THE PAST, PRESENT, AND FUTURE OF 18 U.S.C. § 4: AN EXPLORATION OF THE FEDERAL MISPRISION OF FELONY STATUTE

I. INTRODUCTION

Today, the law generally places no affirmative duty on citizens to report criminal activity. However, this has not always been the case. Historically, English citizens were expected to fully and actively participate in law enforcement.[1] As the policing function became more of a state responsibility, the expected level of private citizen participation correspondingly decreased.[2] Despite the diminished expectation for citizen involvement, the onus on citizens to act in response to criminality still exists in some limited circumstances. The federal misprision of felony statute[3] is one remnant of this responsibility.

This Comment examines the historical context surrounding the offense of misprision of felony. It also addresses issues surrounding the modern day version of the statute, including its interaction with the U.S. Constitution. Finally, this Comment addresses potential trends and suggestions for the future of the federal misprision of felony statute.

II. THE HISTORICAL CONTEXT OF MISPRISION OF FELONY

Before the advent of modern police forces, the weight of policing communities was borne by the individual citizen.[4] English citizens were under "a duty to raise the 'hue and cry' and report felonies to the authorities."[5] A citizen could violate his policing duty in one of four ways. First, the citizen breached his duty if he failed to raise the hue and cry when a felony had been committed or when a deadly wound had been inflicted in the citizen's presence.[6] Second, he would be in breach if he failed to raise the call when he discovered a corpse,[7] even if the person had apparently died from natural

1. *See* Carl Wilson Mullis III, *Misprision of Felony: A Reappraisal*, 23 EMORY L.J. 1095, 1114 (1974).
2. *Id.*
3. 18 U.S.C. § 4 (2000).
4. *See* Mullis, *supra* note 1, at 1114.
5. *See* Branzburg v. Hayes, 408 U.S. 665, 696 (1972).
6. *See* P.R. Glazebrook, *Misprision of Felony: Shadow or Phantom?*, 8 AM. J. LEGAL HIST. 189, 199 (1964).
7. *Id.*

causes.[8] Third, the citizen failed to perform his duty if he refused to respond to a hue and cry that others had raised.[9] Finally, the citizen violated his duty if he was "in a position to arrest the offender" but nevertheless failed to do so.[10] Thus, there was not only a duty to report criminal or suspicious activity but also a duty to arrest. It is important to note that, even then, there were exceptions to these duties. For example, the hue and cry duty was limited to men between the ages of fifteen and sixty years old.[11]

The offense of failure to report a felony was eventually branded as "misprision of felony" in 1557.[12] However, there were so few prosecutions for misprision of felony after that point that "the continued existence of misprision as a crime in England was eventually questioned by both judges and commentators."[13] It fell into so much disuse that in 1866 it was claimed that the crime had disappeared from England altogether.[14] The commentators were apparently in error, as several prosecutions for misprision of felony did take place in the twentieth century in England.[15]

Under English law, a conviction for misprision of felony required no affirmative act of concealment; a person could be guilty of the offense for a "[m]ere failure or refusal to disclose" the existence of a felony.[16] There were only two requirements for the offense.[17] First, the accused must have known that someone else committed a felony.[18] The accused did not need to actually know the underlying crime was classified as a felony, but he did need to know that a serious offense had been committed (and that offense, in actuality, must have been a felony).[19] Second, the accused must have kept some of his knowledge concealed or secret.[20] Partial disclosure to authorities was insufficient as a defense; "[t]he accused must have reported all material facts known by him to the police or magistrate or anyone else in lawful authority. . . ."[21] Some privileges, however, were a defense.[22] For example, the attorney-client privilege and the physician-patient privilege could both excuse nondisclosure.[23] Likewise, a person could assert the privilege against self-incrimination as a justification for not reporting a crime.[24] However, the privilege would not apply if the accused deliberately offered

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8. *Id.* at 202-03.
9. *Id.* at 199.
10. *Id.*
11. *Id.*
12. Mullis, *supra* note 1, at 1095.
13. *Id.* at 1096.
14. *Id.*
15. *Id.* at 1096 n.13.
16. *Id.* at 1098.
17. *Id.* at 1099.
18. *Id.*
19. *Id.* at 1099 n.22.
20. *Id.* at 1099.
21. *Id.* at 1099 n.23.
22. *Id.* at 1099-1100.
23. *Id.* at 1099.
24. *Id.* at 1100.

misinformation because lying was considered an affirmative act of concealment.[25]

III. 18 U.S.C. § 4

Despite questions about the continued existence of misprision of felony in England, there is no refuting its existence in the United States. Since 1790, the United States has recognized some form of misprision of felony as an offense.[26] The original misprision statute still exists, providing in its current form that:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[27]

However, unlike its English counterpart, the phrasing "conceals and does not as soon as possible make known" has been uniformly construed to require both active concealment and a failure to disclose.[28] Thus, the elements of American misprision of felony are that: "(1) the principal committed and completed the felony alleged; (2) the defendant had knowledge of the fact; (3) the defendant failed to notify the authorities; and (4) the defendant took affirmative steps to conceal the crime of the principal."[29] It is immaterial whether the government actually knew of the crime or the perpetrator at the time of the concealment.[30]

The majority of cases involving the misprision of felony statute have dealt with answering two questions. The first is determining what constitutes active concealment. The second is how the statute interacts with the Fifth Amendment privilege against self-incrimination. This Comment examines both of these issues and others.

A. What Constitutes Active Concealment?

In order for a conviction to be sustained, there must be a concealment—not merely an omission or failure to report criminal activity.[31] Concealment under the statute comes in two varieties: physical acts of concealment and verbal acts of concealment. Of these two, physical acts are almost uniformly

25. *Id.*
26. *Id.* at 1101.
27. 18 U.S.C. § 4 (2000).
28. *See* Branzburg v. Hayes, 408 U.S. 665, 696-97 n.36 (1972).
29. United States v. Goldberg, 862 F.2d 101, 104 (6th Cir. 1988).
30. Lancey v. United States, 356 F.2d 407, 409 (9th Cir. 1966).
31. United States v. Johnson, 546 F.2d 1225, 1227 (5th Cir. 1977).

held to be sufficient to constitute an affirmative act. In *United States v. Gravitt*,[32] the underlying offense was a bank robbery. The defendant "took his car, with his wife, his baby and a boat as camouflage, and two of the three robbers to the place where the duffel bag with clothing, guns and money had been stashed."[33] After retrieving the bag, he allowed the robbers to divide the proceeds in his apartment.[34] The court found both the conveyance of the criminals and the use of the defendant's apartment to be sufficient affirmative acts of concealment justifying the defendant's conviction because they both tended to shield the crime from law enforcement's view.[35] Other courts that have addressed physical acts have held similarly.[36]

Verbal concealment is harder to prove. Mere silence is insufficient to support a conviction for misprision.[37] At the other extreme, knowingly providing the police with completely false information will constitute concealment.[38] In *United States v. Hodges*,[39] the underlying offense was a kidnapping in which the defendant misrepresented to FBI agents that he had never seen the kidnapping victim. The court held that lying to authorities about a crime is an act sufficient to constitute concealment.[40] In contrast, making truthful but incomplete statements may not amount to concealment.[41] The Ninth Circuit's rationale for this is that a partial, truthful disclosure does "not result in any greater concealment of the crime than would" result if the defendant said nothing at all.[42]

Thus, the modern misprision of felony cases differ from their historical counterparts. The historical versions started with the assumption that an ordinary citizen had a duty to control crime, and they questioned whether the citizen failed in that duty. The modern cases assume the duty rests with law enforcement, and they question whether the citizen interfered with that duty.

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32. 590 F.2d 123 (5th Cir. 1979).
33. *Id.* at 126.
34. *Id.*
35. *Id.*
36. *See* United States v. Davila, 698 F.2d 715, 718 (5th Cir. 1983) (holding that payoff money for false testimony until the testimony was given counts as concealment); United States v. Daddano, 432 F.2d 1119, 1124 (7th Cir. 1970) (holding that forcing co-conspirators to take a lie detector test to discourage them from contacting authorities constitutes an affirmative act of concealment); Lancey v. United States, 356 F.2d 407, 410 (9th Cir. 1966) ("A harboring of the criminal, with full knowledge, may be the positive act required to constitute the required concealment."). *But see* United States v. Goldberg, 862 F.2d 101, 105 (6th Cir. 1988) (holding that a doctor who continued writing prescriptions that he knew the pharmacist was subsequently altering was not acting to conceal the crime).
37. *See* United States v. Johnson, 546 F.2d 1225, 1227 (5th Cir. 1977).
38. United States v. Hodges, 566 F.2d 674, 675 (9th Cir. 1977); United States v. Pittman, 527 F.2d 444, 444-45 (4th Cir. 1975).
39. *Hodges*, 566 F.2d at 675.
40. *Id.*
41. United States v. Ciambrone, 750 F.2d 1416, 1418 (9th Cir. 1984).
42. *Id.* at 1418. The court distinguished its decision in *Hodges* by saying that a person "lying to the authorities can help those who committed a crime by throwing the authorities off the track[,]" while a person revealing only a portion of their knowledge does not. The court did not address the fact that a defendant falsely telling an officer he only represents a limited source of knowledge similarly throws the authorities off the track.

B. Interaction with the Fifth Amendment

Defendants have successfully raised Fifth Amendment challenges to misprision of felony convictions. The Fifth Amendment not only allows defendants to refrain from making statements that would directly support their conviction, but it "likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the individual for a crime, provided such individual has reasonable cause to fear he might thereby be convicted of that crime."[43] Thus, misprision would normally be unavailable to prosecute people for concealing their own crimes (although the privilege against self-incrimination can be waived, which preserves the ability for prosecutors to use misprision as a lesser sanction for the purpose of plea agreements).[44]

Tensions exist in cases where the person with knowledge of an underlying crime might also be implicated in that crime. The Seventh Circuit explored the tension between the Fifth Amendment and the statute's requirement of affirmative concealment. In *United States v. Daddano*,[45] the court originally seemed to say that the misprision statute's requirement of an affirmative act of concealment cured the possible Fifth Amendment conflict in such cases.[46] The court later retreated from this position in *United States v. Kuh*:[47]

> Under the circumstances of this case, we cannot accept the argument that, although a person who fails to disclose a felony in which he might be implicated is protected from punishment by the Fifth Amendment, his failure to make known the felony, when coupled with an act of concealment, makes him susceptible to prosecution, conviction, and punishment under 18 U.S.C. § 4.[48]

The court instead factually distinguished *Daddano* from *Kuh*, limiting *Daddano* to its facts.[49] In *Daddano*, the underlying crime was a bank robbery.[50] None of the defendants convicted for misprision faced any criminal exposure for the actual planning or commission of that robbery.[51] Rather, the three indicted for misprision had merely been involved in the administration of lie detector tests on the robbers after the robbery had already

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43. United States v. King, 402 F.2d 694, 697 (9th Cir. 1968).
44. *See, e.g.*, United States v. Davila, 698 F.2d 715, 719 (5th Cir. 1983).
45. 432 F.2d 1119 (7th Cir. 1970).
46. *Id.* at 1125 ("[T]he statute does not purport to punish one solely for failure to report facts which he has [a] reasonable fear might lead to his conviction . . . ."); *see also* Mullis, *supra* note 1, at 1106 ("The Seventh Circuit was in effect saying that misprision is actually a crime of concealment, and it is the act of concealment by itself which is punishable.").
47. 541 F.2d 672 (7th Cir. 1976).
48. *Id.* at 677.
49. *Id.* at 676-77.
50. United States v. Daddano, 432 F.2d 1119, 1121 (7th Cir. 1970).
51. *Id.* at 1123.

occurred.[52] The lie detector tests were given at one of the co-conspirator's request to discourage the other robbers from revealing to the police any information about the crime.[53] Thus, had the misprision defendants never participated in the testing, they would have faced no criminal liability; their participation in the concealment of the robbery was the sole source of their criminal culpability.

On the other hand, in *Kuh*, the misprision defendants actually possessed the proceeds stolen by other bank robbers.[54] They therefore had knowledge of the underlying bank robbery (which they did not report), and they affirmatively concealed the crime by clandestinely possessing the money. However, a second statute[55] prohibited such possession and concealment of stolen bank funds.[56] Thus, had the defendants revealed their knowledge of the underlying crime, they might have escaped the dangers of a misprision conviction, but they would have possibly faced charges under § 2113(c). Despite the government's claim that the defendants could not be prosecuted under § 2113(c), the court still held that the defendants' fear of such a conviction was reasonable.[57] Accordingly, even though there was a failure to report coupled with an affirmative act of concealment, it was not enough to overcome the Fifth Amendment hurdle because the act of reporting would have exposed the defendants to new criminal liability.

The interaction between 18 U.S.C. § 4 and the Fifth Amendment creates an anomalous situation. One who bears almost no relation to the underlying offense but makes even a slight affirmative act to conceal it can readily be punished. In contrast, the more involved a criminal defendant is with the actual culprits and the planning of a crime, the less likely he is to be sanctioned under the misprision of felony statute because the defendant can tenably claim fear of prosecution for another offense, such as aiding and abetting or serving as an accessory after the fact.

C. Other Issues Relating to Misprision of Felony

The privilege against self-incrimination is the most common attack based on privilege. Besides that privilege, however, other attacks have been made against prosecutions for misprision.

Attacks against simultaneous convictions for both misprision and other similar offenses have been raised as violations of double jeopardy.[58] Usually, these attacks have been unsuccessful. The courts apply the test of whether each conviction "requires proof of a fact which the others do not."[59]

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52. *Id.* at 1123-24.
53. *Id.* at 1124-25.
54. United States v. Kuh, 541 F.2d 672, 675-76 (7th Cir. 1976).
55. 18 U.S.C. § 2113(c) (2000).
56. *Kuh*, 541 F.2d at 676.
57. *Id.* at 677.
58. United States v. Gebbie, 294 F.3d 540, 544 (3d Cir. 2002).
59. United States v. Dye, 508 F.2d 1226, 1237 (6th Cir. 1974).

Applying this test, courts have held that dual convictions for misprision of felony and accessory after the fact are not duplicative[60] and, similarly, that convictions for misprision and conspiracy to commit mail fraud were not violations of the prohibition against double jeopardy.[61]

Further, the exertion of the marital privilege may not invoke liability under the misprision statute. In *United States v. Rakes*,[62] the court looked at a situation where the defendant had been the victim of an extortion scheme.[63] The defendant's wife testified, and the defendant moved to suppress the evidence as a confidential marital communication.[64] The government tried to assert that, as a victim of an extortion scheme who was trying to conceal the fact of the extortion, the defendant was in fact a participant in the crime.[65] Thus, in the government's view, the marital privilege was forfeited under the crime-fraud exception.[66] The court rejected this notion, stating that "the fragments of evidence cited do not even approach misprision of felony . . . . The government's theory would make a criminal of anyone who, as the victim of a crime or faced with a criminal threat, resisted a spousal suggestion that the police be called."[67] Thus, although the defendant had information regarding a felony and he purposefully attempted to conceal the felony by trying to prevent his wife from talking to the authorities, the court did not consider the defendant's actions criminal.

Misprision of felony can also play a role in deportation proceedings. In *Castaneda de Esper v. INS*,[68] the government unsuccessfully tried to use the misprision statute as the basis for a deportation.[69] The underlying offense was a conspiracy to possess narcotics, which would have authorized deportation.[70] However, the Sixth Circuit rejected the notion that the misprision of a narcotics offense was in itself a narcotics crime:[71] "Historically, the crime of misprision of felony has long been a criminal offense separate and distinct from the particular felony concealed."[72] Thus, because misprision was not a narcotics offense, the defendant was not deportable on the basis of a misprision conviction.[73]

In contrast, misprision of felony may still lead to deportation on other grounds. Immigration laws allow the government to deport an alien if he is

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60. *Id.*
61. *Gebbie*, 294 F.3d at 544; *see also* United States v. Salinas, 956 F.2d 80, 82-83 (5th Cir. 1992) (allowing false declarations to a grand jury regarding another's crimes to serve as the predicate for both perjury and misprision convictions).
62. 136 F.3d 1 (1st Cir. 1998).
63. *Id.* at 2.
64. *Id.* at 2-3.
65. *Id.* at 4.
66. *Id.*
67. *Id.* at 5.
68. 557 F.2d 79 (6th Cir. 1977).
69. *Id.* at 84.
70. *Id.* at 82.
71. *Id.* at 83-84.
72. *Id.* at 83.
73. *Id.* at 84.

involved in a crime of moral turpitude.[74] In *Itani v. Ashcroft*,[75] the Eleventh Circuit examined misprision of felony and concluded that because of the longstanding history of the offense and because misprision requires an affirmative act of deception, misprision of felony may be considered a crime involving moral turpitude.[76] Thus, even though deportation is foreclosed for misprisions of felonies merely because they may be tangentially related to narcotics offenses, deportation on the grounds of moral turpitude is now a possible consequence for all aliens convicted of misprision of felony.

IV. TRENDS AND SUGGESTIONS

In *Roberts v. United States*,[77] the Supreme Court stated that "gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship."[78] Even the President is not immune from fear of misprision prosecution.[79] However, the application of the misprision of felony statute has now extended beyond mere citizens and into the corporate realm. In 1996, misprision of felony charges were brought against a corporation for the first time when Daiwa Bank, Ltd. was indicted for the offense.[80] Daiwa executives learned that one of the company's traders "had lost over $1.1 billion through unauthorized trading in United States government securities" and that the trader had sold securities belonging to Daiwa's customers to cover the losses.[81] Once Daiwa discovered the crime, rather than reporting it, Daiwa instead:

> committed numerous crimes in its effort to hide these losses. In particular, DAIWA made extensive false entries in its books and records, prepared and sent false account statements, filed a false report with the Federal Reserve, explored plans to hide the loss permanently by moving it off-shore, secretly replaced the missing $377 million of customer securities, and engaged in a fictitious transfer of $600 million worth of nonexistent securities.[82]

Daiwa pled guilty to the misprision charge and fifteen other federal felonies and paid a $340 million dollar fine, the largest ever paid in a criminal case at that time.[83] Although the Daiwa case never made it to trial, it

74. 8 U.S.C. § 1227(a)(2)(A)(i) (2001).
75. 298 F.3d 1213 (11th Cir. 2002).
76. *Id.* at 1216.
77. 445 U.S. 552 (1980).
78. *Id.* at 558.
79. H.R. REP. NO. 105-795, at 16-17 (1998) (stating that because former President Clinton took affirmative steps to conceal felonies he was aware of, he was possibly guilty of misprision of felony).
80. Annie Geraghty, *Corporate Criminal Liability*, 39 AM. CRIM. L. REV. 327, 335 n.53 (2002).
81. Press Release, U.S. Attorney, Southern District of New York, Announcement of Filing of 24-Count Indictment Against The Daiwa Bank, Ltd. (Nov. 2, 1995) (WL 1248 PLI/Corp 197, 237-38).
82. Press Release, U.S. Attorney, Southern District of New York, Announcement of Daiwa Guilty Plea and Sentence (Feb. 28, 1996) (WL 1248 PLI/Corp 197, 245).
83. *Id.* at 243.

seems clear that it paves the way for other misprision prosecutions in the corporate sphere. The real utility of the misprision statute in this situation stems not from its ability to punish the principals (because the Fifth Amendment hurdle would be substantial and the possible punishments for misprision would be relatively minor compared to other prosecutorial alternatives), but rather from the ability to coerce low-level employees within a corporation into cooperating. Employees who could not ordinarily be convinced to testify may be enticed to do so in order to avoid a misprision charge (or in order to receive a relatively slight misprision conviction rather than a more severe one for accessory after the fact or obstruction of justice).

As the statute stands now, it represents a useful but underutilized prosecutorial tool. Several alterations could affect its utility. The first alternative is to return misprision to its common law roots and eliminate the requirement of active concealment altogether. Such an approach has been taken in response to specific areas of the criminal law.[84] The same approach could be applied to criminal law in general. However, such an alteration would likely be unwise for two reasons. First, there would be a high social cost to such an alteration. Justice Marshall, in his dissent in *Roberts*,[85] noted that the "countervailing social values of loyalty and personal privacy have prevented us from imposing" a general duty on citizens to undertake the "business of crime detection."[86] Second, the cost for detecting and prosecuting a general duty to report could be prohibitive to the already overburdened criminal justice system. Even the states that have duty-to-report laws usually limit the duty to specific categories of offenses.[87]

A better alternative would be to remove the requirement of an affirmative act of concealment when dealing with people in positions of trust, such as government officials. In these situations, requiring an affirmative act makes little sense because such officers are usually already under an affirmative duty to report illegal activities.[88] This change would be consistent with the common law tradition of misprision because the term misprision itself was thought to have been "especially appropriate to the misconduct of public officers."[89] Further, such an alteration may be advisable because "[p]ublic officers *voluntarily seek* this special position of trust, and expecting them to report crimes does not place an onerous burden upon them."[90] Thus, it may be appropriate to not only maintain the current misprision of felony statute that requires affirmative acts of concealment as well as a failure to report, but also to develop a second version that punishes a public

84. *See* Alison M. Arcuri, *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 483-86 (2000) (detailing various state and federal duties to report laws involving certain crimes, such as child abuse, murder, manslaughter, armed robbery, or sexual crimes).
85. Roberts v. United States, 445 U.S. 552, 570 (1980) (Marshall, J., dissenting).
86. *Id.*
87. *See* Arcuri, *supra* note 84, at 483.
88. Mullis, *supra* note 1, at 1113.
89. Glazebrook, *supra* note 6, at 194.
90. Mullis, *supra* note 1, at 1114.

figure's mere failure to report. This same approach could also be used in the corporate realm, where disclosure is an expected and (increasingly) recommended business practice.

V. CONCLUSION

The common law offense of misprision of felony no longer exists in our federal system, due in large part to a reluctance of the criminal law to require affirmative acts from private citizens. As law enforcement duties have been removed from the public's shoulders and placed on those in professional law enforcement, the offense of misprision of felony has shifted in its purpose. It no longer serves to enforce a general duty on citizens. Instead, it serves to prevent citizens from hindering those now charged with the duty. The current misprision of felony statute, through its history, has faced considerable tensions from both the realm of privilege and under the determination of what constitutes a sufficient affirmative act of concealment. However, in recent years, misprision has enjoyed a resurgence, and it seems poised to enjoy renewed vitality from its application in corporate criminal prosecutions.

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