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# ARTICLES

## MISPRISION OF ANTITRUST FELONY

ROBERT J. HOERNER\*

### I. PROLOGUE

**T**HE FOLLOWING COLLOQUY TOOK PLACE on April 7, 1978, at the spring meeting of the Antitrust Section of the American Bar Association, between Miles Kirkpatrick, former Chairman of the Federal Trade Commission and John Shenefield, then Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice:

MR. KIRKPATRICK: Yes, there is a thorny question that many of us, in one way or another, have faced. It arises out of the fact that the Sherman Act offenses are now felonies. *Therefore, the misprision of felony statute applies.*<sup>1</sup> Has the Division developed any policy on this?

Let us assume that a company finds that its sales manager has been engaged in some hard core price fixing. It is arguable that under the misprision statute the company has two choices and two choices alone without grave risk of becoming involved in a misprision. One is to leave the guy exactly where he is, continue to pay him exactly what he is paid and treat him no differently than if it had not been discovered. The other is to fire him out of hand. To do anything less than firing him out of hand, to demote him, to keep him on the payroll, to retire him early, could well be interpreted as keeping him on a string, and as such it might be an affirmative . . . [act of] . . . concealment which would trigger the statute. Has the Division any policy on that?

MR. SHENEFIELD: No. This is an area that is recently receiving attention. The Division has no special wisdom on it. In fact, the Antitrust Section of the Bar Association could well devote some attention to this, because it is something with which individual

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<sup>1</sup> 18 U.S.C. § 4 (1976).

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.

counsel have to come to grips very late at night in rooms full of documents. The question of whether a delay in doing any of these things can be interpreted as affirmative action is also unanswered.

The *Lancey* case,<sup>2</sup> the main precedent construing that statute, does require an affirmative act, in spite of the language of the statute. So, perhaps there is some slight room for movement there. *But it seems to me that the lawyer is left in an impossible position and a very uncomfortable one.* The Division has no special wisdom or advice to lawyers on their efforts in this area, as opposed to some others. I think it ought to get some attention.

*We clearly have no guidelines or policy.*<sup>3</sup>

The purpose of this article is to give the misprision area some preliminary attention in order to make the lawyer's position a little less impossible and a little more comfortable.

## II. THE BROADER PROBLEM

When an attorney discovers clear evidence that his corporate client has committed an antitrust felony, he and his client are immediately confronted with an interrelated tangle of extraordinarily difficult questions:

—To what extent will the attorney's communications with the client about the violation be subject to the attorney-client privilege?<sup>4</sup>

—In this context, who is deemed the "client," the entity or the individual?<sup>5</sup>

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

<sup>3</sup> *Panel Discussion Interview with John Shenefield, Assistant Attorney General, Antitrust Division*, 47 ANTITRUST L.J. 775, 794-95 (1978) (emphasis added).

<sup>4</sup> See Miller, *The Corporate Attorney-Client Privilege and the Work Product Doctrine: Protection from Compelled Disclosure in Criminal Investigation of a Corporation*, 12 U.S.F. L. REV. 569 (1978); Note, *The Attorney-Client Privilege, the Self-Evaluative Report Privilege, and Diversified Industries, Inc. v. Meredith*, 40 OHIO ST. L.J. 699 (1979). See also Note, *Corporations—Attorney Client Privilege*, 47 GEO. WASH. L. REV. 413 (1979).

<sup>5</sup> The question of whether the identity of the corporate client is determined by the "control group" test or the "subject matter" test will presumably be decided in *United States v. Upjohn*, 600 F.2d 1223 (6th Cir. 1979), *cert. granted*, 100 S. Ct. 1310 (1980). See 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 503(b)[04] (1979). Is the attorney also representing, or should he arrange to represent, the individual corporate employees whom he is interviewing or may interview? If so, what is his duty to them, especially if they are in a position conflicting with the attorney's corporate client? See Favretto, "The Perils of Multi-

- If the attorney has been acting, to some extent at least, as an investigator, will the report of his findings be privileged?<sup>6</sup>
- What is the attorney's duty and the client's duty of disclosure to the client's auditors?<sup>7</sup>
- What, if any, is the attorney's duty of disclosure to the Securities and Exchange Commission;<sup>8</sup> what is the client's duty of disclosure to the Commission;<sup>9</sup> and what is the potential

ple Representation in Criminal Antitrust Proceedings," Remarks at Chicago Bar Assn.'s Spring Antitrust Symposium (May 3, 1977); Kennedy, *Special Problems in Representing the Individual Defendant*, 47 ANTITRUST L.J. 667, 668-69 (1978). Finally, does the corporate client include its shareholders? See Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

<sup>6</sup> See Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 BUS. LAW. 5 (1979). See also ABA MODEL RULES OF PROFESSIONAL CONDUCT 6.2 (Discussion Draft, Jan. 30, 1980).

<sup>7</sup> ABA CORPORATE BANKING AND BUSINESS LAW SECTION, AUDITOR'S LETTER HANDBOOK (1976); Note, *Attorney Responses to Audit Letters: The Problem of Disclosing Loss Contingencies Arising from Litigation and Unasserted Claims*, 51 N.Y.U. L. REV. 838 (1976); Note, *The Scope of Attorneys' Responses to Auditors' Requests for Information—The ABA and AICPA Compromise*, 1976 U. ILL. L.F. 783 (1976).

<sup>8</sup> The contours of an attorney's general duty of disclosure, if any, under the federal securities laws are uncertain at present. See generally Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U. L. REV. 437 (1974); Lowenfels, *Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standard of Care and Priorities of Duties*, 74 COLUM. L. REV. 412 (1974); Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liberties of Attorneys under the Federal Securities Statutes*, 34 OHIO ST. L.J. 231 (1973). The Securities and Exchange Commission (SEC) has taken the position in litigation that in certain circumstances an attorney has the duty to ensure public disclosure of material financial information concerning his client notwithstanding the traditional obligation of confidentiality. See, e.g., *S.E.C. v. National Student Marketing Corp.*, [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,360 (D.D.C., complaint filed Feb. 3, 1972) [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,027 (D.D.C. May 2, 1977) (stipulation of settlement and order). See also KLEIN, *THE SEC AND THE LEGAL PROFESSION: MATERIAL ADVERSE DEVELOPMENTS*, ELEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION, 597 (PLI 1979). The SEC recently rejected a rulemaking petition which would have required disclosure of the nature of the relationship between reporting companies and their outside counsel with respect to reporting on probable law violations. 44 Fed. Reg. 44,881 (1979), comments summarized in 532 SEC. REG. & L. REP. (BNA) A-1 (Dec. 12, 1979), rejection announced in 552 SEC. REG. & L. REP. (BNA) H-1 (May 7, 1980). It nevertheless seems likely that the principles governing this area will undergo significant revision in the near future. See ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1.13(b) (Discussion Draft, Jan. 30, 1980), Kramer, *Client's Frauds and their Lawyer's Obligations: A Study in Professional Irresponsibility*, 67 GEO. L.J. 991 (1979).

<sup>9</sup> Under traditional principles, the question whether public disclosure of illegal or possibly illegal conduct is required is based, in the first instance, upon a qualitative economic analysis, i.e., emphasis is to be placed upon the effect of an

liability of each under Rule 10b-5<sup>10</sup> for nondisclosure of a violation?<sup>11</sup>

item of information on the corporation's profit and loss account and on the earnings trends which determine modern ratios. See Kripke, *Rule 10b-5 Liability and "Material" "Facts"*, 46 N.Y.U. L. REV. 1061, 1071 (1971). The second component of the traditional analysis is based upon a quantitative analysis, i.e., the relative importance of a particular fact or group of facts must be assessed to determine if it is important enough to require public disclosure. See, e.g., Instruction 2 to Item 5 of Regulation S-K, [1979] 5 FED. SEC. L. REP. (CCH) ¶ 70,963 (excluding from disclosure requirement claims for damages if the amount involved is less than ten percent of the current assets of the reporting company). The foreseeable consequences of antitrust violations could well meet this test. See *Panel Discussion: Is There an Obligation to Report Violations*, 48 ANTITRUST L.J. 119 (1979).

Even in the absence of quantitative materiality, there could be a disclosure question, for in the area of so-called questionable payments, the SEC has advanced an analysis which is not based upon traditional principles. Instead, in this context the SEC has asserted that five factors are controlling: (1) falsification of corporate records, (2) management participation or knowledge, (3) legality, (4) identity of the recipients of the payments, and (5) the amounts involved and their relation to the business of the reporting company. REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976) (submitted to the Senate Banking, Housing, and Urban Affairs Committee of the Second Session of the 94th Congress). The SEC has recently expanded the applicability of its analysis in the questionable payments context to other areas, such as, so-called corporate "perquisites." See Profusek, *Nonmonetary Forms of Remuneration Under the Federal Securities Laws*, 30 CASE W. RES. L. REV. 3, 4 n.9, 28 n.116 (1979). The SEC's approach in these contexts has been heavily criticized. See Freeman, *The Legality of the SEC's Management Fraud Program*, 31 BUS. LAW. 1295 (1976); Kripke, *Opening Remarks on the Corporation in Crisis*, 31 BUS. LAW. 1277 (1976). It has, however, been adopted by some courts. E.g., *Berman v. Gerber Prod. Co.*, 454 F. Supp. 1310 (W.D. Mich. 1978). Moreover this approach, particularly in its emphasis upon management involvement in illegal or questionable conduct, is not completely unique to matters such as questionable payments or corporate perquisites. See, e.g., *Rafal v. Geneen*, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,505, at 92,440 (E.D. Pa. 1972) (the fact that a nominee for election as a director was a defendant in an action alleging improper use of inside information was deemed material under the federal proxy solicitation rules). As such, it would appear that the SEC's analysis could apply to any violation of law by a reporting company, including an antitrust violation or present concealment of a past antitrust violation. See Mann, *Watergate to Bananagate: What Lies Beyond?*, 31 BUS. LAW. 1663, 1667 (1976).

<sup>10</sup> 17 C.F.R. § 240.10b-5 (1979). See note 11 *infra*.

<sup>11</sup> Various provisions of the federal securities laws, expressly or by implication, impose liability on reporting companies and their officers and directors for misstatements or omissions of material facts in connection with documents or reports distributed to shareholders or filed with the SEC. See generally Allen, *The Disclosure Obligations of Publicly Held Corporations in the Absence of Insider Trading*, 25 MERCER L. REV. 479 (1974); Bauman, *Rule 10b-5 and the Corporation's Affirmative Duty to Disclose*, 67 GEO. L.J. 935 (1979). The primary example is SEC Rule 10b-5. 17 C.F.R. § 240.10b-5 (1979). Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or

- Are the attorney's duties, privileges and liabilities different if he is also a director of the corporate client?<sup>12</sup>
- What are the attorney's ethical obligations under the Code of Professional Responsibility?<sup>13</sup> What would they be if the proposed Model Rules of Professional Conduct were adopted?<sup>14</sup>
- Should the attorney advise his client to take advantage of the Voluntary Disclosure Program of the Department of Justice?<sup>15</sup>

of any facility of any national securities exchange, . . . .

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . .

Perhaps the best known cases under Rule 10b-5 involving claims for monetary damages arising out of alleged failures to disclose material adverse information are *Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973) (*en banc*), and *Financial Indus. Fund v. McDonnell Douglas Corp.*, 474 F.2d 514 (10th Cir.) (*en banc*), *cert. denied*, 414 U.S. 874 (1973). See generally Note, *The Liability of Outside Directors under Rule 10b-5*, 49 N.Y.U. L. REV. 551 (1974). For a discussion of potential liability under section 11 of the Securities Act of 1933, see *Escott v. BarChris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968). See generally, Folk, *Civil Liabilities Under the Federal Securities Acts: The BarChris Case*, 55 VA. L. REV. 1 (1969).

The reaction to the problem of so-called "questionable payments" suggests a disclosure obligation, enforceable in private litigation, even in the absence of financial materiality. In upholding a pleading seeking an injunction under § 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a), in *Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650 (2d Cir. 1979), the Second Circuit wrote, "Furthermore, plaintiffs allegation of a cover-up of the alleged bribes enhances the prospect that she will succeed in demonstrating materiality, since we believe that shareholders, in deciding which directors to elect, would consider such conduct, if it occurred, more important than the initial authorization or the payments." *Id.* at 655.

State law may also provide a source of liability. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78 (1969). See, e.g., *Graham v. Allis-Chalmers Mfg. Co.*, 41 Del. Ch. 78, 188 A.2d 125 (Sup. Ct. 1963); Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1099 (1968).

<sup>12</sup> See *In re Grand Jury Proceedings in the Matter of Browning Arms Co.*, 528 F.2d 1301 (8th Cir. 1976); Knepper, *Liability of Lawyer-Directors*, 40 OHIO ST. L.J. 341 (1979); Williams, *Corporate Accountability and the Lawyer's Role*, 34 BUS. LAW. 7 (1979).

<sup>13</sup> See Frank, *A Higher Duty: A New Look at the Ethics of the Corporate Lawyer*, 26 CLEV. ST. L. REV. 337 (1977); Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423 (1978); Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979).

<sup>14</sup> See ABA MODEL RULES OF PROFESSIONAL CONDUCT, (Discussion Draft, Jan. 30, 1980).

<sup>15</sup> See J. Shenefield, *The Disclosure of Antitrust Violations and Prosecutorial Discretion*, (address before the 17th Annual Corporate Counsel Institute, Chicago, Illinois, Oct. 4, 1978), summarized in [1979] 5 TRADE REG. REP. (CCH) ¶ 50,388 at 55,858 (Nov. 13, 1978); Panel Discussion: *Interview with J. Shenefield*,

— Finally, to what extent, if at all, can the attorney recommend destruction of evidence of the violation without him or his client becoming criminally liable under the misprision of felony statute?

There has been much concern over these questions, particularly since violation of sections 1, 2 and 3 of the Sherman Act<sup>16</sup> became indictable as felonies on December 21, 1974.<sup>17</sup> Little has been written, however, on the misprision issue. Antitrust practitioners are not ordinarily trained in the contours of 18 U.S.C. § 4, the federal misprision statute. Our criminal practice is typically in rarified and antiseptic economic fields,<sup>18</sup> and does

*Assistant Attorney General, Antitrust Division*, 48 ANTITRUST L.J. 637, 646-49 (1979); *To Confess or Not to Confess: Agonies of Uncovering Price Fixing*, ANTITRUST & TRADE REG. REP. (BNA), No. 861, § AA (Apr. 27, 1978).

<sup>16</sup> 15 U.S.C. §§ 1, 2, & 3 (1976). Section 1 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal *shall be deemed guilty of a felony*, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court (emphasis added).

Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, *shall be deemed guilty of a felony*, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court (emphasis added).

Section 3 provides:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, *shall be deemed guilty of a felony*, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court (emphasis added).

<sup>17</sup> Antitrust Procedures and Penalties Act—Expediting Act, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (amending 15 U.S.C. §§ 1, 2 & 3 (1974)).

<sup>18</sup> See generally NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEPT. OF JUSTICE, ILLEGAL CORPORATE BEHAVIOR (1979);

not concern bank robberies and kidnappings, where the misprision cases are to be found. This article is intended to provide a familiarity which may come to be needed.

Before turning to the misprision statute, it is important to mention other federal statutes which may apply to a misprision problem, depending on the circumstances. These statutes include: obstruction of justice;<sup>19</sup> perjury and subordination of perjury;<sup>20</sup> false statements;<sup>21</sup> accessory after the fact;<sup>22</sup> obstruction of agency proceedings or of a civil

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*Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

<sup>19</sup> 18 U.S.C. § 1503 (1976). Section 1503 provides, in pertinent part, that "whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both." The section normally applies only to proceedings pending before a federal court or grand jury. *See, e.g.*, *Pettibone v. United States*, 148 U.S. 197, 205 (1893); *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972); *United States v. Metcalf*, 435 F.2d 754, 757 (9th Cir. 1970). Case law has held that specific criminal intent must be shown. *Pettibone v. United States*, 148 U.S. at 205; *Knight v. United States*, 310 F.2d 305 (5th Cir. 1962). *See generally* Note, *Interpretation of Misrepresentation as found in the Federal Obstruction of Criminal Investigation Statute*, 14 WAKE FOREST L. REV. 117 (1978).

As to footnotes 19 through 27, *see generally*, Baker, *The Control of Documents*, 48 ANTITRUST L.J. 35 (1979).

<sup>20</sup> 18 U.S.C. §§ 1621-22 (1976). The essential elements of perjury as defined by section 1621 are "(1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement willfully made as to facts material to the hearing." *United States v. Debrow*, 346 U.S. 374, 376 (1953). Subordination of perjury under section 1622 occurs when one procures or instigates another to commit the crime of perjury. *Petite v. United States*, 147 F. Supp. 791 (D. Md. 1957), *aff'd*, 262 F.2d 788 (4th Cir. 1959), *remanded on other grounds*, 361 U.S. 529 (1960). A charge of perjured testimony before a grand jury can be brought under section 1621 as well as under 18 U.S.C. § 1623 (1976) (false declarations before a grand jury or court). *United States v. Kahn*, 340 F. Supp. 485 (S.D.N.Y. 1971), *aff'd*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). *See generally*, Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977); Note, *Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century*, 75 MICH. L. REV. 1681 (1977).

<sup>21</sup> 18 U.S.C. § 1001. Section 1001 provides that "[w]hoever, 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 . . . shall be fined not more than \$10,000 or imprisoned not more than five years, or both." The statements may be oral or written and do not have to be made under oath. *United States v. Massey*, 550 F.2d 300, 305 (5th Cir. 1977). *See United States v. Bramblett*, 348 U.S. 503 (1955); *United States v. Beacon Brass Co., Inc.*, 344 U.S. 43 (1952); Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316 (1977).

<sup>22</sup> 18 U.S.C. § 3 provides: "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." The reviser's note indicates that the statute was based



investigative demand;<sup>23</sup> contempt of court;<sup>24</sup> conspiracy;<sup>25</sup> aider and abettor;<sup>26</sup> and mutilation, etc., of documents demanded by the Federal Trade Commission.<sup>27</sup>

on *Skelly v. United States*, 76 F.2d 483 (10th Cir.), *cert. denied*, 295 U.S. 757 (1935). As its wording shows, the statute applies only to assistance to "the offender," and does not apply to actions taken to conceal only the crime. *United States v. Prescott*, 581 F.2d 1343, 1353 (9th Cir. 1978); *United States v. Barlow*, 470 F.2d 1245, 1252-53 (D.C. Cir. 1972). See MILLER ON CRIMINAL LAW § 77 (1934). See also 18 U.S.C. § 1071 (1976).

<sup>23</sup> 18 U.S.C. § 1505 (1976). Section 1505 subjects to criminal liability anyone who "corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which [a] proceeding is being had before [a] department or agency of the United States, . . ." The statute also applies to obstruction of compliance with a civil investigative demand. The term agency "proceeding" in the statute has been broadly construed. *United States v. Vixie*, 532 F.2d 1277, 1278 (9th Cir. 1976); *United States v. Fruchtmann*, 421 F.2d 1019, 1021 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970).

<sup>24</sup> 18 U.S.C. § 401 (1976). Subsection 3 of the contempt statute allows the court to punish "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." See generally *United States v. Greyhound Corp.*, 363 F. Supp. 525 (N.D. Ill. 1973), *supplemented* 370 F. Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974). (corporation's officers had an affirmative duty to act to insure compliance with court order). A corporation would be vulnerable to prosecution under this statute if, for example, it allowed destruction of documents which it was required to preserve under an outstanding antitrust decree or if it failed to comply with a valid grand jury subpoena. *United States v. National Gypsum Co.*, 1972 TRADE CAS. (CCH) ¶ 74,173 (W.D. Pa. 1972). See also 18 U.S.C. §§ 402, 3691 (1976).

<sup>25</sup> 18 U.S.C. § 371 (1976). Section 371 provides that "If two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both." The section covers both felonies and misdemeanors and has been linked with the obstruction of justice provisions. (18 U.S.C. § 1503). See *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942). On at least two occasions the Antitrust Division has challenged the selective destruction of corporate records under 18 U.S.C. §§ 371 and 1503. *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1975) (indictment quashed); *United States v. Turen*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 at 53,572-74 (D.N.J. May 16, 1974).

<sup>26</sup> 18 U.S.C. § 2 (1976). This statute states, in part, that one who "aids, abets, counsels, commands, induces or procures" an offense against the United States is punishable as a principal. It has been used to charge the directing heads of corporations with criminal liability for the unlawful acts of subordinates, regardless of whether they were present when the acts were committed or personally supervised the acts. *Carolene Products Co. v. United States*, 140 F.2d 61 (4th Cir.), *aff'd*, 323 U.S. 18 (1944).

<sup>27</sup> 15 U.S.C. § 50 (1976). The second paragraph of this section subjects to criminal liability anyone who shall wilfully "mutilate, alter, or . . . falsify" documents required to be kept by a corporation under the Act. "Destroy" appeared in the Senate version of the bill but not in the final version. See S. REP. No. 597, 63rd Cong., 2d Sess. (1914). See also *United States v. Cannon*, 117 F. Supp. 294, 295 (N.D. Ill. 1953).

The difference between the misprision statute and these other statutes is that, as their texts indicate, most (the exceptions being aider and abettor, accessory after the fact, and conspiracy) seem to be applicable only when some kind of government involvement is present. For example, a person must be under oath, or be making statements to the government, or be subject to a court order or decree; justice must be in the process of being "administered"; or a Civil Investigative Demand or a grand jury subpoena must have been issued. The misprision statute, however, applies even when there is no government involvement of any kind. This article is directed to situations where none of these other obligations is being violated.

### III. PRELIMINARY OVERVIEW

The current federal statute governing misprision of felony, 18 U.S.C. § 4, requires:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both.<sup>28</sup>

The statute's antecedents stretch back to section 6 of "An Act for the Punishment of certain Crimes against the United States," enacted on April 30, 1790, by the Second Session of the First Congress.<sup>29</sup> Most courts applying the misprision statute adopt the formulation of the elements set out in *Neal v. United States*,<sup>30</sup> as generalized and quoted in *Lancey v. United States*:<sup>31</sup>

<sup>28</sup> 18 U.S.C. § 4 (1976) (enacted in this form as Act of June 25, 1948, 62 Stat. 684).

<sup>29</sup> 1 Stat. 113, § 6 (1790).

And be it [further] enacted, That if any person having knowledge of the actual commission of the crime of wilful murder or other felony, upon the high seas, or within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.

*Id.*

<sup>30</sup> 102 F.2d 643 (8th Cir. 1939), *conviction as accessory after the fact aff'd following retrial*, 114 F.2d 1000 (8th Cir. 1940), *cert. denied*, 312 U.S. 679 (1941).

<sup>31</sup> 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966). *See also* *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977).

To sustain a conviction \* \* \* for misprision of felony it was incumbent upon the government to prove beyond a reasonable doubt (1) that \* \* \* the principal had committed and completed the felony alleged \* \* \* ; (2) that the defendant had full knowledge of that fact; (3) that he failed to notify the authorities; and (4) that he took \* \* \* affirmative steps to conceal the crime of the principal.<sup>32</sup>

With that brief introduction to the background of the statute<sup>33</sup> and a general overview of its coverage, the statute will now be examined element by element to determine its application to the antitrust field.

#### IV. THE ELEMENTS

##### A. "Whoever,"

The statute can be violated by "who[m]ever." Relevant in determining the scope of "whoever" is 1 U.S.C. § 1: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. . . ."<sup>34</sup> Despite this broad definition, no reported case reflects the indictment of anyone other than an individual. Nevertheless, the possibility of the indictment of a corporation, which does not have a fifth amendment privilege, should not be ignored. Conceivably, the cumulative knowledge of all of the corporation's agents could be imputed to the corporation. If any one of the agents had undertaken an act of concealment of a felony which the corporation had not reported, an indictment of the entity might lie. Indeed, the possibility exists that a corporation might be indicted for misprision because its agents had engaged in price fixing, and therefore knew of the commission of a felony, had not reported it, and may have taken actions to conceal it.<sup>35</sup>

<sup>32</sup> 356 F.2d at 409. This precise formulation has also been approved by the Sixth Circuit. *United States v. Stuard*, 566 F.2d 1 (6th Cir. 1977) (modifying previous formulation of the requisite elements); *United States v. Norman*, 391 F.2d 212, 213 (6th Cir.), cert. denied, 390 U.S. 1014 (1968).

<sup>33</sup> The origins of the crime in the early English law are traced in Glazebrook, *Misprision of Felony—Shadow or Phantom?*, 8 AM. J. LEGAL HIST. 189, 283 (1964), whose conclusion is that there was no common law crime of misprision of a felony, although *Sykes v. Director of Public Prosecution*, [1962] A. C. 528 (1961), [1961] 3 All E.R. 33 holds the contrary. The historical materials cited in *Brzburg v. Hayes*, 408 U.S. 665, 696 (1972); Judge Wyzanski's opinion in *United States v. Worcester*, 190 F. Supp. 548, 565-66 (D. Mass. 1960 and 1961); Goldberg, *Misprision of Felony: An Old Concept in a New Context*, 52 A.B.A. J. 148 (1966), and Note, *Misprision of Felony: A Reappraisal*, 23 EMORY L.J. 1095 (1974), may also be of interest.

<sup>34</sup> 1 U.S.C. § 1 (1976).

<sup>35</sup> The Antitrust Division is not yet pursuing such a policy. On February 7, 1980, an indictment was returned containing in paragraph 12(g) the following

If the statute were successfully so used, it would become a vehicle pursuant to which a corporation might be thought to have a duty to come forward and report its wrongdoing. If it did not do so, it could be subject to a misprision indictment, at least if acts of concealment had taken place or were taking place. Such a duty could be found to lie even at a relatively advanced stage of a government investigation, since, as will be shown, prior knowledge of the authorities that a felony had been committed and also the identity of the perpetrator thereof would not relieve the corporation from the operation of the misprision statute.<sup>36</sup>

Two comments on the above possibility may be appropriate. First, since a corporation cannot be sent to jail, the \$500 fine provided for by the misprision statute may not be thought meaningful, apart from whatever collateral consequences may result from a felony conviction.<sup>37</sup> Second, the significance of the United States Supreme Court's quotation from Blackstone in *Branzburg v. Hayes*,<sup>38</sup> where it is said that at common law misprision of felony constituted "the concealment of a felony 'which a man knows, *but never assented to . . .* [so as to become] either principal or accessory . . .,'"<sup>39</sup> must be evaluated. If the federal misprision statute can be construed in the light of this common law definition, then it would seem that "whoever" only means those persons who are not themselves guilty of the main offense, either directly or as an aider and abettor under 18 U.S.C. § 2.<sup>40</sup> No case under 18 U.S.C. § 4 has been found where a person was indicted for both a substantive felony and also for misprision of that substantive felony. The argument in favor of any such construction is quite compelling, for otherwise virtually any person who committed a felony would automatically be guilty of the second felony of misprision, since such a person would have knowledge of the actual commission of the crime, would not have reported it, and would ordinarily have taken actions to conceal it, as well as himself, from the authorities. Perhaps, however, this was exactly the state of affairs in the early law, for Blackstone also wrote, "that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision

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alleged overt act: "concealing the allocation of projects and the submission of colusive bids and destroying documents recording meetings at which projects were allocated and the results of said meetings." If there ever were a case in which a corporate indictment for both misprision and violation of the Sherman Act were appropriate, it would appear to have been this one. *United States v. Western Concrete Structures Co.*, Crim. No. 80-114 (C.D. Cal. Feb. 7, 1980) (indictment).

<sup>36</sup> See notes 82-83 *infra* and accompanying text.

<sup>37</sup> See generally, *Symposium—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970); Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1967).

<sup>38</sup> 408 U.S. 665 (1972).

<sup>39</sup> *Id.* at 696 (emphasis added).

<sup>40</sup> See note 26 *supra*.

only."<sup>41</sup> This quotation could mean, however, that the King could take his choice, not that he could choose both.

### B. "having knowledge"

The "knowledge" required is knowledge of the "actual" commission of a felony and, as the cases cited in the succeeding section will show, if the government does not prove the actual commission of a felony at the trial of the person indicted for misprision, then acquittal will be required.<sup>42</sup> The cases are not very clear on the quality of knowledge which a person must have for the statute to be applicable to him. Is mere suspicion enough? Is reasonable cause to believe enough? Clearly the government must prove the knowledge element beyond a reasonable doubt, but this means only that the question is one for the jury under proper instructions, and an appellate court would presumably not disturb a jury verdict "if there is substantial evidence, taking the view most favorable to the Government, to support it."<sup>43</sup>

In the conventional statement of the elements of the offense,<sup>44</sup> the word "full" modifies the word "knowledge", which would suggest that mere suspicion is not enough. If this is sound, then it necessarily raises the question whether it is wise, if mere suspicion exists, to attempt fully to develop the facts before taking prophylactic measures; for developing the facts so that one has "full knowledge" may be the very thing that may trigger the misprision statute and prevent any such measures from being implemented.

A few comments may be made with a little more certainty than the above speculation. First, it is required not only that the misprision defendant know that a crime has been committed, but also that he know the identity of the perpetrator. Thus, the conventional statement of the elements of the crime includes proof that "the *principal* had committed and completed the felony alleged."<sup>45</sup> This aspect of the requirement of knowledge is illustrated in *Lancey v. United States*.<sup>46</sup> There, in finding that defendant Lancey had acquired the requisite knowledge prior to his arrest for concealing and failing to report a crime of bank robbery committed by one Zavada, the court held:

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<sup>41</sup> 4 BLACKSTONE, COMMENTARIES 119 (4th ed. MDCCLXXI). In *Branzburg*, the Supreme Court noted that the Statute has been construed to require "some affirmative act of concealment or participation." 408 U.S. at 696 n.36 (emphasis added). See also *Castaneda de Esper v. Immigration and Naturalization Service*, 557 F.2d 79 (6th Cir. 1977). But see *Glazebrook*, note 33 *supra*, at 194-97.

<sup>42</sup> *Lancey v. United States*, 356 F.2d 407 (9th Cir.), cert. denied, 385 U.S. 922 (1966); *United States v. Heckler*, 428 F. Supp. 269 (S.D.N.Y. 1976).

<sup>43</sup> *Glasser v. United States*, 315 U.S. 60, 80 (1942).

<sup>44</sup> See note 32 *supra* and accompanying text.

<sup>45</sup> See note 32 *supra* and accompanying text (emphasis added).

<sup>46</sup> 356 F.2d 407, 409, cert. denied, 385 U.S. 922 (1966).

Here it may well be that despite the defendant's knowledge that Zavada was named on television as the bank robber, and that the method used coincided with Zavada's *modus operandi*, when he heard this television news at 8:00 P.M. on June 11, 1964, or even at 11:00 P.M. when he recorded a second television newscast, *he had no obligation to notify the civil authorities.*

But one half hour later, when Lancey's telephone rang and he was told to pick up Zavada at a street intersection in San Jose, *he had information the civil authorities presumably did not have.* One and one half hours later when Zavada came to Lancey's home, carrying thousands of dollars in a laundry type bag, *any lack of certain knowledge as to the commission of a felony and who had committed it was laid at rest.*<sup>47</sup>

This quotation from *Lancey* is interesting in that it reflects that there may be a point in time when one has some knowledge, but not enough to trigger section 4, while, when additional knowledge is obtained, section 4 may then become applicable.

Particularly interesting from this standpoint is *In re Grand Jury Investigation*.<sup>48</sup> There the government filed a motion to compel production of certain documents demanded by a grand jury subpoena *duces tecum*. The subpoena was served on a law firm acting as counsel to a bank which had made certain loans. The applicants for those loans were thought to have made false statements in applying for them in violation of 18 U.S.C. § 1014, and the bank was thought possibly to have concealed the applicants' offense. The documents subpoenaed were law firm memoranda dealing with the question whether the applicants had, indeed, committed a felony. The question arose only because the bank had waived the attorney-client privilege. In this context, Judge Becker stated:

The grand jury suspects that certain bank customers may have made false statements in applying for loans, in violation of 18 U.S.C. § 1014. Also under investigation, however, is the possibility that certain bank officers, knowing that criminally false statements had been made in loan applications, actively concealed that information from responsible authorities, in violation of 18 U.S.C. § 4, which forbids misprision of felony. Thus, the advices of counsel to bank employees regarding the legal effect of particular statements in loan applications could bear on whether the bank or its officers had "knowledge of the actual commission of a felony," an element of misprision. Concomitantly, the bank officers' knowledge of their obligation (if any) to

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<sup>47</sup> *Id.* at 410 (emphasis added).

<sup>48</sup> 412 F. Supp. 943 (E.D. Pa. 1976).

report what they knew might, in the grand jury's view, bear on their criminality *vel non*.<sup>49</sup>

Several of the memoranda were ordered to be produced over the law firm's "work product" objection, on the ground that they had been prepared before litigation was actually anticipated. The interesting aspect of the court's analysis, however, is the clearly implicit suggestion that legal research may be relevant to the determination of whether there has been an "actual commission of a felony" and that, until that research has been done, a person's knowledge of the facts may not constitute the requisite knowledge under the statute. As will be noted below, this same thought has clear implication with respect to what "as soon as possible" may mean.<sup>50</sup>

### C. "of the actual commission"

There is no question but that the underlying felony must be proved in the trial of a person indicted for misprision.<sup>51</sup> If trial under the misprision indictment is separate from and subsequent to trial under the indictment for the underlying felony, the question arises whether the record of conviction in the first trial can be admitted in the misprision trial. No misprision case indicates that any such record has been admitted, and it seems likely that admission of that record would be an unconstitutional violation of the right to confrontation guaranteed by the sixth amendment to the United States Constitution.<sup>52</sup> *Barone v. United States*,<sup>53</sup> indicates that this is the case with respect to an accessory after the fact prosecution, citing *Kirby v. United States*.<sup>54</sup> In the only relevant misprision case, *United States v. Hodges*,<sup>55</sup> the court assumed, but did not decide, that a mere reference to the prior conviction of the substantive offense "was improper."<sup>56</sup>

<sup>49</sup> *Id.* at 945.

<sup>50</sup> See note 117 *infra* and accompanying text.

<sup>51</sup> *Lancey v. United States*, 356 F.2d 407, 410 (9th Cir.), *cert. denied*, 358 U.S. 922 (1966); *United States v. Heckler*, 428 F. Supp. 269, 273 (S.D.N.Y. 1976).

<sup>52</sup> *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979). The sixth amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. amend. VI.

<sup>53</sup> 205 F.2d 909, 914 (8th Cir. 1953).

<sup>54</sup> 174 U.S. 47 (1899).

<sup>55</sup> 566 F.2d 674 (9th Cir. 1977). The Ninth Circuit also noted that the trial court had ruled evidence of the underlying conviction (kidnapping) inadmissible.

<sup>56</sup> *Id.* at 676.

Since the underlying felony must be proved in the misprision trial, a federal prosecutor presumably would be tempted to join the offenses and the defendants so that the trial on both the underlying felony indictment and the misprision indictment would be conducted at the same time. Such joinder has been held proper.<sup>57</sup>

#### D. "of a felony"

As stated succinctly in *Miller v. United States*,<sup>58</sup> "[t]here is no misprision of a misdemeanor . . ."<sup>59</sup> This conclusion seems clearly to be required by the words of the statute.<sup>60</sup>

Determination of the offenses which are felonies would presumably be made under 18 U.S.C. § 1. "Notwithstanding any Act of Congress to the contrary: (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony."<sup>61</sup> In light of this definition, violations of sections 1, 2, and 3 of the Sherman Act<sup>62</sup> and section 10 of the Federal Trade Commission Act, second paragraph,<sup>63</sup> are felonies, but violations of section 73 of the Wilson Tariff Act,<sup>64</sup> section 3 of the Robinson-Patman Act,<sup>65</sup> section 10 of the Clayton Act,<sup>66</sup> and section 10 of the Federal Trade Commission Act, first and fourth paragraphs,<sup>67</sup> are not.

#### E. "cognizable by a court of the United States,"

Not only must the underlying offense be a felony, it must be a federal felony.<sup>68</sup> Thus, in *Neal v. United States*,<sup>69</sup> an early leading case, the defendant's brother had been stealing for a long period of time, by

<sup>57</sup> *United States v. Dye*, 508 F.2d, 1226 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975); *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970), *cert. dismissed sub nom.*, *Montagna v. United States*, 401 U.S. 967, *cert. denied*, 402 U.S. 905 (1971).

<sup>58</sup> 230 F.2d 486 (5th Cir. 1956).

<sup>59</sup> *Id.* at 489 n.7.

<sup>60</sup> *See United States v. Venturini*, 1 F. Supp. 213 (S.D. Ala. 1931) where the court stated, "Having held that the offense committed . . . was a misdemeanor and not a felony, of course [the] defendant cannot be held under the second count which charges misprision of felony." *Id.* at 215. *See also* *Presont v. United States*, 281 F. 131 (6th Cir. 1922).

<sup>61</sup> 18 U.S.C. § 1(1)(1976).

<sup>62</sup> 15 U.S.C. §§ 1, 2, & 3 (1976). *See* note 16 *supra*.

<sup>63</sup> 15 U.S.C. § 50 (1976).

<sup>64</sup> 15 U.S.C. § 8 (1976).

<sup>65</sup> 15 U.S.C. § 13a (1976).

<sup>66</sup> 15 U.S.C. § 20 (1976).

<sup>67</sup> 15 U.S.C. § 50 (1976).

<sup>68</sup> *See United States v. Brandenburg*, 144 F.2d 656 (3d Cir. 1944).

<sup>69</sup> 102 F.2d 643 (8th Cir. 1939), *conviction as accessory after the fact aff'd following retrial*, 114 F.2d 1000 (8th Cir. 1940), *cert. denied*, 312 U.S. 679 (1941).



means of artifice, monies belonging to a bank. His particular technique, however, had been made a federal felony only recently. The court seemed to indicate quite clearly that the defendant's secreting a portion of the stolen money in a golf bag and altering corporate books to expunge any record of the contributions of capital by the thief to the defendant's corporation were acts of misprision. Since such acts could equally have shown concealment of the thievery constituting a state felony or the thievery constituting the recently made federal felony, the conviction of the defendant was reversed.<sup>70</sup>

#### F. "conceals and"

In *Branzburg v. Hayes*,<sup>71</sup> the Supreme Court, in *dictum*, stated, "[t]his statute [18 U.S.C. § 4] has been construed, however, to require both knowledge of a crime and some affirmative act of concealment or participation."<sup>72</sup> This requirement is often stated in two ways. First, it is said that mere silence or mere failure to report is not enough to establish the crime.<sup>73</sup> Alternatively, some cases state the requirement the other way, namely, that an affirmative act of concealment must be alleged.<sup>74</sup>

The cases which might be cited to suggest that an affirmative act is not required are clearly distinguishable and reflect sensitivity to the collateral consequences of 18 U.S.C. § 4 rather than direct attention to the elements of the offense. For example, in *Grudin v. United States*<sup>75</sup> the Ninth Circuit dealt with a contempt order resulting from an allegedly improper assertion of the appellant's fifth amendment rights before a grand jury. The appellant had admitted to writing a certain letter to a used car dealer prior to the point in time when that dealer had been

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<sup>70</sup> Cases may arise where it is unclear whether courts before which an offense was cognizable were "of the United States." In such cases the definition of the "United States" as it appears in 18 U.S.C. § 5 should be consulted. Section 5 provides, "[t]he term 'United States,' as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."

<sup>71</sup> 408 U.S. 665 (1972).

<sup>72</sup> *Id.* at 696 n.36 (1972). *Accord*, *Roberts v. United States*, 100 S. Ct. 1358, 1363 (1980).

<sup>73</sup> *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977); *United States v. Johnson*, 546 F.2d 1225, 1227 (5th Cir. 1977); *Sullivan v. United States*, 411 F.2d 556, 558 (10th Cir. 1969); *Lancey v. United States*, 356 F.2d 407, 410 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966); *United States v. Farrar*, 38 F.2d 515, 517 (D. Mass.), *dismissal of indictment aff'd without discussion of misprision count*, 281 U.S. 624 (1930).

<sup>74</sup> *United States v. Johnson*, 546 F.2d 1225, 1227 (5th Cir. 1977); *Bratton v. United States*, 73 F.2d 795, 797-98 (10th Cir. 1934); *United States v. Farrar*, 38 F.2d 515, 517 (D. Mass.), *dismissal of indictment aff'd without discussion of misprision count*, 281 U.S. 624 (1930).

<sup>75</sup> 198 F.2d 610 (9th Cir. 1952).

linked to a suspect in an espionage investigation. Following such linkage, the appellant was asked additional questions about the car transaction which he refused to answer on the grounds that the answers might incriminate him. The district court found him in contempt on the basis that he had waived his privilege by virtue of his earlier answer. The Ninth Circuit, noting that at the time of the earlier answer there had been no connection between the car transaction and the espionage suspect but that there was such a connection at the time of the subsequent refusals to answer for which he was held in contempt, stated with respect to those refusals:

They quite well could be incriminating because *if Grudin had learned* in the ten days after January 28, 1946, *that Goodman was engaged in the actual commission of a felony* in violating the espionage act *and did not as soon as possible make it known to some judge or other person in civil or military authority, he was guilty of the crime of misprision of felony.* 18 U.S.C. § 4.<sup>76</sup>

This holding was clearly correct, since one is entitled to his fifth amendment privilege if any answer would forge "a link in the chain of evidence"<sup>77</sup> even though it would not by itself completely incriminate him. The case, properly construed, should not be held to read the concealment element out of the misprision statute.

*United States v. Smith*<sup>78</sup> is more difficult to explain. The defendant was charged under the federal blackmail statute.<sup>79</sup> The indictment charged that the defendant union representative, under a threat of informing authorities that the American Tent Company had committed a fraud on the Army's Quartermaster Corps, demanded that the company recall to work three employees of the union which he represented. In upholding the indictment the court stated:

Secondly, and in addition, the consideration offered must have been unlawful. The indictment specifies that defendant's consideration was 'not reporting certain information concerning alleged fraud in a contract between the American Tent Company and the Quartermaster Corps of the United States Army.' The Quartermaster Corps is an agency of the United States, and any fraud perpetrated upon that agency is punishable by up to five years' imprisonment under 18 U.S.C. § 1001. Furthermore, it is a felony as defined by 18 U.S.C. § 1. *Moreover, anyone having knowledge of the commission of a felony cognizable by a court of the United States must report such information as soon as possible or himself be guilty of a crime.* The indictment states

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<sup>76</sup> *Id.* at 612 (emphasis added).

<sup>77</sup> *See, e.g., Hoffman v. United States*, 341 U.S. 479, 486 (1951).

<sup>78</sup> 228 F. Supp. 345 (E.D. La. 1964).

<sup>79</sup> 18 U.S.C. § 873 (1976).

that the defendant had knowledge of a fraud and that he offered to withhold that information. Such consideration is thus unlawful and comprises the second element of the blackmail here charged.<sup>80</sup>

It may be that the court's analysis was immaterial, since the underlying statute certainly does not, in express terms, require that the consideration be shown to be unlawful. Title 18 U.S.C. § 873 states only, "[w]hoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined . . . ."<sup>81</sup> Moreover, the "consideration for not informing" was reinstatement of the three union employees and not withholding information about the fraud on the Quartermaster Corps. The court's analysis simply does not parse. In any event, the case did not focus directly on the sufficiency of a misprision indictment.

One point which seems to be clearly established by the cases is that a person is guilty of concealment even though the authorities know that the crime has been committed and know the person who has committed it.<sup>82</sup> Indeed, a conviction for misprision has been affirmed when the acts of concealment took place *after* indictments had been returned for the underlying crime.<sup>83</sup> Accordingly, it must be concluded that for purposes of the misprision statute a defendant "conceals" a crime even though there is no relationship between his concealment and the authority's knowledge or lack of knowledge of the crime.

Before noting the various acts which have been held to constitute concealment, three questions are worth independent examination. The first is to what extent intent is an element of this aspect of the offense; the second is whether lying to authorities for the purposes of throwing them off the track constitutes concealment; and the third is whether acceptance of money for nondisclosure constitutes concealment.

### 1. Intent as an Element

On the question of intent *United States v. King*<sup>84</sup> is relevant. There the defendant allegedly accepted "some" money obtained in a bank robbery. Defendant, who had heard the original planning, apparently did not believe that the robbers would do the deed. Upon hearing them

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<sup>80</sup> 228 F. Supp. 345, 348 (emphasis added).

<sup>81</sup> 18 U.S.C. § 873 (1976).

<sup>82</sup> *Lancey v. United States*, 356 F.2d 407, 409-10 (9th Cir.), cert. denied, 385 U.S. 922 (1966); *United States v. Thornton*, 178 F. Supp. 42, 44 (E.D.N.Y. 1959).

<sup>83</sup> *United States v. Daddano*, 432 F.2d 1119, 1124-25 (7th Cir. 1970), cert. dismissed sub nom., *Montagna v. United States*, 401 U.S. 967, cert. denied, 402 U.S. 905 (1971).

<sup>84</sup> 402 F.2d 694 (9th Cir. 1968).

state that the deed had been done, defendant initially expressed disbelief. On these facts the question was whether accepting "some" of the proceeds was an act of concealment:

The record does not indicate how much money defendant received from his brother or why it was given to him. There is no testimony indicating that a *purpose* of defendant in receiving the money was to hide it for the principals, or to otherwise conceal information about the crime, or to in any other way assist the principals in making their escape or avoiding detection. For all this record discloses, defendant may have received only ten dollars out of the robbery proceeds, in repayment of a prior loan to his brother . . . .

We therefore conclude that on this meager evidence it was not established, beyond a reasonable doubt, that defendant's act and *purpose* in receiving 'some' money from the robbery was an affirmative step designed to conceal the crime, or that it had that effect.<sup>85</sup>

The interesting aspect of this holding is that it appears to make the question of concealment turn on intent or "purpose." Did defendant receive the money for the purpose of buying his silence, or did he receive it, for example, to pay a debt?

This kind of question could obviously be relevant on the effect of a corporate decision to allow a record retention program to continue. Was the purpose to get rid of enormously burdensome volumes of paper, or was the purpose to conceal the commission of a felony? Similarly, imagine a situation where past statistical data identifying actual transactional prices to named customers by named competitors had been maintained and disseminated by a trade association. The question could be whether such statistical reports were destroyed to suppress evidence of an arguable antitrust crime,<sup>86</sup> or instead whether they were destroyed in order that pricing officials of the company would not have access to them in order to use them for an improper purpose. Certainly "conceals" seems to have an element of intent in it and the *King* case is one which would permit an argument that intent, with respect to the requirement of "conceals," is relevant.

## 2. Lying to Authorities

A second question is whether lying to authorities for the purpose of throwing them off the track in their search for the person believed to

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<sup>85</sup> *Id.* at 696-97 (emphasis added). See also *United States v. Benfield*, 593 F.2d 815, 822 (8th Cir. 1979) (defendant's intent in misprision trial constitutes a fact question). Federal criminal statutes are typically construed to include an intent element. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-38 (1978).

<sup>86</sup> See *United States v. Container Corp. of America*, 393 U.S. 333 (1969).

have committed the underlying felony is an act of concealment. The cases have uniformly concluded that it is, even though the lies are not committed under oath or by one arguably having a duty to tell the truth (such as a law enforcement officer has to his superior). Thus, in *United States v. Hodges*,<sup>87</sup> the holding of the court was that "the giving of an untruthful statement to authorities is a sufficient act of concealment to sustain a conviction for misprision of felony."<sup>88</sup> The obvious conclusion is that lying to FBI agents or Antitrust Division attorneys, even in informal interviews which are not conducted under oath and especially in proffers tendered to obtain immunity, may be interpreted as an act of concealment.<sup>89</sup>

### 3. Accepting Money as an Act of Concealment

The third issue to be separately identified is whether acceptance of money, which might or might not be a share of the feloniously obtained loot, constitutes an act of concealment. The early, leading case of *Bratton v. United States*,<sup>90</sup> held that receiving payment could not be an act of concealment. The court there said, "[t]he consideration paid is the motive for, and not an act of, concealment."<sup>91</sup>

This seems sound for, while receiving money in return for silence may make it more likely that the silence will continue, receiving money does not make it any more difficult for the authorities to uncover the crime. Paid-for silence is still merely silence. Solicitation of money, or any other valuable thing, in return for silence could, however, raise a significant question under the federal blackmail statute.<sup>92</sup>

The argument that a paid-for agreement not to disclose could be considered an act of concealment does gain support from *dictum* in *King*,<sup>93</sup> where the Ninth Circuit said that if "the jury could infer that defendant's brother gave defendant some of the money in order to keep defendant quiet about the crime, and that defendant had this purpose in mind in receiving the money," then the "receipt of the money by defendant would be an affirmative act fulfilling the fourth essential element of the crime [an affirmative step to conceal]."<sup>94</sup>

<sup>87</sup> 566 F.2d 674 (9th Cir. 1977).

<sup>88</sup> *Id.* at 675 (citing *United States v. Pittman*, 527 F.2d 444, 445 (4th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); *Lancey v. United States*, 357 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966)).

<sup>89</sup> It may be, however, that if a defendant was a suspect in custody at the time he lied, his lies cannot be used to show concealment unless he was given *Miranda* warnings. (*Miranda v. Arizona*, 384 U.S. 436 (1966)). See *United States v. Pittman*, 527 F.2d 444, 445 (4th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976).

<sup>90</sup> 73 F.2d 795 (10th Cir. 1934).

<sup>91</sup> *Id.* at 798.

<sup>92</sup> 18 U.S.C. § 873 (1976). See *United States v. Smith*, 228 F. Supp. 345 (E.D. La. 1964).

<sup>93</sup> 402 F.2d 694 (9th Cir. 1968).

<sup>94</sup> *Id.* at 696.

In a different vein, it might be argued that acceptance of money by one who had a duty, because of his position in a law enforcement agency, to report the crime would evidence an affirmative act of concealment. In *United States v. Blasco*,<sup>95</sup> the Seventh Circuit found "the essential elements of the crime" present when the only apparent action by the Chicago police defendants which could constitute concealment was that the defendants "reportedly received approximately \$1,000.00 from Sam Johnson [who] was not arrested."<sup>96</sup> The court found that the defendants "concealed [the offense of distributing heroin] in exchange for the payment of a bribe."<sup>97</sup>

This argument, if sound, is far reaching. In the antitrust context, there could well be situations where the pervasiveness of the violation and the probable resultant treble damage exposure could be thought to trigger a reporting requirement to the Securities and Exchange Commission.<sup>98</sup> In such circumstances, a person such as the corporation's secretary, or its outside counsel who was its assistant secretary, who accepted money, a promotion, or excessive legal fees in consideration for failure to make that report, could conceivably be thought to have concealed the violation. Suppose an Antitrust Division attorney accepted an advantageous legal position in a company under grand jury investigation without first disclosing to his superiors the results of a lengthy incriminating examination of the company's documents. Is that attorney guilty of concealment?<sup>99</sup>

Some hypothetical examples will illustrate the difficulty and uncertainty in this area with regard to accepting payments. May an employee implicated in a felonious antitrust violation demand, and may his corporate employer accept, his early retirement? Is there a difference if he demands, and the company grants, his early retirement with generous severance pay? May a corporate employer promote such an employee? May it assign him to head up its Bolivian branch office? May it do this with a \$10,000 yearly in-lieu-of-leave payment if he does not return to the United States? All that can be said is that most of these examples would seem to present a fact question for a jury, and evidence on the intent underlying such actions would be relevant and admissible.

It would seem clear that if the money given to a misprision defendant was all or a portion of the loot and it was received by that defendant

<sup>95</sup> 581 F.2d 681 (7th Cir. 1978), *convictions rev'd on other grounds sub nom.*, *United States v. Jennings*, 603 F.2d 650 (7th Cir. 1979).

<sup>96</sup> *Id.* at 684 n.6.

<sup>97</sup> *Id.*

<sup>98</sup> See notes 7-9 *supra*.

<sup>99</sup> Without much question, a person paying money or otherwise acting to cause another's silence has committed an act of concealment. See *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970), *cert. dismissed sub nom.*, *Montagna v. United States*, 401 U.S. 967, *cert. denied*, 402 U.S. 905 (1971); *United States v. King*, 402 F.2d 694 (9th Cir. 1968).

for the purposes of secreting it or otherwise making it difficult for the authorities to locate, then the payment would constitute an affirmative act of concealment.<sup>100</sup> This would be so, not because the money constituted a bribe, but because the money constituted the fruits of the crime and concealing the fruits would help conceal the crime.<sup>101</sup>

Acts done knowingly and wilfully which have been found in fact or in dictum to constitute acts of concealment include the following: hiding the loot for those who had stolen it;<sup>102</sup> hiding the means or instrumentalities of a crime;<sup>103</sup> changing license plates;<sup>104</sup> falsifying books to conceal corporate contributions made with embezzled money;<sup>105</sup> registering an escaped felon in a hotel room<sup>106</sup> under an assumed name;<sup>107</sup> surgically obliterating a fleeing fugitive's fingerprints and identifying scars;<sup>108</sup> providing an escaped felon with money;<sup>109</sup> attempting to silence persons having knowledge of a crime by giving them a lie detector test which, if they failed, would lead to their murder;<sup>110</sup> attempting to silence persons by, more prosaically, paying them money;<sup>111</sup> lying about receipt of the proceeds of a bank robbery;<sup>112</sup> suppression of the evidence<sup>113</sup> camouflaging three bank robbers' return to their cached loot, by driving them there with defendant's wife and baby in a car pulling defendant's boat;<sup>114</sup>

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<sup>100</sup> *United States v. Kuh*, 541 F.2d 672 (7th Cir. 1976); *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969); *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966).

<sup>101</sup> *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), *conviction as accessory after the fact aff'd following retrial*, 114 F.2d 1000 (8th Cir. 1940), *cert. denied*, 312 U.S. 679 (1941).

<sup>102</sup> *United States v. Kuh*, 541 F.2d 672 (7th Cir. 1976).

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

<sup>104</sup> *United States v. Norman*, 391 F.2d 212 (6th Cir. 1968).

<sup>105</sup> *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), *conviction as accessory after the fact aff'd following retrial*, 114 F.2d 1000 (8th Cir. 1940), *cert. denied*, 312 U.S. 679 (1941).

<sup>106</sup> *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979).

<sup>107</sup> *United States v. Thornton*, 178 F. Supp. 42 (E.D.N.Y. 1959).

<sup>108</sup> *United States v. Brandenburg*, 144 F.2d 656 (3d Cir. 1944).

<sup>109</sup> *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979).

<sup>110</sup> *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970), *cert. dismissed sub nom.*, *Montagna v. United States*, 401 U.S. 967, *cert. denied*, 402 U.S. 905 (1971).

<sup>111</sup> *United States v. King*, 402 F.2d 694 (9th Cir. 1968).

<sup>112</sup> *United States v. Pittman*, 527 F.2d 444 (4th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969).

<sup>113</sup> *Neal v. United States*, 102 F.2d 643, 649 (8th Cir. 1939), *conviction as an accessory after the fact aff'd following retrial*, 114 F.2d 1000 (8th Cir. 1940), *cert. denied*, 312 U.S. 679 (1941); *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934).

<sup>114</sup> *United States v. Gravitt*, 590 F.2d 123 (5th Cir. 1979).

and falsely denying to authorities knowledge about a kidnapped child.<sup>115</sup> All of these actions constitute requisite affirmative acts of concealment which trigger the misprision statute if the other elements are present.

G. "does not as soon as possible"

"As soon as possible" obviously contains an element of elasticity; what is "possible" may be subject to differing interpretations. Accordingly, it is likely that this element will present a jury question unless the defendant did not make any report of the underlying crime, which will probably be the usual case. Thus, under a predecessor statute in which the "as soon as possible" requirement was phrased "as soon as may be," the court in *Neal v. United States*,<sup>116</sup> stated:

The sufficiency of the charge is not assailed, but it is claimed that defendant did not fail to disclose 'as soon as may be'; that he did in fact as shown by the government's evidence disclose all that he knew on the fourth, fifth and sixth of January, 1938. The evidence also shows that he made no disclosures until after he had been frightened into doing so by the federal officers who were investigating the crime. He might have given them such information on the 28th of December, 1937, but instead of doing so he 'threw dust in their eyes' when they interviewed him and gave them misleading information. Under the evidence it was a question for the jury to determine whether he made the disclosure 'as soon as may be' to satisfy the requirements of the law.<sup>117</sup>

It would seem that the duty to make known "as soon as possible" cannot arise until the knowledge requirement is met in that the duty is required only of one who has knowledge. This not only seems to follow logically from the structure of the misprision statute but can be deduced from *In re Grand Jury Investigation*.<sup>118</sup> From the facts of that case it can be inferred that the bank officers knew all available facts, but the court held that the legal research memoranda were relevant on the question whether those facts reflected knowledge of the "actual commission" of a felony. The memoranda could not have been relevant if the duty to disclose had already arisen; thus the requirement to disclose "as soon as possible" does not apply until "full knowledge" is acquired. This would seem to mean that, for example, where an antitrust violation is suspected but not all of the facts are known or where the facts are known but the legal significance of them requires intense legal analysis,

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<sup>115</sup> *United States v. Hodges*, 566 F.2d 674 (9th Cir. 1977).

<sup>116</sup> 102 F.2d 643 (8th Cir. 1939), *conviction as an accessory after the fact aff'd following retrial*, 114 F.2d 1000 (1940), *cert. denied*, 312 U.S. 679 (1941).

<sup>117</sup> *Id.* at 649.

<sup>118</sup> 412 F. Supp. 943 (E.D. Pa. 1976).



time to investigate either this factual or legal question is permitted before the necessity of disclosing "as soon as possible" arises.

It should also be noted that the duty to disclose does not arise until the felony is "completed."<sup>119</sup> This has significance in the antitrust context because making the illegal agreement is, by itself, the crime; neither overt acts in furtherance of the conspiracy nor success in achieving the end goal of the conspiracy is required for criminality.<sup>120</sup>

In at least two cases defendants contended that they did not have a duty to disclose until they had an opportunity to do so free from duress and fear of physical retaliation.<sup>121</sup> In *Lancey*, the court found that the defendant did have ample opportunity but noted that "[w]ere [fear] a defense, there seldom could be a conviction."<sup>122</sup> In *Roberts*, these questions were not answered by the court because they were raised for the first time in defendant's appellate brief, although he had ample opportunity to raise them at the trial level.<sup>123</sup>

In view of the gravity and possible financial consequence of an anti-trust felony, it is important to consider whether "as soon as possible" permits time for an investigation, a report to the corporation's board, executive committee, or senior officers and a decision by them on whether to disclose. Former Assistant Attorney General Shenefield has made clear that the Antitrust Division thinks a report is imperative. "I think it is significant that the lawyer has an obligation to tell his client. The one thing he cannot do in good conscience is forget about it. He has to tell his client."<sup>124</sup> In view of this position, it would be surprising and anomalous for the Division to exercise its discretion to indict for misprision on a theory that "mak[ing] known" was required prior to an investigation and corporate decision.

H. *"make known the same to some judge or other person in civil or military authority under the United States"*

The vaguely defined and quite large number of persons to whom a felony may be made known, thereby avoiding criminality under the misprision statute, seems, on first reading, surprising. The explanation

<sup>119</sup> *United States v. Hodges*, 566 F.2d 674 (9th Cir. 1977).

<sup>120</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

<sup>121</sup> *Roberts v. United States*, 100 S. Ct. 1358 (1980); *Lancey v. United States*, 356 F.2d 407 (9th Cir.), cert. denied, 385 U.S. 922 (1966).

<sup>122</sup> 356 F.2d at 410.

<sup>123</sup> 100 S. Ct. at 1360.

<sup>124</sup> *Panel Discussion: Interview with John Shenefield, Assistant Attorney General, Antitrust Division*, 47 ANTITRUST L.J. 775, 795 (1978). See *In re Carter*, [1979 Decisions] FED. SEC. L. REP. (CCH) ¶ 82,175 (SEC ALJ Decision, Mar. 7, 1979), argument before SEC summarized in SEC. REG. & L. REP. (BNA) No. 532, § AA (Dec. 12, 1979); ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1.13(b)(3) (Discussion Draft, Jan. 30, 1980).

probably lies in history. In 1790, when the predecessor of the current statute was passed, the phrase "some judge" included only the chief justice and five associate justices of the Supreme Court and the thirteen judges of the district courts.<sup>125</sup> These were all the judges there were "under the United States" at that time.

The scope of a "person in civil . . . authority under the United States" should be contrasted, as to the level of authority required, with section two of the 1790 Criminal Code<sup>126</sup> providing punishment for misprision of treason. There it is specifically provided that the disclosure may be made only to the "President of the United States, or some one of the judges thereof" plus certain state officials.

The only felonies to which the initial misprision statute applied were those committed in certain military installations "or other place or district of country, under the sole and exclusive jurisdiction of the United States."<sup>127</sup> As a result, "persons . . . in civil authority" could well have meant the person or persons in authority in such "other place or district of country." With the broadening of the statute to misprision of felonies merely "cognizable by a court of the United States," the scope of persons to whom a disclosure permissibly could be made would seem to have been broadened accordingly.

No case has defined a "person in civil . . . authority." Presumably such persons, now, would include at least United States Attorneys and their legal staffs, Justice Department attorneys, and FBI agents. If the felony were a crime against the government, presumably such a person would also include the head of, or senior executives in, the agency involved. Do such persons also include the ambassador in charge of the United States embassy in Senegal, a forest ranger in a national park, and the local administrator of the Social Security System? Would a letter to such a person making known a price-fixing felony avoid the misprision statute?

The statute's reference to "person in . . . military authority" is explained by the fact that the early statute focused particularly on "wilful murder . . . within any fort, arsenal, dock-yard [or] magazine."<sup>128</sup> Thus, the persons to whom a murder should be made known were presumably the military officers in authority at those places. With respect to felonies committed on federal military installations, that interpretation would seem sound today.

A fascinating problem is suggested with respect to the reporting aspect of the statute in *United States v. King*,<sup>129</sup> where the court stated, "[w]e find nothing in the record bearing upon the third essential ele-

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<sup>125</sup> 1 Stat. 73 (1790).

<sup>126</sup> 1 Stat. 112 (1790).

<sup>127</sup> 1 Stat. 113 (1790).

<sup>128</sup> *Id.*

<sup>129</sup> 402 F.2d 694 (9th Cir. 1968).

ment, namely, that defendant failed to notify the authorities. However, defendant makes no point of this and apparently concedes that the Government proved the first three elements of the crime.<sup>130</sup> To whom is the report to be made? With respect to the usual felony, including anti-trust violations, there is no statutorily prescribed place at which, or person to whom, a crime must be reported. The question arises how the government can prove this element of the offense beyond a reasonable doubt, at least if the defendant does not take the stand and has not made any out-of-court admissions. Suppose on cross-examination defense counsel asked the government's witnesses if they knew whether the defendant had reported the underlying felony to a roster of persons which included all federal judges, all FBI agents, all United States attorneys, and all Antitrust Division attorneys. How would the government negate the possibility of a report having been made to one of those persons, even on a possibly inadmissible hearsay basis?

One court has even gone so far as to question whether the misprision statute can be applied in the absence of a requirement to make a report of the wrongdoing. In dismissing the indictment, the court stated, "[t]he misprision of a felony statute appears to be applicable only in a limited number of cases where the place of filing or reporting is specified by law."<sup>131</sup> This conclusion is surprising and is belied *sub silentio* by all of the cases affirming misprision convictions where the place of reporting was not specified, but no case has been found expressly rejecting this line of reasoning. Indeed, it is supported to a limited extent by *Bratton v. United States*,<sup>132</sup> although *Bratton* addressed the question only in the context of venue.

In addition to the problem of where to report the violation, it is fairly clear that the fifth amendment privilege against self-incrimination may stand as a bar to the application of the misprision statute. The reasoning proceeds that an individual (although not a corporation)<sup>133</sup> has an absolute right *not* to incriminate himself. There could be cases where his disclosure of the underlying felony would be a link in a chain of evidence which might lead to his own prosecution as an accessory after the fact under 18 U.S.C. § 3,<sup>134</sup> as a principal under 18 U.S.C. § 2,<sup>135</sup> as a conspirator under 18 U.S.C. § 371,<sup>136</sup> or as a perpetrator of any one of a wide variety of possible crimes.<sup>137</sup> Having such a right against self-

<sup>130</sup> *Id.* at 695-96.

<sup>131</sup> *United States v. Heckler*, 428 F. Supp. 269, 273 (S.D.N.Y. 1976).

<sup>132</sup> 73 F.2d 795 (10th Cir. 1934).

<sup>133</sup> *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906); *Hyster Co. v. United States*, 338 F.2d 183, 187 (9th Cir. 1964).

<sup>134</sup> See note 19 *supra*.

<sup>135</sup> See note 26 *supra*.

<sup>136</sup> See note 25 *supra*.

<sup>137</sup> See generally notes 19-27 *supra* and accompanying text.

incrimination, the individual therefore had an absolute right not to make any report of the underlying felony. The conclusion drawn from this line of reasoning is that an individual cannot be constitutionally prosecuted for a crime, one element of which requires him to do something he has a constitutional right not to do. Therefore a misprision indictment in the circumstances postulated cannot stand. The Ninth Circuit accepted this approach in *United States v. King*.<sup>138</sup> The Seventh Circuit, although originally rejecting *King* in *United States v. Daddano*,<sup>139</sup> subsequently distinguished its own *Daddano* case,<sup>140</sup> and recently has limited it into oblivion.<sup>141</sup>

In applying the fifth amendment as a bar to a misprision conviction, it is important to ask whether the misprision defendant was legitimately in jeopardy at the time he first obtained "full knowledge" of the actual commission of the underlying felony.<sup>142</sup> A defendant cannot obtain the requisite knowledge, accept a portion of the stolen bank money, and thereafter claim that the fifth amendment prohibits his prosecution for misprision because his disclosure would have incriminated him on a possible receiving count. The point is that the duty to disclose arose before he had accepted the stolen money.<sup>143</sup>

The fifth amendment question can also arise at an earlier point in time, such as during questioning before a grand jury. Thus, it has been held that one can properly invoke the fifth amendment before a grand jury when being questioned about his knowledge of an underlying felony if he has reasonable cause to believe that his answer might tend to incriminate him or furnish a link in the chain of evidence necessary to constitute a violation of the misprision statute.<sup>144</sup> It would similarly seem that a suspect in custody could invoke his right to remain silent when being questioned by the FBI or other investigating authorities. Any false statements he might make pursuant to such questioning arguably could not be admitted against him to show concealment in his misprision trial if he were not given appropriate *Miranda* warnings.<sup>145</sup>

<sup>138</sup> 402 F.2d 694, 697 (9th Cir. 1968). *Accord*, *United States v. Pigott*, 453 F.2d 419 (9th Cir. 1971); *United States v. Graham*, 487 F. Supp. 1317 (W.D. Ky. 1980).

<sup>139</sup> 432 F.2d 1119, 1125 (7th Cir. 1970) *cert. dismissed sub. nom.*, *Montagna v. United States*, 401 U.S. 967, *cert. denied*, 402 U.S. 905 (1971).

<sup>140</sup> *United States v. Kuh*, 541 F.2d 672, 676-77 (7th Cir. 1976).

<sup>141</sup> *United States v. Jennings*, 603 F.2d 650, 653 n.6 (7th Cir. 1979). Self incrimination, in a proper factual setting, is also a defense to a misprision indictment in England. *Rex v. King*, [1965] 1 All E.R. 1053.

<sup>142</sup> *See United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979).

<sup>143</sup> *See United States v. Jennings*, 603 F.2d 650, 653-54 (7th Cir. 1979).

<sup>144</sup> *United States v. Chandler*, 380 F.2d 993 (2d Cir. 1967); *United States v. Trigilio*, 225 F.2d 385 (2d Cir. 1958); *Grudin v. United States*, 198 F.2d 610 (9th Cir. 1952).

<sup>145</sup> *See Roberts v. United States*, 100 S. Ct. 1358 (1980); *United States v. Pittman*, 527 F.2d 610 (4th Cir. 1975). *See also United States v. Bekowies*, 432 F.2d 8 (9th Cir. 1970).

The fifth amendment protection may explain why no individual has been indicted for a substantive felony and also for misprision of that felony. If the grand jury thinks it sufficiently clear that a person has committed the substantive felony to issue an indictment, then surely the defendant has cause to believe that his making the felony known to civil authorities would tend to incriminate him. The logic of this position leads to the rather startling conclusion that the individuals who actually engaged in fixing corporate prices with their competitors may be able to destroy corporate records evidencing this violation with impunity. They cannot be prosecuted for misprision because of the fifth amendment, and their acts of concealment, since concealment is not in itself a crime,<sup>146</sup> would therefore go unpunished. Query, however, whether the corporation could be indicted for misprision in such a case, if other corporate agents knew of the antitrust felony, but were not involved in the price fixing activities and so were able to report it on behalf of the corporation.<sup>147</sup>

By far the most interesting question which arises when misprision is considered in the antitrust context is whether the fifth amendment cases will be held applicable when the attorney-client privilege<sup>148</sup> is substituted for the constitutional privilege against self-incrimination. That is, can an attorney, after being told the incriminating facts of a past antitrust violation by his client, then destroy documentary evidence with impunity because the attorney-client privilege relieves him (indeed, precludes him<sup>149</sup>) from disclosing the felony, the facts of which his client disclosed to him in confidence for the purpose of receiving legal advice? Is this attorney, himself, then protected from prosecution?

Preliminarily, it should be noted that England, a common law jurisdiction, appears to accept the attorney-client privilege as a defense to a misprision indictment.<sup>150</sup> Ohio, by statute, has provided that knowing failure to report information that a felony has been committed is excused if the "information is privileged by reason of the relationship between attorney and client."<sup>151</sup> In both England and Ohio, however, failure to

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<sup>146</sup> Concealment of a crime, as by destroying evidence, is not a violation of the accessory after the fact statute, 18 U.S.C. § 3. That statute requires harboring or otherwise giving aid to the felon personally. See note 22, *supra*. In any event, one could hardly be an accessory after the fact to his own crime.

<sup>147</sup> This assumes that a corporation can be guilty of misprision of its own price fixing felony, which may not be the case. See text accompanying notes 38-41 *supra*.

<sup>148</sup> FED. R. EVID. 501.

<sup>149</sup> "A lawyer is legally obliged not to divulge information confidentially revealed to him by his client regarding a committed felony." Goldberg, *Misprision of Felony: An Old Concept in a New Context*, 52 A.B.A.J. 148, 150 (1966).

<sup>150</sup> *Sykes v. Director of Public Prosecution*, [1962] A.C. 528, 564.

<sup>151</sup> OHIO REV. CODE ANN. § 2921.22(E)(1) (Page 1978).

report constitutes the crime; there is no further requirement of concealment.<sup>152</sup> When the crime is passive non-disclosure only, relieving from criminality an attorney who protects his client's confidences seems reasonable. The question under federal law, however, is whether he is also protected if he actively destroys documentary evidence, thus making it more difficult for a grand jury to uncover the antitrust felony.

While the argument is syllogistically seductive, reliance on it does not seem advisable. A court could easily object that it makes a sword rather than a shield out of the attorney-client privilege. It might hold that disclosure to the attorney, followed by his destruction of evidence, shows that the disclosure was not made for the purpose of obtaining legal advice. Even though concealment alone is not a crime,<sup>153</sup> a court might nevertheless apply the principle that the privilege does not protect non-disclosure of future wrongdoing.<sup>154</sup> There is a flexibility in the common law not present in constitutional imperatives. Most importantly, the argument gives the attorney rights which go well beyond the necessity of the legal relationship; clients with criminal legal problems will hardly cease retaining attorneys because of the attorneys' legal inability to conceal (i.e., destroy) facts evidencing the clients' crimes.

The question which logically follows is whether an attorney may advise his client to destroy evidence, if by doing so his client would commit misprision of antitrust felony. Would the attorney then be guilty of misprision? Such a course is hardly to be recommended, for advising commission of a felony is obviously unethical,<sup>155</sup> would subject the attorney to discipline, and would not be a privileged communication.<sup>156</sup> Nevertheless, it may *not* be an act of concealment required to trigger the statute. In *Neal v. United States*,<sup>157</sup> the court dealt with the advice as follows:

The government argues that for a few days after December 27, 1937, the defendant aided in concealing John L. Neal, and that he is therefore guilty of misprision of felony. The evidence shows that he did know where John was in hiding and may have advised with him about escaping; but failure to inform the officers is not sufficient alone to constitute a crime under the statute.<sup>158</sup>

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<sup>152</sup> *Sykes v. Director of Public Prosecution*, [1962] A.C. 528, 562-63; OHIO REV. CODE ANN. § 2921.22(A) (Page 1978).

<sup>153</sup> See note 146 *supra*.

<sup>154</sup> See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR4-101(C)(3).

<sup>155</sup> *Id.* DR7-102(A)(7).

<sup>156</sup> MCCORMICK, EVIDENCE, § 95 (2d ed. 1972).

<sup>157</sup> 102 F.2d 643 (8th Cir. 1939), conviction as an accessory after the fact *aff'd* following retrial, 114 F.2d 1000 (8th Cir. 1940), cert. denied, 312 U.S. 676 (1941).

<sup>158</sup> *Id.* at 650.

In spite of this, it would not seem wholly fanciful to suggest that the attorney nevertheless could be guilty of misprision on an aider and abettor theory under 18 U.S.C. § 2 or that the client and the attorney could theoretically be indicted under 18 U.S.C. § 371 for conspiring to commit misprision.

Suppose, however, that the individual client was the principal price fixer and could not be successfully prosecuted for misprision because of the fifth amendment.<sup>159</sup> In such a case the attorney, in advising his client to destroy evidence, would not be advising his client to commit a crime and thus the attorney could not, himself, be guilty of aiding and abetting, or conspiracy to commit, a non-existent crime. The line the attorney would be walking is very narrow but, analytically, it is there.

- I. "shall be fined not more than \$500 or imprisoned not more than three years, or both."

The punishment provided makes misprision of felony itself a felony under 18 U.S.C. § 1<sup>160</sup> and, theoretically at least, it would seem possible for there to be misprision of the felony of misprision, that is to say, there could be a cover-up of a cover-up.

The cases make it clear that misprision is a separate offense from the underlying felony which was concealed and not reported.<sup>161</sup> It has been held also that the felony of misprision of felony is separate from the crime of being an accessory after the fact under 18 U.S.C. § 3.<sup>162</sup> This holding has at least two implications: first, a defendant could be tried for both misprision and accessory after the fact, convicted of both, and sentenced consecutively on each; and second, reasonable fear of prosecution on one or the other would justify assertion of the fifth amendment privilege when being questioned on either. When a conviction on a count other than misprision is valid and the sentence given on that count is at least as long as the sentence given on conviction of the misprision count,

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<sup>159</sup> See note 146 *supra* and accompanying text.

<sup>160</sup> See note 61 *supra* and accompanying text.

<sup>161</sup> *E.g.*, *Castaneda de Esper v. Immigration and Naturalization Service*, 557 F.2d 79 (6th Cir. 1977) (holding that misprision of the felony of conspiring to possess heroin was not a conviction of a crime "relating to" drugs which would justify her deportation).

<sup>162</sup> See *United States v. Daddano*, 432 F.2d 1119, 1129 (7th Cir. 1970) *cert. dismissed sub nom.*, *Montagna v. United States*, 401 U.S. 967, *cert. denied*, 402 U.S. 905 (1971) (holding that consecutive sentences could be given for convictions under 18 U.S.C. §§ 3 and 4). *Daddano* was followed in *United States v. Dye*, 508 F.2d 1226, 1237 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975) (holding that an indictment containing both misprision and accessory after the fact counts was not "duplicitous"). Language approving of both *Daddano* and *Dye* appears in *Castaneda de Esper v. Immigration and Naturalization Service*, 557 F.2d at 83. See also *United States v. Benfield*, 593 F.2d 815, 822 (8th Cir. 1979); *United States v. Gonzalez*, 582 F.2d 1162, 1165 (7th Cir. 1978).

and when such sentences are to run concurrently, a court is entitled to refuse to pass on the validity of the misprision conviction.<sup>163</sup>

#### V. MISCELLANEOUS PROCEDURAL CONSIDERATIONS

Several procedural points merit attention. First, at least two cases have held that a misprision of felony indictment can be returned in the words of the statute, with the defendant being relegated to a bill of particulars to obtain a statement of the precise charges against him.<sup>164</sup> Second, the protections of Rule 11 of the Federal Rules of Criminal Procedure are fully applicable to bargained pleas of guilty to a misprision of felony count, and if this rule is not followed, it will result in a reversal of a conviction for misprision of felony.<sup>165</sup> Third, when the government has been guilty of excessive and prejudicial pre-indictment and post-indictment delay, resulting in loss of a relevant witness to the underlying felony, defendant is entitled to dismissal of the misprision indictment since proof of the actual commission, *vel non*, of the underlying felony, would be a necessary element of the proof in the misprision trial.<sup>166</sup>

#### VI. CONCLUSIONS

Reaching conclusions from the preceding material is difficult. The potential reach of the statute seems much greater than its current application by the Antitrust Division. Indeed, it has never been used in an antitrust context.<sup>167</sup> Moreover, each fact situation will have its own set of imperatives and nuances; formulating sound advice of general applicability is therefore all but impossible.

Nevertheless, a few observations can be advanced. First, and by far the most important, the attorney should make certain that the antitrust

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<sup>163</sup> *Consenza v. United States*, 195 F.2d 177, 178 (9th Cir. 1952).

<sup>164</sup> *Sullivan v. United States*, 411 F.2d 556, 558 (10th Cir. 1969), *aff'g* 284 F. Supp. 579 (N.D. Okla. 1968), followed in *United States v. Daddano*, 432 F.2d 1119, 1124 (7th Cir. 1970) *cert. dismissed sub nom.*, *Montagna v. United States*, 401 U.S. 967, *cert. denied*, 402 U.S. 905 (1971).

<sup>165</sup> *United States v. Clark*, 574 F.2d 1357 (5th Cir. 1978); *United States v. Johnson*, 546 F.2d 1225, 1226 (5th Cir. 1977).

<sup>166</sup> *United States v. Heckler*, 428 F. Supp. 269, 273 (S.D.N.Y. 1976).

<sup>167</sup> The Justice Department is moving, however, toward the use of misprision indictments in the so-called "white collar crime" area. See *United States v. Wilkins*, *United States v. Regan* and *United States v. Smith*, Crim. No. 3-80-14-G (N.D. Tex. Dallas Div., May 28, 1980) (indictments), *superseding* *United States v. Smith, et al.*, Cr. No. 3-80-14 (N.D. Tex. Dallas Div., February 5, 1980) (indictment). *Smith* and *Regan* were indicted for misprision of *Wilkin's* income tax evasion felony and *Wilkins* was indicted for misprision of *Regan's* income tax evasion felony. When the original indictment is compared with the superseding indictments, however, it is reasonably clear that the misprision counts in the superseding indictments were the result of plea bargaining.



laws are currently being complied with. Such an action constitutes good corporate governance and is socially desirable. It also helps reduce liability in light of the inexorable running of the statute of limitations. As an essential predicate to developing the best possible relations with the government on behalf of one's client, as soon as the attorney has even a hint that there is a problem, he should advise the client to remedy it. Promptly getting the client back into antitrust compliance may well be the single most important factor which will bear on the government's discretionary decision to bring a misprision indictment.

If the attorney suspects that evidence of an antitrust violation lurks in his client's records and his client has been negligent in administering its record retention program or remiss in setting one up, then such activities should be considered *before* conducting a factual investigation. If full knowledge is first acquired, and that knowledge is of the actual commission of an antitrust felony, subsequent destruction of harmful documents will present a concealment issue.

Even if full knowledge is obtained however, not stopping the routine implementation of a pre-existing record retention program could be thought to present no more than an acceptable level of risk, for it could be argued that there is no concealment until there is a departure from a pre-existing procedure. Obviously, setting up a record retention program *after* full knowledge is acquired presents the greatest concern. If that course is nevertheless decided upon, then it may be desirable to use an outside consultant who is not necessarily advised of the existence of a problem,<sup>168</sup> for implementation of his professional recommendations should be useful on negating a claim that destruction was for the purpose of concealment.

It is tempting to argue that the board of the corporation should be kept uninformed, for if it has no knowledge, then its members are immune from misprision indictment. This argument is seriously flawed. It is the board that runs the corporation. Indeed, in some senses the board *is* the corporation. While insulating against a misprision indictment is desirable, the duty to auditors<sup>169</sup> and the SEC,<sup>170</sup> the necessity of implementing an effective antitrust compliance program<sup>171</sup> and the decision

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<sup>168</sup> Such consultants can be located through directories such as CONSULTANTS AND CONSULTING ORGANIZATIONS DIRECTORY, and NEW CONSULTANTS, 1979 SUPPLEMENT (Gale Research Co., Detroit MI); DIRECTORY OF MANAGEMENT CONSULTANTS (Consultant News, Fitzwilliam, NH) and DIRECTORY OF MEMBERSHIP AND SERVICE (Association of Consulting Management Engineers, N.Y., NY).

<sup>169</sup> See note 7 *supra* and accompanying text.

<sup>170</sup> See notes 8-11 *supra* and accompanying text.

<sup>171</sup> See generally, National Institute on Preventive Antitrust, 48 ANTITRUST L.J. 1 (1979); especially Scher, *Antitrust Compliance Documents*, *id.* at 437; Greenberg, *Antitrust Compliance Procedures*, *id.* at 453. See also Record, vol. 110, at 245-46, United States v. International Paper Co., Cr. No. H-76-11 (S.D. Tex., Apr. 26, 1979) (jury charged that it could consider a diligently enforced compliance program on the question of intent).

whether to invoke the Division's Voluntary Disclosure program<sup>172</sup> are considerably more important. It is the board which often will have the responsibility for making such corporate decisions.<sup>173</sup> The misprision statute is only one factor, and while care should be taken to avoid its violation, there are more significant questions to consider when a clear antitrust felony has been uncovered.

Prompt use of the Voluntary Disclosure program has an interesting impact on the question of document destruction. If it is correct that the Division will permit board review of the implications of discovery of an antitrust felony before the duty to disclose begins,<sup>174</sup> then it may be that disclosure to the Division promptly after such review would preclude finding a misprision violation since disclosure was made "as soon as possible" after the corporation (meaning its board) had knowledge of it. If this is correct, concealment by way of wholesale document destruction would *not* be unlawful, for the misprision statute would otherwise be inapplicable.<sup>175</sup>

Generalizing from the misprision cases is difficult, but it is possible to suggest that they represent four distinct threads. First, the affirmative acts constituting misprision may be genuinely antisocial acts. Law enforcement officials have a legitimate concern when an agreement is reached to kill anyone who fails a lie detector test designed to ferret out informers.<sup>176</sup> Second, misprision seems to be used as a sort of lesser-included offense designed to secure the offender's cooperation in prosecuting the principal felons while not letting the offender off without any criminal sanctions.<sup>177</sup> Third, the statute appears to be used when the authorities feel that the offender was guilty along with the principal felons but proof of such guilt is lacking. Finally, the statute may be used when the authorities genuinely feel that the offender was obstructing

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<sup>172</sup> See note 15 *supra*.

<sup>173</sup> If the violation involved only a minor product line of a sizeable corporation, perhaps these decisions could be made at a lower level. The point is that risks under the misprision statute are probably an inadequate reason for not making appropriate disclosure to whatever decisional level of the corporation would otherwise be appropriate.

<sup>174</sup> See note 124 *supra* and accompanying text.

<sup>175</sup> The evidentiary inferences which arise from *ad hoc* destruction of evidence should always be carefully evaluated before any such course is decided upon. Compare *A.C. Becken Co. v. Gemex Corp.*, 314 F.2d 839, 841 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963) and *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819, 859 (M.D. Tenn. 1974) with *Vick v. Texas Employment Comm'n.*, 514 F.2d 734, 737 (5th Cir. 1975).

<sup>176</sup> *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970), *cert. dismissed sub. nom.*, *Montagna v. United States*, 401 U.S. 967, *cert. denied*, 402 U.S. 905 (1971).

<sup>177</sup> *E.g.*, *United States v. Davis*, 597 F.2d 648 (8th Cir. 1979); *United States v. Lamont*, 565 F.2d 212, 221 (2d Cir. 1977).

justice but cannot rely upon 18 U.S.C. § 1503 because justice was technically not being administered.

Consideration of these generalizations with respect to document destruction in the antitrust context may be useful. Document destruction is, intrinsically, a neutral act. No one's property or person is put in jeopardy by placing documents in a wastepaper basket. Misprision does not serve the purpose of a lesser-included offense, for it carries the same three year prison term as does a direct violation of the Sherman Act. A situation in which the Division believes that an individual was engaged in price fixing but cannot prove it and therefore searches for a possible misprision indictment, instead, seems unlikely in the extreme. Only in the fourth circumstance—when the Division genuinely feels that the concealment has obstructed its efforts to uncover the crime—does it seem likely that the Division would want to indict. But query whether it would have that feeling unless an investigation were underway and a subpoena or Civil Investigative Demand, or at least a letter inquiry, were outstanding? In such circumstances, however, the perjury,<sup>178</sup> false statement<sup>179</sup> and obstruction statutes,<sup>180</sup> and criminal contempt<sup>181</sup> may offer more inviting weapons. One should also be aware that the antitrust violation must be proved beyond a reasonable doubt at the trial for misprision of an antitrust felony,<sup>182</sup> and that a culpable intent must be shown in proving the antitrust felony.<sup>183</sup>

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<sup>178</sup> 18 U.S.C. §§ 1621, 1623 (1976). *See note 20 supra. See also* United States v. Reeves, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079, at 53,762-63 (E.D. Mo. 1979); United States v. Scrimgeour, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079, at 53,752 (S.D. Fla. 1979); United States v. Tobey, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078, at 53,728 (E.D. Ill. 1978); United States v. Hughes, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,077, at 53,712 (S.D. Fla. 1977); United States v. Hopwood, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,075, at 53,605 (C.D. Cal. 1975); United States v. Swartz [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,075, at 53,615 (M.D. Pa. 1975); United States v. Usden, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074, at 53,572 (D. N.J. 1974); United States v. King, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,073, at 53,553 (W.D. Ky. 1973).

<sup>179</sup> 18 U.S.C. § 1001 (1976). *See note 21 supra. See also* United States v. Markham, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074, at 53,594 (E.D. Va. 1975).

<sup>180</sup> 18 U.S.C. §§ 1503, 1505 (1976). *See note 19 supra. See also* United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978); United States v. Turen, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074, at 53,572 (D. N.J. 1974).

<sup>181</sup> 18 U.S.C. §§ 401-402 (1976). *See note 24 supra. See also* United States v. White, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078, at 53,724 (D.D.C. 1978); United States v. National Gypsum Co., 1972 TRADE CAS. (CCH) ¶ 74,173 (W.D. Pa. 1972).

<sup>182</sup> *See note 51 supra* and accompanying text.

<sup>183</sup> United States v. United States Gypsum Co., 438 U.S. 422 (1978).

In addition, there is some ambivalence in our society as to the extent to which disclosure of the crimes of others is a high social goal. While Mr. Justice Powell has said that "gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship,"<sup>184</sup> Mr. Justice Marshall has answered that, if this is so, then it is "hard to understand how terms such as 'stoolpigeon,' 'snitch,' 'squealer,' and 'tattletale' have come to be the common description of those who engage in such" reporting.<sup>185</sup> Chief Justice Marshall stated, "It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case for not performing his duty is too harsh for man."<sup>186</sup>

The answer to this line of social inquiry, apart from its legal irrelevance, may be that misprision involves concealment as well as non-disclosure, although, as stated, document destruction, intrinsically, is a rather benign form of concealment.

All of the above leads to the reasoned speculation that the Division will probably continue to be chary about invoking the misprision statute. In most circumstances where it might apply, the Division has other and better weapons at its disposal. If a case arose where knowing nondisclosure and concealment were used to facilitate a continuation of the violation, then a misprision indictment would be swift and certain. If, however, the corporation promptly acted to terminate the violation and to implement an antitrust compliance program, it seems fair to suggest that the Division would be reluctant to utilize misprision unless the concealment were particularly flagrant or blatant. The conclusion would seem to be that, if destruction of documentary evidence of an antitrust felony has been decided upon, it should be done only where there is at least a colorable and presentable reason for it which would negate the intent requirement inherent in the active verb "conceals."<sup>187</sup> If no such reason exists, the documents should probably be quietly stored in the company vault until the day an impersonal record retention program takes them to their grave.<sup>188</sup>

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<sup>184</sup> *Roberts v. United States*, 100 S. Ct. 1358 (1980).

<sup>185</sup> *Id.* at 1369.

<sup>186</sup> *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575 (1822).

<sup>187</sup> *See Killian v. United States*, 368 U.S. 231 (1961). "... [A]most everything is evidence of something, but that does not mean that nothing can ever safely be destroyed." *Id.* at 242.

<sup>188</sup> *United States v. Sampol*, No. 79-1541 (D.C. Cir., filed Sept. 15, 1980) was not reported at the time this article was printed. It holds that trying a misprision offense with courts alleging murder of foreign officials is prejudicial error; that lying to an FBI agent and making false statements to a grand jury are both acts of concealment; and that consecutive sentences on the false statement count and the imprisonment count violates the fifth amendment protection against double jeopardy.

