966); Neal v. United States, 102 F.2d 643 (8th Cir. 1939), *cert. denied*, 312 U.S. 679 (1941); Bratton v. United States, 73 F.2d 795 (10th Cir. 1934); United States v. Farrar, 38 F.2d 515 (D. Mass.), *aff'd*, 281 U.S. 624 (1930).

42. See pp. 61-63 *supra*.

43. United States v. Chapman, 3 F. Supp. 900 (S.D. Ala. 1931), where a demurrer to the indictment was sustained upon a finding that the principal's offense was a misdemeanor.

44. United States v. King, 402 F.2d 694 (9th Cir. 1968).

45. Sullivan v. United States, 411 F.2d 556 (10th Cir. 1969).

46. United States v. King, 402 F.2d 694, 696 (9th Cir. 1968).

47. Bratton v. United States, 73 F.2d 795, 798 (10th Cir. 1934).

48. See United States v. Farrar, 38 F.2d 515 (D. Mass.), *aff'd*, 281 U.S. 624 (1930), where an indictment for purchasing illegal liquor was quashed as not within the intent of Congress in enacting the National Prohibition Act and as not charging a misprision because "[m]ere silence after knowledge of the commission of the crime is not sufficient."



Furthermore, if merely receiving stolen goods were an act of concealment within the misprision statute, then anyone knowingly receiving stolen goods and failing to report his supplier would simultaneously be guilty of misprision and immune from prosecution for it, under his Fifth Amendment protection against prosecution for failing to reveal self-incriminating information to the authorities.<sup>49</sup>

Whether a person who obtained possession of evidence of a felony concealed it, within the meaning of the misprision statute, would seem logically to depend upon what he did with it. Examples of conduct with respect to such evidence that would indicate an intent to prevent it falling into the hands of the authorities (thus a concealment) would be altering stolen goods to disguise their identity, hiding money to avoid its detection until the search for it had waned, transporting stolen money from the place of the crime so as to prevent its detection when spent, et cetera.

Silencing a felony witness by murder, intimidation or bribery would seem to be a positive act intended to conceal the felony or to hinder its prosecution, thus to satisfy the concealment element of misprision.<sup>50</sup>

The following have been held to be affirmative acts of concealment: giving lie detector tests to members of a gang to discourage cooperation with police;<sup>51</sup> registering in a hotel and sharing the room with a known fugitive felon;<sup>52</sup> illegally obtaining automobile registration plates and placing them upon a stolen vehicle.<sup>53</sup>

The foregoing analysis of the cases somewhat tenuously supports the conclusion that any intentional act which destroys<sup>54</sup> or conceals<sup>55</sup> physical evidence of a federal felony, or conceals the felon,<sup>56</sup> or intimidates<sup>57</sup> or bribes<sup>58</sup> witnesses satisfies the concealment element of misprision.

In the context of the misprision statute,<sup>59</sup> the courts have not

49. See p. 68 *infra*. This point was recognized by the dissenting judge in *United States v. King*, 402 F.2d 694, 698 (9th Cir. 1968), who pointed out that "one knowingly receiving and keeping any type of stolen property could employ the suggested constitutional shield and thus prevent prosecution under" the misprision statute.

50. See note 39 *supra*. The one sentence in *United States v. Perlstein*, 126 F.2d 789, 798 (3d Cir. 1942), to the effect that the indictment for conspiracy to influence and intimidate grand jury witnesses to testify falsely "does not charge or attempt to charge misprision of felony," meant only that the defendants in that case were in fact indicted for conspiracy (for which their conviction was affirmed) and not for misprision.

51. *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970).

52. *United States v. Thornton*, 178 F. Supp. 42 (E.D.N.Y. 1959).

53. *United States v. Norman*, 391 F.2d 212 (6th Cir. 1968).

54. At least in the sense of disposing of the evidence by spending it. See *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969).

55. *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966). In the sense of disguising the identity of a stolen vehicle by putting illegally obtained license plates on it, see *United States v. Norman*, 391 F.2d 212 (6th Cir. 1968).

56. *United States v. Thornton*, 178 F. Supp. 42 (E.D.N.Y. 1959).

57. *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970).

58. If misprision may be committed by intimidating a felony witness, it would seem to follow, *a fortiori*, that bribing would suffice.

59. 18 U.S.C. §4 (1970).

interpreted the word "conceal" to mean "to prevent disclosure or recognition of," as Webster's<sup>60</sup> has it, but to mean merely an act intended to have that effect.<sup>61</sup> Thus the statute appears to have been judicially amended to include an attempt as a punishable misprision. But it is submitted that what thus appears to be judicial legislation is defensible on two grounds. First, misprision does not require concealment *permanently*. An attempted concealment may be a successful concealment, temporarily. Second, the courts' interpretation fits the secondary meanings of conceal, that is, "to place out of sight; withdraw from being observed; shield from vision or notice."<sup>62</sup>

When the foregoing meanings are employed, misprision becomes the act of one who, having knowledge of a felony, places evidence of it or the felon himself out of sight, withdraws either from being observed, or shields them from vision or notice. It follows that "whether the government did or did not know of the crime or who the perpetrator was is unimportant"<sup>63</sup> in a prosecution for misprision. "The pertinent matter is whether the defendant made the information known to a judge or other authority."<sup>64</sup>

Whether an unsuccessful attempt to bribe or intimidate a felony witness into silence would be deemed a sufficient concealment for misprision—*quaere*.<sup>65</sup> On the one hand it would seem that such an affirmative act intended to conceal the felony or to hinder its investigation and prosecution would be analogous to the act of unsuccessfully concealing physical evidence,<sup>66</sup> or the felon.<sup>67</sup> On the other hand, unsuccessfully concealing physical evidence or the felon does "place out of sight; withdraw from being observed; shield from vision or notice" thus "conceal;" while an unsuccessful attempt to bribe or intimidate a witness does not do so. This problem could be readily eliminated by the addition of an attempt to the definition of misprision.<sup>68</sup>

### *Does Not Make Known*

An essential element of the federal crime of misprision is that a person "does not as soon as possible make known the [felony] to some judge or other person in civil or military authority. . . ."<sup>69</sup> All of the

60. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 469 (1966).

61. In none of the misprision cases cited in this article was the accused successful in permanently preventing disclosure of what he was trying to conceal.

62. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 469 (1966).

63. *Lancey v. United States*, 356 F.2d 407, 409 (9th Cir. 1966).

64. *United States v. Thornton*, 178 F. Supp. 42, 44 (E.D.N.Y. 1959).

65. In the only witness-intimidation misprision case found, the defendant's effort was apparently successful. See *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970). No misprision case involving the bribery of a felony witness has been found.

66. *United States v. Norman*, 391 F.2d 212 (6th Cir. 1968).

67. *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966); *United States v. Thornton*, 178 F. Supp. 42 (1959).

68. 18 U.S.C. §4 (1970).

69. *Id.*

known federal misprision convictions have involved defendants who failed to do anything to disclose the crime. Consequently, no court decision has been found which defines the phrase, "does not . . . make known," or which prescribes the manner of fulfilling the statutory duty to report.<sup>70</sup>

Whether an ineffective attempt to communicate the information would be a good defense to prosecution for misprision is therefore an open question. On the one hand, such an attempt would not make known the felony to the authorities, as required by the statute; but on the other hand, the effort to comply with the law and the absence of criminal intent would seem to make punishment unjust.

The courts have held that "conceals" and "does not . . . make known" are two discrete elements of misprision and that both are required for conviction,<sup>71</sup> except when the Fifth Amendment eliminates the duty to disclose incriminating information.<sup>72</sup> Therefore, without strict liability for failure to make known the commission of a felony, an ineffective attempt to disclose the fact of the crime to the authorities would be a defense to one who had willfully concealed evidence thereof. The opportunity for an accessory of a felon to escape conviction of misprision is obvious. Whether the risk of such an evasion of justice should be met by imposing strict liability for failure to make known effectively or, rather, by merely imposing upon an accused the burden of proving that he made a bona fide effort to communicate his information to the authorities, is a question of policy which should be resolved by Congress or the judiciary.

It is submitted that the question should be resolved in favor of strict liability. The number of authorities to whom the crime may be reported ("some . . . person in civil or military authority under the United States") and the ubiquity of modern communications make compliance a simple matter. While fear of immediate harm might justify a delay in reporting a felony,<sup>73</sup> fear of retaliation by the principal is almost certainly no defense to one who failed to report when it was possible to do so without immediate danger.<sup>74</sup> Furthermore, anyone fearful of retaliation by the principal felon might make his report anonymously and then, if defense of prosecution for misprision became necessary, identify himself as the informant by his knowledge of the time, place and manner in which the report was made.

In the rare case in which a misprision defendant had in fact made a bona fide but ineffective attempt to report to the authorities and then

70. "To inform is a statutory duty. . . ." *United States v. Rogers*, 53 F.2d 874, 876 (D.N.J. 1931).

71. *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), *cert. denied*, 312 U.S. 679 (1941).

72. *United States v. Pigott*, 453 F.2d 419 (9th Cir. 1971).

73. See *Lancey v. United States*, 356 F.2d 407, 411 (9th Cir. 1966); p. 70 *infra*.

74. In *Lancey v. United States*, 356 F.2d 407, 411 (9th Cir. 1966), the court pointed out that if fear of the principal were a defense to misprision, "there seldom could be a conviction." Analogously, fear induced by threats upon one's life is no defense to prosecution for failure to appear in court for trial. *United States v. Eley*, 480 F.2d 617 (5th Cir.), *reh. denied*, 480 F.2d 925 (1973); *United States v. Miller*, 451 F.2d 1307 (4th Cir. 1971).

was caught before he had another opportunity to make his information known, he should have an appealing plea to the mercy of the court.

### *As Soon As Possible*

When Congress rewrote the earlier misprision statute<sup>75</sup> they changed the time within which the report of a felony is to be made from "as soon as may be" to "as soon as possible." No explanation of congressional intent in making this change has been found.

In a case arising under the statute as formerly worded,<sup>76</sup> the court pointed out that, while the accused had told the investigating authorities all he knew about his principal's wrongdoing and the location of evidence thereof after he had been frightened into doing so by the federal officers who were investigating the crime, he might have done so several days earlier than that, after his principal had fled the premises.

A case decided after the statute was amended, which addresses the issue of time within which the report is to be made is *Lancey v. United States*.<sup>77</sup> The defendant's conviction of misprision was affirmed over his protest that he did not report because he was afraid of the principal felon, the harboring of whom was one of the acts of misprision for which he was convicted. While the court neither accepted nor rejected fear or duress as a defense for failing to make known to the authorities information about a felony,<sup>78</sup> it went on to enumerate the several opportunities that the defendant had to notify the authorities when the principal felon was away from the defendant's house. The court emphasized "that he failed to notify the civil authorities when he had the opportunity to do so. . . ."<sup>79</sup>

These two cases seem to support the conclusion that the courts view the change in the wording of the statute as not changing the meaning; and that the change was intended merely to emphasize that the duty to report a felony is to be performed at the first opportunity to do so without risk of immediate harm; but that no penalty is to be imposed for a failure to accomplish the impossible.

### *Conceals and Does Not Make Known*

The conjunctive terms of the misprision statute<sup>80</sup> and the unanimous opinions of federal judges in six jurisdictions from 1930 to

75. . . . Whoever, having knowledge of the actual commission of the crime of murder or other felony cognizable by the courts of the United States, conceals and does not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both.

Act of March 4, 1909, ch. 321, §146, 35 Stat. 1114.

76. *Neal v. United States*, 102 F.2d 643, 649 (8th Cir. 1939).

77. 356 F.2d 407 (9th Cir. 1966).

78. The court commented, however, that "[w]ere this a defense, there seldom could be a conviction." *Id.* at 411.

79. *Id.*

80. 18 U.S.C. §4 (1970).

1970<sup>81</sup> were thought to have settled the point that *both* the act of concealment of a felony and the omission to make it known must be proved to support conviction of misprision. It would follow that one who failed to report a known felony, but who took no action to conceal it, would not be guilty of misprision under the federal statute.<sup>82</sup> There is reason to believe that Congress specifically intended this to be so.<sup>83</sup> Furthermore, this position appeals to one's sense of fairness and distaste for prosecution of mere bystanders.

But the converse of such events has a possible result not so satisfactory. That is, if a person willfully destroyed evidence of a felony and then reported the felony to the federal authorities (to conceal his own involvement, for example), the report should not be a defense to prosecution for the destruction of evidence; yet the destruction alone would not be a misprision as the statute has been interpreted, above.

A willful destruction of evidence of a felony should be an obstruction of justice;<sup>84</sup> but apparently is not.<sup>85</sup> Neither would such a wrongdoer be a conspirator, without some association with the principal.<sup>86</sup> Literally, one who willfully and knowingly destroys or conceals evidence of a felony, "assists the offender in order to hinder . . . his apprehension, trial or punishment"<sup>87</sup> and therefore should be punishable as an accessory after the fact,<sup>88</sup> although there seems to be some

81. *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969); *United States v. King*, 402 F.2d 694 (9th Cir. 1968); *United States v. Norman*, 391 F.2d 212 (6th Cir. 1968); *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966); *United States v. Thornton*, 178 F. Supp. 42 (E.D.N.Y. 1959); *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), *cert. denied*, 312 U.S. 679 (1941); *Bratton v. United States*, 73 F.2d 795 (10th Cir. 1934); *United States v. Farrar*, 38 F.2d 515 (D. Mass.), *aff'd*, 281 U.S. 624 (1930).

82. Although mere failure to report was sufficient for conviction of misprision at common law (*Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33 (H.L.)), "what a federal statute does not make criminal is not an offense against the United States." *United States v. Perlstein*, 126 F.2d 789, 802 (3d Cir. 1942) (dissenting opinion).

83. The common law definition of the offense consisted only of the elements of knowledge and failure to disclose, *Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33 (H.L.), while the federal misprision statute as enacted in 1790 added the phrase "conceal and," Act of April 13, 1790, ch. 9, §6, 1 Stat. 113. In *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934), the court said that "we must assume that Congress intended something by the use of the words 'conceal and.'"

84. 18 U.S.C. §§1501-09 (1970).

85. 18 U.S.C. §§1501-04 (1970) involve assaults upon people, or obstructing, influencing or injuring people, not evidence; *id.* §1507 applies to picketing and parading; *id.* §1508 to spying on grand juries; *id.* §§1505, 1509-10 apply to the use of force, threats or improper persuasion to influence people; *id.* §1511 to conspiracy; *id.* §1505 pertains to a "civil investigative demand . . . made under the" Antitrust Civil Process Act or the act pertaining to Racketeer Influenced and Corrupt Organizations; *id.* §1506 to judicial documents.

86. See 18 U.S.C. §371 (1970).

87. 18 U.S.C. §3 (1970).

88. Although no case has been found which holds that one who knowingly conceals or destroys evidence of a felony is an accessory after the fact thereto, see *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970), intimidation of witnesses is both misprision and accessory after the fact; *Cleaver v. United States*, 238 F.2d 766, 770 (10th Cir. 1956), conviction of conspiracy reversed because his admission that defendant helped dispose of stolen goods "show[s] only that he is an accessory after the fact;" *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), *cert. denied*, 312 U.S. 679 (1941), conviction of misprision and accessory after the fact reversed for failure to prove that what was concealed was part of the fruits of

confusion on the point.<sup>89</sup>

It is a cliché that hard cases make bad law. Sometimes, judicial desire to affirm a conviction has a like result. In *United States v. Daddano*,<sup>90</sup> the court recognized that the Fifth Amendment relieved the defendant of the statutory duty to report the felony involved, but said that "the statute does not purport to punish one solely for failure to report facts which he has a reasonable fear might lead to his conviction of crime,"<sup>91</sup> and affirmed the conviction for misprision on the ground that, "the offense of misprision . . . consists of an act of concealment in addition to failure to disclose."<sup>92</sup> With all respect, it seems equally clear that the statute does not purport to punish one solely for an act of concealment.<sup>93</sup> Just as possible self-incrimination is a defense to punishment for contempt in failing to answer questions,<sup>94</sup> so should it be also a defense to prosecution for failure to report a felony.<sup>95</sup> Therefore, the conviction should have been reversed.

In support of the court's position in *Daddano*, it could be argued that although a person who fails to disclose a felony in which he might be implicated is protected from punishment by the Fifth Amendment, nevertheless, he has failed to make known the felony. When his failure to make known the felony is joined by his act of concealment, the required elements of federal misprision are satisfied. It is submitted that this argument is specious in that Congress has expressly required a failure to make known as an element of misprision and that upholding a conviction for either a concealment or a nondisclosure would unconstitutionally amend the statute by judicial fiat. Consequently, *Daddano* should be overruled.

## II. RELATED CRIMES COMPARED

### *Accessory After the Fact*

The superficial similarity of misprision to the crime of the accessory after the fact, and the existence of some confusion in the cases,<sup>96</sup>

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a felony; *Skelly v. United States*, 76 F.2d 483, 489 (10th Cir. 1935), conviction of conspiracy affirmed on evidence that defendant knowingly received and exchanged ransom money on the ground that by the agreement to commit "such acts as accessories after the fact, they thereby became parties to the conspiracy. . . ."

89. See pp. 72-73 *infra*.

90. 432 F.2d 1119 (7th Cir. 1970).

91. *Id.* at 1125.

92. *Id.*

93. The elements of the offense under the statute are two: There must be (1) a concealment of something such as suppression of the evidence or other positive act and (2) a failure to disclose. Proof of one of the elements only, and not of both, is not sufficient to support a conviction.

*United States v. Neal*, 102 F.2d 643, 649 (8th Cir. 1939). In a later reversal of a misprision conviction, it was said:

Our analysis of the facts indicates [the defendant's] simultaneous involvement in the crime at the moment when her duty to notify could have arisen. But at that point we have a collision with the Fifth Amendment and the latter must prevail.

*United States v. Pigott*, 453 F.2d 419 (9th Cir. 1971).

94. *Grudin v. United States*, 198 F.2d 610 (9th Cir. 1953).

95. *United States v. King*, 402 F.2d 694 (9th Cir. 1968).

96. For example, one who harbored a known fugitive felon was convicted of being an

compels comparison. It is provided that "[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial, or punishment, is an accessory after the fact."<sup>97</sup> The dichotomy between this and misprision is that an accessory after the fact is one who assists the offender himself while a misprisoner is one who conceals the felony itself. This is the primary distinction between the two offenses as found in the common law.<sup>98</sup>

It is apparent that secretly harboring the felon or concealing the fruits of the felony "assists the offender" and when accomplished, "in order to hinder or prevent his apprehension," the requirements of both statutes are met. Nevertheless, misprision and accessory after the fact have been held to be discrete offenses on the ground that the principal element of each (concealment of the felony; assisting the felon) is not a *required* element of the other.<sup>99</sup> Consequently, one may be separately punished under each statute for a single act of secretly harboring a known felon or concealing evidence of the felony if one intends thereby to hinder or prevent his principal's apprehension, trial or punishment.<sup>100</sup> (One wonders if this could be "the logic of an accurate mind overtasked.")<sup>101</sup>

### *Harboring Fugitive Felon*

Fugitives from justice may be classified as persons suspected of crimes and sought for investigation, persons sought under warrant or other process (before or after conviction), and escaped prisoners. Persons who knowingly harbor or conceal fugitives of the latter two categories are subject to prosecution.<sup>102</sup> Persons harboring a fugitive in any of these categories would be guilty of misprision, if the person harbored or concealed was known by them to be guilty of a felony,<sup>103</sup>

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accessory after the fact, *Orlando v. United States*, 377 F.2d 667 (9th Cir. 1967), while another was convicted of misprision, *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966); one who knowingly received and disposed of the proceeds of a felony was convicted of misprision, *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969), while another was convicted of conspiracy to commit the felony on the ground that he was an accessory after the fact, *Skelly v. United States*, 76 F.2d 483 (10th Cir.), *cert. denied*, 295 U.S. 757 (1935).

97. 18 U.S.C. §3 (1970).

98. *Sykes v. Director of Pub. Prosecutions*, [1961] 3 All E.R. 33, 40 (H.L.).

99. *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970). See also *Neal v. United States*, 102 F.2d 643, 645-46 (8th Cir. 1939), where the court's analysis of the elements of the two offenses reveals that the only difference is that misprision requires "that he failed to notify the authorities" while the accessory after the fact statute contains no such element. At first blush it seems unlikely that an accessory after the fact could be one who notified the authorities; but then it is conceivable that reporting the crime with further false information might well assist the concealed felon to escape immediate apprehension. Thus, again it is possible to be an accessory after a felony without being guilty of misprision of the felony.

100. *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970).

101. O. W. HOLMES, SR., *THE AUTOCRAT OF THE BREAKFAST TABLE* 40 (Am. Cent. ed. 1957).

102. 18 U.S.C. §§1071-72 (1970).

103. *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966), where

and would be subject to punishment by consecutive sentences for the two violations based upon the single act of harboring or concealing the fugitive.<sup>104</sup> Furthermore, since such knowing harboring or concealing of a fugitive felon would also receive, relieve, comfort or assist the offender in order to hinder or prevent his apprehension, trial or punishment, a third consecutive sentence could be imposed under the section punishing an accessory after the fact,<sup>105</sup> and a fourth for conspiracy.<sup>106</sup>

### Blackmail

It is provided that "[w]hoever shall, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined . . . or imprisoned . . . or both."<sup>107</sup> Clearly, a misprision committed for money is also blackmail under this section. The possible confusion resulting from the overlapping of these two offenses has resulted in the reversal of at least one conviction.<sup>108</sup>

### Conspiracy

The federal conspiracy statute provides that, "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . or both."<sup>109</sup> When a court finds that such a conspiracy embraces the concealment of the fruits of the crime or of the identity of the conspirators (and what criminal conspiracy worthy of its salt would not include such objectives?), then the conspirators become misprisoners when any one of them commits any act of concealment;<sup>110</sup> and a misprisoner becomes thereby a member of the conspiracy.<sup>111</sup>

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harboring one known to be sought by the Federal Bureau of Investigation for bank robbery was held to be misprision (*a fortiori*, misprision should apply to one wanted *under warrant* or other process for a felony); *United States v. Thornton*, 178 F. Supp. 42 (E.D.N.Y. 1959).

104. *Gore v. United States*, 357 U.S. 386 (1958); *see United States v. Thornton*, 178 F. Supp. 42 (E.D.N.Y. 1959).

105. 18 U.S.C. §3 (1970).

106. *See Skelly v. United States*, 76 F.2d 483 (10th Cir.), *cert. denied*, 295 U.S. 757 (1935).

107. 18 U.S.C. §873 (1970).

108. *Bratton v. United States*, 73 F.2d 795 (10th Cir. 1934). The indictment did not specify whether the accused was charged with blackmail or misprision. Conviction was reversed on the ground that the Government failed to allege or prove an act of concealment and was not entitled to an affirmance on the theory that the accused had committed another crime (blackmail) than that for which convicted.

109. 18 U.S.C. §371 (1970).

110. The act of the conspirator in furtherance of the conspiracy is attributable to the other members of the conspiracy as if each had himself committed the act. *Pinkerton v. United States*, 328 U.S. 640 (1946).

111. *See Skelly v. United States*, 76 F.2d 483 (10th Cir.), *cert. denied*, 295 U.S. 757 (1935). A



### *Obstruction of Justice*

Given the elements of misprision as hereinabove reviewed, it may readily be seen that the offense when committed by threatening or bribing felony witnesses is also an obstruction of justice under various statutory provisions,<sup>112</sup> all of which prescribe punishment for anyone who attempts to influence witnesses or prevent the communication of information to criminal investigators.

It has been held that there is no obstruction of justice as defined by the foregoing statutes until, at the earliest, a criminal complaint has been filed.<sup>113</sup> The point has been contested.<sup>114</sup> Nevertheless, even if so held, the conclusion would remain that while every obstruction of justice is not a misprision, any misprision consisting of the suppression of evidence as defined above, occurring after an official proceeding had commenced, would also be a violation of one of the foregoing sections.

conspiracy to kidnap and to dispose of the ransom in such a way that it could not be traced was executed, the present defendants having knowingly received part of the ransom and exchanged it for a bank cashier's check. The court held that they were accessories after the fact and therefore part of the conspiracy. Their act of knowingly receiving and trying to conceal the ransom would also be a misprision. *See pp. 59-61 supra.*

112. Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. §1503 (1970).

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or . . .

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

*Id.* §1505.

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator . . .

Shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

*Id.* §1510.

113. *Pettibone v. United States*, 148 U.S. 197 (1893).

114. *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942).

## III. DEFENSES

The obvious defenses potentially available to one charged with misprision of a federal felony are (1) the principal's offense was not a felony,<sup>115</sup> (2) the defendant did not know that the principal's offense was a felony,<sup>116</sup> (3) the defendant did not conceal anything relevant to the felony,<sup>117</sup> (4) the defendant either reported the offense or had a constitutional right to refrain from doing so,<sup>118</sup> and (5) the defendant was prevented from reporting the offense by reasonable fear of immediate harm if he tried to do so.<sup>119</sup>

Other defenses which are less certainly available include the following.

*Fear of Libel Suit*

Fear of prosecution for libel or slander should be no excuse for a failure to report by one who had the requisite knowledge,<sup>120</sup> because such basis for the report and the statutory duty to report<sup>121</sup> would eliminate the element of malice required for a successful libel prosecution.<sup>122</sup>

On the other hand, the fear of prosecution or a lawsuit for libel or slander could be very real in the mind of one unsure of the accuracy of his information.<sup>123</sup> The knowledge that Ormsby's libel conviction was based upon a finding that he in fact acted maliciously would be small comfort to one impaled on the dilemma of possible prosecution for misprision if he did not report and for libel if he did. The best legal advice available could do no more than speculate whether a judge or jury in the latter case would agree that the defendant had enough information to be acting in good faith.

The dilemma is probably not capable of resolution with perfect justice to the individual and to society. If one had actual knowledge to a certainty that a felony had been committed, then the truth of his

115. See pp. 54-56 *supra*.

116. See p. 57 *supra*.

117. See pp. 59-61 *supra*.

118. See p. 65 *supra*.

119. See p. 63 *supra*.

120. See pp. 56-58 *supra*.

121. See note 13 *supra*.

122. In *Ormsby v. United States*, 273 F. 977, 983 (6th Cir. 1921), the court upheld an indictment for libel over the defendant's contention that it was void as alleging the performance of a statutory duty (to report a felony), on the ground that the indictment alleged that "the libelous words charged were not only false . . . but were uttered with the unlawful and malicious intention to vilify, defame, scandalize, and disgrace the subject of the publication."

123. The fear of prosecution—regardless of the probability of acquittal—is a judicially recognized basis for the Constitutional right to refrain from giving potentially self-incriminating information to the government. *Emspak v. United States*, 349 U.S. 190 (1955); *United States v. King*, 402 F.2d 694 (9th Cir. 1968). The same principle would seem to apply to a misprisoner, whose defense was fear of prosecution for libel or slander.

report should be a defense to libel; but it would be no guarantee that the principal would not be acquitted and sue him. If his information were no more than uncorroborated hearsay, he would have no duty to report it and fear of a libel suit should be a defense to prosecution for misprision; but would be no guarantee that he would not be charged with misprision.

The ground between these two extremes, therefore, can but support different degrees of potential liability, calling for the exercise of an attorney's professional judgment as to the relatively safer alternative. No better solution than that is apparent, so long as the report of felonious misconduct and the failure to report same are both subject to punitive consequences.

### *Interspousal Privilege*

Rule 26 of the Federal Rules of Criminal Procedure provides, in material part, that "[t]he admissibility of evidence and the competency and privileges of witnesses shall be governed . . . by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The Supreme Court of the United States long ago accepted, "in the light of reason and experience," the modified common law rule that, "the wife is not competent, except in cases of violence upon her person, directly to criminate her husband; or to disclose that which she has learned from him in their confidential intercourse."<sup>124</sup> That ruling has been affirmed more than once.<sup>125</sup>

Since the basis for the rule with respect to competence to testify is "the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails,"<sup>126</sup> it would seem clearly to apply to a wife (and, indeed, a husband as well) who failed to report the spouse's felony, raising a bar to prosecution for misprision. However, in the only case found in which the point was raised, the defendant failed to establish the marital relationship;<sup>127</sup> and in another case in which a wife was prosecuted for misprision of a felony in which her husband was involved, the point was apparently not raised at all.<sup>128</sup>

### *Double Jeopardy*

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." says the Fifth Amendment of the

124. *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 222 (1839).

125. *Hawkins v. United States*, 358 U.S. 74 (1958); *Wolfe v. United States*, 291 U.S. 7 (1934).

126. *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

127. *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966).

128. *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969).

United States Constitution. The Supreme Court of the United States has announced that, "[o]ur minds rebel against permitting the same sovereignty to punish an accused twice for the same offense."<sup>129</sup> Yet the overlapping identity of the elements of misprision and of other federal offenses<sup>130</sup> permits multiple prosecutions for what is in fact a single act by a single defendant with a single purpose and consequence.

For example, a knowing concealment of evidence or fruits of a felony would necessarily assist the felon to avoid apprehension, trial or punishment. If the person concealing the evidence also failed to report the felony he would be simultaneously in violation of the misprision statute<sup>131</sup> and of the section providing punishment for an accessory after the fact.<sup>132</sup> Other examples are set out hereinabove.<sup>133</sup>

It seems to be settled that consecutive sentences may be imposed for any combination of misprision and the other offenses compared herein, even if the defendant perpetrated but a single act.<sup>134</sup> It is submitted that those decisions should be over-ruled and that, regardless of the validity of the constitutional argument, Congress should be "unable to believe such a second [and third and fourth] punishment for one crime is either fair or consistent with the Fifth Amendment's prohibition against double jeopardy,"<sup>135</sup> and should therefore amend the misprision statute to prevent this result.

### *Violation of Due Process*

"No person shall . . . be deprived of life, liberty, or property, without due process of law," says the Fifth Amendment of the United States Constitution. Volumes have been written on the meaning of "due process of law" and a reevaluation thereof is beyond the scope of this article, so it is hoped that a consensus can be assembled around the proposition that due process includes the concept of fundamental fairness in the process of trying out the guilt or innocence of one accused of a crime.

A succinct statement of what this means in terms of an indictment is found in *Evans v. United States*:<sup>136</sup>

Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be

129. *Louisiana ex rel Francis v. Resweber*, 329 U.S. 452 (1947).

130. See pp. 65-68 *supra*.

131. 18 U.S.C. § 4 (1970).

132. *Id.* § 3.

133. See pp. 66-68 *supra*.

134. *Gore v. United States*, 357 U.S. 386 (1958), where three Justices dissented. The decision is criticized in Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 303-04 (1965). See also *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970).

135. *Ashcraft v. United States*, 361 U.S. 925 (1959) (dissent to denial of certiorari).

136. 153 U.S. 584, 587 (1894).

charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates.

In view of the overlapping of the elements of misprision with those of similar crimes,<sup>137</sup> to the extent that serious double jeopardy questions are raised,<sup>138</sup> it is difficult to see how most misprision indictments escape constitutional challenge on this ground. But only one case has been found in which the point was raised (and in that it was successful).<sup>139</sup>

It can only be concluded that the rarity of constitutional attack on misprision indictments is due in part to the rarity of misprision prosecutions and in part to the failure of defense counsel to see the innate ambiguity of a misprision indictment, when compared with the terms in which related offenses<sup>140</sup> are necessarily charged.

#### IV. CONCLUSION

Implicit (and sometimes explicit) in the foregoing discussion of the federal crime of misprision are the following criticisms of it:

(1) the federal misprision statute is either selectively or capriciously enforced and then, only in a few federal districts, thus violating our constitutional concept that all are equal under the law;<sup>141</sup>

(2) the limitation of the offense to concealment of felonies seriously impairs its effectiveness in turning up serious crimes and creates a serious danger of violating the constitutional concept of due process;

(3) the ambiguity of the phrase in the misprision statute, "having knowledge of the actual commission of a felony," creates problems of statutory interpretation which unduly hamper effective enforcement and open technical loopholes which competent defense counsel are ever alert to push their clients through;

(4) the failure of the misprision statute clearly to include attempted concealment of a federal felony as a punishable offense leaves an escape route potentially available to every apprehended misprisoner;

137. See pp. 65-68 *supra*.

138. See pp. 70-71 *supra*.

139. *Bratton v. United States*, 73 F.2d 795 (10th Cir. 1934). Defendant blackmailed a felon to conceal and not report the felony. The indictment alleged those facts. His conviction of misprision was reversed for the ambiguity in the indictment as to whether it charged misprision or blackmail. The court said:

If the indictment is under [the misprision statute], the averment of a consideration is surplusage.... If the indictment alleges two distinct offenses, it is duplicitous.... If the indictment leaves the defendant in fair doubt as to the offense charged, it fails to meet the test that an indictment should "leave no doubt in the minds of the accused and the court of the exact offense intended to be charged."

73 F.2d at 797.

140. See pp. 65-68 *supra*.

141. See *Berra v. United States*, 351 U.S. 131, 138-40 (1956) (Black, J. dissenting); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973); *Hutcherson v. United States*, 345 F.2d 964, 972 (D.C. Cir. 1965) (Bazelon, J. dissenting).

(5) exactly what is an act of concealment, within the meaning of misprision, has yet to be defined; that provided herein being both unofficial and highly speculative, as well as including acts which are more properly charged as offenses other than misprision;

(6) what one may do to avoid punishment for failure to make known a felony is not clear, nor is whether an ineffective attempt will bar conviction; whether there is strict liability for failure to make known has not been decided and, if strict liability is not imposed, what circumstances would excuse the failure to make known are presently uncertain;

(7) although the statute seems clearly to require both an act of concealment and an omission to report as prerequisite to guilt, there is authority to the contrary;<sup>1 4 2</sup> and both interpretations create substantial problems, respectively, of enforcement and of due process;

(8) the misprision statute as so far interpreted encourages multiple prosecutions of a single defendant for a single act of misprision when that act is also a related federal crime and thereby, arguably, violates the constitutional protection against double jeopardy.

In the face of the foregoing problems of interpretation, enforcement and constitutional validity of the federal misprision statute, it is submitted that cosmetic surgery would be inadequate and that excisement from the criminal code is indicated. At the least, there should be a reevaluation of this ancient crime to determine whether it still serves its historic purpose of encouraging citizen participation in law enforcement.

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142. *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970).