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SILENCE AND PERJURY BEFORE POLICE OFFICERS

An Examination of the Criminal Law Risks

Dale W. Broeder*

I. INTRODUCTION

Briefly stated, the purpose here is to review and to synthesize those areas of the law bearing on the nature and extent of the citizen's modern-day responsibilities to inform on the criminal activities of others and to discuss the criminal law risks involved in lying to police officers during the course of their investigations of crime. Policy considerations, of course, are also advanced. These subjects, it is realized, constitute only a portion, and that a comparatively small one, of the broad area of the extent of the citizen's duty to cooperate with police officers, but, it is hoped, a sufficiently important one to merit separate treatment. Certainly there is need for such treatment if the extent of law student misunderstanding of these subjects is any criterion. The difficulty, however, has not primarily been with the students but rather with the confused, intertwining and to a considerable extent overlapping way the law has evolved in these areas. Common law misprision of felony, modern misprision of felony statutes, duty to assist and to obey police officers statutes, two fundamentally different varieties of accessory after the fact statutes and obstruction of justice and lying to police statutes must all be considered together with accompanying caselaw and questions of policy and constitutionality in order to get a complete picture. Previous writings in these areas largely tend to concentrate only on one crime area, ignoring or virtually ignoring the others and a particular effort has been made here to avert at least this one difficulty.

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Organizationally, the discussion falls into two major parts, the first dealing with the extent of one's duty to inform on the criminal activities of others, the second with the risks involved in attempting to lie to police officers or to mislead them.

II. DUTY TO INFORM

A. CONVENTIONAL IDEAS

Under what circumstances, then, if any, does a citizen expose himself to the risk of criminal liability for failing to disclose the criminal activities of others? The conventional answer—to the extent that the texts bother any more even to discuss the question—is that there no longer is any risk and that failure to inform on the criminal behavior of others is not and has not for generations been punishable.¹ No exceptions are considered, no qualifications drawn. While it is almost invariably stated that the answer was once different as to treason and felonies, modern American authority is said unswervingly to point in the other direction and conclusively to settle the question.² The Model Penal Code, for example, takes this approach and brushes the problem aside in less than a page.³

The conventional answer, however, is misleading. While the part about misdemeanors is true—the law has never, except perhaps in the case of law enforcement officers,⁴ imposed any affirmative duty to report misdemeanors, regardless of the circumstances—the matter as to treason⁵ and felonies is not nearly so clear cut. As

¹ See, e.g., MAY, *LAW OF CRIMES* § 12 (4th ed. 1938); McCLAIN, *CRIMINAL LAW* § 938 (1897); 1 WHARTON, *CRIMINAL LAW* § 289 (12th ed. 1932); 9 HALSBURY, *THE LAWS OF ENGLAND* § 580, n.1 (Hailsham ed. 1933); Notes, 54 *HARV. L. REV.* 506 (1941); 20 *NEB. L. REV.* 66 (1941).

² See authorities cited in note 1 *supra*.

³ MODEL PENAL CODE, Tentative Draft No. 9, at 209 (1959).

⁴ Cf. *People v. Herlihy*, 35 Misc. 711, 72 N.Y. Supp. 389 (1901); *Donnelley v. U.S.*, 276 U.S. 505 (1928).

⁵ The question of one's criminal law obligation affirmatively to come forward and to disclose his knowledge of another's treasonable acts to the authorities is not herein discussed as there is no recorded American case dealing with the subject. It should be noted, however, that the federal government and many states have by statute apparently imposed such a duty in the form of a crime known as misprision of treason. See, e.g., CAL. PEN. CODE § 38: "Misprision of treason is the knowledge and concealment of treason without otherwise assenting to or participating in the crime. It is punishable by imprisonment for a term not exceeding five years." And see CONN. GEN. STAT. § 8344 (1949); ILL. ANN. STAT. c. 38, § 557 (Smith-Hurd 1935); and IND. ANN. STAT. § 10-4402

a matter of fact, nothing about the subject seems ever to have been altogether clear, and modern American authority at least would seem to compel the drawing of various distinctions. Much may depend, for example, on whether we are speaking about a simple failure to disclose felonies to the authorities with no intention on defendant's part of aiding the felon or of profiting from his silence or of impeding a police investigation or on whether such factors are present. Other distinctions may also occasionally be important. There is some reason to believe, for instance, that failing to disclose information concerning another person's felonies when requested to do so by law enforcement officers may be quite different from simply failing to volunteer information, that law enforcement officers are perhaps dealt with differently in this area from other people and that various groups of persons who might otherwise be subject to criminal liability for failing to speak out may be protected because of their businesses or professions or because of the way in which information concerning the felonies comes to their attention.

B. HISTORY

Probably it is best to begin with the history and the English law on the question. Such distinguished common law commentators as Coke,⁶ Hale,⁷ Hawkins,⁸ East⁹ and Blackstone¹⁰ unqualifiedly asserted that a simple failure without any ulterior purpose to disclose another's felony to the authorities was punishable as a common law misdemeanor—known as misprision of felony—and that it was a misdemeanor even to stand by and watch a felony without at least attempting to prevent it and this latter apparently without regard to the bystander's ability effectively to intervene. And such statements, particularly as regards the criminality of failing to disclose felonies to the authorities, have many times been repeated by later English and American commentators so as to give them almost the force and effect of law.¹¹

(1946). A short but helpful textbook discussion will be found in MILLER, *CRIMINAL LAW* 503 (1934).

⁶ 3 COKE, *FIRST INSTITUTE* 139-42 (1836).

⁷ 1 HALE, *PLEAS OF THE CROWN* 439 (1847).

⁸ 2 HAWKINS, *PLEAS OF THE CROWN* 440, c. 29 § 10 (8th ed. 1824).

⁹ 1 EAST, *PLEAS OF THE CROWN* 377 (1803).

¹⁰ 4 BLACKSTONE, *COMMENTARIES* § 121 (Lewis ed. 1897).

¹¹ See, e.g., CLARK & MARSHALL, *CRIMES* 486 (6th ed. 1958): "One who sees another commit any felony, or knows of its commission, and uses no means to apprehend him, or bring him to justice, or to prevent the

The repetition, to be sure, is understandable. The early writers are legitimately entitled to great deference and their statements concerning the English law of misprision, though quite severe, have an independently plausible ring when viewed in the light of political, social and economic conditions of early England and particularly of the two and one-half centuries immediately following the Norman conquest. The pressure of the need to protect the invading Normans against a hostile countryside gave a special impetus to the development of an already partially established system of communal responsibility for crime, which, once firmly established, continued in some form in England until the early 17th century.¹² The Statute of Winchester in 1285,¹³ for example, compelled every private citizen, according to his wealth, to provide himself with armaments and a horse the use of which would be at the disposal of the King's officers for the purpose of putting down crime. It was also, of course, the duty of every able-bodied male to pursue criminals once the "hue and cry" was raised,¹⁴ an obligation, incidentally, which stubbornly persists in modified form today in the criminal codes of most states.¹⁵ Finally, in order to give added incentive to this system of communal responsibility, the practice was developed of fining the members of the vill or hundred in which crime occurred for their failure or inability to produce criminals for trial before the King's justices.¹⁶ Against this historical backdrop, there would be nothing very surprising in the birth of

felony, is guilty of a (common law) misdemeanor named 'misprision of felony.' " And see 1 WHARTON, CRIMINAL LAW 376 (12th ed. 1932); 1 BISHOP, CRIMINAL LAW 514 (9th ed. 1923).

¹² See MORRIS, FRANKPLEDGE SYSTEM 29-30 (1910).

¹³ STATUTE OF WINCHESTER c. 6 (1285).

¹⁴ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 599 (3d ed. 1923).

¹⁵ See, e.g., NEB. REV. STAT. § 28-728 (Reissue 1956): "Whoever, having been called upon by the sheriff or other ministerial officer, in any county in this state, to assist such officer or other officer in apprehending any person charged with or convicted of any offense against any of the laws of this state, or in securing such offender when apprehended . . . neglects or refuses to render such assistance, shall be fined in any sum not exceeding \$50." See also ALA. CODE tit. 14, § 440 (1940); ARIZ. REV. STAT. ANN. § 13-542 (1956); CAL. PEN. CODE § 150; OKLA. STAT. tit. 21, § 537 (1951); WYO. COMP. STAT. ANN. § 9-643 (1945). See generally, Note, *The Private Person's Duty to Assist the Police in Arrest*, 13 WYO. L.J. 72 (1958).

¹⁶ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 598 (3d ed. 1923); *The Policeman in Legal History*, 170 L.T. 355-356 (1930); *Law and Order in 17th Century England*, 95 J.P. 363 (1931); 1 POLLACK AND MAITLAND, HISTORY OF ENGLISH LAW 201 (2d ed. 1911).

a crime such as misprision of felony. Indeed, one would almost expect such a crime to develop.

The difficulty—and we are speaking now only of a simple failure to disclose another's felony where defendant has no ulterior motive and no official request for information has been made, misprision of felony, in other words, in its simplest form—is that none of the early English cases supports the existence of any such crime.¹⁷ So far as the early law is concerned, it appears to live solely in the pages of the famous textbooks and commentaries. The commentaries, furthermore, fail specifically to consider whether the defendant must have some evil motive in keeping quiet or whether an official request for information must be made; they simply assume that proof of such matters is unnecessary. Also noteworthy is their failure to consider what kind and degree of "knowledge" of a felony is necessary for guilt or exactly to whom disclosure of such "knowledge" should be made. Likewise ignored is the whole subject of privileged knowledge or communications, whether a lawyer or a priest gaining knowledge of another's felony in his professional capacities is guilty of misprision for failing to disclose or whether a husband would be guilty for failing voluntarily or even on official request to disclose his wife's felonious misdeeds or those of his minor sons and daughters. Exceptions could, of course, and doubtless would be made for most of such cases but ignoring them avoids a great deal of embarrassment and allows misprision comfortably to live on, at least in the textbooks.

C. MODERN ENGLISH AND COMMONWEALTH AUTHORITIES

But all of this should not be taken to imply that misprision of felony is not at least in some form currently an English crime. Textbooks have influence and a note in Archbold's Criminal Pleading¹⁸ reveals several recent misprision of felony prosecutions in the Central Criminal Court the details of which, however, do not appear. A misprision of felony conviction was also before the Court of Criminal Appeal in *Rex v. Aberg*,¹⁹ in 1948, where defendant was shown simply to have concealed from police her knowledge

¹⁷ The only possible exception is *Anon.*, 7 Mod. 10, 87 Eng. Rep. 1062 (1 Queene Anne), where Chief Justice Holt stated that "[i]t is a matter indictable to bury a man that dies of a violent death before the coroner's inquest sat upon him." This, of course, involves much more than a simple failure to disclose a felony to the authorities.

¹⁸ ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE 1512 (1954).

¹⁹ [1948] 2 K.B. 173, 1 All E.R. 601, 32 Crim. App. R. 144.

that a convict was guilty of escape, a felony. While the Court was not required to pass on the sufficiency of the proof since defendant had in any event to serve a sentence running concurrently with and longer than that imposed on the misprision count, the existence of misprision of felony as an offense *in some form* seems definitely to have been assumed. But not, it appears, in the conventional textbook sense of a simple failure affirmatively to disclose. Lord Goddard, C. J., delivered the following warning:

I desire to say that if in any subsequent case it is thought necessary to put in a count for misprision of felony, it would be desirable that great care should be taken to see what, according to more modern authorities, are the constituents of that offense . . . If this count appears in any subsequent indictments, or if it is made a substantive charge against a prisoner, it may be that this Court will have carefully to consider what are the real constituents of that offense and whether it is necessary to prove, not assume, a concealment for the benefit of the defendant charged.²⁰

The italicized words are, of course, ambiguous. One is not told whether a showing of pecuniary benefit to defendant is meant or whether some more intangible advantage might suffice nor does the judge say definitely that a simple failure to disclose would not now be criminal. The central point, however, is that the opinion evinces a willingness wholly to re-examine the entire area and that, short perhaps of knowing that misprision of felony in some form is currently an English crime, we are still very much at sea. And this, in substance, was the view of a Canadian court concerning English law when required to pass on the existence of misprision of felony as an offense in *Regina v. Semenick*,²¹ in 1955. Appellant was convicted of misprision of felony on proof that he refused on repeated request to reveal to police the name of the person who attempted to murder him and that appellant knew the name of such person. The Crown offered no proof of the motives actuating appellant's behavior and there was no suggestion that appellant stood to benefit economically by his silence. The Court approached the case as one involving only a simple failure to disclose and attached no importance whatever to the question of motive or to the circumstance that appellant had been requested by the police to disclose the name of his assailant. The Court posed two questions for itself: 1) whether a simple failure to disclose another's felony was criminal by English law; and 2) if it was, whether such failure was currently punishable in Canada. The first question was answered affirmatively solely on the basis of English criminal law

²⁰ [1948] 2 K.B. 173 at 176 (emphasis added).

²¹ 15 West. Weekly R. 333 (n.s. 1955).

textbook pronouncements, but the Court spoke with obvious doubts and misgivings and so answered the second question negatively. Misprision of felony did not have that "certainty of existence" at the English common law required for criminal culpability in Canada. The conviction was accordingly upset and appellant discharged. Though the Court did not specifically so state, one is left with the impression that the result would have been no different even had the Crown offered proof of an evil motive or shown that appellant stood to benefit economically from his silence.

One other Commonwealth authority may also prove of interest. Lord Westbury, in *Williams v. Bayley*,²² equated misprision of felony with the well-established offense of compounding a felony, i.e., keeping silent about a felony for a consideration, and was obviously of the opinion that misprision would not be committed except on a showing of defendant's receipt of a pecuniary benefit.²³ Under this view defendant could remain silent if he took no money even though requested to speak out by police and though his sole motive in remaining silent was to enable the felon to make good his escape.

D. UNITED STATES AUTHORITIES

1. *In General*

So much then for history and Commonwealth authority. What of the situation in the United States? The conventional statement, as we have seen,²⁴ is that there is simply no duty to disclose another's felony in the United States regardless of the circumstances and that absolutely no distinctions or qualifications have to be drawn. And, indeed, this seems to be the case in many jurisdictions. In the first place misprision of felony statutes as such are very uncommon in the United States. Congress has enacted one and

²² [1866] 1 H.L. 200, 6 ENG. RUL. CAS. 455.

²³ *Id.* at 220-21, 6 ENG. RUL. CAS. at 475: "If men were permitted to trade upon the knowledge of a crime and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offense would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, 'misprision of felony.' That was a case, when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, farther, converted it into a source of emolument to himself."

²⁴ See text at note 1 *supra*.

labeled it as such²⁵ as have the legislatures of Maine²⁶ and New Jersey²⁷ but that is all. Nor is there the possibility in many states of prosecuting at common law even if it be assumed that misprision of felony is a common law crime. Most states simply do not permit common law criminal prosecutions. Furthermore, at least one which does has held that misprision of felony is not a common law offense. A divided Michigan Court, in *People v. Lefkowitz*,²⁸ upset a conviction under an information charging that defendant "had knowledge" of a robbery and failed "to make a disclosure of said felony to the authorities or to do anything toward the apprehension and bringing to justice the persons guilty of the felony." "The old-time common law offense of misprision of felony," the Court held, was "not adopted by the Constitution because wholly unsuited to American criminal law and procedure as used in the State."²⁹ And while the opinion does not specifically so state, the broad sweep of the language employed leaves the impression that failing to disclose another's felony would not be held criminal under any circumstances.

2. Under Ordinary Accessory After the Fact Statutes

Nor have prosecutions for failing to disclose another's criminality ordinarily been successful under the most common form of accessory after the fact statute. An accessory after the fact at common law³⁰ and by the typical modern accessory statute is one who, "knowing that another has committed a felony . . . conceals, or gives any other aid to such offender, with intent to enable him to avoid or escape from arrest, trial, conviction or punishment."³¹ While such a statute obviously does not reach one who simply fails to disclose another's felony with no ulterior motive, failing to disclose, at least on official request, with intent thereby to aid the

²⁵ 18 U.S.C. § 4 (1958).

²⁶ ME. REV. STAT. ANN. c. 135, § 12 (1954).

²⁷ N.J. REV. STAT. § 2A: 97-2 (1952).

²⁸ 294 Mich. 263, 293 N.W. 642 (1940), noted in 54 HARV. L. REV. 506 (1941), and 8 U. CHI. L. REV. 338 (1941).

²⁹ 294 Mich. 263, 270, 293 N.W. 642, 643 (1940).

³⁰ Consult PERKINS, CRIMINAL LAW 578-580 (1957); 1 BISHOP, CRIMINAL LAW 499-500 (9th ed. 1923) and authorities there cited.

³¹ The quoted language is taken from ALA. CODE tit. 14, § 15 (1940). Identical or substantially identical terminology is employed in the accessory statutes of most states. See, e.g., ALASKA COMP. LAWS ANN. § 65-3-3 (1949); IND. ANN. STAT. § 9-103 (1956); LA. REV. STAT. § 14:25 (1950); ME. REV. STAT. ANN. c. 145, § 3 (1954); S.D. CODE § 13.0203 (1939).

principal felon might conceivably be punishable. But the cases under an accessory statute of *the type now being considered* almost uniformly hold otherwise. The word "aid" or "assists" in such a statute, the courts have held,³² means something more than "merely" failing or refusing to disclose even on official request—harboring or concealing the felon in one's house, for example, providing him with a "get away" car or perhaps, though this is more doubtful, with money to make good his escape³³ or helping him to conceal evidence of his crime, all of course with the requisite criminal intent.

But this is not so everywhere. A Massachusetts case, *Commonwealth v. Wood*,³⁴ leans heavily in the opposite direction. Defendant was convicted under a typical accessory statute of being an accessory to an abortion and the proof showed, *inter alia*, that defendant not only knew of the abortion and the name of the man who performed it and kept silent but that he told the victim's brother to keep his and the abortionist's names from the police and that he lied to the police in stating that he had never seen the victim in the abortionist's house where the abortion was performed. Obviously, the case involves much more than a simple failure to disclose. Active assistance to the felon and lying to the police for the felon's benefit were shown. In affirming the conviction, however, the Court sustained the trial court's refusal to charge the jury on defendant's request that "[i]t is necessary that the defendant actively aided or assisted the principal to escape arrest or punishment" and "that the omission of the defendant voluntarily to give information or to assist the police in the investigation of the principal felony is not sufficient to warrant a conviction of the defendant as accessory after the fact." The requested instruc-

³² See, e.g., *Manry v. State*, 77 Ga. App. 43, 47 S.E.2d 817 (1948); *Farmer v. State*, 56 Okla. Crim. 380, 40 P.2d 693 (1935); *Hightower v. State*, 78 Tex. Crim. 606, 182 S.W. 492 (1916); *Ex parte Overfield*, 39 Nev. 30, 152 Pac. 568 (1915); *Prewett v. State*, 41 Tex. Crim. 262, 53 S.W. 879 (1899); *State v. Doty*, 57 Kan. 835, 48 Pac. 145 (1897) (mother convincing daughter to lie to police in order to protect her husband from incest prosecution not the kind of "aid" contemplated by the statute); *People v. Dunn*, 53 Hun 381, 6 N.Y. Supp. 805 (1899) (dicta that influencing witnesses to testify falsely in order to aid principal not proscribed aid); *People v. Pedro*, 19 Misc. 300, 303, 43 N.Y. Supp. 44, 46 (1897) (same); *Regina v. Chapple* (1840) 173 Eng. Rep. 866, 9 Car. & P. 355 (same); *Rex v. Khadim* (1869) 4 B.L.R.A.C. 7 (India) (passive failure to disclose). See also the authorities cited in note 30 *supra*.

³³ Compare *Nadel v. State*, 27 Ohio App. 339, 161 N.E. 296 (1927), with *United States v. Shapiro*, 113 F.2d 891 (2d Cir. 1940). See generally, Note, 13 ROCKY MT. L. REV. 371 (1941).

³⁴ 302 Mass. 265, 19 N.E.2d 320 (1939).

tions, the Court said, represented "too narrow a statement of the law."

In Massachusetts, therefore, failure to disclose another's felony to the police when requested to do so or even a refusal upon police request to supply information which would assist them in the apprehension or conviction of a felon with intent thereby to aid the felon apparently makes one an accessory, a crime, incidentally, which in that jurisdiction is punishable by seven years' imprisonment.³⁵ The latter point should perhaps be emphasized. *Wood* may proceed sufficiently far to render criminal one's failure on police request to give information helpful in a felony investigation even though defendant has no knowledge of the felony beyond what he may be told by the police, provided, of course, that the felony has been committed and defendant intends to aid the perpetrator. And dicta in the comparatively recent North Carolina case of *State v. Potter*³⁶ under an accessory after the fact statute not expressly defining the crime goes even further in one respect. According to the North Carolina Court, merely keeping quiet concerning one's knowledge of a felony, *even when not asked by the police to speak out*, renders one an accessory provided the concealment of one's knowledge is "for the purpose of giving some advantage to the perpetrator of the crime . . . (and) not on account of fear."³⁷ An accessory in North Carolina, it should be noted, can be sentenced to ten years' imprisonment.³⁸

While the *Wood* and *Potter* cases stand alone so far as accessory statutes of the types now being considered are concerned, it should be clearly understood that many jurisdictions possessing such statutes have not yet had occasion to decide whether such conduct would be criminal under them. So to decide, though perhaps unwise and in contravention of the common law rule which the statutes presumably were intended to codify would hardly be far-fetched, particularly in cases where the defendant stood economically to benefit, there was a police request to cooperate, and no other crime could be made out. Take the case of the bank robber's mistress, for example, who, though taking no part in her

³⁵ MASS. GEN. LAWS ANN. c. 274, § 4 (1959).

³⁶ 221 N.C. 153, 19 S.E.2d 257 (1942).

³⁷ "Where . . . the concealment of knowledge of the fact that a crime has been committed . . . is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact." *State v. Potter*, 221 N.C. 153, 19 S.E.2d 257, 259 (1942).

³⁸ N.C. GEN. STAT. § 14-7 (1953).

paramour's illegal activities (and who carefully avoids receiving any of the stolen money) knows of the robbery and of her paramour's whereabouts but refuses to assist the police in order to benefit her lover and to hang on to her kept position. The point of all this, of course, is that failing to disclose another's felony or to cooperate with the police may under some circumstances be punishable, and severely so, even in jurisdictions with no misprision of felony statute, no common law of crimes and a conventional accessory after the fact statute. The discussion thus far, of course, leaves many important questions dangling—self-incrimination, privileged communications, possible immunity for close relatives, the meaning of “intent to aid the felon” and what constitutes “knowledge that a felony has been committed.” These matters are dealt with below.³⁹

3. “Obstruction” and “Resisting” Statutes

The obstruction of justice and resisting or obstructing a police officer statutes must also be considered. While many of them, to be sure, expressly or by reasonable implication require an actual physical obstruction of the officer or the employment of threats or force against him,⁴⁰ a large number are broad enough to cover the case of one who simply fails or refuses to provide information relating to another's criminality on police request. And this apparently even though defendant has no intent to aid the criminal or any other evil motive but wishes simply to keep from being involved. The Arizona obstruction statute, for example, makes possible a five-year prison sentence for anyone who “willfully . . . delays or obstructs a police officer in the discharge or attempt to discharge any duty of his office.”⁴¹ Obviously, it is a police officer's duty to ferret out criminality and conceivably one who has knowledge of another's crime and willfully fails to disclose it on police request makes the officer's job more difficult and hence “obstructs” or “delays” him. And while some courts have interpreted such a statute as requiring a showing of force or physical obstruction of the officer, (even though its terms obviously do not require it),

³⁹ See text beginning at part F, *infra*.

⁴⁰ See, e.g., 18 U.S.C. § 111 (1958); IND. ANN. STAT. § 10-1005 (1956); MONT. REV. CODES ANN. § 94-205 (1947); N.H. REV. STAT. ANN. § 587.5 (1955); PA. STAT. ANN. tit. 18, § 4314 (1955).

⁴¹ ARIZ. REV. STAT. ANN. § 13-541 (1956). See also ALA. CODE tit. 14, § 402 (1940); FLA. STAT. ANN. § 843.02 (1944); GA. CODE ANN. § 26-4401 (1953); IDAHO CODE ANN. § 18-705 (1947); NEB. REV. STAT. § 28-729 (Reissue 1956).

others have applied a dictionary meaning and held that "obstructs" merely means to make the officer's job more difficult by whatever means, forcible or otherwise.⁴² Concededly, however, no case has been found in which someone has actually been convicted of obstruction for refusing to disclose information relating to another's criminality on police request. And, so far as the cases disclose, no prosecutor has ever attempted to obtain one.

4. "Police Obedience" Statutes

Nor, so far as the cases reveal, has any prosecution ever been brought on the theory that one who fails to reveal knowledge of another's crime on police request thereby violates the increasingly more common "police obedience" type statutes or ordinances which make it criminal to fail without lawful excuse to obey "any lawful order" of a policeman.⁴³ Even assuming the constitutionality of such enactments, concerning which there is grave doubt because their vagueness and the problem of excessive delegation of power, presumably a police "order" for one to speak out would not be "lawful."

5. Failure to Assist an Officer

The cases are similarly silent on whether one who knows of a criminal's whereabouts or who is in a position to assist a police officer by supplying information but who refuses to do so thereby commits the crime of failing to assist an officer in effecting an arrest. As previously noted,⁴⁴ the duty to assist statutes, an anomalous hangover from the *posse comitatus* days, are still quite common, though their violation typically entails only a small fine or a relatively short term of imprisonment. Criminal prosecutions under them, however, have been few and far between⁴⁵ and the typical

⁴² The cases are collected in Annot., *What Constitutes Offense of Obstructing or Resisting Officer*, 48 A.L.R. 746 (1927). See also, Comment, *Types of Activity Encompassed by the Offense of Obstructing a Public Officer*, 108 U. PA. L. REV. 388 (1960); Note, *The Obstruction of Justice by Interference with a Law Enforcement Officer's Performance of a Duty*, 6 ARK. L. REV. 46 (1951). The English and Scottish authorities are reviewed in two articles by Professor Coutts, *Assaulting, Resisting and Obstructing the Police*, 20 J. CRIM. L. (Eng.) 289 (1956); *Obstructing the Police*, 19 MODERN L. REV. 411 (1956).

⁴³ See, e.g., *State v. Pascale*, 134 A.2d 149 (R.I., 1957).

⁴⁴ See text at note 15, *supra*.

⁴⁵ One such case at least is *State v. Ditmore*, 177 N.C. 592, 99 S.E. 368 (1919). See generally, Note, *The Private Person's Duty to Assist Police in Arrest*, *supra* note 15.

modern case involving them deals with the right of an injured "assistor" to recover against the city in tort or under the workman's compensation law.⁴⁶

6. *Conclusions as to "Conventional" Jurisdictions*

Thus far, of course, the discussion has dealt solely with jurisdictions possessing no misprision of felony statutes, no common law of crimes and a conventional set of accessory after the fact and obstruction of justice statutes. And while one can assert with considerable confidence that a mere omission to disclose another's felony as such is not punishable in any of such jurisdictions, a failure to do so on police request, certainly where there is an ulterior motive—a desire to obstruct the police or to aid the felon—makes the matter doubtful at least in some. Certainly the *Wood* and *Potter* interpretations of the conventional accessory statutes cannot be ignored in assessing the picture in a state not yet having rejected them nor can the broad scope of many of the obstruction of justice statutes be passed off. To be sure, however, the absence of caselaw and the restrictive interpretations given the obstruction statutes by many courts provide some assurance that refusal to cooperate with police would not be criminal under them.

7. *Less Conventional American Jurisdictions*

Let us now turn to less conventional jurisdictions. The Virginia Court,⁴⁷ for example, has stated that a simple failure to disclose one's knowledge of another's felony—misprision of felony, in other words, in the conventional common law sense—is there a common law misdemeanor and Delaware has squarely so held under its common law of crimes statute. The Delaware Court, in *State v. Biddle*,⁴⁸ defined the offense as the "criminal neglect either to prevent a felony from being committed or to bring the offender to justice without such previous concern with or subsequent assistance of him as will make the concealer an accessory before or after the fact."⁴⁹ The proof showed that defendant was present at a robbery and the court charged that defendant was guilty if she

⁴⁶ See, e.g., *Riker v. City of New York*, 204 Misc. 878, 126 N.Y.S.2d 229 (1953); *Blackman v. City of Cincinnati*, 66 Ohio App. 495, 35 N.E.2d 164 (1941); *Industrial Comm'n of Ohio v. Turek*, 129 Ohio St. 545, 196 N.E. 382 (1935).

⁴⁷ *Wren v. Commonwealth*, 67 Va. (26 Grat.) 952, 962 (1875).

⁴⁸ 2 W.W. Harr. 401, 124 Atl. 804 (Del. 1923).

⁴⁹ *Id.* at 124 Atl. 805 (1923).

either did nothing to prevent the robbery or subsequently "willfully failed and neglected to make any effort to prosecute."

Misprision of felony in some form seems likewise to be a common law offense in Vermont though not, it appears, in the absence of a showing that defendant intends by his silence "to obstruct and hinder the due course of justice and to cause the felon to escape unpunished."⁵⁰ The meaning of this requirement is perhaps best illustrated by *Commonwealth v. Lopes*,⁵¹ a Massachusetts case, which likewise deals with misprision of felony as a common law offense. Defendant was convicted of conspiring to keep silent about his discovery of the murdered body of one Frances McGrath. The proof showed that defendant, a married man, and his mistress, a married woman, went into the woods in order to commit adultery and after having done so there discovered a girl's body which they had reason to suppose was the body of Frances McGrath, then the object of a well-publicized police search. Defendant agreed with his mistress to remain silent about their discovery, but defendant shortly thereafter reported to police the location of the body, falsely stating that he had gone into the woods in order to relieve himself and had been attracted to the body by a pungent odor. The conviction was quashed on appeal. The Court, while conceding the possible existence of misprision of felony as a common law offense in some form, held that a simple failure to disclose was not enough and that it would in any event be necessary for the State to show "an evil motive to prevent or delay the administration of justice." Here, the "only rational inference was that the failure to disclose the finding of the body was motivated by fear of self-incrimination, or at least by fear of a criminal purpose wholly unconnected with the body." The Court refused to rule on the question of whether defendant's apparently well-grounded suspicion that the body was that of Frances McGrath was sufficient "knowledge" of a felony to make his agreement to remain silent criminal had the requisite evil intent been established. The Court attached no importance to the fact that defendant had lied to the police.

8. *Statutory Misprision of Felony*

So much then for misprision of felony as an American common law offense. What of the statutes? As previously noted, there are three American misprision of felony statutes as such, the federal statute and those of Maine and New Jersey. Each differs from the

⁵⁰ *State v. Wilson*, 80 Vt. 249, 67 Atl. 533 (1907).

⁵¹ 318 Mass. 453, 61 N.E.2d 849 (1945), noted in 32 VA. L. REV. 170 (1945). Cf. *Carroll v. State*, 45 Ark. 539 (1885).

other in phraseology and as authoritatively construed but the New Jersey statute is the most unique, extending to high misdemeanors as well as to the most serious felonies:

Any person having knowledge of the actual commission within the jurisdiction of this state of arson, manslaughter, murder, or of any high misdemeanor, who conceals and does not, as soon as may be, disclose and make known the same information to a judge, magistrate, prosecutor or police authority is guilty of a misdemeanor, (punishable by three years' imprisonment or by a \$1,000 fine or by both).⁵²

The phraseology, it will be noted, is "conceals *and* does not, as soon as may be, disclose," and one would suppose, because of the harshness of the statute and the absence of any requirement of evil intent, that a simple failure to disclose, not on police request, would not be criminal. The New Jersey Court, however, held otherwise in *State v. Hann*,⁵³ nor did the Court see fit to engraft onto the statute any requirement of evil intent. "[T]o remain passive and silent was, at the common law, a misprision of felony, and which offense has been, in the passage cited from the crimes act, specialized and defined."⁵⁴ It is likewise a misdemeanor in New Jersey, under a separate statute, to "knowingly or willfully . . . refuse to reveal the place of abode, refuge, concealment, or disguise of any . . . person" guilty of serious crime with intent thereby to aid such person to escape apprehension.⁵⁵ This statute, at least, would seem absolutely to require an official request to disclose. One does not refuse when never asked.

The Maine statute provides as follows:

Whoever, having knowledge of the actual commission of a felony cognizable by the courts of the state, conceals *or* does not as soon as possible disclose and make known the same to someone of the judges or some officer charged with the enforcement of the criminal laws of the state shall be punished by a fine of not more than \$500 or by imprisonment for not more than three years, or by both such fine and imprisonment.⁵⁶

The statute in question was recently before the Maine Supreme Court in *State v. Michaud*,⁵⁷ a 1955 case. Defendant was charged in general terms with concealing and failing to disclose his knowledge of the crime of adultery, a felony, but there were no facts

⁵² N.J. REV. STAT. § 2A: 97-2 (1953).

⁵³ 40 N.J.L. 228 (1878).

⁵⁴ *Id.* at 229.

⁵⁵ N.J. REV. STAT. § 2A: 85-2(c) (1953).

⁵⁶ ME. REV. STAT. ANN. c. 135, § 12 (1954) (Emphasis added).

⁵⁷ 150 Me. 479, 114 A.2d 352 (1955).

alleged showing how defendant acquired his knowledge or of how specifically he had concealed it. For these reasons, the Court held, the judgment had to be reversed. The Court's opinion exhibits great hostility towards misprision of felony as an offense and it is at least to be doubted whether the most meticulously pleaded information would have passed muster. Be this as it may, the Court did say that they would uphold a conviction where the information charged and the proof established that defendant had actual knowledge of the felony in the sense that he could testify to it in a court of law—presumably even a direct admission from the perpetrator would not suffice—and where the pleading and proof showed a "positive act" of concealment. The term "positive act," however, was left wholly undefined and one can only speculate on whether a simple refusal to disclose on police request would be sufficient. However, the fact that the Maine statute employs the disjunctive "or" rather than the conjunctive "and" as is the case under the New Jersey and federal misprision statutes was not lost on the Court. The Court squarely faced the point and simply held that "or" could not really mean "or" but must mean "and," for otherwise the statute would probably violate due process. Making a simple failure to disclose another's felony criminal, without requiring an additional showing of some "positive act" of concealment, the Court felt, would be unconstitutional. In so stating, the Court relied heavily upon certain language to this effect in *Bratton v. United States*,⁵⁸ decided under the federal misprision statute, and to an oft-quoted dictum of Chief Justice Marshall, in *Marbury v. Brooks*,⁵⁹ that a law punishing the mere failure to proclaim every offense that comes to one's knowledge would be "too harsh for man." It should be noted, however, that the Maine statute as construed by the Court does not require a showing of evil intent as is the case in Vermont and Massachusetts. Actual knowledge of the felony plus a positive act of concealment—perhaps merely a failure to talk to police on request—are alone sufficient to establish a punishable misprision. Defendant apparently need not intend to aid the felon, to obstruct the police or to gain in any way by his failure to cooperate.

The federal misprision of felony statute, after which the Maine and New Jersey statutes were patterned, was first enacted in 1790 and has been retained through the years without material change. It now appears as Section 4 of the Federal Criminal Code and provides as follows:

⁵⁸ 73 F.2d 795, 797 (10th Cir. 1934).

⁵⁹ 20 U.S. (7 Wheat.) 555, 575-76 (1822).

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.⁶⁰

The Federal statute, it will be noted, like the New Jersey statute which copied it in material part, employs the conjunctive "and" rather than the disjunctive "or". But whereas this made no difference in New Jersey where a simple failure to disclose was nonetheless held to be punishable, it has made a great deal of difference under the Federal statute. The leading case is *Bratton v. United States*.⁶¹ Defendant, a state police officer, was convicted of misprision of felony under an indictment charging him with apprehending two men illegally in possession of liquor under federal law and of failing to disclose the men's felonies to the federal authorities for a \$300 consideration. (Then, as now, there was no federal compounding statute, so the offense, if anything, was misprision of felony). On appeal, the conviction was reversed. The language employed in the federal statute, the Court noted, is "'conceals and does not as soon as may be disclose:'"

Some meaning must be given to the words 'conceal and.' If it should be held that a failure to disclose is in itself a concealment, then a conviction may be had for a failure to disclose without more, and the words 'conceal and' are thus effectively excised from the statute.⁶²

Furthermore, the Court continued:

[S]ome such interpretation is necessary to rescue the act from oppressiveness and to eliminate a serious question of constitutional power. Whatever may have been the case in 1790, when federal felonies were few, the act if otherwise construed would be but another unworkable and unenforceable law in latter days. Take the case here: The defendant was a state police officer; he would be guilty of a felony, under any other interpretation, even if he turned his prisoner over to the proper state authorities . . . if he failed promptly to report the arrest to federal authority. The bystander who saw a federal felony committed would become a felon if he did not promptly report it, although federal officers apprehended the criminals on the spot. The guest at a club or a dinner in Eastern Oklahoma would lately have been a felon if he had not promptly reported to the nearest federal judge the fact that he observed

⁶⁰ 18 U.S.C. § 4 (1958).

⁶¹ 73 F.2d 795 (10th Cir. 1934). See also *United States v. Farrar*, 38 F.2d 515 (D. Mass. 1930), *aff'd* 281 U.S. 624 (1931); *Presont v. United States*, 281 Fed. 131 (6th Cir. 1922); Notes, 29 MICH. L. REV. 617 (1931); 28 MICH. L. REV. 935 (1930).

⁶² 73 F.2d 795, 797 (10th Cir. 1934).

another guest in possession of a beverage of a proscribed alcoholic content. An interpretation leading to such an intolerable conclusion should not lightly be imputed.⁶³

Accordingly, the Court ruled, the government must show "something more than a 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 has been committed."⁶⁴ Whether the term "or other positive act" would render criminal lying to a federal investigative officer the Court fails to say but certainly lying is in common parlance affirmative or "positive" in nature. And it may well be that an obstinate refusal to talk to a federal investigative officer with knowledge of another's felony would similarly be held criminal though this, of course, is much more doubtful, particularly in view of the Court's "positive act" illustrations. One point, however, is clear. The Court attached no importance to the fact that defendant had received a consideration for his silence since the consideration paid was merely the "motive for, and not an act of, concealment." In England, as we have seen, and perhaps also in Vermont and Massachusetts, the consideration aspect of the case might have made all the difference.

One further point of importance. Neither the *Bratton* opinion—or any other interpreting the federal misprision statute, for that matter—even remotely suggests that defendant's "positive act of concealment" must be for the felon's benefit, for his own or for anyone's. Assuming that defendant has "knowledge" of a felony and is guilty of a "positive act" of concealment, no evil motive or intent need be shown.

Furthermore, at least one federal case, *Grudin v. United States*,⁶⁵ though not a misprision of felony case as such, suggests that a mere failure to disclose another's felony is criminal and that no positive act of concealment need be shown. Thus defendant in *Grudin* was held justified on Fifth Amendment grounds in refusing to answer certain questions concerning his receipt of a check because he might have discovered by such receipt that the "sender was engaged in the actual commission of a felony in violating the Espionage Act and [that he] did not as soon as possible make it known to some judge or other person in civil or military authority."

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ 198 F.2d 610 (9th Cir. 1952).

9. Other Statutes

One final group of statutes must also be noted. Eight states—Arizona,⁶⁶ Arkansas,⁶⁷ Colorado,⁶⁸ Idaho,⁶⁹ Illinois,⁷⁰ Montana,⁷¹ Nebraska⁷² and Utah⁷³—while possessing no misprision of felony statutes labeled as such, do possess accessory after the fact statutes which on their face and with practically no variation in wording make penal a simple failure with no evil intent to disclose another's felony to the authorities—misprision of felony, that is, in the conventional common law sense. The maximum punishment possible under these statutes, furthermore, is severe, ranging from a possible two years plus \$500 fine in Idaho,⁷⁴ Illinois⁷⁵ and Nebraska⁷⁶ to a maximum of five years in Arizona,⁷⁷ Montana⁷⁸ and Utah.⁷⁹ And the Arkansas accessory Statute under some circumstances even permits a sentence of life imprisonment.⁸⁰ The conventional accessory after the fact statute, as we have seen,⁸¹ following the common law cases, requires an intent to aid the felon and, by usual judicial construction, some "affirmative act" in addition. The accessory statutes of the kind now being considered—at least so far as their wording is concerned—do not. The Nebraska statute, for example, defines an accessory after the fact, as "a person who, after full knowledge that a felony has been committed, *conceals it from the magistrate*, or harbors and protects the person charged with or found guilty of the crime."⁸²

Concededly, however, no case has been found in which a court

⁶⁶ ARIZ. REV. STAT. ANN. § 13-141 (1956).

⁶⁷ ARK. STAT. ANN. § 41-120 (1947).

⁶⁸ COLO. REV. STAT. ANN. § 40-1-13 (1953).

⁶⁹ IDAHO CODE ANN. § 18-205 (1947).

⁷⁰ ILL. ANN. STAT. c. 38, § 584 (Smith-Hurd 1935).

⁷¹ MONT. REV. CODES ANN. § 94-205 (1947).

⁷² NEB. REV. STAT. § 28-202 (Reissue 1956).

⁷³ UTAH CODE ANN. § 76-1-45 (1953).

⁷⁴ IDAHO CODE ANN. § 18-205 (1947).

⁷⁵ ILL. ANN. STAT. c. 38, § 584 (Smith-Hurd 1935).

⁷⁶ NEB. REV. STAT. § 28-202 (Reissue 1956).

⁷⁷ ARIZ. REV. STAT. ANN. § 13-143 (1956).

⁷⁸ MONT. REV. CODES ANN. § 94-206 (1947).

⁷⁹ UTAH CODE ANN. § 76-1-46 (1953).

⁸⁰ ARK. STAT. ANN. § 41-121 (1947).

⁸¹ See text at notes 32-33 *supra*.

⁸² NEB. REV. STAT. § 28-202 (Reissue 1956) (Emphasis added).

has actually held that a simple failure to disclose one's knowledge of another's felony to the authorities would, absolutely nothing else being shown, render one an accessory under such a statute. Indeed, the California Court, under an accessory statute of this type, now repealed, squarely held otherwise. Defendant in *People v. Garnett*⁸³ was convicted as an accessory after the fact to grand larceny and the proof showed only that defendant knew of the larceny and failed to disclose his knowledge to the authorities. The conviction was upset. The Court, while noting that the statute was "not as plain and explicit as it might be, by any means," construed the word "conceals" to mean "more than a simple withholding of knowledge possessed by a party that a felony has been committed. . . . [C]oncealment necessarily includes the element of *some affirmative act* upon the part of the person tending to or looking towards the concealment of the felony. Mere silence after knowledge of its commission is not sufficient to constitute the party an accessory."⁸⁴ Somewhat similar language may also be found at one point in a recent opinion of the Colorado Court, in *Lowe v. People*.⁸⁵ Neither the *Garnett* nor the *Lowe* opinion, however, contains anything helpful on the meaning of the phrase "affirmative act."

On the other hand, a Nebraska case, *Heyden v. State*,⁸⁶ appears to look in the opposite direction. In affirming defendant's conviction on a charge of harboring felons, the Nebraska Court upheld the trial court's refusal to permit defense counsel to show that defendant's failure to "run to the sheriff . . . or to . . . the chief of police" and inform them of the felons' whereabouts was motivated by excitement and ignorance of their responsibilities. In ruling that excitement or ignorance were not of themselves defenses, the Court seems to have assumed that the only way one having knowledge of another's felony can escape conviction as an accessory is to disclose his knowledge to a *magistrate* as such. Even a disclosure to police would apparently not suffice. Noting that the statute made concealment from the *magistrate* unlawful, the Court then proceeded to observe that the offer of proof referred only to police officers and that police officers "were not 'magistrates' within the meaning of the act." No other case even remotely suggests such a construction. It should also be emphasized that *Heyden* involved a harboring rather than a con-

⁸³ 129 Cal. 364, 61 Pac. 1114 (1900) (Emphasis added).

⁸⁴ 129 Cal. 364, 365, 61 Pac. 1114, 1115 (1900).

⁸⁵ 135 Col. 209, 309 P.2d 601 (1957).

⁸⁶ 114 Neb. 783, 210 N.W. 165 (1926).

concealment of knowledge charge and that the Court's apparent assumption about the criminality of failing to disclose to a magistrate was made solely for the purpose of ruling on a question of evidence.

So much then for the bare failure voluntarily to come forward and disclose another's felony under these statutes. The implication from *Heyden* aside, such failure is probably not criminal under them. The cases strongly suggest, however, that little else may be required. The point is perhaps best made by *Fields v. State*,⁸⁷ an Arkansas case. Defendant was convicted of being an accessory after the fact to a homicide on proof that the killing occurred in his presence and in his room and that he not only made no report that the killing occurred in his room and no report of the crime which he had witnessed, but that he attempted to thwart a police investigation by telling a material witness that she "would not be mixed up in the matter provided she knew nothing." While the judgment of conviction was reversed because defendant had never expressly refused to cooperate with the police the Court left no doubt that the result would have been different had evidence of such lack of cooperation been present. Accessorial guilt, the Court stated, would be established either by the showing of "some affirmative act tending toward the concealment of [a felony's] commission or (by) a refusal to give knowledge of the commission of the crime when (the) same is sought for by officials of the person having such knowledge."⁸⁸ Nor did the Court read into the statute any requirement of evil intent. In Arkansas, at least, simple refusal on police request to disclose one's knowledge of another's felony makes one an accessory after the fact.⁸⁹ Absent a showing of some "affirmative act," the nature of which has never been clearly defined, however, a police or other official request is necessary.

The only other relevant body of caselaw under these statutes is from Colorado and the situation there, to say the least, is confusing. While it seems reasonably clear that a mere failure to come forward voluntarily and to disclose one's knowledge of another's felony is not criminal in Colorado, a failure to do so on police request makes the matter doubtful. Language in two of the cases

⁸⁷ 213 Ark. 899, 214 S.W.2d 230 (1948).

⁸⁸ *Id.* at 214 S.W.2d 230, 231 (1948) (Emphasis added).

⁸⁹ It should be noted that *Fields v. State* is merely one of a large number of Arkansas cases so stating. The authorities are cited in the *Fields* opinion.

seems on balance to make such refusal to cooperate criminal⁹⁰ while that in a third,⁹¹ the most recent of the cases, would seem to make it criminal only upon a showing that defendant's reason for refusing to cooperate was to aid the felon. Under the latest pronouncement, in other words, refusing to talk on account of excitement or because of a fear of becoming involved would presumably be excusable.

It should be emphasized, however, that what we are talking about now is a simple statement to police by a person having knowledge of another's felony that he will not cooperate, that he refuses to speak. If, instead of so stating, such person *denies* to police that he has any knowledge when he does we probably have a very different case. Such denial of knowledge to police almost certainly makes such person an accessory in Colorado where he intends thereby to aid the felon and probably where he simply wishes to keep from being involved. Such, at least, is the implication from *Roberts v. People*⁹² and *Howard v. People*⁹³ where the Colorado Court affirmed accessory to homicide convictions in large part on proof that defendants, having personal knowledge of homicides and knowing of deceaseds' whereabouts, repeatedly denied having such knowledge to police officers. While the defendants in these cases also helped conceal the bodies, that fact is not heavily relied upon in either case and the language of both opinions is such as to make criminal a defendant's mere denial of knowledge to police. And this is likewise the implication from a more recent Colorado case, *Lowe v. People*⁹⁴ with the qualification that under it defendant's denial of knowledge must probably be for the purpose of aiding the felon. A general consideration of the criminality of lying to police is deferred until later.⁹⁵ The subject has been introduced here only to clarify the point being discussed, namely, the criminality of merely *refusing* on police request to disclose one's knowledge of another's felony.

E. SUMMARY OF THE AMERICAN AUTHORITIES

To what then does the situation boil down? A summary of the law at this point seems to be in order. In jurisdictions possessing

⁹⁰ *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938); *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

⁹¹ *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

⁹² 103 Colo. 250, 87 P.2d 251 (1938).

⁹³ 97 Colo. 550, 51 P.2d 594 (1935).

⁹⁴ 135 Colo. 209, 309 P.2d 601 (1957).

⁹⁵ *Infra.*, pt. III A(1).

no misprision statutes as such, no common law of crimes and conventional accessory after the fact and obstruction of justice statutes, there is probably no duty to disclose one's knowledge of another's felony under any circumstances. No case involving even an attempted prosecution for failing to disclose one's knowledge, whether on police request or otherwise, has been found under the obstruction statutes and those statutes have in any event often been given a restrictive interpretation. The conventional accessory statute, of course, requires by its terms an "intent to aid the felon" and, as judicially construed, some "affirmative act" in addition. And the term "affirmative act" under the conventional accessory statute has generally come to mean "something more" than a failure to disclose one's knowledge even on police request. On the other hand, cases from Massachusetts and North Carolina look the other way on this point and it must be continually borne in mind that the courts of many states possessing conventional accessory statutes have not yet spoken.

At the other extreme are jurisdictions such as Virginia and Delaware whose courts have either held or stated that misprision of felony exists as a common law offense which is committed merely by having knowledge and remaining silent regardless of one's intent and whether or not there is a police request to speak out, and New Jersey whose misprision statute has been interpreted to yield a similar result. Misprision of felony likewise exists as a common law offense in Vermont and possibly in Massachusetts also—and one may be guilty even though not requested to speak out by police—but there must be a showing in those jurisdictions of some "improper motive" for remaining silent, such as a desire to obstruct the police as distinguished from a simple desire to avoid becoming involved.

Misprision of felony likewise, as we have seen, exists by statute in Maine and federally, and no evil intent need be shown, but certainly in Maine and probably under the federal statute mere silence with knowledge will not suffice. There must be some "affirmative" or "positive" act in addition. Whether the term "affirmative act" covers the case of one refusing to talk to police or one denying his knowledge to police, however, is uncertain but the latter is very probably criminal. Finally, there are the less conventional accessory after the fact jurisdictions just considered where concealing from the magistrate makes one an accessory. While the courts of many of these jurisdictions have not yet had occasion to interpret the word "conceals," the caselaw of the jurisdictions which have seems to indicate that merely remaining silent is not criminal. Remaining silent with knowledge on police request,

and, a fortiori, denying one's knowledge to police, however, very possibly makes one an accessory under these statutes.

F. IMPORTANT CONSIDERATIONS

So much then, for our brief interstitial survey of the law. Several important questions, involved in most of what has gone before but intentionally left dangling, remain to be considered. One, of course, is the meaning of "knowledge" as employed in the conventional accessory after the fact statutes and in the offense of misprision of felony and the term "full knowledge" as contained in the concealment from the magistrate type of accessory statute. One reads in the newspapers, for example, that a house has been broken into and property taken or that a young girl of a certain description is missing or one is told of these things by police officers. Does one thereby acquire "knowledge" or "full knowledge" that a felony has been committed? Or does one only have "knowledge" or "full knowledge" who actually witnesses a felony or if not actually a witness is told by the supposed perpetrator that he has committed a felony? The caselaw, as might be supposed, is ambiguous. The only opinion squarely discussing the point is *State v. Michaud*,⁹⁶ decided under the Maine misprision of felony statute. *Michaud*, it will be recalled, requires actual personal knowledge of the felony in the sense that one is able to testify to it in a court of law. Under *Michaud*, one must actually witness the felony.⁹⁷ Other misprision and concealment from the magistrate type accessory cases, however, appear to assume that knowledge in this direct personal sense is unnecessary but that reasonable belief which happens to coincide with the truth is all that is required.⁹⁸ This construction, furthermore, would be supported by precedent under the conventional accessory statutes where reasonable belief coinciding with the truth is all that has ever been re-

⁹⁶ 150 Me. 479, 114 A.2d 352 (1955).

⁹⁷ "It must be actual and personal knowledge. It must not be knowledge from hearsay, or from possibilities or probabilities. It must be firsthand knowledge by the respondent of all facts necessary to know that the alleged felony has been committed." *Id.* at 354.

⁹⁸ See, e.g., *Wren v. Commonwealth*, 67 Va. (26 Grat.) 952, 956 (1875).

quired,⁹⁹ by the receiving stolen property cases¹⁰⁰ where a similar construction of "knowledge" has prevailed and by the harboring cases where defendant's reasonable belief that he is shielding a felon has been held sufficient for culpability.¹⁰¹ No case has been found discussing or even advertg to the question of whether the term "full knowledge" as employed in the concealment from the magistrate type of accessory statutes is different from the mere "knowledge" required under the conventional accessory after the fact statutes and in the offense of misprision of felony. The term "full knowledge" might well be interpreted to require a showing of direct personal knowledge, particularly as the Maine statute, which merely uses the word "knowledge," was held to require this.

There is, however, yet another and perhaps even more important question lurking in the background. The wording of the misprision statutes and the common law definition of that offense as well as the concealment from the magistrate type accessory statutes require a concealment of *knowledge of the felony*. Only concealment of knowledge of the felony seems to be made criminal. Even though one does possess "knowledge" or "full knowledge" of a felony in the required sense, in other words, he would presumably not render himself criminally culpable in a misprision of felony or concealment from the magistrate type jurisdiction merely by refusing to disclose some collateral bit of information which might be helpful to the police in their investigation of a felony. Assume, for example, that Jones has knowledge of a criminal homicide and also knows the present whereabouts of the perpetrator. He can presumably avoid criminal liability so far as common law misprision and statutes of the kind now being considered are concerned merely by informing the authorities of his knowledge of the felony. He need not go further and tell the police of the perpetrator's present whereabouts and the result should be no different even though he is expressly requested to do so by police. The common law definition of misprision, the misprision of felony statutes and the concealment from the magistrate type accessory

⁹⁹ "[I]t is sufficient for the State to show that the accused had actual knowledge of facts which would give him *good reason to believe* [emphasis supplied] that the person harbored or assisted by him was guilty of the felony." *Robertson v. State*, 69 Ga. App. 541, 26 S.E.2d 142, 143 (1943). See generally, 22 C.J.S. *Criminal Law* § 96 (1940).

¹⁰⁰ "That guilty knowledge, or its equivalent, guilty belief, is of the gist of this offense has been declared by many decisions." *Meath v. State*, 174 Wis. 80, 83, 182 N.W. 334, 335 (1921). See generally, PERKINS, *CRIMINAL LAW* 278 (1957).

¹⁰¹ *E.g.*, *Heyden v. State*, 114 Neb. 783, 210 N.W. 165 (1926).

statutes at most require a disclosure of one's *knowledge of a felony*, not one's knowledge of circumstances which, if known to the authorities, would be helpful in their investigation. That this construction is the correct one, furthermore, would seem to be supported by the statutory pattern currently prevailing in New Jersey. While New Jersey possesses a misprision of felony statute interpreted as requiring one to disclose his knowledge of another's felony without more, the legislature nevertheless felt it necessary to punish under a separate statute one who with intent to aid a felon "knowingly or willfully . . . refuse[s] to reveal the abode, refuge, concealment or disguise of any . . . person" believed guilty of serious crime.¹⁰²

This distinction between knowledge of a felony and knowledge of circumstances helpful in a felony investigation may not, however, hold true in some jurisdictions possessing conventional accessory after the fact statutes, assuming that defendant intends by his silence to aid the felon. The conventional accessory statute, it will be recalled, punishes one who, "knowing that another has committed a felony . . . conceals, or gives any other aid to such offender, with intent to enable him to avoid or escape from arrest, etc." And while most courts have held under these statutes that refusing to talk to police concerning one's knowledge of another's felony is not criminal, one Massachusetts case¹⁰³ suggests that refusal to cooperate with police, *even as regards the disclosure of helpful collateral circumstances*, would make one an accessory provided defendant's intent was thereby to aid the felon. While the Massachusetts case stands alone, it should again be emphasized that many courts possessing conventional accessory statutes have not yet passed on the criminality of such conduct.

There is also the matter of exemptions for close relatives and the question of privileged communications. As previously noted, criminal law texts discussing common law misprision make no mention of exemptions for close relatives. Common law misprision cases are similarly silent on the question as are the New Jersey, Maine and federal misprision statutes. Some conventional¹⁰⁴ and some concealment from the magistrate type accessory after the fact

¹⁰² N.J. REV. STAT. § 2A: 85-2(c) (1953).

¹⁰³ Commonwealth v. Wood, 302 Mass. 265, 19 N.E.2d 320 (1939). Compare State v. Doty, 57 Kan. 835, 48 Pac. 145 (1897).

¹⁰⁴ E.g., ALA. CODE tit. 14, § 15 (1940); FLA. STAT. § 776.03 (1944); MINN. STAT. ANN. § 610.13 (1947).

statutes,¹⁰⁵ however, do have such exemptions. But many do not.¹⁰⁶ The absence of such exemptions in the misprision and accessory areas, it must be conceded, is a highly embarrassing circumstance to the existence of criminal liability for refusing to divulge one's knowledge of another's felony to a policeman regardless of who would thereby be implicated. The prospect of incarcerating a husband on a misprision or accessory theory for refusing to talk over his wife's felonious misdeeds with a policeman, in other words, would doubtless cause many courts wholly to deny criminal liability for failing to speak out, whether as regards the felonious activities of close relatives or of other persons. On the other hand, a court faced with such a prospect might circumvent the problem to some extent at least by judicially incorporating the entire law of privileged communications into the accessory and misprision fields. Concededly, however, this would not help for all situations—brother against sister or parent against child, for example, or for any case in which one's knowledge was acquired by a means other than a privileged communication.

This, then, brings us broadly to the question of privileged communications. Suppose a lawyer or a psychiatrist or a priest, for example, acquires knowledge of someone's felony by reason of a privileged communication. Would any court hold him liable on a misprision or accessory theory for failing to divulge such knowledge at the behest of a policeman? To ask the question is practically to answer it. The law of privileged communications must of necessity be applied. But here again is an embarrassing consideration to the existence of criminal liability for failing to disclose one's knowledge of another's felony to a police officer. Cases, statutes, and texts are uniformly silent on the applicability of the law of privileged communications.

Finally, there remain certain broad questions of policy and constitutionality. First of all, is it either wise or constitutionally permissible criminally to penalize one who, having knowledge of another's felony in the required sense, fails affirmatively to seek out a magistrate or a law enforcement officer and divulge such knowledge? So far as wisdom is concerned, the answer quite clearly is no. There is in the first place the difficulty above mentioned concerning the general absence of exemptions for close relatives and the ambiguity over the applicability of the law of privileged

¹⁰⁵ *E.g.*, ILL. ANN. STAT. c. 38, § 584 (1935).

¹⁰⁶ *E.g.*, CAL. PEN. CODE § 32 (1955); GA. CODE ANN. § 26-604 (1953); NEB. REV. STAT. § 28-202 (Reissue 1956). See generally, Morse, *A Survey of Accessory After the Fact Exemptions*, 54 DICK. L. REV. 324 (1950). In all, twenty-two state statutes exempt close relatives.

communications. And what constitutes "knowledge" or "full knowledge" that a felony has been committed? And who but one knowledgeable in the law can in most cases draw the line between felony and misdemeanor and know with some assurance even if he recognizes what conduct theoretically constitutes a felony whether one has in fact and in law been committed? More fundamentally, of course, requiring one affirmatively to seek out a magistrate or police officer on pain of imprisonment is simply too great an infringement of the citizen's right to be left alone and to keep his own counsel, particularly in these days of highly trained and efficient law enforcement departments. And if one is in fact required to do this and does not, his knowledge of another's felonious misdeeds then becomes sacred and inaccessible because of the privilege against self-incrimination. Requiring him to testify concerning his knowledge after he has failed affirmatively to come forward would violate the privilege and indeed this has at least twice judicially been recognized¹⁰⁷ and was in one federal case actually so held.¹⁰⁸ There is, in the case of the federal misprision statute, at least one additional difficulty. As noted in *Bratton v. United States*,¹⁰⁹ a state police officer arresting one who to his knowledge has committed both a federal and state felony by the same act would be guilty of misprision if he failed to contact federal authority even though he handed his man over to the state for prosecution. So far as the constitutional question is concerned, one is compelled to conclude with Chief Justice Marshall that a law requiring one affirmatively to come forward and to divulge one's knowledge of another's felony is indeed "too harsh for man."

The objections raised to punishing one who fails affirmatively to come forward and divulge apply with almost equal force to the practice sanctioned by statute and decisions in some jurisdictions of penalizing one as an accessory or for misprision who fails to divulge his knowledge of another's felony *on police request*. There is, in addition, this consideration applicable to both situations. One having knowledge of another's felony will, by the same token, typically possess information constituting a link in the chain of evidence which could be used to convict him of that very felony. Is there not, then, a valid self-incrimination objection if he is required on pain of punishment to divulge it? The answer, of course, is no, so far as a courtroom situation is concerned where a

¹⁰⁷ *Grudin v. United States*, 198 F.2d 610 (9th Cir. 1952); *State v. Van Bueren*, 13 N.J. Super. 592, 81 A.2d 42 (1951).

¹⁰⁸ *Grudin v. United States*, 198 F.2d 610 (9th Cir. 1952).

¹⁰⁹ 73 F.2d 795 (10th Cir. 1934).

judge sits impartially to determine whether under all of the circumstances there is any risk of a criminal prosecution against the witness if he is compelled to answer.¹¹⁰ There is, on the other hand, no such impartial arbiter in the police station, and to compel a layman, without the benefit of counsel, to decide whether there is any such risk, particularly when he will not have at his disposal all of the relevant circumstances, would appear to make a mockery of the privilege. Concededly, however, the Supreme Court's unfortunate decision in *In re Groban*,¹¹¹ allowing an Ohio fire marshal to subpoena possible arson suspects and to interrogate them under oath in private without allowing their counsel to be present shows that this is not necessarily the test, at least insofar as due process is concerned.

III. ATTEMPTS TO LIE TO OR MISLEAD OFFICERS

A. RISK OF CRIMINAL LIABILITY

1. *In General*

We have now considered various situations in which one may possibly render himself criminally culpable by failing or refusing to disclose the criminal activities of others and discussed related questions of policy and constitutionality. Let us now turn to the closely related question of whether and under what circumstances lying to the police or other investigative officers may be criminal. And while our starting place will be the criminality of lies about the criminal activities of third parties, the nature of the problem and the decisions as well as the wording of various statutes bearing on the question make it necessary in addition to consider the criminality of lies to police and other officials by one who is himself suspected of crime. To some extent, of course, the problem has already been discussed. Some of the misprision cases, it will be recalled, most notably *Bratton v. United States*,¹¹² decided under the federal misprision statute, while holding that the word "conceals" requires more than a simple failure voluntarily to disclose another's criminality to the police, appear to assume that lying to the police about one's knowledge of another's felony would be the kind of "affirmative act" necessary for misprision guilt. In addition to misprision cases such as *Bratton*, however, consideration of the present subject invites analysis of three additional statutory areas: accessory after the fact, obstruction or resistance to police

¹¹⁰ See *Hoffman v. United States*, 341 U.S. 479 (1951).

¹¹¹ 352 U.S. 330 (1957).

¹¹² 73 F.2d 795 (10th Cir. 1934).

and certain statutes and ordinances expressly making it criminal to make false statements or reports to police or other government officials.

2. Accessory After the Fact Cases

The accessory after the fact cases are best disposed of first. An accessory after the fact at common law and under the conventional modern accessory statute, it will be recalled, is one who, knowing that a felony has been committed, and with intent to aid the felon, assists him to escape arrest, trial or punishment. The question, then, is the simple one of whether one who lies to the police in order to aid a felon thereby criminally "assists" him within the meaning of the accessory after the fact definition. The English common law answer, it seems reasonably clear, was "no." Accessorial guilt at common law was incurred only by acts which give "personal aid and comfort" to the felon himself, such as concealing him in one's house and giving him food, supplying him with a disguise or with transportation to elude the authorities, perhaps giving him money, providing him with a weapon with which to combat the authorities or physically assisting him to resist arrest or to break jail.¹¹³ Even concealing evidence of the felon's crime or intimidating witnesses who would otherwise testify against him does not seem to have been sufficient.¹¹⁴ Concealing evidence and intimidating witnesses, while doubtless of great benefit to the felon, would not be assistance to him "personally." And merely lying to the police would seem to be a fortiori. At common law, the act of assistance must apparently be given directly and personally to the felon himself.

And a few cases decided under conventional modern accessory statutes appear to follow the common law rule. In *Farmer v. State*,¹¹⁵ for example, defendant was convicted as an accessory after the fact to the crime of assault with intent to kill and the proof showed that he lied to an investigating sheriff in saying that he did not know the principal felons and that he did so in order to help them avoid arrest. The Attorney General's confession of error was approved by the Oklahoma Court as "there . . . [was] no evidence . . . to show that the defendant rendered any active as-

¹¹³ See generally the authorities cited in notes 30 and 32, *supra*. And see *Commonwealth v. Giacobbe*, 341 Pa. 187, 19 A.2d 71 (1941); *Levering v. Commonwealth*, 132 Ky. 666, 117 S.W. 253 (1909).

¹¹⁴ *Regina v. Chapple*, [1840] 9 Car. & P. 353, 173 Eng. Rep. 865.

¹¹⁵ 56 Okla. Crim. 380, 40 P.2d 693 (1935).

sistance personally to the party charged with the felony.”¹¹⁶ A line of Texas cases, on the other hand, also decided under a conventional accessory statute, takes the position that lying to the police for the felon’s benefit makes one an accessory;¹¹⁷ some of the cases even make accessories out of persons who lie to private citizens in order to mislead the police or who conspire with others to lie to the police.¹¹⁸ Suborning witnesses to lie for a felon’s benefit at a preliminary hearing or a coroner’s inquest similarly makes one an accessory.¹¹⁹ In Texas, at least, accessorial guilt need not be predicated on acts which assist the felon “personally.” The word “assists” in the accessory statute is given the meaning it has in everyday conversation. On the other hand, at least so far as the lying to police cases are concerned, there appears to be a distinction in Texas between falsely asserting to a police officer that one knows nothing about a felony when he does and an “affirmative lie” to police by which defendant seeks to throw suspicion away from the felon, as by giving him an alibi or by manufacturing a self-defense story when defendant knows the felon is guilty of first degree murder. A lie of the former or denial of all knowledge type is apparently not criminal.¹²⁰

What, then, about lying to the police under the less conventional “concealment from the magistrate type” accessory after the fact statutes? One case, *Ex Parte Overfield*,¹²¹ while not a lying to the police case as such, adopts the common law “personal aid and comfort” to the felon rule and clearly assumes that a lie to a police officer for the felon’s benefit would not make one an accessory after the fact. On the other hand, as discussed earlier,¹²² several cases decided under statutes of this type appear rather clearly to adopt the contrary rule.

¹¹⁶ *Accord*, *State v. Doty*, 57 Kan. 835, 48 Pac. 145 (1897); *Regina v. Hussian Bakhsh* (1903, India), 25 Indian L.R. (Alka. Series) 161.

¹¹⁷ See, e.g., *Little v. State*, 111 Tex. Crim. 500, 14 S.W.2d 853 (1929). *But see* *Prewett v. State*, 41 Tex. Crim. 262, 53 S.W. 879 (1899).

¹¹⁸ *Jones v. State*, 160 Tex. Crim. 479, 272 S.W.2d 368 (1954); *McGoodwin v. State*, 134 Tex. Crim. 231, 115 S.W.2d 634 (1938); *Turner v. State*, 112 Tex. Crim. 245, 16 S.W.2d 127 (1929). Compare *Pinkard v. State*, 62 Tex. Crim. 602, 138 S.W. 601 (1911).

¹¹⁹ *Orr v. State*, 124 Tex. Crim. 252, 61 S.W.2d 490 (1933); *Blakeley v. State*, 24 Tex. Crim. 616, 7 S.W. 233 (1888).

¹²⁰ The distinction is perhaps most clearly made in *Tipton v. State*, 126 Tex. Crim. 439, 72 S.W.2d 290 (1934).

¹²¹ 39 Nev. 30, 152 Pac. 568 (1915).

¹²² See text at notes 92-94.

Regardless of the form of the accessory statute with which one is concerned, however, one important point should be kept in mind. If defendant's motive in lying to the police is merely to avoid his own arrest, such lie will almost certainly not make him an accessory after the fact even though the direct effect of his lie is to aid a felon to avoid arrest, trial or punishment. Singularly, only one case has been found illustrating the point, *Reg. v. Jones*,¹²³ decided in 1948. Appellant, who was acquitted on a number of counts charging him, his wife and another person, of receiving stolen property, was convicted as an accessory after the fact to his wife's crime of receiving stolen property. The proof showed that defendant knew that his wife had stolen the property and that it was stored in his house but that he falsely denied to police that he knew the location of the property. The conviction was quashed because of the failure of the trial judge specifically to instruct the jury to acquit "if the motive in the mind of the appellant was merely a desire to avoid his own arrest."¹²⁴ To hold otherwise, of course, would be tantamount to punishing defendant's mere unsworn denial of his own guilt to a police officer and seriously run afoul of the policy underlying the privilege against self-incrimination.

3. Obstruction of Justice Cases

Let us now turn to the obstruction of justice cases. Many of the obstruction statutes, as we have seen,¹²⁵ are on their face broad enough to make punishable not only lying to police but even a failure to cooperate with them, as by refusing to talk when ordered to speak out. Yet we saw that no obstruction prosecution merely for refusing or failing to talk—either about one's own involvement with crime or about the criminal activities of others—has apparently ever been attempted. It should be noted, however—and this is a point not previously made—that prosecutions for such silence have occasionally been instituted on other theories, (disorderly conduct and vagrancy, for example), but the result, again, has uniformly been negative.¹²⁶

¹²³ [1948] 2 All E.R. 964, 1 K.B. 194 (1949).

¹²⁴ [1948] 2 All E.R. 964, 966, 1 K.B. 194, 196 (1949).

¹²⁵ See text at part II D (3), *supra*.

¹²⁶ *E.g.*, *People v. Tinston*, 6 Misc.2d 485, 163 N.Y.S.2d 554 (1957); *Commonwealth v. Chalmers*, 76 Pa. D. & C. 218 (1950). See also, *Myers v. Collett*, 1 Utah 2d. 406, 268 P.2d 432 (1954). See generally, Note, *Police Control Over Citizen Use of the Public Street*, 49 J. CRIM. L., C. & P. S. 562 (1959).

Obstruction prosecutions for lying to police, on the other hand, while infrequent, have sometimes been instituted. Results have varied. Where the obstruction statute requires by its terms a "forcible" or "physical" obstruction of the officer, no case has been found sustaining such a prosecution. But negative results have also sometimes obtained under statutes construed as not requiring a physical obstruction. *Miller v. United States*¹²⁷ is illustrative. Defendant was convicted under a federal statute penalizing anyone who "knowingly and willfully obstructs . . . or opposes any officer of the United States . . . in serving . . . any legal . . . process."¹²⁸ Proof showed that defendant refused to permit federal officers to enter her home to serve a subpoena on one Morris and that she knowingly and falsely denied to the officers that Morris was then in her home. The conviction was upset. While conceding that the statute did not require a physical obstruction, the Court was emphatic that "certainty in the nature of criminal offenses forbids . . . the use of this section as a catch-all to make crime out of actions which law-enforcing agents may feel to be undesirable, but which Congress has not seen fit to prescribe."¹²⁹ If lying to police was to be made a punishable obstruction, Congress would have to be much more specific.

Some cases take a different view. A lower Pennsylvania court, for example, in *People v. Citren*,¹³⁰ indicated its willingness to sustain an obstruction conviction merely on proof that defendant willfully and falsely denied to police that a certain person was in his place of business.¹³¹ The Pennsylvania statute was similar to the federal statute involved in *Miller*. *Rex v. Sharpe and Stringer*¹³² should also perhaps be noted. One of the defendants, while motor-ing, knocked down and injured a cyclist and the two defendants agreed to tell a story which would disprove any charge that the car in question was involved in an accident. They maintained this story upon police investigations and induced a third person to make false statements to police officers corroborative of the invented story. Defendants' convictions for conspiring to obstruct justice were sustained. The theory of the convictions, it should be noted,

¹²⁷ 230 F.2d 486 (5th Cir. 1956).

¹²⁸ 18 U.S.C. § 1501 (1958).

¹²⁹ 230 F.2d 486, 488 (5th Cir. 1956). See also, *Davis v. Lisle*, [1936] 2 All E.R. 213, 2 K.B. 434, 155 L.T. 23.

¹³⁰ 66 P.R.R. 232 (1946).

¹³¹ See also, *In re Billington*, 156 App. Div. 63, 141 N.Y. Supp. 16 (1913); *Rex v. L.*, 51 Ont. L.R. 575, 583; 69 D.L.R. 618, 625 (1922).

¹³² [1938] 1 All E.R. 48, 159 L.T. 96.

was conspiracy to obstruct and considerably more than a bare denial of guilt to police by the suspected party was shown. The Court failed to distinguish between conspiracy to obstruct and obstruction, however, and apparently saw no self-incrimination policy question as to the defendant actually involved in the accident. But perhaps the conspiracy aspect of the case did make the difference. This would certainly be supported by recent developments under the omnibus federal conspiracy statute in the United States¹³³ and it is noteworthy that the Scottish Court, on facts very similar to *Sharpe and Stringer*, refused to sustain obstruction as distinguished from conspiracy to obstruct convictions.¹³⁴

From the standpoint of a defendant himself suspected of crime, of course, there would appear to be no sound policy basis for distinguishing between a non-punishable affirmative falsehood to police by which the suspected defendant seeks to exonerate himself and a punishable agreement between defendant and another not involved or suspected to tell the police an affirmative falsehood. The distinction, if there is to be one, should be between an affirmative falsehood by the suspected defendant and his bare false denial of guilt. The latter type lie should never be punishable; to do so would emasculate the policy underlying the privilege against self-incrimination. Indeed, as will later be argued,¹³⁵ neither type lie should in the usual case be punishable, and it is at least highly debatable whether, apart from certain highly exceptional situations, lying to the police should ever be punishable, either in the case of suspects or non-suspects.

4. Statutes and Ordinances Making False Statements Criminal

One final group of statutes and caselaw remains to be considered. Delaware¹³⁶ and Michigan¹³⁷ possess statutes making it unlawful knowingly to report fictitious crimes to the police, and an English Court, in *King v. Manley*,¹³⁸ has held such conduct to constitute a common law offense. Enactments in four other states—Mary-

¹³³ See e.g., *United State v. Bonanno*, 177 F. Supp. 106 (S.D.N.Y. 1959).

¹³⁴ *Curlett v. M'Kechnie*, [1939] 1 Scots L.T.R. 11 (Justiciary, 1938). Compare *Hinchcliffe v. Sheldon*, [1955] 3 All E.R. 406, 99 Sol. J. 797; *Betts v. Stevens*, [1910] 1 K.B. 1; *Bastable v. Little*, [1907] 1 K.B. 59.

¹³⁵ See text beginning at note 158, *infra*.

¹³⁶ DEL. CODE ANN. tit. 11, § 103 (1953).

¹³⁷ MICH. STAT. ANN. § 28.643(1) (1954).

¹³⁸ [1933] 1 K.B. 529 (defendant falsely reported that she had been robbed and gave to police a fictitious description of the non-existent robber).

land,¹³⁹ Nebraska,¹⁴⁰ Washington,¹⁴¹ and Wisconsin¹⁴²—go even further. Statutes there—and ordinances in municipalities throughout the nation¹⁴³—penalize any knowingly false statement to a police officer, even a criminal suspect's knowingly false oral and unsworn denial of guilt. Penalties for such false statements, it should be noted, range from a possible maximum of ninety days in Maryland to one year in Wisconsin.

But the harshness of the above enactments becomes benevolence when compared with the rigor of Section 1001 of the federal criminal code. This statute, representing virtually the ultimate in attempts to ensure honesty by citizens in dealings with government officers,¹⁴⁴ provides as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or *makes any false, fictitious or fraudulent statements or representations*, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent

¹³⁹ MD. ANN. CODE art. 27, § 150 (1957).

¹⁴⁰ NEB. REV. STAT. § 28-744 (Supp. 1959). This section provides as follows: "Any person who furnishes information he knows to be false to any law enforcement officer who operates under the authority of the State of Nebraska or any political subdivision or court thereof, or other official, with the intent to instigate an investigation of an alleged criminal matter, or to impede an investigation of an actual criminal matter, shall be fined in a sum of not to exceed five hundred dollars, or imprisoned in the county jail for a term not to exceed six months, or by both such fine and imprisonment."

¹⁴¹ WASH. REV. CODE § 9.69.060 (1956).

¹⁴² WIS. STAT. ANN. § 946.41 (2) (b) (1958).

¹⁴³ Some of these ordinances, it should be noted, are phrased in terms of false "reports" to police officers rather than false "statements" and it has accordingly been held that an oral false "reply" to a policeman's question as distinguished from a false formal written or "volunteered report" is not punishable. *Compare* People v. Smith, 131 Cal. App.2d 289, 281 P.2d 103 (1955) (non-punishable false oral reply), *with* People v. Minter, 135 Cal. App.2d 838, 287 P.2d 196 (1955) (punishable false oral statement by defendant who went to police station of his own motion and accused certain persons of perjury).

¹⁴⁴ Perhaps the absolute ultimatum in this regard is represented by Section 120 of the Canadian Criminal Code which makes possible a five year prison sentence for anyone "causing a police officer to enter upon an investigation . . . by doing anything . . . to divert suspicion from himself."

statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.¹⁴⁵

Section 1001, it will be noted, covers any knowingly false statement to a government agent or department whether oral or written, sworn or unsworn, material or immaterial and regardless of any intent to mislead or gain any benefit so long as the statement concerns a matter "within the jurisdiction of any department or agency of the United States." It covers false statements by suspects in criminal cases and would even extend if read literally not only to bare false denials of culpability by criminal suspects but to a criminal defendant's knowingly false plea of not guilty on his arraignment. The penalty, furthermore—five years in prison and a \$10,000 fine—is extremely harsh.

Judicial interpretation of § 1001 has been almost unbelievably literal and it has been made to cover, among a host of other things,¹⁴⁶ oral and written lies to federal internal revenue agents by actual criminal suspects in income tax fraud investigations¹⁴⁷ and even in one case to a false oral report of a theft to an Assistant United States District Attorney.¹⁴⁸ The leading case is *Marzani v. United States*.¹⁴⁹ Defendant, a State Department employee, was shown to have falsely told his superior at some point during an informal non-compulsory two hour meeting called at defendant's request and at which no one else was present that he, defendant,

¹⁴⁵ 18 U.S.C. § 1001 (1958) (Emphasis added). The history of § 1001 is traced in *United States v. Bramblett*, 348 U.S. 503 (1955); *United States v. Gilliland*, 312 U.S. 86 (1941), and *United States v. Cohn*, 270 U.S. 339 (1926).

¹⁴⁶ See, e.g., *Frazier v. United States*, 267 F.2d 62 (1st Cir. 1959) (defendant successfully prosecuted for having falsely indicated on omnibus army induction form that he had never attended communist party meetings); *United States v. Private Brands, Inc.*, 250 F.2d 554 (2d Cir. 1957) (successful prosecutions of defendants for having lied to FBI agent concerning the quality of certain merchandise during latter's criminal investigation of defendants); *United States v. Myers*, 131 F. Supp. 525 (N.D. Cal., 1955) (defendant, a federal employee, falsely stated on official government form that a certain person had purchased an auto from the War Assets Administration).

¹⁴⁷ *Knowles v. United States*, 224 F.2d 168 (10th Cir. 1955) (false oral statement by defendant to internal revenue agent conducting an audit of defendant's returns that certain monies had been received by him as an agent so that they would not be taxable); *Cohen v. United States*, 201 F.2d 386 (9th Cir. 1953) (false written statement of defendant's net worth given to internal revenue agents at their informal request during a tax conference).

¹⁴⁸ *United States v. Van Valkenburg*, 157 F.Supp. 599 (D. Alaska 1958).

¹⁴⁹ 168 F.2d 133 *aff'd*, 335 U.S. 895 (1948).

was not a communist and that he had never been known by the name of Tony Whales. Defendant's statements were oral and unsworn, there was no stenographic or other transcription of defendant's statements, no proof that defendant knew of the possible criminal-law consequences of his lies and no showing of any limitation, formal or otherwise, of the subjects to be covered at the meeting. Indeed, a great variety of subjects were discussed and defendant and his superior were friends and called one another by their first names throughout the two hour meeting. Defendant's conviction under Section 80, the predecessor of Section 1001, was nevertheless affirmed over defendant's due process objections and such judgment was in turn affirmed by an equally divided United States Supreme Court.¹⁵⁰

Post-Marzani precedent has followed that case and even perhaps expanded upon it.¹⁵¹ The requirement obtaining in federal perjury cases that the falsity of defendant's statement be proved by two witnesses or by one witness plus convincing corroborative evidence seems now definitely to have been held inapplicable to § 1001 prosecutions.¹⁵² And no court has thus far insisted on proof that defendant knew (or even should have known) of the possible criminal-law consequences of lying, that a warning was given of the possible scope of the inquiry or that defendant was given the opportunity of being interviewed in the presence of his attorney. Nor has any court talked or even so much as suggested the necessity of apprising defendant of his right to remain silent.

5. Conclusions

The wisdom of enactments such as § 1001 is, to say the least, highly dubious. They first of all tend to discourage public cooperation with the police by making persons interviewed during a police investigation liable to criminal prosecution merely on the basis of a policeman's recollection of what might have been said, often, perhaps usually, in a highly charged emotional situation. Lawyers must of necessity frequently advise silence in the face of such a risk. Such enactments, furthermore, ignore the stringent proof require-

¹⁵⁰ See note 149 *supra*.

¹⁵¹ A few courts, however, balking at the oppressiveness of § 1001, have applied a strict construction of the term "statement" and of what constitutes a "matter within the jurisdiction" of particular agents or agencies of the United States. See, *e.g.*, *Rolland v. United States*, 200 F.2d 678 (5th Cir. 1953); *United States v. Moore*, 185 F.2d 92 (5th Cir. 1950); *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955).

¹⁵² See the discussion and citation of authorities in *DeCaus v. United States*, 250 F.2d 150 (9th Cir. 1957).

ments which have always obtained in the case of perjury and there is not, of course, (as the statutes embrace both written and oral statements), the written proof of the statement having been made as there is in the usual perjury and false swearing case. Again, there is no requirement of materiality other than that the officer be conducting a lawful investigation. A woman lying about her age to a policeman is dealt with on the same basis as one lying about the whereabouts of a murderer. Nor—unless due process would require it—does criminal liability under these statutes require the presence of a lawyer, the solemnity of an oath or so much as a warning from the investigator of the consequences of a lie¹⁵³ or of the scope of the inquiry.¹⁵⁴

Finally, such enactments, at least when applied to the false statements of criminal suspects and particularly to their bare false and unsworn denials of culpability, do violence to the spirit of the law of entrapment and to the spirit if not the letter of the privilege against self-incrimination. And, indeed, the force of the self-incrimination point as it relates to actual criminal suspects has been at least once judicially noted. A federal district court, in *Meyer v. Brownell*,¹⁵⁵ strongly intimates that the Fifth Amendment would bar a Section 1001 prosecution upon a showing that federal agents were contemplating a criminal prosecution of the defendant at the time his false statements were made to them. Such a ruling, of course, would be in accord with precedent in analogous situations. A grand jury indictment returned against a person called and sworn by them to answer at a time when the grand jury is contemplating a criminal prosecution against such person, for example, has traditionally been subject to outright dismissal on self-incrimination grounds.¹⁵⁶ And this, it should be noted, regardless of whether such person was or was not informed by the grand jury of his right to remain silent.¹⁵⁷ The constitutional evil lies merely in the attempt to question under such circumstances.

B. UNDER THE MODEL PENAL CODE

The Model Penal Code, it should be observed, has tentatively made unsworn falsification to police officers a misdemeanor. Section 208.22 of the 1957 Tentative Draft provides as follows:

¹⁵³ Cf. *Lambert v. California*, 355 U.S. 225 (1957).

¹⁵⁴ Cf. *Watkins v. United States*, 354 U.S. 178 (1957).

¹⁵⁵ 137 F. Supp. 594, 610 (E.D. Pa. 1956).

¹⁵⁶ See, e.g., *State ex rel. Poach v. Sly*, 63 S.D. 162, 257 N.W. 113 (1934); *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468 (1959).

¹⁵⁷ *Ibid.*

A person commits a misdemeanor if, with intent to mislead an official in performing his official function:

(a) he makes any written false statement which he does not believe.

This, to be sure, is a vast improvement on enactments such as § 1001. The crime is made a misdemeanor rather than a felony, there is an intent to mislead requirement and the false statement must be in writing. There is, however, no meaningful requirement of materiality—a lie about one's address is as bad as one concerning culpability—there is no insistence on a warning of the consequences of making a false statement and the section is broad enough not only to cover an affirmative attempt by a criminal suspect to exonerate himself but even his bare false denial of guilt.

Some lies to police should, of course, be punishable and the Model Penal Code is doubtless on sound ground when it penalizes in a minor way, as it does in Section 208.24,¹⁵⁸ the giving of false information to police with intent to implicate another and the reporting of non-existent crimes or false leads. The above-quoted Section 208.22, however, is something else again and the same may be said of § 208.32,¹⁵⁹ the Code's accessory section, which, following the view taken in a minority of states, makes a felon out of one who "volunteers" false unsworn information to police officers with intent to

¹⁵⁸ § 208.24 of Tentative Draft No. 6 (1957) provides as follows: "Section 208.24. False Reports to Law Enforcement Authorities.

(1) *Falsely Incriminating Another.* A person who knowingly gives information to any law enforcement officer, with purpose to implicate another, commits a misdemeanor.

(2) *Wasting Enforcement Facilities.* A person who causes a law enforcement officer to act in reliance on false information commits a petty misdemeanor in the following circumstances:

(a) where the actor reports to law enforcement authorities an offense or other incident within their concern, knowing that it did not occur; or

(b) where the actor pretends to furnish information relating to an offense or incident when he knows he has no such information."

¹⁵⁹ § 208.32 of Tentative Draft No. 9 (1959) provides, in relevant part, as follows:

"Section 208.32. Aiding Another to Avoid Prosecution or to Consummate Crime.

(1) *Avoiding Prosecution.* A person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction, or punishment of another for crime, he: * * *

(e) attempts to mislead law enforcement officers by volunteering information which he knows to be false.

Violation of this subsection is a felony of the third degree if the conduct which has been charged or is liable to be charged against the person aided would constitute a felony of the first or second degree. Otherwise, violation of this subsection is a misdemeanor."

mislead them and to aid the principal offender. The meaning of the word "volunteers" in § 208.32 however, is unfortunately not spelled out either in the Code proper or in accompanying comments but it is in any event clear that there is again no meaningful materiality requirement, and no need for a warning of the possible criminal law consequences of a lie. But the objection here to these sections and to the statutes, decisions and policy they represent goes deeper. In the writer's judgment at least, it is simply not sound policy to require scrupulous honesty and exactitude on the part of our citizens in their unsworn statements to policemen, when, as case after case in the reports remind us, those statements will often, if not typically, be made in a highly charged emotional situation during the course of an illegal confinement in a police station. Surely the crime of perjury before policemen can at least be put off until the practices of our law enforcement officers coincide more with the ideals and principles of our procedural criminal law. And judging from most recent samplings of federal habeas corpus cases, that will unfortunately take a long time indeed.

IV. CONCLUSION

Little remains by way of conclusion. One purpose here, of course, has simply been to show the varied statutory and case law configurations to be considered in assessing the citizen's modern day responsibilities to inform on the criminal behavior of others. And the picture, it is submitted, is not altogether a simple one. Nor probably has it ever been. Consider, for example, just the initial irony of the total absence of early English precedent supporting the existence of misprision of felony as a common law offense as compared with the universal recognition of the offense in some form by common law commentators such as Coke, Hale and Blackstone. One thing, however, does seem clear. Flippant modern assertions that a citizen is under no circumstances currently obliged to inform on the criminal or at least the felonious activities of third parties simply cannot be justified in terms of the statutes and caselaw of many jurisdictions. While there are few places where one must affirmatively seek out a policeman—and perhaps there is no such place when constitutional considerations are given appropriate weight—the situation in many states becomes quite different when one is asked by a policeman to speak out and refuses. And particularly is this true if the citizen has some ulterior purpose in refusing to cooperate—notably, of course, an intent to aid the felon. But less culpable states of mind, such as a bare obstinate desire to obstruct justice, may also in some states suffice for conviction. As a matter of policy, on the other hand, a citizen should not be re-

quired to speak out even on police request. Our law enforcement agencies simply do not require the aid of criminal offenses to hold over the heads of private citizens who for reasons of their own wish to remain silent. Prosecution subpoena power at the preliminary hearing and at the trial coupled with the subpoena power of the grand jury and the natural desire of most citizens to cooperate with official authority are amply sufficient to protect the public interest.

The matter of lying to police, of course, is somewhat different. Certainly the current risks of criminal prosecution for such lying are much greater than for merely remaining silent when requested to talk by a policeman and probably much greater, too, certainly in the federal area, than is currently appreciated by most of the Bar. That, of course, was one of the central reasons for this undertaking. More importantly, however, it was designed to show the unfairness, apart from certain exceptional situations, of penalizing citizens, and particularly criminal suspects, for their falsifications to police officers and to urge the repeal of enactments such as Section 1001.