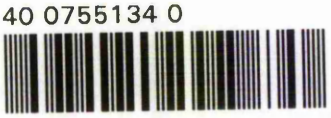

SHOULD FAILING TO REPORT BE A CRIMINAL OFFENCE? A COMPARATIVE ANALYSIS OF MANDATORY REPORTING IN ENGLISH AND FRENCH CRIMINAL LAW.

RACHAEL ELIZABETH STRETCH

A thesis submitted in partial fulfilment of the requirements of The Nottingham Trent University for the degree of Doctor of Philosophy

September 2001

Acknowledgements

I would like to thank my friends, family and colleagues for their support and encouragement. I would like to give particular thanks to Professor Richard Stone, Professor Michael Gunn, Professor Peter Kunzlik and Professor John Bell for their help and advice.

I am also grateful to the English and French respondents without whose insight and contributions this thesis would not have been possible.

Abstract

Under English criminal law, an individual will rarely be punished for failing to report an offence. In contrast, in France, an individual commits an offence by failing to report a crime, an offence against the State or a violent offence against a vulnerable individual. This thesis compares the approaches in order to determine whether duties to report are justified or effective. There have been few examinations of mandatory reporting in the criminal law. Furthermore, the comparative examination of the subject is also original.

The thesis examines whether a duty to report would encourage reporting. Levels of reporting in both countries are examined as are the reasons why an individual would report or decline to report. The thesis also considers reporting as a means of helping a victim of a crime. In this respect, it compares duties to report to duties to rescue. The thesis also examines criminal liability to determine whether it should be extended beyond the principal offender and the accessories to include a non-reporter.

CONTENTS

LIST OF LEGISLATION AND CASE LAW

English Materials

English Statutes

English Statutory Instruments

English Case Law

French Materials

French Legislation

Constitutions

Penal Codes

Le Code Pénal - The Penal Code

Criminal Procedure Codes

French Case Law

Decisions of the Constitutional Court

Decisions of Judicial Courts

US Materials

Federal Legislation

State Legislation

US Case Law

Australian Materials

Australian Legislation

Australian Case Law

International Conventions

CHAPTER 1

INTRODUCTION

In the evening of March 13th 1964, Kitty Genovese was repeatedly stabbed outside her New York apartment block. None of the thirty-eight neighbours, who heard her screams, called the police. When eventually her murderer was caught and questioned, the police and the public were shocked by the inaction of her neighbours. There was disgust and horror at their failure to call the police, and anger and frustration that their failure to help Genovese could not be punished.[1]

In 1933 an eighteen-year old woman, Violette Nozières, who had been sexually abused by her father, poisoned her parents.[2] She told a young man, Nabin, about the poisonings. He told the police and she was eventually convicted and sentenced to death.[3] Her case became infamous throughout France.[4] Unsurprisingly, given the sympathy for Nozières, Nabin's decision to report was condemned as a betrayal of the tragic Violette.[5]

This thesis evaluates the criminal law's response towards individuals who do not report crime. Specifically, it uses offences of failing to report on the part of witnesses[6] in the French Penal Code[7] to evaluate whether mandatory reporting can be justified.

The decision whether to report is a crucial filter in the investigation and prosecution of crime. The reporting of a crime will often be the most useful

---

[1] *Kitty Genovese – the queens story* at http://www.icf.de/asa/kitty_qstory.html; M. Davies, "How Much Punishment Does a Bad Samaritan Deserve" (1996) 15 Law and Philosophy 93-116 at p. 93.
[2] It is not clear what role, if any, her mother played in the abuse and whether she knew that Violette was being abused. The public reaction to the case might suggest that the mother knew about the abuse and maybe even that she was complicit in it.
[3] This was commuted to life imprisonment.
[4] For example, a collection of poems for Nozières, written by the leading poets of the day including Breton, Char, Eluard and illustrated by Dali, Ernst and Magritte, was published.
[5] J-F Gayraud, *La Dénonciation,* (1995), pp. 55-56.
[6] The offences are offences of *non-dénonciation*. *Dénonciation* means a report by a person other than the victim. The term for a report by a victim is *plainte*.
[7] These are Articles 434-1, 434-2 and 434-3. These offences are discussed more fully in Chapter 7 pp. 174-196.

assistance that a member of the public can give the police.[8] Furthermore, reporting an offence may help victims of crime. In this respect mandatory reporting can be compared to duties of easy rescue. The aim of both these social duties being to help individuals in extreme need.

On the other hand, unlike rescuing a person in danger, reporting an offence may not always be praiseworthy or altruistic. Reporting may be malicious.[9] In the case of an especially minor offence, or if the offender is unlikely to reoffend, it may be that reporting that offence is not the most effective way to deal with the offence. In addition, it might be that far from helping the victim of an offence, reporting that offence disadvantages him/ her. For example, the fact that a doctor reports offences that (s)he[10] discovers may deter victims from seeking medical help.[11]

Furthermore, a non-reporter may have an excuse for failing to report which would mean that it would be inappropriate to punish that failure. If the witness is threatened, deciding to report may be dangerous. Less extreme perhaps is the problem of the professional or the member of the victim or offender's family. Whilst the information that these individuals possess may make them especially useful reporters, any decision to report may be at the expense of family loyalty and love or professional ethics.

Finally, even in those cases where reporting would be neither dangerous nor inconvenient, an obligation to report may still be an inappropriate use of the criminal law. Unlike the active offender, the non-reporter has neither injured nor harmed the victim.[12] One justification for mandatory reporting is that by encouraging reporting it would help prevent crime and detect offenders.[13] Nevertheless even if a duty to report were to have this impact on reporting levels, it might still not be justifiable to force an individual to behave in a certain way in order to produce these benefits.[14]

---

[8] N. Fielding, "Being Used by the Police" (1987) 27 Brit. J. Criminology 64 at p. 68.
[9] See below Chapter 7 pp. 170-171 and Chapter 9 pp. 335-336.
[10] In the interests of brevity, in the rest of this thesis male pronouns will be used to cover those situations where both female and male individuals are being discussed.
[11] See below Chapter 7 pp. 201-202, Chapter 8 pp. 258-259 and Chapter 9 pp. 304-306, 333-335.
[12] See below Chapter 2 pp. 24-26.
[13] See below Chapter 10 pp. 353-354.
[14] See below Chapter 2 pp. 28-29.

The Originality of the Research

Whilst existing studies of reporting concentrate on voluntary reporting,[15] this research examines whether there should be a criminal offence of failing to report. In Chapter 6 I analyse whether a non-reporter can be punished under English criminal law. Although there have been earlier discussions of duties to report, these have concentrated on individual duties for example misprision of felony[16] or the mandatory reporting of child abuse.[17] Chapter 6 takes a more extensive approach. It not only critically examines specific duties to report but also investigates whether other offences can be employed against the non-reporter.[18] Furthermore, the analysis of mandatory reporting in Chapter 6 is informed by the examination of the French duties to report elsewhere in the thesis. This comparative analysis of duties to report is also original.

Chapter 7 discusses French duties to report. There are no previous discussions of French duties to report written from a common law perspective. Furthermore, the research is original because it uses the mandatory reporting in the French Penal Code to understand the position in English criminal law and to suggest developments to the English approach. Although there have been comparative examinations of duties to rescue in English and French law,[19] the discussion of the French duty of easy rescue in Chapter 7 is original

---

[15] A. K. Bottomley & C. Coleman, *Understanding Crime Rates, Police and Public Roles in the Production of Official Statistics,* (1981), pp. 42-48; R. A. Carr-Hill & N. H. Stern, *Crime, the Police and Statistics, An Analysis of Official Statistics for England and Wales Using Econometric Models,* (1979), pp. 81-92; C. Clarkson, A. Cretney, G. Davis & J. Shepherd, "Assaults, the Relationship Between Seriousness, Criminalization and Punishment" [1994] Crim. L. R. 4-20 at pp. 11-13; N. Fielding, "Being Used by the Police" (1987) 27 Brit. J. Criminology 64, 68; Government Statistical Service, *Ethnicity and Victimisation: Findings from the 1996 British Crime Survey,* (1998); A. Maung, P. Mayhew, C. Mirlees-Black, *The 1992 British Crime Survey,* (1993); A. Maung & C. Mirlees-Black, *Racially Motivated Crime: A British Survey Analysis,* (1994), pp. 19-21; R. Mawby, *Policing the City* , (1979), pp. 90-108; R. Mawby, "Bystander Responses to Victims of Crime, Is the Good Samaritan Alive and Well" Victimology Vol. 10 461; C. Mirlees-Black, P. Mayhew & A. Percy, *The 1996 British Crime Survey,* (1996); J. Shapland, J. Willmore & P. Duff, *Victims in the Criminal Justice System,* (1988), pp. 14-31; J. Shapland & C. Lisles, "Towards a Multi-Agency Violence Prevention and Victim Support" (1998) 38 Brit. J. Criminology 351.

[16] G. Allen, "Misprision" (1961) 78 L. Q. R. 41; P. R. Glazebrook, "How Long, Then, Is the Arm of the Law to Be" (1962) 25 M. L. R. 301.

[17] D. A. P. Lamond, "The Impact of Mandatory Reporting Legislation on Reporting Behaviour" (1989) 13 Child Abuse and Neglect 471.

[18] See below Chapter 6 pp. 151-158.

[19] A. Ashworth & E, Steiner, "Criminal Liability for Omissions, The French Experience" (1990) 10 Legal Studies 153; F. J. M. Feldbrugge, "Good and Bad Samaritans: A Comparative Study of Criminal

because it concentrates on the use of this offence as a further duty to report. This use of this offence is also explored in Chapter 8.[20]

The critical examination of the literature in Chapters 6 and 7 is supplemented by interviews and questionnaires which are evaluated in Chapters 8 and 9. Whilst this empirical research could not by itself be conclusive, it did offer a different perspective. Through the interviews and the questionnaires I was able to discover the experiences and opinions that different criminal justice professionals in England and France had in relation to mandatory reporting. This focus on the reality of mandatory reporting was original. Existing studies of the duties to report in France concentrate on the theory of the duties to report.[21]

The thesis will contribute to the understanding of duties to report in England and France. It will also have a wider relevance because it examines the different approaches adopted by English and French criminal law to positive criminal law duties. Furthermore, the fact that a comparative analysis is used is original and the methodology, which uses both a thorough literature review of English and French sources and empirical research, may also be of interest.

The Organisation of the Thesis

The aim of the research was to use the duties to report in the French Penal Code to evaluate the reasons behind duties to report and the effects that they have. There were two stages to the research. The first was a critical literature review. This considered the criminal justice systems in France and England, their approaches to positive criminal liability, voluntary reporting in both jurisdictions and the offences of failing to report in English and French criminal law. The second stage to the research were interviews and questionnaires with English and French criminal justice professionals. The literature review is examined in Chapters 2 to 7, the empirical research is discussed in Chapters 8 and 9.

Law Provisions" (1966) 15 Am. J. Comp. Law 630; A. Cadoppi, "Failure to Rescue and the Continental Criminal Law", in M. Menlowe & A. McCall Smith, (ed), *The Duty to Rescue*, (1993), pp. 93-130.

[20] See below Chapter 7 pp. 197-198, Chapter 8 pp. 246-247.

[21] S. Fontenelle, *La France des Mouchards, Enquete sur la Delation*, (1997); J-F. Gayraud, *La Dénonciation*, (1995).

In Chapter Two I explore possible justifications for mandatory reporting. The chapter concentrates on the particular difficulties that punishing omissions, such as failures to report, present for liberal based theories of the criminal law.[22] Chapter two also examines the link between a special responsibility for the person in need and duties of assistance in English criminal law.[23] Chapter three examines a contrasting approach to liability for omissions, that taken by French criminal law. The Chapter focuses on the duty of easy rescue in the French Penal Code.[24]

Chapters four and five examine the English and French criminal justice systems and voluntary reporting in England and France. I wanted to examine whether there was a need for mandatory reporting and whether existing duties to report had any impact on reporting levels. I also wanted to identify reasons why individuals choose not to report. These would be useful in determining whether existing duties to report were onerous and in insuring that any suggested duties to report were justifiable.

Chapters six and seven examine existing duties to report in England and France. As well as offences that specifically punish failing to report, the Chapters also consider whether more general offences might be used against non-reporters. In the case of French criminal law, this means focusing on this aspect of the duty of easy rescue.[25] In relation to English criminal law, Chapter 6 considers whether the offence of obstructing a police officer can be used to prosecute a non-reporter and whether a non-reporter can ever be liable as an accessory.[26]

In Chapters Eight and Nine the methodology and the data from interviews conducted with French criminal justice professionals and questionnaires completed by English criminal justice professionals are evaluated. I conducted interviews with French respondents in order to develop the understanding that I had of mandatory reporting from the literature. The respondents were French lawyers, a French judge, professionals responsible for child protection and a

[22] See below Chapter 2 pp. 19-35.
[23] See below Chapter 2 pp. 36-42.
[24] Code Pénal (French Penal Code) (CP) Article 223-6; see below Chapter 3 pp. 53-66.
[25] See below Chapter 7 pp. 197-8.
[26] See below Chapter 6 pp. 151-4, 155-8.

French police officer. They were able to explain their own experiences and opinions about mandatory reporting in France. The data from these interviews are interesting, and they illustrate and compliment the thorough review of the literature on the duties to report in Chapter 7. Given the small number of respondents interviewed, it is not possible, however, to make any statistical claims from the respondents' replies.[27] Furthermore, whilst the respondents' experiences and opinions of mandatory report might suggest how the duties are used or how effective they are, they can not, by themselves, be conclusive.

Chapter Nine examines the data from questionnaires completed by English criminal law professionals. This questionnaire is included in Appendix C. The aim of the questionnaire was to consider whether duties to report such as those used in France could be justifiably introduced into England. The questions were based on information about the duties in the literature and the interviews with the French respondents. The questionnaire also examined the respondents' experiences and opinions of existing English mandatory reporting.[28] Again, as with the French interview, the number of respondents completing the questionnaire was very small and whilst their replies can, when used with other information, suggest whether mandatory reporting would be useful or justifiable, the data from the questionnaire are neither conclusive nor statistically valid.[29]

The final Chapter contains the thesis's conclusions. It examines whether further duties to report offences should be introduced into English criminal law and what effects such duties would be likely to have. Chapter 10 also considers whether the contrasting approaches to mandatory reporting and to positive criminal liability in general in English and French criminal law are indicative of more general differences between criminal law in the two jurisdictions.[30]

[27] See below Chapter 8 p. 215.
[28] See below Chapter 9 pp. 271-286.
[29] See below Chapter 9 p. 270.
[30] See below Chapter 10 pp. 367-371.

CHAPTER 2

THE FUNCTION AND LIMITS OF THE CRIMINAL LAW

Living in a community with no criminal law or criminal justice system might be difficult or even dangerous. How would the weak or vulnerable be protected from attack? How would property be distributed or guarded?[31] Even though the criminal law has not eradicated violence, it does provide some protection from attack, helping individuals exercise their autonomy.[32]

Imagine instead a community where every minor transgression risked criminal sanction. A State, where the only citizens, not to have been convicted and punished, were either saints or hermits. This distopia would be tyrannical and unbearable. Free to act only within a shrunken range of permitted behaviour, individuals would lead curtailed, monotonous lives. In addition, the harshness and significance of criminal sanction would be an overreaction to a trivial offence. Rather than fearing their fellow citizens, individuals would instead dread public power.

These two fictional examples have been introduced to illustrate the purpose of this Chapter. The aim of the thesis is to examine whether a State should criminalize failures to report. This Chapter will examine the purpose and limits of the criminal law. It is hoped that this will provide a context against which to assess whether positive criminal law duties and in particular mandatory reporting are justified.

The Purpose of the Criminal Law

In "Principles of Criminal Law" Ashworth identifies three purposes of the criminal law: declaratory, preventative and censuring. Whether an existing or

[31] C. H. Wellman, Liberalism, Samaritanism and Political Legitimacy (1996) 25 Philosophy and Public Affairs 211-237 at p. 217.
[32] J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), p. 8.

proposed criminal law is justified depends on whether the law fulfils any of these objectives.[33]

By choosing to criminalise behaviour, or by not criminalising, or decriminalising behaviour, the State makes a forceful declaration of its ideology and concerns. This is illustrated by changes to the French Penal Code after Liberation. Criminal laws introduced by the Occupation forces and by the totalitarian Vichy Government were modified or abolished to reflect more democratic values.[34] In relation to mandatory reporting, an obligation to report demonstrates the State's approval of and support for reporters. The fact that an individual is required to report provides him with a justification for reporting.[35] Moreover, it might also be that by limiting mandatory reporting to specific offences, the State is highlighting those offences as a significant criminal justice concern or those offenders as especially dangerous.

The criminal law is the use of State authority to control behaviour. The citizen is expected to comply with the criminal law otherwise his failure to do so can be punished. It is difficult to use the idea of deterrence to justify mandatory reporting. The duty to report requires an individual to carry out a required action, rather than to refrain from a prohibited action. Consequently, rather than prevention, it might be more appropriate to analyse whether mandatory reporting *encourages* reporting. In this respect it may be that an offence of failing to report would be ineffective and that civil penalties, rewards or publicity would be more successful in encouraging reporting.[36]

The criminal law represents the use of State force to punish an individual who has transgressed from permitted behaviour. There is the idea that the offender has done something wrong, that he has caused harm.[37] Because failing to report is an omission, it is more difficult to apply this to duties to report.[38] Furthermore, whether the non-reporter deserves to be punished may depend

[33] A. Ashworth, *Principles of the Criminal Law,* 3rd Edition (1999), pp. 24-27, 36.
[34] Ordonnance June 1945; see below Chapter 7 pp. 172-174.
[35] See below Chapter 10 p. 357.
[36] See below Chapter 8 p. 263.
[37] See below pp. 12-15.
[38] See below pp. 13, 25,

on whether his failure to report is neutral or whether it can be equated with supporting and helping the criminal.[39]

The Need to Limit the Criminal Law

The criminal law is only one way of enforcing behaviour. It is a powerful sanction and should be restricted to behaviour that merits and needs it. It should not be used to deal with trivial wrongs.[40] The civil law and social pressure may also persuade an individual to behave in a "good" way.[41] It might be as effective to reward compliance as to punish breaches.

This raises the question of whether these different measures would be appropriate for encouraging reporting. There is some evidence that publicity about the seriousness of an offence can encourage reporting as can support for victims and witnesses. On the other hand, rewarding reporting is problematic. Paying reporters might encourage malicious or exaggerated reports.

In practice a limitless criminal law would be unworkable. Inflation in criminal offences would suffocate the criminal justice system. Police, prosecutors, courts and judges, who were faced with dealing with minor offences, would not have the time, nor the resources, to deal with more serious offending.[42] Furthermore, as more behaviour became illegal, the fact that behaviour was an offence would not be as significant, nor would there be the same stigma attached to being an offender. It is even possible that a criminal prohibition may be counter-productive. It might be argued that criminalising drug use has not prevented drug use but has instead helped support illegal gangs.[43]

In this thesis I am interested in whether the criminal can and should be used to enforce social duties that one individual may have towards the rest of the community. Specifically, the research examines whether mandatory reporting is justified. Whether an individual should have to report offences is one aspect of a wider discussion of how relationships between different individuals and

---

[39] See below pp. 28-29.
[40] A. Ashworth, *Principles of Criminal Law,* 3rd Edition (1999) p. 32-37.
[41] A. Ashworth, *Principles of Criminal Law*, 3rd Edition (1999) p. 35.
[42] N. Lacey, *State Punishment, Political Principals and Community Values,* (1988), p. 21.
[43] A. Ashworth, *Principles of Criminal Law,* 3rd Edition, (1999), p. 35.

between individuals and the State should be framed. In order to analyse this relationship, I have decided to focus on liberal and communitarian theories of the individual and the State. I have chosen these two theories because of their differences. The focus in liberal theory on individual autonomy and on atomised individuals would be unlikely to support an individual being punished for not reporting an offence.[44] In contrast, it may be that communitarianism, with its consideration of the rights and responsibilities that are the result of belonging to a community may be more supportive.[45]

The Liberal View

According to liberals, the individual is atomised and the community is merely a collection of individuals.[46] Because of this interpretation, liberals maximise the significance of the individual whilst minimizing that of the collective. In any conflict between the individual's interests and the interests of the State, liberal theories will promote the rights of the individual.[47] Liberals support an individual's exercise of his autonomy regardless of the cost or benefit that this brings the wider community. Consequently, liberals would oppose mandatory reporting even if this were to substantially prevent crime.

Autonomy

For liberals, an individual's most important right is autonomy. Without autonomy the individual will lead a restricted and meaningless life. He would not be able to access or exploit any other rights.[48] Furthermore, autonomy is important in promoting an individual's development. It is probable that an individual will be more determined and enthusiastic in pursuing outcomes that he has chosen and is therefore more likely to be successful.[49]

Furthermore, although the right to autonomy is justified by the benefit that this brings to the individual, the community may also profit from increased

---

[44] See below pp. 10-11.
[45] See below pp. 16-17.
[46] R. Nozick, *Anarchy, State and Utopia*, (1975).
[47] R. Dworkin, *Taking Rights Seriously*, (1977), p. 199.
[48] J. Feinberg, *the Moral Limits of the Criminal Law, Harm to Others*, (1984), pp. 37-38; see below p. 14.
[49] A. Buchanan, "Liberalism and Group Rights" in A. Buchanan & J. Coleman, (ed.), *In Harms Way, Essays in Honor of Joel Feinberg*, (1994), pp. 1-15.

autonomy. If the individual is allowed to develop and experiment he is likely to discover new ideas or inventions. What may once have been unconventional, may, because of its proven effectiveness, become the norm. The wider social group gains from an individual's willingness to test new lifestyles and learns from his mistakes.

On the other hand, the extent to which increased autonomy benefits the individual or the State is debatable. A conservative individual may prefer security and material well being over the possible future benefits of another's experimentation. It is even possible, that he will accept a reduction in his own liberty if this means that he will be entitled to greater material wealth or security. One criticism of Rawls's contractarian theory[50] is that it assumes that individuals, who do not know their own preferences, will choose to maximise autonomy, when they might prioritise other values such as security.[51]

Equality

Because an individual's right to autonomy does not depend on his being a member of a community,[52] liberals support all individuals having the same right to exercise their autonomy regardless of their class, gender, religion or race.[53] Furthermore, this recognition that each individual has a right to his autonomy means that according to liberals the State is not justified in sacrificing the autonomy of some of its citizens in order to obtain a benefit for the majority or for the community as a whole. The individual has certain inherent, in Ronald Dworkin's terminology "trump rights", that override any utilitarian considerations.[54] Liberal theories, therefore, support the rights of minority groups to exercise their autonomy.

Nevertheless, the fact that an individual has the right to exercise his autonomy in a certain way does not mean that, in practice, he will be able to exercise his autonomy in that way. Many choices require finance, training, contacts and

---

[50] J. Rawls, *A Theory of Justice,* (1972), pp. 150-161, 195-211.
[51] H. L. A. Hart, "Rawls on Liberty and its Priority" in N. Daniels, (ed.), *Reading Rawls: Critical Studies of Rawls' Theory of Justice,* (1975), pp. 248-9.
[52] See below pp. 15-16.
[53] E. Frazer & N. Lacey, *The Politics of the Community: A Feminist Critique of the Liberal-Communitarian Debate,* (1993), p. 42.
[54] G. Regan, "Glosses on Dworkin: Rights, Principles and Politics." in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence,* (1983), pp. 120-4.

materials, none of which are equally distributed. Liberals would not support the State acting to increase the availability of these resources to needy individuals or groups. Redistributing these resources or implementing measures to make opportunities available to a wider cross section of the public would restrict the autonomy of other individuals. Consequently although liberal theories may give an individual a theoretical right to equality, they will not insure equality in practice.

Generally liberal theories are anti-perfectionist.[55] They reject the State promoting one individual's choices at the expense of another individual's choices and judgment. In "A Theory of Justice" Rawls examines the nature of a State based on a hypothetical contract between its members. The contracting members negotiate and agree to the contract from a position of ignorance. They do not know their own gender, class, skills, preferences or weaknesses. Not knowing what their own concept of "good" is, Rawls claims that the members would, for safety, agree that the State should enforce no idea of "good". They would support a State that respected individuals' autonomy and they would reject benefits to the common good that significantly reduced liberty in case they were the sacrificed individuals.[56]

This anti-perfectionism is another reason why liberal theories are unlikely to support mandatory reporting. Whilst reporting, or in the case of duties of easy rescue, rescuing, might be the most moral, most altruistic choices for an individual to make, the State is not justified in limiting an individual's exercise of his autonomy in this way.

Liberal Ideas of the Criminal Law

The liberal attachment to autonomy means that criminal liability is only justified in order to protect the liberty of another individual. In contrast self-regarding behaviour, which only affects the actor himself, should not be restricted.

---

[55] An important exception to this is Raz who argues for a liberal perfectionism according to which the State promotes and enforces liberal values cf. J. Raz, *The Morality of Freedom,* (1986); I. Sadurski, "Joseph Raz on Liberal Neutrality and the Harm Principle" (1990) 10 O. J. L. S. 122.

[56] J. Rawls, op. cit. pp. 202-205.

"the only purpose for which power can rightfully be exercised over any member of a civilized community against his will, is to prevent harm to others."[57]

An individual "harms" another when he sets back, impairs or violates that individual's interests. This suggests that an individual will only be liable when he changes another individual's situation by making it worse. As a result, many liberals reject the criminalization of omissions because the individual, who fails to act, does not affect anyone and therefore does not *harm* anyone.[58] In relation to mandatory reporting, one argument against punishing failures to report, is that the witness, who chooses not to report, is not responsible for any harm suffered by the victim.[59] Any injury or loss suffered by the victim is due to the active offender. One possibility might be that by failing to report, the non-reporter denies the victim the opportunity of having the case investigated and the offender prosecuted, or harms the criminal justice system by denying it information. Nevertheless, this is not convincing. If the victim wants the offence investigated, the victim will often be able to report the offence himself. Furthermore, not providing information may be interpreted as a failure to benefit to the Criminal Justice System rather than as harm.[60]

One possibility is that without reports from the public, police effectiveness in detecting offences and identifying offenders would be significantly compromised. This may lead to an increase in crime, either because the original criminals remain free to continue to offend, or because other individuals are persuaded to begin offending because of the unlikeliness of detection or punishment. Consequently, a failure to report may eventually lead to harm. Nevertheless, the harm of these future offences is not *caused* by the failure to report. Instead, the offender, who either continues, or commences offending and who has chosen to act against the victim's interests, should be responsible for the cost that he has caused the victim.[61]

Not every action that sets back an individual's interests will be classified as harm. The interest interfered with must be legitimate. Preventing an offence, even though it sets back the offender's plans is not therefore harm. Similarly,

---

[57] J. S. Mill, *On Liberty,* G. Himmelfarb, (ed), (1974), para. 9.
[58] See below pp. 24-26.
[59] See below Chapter 9 p. 283.
[60] See below pp. 28-29.
[61] A. Von Hirsch, "Extending the Harm Principle: Remote Harms and Fair Imputation" in A. P. Simester and A. T. H. Smith, (ed.), *Harm and Culpability,* (1996), pp. 259-276.

the interference must be illegitimate. Feinberg gives the example of the impact of a new business on similar enterprises. Although, the new business will set back the plans of rival businesses, this is not harm because competition is legitimate.[62]

In addition, the interest harmed must not be trivial. According to Feinberg, the clearest case of an individual being wronged is if that individual's welfare interests are set back.[63] Welfare interests are basic, essential interests such as bodily integrity, shelter, security. According to Feinberg, these welfare interests are crucial because they are fundamental basic interests from which the individual can develop other interests. In other words, an individual whose welfare interests are compromised is not able to exercise his autonomy. Consequently, by attacking a welfare interest, the offender not only hinders that interest but other interests which are based on it.

This analysis reinforces the liberal attachment to autonomy. First, it limits the criminal law to the protection of the most important, vital interests. If an individual's behaviour does not harm these interests, the criminal law would not be justified in prohibiting it. In addition, welfare interests are seen as so important because they are necessary for an individual to make and promote his choices.[64]

In "Gauging criminal harm: A Living-Standard Analysis", Von Hirsch and Jareborg advocate an alternative assessment of the significance of a harm.[65] They argue that criminal behaviour, for example theft and mayhem, is harmful and is criminalised because it reduces the victim's well being:

> "The guiding idea which we have come to find most natural is one concerned with the quality of a person's life. The most important interests are those central to personal well being; and, accordingly, the most grievous harms are those that drastically diminish one's standard of well-being. Mayhem is so serious because it makes its victims live in misery; burglary seems less serious because it does not create such misery but still has a significant impact on the quality of life in its intrusion on a person's privacy and comfort."[66]

---

[62] J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), p. 114.
[63] Ibid. pp. 37-8.
[64] See above p. 10-11.
[65] A. Von Hirsch & N. Jareborg, "Gauging Criminal Harm: A Living Standard Analysis" (1991) 11 O. J. L. S. 1
[66] Ibid. p. 7.

They identify four generic interests that are attacked by crime. These are physical integrity, material support and amenity, freedom from humiliation and degrading treatment and privacy and autonomy. If one of these interests is violated, this is important, not because of the impact on choice and autonomy, but because these interests themselves they are essential to a decent life. This interpretation recognises that other interests, for example security, might be as or more important to an individual as his autonomy.[67]

The Communitarian View

According to communitarians the liberal view of the atomised individual is artificial. Few individuals, in reality, live entirely separately from other individuals. Furthermore, these relationships with and reliance on other individuals affect the choices that a person makes and how he exercises his autonomy.[68] One example of this is that communitarians recognise that members of a community often act out of altruism. Racial and sexual equality, for example, are not only pursued by the minorities and women who would directly benefit from them.[69] Similarly, when making economic choices, a citizen may rank a commitment to welfare and to the public interest as more important than any benefit or cost to him as an individual.

Membership of a community is seen as vital to the well being of citizens. Rather than concentrating on the increased autonomy that an atomised individual would have, communitarianism contends that membership of a community promotes a citizen's welfare interests. By joining with others, an individual will increase his security, his well being and is more likely to be successful in promoting his life choices. In contrast, acting by himself, an individual's effectiveness is likely to be limited.

On the other hand, interpreting an individual as a member of a community may be problematic if membership of a community, or a role within a community is seen as a prerequisite for an individual's rights. If communities are able to control their membership this could effectively mean that some individuals will,

---

[67] See above p. 11; H. L. A. Hart, "Rawls on Liberty and its Priority" in N. Daniels, (ed.), *Reading Rawls, Critical Studies of Rawls Theory of Justice,* (1975), pp. 248-9.
[68] M. Sandel, *Liberalism and the Limits of Justice*, (1982).
[69] D. O' Sears & C. Funk, "Self Interest in Americans' Political Opinions." in J. Mansbridge, (ed.), *Beyond Self Interest,* (1990), pp. 147-170.

because of their exclusion from the social group, be denied these rights. Furthermore, because an individual is defined as a member of a community, an individual may be constrained by community expectations and needs. The citizen's choices may be restricted in order to meet the needs or expectations of the social group. The community might, for instance, have a traditional view of gender roles and therefore might restrict the individual man or woman to exercising his or her autonomy within a restricted class of acceptable roles.[70] In addition to depriving the individual of opportunities, this may also restrict the development of the community. Talents will not be fully realised; new ideas will not be developed nor tried.[71]

Etzioni responds to these criticisms by claiming that, in reality, any citizen is a member of more than one group, for example work community, home community and therefore the influence of any one community is diluted.[72] The difficulty with this argument is that a citizen's capacity to enter a particular community may be shaped by his existing membership of other communities and the roles that he has in those communities. Etzioni also contends that membership of a community is optional. An individual can choose his community in order to match his own preferences.[73] Whilst this may be true for some communities, an individual will not be able to choose the community that he is born into, and national, racial and religious communities may all determine what other communities that individual can join later.

The Effects of Community Membership

The interdependence between citizens affects the communitarian interpretation of the rights and responsibilities of the State and the individual. Rather than having the purely negative duty, not to restrict individuals' liberty, under communitarian theories the State has an obligation to promote the welfare of its citizens.

> "I want to stress instead the sense in which every political community is in principle a "welfare State". Every set of officials is a least putatively committed to the provision of security and welfare: every set of members is committed to bear the necessary burdens (and actually does bear them). The first commitment has to do with the duties

[70] E. Frazer & N. Lacey, op. cit., pp. 130-142.
[71] A. Buchanen, op. cit.; see above p. 10.
[72] A. Etzioni, *The New Golden Rule, Community and Morality in a Democratic Society,* (1997), p. 128.
[73] Ibid. p. 129.

of office: the second with the dues of membership. Without some shared sense of duty and the dues there would be no political community at all and no security or welfare- and the life of mankind "solitary, poor, nasty, brutish, and short."[74]

Another example of the State acting to promote the well-being of its citizens is in relation to freedom. In contrast to liberal theories,[75] communitarian theories would claim that the State can promote freedom through education, increasing security or redistributing wealth. The danger with this is that the cost for this may not be equally distributed, and a minority of citizens may argue that their autonomy is severely restricted, in order to provide other citizens with the opportunities to fulfil their choices.[76]

Furthermore, if the State is providing citizens with materials and support it may claim a greater right to determine how these citizens should use their autonomy. There is the risk that the State may promote one exercise of freedom at the expense of another and that minority or unpopular choices will be prohibited.

In addition to the State have duties towards its members, the citizen also has responsibilities and duties towards the community and towards other citizens. His autonomy may be limited in order to guarantee the security or welfare of the community. Furthermore, whilst these duties might cost a person in terms of autonomy, they may benefit him as a citizen in terms of security and welfare.

Communitarianism and the Criminal Law

The communitarian interpretation of the criminal law is likely to be more extensive than the liberal view of the criminal law. In particular, it is possible that communitarians are more likely to accept positive criminal law duties, including duties to report.

The citizen's responsibilities towards the community as a whole and to other citizens might include the obligation to protect other members of the community from severe danger. If this were the case, communitarians might support an offence of failing to rescue. Furthermore, unlike liberals, communitarians would

[74] M. Walzer, *Spheres of Justice,* (1983), p. 68.
[75] R. Nozick, op. cit.; see above pp. 11-12.
[76] R. Dworkin, *Taking Rights Seriously,* (1977), p. 199.

not be as concerned that this duty to rescue would restrict that citizen's liberty. Instead it might be argued that the citizen, as a member of the community, would also benefit from the security of knowing that he too would be rescued from danger.[77]

Nevertheless, the fact that communitarian theories recognize that citizens have duties towards each other, does not necessarily mean that they would use the criminal law to enforce and promote these responsibilities. It is possible that education, rewards or the civil law would be preferred.

The Criminal Law and Positive Duties

Having considered the criminal law in general, this Chapter now focuses on liability for omissions. Here the differences between communitarian and liberal theories are evident. Liberal theories would regard as unjustified a restriction to one individual's freedom to provide a benefit for another individual.[78] Furthermore, the influence of the harm principle on the development of the English criminal law may explain the limited scope of positive criminal liability in English criminal law.[79] In contrast, communitarian theories' concern for welfare may mean that they would support duties to rescue because they would help individuals who were in serious danger.

Only exceptionally is an omission punishable under English criminal law.[80] This section examines the reasons for this and whether English criminal law is justified in its rejection of greater positive criminal liability. The section will conclude by examining those rare situations when an individual may be punished for an omission.

Although the thesis focuses on duties to report, this section will concentrate on the more familiar duty to rescue. One reason for this is that much of the debate about positive criminal liability has concentrated on duties to rescue.[81]

---

[77] A. Gewirth, "Individual Rights and Political Military Obligation" in A. Gewirth, *Human Rights, Essays on Justification and Applictions,* (1982).
[78] See below pp. 28-29.
[79] See above pp. 12-15.
[80] A. Ashworth *Principles of the Criminal Law*, 3rd Edition (1999), pp. 113-116.
[81] L. Alexander, "Affirmative Duties and the Limits of Self Sacrifice" (1996) 15 Law and Philosophy 65; T. Honoré, "Law, Morals and Rescue" in T. Honoré, *Making Law Bind,* (1987), pp. 256-269; T. Honoré, "Are Omissions Less Culpable?" in P. Case & J. Stapelton, (Ed.) *Essays for Patrick Atiyah,*

Furthermore, there is some correspondence between duties to report and duties to rescue. An individual, faced with a victim of a violent offence, might be bound by both duties. The victim of the offence will need to be protected from further assaults and the police informed of the offence. Furthermore, in this situation, it might be that the most effective and easiest way of rescuing the victim is to report the offence. Nevertheless, the two duties should not be confused. Even if not obligatory, a rescue will always be praiseworthy. In contrast, some decisions to report may be criticized. In addition, whilst rescue helps the victim in danger, reporting an offence may help both victims of crime and support the criminal justice system.[82] This Chapter will emphasise issues that are especially relevant to mandatory reporting and highlight differences between the two types of duty.

The Common Law Rejection of Positive Liability

Positive duties, such as duties to rescue or to report, are rejected because they exceed the justifiable limits of criminal liability. Whilst the criminal law should be limited and should only enforce minimal standards of behaviour, positive criminal law duties are supererogatory.[83] Furthermore, an individual's failure to act does not harm anyone. Finally, in practice positive duties may prove unworkable. Whilst some failures to rescue or to report may seem shocking and be deemed to deserve to be punished, it may be difficult to separate these omissions from other more understandable failures to act.

Duties to Rescue are Supererogatory

The first objection to positive duties is based on the idea that positive duties, and in particular, duties to rescue, are supererogatory. In other words, that they exceed what the criminal law can legitimately demand from any

---

(1991); M. Kamm, "Rescue and Harm, Discussion of Peter Unger's *Living High and Letting Die*" (1999) 5 Legal Theory 1; S. Levmore, "Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations" (1986) 72 Virginia Law Review, 879; H. Malm, "Liberalism, Bad Samaritan Laws and Legal Paternalism" (1995) 106 Ethics 4, M. Menlowe and A. McCall Smith, (ed.), *The Duty to Rescue and the Jurisprudence of Aid,* (1993); C. H. Schroeder, "Two Methods of Evaluating Duty to Rescue Proposals" (1986) 46 Law and Contemporary Problems, 181; P. Smith, "The Duty to Rescue and the Slippery Slope Problem" (1990) 16 Social Theory and Practice, 19; P. Smith, "The Duty to Rescue and Wilful Disregard: An Unprincipled Response" (1991) 17 Social Theory and Practice 19.

[82] See below Chapter 7 p. 184-185.

[83] See above pp. 8-9; A. Ashworth *Principles of the Criminal Law*, 3rd Edition (1999), pp. 32-37.

individual.[84] Initially, it does seem that rescuing can be charecterised as supererogatory. The rescuer is frequently lauded as a hero.[85] In reality, however, it is questionable whether a duty to rescue would be supererogatory. Under suggested duties to rescue, an individual is excused from rescuing if the rescue is dangerous. He is even excused for failing to rescue if the rescue would have been expensive or inconvenient.[86] Similarly existing easy rescue statutes are limited to easy rescues where the potential rescuer is not in danger and the rescue is not onerous.[87] In addition, the existence of emergency services mean that in reality the rescuer will only have to call an ambulance in order to fulfill his duty.[88]

As for the person, who reports an offence, he is not undertaking to arrest or punish the offender, or to protect the victim himself, he is passing on these responsibilities to public authorities. Whilst reporting may mean that he also has to testify and may therefore be inconvenient, it is unlikely, except when extreme reprisals are threatened, that he will be risking injury or death. Although this suggests that a duty to report would be even less onerous that a duty to rescue, this may not be accurate. Reporting an offence is likely to be followed by giving a statement to the police, identifying an offender and giving evidence in court.[89] Consequently mandatory reporting may represent a significant cost to the individual's time. Furthermore, even if an individual does not risk physical injury by reporting, he may risk being excluded from his family of social group, or his reporting may hinder his exercising a profession.[90]

---

[84] D. Heyd, Supererogation, *Its Status in Ethical Theory,* (1982), pp. 130-136.
[85] J. Urmston, "Saints and Heroes" in J. Feinberg, (ed.), *Moral Concepts,* (1969), pp. 60-73.
[86] P. Smith, op. cit. pp. 25-32.
[87] For general comparative surveys of duties to rescue see F. L. M. Feldbrugge, "Good and Bad Samaritans: A Comparative Study of Criminal Law Provisions" (1966) 14 American J. Comparative Law 630; A. Cadoppi, "Failure to Rescue and the Continental Criminal Law" in A. Menlowe & A. McCall Smith, (ed.) *The Duty to Rescue*, (1993), pp. 93-130; for the French criminal law duty to rescue see CP Article 223-6; below Chapter 3 pp. 53-66; A. Ashworth & E. Steiner, "Criminal Liability for Omissions, The French Experience." (1990) 10 Legal Studies 153; D. Mayer, "La "Charité Mesurée de l' Article 63 alinéa 2 du Code Pénal" 1977 JCP 2851; J-L. Fillette, "L' Obligation de Porter Secours à la Personne en Péril" 1995 JCP I 3863; for the German duty to rescue see G. Fletcher, "Criminal Omissions Some Perspectives" (1976) Am. J. Comparative Law 703.
[88] P. Smith, op. cit., p. 25.
[89] J. Shapland, J. Willmore & P. Duff, *Victims in the Criminal Justice System*, (1986), pp. 32-50.
[90] See below Chapter 10 pp. 347-348, 357.

In "A Defense of Abortion"[91] Judith Thompson emphasises the distinction between the basic level of Samaritanism that might be required by law and the higher level that an especially heroic individual might achieve.[92]

> "These things are a matter of degree, of course, but there is a difference, and it comes out perhaps most clearly in the story of Kitty Genovese, who, as you will remember, was murdered while thirty-eight other people watched or listened, and did nothing at all to help her. A Good Samaritan would have rushed out to give direct assistance against the murderer. Or perhaps we had better allow that it would have been a Splendid Samaritan who did this on the ground that it would have involved a risk of death for himself. But the thirty-eight not only did not do this, they did not even trouble to pick up the phone and call the police. Minimally decent Samaritanism would call for doing at least that, and their not having done it was monstrous."[93]

It is only this "splendid Samaritanism" that is supererogatory. Mandatory reporting laws and easy rescue statutes, by contrast, are unlikely to be supererogatory. Interestingly, this quotation also suggests that reporting may be less difficult than rescue.[94] The minimally decent Samaritanism described by Thompson is phoning the police, not stopping the attack personally.

The essence of supererogation is that the individual is exceeding what can be required of him. In contrast, as was discussed earlier, communitàrian theories recognize that members of a community may have duties to protect the welfare of other citizens.[95] According to this, easy rescue would be interpreted as a right each member of the community had in times of extreme need. Given that rescue would be the victim's right and the rescuer's duty, it would not be supererogatory.

Duties to Rescue and the Restriction of Liberty

Even if positive duties to report do not require heroic or saintly actions, can they be opposed because they are too great a constraint on liberty? Whereas the more usual negative criminal law duties, such as a duties not to steal or kill, leave the individual free to choose between many permitted actions, a duty to rescue only allows the individual one permitted choice, to rescue the person in

---

[91] J. Thompson, "A Defense of Abortion" (1971) Philosophy and Public Affairs" pp. 47-66.
[92] Ibid. pp. 62-64.
[93] Ibid. pp. 62-63.
[94] See below Chapter 6 p. 123.
[95] See above pp. 16-18.

danger.[96] Furthermore, mandatory reporting laws are even more prescriptive. Unlike the rescuer, who can choose whether to save the person in danger himself or fetch help, the reporter must inform the police. He does not have the option of dealing with the offending himself.[97] Against the claim that positive duties limit liberty is the fact that neither easy rescues nor reporting offences to the police are likely to be time consuming or onerous.[98]

A possibly more compelling reason why positive duties are a greater threat to autonomy is that they are unpredictable. An individual is not able to plan to avoid them and therefore his control over his life is diminished.[99] The fact that an individual faces these duties can not be traced back to an earlier choice that he has made. This diminishes the link between criminal liability and an individual's exercise of his autonomy. Nevertheless, this unpredictability does not explain why positive criminal liability is unjustifiable. Some existing offences are unpredictable. It might be due to chance that an individual is liable as an accomplice or for strict liability, or that an individual is guilty of manslaughter rather than assault.[100]

Moreover, although an individual may be unable to predict the occasions when he will be called upon to fulfil a positive duty, those occasions are unlikely to be frequent. This is particularly true with regard to Good Samaritan duties. Most people will never be in the position of having to rescue someone. It is highly probable that even if an individual is "unlucky" enough to be called upon to rescue, that he will never again face a victim needing help. The obvious exceptions to this are where an individual has a role that makes him likely to be involved in rescue attempts, for example a lifeguard, or where an individual carries out a dangerous pursuit that makes life or death situations and rescue attempts likely. In both these cases the unpredictability of positive duties does not arise because it is foreseeable that these individuals would encounter

---

[96] J. Bennett, *The Act Itself,* (1995), p. 75; J. Kleinig, "Good Samaritanism" (1976) 6 Philosophy and Public Affairs p. 396

[97] J. Wenik, "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime" (1985) 94 Yale Law Journal 1787.

[98] See above pp. 19-20.

[99] J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), p. 164; J. Kleinig, "Good Samaritanism" (1976) 6 Philosophy and Public Affairs No. 3 pp. 382-407 at p. 384; C. H. Schroeder, "Two Methods of Evaluating Duty to Rescue Proposals" [1986] Law and Contemporary Problems, 181 at p. 193.

[100] J. C. Smith, "The Element of Chance in Criminal Liability" [1971] Crim. L. R. 63, K. J. M. Smith, *A Modern Treatise on the Law of Criminal Complicity,* (1991), pp. 64-5.

people in danger. Furthermore, the fact that they are likely to be faced with these duties is due to choices that they have made in deciding to take part in dangerous activities, or to have a particular occupation.

This argument is less successful if applied to mandatory reporting. Individuals, who are especially likely to know that an offence has been or will be committed, will not always have this knowledge because of choices that they have made. In addition, for some of these individuals, there may be particular reasons why they would be reluctant to report and why their failures to report should be excused. Because of their relationship with the offender, the offender's family may be more likely than a stranger to know of the offender's crimes.[101] On the other hand, this relationship will make it difficult for them to betray the offender by reporting him.[102] Similarly, doctors, who treat offenders, who have been injured, or victims of crime, may be more aware of what offences have been committed. Nevertheless, because of their duties of confidentiality they may be reluctant to report.[103] A further suggestion is that residents of high crime areas are more likely to witness crime than individuals living in safer areas. Concentrating mandatory reporting on these individuals, however, would seem to be further penalising individuals who might already suffer from the high crime rate itself. The one exception where an individual can be predicted to know about offences, and where it might be justifiable for him to be more likely to be required to report, is that of the individual who is on the fringes of criminal activity.[104] Although his behaviour may fall short of complicity, his knowledge of and support for the offending is not in doubt.[105]

Criticising positive duties, for example duties to rescue, because they decrease liberty, considers duties to rescue from the point of view of the potential rescuer and more particularly it concentrates on his autonomy at that particular moment in time. The assessment of whether such duties decrease liberty is altered substantially if the viewpoint is switched to that of the victim.

"The reasoning is rather that the imposition of certain minimal duties shows a concern for the rights of other members of the community and therefore for the community itself, and so tends to promote the maximisation of liberty. However, the idea of liberty

[101] See below Chapter 8 p. 248.
[102] See below Chapter 6 pp. 134-135; Chapter 7 pp. 183-184; Chapter 9 pp. 329-330, 333.
[103] See below Chapter 6 pp. 134; Chapter 7 pp. 184, 198-203.
[104] See below Chapter 10 pp. 359-360.
[105] See below Chapter 8 pp. 242-244.

relates to each individual as a member of the community rather than to each individual in isolation. Thus an apparent diminution of the freedom of one citizen (by requiring that citizen to prevent a harm or to call the emergency services) may be justifiable by reference to the augmentation of the freedom of another citizen (who is under attack or otherwise in danger), and such justification is in the context of striving towards a community in which the liberty of each and all can be maximised."[106]

It seems from this that a communitarian analysis of the relationship between the individual and the State and between different individuals would be more likely to support positive duties.[107] The interdependence of the members of the community and their welfare rights means that the victim will have the right to call upon other members of that community to save him.

A Failure to Rescue Does Not Cause Harm

Both failures to rescue and failures to report are omissions. Neither the non-rescuer, nor the non-reporter has caused harm because they have not done anything to worsen the victim's situation.

Can an omission cause harm?

In their analysis of causation, Hart and Honoré establish a link between causation and the unusualness of a particular happening (or non-happening).[108] Certain factors should be dismissed from any causal evaluation because they are so commonplace and expected that they do not explain why a specific event occurred. In contrast, something that is unusual can be interpreted as a cause. According to this analysis an especially unusual omission, for example a particularly unlikely failure to rescue, can be interpreted as a cause. This link between the unexpectedness of an omission and whether it has caused harm is supported by Feinberg[109] and by Kleinig. Kleinig argues that an omission can be responsible for a particular effect if that omission is an "active nondoing". "Active nondoing" implies that an individual has failed to behave in the way that would reasonably be expected of him.[110]

---

[106] A. Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 L. Q. R., 424-459 at p. 448.
[107] See above pp. 16-18.
[108] H. L. A. Hart and T. Honoré, *Causation and the Law,* 2nd Edition (1985), p. 38.
[109] J. Feinberg, *Harm to Others, the Moral Limits of the Criminal Law,* (1984), pp. 178-9.
[110] J. Kleinig, "Good Samaritanism" (1976) Philosophy and Public Affairs 382-407 p. 393; A. P. Simester, "Why Omissions are Special" [1995] Legal Theory 311-335, at p. 320.

"Active nondoings, as acts (albeit negative) can figure in causal explanations. The pharmacist who fails to check his labels does something which, given someone's death, might be cited as its cause. My omitting to turn off the tap is a candidate for citation if the house floods. Likewise my withholding of aid may be the difference between someone's life and death. If *F* is floundering in the water, and I can see and help him but do nothing my withholding of aid is a causal factor."[111]

Leavens agrees that an unusual omission may be a cause. He contends that the status quo against which the non-rescuer's failure to rescue should be judged should include what could be expected to happen, therefore, if usually a type of rescuer would help, his failure to help is a departure from what could be expected to happen. In other words, by failing to help, the non-rescuer has intervened to alter the status quo and his inaction can be a cause of the non-rescued victim's injury or death.

"Once we realize that a particular undesirable state of affairs can be avoided by taking certain precautions, we usually incorporate these precautions into what we see as the normal or at rest state of affairs. A failure to engage in the preventative conduct in these cases can thus be seen as an intervention that disturbs the status quo."[112]

Applied to non-reporting this suggests that it might be justifiable to punish unusual failures to report. From the research into voluntary reporting, it seems that individuals are more likely to report serious, violent offences, especially if the victim is particularly vulnerable.[113] In contrast, they rarely report if they are threatened, or if they have a relationship with the offender.[114] This would suggest that any duties to report should be limited to the most serious offences, and that the threat, or fear of reprisals should excuse a decision not to report.

In his analysis of positive criminal liability, Wellman disagrees that because an omission is unusual, it is causally relevant. Unlike Feinberg Wellman uses an active, movement oriented notion of cause.[115] In addition, according to Wellman the fact that a failure to act is unusual makes it an omission rather than a simple failure to act. This would be unimportant if all omissions could cause harm, and that establishing that a failure to act was an omission necessarily showed that it could be causally relevant. According to Wellman,

---

[111] J. Kleinig, "Good Samaritanism" (1976) Philosophy and Public Affairs 382-407 p. 393.
[112] A. Leavens, "A Causation Approach to Omissions" (1988) 76 Cal. Law Review 542.
[113] See below Chapter 4 pp. 82-84.
[114] See below Chapter 4 pp. 85, 87-88.
[115] C. H. Wellman, "Liberalism, Samaritanism and Political Legitimacy" (1996) 25 Philosophy and Public Affairs 211-237, at p. 228.

Feinberg does not establish this correspondence between an omission and the causation of harm.[116]

Isolating the Blameworthy Omittor

Like Wellman, Mack argues that omissions can not cause harm. Unlike him, however, Mack argues that this means that the criminal law is not justified in punishing omissions. Mack examines Kleinig's suggested "active non-doings".[117] Although he accepts that the first two active non-doings suggested by Kleinig may be causally relevant, he claims that these situations involve actions rather than omissions. The pharmacist is liable, not because he failed to check labels, in other words for an omission, but because he is preparing and distributing drugs.[118] Kleinig responds to these criticisms in a later analysis of liability for omissions.[119] He uses the example of a bath being run and being allowed to overflow because the tap is not turned off. He argues that this is an example of an omission rather than an act because it is the omission, not turning of the tap, that is unusual and that explains why the house was flooded.

Most problematic is the third of Kleinig's original examples, that of a failure to rescue *F* from the water. Mack argues that it is impossible to justifiably differentiate, for the purposes of causation and criminal liability, one individual's failure to rescue *F* from the omissions of millions of other individuals who have also omitted to rescue *F*.[120] *This* is one of the main difficulties with punishing omissions. If there had been a duty to report serious crimes at the time of the Kitty Genovese's murder, how many of her non-reporting neighbours would have been prosecuted? All of them? None? Or if some, how would these non-reporters have been distinguished from the other non-reporters?

In "The Duty to Rescue and the Slippery Slope Problem" Patricia Smith argues that the fact that more than one potential rescuer was present does not make any of the individual non-rescuers less liable. If there is a victim is injured and one individual out of a crowd of potential rescuers helps that victim, his

---

[116] Ibid pp. 226-229.
[117] J. Kleinig, "Good Samaritanism" (1976) Philosophy and Public Affairs 382-407; see above pp. 25-26.
[118] E. Mack, "Bad Samaritanism and the Causation of Harm" (1984) 9 Philosophy and Public Affairs 230-259 at p. 242.
[119] J. Kleinig, "Failures to Act" (1986) 49 Law and Contemporary Problems, 162-180 at p. 177.
[120] E. Mack, op. cit. pp. 243-246.

assistance means that the victim is no longer in danger and the rest of the crowd, all of who were non-rescuers, can not be liable for their failures to rescue. Nevertheless, one potential rescuer amongst a mass of other potential rescuer can not just assume that one of these other potential rescuers will help the victim. The victim needs the help of that rescuer until it becomes apparent that someone else has come to the victim's aid.[121] Furthermore, the fact that not every non-rescuer would be punished, is not unique to the criminalisation of omissions, not every active wrongdoing that is discovered is punished.[122]

A large number of non-rescuers, or non-reporters is problematic however because the fact that other individuals decided not to report, or to rescue, might suggest that the need for rescue, or the fact that an offence was being committed was not evident. Following the Kitty Genovese murder,[123] Latane and Darley investigated bystander behaviour. They discovered that potential rescuers, and potential reporters were inhibited from helping if there were other people present. The passivity of these other individuals made the potential rescuer or reporter doubt his interpretation that a person was in danger, or an offence had been committed.[124] A non-rescuer might claim that he choose not to help because the inaction of others convinced him that it was a false alarm, or that another individual had already acted. He might also argue that he was afraid that he would be overreacting and that his attempts to help would be inappropriate and he would be humiliated. Knowledge that an offence has been committed, or that a person is in danger, is vital for liability for failing to report an offence or rescue a person in danger.[125] Consequently, it might be that the non-rescuer, or non-reporter out of a crowd of non-rescuer, or reporters would only rarely be prosecuted.

Causation and non-reporting

One of the main difficulties with criminalising non-reporting is that the non-reporter is not responsible for the harm suffered by the victim of the offence. It might even be argued that punishing a non-reporter deflects blame from this

[121] (1990) Social Theory and Practice 19-41 at pp. 33-36.
[122] See below Chapter 4 pp. 67-75.
[123] See above Chapter 1 p.1; *Kitty Genovese – the Queens story* at http://www.icf.de/asa/kitty_qstory.html.
[124] B. Darley & J. M. Latane, *The Unresponsive Bystander, Why Doesn't He Help?*, (1970).
[125] See below Chapter 3 pp. 61-63, Chapter 6 pp. 129-132; Chapter 7 pp. 179-181; J. Wenik, op. cit.

active offender. On the other hand, English criminal law, by punishing accessories, already recognises that liability can be extended beyond the principal offender.[126] Is it therefore also reasonable to extend liability yet further to include the non-reporter?

Is a Failure to Rescue a Benefit?

Unlike a failure to rescue, a decision to rescue a person in need will change that person's situation. The victim, who faced death or serious injury, is protected. One problem with this is that whilst an individual can be prohibited from harming another individual, he should not be required to benefit that individual. Consequently, liability for omissions, such as failures to rescue, should be rejected. There are two main arguments against this. The first denies that rescuing is a benefit and instead sees a failure to rescue as causing harm. The second, admits that failures to rescue are failures to benefit, but denies that this precludes liability for omissions such as failures to rescue from being justified.

Feinberg discusses the relationship between positive duties and benefit in the context of obligations to assist strangers in danger. He contends that the word "benefit" can be interpreted in several ways. These shades of meaning reflect different levels of gain.[127] Instead of an absolute bar on positive duties towards strangers because such obligations confer a benefit, the issue should be the type of benefit conferred. Whether the benefit should be within the remit of the criminal law depends upon the seriousness of the individual's situation were he not to be benefited. Benefits representing a "windfall profit"[128] should remain outside the scope of the criminal law. Feinberg gives the examples of calling an ambulance to a dying man and covering an unlucky gambler's losses to illustrate the difference between a benefit that prevents a disaster and one which is a mere gift. According to Feinberg, the criminal law can legitimately enforce the first kind of benefit. The distinction is founded upon the idea of an individual having a base line of welfare interests.[129] If an individual has a right to these welfare interests, the protection of these welfare interests is a matter

[126] Accessories and Abettors Act 1861; see below Chapter 6 pp. 155-158.
[127] J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), p. 139.
[128] Ibid. pp. 141-2.
[129] J. Kleinig, "Good Samaritanism"(1976) Philosophy and Public Affairs, pp. 382-407 at p. 400.

of justice, of right, rather than one of benevolence.[130] This means that the individual has a right to these interests and if this right is not protected, that he is harmed.

On the other hand, Wellman in his article "Liberalism, Samaritanism and Political Authority"[131] accepts that rescuing someone from extreme danger is a benefit. Nevertheless, he argues that in cases of extreme danger, where rescue can be achieved with little cost to the rescuer, there is a duty to rescue.[132] This suggests that the person in danger has a right to be rescued because of the severity of the consequences were they not to be saved. If there is a right to be rescued, however, not rescuing is a harm because that individual's rights have not been respected. For both Wellman and Feinberg the severity of not rescuing for the victim is crucial. For Feinberg, this gravity gives the victim a right to be rescued, therefore making a failure to rescue harm. According to Wellman, the seriousness of the danger faced by the victim means that the potential rescuer has a duty to help the victim even though that duty can not be justified by the harm principle.

The final issue is how positive duties would work in practice. Here there are two questions. The first relating to the drafting of any positive duty, how would a duty limited to the most deserving cases. The second concerns the impact, if any, of a duty to rescue on an individual's decision whether to rescue, or of a duty to report offences on an individual's decision to report.

Limiting Duties to Rescue

The dilemma is how to distinguish between justifiable and unreasonable duties to rescue. Once the law recognises that an individual may have a duty to rescue in some situations, it may be difficult to explain why another individual, in slightly different circumstances, should not also have a duty to rescue. Gradually, the duty is extended until it is no longer minimal but onerous.[133]

---

[130] J. J. Thompson op. cit.
[131] C. H. Wellman, "Liberalism, Samaritanism and Political Authority" (1996) 25 Philosophy and Public Affairs pp. 211-237.
[132] Ibid. pp. 215-216.
[133] L. Katz, *Bad Acts and Guilty Minds,* (1987), p. 76.

"It is true that none but a very depraved man would suffer another to be drowned when he might prevent it by a word. But if we punish such a man where are we to stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon in May in order to caution a traveller against a swollen river? Is he to be a murderer if he does not go a hundred yards? – if he does not go a mile? – if he does not go ten? What is the precise amount of trouble and inconvenience which he is to endure? The distinction between a stranger who will not give a halloo to save a life, and a stranger who will not run a mile to save a man's life is very far from being equally clear."[134]

For Lord MacCaulay, the preferred solution was to limit positive duties to those situations where the potential rescuer already had a legal duty towards the victim. Consequently, it would be possible to hold nurses or gaolers liable for their failure to care for their patients or inmates but not to hold strangers responsible for other strangers.[135]

The advantages of limiting liability to these individuals is that it clearly distinguishes between the non-liable stranger and those who would have a duty to help. Furthermore, because many of these legal duties will be the result of the individual choosing to have that duty, there is less conflict between duties to rescue and an individual's autonomy.[136] Finally, it might be that it is these omissions that are most unusual and therefore most relevant to causation.[137]

The weakness of this approach is that it does not allow for even the most blameworthy Bad Samaritan to be punished. According to Feinberg blameworthy failures to rescue should be punished and he suggests that a non-rescuer should be liable if there was "clearly no unreasonable risk, cost or inconvenience (including cases where there is no risk cost or inconvenience whatsoever)."[138] This would exclude those rescues that were dangerous and supererogatory.[139] Furthermore, it is possible that by excluding those rescues that are inconvenient, a duty to rescue would respect autonomy. The problem with this approach is that reasonableness is a rather vague and flexible concept and it may be difficult, therefore, for a potential rescuer to judge whether his situation would be a reasonable rescue. Furthermore, according to

---

[134] Lord MacCaulay, "Notes on the Indian Penal code" pp. 496-7 quoted in J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), pp. 154-155.
[135] J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), pp. 151-152.
[136] See above pp. 21-23.
[137] See above pp. 24-26.
[138] J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), p. 157.
[139] See above pp. 19-21.

Norrie, using reasonableness to define whether a particular rescue should be compulsory is especially problematic because reasonableness is being used both to define whether a particular rescue would be reasonable and to determine whether a non-rescuer's failure to rescue is blameworthy.[140]

Patricia Smith argues that it is possible to have a limited, workable duty to rescue. According to her, the duty should be minimal, in other words there should be no risk, cost or inconvenience to the rescuer.[141] Furthermore, there should only be a duty in relation to an individual victim, consequently, a rescuer, who is faced with several needy victims and who is unable to decide which of them to help, or who ignores all of them and ends up helping none of them, can not be liable.[142] The difficulty with this approach is that the non-rescuer of a single victim would be liable, the result of his non-rescue being one injured or dead victim. In contrast, the non-rescuer of several victims would not be liable, even though because of his omission were several injured or dead victims. Whilst it would be unrealistic to hold a rescuer liable for having only saved some victims rather than all of them, a better approach might be that the rescuer should try to save some of the victims.

The third of Smith's limitations is that the rescuer must be directly confronted with the victim's need.[143] The advantage of this is that because a potential rescuer has himself perceived a victim's risk, he is more likely to know that the victim is in danger. Furthermore, this requirement clearly excludes inconvenient or expensive rescues. The uniquely qualified doctor would not have to travel to another continent to perform a life saving operation; similarly, it would not be an offence not to give to help famine relief in Africa.[144] One problem though is that it might also be excluding the most able rescuers. Emergency services, for example, are rarely directly confronted by a victim. One possibility might be that the need to have directly perceived the danger should only apply to unqualified rescuers who do not have any relationship with the victim.

---

[140] A. Norrie, *Crime, Reason and History – A Critical Introduction to the Criminal Law*, (1993), at pp. 130-131.
[141] P. Smith, op. cit. pp. 25-26.
[142] Ibid. pp. 26-27.
[143] Ibid. pp. 28-29.
[144] J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), p. 152.

Limiting liability to the individual who has direct knowledge might be more appropriate for duties to report.[145] It would mean that only a first hand witness would have a duty to report.[146] Unlike the individual who is told that an offence has been committed and has to check how reliable this information is, the first hand witness will not have to investigate before reporting. Furthermore, the first hand witness who reports is reporting something that he has seen rather than passing on a confession from the offender. This would also mean that organizations would have no duty to refer reports on to the police. Arguably this would significantly reduce the effectiveness of any duties to report. As will be seen, most reports of suspected child abuse are initially made to social services.[147] If liability were limited to those who had direct knowledge, social services would not have a duty to pass on the report.

Smith's final limitation is that an individual would only have a duty to help in an emergency where there was a "clear, immediate need."[148] This idea of urgency would also exclude long distance traveling. As for duties to report it would be likely to limit any mandatory reporting to the most serious offences currently being committed. It is these offences that an observer would be most able to interpret as crimes, and it would be in these situations where there would be the immediate need.

The Decision to Rescue

The final issue concerns how a duty to rescue, or a duty to report would impact on reporting and rescuing levels. One argument is that neither a duty to report nor a duty to rescue would significantly influence citizens' decisions to report or to rescue. Regardless of any criminal law duty to rescue, many individuals will choose to carry out rescues which are neither dangerous, expensive, nor inconvenient. Similarly, many witnesses choose to report the serious, violent offences that are usually covered by mandatory reporting.[149] Furthermore, if a

[145] See below Chapter 6 pp. 129-132.
[146] See below Chapter 10 pp. 349-350; J. Wenik, "Forcing the Bystander to Get Involved: A Case for a Statute Requiring a Witness to Report Crime" (1985) 94 Yale L. J. 1787.
[147] C. Hallett, *Interagency Coordination in Child Protection*, (1995), p. 69.
[148] P. Smith, op. cit. pp. 29-30.
[149] See below Chapter 4 pp. 82-84; Chapter 5 pp. 111-114.

positive duty were not well known it would not be able to act as a motivation for reports or rescues.[150]

Moreover, rather than just being ineffective and not encouraging any rescuing or reporting, positive duties might actually decrease the number of reports or rescues. One suggestion is that whilst rescuing is voluntary, some rescuers choose to rescue because they want to do something supererogatory and heroic. Once rescuing is mandatory, their decision to rescue will no longer be glorious, but will merely be following law. Having lost their motivation to rescue, such rescuers will no longer be willing to rescue.[151] Some support for this is found in Titmuss's study of blood transfusions.[152] Titmuss found that individuals, who had chosen to give blood for altruistic reasons, no longer gave blood once they could be paid for it. On the other hand, a duty to rescue would not include dangerous or expensive rescues, a rescuer, who performed one of these rescues, would still have his heroism and altruism recognised.

Individuals report offences because the offences are serious and the offender especially blameworthy, or because the reporter sympathises with the victim, some individuals report because they hope to benefit by reporting.[153] Assuming that mandatory reporting would be limited to a small class of serious offences,[154] outside these offences a potential reporter would still be able to distinguish between the respective blameworthiness of individual offenders, and vulnerability of individual offenders. More significant might be the effect that mandatory reporting would have on post reporting assistance to the criminal justice system. It might be that a witness, who feels that his report has been coerced, will be less inclined to help with statements, or evidence in court.

A further reason why duties to report or rescue would be counterproductive is that in order to avoid these duties an individual would avoid areas or situations where he would be likely to face them. Nevertheless, in reality there is little evidence that a duty to rescue would lead to individuals avoiding supposedly

---

[150] See below Chapter 8 pp. 237-238.
[151] S. Levmore, "Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations." (1986) 72 Virginia Law Review No. 5 pp. 879-937 at p. 889.
[152] R. M. Titmuss, *The Gift Relationship, From Human Blood to Social Policy,* (1970).
[153] See below Chapter 4 p. 88.
[154] See below Chapter 7 pp. 175-176.

dangerous areas. The duty of easy rescue in France does not seem to have had this effect. Furthermore, it does not seem likely that duties to rescue would have this impact. Even if this dangerous or crime ridden areas were identified, and even if potential rescuers or reporters did avoid them, it is probable that they would avoid them for their own safety rather than to avoid having to rescue or report.

Linked to this is whether individuals would choose not to help people in need, who might have been the victims of crime, in case they had to report that offence.[155] How likely this would be may depend in part on how mandatory reporting is limited, in particular how certain the potential reporter would need to be that an offence had been committed.[156] Although, the French duties to report do not seem to have had this effect, it may be significant that the French Penal Code contains both a duty to rescue[157] and duties to report.[158] Helping a victim is not dependant on his having been the victim of an offence. Does this mean however that mandatory reporting without a duty of easy rescue will be ineffective?

A final risk is that Good Samaritan duties or positive duties in general might promote meddling.[159] The individual, encouraged by the State to take an interest in others, will use this to justify nosiness and meddling. Linked to this is the idea that if there is a duty to rescue the victim of an offence, this might degenerate into vigilantism.[160] Kleinig rejects this argument. He claims that the experiences of countries with duties to rescue do not suggest that positive criminal liability encourages meddling. In the research for this thesis I did not find that either the literature on the French duty to rescue or that on French duties to report suggested that these duties have encouraged or supported meddling. This was also supported by the interviews that I conducted with French respondents. Moreover, it might even be argued that the more prescriptive nature of duties to report[161] means that they inhibit rather than encourage meddling or vigilantism. Under mandatory reporting the person who discovers a serious violent offence has to report that offence to the public

[155] See below Chapter 10 pp. 357-358.
[156] See below Chapter 6 pp. 129-132, 139-140, 144.
[157] CP Article 223-6; see below Chapter 3 pp. 53-66.
[158] CP Articles 434-1, 434-2 and 434-3; see Chapter 7 pp. 175-197.
[159] J. Kleinig, "Good Samaritanism" (1976) Philosophy and Public Affairs p. 405.
[160] J. Wenik, op. cit.

authorities rather than having the choice of dealing with the offence and the offender himself.[162]

Duties to Rescue and to Report Compared

Given that the criminal law should be limited in the extent to which it restricts a person's autonomy, as duties to act, both mandatory reporting and duties to rescue might be rejected as being too onerous.[163] How do the two duties compare with each other? Is mandatory reporting more or less onerous than duties to rescue? It is difficult to answer this without knowing more about the scope of a duty to report or a duty to rescue. A duty to rescue that did not exclude dangerous rescues would be a greater duty than a duty to report an offence to the police.[164] This would not be the case, however, if the duty to report did not exclude the non-reporter who had been threatened.

One important difference between duties to report and duties to rescue is in relation to the victim. Duties to rescue benefit the victim, the person in danger. In contrast, reporting an offence benefits both victims and the criminal justice system as a whole.[165] Furthermore, whilst the person trapped in a dangerous situation may nearly always want to be rescued, not every victim of an offence will want to report that offence to the police. Might there not be an argument that the victim should be allowed to decide whether the offence is reported, and that an individual should not be forced to report both against his wishes and against those of the victim of the offence.[166]

On the other hand, not all victims will be capable of deciding whether the offence should be reported or making their views clear. There may be particular difficulties in this respect with child victims or people who have been seriously injured by the offence. Furthermore, in any case, should the criminal justice process depend on the victim's wishes? Whilst compensating the victim is important, the criminal justice system should treat the offender fairly and if it

---

[161] See above p. 22.
[162] J. Wenig op. Cit.
[163] See above pp. 21-24.
[164] See above pp. 19-21.
[165] See below Chapter 5 p. 102; Chapter 7 p. 184-185.
[166] See below Chapter 7 p. 102, Chapter 10 pp. 355-357.

punishes him, do so proportionately. Furthermore, the criminal justice system should protect the wider community as well as the individual victim.

Finally, another important distinction between duties to rescue and duties to report is that the former are always blameworthy. Conversely, it seems that some reporting should not only not be obligatory but should not be even be encouraged.

Do these differences mean that duties to report are less justifiable than duties to rescue? The fact that the French Penal Code contains both types of duty and they were introduced at the same time might suggest that this is not the case.[167] On the other hand, the greater use of the duty to rescue might be evidence that this duty is considered more acceptable, or possibly more effective, than the duties to report.[168]

Duties to Act in English Criminal Law

There is no general duty to rescue in English criminal law. Instead an individual may have a duty to rescue because of his relationship with and responsibility for the victim, or his responsibility for the victim's situation.

Family Relationship

The first potential source of liability is founded on a family relationship between the victim and the non-rescuer.[169] An example of this type of liability is the case of *Stone and Dobinson.*[170] This case concerned the death, in horrible conditions, of Fanny, Stone's sister. Fanny, an anorexic, was living with Stone and Dobinson. As her condition worsened the couple tried, but failed, to obtain medical help for her. The Court of Appeal upheld both defendants' conviction for manslaughter. The Court decided that Stone had a duty to help Fanny because of their relationship as brother and sister.

---

[167] The Law of 25th October 1941; see below Chapter 3 p. 52-53; Chapter 7 pp. 163-165.
[168] See below Chapter 8 pp. 246-247..
[169] A. Ashworth, "The Scope of Criminal Liability for Omissions." (1989) 105 L. Q. R. pp. 424-459 at pp. 440-443.
[170] [1977] QB 354.

The paradigm of family members having positive duties towards each other is that of parents towards their minor children.[171] Under section 1 of the Children and Young Persons Act 1933 a parent, who fails to protect his child from abuse or neglect, commits an offence. According to this provision, the parent has a duty to protect the child even if is he himself at risk. In other words, it is not just "easy rescues" that are required from parents. In *R v Simpson*[172] a mother, who failed to protect her child from being seriously abused by her partner, was sentenced to six months.[173] The court determined that Simpson's fear for her own safety did not excuse her failure to protect her child. Similarly, in *R. v. Emery*[174] the defendant was convicted for failing to protect her child from the child's father. In this case, the defendant was also mistreated by the abuser and this violence significantly reduced her capacity to resist him and protect the child. The abuse that she had suffered was relevant in mitigation but did not excuse her from a duty to protect her child from abuse.

In contrast, some would argue that the parent's duty to rescue his child from accidental harm, for example to save a child, who has fallen into a pool, is more limited. According to Larry Alexander, a parent will be excused from failing to rescue his child from accidental harm if the rescue would be more than minimally risky for him.[175] This is because although the parent has a duty to rescue the child, he does not have to give equal weight to his own well being and the child's interests. He can prioritise his own safety and wellbeing.

Is this distinction justified? One reason for it might be that the accident is sudden whereas the child abuse and neglect cases involve a background of abuse and neglect. As a result, some might argue therefore that the parent in the second scenario could have done something earlier before the danger was so great. This is unconvincing. It fails to recognize the inactive parent's fear of and love for the other parent that may have made reporting difficult.[176] It also takes no account of his wish to keep the family together and to avoid the involvement of social services and the child's possible removal to care. It does

---

[171] J. Eekelaar, "Are Parents Morally Obliged to Care for Their Children?" 11 (1991) O. J. L. S. 340; R. E. Goodin, *Protecting the Vulnerable, A Reanalysis of our Social Responsibilities,* (1985), pp. 79-83.
[172] (1990) 12 Cr. App. R. (S.) 431.
[173] On appeal the original sentence was nine months.
[174] (1993) 14 Cr. App R. (S.) 394.
[175] L. Alexander, "Affirmative Duties and the Limits of Self-Sacrifice" (1996) 15 Law and Philosophy 65-74 at p.67.
[176] See below Chapter 9 pp. 329-330, 333.

not explain why one parent will be excused a rescue that is slightly dangerous, or inconvenient whilst the other parent has to rescue despite being in significant danger. Another explanation might be that the parent of the drowning child might be carrying out the rescue himself, whilst the parent of the abused child will be relying on the help of the police and social services.[177] This suggests that the duty to rescue is more onerous if the rescuer is able to call for the assistance of a third party rather than having to carry out the rescue himself.

The special duty towards family members is not based on the biological relationship between the victim and the potential rescuer. Not all family relations carry a duty to rescue, parents, for example, are unlikely to be held liable for failing to rescue, or care for their adult children.[178] One suggestion is that family members are liable towards each other because they assume that duty. The potential rescuer, or carer by continuing to be a member of a family has assumed a duty towards other family members.

> "Surely we do not have any such "special relationship" for a person unless we have assumed it, explicitly or implicitly. If a set of parents do not try to prevent a pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they have assumed responsibility for it, they have given it rights, and they cannot *now* withdraw support from it at the cost of its life because they find it difficult providing for it."[179]

In Protecting the Vulnerable, Goodin argues that the basis for duties to care for others is the vulnerability of the victim rather than a voluntary undertaking to care on the part of the potential carer. This explains, for example, why parents do not usually have a duty to care for their adult children. Furthermore, the person in need may be more vulnerable in relation to his family than he is in respect of strangers. The interdependence of family life means that the victim is especially reliant on any family member who might be able to care for him.[180] The family is best placed to help the victim[181] and often will help the victim.[182] This immediate source of help, the family, may also make it more difficult for outside help to discover, or reach the victim. This may be especially true if the

---

[177] See above p. 20.
[178] *Smith* (1826) 2 C & P 449, *Shepherd* (1862) 9 Cox CC.
[179] J. J. Thomson, op. cit. pp. 47-63 at p. 63.
[180] R. E. Goodin, op. cit. pp. 118-121; M. Menlowe, "The Philosophical Foundations of a Duty to Rescue" In M. Menlowe & A. McCall Smith, (ed.), op. cit. pp. 5-54 at pp. 30-36.
[181] A. P. Simister, op. cit. p. 325.
[182] A. Leavens, op. cit.

victim is living with the family member as in *Stone and Dobinson.*[183] It would not be reasonable for a member of the victim's family to excuse his failure to help the victim by highlighting the failure of strangers to help the victim.

Restricting a duty to rescue to family members establishes a clear cut off point for liability. Furthermore, it may be easier to isolate an omission from a potential rescuer, who is related to the victim, as the legally relevant cause, because this type of omission may be especially unexpected and unusual.[184] Even if we do not expect individuals to rescue strangers, it is reasonable to expect them to be concerned for family members and others who are close to them. It may be as well that this type of omission is seen as especially blameworthy and deserving of punishment.[185]

An Undertaking to Act

Individuals who have undertaken to help the victim have a duty to continue this assistance.[186] Originally, this form of liability was a development from a defendant being liable because of a contractual duty.[187] It was necessary therefore to establish an express agreement to care, and that the carer benefited, or stood to benefit, from their obligation towards the victim. In *R. v. Instan*,[188] the fact that the defendant had been paid for caring for her aunt was significant in establishing an undertaking to care for her Aunt and the defendant's liability for not providing this care. More recent cases have expanded this type of liability. There is an increased willingness to infer an undertaking from the potential rescuer's behaviour. In *Stone and Dobinson*, for example, Dobinson's liability was justified by her previous care for Fanny.[189]

This type of liability is based on the victim's reliance on the defendant. It is this relationship of need, support, reliance and expectation that distinguishes this type of non-rescuer from the ordinary, non-liable bad Samaritan. Particularly important is whether the victim reasonably expects the assistance to continue

[183] I. H. Dennis, "Manslaughter by Omission" [1980] C. L. P. 255 at p. 261; R. E. Goodin op. cit. pp. 82-83.
[184] Ibid. p. 179.
[185] A. P. Simister, op. cit. pp. 311-312.
[186] A. Ashworth, "The Scope of Criminal Liability for Omissions." (1989) 105 L. Q. R. pp. 424-459 at pp. 443-445.
[187] See below pp. 40-41.
[188] [1893] 1 QB 450

and relies on this assistance.[190] It is this requirement that, according to Menlowe, distinguishes this basis for liability from an individual who gave to a homeless person having a duty to continue to give to that homeless person.[191] A further reason for holding this type of non-rescuer liable is that his promise to help may discourage others from helping the victim.

The problem with basing liability on an individual's prior conduct is that the individual, who tries to help, is worse off legally than the person who does nothing. In *Stone and Dobinson*, Dobinson was concerned about Fanny. Furthermore, within her limited capabilities, she did try to help Fanny. Had she not cared, or even enjoyed watching Fanny suffer, she would not have been liable for manslaughter.

Contractual Relationship

A non-rescuer may be punished for a failure to rescue if he has an obligation to rescue because of his employment.[192] This was one of the earlier sources of a duty to act.[193] In *R. v. Pittwood,*[194] for example, the defendant, who worked as a gatekeeper at a level crossing, was convicted of manslaughter after he failed to close that gate. Only if the contractual duty was aimed at protecting the basic welfare interests of potential victims and if its breach has, or could have, serious consequences, will breaching that duty lead to criminal liability.[195]

As in the previous category of non-rescuers this type of duty to act is based on the victim's reasonable reliance on the non-rescuer. An individual, who is drowning, is entitled to expect a lifeguard to save him, even if he has no right to claim assistance from an ordinary member of the public. Moreover, for a professional rescuer not to act in these circumstances is especially unusual and therefore it is appropriate to select this type of omission as the cause of a

---

[189] A. Norrie, op. cit. 129.
[190] G. Mead, "Contracting Into Crime, A Theory of Criminal Omissions" (1991) 11 O. J. L. S. 147-175 at p. 153; R. E. Goodin, op. cit. pp. 44-48.
[191] A. McCall Smith, op. cit. pp. 65-67.
[192] *R. v. Haines* [1847] 2 Car. & K. 368; *R. v. David Hughes* (1857) 7 Cox CC 547
[193] P. R. Glazebrook, "Criminal Omissions: The Duty Requirement in Offences Against the Person." (1960) 76 L. Q. R. 386.
[194] (1902) 19 TLR 37; G. Mead, op. cit. at p. 158; H. Benyon, "Doctors as Murderers." [1982] Crim. L. R. 171.
[195] A. Ashworth, "The Scope of Criminal Liability for Omissions." (1989) 105 L. Q. R. 424.

victim's harm.[196] The professional rescuer will probably have been trained and is therefore less likely to risk his life.[197] This is significant because it excludes supererogatory rescues.[198] Finally, these rescuers chose a profession that would require them to rescue. Requiring them to rescue therefore respects their autonomy.

The non-rescuer has created the dangerous situation

Finally, an individual, who creates a dangerous situation, has a duty to deal with that dangerous situation.[199] In *R. v. Miller*[200] the defendant was smoking in bed. He fell asleep. On awakening, he found that his cigarette had fallen in the bed and the bed was on fire. Rather than extinguishing the fire, Miller moved to another room and went back to sleep. Eventually, Miller was convicted for arson. His conviction was upheld by the House of Lords. Lord Diplock arguing that because the defendant had created the dangerous situation, he was liable for then failing to rectify that situation. One of the principal objections to punishing omissions is that the omittor has not *caused* any harm.[201] In contrast, this class of liability for omissions concentrates on situations, where if the omittor had not been there, the damage would not have occurred.[202] Furthermore, in this situation, there is no other individual who is more to blame for the harm.

One reason why establishing this causal link between the omission and the harm is so important is because of the charge that the omittor will face. In *Miller* itself the defendant was charged with arson, in non-rescue, or non-care cases it will usually be manslaughter. This means that the omittor risks the same punishment as the active arsonist, or attacker. It is hardly surprising therefore that liability has been restricted to the most blameworthy omittors, those whose inaction could be interpreted as causing the harm. In contrast, non-rescuers in France are prosecuted and punished as non-rescuers, rather

---

[196] J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), p. 179.
[197] M. W. Jackson, "Above and Beyond the Call of Duty." in M. W. Jackson, *Matters of Justice,* (1986), pp. 114-131 at p. 123.
[198] See above pp. 19-21.
[199] A. Ashworth, "The Scope of Criminal Liability for Omissions." (1989) 105 LQR pp. 424-459 at pp. 439-440.
[200] [1983] 2 AC 161.
[201] See above pp. 24-26.
[202] E. Mack, op. cit. pp. 241-242.

than as killers.[203] Initially, this French approach does seem to better represent the level of the non-rescuer blame.[204] Whether this assessment is valid will depend on how the easy rescue offence is used, whether the Code itself, case law, or doctrine have limited or restricted it. These are questions that are explored in the following Chapter.

On the other hand, it might be that it is more difficult to apply this class of liability for omissions to mandatory reporting. In effect, requiring the person responsible for an offence to report it would be against the right not to self-incriminate.[205]

Duties to Report

Like duties to rescue, duties to report in English criminal law are often limited to specific individuals. The duties to report road traffic accidents and offences in the Road Traffic Act 1988 apply to the vehicle's owner and driver.[206] In these instances the duty to report can be interpreted as a responsibility that the driver owes as the cost for the benefit of him being able to use the public highway.[207] Moreover, when initially formulated the increased duties of motorists may have been justified by the dangerousness and unusualness of driving.[208]

Under section 18A of the Prevention of Terrorism (Temporary Provisions) Act 1989 and section 19 of Terrorism Act 2000 liability for failing to report financial support for terrorism is limited to professionals who discovered the offences during their profession.[209] Again it seems that a duty to report is limited to those individuals whose training and experience might make them especially able to recognize and report and who because of their decision to enter a particular profession might be thought to have agreed to be bound by a particular duty to report. Moreover, it is perhaps also relevant that the more generally applicable duty to report terrorist offences and offenders under

---

[203] See below Chapter 3 p. 65-66.
[204] A. Ashworth, *Principles of Criminal Law,* 3rd Edition (1999), pp. 90-93; A. Ashworth, "The Elasticity of Mens Rea" in C. Tapper (ed.), *Crime Proof and Punishment,* (1981), pp. 45-70; G. Williams, "Convictions and Fair Labelling" [1983] Camb Law Journal 85.
[205] See below Chapter 6 p. 149.
[206] Road Traffic Act 1988 ss. 170, 172; see below Chapter 6 pp. 145-151.
[207] See below Chapter 9 p. 284.
[208] See below Chapter 6 p. 156-157.
[209] See below Chapter 6 pp. 139-140, 144.

section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989 has not been included in the Terrorism Act 2000.

As will be explained later in the thesis this greater willingness to impose a duty to report on the professional distinguishes common law duties to report from those in the French Penal Code.[210] This difference of approach might mean that it would be especially difficult to transpose the French duties to report into the English criminal law. Furthermore, the empirical research with criminal justice professionals in England and France demonstrated that the attitudes towards reporting by professionals and by unqualified individual in both jurisdictions did not always match the law in both countries.[211]

This thesis, in analyzing mandatory reporting, aims to discover the impact and cost of these duties. Whilst this Chapter has provided an introduction to positive criminal liability and the purpose and function of the criminal law, mandatory reporting will be explored in greater detail in Chapters 6 and 7 and its impact discussed in Chapters 8 and 9. As will be clear from these later two Chapters, the experience of mandatory reporting is important in the research.

[210] CP Article 434-1 and Article 226-13; F. Alt-Maes, "Un Exemple de Dépénalisation: La Liberté de Conscience Accordée aux Personnes Tenues aux Secret Professionnel [1998] Rev. Sci Crim 301; see below Chapter 6 pp. 158-160; Chapter 7 pp. 197-202.
[211] See below Chapter 8 pp. 261-263; Chapter 9 pp. 304-305.

CHAPTER 3

THE PURPOSE AND SCOPE OF FRENCH CRIMINAL LAW

LIABILITY FOR OMISSIONS

According to the French Penal Code, *Code Pénal* (CP) the non-reporter, who fails to report a serious crime, a crime against the State or a violent offence against a vulnerable victim, commits an offence.[212] It is also an offence to fail to rescue an individual in danger, or to fail to prevent a violent crime.[213] Clearly, the French approach towards punishing omissions differs significantly from that of the common law.[214] In this Chapter, I will examine the French duty of easy rescue. This will introduce the French approach to liability for omissions before the specific non-reporting offences are examined in Chapter 7.

Although Article 223-6 of the CP is not specifically a duty to report it may have the indirect effect of encouraging reporting. One way of preventing an offence is to call the police.[215] Furthermore, both duties were introduced at the same time, and the rationales for introducing the duty to rescue were also used to support mandatory reporting.[216] Consequently, analysis of the duty to rescue might also be relevant to mandatory reporting. This is important because the greater use of the duty to rescue means that doctrine discussing positive criminal liability has focused on duties of easy rescue.

The aim of this Chapter is to provide a French perspective to the issues examined in Chapter 2. Like the preceding Chapter it begins by considering the relationship between the individual and the State.[217] Although this Chapter will highlight differences between the French and English approaches to criminal liability and to punishing omissions, it is also important to consider any similarities between the two jurisdictions. Both are members of the European Union and the European Convention on Human Rights is applicable in both

---

[212] CP Articles 434-1, 434-2 and 434-3; see below Chapter 7 pp. 174-197.
[213] CP Article 223-6; see below pp. 53-66.
[214] See above Chapter 2 pp. 19-42.
[215] See below Chapter 7 pp. 197-198; Chapter 8 pp. 246-247.
[216] Law of 25th October 1941; see below Chapter 7 pp. 164-166.
[217] See above Chapter 2 pp. 10-19

English and French law.[218] Furthermore, Great Britain and France, as western, capitalist democracies share common values and a legal culture which recognises individual rights.[219]

Both English and French criminal law recognise the need for the use of the criminal law to be limited and proportionate.[220] They both reject the criminal law being used to deal with the most minor problems and harms.[221] Moreover, the most significant effects of criminal liability are restricted to the most harmful offending. One example of this in French criminal procedure is the tripartite division of offences into *crimes, délits* and *contraventions.*[222] Coercive police powers are restricted to the more serious offences which carry prison sentences.[223] Similarly, the individual's duty to report is restricted to the most serious offences.[224]

The Influence of Liberal Theories

After the Revolution liberal theories were important in shaping French political theory. The influence of liberal ideas was also apparent in the first Penal Code of 1810. Despite increased recognition of social rights[225] and a strong centralised State, liberal theories remain important.[226]

The 1789 Declaration of the Rights of Man and of the Citizen supports a liberal interpretation of human rights. Article 4 of the Declaration states that individuals should be free to do anything that does not harm another. This provision corresponds to Mill's harm principle, limiting the restriction of individual autonomy to the prevention of harm.[227] Articles 10 and 11 set out

---

[218] M. Delmas-Marty, *Raisoner, La Raison d' Etat, Vers Une Europe des Droits de l' Homme,* (1989).
[219] M. Van Hoecke & M. Warrington, "Legal cultures, Legal Paradigms and Doctrine: Towards a New Model for Comparative Law" [1998] I. C. L. Q. 495-536 at pp. 505-505.
[220] See above Chapter 2 pp. 8-10; M. Delmas-Marty, *Modeles et Mouvements de Politique Criminelle,* (1983), 13-46; D. Lochak, "Les Bornes de la Liberté" in Pouvoirs No. 84 *La Liberté,* (1998), 15-30.
[221] J. Carbonnier, "Vers le Degré Zéro du Droit de minimis" in J. Carbonnier, *Flexible Droit, Pour une Sociologie du Droit sans Rigeur*, (1998), pp.71-80.
[222] CP Article 111-1; J. Bell, S. Boyron and S. Whittaker, *Principles of French Law*, (1998), pp. 206-207; see below Chapter 5 pp. 93-94.
[223] Code of Criminal Procedure *Code de Procédure Pénale* (CPP) Article 67.
[224] See below Chapter 7 pp. 175-176.
[225] See below pp. 48-49.
[226] M. Agulhon, "La Conquete de la Liberté" and P. Ardant, "Les Constitutions et Les Libertés" both in *Pouvoirs La Liberté*, (1998), pp. 5-13, 61-74.
[227] J. S. Mill, *On Liberty*, G. Himmelfarb, (ed), (1974) paragraph 9; see above Chapter 2 pp. 12-15.

freedom of thought, religion and expression, and Article 17 is the right to own property. These are all liberal rights.[228]

Furthermore, in its first Article, the Declaration states that all individuals are equally entitled to certain basic rights. This is important because it rejects the idea that rights can be limited to a social class, religion or background. It corresponds to the liberal idea that rights do not depend on an individual's role within the community.[229] An important example of this equality is in relation to criminal procedure. Whilst during the *ancien regime* the criminal investigation and the punishment and offender might face would depend on his social background, after the Revolution, the same criminal justice procedure applied to all classes of defendants.[230] As well as according different types of individuals the same rights, this equality also means that they should have the same responsibilities.

Communitarianism

The revolutionaries were influenced by the political theories of Rousseau. [231] In "Le Contrat Social", Rousseau had argued that contracting together to form a community, citizens invested power in a central law making body. This central body was the representative of the whole community and had the right to govern and control the individual members of the community.[232] This is significant because it means that the interests of an individual can be restricted in the interests of the wider community.

This interpretation accords a central role to the State. The State is the provider and protector of individual liberties and it is from the State that an individual derives his rights and liberties.[233] This corresponds to the communitarian idea

---

[228] J. Rivero, *Les Libertés Publiques, Les Droits de l' Homme,* 2nd Edition (1978), pp. 41-72; G. Le Breton, *Libertés Publiques et Droits de l'Homme,* (1997), pp. 56-76.
[229] See above Chapter 2 pp. 11.
[230] J. Pradel, *Droit Pénal Général,* 8th Edition (1992), pp. 97-8.
[231] J. McDonald, *Rousseau and the French Revolution* (1965); R. Vernon, *Citizenship and Order, Studies in French Political Thought,* (1986), p. 53; C. J. Friedrich, "The Ideological and Philosophical Background" in B. Schwartz, (Ed.) *The Code Napoleon and the Common Law World,* (1923), p. 10; M. Agulhon, "La Conquete de la Liberté" in Pouvoirs No. 84 *La Liberté,* (1998), pp. 5-13 at pp. 8-9.
[232] J-J. Rousseau, *The Social Contract and Discourses,* translated G. D. H. Cole, (1993), and A. Cobban, *Rousseau and the Modern State,* (1964), 20-22.
[233] D. Salas, *Du Procès Pénal,* (1992), 103-105.

of the community providing its members with basic rights.[234] The Declaration of 1789 explicitly recognised that some rights were the result of an individual being a member of a community as a citizen. Interpreting the State as the source of liberties and rights can be used to promote a strong, powerful State.[235] Indeed it was this interpretation of the State's welfare and rights providing role that was used to justify the use of an extensive police system under Napoleon's main police officer, Fouché.[236]

The State has a duty and a right to protect individual freedoms. One consequence of this is that an individual's autonomy can be limited if it threatens community security, and therefore the exercise by other citizens of their rights. The individual's right to freedom may be limited so that he and other citizens can enjoy increased security. The Constitutional Court (*Conseil Constitutionnel)* has recognised that the State can limit individual freedom if this is necessary for public safety, to maintain order or to investigate crime.[237]

Article 4 of the Declaration of 1789 states that an individual is free to do anything that does not harm another. This seems to correspond to Mill's harm principle and suggests a liberal interpretation of criminal liability. On the other hand, according to Article 5 of the Declaration the law can also prohibit actions that are harmful to *society.* This later Article suggests that behaviour can be prohibited if rather than damaging an individual's interests, it harms the community as a whole. Moreover, the Declaration of 1789 also states that security is a fundamental right.[238] According to Carbonnier this includes the security of the wider community as well as the security of the individual. Significantly for Carbonnier this has meant that the State has claimed that reductions in individual liberty are justified by the greater security they bring the community and the extent to which the State has done this has increased significantly since the eighteenth century.[239]

---

[234] A. Etzioni, *The Spirit of the Community, Rights, Responsibilities and the Communitarian Agenda,* (1993); M. Walzer, *Spheres of Justice,* (1983) p. 68; see above Chapter 2 pp. 16-17.
[235] K. Dyson, *The State Tradition in Western Europe, the Study of an Idea and an Institution,* (1980) p. 119.
[236] C. Journès, "Proactive Policing in France," in S. Field & C. Pelsner, (ed.) *Invading the Private: State Accountability and New Investigative Methods in Europe,* (1998) pp. 83-93 at p. 84.
[237] CC Decision no. 76-78 of 12th Jan. 1977, CC Decision no. 80-127 of 19, 20th Jan. 1981, J. Bell, *French Constitutional Law,* (1992), pp. 141-144.
[238] Declaration of the Rights of Man and of the Citizen 1789 Article 2.
[239] J. Carbonnier, "La Part du Droit dans l' Angoisse Contemporaine" in J. Carbonnier, *Flexible Droit pour une Sociologie de Droit sans Rigeur,* (1998), pp. 187-197 at pp. 195-197.

The experiences of the Occupation and the Second World War led to a reaffirmation of the need to reinforce civil liberties. The Preamble to the Constitution of the Fourth Republic declared the State's commitment to the Declaration of 1789. The influence of socialism and the power and popularity of socialist and communist groups meant however that the interpretation of civil liberties was developed from the liberalism of the 1789 Declaration. Accordingly, the citizen was also entitled to social and economic rights in addition to the traditional liberal rights.[240] There are two aspects of these rights that are especially significant. First, the rights are worded in terms of benefits. The State has a duty to insure or procure an advantage to the citizen, rather than just being prohibited from limiting these rights. One of the objections against positive criminal law duties in the common law has been that these duties represent a benefit.[241] The fact that the French Republic has recognized that the State may owe positive duties towards the citizen might explain its greater willingness to support positive duties owed by a citizen towards another.[242] In addition, under the Constitution, a person might have rights because of his membership of a group. This is important because by recognizing these rights the drafters of the Constitution were rejecting a purely liberal interpretation of the atomized individual.

These rights, and those in the Declaration of the Rights of Man and of the Citizen of 1789, have been incorporated into the Constitution of the Fifth Republic. Legislation in France must comply with the liberal rights of the Declaration, the social rights of the Preamble of 1946 and with fundamental Republican principles.[243] It is clear, however, that the social rights are seen as less fundamental that the traditional liberal rights and are less protected. The Constitutional Court has consistently recognised that liberal rights are more important that social rights.[244] This is perhaps unsurprising. The 1946 Preamble itself states that an individual's social rights should be interpreted in

---

[240] J. Rivero, op. cit. pp. 95-98.
[241] J. Feinberg, *The Moral Limits of the Criminal Law Harm to Others*, (1984), p. 139; E. Mack, "Bad Samaritanism and the Causation of Harm" (1984) 9 Philosophy and Public Affairs 230-259; see above Chapter 2 pp. 28-29.
[242] See below Chapter 7 pp. 174.
[243] The Associations Law Decision 16th July 1971.
[244] The Nationalisations Decision 16th January 1982; J. Bell, *French Constitutional Law,* (1992), pp. 273-275; P. Pactet, *Institutions Politiques, Droit Constitutionnel* 18th Edition (1999) pp. 518-521.

accordance with the liberal rights recognised by the Declaration of 1789.[245] Furthermore, the fact that the social and economic rights of the 1946 Constitution were described as those rights that were needed at that time, whereas the rights in the Declaration of 1789 are viewed as being of eternal relevance and application, suggests that it is the later rights that are more fundamental.[246]

Criminal Liability for Omissions

In the first Penal Code of 1810, definitions of offences were based on prohibited behaviour. This behaviour was always defined in terms of an action, or actions, which if an individual carried out could make him guilty of that offence.[247] This nexus between actions and criminal liability meant that there was no liability for failing to act. This was confirmed in the infamous case of the Prisoner of Poitiers in which the Poitiers Court of Appeal decided that assault[248] could not be committed by an omission.[249] A court considering a similar assault case today would reach the same conclusion. Assault still requires an action.[250]

The Poitiers case concerned a young, mentally ill woman, Blanche Monnier, who was kept locked up at her parent's house. Until the death of her father, she had received proper care from her family.[251] Unfortunately, the same level of care did not continue after her father's death and whilst her mother provided food, she did not check that Blanche was eating the food, or clean Blanche, or her clothes, bed sheets or the room. On the 23rd May 1900 Blanche Monnier was found[252] covered in lice, dirt, faeces and uneaten food. Blanche's mother was charged, under Article 311 of the French Penal Code of 1810, with having assaulted her daughter. Before the case against Mme Monnier could be heard,

---

[245] Preamble to the 1946 Constitution paragraph 1.
[246] J. Rivero, op. cit. pp. 61-63, pp. 94-96.
[247] J. Pradel, *Droit Pénal Général*, 8th Edition (1992), pp. 99-101.
[248] Penal Code of 1810 Article 311.
[249] *La Séquestrée de Poitiers* D. 1902 2 81; J. H. Soutoul, *Le Médicin Face à L' Assistance à Personne en Danger et à l' Urgence,* (1992), p. 31; G. Stefani, G. Levasseur & B. Bouloc, *Droit Pénal Général,* 15th Edition (1995), 185-6; J. Pradel, op. cit. p. 356.
[250] CP articles 222-7 to 222-16; J. Pradel & M. Danti-Juan, *Droit Pénal Spécial*, (1995), pp. 52-73; C. Dadamo & S. Farran, *French Substantive Law, Key Elements*, (1996), pp. 208-209.
[251] Medical opinion at the time agreed that the family was justified in keeping Blanche locked up for her own well-being.
[252] The report does not say who by, or in whether the person/ people who found her had been looking for her.

she died. Attention then focused on Blanche's brother. He was charged with complicity in his mother's assaults on Blanche.

The trial court, the Poitiers *Tribunal Correctionnel,* found him guilty and sentenced him to fifteen months imprisonment. The trial judges stated that assault could be committed by an omission, such as a failure to feed or clean a patient. Furthermore, they argued that an individual could be guilty as an accessory, if he did not prevent an offence despite the fact that he knew it was going to be committed, had regular contact with the victim and could have prevented it.

Monnier's conviction was overturned by the Poitiers Appeal Court. The Appeal Court interpreted the wording of Article 311 as requiring an action. In the commentary to the Appeal Court's decision, Gustave le Poittevin examined other judicial and doctrinal interpretations of Article 311. He found that previous court decisions had adopted a restrictive interpretation of Article 311. Threats, sulking and "moral violence" had all been declared not to be an assault. Given the refusal to extend Article 311 to include threats, le Poittevin argued that the refusal of the Poitiers Court of Appeal to include omissions within Article 311 was appropriate and unsurprising.

Le Poittevin's commentary also compares the wording of Article 311 with that of the offence of *rebellion* in Article 209 of the Penal Code of 1810. *Rebellion* is the offence of resisting or opposing a police officer. The definitions of both this offence and assault use the term "*violences et voies de fait*". In an earlier *rebellion* case it had already been decided that *violences et voies de fait* did not include passively resisting a police officer. Consequently, by analogy, neglect would not be included within Article 311.

According to le Poittevin, an individual would only be liable for an omission if he had failed to comply with a legal or contractual duty to act. Le Poittevin gives the example of someone, who promised to take care of an ill person, and then failed to do so and the ill person died. It was justifiable to punish this failure to act because the patient's death could be attributed to the promise to care for the patient and the failure to fulfil the promise. Had the individual not promised to care for the patient, the patient would have sought help from others, or

others might have cared for the patient.[253] Furthermore, in this instance, by promising to care for the person in need, the individual has chosen to have duties towards that person. Consequently, by holding him liable, the criminal law is respecting his autonomy. When a carer has undertaken to help a person in need and then fails to fulfil this promise, there might also be a causal connection between his omission and the patient's demise. In le Poittevin's example, the promise to give aid and care dissuades others from helping the victim. The failure to fulfil the promise can therefore be interpreted as being responsible for the victim's harm.

The Poitiers Court of Appeal considered whether Monnier had any legal or contractual duties towards his sister. One possibility was that he had a duty to act to protect his sister under Article 1 of the Law of 19th April 1898. This provision required parents to provide food and care for their minor children. Although Blanche was an adult, it was claimed that her mental illness made her as vulnerable as a child, and therefore, that she was entitled to the same legal protection. Nevertheless, the court applied a restrictive interpretation to the 1898 law. It had been aimed at dealing with parental neglect and child abuse following some horrific, infamous cases of abuse. It was not appropriate therefore for the court to extend the law, beyond the intentions of the legislature, to deal with a different type of victim.[254] Furthermore, the Law of 19th April 1898 did not impose a general duty to care for children in need. The duty was imposed on *parents* to care for *their children.* Not being Blanche's father, the defendant would not have been liable in any case.[255]

The Appeal Court decided that Mme Monnier's omissions could not be an assault. There was therefore no offence, in respect of which Monnier could be an accomplice. Consequently, the Appeal Court did not examine whether the trial court had been correct in determining that a failure to prevent an offence could be complicity. Nevertheless, in his commentary le Poittevin also analyses this aspect of the trial court's decision. He disagrees with the trial court's interpretation, stating that under Article 60 of the Penal Code of 1810, accessories and accomplices can only be liable if their actions have helped the commission of an offence. In this case, the defendant did not prevent, or

[253] D. 1902 81 at p. 82.
[254] D. 1901 81 at p. 83.
[255] D. 1902 81 at p. 84.

hinder the commission of any offence, but his omission could not be described as having made that offence easier. This is significant in relation to mandatory reporting. One of the main arguments used to support mandatory reporting is that it enables the criminal law to deal with the individual, who although he supports a crime can not be prosecuted as an accessory.[256] Le Pottevin's rejection of a person being liable as an accessory because of an omission, suggests that without a specific offence of failing to report, the non-reporter would not be liable in French criminal law.

Graphic descriptions in the popular press of Blanche Monnier's condition meant that her family were reviled and the decision in the case was very unpopular. There was a great deal of public outcry and criticism from legal commentators and that outcry in turn produced a backlash of its own.

Gradually, the criminal law's refusal to punish omissions was relaxed and duties to help in limited circumstances were recognised. A citizen no longer had a duty just not to interfere with others, and not to harm them, he might exceptionally have a duty to aid them too. As a result of laws in 1891[257] and 1916[258], a captain at sea had a duty to save passengers from a sinking ship even if in so doing he risked his own life.[259]

The French approach towards omissions departed significantly from that of the common law with the introduction in 1941 of a duty to rescue individuals in danger of serious bodily injury or death.[260] Although introduced during Occupation, it was claimed by its supporters and by the Provisional Government after the Liberation[261] that it drew significantly from a 1934 proposal for an offence of failing to rescue.[262] The duty to rescue was therefore retained as Article 63 of the ACP and this provision can now be found at Article 223-6 of the CP.

---

[256] See below Chapter 6 pp. 155-158; Chapter 8 pp. 242-244; Chapter 9 pp. 292-293.
[257] 10th May 1891.
[258] 29th April 1916.
[259] This duty was probably justified by the fact that helping passengers could have been interpreted as an important part of the captain's responsibility and profession and by the fact that the captain would have been the only source of help available.
[260] Law 25th October 1941; H. Donnedieu de Vabres, "Loi 25 octobre 1941, commentaire." D. 1942 l. 33; see below Chapter 7 pp. 163-165.
[261] D. 1946 1 33.
[262] See below Chapter 7 p. 163.

The Duty of Easy Rescue – Article 223-6 of the Code Pénal[263]

Article 223-6 contains two duties. The first is the duty to prevent a violent offence and the second the duty to rescue a person in danger.

"Quiconque pouvant empecher par son action immédiate, sans risque pour lui ou pour un tiers, soit un crime, soit un délit contre l' intégrité corporelle de la personne s' abstient volontairement de le faire est puni de cinq ans d' emprisonnement et de 500000F d' amende.

Sera puni des memes peines quiconque s' abstient volontairement de porter à une personne en péril l' assistance que, sans risque pour lui ou pour les tiers, il pouvait lui preter soit par son action personnelle, soit en provoquant un secours." [264]

Initially, Article 63 ACP had been interpreted that an individual would only have a duty to rescue a victim, who was in danger *because he had been a victim of a violent offence.* The justification for this approach was that the duty to rescue in the 1941 law had been passed in order to provide assistance for victims of violent offences. Eventually, case law and doctrine developed the interpretation of Article 63. The duty to rescue and the duty to prevent a violent offence were seen as separate duties. Consequently, there was a duty to rescue a person in danger whether he was the victim of an accident, or the victim of a criminal offence. This approach was preferable. A potential rescuer, seeing an injured person, would not know whether that individual had been the victim of an offence or an accident. A duty to rescue that was limited to victims of crime would prove ineffective. This might suggest that a duty to report violent crime without a duty to rescue individuals in danger will also be ineffective. A potential reporter would be able to avoid liability by claiming that he thought that the victim's trouble was the result of an accident rather than due to an offence.

Similarly in Article 223-6 there is a duty to rescue a person in danger whether he is the victim of an offence, or the victim of an accident. One way of

---

[263] D. Mayer, "La "Charité Mesurée" de l' Article 63 alinéa 2 du Code Pénal" 1977 JCP I 2851; J-L. Fillette, "L' Obligation de Porter Secours à la Personne en Péril" 1995 JCP I 3863.

[264] Translation:
"Whoever, being able to prevent, by his immediate action, either a very serious offence, or a violent offence, voluntarily fails to do so, is liable to a punishment of five years imprisonment or a 500000F fine.

The individual who voluntarily fails to help an individual in danger, when he could without risk to himself or to a third party, either personally or by fetching help, have done so, is liable to the same punishment."

preventing crime, or of rescuing a victim of an offence, might be to report that offence to the police. There is clearly a link between this duty and mandatory reporting and that is examined further in Chapter 7.[265] This Chapter concentrates on Article 223-6 as a duty of easy rescue.

The evaluation of this article will focus on three areas – whether Article 223-6 is a Good Samaritan duty, how the CP distinguishes between culpable and non-culpable omissions and whether the failure to rescue has to be causally relevant.

Who has a Duty to Act Under Article 223-6?

The terminology of Article 223-6 suggests a Good Samaritan duty. According to the Code, the duty is owed by "*quiconque*" or "whoever". Furthermore, unlike other offences, the failure to rescue is not aggravated by a special relationship between the non-rescuer and the victim. On the other hand, the reported cases of failures to rescue, or failures to prevent crime usually concern non-rescuers who had a special duty towards the victim. This special relationship will often match one of the common law categories of liability for omissions, a family relationship, an assumption of duty, a professional duty to assist, or the creation of the dangerous situation.[266] This suggests that the reality of duties to rescue in French criminal law may be closer to the English approach than the CP implies.

The Liability of Family Members

Three cases under Article 223-6, one of a failure to rescue and two of failures to prevent an offence, illustrate the offence being used to punish a non-rescuer who was related to the victim.

In *Theuriot,* the supreme French court, the *Cour de Cassation,* upheld the conviction of Mme Theuriot, under Article 63 of the ACP, after she failed to prevent her lover murdering her husband.[267] The murderer had frequently told

[265] See Chapter 7 pp.197-198.
[266] See above Chapter 2 pp. 36-42; A. McCall Smith, "The Duty to Rescue and the Common Law" In M. Menlowe and A. McCall Smith (ed.), *The Duty to Rescue, The Jurisprudence of Aid,* (1993), pp. 55-95.
[267] D. 1951 452; JCP 1951 II 5629.

the wife of his plans to murder her husband so that they could be together. Consequently, the court had no difficulty in finding that she knew that a serious crime was going to be committed.

In a more recent decision, a woman, who had not made any attempt to prevent her husband from abusing their adopted daughter, was similarly convicted for failing to prevent an offence. [268] In this case, the court decided that it was especially important that, as well as not preventing the abuse, the wife had often left the girl alone with her husband. The court interpreted this as providing the husband with the opportunity to carry out the abuse.

In both these cases, as well as being related to the victim, the non-rescuer also knew the offender. Under Article 223-6, in order for the non-rescuer to be liable for failing to rescue, he needs to have been aware that the victim was in danger, or that the offender intended to commit an offence.[269] It is more likely that an individual would know about offences, which members of his family, were planning to commit, than about offences that strangers were intending to carry out. It may be therefore that the two cases described were prosecuted because the defendant's knowledge of the offence could be proved, rather than because the defendant had a special duty towards the victim of the offence. Certainly, in the *Theuriot* case, the judgement focused on whether the defendant knew of her lover's plans to kill her husband.[270] The defendant had claimed that although she knew of the plans to cover up the murder, she did not actually know how or when the murder would be carried out. The *Cour de Cassation* rejected her arguments. It determined that she did not need to know the details of how and when her husband was to be killed, it was enough that she knew that her lover planed to murder him.

Nevertheless, requiring an individual to inform on his family, or on a partner, is problematic. An individual may feel that his loyalty to his family should outweigh any loyalty that he owes to the wider community.[271] Moreover, the offences that are specifically aimed at punishing non-reporting often exempt

[268] Gaz. Pal. 1992 2 Somm. 357.
[269] See below pp. 61-63.
[270] D. 1951 452; JCP 1951 II 5629.
[271] J. F. Gayraud, *La Dénonciation,* (1995), pp. 42-43.

the offender's family.[272] It could be that this presumption, that an individual is justified in not preventing offences that a member of his family plans to commit, is overruled if the planned victim of the offence is also a member of his family.[273] In this situation, the loyalty that the potential rescuer, or reporter feels towards the offender, is cancelled out by the loyalty they should feel towards the victim. This suggests that the relationship between the victim and the potential rescuer/ reporter is significant.

The victim's family is also better placed to be able to help him if he is in danger. Their knowledge of the victim and proximity to him means that they will be able to realise that he needs help and the presence of a family may deter or inhibit strangers from helping. It is therefore unsurprising that families, who have not provided adequate care for their vulnerable members, have been charged under this provision. For example, a 1965 case before the Angers Appeal concerned parents who were charged under this provision after they had failed to obtain adequate medical treatment for their child.[274]

A Contractual Duty to Act

Many of the reported cases concern professionals who have been prosecuted for failing to rescue or failing to prevent an offence. For example, a chemist, who did not warn a customer about a dangerous drug, was convicted under this provision,[275] as was a bar owner, who failed to help a seriously ill customer,[276] a captain of a ship, who did not help some stranded sailors,[277] was also convicted, as was a SNCF inspector who did not help a young woman who was being attacked.[278] The profession, though, that has been most prosecuted for failing to rescue a person in danger, is the medical

[272] CP Article 434-1 paragraph 2; J. Pradel & M. Danti-Juan, op. cit. pp. 136, 746; P. Mousseron, "Les Immunités Familiales [1998] Revue Sciences Criminielles 291; and see below Chapter 7 pp. 193-194.
[273] See below Chapter 7 pp. 195-196.
[274] D. 1965 Somm. 23.
[275] D. 1990 53. One problem with this case for a comparative analysis is whether this should be interpreted as an omission, is the chemist liable for not warning the patient or for his lack of care in providing the patient with drugs (an action) – cf. Chapter 2 pp.; E. Mack, "Bad Samaritanism and the Causation of Harm" (1984) 9 Philosophy and Public Affairs 230-259
[276] Bull. Crim. 1995 no. 290.
[277] D. 1996 473.
[278] This was a case that was discussed by several respondents during their interviews; see below Chapter 8 p. 246.

profession.[279] Initially, doctors were no more likely to be prosecuted or convicted under Article 63 of ACP than any other individual. This was because the duty in Article 63 was interpreted as being the doctor's duty as a citizen. Consequently, any special knowledge and training that the doctor might have was irrelevant in whether he had breached this duty. If a doctor failed to care for a patient, for example by travelling to treat him, this was a failure to fulfil his obligations as a doctor. This failure was a breach of Article 5 of the Code of Medical Ethics[280] and was therefore a matter for specialised professional, disciplinary tribunals rather than for general criminal courts.[281] This interpretation was finally rejected by the Court of Appeal in Rennes. This Court of Appeal determined that the doctor could have a greater duty under Article 63 to a person in danger because of the doctor's knowledge and training.[282]

There are several explanations why professionals have a greater duty to rescue that the unqualified. First carrying out a profession may bring the individual into regular contact with those in need. For example, a lifeguard is especially likely to be called upon to rescue swimmers in trouble. Similarly, a doctor will have more contact with ill or injured people and therefore will be more likely to have to rescue.

As well as their greater contact with people in need, many of these professionals will, because of their training and experience, be better able to recognise that the victim needs help.[283] Although this can be convincingly applied to doctors to justify their greater liability, it does not explain why some of the other professions listed above were liable. Take the bar owner, for example, what would be the training that he received that would enable him to recognise a heart attack victim?

A further reason for the increased liability of the professional is that because of his training, he may be more capable of helping the victim than an unqualified individual. Article 223-6 requires that an individual either carry out the rescue himself or if he is unable to rescue the individual himself, that he alerts

[279] J-L. Fillette, "L' Obligation de Porter Secours à Personne en Péril" JCP 1995 I 3868; J. H. Soutoul, op. cit.
[280] Currently Article 4 of the Code of Medical Ethics.
[281] J. H. Soutoul, op. cit. p. 44.
[282] JCP 1949 II 4945.
[283] J. Pradel & M. Danti-Juan, op. cit. pp. 135, 140-141

someone who would be able to help. It is clear, however, that an individual, who has got the skills and experience to help, will be liable if he delays the victim receiving help by calling for someone else to be involved.[284] For example, a doctor, who told a man, who had been stabbed in a fight, to call an ambulance, received a four-month suspended sentence for failing to rescue. In this case, both the trial court and the appeal court decided that it was significant that the doctor could have treated the victim himself and avoided the delay of calling the ambulance.[285] Again, although this justifies the greater liability of the doctor, it is less convincing if applied to the bar owner.

In fact, it seems that the bar owner and the SNCF guard can be distinguished from the other types of professionals listed earlier. In both these cases, the defendants' greater liability can be explained by the fact that the potential rescuer, or his employers, had benefited from the victim's custom, and the victim was in danger on the potential rescuer's property.

Unlike the duties to report,[286] professional ethics will not excuse a failure to rescue, or a failure to prevent an offence. This is illustrated by a *Cour de Cassation* decision regarding a youth worker who did not prevent offences that were being committed by his charges.[287] In this case, the defendant's work depended on him gaining the trust of the young people. One night, he was asked by some of the young people to give them a lift. He agreed and as directed drove them to a house. When they arrived the youths began to pull up plants in the garden before breaking into the house. Having broken in, they then attacked two people, who lived in the house, one of whom needed to be hospitalised. Throughout the vandalism in the garden, the breaking in and the assaults, and even though the victims shouted for help, the defendant remained entirely passive. He was convicted of failing to help a person in danger under Article 63 of ACP. His appeal was dismissed by the Appeal Court in Caen and the *Cour de Cassation* upheld this decision.

---

[284] J-L. Fillette, op. cit.
[285] J-H. Soutoul, op. cit. pp. 56-57; D. 1966 30.
[286] CP Article 434-1; CP Article 226-13; F. Alt-Maes, "Un Exemple de Dépénalisation: La Liberté de Conscience Accordée aux Personnes Tenues aux Secret Professionnel" [1998] Rev. Sci Crim. 301; see below Chapter 7 pp. 198-203.
[287] JCP 1975 II 18143.

The defendant claimed that his failure to rescue was excused by the defence of necessity. Had he gone to help the victims, he would have destroyed his relationship with the young people. He was forced, therefore, to ignore the women's pleas for help. The *Cour de Cassation* rejected his arguments. It decided that he could not use the defence of necessity to excuse his failure to rescue because his duty as a citizen to rescue someone in danger was more important than his professional duty to maintain a good relationship with the young people. As a result, the second duty should not have prevailed. Furthermore, the court found that the defendant was not in danger, and that though he feared that preventing the attacks on the women would harm his relationship with the young people this fear was merely hypothetical whilst the attack on the women was real and current. Although it is not discussed in the report or in the commentary, it might also have been relevant that as well as not preventing the attack, the defendant actively helped the attackers by driving them to the victims' home.

In the *Fontaine* decision, the *Cour de Cassation* ranked an individual's duty as a citizen above his duty as a professional. This would seem to be a communitarian interpretation of the relationship between the individual and the State. First, the citizen has duties, here the duty to rescue someone in danger, because of his membership of the community. In addition, these citizen duties are more important than other duties that he might have because of choices that he has made, namely because of his choice of profession.

The Omission has Caused the Dangerous Situation

Finally, individuals have been prosecuted under Article 223-6 for failing to rescue another individual in circumstances when the dangerous situation and risk to the potential victim was due to their negligence. One illustration of this is the prosecution of a hit and run driver for failing to rescue an individual whom he knocked over.[288]

Whether an individual, who *deliberately* harms another, can also be liable for failing to rescue, is more problematic. In one case, it was decided that a poisoner had a duty to rescue his victim because only he would know the

[288] JCP 1949 II 4945.

danger that the victim faced, and therefore only he would be able to help.[289] Similarly, in another case, an individual, who beat a man, causing his victim to bleed profusely, was convicted for failing to rescue his victim.[290] On the other hand, some commentators argue that the attacker and the poisoner should be punished for their actions, the assault or the poisoning, rather than for their omissions, because the actions are more blameworthy than the resulting omission.[291] It is also claimed that it would be unreasonable to expect the non-rescuer to move psychologically from attacking the victim to helping him.[292]

Another problem with prosecuting intentional attackers for failing to rescue is the fact that in reality most attackers will also fail to rescue their victims. Does this mean that they should always be charged with failing to rescue as well as with the active assault? If not, when should it be used? One possible limitation might be to use the duty to rescue if the attacker has caused the victim greater harm than he intended. This would recognise the attacker's responsibility for this harm, but would also distinguish him from the attacker who intended to cause that serious harm. It might also be an alternative, lesser charge for the prosecution if it were difficult to prove that the defendant was actively responsible for harming the victim.

Is Article 223-6 Supererogatory?

Is the duty to rescue a duty of heroism or sainthood?[293] There is no duty to rescue if that rescue would be dangerous, either for the rescuer himself or for a third party.[294] This has been interpreted to mean that an individual will be excused failing to rescue if he was faced with a risk which would make a reasonable and stable individual decide not to rescue.[295] Furthermore, the "reasonable and stable individual" has the same personal characteristics as the non-rescuer. Consequently, a non-swimmer would not be punished for failing to dive in and save someone, because a reasonable non-swimmer would also

[289] D. 1949 230.
[290] Rev. Sc. Crim 1981 p. 618; J. Pradel & M. Danti-Jean op. cit p. 138.
[291] D. 1955 55.
[292] J. Pradel and M. Danti-Juan, op. cit. p. 138.
[293] J. Kleinig, "Good Samaritanism" (1976) 5 Philosophy and Public Affairs pp. 382 –407 at p. 396.
[294] J. Pradel & M. Danti-Juan, op. cit. pp. 141-142.
[295] G. Levasseur, "Rapport sur l' Omission de porter Secours, présenté aux Journées Franco-Belgo-Luxembourgeoises de Droit Pénal" quoted in J. Pradel & M. Danti-Juan, op.cit. p. 141.

decide not to attempt the rescue.[296] Similarly, medical emergencies will and should usually be left to trained individuals.

Although risk would excuse a failure to rescue, neither inconvenience nor expense would. In one reported decision, the fact that a doctor was suffering from a sore throat was an inconvenience rather than a danger. It did not excuse him from a duty to rescue.[297] Even a serious illness may not excuse a doctor's failure to rescue. In another case, a doctor, who suffered from angina, was liable for failing to go to help a seriously injured patient.[298] This refusal on the part of the CP to recognise either expense or inconvenience as an excuse for non-rescue is in contrast with similar legislation in other jurisdictions.[299] It is of course possible that the offence is rarely prosecuted if rescue would have been inconvenient and/ or expensive. Nevertheless, the wording of the French duty to rescue does seem harsh, especially because the Code was revised in 1993 and the current form of the duty to rescue demonstrates that the chance to modify the duty was not taken up.

Knowledge of the Victim's Situation

Under Article 223-6, an individual will only be liable for a failure to rescue or prevent an offence, if he knew that the victim was in danger or that an offence was going to be committed. As a result, an individual, who because of a weakness or incapacity did not appreciate the dangerous situation, will be excused for failing to rescue. One example of this is the 1965 case of the parents who did not fetch adequate medical treatment for their child.[300] In this case, the parents were not convicted of failing to obtain medical treatment for their child because, due to their lack of mental capacity, they had not appreciated the gravity of the child situation or been able to decide how best to deal with it.

---

[296] JCP 1944 II 2624; J-L Fillette, "L' Obligation de Porter Secours à Personne en Péril" JCP 1995 I 3868.
[297] JCP 1951 II 5990.
[298] JCP 1944 II 2624.
[299] A. Cadoppi, "Failure to Rescue and the Continental Criminal Law" in M. Menlowe and A. McCall Smith, *The Duty to Rescue*, (1993) pp. 93-130; F. L. M. Feldbrugge, "Good and Bad Samaritans: A Comparative Study of Criminal Law Provisions" (1966) 14 American Journal of Comparative Law 630; G. Fletcher, "Criminal Omissions Some Perspectives" (1976) 24 American Journal of Comparative Law 703.
[300] D. 1965 Somm. 23; J. Pradel & M. Danti-Juan, op. cit. p. 140.

An important aspect of the knowledge requirement is whether an individual has to witness the victim's plight firsthand.[301] Article 223-6 does not require a rescuer to have personal knowledge of the danger. In practice, however, prosecutions for failing to travel to help stranger victims have been limited to medical professionals. This is unsurprising. It is unlikely that an unqualified individual would be called to rescue a stranger. One possibility is that a distant non-rescuer will only be liable if there is some special reason why he has been asked to help, and why it was reasonable for the victim to expect him to help. In the case of the distant doctor this is justified because of the doctor's training, however, for the ordinary, unqualified individual it is unlikely there will be a justification why he, rather than other individuals, who are nearer, should have rescued. Furthermore, even with the doctor, he may be able to justify not helping a victim, if there were other doctors nearer, and he had not previously treated that victim.

The fact that a doctor can be liable for failing to treat a distant victim is a development of the duty to rescue by the courts. Initially a doctor was only liable if he had personal knowledge that the patient was in danger.[302] The first doctor to be charged with failure to rescue under Article 63 of the ACP was acquitted because he was told of the patient's illness by her father, rather than discovering and realising the danger that she was in himself.[303] In this case, the doctor had refused to go to treat a three-month-old girl, who had already been his patient, and who was suffering from severe eczema. The girl later died and the doctor was charged under Article 63.[304] He was acquitted because according to the court, not having seen the patient himself he could not have known that she was in danger. The courts were extremely wary of overruling the doctor's judgement and assessment of patients' needs with that of the court. The doctor was entitled to decide, based on his knowledge and experience, whether the patient needed help. An extreme example of this is a decision by the Court of Appeal in Poitiers that a doctor, who had not gone to help an individual, who had received a serious head injury in a traffic accident, was not guilty of failing to rescue a person in danger.[305]

---

[301] J. Pradel and M. Danti-Juan, op. cit. pp. 140-141.
[302] J-H. Soutoul, op. cit pp. 45-49.
[303] D. 1947 94.
[304] J. H. Soutoul, op. cit. p. 42.
[305] Ibid. p. 48.

Later the case law distinguished between whether the doctor had previously treated the patient, and whether the patient was a stranger to him. In the former situation, based on the patient's medical history, the doctor could be presumed to know how dangerous the patient's situation was.[306] In one case a doctor was found guilty of failing to rescue a child who later died. The doctor had earlier treated and diagnosed the child but when asked for helped refused to visit and treat the child. On the other hand, if the doctor had never treated the patient he would only have an obligation to treat him if he were certain that the patient was in danger and it was for the doctor to decide whether he could be certain that the victim was in danger. [307]

Eventually the interpretation of the duty of easy rescue developed and the *Cour de Cassation* recognised that a doctor, called upon to help a victim, needed to check the patient's condition, before deciding whether the patient needed treatment.[308] This will often mean that the doctor will have to visit the patient. For example, in a decision given by the *Tribunal Correctionnel* in Bethune, a doctor, who had been called to see a patient, who was haemorrhaging after having his tonsils removed, and who had instead written a prescription, was convicted and fined 1000F for failing to rescue.[309]

The fact that doctors may be and have been found liable for failing to travel and treat a stranger is the main argument why some doctors claim that they are unfairly burdened by Article 223-6. Some doctors argue that under the criminal law they should have a limited duty to treat those patient whose dangerous situation they are personally aware of. Failure to travel and treat strangers should only by a disciplinary offence.[310] In support of the doctors' arguments it does seem contradictory that duties to rescue can be described as civic duties in order to explain why they are more important than professional duties, but at the same time, the professional standards of the doctor, rather than those of the ordinary citizen can be used to determine how extensive the duty is. On the other hand, the fact that a rescue may be more effectively carried out by a doctor than by an unqualified citizen may justify the fact that doctors seem to have a more extensive duty to rescue.

---

[306] J-L. Fillette, op. cit. p. 354.
[307] D. 1949 347.
[308] D. 1954 255; J-H. Soutoul, op. cit. p. 50.
[309] JCP 1963 II 386; J-H Soutoul, op. cit. p. 53.
[310] J-L. Fillette, op. cit. p. 354.

What is Danger?

The final limitation on the scope of the duty in Article 223-6 is that it is a duty to help an individual who is in serious danger. It is reserved for the extreme and rare occasions when an individual's very existence is in peril.[311] According to one decision, an individual is in danger if his life, health or physical integrity is threatened.[312] Similarly, Fillette defines danger as a threat to an individual's life or health. In contrast, neither a risk to economic wellbeing nor a threat to an individual's psychological health constitute danger.[313] In one case, it was decided that a doctor, who refused to carry out an abortion, was not guilty of failing to rescue a person in danger. The woman's claim that forcing her to have the child would cause her grave psychological distress and that this distress was a danger was rejected by the court.[314] One explanation for the court's decision in this case might be that it was reluctant to require a doctor to perform an abortion. Furthermore, the argument that if that doctor had a duty under Article 223-6 towards the woman, he could have fulfilled this duty by referring her to another doctor is not really satisfactory. As has already been seen, an individual is only able to rescue by calling someone else, if he is unable to carry out the rescue himself. It is possible that this is limited to a physical inability to do something, or a lack of a particular skill, rather than a moral inability, or refusal to do something.

A potential rescuer, who sees another individual in extreme physical danger, is unlikely to have difficultly recognising the seriousness of the victim's predicament. Is this true for psychological danger? Generally a physically injured person can be quickly helped.[315] In contrast, helping a psychologically or economically threatened person may be a more longstanding commitment. Giving money to a beggar will not make that beggar financially independent. Will the donor have to give again the following day if he knows that the beggar is in danger and he can afford to give? Restricting danger to physical danger is an important and necessary restriction on the scope of the duty to rescue.

---

[311] J. Pradel & M. Danti-Juan, op. cit. pp.137-140.
[312] Dr. pén 1991 comm. 135.
[313] J-L. Fillette, op. cit. p. 351.
[314] D. 1976 531.
[315] Exceptions to this would be cases such as that found in Monnier where the victim needed long-term care.

The danger must be imminent. This means that the danger must be close in time, and foreseeable. Consequently, although there is a duty to prevent violent crime in Article 223-6, this will be limited to offences that are actually being attempted. Criminal plans would not be included. A further question is whether a duty to rescue would include a duty to prevent a dangerous situation? For example, an individual might have a duty to pull a drowning victim from a pool under Article 223-6, but would that Article also compel the owner of the pool to fence it off? It is probable that there would be no duty to prevent accidents because this would be dealing with a speculative rather than an imminent danger. Certainly none of the cases reported in the Dalloz edition of the Code involved rescuing a person by preventing future harm.

If a victim survives, or defends himself against a criminal assault, a non-rescuer will not be liable, even though he failed to help.

Causation

Finally, it is important to note that Article 223-6 does not require that the non-rescuer *cause* the victim harm. The non-rescuer is punished because of his failure to help rather than because of the eventual death or serious injury of the victim. This attitude is clearly demonstrated by the fact that the consequences of the failure to rescue or the potential consequences of a hypothetical rescue are irrelevant in any consideration of the non-rescuer's guilt. This has been confirmed in a number of decisions in which the non-rescuer claimed that his failure to act was not culpable because even were he to have helped, the victim would have died or suffered serious injury. In other words, his failure to rescue was not responsible for the victim's harm. In the one case, for example, an individual, who had not rescued someone, who had jumped out of a window, was liable even though he contended that any assistance would have been ineffective.[316]

Even though the non-rescuer does not have to be the cause of the victim's harm, the fact that the victim faces serious injury of death is still crucial in Article 223-6. The motivation for the duty to rescue is to protect victims or to

[316] Gaz. De Palais 1990 II 571.

minimise their harm. It seems that the harm suffered by the victim, and the fact that the defendant could have prevented or minimised it, is relevant to liability for failing to rescue in general rather than for specific defendants' liability.

The fact that French criminal law avoids the causation problems faced by common law discussions of duties to act[317] can be attributed to the existence of specific offence of failing to rescue. When exceptionally English law punishes a failure to rescue, it does so as manslaughter.[318] This can raise the difficulty of highlighting the omission as the cause of the victim's death rather than any preceding commissions against the victim. In contrast, because the CP has a specific offence of failing to rescue these problems are avoided. According to the word and interpretation of Article 223-6, the death, or serious injury of the victim, is an impetus for rescue, not a requirement for liability on the part of the non-rescuer. There is therefore no need to establish that the failure to rescue caused, or even contributed to death.

The Effect of a Duty to Rescue

Given that failures to rescue are still reported and prosecuted it is clear that mandatory rescuing has not ensured that all "easy" rescues are carried out. On the other hand, despite fears from some common law commentators, it does not seem that the duty to rescue has either lead to meddling, or has discouraged rescue.[319] One important application of the duty to rescue for the research is its use to require an individual to fetch professional help. As will be seen in Chapter 7 and from the interviews with the French respondents in Chapter 8, this means that the duty to rescue can act as an extra mandatory reporting offence, importantly this duty may be wider and more generally applicable that the specific duties to report.[320] Given that Article 223-6 can be used to punish failures to report, it is therefore important to examine the purpose and justification of specific mandatory reporting laws and whether such obligations are justified.

[317] J. Kleinig "Good Samaritanism" (1976) 5 Philosophy and Public Affairs 382-407; E. Mack, "Bad Samaritanism and the Causation of Harm" (1980) 9 Philosophy and Public Affairs pp. 230-259; see above Chapter 2 pp. 24-26
[318] See above Chapter 2 pp. 36-42.
[319] See above Chapter 2 pp. 34.
[320] See below Chapter 7 pp. 197-198.

CHAPTER 4

Reporting a crime may lead to that offence being investigated and possibly to the offender being prosecuted and punished. This Chapter will examine criminal justice procedure in England and Wales in order to discover the potential effects of reporting. The second part of this Chapter evaluates studies of voluntary reporting of offences.[321] This voluntary reporting provides a context against which to assess mandatory reporting. One possibility is that the studies of voluntary reporting show gaps in reporting where a duty to report might be needed. Alternatively, the motivations behind voluntary reporting might provide a framework for limiting any mandatory reporting. According to this approach, a failure to report when most other individuals would report is especially deviant and blameworthy. In addition, an obligation to report in situations where most people would choose to report might not be too onerous.

The English Criminal Justice System

Only a small proportion of offences committed are ever tried.[322] At each stage, discovery, reporting, investigation, prosecution, conviction and sentence, filtering will occur.

Discovery

The first stage of filtering is the discovery of offences. There are two elements to an offence being discovered. First, that the offending behaviour is noticed and secondly, that it is recognised as an offence. Some offences are unlikely to be discovered. It may be that an offence committed within the home is unlikely to be discovered outside that domestic setting.[323] Offences that do not have a direct victim are rarely discovered. Unless the offending is committed in public, the offence will only be known about by the offender and his associates.

Some behaviour is obviously criminal. A potential reporter, who saw a violent, unprovoked attack, would probably realise that the attacker's behaviour was

---

[321] See below pp. 75-88.
[322] A. K. Bottomley and K. Pease, *Crime and Punishment, Interpreting the Data,* (1986), pp. 1-32; C. Coleman & J. Moynihan, *Understanding Crime, Haunted by the Dark Figure,* (1996).
[323] K. O' Donovan, *Sexual Divisions in the Law,* (1985), pp. 119-125.

illegal.[324] Nevertheless, other situations might be less clear, for example, a member of the public might not realise that a lorry was overloaded, or that a building site was unsafe. In both these cases, the potential reporter is hindered by a lack of professional knowledge. Alternatively, the behaviour itself might be equivocal. A witness, who saw an adult dragging a crying child, might be unsure whether this was the child's parent taking the child home or someone abducting the child. Finally, an individual's ability to recognise criminal behaviour may be restricted by his life experience. A criminal offence is a transgression from normal behaviour. An individual will construct his idea of normality from his own experiences and expectations. Consequently, an individual may be unable to recognise criminal activity, because although the behaviour is defined by society as deviant, it matches the individual's own experiences. One example of this is the non-reporting by victims of child abuse. A child, who has no non-abusive experience of adults, might not realise that the abuser's behaviour is criminal.[325]

Reporting

The next stage is the reporting of the offence. Although the police receive most reports of offences, many reports of child abuse are initially received by social services. [326]

According to research, victims and witnesses decide whether to report offences on the basis of whether punishing the offender is an appropriate use of the criminal law. It may be that a more informal response is preferred, as when the offence is not serious,[327] or where the victim and the offender know each other.[328] An individual might also decide not to report because the risks of involving the police outweigh the benefits, for example, when reporting an offence means the citizen revealing his own immoral or illegal behaviour.[329]

---

[324] This does not mean that those witnesses would report such an incident, cf. Kitty Genovese incident.
[325] See below Chapter 9 p. 332.
[326] C. Hallett, *Interagency Coordination in Child Protection,* (1995), p. 69.
[327] J. Shapland, J. Willmore, & P. Duff, *Victims in the Criminal Justice System*, (1988), pp. 14-5; R. Mawby, *Policing the City*, (1980), p. 100; J. B. Morgan, *The Police Function and the Investigation of Crime*, (1990), pp. 69-71; D. Steer, *Uncovering Crime*, (1980), p. 67.
[328] A. K. Bottomley & K. Pease, op. cit. p. 25.
[329] J. B. Morgan, *The Police Function and the Investigation of Crime*, (1990), p. 69.

Reporting is a vital stage. As will be seen, without the input of the public in reporting crime, far fewer offences would be discovered and investigated by the police.[330]

Investigation

Having received the report, the police decide whether to investigate the alleged offence. The police will only investigate behaviour which they interpret as criminal.[331]

Report and investigation may be simultaneous. This happens when the offence is discovered by the police whilst it is being committed, or when the reporter detains the offender as well as reporting the offence, for example, a store detective detaining a shoplifter.[332] After the suspect has been identified and detained the case against him is prepared. An important part of the investigation is the questioning of the suspect and the use of post arrest entry, search and seizure powers.[333]

The police are the main investigators of criminal offences. Police powers to investigate offences are set out in PACE. Although increasing police investigative powers may lead to more offenders being detected, any increase in these powers will be at the cost of civil liberties. There is a conflict between an efficient investigation, the deterrent that an offender will be identified and prosecuted, and civil liberties. Setting the balance between the individual and the State can be difficult. It is perhaps unsurprising therefore that some have claimed that PACE has failed. Some disagree with the Act because it grants the police too much power, to the detriment of the individual,[334] others because its safeguards hamper the efficiency of police investigations.[335]

---

[330] See below pp. 75-82.
[331] Ibid. p. 71; S. McCabe & F. Sutcliffe, *Defining Crime, A Study of Police Decisions,* (1978), pp. 19-37; M. McConville, A. Sanders & R. Leng, *The Case for the Prosecution,* (1988).
[332] R. Mawby, op. cit. pp. 111-132.
[333] PACE ss. 18 & 32; K. Lidstone & C. Palmer, *The Investigation of Crime, A Guide to Police Powers,* 2nd Edition, (1996); M. Zander, *The Police and Criminal Evidence Act*, 3rd Edition (1995).
[334] L. Christian, *Policing by Coercion,* (1983).
[335] R. Reiner, *Chief Constables, Bobbies, Bosses or Bureaucrats,* (1986), pp. 146-156; L. Curtis, "Policing in the Street" in J. Benyon & C. Bourn, (ed.), *The Police, Policies, Procedures and Proprieties*, (1986), pp. 95-102.

One example of the claimed imbalance in PACE is in relation to the Codes of Practice. The Codes of Practice state how the police powers should be used and what safeguards a suspect should be provided with. A failure to follow the Codes of Practice is not a criminal offence, nor is it grounds for a civil claim.[336] In contrast, if an individual prevents a police officer using his investigative powers, he may be charged with obstructing the police.[337] On the other hand, some police commentators argue that, whilst the safeguards in the Codes of Practice were new, the investigative powers in PACE only confirmed previous police procedure, and that therefore PACE has increased suspects' rights.[338]

The balance between the police interest in investigating offences and the suspect's interest in his freedom will depend upon the nature of the offence being investigated and the type of suspect. The more serious an offence is, the greater the coercive powers of the police. Although, the increased gravity of these offences may mean that they are a greater threat to security, and therefore that the police should be granted increased powers to deal with these offences, the consequences for the individual arrested and convicted of a serious offence are particularly severe, it might be argued therefore that the suspect should have greater rather than less protection.[339]

Section 24 of PACE defines arrestable offence. A police constable can arrest an individual, whom he reasonably suspects of having committed, or being about to commit, an arrestable offence.[340] Arrest may lead to the suspect being detained, being questioned and to him and his premises being searched.[341] The range of offences defined by section 24 as carrying a power of arrest is extensive. In addition, legislation since PACE has added to the list of arrestable offences. In particular, the Criminal Justice and Public Order Act 1994 (CJPOA) added the additional offences of possessing of publishing obscene matter[342], possessing, distributing and advertising indecent photographs of children,[343] publishing or distributing material likely to stir up

---

[336] PACE s. 67 (10).
[337] Police Act 1996 s. 89(2); see below Chapter 6 pp. 152-155; R. Baldwin, "Regulation and Policing by the Code" in M. Weatheritt (ed), *Police Research Some Future Prospects,* (1989), pp. 157-168.
[338] R. Reiner, op. cit., pp. 144-160, L. Curtis, op. cit.
[339] A. Sanders & R. Young, *Criminal Justice*, (1994), p. 124.
[340] M. Zander, *The Police and Criminal Evidence Act 1984,* 3rd Edition (1995), pp. 66-70; K. Lidstone & C. Palmer, op. cit. pp. 245-254.
[341] PACE s. 32.
[342] Obscene Publications Act 1959 s. 2
[343] Protection of Children Act 1978 s. 1.

racial hatred,[344] ticket touting,[345] and touting for taxi services.[346] Increasing concern about the sexual exploitation of children may mean that the indecency offences added by CJOPA are likely to be uncontroversial. Similarly, there is an increased recognition of the seriousness of racial offences.[347]

Section 116 of PACE defines serious arrestable offences. [348] There are two types of serious arrestable offence. First, there are offences that are always serious arrestable offences, for example, treason, murder and rape.[349] In addition, other arrestable offences may, depending on their consequences, be defined as serious arrestable offences. For example, although theft is not specifically defined as a serious arrestable offence, it will be a serious arrestable offence if it entails either substantial financial gain[350] or serious financial loss.[351]

The police have greater powers in investigating serious arrestable offences than they do if they are investigating arrestable offences. Under sections 42 and 43 of PACE, an officer, of at least the rank of superintendent, or a Magistrates' Court, may, if it is necessary for obtaining or preserving evidence, extend the time limits of the suspect's detention beyond the usual limit of twenty-four hours to ninety-six hours.[352] Furthermore, the suspect accused of a serious arrestable offence can be refused the right to consult his lawyer.[353] Finally the police can apply for a warrant to search premises for evidence of a serious arrestable offence.[354] These premises do not have to belong to or be inhabited by the suspect and under schedule one of PACE, the police can apply for a warrant to search for and seize confidential material.[355]

---

[344] CJOPA s. 155, PACE s. 24 (2) (i).
[345] CJOPA s. 166 (4), PACE s. 24 (2) (h).
[346] CJOPA s. 167 (7) and PACE s. 24 (2) (j).
[347] B. Bowling, "Racial Harassment and the Process of Victimisation" (1993) 33 British Journal of Criminology 231; M. Malik, ""Racist Crime" Racially Aggravated Offences in the Crime and Disorder Act 1998" (1999) 62 M. L. R. 409.
[348] PACE s. 116; M. Zander, op. cit. pp. 296-298; K. Lidstone & C. Palmer, op. cit. pp. 15-20.
[349] PACE schedule 5.
[350] PACE s. 116(6)(e).
[351] PACE s. 116 (6)(f).
[352] M. Zander, op. cit. pp. 96-102; K. Lidstone & C. Palmer, op. cit. pp. 360-372.
[353] PACE s. 58 (8).
[354] PACE s. 8; M. Zander, op. cit. pp.27-28; K. Lidstone & C. Palmer, op. cit. pp. 96-101; D. Feldman, *The Law Relating to Entry, Search and Seizure,* (1986), pp. 125-128; R. Stone, *Entry, Search and Seizure, A Guide to the Civil and Criminal Powers of Entry*, 2nd Edition (1989), pp. 49-61.
[355] M. Zander, op. cit. pp. 36-42; K. Lidstone & C. Palmer, op. cit. pp. 179-193; D. Feldman, op. cit. pp. 91-128; R. Stone, op. cit. pp. 53-57; R. Stone, "PACE: Special Procedures and Legal Privilege" [1998] Crim. L. R. 498; R. Costigan, "Fleet Street Blues, Police seizure of Journalists Material" [1996] Crim. L. R. 231; R. Costigan, "Journalistic Material in the UK criminal process" in S. Field & C.

The rights of the suspect accused of a terrorist offence are also restricted in comparison with those of the individual accused of non-terrorist offences. The initial detention period for a terrorist offender is forty-eight rather than twenty-four hours. A terrorist suspect can be delayed access to a solicitor if this would interfere with the gathering of evidence about terrorist acts, or prevent the detention of anyone involved in terrorist acts.[356] Furthermore, the police can require any consultation between the terrorist suspect and his advisor to take place within sight and hearing of a uniformed officer. The Terrorism Act 2000 maintains the distinctive treatment of terrorist suspects with the bill giving the police powers to cordon off areas,[357] stop and search,[358] and to enter and search premises.[359] Terrorist offences are also treated differently in relation to duties to report. Although, there is no general duty to report serious crime, it is an offence to fail to report terrorist offences.[360]

Why are terrorist offences treated differently? One explanation is the gravity of these offences, particularly because of their impact on the whole community.[361] Another reason though might be that they are especially difficult to investigate and that therefore the police need the extra powers.

Rather than being restricted, the safeguards protecting a suspect may be increased if the suspect is thought to be especially vulnerable. Juveniles and the mentally disordered and handicapped are accompanied by an appropriate adult who oversees their treatment and welfare.[362] Similarly, Code C states that interpreters need to be available for the deaf and for non-English speakers. In reality, it is questionable how effective these provisions are.[363] There is some doubt about whether vulnerable individuals are always accompanied by an

---

Pelser, (ed.), *Invading the Private: State Accountability and New Investigative Methods in Europe*, (1998), pp. 239-251; C. Graham & C. Walker, "The Continued Assault on the Vaults – Bank Accounts and Criminal Investigations" [1989] Crim. L. R. 185; L. Newbold, "The Crime/ Fraud Exception to Legal Professional Privilege" (1990) 53 M. L. R. 472; A. Zuckerman, "The Weakness of PACE special Procedure for Protecting Confidential Material" [1990] Crim. L. R. 478.

[356] Code C Annex B.

[357] Terrorism Act 2000 ss. 33-36.

[358] Terrorism Act 2000 ss. 44-47.

[359] Terrorism Act 2000 schedule 7.

[360] Prevention of Terrorism (Temporary Provisions) Act 1989 s. 18; see below Chapter 6 pp. 144-153.

[361] See below Chapter 9 p. 282.

[362] Code C paragraph 3.9.

[363] J. Williams, "The Inappropriate Adult" [2000] Journal of Social Welfare and Family Law 43; Pierpoint, "How Appropriate are Volunteers as Appropriate Adults for Young Suspects? The Appropriate Adult System and Human Rights" [2000] Journal of Social Welfare and Family Law 383.

appropriate adult[364] and whether the presence of the appropriate adult is an effective safeguard for the vulnerable individual's rights.[365]

Although this section has concentrated on the coercive powers of the police, many investigations are based on consent rather than on the exercise of an investigative power. Some suspects will "voluntarily" attend the police station to answer police questions. This is advantageous for the police because any time limits on detention[366] operate from when the individual was detained, not from when he entered the police station voluntarily. Voluntary attendance acts as extra investigation time for the police before the PACE time limits start to run. Although, voluntary attenders are entitled to consult a solicitor, they do not have to be informed of this right. Furthermore, it is possible that few voluntary attenders will feel able to assert and exercise their right to leave the police station.[367] In addition, many entries and searches are conducted with the consent of the householder rather than under a legal power.[368] Whilst this may help police/ public relations, an individual who, consents to a search, may not benefit from the same safeguards as someone whose premises are searched under a power. Furthermore, not being defined, the police power to seize evidence following a consensual search is likely to be greater than their power to seize evidence following a search under a power.

Prosecution

Having investigated the offence and arrested and questioned the alleged offender, the police may decide to charge that individual. If he is charged, the next decision is whether to prosecute. The Royal Commission on Criminal Procedure recommended that the investigative and prosecution function should be separated and an independent body should be responsible for deciding when to prosecute and for carrying out those prosecutions.[369] The result was the Prosecution of Offenders Act 1985 (POOA) and the formation of the Crown Prosecution Service (CPS). The CPS does not have an obligation to prosecute

[364] T. Nemitz & P. Bean, "The Use of the "Appropriate Adult" Scheme (A Preliminary Report)" (1994) 34 Med. Sci. Law 161.
[365] P. Fennell, "The Appropriate Adult" Gazette 90/19 pp. 19-20.
[366] PACE s. 41.
[367] I. MacKenzie, R. Morgan & R. Reiner, "Helping the Police with their Inquiries – the Necessity Principle and Attendance at the Police Station" [1990] Crim. L. R. 22.
[368] D. Feldman, op. cit. p. 29.
[369] Prosecution of Offenders Act 1985 s. 1.

a suspect. They should prosecute only if a conviction is probable[370] and prosecution would be in the public interest.[371]

Although the POOA stated that the CPS would be responsible for deciding whether to prosecute, the police remain important gatekeepers. The police may downgrade behaviour that they believe not to merit prosecution and punishment although technically it may be illegal. Later on in the investigation, they may decide to release the individual without charge, or to caution him.[372] If either of these decisions is taken the CPS do not have the option of deciding to prosecute the suspect.

Trial and Sentencing

The mode and venue for the trial will depend on the seriousness of the offence of which the defendant is accused. The most serious offences, indictable offences, are tried in the Crown Court.[373] The least serious offences, summary offences, can only be tried in the Magistrates' Court.[374] Between these two categories are either way offences that can be tried in either the Magistrates' or the Crown Court.

Trial procedure in England is broadly adversarial. The prosecution and defence prepare their cases and examine and cross-examine witnesses. Only exceptionally does the judge ask a witness questions. His role is neutral, as an umpire.[375] Procedural rules are more important than they are under the inquisitorial system.[376] One example of this is in relation to the exclusion of evidence. Whether a court excludes evidence is not dependant on the defendant being factually innocent. For example, a confession may be excluded even if it is true.[377] This is in contrast to French criminal procedure

---

[370] *Code for Crown Prosecutors* paragraph 4
[371] *Code for Crown Prosecutors* paragraph 6; A. Ashworth, "The Public Interest Element in Prosecutions." [1987] Crim. L. R. 595
[372] R. Evans & C. Wilkinson, "Variations in Police Cautioning Policy and Practice in England and Wales" (1990) 29 Howard Journal of Criminal Justice 155.
[373] A. Sanders & R. Young, *Criminal Justice*, (1994), pp. 305-389.
[374] Ibid. pp. 249-304.
[375] M. Damaska, *The Faces of Justice and State Authority*, (1986), pp. 119-126.
[376] Ibid. pp. 101-3.
[377] PACE s. 76; *Davis* [1990] Crim. L. R. 860, A. Ashworth, "Excluding Evidence as Protecting Rights" [1973] Crim. L. R. 690.

under which evidence establishing the guilt of a factually guilty defendant is unlikely to be excluded.[378]

Furthermore, the different ideologies of the inquisitorial and adversarial systems may explain the different approaches in both jurisdictions towards mandatory reporting. If the rationale behind the inquisitorial model is to find the truth, this may support an individual being compelled to report. In contrast, the adversarial model of criminal justice does not expect the trial to narrate the relevant events accurately and completely. It is recognized that some relevant witnesses may never be heard. In addition, the idea of a contest, inherent in the adversarial model, suggests conflict, whereas, the citizen reporting offences implies cooperation.

Voluntary Reporting

Reporting offences to the police is arguably the most effective way in which a member of the public can assist the police. An individual's knowledge of other individuals and his interactions with them mean that he may discover some offences that the police would otherwise not learn about.

"The only way the public will be "used" positively is if the police judge they have something to offer. Information is the key"[379]

This section will examine who reports offences to the police and their reasons for reporting or choosing not to report. In particular, because later chapters will consider whether a duty to report child abuse, comparable to that in Article 434-3 of the French Penal Code, should be introduced, this section will examine the reporting of child abuse.

Who reports offences

Victims

Investigation of crime is largely a reactive response to reports of crime from members of the public. The role of victims is especially important. Mawby found that 74.6% of offences that were reported to the police were reported by,

[378] See below Chapter 5 pp. 105-107.
[379] N. Fielding, "Being Used by the Police" [1987] Brit. J. Criminology 64, 68.

or on behalf of, the victim, this figure rose to 92% when offences against corporations were excluded.[380] Similarly Bottomley and Coleman's study of crime reporting in Hull discovered that victims reported 80% of all offences[381] and according to Steer's research for the Royal Commission on Criminal Procedure, between 70.5% and 74.7% of offences were reported to the police by the victim or someone acting on behalf of the victim.[382]

What offences do victims report? Obviously an offence that does not have a direct victim, for example drug use, or many motoring offences can not by their nature be reported by victims. Beyond this, it seems that victims are more likely to report property than violent offences. Shapland, Willmore and Duff confirm this in their research on the involvement of victims in the criminal justice system. Their research concentrated on victims of violent offences and they found a substantially lower level, 35% to 41% of reports of offences from victims than previous studies which had considered a wider range of offences.[383] Moreover, their analysis of the criminalisation of assaults, which received hospital treatment in Bristol, Clarkson et al discovered that of the ninety-three assaults they analysed, in nineteen of the cases the police were never informed and in a further twenty no formal report was made.[384]

Although these studies suggest that victims of violent crime are less likely to report, this is contradicted by an earlier study by Bottomley and Coleman which found that victims reported 90% of violent offences. One possible reason for the discrepancy may be the type of assault. A victim, who suffers serious injury as a result of an assault, may be incapacitated and unable to report.[385] It might be that the Bottomley and Coleman concentrated on less serious violent offences than were considered the other surveys. In contrast, the study by Clarkson et al includes the full range of violent assaults from "the trivial to the near murderous."[386]

---

[380] R. Mawby, op. cit. pp. 98-100.
[381] A. K. Bottomley & C. Coleman, *Understanding Crime Rates, Police and Public Roles in the Production of Official Statistics,* (1981), pp. 45-6
[382] D. Steer, op. cit. p. 67
[383] J. Shapland, J. Willmore & P. Duff, op. cit. p. 17
[384] C. Clarkson, A. Cretney, G. Davis, J. Shepherd, "Assaults the Relationship Between Seriousness, Criminalisation and Punishment" [1994] Crim. L. R. 4, 5.
[385] J. Shepherd & C. Lisles, "Towards Multi-Agency Violence Prevention and Victim Support" (1998) 38 British Journal of Criminology 351, 366.
[386] C. Clarkson et al. op. cit. p. 7.

Victims of sexual assault are often unwilling to report. They may be ashamed, feel responsible, or fear aggressive police interviewing and testifying in court.[387] Consequently, if the term "assaults" is interpreted as including sexual assaults, it is likely that the number of assaults reported will be lower than if sexual violence is considered separately. In light of this, it is important to note that whilst the Shapland, Willmore and Duff research included victims of sexual assaults, in the Bottomley and Coleman research these offences were a separate category.

Child abuse is not generally reported to the authorities by the victim. Out of forty-eight cases, Hallett found that only one case of physical abuse and one case of sexual abuse were reported by the child. [388] Furthermore, the physical abuse was reported to a doctor, and the sexual abuse to a teacher. This suggests that when children do report abuse it is to an intermediate agency, which might refer the abuse on to the social services or the police. The fact that children report to an intermediary is significant. One of the problems with imposing a duty to report on professionals is that this might deter victims from going to these professionals for help and treatment.[389] Furthermore, the fact that many reports are made to professionals other than the police suggests that approaches to child abuse should recognize that the need to protect the child may be of greater or more immediate concern that the wish to punish the offender.[390]

Witnesses

In this research "witness" means an individual, who is neither the victim, nor the offender, but who is aware that an offence is being, has been or will be committed. Although some witnesses will have seen the offence, other witnesses will only learn about the offence from the victim, from other witnesses or from the offender. Witnesses include both the general public and individuals who come into contact with offenders and victims because of their profession. These professional witnesses present particular difficulties for

[387] J. Shapland, J. Willmore & P. Duff, op. cit. pp. 16-17
[388] C. Hallett, *Interagency Coordination in Child Protection,* (1995), pp. 68-71.
[389] See below Chapter 7 pp. 200-202; Chapter 8 pp. 258-259.
[390] See below Chapter 9 pp. 322-323.

mandatory reporting. Any duty to report may conflict with their professional ethics.[391]

The role of witnesses in reporting crime is less significant than that of victims.[392] One possible explanation for this is the victim's greater motivation to report the offence and to receive redress through the criminal law. Research into reporting rates shows the connection between the seriousness of an offence and the probability that it will be reported.[393] The victim has a greater appreciation of factors that may make the offence serious. Another reason for the lesser role of witnesses in reporting offences is that before a third party can report an offence he must himself discover the offence. Because the victim experiences the offence, it will generally be less difficult for him to discover it.[394]

Nevertheless, the importance of witness reporting should not be underestimated. The witness may report violent crime in cases where the victim is too injured to report. This is important because it suggests that witness reporting is focused on those offences that are assessed by the public as being the most serious.[395]

Shapland, Willmore and Duff divided the reporting witnesses into categories. A significant proportion of reporting witnesses were individuals who had a professional responsibility to report: 28% of reporters were people in charge of, or working at the place where the offence occurred and 9% were work colleagues of the victim, or more accurately, 9% were taxi or bus drivers who reported attacks on other taxi or bus drivers. It seems that bus and taxi companies have policies on how to deal with attacks on drivers. An even larger proportion of reporters were people who knew the victim. In addition to the 9% work colleagues already mentioned, 21% were neighbours of the victim and 14% were friends of the victim. An obvious problem with these categories is that an individual may belong to more than one category. Finally, it is interesting to note that a significant proportion of reporters, 23%, were "Good

---

[391] See below Chapter 9 pp. 304-304 and Chapter 10 pp. 356-357.
[392] See above pp. 75-77.
[393] See below pp. 82-84.
[394] See above pp. 67-68.
[395] M. Levi & S. Jones, "Public Perceptions of Crime Seriousness in England and Wales" (1995) 35 British Journal of Criminology pp. 234 –250; M. O' Connell & A. Whelan, "Taking Wrongs Seriously" (1996) 36 British Journal of Criminology pp. 299-317; D. A. Parton ; M. Hansel & J. R. Stratton,

Samaritans" who had no connection with the victim.[396] This confirms the earlier research of Bottomley and Coleman. In that study of the 3% of offences reported by a witness, half were reported by someone who knew the victim, and half by a stranger.[397] The fact that strangers play a significant role in reporting offences might suggest that any duty to report does not need to be limited to the victim's family and associates, and that duties to report can be treated differently from duties to rescue.

In Hallett's study of inter-agency cooperation in the investigation of child abuse, the main reporters of both physical and sexual abuse were the victim's immediate family. Especially important in reporting both physical and sexual abuse were mothers of victims. They reported eleven cases of sexual abuse and seven of physical abuse. In addition, fathers reported four cases of physical abuse, however none of the sexual abuse cases were reported by the victim's father. Finally, other relatives reported two cases of sexual abuse and one of physical abuse.

This contradicts claims that the victim's family is unlikely to report child abuse.[398] It is sometimes suggested that, in cases where the mother is in a relationship with the abuser, this relationship and loyalty towards the offender will deter her from reporting. Furthermore, the potential cost of reporting, in the child being removed from the family home, is seen as persuading many potential family reporters not to report.[399]

This research investigates whether any offences are underreported. A converse problem is when offences are over reported, in particularly the problem of malicious reports. In relation to child abuse, the individuals who are usually considered to be responsible for malicious reporting are the child's parents in the context of a separation. It would be interesting to know whether any of the family reports noted by Hallett represented unfounded accusations.

"Measuring Crime Seriousness – Lessons from the National Survey of Crime Severity" (1991) 31 British Journal of Criminology pp. 72-83.

[396] J. Shapland, J. Willmore & P. Duff, op. cit. p. 18

[397] A. K. Bottomley & C. Coleman, op. cit. p. 47

[398] S. C. Kalichman, M. E. Craig & D. R. Follingstad, "Professionals' Adherence to Mandatory Child abuse Reporting Laws: Effects of Responsibility Attribution, Confidence Ratings, and Situational Factors" (1990) 14 Child Abuse and Neglect 69, 71.

[399] See below Chapter 9 p. 329.

In addition to the child's family, professionals working with the child might also have an important role in reporting abuse to the police. Because of their contact with children, teachers might be thought to be likely to discover abuse,[400] similarly, by treating and examining children, doctors are well placed to discover abuse.[401] Although, most reports of child abuse are made to social services, the principle of "Working Together" in the Children Act 1989 supports different types of professionals cooperating and exchanging information and seems to favour Social Services referring reports on to the police.[402]

Hallett found that Social Services did refer the majority of accusations that they received. They were especially willing to report accusations of sexual abuse and nearly all of these cases were passed on to the police. Physical injuries were seen as more difficult to interpret and there was a greater discretion whether to report an accusation of physical abuse to the police.[403] It might be difficult to show that the parent had injured the child, rather than the child being hurt in an accident. Alternatively, whilst sexually abusing a child was clearly wrong and deviant, the distinction between "normal", permissible punishment and physical abuse might be less clear.[404]

According to Hallett's research, the level of reporting from schools was "varied and uneven". This matches American research, which has found that teachers either under report, or over report suspected abuse.[405] Teachers are reluctant to report.[406] They do not feel trained or confident to correctly identify abuse. They are afraid of damaging their relationship with the child and with the child's parents and are concerned that a report of abuse will harm the child's future development.[407] Those teachers, who do report suspected abuse, tend to report to the social service department rather than to the police.

The reporting of child abuse, or any crime, by doctors is complicated by the doctor's duty of confidentiality and by the fear that reporting will deter

---

[400] Department of Health, "*Working Together to Safeguard Children, a Guide to Interagency Working to Safeguard and Promote the Welfare of Children*", (1999), pp. 15-16.
[401] Ibid. pp. 17-20.
[402] Ibid. pp. 40-41.
[403] C. Hallett, op. cit. pp. 112-114.
[404] See below Chapter 7 pp.
[405] R. Tite, "How Teachers Define and Respond to Child Abuse: The Distinction Between Theoretical and Reportable Cases" (1993) 17 Child Abuse and Neglect 591.
[406] C. Hallett & E. Birchall, *Coordination Child Protection, A Review of the Literature,* (1992), p. 157.
[407] Ibid. p. 158.

individuals from seeking medical treatment.[408] As far as child abuse is concerned, the guidance in "Child Protection, Medical Responsibilities" states that the doctor should act in the best interests of the child.[409] Given the significance of the damage caused by child abuse, it might be argued that this advice favours the doctor reporting the abuse. Despite this guidance, studies have shown that doctors only report 19-57% of cases of suspected child sexual abuse.[410]

From treating both victims and offenders, hospital emergency staff are also likely to discover offences. Research shows that not all crime related injuries treated by medical staff are reported to the police.[411] In "Towards Multi-Agency Violence Prevention and Victim Support" Shepherd and Lisles analysed the reporting of offences by hospital emergency staff.[412] From their research, it is possible to distinguish three reactions of the medical staff towards reporting injuries that resulted from crime. The first is that the medical staff adopt a pro-active response and volunteer information. The second is that the medical staff assist the police after a police request for information and the third is that the medical staff hinder the police investigations, for example by refusing a police request for information. Only the first type of response matches this study's interpretation of reporting. In the second type of response, the offence has already been discovered and the police are asking for further information. As regards reporting by emergency staff three-quarters of the police respondents stated that emergency department staff frequently or sometimes volunteered information, and forty-four percent reported that emergency department staff frequently or sometimes telephoned them with information.[413] Although these figures suggest that the emergency room staff frequently report offences, this interpretation is not supported by the examination, in the rest of the article, of the reasons why emergency room staff are reluctant to report.

---

[408] See below Chapter 8 p. 257-258.
[409] R. Reder, "Child Protection: Medical Responsibilities" (1996) 5 Child Abuse Review 64, C. Hallett & E. Birchall, op. cit. pp. 140-141.
[410] C. Hallett & E. Birchall, op. cit. p. 157.
[411] C. Clarkson, A. Cretney, G. Davis, J. Shepherd, op. Cit.
[412]
[413] Ibid. p. 358.

Discovery of Offences by the Police

According to research by Bottomley and Coleman the police discover 14% of offences. This figure included indirect discovery, for example, a suspect being questioned for one offence and asking to have another offence taken into account.[414] Steer found that in one of the regions he investigated 17.6% of offences were discovered by the police, in another 5.2% of offences were discovered by the police. This discrepancy was largely due to a difference in the level of indirect discovery of offences.[415]

The police mainly discover offences that have been committed in public.[416] Furthermore, their knowledge and training may mean that they are better able to discover some offers, for example, nearly all traffic offences, for example, are discovered by the police.[417]

The Motivations Behind a Decision to Report or not to Report

Studies of voluntary reporting by witnesses and victims suggest that reasons for non-reporting fall in three broad categories. First are reasons connected to the offence itself - the seriousness of the offence and the victim/offender dynamic. The second type of motivations relate to the potential reporter's opinion and expectations of the police. Finally, the potential reporter may decide whether to report depending on how reporting would benefit or cost him.

The Seriousness of the Offence

Studies of reporting confirm that the seriousness of an offence is a major factor in encouraging reporting.[418] Similarly, the perceived triviality of an offence is a reason not to report. In the 1996 British Crime Survey 40% of respondents said that they did not report an offence that they thought was not serious enough.[419] This confirms the figures from the 1992 British Crime Survey, where

[414] A. K. Bottomley & C. Coleman, op. cit.
[415] D. Steer, op. cit. pp. 67-70
[416] R. Mawby, op. cit. p. 96.
[417] Ibid. p. 101
[418] J. Shapland, J. Willmore & P. Duff, op. cit. p. 15.
[419] C. Mirlees-Black, P. Mayhew, & A. Percy, *The 1996 British Crime Survey*, (1996), p. 23.

it was found that 55% of unreported offences were not reported because they were too trivial whilst two thirds of offences, which the public classified as the most serious, were reported.[420] More recently, the 2000 International Crime Victimisation Survey found that 34% of the British respondents stated that they had not reported an offence because it was not serious enough.[421]

If reporting depends on the seriousness of an offence, what offences are considered to be sufficiently serious as to merit reporting? It seems that the seriousness of an offence depends on the harm caused and the innocence of the victim. Violent offences, especially those causing substantial or long-lasting injuries, are generally considered serious.[422] Furthermore, some victims, for example children or the old, are considered to be particularly vulnerable and an offence against them is seen as especially blameworthy.[423]

The seriousness of an offence is an important factor in reporting behaviour because the more serious an offence is, the more likely it is that a potential reporter will consider that the offender deserves punishment. In this respect it is interesting that, in addition to the 34% of British respondents to the 2000 International Crime Victimisation Survey, who did not report because the offence was not serious enough a further 21% did not report an offence because it was not appropriate to involve the police.[424] Although it is not explicit in the survey, it is possible that this may mean that the respondents did not feel that the offenders deserved to be punished.

Another reason why serious offences are more likely to be reported is where the offender's behaviour is less equivocal so a potential reporter will be more certain that an offence has been committed.[425] Furthermore, he will be less worried that by reporting he is accusing someone unjustly.[426] One example of this is the reporting by doctors of suspected child abuse. Research has shown

---

[420] N. Maung, P. Mayhew & C. Mirlees-Black, *The 1992 British Crime Survey*, (1993), p. 25.
[421] J. Van Kesteren, P. Mayhew & P. Nieuwbeerta, *Criminal Victimisation in Seventeen Industrialised Countries, Key Findings from the 2000 International Crime Victimisation Survey*, p. 67.
[422] M. Levi & S. Jones, "Public Perceptions of Crime Seriousness in England and Wales" (1985) 25 British Journal of Criminology 234; M. O' Connell & A. Whelan, "Taking Wrongs Seriously" (1996) 36 British Journal of Criminology 299.
[423] B. Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453, 461-463.
[424] J. Van Keseren, P. Mayhew & P. Nieuwbeerta, op. cit. p. 67.
[425] See below Chapter 6 pp. 124-127.
[426] S. C. Kalichman, M. E. Craig, D. R. Follingstad, op. cit. p. 75.

that doctors are more likely to report suspicious injuries to children if those injuries are especially serious. One reason for this is that the graver the injury, the less likely that there is an innocent explanation.[427]

Although seriousness is an important consideration, it is not the only factor in a decision whether to report. Some relatively trivial offences are reported, whilst some serious offences are not. Sexual assault is consistently rated by the public as one of the most serious offences and a major policing priority,[428] nevertheless, it remains under reported.[429] In this instance, however, there are specific reasons why individuals are unwilling to report. Victims might choose not to report because shame, embarrassment and fear of an unsympathetic police force and court system.[430]

The Blameworthiness of the Victim and the Offender

A potential reporter is more likely to report an offence, if he thinks that the "offender" was entirely to blame for the offence. In contrast, if it seems that the "victim" was partly responsible, the potential reporter will often be unwilling to label one as the offender by reporting. The assessment of blame affects all types of offences and all kinds of offenders and victims. For example, many might argue that a victim of child abuse was an especially "innocent" victim,[431] nonetheless Warner and Hansen found that doctors were less likely to report physical abuse in cases where the beating, or what ever else caused the injury, followed misbehaviour by the child.[432]

In their study of reporting by hospital staff Shepherd and Lisles discovered that medical staff preferred to remain impartial between the victim and the offender. They were wary of accepting the "victim's" or the police's history of the assault believing that there were "two sides to every story". This neutrality made it

---

[427] J. Warner & D. Hansen, "The Identification and Reporting of Physical Abuse by Physicians: A Review and Implications for Research" (1994) 18 Child Abuse and Neglect 11 at p. 17.
[428] D. Smith, *Police and People in London 1: A Survey of Londoners,* (1983), pp. 49-55.
[429] J. Shapland, J. Willmore & P. Duff, op. cit. pp. 16-7
[430] J. Temkin, "Plus ca change – Reporting Rape in the 1990s" (1997) 37 British Journal of Criminology 507.
[431] See below Chapter 7 pp. 192-197.
[432] Warner & Hansen, op. cit. pp. 18-19.

difficult for the hospital staff to apportion blame and was a factor against them reporting assaults.[433]

Clarkson et al found that victims of assault were less likely to report when their own behaviour could be questioned. One example of this is if they were unable to prevent the assault. Some victims would feel that they should have prevented the assault and would view this as a weakness. Similarly, victims who had a criminal record were unwilling to report.[434]

Relationship Between the Offender and the Victim or the Reporter

Both the victim and witnesses are less likely to report an offender whom they know.

If the victim and the offender know each other it may be that there are other unofficial responses to the offence, which are able to compensate for the harm caused and punish the offender. For example, in a case of an employee stealing from his work, dismissal may be seen as appropriate and sufficient punishment.[435] Furthermore, if there is a relationship between the potential reporter and the offender, it is more likely that the reporter will sympathise with the offender, will know the background the offence and because of this the potential reporter may choose not to report the offence.[436]

In addition, a victim's decision to report an offender, whom he knows, may be costly. The victim risks damaging his relationship with the offender and with other shared acquaintances.[437] Furthermore, a potential reporter may be in greater danger of reprisals if he knows and is known by the offender.[438] In the study of the prosecution of assaults in Bristol fear of reprisals was found to be a major reason for not reporting.[439] This fear of reprisals was especially strong if there was a relationship between the offender and the victim.

---

[433] J. Shepherd & C. Lisles, op. cit. pp. 360-361.
[434] C. Clarkson et al., op. cit. p. 12.
[435] R. A. Carr-Hill & N. H. Stern, *Crime, the Police and Statistics, An Analysis of Official Statistics for England and Wales using Econometric Models*, (1979), p. 84
[436] J. Shapland, J. Willmore & P. Duff, op. cit. p. 16.
[437] C. Clarkson et al., op. cit. p. 12.
[438] N. Maung, P. Mayhew, C. Mirlees-Black, op. cit. p. 26.
[439] C. Clarkson et al., op. cit p. 13.

The Potential Reporter's Opinion of the Police

The Islington Crime Survey found that the major reason for not reporting an offence was that contacting the police would be ineffective.[440] In particular, a majority of respondents reckoned that the police dealt unsatisfactorily with muggings (61.5%), burglary (65.7%), vandalism (65.9%), sexual assaults on women (56.9%) and women being pestered and molested (61.7).[441] This survey found that young people and ethnic minorities were especially sceptical towards the police.[442] Moreover, according to the 1992 British Crime Survey, 35% of respondents did not report offences for police related reasons[443] and police related reasons were especially significant in relation to the non-reporting of serious offences.[444] On the other hand, according to the International Crime Survey 2000 only rarely was fear or dislike of the police a reason for not reporting an offence. In this study, only 3% of the British respondents gave this as a reason for not reporting.[445]

It is suggested that police-related reasons for not reporting offences can be divided into two categories, broadly entitled – "ineffective cop" and "nasty cop." The first of these categories is where an individual does not report an offence because he does not believe that the police will be able to do anything. According to the 1992 British Crime Survey 25% of respondents did not report offences for this reason.[446] Similarly, the study by Clarkson, Cretney, Davis and Shepherd noted that victims chose not to report assaults because there was little chance of the crime being detected.[447] One possibility is that in many cases where the attacker is a stranger, the victim will be reluctant to report because if he is unable to identify the attacker he may believe that reporting will be of little use. It seems therefore that both a relationship with an offender and conversely not knowing an offender may deter a potential reporter from informing the police.

---

[440] T. Jones, B. Maclean & J. Young, *The Islington Crime Survey, Crime Vicitmisation and Policing in Inner-City London*, (1986), p. 39.
[441] Ibid. p. 111.
[442] Ibid. p. 113.
[443] N. Maung, P. Mayhew, C. Mirlees-Black, op. cit. p. 26
[444] Ibid. p. 118.
[445] J. Van Kesteren, P. Mayhew & P. Nieuwbeerta, op. cit. p. 67.
[446] N. Maung, P. Mayhew, C. Mirlees-Black, op. cit. p. 26.
[447] C. Clarkson et al., op. cit. p. 11.

A non-reporter, who decides not to report for these reasons, may have pro-police, crime control attitudes. He may choose not to report an offence because he feels that the criminal justice system is weighted against the police who do not have sufficient powers to detect and deal with the offender.

The second category is where an individual does not report an offence because he does not believe that the police will be interested (British Crime Survey 1992, 13%) or because he fears or dislikes the police (British Crime Survey 1992, 1%).[448] It may be that this is particularly significant reason for the non-reporting of sexual assault. In Shapland, Willmore & Duff's study on victims, they found that many victims of sexual assault did not want to report the attack because they were afraid of hostile police questioning.[449] In fairness to the police, they were also afraid of hostile questioning in any court appearance, and those victims who did not report were pleased by how sympathetic and understanding the police were.[450]

The Costs of Reporting

A potential reporter may choose not to report for fear of damaging his relationship with either the victim or the offender. As has already been explained a reporter who knows the offender may fear that reporting the offender will damage that relationship, or his relationship with the offender's family or friends.[451] In addition, medical professionals may fear that reporting offences will deter victims or offenders from seeking help. In their study of reporting by hospital staff, Shepherd and Lisle found that four hospital staff did not report offences because they did not want to damage the relationship between the patient, whether he was the victim or the aggressor, and the medical staff. [452]

A potential reporter may not report because he fears reprisals from the offender. According to Clarkson et al reprisals were a significant reason for the

[448] N. Maung, P. Mayhew, & C. Mirlees-Black, op. cit p. 26
[449] J. Shapland, J. Willmore & P. Duff, op. cit. p. 17.
[450] Ibid. p. 23; Z. Adler, "Picking up the Pieces" [1991] Police Review 1114; J. Temkin, op. cit. pp.514-515.
[451] See above p. 85.
[452] J. Shepherd & C. Lisle, op. cit. p. 360.

non-reporting of violent crime, particularly in relation to assaults that took place within the drugs underworld.[453] Data from the 2000 International Crime Survey suggest that fear of reprisals may be a reason for not reporting a violent offence.[454] On the other hand, the 2000 International Crime Survey also found that generally fear of reprisals was not an important reason for failing to report an offence. Of the British respondents, only 3% gave it as a reason for not reporting.[455]

The Benefits of Reporting

According to the 1984 British Crime Survey approximately 30% of respondents reported offences because reporting would be beneficial for them. The most significant of these benefits were the recovery of property and the satisfaction of insurance formalities. Similarly, the 1996 British Crime Survey found that of the respondents who had their damaged or stolen property insured, 92% reported the offence to the police.[456] A witness may also decide to report because of the benefit that the report will bring them. An example of this might be a reward.

The impact that a potential benefit has on a decision to report might suggest that reporting would be encouraged more effectively by rewarding reporting, rather than by punishing non-reporting. Against this would be the difficulty and potential expense and the fact that rewarding reporting might suggest that reporting was an extraordinary, supererogatory action. There might also be the risk that this would encourage false reports.[457]

Organised and Mandatory Reporting

An alternative to punishing non-reporting would be to encourage and organise reporting. This section examines initiatives that aim to do this.

---

[453] C. Clarkson et al., op. cit. p. 13.
[454] J. Van Kesteren, P. Mayhew & P. Nieuwberta, op. cit. p. 65.
[455] Ibid. p. 67.
[456] C. Mirlees-Black, P. Mayhew, & A. Percy, op. cit. pp. 25-6.
[457] See above Chapter 2 p. 34.

Neighbourhood Watch

According to the "Guidelines for the Introduction of Neighbourhood Watch", Neighbourhood Watch is a "network of public spirited members of the community who observe what's going on in the neighbourhood and report suspicious activity to the police."[458]

Despite their popularity, it is questionable how effective Neighbourhood Watch schemes are. There is no clear understanding of what is expected of members and few members play an active role.[459] Furthermore, McConville and Shepherd's interviews with Neighbourhood Watch members showed that although some of them did watch out for and report suspicious activity, they would have done this before Neighbourhood Watch.[460] Neighbourhood Watch had not encouraged them to report, it merely justified their existing behaviour. This is an interesting because it might be that mandatory reporting would be similarly limited. Duties to report in the French Penal Code are limited to the most serious offences.[461] Given that these offences are often reported voluntarily,[462] it is possible that making the reporting of them compulsory would have little, if any, effect on reporting levels. Like Neighbourhood Watch, however, it is possible that duties to report would support reporters and justify their decision to report.[463]

Television

There are currently two main television crime appeals programmes – Crimewatch and Crimestoppers. Both these programmes show reconstructions of offences and invite the audience to telephone in with information. [464] The justification behind television appeals programmes is that they help detect crime, for example, in September 1990 the makers of Crimewatch claimed that there had been two hundred and fifty-one arrests from

[458] M. McConville & D. Shepherd, *Watching Police, Watching Communities*, (1992), p. 5.
[459] Ibid. pp. 87-89.
[460] Ibid. pp. 91-2
[461] CP Articles 434-1, 434-2 and 434-3; see below Chapter 7 pp. 174-197.
[462] See above pp. 82-84.
[463] See below Chapter 10 p. 357.
[464] P. Schlesinger & H. Tumber, "Fighting the War Against Crime, Television, Police and Audience" (1933) 33 British Journal of Criminology 19.

the six hundred and eight-six cases shown. Unsurprisingly given the programmes emphasis on serious violent crime,[465] a significant proportion of these arrests related to murder, attempted murder and armed robbery.[466]

On the other hand, other research suggests that the public do not always respond to television appeals. The public is reluctant to report property offenders, especially fraudsters or con artists. Ethnic minorities are especially unwilling to report because of their negative experiences with the police and their low expectations of police effectiveness.[467]

The effectiveness of programmes such as Crimewatch in clearing up crime is debatable. Furthermore, the programme has been criticised for its concentration on sensationalist crimes.[468] It is argued that its focus on violent and sexual crimes both encourages voyeurism and increases fear of crime.[469]

Voluntary and Mandatory Reporting

Without the reporting of victims and witnesses significantly fewer offences would be discovered and investigated by the police. Some of these non-discovered offences would be extremely serious, some of the offenders dangerous. Many of the non-reported offences would have been committed in the home, where there was little or no chance of discovery by the police. By reporting offences the general public therefore have an important role within the criminal justice system. Does this mean that this involvement should be obligatory? Should mandatory reporting be introduced?

The fact that many individuals are prepared to report offences might suggest that reporting would be a non-onerous duty and that a wide duty to report can justifiably be introduced. This ignores the many reasons why an individual may refuse to report. It would not be reasonable for mandatory reporting to, for instance, ignore fear of reprisals, or concerns about professional confidentiality, therefore any duty to report would need to be carefully limited.

---

[465] Ibid. p. 25.
[466] Ibid. p. 20.
[467] Ibid. p. 30.
[468] Ibid. pp. 25-26.
[469] Ibid. p. 20.

It is suggested that there are two contrasting methods of limiting mandatory reporting. The first would be to restrict it to those areas that are currently under reported, the second would be to focus on the most deviant non-reporter and therefore to limit it to those situations when most individuals would report. Whilst this Chapter can consider the theoretical benefits and disadvantages in either approach, by evaluating French voluntary reporting[470] and duties to report[471] later in this thesis, it is hoped that the actual effects of mandatory reporting can be identified and analysed.

The main advantage of a duty to report that focused on gaps in reporting would be that, provided that there were a high level of compliance, it would have a significant impact on reporting levels. According to studies of voluntary reporting a duty that focused on the gaps in reporting would require the reporting of non-serious, or financial offences.[472] If it were limited to specific individuals, it would be especially likely to require the offender's family to report. This would not be a justifiable use of mandatory reporting. Even if requiring reporting can be justified in serious offences, it might not be as appropriate for lesser offences. Furthermore, the fact that an offence carries a duty to report might suggest that that offence is a criminal justice system priority,[473] it would be inappropriate if lesser offences were a greater priority than serious offences.

Mandatory reporting that was based on voluntary reporting would be limited to serious violent offences.[474] Threat or fear of reprisals would excuse a failure to report,[475] as would a relationship with the offender, or professional duties of confidentiality. This is the approach that has been adopted by French duties to report.[476] The difficulty with this type of mandatory reporting might be that it would merely confirm voluntary reporting.

---

[470] See below Chapter 5 pp. 109-118; Chapter 8 pp. 228-236.
[471] See below Chapter 7 pp. 174-197; Chapter 8 pp. 238-259.
[472] See above pp.82-84.
[473] See above Chapter 2 p. 8.
[474] See above pp. 82-84.
[475] See above pp. 87-88.
[476] See below Chapter 7. pp. 174-197.

Even if a duty to report has little impact on reporting, a duty to report might still be justified because of its symbolic, declaratory value.[477] In this respect, it is surely more appropriate to limit duties to report to the most serious offences, because it is these offences that should be the focus of the criminal justice system and whose non-reporters are most blameworthy.

[477] A. Ashworth, *Principles of Criminal* Law, 3rd Edition (1999), pp. 16-18.

CHAPTER 5

FRENCH CRIMINAL JUSTICE SYSTEM
VOLUNTARY REPORTING IN FRANCE

This Chapter describes the French criminal justice system. It examines whether the French criminal justice system is especially suited to positive criminal law duties such as mandatory reporting. The second part of the chapter considers studies of reporting in France.[478] This will provide a context against which to assess the purpose and impact of the duties to report.

The Three Classes of Offences

French criminal law divides offences into three categories depending on their seriousness. The most serious offences are *crimes*, major offences are *délits* and the least serious offences are *contraventions.*[479] The duties to report in the CP are restricted to *crimes* and violent *délits.*

This tripartite division impacts on criminal procedure. Unsurprisingly, the more serious the offence, the greater police investigative powers are. The increased powers available for a *flagrant* offence[480] are only available if the offence being investigated is a *crime* or a *délit* that carries a prison sentence.[481] In addition, it is only in the most serious cases, *crimes*, that a suspect is guaranteed the involvement and safeguard of the *juge d' instruction.*[482]

Crimes, délits and *contraventions* are tried in different courts. *Crimes* are tried in the *Cour d' Assises* by a panel of nine jurors and three professional judges.[483] *Délits* are tried in the *Tribunal Correctionnel.* Generally, the guilt and, if appropriate, the sentence for an individual accused of a *délit* is decided

---

[478] See below pp. 108-118.
[479] CP Article 111-1.
[480] *Code de Procédure Pénale* Code of Criminal Procedure, CPP Article 53; J. Bell, S. Boyron & S. Whittaker, *Principles of French Law*, (1998), pp. 126-127; A. West, Y. Desdevises, A. Fenet, D. Gaurier, M-C. Heusaff, B. Lévy, *The French Legal System*, 2nd Edition (1998), pp. 239-240; see below p. 98.
[481] CPP Article 67.
[482] See below pp. 100-102.
[483] CPP Articles 231-380; J. Bell, S. Boyron & S. Whittaker, op. cit, p. 44; A. West et al, op. cit, pp. 236-239; G. Stefani, G. Levasseur & B. Bouloc, *Procédure Pénale*, 16th Edition (1997), pp.380-390.

by a panel of three professional judges.[484] Finally *contraventions* are tried in the *Tribunal de Police* by a single judge.[485] Appeals against conviction or sentence are heard by regional Appeal Courts and then by the Supreme Court, the *Cour de Cassation,* in Paris. Until reforms in 2000,[486] there was no right of appeal from the *Cour d' Assises* to the regional Appeal Courts. An appellant in such a case could only appeal to the *Cour de Cassation.*[487]

The non-reporting offences are *délits* and will therefore usually be tried by the *Tribunal Correctionnel.* Alternatively, it is possible to try the non-reporter in the *Cour d' Assises* alongside the criminal whom he failed to report. The advantage of this is that the failure to report is judged in its proper context. However, using the *Cour d' Assises* is more time consuming and more expensive. Consequently, the current tendency is to try non-reporters in the *Tribunal Correctionnel.*[488]

The classification of the offence also affects the sentence that an offender can receive. The three types of offences have a prescribed level of penalty. *Crimes*, as the most serious offences, can carry a life sentence, and the minimum sentence[489] for a *crime* is ten years.[490] *Délits* can be punished by imprisonment of up to ten years, fines or community work.[491] Finally, *contraventions* are punished by fines, or by removal of the offender's rights, this latter type of sentence mainly applies to motoring offences and means a suspension of a driver's licence.[492]

---

[484] CPP Articles 381-520; A. West et al, op. cit. pp. 82-3; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 376-379.
[485] CPP Articles 521-549; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 375-376.
[486] Law 15th June 2000 Article 20.
[487] C. Elliott & C. Vernon, *French Legal System*, (2000), pp. 73-78; A. West et al, op. cit, pp. 268-271.
[488] See below Chapter 8 pp. 243-244.
[489] Even if an offences carries a sentence of ten years, an offender may receive a sentence lower than this. Therefore, even though the "minimum" sentence for a *crime* is ten years. Someone convicted of a *crime* may receive a sentence less than ten years.
[490] CP Article 131-1.
[491] CP Articles 131-3 and 131-4.
[492] CP Article 131-12.

Flagrance

Criminal procedure in France also depends on how recently an offence was committed. This is the idea of *flagrance.*[493] The rationale behind *flagrance* is that because the investigation starts soon after the offence has been committed, there is a greater chance that the offender will be identified and detained. Not only will this promote the security of the community, but there is less risk that an innocent person will be falsely accused.

"Est qualifié crime ou délit flagrant, le crime ou le délit qui se commet actuellement, ou qui vient de de commettre. Il y a aussi crime ou délit flagrant lorsque, dans un temps très voisin de l' action, la personne soupconnée est poursuivie par la clameur publique, ou est trouvée en possession d' objets, ou présente des traces ou indices, laissant penser qu' elle a participé au crime ou au délit.

Est assimilé au crime ou délit flagrant tout crime ou délit, qui meme non commis dans les circonstances prévues à l' alinéa precedent, a été commis dans une maison dont le chef requiert le procureur de la République ou un officier de police judiciare de le constater."[494]

There are three types of *flagrance.* First, an offence is *flagrant* if it is either currently being committed or has just been committed.[495] Secondly, a very recent offence can be *flagrant* if there is substantial reason for suspecting an individual. One example of this would be a suspect who, soon after a burglary, was found in possession of stolen goods.[496] Finally, an offence, committed in a home can be *flagrant* if the head of the household requires it to be defined as a *flagrant* offence. This is the most problematic type of *flagrance* because it dispenses with the close temporal link between commission and investigation present in the other two types of *flagrance.*

---

[493] CPP Article 53; A. West et al, op. cit. pp. 239-240; J. Bell, S. Boyron, S. Whittaker, op. cit. pp. 126-127.

[494] CPP Article 53

Translation:

"Any *crime* or *délit* that is being currently committed or which as just been committed is defined as a *flagrant crime* or *délit.* There is also a flagrant *crime* or *délit* when in a time very close to the offence, the suspect is chased by public hue and cry, or is found in the possession of objects, or traces or evidence, which make one think that he has participated in the *crime* or *délit.*

Any *crime* or *délit*, even if it has not been committed in the circumstances described in the preceding paragraph, can be assimilated to a *flagrant crime* or *délit*, if it was committed in a house and the householder demands that the *Procureur of the Republic,* or an officer of the judicial police records the offence."

[495] H. Matsopoulou, *Les Enquetes de Police,* (1996), pp. 93-98.

[496] Ibid. pp. 98-107.

In practice the timeframe for *flagrance* can be quite broad. Terms such as "recent" and "would lead one to think" are flexible.[497] An investigation has been held to be *flagrant* twenty-eight hours after an offence was committed.[498] This flexibility has lead to concerns that *flagrance* might be misused. During the 1993 reforms of criminal procedure the possibility of introducing a fixed time limit for the use of *flagrance* was discussed. This suggestion was rejected. It was decided that it would be too rigid and it would be difficult to decide the appropriate limits for *flagrance.*[499]

A further difficulty is deciding when an offence is being committed. In a continuous offence the offending might last a long time. Should *flagrance* be judged from when the offending began, or from when it was completed? Alternatively, the type of offence that has been committed may develop. If the victim of an assault dies from his injuries some days after the attack, does *flagrance* require that the assault itself have to have just occurred, or is it enough if the death has just occurred? The fact that the rationale behind *flagrance* is that it is easier to identify the individual responsible, suggests that *flagrance* should be judged from when the offender was involved, in other words from the assault. Despite this, courts have been prepared to interpret *flagrance* very flexibly. In *Fekhardji,*[500] the victim of an assault only realised the extent of his injuries some days later when medical advice suggested that he would be unfit for work for several weeks.[501] The court in *Fekhardji* decided that the offence had not been committed until the victim realised the extent of his injuries. It was this date that was the relevant date for determining whether the assault was *flagrant.*

As well as the requirement that an offence is recent, case law has also determined that in order to be *flagrant,* there has to be some objective, verifiable criteria to link a particular individual with the commission of the offence. Most of the discussion of this requirement is focused on what evidence will be sufficient for *flagrance.* Significantly in this regard anonymous

---

[497] Ibid. pp. 135-139.
[498] *Bartoli* D. 1991 IR 115
[499] H. Matsopoulou, op. cit. p. 135.
[500] [1988] JCP 21009.
[501] Definitions of assault in the CP are based on how long the victim will be unable to work, CP Articles 222-13 and 222-14; J. Pradel & M. Danti-Juan, *Droit Pénal Spécial,* (1995), pp. 52-64.

reports have been held not to be sufficient.[502] In relation to anonymous reports there is the danger that these would be malicious and an innocent person would be unjustly accused.[503] This would conflict with the rationale for the flagrant procedure.[504] Moreover, the fact there must be substantial and reliable evidence that an offence has been committed in order for it to be defined as *flagrant* may mean that it is these offences that are especially likely to be reported. After all, one reason why a potential reporter may decide not to report might be because he is unsure that an offence has been committed, or does not want falsely to accuse anyone.[505]

Crimes or *délits*, which are *flagrant* and carry a prison sentence, are subject to a special investigative procedure known as an *enquete de flagrance*. Although generally the French Code of Criminal Procedure requires the police to have the written consent of the householder before they enter and search for evidence,[506] if the offence being investigated is *flagrant*, the police can search without consent and can use force.[507] Furthermore, if the offence is *flagrant,* they may be able to search for confidential material.[508] Similarly, and by analogy, the courts have recognised a police power to carry out body searches when investigating *flagrant* offences.[509]

The Personnel

There is often no direct English equivalent to the French personnel and if the nearest English equivalent is given, this may be misleading.[510] Consequently, in this thesis I have retained the French terminology. The aim of this section is to explain the terms that have been used by describing the powers and responsibilities of the different personnel.

---

[502] [1990] JCP II 21580.
[503] See below Chapter 8 pp. 236-237.
[504] See above p. 95.
[505] See below p. 113.
[506] CPP Article 76.
[507] CPP Article 54; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 321-324; A. West et al, op. cit. pp. 240-246.
[508] CPP Article 57.
[509] D. 1985 IR 146.
[510] G-R. de Groot, "Law, Legal Theory and the Legal System: Reflections on Problems of Translating Legal Texts" in V. Gestner, A. Harland & C. Varga, (ed.), *European Legal Cultures*, (1996), pp. 155-160.

La Police Judiciaire[511]

The role of the judicial police or *police judiciaire* is to investigate offences.[512] Police forces in France have two functions, to maintain order and to investigate offences. The first function is the responsibility of the administrative police, *police administrative* and the judicial police force, the *police judiciaire* are responsible for investigating offences.[513]

There are three classes of *police judiciaire.*[514] The first are the *officiers de police judiciaire (OPJ).* Most OPJ are experienced members of the *Gendarmarie* or the *Police Nationale,* although some public officials, for example the mayor and his deputy, are also OPJs.[515] OPJs are the most important of the *police judiciaire.* Unlike other members of the *police judiciaire,* they can detain an individual in police custody for questioning,[516] and they can be delegated powers to investigate by the *juge d' instruction.*[517]

The second type of *police judiciaire* are the *agents de police judiciaire (APJ).* They are less experienced members of the *Gendarmarie* and the *Police Nationale.*[518] Finally, specific laws, particularly concerning road safety and public health, can accord certain civil servants the same powers as the APJs.[519]

---

[511] D. Mojardet, *Ce Que Fait la Police*, (1996); B. Loveday, "Governance and Accountability of the Police," in R. Mawby, (ed.), *Policing Across the World, Issues for the 21st Century*, (1999), pp. 132-150 at pp. 146-9.
[512] A. West et al, op. cit. pp.224-226; C. Horton, *Policing Policy in France*, (1995), pp. 59-61.
[513] G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 286-288; H. Matsopoulou, op. cit. pp. 17-42.
[514] CPP Article 15.
[515] G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 303-305; H. Matsopoulou, op. cit. pp. 64-67.
[516] CPP Article 20.
[517] CPP Article 151; P. Chambon, *Le Juge d' Instruction, Théorie et Practique de la Procédure,* 4th Edition (1997), pp. 289-302; see below pp. 100-102.
[518] CPP Article 20; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 305-306; H. Matsopoulou, op. cit. pp. 67-69.
[519] CPP Article 28; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 306-307; H. Matsopoulou, op. cit. pp. 69-71.

Ministère Public

Ministère Public is the general term for the public prosecution service. The prosecution service is organised hierarchically. At the top, based at the *Cour de Cassation*, is the *Procureur Général.* At a local level, the prosecution service is represented by the *Procureur de la République (*PDR*).* He is responsible for prosecutions in that area. He can instruct the police to begin to investigate an offence.[520] Furthermore, the police must immediately inform the PDR of any crime reports that they receive.[521] As well as initiating investigations, the PDR also oversees police investigations.[522]

Recent legislation has increased the PDR's control of the investigation. Under Article 15 of the Law of 15th June 2000, the PDR can set time limits within which the police have to complete their investigations. The *police judiciaire* also have a duty to keep the PDR informed of how the investigation is progressing. In particular, they must inform the PDR as soon as they have identified a suspect. Nevertheless, it is questionable how much impact the reforms will have in most criminal investigations. Neither the obligation to notify the PDR nor the time limits will apply if the offence is *flagrant.* In addition, even if the requirements are breached, this is unlikely to lead to evidence being excluded.[523]

The PDR decides whether the offender should be prosecuted.[524] According to Ministry of Justice figures, almost 90% of offences that are reported to the PDR are not prosecuted.[525] The PDR's decision whether to prosecute is based on two elements. The first is whether there is evidence that the suspect has committed an offence, and whether a conviction would be likely, this is known as the question of *légalité.*[526] The second element is whether the prosecution

[520] CPP Article 75; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 457-460.
[521] CPP Article 19.
[522] G. Stefani, G. Levasseur, B. Bouloc, op. cit. p. 331; J. Hodgson, "The Police, The Prosecutor and The Juge d' Instruction" (2001) 41 British Journal of Criminology 342-361 at pp. 345-6.
[523] Circulaire 16/05/00; see below pp. 110-112.
[524] CPP Article 40. According to Chapter 1 of the Law of 6th June 1999 the PDR can also decide to divert the suspect from the criminal justice system, for example, by using mediation – *Loi Renforcant l' Efficacité de la Procédure Pénale.*
[525] A. Crawford, "Justice de Proximité – the Growth of "Houses of Justice" and Victim/ offender Mediation in France: A Very UnFrench Legal Response?" [2000] Social and Legal Studies 29 at p. 35
[526] G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 462-3.

would be appropriate. This seems very similar to the requirement for the Crown Prosecution Service that a successful prosecution would be likely and that the prosecution would be in the public interest.[527] The PDR has a complete discretion as to whether prosecution is *opportune.*

Juge d' Instruction[528]

Between the police investigation and the trial, all *crimes* and a few *délits* go through a stage known as *instruction.*[529] During this phase a judge, the *juge d' instruction,* prepares the case file for trial.[530] He examines the case and the police investigations and conducts his own investigations. An especially important power of the *juge d' instruction* is his right to interview any witness or suspect.[531] This right is backed by sanctions for non-appearance.[532] The preparation of this file is extremely important. The file and the *juge d' instruction's* conclusions form the foundation of any eventual trial.[533]

Although the *juge d' instruction* has this right to conduct investigations, in practice he will delegate many of the investigations to OPJ by means of a *commission rogatoire.*[534] The *commission rogatoire* is a fairly broad power and the police are often left with a wide discretion in how to carry out the investigation. The two limitations are that a *commission rogatoire* can only be issued for the police to investigate a specific offence. [535] Moreover, unlike the *juge d' instruction,* the police are not able to interview anyone who is already a suspect or who is likely to become a suspect.[536]

---

[527] Code for Crown Prosecutors paragraph 4 and paragraph 6; A. Ashworth, "The Public Interest Element in Prosecutions" [1987] Crim. L. R. 595; A. Ashworth, *The Criminal Process*, 2nd Edition (1998), pp. 181-188; A. Sanders & R. Young, *Criminal Justice*, (1994), pp. 205-248; M. Wasik, T. Gibbons, M. Redmayne, *Criminal Justice Text and Materials*, (1999), pp. 325-346; see above Chapter 4 p. 77.
[528] P. Chambon, *Le Juge d' Instruction, Théorie et Practique de la Procédure,* 4th Edition (1997); C. Samet *Journal d' un Juge d' Instruction*, (2000).
[529] CPP Article 79.
[530] CPP Article 81; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 361-363.
[531] CPP Article 80-1.
[532] P. Chambon, op. cit. pp. 129-169; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 516-528.
[533] C. Johnson, "Trial by Dossier" (1992) 142 NLJ 249; M. Damaska, *The Faces of Justice and State Authority*, (1986), pp. 162-3; J. Bell, S. Boyron & S. Whittaker, op. cit. p. 123; A. West et al, op. cit. pp. 147-148.
[534] CPP Article 151; P. Chambon, op. cit. pp. 289-302; J. Hodgson, op. cit. p. 350.
[535] P. Chambon, op. cit. pp. 301-302; D. 1953 533.
[536] CPP Article 152.

English analysis of French criminal procedure has often focused on the *juge d' instruction.*[537] Some evaluations of the role of the *juge d' instruction* have stressed the magistrate's impartiality. In particular, as a non-police officer, the *juge d' instruction* is seen as an important protector of civil liberties.[538] In fact, the effectiveness of the *juge d' instruction* may be overstated. First, the *juge d' instruction* is only involved in a small, and decreasing, number of cases. The *juge d' instruction* is not involved in over 90% of criminal investigations.[539] Consequently, in reality, most suspects will only be interviewed by the police.[540] Involving a *juge d' instruction* is only compulsory if the offence is a *crime*, otherwise the PDR decides whether to involve the *juge d' instruction.*[541] The defendant has no right to require that the offence is investigated by a *juge d' instruction.* Even if the *juge d' instruction* is involved, the choice of which *juge d' instruction* to use is weighed in favour of the prosecution. The PDR supplies the President of the *Tribunal de Grande Instance* with a list of suitable *juges d' instruction* and the President chooses from this list.[542] It would not be unreasonable to assume that the list is sometimes checked to insure it only contains prosecution friendly *juges d' instruction.*[543] Indeed this was confirmed in an interview with a senior police officer.[544]

In addition, it is questionable how effectively the *juge d' instruction* supports the rights of suspects or witnesses. The Delmas-Marty Committee reviewing the criminal law and criminal procedure contended that the role of the *juge d' instruction* should be redefined and legal safeguards for suspects should be introduced.[545] In reality, many *juges d' instruction* will identify with and support police objectives in an investigation and the friendly working relationship that they will often develop with the police may make it difficult for them to oppose

---

[537] L. H. Leigh & L. Zedner, *A Report on the Administration of Justice in the Pre-Trial Phase in France and Germany*, (1992), pp. 5-9, 14-16, 23.
[538] M. Mansfield, *Presumed Guilty*, (1993), pp. 185-6.
[539] J. Hodgson, op. cit. p. 344.
[540] M. Delmas-Marty, "Réformer Anciens et Nouveaux Débats" in *Droit Pénal, Bilan Critique*, (1990), p. 5.
[541] M. Delmas-Marty, "The Juge d' Instruction, Do the English Really Need Him?" in B. S. Markesinis, (ed.), *The Gradual Convergence, Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century,* (1994), pp. 46-58 at p. 53.
[542] CPP Article 83
[543] G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 364-5; P. Chambon, op. cit. pp. 60-62.
[544] As part of the research, I interviewed French criminal justice professionals. One of them, a senior police officer in a provincial force confirmed that some *juges d' instruction* were known for their attitude towards certain offences and therefore were often selected for those offences because they were pro-prosecution.
[545] *La Mise en Etat des Affaires Pénales,* (1991).

or censure police investigations. Finally, many *juges d' instruction* are young and inexperienced and may be overawed by the greater "real-life" experience of the police officers whom they are supposed to be controlling.[546]

Partie Civile[547]

Under French criminal procedure, the victim of an offence can claim damages for his loss and injuries during the criminal trial itself rather than having to bring a separate civil action.[548] The victim, or the group representing him, is known as the *partie civile.*

An individual can only recover for damage that has already occurred.[549] The injury or loss must have directly affected the claimant[550] and must be the direct result of the offence.[551]

At one time it was thought that the requirement that a *partie civile*'s loss be personal limited the range of offences in relation to which the *partie civile* procedure was available. The *partie civile* procedure was thought to be restricted to those offences that were aimed at protecting a private individual. Consequently, some offences were excluded from the *partie civile* procedure. It could not be used for offences against public institutions. It was not possible for an individual to be a *partie civile* in relation to an economic offence, for example price fixing.[552] Similarly, and significantly for this research, it was not possible to recover as a *partie civile* under the non-reporting offences because these offences were aimed at protecting the justice system rather than at helping individual victims of crime.[553] Case law and doctrine have now become more flexible and victims have been able to claim as *parties civiles* under both these types of offences.[554]

---

[546] A. Guyamarch, "Adversary Politics and Law and Order in French Politics" in P. A. Hall, J. Hayward & H. Machin, (ed.), *Developments in French Politics,* (1990), p. 223.
[547] A. West et al, op. cit. pp. 231-234; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 153-274; Ministère de la Justice, *Guide des Droits des Victimes*, (1988).
[548] CPP Articles 419-423, Article 551, Article 85-87.
[549] G. Stefani, G. Levasseur, B. Bouloc, op. cit. p. 163.
[550] Ibid. pp. 163-168.
[551] Ibid. pp. 168-171.
[552] Ibid. pp. 166-167.
[553] D. 1962 121.
[554] Bull. Crim. 17th. Nov 1993; see below Chapter 7 p. 184-185.

The requirement that injury be personal is nuanced by the possibility of groups, concerned with particular crimes or issues, bringing a claim on behalf of an individual victim. Anti-racist organisations can be the *partie civile* in race crimes,[555] organisations that support victims of sexual violence can be the *partie civile* in those types of offences.[556] When an organisation rather than an individual is the *partie civile*, the aim is often to campaign on a particular issue and to raise public awareness.

Using the *partie civile* procedure rather than bringing a separate civil action has a number of advantages for the victim.[557] The procedure is quicker and cheaper. Furthermore, the victim, who brings his claim for damages as part of the criminal prosecution, can benefit from the information gathered by the police or contained in the *juge d' instruction's* file and can suggest to the *juge d' instruction* investigations that might prove useful.[558] It is arguable that the criminal investigations are likely to be more thorough and better funded than would any civil investigation carried out by the *partie civile's* own representatives. In particular, becoming a *partie civile* can be especially effective when the victim can not identify the individual responsible for the offence.

On the other hand, the involvement of a *partie civile* in the criminal investigation may hinder the efficiency and the fairness of the investigation. The *partie civile* and his lawyers are a further prosecution minded force which may unbalance the investigation and the trial against the suspect. There is also the danger that a victim will use the *partie civile* procedure abusively. Following a fight, for example, one of the parties may use the *partie civile* procedure against the other. By assuming the role of the victim, the *partie civile* is defending himself against a civil claim from the alleged offender. Furthermore, there is the danger that a victim will exaggerate or invent injuries in order to secure or increase compensation.

Given these difficulties, it is unsurprising that the CPP contains measures to prevent the potential *partie civile* from using the procedure abusively and to

[555] CPP Article 2-1.
[556] CPP Article 2-2.
[557] G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 224-225.
[558] P. Chambon, op. cit. pp. 88-96.

punish abuses of the procedure.[559] Looking first at prevention, the PDR can object to the involvement of a *partie civile,*[560] or can recommend that a particular accused be acquitted. If a defendant is released after being investigated by the *juge d' instruction* or is acquitted, the *partie civile* may face a civil fine or even prosecution.[561] If the *partie civile*'s involvement was ill considered and without value and the *partie civile* used the procedure in an abusive or dilatory manner, the PDR can fine the *partie civile* up to 100000F.[562] Alternatively, the defendant can bring a claim against the *partie civile* for the same amount.[563] Both these Articles are reinforced by the requirement that the *partie civile*, unless he is on legal aid, pay into the court a sum of money set by the court or the *juge d' instruction* to cover any eventual fine.[564]

If the *partie civile* not only misused the procedure but also knew that the accusations that he made against the defendant were entirely or partially false, the *partie civile* can also face a prosecution for *dénonciation calmonieuse.*[565]

The Law of 15th June 2000[566] will probably increase the use of the *partie civile* procedure. Under this provision, both the *police judiciaire*[567] and the *juge d' instruction*[568] have to inform the victim of his right to use the *partie civile* procedure. Furthermore, non-French speaking, or deaf victims will have to be provided with interpreters and translators in order that they follow the procedure and contribute to the investigation.[569] The increase in awareness of the procedure will probably lead to an increase in victims claiming as *parties civiles.* According to the Ministry of Justice, however, the most important change is that victims can now register as *parties civiles* by post of fax.[570] The circular explaining the new Law claims that this will be a significant improvement because previously many victims were unable to claim as *partie civile* because they were unable to travel to the territorially competent court.[571]

---

[559] G. Stefani, G. Levasseur, B. Bouloc, op. cit. p. 461.
[560] CPP Article 87-3.
[561] J-F. Gayraud, *La Dénonciation*, (1995), p. 147.
[562] CPP Article 91 paragraph 1.
[563] CPP Article 91 paragraph 2.
[564] CPP Articles 88, 392-1.
[565] J-F. Gayraud, op. cit. pp. 146-147; see below Chapter 7pp. 210-212.
[566] Loi 2000-516.
[567] Law 15/ 06/00 Article 104.
[568] Law 15/ 06/00 Article 109.
[569] Law 15/06/00 Article 110.
[570] Law 15/06/00 Article 111.
[571] Circulaire 31/05/00.

The Nature of the Process – Due Process or Crime Control

According to the drafters of the CPP, the two aims of criminal procedure were the defence of society and the safeguard of individual liberties.[572] The development and the current state of criminal procedure in France reflect the tension between these competing objectives. Following the Revolution, a mainly adversarial procedure was introduced as a backlash against the abuses of the inquisitorial procedure of the *ancien regime*.[573] During the Occupation, entry, search and seizure powers were increased and the role of the juries was curtailed. These measures were in part a reaction to the increased civil liberties and the perceived laxness of the Third Republic.[574] More recently, an increased awareness of defendant's rights has been matched by insecurity and worries about particular types of criminality.[575] This tension can be illustrated by two laws from 1993. The first, the law of the 4th January 1993, reformed the criminal law and criminal procedure and increased defendants' rights. The second, the law of 24 August 1993, which followed on from a change of government, removed or modified some of these reforms and heightened the crime control aspects of criminal procedure.[576]

Although the defendant is innocent until proven guilty, the task of establishing guilt is made easier because under the system of *liberté des preuves*, the prosecution have a fairly broad freedom in establishing and proving the defendant's guilt.[577] In contrast to English criminal procedure, hearsay evidence will often be allowed. Furthermore, and especially astonishing from a common law perspective,[578] the investigation and the case against the defendant at any trial will include his personality and his previous convictions. In short, the prosecution is generally free to use whatever evidence it thinks will

---

[572] G. Stefani, G. Levasseur, B. Bouloc, op. cit. p. 81.
[573] G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 69-71; D. Salas, *Du Procès Pénal*, (1992), pp. 67-81.
[574] G. Stefani, G. Levasseur, B. Bouloc, op. cit., 75-78.
[575] Ibid. pp. 82-83, 313-318.
[576] Le Gunehec, "La Loi du 24 aout 1993, Un Rééquilibrage de la Procédure Pénale" 1994 JCP 3720; H. Trouille, "A Look at French Criminal Procedure" [1994] Crim. LR 735.
[577] G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 33-39; A. West et al. op. cit. pp. 218-220.
[578] J. McEwan, "*Evidence and the Adversarial Proc*ess – *The Modern Law*, 2nd Edition (1998), 265, A. Keane, *The Modern Law of Evidence*, 3rd Edition, (1994), 193-211, *Law* Commission Consultation Paper 141 *Evidence in Criminal Proceedings Previous Misconduct of the Defendant*, (1996); S. Lloyd-Bostock, "The Effects on Juries on Hearing Evidence on the Defendant's Previous Criminal Record" [2000] Crim. L. R. 234; A. Keane, op. cit. pp. 500-506.

be effective, and the judge or judges will decide how much weight should be accorded to a particular piece of evidence.

Improperly obtained evidence may be excluded. There are two situations where evidence may be excluded. The first is where the CPP specifies that failure to follow that procedure will lead to evidence being excluded.[579] This is known as *nullité textuelle*. The class of *nullité textuelle* is fairly restricted. Although the law of the 4th January 1993 had added a list of at least nineteen *nullités textuelles* to Article 171 of the CPP this list was removed by the law of 24th August 1993. Instead *nullités textuelles* are restricted to specific provisions, for example, searches and seizures,[580] identity checks,[581] telephone tapping on the line of a deputy or a senator or a lawyer.[582] There are some important omissions. The suspect's right to legal advice is not reinforced by the sanction of *nullité textuelle*. In addition, although tapping the phone of a deputy, senator or lawyer is a *nullité textuelle*, outside those situations telephone tapping does not automatically mean that evidence will be excluded.[583] In fact, the use of telephone tapping increased significantly during the 1990s and even the telephones of non suspects may be tapped.[584]

The second is that based on a *nullité substanielle*.[585] According to Article 171 CPP, evidence is excluded where a failure to observe a substantial formality has harmed the interests of the party concerned. *Nullités substanielles* are less strict than *nullités textuelles* because the court has discretion whether to exclude evidence. The court has to decide whether the breach was substantial and whether it harmed the defendant. In practice it seems that the courts and the doctrine have tended to interpret this as limiting the use of *nullité* substantielle to those situations where allowing the evidence might lead to the conviction of a factually innocent person. The justification for this approach is that a guilty defendant is not harmed by being convicted and punished.

---

[579] A. West et al op. cit. pp. 223; G. Stefani, G. Levasseur, B. Bouloc, op. cit. 611-612.
[580] CPP Article 59 paragraph 2.
[581] CPP Article 78-3.
[582] CPP Article 100-7.
[583] The use of telephone tapping and other interception of communication in investigating an offence and as evidence in a trial is dealt with in the Regulation of Investigative Powers Act 2000; http://www.homeoffice.gov.uk/ripa/ripact.htm.
[584] S. Field, "The Legal Framework of Covert and Proactive Policing in France" in S. Field & C. Pelser, (ed.), *Invading the Private: State Accountability and New Investigative Methods in Europe*, (1998) pp. 67-81 at pp. 70-71.
[585] G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 612-613.

One of the main concerns of the Delmas-Marty commission, which reviewed the criminal law and criminal procedure prior to the Law of 4th January 1993, was the position of the suspect being held for questioning. In order to strengthen the rights of the suspect, the law of the 4th January 1993 increased the suspect's right to legal advice.[586] Despite this reform, the right of the suspect in France to legal advice is limited in comparison to his common law counterpart. The suspect can consult with a lawyer at the beginning of detention, after twenty hours and after thirty-six hours.[587] Outside these hours, there is no right to see a lawyer. Furthermore, until recently the right to see a lawyer was even more limited as it did not arise until the suspect had been in custody for twenty hours.[588] As many suspects would be charged before they had been detained for twenty hours, this rule meant that many of them were questioned by the police without seeing a lawyer.[589] Whenever it arises, the suspect's consultation with a lawyer is limited to a thirty minute interview and its purpose is to check that the suspect is not being mistreated rather than for the lawyer to advise him.[590] Suspects, accused of organised crime or terrorism have even less rights. For the former, the right to consult a lawyer does not arise until the thirty-sixth hour; for the latter, it does not arise until the seventy-second hour. It is probable that these delays are because of the seriousness and professional nature of both types of offending. However, the delays before a suspect can consult a lawyer are considerable. Furthermore, in contrast to English procedure, the delay is automatic.[591]

The Inquisitorial Nature of the Process

French criminal procedure is broadly inquisitorial.[592] Do the different criminal procedures adopted in England and France explain the contrasting approaches to mandatory reporting in the two jurisdictions?

---

[586] CPP Article 63-4; A. West et al, op. cit. pp. 244-245; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 328-330.
[587] Law 15th June 2000 Article 11.
[588] Law 24th August 1993.
[589] S. Field & A. West, "French Defense Rights and Police Powers" [1995] Criminal Law forum Vol. 6 No. 3. 473 pp. 485-489.
[590] J. Hodgson, op. cit. p. 355.
[591] PACE s. 58(1).
[592] D. Salas, *Le Tiers Pouvoir*, (1998), p. 47.

The emphasis within inquisitorial procedure on obtaining information may explain the fact that procedural rules of evidence are less important. If evidence helps to establish what happened, it is thought that it would not be right to exclude it even if it has been unfairly obtained.[593] Furthermore, the inquisitorial system has traditionally viewed the suspect as a source of information whom the State is justified in exploiting.[594] Traditionally, this has traditionally meant that although the suspect has a right not to answer questions, suspects are unlikely to rely on this right because of the lack of legal assistance[595] and because a failure to answer questions has been interpreted as suggesting guilt. Although Article 8 of the law of 15th June 2000 states that every suspect has a right to be informed of his right not to answer questions, it is questionable how effectively this will reinforce the right not to answer questions. In particular, it is probable that fear that silence will be interpreted as evidence of guilt, will persuade many suspects to speak.[596]

This emphasis on information also impacts on the treatment of potential witnesses. Prior to recent reforms,[597] in investigations of flagrant offences a witness could be detained until he answered police questions. It was argued that the State's right to information prevailed over the witness's freedom of movement and right not to be involved. The same balance between the rights of the witness and those of the State in obtaining evidence might also explain mandatory reporting.

Voluntary Reporting in France

In Chapter 4, studies of voluntary reporting by witnesses and victims in England were examined.[598] The aim of this section is to provide an equivalent analysis for voluntary reporting in France. This analysis will be based on three victimisation studies - the 2000 International Crime Victimisation

---

[593] See above pp. 106-107.
[594] M. Damaska, op. cit. pp 147-180; J. Hodgson, op. cit. pp. 353-354.
[595] See above p. 107.
[596] For the position in Britain see Criminal Justice and Public Order Act 1994 ss. 34, 36 and 37, *Murray v UK* (1996) 22 EHRR 29, S. Greer, "The Right to Silence a Review of the Current Debate," (1990) 53 M. L. R. 709; R. Munday, "Inferences from Silence and European Human Rights Law" [1996] Crim, L. R. 370; A. Ashworth, *The Criminal Process, An Evaluative Study*, 2nd Edition (1998), pp. 96-108.
[597] Law 15th June 2000 Articles 4 and 5.
[598] See above Chapter 4 pp. 75-88.

Survey,[599] "Les Victimes, Comportements et Attitudes Enquete Nationale,"[600] and "Les Victimes d' Infractions"[601] and two newspaper surveys of reporting by witnesses - a *Nouvel Observateur* survey from 1989[602] and a survey from the *L' Evenement de Jeudi* in 1997.[603] In addition, it will consider two academic discussions of reporting – "La Dénonciation" by J-F. Gayraud and "La France des Mouchards, Enquete sur La Délation" by S. Fontenelle.

The academic evaluations of reporting analyse the motivations behind reporting and whether reporting is justified. Gayraud and Fonenelle's evaluations of reporters and of duties to report are radically different. Whilst Gayraud is in favour of reporting and sympathetic towards reporters, Fontenelle interprets reporting as a betrayal and as rarely being justified. Although this disagreement is useful because it highlights both the advantages and disadvantages of mandatory reporting, both the writers have concentrated on types of reporting that support their view of reporting and of reporters, therefore, whilst Gayraud focuses on the reporting of serious offences, Fontenelle concentrates on the reporting of more minor offences. As a result, although taken together the two evaluations provide a full picture of reporting in France, they rarely cover the same offences. Consequently, it is difficult to test the validity of each of the author's claims by comparing them.

There are also difficulties with the surveys. The surveys on reporting by witnesses are magazine rather than academic surveys. It is not clear from reading these two surveys what methodology was used or even how many respondents were included. Consequently, the reliability of these two surveys is questionable. Another problem with these surveys is that it is questionable whether they are a true reflection of voluntary reporting. For example, if these surveys show a high level of reporting for serious, violent offences, this may be

---

[599] J. Van Kesteren, P. Mayhew & P. Nieuwbeerta, *Criminal Victimisation in Seventeen Industrialised Countries, Key Findings from the 2000 International Crime Victimisation Survey*.
[600] R. Zauberman, P. Robert, R. Levy & C. Perez-Diaz, "Les Victimes: Comportements et Attitudes. Enquete Nationale de Victimisation", (1990), CESDIP.
[601] IFOP, "Les Victimes d' Infractions", (1987). Both this survey and the CESDIP one are discussed in R. Zauberman, "The International Crime Survey in France: Gaining Perspective" in A. del Frare, U. Zvekic, J. Van Dijk, (ed), *Understanding Crime: Experience of Crime and Crime Control*, (1993), 307-319.
[602] Le Nouvel Observateur No. 1296 7-13 Sept. 1989; J-F. Gayraud, op. cit. pp. 53-54.
[603] L' Evenement de Jeudi 29th. May 1997; S. Fontenelle, op. cit. p. 7.

because people are choosing to report these offences, alternatively it may be because these offences carry a duty to report.[604]

The other surveys that will be discussed – the International Crime Victimisation Survey and those evaluated by Zauberman are victimisation surveys. Because the duties to report do not apply to victims, it may be that these represent a truer reflection of voluntary reporting. On the other hand, it should be remembered that the experience of reporting of victims and witnesses may be different and therefore it may not be possible to draw conclusions from reporting by victims to voluntary reporting in general. One example of this is violent crime, whilst this seems one of the types of offending most likely to be reported by witnesses, it is less likely than property offences to be reported by victims.[605]

Attitude Towards Reporting

Before examining the public's attitude towards reporting specific offences, the *Nouvel Observateur* survey looked into their attitude towards reporting in general. The respondents were asked what they thought about reporting a person suspected of having committed an offence. Seventeen percent said that reporting was a civil duty and twenty-one percent said that reporting was necessary to fight crime. Less favourably, forty-one percent said that reporting was only justified in exceptional cases and seventeen percent said it was morally unacceptable. Four percent of respondents did not know. Although this suggests that the majority was against reporting, this interpretation may not be correct. Exceptional circumstances could match those occasions when there is a duty to report because of the seriousness of the offence[606] or the vulnerability of the victim.[607] If this were the case it could be that a majority of French people, seventy-nine percent, would report in those situations where the law currently demands it.

Furthermore, this seems to be contradicted by the CESDIP survey.[608] According to this 80-90% of victims thought that reporting was a civic duty.

[604] CP Article 434-1; see below Chapter 7 pp. 175-176.
[605] R. Zauberman, op. cit. pp. 308-9.
[606] CP Article 434-1; see below Chapter 7 pp. 175-176.
[607] CP Article 434-3; see below Chapter 7 pp. 194-195.
[608] Zauberman, op. cit. pp. 315-315.

One explanation for this difference might be that the *Nouvel Observateur* survey concerned witnesses, whilst the CESDIP survey examined reporting by victims. It is possible that the victim's greater awareness of the harm caused by the offence might mean that he would be more likely to view reporting as a civic duty.

Motivations for Reporting

Reporting and the Seriousness of the Offence

Studies of reporting in England demonstrated a link between seriousness and reporting.[609] I was interested in whether it was also a factor in France. In the *Nouvel Observateur* survey respondents were asked whether they would report in different situations. I was interested in whether there was any connection between the willingness of the respondents to report and the seriousness of the offence. As a result, I have added the third column, which gives the maximum sentence for a particular offence. This method is not perfect. The seriousness of a particular offence will depend on many factors and a particular offender may in fact receive a sentence that is well below the maximum.[610] Another difficulty is that the respondents might have agreed to report some of the more serious offence because of the duty to report serious offences. Without further information it is difficult to determine whether the higher reporting rates for the more serious offences were because of voluntary reporting or whether they were due to mandatory reporting. Moreover, it might be that a reporter chooses to report a serious offence for reasons other than its seriousness.

[609] C. Mirlees-Black, P. Mayhew, & A. Percy, *The 1996 British Crime Survey*, (1996), p. 23; see above Chapter 4 pp. 82-84.
[610] A. Von Hirsch & N. Jareborg, "Gauging Criminal Harm: A Living Standards Analysis" [1991] O. J. L. S 1-38.

	Would Report	Would Not Report	Sentence
A neighbour who beats his child	96%	2%	10 years[611]
An arsonist	94%	8%	10 years[612]
A Drug Dealer	87%	8%	10 years[613]
A child, who extorts money or property from other children.	76%	19%	7 years[614]
An escaped prisoner who hides out at your home.	58%	24%	3 years[615]
Someone who carries out a hold up.	61%	28%	20 years[616]
A neighbour who regularly beats his wife.	59%	32%	5 years[617]
A burglar	56%	33%	5 years[618]
Someone that you suspect of being a terrorist.	52%	31%	15 years[619]
Someone that you suspect of being a nazi war criminal.	48%	35%	Life[620]
A neighbour who has stolen a car radio.	37%	54%	3 years[621]
An employer who employs people without declaring it.	36%	53%	25000F[622]
An employee who steals from work.	34%	54%	3 years[623]
Someone that you suspect of Being a spy.	26%	54%	Life[624]
A shoplifter	23%	69%	3 years[625]
An illegal immigrant	14%	78%	
Someone committing tax fraud	12%	78%.	

Nouvel Observateur Sept. 1989.

[611] CP Article 222-14 paragraph 3.
[612] CP Article 322-6.
[613] CP Article 222-37
[614] Extortion – punished 7 years.
[615] CP Article 434-27, although the gravity of the offence that the prisoner was originally sentenced for may be more important.
[616] CP Article 311-8, if armed robbery.
[617] CP Article 222-12.
[618] CP Article 311-4.
[619] CP Article 421-4. The fact that an offence was committed in a terrorist purpose is an aggravating factor and increases the sentence for other offences – CP Article 421-3.
[620] CP Article 212-2.
[621] CP Article 311-3.
[622] Employment Code – Code de Travail Article 364-1.
[623] CP Article 311-3.
[624] CP Article 411-2.

Although in general this survey suggests that there is a link between reporting and the gravity of an offence, there are some anomalies. Given the sentence that such offences receive, there is a low reporting rate for suspected terrorists, war criminals and spies. One possibility is that despite their heavy sentence these offences are not considered by the public to be serious, or more accurately, they are not considered to be an urgent problem. This may be especially true in relation to suspected war criminals. The reluctance to report war criminals may also be due to the experience of reporting during the Occupation and immediately after Liberation.[626] Alternatively, it is possible that the low reporting rates for these offences is because individuals would not be certain that someone was guilty of that offence and would be wary of falsely accusing someone.

It is interesting that the public seem reluctant to report terrorism. Under Article 434-2, it is an offence to fail to report terrorism.[627] One explanation for this duty might be therefore that it is needed in order to encourage the reporting of offences that are not otherwise reported.

According to the survey, 76% would report children who use violence to obtain property from other children, whilst only 61% would report an armed robber. This does not support the hypothesis that an individual is more likely to report a serious offence. One possible reason for the relatively low reporting rates for the hold-up is that an individual might fear reprisals were he to report this type of offence. This type of offending, particularly because it involves guns, might be associated with professional criminals and there therefore might be an increased risk of reprisals. In addition, the higher reporting rate for the child might be due to the reporter believing there is a greater chance of rehabilitating that offender. In this category reporting might be seen as benefiting not only the victim and the wider community, but also the offender.

The link between reporting and seriousness is supported by the *Evenement de Jeudi* survey and the International Crime Victimisation Survey 2000. A majority, sixty-four percent, of respondents in the *Evenement de Jeudi* survey claimed that they would not report someone "who broke the rules". Illegal

---

[625] CP Article 311-3.
[626] J-F. Gayraud, op. cit. pp. 89-100; S. Fontenelle, op. cit. pp. 71-81.
[627] See below Chapter 7 pp. 188-191.

immigration and tax fraud were used as examples of "breaking the rules". These are minor, regulatory offences. Similarly, in the International Crime Victimisation Survey 2000 39 of the French respondents explained that they had not reported an offence because that offence was not serious enough.[628] Furthermore, the two surveys analysed by Zauberman both suggest that an offence is more likely to be reported if it is serious. According to the ICS survey, between one third and one half of the victims questioned did not report an offence because it was not considered to be serious and in the CESDIP survey between one half and two thirds of victims did not report offences that they did not consider to be serious.[629]

The Type of Victim

It appears from the *Nouvel Observateur* that an offence is more likely to be reported if the victim is a private individual than a company or the State. Only 23% of respondents would report a shoplifter, whilst 37% would report a neighbour who steals a car radio. Although, it is not explicit that the radio was stolen from a private individual, it could perhaps have been taken from car-radio suppliers, or a warehouse, it is reasonable to suppose that many of the respondents would have interpreted the scenario in this way. Similarly, illegal immigration and tax fraud are not well reported. It could be because these offences are not seen as important because there is no immediate, private victim. This may also explain why spying, despite being a serious offence in terms of sentence, only has a low reporting rate.[630] The victim of spying is the State rather than an identifiable private victim.

If an offence is committed against a particular individual, a potential reporter may identify and empathise with that individual. This identification may mean that the potential reporter will view the offence as being serious, and in this situation, the potential reporter may also support the victim being compensated and the offender punished. In contrast, it may be harder for a potential reporter to consider all the consequences of an offence when there is no immediately identifiable victim. Finally, the CP itself recognises the connection between the vulnerability of the victim and the seriousness of an offence.

---

[628] J. Van Kesteren, P. Mayhew & P. Nieuwbeerat, op. cit. p. 67.
[629] Zauberman, op. cit. p. 313.
[630] See above p. 113.

The *Nouvel Observateur* survey suggests that the respondents were more willing to report offences that had been committed against especially vulnerable victims. The most reported offence was that of a child being regularly beaten. Nevertheless, whilst the survey suggests that the vulnerability of the victim may be a factor, it is not very clear. The survey does not investigate the reporting of violent offences against non-vulnerable victims. It may be that the vulnerability of the victim is irrelevant and the public would report a violent offence regardless of the identity or characteristics of the victim. Furthermore, in the case of the child being beaten, it may be that the high level of reporting was because the beating was regular and therefore likely to continue.

Relationship Between the Offender and the Potential Reporter

Family loyalty means that potential reporters are reluctant to report offender to whom they are related.[631] This is recognised by the duties to report, generally the offender's family are exempt from these obligations.[632] Nevertheless, even though, a witness may be reluctant to report a friend or even an acquaintance, the CP does not exempt him from reporting them.

In the *Nouvel Observateur* survey, in three of the cases, child abuse, wife beating and theft of the car radio, the offender is a neighbour and therefore someone known to the reporter. From these examples, it is unclear, how, if at all, the relationship between offender and reporter influenced reporting. This was therefore something that I investigated during the qualitative interviews. The respondents' experience was that potential reporters were reluctant to report offenders whom they knew.[633]

Occasionally, rather than discouraging reporting, the reporter's knowledge or relationship with the offender may encourage reporting. For example, a jilted lover or a sacked employee may report offences committed by their previous lover or employers out of bitterness and revenge.[634] Similarly, in the context of a neighbourhood dispute, it would not be surprising if rather than being

[631] J-F. Gayraud, op. cit. pp. 40-43.
[632] P. Mousseron, "Les Immunités Familiales" [1998] Revue Sciences Criminelles 291; see below Chapter 7 pp. 183-185.
[633] See below Chapter 8 pp. 230, 233.
[634] S. Fontenelle, op. cit. p. 53.

reluctant to report, an individual would be glad to report his neighbours. A related issue is that a potential reporter may be especially willing to report because he resents the offender, or because he blames the offender for his own problems. Some reporters may resent non-payers of tax or social security fraudsters benefiting from their dishonesty, whilst the reporters' own honesty is not rewarded.[635] Furthermore, a particular group may become a scapegoat. Seen as the reason for society's problems, they will be constantly watched and reported.[636] This may explain the high level of reports of Jews and of individuals and business breaking the anti-Jewish legislation during the Occupation.[637] It might also explain the high level of reports of businesses, who employ illegal immigrants.[638]

Attitude Towards the Police and Reporting

Gayraud argues that some failures to report can be attributed to the non-reporter's opinion of the police. [639] Furthermore, in the surveys analysed by Zauberman, the fear that the police could do nothing was among the top two reasons why victims did not report.[640] On the other hand, from the data in the International Crime Victimisation Survey 2000 it does not seem that an individual's attidude towards the police is a significant reason for not reporting.

Although these surveys seem contradictory, it is possible that they can be reconciled. It might be that the higher level of non-reporting because of an individual's opinion of the police in the ICS and CESDIP surveys is because these surveys were inner city surveys. A comparison with the Islington Crime Survey in Britain suggests that police related reasons for non-reporting might be more significant in inner city areas.[641] Furthermore, the victims in these surveys were failing to report because they did not think that the police could or would not do anything. One reason for this might be because the offence was minor and therefore would be unlikely to be a police priority. If this were the

[635] Ibid. p. 20, pp. 22-3.
[636] J-F. Gayraud, op. cit. pp. 25-26.
[637] H. Amouroux, La Grande Histoire des Francais Sous l' Occupation, Les Passions et Les Haines, (1981), p. 249.
[638] S. Fontenelle, op. cit. pp. 136-159.
[639] J-F. Gayraud, op. cit. p. 37.
[640] Zauberman, op. cit., p. 313.
[641] T. Jones, B. Maclean & J. Young, *The Islington Crime Survey, Crime Victimisation and Policing in Inner-City London,* (1986), p. 39; see above Chapter 4 pp. 86-87

case, then some of these failures to report can be linked to the wider issue of unwillingness to report non-serious offences.[642]

Gayraud's interpretation of non-reporting because of an individual's opinion of the police is different. He argues that potential reporters are reluctant to report to the police because of misunderstanding or anti-police prejudice, rather than any justified concerns.[643] Given Gayraud's pro-police stance, it might be that he minimises civil liberties concerns about mandatory reporting.

A more moderate view of the impact of attitudes towards the police might be that victims and witnesses have fears, some of which may be legitimate, about how their reports will be treated and these fears may deter them from reporting. An illustration of this is the reporting of sexual violence. French criminal procedure and police practice has developed over the last ten years in response to victims' fears of being ill-treated or disbelieved by the police and prosecutors.[644] The reporting of sexual violence, especially by victims, has increased after these reforms.[645] There has been similar reluctance and measures to improve reporting and support victims in England.[646]

It is interesting that the increase in the reporting of sexual violence is attributed to these measures, rather than to the duty to report under Articles 434-1 or 434-3 of the CP. This suggests that mandatory reporting may not be the most effective way of encouraging reporting, and it will often be preferable to instead, or as well, support the reporter as well as punish the non-reporter.

The Reporter Hopes to Obtain a Benefit by Reporting

Sometimes an individual chooses to report because reporting will be advantageous to him personally. Victims may decide to report property offences so that they can claim on their insurance.[647]

---

[642] See above pp. 111-114.
[643] Ibid. p. 38.
[644] Ministère de la Justice, *Guide des Droits des Victimes*, (1988), pp. 111-117; J. Castaignède, "L' Effectivité de la Protection Pénale du Mineur Victime d' Abus Sexuels" in R. Nérac-Crosier, (ed.), *Le Mineur et le Droit Pénal*, (1997), pp. 83-109.
[645] See below Chapter 8 pp. 229-230.
[646] Z. Adler, "Picking up the Pieces" [1991] Police Review 1114.
[647] See above Chapter 4 p. 88; Zauberman, op. cit. p. 312.

In addition, a witness may decide to report because of the benefits of reporting. Fontenelle describes two situations where the reporter is explicitly rewarded for reporting. The first is the official and unofficial payments that individuals who report tax fraud receive.[648] The second is so called "*repentis*", reformed criminals, who can expect a substantially reduced sentence in return for their evidence.[649] The offences where *repentis* may receive a lesser sentence for informing are attacks against the fundamental interests of the state[650], terrorist offences,[651] drug trafficking,[652] belonging to a criminal gang/organisation,[653] counterfeiting money,[654] customs corruption[655] and prison escape.[656] Generally speaking the mitigation is more generous if the *repenti* informed the authorities whilst the crime could still be prevented. According to Fontenelle, there have been few *repentis* because the reduced sentence is not backed up by protection for the *repenti*.[657] One use of the *repenti* procedure has been against terrorist organisations, in particular *Action Directe*.[658]

The use of rewards to encourage ex-offenders to report is interesting. One of the main justifications for mandatory reporting is that it enables the criminal law to punish the individual involved at the periphery of criminal activity.[659] From this I had thought that the duties to report might be prosecuted if the non-reporter was an inactive member of a criminal gang. It might be however that potential informants are more likely to be rewarded in order to encourage reporting, rather than punished for failing to report. Again this was an issue that I was keen to explore during the qualitative interviews.[660]

---

[648] S. Fontenelle, op. cit. pp. 31-41.
[649] Ibid. pp. 84-86; J-F. Gayraud, op. cit. pp. 262-271.
[650] CP Articles 414-2; 414-3; 414-4.
[651] CP Articles 422-1; 422-2 .
[652] CP Article 222-43.
[653] CP Article 450-2.
[654] CP Article 138.
[655] Customs Code, Code des Douanes Article 59.
[656] CP Article 434-11.
[657] S. Fontenelle, op. cit. p. 85.
[658] J-F. Gayraud, op. cit. p. 270.
[659] See below Chapter 6 pp. 141-142.
[660] See below Chapter 8 pp. 242-244.

Encouraging voluntary reporting

Publicity and Reporting

In the interviews that I conducted with French lawyers, police and judges, I was interested in whether the duties to report were well-known. The better known the offences were, and in particular, the better known prosecutions of non-reporters were, the greater the likelihood that an individual's reporting might be motivated by the existence of the offences of non-reporting. This particular question is explored in the analysis of the interviews in Chapter eight.[661]

On the issue of publicity and reporting in general, it does seem that publicity about an offence, or an organisation can increase reporting.[662] Furthermore, it may be that the increased reporting of child abuse is due as much to an increased awareness of this problem as the specific duty to report these offences under Article 434-3.[663]

Organised Voluntary Reporting

Perhaps surprisingly given their support for mandatory reporting, the French attitude towards Crime Watch style programmes is extremely hostile.

> "faire croire à d' honnetes gens que le système D, les racontars, la délation peuvent faire mieux que police et justice pour révéler la vérité, c'est vraiment nous renvoyer tout droit au Moyen Age. Cela me parait beaucoup plus grave que de fabriquer de faux billets."[664]

As this quotation shows, however this rejection of television reporting does not contradict the support for mandatory reporting. First, it is crucial that the television programmes call for the identification of suspects, whereas under the duties to report, naming a suspect is excluded.[665] Secondly, it is clear from the

---

[661] See below Chapter 8 p. 237.
[662] S. Fontenelle, op. cit. p. 23.
[663] See below Chapter 8 pp. 230-231.
[664] Quote from a government minister (1993) quoted in Gayraud, op. cit. p. 51.
Translation: "To make decent people believe that gossip and informants can do better than the police and the courts to discover the truth, it really is sending us straight back to the Middle Ages. It seems to me that it is a lot more serious that manufacturing counterfeit money."
[665] See below Chapter 7 pp. 176-179.

quotation from the minister that reporting to the television programme is seen as hindering rather than assisting the police and the State.

The Qualitative Interviews

Many of the motivations behind a decision to report match those in the English surveys. An individual is more likely to report serious, violent offences, especially if the victim is vulnerable.[666] Fear of reprisals will deter reporters.[667] Nevertheless, after examining existing studies of reporting in France, it is still unclear how great an influence these motivations are on a decision to report. Unsurprisingly, therefore I decided to investigate the motivations behind a decision to report in the qualitative interviews.[668] In these interviews I wanted to rank the respective importance of the different motivations. I also wanted to investigate whether the high level of reporting of serious and violent crime was due to mandatory or voluntary reporting. It seems that mandatory reporting in France is not aimed at the gaps in voluntary reporting, but instead concentrates on those situations where most individuals choose to report. Will the qualitative interviews confirm this? Is this an appropriate and effective use of mandatory reporting?

[666] See above pp. 111-114; above Chapter 4 pp. 82-85.
[667] See above p. 113 and Chapter 4 p. 87-88.
[668] See below Chapter 8 pp. 228-236.

CHAPTER 6

MANDATORY REPORTING IN ENGLISH CRIMINAL LAW

Since the abolition of the offence of misprision of felony in 1967,[669] there has not been a general duty to report serious offences in English criminal law. Instead, mandatory reporting has been restricted to specific offences, terrorism,[670] treason,[671] and road traffic accidents.[672] This Chapter will examine the existing duties to report in English criminal law in order to evaluate whether English criminal law should adopt a more extensive duty to report. In addition to English duties to report, the chapter will conclude by examining the professional's duty to report child abuse in American and Australian criminal law.[673] Given that, like England, these countries are common law jurisdictions and have a mainly adversarial criminal justice system,[674] it will be interesting to examine why these countries introduced duties to report child abuse and how effective these duties have been.

In addition to offences of failing to report, the chapter will also analyse whether other offences can be used against the non-reporting. Specifically, it will investigate whether the non-reporter can be charged with obstructing a police officer in the exercise of his duty,[675] and whether the non-reporter can be punished as an accessory.[676]

Misprision of Felony.

Under misprision of felony it was an offence to fail to report any serious offence. Even though it was abolished in 1967, it is still important to examine misprision of felony. The abrogation of misprision of felony might suggest that duties to report are not needed, that they are unjustified or ineffective. It might

---

[669] Criminal Law Act 1967 s. 1.
[670] Prevention of Terrorism (Temporary Provisions) Act 1989 s. 18 and s. 18A and Terrorism Act 2000 s. 19; see below pp. 137-145.
[671] Misprision of Treason; see below p. 138.
[672] Road Traffic Act 1988 s. 170; see below pp. 146-152.
[673] See below pp. 158-160.
[674] M. Damaska, *The Faces of Justice and State Authority*, (1986), pp. 147-180; A. Sanders & R. Young *Criminal Justice*, (1994) pp. 8-12; see above Chapter 4 pp. 75; Chapter 5 pp. 108.
[675] Police Act 1996 s. 89(2); see below pp. 151-154.
[676] K. J. M. Smith, *A Modern Treatise on the Law of Criminal Complicity*, (1991), pp 34-47; see below pp. 156-159.

be because of this that the "failure" of misprision of felony is sometimes marshalled as a warning against reintroducing a duty to report serious offences.[677] Whether this rejection is justifiable depends on how any future mandatory reporting compares with misprision of felony. In this chapter, as in the rest of the thesis, similarities and differences between both existing duties and proposed duties and misprision of felony are highlighted and explained.

The History of Misprision of Felony.

In 1960 thieves, having stolen guns from an air force base, tried to sell those guns to the I. R. A. The men, who had arranged to sell the guns, were charged with receiving. A further individual, Sykes, who had not profited from the offence, was charged and convicted of misprision of felony. He appealed against his conviction. His appeal was unsuccessful.[678]

Sykes' main argument against his conviction was that there was no offence of misprision of felony in English criminal law. He claimed that there was only a duty to report treason[679] and that mandatory reporting had been erroneously extended to cover felonies due to a mistake in Staunford's Plees del Corone (1557).[680] In support of this argument, the defendant submitted that there had been no prosecutions for misprision of felony between the sixteenth century and 1938[681] and that, unlike misprision of treason, the offence of misprision of felony had never been included in a statute.

The House of Lords rejected these arguments. They decided that there was an offence of misprision of felony in English criminal law. The judgements of Lord Goddard[682] and Lord Denning[683] discussed the antecedents for establishing the existence of misprision of felony in English law. They determined that the inclusion of misprision of felony in Staunford's Plees del Corone was not a mistake and in any case was confirmed by later authorities notably Lord Coke (1621) and Sir Matthew Hale (1670).[684] In addition, according to Lord Denning,

---

[677] G. Williams, "Criminal Omissions, the Conventional View." (1991) 107 L. Q. R. 86 at p. 89.
[678] *Sykes v D. P. P.* [1961] 3 W. L. R. 371.
[679] Misprision of treason; see below p. 137.
[680] G. Allen, "Misprision" (1962) L. Q. R. 40 at p. 52.
[681] *R v Casserley* (1938) The Times, May 28th.
[682] [1961] 3 W. L. R. 371, pp. 387-390.
[683] [1961] 3 W. L. R. 371, pp. 374-385.
[684] G. Allen, op. cit, pp. 52-54.

the offence of misprision of felony developed from the duty to raise hue and cry if an offence had been committed. Lord Denning also cited hue and cry cases to show that failure to report had been prosecuted prior to 1938. The final argument that misprision of felony was an offence in English criminal law was that Chitty had included the form for an indictment for misprision of felony.

Glazebrook's analysis of the judgement in *Sykes v D. P. P.* was very critical. Unlike the House of Lords, he agreed with Sykes's claim that there was no duty to report felonies in English criminal law.[685] According to Glazebrook, it was particularly significant that prior to *Sykes v D. P. P.* there was no recorded court decision establishing that misprision of felony was an offence. Glazebrook distinguishes the hue and cry cases cited by Lord Denning on the basis that the duty to raise hue and cry was different from the citizen's duty under misprision of felony. Whilst the former commanded the citizen to take an active, physical role in apprehending the offender, the later required him to inform the public authorities. Furthermore, the hue and cry cases and laws were the products of a disorganised society without a professional law keeping force.[686] The situation and needs of twentieth century England were distinguishable.[687] Nevertheless, even if misprision of felony can be distinguished from hue and cry, reporting an offence may be a less onerous duty.[688] An individual risks greater injury chasing and detaining an offender than he does by calling the police. Furthermore chasing and detaining the offender is likely to take more time and may be more inconvenient than informing the police that an offence has been committed. As a result the duty under the hue and cry offence is arguably more likely to be supererogatory and is a more extensive restriction of autonomy.

The first conviction for misprision of felony in the twentieth century was that of Mrs Casserley in 1938,[689] after this there were four more convictions for misprision of felony before the conviction of the defendants in *Sykes v D. P. P.* Sykes was the first defendant to plead not guilty. He was also the first defendant to appeal against his conviction. Glazebrook argued therefore that

---

[685] P. R. Glazebrook, "How Long Then is the Arm of the Law to Be" (1962) 25 M. L. R. 301.
[686] J. Wenik, "Forcing the Bystander to Get Involved: A Case for a Statute Requiring a Witness to Report Crime" (1985) 94 Yale Law Journal 1787.
[687] P. R. Glazebrook, op. cit. pp. 304-307.
[688] See above Chapter 2 p. 20.
[689] (1938) The Times May 28th.

the earlier twentieth century convictions for misprision of felony could not be used to establish the existence of misprision of felony. In each of the earlier cases the defendant had pleaded guilty and therefore the issue of whether the criminal law required reporting had not been properly tested.[690]

What Offences did an Individual have to Report?

The Seriousness of the Offence

Requiring the reporting of serious offences is more justifiable than requiring the reporting of a minor offence. Serious offences have a greater impact on the victim and the wider community. Furthermore, from studies of voluntary reporting, it seems that that witnesses are more willing to report serious offences.[691] Because it was restricted to felonies, misprision of felony was supposed to be limited to serious offences. Nevertheless, a wide range of offences, not all of which were serious, were classified as felonies.[692] In practice therefore, misprision of felony could require the reporting of minor offences. A striking example of this was given in *Wilde.*[693] It was explained that if misprision of felony were strictly interpreted to require the reporting of all felonies this would meant that not reporting a fifteen year old boy for collecting the windfall apples from his neighbour's garden would be misprision of felony. Conversely, some offences that might be considered serious were classified as misdemeanours.[694]

Of the two criticisms, it was more problematic that a seemingly minor offence might be defined as a felony and carry a duty to report. As positive criminal law duties, duties to report are unusual.[695] They may be more onerous that most criminal law duties and more difficult to avoid.[696] It would be preferable, therefore, if their scope was limited. Furthermore, if a seemingly minor offence

---

[690] P. R. Glazebrook, op. cit. pp. 304-307.
[691] See above Chapter 4 pp. 82-84; J. Shapland, J. Willmore & P. Duff, *Victims in the Criminal Justice System*, (1988), p. 15; C. Mirlees-Black, P. Mayhew, A. Percy, *The 1996 British Crime Survey*, (1996), p. 23; N. Maung, P. Mayhew & C. Mirlees-Black, *The 1992 British Crime Survey*, (1993), p. 25.
[692] C. L. R. C., 7th Report *Felonies and Misdemeanours,* (1967).
[693] [1960] Crim. L. R. 116 at p. 117.
[694] Allen, op. cit. p. 60.
[695] See above Chapter 2 p. 19.
[696] J. Bennett, *The Act Itself*, (1995), p. 75; J. Feinberg, *The Moral Limits of the Criminal Law, Harm to Others,* (1984), p. 164; J. Kleinig, "Good Samaritanism" (1976) 6 Philosophy and Public Affairs No. 3

were to carry a duty to report this would mean that an individual could be liable for failing to report even though he, quite reasonably, did not realise that the particular offence carried a duty to report.[697]

In *Wilde*, it was suggested that the duty to report under misprision of felony should be limited to those felonies that "a reasonable person would regard as sufficiently serious to report to the police."[698] This suggestion was supported by Lord Denning in *Sykes*. Whether an offence carried a duty to report therefore would not depend on a legal distinction that many would find artificial, but would also consider the public view of the offence.

Is it possible to identify offences that the public consider to be serious? And if so, what offences would be likely to carry a duty to report? Studies of public perception of the seriousness of offences suggest that there is considerable agreement among the sexes and among different ages, classes, and races on the seriousness of offences.[699] Violent offences and violent sexual offences are ranked by the public as the most serious offences. There is also some evidence that offences against children and other vulnerable individuals are viewed as more serious.[700] This suggests that mandatory reporting limited to offences that were recognisably serious would be restricted to these offences.

Whether a particular offence is considered to be serious may change. Increased publicity about an offence, a notorious case, or changes in morals may all lead to an offence being judged as more or less serious. How should any duty to report respond to these developments? The duty to report should not be too flexible. It would not be appropriate for mandatory reporting to respond to every moral panic and if the scope of duties to report were too variable, the potential reporter might be unsure of the extent of his liability. On the other hand, if the duty to report never changed it would be too rigid. With time it might become as archaic and difficult to understand as misprision of

---

pp. 382-407 at p. 384; C. H. Schroeder, "Two Methods of Evaluating Duty to Rescue Proposals" [1986] Law and Contemporary Problems, 181 at p. 193.

[697] See below p. 132.

[698] [1960] Crim. L. R. 116 at p. 118.

[699] See above Chapter 4 p. 87; M. Levi & S. Jones, "Public and Police Perceptions of Crime Seriousness in England and Wales" (1995) 35 Brit. Journal of Criminology 234.

[700] B. Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453, 459, 462.

felony.[701] In the following Chapter, I examine how the French duties to report have responded to changes in the seriousness of offences. It seems that the general duty to report serious offences applies to a decreasing number of offences, as decreases in sentences have made it less relevant.[702] In contrast, if an offence is increasingly considered to be serious, a specific duty to report is used.[703] The advantage of this is that whilst developments that minimise the duty to report are automatic, extensions to mandatory reporting have to be specifically considered and justified. Furthermore, the use of a specific offence highlights the fact that these offences now must be reported.

Unlike Lord Denning, Lord Morton claimed that the duty should apply to *all* felonies, but only the non-reporting of the more serious felonies would be and should be prosecuted. Both Allen[704] and Glazebrook[705] disagree that the choice of what failures to report will be prosecuted should be left to the discretion of the police force. Although it would now be the Crown Prosecution Service who would decide what non-reporting to prosecute,[706] their concerns remain valid. It would be preferable for the limits of any duty to report to be enforceable rather than being left to the good practice and discretion of the Crown Prosecution Service.

There is no longer a separate class of offences known as felonies.[707] One possibility is that a duty to report serious offences would be based on the concept of serious arrestable offence.[708] A problem with this is that, although some offences are always classified as serious arrestable offences, other offences will only be serious arrestable offences depending on the circumstances. It may be difficult to prove whether a non-reporter knew that a particular offence carried a duty to report, and in fact many witnesses may not be aware of aggravating factors that would mean that an offence would have to be reported, for example, many potential reporters might not know enough about the victim's financial situation to realise that a theft represented a

---

[701] C. L. R. C. *7th Report, Felonies and Misdemeanours,* (1967).
[702] CP Article 434-1; see below Chapter 7 pp. 174-175.
[703] CP Article 434-2; Article 434-3; see below Chapter 7 pp. 188-191, 194-197.
[704] Allen, op. cit. at p. 58.
[705] P. R. Glazebrook, op. cit. at p. 312.
[706] Prosecution of Offenders Act 1985; see above Chapter 4 pp. 73-74.
[707] Criminal Law Act 1967 s. 1.
[708] PACE s. 116, schedule 5; see above Chapter 4 p. 71.

substantial financial loss to him.[709] Another possibility would be to limit mandatory reporting to those offences that are always serious arrestable offences. This would mean that the duty to report was limited to serious violent or sexual offences.[710]

Past, Current or Future Offences?

In *Sykes*, *Wilde* and *Aberg*[711] the defendants were punished for not reporting offences that had already been committed. In *Sykes*, the guns had already been stolen, in *Wilde,* the thefts had already been carried out, in *Aberg,* the defendant was sheltering a man who had escaped from prison. It is clear that the obligation to report under misprision of felony applied to offences that had already been committed. This suggests that the justification behind misprision of felony was the identification, prosecution and punishment of offenders.[712]

On the other hand, at least in theory, English criminal law also recognised, and promoted, the use of misprision of felony to report future offences. Criminal Law Commissioners, who reported on the criminal law in the 1840s, had claimed that misprision of felony could require the reporting of a "meditated crime".[713] Similarly, in his judgement in *Sykes* Lord Denning stated that an individual had a duty, under misprision of felony, to report a "contemplated felony".[714] One reason for this support for the reporting of future offences might be that in this situation the offence may be prevented.[715]

One problem is how the duty to report future offences would be interpreted. Would the duty be limited to those future offences in relation to which some definite steps had been taken? Or would the duty be extended to a plan to commit a felony where no action had been taken? Both "meditated" and "contemplated" suggest the latter interpretation. The difficulty with this is that, whilst the plotter could not be liable as he had not taken any definite steps to

[709] PACE s. 116(6)(f).
[710] PACE schedule 5.
[711] [1948] 2 KB 173.
[712] See below Chapter 7 pp. 163-168.
[713] P. R. Glazebrook, op. cit. pp. 301.
[714] [1961] 3 All ER 371 at p. 386.
[715] See below Chapter 8 pp. 240-241; Chapter 9 pp. 301-303.

commit the offence,[716] the person who did not report his offences could be. This is unjustified. The plotter has a greater commitment to and awareness of the offence. It is possible, though, that in practice the duty would be limited to those future offences where some unequivocal steps had been taken towards their completion. The nearer the offender was to committing the felony, the more likely that any potential reporter would know that the offence would be committed. It is only when the potential reporter *knew* that the offence was going to be or had been committed that he had a duty to report.

What Information must the Reporter Give?

In contrast to the French duties to report,[717] misprision of felony required a reporter to identify the offender as well as report the offence.[718] In *R v Cummins,* a man, who was stabbed during a fight between two criminal gangs, was convicted of misprision of felony after he refused to identify his assailant.[719] The problem with this is that many reporters will be reluctant to identify the offender. If they feel loyalty towards the offender, they may interpret naming the offender as an even greater betrayal than reporting his offence. In addition, they may feel that the offender, who is named, will have a greater motivation to take reprisals on the reporter.

On the other hand, reporting the offence and naming the offender is more useful to the police. If the offender is named he can be detained and questioned and perhaps prosecuted.[720] It might be argued that if there is to be a duty to report, it should be as effective as possible. Furthermore, fears about betraying relationships or other duties or of reprisals can be dealt with by restricting the application of mandatory reporting. Another problem might be that even if the criminal law duty to report is restricted to reporting an offence, it might be difficult for a reporter to then refuse to identify the offender as well. It is reasonable to suggest that many individuals if questioned by the police would find it difficult to rely on a legal right to refuse to identify a suspect.[721]

---

[716] A. Ashworth, *Principles of the Criminal Law*, 3rd Edition (1999), pp. 466-468.
[717] See below Chapter 7 pp. 176-179.
[718] [1961] 3 W. L. R. 371 at p. 384.
[719] [1959] V. R. 270. In this case it was the victim who was punished for failing to report. This also would not happen with the French duties to report. Articles 434-1, 434-2 and 434-3 of the French Penal Code are restricted to non-reporting by witnesses.
[720] See above Chapter 4 pp. 69-74.
[721] See below Chapter 7 pp. 179.

Does the Reporter need to Witness the Offence?

Under misprision of felony an individual committed an offence if he failed to report a felony that he *knew* had or would be committed. From the discussion of the offence in the few reported cases, it seems that knowledge was quite broadly defined. Importantly, knowledge was not limited to those offences that an individual witnessed first hand.[722]

One of the dangers of an extensive interpretation of knowledge is that the duty to report is onerous.[723] It would mean that a potential reporter is forced to investigate whether an offence has been committed in order to determine whether he has to report. This problem is central to Glazebrook's criticism of the House of Lords decision in *Sykes.*[724] He argues that requiring a citizen to report crimes, which he has heard about or about which he is suspicious, effectively requires the citizen to investigate as well as report crimes:

> "If this rule is applied to misprision two duties are imposed; a duty to disclose knowledge of a felony, and a duty also to make inquiries to resolve a suspicion concerning the commission of a felony. Are the English to become a nation of detectives as well as informers?"[725]

One solution is to limit the duty to report to those offences that an individual has witnessed first hand.[726] The justification for limitation is that the first hand witness can be more confident that a serious offence has been committed. In contrast, a person, who is told about an offence may not be sure how reliable his informant is and may feel that he needs to carry out further checks before he reports. Restricting reporting to a first hand witness would also exclude potential reporters who learnt about the offence because of the offender's confession or because they helped the victim. This is important because it would mean that professionals would be less likely to have to report. It is for

---

[722] See below p. 132; J. Wenik, "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime" (1985) 94 Yale Law Journal 1787.
[723] See above Chapter 2 pp. 24-26.
[724] P. R. Glazebrook, op. cit. pp. 312-316.
[725] Ibid. p. 313.
[726] J. Wenik, "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime" (1985) 94 Yale Law Journal 1787.

these reasons that the offences of failing to report in Massachusetts[727] and Washington[728] have adopted this approach.

Nevertheless, the fact that a person is present at a crime scene does not guarantee that he will know that a crime has been committed. He might not be certain that an individual's actions constitute an offence and he is unlikely to know whether the "offender" could claim any defence or whether he has sufficient mens rea to be liable. Following the murder of Kitty Genovese,[729] psychologists, Latane and Daley, carried out experiments to discover how individuals responded to situations where a stranger was either in danger or the victim of an offence to try and explain the neighbours' failure to report. They found that people were often unwilling to get involved because they were reluctant to treat an event as a crime in case their interpretation was wrong.[730] This suggests that even a first hand witness will not always "know" that an offence has been committed.

Furthermore, restricting mandatory reporting to first hand witnesses might exclude those reporters who would be best able to report. Training, knowledge and experience will mean that some professionals are especially able to realise that an offence has been committed.[731] It is unlikely however that these professionals will be first hand witnesses.

---

[727] General Laws of Massachusetts Chapter 268 Section 40:
"Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that the said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as is reasonably practicable. Any person who violates this section shall be punished by a fine of not less that five hundred nor more than two thousand and five hundred dollars."

[728] Revised Code of Washington 9.69.100
"(1) A person who witnesses the actual commission of:
(a) a violent offence ...
(b) a sexual offence against a child or an attempt to commit such a sexual offense; or
(c) An assault of a child that appears reasonably likely to cause substantial bodily harm to the child,
Shall as soon as is reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials.
(2) This section shall not be construed to affect privileged relationships as provided by law.
(3) The duty to notify a person or agency under this section is met if a person notifies or attempts to provide such notice by telephone or any other means as soon as is reasonably possible
(4) Failure to report as required under subsection (1) of this section is a gross misdemeanor. However, a person is not required to report under this section where that person has a reasonable belief that making such a report would place that person or another family or household member in danger of immediate physical harm."

[729] *Kitty Genovese – the queens story* at http://www.icf.de/asa/kitty_qstory.html; M. Davies, "How Much Punishment Does a Bad Samaritan Deserve" (1996) 15 Law and Philosophy p. 93-116 at p. 93.

[730] B. Latane & J. Darley, *The Unresponsive Bystander, Why Doesn't he Help?*, (1970).

[731] See above Chapter 4 pp. 80-81.

Misprision of felony did not require a reporter to have witnessed the felony. In *Sykes*, for example, the defendant had not witnessed the theft of the guns. Nevertheless, in *Sykes*, in *Wilde* and in *R v Aberg*[732] there was no doubt that the non-reporter had known that a felony had been committed. In *Sykes*, the defendant had tried to arrange a contact with the I. R. A. to sell the stolen guns. In *Wilde*, the defendants had arranged with their employee for money to be paid, in return for the offence not be reported.[733] In *Aberg*, the defendant was told by the police that the man, who was staying at her house, had escaped from prison where he was serving a sentence for housebreaking.[734]

One interpretation of these cases is that the prosecution would only be able to establish that a non-reporter knew about an offence in cases where the non-reporter had either benefited from not reporting, as in *Wilde*, or had a greater role in committing the offence than merely not reporting, as in *Sykes*. Certainly, in *Sykes* one of the main reasons given by the House of Lords for retaining misprision of felony was that the offence was needed to deal with individuals involved with criminal gangs.[735] Furthermore, one of the main arguments for the reintroduction of a duty to report serious offences to English law is that it would help deal with members of criminal gangs whose more active involvement in offences could not be proved.[736]

If mandatory reporting is not limited to individuals who witness crimes firsthand, what other types of potential reporters would be sufficiently certain to have a duty to report? One suggestion is that a reporter, who is told by the victim, or by the offender about the offence, will know that that offence has been committed. Nevertheless, there are difficulties with requiring such a person to report. Often by reporting the individual would be betraying the victim's, or the offender's confidence. Moreover, many of these reporters might be professionals owing a duty of confidentiality towards their client or patient, reporting in this situation conflicts with professional ethics[737] and there is the

---

[732] [1948] 1 All ER 601.
[733] G. Allen, op. cit. p. 55.
[734] [1948] 1 All ER 601.
[735] Ibid. p. 54.
[736] See below Chapter 9 p. 293.
[737] See below Chapter 7 pp. 183, 198-203; Chapter 8 pp. 255-259; Chapter 9 pp. 304-305.

danger that if such individuals had to report, some victims would be deterred from seeking help and advice.[738]

Another problem with misprision of felony is whether the individual had to know that the offence was a felony.[739] This might have been particularly problematic because some seemingly minor offences were classified as felonies.[740] If an individual witnessed one of these minor felonies, would he be excused reporting because although he realised that an offence was being committed, he had falsely assumed it was a misdemeanour? In *Sykes*, Lord Denning argues that in order for the duty to report to arise, the individual needs to know that the offence is serious, but does not need to know that it is a felony.[741] On the other hand, given that Lord Denning favoured limiting misprision to those offences that objectively were considered to be serious enough to merit a duty to report,[742] it might be unlikely that a potential reporter would not realise that an offence carried a duty to report. Another case, *Dadson,*[743] suggests that an individual will not be liable for a failure to report a felony that he did not realise was a felony. In this case, the defendant police officer could not justify his shooting of a man stealing wood from a copse by the fact that the man was committing a felony because he did not realise that the theft was a felony. By analogy it might be that the duty to report under misprision of felony only applied if the potential reporter realised the offence was a felony.

Excusing Failures to Report

A potential reporter, who knows the offender, especially if they are related, is often reluctant to report him.[744] The failure of the defendant in *R v Aberg* to report an escaped prisoner, who was living in her house, may have been because she knew him. Furthermore, if the reporter knows the offender he may be worried about reprisals from the offender. A potential reporter may also be reluctant to report because of his professional ethics. A doctor, who discovers an offence during a consultation with the victim, or the offender, may

---

[738] See below Chapter 7 p. 202; Chapter 8 pp. 258-259.
[739] See below Chapter 7 pp. 179=180.
[740] C. L. R. C. *7th Report, Felonies and Misdemeanours,* (1967); see above p. 125.
[741] [1961] 3 All ER 371 at p. 385.
[742] See above pp. 125-126.
[743] (1850) 2 Den 35 SHC 7.
[744] C. Clarkson et al. "Assaults, the Relationship Between Seriousness, Criminalization and Punishment" [1994] Crim. L. R. 4 at p. 12; see Chapter 4 p. 85.

be reluctant to report because of medical confidentiality. He may also fear damaging his relationship with the patient.[745]

In his judgement in *Sykes* Lord Denning suggests that some professionals would be excused for failing to report a felony.[746] He claimed that lawyers, doctors, clergymen and other professionals might have been able to claim that they had thought that their reporting of a crime committed by a client, patient or penitent would be against the public interest. Consequently, they would not be liable for failing to report. From Lord Denning's judgement it seems that the defence was not limited to those professionals whose duty of confidentiality has traditionally been recognised by English law. According to Lord Denning, it would also excuse an employer's failure to report his employee. Whilst this suggests that a wide class of individuals would be excused, in *Wilde*, a failure by employers to report their employee was prosecuted.[747] It seems therefore, that employers were not exempt from mandatory reporting. One possibility is that that *Wilde* can be distinguished because in that case the non-reporting employers were paid not to report.

The difficulty with Lord Denning's approach was that professionals were not exempt from misprision of felony, they were only excused *one* failure to report. Because of this, Glazebrook argued that a claim of right did not adequately exempt the professional from mandatory reporting. Although a claim of right would excuse an initial failure to report, having learnt of the duty to report, the professional would have to report.[748] Furthermore, the professional would have to report whether his client, through whom he learned about the offence, was the offender, the victim or a witness.

The offender's family did not receive even this limited protection. They would have had a duty to report under misprision of felony. This was confirmed after Sykes by a prosecution under misprision of felony for failing to report a family member.[749] Both Glazebrook and Allen claimed that the offender's family should not have had a duty to report. Glazebrook contended that requiring the offender's family to report him is "utterly callous and certainly futile". He

[745] See below Chapter 9 pp. 304-305, 333-334.
[746] [1961] 3 W. L. R. 371 at p. 386.
[747] [1960] Crim. L. R. 116
[748] P. R. Glazebrook, op. cit. p. 317; C. K. Allen, op. cit. pp. 58-9.
[749] *R. v Davies* [1961] Daily Telegraph September 23rd from C. K. Allen, op. cit. p. 59.

rejected professional duties being ranked higher than family love and loyalties.[750] Furthermore, Allen argued that although a wife would have to report her husband under misprision of felony, she would not be able to give evidence against him. It might be then that as well as being unjustified, this use of misprision of felony would have been ineffective.[751]

Since then PACE has extended the compellability of a defendant's spouse. According to subsection 80(3) of PACE, a defendant's spouse will be required to give evidence if the defendant is charged with a violent offence against either the spouse or a minor under the age of 16,[752] a sexual offence against a child under the age of 16,[753] or if the defendant is charged as an accessory to that type of offence.[754] The fact that the usual principal, that a defendant's spouse does not have to testify for the prosecution, is overruled in these situations is interesting. The offences included within s. 80(3) of PACE match those offences which carry a duty to report in the French Penal Code.[755] This might suggest that English criminal law would support a duty to report in relation to these offences. Furthermore, the development in the compellability of spouses in PACE might suggest a move towards prioritising the role of the spouse as a member of the community at the expense of his role as husband.

Sentence for Misprision of Felony

The defendant in *Sykes* had been sentenced to five years imprisonment. This was a longer sentence than that received by the men who had been charged with receiving the stolen guns. On appeal, the Court of Appeal, having compared Sykes' sentence with the sentence he would have received as an accessory, reduced his sentence and he actually served just under a year in prison.[756] The defendant in *Aberg* was sentenced to six months for the misprision of felony. She received an eighteen month sentence for giving an escaped prisoner a home.

---

[750] P. R. Glazebrook, op. cit. p. 318.
[751] G. Allen, op. cit. p. 59.
[752] PACE s. 80(3)(a).
[753] PACE s. 80(3)(b).
[754] A. Keane, *The Modern Law of Evidence*, 3rd Edition (1994) pp. 90-92; J. McEwan, *Evidence and the Adversarial Process*, 2nd Edition (1998) pp. 95-100.
[755] See below Chapter 7 pp. 174-197.
[756] [1961] 2 QB 9.

These sentences suggest that failing to report an offence was not considered to be as serious as actively helping the offender commit the offence.

Misprision and Liability for Omissions

Misprision of felony was regarded as a harsh law because it punished an individual for an omission. Traditionally, English criminal law has only imposed liability for omissions because of an individual's occupation, assumption of the duty or relationship with the beneficiary of the duty.[757] Misprision of felony however imposed liability because an individual fortuitously and without choosing it learnt that a serious offence had been or would be committed:

"Misprision thus differs from almost all other common law offences of omission in that the duty to act arises not because of the willing assumption of responsibility, the occupation of an office, or the ownership of property, but because of the mere possession of certain knowledge – knowledge possessed accidentally and undesired – knowledge which may have been acquired through some malevolent person."[758]

This quotation assumes that the non-reporter who learns of the offence does so blamelessly and by accident. By contrast, supporters of duties to report assume that a non-reporter will often learn of an offence because of his involvement with and support for the non-reporter. Given the different ways a third party may learn of an offence, first hand witness, report from victim, confession from offender, report from other witness and the different reasons for not reporting, it is unrealistic to classify all non-reporters as having been involved in the offence. Furthermore, the duty to report in misprision of felony was not limited to those whose knowledge of the offence was deliberate or blameworthy. One suggestion is that the law should distinguish between those individuals who fortuitously discover an offence, and those whose knowledge is due to their involvement. Mandatory reporting would only apply to the later type of non-reporters.

---

[757] A. Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 LQR 424; A. McCall Smith, "The Duty to Rescue and the Common Law" in M. Menlowe & A. McCall Smith, (ed), *The Duty to Rescue*, (1993), pp. 55-91; see above Chapter 2 pp. 39-45.
[758] P. R. Glazebrook, op. Cit. p. 311.

Compounding an Arrestable Offence

Under section 5 of the Criminal Law Act 1967, an individual who fails to report an offence because of consideration that he has received commits an offence. In *Sykes v D. P. P.*[759] the defendant had suggested that a non-reporter should only be punished if he had benefited from his failure to report. Whilst the House of Lords rejected this approach, it is interesting that the current law distinguishes between blameworthy and non-blameworthy failures to report on this basis.

"Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed, and that he has information which may be of material assistance in securing the prosecution or conviction of an offender for it accepts or agrees to accept for not disclosing that information consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be liable on conviction on indictment to imprisonment for not more than two years."

The duty to report in section 5 is limited in two ways. First, it is restricted to arrestable offences. Secondly, the offence is limited to those failures to report that were motivated by consideration that the non-reporter received. The first restriction is unlikely to be significant. The class of arrestable offences is extensive.[760] It is wider than the definition of *crimes* which limits mandatory reporting in the CP.[761] It is the second requirement, that the non-reporter was paid not to report, that is more significant. The idea that a non-reporter should not be allowed to benefit from his failure to report was expressed by Lord Westbury in the House of Lords decision in *Williams v Bayley.*[762]

"If men were permitted to trade upon the knowledge of a crime, and to convert their privity of that crime into an occasion of advantage, no doubt a great legal and moral offence would be committed."

Moreover, the fact that an individual has been paid for not reporting an offence means that the issue of whether he knows that an offence has been committed is less problematic.[763] An individual would be unlikely to pay another not to

[759] [1961] 3 W. L. R. 371.
[760] PACE s. 24; see above Chapter 4 pp. 70-71.
[761] CP Article 434-1; see above Chapter 5 pp. 93-94; see below Chapter 7 pp. 174-175.
[762] (1866) L. R. 1 H. L. 200.
[763] See above pp. 129-132.

report a non-existent crime or one which he did not already suspect or have evidence had been committed.

An individual, who does not report an offence because the offender compensates him for any loss suffered, is not liable. This allows the victim to choose how to react to the offence. This suggests that a case such as *Wilde*[764] would be unlikely to be prosecuted under section 5. In this case, employers, decided not to prosecute their employee, who had been stealing from them, if her relatives repaid the money stolen. Furthermore, it also suggests that the scope of any duty to report is determined by the wishes of the victim.

Misprision of Treason

Misprision of treason is the offence of concealing treason. The last conviction for misprision of treason was of one of the Cato Street conspirators in 1820.[765] Because there are no more recent decisions, the scope of misprision of treason has been analysed by comparing it to misprision of felony.

The purpose of misprision of treason is both to prevent treason and to punish traitors.[766] Accordingly, the offence includes both failing to report an offence and failing to identify the person responsible. An individual only has a duty to report treason if he knows that it has or will be committed. Nevertheless, whilst a person does not have to pass on gossip, liability is not limited to those individuals who witnessed the offence first hand.[767] Finally, it is probable that professions having a duty of confidentiality would be excused for failing to report, but that the offender's family would not be.[768]

Withholding Information About Terrorist Offences

According to section 18 of PTA 1989, a person is guilty of an offence if he withholds information which would be of material assistance, either in the

[764] [1960] Crim. L. R. 116.
[765] *R. v. Thistlewood* (1820) 33 St. Tr. 681.
[766] See above p. 128.
[767] See above p. 131.
[768] See above pp. 132-134.

prevention of an act of terrorism, or in securing the apprehension, prosecution, or conviction of a terrorist offender:

> "A person is guilty of an offence if he has information which he knows or believes might be of material assistance –
> (a) in preventing the commission by any other person of an act of terrorism connected with the affairs of Northern Ireland; or
> (b) in securing the apprehension, prosecution or conviction of any other person for an offence involving the commission, preparation or instigation of such an act of terrorism, and fails without reasonable excuse to disclose that information as soon as reasonably practicable –
> i) in England and Wales, to a constable
> ii) in Scotland to a constable or to the procurator fiscal; or
> iii) in Northern Ireland, to a constable or to a member of Her Majesty's Forces."

The Criminal Justice Act 1993 s. 51 added a duty to report suspicion or knowledge that an individual is providing financial assistance to a terrorist group. This can be found in section 18A of the PTA 1989.

> "A person is guilty of an offence if –
> (a) he knows, or suspects, that another person is providing financial assistance for terrorism;
> (b) the information, or other matter, on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment; and
> (c) he does not disclose the information or other matter to a constable as soon as it is reasonably practicable after it comes to his attention."

What Offences Carry a Duty to Report?

Section 18 requires an individual to report "acts of terrorism" and the individuals responsible. Terrorism is defined in section 20 of Prevention of Terrorism (Temporary Provisions) Act 1989 as "the use of violence for political ends, [including] any use of violence for the purpose of putting the public or any section of the public in fear." Initially, the anti-terrorist legislation was aimed at the conflict in Northern Ireland, but later international terrorism was included. The definition of terrorism has been further extended by the Terrorism Act 2000 and it now includes domestic terrorism.[769]

Section 18A focuses on the financing of terrorist offences. Its aim is to prevent terrorist acts by stopping the funds available to terrorist organisations.

[769] Terrorism Act 2000 s. 1(c).

Both section 18 and section 18A require that the offence is reported and that the terrorist, if known, is identified. Furthermore, the duties to report terrorism are aimed both at preventing terrorism and at identifying terrorist offenders. In relation to section 18, paragraph (a) relates reporting to the prevention of offences, whilst paragraph (b) links reporting to the prosecution of terrorist offenders. As for section 18A, the financial assistance, which carries a duty to report, is likely to be ongoing. Reporting this type of offence will therefore help identify and prosecute the individual who has provided the terrorist with financial assistance and prevent this assistance continuing.

Knowledge of the Offence

Section 18 requires that an individual pass on information that may be of "material assistance" in the prevention of an act of terrorism or in the investigation, prosecution and conviction of the terrorist offender. It is claimed that this requirement, that the information be of material assistance excludes rumours and gossip.[770] The Act does not specify all the circumstances when an individual will have information that would be of material assistance. Instead, it seems that an objective standard is used – would an ordinary member of the public consider the information to be of material assistance.

Even if section 18 does not require an individual to report gossip or other unreliable information, it might nonetheless encourage such reports. Rather than risk liability, an individual might decide to report even if he has little information that an offence has or will be committed. Moreover, the duty to report might make reporting the norm. This too may encourage unreliable or even malicious reports.[771]

The duty to report under section 18A is more restricted. Under this provision there is only a duty to report information that was acquired in the course of a trade, business or employment.[772] This is unsurprising. Given the nature of the offences that carry a duty to report under section 18A, it is probable that these would be offences that an individual would only discover because of his professional duties. Moreover, the fact that the reporter is a professional

[770] C. Walker, *The Prevention of Terrorism in British Law*, 2nd Edition (1992), p. 131.
[771] See below Chapter 10 pp. 351-352.
[772] Prevention of Terrorism (Temporary Provisions) Act 1989 section 18A (1)(b).

means that he will have the training and experience to recognise that an offence has been committed.

Excusing Non-reporting

Under PTA 1989, a non-reporter is only liable if he did not have a reasonable excuse for his failure to report. An important aspect of this is whether it will excuse the family member who does not report and whether a professional's duty of confidentiality will excuse a failure to report.

A professional is unlikely to have to betray a professional confidence and report. In particular, he is unlikely to have a duty to report the past terrorist offences of his client.[773] Furthermore, the professional, who decides not to report because of his duty of confidentiality, is better protected than he would have been under misprision of felony. Unlike misprision of felony, which only excused the first failure to report,[774] it seems that under section 18, professional confidentiality will also justify subsequent decisions not to report.

On the other hand, the extent to which professional ethics will excuse a failure to report will vary according to the profession. Lawyers will be especially unlikely to have to report under section 18.[775] Other professionals, however, may be required to report both future and even past terrorist offences.[776]

Family members seem to be less well protected. They have no legal justification for their decision not to report. Home Office Circulars have advised the police only to use the offence against them in extreme circumstances, if this withholding of information has lead to death, serious injury or the escape of a prisoner.[777] The fact remains though that, because of their proximity to offenders and relationship with them, family members may be an important source of information for the police. It is questionable to what extent the police will abstain from using the offence against them, at least as a bargaining

---

[773] C. Walker, op. cit. p. 152.
[774] *Sykes v D. P. P* [1961] 3 W. L. R. 371; P. R. Glazebrook, "How Long, Then is the Arm of the Law to Be" (1962) 25 M. L. R. 301; see above pp. 132-133.
[775] J. McHale, *Medical Confidentiality and Legal Professional Privilege,* (1993); R. Lee, "Disclosure of Medical Records, A Confidence Trick" in L. Clarke, (ed), *Confidentiality and the Law*, (1990), pp. 23-44.
[776] A. Jennings, *Justice under Fire, The Abuse of Civil Liberties in Northern Ireland,* (1988), p. 163.
[777] H. O. Circular No. 90/1983 para. 9; H. O. Circular No. 27/1989 para. 7.4.

tool.[778] Furthermore, the fact that this limitation is suggested for family members might suggest that outside the family the use of section 18 is far wider.

A further difficulty is whether section 18 represents a departure from the right to silence. If an individual is required to report terrorism, can he be punished for failing to report terrorist activity in which he is implicated? Reviews of the legislation have stressed that this is not the purpose of section 18. Mandatory reporting of terrorism requires that an individual report another's terrorism, not confess his own.

Section 18A is limited to information that a reporter discovers during the course of their employment. It is extremely unlikely that this would ever apply to the offender's family. As for professionals, according to subsection (2) legal professional privilege excuses non-reporting.[779] It seems, therefore, that this section does recognise the professional's conflict between reporting and their duties of confidentiality.

The Use of Section 18

The offence of withholding information about terrorist offences was originally intended to enable the police to deal with individuals who were important to the success of terrorist outrages, but who were on the periphery, and who could not be charged under any other offence.

> "the situation in practice is more likely to be that a prosecution is brought against ten people, for example, for a given outrage, two of them being charged with committing the act and conspiring to do it, and the others being charged formally with conspiracy. It may be that the jury is satisfied that some of the accused did it and some of the accused conspired to do it. The jury may, on the evidence, be satisfied that those persons knew about it and could have informed the police. I suggest that this is a realistic scenario. As the law stands, the people found to have knowledge but who did not conspire could not be convicted of anything. I suggest that there is a situation we should remove."[780]

This would suggest that section 18 is used to prosecute individuals who are less directly involved in terrorism and those terrorists against whom the police

---

[778] See below p. 142.
[779] Prevention of Terrorism (Temporary Provisions) Act 1989 section 18A (2).
[780] George Cunningham M. P. quoted in C. Scorer & P. Hewitt, *The Prevention of Terrorism Act, The Case for Repeal*, (1981), pp. 54-5.

do not have sufficient evidence to charge them with direct involvement in the offence. Walker suggests that section 18 is used as an insurance measure when there is not enough evidence to charge with other more serious offences, or as a means to prosecute lesser terrorists.[781]

Nevertheless, according to statistics, section 18 is rarely prosecuted and there are few arrests under the provision. Between 22nd March 1984 and 31st December 1997, there was only one conviction under s. 18 and only five cases of non-reporting were prosecuted. Furthermore, only fifteen people were detained because they were suspected of withholding information.[782] This low prosecution rate suggests that section 18 is not needed or that it has been ineffective. In fact, the low prosecution rate and its minimal effect on reporting levels have been used as arguments against introducing a similar duty into the Terrorism Act 2000.[783]

On the other hand, supporters of mandatory reporting of terrorism claim that its use and effectiveness is not demonstrated by the prosecution rate but by the information about terrorism that has been obtained by it. In Lord Jellicoe's review of the anti-terrorist legislation[784] he considers the use of mandatory reporting and attitudes towards it. He discovered that since its introduction the majority of police officers had come to consider the duty to be very useful. They believed that the offence was useful and should be retained because it had acted as a bargaining tool to persuade the individual to report a terrorist offence or a terrorist offender. The suggestion being that without the offence, this information would not have been obtained.

The Terrorism Act 2000 retains a duty to report terrorist offences. Even though the duty is less extensive than that in the Prevention of Terrorism (Temporary Provisions) Act 1989 s. 18, the Government decided to retain some form of mandatory reporting because of its symbolic value in showing disapproval of terrorism and those who failed to report terrorism. Moreover, it was noted that the Irish Government had introduced a similar duty to that in section 18.

---

[781] C. Walker, op. cit. pp. 138-9.
[782] *Statistics on the Operation of the Prevention of Terrorism Legislation in Great Britain in 1997* Home Office Statistical Service, (1998).
[783] Home Office, *Legislation Against Terrorism*, (1998), Chapter 12, paragraphs 5-7.
[784] G. Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976,* (1983), paragraph 221.

The Terrorism Act 2000

The duty to report in the Terrorism Act 2000 is more limited that that in the PTA. The new duty in section 19 of the Terrorism Act is limited to the financial offences. Furthermore, the individual only has to report information that he has acquired through a business, trade, profession or employment. Section 19 of the new Act corresponds to section 18A of the PTA.

"(1) This section applies where a person –
(a) believes or suspects that another person has committed an offence under any of sections 14 to 17, and
(b) bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment.

(2) The person commits an offence if he does not disclose to a constable as soon as is reasonably practicable -
(a) his belief or suspicion, and
(b) the information on which it is based.

(3) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure.

(4) Where –
(a) a person is in employment,
(b) his employer has established a procedure for making disclosures of the matters specified in subsection (2), and
c) he is charged with an offence under that subsection
it is a defence for him to prove that he disclosed the matters specified in that subsection in accordance with the procedure.

(5) Subsection (2) does not require discloser by a professional legal adviser of –
(a) information which he obtains in privileged circumstances, or
(b) a belief or suspicion based on information which he obtains in privileged circumstances.

(6) For the purpose of subsection (5) information is obtained by an adviser in privileged circumstances if it comes to him, otherwise than with a view to furthering a criminal purpose –
(a) from a client or a client's representative, in connection with the provision of legal advice by the adviser to the client,
(b) from a person seeking legal advice from the adviser or the person's representative, or
c) from any person for the purpose of actual or contemplated legal proceedings.

(7) For the purposes of subsection (1) (a) a person shall be treated as having committed an offence under sections 14 to 17 if –
(a) he has taken an action or has been in possession of a thing, and
(b) he would have committed an offence under one of those sections if he had been in the United Kingdom at the time when he took or was in possession of the thing.

(8) A person guilty of an offence under this section shall be liable -
(a) on conviction on indictment to imprisonment for a term not exceeding five years to a fine or both , or
(b) on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum or both."

Knowledge

Under the Terrorism Act 2000, an individual has to report if he believes or suspects that an offence will be committed. This seems a lot wider than the PTA which limited reporting to those offences that a person *knew* about.[785] Nevertheless, it is unlikely that the Terrorism Act will require the passing on of gossip or will encourage unreliable or malicious reports. It is limited to those financial offences that a professional discovers whilst exercising his profession and when reporting an individual has to detail the information that he is relying on as well as report the offence and identify the offender.[786]

In common with the PTA legal professional privilege excuses a failure to report.[787] Furthermore, under subsection (4) it is also a defence for an individual to have reported to a work superior. This defence is probably due to the duty being based around information that an individual will discover because of his profession.

The Justifications for the Mandatory Reporting of Terrorism

One argument for the mandatory reporting of terrorist offence might be that it is needed because terrorist offences are unlikely to be reported voluntarily. Nevertheless, it is difficult to assess this because it may be that the low level of reporting of terrorist offences is because few terrorist offences are discovered rather than because individuals are reluctant to report. Moreover, even those individuals, who discover terrorist offences, might decide not to report because they fear reprisals from the terrorist organisation. In this situation their failure to report would, in any case, be excused.[788] Finally, it seems that, in fact, section 18 of PTA has very rarely been prosecuted and has only had a minimal effect on reporting.

[785] See above pp. 139-140.
[786] Terrorism Act 2000 s. 19(2)(b).
[787] Terrorism Act 2000 s. 19(5).
[788] Prevention of Terrorism (Temporary Provisions) Act s. 18 (1); Terrorism Act 2000 s. 19 (3).

Another reason why terrorism might be singled out for a duty to report is because of the seriousness of terrorist offences.[789] On the other hand, other serious offences, for example murder and rape do not carry a duty to report. It is the terrorist's political or ideological motivation that distinguish him from these other offenders, does this justify there being a duty to report the terrorist whilst there is not a duty to report these other serious offenders? Furthermore, however serious the effects of terrorism are, these are due to the active terrorist offender, rather than the non-reporter.[790]

The Duty to Report Road Accidents and Road Traffic Offences.

Under Road Traffic Act 1988 the driver or owner of a vehicle has a duty to report the individual responsible for a traffic accident or traffic offence. These duties may be the most frequent use of mandatory reporting.[791] Whilst few individuals are likely to discover terrorist offences, widespread car ownership means that more people might be the owners or drivers of vehicles involved in car accidents or offences. Unlike misprision of felony, or the duties to report terrorism, the duties to report under the Road Traffic Act 1988 are not explained by the seriousness of the offences involved.[792] Instead, the justification for these duties is that they help to identify the driver responsible. Not only will reporting enable the police to investigate that incident, but it is also possible that other offences will also be revealed by the report.[793] In addition, identifying the offender may enable anyone injured because of the accident or the offence to bring a civil claim against the person responsible.

Section 170 of the Road Traffic Act 1988 (RTA 1988) imposes a duty on a driver involved in an accident, which either injures someone else or causes damage, to stop, give information about himself and his vehicle and to report the accident to the police. If the accident has injured someone, he also has to produce his insurance details. In *Roper v. Sullivan*[794] it was decided that a

---

[789] See below Chapter 7 pp. 188; Chapter 9 pp. 284-285.
[790] See above Chapter 2 pp. 24-25; below Chapter 9 p. 283.
[791] See below Chapter 9 p. 280.
[792] D. W. Elliott & H. Street, *Road Accidents*, (1968), pp. 137-159; C. Cobbett & F. Simon, "Police and Public Perceptions of the Seriousness of Traffic Accidents" (1991) 31 British Journal of Criminology 153.
[793] D. W. Elliott and H. Street, op. cit. p. 119.
[794] [1978] RTR 181.

driver could be guilty of failing to report under section 170 (4) if he had either, stopped and then failed to report, or he had not stopped at all. The driver who neither stopped, nor reported committed two offences, namely failing to stop under section 170 (2) and failing to report under section 170 (4).

"(1) This section applies in a case where owing to the presence of a mechanically propelled vehicle on a road, an accident occurs by which-

(a) personal injury is caused to a person other than the driver of that mechanically propelled vehicle, or

(b) damage is caused-

(i) to a vehicle other than that mechanically propelled vehicle or a trailer drawn by that mechanically propelled vehicle, or

(ii) to an animal other than an animal in or on that mechanically propelled vehicle or a trailer drawn by that mechanically propelled vehicle, or

(iii) to any other property constructed on, fixed to, growing in or otherwise forming part of the land on which the road in question is situated or land adjacent to such land.

(2) The driver of the mechanically propelled vehicle must stop and, if required to do so by any person having reasonable grounds for so requiring, give his name and address and also the name and address of the owner and the identification marks of the vehicle.

(3) If for any reason the driver of the mechanically propelled vehicle does not give his name and address under subsection (2) above, he must report the accident.

(4) A person who fails to comply with subsection (2) or (3) above is guilty of an offence.

(5) If, in a case where this section applies by virtue of subsection (1) (a) above, the driver of a motor vehicle does not at the time of the accident produce such a certificate of insurance or security, or other evidence, as is mentioned in section 165 (2) (a) of this Act –

(a) to a constable, or

(b) to some person who, having reasonable grounds for so doing, has required him to produce it,

the driver must report the accident and produce such a certificate or other evidence.

This subsection does not apply to the driver of an invalid carriage.

(6) To comply with a duty under this section to report an accident or to produce such a certificate of insurance or security, or other evidence, as mentioned in section 165 (2) of this Act, the driver –

(a) must does so at a police station to a constable, and

(b) must do so as soon as is reasonable practicable and, in any case, within 24 hours of the occurrence of the accident.

(7) A person who fails to comply with a duty under subsection (5) above is guilty of an offence, but shall not be convicted by reason only of a failure to produce a certificate, or other evidence if, within seven days after the occurrence of the accident, the certificate or other evidence is produced at a police station that was specified by him at the time when the accident was reported.

(8) In this section "animal" means horse, cattle, ass, mule, sheep, pig, goat or dog.

Under section 172 the keeper of the vehicle involved in certain road traffic offences and other individuals have a duty to identify the driver of the vehicle.

(1) This section applies
(a) to any offence under the preceding provisions of this Act except –
(i) to any offence under Part V, or
(ii) an offence under section 13, 16, 51(2), 61(4), 67(9), 68(4), 96 or 120
and to an offence under section 178 of this Act,

(b) to any offence under sections 25, 26 or 27 of the Road Traffic Offenders Act 1988

(c) to any offence against any other enactment relating to the use of vehicles on the roads, except an offence under paragraph 8 of Schedule 1 to the Road Traffic (Driver Licensing and Information Systems) Act 1989, and

(d) to manslaughter, or in Scotland culpable homicide by the driver of a motor vehicle.

(2) Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies -
(a) the person keeping the vehicle shall give such information as to the identify of the driver as he may be required to give by the chief officer of the police, and
(b) any other person shall if required as stated above give any information which it is in his power to give and may lead to the identification of the driver.

(3) Subject to the following provisions, a person who fails to comply with a requirement under subsection (2) above shall be guilty of an offence.

(4) A person shall not be guilty of an offence by virtue of paragraph (a) of subsection (2) above if he shows that he did not know and could not with reasonable diligence have ascertained who the driver of the vehicle was.

(5) Where a body corporate is guilty of an offence under this section and the offence is proved to have been committed with the consent or connivance of or to be attributable to neglect on the part of a director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly.

(6) Where the alleged offender is a body corporate, or in Scotland a partnership or unincorporated association, or the proceedings are brought against him by virtue of subsection (5) above or subsection (11) below, subsection (4) above shall not apply unless in addition to the matters there mentioned, the alleged offender shows that no record was kept of the persons who drove the vehicle and that the failure to keep a record was reasonable.

(7) A requirement under subsection (2) may be made by written notice served by post and where it is so made -
(a) it shall have effect as a requirement to give information within the period of 28 days beginning with the day on which the notice is served, and
(b) the person on whom the notice is served shall not be guilty of an offence under this section if he shows either that he gave the information as soon as reasonably practicable after the end of that period or that it has not be reasonably practicable for him to give it.

(8) Where the person on whom the notice under subsection (7) above is served is a body corporate, the notice is duly served if it is served on the secretary or clerk of that body.

Who has a Duty to Report?

Under section 170 it is the driver who has the duty to report. He can not avoid liability by nominating someone else to remain at the scene and give his details.[795] The driver's duty to report can be interpreted as the responsibility that comes with the benefit of the use of the vehicle. Furthermore, the driver has control of the vehicle. It is reasonable therefore that he should be responsible for accidents caused by the vehicle.

Although it is the driver who primarily has a duty to report, another individual may also be liable for failing to stop or report. In *Bentley v. Mullen*[796] an accident occurred involving a car that was driven by a learner driver. The defendant, who was supervising the learner's driving, did not prevent the learner from leaving the scene. According to the Divisional Court, the supervisor was liable for aiding and abetting the learner's failure to remain at the scene of the accident. Significantly, in this case, it may well have been the supervisor, rather than the driver, who controlled the vehicle.[797]

Under section 170, the driver does not have to report an accident if he was unaware that it had occurred and it was reasonable for him not to have realised.[798] Once the driver realises that an accident has occurred, he has to report the accident within 24 hours.[799]

---

[795] *Lee v. Knapp* [1967] 2 QB 442.
[796] [1986] RTR 7.
[797] See below pp. 156-157.
[798] *Harding v. Price* [1948] 1 KB 695; *Hampson v Powell* [1970] All E R 929.
[799] *Director of Public Prosecutions v Drury* [1989] RTR 165.

Under section 172 the keeper of the vehicle has a duty to report. This may be because the keeper of the vehicle will be especially able to identify who was using the vehicle and therefore who was involved in any of the offences that carry a duty to report under this section. In addition to the vehicle's keeper, according to subsection (2) (b), other individuals may also have a duty to identify the driver. Despite their duties of confidentiality, this may include professionals such as doctors. In *Hunter v Mann* a doctor's duty of confidentiality did not excuse his failure to identify a dangerous driver.[800]

Whilst misprision of felony, compounding an arrestable offence and withholding information about a terrorist offence are concerned with reporting another individual's offending, in section 170 it will often be the driver who is responsible for an accident and who then has to report that accident. Similarly, the keeper of the vehicle will often be the driver therefore the driver and person responsible for the offences will have to report under section 172. Because of this there is the danger that an individual can be punished for failing to report offences that he has committed, and that both sections contravene the right not to self incriminate.[801] This issue was considered in a recent Scottish case. The Court of Sessions determined that the duty to report under section 172 of the Road Traffic Act was contrary to the right not to self incriminate. Accordingly it would not allow a woman's admission under section 172 that she was the driver to be used against her.[802] The Procurator Fiscal appealed and the Divisional Court allowed the appeal.[803] It decided that the right not to self incriminate was not absolute and in this case it needed to be balanced against the need to enforce road traffic legislation.

What Accidents does the Driver have a Duty to Report?

A driver does not have to report an accident if it only injures him or causes damages to his property. If however, another person is injured or suffers loss in the accident, the driver must report even if this damage or injury is extremely trivial.[804]

---

[800] [1986] RTR 7.
[801] *Robert Jardine Hamilton v Procurator Fiscal* [1998] ScotHC 15.
[802] *Brown v Procurator Fiscal* Times 14th February 2000.
[803] *Brown v Stott* [2001] 2 WLR 817.
[804] D. W. Elliott and H. Street, op. cit. p. 147.

It is not clear whether a driver will have a duty to report if the accident causes psychiatric rather than physical injury to another road user. Although, in an Australian case, *Clements v. Gill*[805], it was held that there was no duty to report when a pedestrian had been dazed and shaken, it may be that there is a duty to report an accident that has injured an individual mentally rather than physically.[806] One problem with this would be whether the driver would be able to recognise that the person was injured psychologically. It is possible that a duty to report psychological injury would be ineffective and would be unlikely to be punished.[807]

As to damage, a driver could be liable even if his vehicle is the only vehicle involved. The definition of animals given in subsection (8) implies that the subsection is only concerned with animals that have an agricultural or commercial use. It could be that the injuring these animals has greater potential for causing subsequent losses and that the cost of injuries to these animals would be easier to quantify. Whether there has been personal injury or damage it must been shown that the accident was caused by the presence of the vehicle on the road.[808]

It seems therefore that the duty to report under section 170 is broadly defined. Is this mandatory reporting limited in practice by the use made of it by police and prosecutors? Is arrest and prosecution for non-reporting under section 170 restricted to failures to report serious accidents? In reality if the accident is minor and the individuals involved resolve how to pay for any damage between them, the police are unlikely to learn that there was an accident, and consequently that that accident has not been reported contrary to section 170(4).

On the other hand, the victim of the accident does not need to approve the prosecution. Furthermore, although one justification for section 170 might be that it helps victims bring civil claims, a driver can still be prosecuted under section 170 even if the victim could have claimed against the driver without the duty to report. An example of this is the case of *Kingston upon Thames Crown*

---

[805] [1953] SASR 25.
[806] Miller [1954] 2 QB 282.
[807] See above p. 148.
[808] R. McMahon, *A Practical Approach to Road Traffic Law*, (1994), pp. 102-3.

court ex. Parte Scarll[809] when a motorist was prosecuted under section 170 for failing to give his details even though the victim knew him and did not need him to give his name or address.

In their discussion of road accidents, Elliott and Street contend that "road accident" is a broad category. They recommend dividing road accidents into two categories. Whilst there would still be a duty to report all accidents, a driver would also be liable for a failure to render assistance where assistance was necessary due to the presence of his vehicle on the road.[810] Given the fact that English criminal law already recognises that a person who causes damage is liable for failing to correct that damage,[811] it is questionable whether Elliott and Street's suggestion would extend the law.

Obstruction

Under section 89(2) of the Police Act 1996,[812] it is an offence to obstruct a police officer in the execution of his duty.

> "Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level three on the standard scale, or both."

There are two elements to this offence, first that the police officer be acting in the course of his duty and, secondly, that the citizen makes that duty more difficult.[813] It is unlikely that a failure to report an offence would fulfil these requirements.

The Duty of the Police

The offence of obstruction can only be committed if the police constable concerned is acting in the "execution of his duty." Although a police officer will obviously be acting within his duty if he is carrying out a specific function that he has under a statute or other provision, whether the duty is wider than this is

---

[809] [1990] Crim. L. R. 429.
[810] D. W. Elliott and H. Street, op. cit. p. 147.
[811] *Miller* [1983] 2 AC 261; see above Chapter 2 pp. 41-42.
[812] Previously Police Act 1964 s. 51(3), Prevention of Crimes Amendment Act 1885 s. 12.
[813] See below pp. 153-154.

more controversial. One possibility is that the police officer's duty is to identify and detain offenders and to preserve the peace. An example of this interpretation can be found in Lord Parker's judgement in *Rice v Connolly*:[814]

"It is also in my judgement clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."

From a crime control perspective this approach is preferable. It enables the police to determine the powers that they need to effectively investigate and prevent crime.[815] The disadvantage is that whether an individual is obstructing the police will depend on the police interpretation of their duty and needs.[816] Arguably this allows the police too much discretion and may be too vague.[817]

There is the danger that a general police duty will be too great a restriction on individuals' autonomy. Because of these fears, some commentators prefer a narrower definition of "police duty", according to this, although the general objective of the police force is to prevent crime and identify offenders, the police can only require an individual to do or to refrain from doing something if they are relying on a special power in addition to their general crime prevention mission.[818] In some evaluations this has produced a tripartite division of the balance between police duties (or powers) and individual liberty.[819] At the one extreme is the police officer who is acting under a particular duty. This specific duty will empower him to require a citizen to act or to refrain from acting in a certain way, for example, the police can only require an individual to stop his car, or to answer questions if they have a specific duty and power.[820] At the other extreme, if the police officer is neither following a particular power, or acting within his general crime prevention/peace-keeping mission, he has no control over the individual. In this situation, the police officer can be equated to

---

[814] [1966] 2 Q. B 414 at p. 419.
[815] H. Packer, *The Limits of Criminal Sanction*, (1969); M. King *The Framework of Criminal Justice,* (1980), pp. 16-19.
[816] K. W. Lidstone, "A Policeman's Duty not to Take Liberties" [1975] Crim L. R. 617; T. Daintith, "Disobeying a Policeman, A Fresh Look at *Duncan v Jones*" [1966] P. L. 248.
[817] T. Gibbons, "Obstructing a constable – The Emergence of a New Duty to Co-Operate With the Police." [1983] Crim. L. R. 21 at p. 25.
[818] K. W. Lidstone, "Obstructing Freedom?" [1983] Crim. L. R. 29 at p. 30.
[819] S. A. Robilliard & J. McEwan, *Police Powers and the Individual*, (1986), pp. 45-54.
[820] *R. v Waterfield* [1964] 1 QB 164, *Rice v Connolly* [1966] 2 Q. B. 414.

the ordinary citizen, and just as there is no offence of obstructing the citizen in the exercise of his duty, in this case the individual can not be said to be obstructing the police officer.

This leaves the situation where the police officer is investigating an offence, or preserving the peace, and therefore acting within his general duty, but does not have a specific duty or power. In this situation whilst inhibiting and hindering the police officer will be an obstruction, the citizen will not have any duty to help or assist the police officer. Lidstone gives the example of an individual who hinders a police campaign, by warning drivers of a speed trap, or publicans of a check on licensing laws. According to Lidstone, it is because the police in *Green v Moore*[821] were not acting against the defendant probationer constable, or requiring him to do anything to assist them that the police did not need a specific power and the defendant's conviction for obstruction was justified.[822]

As regards failure to report a crime, generally the police have no power to require people to report crime. As a result it is unlikely that a failure to report a crime could be an obstruction. Furthermore, the leading case of *Rice v Connolly*[823] may be analogous. In this case the defendant, who refused to answer police questions, had not obstructed the police because his obstruction was not wilful. Lord Parker determined that the refusal to answer questions was not wilful because the common law right to refuse to answer questions meant that there was a legal basis to his (in)actions. Whether the same reasoning would prevent a failure to report being obstruction is debatable. It might be argued that failing to report another's offence would not be justified by the right against self-incrimination and therefore could be defined as "wilful". On the other hand, there are few specific duties to report, and it is doubtful that a police officer could claim that he had the power to compel someone to report.

More Difficult?

Although the police rely on the public reporting crimes and giving information about the individual(s) who are responsible,[824] a failure to report an offence

[821] [1982] 1 All E. R. 428.
[822] K. W. Lidstone, "Obstructing Freedom" [1983] Crim L. R. 29.
[823] [1966] 2 Q B 414.
[824] N. Fielding, "Being Used by the Police" (1987) 27 British Journal of Criminology 64; D. Steer, *Uncovering Crime, The Police Role*, (1980).

does not damage a police investigation. It merely fails to advance or assist that investigation. It seems therefore that rather than making an investigation more difficult, or harming it, a failure to report, is a failure to benefit the investigation.[825] This suggests that, in fact, most non-reporters could not be prosecuted for obstructing a police officer in the exercise of his duty.

The Citizen's Duty to Help the Police Preserve the Peace[826]

It is a common law indictable offence for an individual to refuse to assist a police officer deal with a breach of the offence, or to refuse to help a police officer who has been assaulted or obstructed whilst carrying out an arrest. This offence has its origins in the old duty of hue and cry, the obligation of every citizen to deal with criminal activity and breaches of the peace.

Is there a Duty to Report?

The three reported convictions for failing to assist a police officer in preventing a breach of the peace all involved a request for physical assistance.[827] However, restraining a rioter may not be the only way a member of the public can assist a police officer deal with a breach of the peace. Another way might be to identify the individuals responsible. This raises the question of whether this offence could be used to require reporting.

In his evaluation of this offence, Nicolson is concerned that if it were interpreted as also requiring the citizen to identify offenders, this would contradict section 5 of the Criminal Law Act 1967. Whereas under that provision, an individual is only liable for a failure to report if he has been paid not to report,[828] if this offence could be used to require the reporting of public order offences, liability for non-reporting would no longer be restricted to those instances when the non-reporter had been paid. This argument ignores the distinction between general duties to report offences and offenders and specific duties targeted at particular offences or circumstances.[829] Section 5 abolished the old offence of

---

[825] See above Chapter 2 pp. 28-29.
[826] D. Nicolson, "The Citizen's Duty to Assist the Police." [1992] Crim. L. R. 611.
[827] *Brown* [1841] Car. & M. 314; *Sherlock* [1886] L.R. 1. C.C.R. 20; *Waugh* The Times, October 1st 1976.
[828] See above pp. 136-137.
[829] P. R. Glazebrook, op. cit. pp. 307-311.

misprision of felony, a general offence of failing to report. Requiring an individual to point out to the police when required who was/were responsible for a breach of the peace would be a specific duty to report. Moreover, there is no general duty to assist the police by helping them arrest someone or by restraining an offender. These duties are only available in order to prevent a breach of the peace. If the powers of the police and responsibilities of the citizen can be extended in this respect, can they not also be extended to require that individuals point out those responsible for a breach of the peace?

The more pertinent question is whether it is appropriate for the citizen to have any specific duties to assist the police if they are dealing with breaches of the peace. It is contended that as both the scope of this duty and the nature of a breach of the peace itself[830] are ill defined the citizen risks having an overwhelming duty imposed on him. It is difficult to predict when this duty will arise. Furthermore, this offence can also be criticised because it depends on the police officer's discretion.[831] He will decide whether there is a breach of the peace and whether there is a need for assistance from the public.

Finally, it seems that there is little support for the duty from the police.[832] In his study of public order policing, Waddington found that the police preferred to negotiate with the public rather than rely on their powers.[833] They believed that policing by consensus was more effective than relying on powers that were ill defined and risked being subsequently reviewed and criticised by a court.[834] Therefore, it seems extra duties to assist in preventing or quelling a breach of the peace can be criticised both for being unwarranted and ineffective.

Liability as an Accessory

Although English criminal law recognises that individuals, other than the principal offender, may be responsible for an offence,[835] it is doubtful whether accessorial liability would stretch to include the non-reporter. Unlike active

---

[830] A. T. H. Smith, *The Offences Against Public Order Including the Public Order Act 1986,* (1987), pp. 174-176.
[831] D. Nicolson, op. cit. p. 621.
[832] See below Chapter 9 p. 279.
[833] P. A. J. Waddington, *Liberty and Order, Public Order Policing in a Capital City*, (1994), pp. 58-64.
[834] Ibid. p. 59.
[835] Accessories and Abettors Act 1861.

accessories, the non-reporter has not done anything to promote the offence.[836] The most that can be said is that he has not prevented it and that this may have encouraged the offender. It might also be argued that by failing to report the offence, the non-reporter is showing his support for the offence, whilst this may be true in some cases, some individuals will decide not to report for other reasons.[837] Moreover, even if the non-reporter does support the offender, unless he has done something to show this support and help the offender, he does not deserve to be punished.

Liability for omissions

Generally an individual will not be liable as an accessory for not reporting or otherwise preventing an offence. The exception to this is if an individual had control over the principal offender and chose not to exercise that control. In this case, his failure to act is interpreted as encouragement and incentive to the principal offender rather than as merely neutral. A clear formulation of this can be found in the jury direction in *R v Forman and Ford.*[838]

> "If one police officer, despite being in the presence of another officer, has the added confidence to assault their joint prisoner because he can and does rely on the second officer neither to intervene to prevent nor afterwards reporting the offence, and the second officer in fact refrains from intervening and from reporting the offence, then it does not matter which of the two of them struck their prisoner and which of them in that way encouraged him to do it. Both of them are guilty of the assault."

The existence of a duty to control and therefore to prevent offences has been especially marked in road traffic offences.[839] Drivers, owners who are passengers, and in the case of learner drivers, supervisors,[840] have all been held liable for their failure to control another person in the vehicle. In the earlier cases, the novelty of motor vehicles would have made driving a car seem a necessarily dangerous pursuit. Furthermore, car ownership was a rare luxury. Given the potential for an accident and the expense of cars, it was

---

[836] K. J. M. Smith *A Modern Treatise on the Law of Criminal Complicity*, (1991), pp. 34-47, H. Benyon, "Causation, Omissions and Complicity" [1987] Crim. L. R. 539.
[837] R. A. Duff, "Can I Help you? Accessorial Liability and the Intention to Assist." [1990] L. S. 165; G. R. Sullivan, "Intent, Purpose and Complicity." [1988] Crim. L. R. 641; I. H. Dennis, "Intention and Complicity: A Reply." [1988] Crim. L. R. 649.
[838] [1988] Crim. L. R. 677.
[839] D. Lanham, "Drivers, Control and Accomplices" [1982] Crim. L. R. 419, G. Williams, "Which of You Did It?" (1989) M. L. R. 177 at pp. 181-183
[840] *Du Cros V Lambourne* [1907] 1 K. B. 40, *Rubie v Faulkner* [1940] 1 K. B. 40, G. Williams, "Which of You Did It?" (1989) 52 M. L. R. 177 at pp. 181-183.

reasonable to extend liability beyond the driver and continue to hold the owner of a vehicle responsible for any accidents caused. It was neither likely that he would in fact relinquish all control over the use of the car, nor sensible that the law should allow him to do so. Nowadays, it is perhaps because of the increased and widespread car ownership and the consequent growth in car accidents that requiring some passengers to control a driver is seen as necessary and effective.

Intention

Another problem with holding the non-reporter liable as an accessory is that he may have chosen not to report for other reasons than because he wanted to assist the active offender. He may not have reported because of his professional duties of confidentiality.[841] He may not have reported because he thought that involving the police was not the most effective way to help the victim or deal with the offender.

Following important and seemingly contradictory cases such as *National Coal Board v Gamble*[842] and *Gillick v. West Norfolk and Wisbech Area Health Authority*[843] there has been substantial academic debate about the scope of accessorial intention.[844] Namely, does the potential accessory need to aim to help the principal commit the crime, or is it enough that he was aware that this was a likely result of his assistance. Sometimes, an individual's behaviour may help the principal offender but may be motivated by excusable or even laudable aims. In *Gillick,* for example, the doctor's decision to advise under-age girls about contraception and prescribe them contraception without the knowledge of the girls parents was motivated by concern for the girls' well-being and health and respect for their right to confidential medical advice.

Alternatively individuals have sold[845] or returned[846] items that they knew would be used to commit a crime. An individual in such a situation may find himself

---

[841] See below Chapter 9 pp. 304-305, 333-334.
[842] [1959] 1 Q. B. 11.
[843] [1986] AC 112.
[844] R. A. Duff, "Can I Help you? Accessorial Liability and the Intention to Assist." [1990] L. S. 165; G. R. Sullivan, "Intent, Purpose and Complicity." [1988] Crim. L. R. 641; I. H. Dennis, "Intention and Complicity: A Reply." [1988] Crim. L. R. 649.
[845] *Fretwell* [1864] 9 Cox CC 471.
[846] *Lomas* [1913] 23 Cox 765.

with a difficult choice. Returning the goods may help the principal offender commit an offence, whilst holding on to the objects may itself be illegal. Arguably, it is not reasonable that an individual is held liable as an accessory because he chooses to avoid criminal or civil liability under another provision.[847] On the other hand, it may be that in some cases, for example, if the offence is especially serious, an individual should be liable for not taking a stand against the offence by refusing to return or sell an item which could be used in committing the offence.[848] One potential solution is to allow an individual to return or sell the goods in question, but to hold him liable as an accessory if he does not report the offence to the police.

A non-reporter is unlikely to be liable as an accessory. This seems reasonable if non-reporting is compared with other, more usual ways, in which an individual may be liable as an accessory. Furthermore, the accessory can be given the same sentence as the active offender, yet in the case of the non-reporter there is a significant difference between his responsibility and that of the active offender.[849] Consequently, it could be that the preferred solution lies not in accessorial liability, but in a lesser offence of facilitation.[850] This offence would hold liable those who *knowingly* participate in the commission of crimes. Occasionally, for example if the offence is particularly serious, or if there is a link between the non-reporter and the principal offender, a failure to report may be facilitation.

Duties to Report Child Abuse

All American states require certain professionals for example doctors, teachers, mental health professionals to report child abuse.

"A person who, while engaged in a capacity or activity described in subsection (b) of section 226 of the Victims of Child Abuse Act of 1990 on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, as defined in subsection (c) of that section, and

[847] G. Williams, "Obedience to the Law as a Crime." (1990) 53 M. L. R. 445.
[848] Ibid. p. 452.
[849] A. J. Ashworth, "The Elasticity of Mens Rea" in C. F. H. Tapper (ed), *Crime, Proof and Punishment, Essays in Memory of Sir Rupert Cross*, (1981); A. Ashworth, *Principles of Criminal Law*, 3rd Edition (1999), pp. 90-93 and pp. 432-433; G. Williams, "Convictions and Fair Labelling" (1983) 42 Cambridge Law Journal pp. 85-95.
[850] P. Duff, op. cit. at p. 168.

fails to make a timely report as required by subsection (a) of that section, shall be guilty of a Class B misdemeanor."[851]

Similarly most Australian states have mandatory child abuse reporting laws.[852] These duties also are limited to professionals.[853] It is not surprising that both the United States and Australia have restricted mandatory reporting to professionals, given that the common law traditionally limits positive duties to specific individuals.[854]

The little research that there is on the American duty suggests that its effect on reporting rates is negligible. The decision to report is complex and depends upon a variety of factors,[855] the duty to report is just one factor and by itself may not be enough to persuade the professional to report.[856] In addition, it seems that the duty to report child abuse is not well known and is therefore unlikely to persuade a professional to report.[857]

As for the Australian duties, the Australian Law Reform Commission Report "Speaking for Ourselves Children and the Legal Process" suggests that opinions and experiences of mandatory reporting laws differ. The Doctor Barnados charity in Australia argued that the duty was ineffective in preventing abuse, and that it often alienated the victim's family making it more difficult for them to get help or advice, or for professionals to work with them. Furthermore, evidence from the State of Victoria suggested that the cost of

---

[851] United States Code Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 110, Sexual Exploitation and Other Abuse of Children, section 2258, Failure to Report Child Abuse.
[852] Australian Capital Territory – Children's Services Act; New South Wales – Children (Care and Protection) Act 1987 s. 22; Northern Territory – Community Welfare Act 1983 s. 14; Queensland – Health Act 1937 s. 76K; South Australia – Children's Protection Act 1993 s. 11; Tasmania – Child Protection Act 1974 s. 8; Victoria - Children and Young Persons Act 1989 s. 64.
[853] Australian Law Reform Commission 18 *Speaking for Ourselves, Children and the Legal Process*, (1996), Chapter 7 paragraph 15.
[854] A. McCall Smith, "The Duty to Rescue and the Common Law" in M. Menlowe and A. McCall Smith, (ed), *The Duty to Rescue*, (1993), pp. 55-91; A. Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 L. Q. R. 424; J. Kleinig, "Good Samaritanism" (1976) 5 Philosophy and Public Affairs 382-407; see above Chapter 2 pp. 39-45.
[855] See above Chapter 4 pp. 82-88.
[856] S. C. Kalichman, M. E. Craig, D. R. Follingstad, "Professional Adherence to Mandatory Child Abuse Reporting Laws: Effects of Responsibility Attribution, Confidence Ratings and Situational Factors" (1990) 14 Child Abuse and Neglect 69 at p. 75; J. Warner & D. Hansen, "The Identification and Reporting of Child Abuse by Physicians: A Review and Implications for Research" (1994) 18 Child Abuse and Neglect 11 at p. 12; A. Reiner, E. Robison, M. McHugh, "Mandated Training of Professionals: A Means for Improving Reporting of Suspected Child Abuse" (1993) Child Abuse and Neglect 63, 67.
[857] A. Reiner, E. Robinson, M. McHugh, op. cit. p. 68; J. Warner & D. Hansen, op. cit. p. 21.

implementing mandatory reporting diverted funds from other, possibly more effective, child protection measures.

On the other hand, there was some evidence that duties did encourage reporting. This confirms other research that the duty to report child abuse in Australia significantly increased the reporting of child abuse by teachers.[858] Other witnesses to the Australian Law Reform Commission claimed that the duties were useful because they provided a professional with an excuse for reporting.[859]

There are few offences of failing to report and even fewer prosecutions of non-reporters in English criminal law. One of the main justifications for mandatory reporting is that this helps to prevent offences. The analysis of existing offences in this Chapter suggests that duties to report are not effective in preventing crime. The restriction of the duty to report terrorism in the Terrorism Act 2000 is partly motivated by the minimal effect of mandatory reporting on the prevention of terrorism.[860] Similarly, duties to report child abuse in Australia and the States have been criticised because they are ineffective in preventing abuse. Whether there is a connection between mandatory reporting and the prevention of offences will be investigated in the next two chapters which examine the duties to report offences in the French Penal Code. If, unlike the English duties, these help to prevent offences, this might suggest an effective way of focusing duties to report. On the other hand, if they do not prevent offences, but are nonetheless considered to be justified, this would imply that there are other convincing reasons for favouring mandatory reporting.

---

[858] D. A. P. Lamond, "The Impact of Mandatory Reporting Legislation on Reporting Behaviour" (1989) 13 Child Abuse and Neglect 471.
[859] Australian Law Reform Commission 18 *Speaking for Ourselves, Children and the Legal Process*, (1996), Chapter 7 paragraph 17.
[860] Home Office, *Legislation Against Terrorism*, (1998).

CHAPTER 7

THE DUTY TO REPORT OFFENCES IN FRENCH CRIMINAL LAW

This Chapter will analyse mandatory reporting in France. Mandatory reporting in the French Penal Code is more extensive that it is in English criminal law. According to the Code, it is an offence to fail to report serious offences,[861] offences against the State[862] and violent offences against vulnerable individuals.[863] Given this difference between the two jurisdictions, it is important to examine how the French Penal Code and doctrine justify the duties to report and how effective these duties are. This Chapter will consider these questions by evaluating the Code, the case law and the history of the offences. In addition, in Chapter 8 the use and impact of the duties to report will be further explored through qualitative interviews.

A General Duty to Report

The History of Duties to Report

During the *ancien regime* an individual could be punished for failing to report an attack on a member of his family and for failing to report an attack on the King.[864] The justifications for both duties to report were similar. Blood ties meant that the individual owed a greater duty to protect his family than he did strangers. In addition, French criminal law has traditionally considered the murder of a parent to be an especially serious form of murder.[865] The King was viewed as the father of the nation. As such he was entitled to the same, if not greater, respect and protection. Furthermore, an attack on the King was more that mere violence, or even murder, it was treachery and an attack on the wellbeing of France itself.

These rationales for punishing failures to report have continued into current criminal law. Although, there is now a duty to report some offences against strangers, it can be argued that the duty to report is more justified and more

[861] CP Article 434-1; see below pp. 174-186.
[862] CP Article 434-2; see below pp. 188-191.
[863] CP Article 434-3; see below pp. 194-197.
[864] A. Langui, *L' Histoire du Droit Pénal*, (1970).
[865] J. Pradel & M. Danti-Juan, *Droit Pénal Spécial,* (1995), p. 39.

extensive if the victim is a member of the potential reporter's family.[866] Furthermore, there is a specific offence of failing to report offences against the State[867] and at one time this failure to report was viewed as more serious that the more general offence of failing to report a crime.[868]

After the Revolution, citizens were called upon to show their loyalty to the new Republic by reporting aristocrats, counter-revolutionaries and the federalist Girondins. Failure to do so was often an offence in itself.[869] The revolutionaries were keen to distinguish these duties to report from those of the *ancien regime*. This is repeated in later history. The French Government after Liberation were keen to distinguish the duties to report that they introduced into the ACP[870] from mandatory reporting introduced by the Germans during the Occupation.[871]

The first Penal Code of 1810 was influenced by liberal ideology. One consequence of this was that criminal liability was restricted to actions[872] and almost all the duties to report were removed. The only offence of non-reporting that remained was that of failing to report an attack on the Head of State.[873] It is probable that this duty to report was retained due to the influence of Napoleon.[874] Even this mandatory reporting was removed in 1832. Offences of failing to report were rejected because it would be difficult to prove a failure to report or to prosecute the non-reporter.[875] Furthermore, the historical experience of duties to report and of informers, especially during the Terror, had left a negative image of reporting. Informers were seen as low, treacherous and mercenary.[876] This was behaviour that the State was unlikely to encourage, still less require.

---

[866] See below pp. 195-196.
[867] CP Article 434-2; See below pp. 188-191.
[868] See below p. 187.
[869] S. Fontenelle, *La France des Mouchards, Enquete sur la Délation*, (1997), pp. 65-9; D. Salas, *Du Procès Pénal*, (1992), pp. 106-108.
[870] Ordonnance 25 June 1945; see below pp. 172-174.
[871] Law 25th October 1941; see below pp. 163-172.
[872] See above Chapter 3 pp. 49-52.
[873] Articles 103 to 108.
[874] O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History*, 3rd Edition (2000), pp. 254, 262-7.
[875] H. Donnedieu de Vabres, "Loi 25 octobre 1941, commentaire" D. 1942 L. 33.
[876] J-F. Gayraud, *La Dénonciation*, (1995), pp. 80-89.

On 29th June 1939, the Government introduced the offence of failing to report treason and spying. The fact that not reporting these offences was punishable was because of the seriousness of these offences at this time with the threat of War and invasion.[877] Even before this provision, Article 30 of the *Code d' Instruction Criminielle*, the Code of Criminal Procedure in force at the time, required the reporting of crimes against public safety or against the life or property of any individual. It was not very effective however as it was not backed by any sanction.[878]

Alongside a greater liability for failures to report, there was an increased willingness to punish a failure to rescue.[879] This is shown by the inclusion of a duty to rescue in a planned revision of the Penal Code in 1934. Although, the War meant that this revision was never implemented, these proposals are relevant because they might be interpreted as democratic support for positive criminal liability. One of the criticisms of mandatory reporting and duties to rescue in the CP is that they were introduced during the Occupation. The suggestion that these origins make them invalid might be countered if they can instead be linked to the democratic Third Republic.[880] The problem with this argument is that the 1934 proposals were heavily influenced by reforms to the Italian Penal code during the 1930s. These reforms were themselves motivated by fascist ideology.[881]

The Law 25th October 1941

Following the German invasion of the Soviet Union on 22nd June 1941, French communists began to fight against occupying German forces in France. By attacking German soldiers based in France, the communist Resistance hoped to divert forces from the Russian front to France. It was also clear that a German soldier, who was killed, or badly injured in France, would never be able to fight in the Soviet Union.

---

[877] J. H. Soutoul, *Le Médecin Face à la Personne en Danger et à l' Urgence*, (1991), p. 32.
[878] R. Tortat, "L' Obligation de Porter Secours et la Responsabilité du Médicin." discussed in J. H. Soutoul, op. cit. p. 31.
[879] See above Chapter 3 p. 52.
[880] Donnedieu de Varbes, op. cit.
[881] A. Cadoppi, "Failure to Rescue and the Continental Criminal Law" in M. Menlowe & A. McCall Smith, (ed), *The Duty to Rescue,* (1993), pp. 93-130 at pp. 111-115; T. G. Watkins, *The Italian Legal Tradition*, (1997), p. 47, p. 136.

In line with this policy, on 20th October 1941, at 8.00 in the morning, in the centre of Nantes, two German officers were killed by members of the communist Resistance. The next day, another officer was shot in Bordeaux. The German response focused on finding and punishing those responsible,. By 22nd October the culprits had still not been found. It is possible that they were known only to their communist cell, and therefore there were few who could have reported them. Having failed to identify the individuals responsible, the Nazi revenge was to shoot fifty hostages.[882]

The legislative response followed three days later when it was made an offence to fail to prevent violent attacks or to fail to report certain offences.

"Sera puni d' un emprisonnement de trois mois à cinq ans celui qui, ayant eu connaissance d' un projet permettant de craindre la perpétration de l' une des infractions énumérées ci-après: crimes contre les personnes, vols commis avec violences ou menaces de violences sur une personne, incendie voluntaire, quel qu' en soit l' objet, explosion de tous édifices publics ou privés et de tous objet mobiliers, attentats dirigés contre la libre circulation de divers moyens de transport, attentats contre les installations téléphoniques, télégraphiques et de transport d' énergie électrique, ouvrages d' art, écluses, installations portuaires, n' en aura pas averti les autorités publiques.

Sera puni des memes peines toute personne qui ayant été témoin de l' une des infractions énumérées à l' alinéa précédent, n' en aura pas averti les autorités publiques dès qu' elle en aura eu connaissance.

Dans les cas graves, les personnes visées aux alinéas premier et deuxième du présent article pourront etre retenus et punies comme complices.

Sont exceptés des dispositions de l' alinéa deux du présent article les ascendants et descendants, époux ou épouses, meme divorcés, frères ou soeurs des délinquants ou leurs alliés au meme degré."[883]

---

[882] M Dank, *The French Against the French,* (1978), pp. 106-108, 112-116.

[883] Translation:

"It is an offence punishable by three months to five years imprisonment for a person who knows of a plan which leads him to fear that one of the offences listed below will be committed to fail to report that offence to the public authorities: violent offences, robbery, arson of any object, explosion of a public or a private building or of any vehicle, attacks on the free circulation of any means of transport, attacks on telephone, telegraph and electrical installations, works of art, canal locks or harbour installations.

It is an offence carrying the same sentence for any person who has witnessed one of the offences listed in the preceding paragraph to fail to alert the public authorities as soon as he knows of the offence.

In serious offences individuals referred to in paragraphs 1 and 2 of this article can be prosecuted and punished as accessories."

This war-time provision was the first generally applicable duty to report in French law. For some commentators, the fact that it was the Nazis who introduced duties to report and duties to rescue is an overwhelming argument against the inclusion of such duties in the criminal law.[884] To assess how valid this argument is, it is important to examine the 1941 law and to evaluate subsequent duties to report in order to determine whether they differ from the 1941 law.

The Scope of the 1941 Duty to Report

It is important to determine how extensive the 1941 duty to report was. Was it limited to serious offences or were minor offences included? This is important because whilst it may be justifiable to limit an individual's autonomy by requiring him to report a serious offence, it is more problematic to require reporting merely to prevent minor damage or a person being offended. It is also important to examine the extent to which the 1941 duty to report was influenced by its wartime context or whether it could have been applied in peacetime.

Looking at the offences that carried a duty to report, some of these offences would be considered serious during peacetime as well as during the War. Robbery and arson, for example, still carry a duty to report under the current French criminal law.[885] This might suggest that the 1941 law was aimed at encouraging the reporting of serious offences and might be applicable in peace as well as during the War. On the other hand, the 1941 law was not limited to the most serious offences. The use of the word "*délinquants*"[886] suggests that the duty to report in the 1941 law was not limited to *crimes*. Whilst this does not necessarily mean that it was a war measure, more recent duties to report have tended to be restricted to *crimes*.

Linked to this is the question of when the duty to report arose. The first possibility would be to limit the duty to report to current offences or to actual

---

The following individuals are exempt from the provisions of paragraph 2 of this article: the ascendants and descendants, the wife or husband, even if divorced, the brothers or sisters or parents in law and step children, and brothers and sisters in law of the offender.

[884] S. Fontenelle, op. cit. p. 71.

[885] CP Article 434-1; see below pp. 174-175.

[886] This word literally means someone who has committed a *délit*.

attempts to commit crime.[887] This has a number of advantages. If the reported offence is currently being committed or is in the future, reporting might prevent the offence, or at least limit its effects. This is important. It might be that a duty to report is more justifiable if it would prevent an offence and spare victims harm, injury and suffering. Furthermore, because the offence was being committed, or steps have been taken towards it being committed, there would probably be evidence of criminal activity meaning that the potential reporter could be more confident in reporting and the risk of unreliable reports would be decreased.

The second possibility would be that the timescale for reporting includes offences that have only be thought about and discussed as well as those that are definite attempts. Whilst this might mean that more offences are prevented, it would be difficult to establish that a non-reporter *knew* of such an offence. There is also the danger that wording the duty in this way would encourage individuals to be suspicious of their neighbours, that it would stifle political debate and would penalise those with strong political opinions. Furthermore, because the law of criminal attempts required that definite steps have been taken towards the completion of an offence, the potential offender might not be liable, but a non-reporter, who did not report his plans, might be.

The final option would be to include offences that have already been committed and have already produced all their effects within the duty to report. As reporting in this situation would not directly prevent any offences, the justification for requiring reporting is likely to be the punishment of the offender. Given this, it is possible that duties to report past offences are more likely to require that the offender be identified.

The 1941 duty to report extended over a wide timescale. Offences that were merely in the planning stage had to be reported. This is clear from the law itself, which uses the word "*projet*" or plan. There was therefore no requirement that the offence have actually been attempted in other words that any significant or irreversible steps have been taken towards its completion. This meant that an individual could be punished for not reporting an offence

[887] Although French criminal law punishes individuals who attempt to commit *crimes* and *délits*, the law of criminal attempts requires that the individual have done something which would have lead directly and immediately towards the commission of the offence. CP Articles 121-4, 121-5 and 121-6.

which had not yet be attempted, which might just be, and might always have remained, the wishful thinking and daydreaming of the possible offenders.

The duty also extended to offences that had already been committed. This is unsurprising, the original motivation for the duty to report was an unreported, unsolved past offence.[888]

The wartime context and objective of the duty to report in the 1941 law is quite marked. First, some of the offences that required reporting would have been specifically aimed at preventing Resistance efforts. An example of this would be the requirement to report sabotage. Furthermore, the offence resulted from a Resistance attack on German soldiers. According to Tunc's analysis of the duty in the immediate post war period, the overriding aim of mandatory reporting under the 1941 law was the protection of the German forces.[889]

"il n' est pas douteux que cette loi était une loi de circonstance, destinée à mettre fin aux attentats dont était victime, directement ou indirectement l' ennemi occupant le territoire."[890]

If, as Tunc suggests in the above quotation, the aim of the provision was the protection of German forces, how was mandatory reporting to achieve this aim? Was it by preventing attacks before they could be committed? Or was it by identifying and punishing offenders of members of the Resistance? Linked to this is the question of whether the offence was an offence of *non-dénonciation*, a failure to report an offence, or one of *non-délation*, one of failure to report an offender.

The distinction is crucial. Whereas *dénonciation* is seen as a civic duty, *délation* is seen as underhand and spiteful.[891] The dictionary definition of the two terms is instructive. "*Dénoncer, dénonciation*" is defined as "*faire savoir*", this can be interpreted simply as to make known. In contrast, "*délation*" requires "*motifs méprisables*" in other words, untrustworthy motives and implies treachery.[892] Unsurprisingly, the choice of word, "*dénonciation*" or "*délation*" to

---

[888] See above pp. 163-165.
[889] Tunc Untitled Commentary on the Ordonnance of 25th June 1945 D. 1946 L. 33
[890] Translation:
"It is unquestionable that this law was a law of circumstances, intended to put an end to attacks, either directly or indirectly, against the enemy who was occupying the territory.
[891] J-F. Gayraud, op. cit. pp. 28-32.
[892] *Le Petit Robert, Dictionnaire de la Langue Francais* (1990).

describe a duty to report is significant. Of the two recent examinations of reporting in France, the one critical of duties to report uses the term "*délation*"[893] and the one sympathetic towards duties to report uses the term "*dénonciation*".[894] In the introduction to his account of reporting, Gayraud recognises that the choice or words, including his own choice of "*dénonciation*" rather than "*délation*", is not neutral, but reveals the focus and bias of an analysis.[895]

The two types of reporting may also have different purposes. Because *dénonciation* does not require the offender to be named it is likely to be ineffective if the aim of mandatory reporting is to identify and prosecute offenders. Consequently, *dénonciation* has been interpreted as focusing on prevention. In contrast, *délation*, by requiring the witness to name the offender, can be used to identify and eventually prosecute offenders. A further consequence of this is that under an offence of *non-dénonciation* non-reporters of future and current offences are more likely to be prosecuted than non-reporters of past offences.[896]

The 1941 provision used a general word meaning warn "*averti*" rather than the more specific *dénonciation* and *délation*. Further examination of the provision suggests that it could be used for both *dénonciation* and *délation,* but that *dénonciation* and therefore preventing offences rather than punishing offenders, may have been viewed as being the more important of the two objectives. *Dénonciation* and the reporting of present or future offences is listed first in the provision, suggesting that the legislators considered this to be the primary purpose of the duty to report.[897] Moreover, whilst the offender's family were exempt from reporting his past offences, they still had a duty to report offences that he was planning to commit.

Nevertheless, the need to prevent offences is not an overwhelming priority under the 1941 law. In order for an individual to be convicted for not reporting, the authorities did not need to establish that reporting would have prevented an

---

[893] S. Fontenelle, op. cit.
[894] J-F. Gayraud, op. cit.
[895] Ibid. p. 15.
[896] See below Chapter 8 pp. 240-241.
[897] J-L. Sourioux & P. Lerat, *L' Analyse de Texte, Méthode Générale et Applications au Droit*, (1992), pp. 14-15.

offence. Furthermore, it was possible to punish an individual for not reporting even if the non-reported offence had already been prevented, for example because it was reported by someone else. Finally, it was punishment and the need to arrest and convict the members of the Resistance, who killed the German officers in Nantes and Bordeaux, rather than prevention that provided the impetus for the offence.[898]

The duty to report carried a sentence of between three months and five years. Whilst the contrast between the five years maximum of the 1941 law and the three years maximum of the peace-time duty to report is not too stark, it is perhaps more significant that under the 1941 law, a non-reporter could be punished as an accessory. This suggests that the real maximum sentence for a non-reporter would have been considerably longer than five years. Accessories, then as now, were liable to the same punishment as the principal offender,[899] for many of the offences listed in paragraph one of article two, this would have meant death. Serious circumstances are not defined, it is probable that this was a fluid provision and could be adapted by the authorities to cover any non-reporter.

As well as a maximum sentence, the 1941 law also stated a minimum sentence for failing to report – three months. The minimum sentence was retained following Liberation although it was reduced to one month.[900]

Reporting During the Occupation.

The fact that the Germans had to introduce a duty to report might suggest that there was little reporting to the authorities and that any reporting was coerced through fear of punishment. This idea, that there was little reporting to the authorities, is not supported, however, by research into the Occupation.[901]

---

[898] S. Fontenelle, op. cit. p. 74.
[899] CP Article 121-7; J. Bell, S. Boyron & S. Whittaker, *Principles of French Law*, (1998), pp. 121-7.
[900] See below pp. 172-174.
[901] H. Amouroux, *La Grande Histoire des Francais sous l' Occupation – Les Passions et les Haines*, (1981), p. 261; A. Halimi, *La Délation Sous l' Occupation*, (1983); S. Fontenelle, op. cit. p. 71; J-F. Gayraud, op. cit. pp. 89-97.

Reporting was motivated by political considerations rather than by the desire to prevent crime or punish offenders. The main group reported were Jews.[902] This is unsurprising given the anti-Jewish measures adopted by both the German authorities and the Vichy Government[903] and the anti-Semitic propaganda in the collaborationist press.[904] Whilst the Jews were the main victims of reporting, other groups to be reported included freemasons,[905] Gaullists,[906]and communists.[907] Reporting was also used in disputes between neighbours. Whilst before the war disputing neighbours may have been limited to dealing with nuisances by complaining to the courts, to other neighbours or by getting back with their own nuisance, during the War unwanted neighbours were reported to the occupying authorities.[908]

Although, some of these reports could have fallen within the ambit of the 1941 law, for example, reporting a member of the Communist Resistance who had helped sabotage a railway line, the vast majority of individuals denounced had not committed any of the offences listed in the 1941 law. Moreover, voluntary reporting exceeded the requirements of the 1941 provision. Whilst under paragraph one, an individual was exempt from reporting his family, many people were proud to choose to report and to place their "civic responsibility" over family loyalty.[909]

Only rarely were individuals motivated to report because they feared being punished under the 1941 law[910] and there were few, if any prosecutions for non-reporting.[911] Rather than reporting because of the fear of punishment, it seems that the main motivation for reporting was the hatred of a particular group or individual, whom the reporter blamed for his disappointment and failures. This was particularly true of reports against Jews. Many people reported Jews, whom they accused of taking all the food from the black market

---

[902] H. Amoroux, op. cit. p. 249.
[903] M. Dank, op. cit. pp. 224-244
[904] R. H. Weisberg, *Vichy Law and the Holocaust in France*, (1996), M. Marrus & R. Paxton, *Vichy France and the Jews*, (1996); H. Amouroux, op. cit. p. 254.
[905] Ibid. p. 249.
[906] Ibid. p. 284-5.
[907] Ibid. pp. 285-6.
[908] Ibid. p. 287.
[909] Ibid. pp. 276-280.
[910] Ibid. p. 272.
[911] D. 1946 I. 33.

whilst French families starved.[912] Some individuals used anti-Jewish and anti-free mason legislation to remove a business rival. This professional jealousy influenced reporters from all strata of French society, including doctors,[913]gravediggers[914] and musicians.[915] Other individuals had more personal scores to settle, Amouroux gives the examples of a jilted woman reported her Jewish ex-fiancé[916] and a jealous husband, who reported his wife's Jewish lover.[917] For other reporters the decision to inform was motivated by what it could bring them rather than what it could take away from someone else. For some, the hoped for benefit of reporting was to be the release of a prisoner,[918] for others, in a time of economic need it was extra food.[919] This was explicitly recognised by the authorities when in October 1940 they instituted a system of payments for information. Under this system reporting a Gaullist or a communist carried a reward of 3000F, which was equivalent to the average salary for six weeks.[920] It is noticeable that the Nazis did not need a reward system to entice the public to report Jews or suspected Jews.

In conclusion, it is questionable how influential the 1941 law was in encouraging reporting. The enthusiasm for reporting during the Occupation exceeded that which was legally required and as has been explained individuals reported for many reasons, fear of punishment seems to have rarely been a consideration. Another argument might have been that even if the law did not motivate reports, it nonetheless legitimised them.

The 1941 law and the experience of reporting during the Occupation is important because it highlights the fact that reporting an offence and choosing the State over the individual is not always the morally right decision. There is the risk that individuals report to the authorities in order to settle petty disputes, or to attack a particular group of people. The experience of Occupation also shows that whether mandatory reporting is justified will largely depend on the

---

[912] H. Amoroux, op. cit. pp. 251-2.
[913] Ibid. p. 265.
[914] Ibid. p. 266.
[915] Ibid. p. 269.
[916] Ibid. p. 274.
[917] Ibid. p. 272.
[918] Ibid. p. 271.
[919] Ibid. pp. 277-278.
[920] Ibid. p. 282.

offences that are being reported and the criminal justice system that will investigate them.

Ordonnance of 25th June 1945

After Liberation, the Provisional Government of the French Republic repealed all the laws promulgated by either the German occupiers or the Vichy regime.[921] Despite this break with Occupation, the Provisional Government quickly reinstated the duties to report in the Ordonnance of 25th June 1945 and mandatory reporting was added to the former Penal Code as Article 62. Initially it might seem incongruous for a liberation government to adopt a measure used by an occupying force, it is important, therefore, to analyse the motivations behind the 1945 Ordonnance and to compare it with the 1941 law.

"Art. 2. Les Articles 62 et 63 Code Pénal sont remplacés par les dispositions suivantes:

Art. 62. Sans préjudice de l' application des articles 103 et 104 du présent code, sera puni d' un emprisonnement d' un mois à trois ans et d' une amende de 1000 à 50000F, ou de l' une de ces deux peines seulement celui qui, ayant connaissance d' un crime déjà tenté ou consommé, n'aura pas, alors qu' il était encore possible d' en prévenir ou limiter les effets ou qu' on pouvait penser que les coupables ou l' un d' eux commettraient de nouveaux crimes qu' une dénonciation pourrait prévenir, averti aussitot les autorités administratives ou judiciaires.

Sont exceptés des dispositions du présent article les parents ou alliés, jusqu' au quatrième degré inclusivement, des auteurs ou complices du crime ou de la tentative.

Art. 4. Est expressément constatée la nullité de l'acte dit loi du 25 octobre 1941 modifiant les articles 228 et 248 du code pénal et portant obligation du dénoncer les crimes ou projets de crimes attentatoires aux personnes et de secourir les personnes en danger.

Toutefois, sont validées les condamnations intervenues en application de cet acte, sous réserve des dispositions de l' ordonnance du 6 juillet 1943 relative à la légitimité des actes accomplis pour la cause de la libération de la France et à la révision des condamnations intervenues pour ces faits."[922]

---

[921] P. Pactet, *Institutions Politiques, Droit Constitutionnel,* 18th Edition (1999), pp. 299-300.

[922] Translation:

"Art. 2. Articles 62 and 63 of the penal code are replaced by the following provisions:
Art. 62. Without prejudice to the application of articles 103 and 104 of the present code, it is an offence punishable by a sentence of 1 month to three years and a fine of 1000F to 50000F or one of these two penalties, for an individual who knows that a crime has already been attempted or completed, while it is still possible to prevent or limit the effects, or where it could be thought that the offenders or one of them would commit further crimes and that a report would prevent this, to fail to report the crime as soon as possible to the administrative or the judicial authorities.

The following people are exempt from the provisions of this current article – the offender's or the accessory's relatives and in-laws up to the 4th degree.

Unlike the 1941 provision, mandatory reporting was limited to the most serious offences. Furthermore, it only applied to offences that were either being committed, had been committed or were being attempted.[923] There was no longer an obligation to report mere plans.

Article 62 stated that an individual would only liable for a failure to report if his report would have been useful in preventing a crime, limiting its effects or preventing the offenders from re-offending. Consequently, there was no duty to report an offence that has already been discovered by the authorities or reported by someone else. The aim of Article 62 was to prevent serious offences. This focus on prevention may have been an attempt to distance this duty to report from the *délation* that proved so deadly and so divisive during the Occupation.

The sentence for not reporting was decreased from three months to five years to one month to three years. Arguably more significant was the fact that it was no longer possible to be an accessory to the non-reported offence merely by not reporting.[924]

It was the political, anti-Resistance aspect of the 1941 law that was rejected by the provisional French Government rather than the general idea of positive criminal law duties. This is illustrated by the way Wartime convictions for non-reporting under the 1941 law were treated. Article 4 of the 1945 Ordonnance distinguished between non-reporting that was motivated by a desire to further the aims of the Resistance and other non-reporting. The Provisional Government only excused the first type of non-reporting. The support for the idea of positive criminal law duties whilst rejecting the Nazi use of them is also illustrated by Tunc's commentary on the 1945 Ordonnance. According to Tunc, Occupation meant that positive duties, namely the duty to rescue and the duty

---

Art. 4. The nullity of the measure called the law of 25th. October 1941 modifying articles 228 and 248 of the penal code and requiring the reporting of crimes, plots to commit crimes and the rescuing of individuals in danger is expressly confirmed.

In any case sentences under this measure are valid with the exception that the provisions of the ordonnance of 6th. July 1943 relating to the legitimacy of acts done for the cause of liberating France will repeal any condemnations pronounced for these facts."

[923] ACP Article 62 paragraph 1.

[924] See above p. 169.

to report, had received a negative introduction into French criminal law.[925] Nevertheless, Tunc argued that given the right democratic conditions and the proper use and purpose of duties to report, they could produce a beneficial harvest to the Republic – "*pourra produire des bons fruits.*"[926]

One possible reason for the support for positive duties following Liberation was a move away from a purely liberal interpretation of human rights. This is particularly noticeable if the Preamble of the Constitution of the Fourth Republic is compared with the Declaration of The Rights of Man and of the Citizen of 1789.[927] Whilst under the Declaration, liberty was the most important value, faced with the need to rebuild after the War ideals of mutual support and assistance were also seen as important.[928] The Constitution of the Fourth Republic stated that an individual might have a right to be benefited by the State,[929] perhaps the introduction of positive duties was recognition that the individual might also be able to claim benefits from other citizens. Another possible reason for the retention of the duty to report might have been the particular political and social situation faced by France following Liberation. Whilst political and judicial authority was being reestablished there was an increase in opportunistic crime. Furthermore, many wanted to avenge the experience of Occupation and there were many attacks on real and claimed collaborators. Given this situation, it may have been that the authorities viewed mandatory reporting as a way of bringing offences and disturbances within public control.

Article 434-1 of the Penal Code

In the early 1990s it was decided that the Penal Code and the Code of Criminal Procedure should be reformed. The new Codes came into force in 1993/4.[930] The CP has retained the duty to report serious offences in Article 434-1.

> Le fait, pour quiconque ayant connaissance d' un crime dont il est encore possible de prévenir ou de limiter les effets, ou dont les auteurs sont susceptibles de commettre

[925] D. 1946 L. 33.
[926] Translation: "Will be able to produce good fruit."
[927] See above Chapter 3 pp. 45-49.
[928] J. Bell, *French Constitutional Law*, (1992), pp., 67-8; J. Rivero, *Les Libertés Publiques et Droits de l' Homme*, (1978) pp. 95-98.
[929] See above Chapter 3 pp. 48-49.
[930] Circulaire du 14 mai 1993; P. Mehaignerie, (Ed) *Le Nouveau Code Pénal Enjeux et Perspectives*, (1994).

de nouveaux crimes qui pourraient etre empechés, de ne pas informer les autorités judiciares ou administratives est puni de trois ans d' emprisonnement ou de 300000F d' amende.

Sont exceptés des dispositions qui précèdent, sauf en ce qui concerne les crimes commis sur les mineurs de quinze ans:

1. Les parents en ligne directe et leur conjoints, ainsi que les frères et soeurs et leur conjoints, de l' auteur ou du complice du crime;
2. Le conjoint de l' auteur ou du complice du crime, ou la personne qui vit notoirement en situation maritale avec lui.

Sont également exceptées des dispositions du premier alinéa les personnes astreintes au secret dans les conditions prévues par l' article 226-13."[931]

What Offences Carry a Duty to Report.

In common with Article 62 of the FORMER Penal Code, Article 434-1 only requires an individual to report *crimes*. *Crimes* today are almost entirely violent offences. As the range of offences defined as *crimes* has become more limited, there has been a decrease in the range of offending in relation to which there is a duty to report. For example a famous case on the duty to report, *Société de l' Hotel Aioli,*[932] concerns a jewel thief. Currently there is only a duty to report theft if it is in fact a robbery.

The analysis of voluntary reporting in Chapters 4 and 5 demonstrated the link between willingness to report and the seriousness of an offence.[933] Furthermore, studies have shown that the public consider violent and sexual offences and those where the victim is especially vulnerable to be particularly serious.[934] It seems, therefore, that the duty to report under Article 434-1

---

[931] Translation:
"It is an offence punishable by a sentence of three years imprisonment, or a fine of 300000F, for anyone who knows that a serious offence, which it is still possible to prevent, or in relation to which it is possible to limit the effects, or where the offenders would be likely to commit further crimes, to fail to inform the administrative, or the judicial authorities.

Except where the victims of the serious offences are children aged fifteen or under, the following individuals are exempt from the provisions of the previous paragraph:
1. The parents and the parents' husband or wife, as well as the brothers and sisters and their husbands and wives of the offender of the accessory responsible for the serious offence.
2. The husband or wife or the live in partner of the offender or accomplice responsible for the serious offence.

Individuals who are under a professional obligation of secrecy according to Article 226-13 are also exempt from the provisions of the first paragraph."

[932] D. 1962 121; for a more detailed description and discussion of this case, see below pp. 177-180.

[933] See above Chapter 4 pp. 82-84, Chapter 5 pp. 111-114.

[934] B. Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453-472.

corresponds to those offences that a potential reporter would voluntarily choose to report. Although this may mean that mandatory reporting is unlikely to have a significant impact on reporting levels, this link between voluntary reporting and mandatory reporting may also mean that mandatory reporting would not be an unjustified restriction on an individual's liberty.[935] Basing duties to report on voluntary reporting would suggest that these duties would not be too onerous. Furthermore, given that failing to report serious, violent crime is unusual, it might be that it is these failures to report that are causally relevant.[936]

The fact that mandatory reporting corresponds to voluntary reporting suggests that the purpose of duties to report is symbolic and to highlight and punish those non-reporters who are especially blameworthy.[937]

Does Article 434-1 require dénonciation or délation?

Although the text of Article 434-1 uses the general word "*informer*" meaning to inform rather than the specific term "*dénonciation*", the duty under Article 434-1 is one of *dénonciation*, reporting an offence, rather than *délation*, reporting an offender.[938] Both the Dalloz and Litec editions of the CP refer to an "*obligation de dénonciation*". Moreover, this interpretation of the offence as being one of failure to report a crime rather than a failure to identify the criminal is supported by the case law.[939]

The issue of whether the duty to report the offence included a duty to identify the offender was crucial in *Société de l' Hotel Aioli.*[940] In this case, a hotel receptionist, Seggiano, had been found guilty under Article 62 of the former Penal Code after she had failed to identify a jewel thief, Bonnin, whom she had recognised. One of the hotel guests, whose jewellery had been stolen, sued

---

[935] See above Chapter 2 pp. 21-24.
[936] H. L. A. Hart & T. Honoré, *Causation and the Law*, 2nd Edition (1985), p. 38; J. Feinberg, *Harm to Others, the Moral Limits of the Criminal Law*, (1984) pp. 178-9; J. Kleinig, "Good Samaritanism" (1976) Philosophy and Public Affairs 382-407 at p. 393; A. Leavens, "A Causation Approach to Omissions" (1988) 76 Cal. Law Review 542; see above Chapter 2 pp. 24-25.
[937] A. Ashworth, *Principles of the Criminal Law*, 3rd Edition (1999) pp. 24-27; see below Chapter 10 pp. 371-372.
[938] See above pp. 167-168.
[939] D. 1956 somm. 125; D. 1959 301.
[940] D. 1962 121.

the hotel.[941] In order to avoid their liability the hotel appealed against Seggiano's conviction for non-reporting. The *Cour de Cassation* determined that the duty under Article 62 was one of *dénonciation*, reporting the offence, rather than *délation*, reporting the offender. Since the police knew from the guests' complaints that there was a jewel thief, there was no further obligation on the hotel receptionist, or anyone else, to identify the thief.

In the commentary on this decision, Bouzat analyses the arguments for extending mandatory reporting to include a duty to identify offenders. The main argument in favour of requiring a reporter to name the offender is one of social solidarity. He contends that society, as a whole would benefit from the police being more effective in solving crimes and prosecuting offenders. The assumption is that the interests of society are overwhelming and that it is justifiable to sacrifice an individual's claims in order to advance those interests. As has already been discussed in Chapter 2, this favouring of the interest of the State is extremely problematic. One particular problem might be that the obligation would not be equally spread.[942] Some individuals, because of their background, employment, or by chance, might have greater access to information that identifies offenders. There would be the risk of creating an underclass of informers who would be mistrusted and despised, and who, potentially at least, would be corrupt.[943] Moreover, it is questionable whether a duty to report offenders would increase social solidarity. It is possible, and here the historical example of Vichy and the recriminations after the Liberation are instructive, that requiring individuals to name offenders would be divisive, and that rather than increasing social solidarity, it would heighten divisions and rifts in society.

According to Bouzat, an obligation to identify offenders is further supported because it would benefit victims of crime. For example, the *Cour de Cassation* accepted that if Seggiano had identified Bonnin, the stolen jewellery would have been returned to its owners. In other cases identifying a criminal before he is able to commit a crime might prevent a potential victim being seriously injured or killed. This supports the idea that prevention and prosecution are

[941] Code Civil Article 1384 paragraph 5; B. Starck, H. Roland, L. Boyer *Obligations – 1 Responsabilité Délictuelle*, 5th Edition (1985), pp. 373-399; J. Bell, S. Boyron & S. Whittaker *Principles of French Law*, (1998) pp. 388-389.
[942] See above Chapter 2 pp. 14-15; R. Dworkin, *Taking Rights Seriously,* (1977).
[943] J-F. Gayraud, op. cit. pp. 208-219.

linked, and that one way of preventing future offences would be to detain the offender.[944]

Finally, Bouzat contends that failing to identify an offender is not a neutral and blameless act. Instead, he qualifies it as a wrong or sin. Nevertheless, this qualification of failing to identify an offender as a "sin" is not conclusive. Even if identifying an offender can be described as a moral duty, it does not follow that it should also a legal duty to name him.[945]

Unsurprisingly, the counter argument focuses on the natural mistrust in which informers are held. Central to this is the experience of the Occupation.[946] Bouzat claims that the Provisional Government in including mandatory reporting in the Code would have wished to distance its policy from that of the Nazis. Consequently, it can not have intended to include within the provision a duty to report offenders.

Bouzat's final argument against extending the duty to report is that it would lead to individuals reporting another person upon little evidence and maybe even to blackmail. The first part of this argument is straightforward. With an individual risking conviction and punishment himself for failing to report, it is possible that he would report others to the police on little evidence, just to be safe himself.[947] This is an important argument against mandatory reporting. It suggests that even if a duty to report can be limited to those reports that are both good and easy, it will in practice have the effect of including onerous reports and reports that are unreliable and even malicious.

The second part of Bouzat's submission, that a duty to inform on specific individual would lead to blackmail, is more problematic, not least because Bouzat does not develop this argument. One possibility is that having discovered the identity of the criminal, and risking conviction himself for failing to report, an individual would only not report if paid by the offender.[948] A

---

[944] See below Chapter 9 p. 303.
[945] H. L. A. Hart, *Law, Liberty and Morality*, (1963); P. Devlin, *The Enforcement of Morals*, (1965); J. Carbonnier, "Morale et Droit" in *Flexible Droit Pour une Sociologue du Droit Sans Rigeur*, (1998), pp. 90-99.
[946] Halimi, op. cit.; Amouroux, op. cit.; Dank, op. cit.
[947] See below Chapter 10 pp. 351-352.
[948] It is worth noting the offence of compounding an arrestable offence in English law; this is the offence of failing to report an arrestable offence because of consideration that has been received, i.e.

second possibility is that the duty to report individuals as well as their offences would increase snooping and that this intrusion would mean more individuals would learn information which could be used for blackmail. A third interpretation is of "*chantage*" as intimidation rather than blackmail. According to this definition, the offender would threaten the potential reporter. On the other hand, this interpretation is not supported by the definition of *chantage* in the CP,[949] where it is defined as obtaining an advantage by threatening to reveal things about a person. Without further evidence, or even a clearer statement of what he means by this link between *délation* and blackmail, Bouzat's argument is unconvincing.

In reality the freedom to refuse to identify an offender is weakened by the power of the *juge d' instruction* to interview anyone who has information or who is likely to have information about an offence.[950] It is an offence to fail to attend an interview with a *juge d' instruction* and an individual can be arrested and held in custody to guarantee his attendance. Moreover, once called for an interview, it may be an offence to fail to identify the offender. According to Article 434-12 of the CP, an individual, who claims to know who has committed an offence, and then refuses to give this information to the *juge d' instruction* when questioned, commits an offence.

"Le fait, pour toute personne ayant déclaré publiquement connaitre les auteurs d' un crime ou d' un délit, de refuser de répondre aux questions qui lui sont posées à cet égard par un juge est puni d' un an d' emprisonnement et de 500000F d' amende."[951]

The Duty to Report and the Knowledge Requirement

As is evident from the wording of Article 434-1, an individual is only liable for failing to report if he *knows* that an offence has been committed, is being committed, or will be committed. Moreover, the individual must realise that the offence is a *crime.* This requirement may be problematic. Assaults, for example, can be classified as *contraventions, délits* or *crimes.* Consequently,

---

because the non-reporter has been "bribed." Criminal Law Act 1967 s. 5, See above Chapter 6 pp. 136-137.

[949] CP Article 312-10.

[950] Article 81 CPP; P. Chambon, *Le Juge d' Instruction, Theorie et Practique de la Procédure*, 4th Edition (1997), pp. 132-148.

[951] Translation:

a non-reporter might claim that although he knew that a victim was being assaulted, he did not realise that the offence was a *crime.*[952] This is especially likely because often the gravity of an injury sustained by the victim, and therefore the classification of an assault, is judged by the number of days during which the victim is unable to work.[953] As can be imagined, this will be difficult for an unqualified individual to assess.

As a result, one possibility might be to limit the duty to report to the most serious *crimes* that would readily be interpreted by the ordinary, reasonable individual as very serious offences. This would be interesting because it would be very similar to the use of misprision of felony that had been suggested in *R. v Wilde*[954] and *Sykes v DPP.*[955] Whether the non-reporting offences are in practice limited in this way was investigated further during the qualitative interviews.[956]

The fact that the duty to report is restricted to those offences that an individual knows about excludes gossip and vague suspicions from the duty to report. On the other hand, the requirement to report is not restricted to individuals who actually witnessed the offence. An individual, who was told about the offence by a third party, would, provided that the report was reliable, have a duty to pass the report on to the authorities. Furthermore, unless a reporter was covered by professional duties of confidentiality[957] or was a member of the offender's immediate family[958] he will have to report an offender's confession. One of the problems behind reporting is the connection between reporting and betrayal.[959] The fact that mandatory reporting in the French Penal Code includes reports that might require an individual to ignore a competing duty or relationship suggests that the duty to report in the CP is extensive. Furthermore, the fact that non-first hand witnesses are included distinguishes the duty to report in the CP from mandatory reporting in the Belgian Code of

---

"The fact for any person having claimed public to know the individual or individuals responsible for a *crime* or a *délit* to refuse to answer questions about this which are put to him by a magistrate is punishable by one years imprisonment or 100000F fine."

[952] See below pp. 191-192.

[953] J. Pradel & M. Danti-Juan, *Droit Pénal Spécial*, (1995), pp. 37-52.

[954] [1960] Crim. L. R. 116.

[955] [1962] AC 528; see above Chapter 6 pp. 125-128.

[956] See below Chapter 8 pp. 238, 245.

[957] CP Article 226-13; see below pp. 198-203.

[958] P. Mousseron, "Les Immunités Familiales" [1998] Rev. Sc. Crim.; see below pp. 184-186.

[959] S. Fontenelle, op. cit.

Criminal Procedure[960] and from some American mandatory reporting statutes.[961]

An individual can not avoid reporting by ignoring strong evidence that a *crime* has been reported. The *Cour de Cassation* confirmed the conviction of a social worker who had been informed that a child in care had been hospitalized because of serious, suspicious injuries and refused to visit the child. The social worker did not report the fact that the child might be being abused to the police and was charged with non-reporting. In his defence, he claimed that he did not have a duty to report because he did not *know* that the child was being abused. The court rejected this argument. The social worker's lack of knowledge was deliberate and blameworthy and he could not rely on it to excuse his failure to report.[962] Although this case concerned the specific offence of failing to report child abuse,[963] it would also apply to the general duty to report serious offences.

Limitations on the Duty to Report

An individual will only be punished for his failure to report if he was capable of reporting and of recognising that an offence was or would be committed. Consequently, a non-reporter, who was unable to report because of mental illness, will not be liable.[964] Moreover, an individual's failure to report must be voluntary. If the non-reporter is forced not to report, for example, if the offender threatens him, he may be able to rely on the defence of *contrainte*.[965] Finally, an individual, who decides not to report because he believes that he is prohibited from reporting by another provision, will also be excused.[966]

One difficulty with *contrainte* as a defence to non-reporting is whether the threat would have to be sufficiently serious to inhibit a reasonable person not to report, or whether it is enough that the particular non-reporter was persuaded not to report. On the one hand, *contrainte* has been described as being

---

[960] S. Brahy, "Dénonciation Officielle et Dénonciation Civique" [1978] Rev. Droit Pénal 947.
[961] See above Chapter 6 pp. 129-132; J. Wenik, " Forcing the Bystander to Get Involved, A Case for a Statute Requiring Witnesses to Report Crime" (1985) 94 Yale Law Journal 1787.
[962] Bull Crim. 1995 no. 32.
[963] CP Article 434-3; see below pp. 194-197.
[964] Article 122-1 CP; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 320-328.
[965] Article 122-1 CP; G. Stefani, G. Levasseur, B. Bouloc, op. cit. pp. 320-328.
[966] Article 122-3 CP.

irresistable and making it *impossible* for the individual to obey the law.[967] This suggests a fairly strict interpretation of *contrainte* and implies that the particular weaknesses of an individual will not be taken into account. On the other hand, and more importantly, the Code states that an individual is not liable if he was faced with a force that *he* was unable to resist:

N' est pas pénalement responsible la personne qui a agi sous l' empire d' une force ou d' une contrainte à laquelle *elle*[968] n' a pu résister."[969]

This suggests that an individual's vulnerabilities and weaknesses will not prevent him from being able to rely on the defence of *contrainte.*

As well as being *irresistable* the *contrainte* must also be unforeseeable.[970] The idea here is that if the individual could have foreseen the *contrainte* he could have avoided it, and would not have been compelled to break the law. This has been interpreted to mean that an individual can not avoid criminal liability if the *contrainte* is his own fault. One potential use of the duty to report is against gang members who do not report offences that other members of that gang have committed.[971] Whilst, it is reasonable to assume that these gang members might be afraid to report their associates, they will not be able to rely on the defence of *contrainte.* They voluntarily brought themselves into contact with the gang and therefore they can not rely on their fear of the gang to excuse their failure to report.

Were a duty to report to be introduced into English criminal law, the defence of duress would provide an excuse for those non-reporters who had been threatened. The doctrine of prior fault would mean though that the English gang member would also be unable to excuse his failure to report by claiming that duress prevented him from reporting.[972]

---

[967] J. Pradel, *Droit Pénal Général*, 8th Edition (1992), pp. 476-477; J. Bell, S. Boyron & S. Whittaker, op. cit. p. 218.
[968] Emphasis is the author's own.
[969] Translation:
"The individual who acts under the influence of a force or a pressure which *he* was unable to resist is not criminally responsible."
[970] J. Bell, S. Boyron & S. Whittaker, op. cit. pp. 218-219.
[971] See below Chapter 8 pp. 242-244.
[972] *Sharp* [1987] QB 853.

According to CP Article 122-4 paragraph one, an individual who does not follow a particular criminal provision because it conflicts with another legal duty will not be liable.

"N' est pas pénalement responsible la personne qui accomplit un acte prescrit ou autorisé par des dispositions législatives ou réglementaires."[973]

As will be examined below, there is a difficulty in reconciling the offence of failing to report with the offence of breaching a professional's duty of confidentiality.[974] Under Article 434-1, individuals who owe a duty of confidentiality are exempt from the duty to report. Even without this exemption, it seems that Article 122-4 would excuse a professional who did not report because of his duty of confidentiality.[975]

As well as exempting a professional from mandatory reporting, Article 434-1 also excuses the offender's family. They only have a duty to report if the victim of the offence was a minor. Article 62 also excused the offender's family. However the 1993 reforms developed the class of individuals who were excused from the duty to report because of their relationship with the offender. Whereas, under Article 62 distant relations would be exempt, under Article 434-1 only the immediate family are exempt. On the other hand, the definition of the offender's "family" now includes the offender's live-in partner, including a same sex live-in partner. This change is unsurprising. It reflects changes in the family and in sexual mores.[976]

By exempting the offender's family the criminal law recognises that many individuals will place their loyalty towards their family above their loyalty to the wider community.[977] This "moral duty" is rated as more important than the legal duty to the State to report offences.[978] Furthermore, this recognition and support of family loyalty may not compromise or conflict with the aims of mandatory reporting. An individual's belonging to a family group might be interpreted as a precursor for his membership of a community. In the same

---

[973] Translation:
"A person who carries out an act that is obligatory or permissible under a statute or a regulation is not deemed to be criminally liable."
[974] See below pp. 198-203.
[975] See below p. 200.
[976] Circular 14th May 1993 s. 330.
[977] J-F. Gayraud, op. cit. pp. 42-43.
[978] P. Mousseron, "Les Immunités Familiales" [1998] Rev. Sci. Crim. 291.

way that he identifies family interests that conflict with his own interests as nonetheless being valuable and the demands that they make upon him as being justified, he may accept that he has responsibilities towards the community. The fact that the offender's family is not exempt if the victim is a minor might be explained by the greater vulnerability of child victims of crime and the fact that offences against these are interpreted as especially serious.

The exemption of family members also distinguishes mandatory reporting in Article 62 of ACP and Article 434-1 of CP from the 1941 law and from reporting during the Occupation. The 1941 law only partly excused family members from reporting[979] and examinations of reporting during the Occupation have uncovered many examples of individuals proud to report their family members regardless of whether it was required by the law.[980] Furthermore, the Nazi Occupation was not the only undemocratic regime to use reporters who informed on their own family, the Stalinist Soviet Union, for example, encouraged and rewarded the reporting of family members to the authorities.[981] From these examples, it appears that the encouragement of family members to report each other's offences was an important element of the most criticised instances of States requiring citizens to report each other.[982] The exemption for family members might possibly be explained by the legislator wishing to distance a duty of mutual support in a democratic society from totalitarian precedents.

The Duty to Report and Victims of Offences

Reporting serious crime has traditionally been interpreted as a duty that the citizen owes to the State. This is evidenced by the fact that it is listed in the CP as an offence against the State. The beneficiaries of this duty are the community and the criminal justice system rather than individual victims. One consequence of this traditionally has been that it has not been possible for a victim to use the *partie civile* procedure against a non-reporter.[983] More recent decisions however have allowed victims of crime to recover from the non-reporter. The *Cour de Cassation* confirmed that a headmaster, who did not

[979] See above p. 168.
[980] H. Amoroux, op. cit. pp. 276-280.
[981] J-F. Gayraud, op. cit. p. 112-124.
[982] Ibid. pp. 111-140.
[983] See above Chapter 5 p. 102.

report the abuse of one of his pupils, should pay that pupil 20000F damages.[984] In this case, it was significant that, had the headmaster reported the abuse, it would have stopped earlier.

Non-Reporting and Causation

Punishing a failure to report does not depend on that failure causing anyone harm. It is sufficient that reporting the offence might have prevented it or limited its effects. The non-reporter's failure to report is compared with the actions of an altruistic individual who would have reported, rather than, as in English criminal law, being judged against a hypothetical situation where he never discovered the offence.[985]

The fact that the non-reporter is not responsible for any harm suffered by any victim is reflected in the sentence. The maximum sentence for non-reporting is three years, whereas the sentence for the non-reported offence itself may be life.[986] This recognises that the non-reporter's involvement is peripheral, and he is not as blameworthy as either the offender or any accessories.

Nevertheless, although, the non-reporter does not have to have caused the effects of the *crime*, the *non-dénonciation* offences are not completely detached from any harm caused to victims of non-reported offences. As the Bouzat commentary on the *Société de l' Hotel Aioli*[987] decision demonstrates extensions to, or the existence of the duty to report are often justified by a desire to prevent the harm caused by crime.

The Use of Article 434-1 – The Duty to Report Serious Crime

There are very few convictions for failures to report under Article 434-1. Ministry of Justice figures[988] show that for between 1984 and 1995 the highest number of convictions in one year was twenty in 1990. The lowest was just one conviction in 1988 and in both 1986 and 1987 there were only three convictions. Although the conviction rate was especially low during the late

[984] Bull. Crim. 1993 no. 347.
[985] See above Chapter 2 pp. 24-26.
[986] CP 131-1.
[987] D. 1962 121.
[988] See below Appendix A.

1980s, it increased during the early 1990s. In 1995 however there were only six convictions as compared to fourteen in the previous year, this might suggest that the conviction rate has returned to 1980s levels. The literature on duties to report in France does not explicitly explain why the conviction rate for this offence increased during the 1990s. One possible explanation might be that the early 1990s saw increased concern about gangs in France and about urban violence. It is possible that this lead to a greater willingness to prosecute and punish individuals involved on the periphery of offending including non-reporters.[989]

The conviction rates for an offence are only one aspect of how it is used. It could be that the offence is rarely prosecuted and there a few convictions but that many more are investigated by the police or the *juge d' instruction* for failing to report. It might be that in these circumstances the existence of the offence and the possibility of being prosecuted encourage reluctant witnesses to give evidence.[990] It might also be that there is little need to punish failures to report serious offences because these offences are usually reported[991] and that this is partly because of the duty to report these offences.[992] These issues were explored in the qualitative interviews in order to get a more accurate description of the use of Article 434-1.[993]

A Duty to Report Attacks on the Fundamental Interests of the State

The History

In the 1960s escalation in the Algerian campaign lead to the passing of the Ordonnance of 4th June 1960.[994] This provision, which became Article 100 of the former Penal Code, created a specific duty to report treason, spying or other activities likely to harm the national interest.

> Sous réserve des obligations résultant du secret professionnel, sera punie en temps de guerre de la détention criminelle pendant dix ans au moins et vingt ans au plus et en temps de paix d' un emprisonnement d' un à cinq ans et d' une amende de 3000F à

[989] See below Chapter 8 pp. 242-244.
[990] See below Chapter 8 p. 245.
[991] See above Chapter 5 pp. 111-114.
[992] See above Chapter 2 p. 8.
[993] See below Chapter 8 pp. 238-245.
[994] Particularly important was the week of the barricades 24th Jan. 1960 – 1st Feb 1960 B. Droz, B. & E. Lever, *Histoire de la Guerre d' Algérie*, (1991), pp. 232-246.

40000F toute personne qui, ayant connaissance de projets ou d' actes de trahison, d' espionnage ou d' autres activités de nature à nuire à la défense nationale, n' en fera pas la déclaration aux autorités militaires, administratives ou judiciaires dès le moment où elle les aura connus."[995]

Even before this provision an individual might have been liable for not reporting an offence against the State. Both the 1941 duty to report and Article 62 were often used to deal with politically motivated offences. The former was use to protect the German occupiers and to quash the Resistance.[996] The latter was used in the 1950s to punish failures to report rebel activity in Algeria.[997]

The duty to report under Article 100 was more extensive than that under Article 62. Under Article 100 an individual was obliged to report plots. This requirement is clear from the wording which states that an individual should report as soon as he knows that an attack will be committed. In contrast, Article 62 only required the reporting of a crime once it had been attempted.[998] Furthermore, unlike the general duty to report serious offences there was no requirement that the report under Article 100 would have prevented an attack on the fundamental interest of the State. This suggests that this specific duty to report could have been used to deal with offences that had already been committed and produced all their effects.

The sentence for failing to report under Article 100 was greater than that under Article 62 suggesting that this type of non-reporting was viewed as especially harmful. Generally, in peacetime, the minimum sentence for Article 100 was one year and the maximum sentence was five years. During wartime the sentence was increased to ten years minimum and twenty maximum. Offences such as treason and spying would have graver consequences in war, in addition, this type of offending might be more common in war-time. Although, the 1960 ordonnance was passed in the context of the Algerian conflict, non-reporting during the Algerian conflict would not have carried the

---

[995] Translation:
"With the exception of those individuals owing a professional duty of confidentiality, it is an offence punishable by between ten years and twenty years imprisonment during a time of war, and one year to five years imprisonment during peace-time or a fine of 3000F to 40000F for any person who knows of plots or acts of treason, of spying, or of other activities of a nature to harm the national defence, and does not report it to the military, administrative, or judicial authorities."
[996] See above p. 163.
[997] *El Hachemi* D. 1959 301.
[998] See above p. 173.

increased wartime sentence because the Algerian conflict was not officially classified as a war.[999]

Article 434-2

The current duty to report crimes against the fundamental interests of the State is set out in Article 434-2 CP.

"Lorsque le crime visé au premier alinéa de l' article 434-1 constitue une atteinte aux intérets fondamentaux de la nation prévue par titre premier du présent livre ou un acte de terrorisme prévu par le titre II du présent livre, la peine est portée à cinq ans d' emprisonnement et 500000F d' amende."[1000]

What Offences Carry a Duty to Report under Article 434-2?

Article 434-2 requires an individual, who knows of attacks on the fundamental interests of the nation or knows of acts of terrorism, to report these offences. Fundamental interests are defined in Article 410-1. According to this Article, a wide range of values are protected as fundamental interests. They relate to foreign policy, for example diplomacy and the integrity of the French nation, constitutional law, for example, the requirement that France remain a republic, as well as the economic and scientific potential of France and its cultural heritage. According to the Code, these interests can be attacked by treason,[1001] undermining and attacking the political system,[1002] revolutionary movements,[1003]and mutiny.[1004]

The 1994 reforms of the CP added acts of terrorism to the duty to report under Article 434-2.[1005] This extension is unsurprising given growing concern about terrorism reflected in specific anti-terrorist legislation during the 1980s and

---

[999] B. Droz & E. Lever, op. cit. p. 134; B. Grosjean, "La France Reconnait qu' elle a fait la "Guerre" en Algérie" Libération 10/6/1999.

[1000] Translation:
"When the crime referred to in the first paragraph of Article 434-1 consists of an attack on the fundamental interests of the nation as set out in title I of the present book or an act of terrorism as set out in title II of the present book, the sentence is increased to five years imprisonment and 500000F fine."

[1001] CP Articles 411-2 - 411-11.

[1002] CP Article 412-2.

[1003] CP Article 412-3 to 412-6.

[1004] CP Articles 412-7 to 413-8.

[1005] Circular 14th May 1993 s. 331.

1990s.[1006] Furthermore, it might be that there was a need for a specific duty to report terrorism because terrorism offences were not well reported.[1007]

Three types of terrorism are defined in the CP.[1008] The first is derivative terrorism. This occurs when an offence has been committed with a terrorist motive.[1009] An example of it would be a bank robbery that was committed in order to obtain funds for a terrorist organisation.[1010] The fact that an offence was committed with a terrorist motive is an aggravating factor and the sentence that the offender may receive is increased. This means that some offences, which without a terrorist motivation would not carry a duty to report, with a terrorist motivation will carry a duty to report.

The second type of terrorism is ecological terrorism. This occurs when an individual or group acting with a terrorist motive introduces something dangerous into the air, soil, subsoil or water.[1011] Although it might be possible, to include this type of terrorism within the derivative terrorism under Article 421-2, it was decided that it was preferable to have a specific type of terrorism because environmental offences have not been consolidated and therefore some environmental terrorism might otherwise escape punishment.[1012]

The third type of terrorism is when an individual is judged to be a terrorist because of his membership of a terrorist group.[1013] This class of terrorist activity is a more recent addition to the CP.[1014] It is probable that it was inspired by an increased awareness and concern about criminal gangs in general.[1015]

> "Article 121-1: Constituent des actes de terrorisme, lorsqu' elles sont (L. no. 96-647 du 22 juillet 1996) "intentionnellement" en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l' ordre public par l' intimidation ou la terreur, les infractions suivantes:

[1006] Law of 9th September 1986 and Law 22nd July 1996; F. Colcombet, "Le Crime Organisé" in P. Méhaignerie, op. cit. pp. 69-71; J-L. Brugière, "Le Crime Organisé" in P. Méhaignerie, op. cit. pp. 72-74.
[1007] See above Chapter 5 pp. 113.
[1008] Y. Mayaud, "Le crime organisé" in P. Méhaignerie, op. cit. pp. 60-68.
[1009] Terrorist motive is defined as disturbing public order by using violence or intimidation.
[1010] CP Article 421-1; Y. Mayraud, *Le Terrorisme*, (1997), pp. 7-23.
[1011] CP. Article 421-2; Y Mayraud *Le Terrorisme*, (1997), pp. 23-27.
[1012] Ibid. p. 24.
[1013] CP Article 421-2-1; Y. Mayraud, *Le Terrorisme*, (1997), pp. 27-8.
[1014] Law 22nd July 1996.
[1015] G. Stefani, G. Levasseur, B. Bouloc, op. cit. 254-255.

1. Les atteintes voluntaires à la vie, les atteintes vountaires à l' intégrité de la personne, l' enlèvement et la séquestration ainsi que le détournement d' aéronef, de navire ou de tout autre moyen de transport, définis par le livre II du présent code;

2. Les vols, les extorsions, les destructions, dégradations et détériorations ainsi que les infractions en matière informatique définis par le livre III du présent code;

3. Les infractions en matière de groupes de combat et de mouvements dissous définis par les Articles 434-6 et 441-2 à 441-5;

4. La fabrication ou la détention de machins, engins meutriers ou explosifes, définies à l' article 3 du loi du 19 juin 1871 qui abroge le décret du 4 septembre 1870 sur la fabrication des armes de guerre;
   La production, la vente, l' importation ou l' exportation de substances explosives définies à l' article 6 de la loi No. 70-575 du 3 juillet 1970 portant réforme du régime des poudres et substances explosives;
   L'acquisition, la détention, le transport ou le port illégitime de substances explosives ou d' engins fabriqués à l' aide desdites substances, définis à l' article 38 du décret-loi du 18 avril 1939 fixant le régime des matériels de guerre, armes et munitions;
   La détention, le port et le transport d' armes et de munitions des première et quatrième catégories, définis aux articles 31 et 32 du décret-loi précité.
   Les infractions définies aux articles 1er et 4 de la loi no. 72-467 du 9 juin 1972 interdisant la mise au point, la fabrication, la détention, le stockage, l' acquisition et la cession d' armes biologiques ou à base de toxines.

5. Le recel du produit de l' une des infractions prévues aux I à 4 ci-dessus."[1016]

"Article 421-2:
Constitue également un acte de terrorisme, lorsqu'il est "intentionellement" en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l' ordre public par l' intimidation ou la terreur, le fait d' introduire dans l' atmosphère, sur le sol, dans le sous-sol ou dans les eaux, y compris celles de la mer territoriale, une

---

[1016] Translation:
"Article 421-1: The following offences constitute acts of terrorism when they are committed "intentionally" in connection with an individual or collective undertaking with the aim of seriously disturbing public order by intimidation or terror:

1. Voluntary homicide, voluntary assaults, kidnapping and sequestration as well as the hijacking of a plane, a ship or any other means of transport, defined by Book 2 of the present code;
2. Theft, extortion, destruction, vandalism as well as information technology offences as defined in Book 3 of the present code;
3. Offences concerning combat groups and disbanded groups as defined by Articles 434-6 and 441-2 to 441-5;
4. The making and maintaining of deadly or explosive machines or equipment, defined by Article 3 of the Law of 19th June 1871 which replaced the decree of 4th September 1870 on the making of weapons of war;

The production, sale, import or export of explosives, or of bombs made with the said explosives, as defined by Article 6 of Law no. 70-575 of 3rd July 1970 which reformed the control of explosives;
Obtaining, Maintaining, transporting or carrying without permission of explosives or of bombs made with the help of the said substances, defined by Article 38 of the decree-law of 18th April 1938 setting out the control of instruments of war, arms and munitions;
Maintaining, carrying and the transport of arms and of munitions of the 1st and 4th classes, defined by articles 24, 28, 31 and 32 of the aforementioned decree-law;
The offences defined in Articles 1 and 4 of the law no. 72-467 of June 1972 prohibiting the manufacture, the maintenance, the stocking, the acquisition and the leasing of biological or chemical weapons.

5. Receiving the results of any of the offences listed above.

substance de nature à mettre en péril la santé de l' homme ou des animaux ou le mileu naturel."[1017]

"Article 421-2-1:
Constitue également un acte de terrorisme le fait de participer à un groupement formé ou à une entreprise établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d' un des actes de terrorisme mentionnés aux articles précédents."[1018]

An individual has a duty to report any terrorist *crime*. Most problematic is the duty to report membership of a terrorist organisation. The non-reporter in this instance is punished and yet it is neither his own actions, nor necessarily those of the member of the terrorist organisation, whom he fails to report, that have caused harm. In addition, it is not possible, for an individual to be excused because his membership has been inactive or for a non-reporter to be excused because he failed to report an inactive member. Criminalising inactive membership of terrorist groups is punishing individuals for their political beliefs and penalising the non-reporting of such members is punishing a failure to check and inform on another's thoughts. Whilst it is probable that only the most serious instances of an individual being a member of a terrorist organisation will in fact be punished by a sentence of ten years, the fact remains that there is a duty to report *any* membership of a terrorist organisation.

Article 434-2 carries a lesser sentence than Article 100 of the former Penal Code. Although the maximum peacetime sentence remains at five years, the minimum sentence has been removed. Moreover, the sentence is no longer increased during War. Although, it is regarded as less serious than Article 100, it would seem that a failure to report attacks on the fundamental interests of the State is still viewed as more serious than a failure to report any serious offence. Whereas a failure to report a *crime* under Article 434-1 carries a sentence of three years, a failure to report a terrorist act or an attack on the fundamental interests of the State carries a sentence of five years.

[1017] Translation:
"Article 421-2: It is also an act of terrorism to as part of an individual or collective enterprise to intentionally introduce into the atmosphere, into or under the ground, or into the water including the sea, a substance dangerous to the health of either humans or animals or the environment."
[1018] Translation:
"Article 421-2-1: It is also an act of terrorism to belong to a group or an enterprise charecterised by its involvement in one of the acts of terrorism mentioned above."

The Mandatory Reporting of Child Abuse

The Law of the 6th July 1971 introduced a duty to report the violent abuse and neglect of children. Although the reporting of child abuse might have been included within the general duty to report *crime* in Article 62, this general duty had been ineffective in encouraging the reporting of child abuse. Some child abuse would be classified as a *crime*, however, other child abuse would only be a *délit*. As a result, a non-reporter, who knew of abuse, but who thought it was only a *délit,* would not have a duty to report.[1019] In addition, a potential reporter might think that abuse was a one off and would not happen again. In a situation like this, because the offence had produced all its effects, there would not be a duty to report. Finally, and this may still be a problem, behaviour that one individual interprets as abuse may be seen by another as appropriate parental behaviour. One example of this is the distinction between physical abuse and a parent's right to chastise his child. Whilst for some corporal punishment falls within the first category, others would not wish to penalise a parent for beating his child.[1020]

Given the concept of family that was adopted by the drafters of the Civil Code, it is perhaps unsurprising there was not a duty to report child abuse earlier. The Civil Code used the Roman law concept of the family, according to which the *pater familias* as the head of the household had absolute authority over his wife and children.[1021] Moreover, in line with the prevailing liberal ideology, it was believed that the family should be free from the control of the State.[1022]

Furthermore, the extent of child abuse was only gradually recognised. The first national survey of the extent of child abuse was published in 1978.[1023] Its findings were largely ignored until its authors, Strauss and Manciaux published

---

[1019] See above p. 179-180; see below Chapter 8 pp. 247-248.
[1020] See Chapter 4 p. 80
[1021] G. Cornu, *Droit Civil, La Famille*, (1993), p. 39; A. Borkowski, *Textbook on Roman Law*, 2nd Edition (1997), pp. 112-119; K. Zweigert & H. Kotz, *An Introduction to Comparative Law*, 3rd Edition (1999), p. 9; B. Luckock, R. Vogler & H. Keating, "Child Protection in France and England – Authority, Legalism and Social Work Practice (1996) 8 Child and Family Law Quarterly 297 at p. 307.
[1022] K. O' Donovan, *Sexual Divisions in the Law*, (1985), pp. 119-125.
[1023] P. Strauss, G. Manciaux et Deschamps et coll., *Les Jeunes Enfants Victimes de Mauvais Traitments*, (Paris, C. T. N. E. R. H. I.,1978) discussed in R. Nérac-Croisier, *Le Mineur et Le Droit Pénal*, (1997), at p. 52.

a follow up report in 1982.[1024] If the level of a type of offence is underestimated, this may mean that failures to report are to be prosecuted. It may also mean that potential reporters are less likely to recognise the offence in order to be able to report.

On the other hand, whilst knowledge of child abuse has increased over the last couple of decades, there had been earlier initiatives. Infamous cases of parental child abuse had lead to legislation protecting children being passed in the nineteenth century.[1025] Furthermore, the duty to report child abuse passed in 1971 predated the national surveys of child abuse. Perhaps the better view is that whilst there was some awareness of child abuse, the number of children that were abused was not recognised. The later decades of the twentieth century saw child protection become a matter for political, legal and social concern.[1026] It seems that one effect of this increased awareness and concern has been the growing significance and use of the mandatory reporting of child abuse.

Prior to the reform of the criminal law in 1993, the duty to report child abuse could be found in the second paragraph of Article 62.

"Sera puni d' un emprisonnement de deux mois à quatre ans d' une amende de 2000F à 20000F ou de l' une de ces deux peines seulement celui qui, ayant connaissance de sévices ou de privations infligés à un mineur de quinze ans, n' en aura pas, dans les circonstances définies à l' alinéa précédent, averti les autorités administratives ou judiciaires."[1027]

Under Article 62 the report could be made either to the administrative or the judicial authorities. There was only a duty to report if it would help to prevent child abuse. The fact that the police as well as administrative services could receive reports suggests that the purpose of the duty was to prevent abuse and to punish offenders. On the other hand, the limitation of reporting to those reports that would prevent abuse emphasises the fact that it was the first objective that was most important.

[1024] P. Strauss & G. Manciaux, *L' Enfant Maltraité.*
[1025] Law 19th April 1898; see above Chapter 3 p. 51.
[1026] M. de Béchillon & J-J. Choulot, "L' Abus Sexuel Commis sur des Mineurs et sa Preuve en Droit Pénal" in R. Nérac-Croisier, op. cit. pp. 49-76 at pp. 52-54.
[1027] Translation:
"It is an offence punishable by two months to four years imprisonment or a fine of 2000F to 20000F or one of the two only, for an individual who knows of abuse or neglect inflicted on a minor of fifteen or

Article 434-3

According to Article 434-3 it is an offence to fail to report the abuse or neglect of children or other vulnerable individuals. This duty is more extensive than the duty to report child abuse under Article 62 ACP.

"Le fait pour quiconque ayant eu connaissance de mauvais traitements ou privations infligés à un mineur de quinze ans ou à une personne qui n' est pas en mesure de se protéger en raison de son age, d' une maladie, d' une infirmité, d' une déficience physique ou psychique ou d' un état de grossesse, de ne pas en informer les autorités judiciaires ou administratives est puni de trois ans d' emprisonnment et de 300000F d' amende.

Sauf lorsque la loi en dispose autrement sont exceptées des dispositions qui précèdent les personnes astreintes au secret dans les conditions prévues par l' Article 226-13."[1028]

What Offences Carry a Duty to Report under Article 434-3?

Under Article 434-3 there is a duty to report "*mauvais traitements*" and "*privations*" against vulnerable individuals. This replaces the "*sévices*" and "*privations*" which carried a duty to report under the former Penal Code. Although both "*sévices*" and "*mauvais traitements*" refer to active abuse rather than neglect, "*mauvais traitements*" is a wider term than "*sévices*". It does not require there to have been physical beatings.

Whilst Article 62 was limited to the reporting of child abuse, Article 434-3 requires the reporting of the abuse against other types of vulnerable victims. Included within this are individuals who are unable to protect themselves because of age, illness, disability or pregnancy. Of these, the most controversial is the inclusion of pregnancy as a form of vulnerability.[1029]

---

under to fail to inform the administrative or judicial authorities in the circumstances defined in the preceding paragraph."

[1028] Translation:

"It is an offence punishable by three years imprisonment and a fine of 300000F for an individual who knows of the ill treatment or neglect of a child aged fifteen or under, or of a person who is unable to protect themselves because of their age, an illness, a disability, a physical or mental handicap or pregnancy, and fails to inform the judicial or administrative authorities.

Except in those cases where the law provides otherwise, individuals who are bound by a duty of professional confidentiality under Article 226-13 are exempt."

[1029] One of the French respondents, whom I interviewed as part of the empirical research, argued that pregnancy should not have been included because it equated adult women with children or the mentally incapable.

One explanation for this extension of mandatory reporting to include the abuse and neglect of vulnerable adults is that the growth in awareness of child abuse has been mirrored by an increased awareness of other forms of abuse, for example elder abuse. As the response to child abuse was a duty to report, these other forms of abuse are also tackled by mandatory reporting. Furthermore, the fact that the reforms extended the use the duty to report violent abuse and neglect might suggest that paragraph three of Article 62 had been effective in encouraging the reporting of child abuse.

Unlike Article 434-1, Article 434-3 is not limited to those reports that would prevent further offences. One explanation for this might be that because child abuse is often ongoing, reporting abuse will usually prevent further abuse.

Who has to Report under Article 434-3?

Unlike Article 434-1, the offender's family are not exempt from the duty to report under Article 434-3.[1030] The effectiveness of the provision would be compromised if the offender's family could choose not to report. The fact that abuse often takes place within the family home means that the offender's family may be the only witnesses.[1031] Moreover, whilst the family will feel loyalty towards the offender, they will often also be related to the victim. Consequently, any loyalty towards the offender should be cancelled out by their loyalty towards the victim.

This conflict between loyalty towards an offender and loyalty towards a victim is highlighted by the issue of non-abusing parents and whether they report the abuse when the abuser is their partner. One view is that there is a widespread problem of non-reporting in these circumstances, and that for instance many mothers will not report and instead choose to favour their own happiness over the safety and well being of their children.

[1030] See above pp. 183-184.

[1031] M-C. Eglin, "L' Encadrement Social" and I. V. Nreum, F. Dal, A. Lampo, "Une Structure" both in F. Koehler, (ed.), *Violence et Secret Soigner et Protéger ou Dénoncer et Punir*, (1997).

"C' est aujourd'hui encore le silence des mères qui ne disent rien, qui voient leur mari ou concubin violer leurs enfants. Devant la cour d' assises , on les voit régulièrement arriver, l' air parfaitement angélique, disant "Mais je ne savais pas!"[1032]

This quotation implies that the non-abusing parent, here the mother, must know about the abuse. If the abuse is physical, it may well be that the child will have bruises, cuts or other injuries and the non-abusing parent may even see the abuse. However, if the abuse is sexual, it will be more secretive, is less likely to produce obvious physical injuries and the non-abusing parent is unlikely to witness the abuse. This suggests, that contrary to Gilet's assertion, a mother, who claims that she did not know that her partner was raping her child, could be telling the truth.[1033]

As has already been discussed, individuals may be afraid to report, either because they fear retaliation or because of the cost to them of reporting.[1034] It may be that the mother is herself also being abused. She may feel powerless or believe that if she reports the abuse, it will escalate. Alternatively, a mother may fear that, if she reports the abuse, she herself will lose the children, or that if the abuser is prosecuted and imprisoned, she will no longer be able to afford the family home or be able to care for her children. She may believe that she can manage the situation herself, for example, by making sure that the abuser is never alone with the children.

The Use of Article 434-3

Like failures to report serious offences, the conviction rates for failures to report child abuse increased in the early 1990s in comparison to the 1980s. This increase happened before the reform of the Penal Code and therefore can not be due to the wider duty to report child abuse in Article 434-3.[1035] It is suggested that the main reason for this increase is the greater concern about and awareness of child abuse.[1036] Perhaps more interesting is the fact that

---

[1032] Eric Gilet, President of a regional Cour d' Appel quoted in F. Koehler, op. cit. at p. 128
Translation:
"Today it's the silence of mothers who do not say anything, who see their husband or lover raping their children. You see them arrive in the criminal court with an angelic air saying "But I did not know, I did not know."

[1033] See below Chapter 9 pp. 329-330.

[1034] Chapter 4 pp. 87-88; Chapter 5 pp. 113.

[1035] See above pp. 194-195.

[1036] See above pp. 192-193.

since 1994 the specific duty to report child abuse has more convictions than the more general duty to report serious offences.[1037]

In the following Chapter the use of the duty to report child abuse is examined from the perspective of criminal justice professionals.[1038] The interviews discussed how well that duty was known,[1039] whether failures to report were likely to be prosecuted[1040] and how the duty conflicted with professional duties of confidentiality.[1041]

Failing to Assist a Person in Danger or Help to Prevent a Violent Offence.[1042]

Article 223-6 is the offence of failing to assist a person in danger or failing to prevent a violent crime.

"Quiconque pouvant empecher par son action immédiate sans risque pour lui ou pour les tiers, soit un crime, soit un délit contre l' intégrité corporelle de la personne s' abstient volontairement de le faire est puni de cinq ans d' emprisonnement et de 500000F d' amende."[1043]

Although this offence does not specifically punish a failure to report, it is possible that reporting could be seen as a way in which a crime might have been prevented and therefore a failure to report may be punished through this provision.[1044]

According to Ministry of Justice figures,[1045] this offence is far more likely to be prosecuted that the specific non-reporting offences. In 1995 for example, there were 202 prosecutions for under Article 223-6 compared to six under Article 434-1 and fourteen under Article 434-3.

[1037] See below Appendix A.
[1038] See below Chapter 8 pp. 249-252.
[1039] See below Chapter 8 pp. 249-250.
[1040] See below Chapter 8 pp. 251-252.
[1041] See below Chapter 8 pp. 246-247.
[1042] See above Chapter 3 pp. 53-66; J-L. Fillette, "L' Obligation de Porter Secours à la Personne en Peril." 1995 I J C P 3868; A. Ashworth & E. Steiner, "Criminal Liability for Omissions: The French Experience" (1990) 10 Legal Studies 153.
[1043] Translation:
"Whoever being able to prevent by acting immediately without risk to himself or others, either a crime or a violent offence, chooses not to do so is punishable by a sentence of five years imprisonment or 500000F.
[1044] See below Chapter 8 pp. 246-247.
[1045] See below Appendix A.

Furthermore, Article 223-6 may cover non-reporting not included within the specific *non-dénonciation* offences. Article 223-6 covers any violent offence. As a result, an individual, who did not report an assault because he did not know that that assault would be classified as a *crime,* will not avoid liability. On the other hand, because Article 223-6 is concerned with victims, whose lives are in danger,[1046] it might be therefore that Article 223-6 actually covers a narrower range of offences than the duties to report.

Professional duties of confidentiality, or other professional ethics do not excuse a failure to report under Article 223-6.[1047] The doctor's duty to help his patients, who may be in danger, prevails over his duty of confidentiality.[1048] This suggests that a doctor would have to report the fact that his patients had been the victims of abuse even if those patients did not want him to report.[1049] Similarly, a social worker working with young people may still have to report the offences committed by those young people even if that report would damage his relationship with them.[1050]

Does this mean that Article 223-6 is used by the authorities to punish the non-reporter, who is excused under Article 434-1? If this is the case, then any limitations to the applicability of Article 434-1 are unlikely to be very effective. On the other hand, the focus in Article 223-6 on danger and a victim's life being threatened might mean that in practice this duty will only be used when the consequences of non-reporting are especially serious. In the qualitative interviews, I examined whether Article 223-6 was ever used to punish non-reporting and how attitudes towards this duty compared with opinions of mandatory reporting.[1051]

[1046] See above Chapter 3 pp. 64-65.
[1047] F. Art Maes, "Un Exemple de Dépénalisation la Liberté de Conscience Accordée aux Personnes Tenues au Secret Professionnel" [1998] Rev. Sci Crim. 301 at p. 310.
[1048] J-H. Soutoul, op. cit. p. 76.
[1049] See below pp. 200-202.
[1050] JCP 1975 II 18143; Chapter 3 pp. 58-59.
[1051] See below Chapter 8 pp. 246-247.

The Professional's Duty Confidentiality[1052]

It is an offence under Article 226-13 for various professionals, mainly doctors, lawyers, and priests to breach their professional duty of confidentiality. The French criminal law protects and enforces professional confidentiality because it is seen as being in the public interest that patients, clients and penitents can receive confidential advice, treatment and support.[1053] This means that generally confidentiality will be enforced even if an individual client or patient wishes to revoke it.

"La révélation d' une information à caractère secret par une personne qui en est dépositaire soit par état ou par profession, soit en raison d' une fonction ou d' une mission temporaire, est punie d' un an d' emprisonnement et de 100000F d' amende."[1054]

There is a clear conflict between the duty in Article 226-13 and the duties to report in Articles 434-1, 434-2 and 434-3. A professional, who discovers that his client, or patient is planning to commit an offence, can report, in which case he breaches the duty of confidentiality, or he can refuse to report, in which case he breaches the mandatory reporting laws.

According to Article 226-14 the duty of confidentiality is not absolute. A professional will not commit an offence under Article 226-13 if he reports abuse against children or other vulnerable individuals or if he reports sexual abuse with the consent of the victim. Furthermore, a legal obligation to report will excuse a professional's decision to breach his confidentiality and report.

"L' article 226-13 n' est pas applicable dans les cas où la loi impose ou autorise la révelation du secret. En outre, il n' est pas applicable:

1 Celui qui informe les autorités judiciaires, médicales ou administratives de sévices ou privations dont il a eu connaissance et qui ont été infligés à un mineur de

---

[1052] D. 1948 109, D 1969 316, DP 1892, P. Decheix, "Un Droit de l' Homme mis à Mal: Le Secret Professionel." D. 1983 chr. 133; M. Delmas- Marty, "A Propos du Secret Professionnel." D. 1982 chr. 267; A. Damien, *Le Secret Nécessaire*, (1989); R. Floriot & R. Comboldieu, *Le Secret Professionnel*, (1973), P. Monzein, "Réflexions sur le "Secret Médical" D 1984 chr. 9, M. Robine, "Le Secret Professionnel du Ministre du Culte." D. 1882 chr. 221.

[1053] A. Damien, op. cit. p. 24.

[1054] Translation:
"The divulgence of information which is by its nature secret by a person who receives that information because of his profession, function or because of a temporary mission, is an offence punishable by a sentence of a year and 100000F fine."

quinze ans ou à une personne qui n' est pas en mesure de se protéger en raison de son age ou de son état physique ou psychique;

2. Au médecin qui, avec l' accord de la victime, porte à la connaissance du Procureur de la République les sévices qu' il a constatés dans l' exercice de sa profession et qui lui permettent de présumer que les violences sexuelles de toute nature ont été commisses."[1055]

One interpretation of Article 226-14 is that the general duty to report serious crimes in Article 434-1 would excuse a professional who reported a serious crime. Article 434-1 is a law requiring reporting and therefore reporting in these circumstances would fall within the first paragraph of Article 226-14. On the other hand, this interpretation may not be correct. According to the first paragraph of Article 226-14, the duty of confidentiality is only removed if a professional has a *duty* to report or if the law authorises him reporting. In contrast, Article 434-1 is expressly stated as not applying to professionals.[1056] It would seem, therefore, that Article 434-1 is not a situation where the law imposes a duty to report. Despite this, most evaluations of the duties to report have assumed that the professional can either choose to report or to respect confidentiality and it would seem that this is the most likely interpretation.[1057] In support of this is the fact that an individual does not commit a criminal offence if he breaches one provision because he is trying to fulfil another.[1058] It is unfortunate however that the Code is not clearer and in particular that the duty of confidentiality does not explicitly refer to Article 434-1.

A further problem with reconciling Article 226-14 with the duty to report in Article 434-3 is that the duty of confidentiality uses the old term "*sévices*" rather than the new term "*mauvais traitements*".[1059] Can a professional report ill treatment that is not serious enough to be classified as *sévices?* Although presumably he could, the scope of the duty of confidentiality would have been

---

[1055] Translation:
"Article 226-13 does not apply in those cases where the law authorises or requires revelation. Moreover, it does not apply to:

1 To the person who informs the judicial, medical or administrative authorities of the abuse or neglect of a child under the age of fifteen or of any other person, who is unable to protect himself because of his age, his physical or mental state, that he knows of;
2 To the doctor who, with the consent of the victim, informs the Procureur of the Republic of abuse which he has discovered in the course of his profession and which leads him to believe that sexual abuse of whatever nature has been committed."

[1056] See above p. 184.
[1057] F. Art-Maes, op. cit.
[1058] CP Article 122-4; see above p. 183.
[1059] See above p. 194.

clearer if it had used the same definition of child abuse as that used elsewhere in the Code.[1060]

Two situations where a professional may breach confidentiality are described in Article 226-14, namely where a victim of sexual assault consents, and where a child is being abused. What about the doctor who is treating a child rape victim, can that doctor report without the victim's consent under paragraph one? Or does he need the victim's consent to report under paragraph two? Given that Article 226-14 is a criminal law provision it is likely to be interpreted in favour of the professional and therefore the doctor who reports a child sexual abuse victim without the victim's consent will not be liable. A further question is whether the doctor should report in these circumstances.

The seriousness of the offence and the fact that reporting may protect both the victim and other potential victims are forceful arguments in favour of the doctor reporting. On the other hand, if a doctor is known to report sexual abuse to the police, this might deter some victims from seeking medical treatment.[1061] Moreover, lack of consent is central to the offence of rape.[1062] It might be especially inappropriate for the doctor to ignore this lack of consent and to report against the victim's wishes.

Article 44 of the Code of Medical Ethics gives further guidance on how a doctor should deal with patients who are victims of abuse or neglect. [1063]

"Lorsqu' un médecin discerne qu' une personne auprès de laquelle il est appelé est victime de sévices ou de privations, il doit mettre en oeuvre les moyens les plus adéquats pour la protéger en faisant preuve de prudence et de circonscription.

S' il s' agit d' un mineur de quinze ans ou d' une personne qui n' est pas en mesure de se protéger en raison de son age ou de son état physique ou psychique il doit, sauf circonstances particulières qu' il apprécie en conscience, alerter les autorités judiciaires, médicales ou administratives."[1064]

[1060] Castaignède, op. Cit. p. 83.
[1061] See below Chapter 8 pp. 258-259.
[1062] CP Article 222-23.
[1063] Décret 95-1000.
[1064] Translation:
"When a doctor discerns that an individual to whom he has been called is the victim of neglect or abuse, he must put into place the most adequate means to protect that individual all the time being careful to be prudent and discrete.

According to this, the doctor's main aim should be to protect his patient. Arguably this seems to favour reporting, for if the abuse is reported the abuser may be removed and the victim protected from further abuse. Nevertheless, fear of the abuse being reported may deter victims from seeking help. It may be therefore that the protection of the victim is better secured if the doctor works with the victim and encourages the victim to report.[1065] In support of this interpretation this Article also states that the doctor should act carefully and discretely.

The second paragraph of Article 44 suggests that child and other vulnerable victims of abuse are viewed differently. In these cases, the doctor should inform the medical, judicial or administrative authorities unless there are particular reasons for not doing so. It seems that there is a presumption in favour of reporting abuse against vulnerable victims and that therefore, in the case of the child victim of rape the doctor would normally report. On the other hand, it is possible that the victim's lack of consent or fear of deterring a victim from seeking help might count as particular circumstances against reporting.

Similarly, according to Article 80 of the Family and Social Code, *Code de la Famille et de l' Aide Sociale* social workers should report abuse that they discover. According to Art-Maes a failure by a social worker to report is most likely to be dealt with by disciplinary action.[1066]

"Toute personne participant au mission de service de l' aide sociale de l' enfance est tenue au secret professionnel sous les peines et dans les conditions prévues par l' articles 226-13 et 226-14 du code penal.

Elle est tenue de transmettre sans délai au Président du conseil general ou au responsible désigné par lui toute information nécessaire pour déterminer les measures don't les mineurs et leur famille peuvent bénéficier, et notmamment toute information sur les situations des mineurs susceptibles de relever de la section 5 de chapitre 1er du present titre.

L' article 226-13 n'est pas applicable aux personnes qui transmettent des informations dans les conditions prévues par l' alinéa precedent ou dans les conditions prévues par l' article 78 du présent code."[1067]

If the patient in question is a minor of fifteen or under, or a person who is not able to protect himself because of his age, physical or mental state, then the doctor must, unless according to his conscience there are special circumstances, report the abuse to the judicial, medical or administrative authorities."

[1065] See below Chapter 8 p. 258-259.

[1066] F. Art-Maes, op. cit.

[1067] Translation:

The problem of knowledge has already been discussed in relation to "ordinary" reporters.[1068] Nevertheless, even professionals will not always be confident that a child is being abused and that they therefore have to report. Furthermore, professionals may be wary of falsely accusing the parents and making it more difficult to work with the child and his parents.

Furthermore, it is possible that doctors, social workers and other non-judicial professions may have a different appreciation of how to deal with child abusers and their victims. Their evaluation may focus more on treatment rather than purely punishment. This different evaluation can sometimes lead to conflict between different professionals and can inhibit some professionals from reporting.[1069]

The Professional's Increased Duty to Report

Rather than being excused from any duty to report, it may be that mandatory reporting is more effective if it focuses on professionals and if they have an increased duty to report. An individual's profession may give him access to information that an ordinary citizen would not have and make it more likely that he will discover offences. For example, as will be explained, an auditor's access to business records means that he would be especially likely to discover financial irregularities.[1070] In addition, a professional's training, knowledge and experience may mean that he will be better able than an unqualified individual to recognize that an offence has been committed. Consequently, it may be that a duty to report that forces professionals to report may be especially likely to encourage reporting and to obtain useful

---

"Every person involved in social work for children has a duty of professional confidentiality carrying a sentence and with the conditions as set out in Articles 226-13 and 226-14 of the penal code.
Each person has a duty to inform the president of the general council or an official designated by him of any information needed to determine what measures the child or his family would benefit from and in particular all information on any minor to whom section 5 chapter 1 applies. (section 5 chapter 1 deals with action that can be taken to protect children who are, or who are likely to be the victims of abuse and neglect).
Article 226-13 does not apply to those professionals who report in accordance with the above paragraph of article 78 of this code."

[1068] See above pp. 179-181, Chapter 6 pp. 129-132.

[1069] Koehler, op. cit. pp. 96-99.

[1070] See below pp. 206-208.

information.[1071] This chapter will now examine those instances when, rather than being excused from reporting, the professional has an increased duty to report because of his profession.

The Duty to Report Criminal Offences

According to Article 40 of the CPP, any public official, who discovers a *crime* or a *délit* whilst carrying out his functions, has a duty to report that offence to the Procureur of the Republic.

"Toute autoritée constituée, tout officier public ou fonctionnnaire qui, dans l' exercice de ses fonctions, acquiert la connaissance d' un crime, ou d' un délit est tenu d' en donner avis sans délai au Procureur de la République et de transmettre à ce magistrat tous les renseignements, procès-verbaux et actes qui y sont relatifs."[1072]

Failing to report under Article 40 does not carry a sentence. In 1990 a proposal that a failure to report contrary to Article 40 should carry a three-year sentence was rejected. Unlike the duties to report in the Penal Code, Article 40 is not limited to serious offences, it might be that it was for this reason that it was not thought appropriate to punish failures to report under Article 40. Furthermore, as the duty is limited to professionals, failures to comply with Article 40 could be punished effectively by disciplinary action by professional bodies.

The obligation to report under Article 40 is owed by any professional working in the public sector. This includes postal workers, health service workers and education professionals. These professionals often act as gatekeepers to other services. Consequently, it is especially important that they use Article 40 appropriately. Article 40 should not be used to intimidate a group of individuals or to deter them from accessing services to which they are entitled.

In his examination of Article 40, Fontenelle found that the most frequent use of Article 40 was to report suspected illegal immigrants. Head teachers have used their duty under Article 40 to justify their refusal to enroll the children of immigrants.[1073] Similarly, immigrants have been unable to collect money from

[1071] See below Chapter 10 p. 371.
[1072] Translation:
"Any public officer or civil servant, who, whilst exercising the functions of his position, acquires knowledge of an offence is required to inform the public prosecutor without delay and to provide the prosecutor with any relevant information, forms or documents."
[1073] S. Fontenelle, op. cit. pp. 154-6.

banks[1074] and have been denied medical treatment. Although illegal immigration is an offence, many of the reports under Article 40 were subsequently discovered to be unfounded. This suggests that Article 40 has been misused, rather than offenders being reported, non-white immigrants and even non-white French people have been reported.

Furthermore, Article 40 was not intended to be used to discover illegal immigration. By focusing on the reporting of alleged illegal immigrants, professionals may be breaching other professional duties. Under the International Convention of the Rights of the Child,[1075] each child has a right to an education and a 1984 government circular ruled that head teachers could not require parents to provide proof of their right to stay in France before enrolling their children.[1076] In addition, if an immigrant is refused treatment this conflicts with Article 7 of the Code of Medical Ethics according to which a doctor can not refuse to treat an individual because of their racial, ethnic, or religious background:

"Le médecin doit écouter, examiner, conseiller ou soigner avec la meme conscience toutes les personnes quels que soient leur origine, leurs moeurs, et leur situation de famille, leur appartenance ou leur non-appartenance à une ethnie, une nation ou une religion déterminée, leur handicap ou leur état de santé, leur réputation ou les sentiments qu' il peut éprouver à leur égard."[1077]

In his evaluation of Article 40, Fontenelle draws parallels between this duty and the 1941 law requiring the reporting of crimes during the Occupation. In particular, he contends that the immigrant, especially the illegal immigrant, has replaced the Jew as the scapegoat,[1078] and hence as the focus for reporting:[1079]

"Ainsi se développe un climat détestable dans notre pays, avec des practiques qui ne sont pas sans rappeler, ... celles qui faisaient aux "bons citoyens" un devoir civique de dénoncer les juifs, bouc émissaires des malheurs de la France."[1080]

[1074] Ibid. p. 151.
[1075] This was ratified by France in 1990 by the Law 2nd July 1990 90-548.
[1076] S. Fontenelle, op. cit. p. 154.
[1077] Translation:
"The doctor must listen to, examine, advise or care for all individuals with the same diligence whatever their origins, morals, marital status, membership or non-membership of an ethnic group, a nationality, or a particular religion, their handicap, or state of health, their reputation or any feelings that the doctor has towards them."
[1078] D. Salas, *Le Tiers Pouvoir*, (1998), pp. 35-36.
[1079] See above Chapter 5 pp. 116.
[1080] S. Fontenelle, op. cit. p. 155
Translation:

According to Fontenelle, although the scale and the effects of reporting differ, the motivation behind the reporting, that a scapegoat is found, is the same. The fact that Fontenelle is against all duties to report may suggest that his rejection of Article 40 is based on his disagreement with mandatory reporting in general rather than with any specific problems with Article 40, however one of the respondents in the qualitative interviews, who supported other duties to report, agreed that the duty to report under Article 40 was too extensive and that in his experience the majority of reports under this provision concerned immigrants.[1081]

Another more sympathetic interpretation is reporting under Article 40 is that that officials may be particularly likely to discover irregularities in an individual's entry or stay into France in comparison with other offences. This is because often officials will have to inspect an individual's papers. It could be that it is this, rather than prejudice on the part of the officials, that explains the high level of reports against illegal immigrants. Furthermore, although many reports will involve illegal immigration, another important use of Article 40 has been the reporting and discovery of political corruption. Given recent, high profile cases, notably the "Elf Affair" it is possible that this will be an important use of Article 40.[1082]

An Auditor's Duty to Report Offences in Business' Accounts.

Under Article 457 of the Business Code, *Code des Sociétés*, an auditor commits an offence if he does not report offences that he has discovered whist checking a company's accounts.

"Sera puny d' un emprisonnement de cinq ans et d' une amende de 120000F ou de l' une de ces deux peines seulement , tout commissaire aux comptes qui, soit en son nom personnel, soit au titre d' associé dans une société de commissaires aux comptes, aura sciemment donné ou confirmé des informations mensongères sur la situation de

---

"Thus a revolting climate is developing in our country, its practices are not without precedent ...the reporting as a civic duty by "good citizens" of Jews, who were scapegoats for France's troubles."

[1081] See below Chapter 8 p. 260.

[1082] The French criminal courts are currently investigating claims that many senior members of Chirac's government were bribed to lobby on behalf of the Elf oil company. The most high profile figure to be implicated is Robert Dumas. His former mistress has given evidence that he received 25 ancient Greek statues from Elf. Dumas has been forced to resign from the Presidency of the Constitutional Court and is currently being investigated by a juge d' instruction.

la société ou qui n' aura pas révélé au procureur de la République les faits délicteux dont il aura eu connaissance.

L' article 378 du code Pénal (*devenu Nouv. C. Pén Art. 226-13 et 226-14)* est applicable aux commissaires aux comptes."[1083]

Although, Article 457 states that the auditor must report any offences that he knows about, it is clear that the obligation is one which is owed by the auditor, in his role as an auditor, and that therefore the duty to reported is limited to those offences which he knows about through his work as an auditor. Effectively, this will be financial offences that he discovers whilst he is checking a company's accounts. Provided an auditor discovers an offence because he is exercising his functions as an auditor, he will have a duty to report whether the offence is classified a *crime,* a *délit* and arguably even a *contravention.*[1084]

This obligation to report seems very broad and failing to report may be punished by disciplinary action and criminal sanctions. Given these risks for the auditor, it is perhaps unsurprising that their professional body[1085] recommended that the duty to report be restricted. This recommendation was adopted by a government circular of 23rd October 1985.[1086] This restricted the auditor's duty to report to those offences which were significant *"significatif"* and intentional *"délibéré".* According to the circular, an offence is significant if it either noticeably alters the net worth of the business, or falsifies the economic analysis of the business, or causes, or is of a nature likely to cause harm to the business or to a third party. The circular goes on to define the other requirement, that the offence be deliberate. An offence is *délibéré* if the person who committed it was aware that he was not respecting a rule that was in force at the time.

[1083] Translation:
"It is an offence punishable by a sentence of five years or a fine of 120000F, or one of those penalties only, for any auditor, whether he is acting in his personal capacity, or as a member of a firm of auditors, to knowingly give or confirm false information on the financial situation of the business, or to fail to report to the public prosecutor any offences which he knows about.

Article 378 of the criminal code (now Articles 226-13 and 226-14 of the Revised Penal Code) applies to auditors."

[1084] J-Cl. Boulay, "L' Obligation du Commissaire Aux Comptes de Révéler les Faits Délicteux." [1993] Rev. des Sociétés 850.

[1085] C. N. C. C., Conseil National des Commissaires aux Comptes.

[1086] Circulaire no. 85-22-E2.

It is probable that an auditor only has to report those offences that he realises are both *significatif* and *délibéré.*[1087] It is possible that because of their knowledge, skills and training, auditors will be able to identify offences that are both significant and important. If an auditor is unsure whether to report he can ask the local public prosecutor's office for their opinion, ultimately, however, the decision whether to report is the auditor's responsibility.

The duty to report under Article 457 prevails over the auditor's duty of confidentiality. This is unsurprising. The auditor's duty of confidentiality is ranked below the duty of confidentiality of other professionals for example doctors, lawyers and priests. This is because of the nature of the information that is held by the auditor. The auditor's confidentiality protects the financial well being of a business. A business's interest in the secrecy of its accounts and its financial development is not seen as being as fundamental a right as an individual's right to have their medical records kept secret, or a person's ability to consult a lawyer without worrying that the advice or their problem will be made public.[1088]

The Reporting of Money Laundering

Article 2 of the Law 12th July 1990[1089] created an obligation for some professionals to report money laundering. Under this provision any professional, who gives financial advice or who facilitates the transfer of money, will have an obligation to report any money which he knows comes from drug trafficking or organized crime.

"...fait obligation à toutes les personnes qui, dans l' exercice de leur profession, réalisent, controlent ou conseillent des opérations entrainent des mouvements de capitaux de déclarer au procureur de la République les opérations dont elles ont connaissance portant sur des sommes qu' elles savent provenir de trafic de stupefiants ou d' organisations criminelles."[1090]

[1087] See above pp. 179-181.
[1088] J. F. Barbièri, "De quelques Aspects du Secret Professionnel des Commissaires aux Comptes" [1997] Bulletin Joly chr. 935.
[1089] Loi 90-614.
[1090] Translation:
"...made it obligatory for any individual, who in the exercise of his profession carried out, checked or advised on operations involving the movement of capital, to report to the Procureur of the Republic any operations which he was aware of where he knew that the capital or some of the capital came from the traffic of drugs or from criminal organisations."

The reform of the CP in 1994 widened the definition of money laundering and that offence now includes the profits of any *crime* or *délit.*[1091] It is probable that the duty to report has also be extended and now covers proceeds from any *crime or délit.* De Marsac agrees. He contends that the courts have followed the government and Europe's lead in adopting a hard-line approach to money laundering and that therefore it is likely that there is a duty to report money laundering whatever the criminal origins of the money.[1092]

Although the Provision states that the report should be made to the *Procureur of the Republic,* in fact, money laundering is usually reported to a specialised division of the police known as TRACFIN.[1093] According to TRACFIN's own figures between 1990 and 1995 it received 2763 reports of which 74% came from banks. It is unsurprising that banks play an important role in reporting money laundering given their knowledge of individuals' financial situation.[1094]

The professional's duty to report money laundering prevails over any professional duties of confidentiality. This is illustrated by the prosecution of a lawyer for failing to report the conveyance of an apartment. The money for the property had come from drug trafficking.[1095] In this case, the lawyer should have reported even though as a lawyer, his duty of confidentiality was one of the main professional duties of confidentiality recognised by French law.[1096] Moreover, the individual involved in drug trafficking was not the lawyer's client, but a third party, her boyfriend. As a result, the client had her confidentiality breached despite her own lack of wrongdoing. This was seen as justified because under French law professional duties of confidentiality are based on the public interest rather than on the rights of any particular client. As a result, the conduct of and the consequences to any individual affected by a duty of confidentiality are not of primary importance. Furthermore, there was some implication, that whilst not actively involved in drug trafficking, the girlfriend had known the source of the money.

[1091] CP Article 324-1.
[1092] S. T. De Marsac "L' Extension de la Notion de Blanchiment de l' Argent: Est –elle une Limite à l' Optimisation Fiscale." (1998) 53 Finance et Gestion, La Revue du Centre National des Professions Financières p.9.
[1093] http://www.finances.gouv.fr/DGDDI/activites/tracfin.
[1094] See above p. 203.
[1095] Bull. Crim. No. 95-80-888.
[1096] A. Damien, op. Cit, pp. 43-78.

This French case is similar to *Francis and Francis v Central Criminal Court.*[1097] In this case a majority of the House of Lords determined that the police were able to search a firm of solicitors for documents relating to a particular property transaction. The court allowed the search because the documents were held with the intention of furthering a criminal purpose and were not therefore included within legal professional privilege.[1098] In this case, as in the earlier French case, it was not the solicitors' client who had the criminal intention, but a relative of that client.

According to TRACFIN's figures some professionals report money laundering because of Article 40 of the Code of Criminal Procedure rather than because of the specific duty in the 1990 law. In my qualitative interviews, I interviewed a lawyer who specialized in advising other professionals, especially those working in finance, on their duties of confidentiality and their duties to report. I hoped to discuss the use and opinions of these professional duties to report with him.[1099]

Dénonciation Calmonieuse: Punishing Reporting[1100]

Article 226-10 makes it an offence to make a false report against someone the authorities. This is the offence of *dénonciation calmonieuse:*

" La dénonciation effectuée par tout moyen et dirigée contre une personne déterminée, d' un fait qui est de nature à entrainer des sanctions judidicaires, administratives ou disciplinaires et que l' on sait totalement ou partiellement inexact, lorsqu'elle est addressée soit à un officier de justice ou de police administrative ou judiciaire, soit à une autorité ayant le pouvoir d' y donner suite ou de saiser l ' autorité compétente, soit aux supérieurs hiérarchiques ou à l' employeur de la personne dénoncée, est punie de cinq and s' emprisonment et de 300000F d' amede."[1101]

[1097] [1988] 3 All E.R. 775, L. Newbold, "The Crime/ Fraud Exception to Legal Professional Privilege" (1990) 53 M. L. R. 472.
[1098] PACE s. 10(2).
[1099] See below Chapter 8 pp. 259-260.
[1100] J-F. Gayraud, op. cit. pp. 146-7.
[1101] Translation:
"The report by any means and against a particular individual of a state of affairs or act likely to lead to judicial, administrative or disciplinary sanctions and which is known to be entirely or partially false, and which is made to a judicial officer, or to a officer in the judicial or the administrative police force or to an authority that has the power to investigate the allegation or inform the authority which would be competent, or to the individual's employer is an offence punishable by five years imprisonment or 300000F."

Dénonciation Calmonieuse Compared with the Non-Dénonciation Offences

Dénonciation calmonieuse carries a maximum sentence of five years as compared to three years for the non-reporting offences.[1102] This suggests that falsely reporting someone is seen as more blameworthy than failing to report someone. Whilst failing to report has traditionally been interpreted as an offence against the judicial system,[1103] *dénonciation calmonieuse* is an offence both against the judicial system, which wastes resources in investigating false claims, and against an individual victim, the falsely accused individual. Furthermore, the greater sanction for *dénonciation calmonieuse* reflects the view that of punishing the innocent and not punishing the guilty, it is the first that is the greater wrong.

Rather than *dénonciation calmonieuse,* it might be more accurate to describe the offence in Article 226-10 as *délation calmonieuse.* As the provision makes clear, it is an offence to make a false report against an identified individual. This is a further reason for the harsher sanction for *dénonciation calmonieuse.* The disapproval of *délation*[1104] must be greater if that report is not only treacherous but also false. The fact that the offence is limited to false reports that identify alleged suspects also suggests that the main motivation behind the offence is the harm that a false report causes the individual accused rather than the expense and inconvenience to the justice system.

It is not *dénonciation calmonieuse* to mistakenly report someone. The reporter must know that his claims are false. It is probable that the individual will have to know that the claims are false rather than merely suspect that they are. It would be reasonable for an individual to report his suspicions about an individual to the police and for the police to then investigate whether the suspicions were well founded. Nevertheless, although an individual who mistakenly reports someone may not be included within the ambit of *dénonciation calmonieuse*, the fear of erroneously reporting someone may well deter some people from reporting. A mistaken report, even if it is believed, could ruin any relationship that the reporter has with the suspect. A reporter

[1102] See above pp. 174-175.
[1103] See above pp 184-185; above Chapter 5 p. 102.
[1104] See above pp. 167-168.

may be afraid that they would appear stupid if the report turned out to be unfounded, alternatively they may fear that once their report started investigations the process would be unstoppable whatever its merits.

A false report will only be punishable within Article 226-10 if it is voluntary. This means that if an individual reports someone when questioned by the police, his report, even if false can not be a dénonciation calmonieuse because it was provoked by the questioning and was not spontaneous.[1105] A further question would be whether reporting under one of the duties to report would come within *dénonciation calmonieuse.* Articles 434-1, 434-2 and 434-3 are all limited to reporting an offence rather than identifying an offender.[1106] It is probable, therefore, that were a reporter to accuse someone falsely this would not be excused by his duty to report. On the other hand, Article 40 of CPP requires the official to give "all useful information". It does not seem to be strictly limited to *dénonciation* and it is possible therefore that an official making a false report under Article 40 could claim that the report was not spontaneous.

The English and French Approaches to Mandatory Reporting

The range of offences that carry a duty to report in French criminal law is broader than that in English criminal law. Unlike English criminal law, there is a duty to report violent offences against vulnerable individuals, which has in practice been used as a duty to report child abuse. There is also a general duty to report all serious offences. Interestingly, these specific offences sometimes apply in situations where a non-reporter could be punished under the general duty to report in Article 434-1. The offender, therefore, who fails to report a terrorist *crime* or a *crime* against the State has breached both Article 434-1, the duty to report *any type of crime* and he has breached Article 434-2 the duty specifically to report terrorist *crimes* and *crimes* against the State. In these circumstances it is questionable what purpose the specific offence can have.[1107] One possibility is that the specific offence is a response to a particular concern, for example, the inclusion of terrorism within Article 434-2 was a reaction to increased concern about terrorism. The duties to report specific offence have developed bit by bit to deal with particular problems, in

[1105] D. 1998 196.
[1106] See above pp. 176-179.
[1107] See above Chapter 10 p. 369.

contrast, it might be that the more general duty represents a more comprehensive and principled approach.

From researching mandatory reporting in France, it was clear that outside the Code itself, there was little information on or discussions of duties to report. Earlier in Chapter 3 I had used the more discussed and in some ways similar duty of easy rescue to examine positive criminal law duties, but having concentrated on mandatory reporting in this Chapter, it was clear that I still had questions on how the duties to report were used and viewed. It was also clear that in order to investigate these issues and produce a more valid model of mandatory reporting in France, I would need to go beyond the literature and speak to the individuals who were directly involved with mandatory reporting. This second stage of the research, the empirical research, is the basis for the next two Chapters.

CHAPTER 8

THE QUALITATIVE INTERVIEWS

The literature on mandatory reporting in France suggests that failures to report are rarely punished. The duties to report in the CP are restricted to serious, violent offences,[1108] and even then it is extremely unlikely that a failure to report will actually be prosecuted or punished.[1109] Mandatory reporting is limited to reporting the offence, there is no obligation to identify the offender.[1110] From this, it is reasonable to suggest that the purpose of duties to report in the CP is to prevent crime.[1111] These issues were explored in qualitative interviews conducted with French criminal justice professionals. This Chapter will explain the methodology behind these interviews and examine the data from them.

Before conducting the interviews I designed an interview schedule of issues that I intended to discuss.[1112] Some of the questions built on information that I had obtained from the literature. From reading discussions of mandatory reporting and the reported cases, I could suggest factors that might favour prosecution. This was something that I wanted to discuss with the respondents.[1113] I was interested in finding out when the respondents considered punishing non-reporting to be justified.[1114] I anticipated that this information, combined with the literature, would be useful in determining when mandatory reporting was effective and appropriate.

I also questioned the respondents about issues that were not discussed in the literature. Many of the questions and the interviewees' responses centred on their opinions of the offences. This was information that was not available in the literature. Furthermore, I questioned the police officer respondent about whether the duty to report was used as a bargaining tool to obtain information.[1115] Although the literature on the English duties to report had

[1108] See above Chapter 7 pp. 175-176.
[1109] See below Appendix A.
[1110] See above Chapter 7 pp. 176-179.
[1111] See above Chapter 7 pp. 166-168.
[1112] See below pp. 220-223 see below Appendix B.
[1113] See below pp. 240-245.
[1114] See below pp. 260-263.
[1115] See below p. 245.

suggested that this was an important use of mandatory reporting,[1116] it had not been discussed in examinations of French duties to report.

The interviews that I conducted could not have been used to confirm any hypotheses about the use of duties to report in France. The number of respondents whom I interviewed was very small. The balance between lawyers and other criminal justice professionals was not equal and whilst the interviews did investigate the attitude of professionals towards the duties to report,[1117] ordinary witnesses were not questioned on how it affected them. Consequently, it is not possible to determine from the interviews whether an ordinary witness will be persuaded to report because of the offences of failing to report. Whilst this Chapter will suggest the impact that mandatory reporting seems to have had based on the interviews and the literature, these suggestions are tentative and would need to be tested by reliable empirical research with non-professional reporters.

Furthermore, often when answering the questions, the respondents relied on their opinions or impressions of the offence. Whilst this is useful in understanding of how the offence is viewed, it is not a reliable explanation of how the offence is used. It is possible, for example, that a respondent's explanation of how the offence is used may be how he thinks it should be used rather than an accurate reflection of how it is actually used. For example, one of the respondents[1118] seems to overestimate the prosecution of non-reporters. This respondent was in favour of the duties to report and it is arguable that his answer is evidence of when he thinks it should be used, rather than of when it is actually used. Nevertheless, even if the interviews can not be used to confirm any hypotheses, they are still useful in providing a further insight into the duties to report.

Why use Qualitative Interviews?

I used qualitative interviews because I wanted to use the empirical research to develop my understanding of the duties to report rather than to confirm existing

[1116] See above Chapter 6 p. 142.
[1117] See below pp. 218-219.
[1118] LH1; see below pp. 239-240.

hypotheses.[1119] It was crucial that the interviews were flexible and that the respondents could explain their experiences and opinions without being limited to pre-determined categories. Had I chosen a more rigid methodology I would have risked missing important information. An important example of this is the use of the duty of easy rescue to punish non-reporting.[1120] Both the Penal Code itself and the literature on duties to rescue and duties to report stress the difference between these two duties.[1121] Nevertheless, the respondents' experiences suggested that the duties were more interchangeable.[1122]

Using a qualitative methodology enabled me to explore and probe the issues.[1123] This was especially useful when I was investigating how a respondent might choose between competing duties. An important issue was the relationship between the duty to report and the potentially conflicting duty of professional confidentiality.[1124] The respondents ranking of one duty over the other was often complex and variable, depending on a number of factors. The relative importance and likelihood of these factors was best explored within the flexible open framework of a qualitative methodology.

Empirical research is relatively rare in France. None of the respondents had previously taken part in any empirical research. Given the strangeness of the situation, qualitative interviews were a good way of developing rapport with the respondents. It might be that because I travelled to their place of work and met the respondents; they felt more involved in the research and better able to raise any concerns that they had. Furthermore, although an interview has a prepared structure and is recorded and although it is more one sided than a conversation, there is still the contact and the interaction between the interviewer and the respondent which arguably means that it is less artificial than completing a questionnaire.

[1119] S. Kvale, *Interviews, an Introduction to Qualitative Research Interviewing*, (1996); M. Quinn Patton, *How to Use Qualitative Methods in Evaluation*, (1987); J. A. Holstein & J. F. Gubrium, *The Active Interview*, (1995), J. Kirk & M. Millar, *Reliability and Validity in Qualitative Research,* (1986).
[1120] See below pp. 246-247.
[1121] J. Pradel & M. Danti-Juan, *Droit Pénal Spécial*, (1995), pp. 131-146.
[1122] See below pp. 246-247
[1123] C. Marshall & G. Rossman, *Designing Qualitative Research*, (1989), p. 145.
[1124] See above Chapter 7 pp. 198-203; below pp. 255-259; F. Alt Maes "Un exemple de Dépénalisation, La Liberté de conscience Accordée aux Personnes Tenues au Secret Professionnel" [1998] Rev. Sci Crim 301.

How the Interviews Were Conducted

The Respondents

I interviewed six lawyers, a *juge d' instruction*, a senior police officer and a local official, who specialized in working with victims of child abuse.

I wanted to interview a variety of criminal justice professionals. Lawyers, *juges d' instruction,* police officers and prosecutors have different responsibilities in the criminal justice system. It is possible that this may affect their experiences of mandatory reporting and may influence their opinions of it. In addition, I decided not to base my research in one city. This meant that information from one region could be compared against that from another. It also prevented the research findings from being overly influenced by any unusual policies of a particular Appeal Court or local prosecution service.[1125] It was important to include Paris and provincial cities. Some initiatives are piloted in Paris before spreading to the rest of France. For example, Paris has a special body to investigate child abuse, *Antenne des Mineurs.* By including both Paris and the regions in the research, I was able to examine what effect, if any, this had on the use and appropriateness of mandatory reporting.[1126]

Identifying and Contacting the Respondents

My first step in identifying and contacting potential respondents was to approach individuals, who whilst they would not be interviewed themselves, might act as gatekeepers and introduce me to potential interviewees. I selected three gatekeepers. First, I contacted Presidents of the regional Appeal Courts. I chose them because of their knowledge of the local administration of criminal justice and because I hoped that their standing and influence might encourage respondent participation. Unfortunately, this contact did not prove productive. On reflection, I might have been better concentrating on officials working in the criminal division of the Appeal Court. Secondly, I contacted a French academic, known for his work on the criminal law. He was

[1125] C. Dadamo & S. Farran, *The French Legal System*, 2nd Edition (1996), pp. 41-43; J. Bell, S. Boyron, S. Whittaker, *Principles of French Law,* (1998), p. 44.
[1126] For child protection procedure and responsibilities in the rest of France see B. Luckock, R. Vogler & H. Keating, "Child Protection in France – Authority, Legalism and Social Work Practice" (1996) 8 Child and Family Law Quaterley 297-312.

very helpful and suggested a couple of respondents. Finally, I contacted lawyers who were listed as members of the Franco-British Lawyers Society Ltd. I found that the most useful source of respondents was the French academic. It is possible that his involvement as a gatekeeper gave the research credibility, certainly the three respondents whom he identified all agreed to take part in the research. Furthermore, through him I was able to contact and eventually interview the only police respondent in the research and the only juge d' instruction.

I contacted potential respondents by a letter. The letter briefly described the research project and asked them to participate. In the letter, I also invited respondents to contact me if they had any further questions about the research. I gave this information so that those respondents, who agreed to take part, were giving their informed consent.[1127] Moreover, I hoped that, by being aware of and sympathetic to their concerns, I would develop a good rapport with the respondents. In the letter I also highlighted my awareness of their criminal law duties of confidentiality and stressed that these ethics would not be compromised by the research. I did this because I felt that confidentiality would be an important issue for these professional respondents and that by demonstrating my awareness of this I would develop my rapport with the respondents.

The Respondents

Disappointingly, I was only able to interview three non-lawyers. The main reason for this is that it was easier to find lawyers than the other types of respondents. Contacting police officers, magistrates and other professionals seemed to depend upon an introduction from another professional. Having conducted the interviews it would have been possible to use these interviews to have developed further contacts in France and possibly to have interviewed more police, magistrate and other non-lawyer respondents. Realistically, however, this was not an option. I was limited in the time and money that I could spend in visiting France to carry out the interviews. Furthermore, having primarily based my research in Poitiers and Paris, I was keen that any

[1127] R. Homan, *The Ethics of Social Research,* (1991), pp. 69-95.

respondents should be easily accessible from these cities. This excluded any potential respondents in the South of France.

In addition, unfortunately I was not able to interview any public prosecutors. Although some of the respondents did suggest factors that they thought would be important to the public prosecutor in deciding whether to prosecute, this information is not as reliable as if a prosecutor had been describing what really happened in his experience. Again, the reason why I was not able to interview any prosecutors was that initially it was difficult to identify and contact any and the amount of follow up interviews that I could make was limited.

The number of respondents taking part in the interviews is very small. It would not be possible to confirm any hypotheses by relying on such a small number of informants. That was not, however, the aim of the research. The understanding and critique of mandatory reporting in this thesis is based on the literature[1128] and on the empirical research.[1129] The aim of the interviews was to discover different perspectives on the duties to report in France and to use these along with the analysis of the code and the case law to evaluate their effectiveness and justifiability. In this respect, I believe that they have been successful.

The Interviews

The Timing of the interviews

Although the majority of the interviews lasted about one hour. One interview, with one of the Paris based lawyers lasted for a couple of hours. Another respondent took part in a follow up interview. The potential disadvantage of this is that those respondents, whose interviews lasted longer, had more time to develop their arguments and therefore their viewpoint may be over emphasised in comparison to other respondents. Despite this risk, I agreed that these respondents could have longer interviews. The respondent, who suggested the long interview, specialised in professional ethics. Given the conflict between duties to report and professional confidentiality,[1130] this was an

[1128] See above Chapters 7 and 8.
[1129] See above pp. 215-216, and see above Chapter 1 pp. 3-4
[1130] See above Chapter 7 pp. 198-203.

important area for the research and I needed to obtain as much information as possible from this respondent. Had the interview been shorter, I might have missed important information. Furthermore, I might have damaged my rapport with this respondent and this might have harmed the quality of a shorter interview. As for the respondent, who suggested the follow-up interview, his view of how the duty to report could be reconciled with the conflicting professional duty of confidentiality was the opposite of that expressed by other respondents. The follow up interview gave me the opportunity to examine his attitude further.

The interviews were all conducted face to face with the respondents at their workplace. This helped the rapport between the interviewer and the interviewee. It also helped the gathering and the interpretation of the information. Some respondents checked information, in particular their recollection of a case or an event, by asking colleagues or checking a file. Furthermore, I was able to analyse their responses against the context of their work environment. This is especially important as regards validity, namely did the non-vocal indicators of the interview support the interviewees' responses.

The interviews were all conducted in French with native French speakers. The fact that the interviews were conducted face to face meant that any linguistic difficulties or misunderstandings could be resolved. There are two elements here. First, the realisation that a question had not been understood. In contrast, had I used a questionnaire, I would not have been present when the respondent tried to complete the questionnaire and would not have known that a question had been misunderstood. Secondly, I was able to reword and explain any questions and the interview could continue. Had I used questionnaires, the respondent might have become frustrated with a question that he did not understand and might have stopped completing it.

The Interview Structure[1131]

The interviews that I conducted with the respondents were semi-structured. Although I had a checklist of issues to cover, it was important that the

[1131] See below Appendix B.

interviews were flexible and could respond to the interviewees' answers.[1132] For example, one of the respondents specialised in advising other professionals about their duties. It was unsurprising that my interview with him concentrated on the relationship between mandatory reporting and duties of confidentiality. Had I instead chosen a more rigid structure that was the same for each respondent, it is probable that I would have lost some important information.

I decided which questions to ask based on the literature review. I planned that the interview would discuss the following issues: the motivations behind reporting,[1133] Article 434-1, the duty to report serious offences,[1134] Article 434-3, the duty to report offences against vulnerable individuals[1135] and it would focus on the respondents' opinions of these offences[1136] and whether they themselves would report.[1137]

The starting point for my interviews was to establish the extent of the respondents' experience with the non-reporting duties. If they were lawyers had they ever advised anyone prosecuted under these provisions? For the *juge d' instruction* whether he had ever investigated a charge of non-reporting.[1138] I chose to start the interviews in this way for two main reasons. First, it was a vital question to provide a context for the rest of their responses. When analyzing the data from the interviews, it was helpful to know whether the interviewees' replies were based on their experience. In addition, their answer to this question determined the rest of the interview. Any experience of mandatory reporting that the respondent had had would be followed up in subsequent questions. Secondly, this type of question was relatively unthreatening – the interviewee was not required to reflect on or to explain his behaviour. It was an "easy" first question to answer.[1139]

After this initial question, the interviews focused on the issues that I thought would be the most significant or about which the interviewee might have the

[1132] See above pp. 215-216.
[1133] See below pp. 228-236.
[1134] See below pp. 238-248.
[1135] See below pp. 249-252.
[1136] See below pp. 260-263.
[1137] See below pp. 255-259.
[1138] See above Chapter 5 pp. 100-102.
[1139] J. Mason, *Qualitative Researching*, (1996), pp. 44-51.

most information. There were two reasons for this. First, I was interviewing busy people who had kindly agreed to take time out of their schedule to see me. Although my interviews were planned, and I had checked the timing, I decided that it was important to make sure that even if they were running late or I had to finish the interview early, I would at least have asked the most important questions. The second reason was so that I had plenty of time to ask follow-up questions or modify either the order or wording of my later questions. The main advantage of dealing with the main issues of the research later in the interviews would be that this would allow greater rapport to develop. Ultimately though I decided that the timing arguments were overwhelming.

A potential danger with unstructured interviews is that interviewees might stray from the subject and that any material obtained might, whilst interesting in itself, be irrelevant to the research.[1140] This was a problem that I had anticipated and I decided that the best approach was to deal with it before it arose. After the interviewees had agreed to take part in the research, I sent them an outline of topics that I expected to cover in the interview. This enabled the respondents to reflect on the topic and their experiences and opinions of duties to report. This pre-warning also meant that the beginning of the interview was not wasted by having to explain extensively the nature and purpose of the research. Obviously, I did not want the interviews to be too rigid so, when contacting the respondents, I also stressed that they would be able to suggest areas that they thought were relevant. As well as helping the interviews to be more effective and reassuring the respondents, this information also ensured that the respondents' agreement to participate in the research was informed.[1141]

The main disadvantage of providing interviewees with this pre-interview outline was that it might enable or encourage respondents to censure their responses in order to give either the information that they thought that I would have wanted, or information that reflected well on them. Despite this risk, it did not appear that the interviewees had censured their replies and in reality it was unlikely that they would do so. There was no sanction for giving the "wrong" replies, nor any benefit for giving the "right" answers and, in any case, none of

[1140] M. Quinn Patton, op. cit. p. 116.
[1141] R. Homan, *The Ethics of Social Research*, (1991), pp. 69-95.

the respondents have been named in the research.[1142] Furthermore, the interviews were not intended to trick the respondents thus providing the respondents with an idea of the questions that would be covered did not detract from the methodology of the research.

The Comparative Nature of the Research

In any interview there is the risk that interviewer and interviewee will not understand each other. An answer will be meaningless if the question has been misinterpreted. Similarly, any analysis or follow up of the interview will be weakened if the interviewer is unable to reveal and test the full complexities of the response. Although, these are general concerns, they were of particular importance in my interviews. In formulating the interview in French, I had to ensure that the terms used were both understandable to the interviewees and were the proper translation for the ideas that I wished to explore.[1143] Furthermore, in my interviews I not only had to find the correct *French* vocabulary, but also the relevant *French legal and professional* vocabulary.[1144]

Translating legal terms raises particular problems. The definition of these terms will be shaped by their use, context, historical origins and so on. As a result of the difference in approach between different legal systems it may be that, although an English and French term stand as a direct translation to each other[1145] they do not have the same functional meaning.[1146] For example, different requirements for liability under an offence, a variety of potential defences and a discrepancy in sentencing may mean that, although an offence has the same title in different jurisdictions what is being examined is not the same.[1147] Similarly, the different requirements and acceptability of divorce in jurisdictions may make a common concept of divorce difficult.[1148] Different

---

[1142] See below p. 226.
[1143] I. Deutscher, "Asking Questions Cross Culturally: Some Problems of Linguistic Comparability" in D. Warwick & S. Osherson, (Ed.), *Comparative Research Methods,* (1973), pp. 163-186.
[1144] G-R de Groot, "Law, Legal Theory and the Legal System: Reflections on the Problems of Translating Legal Texts" in V. Gessner, A. Hoeland, C. Varga, (ed), *European Legal Cultures*, (1996), pp. 155-160 at p. 156.
[1145] Deutscher, op. Cit. p. 167.
[1146] J. C. Reitz, "How to do Comparative Law" (1998) 44 American Journal of Comparative Law pp. 617-623 at p. 621.
[1147] G-R de Groot, op. cit. pp. 158-159.
[1148] Ibid. p. 157.

approaches to contract law also mean that it may be difficult to translate terms such as contract.[1149]

In my own research, one issue that I wanted to explore was whether the seriousness of an offence affected how non-reporting of that offence was viewed. To explore this, I had to decide what term to use for "offence". I had a choice between the general term "*infraction*" meaning an offence or specific terms such as "*crime*" or "*délit*". This was important because in the CP offences are divided into three classes according to their gravity.[1150] Examining whether the seriousness of an offence that has already been pre-selected as serious is a factor in determining whether non-reporting should be punished is different from deciding whether an offence is serious from within the class of all offences.[1151] I decided that *crime* was the better term to be used. It was clear from the Code itself that mandatory reporting was limited to the most serious of all offences. In the interviews, I was interested in discovering whether within this class of serious offences, there was a further division between those extremely serious offences where a failure to report would be punished and those other offences where, although failing to report was an offence, it was unlikely to be prosecuted. To avoid misinterpreting the respondents' assessments of offence seriousness, I asked them for concrete examples of serious offences.

A related problem is where not only the terms in different jurisdictions do not relate to functional equivalents, but one jurisdiction uses an idea that is not present in another. The lack of trusts and equity in civil law jurisdictions means that it might be difficult to assess continental attitudes towards these mechanisms.[1152] In my own research, I wanted to examine whether the non-reporting offences were ever used by the police or the *juge d' instruction* as a bargaining tool to obtain information. This question was difficult to phrase because the French have an idealised concept of the use of law. In other words, they tend to interpret law as a theoretical absolute, rather than as a

[1149] R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (1)" (1991) 39 American Journal of Comparative Law pp. 1-34 at p. 13.
[1150] CPP Article 111-1; see above Chapter 5 pp. 93-94.
[1151] See above Chapter 7 pp. 175-176.
[1152] R. Sacco, op. cit. pp. 10-11.

pragmatic bargaining tool.[1153] The strangeness of the issues being raised to the respondent meant that I had to be especially careful that the questions were understood. Furthermore, I had to be sure that I did not ask leading questions and influence the interviewee's responses.

Before carrying out the interviews I piloted my questions with a French academic. This was so I could check that the questions were understandable and I had used the correct terminology.

Researching as a foreigner and an outsider does have special challenges. It also has advantages. Kvale suggests that the interviewer should be open to new information and should play at being deliberately naïve.[1154] This deliberate naiveté suggests that the interviewer is non-judgemental and neutral and encourages the respondent to be open. It also discourages the researcher from leading the interviewee. In situations where the interviewer is researching in a context that is foreign in terms of language, nationality and profession, this naïveté is natural.

The Data from the Interviews

The Recording of the Data

I recorded the interviews and after each interview I made notes. The notes listed the main points of the interview and described any non-verbal factors that would not have been recorded on tape. The tape recorder helped to develop rapport with the respondents. They were sure that their views would be accurately reported. It also meant that I was able to check the wording of quotations. The notes taken immediately after the interview were more useful for getting an overview of the respondents' experiences and opinions. The interviewees did not see either the transcripts of the interviews or the notes made after the interviews. None of the respondents asked to see these, furthermore, rather than enabling them to check their contribution to the

[1153] A. Garapan, "French Legal Culture and the Shock of "Globilization"" [1995] Social and Legal Studies vol. 4 pp. 493-506.
[1154] S. Kvale, op. Cit. p. 33.

research, reading the notes and transcripts might have been a burden on their time.

The Identification of the Respondents

In order to respect the duties of confidentiality of the respondents, I have not named them nor any individuals or cases mentioned by them. Furthermore, in order to hide the identity of the respondents, I have used male pronouns for all the respondents, including the women. The disadvantage of this is that it is not possible to compare the male and female respondents. On the other hand, given the small number of respondents, no firm conclusions could have been reached and in any case if there are any differences between a male and female respondent, these may also be due to age, background, experience, politics and many other factors as well as or rather than gender.

Although I have not named the respondents, I decided that it was important to note the profession of the respondent, who was making a particular comment. This was so that agreements or conflicts between the different professions could be noted. Consequently when analyzing the data I state what the respondent's profession was and where he was based. In other words the two Paris lawyers are LP1 and LP2, the Poitiers lawyer is LPO1, the Tours lawyer is LT1 and the Le Havre lawyer is LH1. The Poitiers police inspector is PPO1, the Poitiers investigating judge is JPO1 and the professor at Poitiers University is UPO1. The representative of the Antenne des Mineurs in Paris is AP1.

The Analysis of the Data

Once I had completed all the interviews, I compared them, looking for points of agreement and conflict. The resulting analysis is examined in the rest of this Chapter. Although I began each interview by discovering the respondents' experience of mandatory reporting, this examination of the data from the interviews will first focus on voluntary reporting before examining the duties to report.

How and when does the Public Choose to Help the Police?

Although the interviews concentrated on the duties to report, I also wanted to examine voluntary reporting. By discussing motivations behind a decision to report I wanted to examine whether duties to report had any effect on reporting levels. I also expected the discussion of voluntary reporting to identify onerous reporting where a duty to report might not be appropriate.[1155]

The Questions

Q. Does criminal liability for the non-reporting of offences increase the reporting of offences?

The literature suggested two main reasons why mandatory reporting might have little impact on the decision to report. The duty to report in Article 434-1 CP is limited to serious offences.[1156] Most people are willing to report serious, violent offences.[1157] Mandatory reporting in Article 434-3 focuses on vulnerable victims.[1158] Individuals seem to be more willing to report if the victim was especially vulnerable.[1159] If individuals voluntarily report in those situations where reporting is mandatory, do duties to report have any effect? In order to examine this, I wanted to explore voluntary reporting with the respondents.

A further argument is that duties to report are little known and therefore are unlikely to persuade someone to report.[1160] It was important, therefore, to discuss with the respondents whether the non-reporting offences were well-known.

The interviewees would only be able to offer suggestions as to answers to these problems. In order to find out why the French public did or did not report, I would have needed to interview ordinary witnesses. The professionals, whom I interviewed, could only have an idea of whether mandatory reporting

[1155] See above Chapter 2 pp. 22-24.
[1156] See above Chapter 7 pp. 174-175.
[1157] See above Chapter 5 pp. 111-114.
[1158] See above Chapter 7 pp. 194-195.
[1159] See above Chapter 5 pp. 114-115.
[1160] See above Chapter 2 p. 8; Chapter 6 pp. 144 and below Chapter 10 pp 346-351.

was well-known by the public.[1161] Despite this, the responses may still be useful. Sometimes, a respondent's account will support that of another respondent. Furthermore, by working in the criminal justice system, the respondents may have an impression of the reasons why a person reports. They may, for example, be basing their replies on case records or on infamous cases on failures to report. Finally, even though I interviewed an elite group of respondents, the respondents may themselves, as ordinary witnesses, been faced with a decision whether to report and may be drawing on this experience in their responses.

The Respondents' Experience of Voluntary Reporting of Offences

How the Police Discover Offences

Empirical studies of the discovery of offences in England and Wales show the importance of the reporting of offences by victims.[1162] In his interview, PPO1 stated that in his experience most offences were discovered because the victim reported. He estimated that 90% of offences were reported by victims. Although English and French studies of reporting suggest that victims are more likely to report property than violent offences,[1163] PPO1 had not noticed this difference in reporting by victims in relation to property or violent crime. On the other hand, he did claim that victims were less willing to report offences that had been committed against them by someone they knew.

As for police discovery of offences, according to PPO1, this was largely due to undercover operations, patrolling areas that were known to have high crime rates, and information from informants. According to PPO1 informants were vital. He had earlier worked for a specialist anti-terrorist service and he said that informers were especially important in identifying terrorist offenders. This

---

[1161] See above p. 216

[1162] R. Mawby, *Policing in the City*, (1979); D. Steer, *Uncovering Crime, the Police Role*, (1980), p. 67; J. Shapland, J. Willmore & P. Duff, *Victims in the Criminal Justice System*, (1988) p. 17; see above Chapter 4 pp. 75-77.

[1163] J. Shapland, J. Willmore & P. Duff, op. cit. p. 17; C. Clarkson et al, "Assaults, the Relationship Between Seriousness, Criminalisation and Punishment" [1994] Crim. L. R 4; R. Zauberman, "The International Crime Survey in France, Gaining Perspective" in A. del Frare, U. Zvekic & J. Van Dijk, (ed), *Understanding Crime, Experience of Crime and Crime Control*, (1993), 307-318 at pp. 308-309; see above Chapter 4 p. 76 & Chapter 5 p. 110.

was unsurprising. Because of the closed nature of terrorist gangs, arrests of terrorist suspects are often due to informers.[1164]

The fact that future terrorist offences may only be known about by a few individuals might suggest that it is especially important to ensure that those who do know report either by rewarding informants or by punishing non-reporters. One of the justifications for mandatory reporting is that it can be used to help the police to discover offences that might not otherwise be reported. The fact that terrorism might otherwise be difficult to discover might explain both the use of informants and the fact that there is a duty to report terrorism.

The Reporting of Offences by Victims: Motivations Behind a Decision to Report

The respondents discussed reporting by witnesses. The interviews can not offer the same insight into non-reporting by victims that victimisation surveys provide. Because the respondents were speaking as professionals rather than as victims, they would not be relying on their own experiences but instead on their impressions from cases that they had worked on. Notably, the lawyers often acted for *parties civiles* and might therefore be thought to have some appreciation of how a victim decided whether to report.

The Victim's Relationship with the Offender

Two of the lawyers, LH1 and LP2, the police officer, PPO1 and the *juge d' instruction,* JPO1, all claimed that the victim would be less likely to report if he was in a relationship with the offender. These same respondents, and a further lawyer, LT1 claimed that fear of reprisals would also discourage victims from reporting. The two reasons may be connected. A victim may fear that if he reports someone he knows, the opportunity for that offender to take revenge is greater than it would be if the reporter were a stranger.[1165]

[1164] J-F. Gayraud, op. cit. pp. 118-9.
[1165] See above Chapter 4 pp. 85, 87-88; C. Clarkson, A. Cretney, G. Davies, J. Shepherd, "Assaults, the Relationship between Seriousness, Criminalization and Punishment" [1994] Crim. L. R. 4, at p. 13.

The Victim's Opinion of the Police

The respondents disagreed about whether the victim's opinion and prior experiences of the police would deter him from reporting. According to LT1 some individuals might believe that the police were unfair and might not report for this reason. This argument was supported by LP2 who argued that an improvement in police/public relations would be more effective than mandatory reporting in increasing reporting.[1166] Interestingly, whilst LT1 argued that distrust of the police was a reason why some individuals failed to report, he does not seem to think that this is justified. From other comments in his interviews he seems to favour a communitarian view of society and of individuals being involved in helping and supporting each other.[1167] JPO1 was adamant that a non-reporter's low opinion of the police was rarely, if ever, a factor. According to JPO1, few potential witnesses would have a negative opinion of the police. Therefore the risk of this deterring reporting was very small. This view should not be interpreted as proving that few individuals in France have a negative opinion of the police. It does illustrate, however, the fact that *juges d' instruction* often have crime control values and are very supportive of the police.[1168]

Reporting by Victims of Sexual Assaults

PPO1, LP1, LT1, LH1 and JPO1 noted that at one time victims of sexual assaults had been reluctant to report. They had been embarrassed and had feared that they would not be believed by the police, *juge d' instruction* or courts. In answering this it is likely that the police officer was drawing on his experience in the police force. His answer concentrated on reforms within the police force. As for the lawyers, it is probable that they based their responses on cases that they had been involved in. According to PPO1 the police response to victims of sexual assault had improved. Most notably there were specially trained police officers who were better able to support the victims. LT1 and LH1 claimed that although the reluctance of victims of sexual assaults to report was significant, things were improving. The number of reported

[1166] See below pp. 266-267.
[1167] See below pp. 232, 260-262.
[1168] See above Chapter 5 pp. 101-102; *La Mise en Etat des Affaires Pénales* (1991); A. Guyamarch, "Adversary Politics and Law and Order in French Politics" in P. A. Hall, J. Hayward & H. Machin, (ed), *Developments in French Politics*, (1990) pp. 221-236.

sexual assaults had greatly increased over recent years, but the respondents argued that this indicated a greater willingness to report rather than an actual increase in sexual assaults:

"il y a les sessions d' assises trois fois par an. Pendant quinze jours, trois dossiers sur quatre sont des dossiers des moeurs, le viol, l' inceste etc. On a beaucoup, beaucoup, beaucoup, et on peut se dire est-ce que c' est parce qu' il y a plus aujourd' hui? Ou est- ce que c' est parce que aujourd' hui on ose plus parler qu' avant? Je crois que ce ne sont plus repandus aujourd' hui qu' il y a cinquante ans."[1169]

"Il y a une vingtaine d' années les enfants venaient et on ne les croyaient pas, on classait l' affaire. Donc il n' y avait pas de poursuites. Et puis l' enfant a grandi, devenu majeur, et puis il a lancé à nouveau et cette fois–ci on le croit, on fait au moins une enquete, on fait des recherches. Il y a beaucoup plus de ces affaires, mais je ne crois pas que les cas sont montés, c' est la revelation. Je ne sais quoi vous dire parce que une constatation qui est faite c' est qu' on fait plus d' attention à la protection des enfants d' une manière générale, au niveau scolaire, au niveau législatif, au niveau des mauvais traitements. Et comment ca s' est fait, ca se fait assez combativement. ...."[1170]

The Role of Witnesses

PPO1 did not spontaneously mention the importance of reports from witnesses in the discovery of crime. This suggests that witnesses play a minor role in the reporting of offences. This might suggest that mandatory reporting is ineffective as it focuses on a relatively insignificant way that the police discover offences.[1171]

[1169] From interview with LT1 -Translation:
"There are assize sessions three times per year and during the fortnight three out of four cases are indecency cases, rape, incest etc. There are lots; lots of them and it can be said is it because there are more of them today? Or is it because people are more prepared to talk about it today? I don't think that it happens any more than fifty years ago."

[1170] Translation:
"About twenty years ago children came and people did not believe them, the case was closed. So there were no prosecutions. And then the child grew up and became an adult and he made the same complaint and this time he was believed, the offence was investigated, research was done. There are lots of cases, but I don't think that it's the number of cases that have increased, it's the reporting. I don't know what to say about it; one observation is that more protection is paid to the protection of children in a general way in school, as far as the law is concerned, as far as abuse is concerned. And how is it done? Well, quite aggressively. "

[1171] See below Chapter 10 p. 346.

Reprisals and Reporting by Witnesses

LT1, LH1, PP01, LPO1 and LPO2 stated that fear of reprisals was a major reason for a witness not reporting offences. It seems reasonable that an individual would not be likely to risk his life to report another's offence. However, in addition to relying on "common sense", the respondents may also be basing their answers on cases that they have been involved in. I discussed reprisals and reporting with LT1. He argued that many potential reporters did not report because of reprisals and because they lacked the courage to report.

"Chez nous les citoyens ont peu de courage...Je ne sais pas s' il y a beaucoup de dénonciations parce que je crois que les gens ne sont pas très courageux."[1172]

The word "*courage*" often implies moral strength. Consequently, by describing the non-reporters lack of "*courage*", LT1 may be criticising the non-reporters moral weakness as well as recognising that they may have been too frightened to report. Later in his interview LT1 described an incident where many bystanders refused to help a woman being attacked.[1173] LT1's opinion of the non-reporters in that case suggest that he is critical of non-reporters.

Reporting and the Witness's Relationship with the Offender

According to LH1 and JPO1, the fact that the offender and potential reporter knew each other might dissuade an individual from reporting. This was important because although French discussions of reporting have recognised that the offender's family will be reluctant to report, they have not considered other individuals who may know or have a relationship with the offender.[1174]

Reporting by Gang Members

Linked to this, LH1 argued that an individual, who had been involved in criminal activity, would be reluctant to report other offenders.

[1172] Translation:
"Here citizens are not very brave...I do not think that many people report crimes because I do not think that people are very brave."
[1173] See below p. 234.
[1174] See above Chapter 7 pp.183-184; Gayraud, op cit. pp. 150-152.

"il doit dénoncer le crime est quand ce sont ses copains, il n' a pas le courage."[1175]

There are four possible reasons why an individual might be reluctant to report in these circumstances. First, loyalty. He does not want to betray his friends by reporting. Secondly, interpreting "*courage*" as daring, he fears reprisals from the other gang members. According to this interpretation the individual fails to report because he is afraid. He is not brave enough to face the threat of gang reprisals. Thirdly, interpreting "*courage*" as moral courage, the offender's involvement in the gang means that he is a bad person. His failure to report is an example of his selfish behaviour. Finally, he may be worried that by reporting his own criminal activity will be discovered. In any case, it is significant that gang members are reluctant to report, because they may well have useful knowledge about planned offences. This might suggest a need for mandatory reporting. Furthermore, one of the justifications for mandatory reporting is that it is useful against criminal gangs. It can be used to prosecute individuals, whose more active assistance or involvement in the offence can not be proved, or to secure the testimony or assistance of those peripheral individuals.[1176]

Reporting and the Relationship Between an Individual and Society

LT1 believed that an important reason for the lack of reports was that people considered themselves more as atomised individuals than as members of a community.[1177] It may be that LT1 in part bases this opinion on the experience of a failure to rescue that he once had.[1178]

"Je crois que c' est une des fautes de nos sociétés Européenes avancées. Vous savez on dit ca beaucoup en France, moi je n' embete personne si personne ne m' embete pas, chacun chez soi comme on dit . Au niveau personnel, je crois que l' homme normal a le devoir de porter secours. Alors dénoncer, c' est pas porter secours. Il faut un peu de courage parce que dénoncer fait craindre les représailles ...."[1179]

[1175] Translation:
"He has to report the offence, and when it's his mates they daren't."
[1176] See above Chapter 6 pp. 141-142; Chapter 7 pp. 182.
[1177] See above Chapter 2 pp. 10-12.
[1178] See below p. 234.
[1179] Translation:
"I think it's one of the faults with our advanced European societies. You know a lot of people in France say if no one bothers me than I won't bother anyone, everyone minding his own business as it were. On a personal level, I think that the normal man has a duty to help someone in danger; well

It seems that LT1 claims that most people interpret an individual's duty towards other individuals as being limited to not harming them. He argues that people reject positive liability, for example duties to rescue, because the non-rescuer has not harmed the person in danger.[1180]

As will be seen in the following quotation however, LT1 himself advocated a more communitarian view of the relationship between individuals. He had a personal experience of an unwillingness to get involved. Working late one night he heard a woman screaming. He went down and found a man attacking a woman. His arrival caused the man to flee. LT1 was amazed that he was the only person who had done anything.

"Une experience personelle, il y a une quinzaine d' années à Tours, j'ai entendu, la nuit, comme ca en ville, je travaillais sur un dossier, hurlé une malade et c'est un hurlement très, très gros et je suis descendu, j' etais tout seul et le fait que je descends fait qu' ils etaient en train d' attaquer une femme, ils avaient les couteaux mais en me regardant ils sortent, heureusement parce que, et c' est vrai que ce jour là je me suis dis bon le cri fait qu' on ne peut pas rester dans le lit ..."[1181]

In this quotation, LT1 clearly supports civic duties of mutual assistance. He is shocked by the refusal of others to help the woman. It is interesting that LT1 seems to disapprove of those individuals, who did not go down to the woman, even though in this case the fact that the attackers were armed suggests that helping would be dangerous.[1182] Furthermore, in the previous quotation, LT1 recognised that the reporter may face the risk of reprisals. Although this might suggest that he would favour an extensive duty to report, and notably would reject fear or threat of reprisals as excusing a failure to report, from the rest of the interview it was clear that although he supported mandatory reporting, he felt that punishment should be reserved for the most blameworthy non-reporters.[1183] In his opinion, fear of reprisals would excuse a failure to report.

---

reporting crimes isn't exactly helping someone in danger. You need to be brave because if you report you may fear reprisals ..."

[1180] See also E. Mack, "Bad Samaritanism and the Causation of Harm" (1984) 9 Philosophy and Public Affairs 230-259; see above Chapter 2 pp. 27-28.

[1181] Translation:

"A personal experience, about fifteen years ago in Tours one night whilst I was working on a file, I heard a poor woman screaming and it was a really, really horrible scream and I went down, I was all alone and the fact that I went down meant that some men who were in the middle of attacking a woman stopped, they had knives but fortunately when they saw me they stopped, thankfully because that night I said to myself, well the scream makes it impossible to stay in bed."

[1182] See above Chapter 3 pp. 64-65.

[1183] See below pp. 242-245.

According to LP1, many individuals reported offences because they did not think it was fair to see dishonesty rewarded whilst their own honesty was not. It is perhaps unsurprising that LP1 should have this opinion. He specialised in advising professionals, especially finance professionals, on their duties of confidentiality. Because of his expertise and experience, his interview concentrated on professional reporters and on the reporting of financial offences. It is arguable that this reason for reporting is more prevalent in relation to financial offences.

Reporting and the Seriousness of an Offence

Research in both England and France demonstrated that individuals were more likely to report serious offences.[1184] In the interviews, I wanted to investigate whether in the respondents' experience individuals were more willing to report *crimes* than the less serious *délits* or *contraventions*. Although, none of the respondents suggested the seriousness of the offence as a reason for reporting, when specifically asked they did recognise that more serious offences were more likely to be reported.

The respondents assessed violent crimes as being the most serious form of offending. The identity of the victim also affected how seriously the crime was rated. According to the respondents, offences against three classes of victim were rated as being especially serious.

- Vulnerable victims - children, old people, disabled people.[1185]
- Domestic violence and therefore relations of the aggressor.
- Victims related to the legal process e.g. police officers, judges and witness who were attacked so that they would not give evidence.

I was not surprised by these interpretations of the seriousness of offences. One possible problem with these responses is that they correspond exactly to the CP concept of aggravating factors.[1186] There is the risk that rather than

[1184] J. Shapland, J. Willmore & P. Duff, op. cit., p. 15; C. Mirlees-Black, P. Mayhew, A. Percy, *The 1996 British Crime Survey*, (1996), p. 23; J-F. Gayraud, op. cit. pp. 53-4; see above Chapter 4 pp. 87-89; Chapter 5 pp. 111-114.
[1185] See above Chapter 7 p. 194-195.
[1186] See above Chapter 7 pp. 174-175, 194-195.

explaining what they personally felt increased offence seriousness, the respondents referred to the Code. On the other hand, the question did ask the respondents for their views of offence seriousness and another interpretation might be that the respondents' interpretation of offence seriousness matched that of the Code. In favour of this interpretation, the respondents' support for the duty to report under Article 434-3 suggests that they do view offences against vulnerable individuals, especially children, as particularly serious. In particular, one respondent, LP2, favoured this duty to report but did not agree with the more general duty to report under Article 434-1. Furthermore, the respondents' involvement in the criminal justice system may have meant that they were especially concerned about attacks on individuals involved in the criminal justice system.

Should Individuals Report Offences to the Police?

One of the differences between rescuing a person in need and reporting an offence is that a decision to rescue someone will usually be praiseworthy. In contrast, some decisions to report may be criticised as treacherous, or meddling, or malicious. I was interested in the respondents' opinions of reporters. If the respondents had been critical of reporting, I would not have expected them to favour duties to report. In fact, however, all the respondents agreed that most decisions to report an offence were praiseworthy. This was especially the case when the offence was serious and the reporting helped the victim. Consequently, they approved of reporting in those circumstances when reporting is mandatory.[1187] Nevertheless, even if the respondents thought that reporting was praiseworthy, this does not mean that they would support a duty to report. It is possible that they would still reject a duty to report as being supererogatory[1188] or unworkable.[1189]

The exception to this idea that reporting is praiseworthy was anonymous reporting. Two of the lawyers, LPO1 and LP2 and the *juge d' instruction* condemned anonymous reporting. These respondents claimed that anonymous reporting was both unreliable and treacherous. The fact that a reporter did not have to identify himself might mean that a reporter would report

[1187] See above Chapter 7. 175-175.
[1188] See above Chapter 2 pp. 19-21
[1189] See above Chapter 2 pp. 29-32.

with little evidence or that he would give the police information that he knew was false. The unreliability of anonymous information is also reflected in the refusal of courts to rely on it.[1190] Anonymous reporting is also criticised because it was prevalent during the Occupation.[1191] Although the negative experience of duties to report during the Occupation did not persuade the respondents to reject mandatory reporting,[1192] the criticism of anonymous reporting may be due in part to anonymous reporting during the Occupation.

Knowledge of the Duty to Report

The impact of duties to report on reporting levels depends on whether mandatory reporting is well known. It seems that the general duty to report, and the duty to report offences against the State and terrorism can be distinguished from the duty to report violent offences against vulnerable individuals in Article 434-3. Both AP1 and LH1 claimed that the duty to report under Article 434-3 was well known. AP1 worked with victims of abuse and their families. He argued that the families of these children usually knew that it was an offence to fail to report abuse. He also explained that the fact that this offence was prosecuted and that there had been campaigns about child abuse and about the duty to report meant that the duty to report was well known.

In contrast, all the respondents, except AP1, claimed that the other duties to report were not well known. LH1 claimed that the other duties could also benefit from increased publicity. He argued that the public should be educated, possibly by a media campaign about the existence of duties to report.[1193] Faced with the threat of punishment for non-reporting individuals would decide to report. LP2 agreed that education was important but contended that the public should be told of the benefits of reporting, for example protecting potential victims of crime, rather than just being threatened with the costs of not reporting.[1194]

[1190] S. Field, "The Legal Framework of covert and proactive policing in France" in S. Field & C. Pelser, (ed) *Invading the Private: State Accountability and New Investigative Measures in Europe*, (1998), pp. 67-81 at p. 77; see above Chapter 5 pp. 96-97.
[1191] J-F. Gayraud, op. cit. pp. 89-100; S. Fontenelle, op. cit. pp. 71-81; and see above Chapter 7 pp. 169-171.
[1192] See below p. 262.
[1193] See below Chapter 10 p. 368.
[1194] See below p. 263.

Article 434-1

This provision makes it an offence punishable by three years imprisonment to fail to report a *crime*.[1195] The relatives of the offender and professionals, who have a professional duty of confidentiality, are exempt.[1196]

The Questions

Q. How often is Article 434-1 prosecuted?
Q. In what circumstances is Article 434-1 prosecuted?

Not all detected failures to report will be prosecuted.[1197] Having studied the doctrine and case law surrounding mandatory reporting, I predicted that Article 434-1 would be more likely to be prosecuted if:

- The non-reported offence was especially serious. The more serious an offence, the greater the justification for requiring reporting. This is because the harm suffered by any victims outweighs the inconvenience suffered by the reporter. As a result, failures to report voluntary homicide, rape, or torture might be thought to be especially likely to be prosecuted.

- Without reports from witnesses and their testimonies, the offence was one that was especially difficult to investigate. Some support for this rationale is found in English duties to report, in particular in relation to the duty to report road traffic accidents.[1198] Similarly, it has been suggested that individuals should be punished for not reporting drugs offences because it was claimed that the police had difficulty detecting these offences.[1199] This may also be the justification for the duty to report terrorism and offences against the State in Article 434-2.[1200]

- The non-reporter was especially blameworthy. This might be because the victim was dependant on the non-reporter, perhaps because of a relationship

[1195] See above Chapter 7 pp. 174-186.
[1196] See above Chapter 7 pp. 183-184, 198-203.
[1197] CPP Article 40; see above Chapter 5 pp. 99-100
[1198] Road Traffic Act 1988 s. 170; see above Chapter 6 pp. 145-151.
[1199] See below p. 245.
[1200] See above Chapter 7 pp. 188-191.

between them. For example, the case law surrounding the duty to rescue in the Penal Code suggests that failures to rescue by the victim's family are more likely to be prosecuted than failures to rescue by strangers.[1201] I was interested in whether the duties to report were interpreted in a similar way.

A non-reporter might also be thought particularly blameworthy and therefore deserving to be punished if it is thought that his failure to report is evidence of wider support for the offender. In relation to this I wanted to discuss whether non-reporting gang members were likely to be prosecuted for failures to report.

I was interested in the respondents' opinions of when prosecution was more likely. Although none of them had ever decided whether to prosecute a failure to report, I though that they might have an impression from their work within the criminal justice system on when reporting would be more likely. I wanted to know whether their opinions would support my interpretation and I was also interested in any other reasons that they might suggest for prosecuting a failure to report.

The Use of Article 434-1: the Level of Prosecutions

LP1, LP2, LT1, LPO1, PPO1, JPO1 all said that prosecutions under Article 434-1 were extremely rare. This is highlighted by the fact that none of these lawyer respondents had ever defended or advised an individual charged with non-reporting. The Ministry of Justice figures for convictions under Article 434-1 also suggest that the offence is rarely prosecuted.

In contrast to the other respondents, LH1 suggested that Article 434-1 was likely to be prosecuted. Apart from his location, he did not seem different from the other lawyer respondents. Unfortunately, he was the first respondent whom I interview, therefore at the time of the interview I did not realise that his experience of the non-reporting offences would be different from that of the other respondents.

One possibility is that the public prosecutors office in Le Havre are more likely to prosecute the offence than other local prosecutors are. With no other

[1201] See above Chapter 3 pp. 54-56.

evidence this can not be confirmed and there is no reason why this should be the case. Another possibility is that LH1 overestimated the use of Article 434-1 and rather than describing how it was actually used he was explaining how he thought it should be used.

When is it Appropriate to Prosecute the Non-Reporting of Serious Offences

Is Article 434-1 Aimed at Preventing Crime or at Detecting and Punishing Criminals?

Article 434-1 is an offence of *non-dénonciation* rather than *non-délation.*[1202] The purpose of the offence is to prevent future offences. According to LH1, this means that individuals, who did not report a crime that was going to be committed in the future, were more likely to be prosecuted than those who did not report a crime that was currently being committed. For the same reason, people who did not report a crime that had already been committed were never prosecuted. LH1 did not justify this by describing a particular case. It is possible that he based his answer upon an interpretation of the Code as prioritising the prevention of offences.[1203]

JPO1 also claimed that the purpose of mandatory reporting was to prevent offences. In his interview, he described a case where non-reporters were not prosecuted to illustrate this. In this case, a husband, GS, was shot by his wife's lover. The wife and her daughter hid the dead husband's body in a van. When they were unable to find a suitable place to bury the body, they decided to report the husband's death to the authorities. They claimed that the husband had been trying to shoot his wife and her lover but had shot himself when the gun went off as the lover was trying to disarm him. This explanation was refuted by the autopsy and by ballistics experts.

The Poitiers *Chambre d' Accusation*[1204] decided that PP, the lover and man who shot the husband, and his lover's daughter, MD, should be tried for murder

[1202] See above Chapter 7 pp. 176-179.
[1203] This seems a reasonable conclusion, given that many respondents referred to the code to support their answers, for example see below pp. 256-257.
[1204] The *Chambre d' Accusation* was the court which reviewed the juge d' instruction's investigation and his decision whether the defendant should be tried.

and being an accessory to murder respectively.[1205] They decided not to try the wife and two other individuals for their failure to report because it was unlikely that either PP or MD would kill any one else. Their failure to report therefore had not stopped future *crimes* being prevented.

Another difficulty with this case was that the background to the murder, and the sometimes complicated personal situation of the offenders and the victim and the different personal loyalties of the various family members, meant that it had been difficult for the *juge d' instruction* to discover what had happened and who had known about the murder.[1206] This illustrates the fact that a non-reporter will only be prosecuted if he knew that the offence was being or was going to be committed and if this knowledge can be established.[1207]

Did the Non-reporter Know that an Offence was Being Committed?

"Et pour venir à l' opportunité, l ' opportunité c' est le procureur qui va prendre l ' essence du dossier et se dire qu' est–ce que quel qu' un de normal pourrait fait à la meme situation. Est-ce qu' il a le temps de réfléchir? Est-ce qu' il a le temps de dénoncer? Est-ce qu' il a compris ce qui s' était passé? Ce genre de choses. Il faut voir quand-meme qu' en France on poursuit beaucoup pour ca (R. vraiment?) quand-meme oui, quand-meme oui. Comme par exemple quand ce sont des crimes on poursuit ce qui a vraiment la connaissance du crime. On poursuit ce qui a vraiment la connaissance du crime avant. Tous ce qui découvrent le crime pendant là on poursuit beaucoup moins parce que c' est très dur de savoir ce qu' ils savaient."[1208]

According to LH1, individuals who do not report crimes that are currently being committed are less likely to be prosecuted because they can claim that they did not realise that a crime was being committed. This is because, in the heat of the moment, they would not have time to reflect.[1209] This might mean that the duty to report is more likely to report if the non-reported offence is particularly

[1205] According to the file, PP had asked MD to give him the "green light" to shoot GS. Accordingly she was believed to have given PP an "aide morale constitutive d' un acte de complicité" – moral support constituting an act of complicity; CP Article 121-7.
[1206] Interview with JPO1.
[1207] See above Chapter 7 pp. 179-181.
[1208] Translation:
"Looking now at when prosecution is appropriate, the Procureur takes an overview of the case and says to himself what would a normal person have done in the same situation? Was there time to reflect? Was there time to report? Did he really understand what was happening? All the same it should be noted that a lot of people in France are prosecuted for that (R. really?). All the same yes, all the same yes. For example when it's the non-reporting of the most serious offences people who know beforehand are prosecuted. Those who discover the offence whilst it's being committed, they're more rarely prosecuted because it's very hard to know what they knew."
[1209] See above Chapter 6 p. 130.

obvious. It might be that an especially violent and unprovoked attack is especially unlikely to be misinterpreted as not being an offence.[1210]

Although LH1 refers to the Procureur, the prosecutor, making the decision on this basis, it is unlikely that he had any first hand experience of the Procureur's decision making process. Instead, he may be basing his answer on cases that he has been involved with, or again on an analysis of the Code itself. It is also possible that rather than describing how the Procureur does decide whether to prosecute, LH1 is instead suggesting factors that he thinks should be considered.[1211]

In addition to the non-reporter having realised that an offence was being or was going to be committed he must also have realised that it was serious enough to be classified as a *crime*.[1212] The significance of this requirement is illustrated by the effect of Article 434-3 on reporting. According to LH1, prior to the specific obligation to report child abuse, neighbours and other individuals who might have known that children were being beaten claimed that although they knew that the children were being beaten, they did not realise that it was sufficiently serious to constitute a *crime*. One possibility is that the more serious an offence, the more likely that an individual will realise that it is classified as a *crime*. It may be therefore that it is the non-reporting of particularly serious *crimes* that will be punished.

Failures to Report by Gang Members

In LH1's experience, Article 434-1 is most frequently used against gang members, who do not report crimes committed by other gang members:

> "Souvent les histoires de violences collectives, lorsque par exemple, vous avez un groupe qui va torturer une personne et vous avez deux ou trois personnes qui ne participent pas, mais quand-meme partie du groupe alors ils ne dénoncent pas. Mais ils sont quand-meme courageux, donc si vous voulez ils refusent de participer à un crime qui c' est un bon chose directement quand un crime s' est en train de se faire, mais ils doivent dénoncer le crime et quand ce sont leurs copains ils n' ont pas le courage. Et bien souvent on voir le dossier et ceux-là on poursuit."[1213]

[1210] See above Chapter 4 pp. 67-68.
[1211] See above p. 215.
[1212] See above Chapter 7 pp. 179-180.
[1213] Translation:
"Often in cases of gang violence, for example when you have a gang who are going to torture a person and you have two or three individuals who don't participate but all the same they're part of the gang so

Many of the interviewees viewed gang violence as a particularly serious form of offending. JPO1, LPO1, PPO1, LP2 and LT1 all referred to gang violence as an especially harmful form of offending. Consequently, it might be that the use of the duty to report against members of gangs is another example of mandatory reporting focusing on especially serious offences. Furthermore, in LH1's example the offence committed by the gang, torture, is a particularly serious offence, regardless of any gang involvement.

Another justification for using the offence against non-reporting gang members might be that this is the only way to punish individuals who support and benefit from criminal activity, but whose more active involvement can not be established. Again there are links with the English non-reporting offences. One of the justifications for the offence of misprision of felony was that it might be used against individuals involved in criminal gangs. Similarly, the offence of withholding information about terrorist offences and offenders was introduced because it was claimed that some individuals who were involved in terrorism could not be prosecuted under existing legislation.[1214]

Furthermore, punishing the non-reporting gang member for his failure to report better reflects his involvement in and support for the offence than punishing him as an accessory. He has done a "good thing" in refusing to participate in the offence. This distinguishes him from the principal and from the active accessories. It would not be appropriate to label him, like them, as being an accessory.[1215]

According to LHI, a member of a gang, who does not join in with the gang but does not report the gang's crime, can either be prosecuted in the *Cour d' Assises* with the gang members who did commit the crime or he can be tried in the *Tribunal Correctionnel.*[1216] LH1 noted that in Le Havre there had been a change in policy. Previously, such non-reporters were tried in the *Cour d'*

---

they do not report. All the same they are brave if you like to refuse to participate in a crime whilst its being committed is a good thing but they should report the offence and when it's their friends they aren't brave enough. And often you see the file and those kind you prosecute."

[1214] See above Chapter 6 pp. 141-142.

[1215] A. Ashworth, *Principles of the Criminal Law*, 3rd Edition (1999), pp. 90-93; A. Ashworth, "The Elasticity of Mens Rea" in C. Tapper, (Ed), *Crime, Proof and Punishment*, (1981), pp. 45-70; G. Williams, "Convictions and Fair Labelling" [1983] Cambridge Law Journal 85.

[1216] See above Chapter 5 pp. 93-94.

Assises. Trying the non-reporters at the same time meant that the *Cour d' Assises* was able to put the non-reporting into context. Now non-reporters are tried in the *Tribunal Correctionnel.* LH1 regretted this development. Its workload meant that the *Tribunal Correctionnel* did not have the time or information to determine whether the non-reporter could really have reported. Interestingly, the fact that there is a specific policy on this in Le Havre might suggest that there is a policy of prosecuting non-reporting in that area. This is not however supported by the figures from the Ministry of Justice.[1217]

Failures to Report and the Reasonable Man

An individual may decide not to report an offence for a variety of reasons, fear of reprisals, relationship with and duties towards the offender.[1218] According to LH1 the Procureur does take account of these factors. The question is what the reasonable man, "*personne normale*" would have done, whether that "*personne normale*" would have reported.

"En fait, si vous voulez le procureur va actuellement prendre sa décision sur le fait de savoir si la personne pouvez *vraiment* dénoncer. S' il n' y avait pas de pressions morales comme par exemple quel' qu' un qui va dénoncer son fils, dénoncer son père, il va avoir ... on va dire comme par exemple, bof, elle était bloquée."[1219]

This emphasis on the reasonable man suggests that a non-reporter will only be excused from reporting if his failure to report is objectively understandable. It is unlikely, for example, that it will excuse the non-reporting gang member. Although the gang member may feel that their loyalty towards the gang would make it difficult, if not impossible, to report, because the "normal" individual will not feel like this, a failure to report will not be excused. In contrast, the normal individual may understand a failure to report family members. This may explain why the offender's family are generally exempt from duties to report.[1220] Moreover, according to LH1 even when the family member is not exempt from reporting, his failure to report will be viewed sympathetically. In contrast, to

[1217] See below Appendix A.
[1218] See above Chapter 5 pp. 115-117.
[1219] Translation:
"In reality, the Procureur currently makes his decision according to whether the person could really report. For example if there are no moral pressures for example someone who was going to report his son, his father, he would have...you'd say well he's blocked."
[1220] P. Mousseron, "Les Immunités Familiales" [1998] Rev. Sci Crim. 291; see above Chapter 7 pp. 183-184.

the example of the gang member just described, the failure of a family member to report may be more objectively understandable.

The Non-reported Offence

I was interested in whether Article 434-1 was used to obtain information about those offences that were not often reported either by witnesses or victims. Research suggests that terrorism and other offences against the State such as spying are unlikely to be reported. Does this explain why there is a duty to report these offences under Article 434-2? As for Article 434-1, one type of serious offence that this might apply to is drugs offences. In 1996, Marc Wolf a mayor of a Northern town wrote to all the inhabitants and all the officials in that town encouraging them to report drugs offences. He claimed that drugs offences were offences about which "*il n' est pas facile de rassembler des preuves solides.*"[1221] In contrast to this, PPO1 claimed that Article 434-1 was not relevant to the detection or investigation of drug offences because drugs offences were usually reported by informants or discovered as a result of surveillance operations.

The Use of the Offence by the Police.

According to PPO1, Article 434-1 was very rarely prosecuted. Despite this, he was in favour of the duty. One reason for this was that, even if a failure to report was not prosecuted, the fact that a non-reporter might be prosecuted, might be used to persuade a reluctant witness to give information. This corresponds to English police support for the offence of withholding information about terrorism. Despite the lack of prosecutions the offence is effective in persuading reluctant witnesses to give information.[1222] Interestingly, LT1 gave this as a use for the duties to report spontaneously rather than in response to a specific question.

[1221] Translation: "It's not easy to get solid proof."
Fontenelle, op. cit. pp. 14-17 at p. 15.
[1222] See above Chapter 6 pp. 141-142.

Reasons for the Lack of Prosecutions

The link between the duty to report offences and the duty to rescue an individual in danger, or prevent a violent offence.

LT1, LPO1 and LP2 emphasised the link between the *non-dénonciation* offences and the duty of easy rescue. They argued that failing to report an offence only deserved to be punished if a victim had been seriously harmed by that non-reported offence. If this were the case, according to these respondents the non-reporter should be prosecuted under Article 223-6 rather than under Article 434-1. The respondents based their information on cases they had been involved in where a failure to report had been prosecuted as a failure to rescue. Furthermore, the fact that both offences stress the need to prevent violent offences does support the respondents' views.

As an example of a blameworthy failure to report that had been punished, both LPO1 and PPO1 described a recent conviction for failure to rescue in the Poitiers *Tribunal Correctionnel.* In this case, a woman was attacked and raped in the Paris-Poitiers train. The ticket collector heard her screams but did not try to stop the attack or call the transport police. A passenger stopped the rapist. When the train arrived in Poitiers, the rapist was arrested, as was the ticket collector. The ticket collector was charged and convicted under article 223-6 for a failure to rescue and to prevent a serious, violent offence.[1223]

I was surprised by the overlap between the non-reporting and non-assistance offences. In the CP and in discussions of the criminal law the former are described as offences against the state and the later is viewed as an offence against a private individual.[1224] The fact that the respondents stressed that the similarities between the offences suggests that a more private law, victim centred interpretation of non-reporting has been adopted. The similarity between duties to report and duties to rescue has other important consequences on mandatory reporting. One possibility is that duty to report will be limited to those offences that put the victim in serious danger.[1225] As for

[1223] See above Chapter 3 pp. 53-66, Chapter 7 pp. 197-198.
[1224] See above Chapter 7 p. 184.
[1225] See above Chapter 3 pp. 64-65.

the non-reporter, he is unlikely to escape liability because he did not personally witness the offence,[1226] or because reporting is inconvenient.[1227] In particular, because professionals are not excused from duties to rescue under Article 223-6, the professional may, despite the duty of confidentiality, be punished for a failure to report.[1228]

Individuals who do not Report Offences that have Produced all their Effects are not Liable Under Article 434-1.

In order for a person to be liable for failing to report a serious offence, it must be shown that, had he reported, he would have prevented that crime, limited its effects, or prevented the criminal committing other crimes. There is the possibility that a non-reporter will admit to knowing that an offence had been committed but claim that he believed that the offence had produced all its effects and the offender would not commit other similar offences. One example of this is the case from the Poitiers *Chambre d' Accusation* which has already been described.[1229] In addition, LH1 described this problem in relation to child abuse:[1230]

"C' est qu' encore une fois on n' a pas une obligation de dénoncer un crime qui a fait tous ses effets, on a l' obligation de dénoncer un crime qui est en train de se commettre. Alors la personne peut tomber entre les deux. Il peut dire j' ai vu qu' il y avait un problème mais j' ai pensé que ca ne continue pas. Alors ca c' est pas très bien comme argument mais c' est ce qui s' est passé quand-meme."[1231]

Although LH1 used child abuse to illustrate this difficulty, it is arguable that rather than an isolated event, child abuse is part of a pattern of behaviour and therefore this restriction is unlikely to limit the reporting of child abuse. Furthermore, the reform of the CP in 1993 extended the duty to report child

[1226] See above Chapter 3 pp. 61-63.
[1227] See above Chapter 3 pp. 60-61.
[1228] See above Chapter 3 pp. 58-59; Chapter 7 pp. 197-198.
[1229] See above pp. 245-246.
[1230] The 1993 reform of the Penal Code changed the duty to report child abuse. It is no longer necessary to prove that reporting would have prevented future crimes see below Chapter 7 pp. 195.
[1231] Translation:
"It's that once again there is no obligation to report a crime which has produced all its effects, there's an obligation to report a crime which is currently being committed. So a person can fall between the two. He can say I saw that there was a problem but I thought that it was not continuing. Well that's not a very good argument, but that's what happened all the same."

abuse.[1232] It is no longer limited to those reports that might prevent further abuse.[1233]

The Offender's Family do not have an Obligation to Report.

LT1, JPO1 and PPO1 all claimed that the fact that the offender's family did not have an obligation to report was a major limitation on the effectiveness of Article 434-1. The family's close connection with the offender means that it is they who are best placed to know whether the offender is going to commit an offence.

"On exclus la famille c' est quand-meme la famille qui est au courant."[1234]

Consequently, excluding the family significantly hindered the effectiveness of mandatory reporting.[1235]

Moreover, it is possible that the focus of Article 434-1 on preventing future crimes means that the offender's family's information would be especially useful. When a crime is actually being committed it may be that there are many people who could report that offence, for example victims or witnesses. In contrast when an offence is in its planning stage it could be that the offender's family are the only individuals, other than the offender himself, who know that he is going to commit a crime.

None of the respondents were responsible for deciding whether to prosecute a failure to report or a failure to rescue. It is possible that they claimed that the offender's family were likely to know about the offence because they had been involved in investigating cases or in defending offenders where this had been the case.

[1232] See above Chapter 7 pp. 194-197.
[1233] CP Article 434-3; see above Chapter 7 p. 195; see below p. 250.
[1234] From interview with LT1.
Translation:
"The family is excluded all the same, it's often the family who know what's going on."
[1235] See below Chapter 10 pp. 355-356.

Article 434-3

Under this Article an individual, who knows that a child or a vulnerable adult is being ill-treated or neglected and does not report, can be sentenced to three years imprisonment.[1236]

According to the respondents, their experience of this offence was that it was mainly used to encourage the reporting of child abuse. This section will therefore focus on Article 434-3 as a duty to report child abuse.

The Questions

Q. How is child abuse viewed in comparison with other serious offences? How is the reporting or failure to report child abuse viewed?

Q. How does the Article 434-3 compare to Article 434-1? How is its wording different? Does it have different objective(s)?

Q. How does the prosecution rate for Article 434-3 compare with that of Article 434-1?

The Greater Awareness and Reporting of Child Abuse

The respondents claimed that awareness of child abuse had increased since the 1970s. According to the respondents, this concern about child abuse meant that members of the public were especially critical both of abusers and of those whose behaviour, including a failure to report, could be interpreted as enabling the abuse to continue:

> "En France on a vu d' abord un grand campaign de presse. Ils ont attaqués ces gens là, en disant très souvent à l' école vous voyez les enfants qui ont des bleus, vous ne faites rien. L' opinion public dit aussi aux assistants publics, vous allez à la maison, vous voyez qu' il y a l ' acool par tout, il y a les livres pornagraphiques partout, vous ne faites rien..."[1237]

[1236] See above Chapter 7 pp. 194-197.
[1237] From interview with LH1
Translation:

Some of the respondents, notably AP1, were directly involved in trying to increase awareness of child abuse and therefore would have been well placed to comment on how effective these efforts had been. Other respondents, for example LH1, who is quoted,[1238] would have been aware, as citizens, of media campaigns to highlight the problem.

Article 434-3 in Comparison to Article 434-1

The Consequences of Reporting

Unlike the general duty to report, the duty to report under Article 434-3 is not limited to those reports that would *prevent* violent offences against vulnerable individuals.[1239] A non-reporter has a duty to report even if the offence is completed and, in theory, even if the attacker would not commit another such offence. In reality, though child abuse may be ongoing, for example, the child will sometimes be living with the offender, and a failure to report a past instance of child abuse is a failure to report a future instance of child abuse.

In his interview, LH1 referred to the possible lacuna where an individual could admit to knowing that an offence had been committed but could claim that he thought that it had finished and had produced all its effects, and therefore, there was no obligation to report.[1240] According to LT1 this argument would not work in relation to Article 434-3:

> "A mon avis non, parce qu' il viendra dire que c' était fait et ca ne va pas recommencer, alors il avait le texte il y a la phrase "dont il est possible d' encore limiter les effets" donc avant. Mais comme vous disait le texte de la non-dénonciation des mauvais traitments "le fait pour quiconque ayant connaissance etc." c' est indépendent du fait que ca va recommencer. Il faut dénoncer meme que c' est passé...Le texte est clair heureusement parce que ca serait un mauvais argument parce que malheureusement les violences contre les enfants c' est répétitives."[1241]

"In France first of all there was a big press campaign, they attacked those people (referring to teachers who do not report abuse of their pupils) saying you often see children at school who have bruises and you do not do anything. Public opinion also says to social workers, you go to their homes and you see alcohol everywhere, pornographic books everywhere and you do not do anything."

[1238] See above p. 249 and see previous footnote.

[1239] See above pp. 240-241.

[1240] See above pp. 247-248.

[1241] Translation:

"In my opinion no because that would be saying that it's done and it won't happen again, look at the text there's the phrase "of which it is still possible to limit the effects" in other words before, but in relation to the non-reporting of abuse it's "the fact that an individual knows that" it's independent of

The Use of Article 434-3

Knowledge of Article 434-3

All the respondents agreed that this specific offence was more widely known and more used than the general offence under Article 434-1. The Ministry of Justice figures show that there was an increase in convictions for failing to report child abuse during the early 1990s. Although the level of convictions for this offence have since decreased, off, it is more likely to be punished than the general offence.[1242] Moreover, whilst the majority of the lawyer respondents had not had personal experience of Article 434-1,[1243] they had been involved in prosecutions under Article 434-3, either advising and representing the defendant or working for the *partie civile.*[1244] The fact that failures to report child abuse have been punished is one explanation why this offence is, according to the respondents, better known than the more general offence. Another explanation is that there has been an increased awareness and concern about child abuse and this has included a greater awareness of the duty to report.

Prosecuting Failures to Report Under Article 434-3

Although it is used more than Article 434-1, Article 434-3 will not be used to punish every failure to report a violent offence against a vulnerable individual. PPO1, JPO1, LPO1 and LT1 all claimed that, in their experience, mothers, who failed to report abuse against their children, were more likely to be prosecuted under Article 223-6. One explanation for this might be that these failures to report are seen as especially serious and meriting the greater sentence under Article 223-6. Furthermore, the reported cases on Article 223-6 suggest that failures to rescue and to report on the part of parents of the victim are more likely to be prosecuted than failures to rescue by strangers.[1245] This suggests

---

the fact that the offence will happen again. You have to report it even if it's already happened. The code is clear fortunately because that would be a very bad argument given that child abuse is repetitive."

[1242] See below Appendix A.

[1243] See above p. 239.

[1244] See above Chapter 5 pp. 102-104.

[1245] See above Chapter 3 pp. 54-60.

that a failure to report child abuse by the victim's family might be punished under Article 223-6.

Some failures to report are never prosecuted. An example of this is a Poitiers case described to me by both PPO1, a police officer, who had been involved in investigating the offence, and LP01, a lawyer who had represented the *partie civile*[1246] in a related action. In this case two children were being sexually abused by their father. The mother knew of the abuse but did not report it. She was afraid of the shame that this would bring on the family. The police were in favour of the mother being prosecuted under Article 434-3. PPO1 could not think of any reason why she had not been prosecuted. He argued that it was a clear case where someone should be prosecuted for not reporting. LPO1 shared this view.

Secret Professionnel: the Professional's Duty of Confidentiality

Secret professionnel is the duty of confidentiality owed by certain professionals towards their clients. Breach of *secret professionnel* is a criminal offence.[1247]

As lawyers, police officers and *juges d' instruction*, the respondents were themselves subject to a duty of confidentiality. Furthermore, one of the respondents, LP1, specialised in representing professionals accused of breaking their professional duty of confidentiality. Consequently, the respondents were able to comment on professional confidentiality and how it affected reporting.

Chapter 7 examined the conflict between *secret professionnel* and the non-reporting offences.[1248] It seemed that mandatory reporting and professional confidentiality are usually interpreted so that the professional can justify not following one of the duties by relying on the conflicting duty.[1249] Although the professional has a choice of which duty to comply with, in his examination of

[1246] See above Chapter 5 pp. 102-104.
[1247] Article 226-13 CP.
[1248] See above Chapter 7 pp. 198-203.
[1249] See above Chapter 7 p. 200-202; F. Alt. Maes, "Un Exemple de Dépénalisation: La Liberté Accordée aux Personnes Tenues au Secret Professionnel" [1998] Rev. Sci. Crim. 301.

reporting, Gayraud claims that most professionals will comply with professional confidentiality rather than with mandatory reporting.[1250]

I was interested in whether, according to the respondents' experience the professionals did have this choice, or whether non-criminal sanctions or guidance required them to prioritise one of the duties. I wanted to discover whether the respondents had ever heard of a professional breaching confidentiality to report an offence and what their view of this was. I was also interested in whether the respondents would report despite their duty of confidentiality.[1251]

The Questions

Q. What is the attitude of the respondents towards secret professionnel?

Q. What is the respondents' experience of secret professionnel?

Q. In what circumstances, if any, would the respondent breach secret professionnel and report an offence

The Scope of Secret Professionnel

The strictness of the duty of confidentiality varies between professionals. Lawyers, doctors and priests are bound by the most extensive duties of confidentiality. Of these three, the most strict is that of the priest, and the least strict, that of the doctor. The respondents suggested two reasons for the extent of the priest's duty of confidentiality.

- The professional's duty of confidentiality is linked to their expertise. According to the respondents it was more difficult to define the boundaries of a priest's competence than it was the competence of a lawyer or a doctor. Accordingly, a priest could be claimed to be exercising his expertise in a wider set of circumstances.

[1250] Gayraud, op. cit. pp. 158-159.
[1251] See below pp. 255-259.

"le secret professionnel le plus etendu est celui du pretre parce que le champ de compétence du pretre est absolu."[1252]

As well as being limited by his expertise, a professional's duty of confidentiality may also be limited by its purpose or by the role that he as a professional has. This was illustrated later in the interview when one of the respondents used the scope of a lawyer's duty of confidentiality to justify his decision to report a client's future offences.[1253] He explained that he would report a client's future offences because it did not come within his duty of confidentiality or his role as a lawyer.

- A professional is only under a duty of confidentiality whilst he is acting as a member of that profession. Unlike lawyers and doctors, it is difficult for the priest to be "off duty".

"Le plus rigoureux est celui du pretre parce que la difficulté du secret professionnel c' est qu' il faut quand meme que le professionnel a recu la confidence en sa qualité du professionelle...le pretre, il est toujours pretre."[1254]

LP1 described a real case to illustrate the duty of confidentiality of priests. A priest discovered a man killing another priest. The killer confessed the murder to the priest and asked for absolution. Because of the priest's duty of confidentiality and in particular the confidentiality of confessions, the priest refused to identify the murderer. Despite protesting his innocence, the priest was himself prosecuted and convicted of the murder. Years later, on his deathbed, the real murderer felt guilty and confessed to the crime and the priest was released.

Although this case highlights the confidentiality of the confessional, the duty of confidentiality of priests is not limited to confessions.[1255] Furthermore, although France has traditionally been a Roman Catholic country, ministers of other

---

[1252] Interview LP1
Translation: "The broadest duty of confidentiality is that of the priest because the field of expertise of the priest is absolute."
[1253] See below pp. 256-257.
[1254] Interview LT1 -Translation:
"The strictest is that of the priest because the problem with professional confidentiality is that in order for it to apply the professional must have received the confidence in his role as a professional...the priest, he is always priest.
[1255] M. Robine, "Le Secret Professional du Ministre du Culte." D. 1882 chr. 221.

denomination and other faiths have the same duty of confidentiality.[1256] More controversial, perhaps, is whether representatives of less established religions should also have an extensive duty of confidentiality recognised by the criminal law. It is perhaps also surprising that the duty of confidentiality of the priest should have remained so important despite the influence of secularity.[1257]

Other professionals have a less stringent duty of confidentiality than that of lawyers, doctors or priests. As was seen in Chapter 3, a social worker working with disadvantaged youths was not able to use his duty of professional confidentiality to excuse his failure to prevent offences that those youths committed.[1258] One reason for the lesser duty of the social worker might be that social work is a more recent profession than that of doctor, lawyer or priest. It might also be that there is an assumption that only individuals who are in trouble will be involved with social workers. The ordinary *"personne normale"* will not therefore benefit from a strict duty of confidentiality for social workers. Finally, social workers are employed by the State. This might mean that they have a loyalty towards the State, which justifies a less extensive duty to report.

LP1 specialised in advising accountants and other financial professionals about their duty of confidentiality. He explained how the duty of confidentiality of auditors and accountants is limited. This is because their duty of confidentiality is linked to business law and obtaining financial success rather than protecting an individual's private life.[1259]

Would the Respondents Themselves Report Crimes that Their Clients Intended to Commit?

The majority of respondents claimed that they would report a crime even if it meant breaking professional confidence. Only one lawyer, LP2 would not. Although I did not interview many lawyers, the respondents had thought about the conflict between confidentiality and reporting. One of the lawyers, LP1,

---

[1256] DP 1892 1 139.
[1257] S. Poulter, "Muslim Headscarves in Schools: Contrasting Legal Approaches in England and France" [1997] O. J. L. S. 43; J. Bell, "Religious Observance in Secular Schools: A French Solution" [1990] Education and the Law 121.
[1258] JCP 1975 II 18143; See above Chapter 3 pp. 58-59.
[1259] See above Chapter 7 pp. 207-208.

advised other professionals on their duties of confidentiality. He had considered how he would choose between reporting and confidentiality. Another of the respondents, PPO1, had been involved in formulating a professional policy on this issue.

I was surprised that so many respondents would report. The professional confidentiality of lawyers has traditionally been recognised as one of the main and most strict duties of confidentiality.[1260] Furthermore, Gayraud had predicted that professionals, especially lawyers and doctors, would favour their duties as professionals, including that of confidentiality, over any duty that they might have as a citizen to report.[1261] Without the interviews, I would not have known that some lawyers would report and their reasons for reporting. Nevertheless, it is important to remember that only a small number of lawyers were interviewed,[1262] had the sample been larger, the results might have been quite different. Furthermore, the respondents chose to take part in the research and it might be that those lawyers, who were very much in favour of the duties to report and who prioritised reporting over confidentiality, were more likely to want to take part than those who were either neutral or who opposed the duty.

Reasons for Reporting

All the respondents, who said that they personally would report, were also in favour of mandatory reporting. Their decision to report may reflect this support.

LH1 claimed that he would report because the mandatory reporting did not conflict with his duty as a lawyer. Referring to the CP, he explained that there was no duty to report if an offence had produced all its effects. As a result, if a client came to see him and confessed a crime that he had committed, LH1 had no legal obligation under Article 434-1, 434-2 or 434-3 to report that offence. It seemed to him therefore, that the mandatory reporting did not require him, or any other lawyer, to betray a client's confidence. On the other hand, the CP did require the lawyer to report future offences. In relation to a client's future offences however, LH1 argued that the duty of professional confidentiality did

[1260] See above p. 252, see above Chapter 7 pp. 207-208.
[1261] J-F. Gayraud, op. cit. p. 158.
[1262] See above pp. 218-219

not apply. This was because it was not part of his role as a lawyer to advise people on how to commit crimes or help them avoid detection.[1263]

"l' avocat qui est contacté par une personne qui lui dit j' ai fait un crime, je veux faire un crime de plus, il n' est pas dans le cadre de son travail dans ce cas là, par exemple, l' avocat ne peut pas donner de renseignements pour aider quel qu' un à faire un crime."[1264]

LH1's response to this question was also significant because he based his answer on the Code. This and other answers, both from this respondent and others,[1265] highlight the importance of the Code in legal reasoning.[1266] Rather than using policy arguments, or his own experiences, the respondent used the actual legal provision to justify his behaviour.

One respondent, LPO1, had already considered if and when he would report his client's offences. He had helped formulate a professional policy on confidentiality and reporting following a Belgian case in which a lawyer, who had been representing a father in custody proceedings, informed the police of his client's intention to kill his son if he lost custody to his wife. The police arrived in time to stop the father poisoning his son. This case caused a lot of debate and interest in France (it was mentioned by three respondents – LPO1, LT1 and JPO1). This case was significant for French legal ethics because the Belgian Criminal Code was based on French criminal law and is very similar to the CP. In the end, the lawyers' ethical committee was unable to agree on a policy because whilst many agreed with the Belgian approach, others felt that the duty of confidentiality should be absolute. LPO1's own view was that he would have to report and that sometimes it was more important to be a good person than to be a good lawyer. The offence described in this case was very serious, a father's murder of his son. It may be that the seriousness of the offence influenced LPO1's decision.[1267]

LT1 would also choose to report:

[1263] See above pp. 252-253.

[1264] Translation:
"The lawyer who is contacted by a person who says to him I have committed a crime, I want to commit another crime, he is not carrying out his business in this instance, for example a lawyer can not give someone advise on how to commit a crime."

[1265] See above p. 250-251.

[1266] A. Crawford, "Justice de Proximité – the Growth of "Houses of Justice" and Victim/ Offender Mediation in France: A Very UnFrench Response" [2000] Social and Legal Studies 29 at pp. 47-48.

[1267] See above Chapter 5 pp. 111-114.

"je sais que moi en tant que avocat si je savais d' une manière suffisament certaine qu' un crime va se realiser, il me semble que je fais quelque chose meme si on pourrait etre reproché par l' organe professionnel."[1268]

Reasons For Not Reporting

LP2 would not report. He argued that although preventing crimes was important, it was also important that people could trust their lawyers:

"Je pense que comme avocat il y a les principes plus euh aussi important que la sécurité publique, il y a la possibilité pour tout le monde de faire appel à l' avocat en confiance et donc ces des principes contradictoires. Et j' avoue que je n' ai jamais confronté personellement, mais si ca m' arrive je ne pense pas que je dénoncerai, je suis meme sur que non."[1269]

LP2 admitted that his was an unpopular view and he argued that the public needed to be convinced of the importance and value of professional duties of confidentiality.

"Le public ne comprend pas le secret actuellement ...le secret c' est encore important. On ne peut pas vivre dans un monde completement ouvert."[1270]

This reluctance to report was supported by AP1. His view of the justifiability and effectiveness of lawyers reporting offences had changed. AP1's role in the Antenne des Mineurs meant that he was likely to encounter the problem of child victims of sexual abuse and whether their advisors for example social workers, lawyers or doctors should report the abuse to the police. AP1 contended that it was better to encourage the child to report and support him in reporting rather than report the abuse against the child's will, or without him knowing. There were two reasons for this. First, it was essential in dealing with child abuse to build and maintain a good relationship with the child. This

---

[1268] Translation:
"I know that myself as a lawyer, if I was sufficiently certain that a crime was going to be committed, it seems to me that I would do something even if I would be disciplined by the professional organisation."

[1269] Translation:
"As a lawyer, I think that there are values more or as important as public safety, there is the possibility for everyone to be able to speak to a lawyer in confidence and well they are two contradictory principles and I admit that I have never personally been faced with this situation, but if it happened to me I don't think that I would report, I'm even sure that I would not."

[1270] Translation:
"At the moment the public doesn't understand the duty of confidentiality, it's still important. We can't live in a completely open world."

relationship required trust. Second, if offences were reported against the child's will, this could discourage other children from seeking help.

From these differences between the respondents, it seems that they were more willing to report future offences than they were past offences. AP1, for example, discussed whether children, who had already been the victims of abuse, would be deterred from seeking help if they thought that that abuse would be reported. In contrast, those respondents who were in favour of reporting focused on future offences. The Belgian case, for example, concerned a future murder. In his response, LH1 distinguished between past offences, which he would not report, and future offences which he would. This distinction is interesting because it suggests that the respondents think that duties to report are more justified if they prevent offences. As has already been described mandatory reporting is aimed at preventing offences.[1271] This may be another example of the respondents' view of mandatory reporting matching that in the CP.

The Professional's Increased Duty to Report

Some duties to report only apply to professionals.[1272] I wanted to examine the respondents' experience and attitudes towards these duties. The interview with LP1 proved especially useful.

According to LP1, based on his experience of advising finance professionals on their duty of confidentiality, banks and other financial institutions were willing to report money laundering. This confirms official figures, which show that the majority of reports come from banks.[1273] LP1 claimed that banks were willing to report because their duty of confidentiality was not especially strong and they were reporting financial rather than personal details.[1274]

For LP1, the most problematic of the professional's duties to report, was that under paragraph 2 of Article 40 of the Code of Criminal Procedure.[1275] Under

[1271] See above pp. 240-241.
[1272] CPP Article 40; Code des Sociétés Article 457; Article 2 of the Law of 12th July 1990; see above Chapter 7 pp. 203-210.
[1273] See above Chapter 7 p. 209, S. T. De Marsac, "L' Extension de la Notion de Blanchiment de l' Argent: Est-elle une limite à l' Optimisation Fiscale?" Finance et Gestion No. 53 Mars 1998.
[1274] See above Chapter 7 pp. 207-209.
[1275] See above Chapter 7 pp. 203-206.

this provision any public official who discovers a *crime* or a *délit* in the course of his/her duties has to inform the Procureur of the Republic. Whereas Articles 434-1, 434-2 and 434-3 are concerned with preventing serious offences this article covers *délits* and *contraventions* as well as *crimes.*[1276] Furthermore, LP1 claimed that rather than being used to discover serious crime, Article 40 had mainly been used as an anti-illegal immigration measure and had had the effect of discouraging immigrants from using hospitals, schools and other services. This supports the criticisms by Fontenelle of this duty.[1277] It is significant because unlike Fontenelle LP1 generally favoured reporting[1278] and would himself report.[1279]

Opinions of the Duties to Report Offences

The Questions

Q. Do the respondents distinguish between the different duties to report?

Q. What reasons did the respondents give for being in favour of a/the offence(s)?

Q. What reasons did the respondents give for being against a/the offence(s)?

Of the respondents all but LP2 were in favour of both the general duty in Article 434-1 and the specific duty to report the abuse or neglect of vulnerable people in Article 434-3. LP2 agreed with the specific duty to report child abuse, but not the general duty. As will be explained below[1280] one of the reasons that LP2 was not in favour of the general duty was that it was not effective and did not increase reporting. In contrast LP2 contended that Article 434-3 was sometimes useful.[1281]

[1276] See below Chapter 10 pp. 344-345.
[1277] See above Chapter 7 pp. 203-206; Fontenelle, op. cit. pp. 154-156.
[1278] See below pp. 260-262.
[1279] See above pp. 255-258.
[1280] See below p. 263.
[1281] See below Chapter 10 pp. 363-367.

Although there were only a small number of respondents, there was no noticeable distinction between the opinions of the lawyers and those of the other types of respondent.

Reasons for being in favour of duties to report

The Seriousness of the Offence

According to LT1, LPO1 and JPO1, a major reason for supporting a duty to report was that individuals should not be able to be neutral when faced with serious offences:

"Je le trouve bien qu' il est indispensable ...bon un crime quand meme est quelque chose de très, très grave, à partir du moment ou ca met en cause la vie humaine juste sur un plan moral l' individu qui a connaissance qu' un crime va se produire et ne dit rien moralement il est moche..."[1282]

The duty to report is justified by the gravity of the harm that would be caused by the offence.

The distinction between serious and non-serious offences was important to the respondents. They contended that the State was justified using greater powers to deal with serious offences than it was in relation to more minor offences. For example, whilst LP1 agreed with the duty to report serious offences in Article 434-1, he did not agree with Article 40 of the Code of Criminal Procedure.

The Police need the Public's Help

An additional reason was the recognition that the police could not fulfil their mission of preventing crimes and keeping the peace and solving crimes without the assistance of the public.[1283]

"il faut etre realiste la police n' a pas connaissance d' un crime avant qu' il se commettre."[1284]

[1282] From the interview with LT1 - Translation:
"I think it's necessary...a crime is something very, very serious, when someone's life is put in danger, an individual who knows that a crime will be committed and does not say anything, morally he is rotten."

[1283] This was examined in the English Questionnaires, see below pp. 299-301.

[1284] From interview with LH1 -Translation:
"You have to be realistic the police can't know about an offence before it has been committed."

This is especially important because it is a further reason why the *non-dénonciation* offences are more likely to be used against individuals, who do not report future offences, than against those who do not report past offences.[1285] This assumes, though, that a duty to report is the only, or the most effective way of encouraging reporting. In contrast, LP2, who was the only respondent to oppose Article 434-1, was also the only respondent to suggest other ways of encouraging the reporting of serious offences.[1286]

The History of Mandatory Reporting

As explained in Chapter 7, mandatory reporting was introduced into French criminal law during the Occupation. Given the fact that critics of mandatory reporting stress this heritage,[1287] I was interested in whether the respondents mentioned it and the extent to which it influenced their opinion of the duties to report.

In the interviews that I conducted both LT1 and LPO1 mentioned the 1941 Provision. However, both these respondents were in favour of the duty to report and did not think that the history of Article 434-1 was important. The main influence of the Occupation was in the respondents' disapproval of anonymous reporting.[1288]

Article 434-3

All of the respondents were in favour of a duty to report child abuse. They claimed that this duty had improved the level of reporting of child abuse. It is particularly significant that AP1 approved of this duty. This respondent specialised in working with victims of child abuse. When the Australian Law Commission examined the duty to report child abuse, it discovered that some organisations and individuals opposed the mandatory reporting of child abuse because it diverted funds from other measures that might be more significant in

[1285] See above pp. 240-241.
[1286] See below pp. 263.
[1287] S. Fontenelle, op. cit. pp. 71-81.
[1288] See above pp. 236-237..

protecting children.[1289] AP1's answer suggests that this respondent had not experienced this conflict between mandatory reporting and other measures to protect children.[1290]

Reasons for not being in favour of Article 434-1

LP2 was the only interviewee who was not in favour of article 434-1. His main objection was that the offence had little effect on reporting levels. He claimed that most French citizens did not know that if they did not report they themselves might face punishment and that if they decided to report it was because of the seriousness of the offence or the vulnerability of the victim. LP2 claimed that the fact that *non-dénonciation* was rarely prosecuted demonstrated that it was not very useful.

He argued that it was better for the police to build a good relationship with the public and to encourage people to report this way.

Conclusions

Mandatory Reporting

The interviews showed the link between mandatory reporting and duties to rescue. This link may even explain the focus of mandatory reporting on future offences.[1291] Once the offence has already been committed, there is no victim of the offence that can be saved from harm.

Generally all the duties to report were well supported. I was surprised that the majority of the lawyer respondents were so much in favour of the duties to report, and in particular that they themselves would report a client's crimes.[1292] Despite my expectations, there did not seem to be a significant conflict between the opinions of the lawyer respondents and those of the other types of respondent. Nevertheless, the numbers of respondents were extremely small and a larger group of interviewees and especially more non-lawyer

[1289] See above Chapter 6 p. 159; Australian Law Commission Report *Speaking for Ourselves, Children and the Legal Process.*
[1290] See below Chapter 10 pp. 365-366.
[1291] See above pp. 240-241.
[1292] See above pp. 255-257.

respondents might have demonstrated more divergence between the different professionals.

The respondents' support for mandatory reporting was not affected by the low level of convictions. One reason for the support was that duties to report would encourage reporting. In addition, however, the respondents supported mandatory reporting because this was a symbolic statement that the non-reporter was wrong not to have reported. This is interesting because it confirms the importance of the symbolic value of the criminal law in French criminal law theory.[1293]

The interviews also confirmed the importance of the Codes. Some of the respondents used the CP to support their argument and it was sometimes difficult to tell whether the respondents were giving their own opinion or describing the Code. As well as evidence of the significance of the Code, this may also suggest that the respondents found the interview a strange procedure. Not knowing what was expected of them, they reverted to explaining the Code. Obviously, I hope that this was not the case. I also think that it was unlikely. As has already been described, the respondents were given full information about the project and about the interviews and whilst carrying out the interviews, at not time did I think that the respondents were confused about the interview.

Having completed the interview, the next stage of the empirical research was the design and analysis of questionnaires completed by the English respondents. These questionnaires are examined in the following Chapter.

[1293] See below Chapter 10 pp. 367-371.

CHAPTER 9

THE ENGLISH QUESTIONNAIRES

In the previous Chapter, I discussed the qualitative interviews conducted with French criminal justice professionals. The second stage of the empirical research was to examine the experiences and attitudes of English legal professionals towards duties to report. The French respondents had generally supported Article 434-1[1294] I wanted to discover how the English respondents viewed an offence of failing to report serious crimes. I also wanted to investigate the English respondents' attitude towards reporting and non-reporters. Would they identify situations where a duty to report was particularly needed? Or where reporting was especially effective? Would they distinguish between especially blameworthy non-reporters and those who had an excuse?[1295] Finally, the duty to report child abuse under Article 434-3 CP is the most used of the duties to report,[1296] therefore, the questionnaire included a section concentrating on the mandatory reporting of child abuse.[1297]

The Use of Questionnaires

The English respondents completed questionnaires rather than being interviewed. When I first contacted the respondents, explaining the research and inviting them to participate,[1298] I included a sample questionnaire but suggested that if they preferred I could interview them instead. All the respondents elected to complete the questionnaire. Although none of them explained why they preferred the questionnaire to being interviewed, it is possible that it was because the questionnaire was more convenient and less time consuming. Unlike an interview, they could take a break between questions or return to questions to add more information. In choosing a questionnaire for the English part of the empirical research I wanted to encourage potential respondents to participate, I was guided therefore by their preferences and wanted to make the process as user friendly and convenient as possible.

[1294] See above Chapter 8 pp. 260-262.
[1295] See below pp. 307-318.
[1296] See above Chapter 7 pp. 194-197; Chapter 8 pp. 251-252..
[1297] See below pp. 319-342.
[1298] See below pp. 267-268.

One of the reasons why I had decided to use interviews for the French respondents was the language barrier and the possibility of questions and answers being misunderstood.[1299] Given that the questionnaire was in English and both the researcher and the respondents were English this problem was less significant in the second stage of the research. Furthermore, it is probable that the English respondents were more accustomed to survey research than their French counterparts and therefore a questionnaire was more likely to be a successful methodology.[1300]

The main reason for using the different methodologies in the French and English stages of the empirical research was that the two stages had different purposes. The French stage was a search for information.[1301] It was vital that it be as flexible and discursive as possible. The qualitative interview was therefore ideally suited.[1302] In contrast, I was interested in how the English view of mandatory reporting compared to that of the French respondents and whether the French duties to report could or should be introduced into English criminal law. As a result, with the English respondents, I wanted to focus on the issues that had been raised in the interviews. Consequently, a more structured method was appropriate.

Respondents

I wanted to question English professionals who worked in criminal justice. I hoped to involve the police, lawyers, CPS and victim support. In relation to the police I was especially eager to get the views of officers who had worked in child protection, road traffic or terrorism. These were all areas where mandatory reporting applied either in this country or in France. In the questionnaire, I examined whether existing duties to report were effective or whether further mandatory reporting was needed. The questionnaire is reproduced in Appendix C. I thought that those police officers with experience of this work would be better able to answer these questions. Unfortunately, I

[1299] See above Chapter 8 p. 220.
[1300] See above Chapter 8 p. 216.
[1301] See above Chapter 8 pp. 215-216.
[1302] S. Kvale, *Interviews, an Introduction to Qualitative Research Interviewing*, (1996); M. Quinn Patton, *How to Use Qualitative Methods in Evaluation*, (1987); J. A. Holstein & J. F. Gubrium, *The Active Interview*, (1995).

did not know any police officers who had this experience and who would be willing to answer the questionnaire. The first stage to contacting police respondents therefore was to write to local Chief Constables hoping that they would be gatekeepers to police respondents.

I was also keen to involve lawyers in the research. French criminal lawyers had contributed significantly to the French stage of the empirical research.[1303] It was hoped that the views of English lawyers would provide an interesting comparison with their French counterparts. Furthermore, the research would be examining the conflict between reporting and confidentiality and professional ethics.[1304] Given that lawyers themselves have a duty of confidentiality,[1305] this was an issue where their views would be particularly relevant. In order to involve lawyer respondents, I wrote to 35 local solicitors who carried out criminal justice work. I addressed my letter to the partner responsible for the criminal justice work. Where I did not have a name for the relevant partner, I rang the firm and asked to whom I should address the letter.

I also hoped that the Crown Prosecution Service would participate in the research. They would know whether a non-reporter was currently likely to be prosecuted and if so what charge he would face.[1306] In addition, they might be best able to predict how any future duties to report would be used and might be able to identify those situations when prosecuting a failure to report would be in the public interest. The police forces that were involved in the research were locally based around Nottingham. Because of this I initially contacted local CPS.

All potential respondents were contacted by letter. The letter included a short abstract explaining the research,[1307] a copy of the questionnaire and a pre-paid envelope for their reply. When I was contacting individuals, who were acting as gatekeepers for other respondents, I included several copies of the questionnaire so that they could pass the questionnaire straight on rather than contacting me first if they preferred. I was keen to give the respondents as much information as possible about the research. It was hoped that this would

[1303] See above Chapter 8 pp. 218-219.
[1304] See below pp. 304-305.
[1305] J. V. McHale, *Medical Confidentiality and Legal Professional Privilege*, (1993).
[1306] See below pp. 271-280.
[1307] See below Appendix D.

encourage the respondents to participate and it would mean that their consent to participating in the research would be informed.[1308]

The response rate for the police officers was very good. Police officers from three police forces agreed to take part and in total there were 26 police respondents involved in the research. Furthermore, the police respondents had various lengths of service, ranks and experiences.[1309] Unfortunately none of the lawyers, whom I originally contacted, agreed to take part in the research. Eight of them explained that they were not able to take part in the research because they had no experience of someone being prosecuted for failing to report. A further two lawyer respondents declined to be involved because they had never considered non-reporting being an offence. Similarly, the local CPS also decided not to be involved in the research. The reason for this was a policy not to be involved in research projects.

Concerned about the lack of non-police respondents, I tried again to involve lawyers in the research. This time I extended my research beyond the local area and focused on firms with a national reputation for criminal justice work. Although the local firms had no experience of duties to report, it was hoped that bigger, national firms might have dealt with them. This time four lawyers agreed to take part in the research. Whilst this again was disappointing, a further four respondents wrote back explaining that they did not want to be involved because they had no experience of non-reporting offences. Although the number of lawyers actually completing the questionnaire was very small, I decided that I was unlikely to find any other lawyers who had any experience of mandatory reporting.

Furthermore, whilst the number of lawyers, who completed the questionnaire, was very small, other lawyers did contribute to the research findings. The fact that 12 lawyers declined to take part in the research because they had no experience of duties to report suggests that existing offences of failing to report are little used and that any additional offences of failing to report would also be unlikely to be prosecuted. Furthermore, this and the fact that two other potential respondents had not thought about the issue suggests that punishing

[1308] R. Homan, *The Ethics of Social Research*, (1991), pp. 69-95.
[1309] See below p. 269.

non-reporters is not a criminal justice priority and that there would not be massive support for increased liability for non-reporters.

As my approach to local CPS had been unsuccessful, I decided to contact the national headquarters of the CPS. Unfortunately this was not productive. At that time it was CPS policy not to be involved in research projects. This policy has now changed and it is probable that any future research in this area could involve the CPS. Their contribution would probably be useful.[1310] I also contacted the Law Commission. Although they confirmed that there were currently no proposals to introduce an offence of failing to report serious offences, the Law Commission was not otherwise involved in the research.

I also contacted Victim Support. Whilst a duty to report based on those in the French Penal Code would not apply to victims, mandatory reporting would still affect the victim. The fact that, for example, a doctor is bound to report offences may discourage some victims from seeking medical treatment. Two representatives from Victim Support participated in the research.

In the end, the questionnaire was completed by 26 police officers, four lawyers and two representatives from victim support. The police respondents came from three different forces and had a variety of ranks and lengths of experience. Table one below sets out the different ranks of the police respondents who completed the questionnaire.

Table 1

CID		UNIFORM	
Rank	**No.**	**Rank**	**No.**
Detective Superintendent	1	Inspector	4
Detective Chief Inspector	1	Sergeant	4
Detective Inspector	5	Constable	4
Detective Sergeant	4		
Detective Constable	3		

Clearly, more police respondents than other types of respondent completed the questionnaire. There is the risk, therefore, that, rather than reflecting the views of different participants in the criminal justice system towards mandatory

[1310] See above p. 267.

reporting the data from the questionnaire will be biased in favour of any police view. In order to avoid this, in discussing the results of the questionnaire both this Chapter and the conclusion are careful to highlight any differences in opinion between the police respondents and the other types of respondent. Furthermore, the analysis also examines how the very small numbers of respondents might have affected the data.

Whoever the respondents were, the number of respondents was very small. It is not possible to make any statistical claims or predictions from the data. I wanted the English side of the empirical research to follow on from the French interviews. It was more important, therefore, to explore mandatory reporting and the respondents' opinions of duties to report. Furthermore, in this respect, it was helpful that the police respondents played a significant role in the research. The experiences of the police officers meant that they were especially able to comment on whether mandatory reporting was needed and how any duties to report might be used.

The Questionnaire Structure[1311]

I wanted the questionnaire to be clear and easy to complete. It was also important that it was not too long. This meant that a balance had to be found between including every question that might be useful and the risk that, if the questionnaire were too long, it might not be completed. In the end the questionnaire was nine pages long. The first page contained instructions for completing the questionnaire and a list of the questionnaire's contents. The questionnaire was divided into sections dealing with current duties to report, the reporting of serious offences and the reporting of child abuse and at the end of the questionnaire the respondents were invited to add any other information that had not been covered elsewhere in the questionnaire. I was interested in how the various experiences of the respondents might affect their identification and opinions of duties to report. The questionnaire therefore included an introductory section which asked for the respondent's length of employment and their present and past responsibilities.

[1311] A copy of the questionnaire is included in Appendix C.

The questionnaire included both closed and open questions. Closed questions were included because they were quicker for the respondents to complete. They also had the advantage of making it easier to compare the views of the different respondents. Open questions enabled the respondents to explain their answers. When the questions were open the respondents were given space to answer and each page of the questionnaire had a large margin so that the respondents could add extra information.

This Chapter follows the format of the questionnaires. It will examine the existing duties to report, in particular focusing on the duty to report terrorism[1312] and the duty to report road accidents[1313] before analysing the respondents' attitudes towards the mandatory reporting of serious offences[1314] and the mandatory reporting of child abuse.[1315]

Knowledge of, Use of and Attitude towards Existing Duties to Report

Knowledge of Existing Duties to Report

Before considering whether additional duties to report were needed or how such duties might be used, it was important to examine the respondents' attitudes towards and experiences of the existing duties to report. First, I wanted to test the respondents' recognition of mandatory reporting by asking them to identify offences of failing to report in English criminal law. If none of the respondents listed an existing duty to report or if the respondents claimed that the duty was ineffective or little used, this might be interpreted as evidence that more extensive and more general duties to report would also be ineffective.

Respondents' Identification of Existing Duties

The respondents were asked whether a non-reporter of a future offence committed an offence and if so what this offence was. This question was repeated for present and past offences. The first part of the question was a filter question – whether any offence at all was committed. It was important to

[1312] The Prevention of Terrorism (Temporary Provisions) Act 1989 s. 18.
[1313] Road Traffic Act 1988 s. 170.
[1314] See below pp. 286-297.
[1315] See below pp. 319-342.

include this because if the respondents had just been asked to list offences that would have been committed, this would have been a leading question.[1316] The open wording of the question meant that a respondent could include specific non-reporting offences or could describe how a more general offence, for example obstruction of a police officer in the execution of his duty, might be used against a non-reporter.[1317] The respondents were not asked to research the law. I wanted to find out which offences they could identify either because they personally had experience of those offences or because the offences were well known. The questionnaire distinguished between future, current and past offences because whilst the French duties to report are mainly limited to future and current offences,[1318] English mandatory reporting has concentrated on offences that have already been committed.[1319] Furthermore, duties to report future offences and duties to report past offences may have different objectives.[1320]

In the introductory section, the respondents had been asked to describe their current and previous work responsibilities.[1321] None of the police respondents had included anti-terrorist work among their work responsibilities. In contrast, some of them had been involved in traffic work or might have been involved in investigating other offences that had been discovered as a result of the Road Traffic Act 1988, section 170. Based on this, I anticipated that more police officers would recognise the duty to report road traffic accidents than would know about or have experience of the duty to report terrorist offences.

Given the Victim Support role in advising and helping victims, I expected their knowledge and experience of duties to report to focus on those duties to report that were most relevant to the victim. As a result, the existing duty to report that I anticipated might be identified by victim support was section 170 of the Road Traffic Act. This was because this offence can be used to help a victim of a road traffic accident obtain compensation. In fact, neither of the victim support respondents answered this question. On reflection this was not

[1316] A. N. Oppenheim, *Questionnaire Design, Interviewing and Attitude Measurement*, 2nd Edition, (1992), pp. 129-130.
[1317] See above Chapter 6 pp. 151-158.
[1318] CP Articles 434-1; 434-2; 434-3; see above Chapter 7 174-197; Chapter 8 pp. 240-241.
[1319] For example the duties under ss. 170 and 172 of the Road Traffic Act 1988 to report road traffic offences and road traffic accidents; see above Chapter 6 pp. 153-160.
[1320] See above Chapter 7 pp. 166-169.
[1321] See above p. 269.

surprising. Victim Support focuses on the victim of the offence rather than the offender.

Table 2 sets out the offences that were identified by the respondents. These offences were conspiracy, withholding information about terrorism, failing to report because of consideration received, parental neglect under the Children and Young Persons Act 1933 section 1 (CYPA), failing to assist a police officer stop a breach of the peace, obstructing a police officer, handling stolen goods, failing to report money laundering and concealing a death. In addition, thirteen of the respondents claimed that no offence was committed by failing to report a past, present or future offence.

Table 2

Offence	Police	Lawyer	Victim Support
No offence committed	12	1	-
Conspiracy	12	0	-
Prevention of Terrorism Act s. 18	6	1	-
Criminal Law Act 1967 s. 5	5	0	-
Parental neglect CYPA 1933 s.1	5	0	-
Failing to report a road accident Road Traffic Act 1988 s. 170	4	0	-
Failing to assist a police officer contain A breach of the peace	4	0	-
Obstructing a police officer Police Act 1996 s. 89(2)	3	0	-
Handling stolen goods Theft Act 1968 s. 22	2	0	-
Failure to report money Laundering	0	2	-
Concealing a death	1	0	-

From this table, it seems that the most popular choice of offence that a non-reporter might commit was conspiracy. Twelve of the police respondents suggested this as an offence. One possible reason for this link between non-reporting and conspiracy is that both these offences can be used to punish an

individual whose more active participation in an offence can not be proved.[1322] The main justification for misprision of felony was that it might be used against individuals involved on the periphery of criminal activity.[1323] Similarly, the same rationale was used to justify the introduction of a duty to report terrorism.[1324]

In contrast to its popularity among the police respondents, no lawyer respondents selected conspiracy as a possible offence committed by a non-reporter. Moreover, even the police respondents, who had identified conspiracy as a non-reporting offence, claimed that a non-reporter was unlikely to be prosecuted for conspiracy.[1325] They argued that a non-reporter would only be charged with conspiracy if his non-reporting were accompanied by other behaviour. Consequently, although conspiracy was cited by twelve of the police respondents as a potential charge, it became clear in subsequent questions that a charge of conspiracy would not be justified solely on the basis that an individual had not reported an offence. Furthermore, the fact that conspiracy requires agreement suggests that it could only be used against the non-reporter who was part of the active criminal's gang and who supported the offence albeit in a passive way.

Despite my predictions, few police respondents identified the duty to report road accidents. One explanation for the low identification rate for this duty may be that the police rarely investigate or detain such non-reporters. Another possibility may be that the respondents interpreted the question as not including the non-reporting of road accidents. This is because the questionnaire invites the respondent to describe situations in which a non-reporter may be penalised for not reporting *an offence*. Although some road accidents will be the result of an offence, for example, an accident that is caused by dangerous driving, other accidents will not involve any offences. Furthermore, even if traffic offences are technically offences they are often not seen as "real" offences by either the public or the police.[1326]

[1322] See below p. 293; I. H. Dennis, "The Rationale of Criminal Conspiracy" (1977) 93 L. Q. R. 39, pp. 47-48.
[1323] See above Chapter 6 pp. 121-135.
[1324] See above Chapter 6 pp. 141-142.
[1325] See below pp. 277-278..
[1326] C. Corbett & F. Simon, "Police and Public Perceptions of the Seriousness of Traffic Offences" (1991) 31 Brit. J. Criminology 153-164.

From the responses to this questionnaire it was not possible to detect any connection between the area of work or length of service and the type or number of offences recognised. For example, a police constable, a detective police constable, a sergeant, a detective sergeant, and two inspectors all cited the offence of withholding information about terrorist acts. These respondents were spread amongst the three forces and their lengths of service varied from five years to twenty-seven years. Similarly, whilst two of the officers, who identified parental neglect, worked in child protection teams, the other three had more general duties.

The lawyer respondents identified fewer duties to report. One possible reason why the lawyer respondents identified fewer offences of failing to report than the police respondents is that fewer lawyers completed the research. With a smaller pool of respondents, it is unsurprising that fewer suggestions were given. Nevertheless, as well as the lawyer respondents, who claimed that a non-reporter would not commit an offence, twelve other lawyers declined to take part in the research because they had no experience of a non-reporter being prosecuted for his failure to report and did not know of any offences that he might commit.[1327] Another possibility is that the lawyer respondents interpreted the question more strictly. They limited potential offences to those where the individual's *only* wrongdoing was not to have reported an offence. This might explain why none of the lawyer respondents included conspiracy as an offence.[1328] Finally, it should be noted that the lawyers, who participated in the research, were criminal defence lawyers. Unlike the police, they would not be used to identifying possible offences that an individual might have committed.

The two lawyer respondents, who did identify circumstances in which non-reporting would be an offence, identified the offence of failing to report money laundering. It is arguable that they were more aware of this duty because it might compel them to report a client's finances.

[1327] See above pp. 268-269.
[1328] See above pp. 273-274.

The Prosecution of These Offences

If a non-reporting offence is unlikely to be prosecuted this will lessen the deterrent against failing to report. The non-reporter will assess his risk of punishment as being minimal. In addition, few prosecutions may mean that the duty to report will not be well known.[1329]

The respondents were asked to rate how likely prosecution was and their responses are set out in Table 3. In the Table, some of the offences, for example the offence of withholding information about terrorist offences, are listed three times. This is to differentiate between failure to report future terrorism, failure to report current terrorism and failure to report past terrorism. In France whether failing to report is prosecuted seems to vary depending on whether it concerns a past, present or future offence.[1330] I was interested in whether the respondents thought that a similar approach was adopted in England. This was important because English criminal law does not seem to distinguish between reporting an offence which is linked to prevention and future offences and identifying an offender which is linked to current and past offences.[1331]

The respondents were asked to chose whether an offence was never prosecuted, rarely prosecuted, sometimes prosecuted, or usually prosecuted, they also had the option of stating that they did not know whether an offence would be prosecuted. The response "do not know" was included because otherwise respondents who were not sure might have chosen the category of "sometimes" as a compromise.

[1329] See above Chapter 8 pp. 237, 263.
[1330] See above Chapter 8 pp. 140-141.
[1331] See below pp. 301-303.

Table 3

Offence	Prosecution Level				
	Never	Rarely	Sometimes	Usually	Do not know
Prevention of Terrorism – future	0	2	1	1	1
Prevention of Terrorism – current	0	2	1	1	1
Prevention of Terrorism- Past	0	2	1	1	1
Conspiracy – future	8	1	2	1	0
Criminal Law Act 1967- current	0	2	0	0	2
Criminal Law Act 1967 – past	0	2	0	1	2
Failing to assist police officer breach of the peace – current	2	1	0	0	1
Parental neglect – current	0	0	4	0	1
Handling stolen goods	0	0	1	1	0
Road Traffic Accident past	0	0	2	2	0
Failure to report money laundering – past	0	2	0	0	0
Concealing a Death- past	0	0	0	1	0
Obstruction – past	0	1	1	0	1

This Table demonstrates that, although conspiracy was the most popular choice for an offence that a non-reporter might commit,[1332] it was thought that only exceptionally would a non-reporter be prosecuted for conspiracy. Eight respondents stated that it would never be prosecuted, according to six of them

[1332] See above pp. 273-274.

a non-reporter would never be prosecuted for conspiracy because of the distinction between omissions and actions. Whilst the latter could be the basis of criminal liability, the former could not. By failing to report an offence, an individual might not have hindered criminal activity, but he had not helped the active offenders to commit the offence.[1333] Furthermore, one of the respondents, who said that non-reporting might sometimes be prosecuted as a conspiracy, suggested that the circumstances in which it might be prosecuted would be when there was other evidence suggesting a conspiracy. All these responses suggest that conspiracy requires active participation in the offence rather than failing to prevent it by not reporting it.

The respondents disagreed about how often the offence of withholding information about terrorist offences was prosecuted. Although two of the police respondents stated that it was rarely prosecuted, two other police respondents claimed that it was sometimes or usually prosecuted. In fact, recent statistics show that section 18 is extremely rarely prosecuted.[1334] It seems, therefore, that some of the officers overestimated the likelihood of prosecution. One possibility is that the respondents were estimating the level of prosecutions and guessed wrong. Alternatively, the respondents' could be suggesting how often they thought the offence *should* be prosecuted rather than how often it actually was prosecuted.[1335]

The respondents did not distinguish between the likelihood of prosecution on the basis of whether the non-reported terrorist offence was planned, currently being committed, or had already taken place. Although this suggests that the aims of prevention and prosecution are seen as equally important in the operation of anti-terrorist legislation, it is impossible to reach any firm conclusions because of the small scale of respondents.

Two respondents claimed that failing to report for consideration received[1336] would rarely be punished. This was because this offence was seldom discovered. The offender, whose offence was not reported, would not have

[1333] See above Chapter 6 pp. 155-6.
[1334] Home Office Statistical Service, *Statistics on the Operation of the Prevention of Terrorism Legislation in Great Britain in 1997* (1997); Home Office, *Legislation Against Terrorism*, (1998), paragraph 12.7.
[1335] See above Chapter 8 pp. 215, 239-240.
[1336] Criminal Law Act 1967 s. 5.

any motivation to inform the police of the failure to report. Similarly, the non-reporter, who would risk punishment for not reporting, would be unlikely to inform the police of his failure to report. Outside these individuals, it is difficult to identify other potential reporters who would know about the offence to notify the police. It is possible that failing to report because of consideration received is only discovered when the original offence, which was not reported, is discovered. If this is the case, it is probable that police attention focuses on the active offender rather than the non-reporter. Although section 5 does not seem to be prosecuted very often, punishing a non-reporter, who has failed to report because of consideration received, was well supported by all types of respondents.[1337]

There are very few reported cases of failing to assist an officer to preserve the peace and analysis of this duty confirms that it is used rarely.[1338] I was not surprised therefore when the respondents claimed that this offence was unlikely to be prosecuted. According to one of them this was because prosecuting this offence was-

"too much hassle for a little sentence"

One possibility might be that the police and prosecuting authorities prefer to use the more general offence of obstructing a police officer in the execution of his duties.[1339] Three of the police respondents identified this as a possible charge against the non-reporter. Of these, one claimed the non-reporter would rarely be prosecuted for obstruction and one that he would sometimes be prosecuted. The third respondent did not know. It is doubtful whether charging a non-reporter with obstruction would be successful. First, there are few instances when an individual, has a duty to report, outside these situations. It would seem that the police officer would not be within his duty in demanding that an individual report an offence. Secondly, the offence requires that an individual make the police officer's duty more difficult.[1340] A decision not to report does not fulfil this requirement. By deciding not to report, the non-

[1337] See below pp. 285-286, 310.
[1338] D. Nicolson, "The Citizen's Duty to Assist the Police" [1992] Crim L. R. 611, pp. 611-2.
[1339] Police Act 1996 s. 89(2); P. Leopold, "Obstructing the Police" [1982] Public Law 559; T. C. Daintith, "Disobeying a Policeman, A Fresh Look at Duncan v Jones" [1966] Public Law 248.
[1340] S. A. Robilliard & J. McEwan, *Police Powers and the Individual*, (1986), pp. 25-54, *Rice v Connolly* [1966] 2 Q. B. 414.

reporter has chosen not to make the police duty easier, not to help the police. He has not, however, made their duty more difficult or obstructed them in the exercise of their duty.

Four respondents claimed that a parent might sometimes be prosecuted for failing to report the abuse or neglect of their child. Whilst this could be interpreted as demonstrating that failure to report itself will be punished, it may also be that the non-reporting takes place within the context of a wider failure to protect the child and that prosecution under section 1 of CYPA 1933 is for this more general neglect rather than specifically for not reporting.

Two respondents included the offence of handling stolen goods[1341] as a possible charge against a non-reporter. It is not clear how failing to report a theft can constitute handling and unfortunately the respondents did not explain how the charge might be used. One possibility is that the individual, who handled stolen goods, would have to know that an offence had been committed.

As for the duty to report a road traffic accident, two of the police respondents assessed it as usually being prosecuted, whilst the other two police respondents contended that it was sometimes prosecuted. This is proportionally, in relation to the number of respondents to identify the duty to report, the highest prosecution rate of the duties identified by the respondents.

Mandatory reporting of money laundering[1342] was identified by two of the solicitor respondents. According to both these respondents it was rarely prosecuted.

The Respondents' Attitudes Towards the Existing Offences

The questionnaire then focused on the respondents' opinions of two existing offences of non-reporting. The respondents were asked whether they strongly agreed, agreed, neither agreed nor disagreed, disagreed, or strongly disagreed with the duty to report terrorism under section 18 of the Prevention of Terrorism

[1341] Theft Act 1968 s. 22.
[1342] SI 1993/ 1933 r. 16.

(Temporary Provisions) Act 1989.[1343] The same method was used to assess their approval or disapproval of section 170 of the Road Traffic Act 1988, which requires vehicle owners to report road traffic accidents.[1344] Both offences were briefly described in the questions to ensure that the respondents' answers would be informed. Because the questionnaires were designed and completed before the Terrorism Act 2000, they focused on section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989 rather than more recent provisions. Despite this the information from the questionnaire is still relevant. In their answers, the respondents examine whether mandatory reporting of terrorism is justified in general.

The use of a sliding scale enabled respondents to distinguish between the two offences. They were able to demonstrate that they approved of one, but not the other, offence or that their approval of one of the offences was greater. On the other hand, terms such as "strongly agree" or "agree" are not exact measures. It is possible that one respondent's "agree" might represent the same level of approval as another respondent's "strongly agree". This is confirmed by the fact that respondents, who "agreed" with a duty, used the same justifications as those, who "strongly agreed" with a duty.

The respondents' opinions of the two offences are set out in Table 4.

Table 4

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
Prevention of Terrorism (Temporary Provisions) Act 1989 s. 18					
Police	14	12	0	0	0
Lawyer	0	0	0	2	2
Victim Support	0	0	2	0	0
Total	14	12	2	2	2
Road Traffic Act 1988 s. 170					
Police	13	12	1	0	0
Lawyer	0	3	1	0	0
Victim Support	2	0	0	0	0
Total	5	15	2	0	0

[1343] See above Chapter 6 pp. 137-145.
[1344] See above Chapter 6 pp. 145-151.

The Duty to Report Terrorism

The different types of respondent disagreed about the duty to report terrorism. Whilst the police respondents supported the mandatory reporting of terrorism, the lawyer respondents opposed punishing a failure to report terrorism.

Reasons for Supporting a Duty to Report Terrorism

The police respondents used four arguments to justify their support for section 18. According to four of the police respondents, an individual should have a duty to report terrorism because terrorism is an extremely serious offence. According to these respondents, terrorism is dangerous because it harms both individual victims and the wider community. By reporting the terrorist offence or the terrorist, the reporter is demonstrating his rejection of terrorism.

The second reason, used by two of the respondents, for supporting the duty to report terrorist activity can be termed the social responsibility rationale. According to this argument an individual should not be able to be neutral and uninvolved in relation to terrorist activity, instead he had a duty to take sides, to protect the wider community. This suggests a communitarian analysis, with the citizen having duties to protect other members of the community.[1345] This rationale is connected to the seriousness of terrorism. It is because of the seriousness of terrorism and the harm that it causes the community that an individual should not be neutral. Moreover, this corresponds to the discussion by one of the French respondents of the link between duties to report and communitarianism.[1346]

The third type of argument was that, in reality, the offence would be used to deal with individuals, whose "support" of terrorist activity extended beyond their not reporting a terrorist offence. This supports other evidence that the offence of withholding information about terrorist offences is used against individuals

[1345] See above Chapter 2 pp. 15-17.
[1346] LT1, see above Chapter 8 p. 233.

suspected of more active support of terrorism.[1347] Three of the respondents justified their support for section 18 by using this argument.

Finally, three respondents supported the duty to report terrorism because it might help prevent terrorist activity. It is possible that this would mean that these respondents would consider the non-reporting of future terrorism to be more blameworthy than the non-reporting of past terrorism.[1348] After all, if a terrorism act that has not yet been committed is reported it might yet be prevented. On the other hand, even with a past offence, reporting the offence might identify the offender and lead to him being detained, thus possibly preventing him from committing any further terrorism.

Reasons for Disagreeing with a Duty to Report Terrorism

In contrast, the lawyer respondents opposed the duty to report terrorist offences. Two of them strongly disagreed with section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989 and two disagreed with it. There were two reasons why the lawyer respondents opposed the mandatory reporting of terrorism. The first, used by two of the respondents, was that serious though the effects of terrorism were, the non-reporter was not responsible for these effects. Significantly, this argument corresponds to the contention that liability for omissions is not justified because the omittor has not caused any harm.[1349]

The two lawyer respondents, who strongly disagreed with the duty to report terrorism, did so because they did not agree that terrorism should be distinguished from other serious offences.[1350] The terrorist was only different from other serious offenders because of his political motivations. This was not a sufficient reason for punishing the non-reporting of terrorism when the non-reporting of other serious offences was not a crime.

[1347] C. Walker, *The Prevention of Terrorism in British Law,* 2nd Edition, (1992), pp. 138-9.
[1348] See below pp. 301-303.
[1349] E. Mack, "Bad Samaritanism and the Causation of Harm" (1984) 9 Philosophy and Public Affairs 230-259; see above Chapter 2 pp. 24-26.
[1350] Since the Criminal Law Act 1967 there has not been a general duty to report serious offences in English criminal law.

The respondents from Victim Support neither opposed nor supported the duty to report terrorist offences. One reason for this might be that the Victim Support respondents have not had much contact or experience with terrorist offences.

The Duty to Report Road Traffic Accidents

In contrast to the duty to report terrorism, support for the duty to report road traffic accidents under section 170 of the Road Traffic Act 1988 was not limited to the police respondents. A majority of the police, lawyer and victim support respondents either agreed or strongly agreed with the duty to report road traffic accidents and none of the respondents were against this duty to report. Whilst the police support for the duty to report road traffic accidents was not as strong as their support for the duty to report terrorism, amongst the other two types of respondents the support for the duty to report road traffic accidents was greater than the support for the duty to report terrorism.

Reasons for Supporting a Duty to Report Road Traffic Accidents

The most popular reason for supporting this duty to report related to the injury or damage that might have been caused to other people involved in any accident. This justification was given by four police respondents, one lawyer respondent and the two victim support respondents. The idea is that section 170 and its obligations to give information and to report might be necessary to enable an injured third party to bring a claim against a driver responsible for an accident.[1351] This reason focused on the future of any potential victims of a road accident. It is unsurprising, therefore, that it was the justification used by Victim Support. Connected to this justification, another lawyer supported the duty because it was necessary given the interdependence of road users. A further lawyer distinguished between this duty, which he supported, and section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989, which he did not, on the basis that under this duty the non-reporter was liable because of something that he had done, rather than just because of a failure to report.

A further rationale, used by two police respondents for supporting this duty, was that it might prevent other offences. One possibility is that prevention here

[1351] See below Chapter 10 p. 354.

can be interpreted as enabling other offences to be detected, and that this increased risk of detection might prevent other offences. For example, if the driver was uninsured this might be discovered when the accident is reported, similarly if the accident was due to dangerous, careless or drunken driving this might be detected because of the driver's obligations under section 170.[1352] Linked to this, two further police respondents justified the duty to report road traffic accidents because it provided a sanction against hit and run drivers. These two justifications for the duty to report road accidents can be termed "crime control". This might explain why these justifications were used by police respondents.

Failing to Report Because of Consideration Received

The level of support for section 5 of the Criminal Law Act 1967 was assessed differently. This was because unlike the duties to report terrorism and road traffic offences which apply to specific types of wrongdoing, section 5 of the Criminal Law Act 1967 is a general duty to report which might apply to any arrestable offence. The respondents were provided with hypothetical examples of non-reporting and were asked how blameworthy each failure to report was.[1353] The majority of the respondents claimed that the non-reporter who had been paid not to report was the most blameworthy non-reporter and the respondents identified this as a situation where failures to report should be prosecuted. Those respondents, who had themselves identified the duty to report under section 5 of the Criminal Law Act 1967 and who had described the difficulties in using this offence, were among those who strongly agreed with the prosecution of the paid non-reporter.

One difficulty is reconciling this high level of support for prosecution of the paid non-reporter, and the low level of prosecutions under Criminal Law Act 1967.[1354] One possibility is that the respondents considered an idealised example of the paid non-reporter, where the non-reporting and the consideration could be established. This would exclude those situations, quite probably the majority, where the non-reporting and the consideration could not be detected or proved. The high level of support for section 5 suggests that

[1352] D. W. Elliott & H. Street, *Road Accidents*, (1968), p. 119.
[1353] This question will be examined further below pp. 307-318.
[1354] See above p. 279.

whether an offence is justified does not depend on whether it is likely to be prosecuted.[1355] This corresponds to the French respondents' support for mandatory reporting despite the lack of prosecutions.[1356]

Should Failing to Report a Serious Crime be an Offence?

Studies of voluntary reporting have demonstrated that the public are more willing to report serious offences.[1357] One of the main criticisms of misprision of felony was that the range of offences carrying a duty to report was too wide and an individual might be punished for not reporting a minor offence.[1358] French mandatory reporting is limited to serious, violent offences.[1359] These factors suggest that mandatory reporting might be more justified and effective if it is limited to serious offences. I was interested in whether the respondents were in favour of a general duty to report serious offences corresponding to Article 434-1 of CP.[1360] I also wanted to examine whether the respondents thought that mandatory reporting should be limited to serious offences.

What Offences are Serious Offences?

Before examining whether there was a connection between a duty to report and the seriousness of offences, it was important to define "serious offence". One method would be to use the maximum sentence for an offence. Another way would be to base the definition of serious offence on the category of serious arrestable offence.[1361] Although these criteria are useful and might be used to frame any duty, I decided that it was important to use the respondents' own definitions of seriousness. Otherwise, if a respondent were to disagree with a duty to report a "serious" offence, it might be because he did not support a duty to report, even though the offence is serious. Alternatively, he might disagree with the duty to report because he personally did not assess the

---

[1355] See below Chapter 10 pp. 358-361.
[1356] See above Chapter 8 pp. 260-262.
[1357] J. Shapland, J. Wilmore & P. Duff, *Victims in the Criminal Justice System*, (1985), p. 15; N. Maung, P. Mayhew, C. Mirlees-Black, *The 1992 British Crime Survey*, (1993), pp. 25-27; C. Mirlees-Black, P. Mayhew, A. Percy, *The 1996 British Crime Survey*, (1996), p. 23.
[1358] See above Chapter 6 pp. 124-127.
[1359] CP Articles 434-1, 434-2, 434-3; see above Chapter 7 pp. 175-176.
[1360] See below pp. 292-297.
[1361] PACE s. 116 (2), K. Lidstone & C. Palmer, *The Investigation of Crime, A Guide to Police Powers*, 2nd Edition (1996), pp. 15-20; M. Zander, *The Police and Criminal Evidence Act*, 3rd Edition (1995) pp.296-298.

offence as serious. Any link between seriousness of an offence and an increased duty to report would be more convincing if the definition of seriousness was determined by the respondents themselves.

I gave the respondents a list of offences. This list included violent, property, public order, indecency and drugs offences. I used general types of offence rather than more detailed hypothetical examples because I wanted to focus on types of offence in this question, before examining the personality of the offender and any mitigating or aggravating circumstances in a later question.[1362]

The respondents were asked to indicate those offences that they thought were serious and to mark "1", "2" and "3" against the three offences that they assessed as being the most serious. The offences were listed alphabetically in order to avoid influencing the responses.

Table five sets out the respondents ranking of the different offences. Two columns have been added – the first gives the sentence for the offence, the second whether the offence could be a serious arrestable offence (S. A. O.).

[1362] See below pp. 307-318.

Table 5

Offence		Is the offence serious?				
	Serious	1	2	3	Sentence	S. A. O.
Arson	30	0	0	2	life[1363]	yes
Burglary	16	0	0	0	10 years/ 14 years[1365]	yes[1364]
Causing death by dangerous driving	30	0	0	0	10 years[1366]	yes[1367]
Child Pornography	26	0	1	3	3 years[1368]	yes[1369]
Commercial Fraud	22	0	0	0	7 years[1370]	yes[1371]
Drug Trafficking	30	0	2	6	Life[1372]	yes[1373]
GBH	28	0	0	1	5 years[1374]/ life[1376]	yes[1375]
Illegal Demonstration	3	0	0	0		
Murder	32	31	0	0	life[1377]	yes[1378]
Rape	32	0	14	6	life[1379]	yes[1380]
Robbery	30	0	0	0	life[1381]	yes[1382]
Terrorism	30	0	6	8	life	yes

[1363] Criminal Damage Act 1971 s. 4.
[1364] PACE S. 116(6) – serious financial gain or loss
[1365] Depending on whether building is a dwelling Theft Act s. 9
[1366] Road Traffic Act 1988 s. 1
[1367] PACE Schedule 5 paragraph 10
[1368] Protection of Children Act 1978 s. 1, s. 6.
[1369] PACE Schedule 5 paragraph 15
[1370] Theft Act s. 17
[1371] PACE s. 116(6) – serious financial gain or loss
[1372] Drug Trafficking Act 1994, Controlled Drugs Penalties Act 1985.
[1373] PACE S. 116 (2) (C)
[1374] Offences Against the Person Act 1861 s. 20
[1375] PACE s. 116 serious injury
[1376] Offences Against the Person Act 1861 s. 18
[1377] Murder (Abolition of the Death Penalty) Act 1965
[1378] PACE Schedule 5 Part 1
[1379] Sexual Offences Act 1956 s. 1.
[1380] PACE Schedule 5 Part 1
[1381] Theft Act 1968 s. 8

Table six outlines the respondents' ranking of the seriousness of the offences. The seriousness of each offence was based on the number of respondents that considered it serious, plus an extra rating for any respondents who assessed it as being one of the three most serious offences. In other words, +3, for each respondent who ranked it as the most serious offence, +2, if it was rated as the second most serious offence and +1 if it was rated as the third most serious offence. For example, thirty respondents thought that drug trafficking was serious. Two evaluated it as the second most serious offence and six as the third most serious. Consequently, drug trafficking received a final rating of 40.

Table 6

Offence	Police	Solicitors	Victim Support	Total
Murder	101	16	8	125
Rape	56	6	4	66
Terrorism	44	4	2	50
Drug trafficking	36	2	2	40
Arson	24	6	2	32
Child pornography	21	7	3	31
Robbery	24	4	2	30
Causing death by dangerous driving	24	4	2	30
GBH	24	2	3	29
Commercial fraud	16	4	2	22
Burglary	14	0	2	16
Illegal demonstration	3	0	0	3

[1382] PACE s. 116 (6) serious injury/ substantial financial gain/ substantial financial loss.

The respondents were asked to identify other offences, not included in the list that might be serious. Twelve of the respondents, ten police respondents and two lawyer respondents, suggested other offences that were serious.

For the police respondents, the most popular addition was that any offence might be serious depending on the circumstances.[1383] One of these respondents clarified this by using the example of burglary. This respondent had not selected burglary as a serious offence, but in the following question he added that burglary could be a serious offence depending on the circumstances. In particular, he claimed that burglary would be serious if it represented a substantial financial loss or hardship to the victim. This corresponds with the PACE concept of an offence being a serious arrestable offence because the victim suffers serious financial loss.[1384]

Another police respondent argued that a racial motive aggravated the seriousness of an offence. It is possible that the respondent favoured an approach similar to that adopted by the Crime and Disorder Act 1998.[1385] Under Chapter 37, Part II of that Act, a racial motive aggravates the seriousness of and the sentence for[1386] assault,[1387] criminal damage,[1388] harassment and public order offences.[1389] According to the Government, racially motivated offences harm the individual and the community and are therefore particularly dangerous. Furthermore, the prevalence of racially motivated offences is increasing,[1390] and notorious cases, in particular that of the murder of Stephen Lawrence,[1391] have increased awareness of racist crimes.

Other respondents suggested substantive offences. Five respondents, three lawyers and two police officers stated that abduction and kidnapping were both

---

[1383] See below Chapter 10 pp. 344-345
[1384] PACE s. 116(6) (f); Lidstone & Palmer, op. cit. p. 17.
[1385] F. Brennan, "Racially Motivated Crime: the Response of the Criminal Justice System" [1999] Crim. L. R. 17; M. Malik, ""Racist Crime": Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II" (1999) 62 M. L. R. 409
[1386] s. 28
[1387] s. 29.
[1388] s. 30
[1389] s. 31.
[1390] A. Maung & C. Mirlees-Black, *Racially Motivated Crime: A British Survey Analysis*, (1994), p. 21, Government Statistical Service, *Ethnicity and Victimisation: Findings from the 1996 British Crime Survey*, (1998).
[1391] W. Macpherson, *The Stephen Lawrence Enquiry Report*, (1999).

serious offences. It is not really surprising that the respondents described abduction and kidnapping as serious. In these offences, the victim may be seriously injured or killed. Moreover, these offences are often planned and carried out by criminal gangs, which may aggravate their seriousness. One police respondent added blackmail. One possible reason for the inclusion of blackmail might have been the difficulty of investigating or even discovering blackmail because of the reluctance of victims to report this offence. A further three police respondents added child abuse. Although, two of the police respondents, who added child abuse to the list of serious offences, worked in child protection, the other officer to include it did not. Perhaps unsurprisingly, all three of these respondents agreed with a duty to report child abuse.[1392]

Conclusions on Respondents' Rating of the Seriousness of the Offences and Comparison with Existing Studies

The respondents perceived violent offences as more serious than property offences or public order offences. This analysis was unsurprising and matched earlier studies of police and public rating of the seriousness of offences.[1393] Among the offences listed, the three most serious offences were murder, rape and terrorism. In relation to terrorism, however, it seems that, whilst this was rated as one of the most serious offences by the police respondents, the lawyer and victim support respondents ranked it behind arson, child pornography, grievous bodily harm and drug trafficking. In light of this, it is perhaps unsurprising that the police approval of the duty to report terrorism was not matched by the other respondents.[1394]

In relation to property offences, commercial fraud was considered to be more serious than burglary.[1395] This could be because of the greater value of property dishonestly acquired by commercial fraud. Alternatively, those police officers, who described commercial fraud as being particularly serious, might have done so because of experience working in specialised fraud units. Given victim support work with victims, it might have been expected that they would rank burglary higher than commercial fraud. Being a victim of a burglary is one

[1392] See below pp. 336-339.
[1393] M. Levi & S. Jones, "Public and Police Perceptions of Seriousness in England and Wales" [1985] Brit. J. Criminology 234 at pp. 239-245.
[1394] See above pp. 282-283.
[1395] See above p. 289.

of the more usual ways in which an individual becomes involved, as a victim, in the criminal justice process. Nevertheless, the question did not enable the respondents to rank every offence. It might be that if, they were asked to select between commercial fraud and burglary, the victim support respondents might have rated the latter as being more serious.

The Respondents' Attitudes Towards Punishing the Non-Reporting of Serious Offences

The respondents were asked to mark on a sliding scale whether they agreed with a duty to report serious offences. The question stated that whether an offence was serious and therefore would carry a duty to report would depend on the respondent's definition of seriousness.[1396]

Table 7

Respondent	Strongly Agree	Agree	Neither agree nor Disagree	Disagree	Strongly Disagree
Police	11	11	0	2	1
Lawyer	0	0	0	0	4
Victim Support	0	0	2	0	0

There was clear disagreement on whether mandatory reporting of serious offence was justified. Whilst most of the police respondents favoured the duty, the lawyer respondents opposed it.

Reasons for Supporting a Duty to Report Serious Offences

The most popular reason, given by five of the police respondents, for supporting a duty to report serious offences was that it might prevent crime. In addition, two respondents supported the duty because it would assist investigations. Whilst both these justifications rely on the supposed effects of a duty to report, the prevention argument focuses on future offences that might not be committed if the offence is reported and the investigation argument concentrates on the offence itself, which has already been committed. Given

[1396] See above pp. 286-287.

the greater support for the former reason, it seems that the respondents would be more likely to favour a duty to report that was aimed at preventing offences. On the other hand, although I have distinguished between the two justifications, they may be connected. By investigating an offence and identifying and detaining an offender, that offender will be prevented from committing future offences.

One police officer favoured mandatory reporting because it would help the police discover offences. According to this respondent, discovery was important because it would help the police accurately record the level and nature of crime. Rather than being based on an individual offence that can be prevented or solved, this reason seems to focus on offending in general. In other words, if the police have an accurate knowledge of crime levels this may influence policy.

Three of the police respondents agreed with punishing non-reporting on the pragmatic grounds that this might be the only way to punish someone whose closer, more active involvement in the offence could not be established. One of the respondents explained this by claiming that the offence could be used to deal with criminal gangs. This justification echoes the support for section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989 on the basis that this offence helps prosecute individuals whose more active involvement in terrorism can not be established.[1397]

Two of the respondents agreed with the duty to report because of the seriousness of the offences. This justification is connected to the other rationales for a duty to report serious offences. For example, because of the greater harm caused by serious offences there may be more need to prevent these offences. This greater harm may also justify a wider interpretation of who can be held liable for the offence.

The final type of justification could be termed social responsibility or communitarian. This was given by two of the respondents. The idea here was that, given the need of the community to be protected from serious crime, the non-reporter should not be allowed not to be involved.[1398] This connected with

[1397] See above Chapter 6 pp. 141-142.
[1398] See above Chapter 2 pp. 15-17.

the other justifications. The obligation to be involved could possibly be justified because of the seriousness of the offence. Alternatively, it might be that the respondents, who used this as a justification, interpreted a failure to be involved to assist the police as assisting the criminal and that this reason connects with the pragmatic reasons for supporting the offence that have already been described.

Reasons for Opposing a Duty to Report Serious Offences.

Seven respondents opposed the duty to report serious offences. Their opposition was based on the difficulty of enforcing such a duty and on the impact it would have on civil liberties.

The three police officers, who disagreed with the mandatory reporting of serious offences, did so because of the difficulty of enforcement. There is some support for the respondents' view that it would be difficult to enforce a duty to report serious offences if section 5 of the Criminal Law Act 1967 is considered. The low prosecution levels for this offence are due to the difficulty of proving this offence.[1399] Furthermore, failing to report a serious offence is only likely to be discovered if the serious offence itself is detected. In this situation, it will usually be more important to prosecute the active offender than the non-reporter.

A connected reason for opposing a duty to report serious offences was that mandatory reporting failed to consider an individual's reasons for choosing not to report. In particular, two of the lawyer respondents who were opposed to a duty to report serious offences cited the threat of reprisals. It would not be reasonable to punish an individual who placed his safety above any public duty to report. Although only two of the respondents used this argument to oppose the duty to report serious offences, later questions suggest that most of the respondents thought that threats would excuse a failure to report.[1400]

[1399] See above p. 278-279.
[1400] See below p. 317.

Should a Duty to Report be Limited to Serious Offences?

I was also interested in whether those respondents who supported the duty to report serious offences did so because of the gravity of the offences or whether they would also support a wider duty to report. I decided to examine this by asking the respondents whether they were in favour of a duty to report any offences other than those that they had decided were serious. If they decided that "non-serious" offences should carry a duty to report, the respondents were asked to explain why these offences carried a duty to report.

Four of the police respondents listed other offences that should carry a duty to report. One police respondent claimed that driving offences should carry a duty to report, another police respondent favoured the mandatory reporting of corruption by a public servant, a further police officer supported a duty to report racially motivated offences and finally one police officer contended that there should be a duty to report all recordable offences. None of the lawyer respondents supported a duty to report for "non-serious" offences. This is unsurprising given their lack of support for a duty to report serious offences.

The inclusion of driving offences in this section reinforces the respondents' support for the duty to report road traffic accidents. The respondent supported a duty to report motoring offences for two reasons. First, because it would enable third parties, who had suffered loss or injury because of a road traffic offence, to make a claim, and secondly because it might lead to the discovery of other offences. These two justifications were also used by the respondents to support the existing duty under section 170 of the Road Traffic Act.[1401] Furthermore, the emphasis on helping third parties recover damages suggests that although the respondent phrases the duty as a duty to report driving offences, the duty would be focused on, and potentially limited to, a duty to report road traffic accidents.

The respondent who supported the mandatory reporting of corruption did not explain why he favoured a duty to report for this offence. One possible explanation is that, although not included as a serious offence, corruption is

[1401] See above pp. 284-285.

nonetheless not a minor offence and is sufficiently important to warrant a duty to report. Another reason might be that corruption is rarely reported or is difficult to prove and there is a need for a duty to report to encourage reporting. It is interesting that one of the justifications for an official duty to report under Article 40 of the French Code of Criminal Procedure is that this offence has been useful in uncovering political corruption.[1402]

The third suggestion was a duty to report racially motivated offences. One justification for this is that a racial motive might aggravate the seriousness of an offence.[1403] Another reason might be that without a duty to report, few racially motivated offences will be discovered,[1404] either because of a fear of reprisals from racist gangs, or because of a distrust of the police.

The final suggestion was that the duty to report should apply to all recordable offences. The category of recordable offences is wider than the definition of serious arrestable offences in PACE or the respondents' interpretations of seriousness.[1405] Although most recordable offences carry a prison sentence, some non-imprisonable offences are recordable offences.[1406] Consequently, the mandatory reporting of recordable offences can not be justified purely on the basis of the seriousness of these offences. The respondent, who included recordable offences, justified their inclusion by contending that this would enable the police to have a clearer picture of the level of crime committed. This respondent had supported a duty to report serious offences for the same reason.[1407]

According to the majority of the respondents, however, any duty to report should be limited to serious offences. Three of these respondents stated that a general duty to report would detract from the detection and prosecution of serious offences. If more offences are reported, it might be that the criminal

---

[1402] See above Chapter 7 p. 206.
[1403] See above p. 290.
[1404] A. Maung & M. Mirlees-Black, *Racially Motivated Crime: A British Survey Analysis*, (1994), pp. 19-21.
[1405] SI 2000/ 1139..
[1406] These recordable offences that do not carry a prison sentence are – loitering of soliciting for the purposes of prostitution – Street Offences Act 1959 s. 1; improper use of the public telecommunications system – Telecommunications Act 1984 s. 43; sending letters with intent to cause distress or cause anxiety – Malicious Communications Act 1988 s. 1; having a knife in a public place – Criminal Justice Act 1988 s. 139(1).
[1407] See above p. 293.

justice system is unable to deal with the most serious offences.[1408] In addition, two of the respondents contended that a general duty to report would be too great an imposition on civil liberties. Interpreting the balance between individual liberty and the security of the community in favour of the later value is more justified if the offence is serious, if the threat to the community is grave.

The Respondents' Views of the Criminal Justice System and the Role of the Public Within it

Table eight sets out the respondents' ranking of statements about the criminal justice system and about the form and purpose of any potential duties to report. The aim of this question was to discover the respondents' opinions of how any duty to report should be used. In particular I was keen to compare the English respondents' view of mandatory reporting with that of the French respondents. Consequently, this question compares the importance of preventing crime and prosecuting offenders,[1409] and whether a duty to identify an offender is more onerous and less justified than a duty to report an offence.[1410]

This question used a sliding scale. The respondents could select whether they strongly agreed, agreed, neither agreed nor disagreed, disagreed or strongly disagreed with the statements. The option of choosing neither agree nor disagree was included so that the respondents could express a lack of opinion, otherwise they might have been forced to agree or disagree with a statement when neither of these options really reflected their opinions. One of the advantages of choosing a sliding scale is that it is quick and simple to complete.[1411]

Table 8

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
The Public should assist the police					
Police respondents	22	4	0	0	0
Lawyer respondents	0	2	2	0	0
Victim support respondents	0	2	0	0	0
Total	22	8	2	0	0

[1408] See below Chapter 10 p. 351.
[1409] See above Chapter 8 pp. 240-241 and below pp. 301-303.
[1410] See below p. 303.
[1411] See above p. 270.

Crimes can only be prevented if the public assist the police					
Police respondents	16	7	2	0	1
Lawyer respondents	1	0	2	1	0
Victim Support Respondents	0	2	0	0	0
Total	17	9	4	1	1
Criminals can only be caught and convicted if the public assist the police.					
Police respondents	16	3	0	1	1
Lawyer Respondents	1	0	2	1	0
Victim Support Respondents	0	2	0	0	0
Total	17	5	2	2	0
It is more important that offences be prevented than that offenders be caught					
Police respondents	7	9	9	0	1
Lawyer respondents	0	2	2	0	0
Victim Support respondents	1	1	0	0	0
Total	8	12	11	0	1
A law requiring an individual to report an offender would be harsher than a law requiring him just to report an offence					
Police respondents	8	10	6	2	0
Lawyer respondents	1	1	2	0	0
Victim support respondents	0	0	2	0	0
Total	9	11	10	2	0
It is more important that the general public are protected from crime than that an individual can choose not to get involved					
Police respondents	8	7	9	2	0
Lawyer respondents	0	0	0	4	0
Victim support respondents	0	2	0	0	0
Total	8	9	9	6	0
The offender's family should not have a duty to report.					
Police respondents	2	4	8	10	2
Lawyer respondents	3	1	0	0	0
Victim Support respondents	0	0	1	0	0
Total	5	5	9	10	2
A doctor's duty of confidentiality is more important than duties to report					
Police respondents	2	3	7	10	4
Lawyer respondents	2	2	0	0	0
Victim Support respondents	0	0	1	0	0
Total	4	5	8	10	4
The main goal of the criminal justice system should be to protect the community					
Police respondents	18	6	2	0	0
Lawyer respondents	0	4	0	0	0
Victim support respondents	2	0	0	0	0
Total	20	10	2	0	0

The main goal of the criminal justice system should be to protect individual liberties.					
Police respondents	0	6	6	10	0
Lawyer respondents	3	1	0	0	0
Victim support respondents	0	1	1	0	0
Total	3	8	7	10	0

Before analysing these results, it is important to note that the total figures for each statement might be misleading. Police officers were better represented in the survey than the other representatives.[1412] Therefore, the police view, if there is a police consensus, is likely to influence strongly the total figures. There is a danger that the total figures represent the police view of the statements rather than an amalgamation of the police, lawyer and victim support views. In order to avoid this misinterpretation the data will be evaluated according to the type of respondent. The total category will only be used when there is either a consensus between the different groups or when differences of opinion are not determined by the type of respondent.

Public Assistance

There was considerable support for the idea that the public should assist the police. The police and victim support respondents and two of the lawyer respondents agreed that the public should assist the police. It is probable that this support for public assistance was based on the perceived usefulness of public assistance. This suggestion is supported by the high level of agreement for the statements that public assistance was vital for preventing crime and for identifying and apprehending offenders.[1413] Although there was significant support for the public assisting the police, this does not mean that these respondents would agree with punishing individuals who failed to assist the police. An individual might agree that a person should assist the police but feel that it would be supererogatory for the criminal law to require it,[1414] alternatively, he might argue that forcing a person to help the police is too great a restriction of that person's autonomy.[1415]

[1412] See above p. 269.
[1413] See below pp. 300-301.
[1414] See above Chapter 2 pp. 19-21.
[1415] See above Chapter 2 pp. 21-24.

On the other hand, the attitude of two of the lawyer respondents towards the public assisting the police was less positive. They neither agreed nor disagreed that the public should assist the police. One possible reason for this might have been that they feared that public assistance, whilst sometimes or even generally useful, might lead to vigilantism. Once the public are required to be involved in dealing with crime, there is the danger that, rather than handing alleged offenders over to the criminal justice system, they will punish the offenders themselves.

On the other hand, it might be argued that rather than encouraging vigilantism, mandatory reporting helps to prevent it by requiring witnesses to involve the authorities rather than deal with the offender himself. Wenik in his examination of American mandatory reporting laws argues that they are more justified than duties to rescue for this reason.[1416]

Although the question asked about "assistance" in general rather than focusing on reporting, it is possible that some of the respondents, because of the subject matter of the questionnaire, interpreted "assistance" as reporting. It would be interesting to know whether it was the respondents' experience or opinion that vigilantism would be a greater problem with assisting the police in other ways than in relation to assisting the police by reporting.

Another reason for the less favourable opinion of public assistance might be because the respondents again interpreted assistance as reporting, and feared malicious reporting. Again this might be an argument for rejecting duties to report. Might mandatory reporting encourage the unreliable gossip and provide a justification for the malicious informer?[1417]

Is Public Assistance Useful?

The majority of the police respondents claimed that public assistance was useful in both preventing crime and detecting and convicting offenders. Twenty-three of the police respondents either agreed or strongly agreed that an offence could only be prevented with public assistance. Nineteen of the police

[1416] J. Wenik, "Forcing the Bystander to Get Involved, A Case for a Stature Requiring a Witness to Report Crime" (1985) 94 Yale Law Journal 1787.
[1417] See below Chapter 10 pp. 351-352.

respondents either agreed or strongly agreed that an offender could only be identified with public assistance. Nevertheless, one of the police respondents strongly disagreed with both statements. His opinion differed significantly from that of the other police respondents. One possible explanation for his view might be that he interpreted the statements as denying the importance of the police in discovering crimes and identifying offenders. The effectiveness of public assistance in preventing crime was rated slightly higher than the effectiveness of the public in helping identify criminals. One possible explanation for this might be that identifying the offender requires specialised police skills and equipment and that, therefore, the public role in this is necessarily marginalised.

Whilst the victim support respondents agreed with the importance of public assistance in preventing offences or in detecting offenders, the lawyer view of the usefulness of public assistance was more varied. One strongly agreed with the usefulness of public assistance both in preventing offences and detecting offences, one disagreed with its importance and two neither agreed nor disagreed. Given the small number of lawyer respondents and the absence of any further explanations, it is not possible to reach any conclusions about lawyers' views or experiences of public assistance in preventing or detecting crime.

Prevention or Prosecution

French duties to report rank the prevention of future offences above the identification and punishment of offenders.[1418] I was interested in how the English respondents viewed the importance of prevention and punishment.

Choosing prevention as the objective of a duty to report over prosecution impacts on the timeframe for reporting and on the nature of the duty to report. A duty to report, the intention of which is to prevent offences, will focus on encouraging reporting *before* the commission of those offences. Accordingly, such a duty to report will penalise the non-reporting of future or current offences. Furthermore, if the objective of the duty is to prevent crime rather than prosecute an offender, it may not be so important that the offender is

[1418] See above Chapter 8 pp. 240-241.

identified. Consequently, in relation to French mandatory reporting, failures to report are generally only prosecuted if they are failures to report future offences, and there is no duty to identify offenders.[1419]

Some of the respondents supported the mandatory reporting of terrorism because this might prevent terrorist offences.[1420] Similarly, some of them had been in favour of a duty to report serious offences because this might prevent serious offences.[1421] This suggests that the respondents might prefer a duty to report that was aimed at preventing offences rather than one that focused on identifying and punishing offenders. On the other hand, more respondents agreed with the duty to report road accidents, a duty which only applies once the offence has been committed.[1422]

In this question the respondents were asked to state whether they agreed that it was more important to prevent an offence than to convict an offender. One problem with this question was that the respondents were not also asked whether prosecuting the offender was more important that preventing the offence. I decided not to include such a question because I wanted to make the questionnaire as concise as possible and thought that were it to be included the questionnaire might seem repetitive.[1423] Moreover, because the significance of prevention and prosecution is also examined elsewhere in the questionnaire the need to include this question for balance was not as important.

None of the respondents disagreed or strongly disagreed with the ranking of prevention above prosecution. It seems, therefore, that prevention is seen as being at least as important as detection. On the other hand, eleven of the respondents – nine police officers and two lawyers neither agreed nor disagreed that prevention was more important than detection. Two reasons are suggested for this. First, for many respondents the respective weightings of prevention and punishment may depend on the circumstances of a case and the character of the offender. As a result they would be unable to decide whether as a general rule prevention is more important than prosecution. In

[1419] See above Chapter 7 pp. 176-179.
[1420] See above p. 283.
[1421] See above p. 293.
[1422] See above pp. 284-285.
[1423] See above p. 270.

addition, it may be difficult to distinguish between prevention and prosecution because often these objectives are linked. Detaining an offender as well as punishing him also prevents him from committing an offence.

Identifying an Offender and Reporting an Offence

The questionnaire also examined whether the respondents considered a duty to report an offender to be more onerous than a duty to report that was limited to reporting offences. Eighteen of the police respondents and two of the lawyer respondents agreed that identifying the offender was a more onerous duty. In contrast, two of the police respondents disagreed that it was a greater duty; and a significant proportion, six of the police respondents, two of the lawyer respondents and two of the victim support respondents, neither agreed nor disagreed with the statement. In relation to the two respondents, who disagreed, it is not clear whether they disagreed because they considered the duties to be equally severe, or if they disagreed because they weighed a duty to report an offence as being harsher than a duty to report an offender. One possibility might be that "disagree" can be interpreted as meaning that they rank the duties as equally serious, although this might also be how neither agree nor disagree was interpreted, and "Strongly disagree" that they consider reporting an offence to be a more onerous obligation that reporting an offender. It may have been preferable to ask the respondents to assess the harshness of the different duties. The disadvantage with this approach would have been that this aspect of the research could not have been included within this question and I wanted to avoid the questionnaire becoming too long or over complex.[1424]

Conflicting Duties

I was interested in how the respondents would resolve conflicts between mandatory reporting and other obligations. The questionnaire focused on whether the offender's family should be excused from any duties to report and whether professional duties of confidentiality should exempt professionals from duties to report.

[1424] See above p. 270.

Should the Offender's Family be Excused from a Duty to Report?

The offender's family is exempt from the general duty to report serious offences in the CP.[1425] It is recognised that the potential reporter's loyalty towards his family may overwhelm any responsibility towards the wider community.[1426] On the other hand, the reporter's contact with any offenders who are also family members may mean that, by excluding the offender's family from a duty to report, an important source of information is lost.[1427] Most of the police respondents did not think that the offender's family should be exempt from a duty to report. In contrast, the lawyer respondents were more sympathetic. They all agreed or strongly agreed that the offender's family should not have a duty to report.

Mandatory Reporting and Professional Duties of Confidentiality

Reconciling duties to report and professional duties of confidentiality is often difficult. Mandatory reporting may be a duty to the community as a whole, whereas confidentiality is based on the relationship between the doctor, or lawyer and the individual patient or client. In the CP, the professional can elect either to report and comply with Article 434-1 or to stay silent and comply with Article 226-13.[1428] Of those French lawyers, whom I interviewed, most would choose to report.[1429] I wanted to examine how the English respondents ranked the importance and value of reporting and confidentiality. In examining the professional's duty of confidentiality, I chose to focus on doctors. Doctors are not exempt from existing duties to report.[1430] Furthermore, the questionnaire considers the reporting of child abuse and a duty to report child abuse.[1431] Doctors are seen as having a vital role in recognising and notifying child abuse because of their contact with injured children.[1432] I decided that it would be

[1425] CP Article 434-1; J-F. Gayraud, *La Dénonciation*, (1995), pp. 42-3; see above Chapter 7 pp. 183-184.
[1426] P. Mousseron, "Les Immunités Familiales" [1998] Rev. Sci. Crim. 291.
[1427] See above Chapter 8 p. 248.
[1428] See above Chapter 7 pp. 198-203; F. Alt-Maes, "Un Exemple de Dépénalisation: La Liberté de Conscience Accordée aux Personnes Tenues au Secret Professional" [1998] Rev. Sci. Crim. 301.
[1429] See above Chapter 8 pp. 255-257.
[1430] *Hunter v Mann* [1974] QB 767
[1431] See below pp. 319-340.
[1432] Department of Health, Home Office, Department of Education and Employment, *Working Together to Safeguard Children, A Guide to Interagency Working to Promote the Welfare of Children,* (1999), pp. 13-29, General Medical Council *Duties of a Doctor*, (1995), see above Chapter 4 pp. 79-81.

useful to examine doctors and reporting more generally in this question before considering the reporting by doctors of child abuse later in the questionnaire.

Given the fact that there is currently no general duty to report in English criminal law, I expected that the English lawyer respondents would prioritise confidentiality over reporting. I also predicted that the lawyer respondents to support professional duties of confidentiality more than the police. Lawyers are protected and bound by legal professional privilege. I expected that the lawyer respondents' awareness and experience of professional duties of confidentiality[1433] would make them more sympathetic to these duties than the police. This expectation was confirmed. All the lawyer respondents agreed or strongly agreed that a doctor's duty of confidentiality was more important than any duty to report to the police. In contrast, only five of the police respondents favoured the duty of confidentiality over the duty to report, and fourteen of the police respondents disagreed or strongly disagreed that the doctor's duty of confidentiality should excuse a failure to report.

Although the lawyer respondents were more sympathetic towards non-reporting members of the offender's family and towards non-reporting professionals, it should be remembered that the lawyer respondents were more critical of mandatory reporting in general.[1434] Consequently, their greater recognition of the conflicts between reporting and other duties might be based on opposition to mandatory reporting rather than on the specific issues of family loyalty and professional confidentiality. It is also interesting that the attitude of the English lawyer respondents towards reporting and in particular to the relationship between duties to report and confidentiality seem to differ significantly from those of the French lawyer respondents.[1435]

The Criminal Justice System – the Security of the Community versus the Liberty of the Individual.

The respondents were asked to rate two statements. The first advocated the security of the community as the main aim of the criminal justice system. The second stated that the protection of individual liberties was the main goal of the

[1433] J. McHale, *Medical Confidentiality and Legal Privilege*, (1993).
[1434] See above p. 294.
[1435] See above Chapter 8 pp 255-259, and see below Chapter 10 p. 368.

criminal justice system. In designing the questionnaire I had thought that the statements were mutually exclusive and that, in answering, the respondents would have to choose between crime control and due process interpretations of criminal justice.[1436] Furthermore, the use of the word "main" was hoped to encourage the respondents to rank the competing values and to choose between them. Despite these expectations, eight of the respondents supported both statements. It seems, therefore, that the respondents supported both individual liberties and community security. One interpretation of this is that the respondents viewed the security of the community as being necessary for individuals to be able to exercise their liberties.

Two of the police respondents added their own interpretation of the proper role of the criminal justice system. One of these evaluations stressed the need for a balance between the individual and the community with the rights of both being protected. This suggests that the respondent would support both interpretations of the criminal justice system. A further possibility is that because the respondent wants the rights of both the community and the individual to be protected, the respondent would support the rights of a small group being sacrificed if this achieved a benefit to the wider community.[1437] According to this respondent might support the rights of accused criminals being restricted, if this lead to greater security for the wider community.

The other respondent stated that the criminal justice system needed to discover the truth, to be just and fair. The use of the word "truth" might be significant. Basing a criminal justice system around the search for truth can lead to a narrow interpretation of exclusionary evidence rules.[1438] Consequently, it might be reasonable to align this respondent's interpretation of criminal justice with a crime control model. This is further supported by the fact that the respondent added that if necessary, the community should be preferred to the individual:

> "It should be to establish the truth and to administer fair justice for all, the needs of the community might sometimes outweigh the need to protect individual liberties."

[1436] H. Packer, *The Limits of Criminal Sanction*, (1969).
[1437] See above Chapter 2 pp. 15-17.
[1438] See above Chapter 5 pp. 107-108.

What Types of Non-Reporter Should be Prosecuted?

Given that not every non-reporter would be prosecuted,[1439] I wanted to examine whether according to the respondents there were types of non-reporter who deserved to be prosecuted. I decided that this was an important question to ask because not only would it examine which non-reporters the respondents considered to be most blameworthy, but it might also suggest how any mandatory reporting should be limited.

The respondents were given a list of types of non-reporter and were asked to rank the blameworthiness of each failure to report on a sliding scale. The scale ranged from (1) for those failures to report that the respondent thought were very blameworthy to (5) for those failures to report that the respondent thought were very excusable. Although the question did not specifically examine whether the respondents should be prosecuted, some of the respondents added additional comments explaining why a particular type of non-reporter should or should not be prosecuted and these comments will also be discussed in this section.

One possible problem with this question is that respondents were asked to assess how blameworthy a particular failure to report was rather than being asked to determine whether that failure to report should be prosecuted. Although the prosecution of a failure to report and the blameworthiness of that failure to report will often be linked, there may be exceptions. Nevertheless, I decided to word the question in terms of the blameworthiness of a failure to report rather than the prosecution of an offender because I wanted in this question to examine the scope of a duty to report in principle rather than how such a duty to report would work in practice. Furthermore, none of the respondents worked for the CPS, I was concerned, therefore, that if I had asked which respondents would or should be prosecuted, the respondents might have been unwilling or unable to answer.

The results of this question are set out in Table Nine. The table is set out with the most blameworthy failures to report first and the least blameworthy last. In the actual questionnaires the ordering of the types of non-reporters was varied

[1439] See above Chapter 4 pp. 73-74.

in order to minimise any risk of the respondents' replies being influenced by the order.[1440]

I based the scenarios around research into English law of omissions and French duties to report. For example, two of the examples considered situations where the non-reporter could be said to have a special duty, either because of family ties or professional undertakings, towards the victim of the offence. These scenarios were based on English liability for omissions, which exceptionally punishes a failure to act if the omittor has a special relationship with the victim or a professional duty to act.[1441] Furthermore, studies of voluntary reporting show that, whilst individuals are more likely to report if the offence is serious or the victim especially vulnerable, they are often dissuaded from reporting if they know the offender, if the offender is a juvenile or if they fear reprisals.[1442]

Table 9

	1	2	3	4	5
The non-reporter was paid not to report					
Police respondents	24	2	0	0	0
Lawyer respondents[1443]	0	3	0	0	0
Victim support	0	1	1	0	0
Total	24	6	1	0	0
A guard on a train does not report an attack on a passenger.					
Police respondents	20	6	0	0	0
Lawyer respondents	0	2	1	0	0
Victim Support	1	1	0	0	0
Total	21	9	1	0	0
The non-reporter was a member of the gang that committed the offence					
Police respondents	16	6	4	0	0
Lawyer respondents	0	0	1	2	0
Victim Support	0	0	2	0	0
Total	16	6	7	2	0

[1440] A. N. Oppenheim, op. cit. p. 125.
[1441] A. Ashworth, "The Scope of Criminal Liability of Omissions" (1989) 105 LQR; A. McCall Smith "The Duty to Rescue and the Common Law" in M. Menlowe & A. McCall Smith, (ed), *The Duty to Rescue*, (1993), pp. 55-91; see above Chapter 2 pp. 36-42.
[1442] See above Chapter 4 pp. 82-88.
[1443] Only three of the lawyer respondents answered this question. The other disagreed with prosecuting non-reporters in any circumstances and so left it blank.

The non-reported offence might have been prevented if it had been reported.					
Police respondents	16	5	5	0	0
Lawyer respondents	0	0	1	2	0
Victim support	0	0	2	0	0
Total	16	5	8	2	0
The victim of the non-reported offence was especially vulnerable					
Police respondents	14	6	5	0	1
Lawyer respondents	0	2	1	0	0
Victim Support	0	1	1	0	0
Total	14	9	7	0	1
If the offence had been reported, the offender could have been arrested.					
Police respondents	10	6	6	3	1
Lawyer respondents	0	0	0	3	0
Victim Support	0	0	2	0	0
Total	10	6	8	6	1
The non-reporter was the mother of the victim of the offence.					
Police respondents	4	6	11	5	0
Lawyer respondents	0	0	2	1	0
Victim Support	0	0	2	0	0
Total	4	6	15	6	0
An individual who hears that someone whom he knows is going to commit an offence					
Police respondents	2	6	12	2	4
Lawyer respondents	0	0	0	1	2
Victim Support	0	0	0	2	0
Total	2	6	12	5	6
The offender was a juvenile					
Police respondents	2	4	10	6	4
Lawyer respondents	0	0	2	1	0
Victim Support	0	0	1	1	0
Total	2	4	13	8	4
The non-reporter had been threatened					
Police respondents	0	0	9	6	11
Lawyer respondents	0	0	0	0	3
Victim Support	0	0	0	0	2
Total	0	0	9	6	16

The non-reporter was the victim of the offence.					
Police respondents	0	0	4	9	13
Lawyer respondents	0	0	0	0	3
Victim Support	0	0	0	0	2
Total	0	0	4	9	18

The non-reporter who was Paid not to Report

According to the respondents, the most blameworthy non-reporter was the non-reporter who had been paid not to report. This scenario matches section 5 of the Criminal Law Act 1967.[1444] Most of the respondents assessed him as being within the top two levels of blameworthiness. In addition, two of the police respondents added that this was a non-reporter who should be prosecuted. Although this seems to contradict the actual prosecution levels for the Criminal Law Act 1967 s. 5,[1445] it was unsurprising that the respondents viewed this as the worst failure to report. By benefiting from his failure to report, the non-reporter has an interest in the offence not being discovered and it might be therefore that his failure to report is not neutral but is evidence of his wider support for the offender.[1446] In addition, the fact that the non-reporter has been paid establishes his knowledge of the offence. There is less risk of someone who merely suspected an offence being prosecuted.[1447]

The non-reporter had a special duty towards the victim

The question considers two situations where there was a special relationship between the non-reporter and the victim of the offence. The first was the professional relationship between the guard on a train and a passenger. The second scenario was that of a mother who did not report an offence against her child. The guard scenario was based on a case that had been discussed by some of the French respondents.[1448] The mother example was more general and could be interpreted as covering all types of offending. Later in the

[1444] See above Chapter 6 pp. 136-137.
[1445] See above p. 279.
[1446] See above pp. 285-286.
[1447] See above Chapter 6 p. 136-137.
[1448] See above Chapter 8 p. 246.

questionnaire, when the non-reporting of child abuse was examined, the specific issue of mothers who do not report that abuse was evaluated.[1449]

Failing to Report Despite a Professional Duty to Act

Twenty-six police respondents assessed the non-reporting guard as being at levels one or two of blameworthiness. Two of the lawyer respondents assessed the non-reporting guard as being within level two of blameworthiness and one lawyer respondent assessed him as being within level three. The victim support respondents claimed that the non-reporting guard was within either level one of two of blameworthiness. It is perhaps unsurprising that this was thought to be a particularly bad failure to report. The fact that the guard had a professional duty towards the victim distinguishes him from other passengers who also did not help the victim or report the offence. Furthermore, although the question did not specifically look at prosecution, it might be that the guard's position and responsibilities make it more reasonable to identify him as deserving to be prosecuted for failing to report rather than the other passengers.

Failures to Report by the Victim's Family

In contrast, the failure to report by a mother whose child was a victim of an offence was seen as less blameworthy. Only ten of the police respondents assessed this failure to report as being either level one or level two of blameworthiness and five of the police respondents claimed that it came within level four of seriousness. As for the lawyer respondents, two of them stated that it was level three of blameworthiness and the other that it was within level four of blameworthiness.

The questionnaire considered the effect of fear of reprisals on reporting. Although not explicitly included within the mother scenario, it is possible that the respondents were nonetheless influenced by the possibility of the mother having been afraid to report. If the mother was reporting an attack on a child by that child's father, she might be afraid of, or already be suffering herself from, violence from the father. Furthermore, in a situation like this, there may

[1449] See below p. 329-330, 333.

be a family loyalty between the mother and the father, which prevents her from reporting. In addition, it might be that the respondents did not want to blame the mother for not recognising the wider implications of her failure to report. The respondents may have decided that it was reasonable for the mother only to be concerned with her own child rather than with other potential victims.

The data from these two statements suggest that a failure to report by a professional is judged more blameworthy than a failure to report by a member of the victim's family and that the respondents would be more likely to agree to the former failure to report being prosecuted than the latter. Nevertheless, it is difficult to draw any conclusions on how blameworthy or excusable such failures to report are. One difficulty is that the wording in the two scenarios does not correspond – the guard scenario uses the word "attack" whilst the mother scenario uses the less emotive "offence." It is possible that whilst the mother example included all types of criminal behaviour, the guard example was limited to the violent and serious offences. It may be therefore, that the greater support for prosecuting the guard is due to the increased seriousness of the non-reported offence in this scenario in comparison with the mother example.

Failures to Report by Gang Members

Some of the respondents had supported the existing duty to report terrorism and had agreed with a duty to report serious offences on the basis that it might be used against fringe criminals, who, although involved, often escaped punishment.[1450] Particularly important in this respect was the use of the offence against gang members. Given these responses, I expected that these respondents, all of whom were police respondents, would consider non-reporting by gang members to be especially blameworthy. Furthermore, one of the French respondents had claimed that non-reporting gang members were especially likely to be prosecuted.[1451] I wanted to investigate whether the English respondents would favour a similar approach.[1452]

[1450] See above p. 293.
[1451] See above Chapter 8 p. 242-244.
[1452] See above p. 265.

In their replies, sixteen of the police respondents indicated that non-reporting gang members were level one of blameworthiness and six of them that they were level two of blameworthiness. On the other hand, four of the police respondents stated that a non-reporting gang member was only level three of blameworthiness. One possible explanation for this is that the respondents who were more sympathetic towards non-reporting gang members might have given them credit for not playing a more active role in the offence and may have felt that their failure to report may have been due to a fear of reprisals from the other members of the gang.[1453] Some of the police respondents added comments explaining their ranking of failures to report by gang members. One of them explained that he had assessed a failure to report at level three of blameworthiness because he did not agree that non-reporting gang members should always be prosecuted for failing to report. He explained that this was because prosecuting gang members for failing to report would lead to a decrease in information.

The lawyer respondents were less critical of the non-reporting gang members. They rated them at levels three and four of blameworthiness. It seems that this is linked to the fact that the lawyer respondents would be less likely to support the prosecution of these non-reporters. One explanation for this might be that gang members may fear reprisals from their former associates were they to report and this reluctance to prosecute non-reporting gang members is due to the wider reluctance to prosecute failures to report where the potential reporter has been threatened.[1454]

Failing to Report an Offence Against a Vulnerable Victim

I wanted to examine whether the respondents considered non-reporting to be more blameworthy if the victim of the offence was especially vulnerable. I did not define vulnerability. Instead I wanted the respondents to use their interpretations of a vulnerable victim in answering the question. This was to ensure that if a respondent judged failures to report offences against vulnerable victims to be excusable or blameworthy this was not due to the fact that he disagreed with the definition of vulnerable in the questionnaire.[1455]

[1453] See above Chapter 8 pp. 232-233.
[1454] See below p. 317.
[1455] See above pp. 286-287.

The respondents generally agreed that these failures to report were blameworthy and should be punished. The idea was presumably that the need of the victim for protection meant that it was especially callous to ignore this need by not reporting the offence to the police.

On the other hand, one of the respondents, a police officer, stated that a non-reporter, who did not report an offence against a vulnerable victim, should be excused. This respondent's view contrasted strongly with the opinions of the other respondents and in particular with the views of the other police respondents. One possibility is that this respondent interpreted vulnerability to mean a victim who was especially wary of the criminal justice process. It is possible that the respondent considered the victim's reluctance to involve the police to justify the non-reporter's failure to report. A witness would not be justified in forcing the victim to be involved in the criminal justice process by reporting the offence.

The Effects of Reporting

In France a failure to report a future offence is viewed as more blameworthy than a failure to report an offence that has already been committed. This is because in the first instance the offence and the harm it caused might have been prevented. I wanted to examine whether the English respondents also considered a failure to report that might have been prevented as worse than failing to report an offence where the offender might have been identified and punished.[1456]

The police respondents assessed a failure to report as more serious if it meant that an offence could not be prevented. In comparison to the police respondents, the lawyers viewed both types of non-reporting as being less serious and although one of them did assess the failure to report that meant the offender could not be identified as being slightly less blameworthy, the figures are too small to reach any firm conclusions. Furthermore, from the additional comments and explanations offered by some of the respondents, it seems that the two aims, preventing offences and detaining offenders, are

[1456] See above pp. 301-303.

viewed as interdependent. If the offender is detained he will often be unable to commit offences and therefore these offences are prevented.

Circumstances that Excuse a Failure to Report

Although the discussion so far has focused on factors that might aggravate a failure to report, the questionnaire also considered whether there were any factors that might excuse a failure to report and what those factors might be. Analysis of voluntary reporting suggests that individuals are reluctant to report someone they know or a young offender. Fear of reprisals also deters reporters.[1457] Given this reluctance, I thought that the respondents might view some failures to report sympathetically.

The Reporter's Relationship with the Offender

I wanted to examine whether a relationship with the offender would deter a potential reporter from informing the police.[1458] The questionnaire revealed that the views of a proportion of the police respondents differed significantly from those of the lawyer or victim support respondents. Although the lawyer and victim support respondents and six of the police officer respondents assessed this type of non-reporter as being levels four or five of seriousness, eight of the police respondents stated that this type of non-reporter was either level one of two of seriousness and a further twelve police respondents decided that this non-reporter was level three of seriousness. Whilst this suggests that the police take a more hard line approach to those that do not report people that they know, it is difficult to reach any firm conclusions. The number of police officers included within the study was greater than the number of lawyer or victim support respondents. It is possible that, had the number of lawyers or victim support respondents been increased to the same number as the police respondents, less sympathetic lawyers or victim support would have emerged.

It is also difficult to interpret the data from this question because of its ambiguity. The term "someone he knows" is vague. One interpretation is that the reporter is unwilling to report because of close ties and affection towards

[1457] See above Chapter 4 p. 87-88.
[1458] C. Clarkson, A. Cretney, G. Davis, J. Shepherd, "Assaults, the Relationship Between Seriousness, Criminalization and Punishment" [1994] Crim. L. R. 4, 13.

the offender. On the other hand, another interpretation is that the offender is known and feared by the potential reporter and the reporter chooses not to report rather than risk reprisals from the offender.[1459] It is possible that the respondents' assessment of how blameworthy the non-reporter is depends on which interpretation of the question the respondent used. Furthermore, the question might also imply that the non-reporter knows the offender because he is an associate of the offender. It is possible that those respondents, who judged this non-reporter harshly, did so because they interpreted the statement in this way and saw the non-reporter as a non-reporting gang member.

Furthermore, in addition to the relationship between the reporter and the offender, the scenario contains other factors, which might also influence the respondents' judgement of the blameworthiness of the non-reporter. The non-reporter does not have direct evidence of the offence, he hears about it.[1460] The fact that the non-reporter did not witness the offence might excuse his not reporting. For example, the non-reporter may feel that he was not sufficiently certain that the offence had been committed and might not want to falsely accuse someone or to waste police time.[1461] On the other hand, the fact that it relates to a future offence, and there is therefore the possibility of the offence being prevented, might be an argument for reporting and, therefore, for punishing the reporter.[1462]

Failures to Report Juvenile offenders

As for the reporting of a juvenile offender, it is possible that individuals may be reluctant to report young offenders because they feel that a legal response to the minor's offending would be inappropriate. A potential reporter may fear that reporting a young offender will establish him as a "criminal", when using non-legal means, for example involving the child's parents, may be more effective. On the other hand, there is serious concern about juvenile offending. It might be argued that it is preferable to detect juvenile offenders earlier in order to prevent them committing more harmful offences when they are older.[1463]

[1459] See above Chapter 4 p. 90.
[1460] See above Chapter 6 pp. 129-132.
[1461] J. Wenik, "Forcing the Bystander to Get Involved: A Case for a Statute Requiring a Witness to Report Crime" (1985) 94 Yale L. J. 1787.
[1462] See above pp. 301-303.
[1463] See above Chapter 5 p. 113.

This conflict and uncertainty about the effects of reporting juvenile offenders is perhaps reflected in the data, for example, in relation to the police respondents, whilst six of them claimed that the non-reporter of a juvenile offender should usually or always be punished, ten police officers stated that such a non-reporter should never or rarely be punished.

Reprisals

The threat of reprisals provided the most justified reason for a witness not reporting. All of the lawyers, all of the victim support respondents and eleven of the police respondents assessed a failure to report that had been motivated by fear of reprisals as being excusable. On the other hand, nine of the respondents stated that it was level three of blameworthiness. This suggests that they support some of these failures to report being prosecuted. One possibility here is that reprisals are not an absolute excuse for failing to report and are evaluated alongside other factors, for example the seriousness of the offence and the benefits of reporting. I did not define reprisals and it might be that those respondents who were less sympathetic towards the reporter who had been threatened with reprisals interpreted reprisals less strictly than the other respondents.

I was not surprised that a significant proportion of the respondents considered the threat of reprisals to excuse a failure to report. Not only is voluntary reporting less likely in these circumstances,[1464] but also the reporter, who does not report, because of a threat, is similar to the potential rescuer, who does not carry out a dangerous rescue.[1465]

The victim's failure to report

The French non-reporting offences exclude victims.[1466] Although the questionnaire focuses on failures to report by witnesses, it was important to examine the respondents' views of victims and non-reporting. All the lawyer respondents and all of the victim support respondents were against punishing

[1464] See above Chapter 4 pp. 87-88.
[1465] See above Chapter 2 pp. 20-21.
[1466] See above Chapter 1 p. 1.

the non-reporting victim, as generally were the police respondents. Furthermore, this reluctance to punish victims, who did not report, was also apparent in the discussion of the reporting of child abuse.[1467]

Police Use of a Non-Reporting Offence

Current non-reporting offences in both England and France are rarely prosecuted. The review of terrorism law before the introduction of the Terrorism Act 2000 stated that Prevention of Terrorism (Temporary Provisions) Act 1989 s. 18 was prosecuted extremely rarely.[1468] Similarly, figures from the Ministry of Justice show that there are few convictions for failing to report[1469] and the French respondents claimed that these offences, in particular the general duty to report under Article 434-1 of the CP, were rarely prosecuted.[1470] Given the lack of prosecutions, I was interested in what use these offences might have, and consequently how a duty to report serious offence might be used were it to be introduced. In particular, I wanted to examine whether the duties to report encouraged individuals to report or to give other information about offences or offenders. There is some evidence that section 18 of PTA 1989 has had this effect and has been used by the police as a bargaining tool to encourage witnesses to give information.[1471] Similarly, it seems that misprision offences in the United States are also used by prosecutors and the police to persuade people to report offences and to identify offenders.[1472]

In the questionnaire, I asked two questions related to this issue. First, I asked an open question inviting the respondents to list uses, other than prosecution of a non-reporter, that a duty to report serious offences might have. Secondly, I focused on the potential use of the duty as a bargaining tool. It was important to include the open question to avoid influencing the respondents.[1473]

In response to the first, open question, none of the respondents suggested that a duty to report might be used as a bargaining tool to persuade reluctant

[1467] See below pp. 339-342.
[1468] Home Office, *Legislation Against Terrorism*, (1998), Chapter 12 paragraph 5-7.
[1469] See below Appendix A.
[1470] See above Chapter 8 pp. 239, 246-8.
[1471] See above Chapter 6 pp. 141-2.
[1472] *United States of America v Cynthia Mitzell.* Case heard by the United States Court of Appeal Fifth Circuit, Case Number 95-10593.
[1473] See above p. 270.

witnesses to give information. Six respondents, five police and one lawyer, stated that the duty could be used to prevent crime. A further three police respondents replied that the duty could be used by the police to obtain a fuller picture of the level and type of crime in an area.

Although none of the respondents included the duty's use as a bargaining tool in answer to the first question, ten of the respondents, when specifically asked, agreed that the duty would often be used as a bargaining tool. Both police and lawyer respondents recognised that the duty might be used as a bargaining tool. One of the lawyers said that the duty would often be used as a bargaining tool and two of the lawyers said that it would sometimes be used in this way. As for the police respondents, nine of them stated that the duty would often be used as a bargaining tool and fifteen that it would sometimes be used as a bargaining tool. On the other hand, three of the police respondents stated that the duty would only rarely be used as a bargaining tool. It is possible that by recognising and admitting that the duty might be used as a bargaining tool the police respondents were demonstrating that they agreed with the duty being used in this way.

One difficulty with this question is that it asks the respondents to predict future behaviour. Furthermore, in the case of the lawyer respondents and the victim support respondents it asks them to predict the future behaviour of another professional group. Given these difficulties, it is interesting to note that one of the lawyer respondents and both the victim support respondents did not reply to this question.

A Duty to Report Child Abuse?

Figures from the Ministry of Justice show that Article 434-3, the failure to report a violent offence against a vulnerable individual, is more likely to be punished than the other offences of failing to report.[1474] This matched the experience of the French respondents. Whilst few of them had been involved in prosecutions of failures to report serious offences,[1475] most of them had experience of cases of failing to report child abuse.[1476] In addition, despite a rejection of a general

[1474] See below Appendix A, see above Chapter 7 pp. 185-186, 196.
[1475] See above Chapter 8 p. 239.
[1476] See above Chapter 8 pp. 251-252.

duty to report, some American states[1477] and Australia[1478] require certain professionals to report child abuse.[1479] Even in Great Britain, the ethos of co-operation and "working together" means that many professionals will have a responsibility to report child abuse.[1480]

A section of the questionnaire was dedicated to the mandatory reporting of child abuse. It examined the respondents' experiences of the reporting of child abuse[1481] and whether they supported the introduction of a duty to report.[1482]

The Respondents' Experience, Knowledge and Attitudes Towards Child Abuse

How the Respondents Defined Child Abuse

Before asking the respondents' for their opinions on duties to report child abuse, I wanted to examine how they interpreted it. The recognition of different types of child abuse has been gradual.[1483] I was interested in whether the respondents included physical, emotional, sexual abuse and neglect within their definitions and whether there was any connection between awareness of different types of abuse and support for a duty to report. Furthermore, without an understanding of how the respondent defined child abuse, any eventual support or rejection of a duty to report child abuse by the respondent would be meaningless. It would be impossible to state whether all the respondents that supported a duty were in favour of the same duty. It might be that a respondent, who rejected an extensive duty to report child abuse, might

---

[1477] S. C. Kalichman, M. E. Craig & D. R. Follingstad, "Professionals Adherence of Mandatory Child Abuse Reporting Laws: Effects of Responsibility Attribution, Confidence Ratings and Situational Factors" (1990) 14 Child Abuse and Neglect 69, A. Reiniger, E. Robison, M. McHugh, "Mandated Training: A Means for Improving Reporting of Suspected Child Abuse" (1993) 17 Child Abuse and Neglect 63.

[1478] D. A. P. Lamond, "The Impact of Mandatory Reporting Legislation on Reporting Behaviour" (1990) 14 Child Abuse and Neglect 471.

[1479] See above Chapter 6 pp. 158-160.

[1480] P. Reder, "Child Protection: Medical Responsibilities" (1996) 5 Child Abuse Review 64, Department of Health, BMA, Conference of Medical Royal Colleges, *Child Protection: Medical Responsibilities*, (1994), Home Office, Department of Health, Department of Education and Science and Welsh Office, *Working Together Under the Children Act 1989: A Guide to Arrangements for Inter-Agency Co-Operation for the Protection of Children from Abuse*, (1991), pp. 11-13; Department of Health, Home Office, Department of Education and Employment, *Working Together to Safeguard Children, A Guide to Inter-Agency Working to Safeguard and Promote the Welfare of Children*, (1999).

[1481] See below pp. 324-335.

[1482] See below pp. 336-342.

[1483] C. Cobley, *Child Abuse and the Law*, (1995), pp. 9-14.

support a duty to report a more strictly defined class of child abuse. One solution might have been to give the respondents a definition of child abuse. I decided however, to first ask the respondents for their definitions of child abuse.

All the respondents included physical, mental/ emotional and sexual abuse and both active mistreatment and neglect in their definitions of child abuse. This consensus on what child abuse included was important for the rest of the questionnaire. The fact that the respondents defined child abuse in the same way would mean that were they to agree with a duty to report child abuse, they would be supporting the mandatory reporting of the same behaviour or neglect.

The Respondents' Experience of Working with Child Abuse Victims and Offenders

In the questionnaire I asked the respondents to identify the voluntary reporters of child abuse.[1484] This was information that could best be obtained from respondents who had experience of working with child abuse victims or offenders. It was important, therefore, to filter out those respondents who had no experience or knowledge of child abuse.[1485] In addition, I wanted to investigate whether those respondents, who had worked with child abuse victims, adopted a more punitive stance towards offenders. Whether they were more likely to favour duties to report, or conversely whether they were more cynical as to the impact of a duty to report child abuse. For these reasons, it was important first to discover the extent of the respondents' experience of working in child protection.

The questionnaire asked the respondents whether they currently worked with child abuse victims or whether they had ever worked with child abuse victims. The respondents were asked the same question in relation to child abuse offenders. Fourteen of the police respondents had professional experience of child abuse survivors and perpetrators. Similarly three of the lawyer respondents had experience of working with abusers as defending solicitor and with victims, helping put in compensation claims. None of the victim support

[1484] See below pp. 323-330.
[1485] A. N. Oppenheim, op. cit. pp. 111-112.

respondents had experience of working with victims or perpetrators of child abuse.

The Purpose of Child Abuse Laws

I asked the respondents what they thought were the objective(s) of child abuse legislation. The question was open and the respondents were able to list more than one objective. The results of this question are set out in Table Ten. The purpose of this question was to provide a context for later discussion of a potential duty to report. In particular, I was interested in how the objectives of protecting the child and punishing the offender were ranked because this may help determine the wording and use of any mandatory reporting of child abuse. It might also help explain a respondent's attitude towards the mandatory reporting of child abuse.

Table 10

Purpose	**No. of Respondents**
Child centred purposes:	
Protection	22
Offender centred purposes	
Prevention	12
Prosecution/ Punishment	10

According to the respondents, the main objective of child abuse legislation was child protection. All the respondents, who answered this question, included this as either the main or the only purpose of child abuse legislation. The second most popular objective was to prevent the offender reoffending. These two aims, of prevention and protection, are connected. The reason why the offender is prevented from continuing to abuse is to protect the child. Nevertheless, whilst "protection" was used by many of the respondents to refer to the child who had already suffered abuse, "prevention" often referred to preventing the offender abusing that child *and future victims*. As a result, the classification in the table above distinguishes between "prevention" and "protection". Furthermore, given that the respondents listed both prevention and prosecution, this might suggest that they distinguish between the two aims.

Nine respondents, all of them police respondents, gave the prosecution and punishment of the abuser as an objective. Those respondents, who stated that

punishment was an objective of child abuse legislation, also included the prevention and protection. It is interesting that punishing the offender was not seen as the primary purpose of any duty to report and that those respondents who did select it were police officers. Given the small number of respondents and especially non-police respondents,[1486] it is impossible to draw any firm conclusions as to whether there are significant differences in attitude between different professionals. Nevertheless, it might be that this does support suggestions that the police adopt a more punitive and criminal justice focused attitude towards child abuse than other professional groups and that the differences in ideology between different professionals hampers cooperation and might hinder any mandatory reporting.[1487]

Is Child Abuse Under Reported?

I wanted to discover whether the respondents thought that child abuse was under reported. I expected those respondents who thought that it was under reported would be more likely to support mandatory reporting. Because I did not want to influence the respondents, I first asked the respondents a general question, whether there were any problems that prevented legislation against child abuse and measures to protect victims from achieving their objectives. If under reporting had been included as a problem in answer to this open question this would have reinforced any suggestion that it was a problem in the later question.

In answering this open question, none of the respondents stated that child abuse was underreported. The problems listed by the respondents related to the criminal justice system, the child/adult dynamic and the difficulty/impossibility of curing child abusers. As far as the criminal justice system was concerned, the major problem was the treatment of child witnesses. This was included by eleven respondents of which eight were police respondents and three were lawyer respondents. Furthermore, this concern, that adversarial process and the formal structure of courts are ill suited to child witnesses, has already been recognised as a significant difficulty

[1486] See above pp. 269-277.
[1487] See below p. 334.

with prosecuting child abuse.[1488] In relation to abuse, one police respondent was concerned that some abuse was seen as normal parental discipline. This is interesting because it might affect reporting. If a person defines a parent's actions as discipline rather than abuse, he will not report that behaviour.[1489]

Although none of the respondents had identified under reporting as a problem, the questionnaire then asked whether child abuse was underreported. This time, when prompted by the questionnaire, all the respondents stated that it was underreported. One possibility is that, whilst the respondents did consider underreporting to be a problem and hence the answers to the second question, they did not think that it was the most significant problem and therefore did not list it when answering the previous question.

Voluntary Reporting of Child Abuse

Who Reports Suspected Child Abuse to the Police?

The respondents were given a list of potential reporters of child abuse. They were asked to mark the three most likely reporters with a "1", "2" or "3" and with an "x" any individuals who were especially unlikely to report. The potential reporters in this question were based on previous studies of the reporting of child abuse.[1490] They included professionals, who, because of their access to the child and specialised training might be thought especially able to report, for example, doctors and teachers and the victim's family because of their proximity to the victim and their responsibility for the victim. The possibility of the victim reporting was also included. One problem with this question is that whilst the police respondents may have had personal experience of which individuals report abuse to the police, the lawyer respondents would probably have been basing their answers on their impressions.

[1488] L. Hogano, "Variations on a theme by Pigot: Special Measures Directions for child Witnesses" [2000] Crim. L. R. 250; P. Collins, "Children in Crossfire" (1995) 25 Family Law 378.
[1489] See above Chapter 4 p. 68, Chapter 7 p. 192.
[1490] C. Hallett, *Interagency Coordination in Child Protection*, (1995), pp. 68-71; see above Chapter 4 pp. 79-81.

Table 11

	Level of Reporting			
Reporter	**1**	**2**	**3**	**x**
Child him/herself	6	0	2	0
Neighbour	0	2	4	0
Teacher	3	0	0	0
If a parent is the abuser, the non-abusing parent, who lives with the abuser.	0	0	0	3
Doctor	0	2	3	2
Sibling	0	0	0	1
Non-parent adult relative	0	0	0	1
If a parent is the abuser, the non-abusing parent, who is separated from the abusing parent	0	7	5	0
Social services	7	5	3	0

Four respondents ranked the reporting behaviour of the listed individuals in a different way. One police respondent and one lawyer respondent ranked the reporters 1-9 in order of their likelihood to report abuse to the police. One was the most likely reporter and nine the least likely.

Table 12: The Police Respondent

Social Services	1
If the abuser is a parent, the non-abusing parent who is separated from the abuser	2
Doctor	3
Non-parent adult relative	4
If the abuser is a parent, the non-abusing parent who lives with the abuser	5
Teacher	6
Neighbour	7
Sibling	8
Child him/herself	9

Table 13: The Lawyer Respondent

Child him/herself	1
If the abuser is a parent, the non-abusing parent who lives with the abuser	2
If the abuser is a parent, the non-abusing parent who is separated from the abuser	3
Social Services	4
Non-parent adult relative	5
Teacher	6
Sibling	7
Neighbour	8
Doctor	9

The other police respondent classified the potential reporters as most often, sometimes, least often and never.

Table 14: The Police Respondent

Level of Reporting	**Reporter**
Most often	Child, Doctor, Sibling, Social Services
Sometimes	Teacher, non-parent adult relative
Least often	Neighbour, In cases where the abuser is a parent, the non-abusing parent who is separated from the abuser.
Never	In cases where the abuser is a parent, the non-abusing parent, who lives with the abuser.

This classification was also used by the other lawyer respondent, who determined whether the potential reporters were most likely (1), quite likely (2), or not likely at all (3) to report.

Table 15: The Lawyer Respondent

Reporter	**Level of Reporting**
Social Services Dept.	1
A teacher	2
Doctor	2
Non-parent adult relative	2
Parent separated from the abusing parent	2
Child him/herself	3
Neighbour	3
Parent living with the abusing parent	3
Sibling	3

In a subsequent question respondents were asked whether any other types of individual reported child abuse but had not been included on the list. If the respondents claimed that there were other reporters they were then asked to identify them. Five of the respondents added other potential respondents. Three police respondents added "a friend". Although one of these respondents specified that he meant an adult friend, the other two did not. A further police respondent added the NSPCC and another police respondent suggested anonymous callers. Two of the lawyer respondents claimed that hospitals, in particular nurses, might be a source of reports. Three of the respondents therefore chose reporters who are professional, or trained, NSPCC and hospital staff. The other three respondents chose reporters who might report because of their relationship with the child.

The respondents did not agree how important is reporting by the listed individuals. One example of this disagreement is in relation to reporting by the child. The respondents seemed either to think that the child was the most likely reporter or that the child was a particularly unlikely reporter. It is possible that both these assessments are reliable. Whilst according to one respondent's experience child victims of abuse might be frequent reporters, according to another respondent's experience victims might rarely report. The respondents' assessments did not seem to depend on their profession and there was disagreement between the police respondents as well as between police and lawyer respondents.

One explanation for these differences might be that the respondents have interpreted "reporter" and "frequently" in different ways. One view is that for anyone other than the victim or the abuser to report the abuse to the authorities, there must first have been a report by the victim to this intermediary. A respondent who included this reporting to intermediaries would probably assess the victim as being a frequent reporter. Nevertheless, this is unlikely to have distorted the data significantly because the question specifically asks about reporting *to the police*. Therefore, in the remainder of this analysis it will be assumed that this is how reporting was interpreted by the respondents and this larger class of unofficial reporting will not be included.

As for frequency, this might be assessed numerically or as a proportion of the level of abuse, which the respondent knew about or suspected. A particular

type of reporter might only rarely discover abuse but report every instance of abuse that he discovers. In contrast another type of reporter may discover more types of abuse but filter out the majority and only report a fraction of the abuse that he discovers. A respondent, who interpreted "frequently" proportionally, might evaluate the first type of reporter as being the more frequent reporter. In contrast a respondent, who used a purely numerical assessment of frequently, might consider the second type of reporter to be the more frequent reporter. In relation to the victim, it might be that those who interpret frequently numerically assess the victim as a frequent report and those who interpret it proportionally will assess him as a rare reporter.

In my research, I was especially interested in whether professionals reported child abuse. In particular, I was interested in how mandatory reporting, or guidance encouraging reporting could be reconciled with doctors and other professionals' duties of confidentiality. There are two possible approaches. The first recognises that the conflicting duty of confidentiality and therefore imposes a lesser reporting duty on the professional or excuses the professional from not reporting. This is the approach adopted by the CP.[1491] The alternative approach is to impose a greater duty to report on professionals because their profession gives them the opportunity to discover offences and because their training will enable them to recognise offences. This is the approach in Australia and America.[1492] In the research it did appear that the respondents recognised the potential conflict between reporting and confidentiality. Although seven of the respondents considered the doctor to be a likely reporter, two thought that the doctor was an unlikely reporter. This discrepancy may in part be due to the tension between a doctor's suspicion that abuse is occurring and factors that might inhibit his reporting, for example the duty of confidentiality.

From this investigation of who does report child abuse it is possible to suggest factors that might encourage or inhibit reporting.

[1491] See above Chapter 7pp. 198-203; F. Alt Maes, "Un Exemple de Dépénalisation: La Liberté de Conscience Accordée aux Personnes tenues au Secret Professional" [1998] Rev. Sci. Crim. 301.

[1492] See above Chapter 6 pp. 158-160; United States Code Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 110 Sexual Exploitation and Other Abuse of Children, section 2258 Failure to Report Child Abuse; Australian Capital Territory – Children's Services Act; New South Wales – Children (Care and Protection) Act 1987 s. 22; Northern Territory – Community Welfare Act 1983 s. 14; Queensland – Health Act 1937 s. 76K; South Australia – Children's Protection Act 1993 s. 11; Tasmania – Child Protection Act 1974 s. 8; Victoria - Children and Young Persons Act 1989 s. 64.

Suspicion of Abuse

An individual must discover that a child has been abused before he can report that abuse.[1493] The more contact that a potential reporter has with a child, the greater the opportunity for him to discover that child has been abused. Consequently, an individual's proximity to a child will influence the likelihood of him reporting. One illustration of this is the fact that according to the respondents, non-parent relatives of the child are infrequent reporters. It is possible that many of these relatives will rarely see the child and therefore will be unlikely to discover the abuse. Conversely, an opportunity to discover the abuse, may make the individual a likely reporter. For example, doctors through examining the child may discover that the child is being abused.[1494] Similarly, a teacher's contact with and knowledge of his students may mean that he is well placed to suspect abuse and therefore to have the opportunity of reporting that abuse.

In addition to proximity, knowledge is important. Returning to medical staff their medical training also helps their recognition of abuse. For example, a doctor, or nurse, might realise that an explanation of an injury was false because it was not medically valid, or would recognise the long-term nature of bruises and other wounds. In contrast, a lack of knowledge will inhibit recognition of abuse. The child, who is being abused, may consider the abuse to be normal, and may not realise that he is being abused.

The Victim's Family

When the child is being abused by a relative, the victim's family concern for the victim may conflict with its loyalty towards the abuser. The respondents recognised the reluctance of one parent to report the abuser when the abuser was his partner. In contrast, separation from the offender, removes this conflicting loyalty. Indeed it is possible that separation may embitter one parent leading him to invent abuse claims against the other parent. Certainly, when the respondents were asked about malicious reports, all the respondents

[1493] See above Chapter 4 pp. 67-68.
[1494] P. Reder, "Child Protection: Medical Responsibilities" (1996) 5 Child Abuse Review 64; J. E. Warner, "The Identification and Reporting of Physical Abuse by Physicians: A Review and Implications for Research" (1994) 18 Child Abuse and Neglect 11.

agreed that the most likely malicious reporter was one parent against the other, or against that other parent's new partner following divorce or separation.[1495]

When the innocent parent is still living with the abuser he may be reluctant to report because he may fear that if the family home is identified as the scene of the abuse, the authority's response may be to remove the child.[1496]

In addition to the distance from the child, other family members rarely report because their responsibility towards the child is less important than that of the child's immediate family. Aunts, uncles cousins and so on may choose not to report because they feel that the child's parents should take primary responsibility for the child's welfare and safety and that this parental role should not be usurped by the wider family.[1497]

The Offender's Reaction to the Report

A potential reporter may be discouraged from reporting because he fears the offender and his reaction to any accusations. In situations where the child is being abused by one of his parents, it may be that the other, non-abusing parent, is also suffering domestic abuse and may believe that reporting the abuse will worsen the situation. This might be another reason why a parent is more likely to report abuse by another parent when the parents are separated. The non-abusing parent in this situation feels that it is safe to report the abuse. Similarly, it is possible that a neighbour may choose not to get involved rather than reporting and risking violence from an abusive neighbour.

Reasons for Not-Reporting

The respondents were given a list of factors that might inhibit reporting. They were asked to rank the extent to which they agreed that that factor might inhibit reporting. Table 16 sets out the responses to this question.

As a follow up the respondents were asked to list other factors that might inhibit reporting. The respondents' suggestions are set out in Table 17.

[1495] See below pp. 335-336.
[1496] See below p. 333.
[1497] See above Chapter 2 pp. 38-39.

Table 16

	Strongly Agree	Agree	Neither agree, nor disagree	Disagree	Strongly disagree
The victim was afraid that he/ she would not be believed.					
Police	2	18	0	0	0
Lawyer	1	3	0	0	0
Total	3	21	0	0	0
The parents of the victim were afraid that their child might be taken into care.					
Police	0	15	5	0	0
Lawyers	0	4	0	0	0
Total	0	19	5	0	0
A doctor did not want to break patient confidentiality					
Police	1	3	5	9	2
Lawyer	0	2	1	1	0
Total	1	5	6	10	2
A doctor was worried about harming his relationship with his patient.					
Police	0	6	7	5	2
Lawyer	0	1	2	0	1
Total	0	7	9	5	3
A potential reporter thought that it was more appropriate to treat the offender than to punish him.					
Police	0	2	7	9	2
Lawyers	0	0	1	2	1
Total	0	2	8	11	3

Table 17

Reason	Police	Lawyers	Total
The reporter was afraid of having to give evidence in court	3	3	6
The reporter was afraid of reprisals	3	2	5
The reporter had had a previous bad experience with the police	1	0	1
The reporter did not believe the child's claims that he was being abused.	1	1	2
The reporter felt that the abuse was not his business and did not want to get involved.	1	0	1
The reporter believed that the abuse had stopped	1	0	0
The victim of the abuse did not realise that he was being abused	1	0	0

Factors that Prevent a Victim from Reporting

According to the respondents, the main reason for a victim's failure to report was fear that he would not be believed. Twenty-four respondents either agreed, or strongly agreed that this inhibited reporting and none of the respondents disagreed.

Although the question did not ask whether the victim would in fact be disbelieved, one of the police respondents claimed that some individuals would not believe a victim's claim that he had been abused and this disbelief would prevent that individual from reporting the abuse. Unfortunately, this respondent does not explain whether any types of individual are especially likely to disbelieve that a child has been abused, or whether certain types of abuse are more or less likely to be believed. It is significant that the respondent claims that disbelief is a reason for not reporting, particularly in view of the supposed increased awareness of child abuse.

One of the police respondents claimed that a victim might not report because he did not realise that he was being abused. A child, whose experience of family life has always included abuse, might not recognise that this was deviant. In other words, a potential reporter must *know* that an offence has been committed and in this situation the child would not know.[1498]

Six of the respondents suggested that an individual might be reluctant to report because of fear of having to give evidence in court. This reason for non-reporting was emphasized by the lawyer respondents. Whilst not specifically linked to children, it is clear that children do present special challenges to the court system.[1499]

A Potential Reporter Fears the Negative Consequences of Reporting

A potential reporter may be deterred from reporting because he considers the costs of reporting to be too great. The questionnaire concentrated on two issues, whether fear that the child would be taken into care would deter parents

[1498] See above Chapter 4 pp. 67-68.
[1499] See above p. 323.

from reporting and whether a reporter would be afraid to report because of the threat of reprisals from the abuser.

Failures to Report by the Child's Parents

Although fifteen of the respondents agreed that parents of abused children might choose not to report the abuse because they feared the child would be taken into care, five of the respondents neither agreed nor disagreed. It is reasonable to assume that parents would be more likely to fear that the child would be removed if the abuse took place within the family home, and if the abuser was a family member.[1500] Because the statement was not explicitly limited to this situation, it might explain the difference of opinion between the respondents.

Five of the respondents stated that an individual might choose not to report because he feared reprisals. One possible situation where this might occur is where one parent is afraid to report the other abusive parent in case the report increases the abuser's violence towards the other parent and the children. In support of this, the respondents claimed that non-abusing parents were more likely to report abusing parents if they were separated.

Professionals and Reporting

Two factors that might deter a doctor from reporting were suggested. The first was that a doctor might be dissuaded from reporting because of medical confidentiality. The second was that a doctor might not report because of the risk that the report might harm his relationship with this patient.

A larger proportion of the lawyer respondents than police respondents agreed that the two reasons might dissuade a doctor from reporting. One explanation for this is that the lawyers would also be bound by a professional duty of confidentiality and therefore might be more aware of the difficulties that this professional duty of confidentiality might cause and therefore more sympathetic towards non-reporting professionals.

[1500] See above p. 330.

More respondents agreed that a doctor might not report because of harming his relationship with a patient, than that a doctor might not report because of medical confidentiality. One possible reason for this is that confidentiality is included within the notion of a good doctor/ patient relationship. Those respondents, who agreed that the doctor would not report because of confidentiality, would therefore necessarily agree that the doctor would not report because of the doctor/ patient relationship.

A further possibility, suggested by Table 16, was that an individual might choose not to report because of a belief that treatment was more appropriate than punishment. Although, this category was not specifically linked to professionals and whether they report, there is some evidence that different professionals disagree about the most appropriate action in relation to child abuse. Typically, for example, the police force is seen as the most punitive and centred on criminal justice. Others might combine this with a treatment approach, or prefer a treatment approach.[1501] Only two of the respondents, both of them police officers, agreed that a respondent might not report because of a belief that punishment was not the most appropriate response to abusers. In contrast fourteen of the respondents, both lawyer and police respondents, either disagreed or strongly disagreed that this was ever a reason for not reporting.

There are two interpretations of this. The first is that there is little disagreement about the correct way to deal with child abuse. Given this consensus, it is impossible for not reporting to be motivated by a different approach to abuse. The second interpretation is that there are disagreements about the correct way to deal with child abuse but that these disagreements rarely motivate a decision not to report. One way of evaluating whether the different professional groups agree on the way to deal with child abuse is to return to the earlier question dealing with the objectives of child abuse legislation. From this question it seems that there was considerable agreement between the police, lawyer and victim support respondents on the purpose of child abuse

[1501] B. Trute, E. Adkins, G. MacDonald, "Professional Attitudes Regarding the Sexual Abuse of Children, Comparing Police, Child Welfare and Community Health" (192) 16 Child Abuse and Neglect 359.

legislation. Nevertheless, unlike the other respondents, some of the police respondents also mentioned the punitive function of child abuse legislation.[1502]

The Criminal Justice System and Reporting

The other two reasons to explain non-reporting, suggested by the respondents, both related to the criminal justice system. Three lawyers and three police officers suggested that an individual might decide not to report because he was reluctant to give evidence in court. This is significant because it corresponds to the respondents' earlier recognition that giving evidence in court was a major problem with child abuse legislation.[1503] In addition, one police respondent claimed that a potential reporter might be deterred from reporting by a previous bad experience with the police.

Malicious Reporting

Although the research focused on whether the underreporting of child abuse was a problem, it was important for balance to consider whether over reporting, in other words, malicious reporting, was also a problem.

Although none of the respondents claimed that most child abuse reports were malicious, all the respondents agreed that some reports were malicious. The respondents were then asked to suggest types of reporter that made malicious claims of child abuse. Their replies are set out in Table 18.

Table 18

Type of Reporter	Police	Lawyer
The alleged victim	2	1
Estranged parents	11	1
Neighbours	1	1

Those respondents, who did identify malicious reporters, often associated malicious reporting with separation and divorce. This was unsurprising and

[1502] See above p. 322-323.
[1503] See above p. 323.

supported other literature detailing malicious accusations of abuse during divorce.[1504]

The Respondents' Attitudes Towards the Mandatory Reporting of Child Abuse

The final stage of the questionnaire was to evaluate the respondents' attitudes towards the mandatory reporting of child abuse. Article 434-3 was described to the respondents and they were asked whether they would agreed with the introduction of a duty to report child abuse, corresponding to Article 434-3, into English criminal law. Table 19 shows the respondents' views of the mandatory reporting of child abuse.

Table 19

	Police	Lawyer	Victim Support
It is usually justifiable to punish a failure to report child abuse	10	0	1
It is sometimes justifiable to punish a failure to report child abuse	14	0	1
It is rarely justifiable to punish a failure to report child abuse	0	4	0
It is never justifiable to punish a failure To report child abuse	0	0	0

This table shows a clear difference of opinion between the different professional groups. Whereas the police and victim support respondents were in favour of the mandatory reporting of child abuse, the lawyer respondents were more cautious. Nevertheless, given that the numbers of respondents were very small, it might be that with a larger sample of respondents, there would have been more consensus between the groups and more disagreement between the same types of respondents. On the other hand, the fact that the lawyer respondents were more cautious was not unexpected. Their own duty of confidentiality may have meant that they were more aware of the difficulties of reconciling duties to report with other professional duties.[1505] Furthermore, as defence lawyers, it was perhaps unsurprising that they were less keen on punishing omissions.

[1504] M. King & J. Trowell, *Children's Welfare and the Law, the Limits of Legal Intervention*, (1992), pp. 55-67.
[1505] See above pp. 304-305.

Given the support from the police respondents for a duty to report serious offences,[1506] I was not surprised that they also supported a duty to report child abuse. Furthermore, the police respondents who had not supported the more general duty did support a duty restricted to child abuse. These police respondents had opposed the more general duty because of the difficulty of prosecuting the offence.[1507] It is interesting that they did not reject a duty to report child abuse for the same reasons. This may be because they did not think there would be the same difficulties in prosecuting a specific duty to report child abuse, it may also have been because they thought that although it would be difficult to prosecute failures to report child abuse, the offence would still be useful.

The two victim support respondents also supported punishing the non-reporter of child abuse. In contrast, the views of the four lawyer respondents were less favourable arguing that it was rarely appropriate to punish the non-reporter of child abuse. Whilst this was not an outright rejection of the mandatory reporting of child abuse, it suggested that any duty to report child abuse should be restricted and only used against the most blameworthy non-reporters. Although they were less in favour than the other types of respondents, the lawyer respondents did support duties to report child abuse more than duties to report serious offences. Whilst they had opposed the more general duty, they did recognize that the specific duty to report might exceptionally be used. This matches the data from the French interviews. The interviewee, who opposed the general duty to report serious offences, nonetheless supported the specific duty to report child abuse in Article 434-3.[1508]

Reasons for Supporting the Mandatory Reporting of Child Abuse

The police respondents, who agreed with a duty to report child abuse, used four arguments to justify their support. The most popular reasons for agreeing with mandatory reporting were the seriousness of the offence and the vulnerability of the victims. Five of the respondents used both these justifications. Because these respondents used both these arguments, I have

[1506] See above pp. 292-294.
[1507] See above p. 294.
[1508] See above Chapter 8 p. 262-263.

kept them as two separate justifications. Nevertheless, these two reasons are connected. One of the reasons why child abuse is perceived as such a serious offence is because of the vulnerability of the victim. One possible distinction between them is that seriousness focuses on the offender and whether he deserves to be punished, whilst the vulnerability argument concentrates on the child and his need to be protected.

Three respondents suggested that a duty to report child abuse was important because this would help with the discovery and detection of child abuse. A further two respondents felt that a duty to report child abuse was important in order to deter other non-reporters.

It is interesting that the respondents used a mixture of symbolic and pragmatic reasons for supporting a duty to report child abuse. Those respondents who supported the duty because of the seriousness of the offence, seem to be suggesting that this is an occasion where failing to report is so blameworthy it should be highlighted as such by a duty to report. On the other hand, other respondents suggest that the duty to report might have an impact on reporting or the investigation of child abuse.

Reasons for Disagreeing with the Mandatory Reporting of Child Abuse

The lawyer respondents were more reluctant to punish failures to report child abuse. They argued that it was rarely justified to punish the non-reporter of child abuse because he did not deserve to be punished. From their explanations, it seems that there are two reasons why the non-reporter of child abuse did not deserve to be punished. First, one of the respondents claimed that the non-reporter was not blameworthy because he had not caused harm. Although child abuse was a serious offence, it was the active abusers who were responsible for this rather than the non-reporter. In addition, another respondent stated that the non-reporter did not deserve to be punished because his non-reporting should be judged in its proper context and the non-reporter might have good reasons for not reporting. Although the respondent did not explain what these reasons might be, it is possible that they included fear of reprisals and professional duties of confidentiality both of which the respondent viewed as being reasons why individuals did not report child abuse.

The lawyers also rejected a duty to report child abuse because they claimed that it would be unworkable. They argued that it would be impossible to prove that a non-reporter knew about abuse and therefore the duty to report child abuse would be unworkable. The need to prove that a non-reporter knew about the abuse might suggest that were a duty to report child abuse introduced it would be limited to individuals who would have a particular reason for knowing that a child was being abused. Consequently, it would be likely that it would be limited to the child's closest family and professionals whose training would make them more able to recognise abuse.

It was interesting that the respondents claimed this duty would be unworkable because this contrasts with the French experience. The French interviewees claimed that, unlike the other duties to report,[1509] Article 434-3 was used.[1510] They also suggested that it was effective and that since the reforms to the Penal Code in 1993 it was not difficult to establish whether a non-reporter of child abuse knew about the abuse.[1511] In addition, official statistics show that it is now more likely to result in a conviction than a failure to report a serious offence under Article 434-1.[1512]

In What Circumstances should non-Reporting be Punished

Those respondents who favoured a duty to report child abuse were then asked to describe the situations when it would be appropriate to punish a non-reporter. Their suggestions are set out in Table Twenty.

[1509] See above Chapter 8 pp. 246-248.
[1510] See above Chapter 8 pp. 251-252.
[1511] See above Chapter 8 pp. 247-248.
[1512] See below Appendix A.

Table 20

	Police	Lawyer	Victim support
The reporter knew that the abuse Had occurred	8	2	0
The abuse was particularly serious	5	0	1
The non-reporter was related to the victim	2	0	0
The non-reporter was a doctor/nurse/ teacher/social worker to whom the child went for help.	2	0	1
The non-reporter had no excuse for not reporting	3	0	0

According to ten of the respondents only non-reporters, who knew that the abuse was occurring, deserved to be punished. This was interesting given that some respondents had rejected a duty to report child abuse because of the difficulty of proving that person knew about the abuse. The requirement that a person not be liable for failing to report unless he was certain about the abuse is a reasonable limitation. Given the seriousness of child abuse, an individual might be reluctant to accuse an abuser until he is certain.[1513] This limitation recognises these concerns. In addition, one criticism of duties to report is that they might encourage malicious or inaccurate reporting.[1514] Requiring a reporter to be certain of abuse rather than merely suspect it might help limit this. Furthermore, a report might lead to the child being removed from his home, or undergoing extensive medical examination. Therefore, an individual, who suspects abuse, might delay reporting so that the alleged victim does not suffer harm.

Six of the respondents claimed that mandatory reporting should be limited to those instances when the abuse is especially serious. The respondents do not give examples of serious abuse, or of factors that aggravate abuse. It is probable that it would be linked to the harm suffered by the child and the danger that he faced. Nevertheless, this still leaves the question of whether it would be limited to systematic abuse, or whether a single instance would ever

[1513] See above Chapter 5 p. 113.
[1514] See below Chapter 10 pp. 351-352.

be included. Given the fact that the respondents stressed the need for child abuse legislation to *prevent* abuse and protect children[1515] and the fact that child protection measures under the Children Act are concerned with preventing future abuse,[1516] it may well be that only when the reporter believes that the child is repeatedly abused would he have a duty to report.

A further possibility is that the severity of the abuse is linked to the earlier requirement that the potential reporter knew that the child was being abused. In other words, it may be less easy to find an innocent explanation for a serious injury. However, whilst there is some evidence that the recognition of physical abuse depends on the severity of the injury,[1517] other forms of abuse, notably sexual and emotional abuse, may not produce apparent physical injuries no matter how serious they are.

A non-reporter, who is related to the child, or who has a professional duty to care for the child is especially blameworthy. Two of the police respondents stated that members of the victim's family who did not report deserved punishment as did professionals to whom the victim went for help. Limiting liability to those individuals who have a special relationship with the victim provides a clear way of distinguishing between those individuals who are liable for non-reporting and those who are not. The difficulty with this approach is that as has been examined the victim's family and professionals may have particular reasons for being reluctant to report.[1518]

Three respondents, all of them police officers, determined that it would be justifiable to prosecute a non-reporter whose failure to report had no excuse. Although, the respondents do not explain what excuses would justify a failure to report, it is perhaps reasonable, based on their view of the general duty to report serious offences, to suggest that they would consider threats from the offender to justify a failure to report.[1519] On the other hand, the more varied

[1515] See above p. 322-323.
[1516] Children Act 1989 s. 31.
[1517] C. F. Johnson, "Physicians and Medical Neglect: Variables that Affect Reporting" (1993) 17 Child Abuse and Neglect 605, 608; J. Warner & D. Hansen, "The Identification and Reporting of Physical Abuse by Physicians, A Review and Implications for Research" (1994) 18 Child Abuse and Neglect 11, 17.
[1518] See above pp. 333-335.
[1519] See above p. 317.

reaction to professional confidentiality[1520] may mean that this would be unlikely to excuse a failure to report child abuse. Furthermore, this is reinforced by the inclusion of non-reporting professionals as being especially deserving of punishment.

Conclusion

Support for a general duty to report serious offences was limited. All the lawyer respondents rejected it, as did some of the police officers. In contrast, a duty to report child abuse seemed more popular. Like the French respondents, the English respondents support for a duty to report does not depend on the likelihood of prosecution. It seems therefore that according to the respondents, even if a duty to report child abuse were rarely used, it might nonetheless be justified.

The distinction between reporting an offender and reporting an offence was less well supported. This respondents were not used to this distinction being applied and might have wondered how it would work in practice. This might suggest that it is sometimes difficult to transpose concepts from one jurisdiction to another. Similarly, the greater support for professional confidentiality amongst the English lawyer might be due to differences between the adversarial and inquisitorial systems.[1521]

The English and French stages of the research used different methodologies. Having carried out interviews and analysed the questionnaires, it seems that the more rigid structure of the questionnaire means that it is easier to compare the response of different participants. This is perhaps shown in this Chapter by the tables showing the respondents' various responses to one questionnaire. On the other hand, it is less easy to explore new suggestions, or check the respondents' answer. In the analysis of the questionnaire there are several issues where although I provide an interpretation or suggestion of what the respondent meant and why he reached that conclusion, in order to confirm this I would need further research with the respondent.

[1520] See above pp. 303-305.
[1521] See above Chapter 5 pp. 105-108; M. Damaska, *The Faces of Justice and State Authority*, (1986).

CHAPTER 10

CONCLUSION

Only rarely, under English criminal law, does the non-reporter of a crime commit an offence.[1522] French criminal law is less sympathetic towards the non-reporter. The non-reporter of a serious offence[1523] and the non-reporter of a violent offence against a vulnerable individual[1524] may both be punished. In this thesis I have used the literature on reporting[1525] and interviews that I conducted with French criminal justice professionals[1526] to examine how justified and effective were these duties to report. In this chapter I will analyse whether either a duty to report serious offences or a duty to report child abuse[1527] should be introduced into English criminal law. This chapter will also consider whether the different approaches to mandatory reporting in both jurisdictions are significant of wider differences in criminal justice culture.[1528]

Should a Duty to Report Serious Offences be Introduced into English Criminal Law?

Extending mandatory reporting to include minor offences would not be justifiable. The example of misprision of felony[1529] suggests that requiring people to report minor offences would force individuals to involve the criminal justice authorities when lesser measures would have been more appropriate and that a duty to report, which applied to minor as well as serious offences, would be unworkable and unpopular.[1530] Requiring an individual to report an offence to the police limits his autonomy.[1531] Whilst it is arguable that this restriction is justified if measured against the benefit to the community of

---

[1522] See above Chapter 6.
[1523] CP Article 434-1; see above Chapter 7 pp. 174-186.
[1524] CP Article 434-3; see above Chapter 7 pp. 194-197.
[1525] See above Chapter 7.
[1526] See above Chapter 8.
[1527] The duty to report violent offences against vulnerable individual has most often been interpreted and used as a duty to report child abuse – see above Chapter 7 pp. and Chapter 8 pp.
[1528] See below pp. 366-9.
[1529] Although the duty to report in misprision of felony theoretically was limited to serious offences, in practice it also covered minor offences.
[1530] *Wilde* [1960] Crim. L. R. 116 at p. 117; see above Chapter 6 pp. 124-127.
[1531] See above Chapter 2 pp. 22-24.

preventing a serious offence or detaining a dangerous offender, this is not the case in relation to minor offences.

The Scope of a Duty to Report Serious Offences

One problem for English criminal law with linking a duty to report to serious offences is deciding which offences would be included. Unlike French criminal law,[1532] offences in England are no longer divided into categories of serious and minor offences.[1533] One suggestion might be that the duty to report should be limited to those offences that a reasonable person would consider to be serious enough to warrant a duty to report. There is some support for this approach in the leading misprision of felony case, *Sykes v D. P. P.*[1534] In his judgment, Lord Denning stated that mandatory reporting should be limited to offences that the public consider to be serious.[1535] The main problem with this approach is that it might not be easy to determine which offences would be considered by the public to be serious. It seems from the questionnaire that there was some disagreement amongst the English respondents about whether certain offences were serious.[1536]

Alternatively, several of the English and French respondents suggested that the gravity of an offence depended on it circumstances.[1537] One example of this was burglary. Although, some of the respondents did not generally classify a burglary as a serious offence, they thought that a burglary might be serious depending on the value of the property stolen or whether the burglar vandalized the place that he broke into. On the other hand, even if it is reasonable that these factors increase the seriousness of an offence and the blameworthiness of an offender, it may be difficult to apply them to a duty to report. A potential reporter of a burglary might not know how much was stolen or how significant the loss was to the victim. Another possibility is that a violent or sexual offence is especially serious if the attacker is in a position of trust in relation to the victim.[1538] Again though, a stranger might not know about this

[1532] See above Chapter 5 pp. 93-94; CP Article 111-1.
[1533] Criminal Law Act 1967.
[1534] [1961] 3 W. L. R. 371.
[1535] See above Chapter 6 p. 125.
[1536] See above Chapter 9 pp. 288-292.
[1537] See above Chapter 9 p. 290.
[1538] This is in fact the position in the French Penal Code where this factor would aggravate the seriousness of a violent or sexual offence – J. Pradel & M. Danti-Juan, *Droit Pénal Special*, (1995), pp.

relationship of trust and therefore might not realize the gravity of the offence and that it should be reported.

Furthermore, whether the public considers an offence to be serious may develop over time.[1539] It is arguable that child abuse is viewed as more serious now than it once was. In contrast, some offences may come to be viewed as less serious. Consequently, there is the danger that if a duty to report serious offences is based on a rigid class of offences it will eventually become out of date. Either it will be too harsh because it requires offences that in reality are minor to be reported,[1540] or it will be ineffective because the most dangerous types of offences are not included. On the other hand, if mandatory reporting is too flexible, an individual may not be sure what offences he has to report. Furthermore, it may not be appropriate for developments in the criminal law to be dependent on public opinion.

It is difficult to define the scope of a duty to report serious offences. The better approach would be to limit the duty to serious violent offences causing death or significant, permanent injury and serious sexual offences. These offences are overwhelmingly classified as serious, and it is likely therefore that there would be a consensus among potential reporters that these offences would be sufficiently serious to be included within a duty to report serious offences. The disadvantage of this is that some other serious offences are not included. On balance however it is preferable for any duty to report to be limited so as to insure that it is justified and not too onerous.[1541]

There are three arguments in favour of the mandatory reporting of serious offences. They are that it would benefit the community because it would help to prevent serious crime and identify those responsible, that it would benefit victims of crime[1542] and that failing to report a serious offence is wrong and should be punished.

466-475. More recently, the Sexual Offences (Amendment) Act 2000 s. 3 made it an offence to have a sexual relationship with a person, under the age of eighteen, in relation to whom the offender was in a position of trust.

[1539] See above Chapter 6 pp. 354-358.

[1540] An example of this is the old offence of misprision of felony; see Chapter 6 pp. 124-125.

[1541] A. Ashworth, *The Principles of Criminal Law,* 3rd Edition (1999), pp. 35-37.

[1542] See below pp.

The Benefit to the Community

The argument that a duty to report serious offence would benefit the community because it would prevent crime assumes that a duty to report serious offences would increase the reporting of serious offences, that this increase in reporting would be a benefit to the community and that if more offences were reported more of them would be prevented or the offenders arrested and punished. As the section will explain these assumptions are questionable.

Would a Duty to Report Increase Reporting?

Mandatory reporting based on the French model would only apply to witnesses, victims would be exempt.[1543] Research into how the police learn about offences has shown that victims of offences play the most significant role.[1544] In contrast reporting by witnesses is generally less important.[1545] Unlike the victim, the witness must first discover the offence,[1546] and he is unlikely to have the same motivation to report the offence or for the offender to be punished as the victim would have.[1547] The fact that reporting by witnesses is not the way that the police will usually learn about an offence might suggest that focusing on this might not be the most effective way of increasing reporting.

Furthermore, it seems from studies of voluntary reporting that victims and witnesses voluntarily report serious offences.[1548] Making this reporting obligatory is unlikely therefore to increase significantly reporting levels.[1549] One possibility is that the fact that an offence carries a duty to report will highlight the fact that it is considered to be a serious offence and this may indirectly encourage reporting. It is arguable that the duty to report child abuse in

[1543] See above Chapter 1 p. 1.
[1544] A. K. Bottomley & C. Coleman, *Understanding Crime Rates, Police and Public Roles in the Production of Official Statistics,* (1981), pp. 45-6; R. Mawby, *Policing the City*, (1979) pp. 98-100; D. Steer, *Uncovering Crime, the Police Role*, (1980), p. 67; see above Chapter 4 pp.
[1545] See above Chapter 4 pp. 77-78.
[1546] See above Chapter 4 pp. 67-68, 78.
[1547] See above Chapter 4 p. 78.
[1548] J. Van Kesteren, P. Mayhew & P. Nieuwbeerta, *Criminal Victimisation in Seventeen Industrialised Countries, Key Findings from the 2000 International Crime Victimisation Survey*, p. 67; N. Maung, P. Mayhew & C. Mirlees-Black, *The 1992 British Crime Survey*, (1993), p. 25; C. Mirlees-Black, P. Mayhew & a. Percy, *The 1996 British Crime Survey*, (1996), p. 23; J. Shapland, J. Willmore & P. Duff, *Victims in the Criminal Justice System*, (1988), p. 15; see above Chapter 4 pp. 82-84.
[1549] See above Chapter 4 pp. 90-91

France has had this effect and this issue will be examined in more depth when duties to report child abuse are considered.[1550] It seems however that this argument may be more applicable to specific duties to report than to a general duty to report serious offences.[1551]

Although serious offences are generally well reported,[1552] a witness may be reluctant to report if he is threatened with reprisals or if he knows the offender.[1553] Nevertheless, it is doubtful that any offence of failing to report serious crimes would increase reporting in these circumstances because it is unlikely that such non-reporters would be punishable under an offence of failing to report. If the witness were threatened with death or serious injury, the defence of duress would excuse his failure to report. Furthermore, given that reporting is a positive obligation, the law may be more lenient and limit reporting to those situations where there was no risk to the reporter. Moreover, it would be unreasonable for failing to report where an individual had faced reprisals to be an offence. Just as duties to rescue are limited to easy rescues,[1554] similarly any duty to report should certainly exclude those reports that are or seem to be dangerous.

Even if reporting a family member is not physically dangerous, it may still be difficult and costly. The reporter is forced to prioritise the wider community and a stranger victim over a loved relative. French criminal law recognizes these difficulties and generally the offender's family is exempt from the duties to report in the French Penal Code.[1555] Similarly, although existing English duties to report are less explicit, there does seem to be some reluctance to punish the offender's family for failing to report.[1556] On the other hand, excluding the offender's family from any duties to report may mean that these duties are less effective. The offender's family's close contact with him means that they will often be well placed to discover offences.[1557] Furthermore, it is possible that

---

[1550] See below pp. 363-365.
[1551] See above Chapter 7 pp. 192-193.
[1552] See above Chapter 4 pp. 82-84; Chapter 5 pp. 111-114.
[1553] C. Clarkson et al, "Assaults and the Relationship Between Seriousness, Criminalisation and Punishment" [1994] Crim. L. R. 4 at pp. 12-13; N. Maung, P. Mayhew & C. Mirlees-Black, op. cit., p. 26; J. Van Kesteren, P. Mayhew & P. Nieuwbeerta, op. cit., p. 65.
[1554] See above Chapter 2 pp. 19-21; see above Chapter 3 pp. 60-61.
[1555] P. Mousseron, "Les Immunités Familiales" [1998] Rev. Sci. Crim. 291; J-F. Gayraud, *La Dénonciation*, (1995), pp. 42-43.
[1556] See above Chapter 6 pp. 140-141.
[1557] See above Chapter 8 p. 248.

without a duty to report these are witnesses who would not report serious offences.[1558]

Comparing reporting levels and the reasons for reporting in England and France seems to confirm that the duties to report have had little impact on reporting. According to the 2000 International Victimisation Survey, English respondents were more likely than French respondents to report offences to the police.[1559] Furthermore, it seems that the same motivations for reporting or for failing to report apply in both England and France. In both jurisdictions, serious offences especially those against vulnerable victims were more likely to be reported.[1560] Furthermore, given that Article 434-1 is rarely prosecuted[1561] and does not seem to be well known,[1562] it is unlikely that reluctant reporters will be persuaded to report because they fear punishment.[1563]

Even if a witness knows about his obligation to report and is likely to be influenced by it, it may still be ineffective in increasing reporting because potential reporters may not be sure when the duty to report applies. In the interviews some French respondents claimed that Article 434-1 was unlikely to encourage reporting because many witnesses would be unsure of whether a particular assault would be classified as a *contravention*, a *délit* or a *crime* and therefore would be uncertain whether they had to report.[1564] Although their views are not conclusive, it is interesting that a specific duty to report child abuse was introduced because of the difficulties of using the general duty to report serious offences. Many cases of child abuse were not being reported because the witness did not know whether the abuse would be classified as a *crime* or as a *délit.*[1565] Given the various assault offences in English criminal, it is arguable that a duty to report limited to the most serious violent offences would face similar problems.

Related to this is the question of how certain an individual would have to be that an offence would be or had been committed before he had a duty to report.

[1558] See above p. 347.
[1559] J. Van Kesteren, P. Mayhew & P. Nieuwbeerta, op. cit, p. 63.
[1560] See above Chapter 4 pp. 82-84 and Chapter 5 pp. 111-114.
[1561] See above Chapter 8 pp. 239, 246-248 and below Appendix A.
[1562] See above Chapter 8 p. 237.
[1563] See above Chapter 2 p. 8.
[1564] See above Chapter 8 p. 242 and see above Chapter 7 pp. 179-180.
[1565] See above Chapter 7 p. 192

If a duty to report is interpreted extensively this may lead to unreliable or maybe even malicious reports.[1566] On the other hand if an individual has to be certain that an offence has been committed this may mean that he not only has to report but also has to investigate any suspicions that he has before deciding whether to report.[1567]

If the aim of mandatory reporting is to increase reporting, it may be that any duty to report should be focused on those types of individuals who are most likely to have reliable information and whose reports might be most useful. One aspect of this is whether the victim's family and certain professionals should have an increased duty to report child abuse because they are more likely to discover child abuse.[1568] This will be examined in the section on the mandatory reporting of child abuse.[1569] Alternatively, mandatory reporting in some American states has been restricted to first hand witnesses,[1570] this Chapter will now examine whether this is a useful approach to mandatory reporting.

Initially, it does seem that a first hand witness will be more reliable. A person, who is told about the offence by someone else, might be misled by a false or exaggerated account. Furthermore, the first hand witness may be less likely to have to investigate the offence or check the offender's identity before reporting. Nevertheless, the first hand witness is not always better able to realise that a crime has been committed than a distant reporter. Professional training, knowledge of the offender or the victim and experience might all make a distant third party more likely to know that an offence has been committed than the confused and unqualified bystander. Furthermore, the fact that a witness has seen the offence first hand does not guarantee that he will know that an offence has been committed. He may be confused; or the fact that other bystanders choose not to report may convince him that it is not really an offence.

[1566] See below pp. 352-353.
[1567] See above Chapter 6 pp. 129.
[1568] See above Chapter 9 pp. 329-330.
[1569] See below pp. 365-366.
[1570] J. Wenik, "Forcing the Bystander to Get Involved, A Case for a Statute Requiring a Witness to Report Crime" (1985) 94 Yale Law Journal 1787; General Laws of Massachusetts Chapter 268 Section 40; Revised Code of Washington 9.69.100.

A further problem with focusing mandatory reporting on first hand witnesses is that these might not be the most blameworthy non-reporters. Often, a witness will be present at an offence because of chance, rather than because he knew about the offence and chose to witness it. This is important because if liability is based on chance it may be difficult for an individual to avoid being liable.[1571] An alternative solution might be to limit duties to report to those non-reporters whose failure to report represented a wider support for the offence.

Moreover, rather than increasing reporting, it is arguable that duties to report will, in fact, decrease the levels of reporting. Given that the individual, who discovers a crime, will have a duty to report that offence, a potential reporter may decide to avoid discovering crime, in order that he will not have a duty to report. With less opportunity to discover crime, the individual will have less opportunity to report crime.[1572] This argument mirrors an argument against duties to rescue that they, in fact, prevent rescues because fear of liability for failing to rescue persuades individuals to avoid dangerous areas and situations.[1573]

It is unlikely that duties to report would discourage reporting. Given the many motivations why an individual might to decide to go or to stay away from a place, it is extremely doubtful that he would base his decision on the likelihood that he might discover an offence. Furthermore, were an individual to avoid an area that was notorious for its high level of crime, it is more likely that this would be because he feared being the victim of an offence than because he was afraid that he would have to report that offence. Even if an individual wanted, above all else, to avoid *discovering* crime, where would he be able to go to ensure that he would not discover any offences? It is doubtful that a potential reporter could manage to avoid discovering offences. None of the French respondents suggested that the duty to report in the French Penal Code discouraged reporting, nor did any of the English respondents consider that this was a problem with existing duties to report in English criminal law, or an argument against extending mandatory reporting. In any case, this

[1571] See above Chapter 2 pp. 22-24.
[1572] See above Chapter 4 pp. 67-68.
[1573] See above Chapter 2 pp. 36-37; S. Levmore, "Waiting for Rescue, An Essay on the Evolution and Incentive Structure of Affirmative Obligations" (1986) 72 Virginia Law Review 879.

argument is only relevant if any duty to report were limited to first hand witnesses.[1574]

It seems from this that a duty to report would have little impact on reporting levels, either to discourage reporting, or more significantly to encourage reporting. Rather than persuading individuals to report it might be that a duty to report instead provides a justification for reporting for willing reporters[1575] and it is probable that the most successful justification for duties to report are their symbolic value rather than any practical effect that they have.[1576]

Is Increased Reporting a Benefit?

Initially, it appears that if more offences were reported, this would be a benefit to the community. If reporting helps more offences to be investigated or prevented, this increases the welfare of the whole community.[1577] Moreover, reporting an offence may have a benefit for the actual or potential victim.[1578] On the other hand, increased security to the community and supporting the victim are benefits of the offence being prevented or successfully prosecuted rather than benefits of reporting per se.[1579] Furthermore, it is possible that rather than benefiting the community, increased reporting would disadvantage the criminal justice system and individuals.[1580]

Whether the criminal justice system, and in particular the police, would benefit from increased reporting depends on the types of offences that would be reported.[1581] The danger is that the investigation of those offences, which have been reported because of mandatory reporting, will mean that the police have less time and resources to investigate other offences.[1582] If the offences that carry a duty to report are serious, then prioritising them may well be justified. On the other hand, if more minor offences carry a duty to report, investigating them, at the expense of other, more serious offences, would be less justified and would be an inefficient use of resources. Limiting a duty to

[1574] See above p. 349.
[1575] See below pp. 356 – 357.
[1576] See below pp. 358-361.
[1577] See above Chapter 2 pp. 15-17.
[1578] See below pp. 354-358.
[1579] See below pp. 353-354.
[1580] See below pp. 351-353.
[1581] See above pp. 344-345.
[1582] N. Lacey, *State Punishment, Political Principals and Community Values*, (1988), p. 21.

report to the most serious offences would mean that this would be less of a problem.

Rather than increased reporting being a benefit, one danger is that mandatory reporting might encourage both unreliable and malicious reports. An individual may report with little evidence in order to avoid being liable himself for failing to report. In addition, if mandatory reporting makes reporting the norm, an individual may interpret this as justifying the reporting of gossip or malicious reports. Malicious and unreliable reports are both unjustified and inefficient. The falsely accused individual is harmed. The State wastes resources in investigating false reports.

It is clear from the wording of duties to report in both English and French criminal law that the duty does not include unreliable or malicious reports. In both jurisdictions, the duty to report is limited to those reporters, who *knew* that an offence had been committed or that the suspect was responsible.[1583] Clearly, knowledge is more than suspicion and such a duty to report would not require an individual to pass on gossip. Nevertheless, whilst gossip may be excluded as clearly unreliable, other forms of information may be more problematic. What about a report from the alleged victim, should this always be believed? What about a potential reporter, who does not witness a crime firsthand, should he have to investigate in order to confirm whether he needs to report?[1584]

The wording of any duty can also be significant in excluding malicious reports. One of the main differences between the French and the English duties to report is that French mandatory reporting is limited to reporting the offence. There is no duty to identify the offender.[1585] One explanation for this distinction is that the informant, who identified a suspect, was more likely to be malicious therefore limiting the duty to report to *dénonciation* was one way of avoiding malicious reporting. Despite this it is probable that it would be difficult to apply the distinction between reporting an offence and identifying an offender to any English duties to report. Existing duties to report in English criminal law do not

[1583] See above Chapter 6 pp. 144, 148; Chapter 7 pp. 179-181.
[1584] See above Chapter 6 pp. 129-132; P. R. Glazebrook, "How Long Then is the Arm of the Law to Be" (1961) 25 M. L. R. 301; J. Wenik, op. cit.
[1585] See above Chapter 7 pp. 176-179; J-F. Gayraud, op. cit., pp. 19-58.

include this distinction.[1586] Furthermore, there was little support for this distinction among the English respondents.[1587]

Both the empirical research and the literature suggested that malicious reporting is motivated by extra-legal factors, for example, a desire to scapegoat an individual or group[1588] or an attempt to gain a personal advantage, rather than by a legal duty to report.[1589] It is also interesting that the French duty, which seems to have lead to malicious reports, namely Article 40 of the Code of Criminal Procedure, does not carry a criminal sanction.[1590] Nevertheless even if duties to report do not specifically include malicious or unreliable reports and even if they do not encourage them, it is still possible that they might provide a justification for such reports.

Will Reporting an Offence Lead to the Offence Being Prevented or the Offender being Prosecuted?

Even if an offence is reported to the police, the police may decide not to investigate it.[1591] Even if the offence is investigated it is possible that the police will be unable to prevent it and they may not be able to identify or detain the offender.[1592] In short, there is no guarantee that reporting an offence will prevent it or ensure that the offender is punished.

Furthermore, it might even be possible that a duty to report by forcing a witness to report, will make it less likely that an offence will be prevented or successfully investigated. A witness's or a victim's involvement in a criminal case rarely stops with reporting. Often he will give a statement to the police and evidence in court. This additional help from the witness may be important in determining whether the investigation is successful.[1593] Although, currently, many reporters willingly help the police,[1594] it is possible that forcing people to

[1586] See above Chapter 6 pp. 143, 145.
[1587] See above Chapter 9 pp. 303.
[1588] S. Fontenelle, *La France des Moucards*, (1997), pp. 154-6.
[1589] H. Amouroux *La Grande Histoire des Francais Sous L' Occupation, Les Passions et les Haines*, (1981), pp. 265-9.
[1590] See above Chapter 7 pp. 204.
[1591] See above Chapter 4 p. 69.
[1592] See above Chapter 4 pp. 69-73.
[1593] P. A. J. Waddington, *Liberty and Order, Public Order Policing in a Capital City*, (1994), pp. 58-64.
[1594] J. Shapland, J. Willmore and P. Duff, *Victims in the Criminal Justice System,* (1988).

report will discourage them from helping the police in other ways. Neither the French literature on duties to report nor the qualitative interviews suggested that the duties to report in the French Penal Code had discouraged individuals from helping the police. Nevertheless, it was difficult to assess whether mandatory reporting might discourage voluntary assistance of the police. Until recently, the reporter of an offence in France could be detained until he had given the police a statement,[1595] and he can still be forced to attend an interview with the *juge d' instruction.*[1596] Consequently, although the duties to report may not have decreased other public assistance of the police, it was difficult to determine whether this assistance was genuinely voluntary.[1597]

The more information that a reporter provides, the greater the assistance to the police. This would suggest that mandatory reporting should include the identification and details about the offender, as well as the offence. The new duty to report the financial assistance of terrorism in section 19 of the Terrorism Act 2000, for example, requires that the reporter identify the offence, the offender and the information that he is relying on.[1598] The problem with this is that the greater the duty to provide information imposed on the reporter, the more his autonomy is limited and the more onerous the duty to report is.

The Benefit to the Victim

An important justification for mandatory reporting is that reporting an offence helps victims of crime. If an offence, which has already been committed, is reported, this may help the victim recover damages for any harm that he has suffered.[1599] The duty to report road traffic accidents under section 170 of the Road Traffic Act 1988 was primarily supported by the English respondents because it might help an injured victim bring a civil claim against the responsible driver.[1600] For many offences the victim is unlikely to receive financial compensation, nevertheless, even if the victim does not receive a financial benefit from the report, he may still gain psychologically. Whereas a

---

[1595] CPP Articles 61-62;
[1596] CPP Article 80-1; P. Chambon, *Le Juge d' Instruction, Théorie et Practique de la Procédure*, 4th Edition (1997) pp. 129-169; see above Chapter 5 p. 103.
[1597] See above Chapter 7 p. 179.
[1598] Terrorism Act 2000 s. 19; see above Chapter 6 pp. 143-144.
[1599] See above Chapter 6 p. 145.
[1600] D. W. Elliott & H. Street, *Road Accidents,* (1968), p. 147.

failure to report might be interpreted as favouring the offender and therefore as a rejection of the victim, reporting might be seen as support for the victim. In relation to future offences, if an offence is reported before it is completed this may prevent some individuals ever being the victim of an offence. Furthermore, if an offender is identified and detained, he will be prevented from committing offences and the potential victims of those crimes will be protected. In relation to the reporting of future offences, the benefit to potential victims is that the offence may be prevented and he will be spared the harm of the offence.

This rationale interprets mandatory reporting as being a type of duty to rescue. In support of it, it was interesting that the French respondents, in their interviews, stressed the similarities between the duties to rescue and the duties to report in the French Penal Code.[1601] It may be that this would be a more popular justification for any duties to report than any benefit to the community as a whole. It is arguable that it is easier to identify with harm to a particular victim than it is with harm to an organ of the State.[1602] Nevertheless, there are difficulties with using mandatory reporting as a type of duty to rescue, as will be explained duties to rescue may be both ineffective and counterproductive.

Forcing an individual to report requires that individual to help the victim in one particular way, by reporting to the police. This may be to the detriment of other, possibly more effective, ways of helping the police. This is illustrated if reporting by professionals and by the victim's family is considered. The victim's family may have compelling reasons for choosing not to report. Their main concern will be the well being of the harmed family member. If the victim can be helped as effectively without a criminal prosecution, and in particular if the victim himself does not want to report the offence, it would be reasonable for them to chose not to report. Whilst it may be appropriate to require an individual's family to rescue him and to care for him, it would not be appropriate to impose mandatory reporting upon the victim's family. This is because, unlike Good Samaritan duties to rescue, duties to report are not aimed exclusively at helping the victim of the offence. Mandatory reporting benefits the victim of the offence, but it also strengthens and supports the criminal

[1601] See above Chapter 8 pp. 246-247.
[1602] See above Chapter 5 pp. 114.

justice system.[1603] The victim's family may find it difficult to report when these two objectives conflict, when the victim is more likely to be helped if the offence is not reported. In these circumstances, the law should allow them to choose the interests of the victim over the interests of the State.

On the other hand, although the conscientious and supportive family may choose not to report because it prefers to assist the victim in other ways, there is also the danger that a neglectful and selfish family will decide not to report and not to help the victim in any way. If a duty to report excluded the victim's family, such non-reporters would avoid liability. Furthermore, it may be that, with the exception of the victim and the offender, these would be the only individuals to have discovered the offence, and therefore if they were to choose not to report, it would be unlikely that the offence would be reported. Moreover, whilst it may seem harsh to require the victim's family to report, English criminal law already imposes a duty to help a family member who is in need.[1604] As the case of *Stone and Dobinson* illustrates, this duty may be more time-consuming, onerous and expensive than a duty to report.

Despite this, it is suggested that, unlike duties to rescue, it is not appropriate to punish the victim's family for failing to report offences that he has been the victim of. Neither the literature nor the empirical research established that there was a significant problem with non-reporting by the victim's family. Moreover, it is unlikely that mandatory reporting would encourage reporting. The main reason, however, why a member of the victim's family should be excused for failing to report is that as has already been explained, a failure to report may not be blameworthy and may in fact have been motivated by a desire to help the victim. Furthermore, in relation to the selfish non-reporter, it is probable that his failure to report would be matched by a failure to help the victim in anyway and therefore he would be covered by existing positive criminal law liability.

[1603] See above Chapter 7 p. 184, Chapter 5 p. 102.

[1604] See above Chapter 2 pp. 39-42; *Stone and Dobinson* [1977] QB 354; A. Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 L. Q. R. 424-459, at pp. 440-443; R. E. Goodin, *Protecting the Vulnerable, A Reanalysis of our Social Responsibilities*, (1985), pp. 79-83; J. J. Thomson, "A Defence of Abortion" (1971) Philosophy and Public Affairs pp. 47-63, 63; M. Menlowe "The Philosophical foundations of a Duty to Rescue" in M. Menlowe & A. McCall Smith, (ed.), *The Duty to Rescue, The Jurisprudence of Aid*, (193) pp. 5-54, at pp. 30-36.

Another suggested use of mandatory reporting is that some professions, whose purpose is to help the victim recover from crime, should as part of their responsibility towards the victim, have a duty to report the offence. On the other hand, the fact that a professional is compelled to report, may in fact make him less able to help the victim. It may, for instance, deter the victim from seeking help.[1605] Alternatively, by focusing on reporting and the criminal justice system, the wider needs of the victim may be ignored.

Although professional duties of confidentiality suggest that professionals should not be forced to report, it might be argued instead that rather than hindering professionals, a duty to report will support them because it will give them the option of reporting. The fact that the professional is forced to report may mean that his decision to report is less likely to harm his relationship with his client or patient. Consequently, rather than detracting from these other ways of helping the victim, mandatory reporting may promote them. On the other hand, even if a patient, or client, does not blame the professional for the confidentiality being breached, he may still be discouraged from seeking help.

This raises the wider issue of whether reporting to the police should depend on the victim's approval. It is tempting to suggest that it should. The victim has suffered harm through the offence without having his autonomy further reduced by being forced to be involved in a criminal justice investigation. On the other hand, the victim's concerns and preferences are not the only relevant interest. Prosecuting the offender may be beneficial to the wider community as well as to other potential, individual victims. Furthermore, the victim may not wish to involve the criminal justice system so that he can take his own action against the offender. The offender, the criminal justice system and the community have an interest in preventing this vigilantism.[1606]

Earlier in this Chapter, I considered whether mandatory reporting would decrease reporting because it deterred individuals from discovering offences in case they were liable for failing to report.[1607] A related argument is that fear of liability may make an individual reluctant to help a person in need. Whilst, helping a person in need, the individual might learn that the victim's injuries are

[1605] See above Chapter 8 p. 258-259.
[1606] M. Wenik op. cit.
[1607] See above p. 350.

the result of a crime. The helper would then have to report the offence. Were he, for whatever reason, reluctant to report offences or to get involved with the criminal justice system, that individual might choose not to help a person in need so that he would not find out about the offence. It was difficult to determine whether duties to report would have this effect. Although neither the literature nor my interviews with French criminal justice professionals, suggested that the duties to report in the French Penal Code deterred individuals from helping victims, there is also a duty of easy rescue in France.[1608] It is possible, therefore, that in a country, such as England, which does not generally punish failures to rescue,[1609] mandatory reporting would be more likely to discourage rescues.

The Symbolic Value of Mandatory Reporting

Despite the lack of prosecutions for failing to report under Article 434-1 and its limited effect on reporting, the French respondents, whom I interviewed, supported it. Obviously, the number of respondents interviewed was very small and it might be that with a larger group there would have been a majority against mandatory reporting. It does seem however that support for Article 434-1 does not depend on whether it increases reporting, instead the main justification for Article 434-1 seems to be that it is a clear statement that the State disapproves of non-reporters and supports reporters.

The non-reporter seems to be blameworthy because faced with a serious offence and a victim in great need, he does nothing even though informing the police would be neither dangerous nor time consuming. On the other hand, this reasoning links the non-reporter to the harm suffered by the victim or to the offender's continuing delinquency, yet the offender as an omittor can not be responsible for these results. The active offender has chosen to commit crime, he is responsible for this as he is responsible for the harm to the victim which is the result of his offending. Furthermore, this justification also fails to take

[1608] See above Chapter 3 pp. 53-66; CP Article 223-6; J-L. Filette, "L' Obligation de Porter Secours à la Personne en Péril" 1995 JCP I 3863.
[1609] See above Chapter 2 pp. 19-35; A. Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 L. Q. R. 105 424; M. Menlowe, "The Philosophical Foundations of a Duty to Rescue" in M. Menlowe & A. McCall Smith (ed), *The Duty to Rescue, the Jurisprudence of Aid,* (1993), pp. 5-54.

account of situations where failing to report may not be blameworthy or where reporting will be dangerous or inconvenient.

One possibility is that the non-reporter is not directly responsible for the offence, but is liable as an accessory for supporting the principal offender by not reporting. Given however that a failure to report is an omission, it is probable that it could only be interpreted as aiding and abetting an offence if it was contrary to a specific duty to report or if it was especially unusual and therefore persuaded the principal offender to commit the offence.[1610] There are very few specific duties to report. It is unlikely therefore that a non-reporter could be liable as an accessory for breaching a specific duty to report.

The unusual failure to report raises other difficulties. First, how are unusual failures to report to be identified? The obvious solution seems to be to compare the failure to report with voluntary reporting, is the situation one where most individuals would report? This might not be conclusive, for example, what about the non-reporting neighbours in the Kitty Genovese case?[1611] Were their failures to report unusual? Although studies of voluntary reporting would suggest that serious violent offences, and in particular murders, are likely to be reported,[1612] a non-reporting neighbour might claim that his failure to report was not unusual given that it was mirrored by the failure to report by the other witnesses?

Moreover, even if a failure to report is unusual, it does not necessarily mean that the failure to report has persuaded or even encouraged the principal offender. Unlike the active accessory, the non-reporter has not made committing the crime easier. Instead, he has made an unpleasant consequence of offending, being caught and detained, less likely. If few offenders consider the possibility that they will punished for their crimes,[1613] it is unlikely that the risk that they will be punished will have much impact on their decision to commit an offence. Finally, if mandatory reporting is based on the

---

[1610] See above Chapter 6 pp. 156-157.

[1611] See above Chapter 1 p. 1; *Kitty Genovese – the queens story* at http://www.icf.de/asa/kitty_qstory.html; M. Davies, "How Much Punishment Does a Bad Samaritan Deserve" (1996) 15 Law and Philosophy p. 93-116 at p. 93.

[1612] See above Chapter 4 pp. 87-89.

[1613] A. Von Hirsch & A. Ashworth, (ed.), *Principled Sentencing, Readings on Theory and Policy,* 2nd Edition (1998), pp. 48-50; D. Beyleweld, "Deterrence Research and Deterrence Policies" in A. Von Hirsch & A. Ashworth, (ed.), op. cit. pp. 66-79.

effect of the failure to report on this active offender, it is likely that only the failure to report future offences will punishable.[1614]

A further possibility for limiting any duties to report is that non-reporting should be punished if it is one part of an individual's wider support for the non-reported offence and offender. This would mean, for example, that mandatory reporting would be used against members of criminal gangs, who did not report offences.

The literature on mandatory reporting suggested that this was a popular justification for and use of mandatory reporting. Section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989 was introduced because it might be used against individuals involved on the periphery of terrorist organisations. Furthermore, one of the arguments for misprision of felony was that it might be used to prosecute individuals, whose involvement, as accessories could not be proved.[1615]

As for the empirical research, whilst the French respondents agreed that the duties to report in the CP were used against gang members and that this was a reasonable and effective use of mandatory reporting,[1616] the responses to the English questionnaire were more varied. Although some of the police respondents favoured mandatory reporting being used against gang members, others argued that it would be ineffective.[1617] One explanation for this difference might be that a respondent, who considered the main justification for mandatory reporting to be that it was symbolic, might favour duties to report being used against gang members because they were especially blameworthy non-reporters. Rather than being neutral, they support the offender and want him to be successful. Furthermore, the fact that a gang member has failed to report may suggest that he was actively involved in that offence, or in others. In contrast, a respondent, who was more interested in what impact mandatory reporting would have on reporting levels, might reject this use of duties to report because they would be unlikely to encourage gang members to report. Furthermore, in addition to being ineffective, punishing non-reporting gang members might actually be counterproductive. It is possible that the threat of

[1614] See Chapter 8 pp. 240-241, 247-248.
[1615] See above Chapter 6 pp. 136-137, 141-142,
[1616] See above Chapter 8 pp. 242-244.
[1617] See above Chapter 9 pp. 312-313.

punishment for failing to report may make it more difficult for a gang member to withdraw from the gang.

If gang members are a clear illustration of blameworthy non-reporters, there are however also types of non-reporters whose failure to report is more excusable. As has already been explained the offender's family and professionals working with either the victim or the offender may have good reasons for being unwilling to report.[1618] If the justification for mandatory reporting is its symbolic value, it is likely that these types of non-reporters will be exempt or excused. If however the rationale behind duties to report is their effect on reporting levels and their benefit to the criminal justice system, these types of non-reporters would be included within a duty to report because of the usefulness of the information that they might provide.[1619]

Furthermore, for any type of reporter, reporting an offence may in practice turn out to be quite an onerous obligation. The reporter's involvement is unlikely to end with reporting the offence, he may have to be interviewed by the police, give a statement and testify in any trial. These obligations may be time consuming and significantly limit the reporter's liberty and it may be because of these, especially the fact that he may have to appear in court that may explain why an individual is reluctant to report.

The other aspect of this is that the duty to report is symbolic in that it supports reporters.[1620] This thesis has looked at the reluctance of some professionals to report.[1621] One reason for this reluctance is the harm reporting may cause the professional's relationship with his client or patient. It is arguable that the fact that a professional has a duty to report and therefore has no choice in reporting may mean that any reporting by the professional may not be as significant and may be less likely to harm his relationship with his client or patient.[1622]

[1618] See above pp. 355-356.
[1619] See above Chapter 8 p. 248.
[1620] See above p. 355
[1621] See above Chapter 6 p. 132-133p; Chapter 7 pp. 198-203; Chapter 8 pp. 253-257; Chapter 9 pp. 304-305.
[1622] See above p. 357.

Conclusion: Should a Duty to Report Serious Offences be Introduced into English Criminal Law?

The replacement of Prevention of Terrorism (Temporary Provisions) Act 1989 s. 18 with the Terrorism Act 2000 s. 19 suggests that the duties to report are becoming more specific.[1623] It is unlikely that a general duty to report serious offences would be introduced into English criminal law and having evaluated the potential justifications for a duty to report serious offences, it does not seem that such a duty would be justified.

The experience of the duties to report in the French Penal Code as well as the existing duties to report in English criminal law suggest that mandatory reporting would have little impact on reporting levels.[1624] Furthermore, if the State wants to encourage reporting there may be more effective ways of doing this. Increased support for victims and witnesses may encourage more individuals to report. Furthermore, it might be that focusing on duties to report will detract from other measures that might encourage individuals to voluntarily report.

The more convincing justification for a duty to report is its symbolic value as a statement that failing to report is wrong. Nevertheless, this is not sufficient to justify punishing someone for failing to report. The non-reporter is not directly responsible for the harm caused by the offence and forcing him to report that offence is restricting his autonomy by forcing him to take action in response to the offence and determining what form that action should take.[1625] In Chapter 2 objections to duties to rescue were evaluated.[1626] In addition, there are specific problems with an offence of failing to report. A non-rescuer is unlikely to have a good reason for failing to carry out an easy rescue and rescuing someone from danger will generally be praiseworthy, in contrast reporting an offence is more complicated.[1627] Although some non-reporters may want to help the offender or to see the victim harmed, there are other quite different,

[1623] See above Chapter 6 pp. 143-145.
[1624] See above Chapter 8 pp. 227-236.
[1625] See above Chapter 2 pp. 22-26.
[1626] See below Chapter 2 pp. 19-35.
[1627] See above Chapter 1 p. 1.

more excusable failures to report and therefore a generally applicable duty to report serious offences would not be justified.

On the other hand, it might be appropriate to punish failing to report on the part of gang members. This would have the advantage punishing the most blameworthy failures to report and therefore symbolically it might be especially effective. It is possible however that forcing a gang member to report might be an ineffective way of encouraging him to inform on his friends and his associates. Furthermore, the fact that a gang member on the edge of the gang is criminally liable if he fails to report might cement his membership in the gang.

Should a Duty to Report Child Abuse be Introduced into English Criminal Law?

Article 434-3, the duty to report violent offences against vulnerable individuals is the most used of the duties to report in the French Penal Code.[1628] It is usually used to punish failures to report child abuse.[1629] Furthermore, whilst they do not have general duties to report serious offences, the criminal law of both the United States[1630] and Australia[1631] have imposed duties to report child abuse on professionals. This chapter will therefore examine whether a duty to report child abuse should be introduced into English criminal law. Moreover, because the approach of the French Penal Code differs significantly from the American and Australian duties to report in its attitude towards non-reporting professionals, this section will consider whether the law should exempt professionals from a duty to report as in France, or impose on them an increased duty to report as in Australia and America.[1632]

[1628] See below Appendix A; see above Chapter 8 pp. 251-252.

[1629] See above Chapter 7 pp. 192-197.

[1630] United States Code Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 110, Sexual Exploitation and Other Abuse of Children, section 2258, Failure to Report Child Abuse; see above Chapter 6 pp. 158-160.

[1631] Australian Capital Territory – Children's Services Act; New South Wales – Children (Care and Protection) Act 1987 s. 22; Northern Territory – Community Welfare Act 1983 s. 14; Queensland – Health Act 1937 s. 76K; South Australia – Children's Protection Act 1993 s. 11; Tasmania – Child Protection Act 1974 s. 8; Victoria - Children and Young Persons Act 1989 s. 64; see above Chapter 6 pp.

[1632] See below p. 370.

The Benefit to the Community

Generally mandatory reporting will have little effect on reporting levels.[1633] It is possible however that a specific duty to report child abuse will highlight the need to report child abuse and the seriousness of this offence. There is some suggestion that Article 62 of the ACP and Article 434-1 of the CP have had this effect in France. Since the 1970s the duty to report child abuse has been extended and increasingly failures to report abuse have been punished.[1634] During this period, there has also been greater public awareness of the extent and nature of child abuse[1635] and a greater willingness to report child abuse.[1636] It might be that public recognition of the seriousness of child abuse and neglect is partly due to the use of Article 434-3 and Article 62. The fact that these offences carry a duty to report might highlight their seriousness and therefore increase reporting.[1637] Moreover, it is possible that the duty to report child abuse publicises child abuse and makes individuals more aware of its dangers. More aware of the dangers and indicators of child abuse, an individual would be more likely to suspect or recognise that a child is being abused and therefore more likely to report.

In the qualitative interviews, the respondents discussed the duty to report child abuse. In their experience, it was the most frequently prosecuted form of mandatory reporting, and that there was greater public awareness of this duty than the more general duty to report serious offences. Furthermore, according to some of the respondents, the duty to report child abuse had increased awareness of the nature and extent of child abuse and neglect.[1638]

On the other hand, public concern about child abuse does not depend on there being a duty to report child abuse. Duties to report child abuse in the United States and in Australia were the result rather than the cause of awareness of abuse.[1639] The relationship between the French duty to report child abuse and

[1633] See above pp. 346-351.
[1634] See above Chapter 7 pp. 192-196; Chapter 8 p. 250.
[1635] See above Chapter 7 pp. 192-193; R. Nérac-Croisier, *Le Mineur et le Droit Pénal,* (1997), pp. 50-56.
[1636] See above Chapter 8 p. 249.
[1637] See above pp. 346-347.
[1638] See above Chapter 8 pp. 249-250.
[1639] See above Chapter 6 pp. 158-160; Section 2258 United States Code Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 110, Sexual Exploitation and Other Abuse of Children, Failure to Report Child Abuse; Australian Capital Territory – Children's Services Act, New South Wales –

awareness of abuse is more complicated. Although, the specific duty to report child abuse was introduced before there was much awareness of the significance of child abuse, it is likely that changes to court and investigative procedures in relation to child abuse[1640] and research into the nature and extent of child abuse have had a greater impact on awareness and on reporting levels than mandatory reporting has done.

If a duty to report child abuse were introduced in English criminal law the situation would be closer to that in America and Australia than that in France. Concern about child abuse already seems to be widespread and it is probable that a duty to report would be a reaction to this rather than a way of increasing awareness of abuse.

The people who are most likely to discover the abuse are the child's family and professionals who work with the child.[1641] In contrast, given that the abuse will often occur in the family home, an ordinary member of the public is unlikely to discover the abuse.[1642] Consequently, a duty to report child abuse that excludes the child's family or professionals is unlikely to have much impact on reporting levels. This might be why in the French Penal Code, professionals and the offender's family are not exempt from the duty to report under Article 434-3 whilst they are exempt from the other duties to report.

Benefit to the Victim

If reporting prevents the abuse of a child, this is a benefit to that victim. The difficulty with this is establishing that mandatory reporting would increase reporting[1643] and that any increase would lead to more offenders being prosecuted and to abuse being prevented. The difficulties of establishing a link between mandatory reporting and increase reporting and prevention have already been examined in relation to a general duty to report,[1644] this Chapter

---

Children (Care and Protection) Act 1987 s. 22; Northern Territory – Community Welfare Act 1983 s. 14; Queensland – Health Act 1937 s. 76K; South Australia – Children's Protection Act 1993 s. 11; Tasmania – Child Protection Act 1974 s. 8, Victoria - Children and Young Persons Act 1989 s. 64.

[1640] See above Chapter 7 pp. 191-193; Chapter 8 pp. 230-231.

[1641] Department of Health, Home Office, Department of Education and Employment, *Working Together to Safeguard and Promote Children, an Guide to Interagency Working to Safeguard and Promote the Welfare of Children*, (199), pp. 13-31.

[1642] See Chapter 9 p. 329.

[1643] See above pp. 346-351.

[1644] See above pp. 353-354.

will examine the potential conflict between duties to report and other ways of helping victims of abuse.

This conflict is highlighted if reporting by professionals is considered. One of the arguments against imposing duties to report on professionals is that it may prevent them helping the child in other ways. One of the French respondents interviewed as part of this thesis worked for the child protection agency in Paris. During his work with child abuse victims, his opinion on whether doctors should report had changed. Initially, motivated by concern for the victims and the harm that they suffered he had thought that doctors should have a duty to report child abuse and those who did not should be punished. When I interviewed him however his view was quite different. He thought that doctors should not have a duty to report because it would deter victims from going to see that doctor and would therefore make it more difficult for the doctor to help the victim.[1645] It should be noted however that this respondent was in favour of the duty to report child abuse, his only concern was its use against certain professionals.

Similarly, one of the main concerns that the Australian Law Commission had about the mandatory reporting of child abuse was that resources used to implement and enforce a duty to report would not be available for other child protection measures[1646] and that consequently, the duty to report child abuse might prove counterproductive.

Conversely, the French respondents were in favour of the duty to report Article 434-3. Rather than viewing mandatory reporting as detracting from child protection measures, they viewed it as complimenting these measures. Literature on the duty to report child abuse also suggests that it is well supported.[1647] One reason for this might be the fact that a duty to report child abuse was introduced early into French criminal law, it might be that greater awareness and other child protection measures are viewed as being linked to mandatory reporting.

[1645] See above Chapter 8 p. 258-259.

[1646] Australian Law Report Commission *Speaking for Ourselves, Children and the Legal Process*, (1996), Chapter 7 paragraph 17, See above Chapter 6 pp. 158-160.

[1647] R. Nérac-Croisier, "L' Efficacité de la Protection Pénale du mineur Victime D' Abus Sexuel" in R. Nérac-Croisier (Ed.) Le Mineur et le Droit Pénal (1997), pp. 13-48.

Moreover, currently professionals working in child protection are encouraged and advised to exchange information without there being a legal duty to report or an offence of failing to report.[1648] It is possible that for a professional to report in these circumstances may be more harmful on his relationship with the victim that it would be if he were to report because of a duty to report.

Should There be a Criminal Offence of Failing to Report Child Abuse?

There is a stronger case for a duty to report child abuse than there is for a general duty to report serious offences. The problem of what offences would be included is not as significant.[1649] It is possible that as a specific duty to report, a duty to report child abuse might be more likely to encourage reporting.[1650] Furthermore, this duty seems to be more acceptable, those English and French respondents, who did not support the general duty to report serious offences, were more likely to support this duty to report[1651] and both the United States and Australia, whilst rejecting general duties to report, have introduced laws requiring professionals to report abuse.[1652]

Nevertheless, the case for introducing such duties to report is far from overwhelming. In order to be effective it seems that both professionals and perhaps the victim's family would have to be bound by the duty to report, yet as already discussed there may be good reasons why these individuals may be reluctant to report.[1653] Although reporting child abuse to the police often will be the right action to take, an offence of reporting child abuse may not be the most effective or the most appropriate way to encourage this.

[1648] DOH, HO, DEE, "*Working Together to Safeguard Children, A Guide to Inter-Agency Working to Safeguard and Promote the Welfare of Children*", (1999).
[1649] See above pp. 344-345.
[1650] See above pp. 363-365.
[1651] See above Chapter 8 p. 262 and Chapter 9 pp. 336-339.
[1652] See above Chapter 6 pp. 158-160; Section 2258 United States Code Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 110, Sexual Exploitation and Other Abuse of Children, Failure to Report Child Abuse; Australian Capital Territory – Children's Services Act, New South Wales – Children (Care and Protection) Act 1987 s. 22; Northern Territory – Community Welfare Act 1983 s. 14; Queensland – Health Act 1937 s. 76K; South Australia – Children's Protection Act 1993 s. 11; Tasmania – Child Protection Act 1974 s. 8, Victoria - Children and Young Persons Act 1989 s. 64.
[1653] See above Chapter 7 pp. 183-185, Chapter 9 pp. 333-335.

English Criminal Law and French Criminal Law

Aside from the specific question of mandatory reporting, my research into duties to report in English and French criminal law also illustrates more general distinctions between English and French criminal legal culture.

Research into French criminal law suggests that there is a greater willingness to use the criminal law in France than there is in England.[1654] In relation to this thesis this difference was illustrated by the French criminalisation of failing to rescue,[1655] breach of a professional duty of confidentiality[1656] and the more extensive mandatory reporting in the French Penal Code.[1657] This focus on the criminal law was highlighted in the interviews with French criminal justice professionals. One of the interviewees suggested that increased publicity would increase reporting. It was interesting that that this publicity would concentrate on the existence and the effect of the offence of failing to report rather than any other reasons for reporting.[1658]

The research also suggested that using a criminal sanction may be not always be effective in deterring or encouraging behaviour. In relation to reporting itself, the existence of a more extensive duty to report in France did not produce greater reporting,[1659] similarly, although professional confidentiality was supported by a criminal sanction in France, my interviews with French professionals suggested that the respondents' commitment to professional confidentiality was limited.[1660] Instead, it seems that English lawyers have a greater commitment to confidentiality arguably because of the culture and ideology of the mainly adversarial criminal justice system in England.[1661]

[1654] A. Crawford, "Justice de Proximité – the Growth of "Houses of Justice" and Victim/ Offender Mediation in France: A Very UnFrench Legal Response [2000] Social and Legal Studies 29; J. Bell, "English Law and French Law – Not so different" [1995] C. L. P. 63-101 at pp. 90-95, A. Wallace, "European Integration and Legal Culture: Indirect Sex Discrimination in the French Legal System" [1999] Legal Studies 397.

[1655] CP Article 223-6; see above Chapter 3 pp. 53-66, Chapter 7 pp. 197-198

[1656] CP Article 226-13, 226-14; see above Chapter 7 pp. 198-203.

[1657] CP Articles 434-1, 434-2 and 434-3; see above Chapter 7 pp. 174-196.

[1658] See above Chapter 8 p. 237.

[1659] J. Van Kesteren, P. Mayhew & P. Nieuwbeerta, op. cit. p. 63.

[1660] See above Chapter 8 pp. 255-259.

[1661] Chapter 9 pp. 304-305; M. Damaska *The Faces of Justice and State Authority*, (1986), pp. 119-126.

The research illustrates the importance of the symbolic function of the criminal law, especially in relation to the French Penal Code. The duties to report in the French Penal Code were well supported despite their limited impact on reporting and the low level of prosecutions.[1662] Furthermore, beyond the duties to report, many offences in the French Penal Code seem to be entirely symbolic. Although the Penal Code contains over 10000 offences, the vast majority of prosecutions concern only 500 offences.[1663]

The fact that the duties to report are largely symbolic is also supported by their wording and extent. Given that Article 434-1 is the duty to report *crimes*, it is difficult to determine what purpose, other than symbolic, the specific duty to report terrorist *crimes* and *crimes* against the State in Article 434-2 serves. The idea that this offence is symbolic is further supported by the inclusion of terrorist *crimes*. This duty was added at a time of increasing concern about terrorism and when police investigative powers against terrorist suspects were being increased, as were the penalties for the terrorist offender.[1664] It might have been that a specific duty to report terrorist offences was part of a political signal against terrorist offences. Furthermore, even the general duty to report in Article 434-1 may be primarily symbolic. According to the respondents, whom I interviewed, failures to report are nearly always prosecuted under Article 223-6 as failures to help prevent offences.[1665] Consequently, the purpose of a specific non-reporting offence is to highlight the need to report.

One of the main distinctions between duties to report in French criminal law and those in English criminal law is the distinction between *dénonciation* and *délation* in French criminal law and the fact that duties to report are limited to the former.[1666] In reality, however, whether reporting can be limited to the offence is questionable. It seems that the identification of offenders is beyond the scope of French duties to report for symbolic reasons rather than because it would actually curtail the individual's obligation to reporting. Limiting reporting to *dénonciation* highlights the distinction between these duties to

---

[1662] See above Chapter 8 pp. 260-263.
[1663] *Massot Rapport* (2000) Chapter 3.
[1664] See above Chapter 7 p. 187; Y. Mayaud, *Le Terrorisme,* (1997) pp. 67-120; F. Colcombet, "Le Crime Organisé" and J-L. Brugière, "Le Crime Organisé" both in P. Méhaignerie, (ed), *Le Nouveau Code Pénal, Enjeux et Perspectives*, (194), at pp. 69-71, pp. 72-74.
[1665] See above Chapter 8 pp. 246-247.
[1666] See above Chapter 7 pp. 176-179.

report and the duties to report during the Occupation.[1667] In addition it demonstrates the State's disapproval of malicious reporting.[1668]

Whilst the symbolic function of the criminal law is arguably more apparent and important in the French Penal Code, it is still relevant in English criminal law.[1669] For example, in the questionnaires I examined the respondents' experience and opinions of the existing duties to report in English criminal law.[1670] One of the duties discussed was the offence of failing to report for consideration received under the Criminal Law Act 1967 s. 5. It was interesting that although this offence was rarely prosecuted and the respondents recognised that it would be a difficult offence to prosecute,[1671] they were nonetheless strongly in favour of this offence.[1672] This was because of failing to report because of consideration received was an especially blameworthy type of failing to report and it was therefore appropriate for the criminal law to highlight this by making it an offence.[1673] The symbolic function of the criminal law was also recognised during the recent reforms of the anti-terrorist legislation. One of the reasons for the inclusion of a duty to report in the Terrorism Act 2000 was the symbolic, declaratory function of such offences.

One of the main differences between the English and French approaches to mandatory reporting is their attitude towards reporting and professionals.[1674] Rather than being applicable to the general public as a whole, duties to report in English criminal law have tended to be limited to individuals with a special reason or responsibility for reporting.[1675] This has included a greater duty to report for the professional, justified because of his experience, training and knowledge. One example of this is the reform to the duty to report terrorism in the Terrorism Act 2000.[1676] Whereas the previous duty to report in section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989 s. 18 was generally applicable and might even have excused a professional who decided

[1667] Law 25th October 1941; see above Chapter 7 pp. 163-171.
[1668] See above pp. 350-351.
[1669] P. S. Atiyah, *Pragmatism and Theory in English Law*, (1987).
[1670] See above Chapter 9 pp. 271-286.
[1671] See above Chapter 9 pp. 279.
[1672] See above Chapter 9 pp. 285-286.
[1673] See above Chapter 9 p. 310.
[1674] See above pp. 356-357.
[1675] See above Chapter 2 pp. 36-42.
[1676] Terrorism Act 2000 s. 19; see above Chapter 6 pp. 143-145.

not to report,[1677] the duty to report in section 19 of the Terrorism Act 2000 is limited to information discovered during the exercise of a profession.[1678] In contrast, although there are duties to report in France specifically aimed at professionals,[1679] the more general attitude has been to excuse the professional because of his duty of confidentiality.[1680]

In this Chapter I have discussed how the decision whether or how much to include professional within mandatory reporting is complicated.[1681] On the one hand, a duty to report may be more effective in terms of uncovering reliable information if professionals are included or if a duty to report focuses on them. On the other hand, professionals may have good reasons for not reporting and forcing them to report may not be concentrating on the most blameworthy failures to report. It is suggested that the approach taken is indicative of the purpose of mandatory reporting. Concentrating on reporting by professionals suggests that the duty to report is intended to increase reporting and cooperation between the police and other professionals. Conversely, excluding the professional suggests that the duty to report is largely symbolic. Moreover, this difference in approach towards mandatory reporting might be evidence of a distinction between a pragmatic approach towards the law in England in contrast to a principled approach in France.

Further Research

By investigating the duties to report in the French Penal Code[1682] and mandatory reporting in English criminal law,[1683] this research has analysed and described the objectives of duties to report and their impact. Based on this research, I have concluded that it would not be appropriate to reintroduce a duty to report serious offences into English criminal law.[1684] Similarly, I am concerned about the conflict between any duty to report child abuse and professional duties of confidentiality.[1685] In addition it is arguable that a duty to

[1677] See above Chapter 6 pp.140-141.
[1678] See above Chapter 6 pp. 143-145.
[1679] See above Chapter 7 pp. 203-210; CPP Article 40, Business Code Article 457.
[1680] CP Article 226-13; see above Chapter 7 pp. 198-203.
[1681] See above pp. 356-358.
[1682] CP Articles 434-1, 434-2 & 434-3.
[1683] Prevention of Terrorism (Temporary Provisions) Act 1989 ss. 18, 18A; Terrorism Act 2000 s. 19; Road Traffic Act 1970 ss. 170, 172; Criminal Law Act 1967 s. 5.
[1684] See above pp. 361-363.
[1685] See above pp. 365-366.

report child abuse that applied to the victim's family would conflict with the principle of partnership in the Children Act 1989.[1686]

As well as its contribution to the understanding of criminal offences of failing to report, the research also suggests wider conclusions about the purpose of the criminal law and distinctions between the criminal law culture in England and in France.[1687] Finally, having completed this thesis I would argue that some of the issues raised in this research could usefully be explored in greater depth in further research.

The examination of duties to report has suggested that there may be a tension between duties to report and other measures to encourage witness and victim participation. This was one of the reactions to Australian duties to report child abuse.[1688] It would be useful to examine how Article 434-3 coexists with other measures to support child abuse victims. In the interview with the representative from child support services in Paris, he claimed that professionals should not report offences if this meant breaking their confidentiality towards their patient or client.[1689] It would be interesting to investigate whether this means that in practice the criminal law duties to report occupy a symbolic role, while other more consensual measures are instrumental in encouraging reporting. Furthermore, given that the child protection scheme in Paris was a pilot for the rest of France,[1690] it would be important to compare the relationship between mandatory reporting and other measures in other areas of France.

This research and other examinations of French criminal law[1691] suggest that despite the large and increasing number of offences in the Penal Code, a small number of offences are actually used as charges.[1692] In the interviews it became clear that a non-reporter was more likely to be punished under the general offence of failing to rescue, rather than under an offence that

[1686] Department of Health, *The Challenge of Partnership in Child Protection: Practice Guide*, (1995); Department of Health, Home Office, Department of Education and Employment, *Working Together to Safeguard and Promote the Welfare of Children*, (1999).
[1687] See above pp. 367-371.
[1688] Australian Law Report Commission *Speaking for Ourselves, Children and the Legal Process*, (1996), Chapter 7 paragraph 17; see above p. 366.
[1689] See above Chapter 8 pp. 258-259.
[1690] See above Chapter 8 p. 217.
[1691] *Massot Rapport* (2000) Chapter 3.
[1692] See above pp. 368-369.

specifically criminalised failures to report.[1693] It would be useful to extend the research and focus on functionality rather than on specific offences. In this respect it would be interesting to examine the law's reaction towards individuals on the fringe of criminality. Are they punished as accessories, and if so how are the rules of accessorial liability interpreted? Are they punished under specific criminal offences as non-rescuers or non-reporters? Or is law and policy more lenient instead encouraging them to act against their associates through *repentis*[1694] or supergrass procedures?

[1693] See above Chapter 8 pp. 246-247.
[1694] These are individuals who are pardoned or receive a reduced sentence in return for information about their criminal associates – see above Chapter 5 p. 118.

BIBLIOGRAPHY

Adler, Z. "Picking Up the Pieces" [1991] Police Review 1114.

Agulthon, M. "La Conquete de la Liberté" in Pouvoirs No. 84 La Liberté (Paris, 1998)

Alexander, L. "Affirmative Duties and the Limits of Self-Sacrifice" (1996) 15 Law and Philosophy 65-74

Allen, G. "Misprision" (1961) 78 L. Q. R. 41

Alt Maes, F. "Un Exemple de Dépénalisation: La Liberté de Conscience Accordée aux Personnes Tenues au Secret Professionel" [1998] Rev. Sc. Crim. 301.

Amouroux, H. La Grande Histoire des Francais Sous L' Occupation – Les Passions et Les Haines (Paris, Robert Laffont, 1981)

Ardant, P. "Les Constitutions et les Libertés" in Pouvoirs No. 4 La Liberté (Paris, 1998)

Ashworth, A. Principles of Criminal Law 3rd Edition (Oxford, Clarendon, 1999)

Ashworth, A. The Criminal Process, An Evaluative Study 2nd Edition (Oxford, O. U. P., 1998)

Ashworth, A. The Criminal Process, An Evaluative Study 2nd Edition (Oxford, Clarendon, 1994)

Ashworth, A. "The Scope of Criminal Liability for Omissions" (1989) 105 L. Q. R. 424.

Ashworth, A. "The Public Interest Element in Prosecutions" [1987] Crim. L. R. 595

Ashworth, A. "The Elasticity of Mens Rea" in C. Tapper (ed.) Crime Proof and Punishment, Essays in Memory of Sir Rupert Cross (London, Butterworths, 1981).

Ashworth, A. "Excluding Evidence as Protecting rights" [1973] Crim. L. R. 690

Ashworth, A. & Steiner, E. "Criminal Liability for Omissions, The French Experience" (1990) 10 Legal Studies 153

Atiyah, P. S. Pragmatism and Theory in English Law (London, Stevens and Sons, 1987)

Australian Law Commission Report Speaking for Ourselves, Children and the Legal Process (Canberra, Australian Government Publishing Service, 1996)

Baldwin, R. "Regulation and Policing by the Code" in Weatheritt, M. (Ed.) Police Research. Some Future Prospects (Aldershot, Averbury, 1989)

Barbièri, J. F. "De Quelques Aspects du Secret Professionnel des Commissaires aux Comptes" (1997) Bulletin Joly chr. 935

Bell, J. "English Law and French Law – Not so Different" [1995] C. L. P. 63-101

Bell, J. French Constitutional Law (Oxford, Clarendon, 1992)

Bell, J. "Religious Observance in Secular Schools: A French Solution" [1990] Education and the Law 121.

Bell, J., Boyron, S. Whittaker, S. Principles of French Law (Oxford, O. U. P., 1998)

Bennett, J. The Act Itself (Oxford, Clarendon, 1995)

Bennett, T. "Factors Related to Participation in Neighbourhood Watch Schemes" (1989) 29 British Journal of Criminology 207.

Benyon, H. "Doctors as Murderers" [1982] Crim. L. R. 17

Benyon, H. "Causation, Omissions and Complicity" [1987] Crim. L. R. 539

D. Beyleweld, "Deterrence Research and Deterrence Policies in A. Von Hirsch & a. Ashowrth, (Ed.) Principled Sentencing. Readings on Theory and Policy (Oxford, Hart 1998).

Bowling, B. "Racial Harassment and the Process of Victimisation" (1993) 33 British Journal of Criminology 231.

Brahy, S. "Dénonciation Officielle et Dénonciation Civique" [1978] Revue Droit Pénal 947

Borkowski, A. Textbook on Roman Law (London, Blackstone Press, 2nd Edition 1997)

Bottomley, A. K. & Coleman, C. Understanding Crime Rates. Police and Public Roles in the Production of Official Statistics (Farnborough, Gower, 1981)

Bottomley, A. K. & Pease, K. Crime and Punishment. Interpreting the Data (Milton Keynes, Open University Press, 1986)

Boulay, J-C. "L' Obligation du commissaires Aux Comptes de Réveler les Faits Délicteux" Rev. Soc. 1993 850

Brahy, S. "Dénonciation Officielle et Dénonciation Civique" [1978] Rev. Droit Pénal 947.

Brennan, F. "Racially Motivated Crime: The Response of the Criminal Justice System" [1999] Crim. L. R. 17

Brugière, J-L. "Le Crime Organisé" in Méhaignerie, P. Le Nouveau Code Pénal Enjeux et Perspectives (Paris, Dalloz, 1994).

Buchanan, A. "Liberalism and Group Rights" in Buchanan, A. and Coleman, J. (Ed) In Harms Way. Essays in Honor of Joel Feinberg (Cambridge, Cambridge University Press, 1994) pp. 1-15.

Cadoppi, A. "Failure to Rescue and the Continental Criminal Law" in Menlowe, M. & McCall Smith, A. The Duty to Rescue. The Jurisprudence of Aid (Dartmouth, 1993) pp. 55-91

Carbonnier, J. "Morale et Droit" in Carbonnier, J. Flexible Droit – Pour une Sociologie du Droit Sans Rigeur (Paris, LGDJ 1998).

Carbonnier, J. "Vers le Degré zero du Droit de minimus" in Carbonnier, J. Flexible Droit – Pour une Sociologie du Droit Sans Rigeur (Paris, LGDJ 1998).

Carbonnier, J. "La Part du Droit dans L' Angoisse Contemporaine" in Carbonnier, J. Flexible Droit – Pour une Sociologie du Droit Sans Rigeur (Paris, LGDJ 1998).

Carr-Hill, R. A. & Stern, N. H. Crime, the Police and Statistics. An Analysis of Official Statistics for England and Wales Using Econometric Models (London, Academic Press, 1979)

Castaignède, J. "L' Effectivité de la Protection Pénale du Mineur Victime d' Abus Sexuels" in Nérac-Croisier, R. Le Mineur et Le Droit Pénal (Paris, L' Harmattan, 1997)

Chambon, P. Le Juge D' Instruction. Théorie et Pratique de la Procédure (Paris, Dalloz, 4th Edition, 1997)

Christian, L. Policing by Coercion (London, GLC Police Committee Research Unit, 1983)

Clarkson, C., Cretney, A., Davis, G. & Shepherd, J. "Assaults, the Relationship between Seriousness, Criminalization and Punishment" [1994] Crim. L. R. 4

Cobban, A. Rousseau and the Modern State (London, Allen and Unwin, 1964).

Cobley, C. Child Abuse and the Law (London, Cavendish, 1995)

Coleman, C. & Moynihan, J. Understanding Crime Data. Haunted by the Dark Figure (Buckingham, Open University Press, 1996)

Collins, P. "Children in the Crossfire" (1995) 25 Family Law 378.

Colcombet, F. "Le Crime Organisé" in Méhaignerie, P. Le Nouveau Code Pénal Enjeux et Perspectives (Paris, Dalloz, 1994).

Corbett, D. & Simon, F. "Police and Public Perceptions of the Seriousness of Traffic Offences" (1991) 31 Brit. J. Criminology 153-164

Cornu, G. Droit Civil, La Famille (Paris, Montchrestien, 3rd Edition 1993)

Costigan, R. "Journalistic Material in the UK Criminal Process" in Field, S. & Pelser, C. (ed) Invading the Private: State Accountability and New Investigative Measures in Europe (Aldershot, Ashgate, 1998).

Costigan, R. "Fleet Street Blues, Police Seizure of Journalist Material" [1996] Crim L. R. 231-239

Crawford, A. "Justice de Proximité – The Growth of "Houses of Justice" and Victim/ Offender Mediation in France: A Very UnFrench Legal Response?" [2000] Social and Legal Studies 29.

Criminal Law Revision Committee Seventh Report: Felonies and Misdemeanours (London, H. M. S. O., 1967)

Curtis, L. "Policing in the Street" in Benyon, J. And Bourn, C. (ed) The Police, Policies, Procedures and Proprieties (Oxford, Pergamon, 1986)

Dadomo, C. & Farran, S. The French Legal System (London, Sweet & Maxwell, 2nd Edition 1996)

Dadamo, C. & Farran, S. French Substantive Law, Key Elements (London, Sweet & Maxwell, 1996)

Daintith, T. "Disobeying a Policeman, A Fresh Look at *Duncan v Jones*" [1966] P. L. 248.

Damaska, M. The Faces of Justice and State Authority (New Haven, Yale University Press, 1986)

Damien, A. Le Secret Nécessaire (Paris, Desclée de Brouwer, 1989)

Dank, M. The French Against the French, Collaboration and Resistance (London, Cassell, 1978)

Darley, B. & Latane, J. M. The Unresponsive Bystander, Why Doesn't He Help (New York, Appleton-Century-Crofts, 1970).

Davis, M. "How Much Punishment Does A Bad Samaritan Deserve" (1996) 15 Law and Philosophy 93

De Béchillion, M. & Choulot, J-J. "L' Abus Sexual Commis sur des Mineurs et sa Preuve en Droit Pénal" in Nérac-Croisier, R. Le Mineur et le Droit Pénal (Paris, l' Harmattan, 1997)

Dechiex, P. "Un Droit de l' Homme mis à mal: le secret professionel" D. 1983 chr. 133.

De Groot, G. R. "Law, Legal Language and the Legal System: Reflections on the Problems of Translating Legal Texts" in Gessner, V., Hoeland, A. & Varga, C. European Legal Cultures (Aldershot, Dartmouth, 1996) pp. 155-160

Delmas-Marty, M. "The Juge d' Instruction, Do the English Really Need Him" in Markesinis, B. (ed) The Gradual Convergence, Foreign Influences, Foreign Ideas and English Law on the Eve of the 21st Century (Oxford, Clarendon, 1994)

Delmas-Marty, M. La Mise en Etat des Affaires Pénales (Paris, 1991)

Delmas-Marty, M. "Réformer, Anciens et Nouveaux Débats" in Droit pénal, Bilan Critique (Paris, P. U. F., 1990)

Delmas-Marty, M. Raisonner, La Raison d' Etat, Vers Un Europe des Droits de l' Homme (Paris, P. U. F. 1989)

Delmas-Marty, M. Modèles et Mouvements de Politique Criminelle (Paris, Economica, 1983)

Delmas-Marty, M. "A Propos du Secret Professionnel" D. 1982 chr. 267

De Marsac, S. T. "L' Extension de la Notion de Blanchiment de L' Argent: Est-Elle Une Limte à L' Optimisation Fiscale" (1998) Finance et Gestion No. 53

Dennis, I. H. "Intention and Complicity, A Reply" [1988] Crim. L. R. 649

Dennis, I. H. "Manslaughter by Omission" [1980] C. L. P. 255

Dennis, I. H. "The Rationale of Criminal Conspiracy" (1977) 93 L. Q. R. 39-64

Department of Health, The Challenge of Partnership in Child Protection: Practice Guide (London, H. M. S. O, 1995)

Department of Health, Home Office, Department of Education and Employment Working together to Safeguard Children, a Guide to Inter-Agency Working to Safeguard and Promote the Welfare of Children (London, The Stationery Office, 1999).

Deutscher, I. "Asking Questions Cross Culturally, Some Problems of Linguistic Compararability" in Warwick, D. & Asherson, S. Comparative Research Methodology (New Jersey, Prentice Hall, 1973)

Devlin, P. The Enforcement of Morals (London, Oxford University Press, 1965)

Donnedieu de Vabres, H. "Loi de 25 octobre 1941, commentaire" D. 1942 1 33

Droz B. & Lever, E. Histoire de la Guerre d' Algérie (Paris, Editions de Seuil, 1991)

Duff, P. "Can I help You? Accessorial Liability and the Intention to Assist" (1990) Legal Studies 165

Dworkin, R. Taking Rights Seriously (London, Duckworth, 1977)

Dyson, K. H. F. The State Tradition in Western Europe (Oxford, Martin Robertson, 1980)

Eekelaar, J. "Are Parents Morally Obliged to Care For Their Children?" (191) 11 O. J. L. S. 340

Eglin, M-C. "L' Encadrement Social" in Koehler, F. (Ed.) Violence et Secret. Soigner et Protéger ou Dénoncer et Punir (Paris, Selim Aslan, 1997)

Elliott, C. and Vernon, C. French Legal System (Harlow, Pearson Education Limited, 2000).

Elliott, D. W. & Street, H. Road Accidents (London, Penguin, 1988)

Etzioni, A. The New Golden Rule. Community and Morality in a Democratic Society (London, Profile, 1997)

Etzioni, A. The Spirit of the community. rights. Responsibilities and the Communitarian Agenda (New York, Crown, 1993)

Evans, R. & Wilkinson, C. "Variations in Police Cautioning Policy in England and Wales" (1990) 29 Howard J. Criminal Justice 155

Feinberg, J. The Moral Limits of the Criminal Law. Harm to Others (New York, Oxford University Press, 1984)

Feldbrugge, F. L. M. "Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions" (1966) 14 Am. J. Comp. Law 630

Feldman, D. The Law Relating to Entry, Search and Seizure (London, Butterworths, 1986).

Fennell, P. "The Appropriate Adult Scheme" Gazette 90/19 19-20

Field, S. "The Legal Framework of Covert and Proactive Policing in France" in Field, S. & Pelser, C. (ed) Invading the Private: State Accountability and New Investigative Measures in Europe (Aldershot, Ashgate, 1998).

Field, S. & West, A. "A Tale of Two Reforms: French Defense Rights and Police Powers in Transition" (1995) 6 Crim. Law Forum 473.

Fielding, N. "Being Used by the Police" (1987) 27 Brit. J. Criminology

Fillette, J-L. "L' Obligation de Porter Secours à la Personne en Péril" 1995 JCP I 3863

Fletcher, G. "Criminal Omissions Some Perspectives" (1976) 24 Am. J. Comp. Law 703.

Floriot, R. & Comboldieu, R. Le Secret Professionnel (Paris, Flammarion, 1973)

Fontenelle, S. La France des Mouchards – Enquete sur la Délation (Paris, Belfond, 1997)

Frazer, E. & Lacey, N. The Politics of the Community. A Feminist Critique of the Liberal – Communitarian Debate (London, Harvester Wheatsheaf, 1993)

Friedrich, A. J. "The Ideological and Philosophical Background" in B. Schwartz The Code Napoleon and the Common Law World (Greenwood, Westport, 1923)

Garapon, A. "French Legal Culture and the Shock of "Globilization"" [1995] Social and Legal Studies Vol. 4 pp. 493-506

Gayraud, J-F. La Dénonciation (Paris, P. U. F., 1995)

General Medical Council Duties of a Doctor (London, GMC, 1995)

Gewirth, A. "Individual rights and Political Military Obligation" in Gewirth, A. Human Rights: Essays on Justifications and Applications (Chicago, Chicago University Press, 1982)

Gibbons, T. "Obstructing a Constable – the Emergence of a New Duty to Co-operate with the Police" [1983] Crim. L. R. 21

Glazebrook, P. R. "How Long, Then, Is the Arm of the Law to Be?" (1962) 25 M. L. R. 301

Glazebrook, P. R. "Criminal Omissions: The Duty Requirement in Offences Against the Person" (1960) 76 L. Q. R. 386

Goodin, R. E. Protecting the Vulnerable (Chicago, University of Chicago Press, 1985)

Government Statistical Service Ethnicity and Victimisation: Findings from the 1996 British Crime Survey (London, Home Office, 1998)

Graham, C. & Walker, C. "The Continued Assault on the Vaults – Bank Accounts and Criminal Investigations" [1989] Crim. L. R. 185

Greer, S. "The Right to Silence: A Review of the Current Debate" [1990] 53 M. L. R.

Grosjean, B. "La France reconnait qu' elle a fait la "guerre" en Algérie" Libération 10/6/1999.

Grosswald Curran, V. "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives" (1998) 46 American Journal of Comparative Law 657

Guyamarch, A. "Adversary Politics and Law and Order in French Politics" in Hall, P., Hayward, J. & Machin, H. (ed) Developments in French Politics (London, Macmillan, 1990)

Halimi, A. La Délation Sous L' Occupation (Paris, A. Moreau, 1983)

Hallett, C. Interagency Coordination in Child Protection (London, H. M. S. O. 1995)

Hallett, C. & Birchall, E. Coordination of Child Protection. A Review of the Literature (Edinburgh, H. M. S. O., 1992)

Hart, H. L. A. Law, Liberty and Morality (Oxford, Oxford University Press, 1963)

Hart, H. L. A. "Rawls on Liberty and its Priority" in Daniels, N. (Ed.) Reading Rawls: Critical Studies of Rawls' Theory of Justice (Oxford, Blackwell, 1975).

Hart H. L. A. & Honoré, T. Causation in the Law (Oxford, Clarendon, 1985)

Hederman, C. & Moxon, D. Magistrates Court and Crown Court Mode of Trial Decisions and Sentences

Heyd, D. Supererogation. Its Status in Ethical Theory (Cambridge, Cambridge University Press, 1982)

Hiel, M. & Aldgate, J. Child Welfare Services Developments in Law, Policy, Practice and Research (London, Kingsley, 1996)

Hodgson, J. "The Police, The Prosecutor and The Juge d' Instruction" (2001) 41 British Journal of Criminology 342.

Hogan, B. "Omissions and the Duty Myth" in Smith, P. F. (Ed) Criminal Law: Essays in Honour of J. C. Smith (London, Butterworths, 1987)

Hogano, L. "Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses" [2000] Crim. L. R. 250.

Holstein, I & Gubrium, J. The Active Interview (Thousand Oaks, Sage, 1995)

Homan, R. The Ethics of Social Research (London, Longman, 1991)

Home Office Legislation Against Terrorism (London, H. M. S. O., 1998)

Home Office, Department of Health, Department of Education and Science and Welsh Office Working Together Under the Children Act 1989 (London, H. M. S. O., 1991).

Home Office Statistical Service Statistics on the Operation of the Prevention of Terrorism Legislation in Great Britain in 1997 (London, H. M. S. O., 1998).

Honoré, T. "Are Omissions Less Culpable?" in Case & Stapelton (Ed.) Essays for Patrick Atiyah (Oxford, Clarendon, 1991)

Honoré, T. "Law Morals and Rescue" in Making Law Bind (Oxford, Clarendon, 1987)

Horton, C. Policing Policy in France (London, Policy Studies Institute, 1995)

Hough, N. "Thinking about Effectiveness" (1987) 27 Brit. J. Criminology 70

Jackson, M. W. "Above and Beyond the Call of Duty" in Jackson, M. W. Matters of Justice (London, Croom Helm, 1986)

Jellicoe, G Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 (London, H. M. S. O., 1983)

Jennings, A. Justice Under Fire. The Abuse of Civil Liberties in Northern Ireland (London, Pluto Press, 1988)

Johnson, C. "Trial by Dossier" (1992) 142 N. L. J. 249

Johnson, C. F. "Physicians and Medical Neglect: Variables that Affect Reporting" (1993) 17 Child Abuse and Neglect 605

Jones, T., Maclean, B. & Young, J. The Islington Crime Survey. Crime Victimization and Policing in Inner City London (Aldershot, Gower, 1986).

Journès, C. "Proactive Policing in France" in Field, S. & Pelser, C. (ed) Invading the Private: State Accountability and New Investigative Measures in Europe (Aldershot, Ashgate, 1998).

Kalichman, S. C., Craig, M. E., Follingstad, D. R. "Professionals Adherence to Mandatory Child Abuse Reporting Laws: Effects of Responsibility Attribution, Confidence Ratings and Situational Factors" (1990) 14 Child Abuse and Neglect 69

Kamm, M. "Rescue and Harm, Discussion of Peter Unger's Living High and Letting Die" (1999) 5 Legal Theory 1-44

Katz, L. Bad Acts and Guilty Minds (Chicago, University of Chicago Press, 1987)

Keane, A. The Modern Law of Evidence (London, Butterworths, 1994)

King, M. The Framework of Criminal Justice (London, Croom Helm, 1980)

King, M & Trowell, J. Children's Welfare and the Law, the Limits of Legal Intervention (London, Sage, 1992)

Kirk, J. & Millar, M. Reliability and Validity in Qualitative Research (Newbury Park, Sage, 1986)

Kleinig, J. "Failures to Act" (1986) 49 Law and Contemporary Problems 162

Kleinig, J. "Good Samaritanism" (1976) 5 Philosophy and Public Affairs 382-407

Koehler, F. (Ed.) Violence et Secret, Soigner et Protéger ou Dénoncer et Punir (Paris, Selim Aslan, 1997)

Kvale, S. Interviews. An Introduction to Qualitative Research Interviews (thousand Oaks, Sage, 1996)

Lacey, N. State Punishment, Political Principals and Community Values (London, Routledge, 1988)

Lamond, D. A. P. "The Impact of Mandatory Reporting Legislation on Reporting Behaviour" (1990) 14 Child Abuse and Neglect 471

Langui, A. I' Histoire du Droit Pénal

Lanham, D. "Drivers, Control and Accomplices" [1982] Crim. L. R. 419-428

Latane, B. & Darley, J. M. The Unresponsive Bystander (New York, Appleton-Century- Crofts, 1970)

Law Commission Consultation Paper No 141 Evidence in Criminal Proceedings Previous Misconduct of the Defendant (1996)

Leavens, A. "A Causation Approach to Omissions" (1988) 76 Cal. L. Review 542

Le Breton, G. Libertés Publiques et Droits de l' Homme (Paris, 1997)

Lee, R. "Disclosure of Medical Records, A Confidence Trick" in Clarke, L. Confidentiality and the Law (London, Lloyds of London, 1990)

Lefeuvre, E. "Intervention de la Police en France dans le Mileu Familial, En Cas de Mauvais Traitements à Enfants" (1982) 6 Child Abuse and Neglect 193

Le Gunehec "La Loi du 24 aout 1993, Un Rééquilibrage de la Procédure Pénale" 1994 JCP 3720.

Leigh, L. H. & Zedner, L. A Report on the Administration of Justice in the Pre-Trial Phase in France and Germany (London, H. M. S. O, 1992)

Leopold, P. "Obstructing the Police" [1982] Public Law 558

Levi, M. & Jones, S. "Public and Police Perceptions of Crime Seriousness in England and Wales" [1985] Brit. J. Criminology 234-250

Levmore, S. "Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations" (1986) 72 Virginia Law Review 879-937

Lidstone, K. W. "Obstructing Freedom" [1983] Crim. L. R. 29

Lidstone, K. W. "A Policeman's Duty not to Take Liberties" [1975] Crim. L. R. 617

Lidstone, K. W. & Palmer, C. The Investigation of Crime. A Guide to Police Powers (London, Butterworths, 1996)

Lloyd-Bostock, S. "The Effects on Juries of Hearing About the Defendant's Previous Criminal Record – A Simulation Study" [2000] Crim. L. R. 734.

Lochak, D. "Les Bornes de la Liberté" in Pouvoirs No. 84 La Liberté (1998).

Loveday, B. "Governance and Accountability of the Police" in Mawby, R. (ed) Policing Across the World. Issues for the 21st Century (London, UCL Press, 1999)

Luckock, B., Vogler, R. & Keating, H. "Child Protection in France and England – Authority, Legalism and Social Work Practice" (1996) 8 CFLQ 297.

Mack, E. "Bad Samaritanism and the Causation of Harm" (1984) 9 Philosophy and Public Affairs 230-259

Mackenzie, I., Morgan, R. and Reiner, R. "Helping the Police with their Inquiries – the Necessity Principle and Attendance at the Police Station" [1990] Crim. L. R. 22.

Macpherson, W. The Stephen Lawrence Enquiry Report (London, H. M. S. O., 1999)

Malm, H. "Liberalism, Bad Samaritan Laws and Legal Paternalism" (1995) 106 Ethics 4

Malik, M. ""Racist Crime": Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II" (1999) M. L. R. 62 409

Mansfield, M. Presumed Guilty (London, Mandarin, 1993)

Marrus, M. & Paxton, R. Vichy France and the Jews (1996)

Marshall, A. & Rossman, G. B. Designing Qualitative Research (Newbury Park, Sage, 1989)

Mason, J. Qualitative Researching (London, Sage, 1996)

Matsopoulou, H. Les Enquetes de Police (Paris, Librairie Générale de Jurisprudence, 1996)

Maung, N., Mayhew, P. & Mirlees-Black, C. The 1992 British Crime Survey (London, H. M. S. O., 1993).

Maung N. & Mirlees-Black, C. Racially Motivated Crime: A British Survey Analysis (London, Home Office, 1994)

Mawby, R. Policing the City (Farnborough, Saxon House, 1979)

Mawby, R. "Bystander Responses to the Victims of Crime, Is the Good Samaritan Alive and Well?" Victimology Vol. 10 pp. 461-475

Mayaud, Y. Le Terrorisme (Paris, Dalloz, 1997)

Mayaud, Y. "Le Crime Organisé" in Méhaignerie, P. Le Nouveau Code Pénal Enjeux et Perspectives (Paris, Dalloz, 1994).

Mayer, D. "La "Charité Mesurée" de l' Article 63 alinéa 2 du Code Pénal" 1977 JCP I 2851

McCabe, S. & Sutcliffe, F. Defining Crime (Oxford, Blackwell, 1978)

McCall Smith, A. "The Duty to Rescue and the Common Law" in Menlowe, M. & McCall Smith, A. The Duty to Rescue, The Jurisprudence of Aid (Dartmouth, 1993) pp. 55-91

McConville, M., Sanders, A. & Leng, R. The Case for the Prosecution (London, Routledge, 1988)

McConville, M. & Shepherd, D. Watching Police, Watching Communities (London, Routledge, 1992)

McDonald, J. Rousseau and the French Revolution (London, Athlone, 1965)

McEwan, J. Evidence and the Adversarial Process (Oxford, Hart, 1998)

McHale, J. Medical Confidentiality and Legal Privilege (London, Routledge, 1993)

McKenzie, I., Morgan, R. & Reiner, R. "Helping the Police With their Enquiries – The Necessity Principle and the Attendance at the Police Station" [1990] Crim. L. R. 22

McMahon, R. A Practical Approach to Road Traffic Law (Oxford, Blackstone, 1994)

Mead, G. "Contracting into Crime, A Theory of Criminal Omissions" (1991) 11 O. J. L. S. 147

Méhaignerie, P. (Ed.) Le Nouveau Code Pénal Enjeux et Perspectives (Paris, Dalloz, 1994).

Menlowe, M. "The Philosophical Foundations of a Duty to Rescue" in Menlowe, M. & McCall Smith, A. The Duty to Rescue, The Jurisprudence of Aid (Dartmouth, 1993) pp. 5-54.

Mill, J. S. On Liberty (G. Himmelfarb (ed), Harmondsworth, Penguin, 1974).

Ministère de la Justice Guide des Droits des Victimes (Paris, Gallimard, 1988)

Mirlees-Black, C., Mayhew, P. & Percy, A. The 1996 British Crime Survey (London, Home Office, 1996).

Mitchell, B. "Public Perceptions of Homicide and Criminal Justice" [1998] Brit. J. Criminology 453

Mojardet, D. Ce Que Fait la Police (Paris, Editions de la Découverte, 1996)

Monzein, P. "Réflexions sur le Secret Médical" D. 1984 chr. 9.

Morgan, J. B. The Police Function and the Investigation of Crime (Aldershot, Avebury, 1990).

Mousseron, P. "Les Immunités Familiales" [1998] Rev. Sc Crim 291.

Munday, R. "Inferences from Silence and European Human Rights Law" [1996] Crim. L. R. 370

Nemitz, T. and Bean, P. "The Use of the Appropriate Adult Scheme (A Preliminary Report)" (1994) 34 Med. Sci Law 161

Newbold, L. "The Crime Fraud Exception to Legal Professional Privilege" (1990) 53 M. L. R. 472

Nicolson, D. "The Citizen's Duty to Assist the Police" [1992] Crim L. R. 611

Norrie, A. Crime, Reason and History: A Critical Introduction to Criminal Law (London, Weidenfeld & Nicolson, 1993)

Nozick, R. Anarchy, State and Utopia (Oxford, Blackwell, 1975)

Nreum, I. V., Dal, F., Lampo, A. "Une Structure" in Koehler, F. (Ed.) Violence et Secret, Soigner et Protéger ou Dénoncer et Punir (Paris, Selim Aslan, 1997)

O' Connell, M. & Whelan, A. "Taking Wrongs Seriously: Public Perceptions of Criminal Seriousness" [1996] Brit. J. Criminology 299-318

O' Donovan, K. Sexual Divisions in the Law (London, Wiedenfeld and Nicolson, 1985)

O' Sears, D. & Funk, C. "Self Interest in Americans' Political Opinions" in Mansbridge, J. J. Beyond Self Interest (Chicago, University of Chicago Press, 1967)

Oppenheim, A. N. Questionnaire Design and Attitude Measurement (London, Pinter, 1992)

Packer, H. The Limits of Criminal Sanction (Stanford, Stanford University Press, 1969)

Pactet, P. Institutions Politiques, Droit Constitutionnel (Paris, Masson, 1999)

Parton, D.A., Hansel, M. & Stratton, J. R. "Measuring Crime Seriousness – Lessons form the National Survey of Crime Severity" [1991] Brit. J. Criminology 72

Pierpoint, H. "How Appropriate are Volunteers as Appropriate Adults for Young Suspects? The Appropriate Adult System and Human Rights [2000] Journal of Social Welfare and Family Law 383.

Poulter, S. "Muslim Headscarves in School: Contrasting Legal Approaches in England and France" [1997] O. J. L. S. 43

Pradel, J. Procédure Pénale (Paris, Cujas, 8th Edition 1995)

Pradel, J. Droit Pénal Général (Paris, Cujas, 8th Edition 1992)

Pradel, J. & Danti-Juan, M. Droit Pénal Spécial (Paris, Cujas, 1995)

Quinn Patton, M. How to Use Qualitative Methods in Evaluation (Newbury Park, Sage, 1987)

Rawls, J. A Theory of Justice (Oxford, Clarendon, 1972)

Raz, J. The Morality of Freedom (Oxford, Clarendon, 1986)

Reder, P. "Child Protection: Medical Responsibilities" (1996) 5 Child Abuse Review 64

Regan, G. "Glosses on Dworkin: Rights, Principles and Politics" in M. Cohen (ed) Ronald Dworkin and Contemporary Jurisprudence (London, Duckworth, 1983)

Reiner, R. Chief constables, Bobbies, Bosses or Bureaucrats (Oxford, Oxford University Press, 1991)

Reiniger, A., Robison, E. McHugh, M. "Mandated Training of Professionals: A Means for Improving Reporting of Suspected Child Abuse" (1993) 17 Child Abuse and Neglect 63

Reitz, J. C. "How to Do Comparative Law" (1998) 46 American Journal of Comparative Law pp. 617-623

Rivero, J. Les Libertés Publiques et Droits de l' Homme (Paris, Dalloz, 2nd Edition 1978).

Robilliard, S. A. & McEwan, J. Police Powers and the Individual (Oxford, Blackwell, 1986)

Robine, M. "Le Secret Professionel du Ministre du Culte" D. 1882 chr. 221.

Robinson, O. F., Fergus, T.D., Gordon, W. M. European Legal History (London, Butterworths, 3rd Edition 2000)

Rousseau, J. J. The Social Contract and Discourses (Translated Cole, G. D. H., London, Dent, 1993).

Sacco, R. "Legal Formats: A Dynamic to Comparative Law (1)" [1991] American Journal of Comparative Law 1-34

Sadurski, I. "Joseph Raz on Liberal Neutrality and the Harm Principle" (1990) 10 O. J. L. S 122-133

Salas, D. Le Tiers Pouvoir (Paris, Hachette, 1998).

Salas, D. Du Procès Pénal (Paris, Cujas, 1992)

Samet, C. Journal d' un Juge d' Instruction (Paris, L' Atelier de l' Archer, 2000).

Sandel, M. Liberalism and the Limits of Justice (Cambridge, Cambridge University Press, 1982)

Sanders, A. & Young, R. Criminal Justice (Butterworths, London, 1994).

Schlesiger, P. & Tumber, H. "Fighting the War Against Crime, Television and Audience" (1993) 33 British Journal of Criminology

Schroeder, C. H. "Two Methods for Evaluating Duty to Rescue Proposals" [1986] Law and Contemporary Problems 181

Scorer, A. & Hewitt, P. The Prevention of Terrorism Act, The Case for Repeal (London, NCCL, 1981)

Shapland, J., Willmore, J. & Duff, P. Victims in the Criminal Justice System (Aldershot, Gower, 1988)

Shepherd, J. & Lisles, C. "Towards a Multi-Agency Violence Prevention and Victim Support" (1998) 38 Brit. J. Criminology 351-369

Simister, A, P. "Why Omissions are Special" [1995] Legal Theory 311-335

Smith, A. T. H. Offences Against Public Order (London, Sweet & Maxwell, 1987)

Smith, D. J. Police and People in London, Vol. 1, A Survey of Londoners (London, P. S. I., 1983)

Smith, D. J. Police and People in London, Vol. 3, A Survey of Police Officers (London, P. S. I, 1983)

Smith, J. C. "The Element of Chance in Criminal Liability" [1971] Crim. L.R. 63.

Smith, K. J. M. A Modern Treatise on the Law of Criminal Complicity (Oxford, Clarendon, 1991).

Smith, P. "The Duty to Rescue and Wilful Disregard: An Unprincipled Response" (1991) 17 Social Theory and Practice 457

Smith, P. "The Duty to Rescue and the Slippery Slope Problem" (1990) 16 Social Theory and Practice 19

Sourioux, J-L. & Lerat, P. L' Analyse de Texte, Méthode Générale et Applications de Droit (Paris, Dalloz, 1992)

Soutoul, J. H. Le Médicin Face à l' Assistance à la Personne en Danger et à l' Urgence (Paris, Maloine, 1992)

Starck, B., Roland, H., Boyer, L. Obligations I La Responsabilité Délictuelle (Paris, Litec, 5th Edition 1985)

Steer, D. Uncovering Crime, The Police Role (London, H. M. S. O., 1980)

Stefani, G., Levasseur, G., Bouloc, B. Procédure Pénale (Paris, Dalloz, 16th Edition 1997)

Stefani, G., Levasseur, G., Bouloc, B. Droit Pénal Général (Paris, Dalloz, 15th Edition 1995)

Stone, R. "PACE: Special Procedures and Legal Privilege" [1998] Crim. L. R. 231.

Stone, R. Entry, Search and Seizure, a guide to the Civil and Criminal Powers of Entry (London, Sweet and Maxwell, 1989)

Sullivan, G. R. " Intent, Purpose and Complicity" [1988] Crim. L. R. 641

Tardeau de Marsac, S. "L' Extension de la Notion de Blanchiment de l' Argent: Est-Elle une Limite à l' Optimisation Fiscale" [1998] Finance et Gestion 9

Temkin, J. "Plus ca Change, Reporting Rape in the 1990's" [1997] Brit. J. Criminolgoy 507-528

Thompson, J. J. "A Defense of Abortion" (1971) Philosophy and Public Affairs pp. 47-63

Tite, R. "How Teachers Define and Respond to Child Abuse: The Distinction Between Theoretical and Reportable Cases" (1993) 17 Child Abuse and Neglect 591

Titmuss, R. M. The Gift Relationship. From Human Blood to Social Policy (London, Allen and Unwin, 1970)

Trouille, H. "A Look at French Criminal Procedure" [1994] Crim. L. R. 735

Trute, A., Adkins, E. & MacDonald, G. "Professional Attitudes Regarding the Sexual Abuse of Children: Comparing Police, Child Welfare and Community Mental Health" (1992) 16 Child Abuse and Neglect 359

Tunc, "Untitled Commentary on the Ordonnance of 25th June 1945" D. 1946 L. 33

Urmston, J. "Saints and Heroes" in Feinberg, J. Moral Concepts (London, Oxford University Press, 1969) pp. 60-73

Van Kesteren, J. P., Mayhew, J. P & Nieuwbeerta, P. Criminal Victimisation in Seventeen Industrialised Countries: Key Findings from the 2000 International Crime Victims Survey (The Hague, Research and Documentation Centre (WODC), Netherlands Ministry of Justice Series Onderzoeck en Beleid No. 187, 2001).

Van Hoecke, M. & Warrington, M. "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comaprative Law" [1998] I. C. L. Q. 495-536

Vernon, R. Citizenship and Order. Studies in French Political Thought (Toronto, University of Toronto Press, 1986)

Von Hirsch, A. "Extending the Harm Principle: "Remote" Harms and Fair Imputation" in Simister, A. P. & Smith, A. T. H. Harm and Culpability (Oxford, Clarendon, 1996)

Von Hirsch, A. & Jareborg, N. "Gauging Criminal Harm: A Living Standard Analysis" (1991) O. J. L. S. 1-38

Waddington, P. A. J. Liberty and Order. Public Order Policing in a Capital City (London, UCL Press, 1994)

Walker, C. The Prevention of Terrorism in British Law (Manchester, Manchester University Press, 1992)

Wallace, A. "European Integration and Legal Culture: Indirect Sex Discrimination in the French Legal System" [1999] Legal Studies 397.

Walzer, M. Spheres of Justice (Oxford, Martin Robertson, 1983)

Warner, J. E. & Hansen, D. J. "The Identification and Reporting of Physical Abuse by Physicians: A Review and Implications for Research" (1994) 18 Child Abuse and Neglect 11

Watkins, T. G. The Italian Legal Tradition (Aldershot, Ashgate, 1997)

Weisberg, R. H. Vichy Law and the Holocaust in France (New York, New York University Press, 1996).

Wellman, C. H. "Liberalism, Samaritanism and Political Legitimacy" (1996) 25 Philosophy and Public Affairs 211-237

Wasik, M., Gibbons, T. Redmayne, M. Criminal Justice Text and Materials (London, Longman, 1999)

Wenik, J. "Forcing the Bystander to Get Involved: A Case for a Statute Requiring a Witness to Report Crime" (1985) 94 Yale L. J. 1787

West, A., Desdevises, Y., Fenet, A., Gaurier, D., Heussaff, M-C. & Lévy, B. The French Legal System (London, Butterworths, 1998)

Williams, G. "Omissions, the Conventional View" (1991) 107 L. Q. R. 86

Williams, G. "Obedience to the Law as a Crime" (1990) 53 M. L. R. 445

Williams, G. "Which of You Did It?" 52 (1989) M. L. R. 177

Williams, G. "Convictions and Fair Labelling" (1983) 42 Cambridge Law Journal 85-95.

Williams, J. "The Inappropriate Adult" [2000] Journal of Social and Welfare Law 43.

Zander, M. The Police and Criminal Evidence Act 1984 (London, Sweet & Maxwell, 1995)

Zauberman, R. "The International Crime Survey in France: Gaining Perspective" in Del Frate, A. A., Zvekic, U & Van Dijk, J. (Ed.) Understanding Crime, Experiences of Crime and Crime Control (Rome, UNICRI, 1993).

Zauberman, R. Robert, P. Levy, R. & Perez-Diaz, C. Les Victimes: Comportements et Attitudes. Enquete Nationale de Victimisation (Paris, CESDIP, 1990).

Zuckerman, A. "The Weakness of PACE Special Procedure for Protecting Confidential Material" [1990] Crim. L. R. 478.

Zweigert, K. & Kotz, H. An Introduction to Comparative Law (Oxford, Clarendon, 1998)

APPENDIX A

The Level of Convictions Under Article 223-6, Article 434-1 and Article 434-3

The following page reproduces Ministry of Justice statistics for the number of convictions for failing to assist a person in danger or prevent a violent offence (Article 223-6), failing to report a serious offence (Article 434-1) and failing to report an violent offence against a vulnerable individual (Article 434-3).

DONNEES STATISTIQUES DE CONDAMNATIONS

Source : casier judiciaire

	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
NON ASSISTANCE A PERSONNE EN DANGER	254	302	325	219	200	258	326	278	265	306	252	202
NON DENONCIATION DE CRIME	8	4	3	3	1	6	20	15	19	12	14	6
NON DENONCIATION DE MAUVAIS TRAITEMENTS OU PRIVATIONS INFLIGES AU MINEURS DE 15 ANS	2	1	8	4	4	5	10	12	11	12	19	14

APPENDIX B

INTERVIEW SCHEDULE

1. **Any experience of Article 434-1? Defending? Advising partie civile? Investigating?**

If yes:

- Details?
- When is it likely to be prosecuted/ punished? Seriousness of offence? Need for information? Types of non-reporters e.g. gangs
- When should failure to report serious offences be punished

If no:

- Likely to be prosecuted? Why?

2. **Any experience of Article 434-3? Defending? Advising partie civile? Investigating?**

If yes:

- How used? Focused on child abuse?
- When are failures to report likely to be prosecuted/ punished?
- Differences between Article 434-3 and Article 434-1
- Use against offender's family and victim's family
- Use against professionals

If no:

- Likely to be prosecuted? Why?

3. **Effect on reporting levels**

- Why do witnesses report/ not report?
- Are Article 434-1 and Article 434-2 well known?

4. **Confidentiality and reporting?**

- Extent and purpose of professional duties of confidentiality
- Would respondent report? Why?

5. **Opinions?**

- In favour of Article 434-1? Why?
- Would respondent develop/ limit duty to report? How?
- In favour of Article 434-3? Why?
- Would respondent develop/ limit duty to report? How?

APPENDIX C: THE ENGLISH QUESTIONNAIRE

FAILURE TO REPORT OFFENCES IN ENGLISH CRIMINAL LAW

This questionnaire is about reporting offences to the police and whether a person commits an offence if he does not report an offence to the police.

Please answer the questions by ticking the relevant boxes or filling in the spaces. If you want to make any additional comments please do so in the right hand margin or at the end of the questionnaire. If you are unable to answer a question, please leave it black and go on the next one.

Thank you for agreeing to complete this questionnaire. Any information that you can give is very useful for the research. Any information that you do give will only be used for the research and it will not be possible to identify you from any discussion of the data.

The Contents of this Questionnaire

1. INTRODUCTORY SECTION

What is your job title?

What are your main responsibilities?

How long have you been employed in this capacity?

Do you have any previous experience of working in the criminal justice system?

Yes [ ] No [ ]

If yes please specify

2. FAILURE TO REPORT OFFENCES THAT ARE GOING TO BE COMMITTED

A. Does an individual, who knows that an offence is going to be committed and who does not report that offence to the police, commit an offence? Yes [ ] No [ ]

If your answer is yes, please continue to 2B, if your answer is no, please continue to 3.

B What offence does the non-reporter commit?

C. Will he be prosecuted for this offence?

Usually [ ] Sometimes [ ] Rarely [ ] Never [ ] Do not know [ ]

D. Are there any other offences that a non-reporter might commit?

Yes [ ] No [ ] *Please go to Q3*

E. What offence is this?

F. Will the non-reporter be prosecuted for this offence?

Usually [ ] Sometimes [ ] Rarely [ ] Never [ ] Do not know [ ]

3. FAILURE TO REPORT A CURRENT OFFENCE

A. Does an individual who knows that an offence is being committed and who does not report that offence to the police commit an offence? Yes [ ] No [ ]

If your answer is yes please go to Q. 3 B if your answer is no please go to Q 4.

B. What offence does the non-reporter commit?

C. Will he be prosecuted for this offence?

Usually [ ] Sometimes [ ] Rarely [ ] Never [ ] Do not know [ ]

D. Are there any other offences that a non-reporter might commit?

Yes [ ] No [ ] *Please go to Q. 4*

E. What offence is this?

F. Will the non-reporter be prosecuted for this offence?

Usually [ ] Sometimes [ ] Rarely [ ] Never [ ] Do not know [ ]

4. FAILURE TO REPORT OFFENCES THAT HAVE BEEN COMMITTED

A. Does an individual, who knows that an offence has been committed and who does not report that offence to the police commit an offence?

Yes [ ] No [ ]

If your answer is yes, please go to Q. 4B, if your answer is no, please go to Q. 5

B. What offence does the non-reporter commit?

C. Will he be prosecuted for this offence?

Usually [ ] Sometimes [ ] Rarely [ ] Never [ ] Do not know [ ]

D. Are there any other offences that a non-reporter might commit?

Yes [ ] No [ ] *Please go to Q. 5*

E. What offence is this?

F. Will he be prosecuted for this offence?

Usually [ ] Sometimes [ ] Rarely [ ] Never [ ] Do not know [ ]

5. THE NON-REPORTING OF SPECIFIC OFFENCES

A. According to section 10 of the Prevention of Terrorism (Temporary Provisions) Act 1989 it is an offence not to report a terrorist offence. Do you agree that it should be an offence not to report a terrorist offence?

Strongly agree [ ] Agree [ ] Neither agree nor disagree [ ]
Disagree [ ] Strongly disagree [ ]

B. Under section 170 of the Road Traffic Act 1988 a motorist who does not report an accident involving his vehicle commits an offence. Do you agree that it should be an offence not to report a road accident.

Strongly agree [ ] Agree [ ] Neither agree nor disagree [ ]
Disagree [ ] Strongly disagree [ ]

6. A DUTY TO REPORT SERIOUS OFFENCES?

In France it is an offence not to report a serious crime. Both professionals such as lawyers and the offender's family are usually exempt from the duty to report.

This section will examine whether a similar duty should be introduced in English criminal law.

A. Below is a list of offences. *Please tick those offences that you consider to be serious.*

Arson [ ] Burglary [ ] Causing death by dangerous driving [ ]
Child pornography [ ] Commercial fraud [ ]
Drug trafficking [ ] GBH [ ] Illegal demonstration [ ]
Murder [ ] Rape [ ] Robbery [ ] Terrorism [ ]

B. Please list the three offences in Q. 6A that you consider to be the three most serious. (1) is the most serious and (3) the third most serious.

(1)
(2)
(3)

C. Apart from the offences in Q. A, are any other offences serious?
No [ ] *Please go to Q. 6D* Yes [ ]
Please list the other offences that you consider to be serious

D. Do you think that the criminal law should punish a person who does not report a serious offence. *The definition of "serious offence" would include and be limited to those offences that you consider serious.*

Yes, most of the time [ ] Yes sometimes [ ]
No rarely [ ] No never [ ]
Why?

E. Apart from serious offences are there any other offences that person should have to report to the police? Yes [ ] No [ ]
If yes, what are those offences?

Why?

The next question is on page 5 please turn over. Thank you

F. *Please could you complete the table below to indicate whether you agree with the following statements.*

	Strongly Agree	Agree	Neither Agree/ Disagree	Disagree	Strongly Disagree
The public should help the police	[ ]	[ ]	[ ]	[ ]	[ ]
Crimes can only be prevented if the public help the police	[ ]	[ ]	[ ]	[ ]	[ ]
Criminals can only be caught and convicted if the public help the police	[ ]	[ ]	[ ]	[ ]	[ ]
It is more that important offences are prevented than offenders are caught.	[ ]	[ ]	[ ]	[ ]	[ ]
A law requiring a person to identify offender would be harsher than a law that just required him to report the offence	[ ]	[ ]	[ ]	[ ]	[ ]
It is more important for the public to be protected from crime than that a person can choose not to be Involved	[ ]	[ ]	[ ]	[ ]	[ ]
The offender's family should not have a duty to report	[ ]	[ ]	[ ]	[ ]	[ ]
A doctor's duty of confidentiality is more important than duties to report	[ ]	[ ]	[ ]	[ ]	[ ]
The main goal of the criminal justice system should be to protect the community	[ ]	[ ]	[ ]	[ ]	[ ]
The main goal of the criminal justice system should be to recognize and protect Individual liberties	[ ]	[ ]	[ ]	[ ]	[ ]

The next question is on page 6, please turn over.

G. This question looks at different types of non-reporters. Are some failures to report worse than others? *Please tick the boxes below to show how blameworthy you think each failure to report is. (1) are the most blameworthy failures to report and (5) are the least blameworthy failures to report.*

	1.	2	3	4	5
The victim of the non-reported offence was especially vulnerable.	[ ]	[ ]	[ ]	[ ]	[ ]
The non-reporter was a member of the Gang that had committed the offence	[ ]	[ ]	[ ]	[ ]	[ ]
The non-reported offence might have been prevented if it had been reported.	[ ]	[ ]	[ ]	[ ]	[ ]
If the offence had been reported the offender could have been arrested	[ ]	[ ]	[ ]	[ ]	[ ]
The non-reporter was the mother of the victim of the offence	[ ]	[ ]	[ ]	[ ]	[ ]
A guard on a train who does not report an attack on a passenger	[ ]	[ ]	[ ]	[ ]	[ ]
An individual who hears that someone he knows is going to commit an offence	[ ]	[ ]	[ ]	[ ]	[ ]
The non-reporter had been threatened	[ ]	[ ]	[ ]	[ ]	[ ]
The offender was a juvenile	[ ]	[ ]	[ ]	[ ]	[ ]
The non-reporter was paid not to report	[ ]	[ ]	[ ]	[ ]	
The non-reporter was the victim of the offence	[ ]	[ ]	[ ]	[ ]	[ ]

H. Are there any other failures to report that should be punished?
Yes [ ] What are they?

No [ ] Do not know [ ]

I. Do you think that an offence of not reporting serious offences would be used in any ways other than to prosecute and punish non-reporting?
Yes [ ] What are those uses?

No [ ] Do not know [ ]

J. The offence of withholding information about terrorism is sometimes used as a bargaining tool to obtain information from witnesses about terrorism and terrorist offenders. Do you think that a duty to report serious offences would be used in a similar way?
Yes often [ ] Yes sometimes [ ] No rarely [ ] No never [ ]

7. THE REPORTING OF CHILD ABUSE

A. How would you define child abuse?

B. Do you have any experience of working with victims of child abuse?
Yes [ ] In what capacity?

No [ ]

Do you any experience of defending individuals accused of child abuse?
Yes [ ] No [ ]
If you have answered "no" to all parts of this question please go to Q. 8.

C. In your opinion what should be the purpose of laws dealing with child abuse?

D. Are there any problems with achieving this?
Yes [ ] What are the problems?

No [ ]

E. Based on your experience do you think that child abuse is underreported?
Yes [ ] No [ ] Do not know [ ]

F. Below is a list of individuals who might report child abuse to the police. *Based on your experience and knowledge please could your mark "1", "2" and "3" the three most likely reporters. If any individuals listed are particularly unlikely to report child abuse could you mark them with a "x".*

The child himself [ ] A neighbour [ ]
A teacher [ ] Victim's sibling [ ]
In cases where the abuser is the child's parent, the non-abusing parent who lives with the abuser [ ]
A doctor [ ] Social services [ ]
Non-parent adult relative of the victim [ ]
In cases where the abuser is the child's parent, the non-abusing parent who is separated from the abuser [ ]

G. Are there any other individual who are likely to report child abuse to the police?
Yes [ ] Who are they?

No [ ]

The next question is on page 8, please turn over.

H. The table below suggests reasons why a person might choose not to report child abuse. *Please complete the table to show whether you agree that each factor may discourage a person from reporting child abuse.*

	Strongly Agree	Agree	Neither Agree/ Disagree	Agree	Strongly Disagree
The victim was afraid that s(he) would not be believed	[ ]	[ ]	[ ]	[ ]	[ ]
The parents of the victim were afraid that their children would be taken into care	[ ]	[ ]	[ ]	[ ]	[ ]
A doctor does not want to break patient confidentiality	[ ]	[ ]	[ ]	[ ]	[ ]
A doctor was worried about harming his relationship with the patient	[ ]	[ ]	[ ]	[ ]	[ ]
A potential reporter may think that it is more appropriate to treat the offender than to punish him	[ ]	[ ]	[ ]	[ ]	[ ]

I. Are there any other reasons why a person may choose not to report child abuse?
Yes [ ] What are they?

No [ ]

J. Are any reports of child abuse malicious?
Yes, most of them are [ ] Yes some of them are [ ]
What types of people make malicious reports?

No, most of them are genuine [ ]

8. A DUTY TO REPORT CHILD ABUSE?

It is an offence in French criminal law for a person who knows that a child is being abused to fail to report that abuse to the authorities. This section will examine whether a similar offence should be introduced into English criminal law.

A. Do you think that the criminal law should punish a person who fails to report the fact that a child is being abused?
Yes, most of the time [ ] Yes sometimes [ ] No rarely [ ] No never [ ]
Why?

B. In what circumstances do you think a person should be punished for not reporting child abuse?

Thank you for completing this questionnaire. If you have any additional comments please add them on this sheet.

APPENDIX D: INFORMATION SENT TO ENGLISH RESPONDENTS

A Comparison of the Duty to Report Offences to the Police in England and in France

Nottingham Trent University

Rachael Stretch

The Issue

The demands of the security of the community and an individual's liberty will sometimes conflict. The research focuses on a particular problem – whether the criminal law should punish an individual who does not report an offence to the police.

Method

In order to understand whether duties to report are justified and what impact they would have, I have examined offences of failing to report in English criminal law and in French criminal law. The citizen's duty to report in French criminal law is more extensive than in English criminal law. This is useful because by looking at French law I have been able to analyse how this more extensive duty to report works and how it is viewed.

I interviewed French police officers, lawyers and judges so that I could find out about the duties to report and how they were used. I would now like to learn about the views and experiences of English criminal law professionals of mandatory reporting.

I am very grateful to both the French and the English respondents for their contributions to the research.