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Arson Fraud: Criminal Prosecution and Insurance Law

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Fordham University School of Law Urban Law Journal

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COMMENTS

ARSON FRAUD: CRIMINAL PROSECUTION AND INSURANCE LAW

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I. Introduction

In 1978, the Illinois Legislative Investigating Commission published a thorough and lengthy report,¹ the product of approximately

1. ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION, ARSONS: A REPORT TO THE ILLINOIS GENERAL ASSEMBLY (May 1978) [hereinafter cited as ARSONS].

a year and one half's study of the arson problem in that state.² Comparing state and nationwide statistics for arson prosecutions, the authors noted that "[s]tatistically, arson is the safest crime to commit."³ This critique of the arson problem underscores the inherent contradictions which face any analysis of the extent and nature of arson. It is a particularly apt comment on that type of arson which is motivated by an intent to defraud an insurance company: while there is a nationwide conviction rate for all arson offenses of less than one percent,⁴ even fewer fraud arson schemes result in conviction.⁵ As one reporter noted, "Arson-for-profit is a curious hybrid—it is the only organized white collar crime kicked off by a violent offense."⁶ The difficulties of identifying and proving the crime of arson are paralleled in the civil area by difficulties which insurance companies face in establishing arson as defense to a claims payment.

Courts have recognized for years the problems in successfully bringing a case of arson fraud.⁷ The surreptitious nature of the crime results in the commission of an offense for which few witnesses are ever present. The intended victim, the insurance company, is considerably removed in time and often by jurisdiction from the fraudulent act; the possibility that a crime was committed may not even come to the attention of a carrier until well after the fire has destroyed the property and a claim has been filed. The unintended victims—the casualties of the actual burning—abound, but they may have even less to add in establishing arson. Commenting on a recent wave of suspicious fires, a Miami arson investigator pointed out: "[I]t's very difficult to get a conviction because you've got to prove a crime was committed and *then* tie the person to the crime. In addition, so much evidence is destroyed by a fire that it's difficult to prove arson 100%."⁸ It has become a truism that criminal arson

2. *Id.* at 1. The report was prepared in response to Senate Resolution 474, adopted by the Illinois Senate on December 16, 1976.

3. *Id.* at 32.

4. *See, e.g., Arson: The Most Neglected Crime on Earth*, THE POLICE CHIEF, July 1974, at 33.

5. *Id.*

6. Karchmer, "Arson," N.Y. Times, August 7, 1978, at C1, col. 3, *reprinted in* 124 CONG. REC. S12890 (daily ed. Aug. 8, 1978).

7. *See, e.g., State v. Edwards*, 173 S.C. 161, 175 N.E. 277 (1934). As the Tenth Circuit Court of Appeals noted in *Havelock v. United States*, 427 F.2d 987 (10th Cir. 1970), "[B]ecause of the nature of the crime, direct evidence is seldom available. . . . [C]onsequently circumstantial evidence, plus reasonable inferences must be relied on to establish the identity and wilfulness of the guilty person." *Id.*

8. N.Y. Times, Feb. 27, 1978, at A5, col. 1 (emphasis added).

cases are successfully based on primarily circumstantial evidence. This is no less true for establishing defenses to an insurance claim.

Arson statistics are by no means coordinated. Until 1979, for example, there were no comprehensive nationwide criminal arson statistics available. Arson was classified as a Part II offense for purposes of the *F.B.I. Uniform Crime Reports*,⁹ with the result that only the national arrest rates and arrest trends were interpreted. Therefore, the data generated by the F.B.I. simply indicated that approximately 8.7 arrests per 100,000 were for arson.¹⁰ A recent amendment to S. 1437¹¹ entitled the "Arson Control Assistance Act," proposed by Senator John Glenn of Ohio and adopted as S. 1882¹² in April, 1978 included the offense as a Part I crime.¹³ This classification is only effective, however, for one year,¹⁴ although subsequent permanent upgrading is expected.¹⁵ At the very least, this should increase the data base for the criminology of arson.

In 1977, the U.S. Fire Administration released data indicating a total of 177,000 arson "incidents" for that year.¹⁶ The statistics for dollar, property and human loss are more startling. It has been estimated that 1,000 persons die annually as a result of arson,¹⁷ with an additional 10,000 reported injuries.¹⁸ The 1976 dollar loss to arson was approximately \$1.5 billion¹⁹ and a \$1.6 billion loss was reported for 1977.²⁰ Moreover, the financial loss per arson incident is signifi-

9. See, e.g., F.B.I. UNIFORM CRIME REPORTS 304 (1978) [hereinafter cited as F.B.I. REPORTS]. Arson is classified as a Part II offense, indicating that only arrests are reported. The Report notes the purpose for collecting such statistics for these offenses: "[T]he number of arrests are primarily a measure of police activity." *Id.* at 169.

10. *Id.* at 173. For a breakdown according to age, see *id.* at 174. For urban arrest trends, see *id.* at 187. For suburban arrest trends, see *id.* at 196. For rural arrest trends, see *id.* at 205.

11. S. 1882, 95th Cong., 2d Sess. (1978), reprinted in 124 CONG. REC. S12889 (daily ed. Aug. 8, 1978).

12. *Id.*

13. Part I crimes include such crimes as homicide, rape, robbery, aggravated assault, burglary, larceny-theft and motor vehicle theft. F.B.I. REPORTS, *supra* note 9.

14. See note 11 *supra*.

15. See, e.g., H.R. 2265, 96th Cong., 1st Sess. (1979); H.R. 2211, 96th Cong., 1st Sess. (1979); H.R. 2763, 96th Cong., (1st Sess., 1979); H.R. 2245, 96th Cong., 1st Sess. (1979).

16. PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, ROLE OF THE INSURANCE INDUSTRY IN DEALING WITH ARSON-FOR-PROFIT 14 (Comm. Print 1979) [hereinafter cited as ARSON INVESTIGATIONS].

17. 124 CONG. REC. S7178 (daily ed. May 9, 1978).

18. *Id.*

19. ARSONS, *supra* note 1, at 99.

20. ARSON INVESTIGATIONS, *supra* note 16, at 1. *But see* 124 CONG. REC. S7178 (Senator Glenn reported \$3 billion in insurance company losses).

cantly higher than that loss sustained by other property crimes: for example, the average dollar loss from an arson is \$6,433 compared with an average robbery loss of \$338.²¹ There are problems with these statistics as well, primarily since both data sources, the U. S. Fire Administration and the American Insurance Association, do not (or are not able to) distinguish fires classified as arson from those categorized as simply suspicious.²²

Organized crime is decidedly involved in arson, in two respects: arson-for-profit²³ and arson for enforcement.²⁴ Arson "rings" have been documented in such cities as Peoria,²⁵ Tampa,²⁶ and Boston.²⁷ As a racket, organized arson generally involves an overall scheme to defraud insurance companies, including as co-conspirators real estate brokers,²⁸ contractors,²⁹ and insurance adjustors.³⁰ The actual arsonist—the individual who is paid to set the fire—is often more removed from the "scam" than other principals. Organized crime's use of arson classically involves burning as a means of extortion to coerce property owners to participate in other crimes.³¹ To curb both forms of organized arson it has been recently suggested that the federal Racketeer Influenced and Corrupt Organizations (RICO) statutes be reactivated.³²

Arson has received attention from both houses of Congress in the last two years, in their efforts to enact the Criminal Code Reform Act of 1977.³³ The proposed Code, S. 1437³⁴ and H.R. 6869,³⁵ con-

21. ARSONS, *supra* note 1, at 98.

22. FIREHOUSE, Oct. 1977, at 59.

23. Karchmer, *Arson and the Mob: The Underworld Turns Fire Into Profit*, FIREHOUSE, Aug. 1977, at 22. See also ARSON INVESTIGATIONS, *supra* note 16, at 5.

24. See, e.g., ABA NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, ORGANIZED CRIME 11 (1976).

25. ARSONS, *supra* note 1, at 45.

26. Karchmer, *The Fight Against Arson: What the Government is Doing*, FIREHOUSE, Oct. 1977, at 68.

27. ARSONS, *supra* note 1, at 45.

28. See note 26 *supra*.

29. ARSONS, *supra* note 1, at 44.

30. See note 26 *supra*.

31. See note 24 *supra*.

32. ARSON INVESTIGATIONS, *supra* note 16, at 8-10.

33. S. 1437, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. 1437]. See also H.R. 6869, Ser. #52, pt. I, 95th Cong., 1st & 2d Sess. (1977), entitled "Legislation to Revise and Recodify Criminal Laws" [hereinafter cited as H.R. 6869].

34. S. 1437, *supra* note 33.

35. H.R. 6869, *supra* note 33.

solidates approximately fifty disparate federal arson provisions into three offenses³⁶ which are based generally on the proposed format of the Model Penal Code. The Senate Committee on the Judiciary commented on the proposed Chapter 17: "Although the common link of many State provisions in this area is the notion of burning as an instrument of destruction, the approach of S. 1437 as reported is to define the crime in series according to the nature of the harm done or contemplated."³⁷ Under the proposed code, arson fraud would not be covered by the arson chapter, but would rather be included as a lesser offense related to theft.³⁸ Despite the implicit advantage of consolidation, this differentiation at the very least underlines and sustains the contradictions found elsewhere in the law between arson and arson fraud: the implication different conduct. This is not borne out by the statistics mentioned previously, particularly with respect to financial losses and loss of human lives.

Renewed attention to arson has also resulted in a strong response from many states and several major cities. Arson Task Forces have been created in Seattle, Chicago and New York. They have focused on such projects as establishing coordinated information retrieval systems and creating information clearing houses.³⁹ Special arson squads have also been created within fire departments. In Houston, for example, the arson squad has the sole responsibility for investigation.⁴⁰ Some arson units have integrated police and fire department personnel.⁴¹ Others, most recently in the boroughs of the Bronx and Brooklyn in New York City,⁴² have given the police the investigative responsibility.

36. See *Report of the Committee on the Judiciary to Accompany S. 1437*, S. 1437, *supra* note 33, at 587-94.

37. *Id.* at 588.

38. *Id.* (Subch. D, "Theft and Related Offenses," § 1734 "Executing a Fraudulent Scheme"). See also *Department of Justice Memorandum on the Provisions of Chapters 1 through 18 of the Criminal Code Reform Act of 1978*. S. 1437, *supra* note 33, at 205-39.

39. Interview with John Engel, Mayor's Task Force on Arson in New York City (February 26, 1979). Mr. Engel stated that a main objective of the Task Force would be to coordinate information from police and insurance companies. Insureds would be required to divulge information such as the name of the real party in interest in the property, which other properties were similarly insured, and if there had been any previous arsons of property owned by the insured. The system would, it is hoped, enable both insurance companies and police in isolating potential fraud arsonists.

40. ARSONS, *supra* note 1, at 83.

41. *Id.*

42. N.Y. Times, March 29, 1979, at B8, col. 4. See also ARSONS, *supra* note 1, at 61 (in Chicago, police alone have responsibility for arson investigations).

Arson poses important problems to be dealt with not only through criminal prosecution but also through action by private sector interests, including insurance companies. The complaints about the arson epidemic are legion: the criminal law places an impossible burden on the prosecution which must be met by wholly circumstantial evidence; the insurance companies, because they must be profit-motivated, are forced to permit the collection of claims where an arson defense is available but time-consuming and financially burdensome; the FAIR plans have promoted insurance scams and encouraged arson in economically depressed neighborhoods.

This Comment will address the arson fraud "epidemic" and divide it into two major parts. The first part will examine the crime of arson fraud within the general context of the offense of arson. Case law and statutory developments will be addressed, and particular attention will be paid to three model arson statutes. The second part will discuss various defenses potentially available to insurers where incendiarism is suspected. These include the common law defense to arson, and several technical defenses typically included in the standard fire insurance policies. Two unsettled areas of the law pertaining to the arson case, the concept of "actual cash value" and the appropriate standard of proof, will be considered. Finally, recovery of insurance proceeds by parties cointerested with the arsonist in the destroyed property will be considered.

II. Common Law Requirements Of The Crime Of Arson

A. Arson at Common Law

Early common law arson was classified as an infamous crime.⁴³ The common law offense was, however, substantially more restricted than present statutory offenses which cover criminal burn-

43. 4 W. BLACKSTONE, COMMENTARIES *220.

[Arson] is an offense of very great malignity and much more pernicious to the public than simple theft: because first it is an offense against the right of habitation . . . ; next, because of the terror and confusion that necessarily attend it; and lastly, because in simple theft the thing stolen only changes its master but still remains in esse for the benefit of the public, whereas by the burning the very substance is destroyed [F]ire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies.

Id. In addition to arson, "infamous" crimes included other heinous crimes such as murder and rape. *Id.*

ings.⁴⁴ As defined by Blackstone, arson *ab ardendo* was "the malicious and willful burning of the house or outhouse of another man."⁴⁵ Limited to the burning of dwelling houses,⁴⁶ common law arson was actually an offense against the fact of habitation,⁴⁷ rather than against the physical property damaged. The offense was directed at setting fire to a house which was generally lived in,⁴⁸ and, thus, creating a potential danger to human life. Simple property destruction, whether it be an uninhabited house or mere personal property, was dealt with as a less serious offense.⁴⁹

Common law required an actual burning of the house as a result of arson; this burning could be minimal, but it must have been represented by certain quantifiable damage to the structure.⁵⁰

At common law, an individual could not commit arson by burning his own home⁵¹ even though such act might threaten the lives of

44. For a discussion of arson at common law, see Note, *Arson—Statutory Change of Common Law Requisites*, 25 MICH. L. REV. 450 (1927).

45. 4 W. BLACKSTONE, COMMENTARIES *220.

46. *Ex parte Bramble*, 31 Cal. 2d 43, 48, 187 P.2d 411, 414 (1947); *State v. Varsalona*, 309 S.W.2d 636, 639 (Mo. 1958); *State v. Arnold*, 285 N.C. 751, 754, 208 S.E.2d 646, 648 (1974).

47. *Lipschitz v. People*, 25 Colo. 261, 266, 53 P. 1111, 1112 (1898); *State v. Cooley*, 176 La. 448, 454, 146 So. 19, 21 (1933) where the court, interpreting a statute, noted, "We are of the opinion that it was the legislative intent . . . to define arson in line with the common-law definition, as a crime against the burning of habitations rather than the burning of all kinds of property." *Id.* (*But see* LA. REV. STAT. ANN. § 14.52 (West 1974), wherein strict common law requirement that burning be of a habitation only has been expanded to include any property); *State v. Spino*, 61 Wash. 2d 246, 248, 377 P.2d 868, 869 (1963).

48. *People v. Losinger*, 331 Mich. 490, 50 N.W.2d 137 (1951), where the court defined dwelling house in accordance with 2 D. GILLESPIE, MICHIGAN CRIMINAL LAW AND PROCEDURE 819 (1949), as "any house intended to be occupied as a residence." 331 Mich. at 502, 50 N.W.2d at 143. *See also* *State v. Long*, 243 N.C. 393, 90 S.E.2d 739 (1956) where the court stated: "An uninhabited house is not subject to common law arson." *Id.* at 396, 90 S.E.2d at 741.

49. *Ex parte Bramble*, 31 Cal. 2d 43, 187 P.2d 411 (1947) where the court, in discussing the development of arson, noted that other kinds of burnings should be classified as "malicious mischief." *Id.* at 49, 187 P.2d at 415.

50. *Lynch v. State*, 370 N.E.2d 401, 403 (Ind. App. 1977); *State v. Schenck*, 100 N.J. Super. 122, 125, 241 A.2d 267, 268 (1968). The *Schenck* court stated:

Under the statute and at common law there must be an actual burning of the dwelling house to constitute the crime of arson, although it is not necessary that the building be wholly consumed, or even seriously damaged. If any part, however small, is consumed it is sufficient The statute which is based on the common law . . . is not violated by the burning of personal property contained in the building if no part of the structure is damaged."

Id. at 126, 241 A.2d at 269 (citations omitted).

51. *Stanley v. State*, 180 Tenn. 70, 72, 171 S.W.2d 406, 407 (1943); *State v. Spino*, 61 Wash. 2d 246, 248, 377 P.2d 868, 869 (1963); *Kopczynski v. State*, 137 Wis. 358, 360, 118 N.W. 863, 864 (1908).

persons living in the house.⁵² Ownership, however, was a term of art in early arson cases. Since many home dwellers were tenant-possessors, but technically not "owners" of the property, strict common law principles of ownership afforded them no legal protection against arson. Thus, the common law, in an effort to shield tenants, developed a specific definition of "ownership" in tenant situations to mean "physical possession."⁵³ Tenants could therefore defend against arson even when they had no legal ownership of the property.⁵⁴ As a direct consequence, landlords not in actual possession of the property could not have recourse in a criminal action against an arsonist, even though the arsonist might be the tenant in possession. This facilitated use of the early common law definition of arson as a crime directed against another, while at the same time protecting the inhabitants.⁵⁵ In this manner, arson came to be classified as a crime against inhabitation.⁵⁷

The crime of arson, usually phrased in Blackstone's terminology, involved two elements: willfulness and malice.⁵⁸ Arson required a willful burning,⁵⁹ the intent being a general knowing and voluntary criminal purpose.⁶⁰ This intent could be inferred from the act,⁶¹ but the burning must have been established as non-accidental.⁶² If in-

52. See note 51 *supra*.

53. See, e.g., *Wimpling v. State*, 171 Md. 362, 189 A. 248 (1937), where the court distinguished the common law from a statute, reasoning that "the rule is that an indictment for arson should allege ownership in the one rightfully in possession of the property rather than in the real owner. . . ." *Id.* at 372, 189 A. at 253.

54. The court in *Kopczynski v. State*, 137 Wis. 358, 118 N.W. 863 (1908), took note of this anomaly:

[It is sufficient] to charge, as regards the property destroyed, that it is the dwelling house of the one who happens to be in possession thereof as a home . . . though title be in the person who sets the fire . . . a person may be charged with being guilty of arson by burning his own house, if it is at the time of the occurrence the home of his tenant. . . .

Id. at 361, 118 N.W. at 864.

55. A. CURTIS, *A TREATISE ON THE LAW OF ARSON* 5, 174-76 (1933).

56. *State v. Varsalona*, 309 S.W.2d 636, 639 (Mo. 1958); *State v. Arnold*, 285 N.C. 751, 754, 208 S.E.2d 646, 648 (1974); *State v. Long*, 243 N.C. 393, 396, 90 S.E.2d 739, 741 (1956).

57. *State v. Copeland*, 46 S.C. 13, 15, 23 S.E. 980, 981 (1896); *State v. Spino*, 61 Wash. 2d 246, 248, 377 P.2d 868, 869 (1963).

58. See note 45 *supra*.

59. *Love v. State*, 107 Fla. 376, 378, 144 So. 843, 843-44 (1932).

60. *State v. White*, 291 N.C. 118, 126, 230 S.E.2d 152, 157 (1976) (citing *State v. Arnold*, 285 N.C. 751, 208 S.E.2d 646 (1974)).

61. *Lipschitz v. People*, 25 Colo. 261, 268-69, 53 P. 1111, 1113 (1898).

62. *State v. Bergman*, 171 Wash. 67, 17 P.2d 604 (1932); see also *Riddings v. State*, 125 Ga. App. 334, 187 S.E.2d 555 (1972).

tent to burn was proven, malice could be inferred from the willful arson.⁶³ The cases do not develop the concept of malice as a separate element of the crime of arson. Rather, it is assumed that if the willful intent is established, malice is implicit. Motive was not an element of the crime of common law arson,⁶⁴ though some early cases are in agreement with more recent statutory formulations in holding that establishing motive might be valuable in finding arson.⁶⁵ Burning with the purpose of collecting money on insured property at common law was not classified as an infamous crime, presumably because it was not an act of "arson" to set fire to one's own home.⁶⁶

B. The Substantive Crime of Arson Fraud

The elements of common law arson, a willful and malicious burning⁶⁷ of a dwelling house⁶⁸ remain as the primary elements for a criminal offense of arson. Statutory and case law have extended the common law definition to include the criminal burning of virtually every type of property,⁶⁹ even burning with intent to defraud an insurance carrier.⁷⁰ Arson for purposes of fraud may be distinguished from other crimes of arson in several ways: the intent required is specific intent to defraud, the quality and substance of admissible evidence pertains specifically to insured situations, and evidence which relates directly to motive is more frequently admissible.

The *corpus delicti* of the crime of arson involves proof of two elements: (1) that the property in question was burned⁷¹ and (2)

63. *State v. Despain*, 152 Wash. 488, 278 P. 173 (1929).

64. *State v. Turner*, 58 Wash. 2d 159, 161 n.2, 361 P.2d 581, 582 n.2 (1961) (citing *Rex v. Solomon*, 168 Eng. Rep. 665 (1802)).

65. *State v. Volk*, 184 Wis. 286, 287-88, 199 N.W. 151, 151 (1924), where the court stated that defendant's motive should be viewed in combination with other factors such as the time of the fire and its incendiary character.

66. *Norville v. State*, 144 Tenn. 278, 230 S.W. 966 (1921) where the court noted that since at common law it was not an offense to burn one's own property "it made no difference that the property was insured." *Id.* at 280, 230 S.W. at 966.

67. *State v. Scott*, 118 Ariz. 383, 385, 576 P.2d 1383, 1385 (1978); *Borza v. State*, 25 Md. App. 391, 405, 335 A.2d 142, 151 (1975).

68. See note 46 *supra*.

69. For a discussion of the various types of property which may be destroyed by arson, see notes 146, 154, 155, 163, 200 *infra* and accompanying text.

70. See note 165 *infra*, which lists several state statutes pertaining to arson fraud.

71. "Burning" is a term of art in arson cases. In a recent Colorado case, *People v. LeFebvre*, 190 Colo. 307, 546 P.2d 952 (1976), the court stated:

[C]ourts of other jurisdictions are in general agreement that the terms "burn" or "set

that the burning was caused by an individual with criminal intent.⁷² The law presumes initially that all fires are accidental in origin.⁷³ The incendiary nature of a fire—that it was set with criminal intent—is therefore an element to be established.⁷⁴

The intent to commit arson may be characterized as a general unlawful intent⁷⁵ to damage or destroy⁷⁶ certain property by fire or explosion.⁷⁷ Arson to defraud, however, requires an additional specific intent, namely, that the property was burned for purposes of collecting insurance, and thereby defrauding an insurance carrier.⁷⁸

fire to" . . . require more than a mere scorching or discoloration. . . . "[B]urn" . . . is defined by the cases as ignition of or an alteration or destruction of the fiber or texture of the materials composing the "building" or "structure." However, it is not necessary under the cases that the entire "building" or "structure" be totally destroyed or materially injured as long as *any part* of the "building" or "structure," regardless of its size, is burned or set afire.

Id. at 311-12, 546 P.2d 955-56 (citations omitted) (emphasis added).

In *Lynch v. State*, 370 N.E.2d 401 (Ind. App. 1977), an Indiana court distinguished the terms "burning" and "set fire," holding that "the common law rigidly required an actual burning." *Id.* at 403. Whereas, by present statute all that was required was some change in the structure's composition. IND. CODE ANN. § 35-16-1-1 (Burns 1978). (For a more complete discussion of this issue, see the dissenting opinion in *Lynch*, 370 N.E.2d 401, 404 (White, J., dissenting)). See also *Washington v. State*, 290 Ala. 344, 345, 276 So. 2d 587, 589 (1973); *Borza v. State*, 25 Md. App. 391, 397, 335 A.2d 142, 146 (1975); *State v. Heard*, 105 N.J. Super. 172, 174, 251 A.2d 464, 465 (1969).

72. *State v. Scott*, 118 Ariz. 383, 385, 576 P.2d 1383, 1385 (1978); *People v. Mooney*, 127 Cal. 339, 340, 59 P. 761, 762 (1899); *R.C.S. v. State*, 546 S.W.2d 939 (Tex. Civ. App. 1977).

73. *State v. Bunton*, 453 S.W.2d 949, 952 (Mo. 1970); *Simmons v. Commonwealth*, 208 Va. 778, 781, 160 S.E.2d 569, 572 (1968); see also *People v. Bailey*, 42 Mich. App. 359, 361-62, 202 N.W.2d 557, 559 (1972). In *Bailey*, the court eliminated several accidental causes for the fire in question.

74. *People v. Beagle*, 6 Cal. 3d 441, 450, 492 P.2d 1, 6, 99 Cal. Rptr. 313, 318 (1972); *State v. Ferrara*, 320 S.W.2d 540, 544 (Mo. 1958); *People v. Lewis*, 275 N.Y. 33, 37-38, 9 N.E.2d 765, 767 (1937).

75. *State v. White*, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976). In *White*, the court stated that "specific intent is not an essential element of the crime of arson." *Id.* at 126, 229 S.E.2d at 157. See also *State v. Kinlaw*, 150 N.J. Super. 70, 374 A.2d 1233 (1977); *People v. Roderman*, 34 Misc. 2d 497, 229 N.Y.S.2d 209 (Sup. Ct. 1962).

76. *People v. Mooney*, 127 Cal. 339, 340, 59 P. 761, 762 (1899), where the court held that there could be no crime of arson unless the intent to destroy was present.

77. Most recent statutes include "explosions" within the means of destruction or damage performed by arsonists. See, e.g., N.Y. PENAL LAW § 150.10 (McKinney 1978). See also *People v. McCrawford*, 47 A.D. 2d 318, 366 N.Y.S.2d 424 (1st Dep't 1975) for a discussion of what constitutes an explosion under this statute.

78. *Norville v. State*, 144 Tenn. 278, 280-81, 230 S.W. 966, 967 (1921) (citing *McDonald v. People*, 47 Ill. 533 (1868)). See also *Latham v. State*, 88 Fla. 310, 102 So. 551 (1924); *People v. Lashkowitz*, 257 A.D. 518, 13 N.Y.S.2d 663 (3d Dep't 1939); *Roth v. State*, 44 Ohio App. 420, 186 N.E. 7 (1933).

Courts have continually stated that proving the crime of arson usually requires the use of circumstantial evidence.⁷⁹ In 1933, an Ohio court succinctly characterized the crime as follows: "Men do not commit the offense of arson in public. In practically every case of arson the incendiary origin must be determined from the surrounding circumstances."⁸⁰ Proof by circumstantial evidence, however, may not be less rigorous than proof of arson by direct evidence: both types of evidence must still result in proof of a defendant's guilt beyond a reasonable doubt.⁸¹ As a West Virginia court emphasized, "[if] the evidence be wholly circumstantial then, it must be of a character which excludes every reasonable hypothesis except the one on which the condition is based."⁸²

Motive, on the other hand, does not strictly bear on the commission of a crime, and is generally never an element of the offense.⁸³ However, motive may be a significant component of the corpus of circumstantial evidence⁸⁴ in two significant respects. Motive may help establish the *corpus delicti* by providing proof that the suspect

79. O'Brien v. State, 39 Ariz. 298, 303, 6 P.2d 421, 422 (1931); State v. Rincones, 209 Kan. 176, 178, 495 P.2d 1019, 1022 (1972); Russo v. State, 126 Ohio St. 114, 115-16, 184 N.E. 241, 241 (1933); Borza v. State, 25 Md. App. 391, 405, 335 A.2d 142, 150 (1975); People v. Bailey, 42 Mich. App. 359, 363, 202 N.W.2d 557, 559 (1972); State v. Lytle, 214 Minn. 171, 179, 7 N.W.2d 305, 309 (1943); Byrd v. State, 165 Miss. 30, 35, 143 So. 852, 852-53 (1932); People v. Moore, 18 A.D.2d 417, 418, 239 N.Y.S.2d 967, 969 (1st Dep't), *aff'd*, 13 N.Y.2d 1070, 195 N.E.2d 894, 246 N.Y.S.2d 216 (1963); Commonwealth v. Moore, 466 Pa. 510, 514, 353 A.2d 808, 810 (1976); State v. Despain, 152 Wash. 488, 491, 278 P. 173, 173-74 (1929); State v. Clay, 135 W.Va. 618, 625-26, 64 S.E.2d 117, 121 (1951).

80. Russo v. State, 126 Ohio St. 114, 115, 184 N.E. 241, 241 (1933). See also People v. Horowitz, 37 Mich. App. 151, 194 N.W.2d 375 (1971), where the court emphasized that "[i]t is the nature of the offense of arson that it is usually committed surreptitiously. Rare is the occasion when eyewitnesses will be available. By necessity proof will be circumstantial." *Id.* at 154, 194 N.W.2d at 376.

81. Stone v. Wingo, 416 F.2d 857, 866 (6th Cir. 1969).

82. State v. Clay, 135 W. Va. 618, 626, 64 S.E.2d 117, 121 (1951).

83. State v. Volk, 184 Wis. 286, 287, 199 N.W. 151, 151 (1924). The Volk court stated that "[m]otive alone will not sustain a conviction of arson." *Id.*

84. People v. Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972). The Beagle court stated that "motive, of course, is not an element of arson but the absence thereof may make proof of the essential elements less persuasive." *Id.* at 450, 492 P.2d at 6, 99 Cal. Rptr. at 318. See also People v. Martin, 59 Ill. App. 3d 785, 788, 376 N.E.2d 65, 68 (1978) (where evidence of motive was admissible); State v. Bergman, 171 Wash. 67, 71-72, 17 P.2d 604, 605-06 (1932). But see Commonwealth v. Nasuti, 180 Pa. Super. Ct. 279, 285, 119 A.2d 642, 644 (1956) (where proving motive was not essential); State v. Turner, 58 Wash. 2d 159, 161-62, 361 P.2d 581, 582 (1961) (where absence of motive was of no consequence). For a neutral position on this distinction, see State v. Janasky, 258 Wis. 182, 45 N.W.2d 78 (1950).

fire was of incendiary origin,⁸⁵ and it may assist in circumstantially identifying the defendant as the arsonist.⁸⁶ Where there is a possibility of collecting insurance on destroyed property, motive becomes particularly relevant.⁸⁷

The fact that the property damaged was insured against loss *per se* is not dispositive circumstantial evidence that arson was committed.⁸⁸ Many courts, however, have held that proof of insurance may facilitate finding whether an arson was committed.⁸⁹ If the fact of insurance is admitted into evidence, several additional factors concerning the insurance have been held relevant in establishing arson fraud. For example, over-insurance of property is often held to be an indicium of motive and of intent to defraud.⁹⁰ It has likewise been held that purchase of insurance a short time before a fire is a significant piece of circumstantial evidence.⁹¹ Insurance on the damaged

85. *People v. Beagle*, 6 Cal. 3d 441, 449-50, 492 P.2d 1, 6, 99 Cal. Rptr. 313, 317 (1972); *People v. Bailey*, 42 Mich. App. 359, 362-63, 202 N.W.2d 557, 559 (1972); *People v. Schatz*, 37 A.D.2d 584, 585, 322 N.Y.S.2d 802, 804 (1st Dep't 1971) (where court found defendants' motive to be contrary to commission of arson).

86. *People v. Martin*, 59 Ill. App. 3d 785, 788, 376 N.E.2d 65, 68 (1978).

87. *State v. Lytle*, 214 Minn. 171, 179, 7 N.W.2d 305, 309 (1943); *State v. Roth*, 117 Minn. 404, 408, 136 N.W. 12, 13 (1912); *Stanley v. State*, 180 Tenn. 70, 73, 171 S.W.2d 406, 407 (1943).

88. *People v. Angelopoulos*, 30 Cal. App.2d 588, 597, 86 P.2d 873, 878 (1939); *People v. Rosen*, 251 A.D. 584, 589, 297 N.Y.S. 877, 883 (3d Dep't), *aff'd*, 275 N.Y. 627, 11 N.E.2d 790 (1937). It should be noted that there is a line of cases that hold that the presence of insurance is not always relevant. *See, e.g., State v. Marasco*, 81 Utah 325, 17 P.2d 919 (1933). These cases, however, often apply in situations where the insurance was held by uninvolved third parties. *See Sawyer v. State*, 100 Fla. 1603, 132 So. 188 (1931); *People v. Nicolola*, 287 N.Y. 398, 39 N.E.2d 929 (1942).

89. *Miles v. State*, 160 Fla. 523, 525, 36 So. 2d 182, 183 (1948); *Russo v. State*, 126 Ohio St. 114, 116, 184 N.E. 241, 242 (1933).

90. *People v. Kessler*, 62 Cal. App. 2d 817, 145 P.2d 656 (1944) (insurance held was in amount twice that of original cost of property); *People v. Martin*, 59 Ill. App. 3d 785, 376 N.E.2d 65 (1978) (sale value of house was \$19,000 and insurance amounted to approximately \$36,000); *People v. Bloodgood*, 251 A.D. 593, 298 N.Y.S. 91 (3d Dep't 1937) (court found house, worth \$4,000 to \$6,000, overinsured by two policies in amounts of \$10,000 and \$7,000); *People v. Badger*, 217 A.D. 424, 216 N.Y.S. 723 (3d Dep't 1926) (court held that even slight overinsurance might be suspicious circumstance). *But see State v. Volk*, 184 Wis. 286, 287, 199 N.W. 151, 151 (1924) (evidence of overinsurance was held to be insufficient of itself to find defendant guilty). *See also Commonwealth v. Reynolds*, 338 Mass. 130, 138-39, 154 N.E.2d 130, 136 (1958) (intent to injure insurer may be found even if property is not overinsured).

91. *Hart v. State*, 144 Fla. 409, 198 So. 120 (1940) (defendant insured property and several days later solicited another to burn it); *Arnold v. State*, 500 S.W.2d 618 (Tenn. Crim. App. 1973) (defendant obtained \$15,000 fire insurance approximately two weeks before fire). *See also State v. Berkowitz*, 325 Mo. 519, 29 S.W.2d 150 (1930); *State v. Ciocca*, 125 Vt. 64, 209

property about to be cancelled may also become important in proving arson.⁹²

A finding that the defendant was in a precarious financial condition and stood only to benefit from the receipt of insurance proceeds is persuasive for establishing both motive and intent.⁹³ Generally, courts have not required that the defendant have actually collected on the policy,⁹⁴ nor even that a claim was filed.⁹⁵ A proof of loss which is, however, disproportionate to the actual value of the property destroyed, may be indicative of an intent to defraud.⁹⁶ That an insurance policy is not valid is no defense to proof of fraudulent purpose; it is sufficient that the defendant thought the policy to be in force.⁹⁷ Third-party insurance, held by someone other than the

A.2d 507 (1965). *But see* Baghrain v. MFA Mut. Ins. Co., 315 So. 2d 849 (La. App. 1975) (court noted that recent purchases of insurance were only necessitated by need of defendant-purchaser to secure interests of creditors).

92. *Chaconas v. United States*, 326 A.2d 792 (D.C. 1974) (insurance on property expired one day after fire). *See also* *State v. Lytle*, 214 Minn. 171, 7 N.W.2d 305 (1943); *State v. Ciocca*, 125 Vt. 64, 209 A.2d 507 (1965).

93. *Commonwealth v. Valcourt*, 333 Mass. 706, 133 N.E.2d 217 (1963). In *Valcourt*, the court ruled that "it is competent for the Commonwealth to show that the defendant was in financial straits." *Id.* at 718, 133 N.E.2d at 225.

Similarly, in *Chaconas*, the court held that even though defendant's bank accounts did not demonstrate financial problems, the facts that the liquor license on the restaurant burned had been suspended and the restaurant had generally poor credit status were dispositive. 326 A.2d 792 (D.C. 1974).

For other examples of indicia of financial problems, see *State v. Latino*, 25 Ariz. App. 66, 540 P.2d 1285 (1975); *State v. Baron*, 136 Me. 516, 8 A.2d 161 (1939) (court noted business in burned restaurant had been bad); *People v. Bailey*, 42 Mich. App. 359, 202 N.W.2d 557 (1972); *People v. Horowitz*, 37 Mich. App. 151, 194 N.W.2d 375 (1971); *State v. Smith*, 149 Wis. 63, 134 N.W. 1123 (1912).

94. *People v. Rabin*, 317 Mich. 654, 666, 27 N.W.2d 126, 131 (1947); *People v. Bloodgood*, 251 A.D. 593, 600, 298 N.Y.S. 91, 99 (3d Dep't 1937).

95. *Johns v. State*, 144 Fla. 256, 197 So. 791 (1940). The court held that the pertinent Florida statute did not require a defendant to have made a claim for insurance in order to find him guilty of arson fraud. *Id.* at 262, 197 So. at 794. *See also* *People v. Martin*, 59 Ill. App. 3d 785, 788, 376 N.E.2d 65, 68 (1978).

96. *State v. Ferrara*, 320 S.W.2d 540 (Mo. 1958). In *Ferrara*, the court found that the proof of loss filed was "grossly in excess of the value of the insured property destroyed in the fire." *Id.* at 543. *See also* *People v. Mix*, 149 Mich. 260, 112 N.W. 907 (1907), where such evidence was held to have "a bearing on defendant's motives." *Id.* at 262, 112 N.W. at 908. *But see* *State v. Marasco*, 81 Utah 325, 17 P.2d 919 (1933), where the proof of loss was commensurate with the value of the property destroyed. *Id.* at 333, 17 P.2d at 922. The court also held such circumstantial evidence insufficient to establish defendant's guilt. *Id.* at 334-35, 17 P.2d at 923.

97. *State v. Roth*, 117 Minn. 404, 407-08, 136 N.W. 12, 13 (1912) (validity of insurance contract was immaterial); *Norville v. State*, 144 Tenn. 278, 280, 230 S.W. 966, 966 (1921) (enforceability of insurance contract was not element of arson offense).

accused, is similarly not an absolute manifestation of innocence.⁹⁸

The varieties of circumstantial evidence admissible in general arson cases may also be admitted in arson fraud prosecutions, and are principally used to prove the threshold elements that the fire was of incendiary origin and that the defendant was the arsonist.

The presence of the defendant near or at the scene prior to, during, or after the fire may assist in proving the *corpus delicti*.⁹⁹ Similarly, statements by the defendant, either as confessions¹⁰⁰ or as admissions¹⁰¹ may be considered with other evidence to establish criminal agency.

98. See note 88 *supra*.

99. *Rausch v. State*, 159 So. 2d 926, 927 (Fla. 1964) (defendant was at scene fifteen minutes before fire was discovered); *People v. Bailey*, 42 Mich. App. 359, 362, 202 N.W.2d 557, 559 (1972) (defendant was in house alone for between ten and twenty minutes before fire); *State v. Despain*, 152 Wash. 488, 489, 278 P. 173, 173 (1929) (defendant was outside house during fire).

In a non-fraud arson case, *State v. Turner*, 58 Wash. 2d 159, 361 P.2d 581 (1961), the defendant's presence at the scene and his conversation with the fire department giving the exact location of the fire were held dispositive. *Id.* at 160-61, 361 P.2d at 582. See also *Watt v. State*, 193 Tenn. 257, 246 S.W.2d 4 (1952) (defendant was fully dressed at scene of fire which occurred late at night); *But see Hines v. State*, 34 Md. App. 612, 368 A.2d 509 (1977), where the court held that the time when the defendant left the scene did not constitute proof of the *corpus delicti*. *Id.* at 617, 368 A.2d at 512. See also *People v. Miller*, 55 Ill. App. 3d 421, 370 N.E.2d 1155 (1977).

In *R.C.S. v. State*, 546 S.W.2d 939 (Tex. Civ. App. 1977), the court diminished the importance of the defendant's presence at the scene of the fire. The *R.C.S.* court stated: "It is common knowledge that conflagrations attract spectators. . . . [defendant's presence] tells nothing concerning the origin of the fire, although it may form some basis for conclusions concerning human nature." *Id.* at 943.

100. See *Borza v. State*, 25 Md. App. 391, 335 A.2d 142 (1975), for a discussion of the use of confessions. In *Borza*, the court (citing *Bollinger v. State*, 208 Md. 298, 307, 117 A.2d 913, 917 (1955)), noted "the general truism that confession of crime alone will not sustain a conviction, and that ordinarily the confession should not be the first item of the state's proof." 25 Md. App. at 402, 335 A.2d at 149.

101. *People v. Martin*, 59 Ill. App. 3d 85, 376 N.E.2d 65 (1978) (defendants discussed among themselves burning house to collect insurance). In *State v. Korth*, 38 S.D. 539, 162 N.W. 144 (1917), the Supreme Court of South Dakota permitted evidence of a two-year old statement by the defendant that he would not build a new barn until his old barn had burned. The court noted "the length of time would impair the probative force of the statement, but would not render it inadmissible." *Id.* at 544, 162 N.W. at 145.

An interesting case where the court permitted an admission to be used was *State v. Turner*, 58 Wash. 2d 159, 361 P.2d 581 (1961). In that case, the Washington court admitted evidence that the defendant placed a telephone call to the fire department, precisely identifying the location of the fire in the building, as he was on his way out. As the court noted, the evidence was probative even absent a showing of motive because "only the appellant knew it." *Id.* at 161, 361 P.2d at 582. See also *People v. Ales*, 247 N.Y. 351, 355, 160 N.E. 395, 221 N.Y.S. 847 (1928) (court permitted admission of statement by defendant to fire marshal because it found such statement voluntary).

Expert opinion by fire and insurance investigators is admissible to demonstrate the non-accidental nature of the burning.¹⁰² Such testimony is restricted, however, to testimony on the technical characteristics of the suspicious fire.¹⁰³

The presence of inflammable materials, such as gas, kerosene, newspapers, and containers, are especially persuasive on the issue of intentional burning.¹⁰⁴ Specific facts concerning the condition of the building, such as the condition of the electric wiring and fuses, may also be significant evidence.¹⁰⁵

One kind of circumstantial evidence which is particularly persuasive in arson fraud cases is proof that the defendant removed goods, stock, and other items of personal property from the structure burned during the period of time immediately preceding the fire.¹⁰⁶ Such evidence tends to support a motive and to reinforce the

102. *Commonwealth v. Nasuti*, 180 Pa. Super. 279, 119 A.2d 642 (1956). In admitting expert opinion evidence given by a Fire Captain or Fire Marshal, the court noted that "necessity is the ground of admissibility of such evidence." *Id.* at 282, 119 A.2d at 643. The court further commented, however, that other courts are "hopelessly in conflict" concerning the admissibility of such testimony. *Id.*

103. *Wimpling v. State*, 171 Md. 362, 376, 189 A. 248, 255 (1936); *State v. Lytle*, 214 Minn. 171, 179, 7 N.W.2d 305, 309 (1943). *But see Harris v. Commonwealth*, 342 S.W.2d 535 (Ky. 1960), where the court held opinion evidence as to the incendiary nature of the fire inadmissible. *Id.* at 541.

104. *State v. Baron*, 136 Me. 516, 8 A.2d 161 (1939) (oil-saturated rags, coating of oil on floor found); *People v. Mix*, 149 Mich. 260, 112 N.W. 907 (1907) (defendant placed jug of kerosene in house); *State v. Ferrara*, 320 S.W.2d 540 (Mo. 1958) (testimony concerning detection of odor of gasoline); *State v. Berkowitz*, 325 Mo. 519, 29 S.W.2d 150 (1930) (odor of gasoline and presence of two glass jars with gas-like substance); *People v. Moore*, 18 A.D. 2d 417, 239 N.Y.S. 2d 967 (3d Dep't 1963) (towel saturated with gas found over hot plate); *Russo v. State*, 126 Ohio St. 114, 184 N.E. 241 (1933) (fireman found gasoline-soaked rags); *Arnold v. State*, 500 S.W.2d 618 (Tenn. Crim. App. 1973) (gas-soaked rug at scene); *State v. Marasco*, 81 Utah 325, 17 P.2d 919 (1933) (defendant had two ten gallon cans of gas in the car which was located next to the burning building); *State v. Ciocca*, 125 Vt. 64, 209 A.2d 507 (1965) (suspects apprehended with newspapers and two gallon jugs).

Compare State v. Latino, 25 Ariz. App. 66, 540 P.2d 1285 (1975) (five-gallon cans found at the scene of two fires) with *People v. Ice*, 265 A.D. 46, 38 N.Y.S.2d 32 (1st Dep't 1942) (where presence of gas can on second floor of burned building was held not dispositive).

105. *Baghrain v. MFA Mut. Ins. Co.*, 315 So. 2d 849, 852 (La. App. 1975); *Borza v. State*, 25 Md. App. 391, 393, 335 A.2d 142, 144 (1975).

106. *See, e.g., People v. Martin*, 59 Ill. App. 3d 785, 376 N.E.2d 65 (1978) (defendant removed personal belongings from house prior to fire); *Gipson v. State*, 162 Miss. 480, 139 So. 868 (1932) (evidence that defendant had concealed dashboard and missing parts of auto which he burned); *State v. Berkowitz*, 325 Mo. 519, 29 S.W.2d 150 (1930) (defendant seen putting "bundles" containing merchandise from his store into his car); *Commonwealth v. Nasuti*, 180 Pa. Super. 279, 119 A.2d 642 (1956) (no supplies or food were found in restaurant which burned); *Watt v. State*, 193 Tenn. 257, 246 S.W.2d 4 (1952) (defendant removed

element of criminal intent. Finally, the fact that a defendant sustained physical injuries as a direct result of the fire may be admissible as evidence suggesting his or her culpability.¹⁰⁷

Accessory liability has been eliminated for both general and fraud arson. One who assists in the commission of an arson is presently punishable as a principal, and deemed to have the requisite intent.¹⁰⁸ Hypothetically, at least, such principal liability could be difficult to sustain in some cases of arson fraud; it is conceivable that a person who actually fires a building or other property for the benefit of another person, may not do so with the knowledge that such destruction is for the purpose of collecting insurance money. Most cases of this kind which have been prosecuted, however, involve knowing agents.¹⁰⁹ Evidence which is admissible on this question is usually circumstantial evidence in that a promise was made for payment from insurance proceeds,¹¹⁰ or that actual payment was from such funds.¹¹¹

III. Statutory Formulations of The Crime of Arson

A. Model Legislation

Three major pieces of model arson legislation have been written in the last thirty years: the Model Arson Law,¹¹² the Model Penal

furniture from house which was burned one week later); *Gamble v. State*, 159 Tenn. 446, 19 S.W.2d 279 (1929) (after fire, house found stripped of valuable furnishings); *State v. Smith*, 149 Wis. 63, 134 N.W. 1123 (1912) (defendant removed most of furniture from house immediately before mortgage was foreclosed).

107. *State v. Sotteriou*, 132 N.J. Super. 403, 334 A.2d 47 (1975), where the defendant admitted himself to the hospital claiming that he had been attacked, injured and kidnapped by two unknown assailants. It was proved, instead, that the injuries were sustained in the arson attempt. *Id.* at 408, 334 A.2d at 49.

108. *State v. Ciocca*, 125 Vt. 64, 209 A.2d 507 (1965). The *Ciocca* court stated that "[t]he fact that those employed did not accomplish [arson] does not relieve the respondent of his guilt." *Id.* at 73, 209 A.2d at 514. See also *State v. Tsiolis*, 202 Minn. 117, 277 N.W. 409 (1938). See the following cases as examples of conspiracies to commit arson: *State v. Colton*, 174 Conn. 135, 384 A.2d 343 (1977); *State v. Daugherty*, 221 Kan. 612, 562 P.2d 42 (1977); *State v. Theodore*, 392 A.2d 122 (N.H. 1978).

109. See, e.g., *State v. Roth*, 117 Minn. 404, 407, 136 N.W. 12, 13 (1912). But see *People v. Rabin*, 317 Mich. 654, 661, 27 N.W.2d 126, 129 (1947). The *Rabin* court found that the evidence was insufficient on the question of whether one agent knew of the existence of the insurance.

110. See, e.g., *State v. Ciocca*, 125 Vt. 64, 209 A.2d 507 (1965) (where defendant hired another to burn building promising payment from expected insurance proceeds).

111. See, e.g., *State v. Ettenberg*, 145 Minn. 39, 176 N.W. 171 (1920).

112. NATIONAL BOARD OF FIRE UNDERWRITERS, SUGGESTIONS FOR ARSON INVESTIGATORS 45-

Code Section 220, "Arson and Related Offenses,"¹¹³ and the Model Arson Penal Law.¹¹⁴ Each model statute represents an effort at re-classifying and consolidating previous disparate common law and statutory criminal provisions.¹¹⁵

The Model Arson Law, written by the National Board of Fire Underwriters, was the first effort at creating a comprehensive statute which would deal with the various kinds of criminal burnings. Although it was adopted by several states,¹¹⁶ it has been widely criticized.¹¹⁷

The Model Arson Law retains the common law concern for dwelling houses and contiguous buildings, while dispensing with the ownership requirements.¹¹⁸ For example, first degree arson is defined as "willfully and maliciously . . . burning . . . any dwelling house . . . or any kitchen, shop, barn, stable or other outhouse. . . ."¹¹⁹ Similar burning of other non-dwelling (and therefore potentially

46 (1956), reprinted in ALI, MODEL PENAL CODE § 220.1, Appendix to Comment (Tent. Draft No. 11, 1960) [hereinafter cited as MODEL ARSON LAW].

113. MODEL PENAL CODE, *supra* note 112, § 220.1 (Tent. Draft No. 11, 1960).

114. Alliance of American Insurers, American Insurance Association, National Association of Independent Insurers, "Model Arson Penal Law, Offenses Against Property, Article 100, Arson, Criminal Mischief and Other Property Destruction" (Jan. 1, 1978) (presented with other materials at the Annual Meeting of the American Bar Association on August 9, 1978) [hereinafter cited as MODEL ARSON PENAL LAW].

115. The discussion in this Comment will be confined to model legislation and will not include a discussion of actual statutes upon which many states may have based their own arson legislation. See, e.g., the New York arson statute, N.Y. PENAL LAW § 150.00 (McKinney 1978), from which several other states modeled their arson legislation.

116. See, e.g., the former Montana statute, MONT. REV. CODES ANN. § 94-501 (1977), and the previous Minnesota arson provisions, MINN. STAT. ANN. § 609.56 (advisory committee comment) (West Supp. 1978), which stated that the statute was based on the Model Arson Law. For an early commentary discussing the advantages of the Modern Arson Law, see Braun, *Legal Aspects of Arson*, 43 J. CRIM L., C. & P.S. 53 (1952).

117. MODEL PENAL CODE § 220.1, Comment at 35-36. The American Law Institute stated:

It is subject to grave criticism on the ground that the system of classifying offenses is arbitrary from the penological point of view. For example, the burning of an empty, isolated dwelling may lead to a 20 year sentence, while setting fire to a crowded church, theater or jail is a lesser offense. The destruction of a large dam, factory, or public service facility is regarded less seriously than destruction of a private garage on the grounds of a suburban home. Moreover, it makes little sense to treat the burning of miscellaneous personal property, whether out of malice or to defraud insurers, as a specific category of crime apart from risks associated with burning.

Id. at 35.

118. MODEL ARSON LAW, *supra* note 112, at 50-51. The first and second degree offenses, for example, provide in their definition that the named property is protected "whether the property of himself or of another. . . ." *Id.*

119. *Id.* at 50.

uninhabited) buildings is classified as a lesser offense.¹²⁰ Separate provision is made for arson to defraud an insurer, whether it be burning of real or personal property.¹²¹ Arson to defraud, however, is classified as an offense of only the fourth degree,¹²² thus allowing for the potential anomaly of an arson of an insured inhabited building, which could be a first degree offense, being prosecuted as an arson to defraud, a lesser offense. Further evidence that the Model Arson Law considers this type of arson to be less serious is found in the fact that the only other classification similar in degree to fraud arson is attempt arson.¹²³ Accessories to an arson are liable as principals under this model.¹²⁴

The American Law Institute's Model Penal Code, in article 220, provides a similarly comprehensive approach to statutory arson.¹²⁵ The Code makes only two categorical distinctions between felony arsons: the first, "arson," is classified as a second degree felony,¹²⁶ and the second, "reckless burning or exploding," is a third degree felony.¹²⁷ Other types of property destruction by fire, chiefly resulting from negligence, are classified as misdemeanors.¹²⁸

120. *Id.* at 50-51. The second degree arson statute reads:

Any person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, not included or described in the preceding section, shall be guilty of Arson in the second degree, and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than ten years.

Id. The penalty for a conviction of Arson in the first degree is not less than two nor more than twenty years. *Id.* at 50.

121. *Id.* at 51. ("Burning to Defraud Insurer," included within fourth degree section).

122. *Id.* This degree of arson carries a penalty of from one to five years.

123. *Id.*

124. *See, e.g.,* the first and second degree statutes which name as potential principals to the crimes anyone who "aids, counsels or procures the burning" of the classified structures. *Id.* at 50-51.

125. *See* note 113 *supra*. The authors of the *Model Penal Code*, in their official Comment to § 220.1 explained their approach:

We grade the offense partly according to the kind of property destroyed or imperilled and partly according to danger to the person. . . . [W]e define a single class of more serious burnings, viz. of a "building or occupied structure." Within this broad category, the treatment agencies can do better than the legislature in proportioning punishment to the actor's demonstrated indifference to human life and other variables in his personality and behavior.

MODEL PENAL CODE § 220.1, Comment at 37.

126. *Id.* § 220.1(1).

127. *Id.* § 220.1(2).

128. *Id.* § 220.1(3).

Arson, the second degree felony, is defined in more general terms than in previous legislation. Property is not specified, except with reference to the degree of damage: "arson" is the destruction of a "building or occupied structure"¹²⁹ or the damage or destruction of any property if the crime is arson fraud.¹³⁰ Danger to human lives is an implicit element of section 220.1(1).¹³¹

The Model Penal Code provisions covering arson fraud are qualitatively different from the Model Arson Law. Under the Code, arson of any property with intent to collect insurance is punishable as a second degree felony¹³² and therefore is commensurate in seriousness with arson of occupied dwellings. In fact, as mentioned, the only Model Penal Code arson-related felony of a lesser degree is the offense of reckless burning.¹³³ This section provides for criminal sanction if an otherwise permissible burning or exploding endangers either life or property. Further, unlike the Model Arson Law, the Model Penal Code does not set a lower value limitation on the burning of personal property.¹³⁴ The Model Penal Code provisions have not been widely accepted directly, but several states have directly, but several states have fashioned their arson statutes on the principles expressed in Article 220.¹³⁵

129. *Id.* § 220.1(1)(a). See also *id.* § 220.1(4), the definitional section, which defines "occupied structure" to include "a ship, trailer, sleeping car, or other vehicle adapted for overnight accommodation of persons or for carrying on business therein, whether or not a person is actually present." *Id.* (emphasis added).

130. *Id.* § 220.1(1)(b).

131. See the definition set forth at note 129 *supra*. See also MODEL PENAL CODE § 220.1(2)(a).

132. *Id.* § 220.1(1)(b). As the authors noted in the Comment to this provision:

Arson for insurance is perhaps the most frequent and dangerous behavior in the field. Often the property involved is a stock of merchandise which would not be a building or structure within clause (a) of subsection (1), and any burning of the structure incidental to the destruction of the goods would not be purposeful as required by clause (a). Accordingly, clause (b) makes it a felony of the second degree to burn one's own property with purpose to collect insurance. The last sentence of clause (b) serves as a reminder to prosecutors and judges that the heavy penalties of arson are not intended for behavior which, while objectionable as part of a fraudulent scheme, has no element of general or personal danger.

Id. § 220.1, Comment at 40-41.

See § 220.1(1)(b) which includes the affirmative defense provision available if the individual "did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury."

133. *Id.* § 220.1(2).

134. Compare *id.* with MODEL ARSON LAW, *supra* note 112, at 51. A third degree offense under the *Modern Arson Law* is limited to burning property worth \$25 or more.

135. The commentaries to the following state arson statutes have cited the MODEL PENAL

Recently, the Alliance of American Insurers, the American Insurance Association and the National Association of Independent Insurers proposed a Model Arson Penal Law, entitled "Arson, Criminal Mischief and Other Property Destruction."¹³⁶ While it is quite similar in its provisions to the Model Penal Code, it may be distinguished on several points.

First, the Model Arson Penal Law includes a first degree felony offense of "aggravated arson."¹³⁷ This provision is similar to the Model Penal Code section 220.1(1)(a), but makes specific provision for resulting death or bodily injury.¹³⁸ The second¹³⁹ and third¹⁴⁰ degree offenses resemble the Code provisions as well, but include unoccupied structures.¹⁴¹ Section 100.1(2)(b) of the Model Arson Penal Law provides for arson of any property for purposes of defrauding an insurer. Unlike the Model Penal Code, however, the statute allows for a property valuation to be written in.¹⁴² This open valuation provision is also included in the section dealing with reckless burning.¹⁴³ Finally, the Model Arson Penal Law has added to each of its three felony sections provisions which include accessorial liability.¹⁴⁴

B. State Statute Survey

Codification of arson, from the common law offense into a statutory crime, has by no means been uniformly accomplished. Some state codes continue to make the common law-based distinctions between dwelling houses and other types of buildings¹⁴⁵ and among

CODE as authority: ARK. STAT. ANN. § 41-1902 (1977); HAW. REV. STAT. §§ 708-820 to 823 (1976); ILL. REV. STAT. ch. 38, § 20-1 (1977); MISS. CODE ANN. §§ 14.040-.050 (1973); N.J. STAT. ANN. § 2C:17-1 (West 1978). Other states cite to these statutes: ME. REV. STAT. tit. 17-A, § 803 (citing to MISS. CODE ANN. §§ 14.040-.050 (1973), Commentary) and KAN. STAT. § 21-3718 (1974) (citing ILL. REV. STAT. ch. 38, § 20-1, Comment).

136. See note 114 *supra*.

137. MODEL ARSON PENAL LAW § 100.1(1).

138. *Id.* § 100.1(1)(b).

139. *Id.* § 100.1(2).

140. *Id.* § 100.1(3).

141. The language used in *id.* § 100.1(2)(a) is "a building or unoccupied structure" while *id.* § 100.1(3)(b) simply states "a building or structure . . . whether occupied or not."

142. *Id.* § 100.1(2)(b) states "destroying or damaging any real or any personal property having a value of \$____ or more, whether his own or another's, to collect insurance for such loss."

143. *Id.* § 100.1(3)(c).

144. *Id.* §§ 100.1(1)-(3). Representative language for each section is "aids, counsels or procures the setting of a fire or causing of an explosion." *Id.* § 100.1(2).

145. See, e.g., S.C. CODE § 16-11-110 (1977) defining arson of dwelling houses, whereas

several kinds of personal property.¹⁴⁶ Some statutes still differentiate between occupancy and vacancy.¹⁴⁷ The common law concern with ownership-possession has been generally dispensed with,¹⁴⁸ eliminating the difficulties mentioned above. Arson fraud, however, remains a separate statute in many states.¹⁴⁹ In these states it is often a comparatively less serious offense.¹⁵⁰

As a heuristic device, it is useful for purposes of this Comment to consider arson statutes with respect to their fitting into one of four categories: (1) statutes which on their face derive from the common law or are based on a form similar to the Model Arson Law, and therefore have separate statutory provisions for the crime of arson to defraud an insurer; (2) statutes which are in format based upon the Model Penal Code, including arson fraud as one aspect of the general offense of arson, and which may also have an additional degree of offense for aggravated arson, an element of the broad offense of arson; (3) statutes derived from the Model Penal Code in principle, but which maintain separate arson fraud provisions; and (4) statutes which may be similar, either in theory or form to the preceding, but which are substantially distinct.

1. Common Law and Model Arson Law Derivatives

North Carolina is the only state which maintains the common law to govern cases involving arson of dwellings.¹⁵¹ The codification or

id. § 16-11-120 covers burning of other kinds of property. See also R.I. GEN. LAWS §§ 11-4-2 to 4-3 (1957).

146. See, e.g., statutes from the following states which distinguish some of the more esoteric criminal burnings according to specific kinds of property damaged: MD. ANN. CODE art. 27, § 10A (1957) ("Burning Cross or Other Religious Symbol"); VT. STAT. ANN. tit. 13, § 507 (1974) ("Burning Forests"); WYO. STAT. § 6-126 (1959) ("Burning Woods or Prairie Belonging to Another").

147. See, e.g., VA. CODE § 18.2-77 (Supp. 1978) which qualifies the designated structures with the words "in which persons usually dwell" and states a lesser offense for burning unoccupied buildings. *But see* the statutes cited in note 159 *infra*.

148. For example, many statutes now include a phrase similar to one in the *Model Arson Law*, "whether the property of himself or another." See, e.g., CAL. PENAL CODE § 447a (West Supp. 1978); ME. REV. STAT. tit. 17-A, § 801 (1977); NEV. REV. STAT. § 205.010 (1973); 18 PA. CONS. STAT. ANN. § 3301 (Purdon 1973); VA. CODE § 18-2-77 (Supp. 1978); WYO. STAT. § 6-121 (1959).

149. See, e.g., WYO. STAT. § 6-125 (1959) ("Arson to Defraud Insurer").

150. Arson fraud carries a penalty of one to five years, *id.*, whereas arson of dwellings carries a penalty of two to twenty years. *Id.* § 6-121.

151. N.C. GEN. STAT. § 14-58, Commentary (1969). *But see* the Rhode Island statutes which presumably retain arson at common law: R.I. GEN. LAWS § 11-4-1 (1957) defines the penalty for common law arson, while *id.* § 11-4-2 (1957) technically covers a non-common law

arson-related offenses involves those crimes not contemplated at common law. For example, there are North Carolina statutes which prescribe punishment for arson,¹⁵² attempt,¹⁵³ arson of non-dwellings,¹⁵⁴ of specific types of property,¹⁵⁵ and two statutes relating to arson to defraud.¹⁵⁶

A majority of arson statutes in force at present resemble the proposed Model Arson Law.¹⁵⁷ Although the commentary to some of these statutes makes explicit reference to the Model Arson Law,¹⁵⁸ it can be said that many are common law-derivative. This is most easily demonstrated by a multiplicity of property-specific arson statutes.

The common law distinctions are generally retained in a primary arson statute which represents the most serious offense. These derivative chapters will often have a highest-degree offense which codifies the common law. This statute will concern burning of dwelling houses and outbuildings reasonably expected to be located close enough to the dwelling to be potentially endangered by fire.¹⁵⁹ Fol-

arson ("the burning whereof shall not be arson at common law"). By definition, however, the latter statute provides for the traditional elements of the offense: intentional and malicious burning of "any dwelling . . . or other outhouse." *Id.* For these reasons, the author considers the Rhode Island statutes to be common law derivative and distinguishable from the North Carolina provisions where the common law crime is implicit.

152. N.C. GEN. STAT. § 14-58 (1969).

153. *Id.* §§ 14-61, -67.

154. *Id.* § 14-60 (burning of schools, colleges); *id.* § 14-62 (churches, offices, mills, shops, granaries); *id.* § 14-61 (buildings under construction); *id.* § 14-64 (ginhouses and tobacco houses).

155. *Id.* § 14-66 (covering burning of personal property); *id.* § 14-63 (covering burning of boats and barges).

156. See notes 165 & 171 *infra* and accompanying text.

157. The author identified 21 states having statutory schemes similar to the *Model Arson Law* or to a general common law perspective. They include: CAL. PENAL CODE § 447a (West Supp. 1978); GA. CODE ANN. § 26-14 (1978); IDAHO CODE § 8 (1979); MD. PENAL CODE ANN. § 6-11 (1976); MASS. GEN. LAWS ANN. ch. 266 (West Supp. 1978); MICH. COMP. LAWS ANN. ch. x (1978); MINN. STAT. ANN. § 609.56 *et seq.* (West Supp. 1978); MISS. CODE ANN. §§ 97-17-1, -17-11 (1973); NEV. REV. STAT. art. 15 (1973); N.C. GEN. STAT. art. 15 (1969); OKLA. STAT. ANN. tit. 21, ch. 56 (West Supp. 1978-79); R.I. GEN. LAWS tit. 11, ch. 4 (1957); S.C. CODE § 16-11-110 (1977); S.D. COMPILED LAWS ANN. ch. 22-33 (1978); TENN. CODE ANN. tit. 39, ch. 5 (1975); VT. STAT. ANN. tit. 13, ch. 11 (1974); VA. CODE § 18.2-77 to -.2-87.1 (Supp. 1978); WASH. REV. CODE ANN. § 9A.48.020, .48.030; W. VA. CODE § 61-3-1 to 3-5 (1977); WIS. STAT. ANN. tit. xlv, ch. 943 (West 1977); WYO. STAT. 6-121 to -128 (1959).

158. See, e.g., MINN. STAT. ANN. § 609.56, Advisory Committee Comment at 521 (West 1978) (this statute was substantively repealed and replaced by MINN. STAT. ANN. § 609.561 (West Supp. 1978)).

159. The usual form is "any dwelling . . . or any kitchen, shop, barn, stable, or other

lowing the form of the Model Arson Law, the statutes generally dispense with any occupancy requirement,¹⁶⁰ but the principle of placing a high value on potentially occupiable structures remains.¹⁶¹

The second statute in derivative groupings generally covers the crime of burning buildings and other structures not used as dwellings.¹⁶² These provisions are followed by one or several lesser offenses involving the burning of certain personal property.¹⁶³ Attempt statutes are then included.¹⁶⁴

States which by statute build upon a common law concept of

outhouse. . . ." See, e.g., CAL. PENAL CODE § 447a (West Supp. 1978) (which adds "trailer coaches"); IDAHO CODE § 18-801 (1978); MD. PENAL CODE ANN. § 7 (1976); OKLA. STAT. ANN. tit. 21, § 1401 (West Supp. 1978-79); S.C. CODE § 16-11-120 (1977); VT. STAT. ANN. tit. 13, § 502 (1974); W. VA. CODE § 61-3-1 (1977); WYO. STAT. § 6-121 (1959) (which adds standing timber to appurtenant fixtures).

160. See, e.g., VT. ANN. STAT. tit. 13, § 502 (1974); W. VA. CODE § 61-3-1 (1977).

161. Some states define "dwelling" at length. For example, GA. CODE ANN. § 1401(b) (1978) states "any building, vehicle, railroad car, watercraft or other structure . . . if such structure is designed for use as a dwelling." MASS. GEN. LAWS ANN. ch. 266, § 1 (West Supp. 1978) states "dwelling house shall mean and include all buildings used as dwellings such as apartment houses, tenement houses, hotel, boarding houses, dormitories, hospitals, institutions, sanatoria or other buildings where persons are domiciled." VA. CODE § 18.2-77 (Supp. 1978) states "any dwelling house or other house trailer . . . any hotel, hospital or asylum, or other house in which persons usually dwell or lodge, or any railroad car, boat, or vessel, or river craft in which persons usually dwell or lodge, or any jail or prison." *But see* MINN. STAT. ANN. § 609.562 (West Supp. 1978) which simply states "any building that is used as a dwelling at the time the act is committed.

162. See, e.g., CAL. PENAL CODE § 448a (West Supp. 1978); GA. CODE ANN. § 26-1402 (1978); IDAHO CODE § 18-802 (1979); MICH. COMP. LAWS ANN. § 750.73 (1968); MD. PENAL CODE ANN. § 7 (1976); S.C. CODE § 16-11-120 (1977); TENN. CODE ANN. § 39-301 (1975); VT. STAT. ANN. tit. 13, § 503 (1974); VA. CODE § 18.2-79 (1975) (which covers arson of "any meeting house, courthouse, townhouse, college, academy, schoolhouse, or other building erected for public use . . . or any banking house, warehouse, storehouse, manufactory, mill or other house . . . not usually occupied by persons lodging therein") and VA. CODE § 18.2-80 (1975) (covering "any building, bridge, lock, dam, or other structure"); WYO. STAT. § 6-121 (1959); MODEL ARSON LAW, *supra* note 112, at 50.

163. See, e.g., CAL. PENAL CODE § 449a (West Supp. 1978); GA. CODE ANN. § 26-14 (1978); IDAHO CODE § 18-803 (1979); MD. ANN. CODE art. 27, § 8 (1976); MICH. COMP. LAWS ANN. § 750.74 (1968); MINN. STAT. ANN. § 609.563 (West Supp. 1978); MISS. CODE ANN. § 97-17-7 (1973); NEV. REV. STAT. § 205.020 (1973); OKLA. STAT. ANN. tit. 21, § 1402(a) (West Supp. 1978-79); R.I. GEN. LAWS § 11-4-4 (1957); S.C. CODE § 16-11-140 (1977); VT. STAT. ANN. tit. 13, § 504 (1974); W. VA. CODE § 61-3-3 (1977).

164. MD. ANN. CODE art. 27, § 10 (1976); MASS. GEN. LAWS ANN. ch. 266, § 5A (West Supp. 1978); MISS. CODE ANN. § 97-17-9 (1973); NEV. REV. STAT. § 205.025 (1973); S.C. CODE § 16-11-190 (1977); VT. STAT. ANN. tit. 13, § 505 (1974). *But see* VA. CODE § 18.2-77 (Supp. 1978) which includes accessories as principals in the offense. See also IDAHO CODE § 18-801 (1979); OKLA. STAT. ANN. tit. 21, § 1401 (West Supp. 1978-79); R.I. GEN. LAWS § 11-4-2 (1957); W. VA. CODE § 61-3-1 (1977); WYO. STAT. § 6-121 (1959).

arson, augmenting their codes to cover a variety of specific possible burnings, significantly create a separate offense of arson for purposes of defrauding an insurer.¹⁶⁵ It is apparent from examining many of these statutes that arson fraud, at least at the time of codification, was not interpreted as a crime equal in severity to arson committed either wantonly or for revenge.¹⁶⁶ Three states, Maryland,¹⁶⁷ Rhode Island,¹⁶⁸ and South Carolina¹⁶⁹ have penal code provisions for arson fraud of personal property only. Virginia¹⁷⁰ and North Carolina¹⁷¹ have separate statutes for such arson of either real or personal property. The remaining derivative codes provide for arson fraud of both real and personal property.¹⁷² Some states make a further distinction: the arson must have been committed with intent to defraud an insurance carrier who has insured the property against fire loss.¹⁷³

2. Model Penal Code Style Statutes

Several states have rewritten their arson statutes to conform, in greater or lesser degree, with the proposed Model Penal Code arson section 220.1.¹⁷⁴ These statutes share the features which distinguish

165. See, e.g., CAL. PENAL CODE § 450a (West Supp. 1978); MD. PENAL CODE ANN. § 9 (1976); MASS. GEN. LAWS ANN. ch. 266, § 10 (1968); MICH. COMP. LAWS ANN. § 750.75 (1968); MINN. STAT. ANN. § 609.611 (West Supp. 1978); MISS. CODE ANN. § 97-17-11 (1973); NEV. REV. STAT. § 205.030 (1973); N.C. GEN. STAT. §§ 14-65, -66 (1969); OKLA. STAT. ANN. tit. 21, § 1403(b) (West Supp. 1978-79); R.I. GEN. LAWS § 11-4-5 (1957); S.C. CODE § 16-11-130 (1977); TENN. CODE ANN. § 39-506 (1975); VT. STAT. ANN. tit. 13, § 506 (1974); W. VA. CODE § 61-3-5 (1977); WYO. STAT. § 6-125 (1959). Of the common law derivative statutes, neither Idaho nor Washington provides for arson fraud. *But see* WASH. REV. CODE ANN. § 9A-56.010(4) (1977) ("Deception") which would probably cover the offense.

166. VT. STAT. ANN. tit. 13, § 502 (1974) provides a penalty of two to ten years for first degree arson, while *id.* § 506 provides a penalty of from one to five years for arson to defraud.

167. MD. PENAL CODE ANN. § 9 (1976).

168. R.I. GEN. LAWS § 11-4-5 (1957).

169. S.C. CODE § 16-11-130 (1957).

170. VA. CODE § 18.2-80 (1975) applies to buildings, while *id.* § 18.2-81 applies to personal property.

171. N.C. GEN. STAT. § 14-65 (1969) covers arson fraud of dwelling houses, while *id.* § 14-66 includes arson fraud of personal property.

172. See, e.g., MISS. CODE ANN. § 97-17-11 (1973) which covers arson fraud of "any building, structure or personal property, of whatsoever class or character."

173. See, e.g., MASS. GEN. LAWS ANN. ch. 266, § 10 (1968); MICH. COMP. LAWS ANN. § 750.75 (1968); MISS. CODE ANN. § 97-17-11 (1973); NEV. REV. STAT. § 205.030 (1973); OKLA. STAT. ANN. tit. 21, § 1403(B) (West Supp. 1978-79); TENN. CODE ANN. § 39-506 (1975); VT. STAT. ANN. tit. 13, § 506 (1974); WYO. STAT. § 6-125 (1959).

174. The statutes included in this section of the article have not necessarily been attributed to the Model Penal Code formulations. It is the author's assumption that they are Model

the Code from previous model legislation.

The categorization of different offenses based on possible types of property is eliminated, generally in favor of two broad classifications: "building or occupied structure",¹⁷⁵ or simply "property."¹⁷⁶ The degree scheme is based on a synthesization of those factors which had previously served to segregate criminal burnings into a multiplicity of degrees of seriousness: namely, the general property type, the potential harm, and in a few cases, the value of the property damaged.¹⁷⁷ Most of these statutes retain an emphasis on endangering life as an indicium of severity. Some statutes, consistent with the Model Penal Code formula, incorporate language covering endangerment of persons or property, resultant injury and recklessness.¹⁷⁸ Many statutes, however, go beyond the Code proposals, creating a specific first degree offense of aggravated arson which addresses that form of arson which does or could result in injury to persons.¹⁷⁹ In one sense, such aggravated arson statutes reaffirm the common law value placed on burning inhabited structures.¹⁸⁰ But inclusion of such offenses within arson codes should not be interpreted as a move away from the Model Penal Code provisions. These state statutes maintain the intention of creating an inclusive offense of arson, generally incorporated as a primary arson offense,

Penal Code-style statutes, based on a number of factors developed *infra*; specifically, the manner of degree classification and the content of the specific provisions.

175. See, e.g., KAN. STAT. § 21-3718(a) (1974) ("any building or property"); N.J. STAT. ANN. § 2C: 17-1(b)(2) (West 1978) (effective Sept. 1, 1979) ("building or occupied structure"); PA. STAT. ANN. tit 18, § 3301(b)(1) (Purdon 1973) ("building or occupied structure"); TEXAS PENAL CODE ANN. tit. 7, § 28.02 (Vernon 1974) ("building or habitation").

176. See, e.g., ME. REV. STAT. tit. 17-A, § 802(A), (B) (1977); N.H. REV. STAT. ANN. § 634.1 (1974); UTAH CODE ANN. § 76-6-102(a) (1978). *But see* ILL. REV. STAT. ch. 38, § 20-1(b) (1977).

177. See, e.g., the New Hampshire arson statute, N.H. REV. STAT. ANN. § 634.1(III) (1977), which includes in the alternative, arson fraud, arson with incumbent injury, and arson which results in "pecuniary loss . . . in excess of one thousand dollars." See also OHIO REV. CODE ANN. § 2909.03(B) which grades the offense according to the value of the property damaged.

178. MODEL PENAL CODE § 220.1; see, e.g., ME. REV. STAT. tit. 17-A, § 802(B)(2) (1977).

179. See, e.g., CONN. GEN. STAT. § 53a-111 (1972); ILL. REV. STAT. ch. 38, § 20-1.1 (West Supp. 1978); KAN. STAT. § 21-3719 (1974); ME. REV. STAT. tit. 17-A, § 801 (1977); N.H. REV. STAT. ANN. § 634.1(II) (1974); N.J. STAT. ANN. § 2C:17-1(a) (West 1978); OHIO REV. CODE ANN. § 2909.02 (Page 1975); UTAH CODE ANN. § 76-6-103 (1978). The Pennsylvania statute is more explicit: PA. STAT. ANN. tit. 18, § 3301(a) (Purdon 1973) is entitled "Endangering Persons" and creates a first degree felony for such arson.

180. See, e.g., the Ohio aggravated arson statute, OHIO REV. CODE ANN. § 2909.02(A)(2) (Page 1975) which defines the offense as causing "physical harm to any *occupied* structure." *Id.* (emphasis added).

which crime is often graded as a second degree offense.¹⁸¹

One significant change based on the Model Penal Code and which all these statutes embody, in the inclusion, in the primary offense, of arson with intent to defraud an insurer.¹⁸² Obviously, this represents a marked departure from previous codification. It not only links arson fraud conceptually with the traditional expressions of the crime, but it generally upgrades the offense to a degree reflecting contemporary perceptions of the seriousness of any form of malicious willful burning.¹⁸³

3. *Modified Model Penal Code Style Statutes*

There are several states which have revised their arson statutes, embodying the principles suggested by the Model Penal Code, but which do not include arson fraud within the core legislation.¹⁸⁴ For these statutes, arson with intent to defraud an insurer remains a lesser offense,¹⁸⁵ if included within the arson provisions at all.¹⁸⁶ In some instances, arson fraud is considered only parenthetically, as included in all burnings "for unlawful purposes."¹⁸⁷

181. See, e.g., KAN. STAT. § 21-3718 (1974) (which includes as arson, property damage by fire and arson fraud, both being Class C felonies); PA. STAT. ANN. tit. 18, § 3301(b) (Purdon 1973).

182. See, e.g., CONN. GEN. STAT. § 53a-112(a)(1)(b) (1972); ILL. REV. STAT. ch. 38, § 20-1(b) (1977); KAN. STAT. § 21-3718(1)(b) (1974); ME. REV. STAT. tit. 17-A, § 802(1)(B)(1) (1977); N.H. REV. STAT. ANN. § 634.1(III)(a) (1974); N.J. STAT. ANN. § 2C:17-1(b) (West 1978); PA. STAT. ANN. tit. 18, § 3301(b)(3) (Purdon 1973); TEXAS PENAL CODE ANN tit. 7, § 2802(a)(2) (Vernon 1974) (limited to burning of buildings).

183. See note 182 *supra*. But see TEX. PENAL CODE ANN. tit. 7, § 28.02 (practice commentary) (Vernon 1974), which notes that arson fraud in Texas is confined to such burning of real property: "The burning of other insured property with intent to collect insurance previously covered by Penal Code art. 1322 poses less danger to persons and consequently is not included in arson." *Id.* at 9 (practice commentary).

184. The author has identified the following state statutes as comprising this category: ARK. STAT. ANN. §§ 41-1901 to -1904 (1977); COLO. REV. STAT. §§ 18-4-104 to -4-105 (1974); KY. REV. STAT. ch. 513 (1970); MO. ANN. STAT. §§ 569.050-.110 (1978); MONT. REV. CODES ANN. tit. 94, ch. 5 (1977); NEB. REV. STAT. §§ 28-501 to -506 (1977); N.D. CENT. CODE art. 12.1-21 (1976); OR. REV. STAT. §§ 164.305-.335 (1977).

185. COLO. REV. STAT. § 18-4-104 (1974) (where arson fraud is a class four felony and arson class three felony). Compare MONT. REV. CODES ANN. § 94-6-102(c) (1977) (criminal mischief which carries a penalty of up to six months imprisonment) with *id.* § 94-6-104 (1977) (arson which carries penalty of up to twenty years imprisonment). NEB. REV. STAT. § 28-505 (1977) (burning to defraud insurer class four felony).

186. Such arson is not included in the arson related sections of the following codes: ARK. STAT. ANN. § 41-1901 to -1904 (1977); KY. REV. STAT. § 513.020 (1970); N.D. CENT. CODE § 12.1-21-01 (1976); OR. REV. STAT. § 164.315, .325, .335 (1977).

187. See, e.g., MO. ANN. STAT. § 569.050 (1978); Comment to PROPOSED CRIMINAL CODE

4. Hybrid Formulations

The remaining state arson statutes in general represent a middle ground between the Model Arson Law-common law and Model Penal Code approaches. Several of these statutes are revisions from earlier common law provisions,¹⁸⁸ and in this respect may have consolidated disparate specific arson offenses.¹⁸⁹ For many of these codes, however, arson to defraud is either covered by a separate statute,¹⁹⁰ or is not included at all.¹⁹¹ Examination of a few specific arson chapters will better illustrate the disparities.

A few statutes restrict arson to structures¹⁹² or buildings.¹⁹³ For example, the Florida statute, a single code provision presumptively covering all proscribed burnings, refers only to damage to structures.¹⁹⁴ The Delaware arson statute applies to damage to buildings alone.¹⁹⁵ The Arizona¹⁹⁶ and South Dakota¹⁹⁷ statutes continue to

§ 14.050, where the authors state: "An actor may be convicted of arson . . . if his purpose in acting is unlawful." *Id.* For example, it is arson to "burn one's own building in order to collect the fire insurance because it is unlawful to defraud an insurer." *Id.* Further, the authors explain that such interpretation facilitates arson prosecution by eliminating the necessity of proof of "fraudulent intent." *Id.*

188. *See, e.g.*, IND. CODE ANN. § 35-43-1-1 (Burns 1979) (replacing IND. CODE ANN. § 35-16-1-1 (Burns 1976)). The original statutory scheme resembled the *Model Arson Law* provisions categorizing properties and including an arson fraud offense. The current statute synthesizes the offenses according to endangerment of life and the value of the property. Although arson-for-hire is included, there is not specific arson fraud.

189. *See, e.g.*, IOWA CODE ANN. §§ 712.1-.4 (West 1978). This group of offenses is graded according to endangerment of life and property value. The third degree arson offense, § 712.4, is defined as "arson which is not arson in the first degree or arson in the second degree," presumably covering all other criminal burnings. *Id.* The definitional section, *id.* § 712.1, includes arson with intent to defraud an insurer.

190. *See, e.g.*, LA. REV. STAT. ANN. § 14.53 (West 1974).

191. *See, e.g.*, the Alaska second degree arson statute, ALASKA STAT. § 11.46.410 (1978), which refers only to buildings, whereas the first degree arson statute, *id.* § 11.46.400, and the statute covering criminally negligent burnings, *id.* § 11.46.430, refer to burning of any property. *See also* IND. CODE ANN. § 35-43-5-4(9) (Burns 1979).

192. *See, e.g.*, S.D. COMP. LAWS ANN. § 22-33-1 (Supp. 1978).

193. *See, e.g.*, ALA. CODE tit. 13A, § 13A-7-40 (1978) which defines building as "any structure which may be entered and utilized by persons for business, public use, lodging, or the storage of goods, and includes any vehicle, railway car, aircraft or watercraft used for the lodging of persons or for carrying on business therein." *Id.*

194. FLA. STAT. ANN. § 806.01 (West 1976).

195. DEL. CODE. tit. 11, §§ 801-03 (1975).

196. ARIZ. REV. STAT. §§ 13-1703, -1704 (1978). Section 13-1703 covers the arson of unoccupied property, and § 13-1704, that of occupied structures.

197. S.D. COMP. LAWS ANN. § 22-23-1 applies to occupied structures, with the further requirement that the arsonist know them to be occupied. Section 22-33-3 pertains to burning of unoccupied structures.

grade offenses according to whether the building burned was occupied.¹⁹⁸ The New Mexico statute,¹⁹⁹ on the other hand, categorizes the types of property subject to arson ranging from occupied buildings to fences.²⁰⁰

Some codes still list arson to defraud as a separate provision²⁰¹ while the New Mexico statute includes it within its general section²⁰² providing distinctions according to the value of property affected.²⁰³ Many states make no specific provision for arson fraud; in these cases arson fraud is either implied²⁰⁴ or found in other sections of the penal code such as a theft-by-deception provision.²⁰⁵

The New York statute²⁰⁶ serves as the model upon which some statutes are based.²⁰⁷ The article covering arson is comprised of four degrees of offense²⁰⁸ which are based on danger to persons²⁰⁹ and the

198. See also LA. REV. STAT. ANN. § 14.51 (West 1974).

199. N.M. STAT. ANN. § 40A-17-5 (1972).

200. *Id.* The statute reads, in pertinent part, "any building, occupied structure or property of another, or bridge, utility line, fence or sign. . . ." *Id.* See also DEL. CODE tit. 7, § 3101 (1975), which proscribes burning of forested land.

201. See note 190 *supra*.

202. See note 199 *supra*.

203. *Id.* See, e.g., N.M. STAT. ANN. § 40A-17-5(1) to -5(3) (1972), which grades the degree of offense committed according to the value of the property destroyed. For example, if the property is valued at \$100 or less, the crime of arson against it is a misdemeanor, whereas if the value is in excess of \$1,000, the classification is a third degree felony. *Id.*

204. See, e.g., IND. CODE ANN. § 35-43-1-1 (Burns 1979), which divides property offenses into Arson and Criminal Mischief, but makes no mention of arson to defraud. See also IOWA CODE ANN. § 712.1 (West 1978) where the statute, in defining arson, deals with arson fraud in a negative sense: it is not arson "where no insurer has been exposed fraudulently to any risk." *Id.*

205. See, e.g., ALA. CODE tit. 13A, § 13A-7-42 (1978). The Commentary to this section states:

Under 13A-7-42 intentionally setting fire to one's own building still amounts to arson if the motivation is not lawful and proper. . . . Submission of a claim to an insurance company under circumstances in which no payment would be made if the truth were known is attempted theft by deception, and actual receipt of money under the policy is theft by deception.

Id., Commentary at 140.

206. N.Y. PENAL LAW §§ 150.00-.20 (McKinney 1978).

207. See, e.g., ALA. CODE tit. 13A, § 13A-7-41 (commentary) (1978) which specifically cites to the New York statute as a source. See also *Ex parte Bramble*, 31 Cal. 2d 43, 49, 187 P.2d 411, 415 (1947) which attributes California's arson statute to the New York formulation.

208. N.Y. PENAL LAW §§ 150.05 (McKinney 1978) (arson in the fourth degree); 150.10 (arson in the third degree); 150.15 (arson in the second degree); 150.20 (arson in the first degree).

209. *Id.* § 150.20. The first degree statute is limited to damage as a result of an explosion when the individual knew or should have known that the building was occupied.

intent to damage.²¹⁰ The statute applies only to buildings.²¹¹ Significantly, New York makes no specific provision for arson to defraud; such an offense is presumptively covered by the general proscription against unlawful burnings.²¹²

Finally, the recent Hawaii statute²¹³ represents a unique departure from any model or actual arson legislation. Eliminating the "archaic"²¹⁴ terminology of arson and criminal mischief, the statute defines all such offenses in four degrees of "criminal property damage."²¹⁵ This novel statute, however, maintains distinctions among the degrees of offense based on the more traditional criteria of danger to persons,²¹⁶ intent,²¹⁷ and the value of the property affected.²¹⁸

It is evident from the foregoing overview of the development of the criminal law of arson that arson is a difficult crime to prove. The fine distinctions which developed from the common law still remain in many state codifications. Despite the intention of the Model Penal Code to consolidate these varieties of arson, the apparent increased incidence of the crime has forced legislatures to create additional offenses such as aggravated arson. Arson fraud is perhaps more difficult to prosecute as it requires proof of a more specific criminal intent: burning with the purpose of defrauding an insurance carrier. Reliance must be placed, of necessity, on otherwise inadmissible evidence such as motive.

210. *Id.* § 150.05. This fourth degree offense is, in essence, a reckless endangerment statute requiring only an intention to start a fire or cause an explosion which results in reckless damage of the building. On the other hand, arson in the third degree, *id.* § 150.10, requires an intent to damage.

211. All of the offenses are defined in terms of destruction to a "building." "Building" is defined to include "any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein." N.Y. PENAL LAW § 150.00 (McKinney 1978).

212. N.Y. PENAL LAW § 150.10(2)(b) (McKinney 1978). This section provides an affirmative defense, namely, if "the defendant's sole intent was to destroy or damage the building for a lawful and proper purpose." *Id.* The Practice Commentary states: "The motive for arson is most often either insurance or vindictiveness The [affirmative] defense is unavailable . . . to a defendant who damages his own building with intent to defraud an insurer, or for some other unlawful or improper purpose." *Id.*, Commentary at 91.

213. HAW. REV. STAT. §§ 708-820 to -822 (1976).

214. *Id.*, Commentary at 379.

215. See note 208 *supra*.

216. Compare HAW. REV. STAT. § 708-820 (1976) (endangering persons) with *id.* § 708-821 (no endangering requirements).

217. *Id.* § 708-821. But see *id.* § 708-823 (reckless damage statute).

218. *Id.* § 708-821 (second degree offense where property damaged exceeds \$500); *id.* § 708-822 (third degree offense where property damaged exceeds \$50).

Many of the difficulties inherent in the proof of the crime of arson are paralleled in civil litigation when an insurance company defends against a claim on the grounds that the property was destroyed by incendiarism. This area is the subject of Part IV.

IV. The Arson Case In the Civil Forum

A. Introduction

Since the latter half of the nineteenth century, state legislatures have recognized a need for uniformity among fire insurance contracts.²¹⁹ In 1943 the New York Standard Fire Policy became effective, and has been adopted in identical or substantially similar form since then by approximately forty-five states, the District of Columbia, and Puerto Rico.²²⁰ This Standard Policy contains the "165 Lines"²²¹ which set forth most of the provisions of the contract. The parties do, however, retain a right to add conditions not in contravention of the Standard Policy. The 165 Lines and the endorsements and forms added thereto define the rights and obligations of the parties, and are inherently involved in the issue of arson for profit.

B Measuring Actual Cash Value of the Insured Property

The first page of the Standard Fire Insurance Policy of the State

219. R. RIEGEL, J. MILLER & C.A. WILLIAMS, *INSURANCE PRINCIPLES AND PRACTICES* 143-44 (6th ed. 1976). The benefits of such uniformity are identified as, *inter alia*, judicial determination of the meaning of important words and phrases as applied against all insureds, and the reduction of discrepancies between policies covering the same risks. Therefore, loss settlement is facilitated and the number of lawsuits is reduced. *Id.* at 144.

220. S.S. HUEBNER, K. BLACK & R. CLINE, *PROPERTY AND LIABILITY INSURANCE* 24 (2d ed. 1976) [hereinafter cited as HUEBNER]. The standard forms have been approved in some jurisdictions by administrative action of the Insurance Commissioner, and, in the following states, by statute: ARIZ. REV. STAT. ANN. § 20-1503 (1975); CAL. INS. CODE § 2071 (West 1972); CONN. GEN. STAT. ANN. § 38-98 (West Supp. 1978); 5A HAW. REV. STAT. § 431-420 (1976); 7B IDAHO CODE § 41-2401 (1977); 30 IOWA CODE ANN. § 515-138 (West Supp. 1978); LA. REV. STAT. ANN. § 22-691; (West Supp. 1978); MO. ANN. STAT. § 379.160 (Vernon 1968); NEB. REV. STAT. § 44-501 (1974); 1947 Nev. Stats. Ch. 266; N.H. REV. STAT. ANN. § 407:22 (1955); N.J. STAT. ANN. §§ 17:36 5.19, 5.20 (1963); N.M. STAT. ANN. § 58-8-10 (1962); N.Y. INS. LAW § 168 (McKinney 1966); N.C. GEN. STAT. § 58-176 (1975); N.D. CENT. CODE § 26-03-40 (1978); OKLA. STAT. ANN. tit. 36, § 4803 (West 1976); OR. REV. STAT. §§ 743.609-663 (1977); PA. STAT. ANN. tit. 40, § 636 (Purdon 1954); R.I. GEN. LAWS § 27-5-3 (1978); 1945 S.D. Sess. Laws Ch. 133; 6A VA. CODE §§ 38.1-364 to 367 (1976); W. VA. CODE § 33-17-2 (1975); 1945 Wyo. Sess. Laws ch. 68.

One state to recently move away from standard policy uniformity is Wisconsin. See 1975 Wis. Laws ch. 375, § 8 (effective June 22, 1976).

221. HUEBNER, *supra* note 220, at 27.

of New York²²² sets forth the measure of liability of a fire insurer as "the extent of the actual cash value of the property at the time of loss. . . ." ²²³ This limit upon recovery is to give effect to "the well-recognized principle that the contract of fire insurance is intended to afford merely indemnity for loss. . . ." ²²⁴ Moreover, the limit is an attempt to curtail the "moral hazard" involved in property insurance. ²²⁵ If insurance proceeds may be received for more than the "actual cash value," arson becomes a profitable alternative.

There are three potential tests to determine the "actual cash value" of insured property: (1) market value, (2) the "broad evidence" rule, and (3) cost of reproduction less depreciation. The "market value" test sets the "actual cash value" equal to the reasonable market price at the time of the fire. ²²⁶ This approach is almost never used independently, and finds expression most frequently as a single consideration among many under the second aforementioned test. The invalidity of "market value" is attributable to the legal doctrine that "real property is unique." If it is unique, it does not have any objective market value. The market value of a building is so necessarily tied to the value of the property upon which it was built that the building can not be said to have an independent value. The test is occasionally used as a conceptual aid in the jury instructions. As such, the "test" is what a theoretical buyer and seller would have agreed upon as a price for the insured property, following fair negotiations, at the point in time just before the fire. ²²⁷ This is really only an additional, intermediary step, be-

222. N.Y. INS. LAW § 168(6) (McKinney 1966).

223. N.Y. INS. LAW § 168 (McKinney 1966). This is subject to the following limitations: not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured. . . .

Id.

224. W. VANCE, INSURANCE § 154 (3d ed. 1951) [hereinafter cited as VANCE].

225. See Note, *Valuation and Measure of Recovery Under Fire Insurance Policies*, 49 COLUM. L. REV. 818, 822 (1949). See also pt IV(D)(4) *infra*.

226. Annot., *Insurance* § 1637, 44 AM. JUR. 2d (1969) [hereinafter cited as Insurance Annotation]. It is noted that this test is usually applied only, if at all, to the valuation of personal property. *Id.*

227. *Olson v. United States*, 292 U.S. 246, 257 (1934); *Butler v. Aetna Ins. Co.*, 64 N.D. 764, 772, 256 N.W. 214, 219 (1934).

cause to determine the price in this hypothetical sale, the trier of fact will turn to the second "test."²²⁸

This second test, commonly known as the "broad evidence" rule, is most often attributed to the landmark case of *McAnarney v. Newark Fire Insurance Co.*²²⁹ The court stated that:²³⁰

[w]here insured buildings have been destroyed, the trier of fact may, and should, call to its aid, in order to effectuate complete indemnity, every fact and circumstance which would logically tend to the formation of a correct estimate of the loss. It may consider original cost and cost of reproduction; the opinions upon value given by qualified witnesses; the declarations against interest which may have been made by the assured; the gainful uses to which the buildings might have been put; as well as any other fact reasonably tending to throw light upon the subject.

The drawback of this rule, accepted in the vast majority of jurisdictions, is that no firm figure as to the value of the property, for insurance purposes, is readily available. This lack of certainty may result in slight violations of the public policy against over or under insuring property, as the insured and insurance agent or broker will probably fail to take into account every relevant consideration. An additional potential danger is the degree of flexibility built into this test, which may allow juries a greater exercise of emotion.²³¹ The obvious benefit, however, is a more equitable distribution of insurance proceeds, and the furtherance of the public policy favoring indemnity. As "value" is largely a matter of opinion, rigid tests to

228. See Insurance Annotation, *supra* note 226, § 1639 (1969). Nevertheless, the "market value" test is given an independent meaning in a few jurisdictions. Courts in California and Maine have flatly declared that "actual cash value" in an insurance policy is synonymous with "fair market value." *Jefferson Ins. Co. of N.Y. v. Superior Court*, 3 Cal. 3d 398, 475 P.2d 880, 90 Cal. Rptr. 608 (1970); *Forer v. Quincy Mut. Fire Ins. Co.* 295 A.2d 247 (Me. 1972). Indiana probably follows the same rule. See *Atlas Construction Co. v. Indiana Ins. Co.*, 160 Ind. App. 33, 309 N.E.2d 810 (1974). What the standards are for setting that market price is, of course, unclear. One commentator has suggested that the "tests" for actual cash value are "battered" about, chosen and discarded, with the true intention of most accurately applying the principle of indemnity to the circumstances at hand. Hinkle, *The Meaning of "Actual Cash Value"*, 539 Ins. L.J. 711, 723 (1967). Another commentator has advocated a greater uniformity among these standards. To this end, defining the phrase legislatively is seen as the "only sensible approach." Cozen, *Measure and Proof of Loss Alternatives*, 12 THE FORUM 647, 659 (1977). In the jurisdictions where "fair market value" is the standard, some clarification is needed. The method of determining "fair market price" must be distinguished, if possible, from the "broad evidence rule."

229. 247 N.Y. 176, 159 N.E. 902 (1928). See also Annot., 56 A.L.R. 1149 (1928).

230. 247 N.Y. at 184, 159 N.E. at 905.

231. This danger is partially offset, of course, by the availability of appellate review.

determine value may do more damage than good under almost any form of evaluation.²³²

The third test to determine "actual cash value" is the cost of reproduction less depreciation.²³³ This is the method of valuation which provides for the greatest degree of certainty. It is also the method that paves the way most accomodatingly for the arsonist's economic gain. Where market value is virtually nothing, there can always be a reproduction cost which will, at least to a small degree, exceed depreciation. The variance between the proceeds and the "true value" is often seen as a prime inducement to arson.²³⁴ Nevertheless, two jurisdictions maintain this test: Pennsylvania²³⁵ and Illinois.²³⁶

Left alone, this standard can work great inequities.²³⁷ In Illinois, the courts dealt with this issue in 1920²³⁸ and have not done so since. The growing alarm at the increase of incendiarism has caused a certain dissatisfaction with this test's results. In 1975 the Seventh Circuit was called upon to interpret Illinois law on this point in *Chicago Title & Trust Co. v. United States Fidelity & Guaranty Co.*²³⁹ The court developed a rule which, without overruling the "reproduction cost less depreciation" standard, manages to infuse some of the principles of equitable indemnification into the law.

The facts from the *Chicago Title & Trust Co.* case present a classic example of the process of urban decay which frequently ends in arson for profit. In 1966 the building in question was put into a land trust. In 1970 the mortgagee began the process of foreclosing

232. As one court has maintained: "Value is a matter of opinion. The adoption of an invariable test of value would only serve to shackle sound opinion in a situation where other factors may overcome or qualify its influence. This cannot be done in the name of speedy and simple administration." *Messing v. Reliance Ins. Co.*, 77 N.J. Super. 531, 534, 187 A.2d 49, 51 (1962).

233. Insurance Annotation, *supra* note 226, § 1638. See also Cozen, *Measure and Proof of Loss Alternatives*, 12 THE FORUM 647, 651-55.

234. Gwertzman, *Arson and Fraud Fires*, 12 THE FORUM 827, 835 (1977).

235. *Farber v. Perkiomen Mut. Ins. Co.*, 370 Pa. 480, 88 A.2d 776 (1952); *Fedas v. Insurance Co. of the State of Pennsylvania*, 300 Pa. 555, 151 A. 285 (1930).

236. *Smith v. Allemannia Fire Ins. Co.*, 219 Ill. App. 506 (1920); *but see Chicago Title & Trust Co. v. United States Fidelity & Guar. Co.*, 511 F.2d 241 (7th Cir. 1975).

237. This is especially true when the essential component of "depreciation" is left undefined. See Cozen, *Measure and Proof of Loss Alternatives*, 12 THE FORUM 647, 653.

238. 219 Ill. App. 506 (1920).

239. 511 F.2d 241 (7th Cir. 1975).

the mortgage, while the city had instituted a suit based on Municipal Building Code violations. The city sought, *inter alia*, the demolition of the building. A receiver was appointed in the meantime to provide heat for the building, but subsequently this plan was dropped without any repairs having been made.²⁴⁰ In 1971, beneficial interest in the land trust was sold to Alex Salb for \$7,000. He thereupon procured, under the FAIR plan,²⁴¹ fire insurance in the amount of \$50,000. Less than six months later, the building was damaged by fire. Alex Salb collected \$18,556 for this loss. None of this money was spent on repairs.²⁴² One can imagine the physical condition of the building in early 1972.

A few weeks after the fire, the Building Inspector found this building to be "vacant and open," and "in a dangerous and hazardous condition."²⁴³ Alex Salb was ordered to "board and secure" the premises. Instead, he sold his beneficial interest to Oddie Banks Wright. Although the "agreed-upon price" was allegedly \$4,400, no more than \$400 was actually paid.²⁴⁴ Ms. Wright, thereafter, was ordered to board and secure the premises. Instead, she allegedly made \$7,000 worth of repairs, although there was no corroborating evidence—invoices, receipts, or testimony—of any repairs at all. A few weeks after the court's order to Ms. Wright, the building was again damaged by fire. Ms. Wright sought a recovery of \$43,795 for her losses.²⁴⁵

The district judge had noted two complete defenses potentially available to the defendant: "vacancy,"²⁴⁶ and "increase of hazard."²⁴⁷ These defenses were mooted, however, by the fact that "the building was economically useless at the time of the fire,"²⁴⁸ thus defeating the insured's right to recover. This interesting hybrid of

240. *Id.* at 242.

241. "FAIR" is acronymic for "Fair Access to Insurance Requirements." For a full discussion of these plans, see Comment, *FAIR Plans: History, Holtzman and the Arson-for-Profit Hazard*, 7 *FORDHAM URB. L.J.* 617 (1979).

242. 511 F.2d at 243.

243. *Id.*

244. *Id.*

245. *Id.*

246. N.Y. INS. LAW § 168(6), lines 33-35 (McKinney 1966). See pt. IV(D)(5) *infra*.

247. N.Y. INS. LAW § 168(6), lines 31-32 (McKinney 1966). See pt. IV(D)(4) *infra*.

248. 376 F. Supp. 767, 770 (N.D. Ill. 1973).

all three "actual cash value" tests²⁴⁹ was subsequently modified by the court of appeals.

The Seventh Circuit recognized its duty to observe Illinois' "cost of reproduction less depreciation" rule, but decided to correlate the award to the "insurable interest."²⁵⁰ This was not an entirely novel idea, even in Illinois courts. In *Lieberman v. Hartford Insurance Co.*,²⁵¹ the court had denied recovery for a building destroyed by fire, where a contract for the demolition of the building had been entered into prior to the date of the fire. Under such facts, it was held that the insured had no insurable interest because the building was wholly without economic value.²⁵² The court of appeals in *Chicago Title & Trust Co.* reasoned, on the basis of *Lieberman*, that Illinois

249. Perhaps a more accurate description of the district court result is that the principle of "insurable interest" was given a broad interpretation. Insurable interest in property is frequently said to exist where the insured "would profit by or gain some advantage by its continued existence and suffer some loss or disadvantage by its destruction." 3 COUCH ON INSURANCE 2d § 24:13 (2d ed. 1960) [hereinafter cited as COUCH]. An insurable interest is invariably required under the standard fire policies. See note 220 *supra*. Although pecuniary interest is a prime consideration, "insurable interest" is not often said to depend on the "economic usefulness" of the property.

250. This concept has been limited very sharply in other jurisdictions. For example, the highest court in Maine decided that "the mere existence of an executory contract for demolition does not destroy the value of the building or deprive the owner of an insurable interest." *Gendron v. Pawtucket Mut. Ins. Co.*, 384 A.2d 694, 697 (Me. 1978). There is one redeeming feature here, however, such that arsonists may not put demolition companies out of business. Maine follows the "fair market value" test for "actual cash value," which is to be determined at the time of the fire. This being the case, the executory contract for demolition would be seen as having a dampening effect on the price a willing seller could receive.

An even more destructive result was reached in *Bailey v. Gulf Ins. Co.*, 406 F.2d 47 (10th Cir. 1969). There, an Oklahoman fraternity house was declared a nuisance (presumably pursuant to the municipal building code), and the owner was ordered to demolish and remove the structure. The merits of this order were not contested. But before demolition, the building burned down. The court held that the order to demolish "has no bearing upon [the] value for fire insurance purposes." *Id.* at 49. In essence, the court entirely removed the concept of "insurable interest" by saying that the insurer is liable for "the real value of the building as such, not its relative value to the insured." *Id.* Despite how much this sounds like a "reproduction less depreciation" standard, Oklahoma officially follows the "broad evidence" test for determining "actual cash value." Nonetheless, the court of appeals decided that "proof that future events might prove the fire to have been of benefit to the insured" was inadmissible. *Id.* This incredible conclusion served to result in a minimum award of \$7,000. *Id.* This figure served to reimburse the insured for the "loss" of certain demolition expenses.

Fortunately, courts have been willing to say, at least, that when a building is *in the process* of being torn down, it has no "actual cash value" as a matter of law. *Aetna State Bank v. Maryland Cas. Co.*, 345 F. Supp. 903 (N.D. Ill. 1972) (emphasis added).

251. 6 Ill. App. 3d 948, 287 N.E.2d 38 (1972).

252. See note 249 *supra*.

courts prefer recoveries at least roughly to correspond to the amount of damage done. This conclusion was bolstered by three public policy considerations of the "insurable interest" requirement:²⁵³ (1) the policy against "wagering;" (2) the policy against rewarding and thereby tempting the destruction of property; and (3) the policy of confining insurance contracts to indemnity. The court found that these policies would be violated where there was an award of damages representing a "gross disparity" from the "value of the building measured on any rational basis, such as market value, economic utility, or utility for a special purpose of the owner."²⁵⁴ The majority opinion clearly implies that, at least in certain circumstances, the "reproduction cost less depreciation" test is somewhat less than "rational."²⁵⁵

In *Lieberman*, the "insurable interest" concept worked as a complete bar, *vel non*, to recovery. However, the court extended that principle in *Chicago Title & Trust* such that damages will be limited to the extent of the interest. The "insurable interest" therefore is coextensive with the insured's investment.²⁵⁶ The court was concerned that perhaps the purchase price, and the \$7,000 for repairs had, in fact, been paid, and that unless the building "is irrevocably committed to demolition or is abandoned subsequent to the making of the expenditures," the insured should be entitled to recover.²⁵⁷ On this ground, the court remanded for a new trial.²⁵⁸

There was a further twist to this case, based on the existence of a "coinsurance clause."²⁵⁹ The clause operated in this instance to re-

253. These principles are discussed in a renowned law review article, which is cited almost invariably when the topic of "insurable interest" arises. See Harnett & Thornton, *Insurable Interest in Property: A Socio-economic Reevaluation of a Legal Concept*, 43 COLUM. L. REV. 1162, 1178-83 (1948).

254. 511 F.2d at 247.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 248. The court of appeals did not consider the two defenses made by the insurance company—vacancy and increase of hazard—which, if successful, would act as a complete bar to recovery. Presumably, these defenses would be available to the insurance company at the new trial. The court did say that if the building were "not irrevocably committed to demolition or abandoned" (*i.e.*, vacant), the insured would recover to the extent of her investment. *Id.* at 248. By including only the "vacancy" defense, the court surely did not intend thereby to exclude the "increase of hazard" defense. No court would have held that the neglect of a building, along with the failure to comply with court orders to "board and secure," could never "increase the hazard," as a matter of law.

259. "Coinsurance has the effect of preventing one who is insured for a small part of actual

duce recovery "in proportion to the amount by which coverage is less than a given percentage, here 80 percent, of the 'actual cash value' of the property."²⁶⁰ In such a case as this, the insured is faced with a dilemma. Since the Illinois law for determining "actual cash value" is formally "reproduction cost less depreciation," this standard will presumably be used for establishing the degree of insurance coverage. If the "insurable interest" concept is to define the "actual cash value" at trial, and this figure is below the value arrived at earlier, the insured will have been subjected to artificially high premiums. If, however, premiums are paid on the basis of the "insurable interest," the insured's recovery for the loss will be reduced by the effect of the coinsurance clause. The court admitted that there was no equitable solution possible for this problem, noting that "[d]evelopment of the law often causes some temporary dislocations."²⁶¹ It was further observed that if the Illinois courts were forced by the law of "actual cash value" to choose between grossly disproportionate recoveries and excessive premiums for buildings with questionable value, it would prefer to allow the latter.²⁶²

The "reproduction cost less depreciation" method of determining "actual cash value" is used to "prevent inequities that may result when there is a disparity between the market value of the real property destroyed and the value of the property to the insured, who in fairness should be put in substantially the same position he was in before the fire."²⁶³ It also, however, frequently results in the "gross disparities" feared by the court in *Chicago Title & Trust Co.* The "fair market value" test is attractive for its simplicity, but there is a major drawback. If the market value is accurately determined, it

value, and who has paid a correspondingly small premium, from collecting as much, in the event of loss, as one who is insured for a large percentage of value and who has paid a correspondingly large premium." *New York Life Ins. Co. v. Glens Falls Ins. Co.*, 184 Misc. 846, 55 N.Y.S.2d 176 (1945), *aff'd*, 274 A.D. 1045, 86 N.Y.S.2d 191 (1949), *aff'd*, 301 N.Y. 506, 93 N.E.2d 73 (1950). These clauses are included because the vast majority of losses by fire are to a relatively small percentage of the total property insured. This is true now more than ever, given sophisticated fire prevention systems. In virtually all jurisdictions these clauses have been held to be valid. There are a few exceptions, where they are statutorily limited. See Annot., 43 A.L.R.3d 566 (1972).

260. 511 F.2d at 247.

261. *Id.*

262. *Id.* at 248.

263. *Id.* at 245. See also 6 COOLEY, BRIEFS ON THE LAW OF INSURANCE §§ 5089; 5090 (2d ed. 1927).

involves, essentially, a "broad evidence" concept. If great weight is given to the actual recent purchase price, as frequently is the case, the jury could easily be misled by sophisticated techniques giving the appearance of an "arm's length" transaction, when one in fact does not exist.²⁶⁴ Potentially serious inequities can be avoided by the more cumbersome, but finally more satisfactory "broad evidence" method of determining "actual cash value." In light of the heightened national awareness of the problem of arson, this standard should be reconsidered in the jurisdictions which have chosen to employ one of the other methods.

C. Arson Cases and the Standard of Proof

An insurance company faced with a claim on a fire insurance policy can defend in many ways. Two primary methods are the affirmative defense of arson for which the plaintiff is responsible, and misrepresentation in the proof of loss.²⁶⁵ The allegations necessary to these defenses establish the essential elements of the crimes of arson and intent to defraud. Yet, in the context of a civil suit to collect insurance proceeds the burden of persuasion²⁶⁶ to be met is not the constitutionally required standard for criminal cases²⁶⁷ of "beyond a reasonable doubt,"²⁶⁸ as might be expected.

264. One example is "a collateral agreement to satisfy the bond and mortgage for a fraction of face value if paid within a fixed period after the transaction." See James J. Taylor, *Updated Guidelines for Defending Arson for Profit Claims*, Address before the Comm. on Prop. Ins. Law, A.B.A. Annual Meeting in New York City 6 (Aug. 9, 1978) [hereinafter cited as Taylor Address]. Also, an "agreed-upon purchase price" might well be fictitious, with no intention of either party that it ever be paid.

265. For a discussion of the common law arson defense, see pt. IV(D)(1) *infra*. For a discussion of the misrepresentation defense, see pt. IV(D)(2) *infra*.

266. The term "burden of proof" has two distinct meanings. Primarily, it refers to the burden of producing evidence, to the judge's satisfaction, which is relevant to proving a fact in issue. Secondly, the "burden of proof" describes a standard, above which the evidence must rise, such that the trier of fact will decide in favor of the party producing that evidence. See McCORMICK, *EVIDENCE* § 336 (2d ed. 1972) [hereinafter cited as McCORMICK]. This second meaning is often referred to as the "burden of persuasion," or the "risk of non-persuasion." 9 J. WIGMORE, *EVIDENCE* § 2485 (3d ed. 1940) [hereinafter cited as WIGMORE]. "Burden of proof" or "burden of persuasion" will, in this section, refer to the "risk of non-persuasion." This aspect of the law of evidence finds expression most frequently in the language used in jury instructions, and as a legal standard providing a subject for appellate review.

267. *In Re Winship*, 397 U.S. 358, 364 (1970).

268. 9 WIGMORE, *supra* note 266, § 2498 n.3 and accompanying text. See *Sundquist v. Hardware Mut. Fire Ins. Co.*, 371 Ill. 360, 21 N.E.2d 297 (1939). Illinois, in the *Sundquist* case, was perhaps the last state to overrule the old principle that facts constituting a crime

There is great variety of opinion regarding the appropriate standard of proof applicable to an insurance company's defense of arson or misrepresentation of a material fact. Traditionally, where a fraud is alleged, proof must be made by "clear and convincing evidence."²⁶⁹ Occasionally, legally equivalent phrases are employed, such as "clear, precise, and indubitable."²⁷⁰ To establish a cause of action or defense in most other civil suits²⁷¹ requires only proof "by a preponderance of the evidence,"²⁷² or as it is frequently stated, "by the greater weight of the credible evidence."²⁷³ The necessary first question is whether there is any difference between the two standards, as applied by the trier of fact.

There is broad agreement that "clear and convincing" proof requires more or better evidence presented to persuade a trier of fact than simple "preponderance of the evidence." McCormick, citing Professor McBaine,²⁷⁴ argues that "clear, strong, and convincing" proof demands that a trier find the fact "highly probably true," whereas "by a preponderance of the evidence" simply necessitates that a fact be "probably true." If "highly" is to have import, then the standards, as described, differ. Most courts have taken this for granted.

However, some recent Tenth Circuit, arson-related cases have questioned this venerable assumption that the two standards differ. In *Connecticut Fire Insurance Co. v. Fox*,²⁷⁵ the court was faced with jury instructions requiring, erroneously, proof by "clear and con-

must be proved, even in a civil suit, by the "beyond a reasonable doubt" standard. *Id.* at 363, 21 N.E.2d at 299. When this rule was in force, there were certain severe criminal consequences of civil liability where a crime was alleged. The *Sundquist* court mentions that prosecution might follow, without the intervention of a grand jury. *Id.* at 365, 21 N.E.2d at 299. The threat of loss of life or liberty as the consequence of a civil action, however, no longer exists.

269. McCormick, *supra* note 266, § 340 n.74 and accompanying text.

270. See, e.g., *Ratay v. Lincoln Nat'l Ins. Co.*, 378 F.2d 209, 212 (3d Cir.), *cert. denied*, 389 U.S. 973 (1967). Other examples include "clear, convincing and satisfactory," "clear, cogent and convincing," and "clear, unequivocal, satisfactory and convincing." McCormick, *supra* note 266, § 340 nn.67-69 and accompanying text.

271. "Fraud" is not the only cause of action or defense which must be proved by "clear and convincing evidence." Others have included: suits on oral contracts to make a will, or to establish the terms of a lost will; suits for the specific performance of an oral contract; reformation or modification of written transactions. *Id.* at nn.76-79 and accompanying text.

272. *Id.* at § 339.

273. See, e.g., *McIntosh v. Eagle Fire Co. of N.Y.*, 325 F.2d 99, 100 (8th Cir. 1963).

274. McCormick, *supra* note 266, § 339 n.47.

275. 361 F.2d 1 (10th Cir. 1966).

vincing evidence."²⁷⁶ The error was found harmless. As justification, the court reasoned that "[t]he words clear and convincing or clear and satisfactory are often used as the standard of proof in such an instruction and can hardly be considered a larger burden than preponderance of the evidence."²⁷⁷

This astounding revelation was met with resounding silence. Perhaps the statement is appropriate only to the confusing issue of the "burden of persuasion" in a defense to a fire insurance claim where incendiarism is involved.²⁷⁸ In 1972 *Connecticut Fire Insurance Co. v. Fox* was cited by the Tenth Circuit for the proposition mentioned,²⁷⁹ and although not relied upon for the holding, there was no skepticism expressed with regard to the validity of the argument.

As a District Court in the First Circuit speculated, "[i]t could be argued that any fact so established by a fair preponderance of the evidence appears clearly and convincingly."²⁸⁰ If this argument were to be generally adopted, it would resolve many of the "burden of persuasion" difficulties which currently exist.²⁸¹ A more explicit route was recently advocated by Mr. Justice Boyd of the Florida Supreme Court: "In the interests of uniformity and speed in our judicial process, I feel we should adhere in all civil cases to the standard jury instruction which simply requires that the greater weight of evidence should control."²⁸²

As the "clear, convincing and satisfactory" standard is presently used, there is a great potential for confusion.²⁸³ The adjectives construed individually and collectively are remarkably unenlightening. "Clear" merely describes the juror's reaction. As a layperson would understand the word, it asks whether a juror *understood* the point in evidence; it does not necessarily require the juror's evaluation of a fact being more or less likely. The application of "convincing" depends solely upon the standard used. The work deftly begs the

276. *Id.* at 6.

277. *Id.* (footnote omitted).

278. See discussion in pt. IV(C) *infra*.

279. *Boone v. Royal Indem. Co.*, 460 F.2d 26, 29 (10th Cir. 1972).

280. *Banco De San German, Inc. v. Maryland Cas. Co.*, 344 F. Supp. 496, 506 (D.P.R. 1972).

281. See pt. IV(C) *infra*.

282. *Allstate Ins. Co. v. Vanater*, 297 So. 2d 293, 297 (Fla. 1974) (concurring opinion).

283. For a suggested rewriting of the "fraud" jury instruction on "burden of persuasion," see E.M. MORGAN, *SOME PROBLEMS OF PROOF* 84-85 (1956).

question.²⁸⁴ "Satisfactory" seems to do no more than state the preponderance of the evidence test.

A further source of confusion is the juror's response elicited by the standard. "Beyond a reasonable doubt" is not a confusing standard as it describes to the juror what his or her state of mind should be in order to acquit or convict.²⁸⁵ "Clear and convincing evidence," however, like the "preponderance" test, compels an objective evaluation of the quality of the evidence. The jury's objectivity, necessary to give these standards meaning, is sometimes thought to be impossible.²⁸⁶

It is unclear to what extent the "clear and convincing evidence" requirement influences triers of fact.²⁸⁷ It may simply suggest caution when considering the evidence. The resolute manner in which the judge frames his instructions on an allegation of fraud may also impress upon the jurors the law's policy preferences. As at least one court has construed the instruction,²⁸⁸ it may establish an objective "quality of the evidence" test for the trier of fact's determination.²⁸⁹ There is certainly a strong body of opinion which opposes the use of this middle standard, at least in its present phrasing.²⁹⁰ Nonethe-

284. For an excellent discussion of this whole issue, see Note, *Evidence: Proof Beyond a Reasonable Doubt in Civil Cases*, 27 U. FLA. L. REV. 260, 264 (1974).

285. *Id.* at 263-64.

286. J. MAGUIRE, *EVIDENCE, COMMON SENSE AND COMMON LAW* 180 (1947).

287. In fact, some writers have suggested that this burden, as a distinct standard of proof, does not even exist. Simon & Mahan, *Quantifying Burdens of Proof*, 5 LAW & SOC'Y REV. 319 (1971). In this empirical study, jurors were asked to quantify the probabilities they personally required to determine an issue both "beyond a reasonable doubt," and "by a preponderance of the evidence." The study showed that for a criminal conviction, the average juror was satisfied with a proof of guilt which was 77 percent reliable, and would find liability under a "preponderance" instruction at a corresponding figure of 73 percent. *Id.* at 326-27. A greater distinction would be expected following careful instruction from the judge. On the other hand, the authors suggest that the average juror employs this implicit probability methodology despite the judge's charge. *Id.* at 329. If this accurately portrays jury deliberation, there is virtually no territory left for the "clear and convincing" standard, which presumably falls somewhere between traditional criminal and civil standards of proof.

288. See note 234 *supra*.

289. *Horner v. Flynn*, 334 A.2d 194 (Me. 1975).

290. See Note, *Horner v. Flynn: A Preponderance of Clear and Convincing Evidence*, 28 ME. L. REV. 240 (1976). The case involved a fraud, and the jury was instructed to decide in favor of the plaintiff if such result were supported by the fair preponderance of the evidence. The Supreme Judicial Court of Maine held this instruction to be erroneous, although, given the facts, only harmlessly so. The court said, however, that the jury should have been instructed to find for the plaintiff only upon the basis of evidence having "strong capacity to induce belief." *Id.* at 200. The court spoke in terms of a "preponderance" of such evidence.

less, it is included in jury instructions frequently, and it remains a popular tool for the furtherance of certain policies. The balance of this Comment will assume, with the vast majority of courts, that the standard can have a cognizable effect. The desired result is evidential favoritism for those accused of fraud.

Where the burden of persuasion in a civil case involving arson is "clear and convincing evidence," the justification for this variance from the common "preponderance" test is the allegation of fraud.²⁹¹ This is supported by the policy that even in a civil suit, a person is entitled to the presumption of innocence of acts *malum in se*.²⁹² One difficulty is finding a satisfactory definition of "fraud."

Fraud can include virtually any act or omission which, by design, results in a loss to someone. Even this would be regarded by many as overly restrictive.²⁹³ In 1871, Mr. Justice Strong described fraud as "deceit, with a design to deprive [a person] of some profit or advantage, and to acquire it for [oneself], whenever loss or damage has resulted from the deceit."²⁹⁴ In 1946, Mr. Justice Douglas said that fraud "connotes perjury, falsification, concealment [and] misrepresentation."²⁹⁵ Faced with authorities both unlikely and unwilling to form a consistent meaning for the word "fraud," only the unimaginative attorney would fail to identify it in a remotely conducive set of facts.

Id. This unusual standard was further defined: "the jury should be told that . . . evidence will constitute preponderance only if it is clear evidence, convincing evidence and unequivocal evidence." *Id.* The jury would thereby be delegated two distinct tasks. The first would require objective appraisal of the quality of the evidence itself. Satisfying this, the jury would then have the subjective task of determining the preponderance, *vel non*, of such evidence. This conceptually difficult, and possibly self-contradictory two-step process is a heavy burden to drop into the laps of jurors. The likelihood of confusion from the "clear and convincing" standard is probably only heightened by the attempt to hybridize it with the "preponderance" test.

291. McCORMICK, *supra* note 266, § 340 n.74 and accompanying text.

292. Hardware Mut. Ins. Co. v. Jacob Hieb, Inc., 146 F.2d 447, 452 (8th Cir. 1945).

293. "[T]he fertility of man's invention in designing new schemes of fraud is so great that courts have always declined to define it, reserving to themselves the liberty to deal with it in whatever form it may present itself. It is, indeed, said that it is better not to define the term lest the craft of men should find ways of committing fraud which might evade such a definition. (footnotes omitted)." Annot., *Fraud and Deceit* § 1, 37 AM. JUR. 2d (1968). "[S]ome courts have said that the common law not only fails to define fraud but perhaps asserts as a principle that there shall be no definition." Annot., *Fraud* § 1, 37 C.J.S. (1943) (footnote omitted).

294. Butler v. Watkins, 80 U.S. (13 Wall.) 456, 464 (1871).

295. Knauer v. United States, 328 U.S. 654, 657 (1946).

There are two distinct acts which have been classified as "fraud" which are frequently charged in arson-related cases. First and most common is the defense of incendiarism: arson for which the insured is responsible. Second, a material misrepresentation of fact in the proof of loss is a complete defense to a suit for fire insurance proceeds. Courts have splintered as to whether one, both, or neither of these acts are "fraud" so as to invoke the more rigorous standard of "clear and convincing evidence." A history of arson-related cases in Illinois, and in the Seventh Circuit applying Illinois law, provides an excellent example of this potential confusion.

In 1935, consistent with the common law, the Illinois Supreme Court noted that fraud, where there was false swearing in a proof of loss, required proof by evidence which was "clear and convincing."²⁹⁶ Four years later, Mr. Chief Justice Shaw²⁹⁷ initiated the confusion with his opinion in *Sundquist v. Hardware Mutual Fire Insurance Co.*²⁹⁸ The defense asserted in *Sundquist* was the plaintiff-insured's alleged "false swearing" in the proof of loss.²⁹⁹ But the court also referred to the defense of "incendiarism"³⁰⁰ upon which the decision seems to rely. The plaintiff sought an instruction requiring proof beyond a reasonable doubt, since the elements of a crime were alleged. After citing many authorities in favor of changing the standard of proof in fraud cases,³⁰¹ the court decided that "preponderance of the evidence" was the applicable standard. The rationale was based on the relation between civil and criminal suits,

296. *Weininger v. Metropolitan Fire Ins. Co.*, 359 Ill. 584, 195 N.E. 420 (1935). The court said that "[t]he presumption very properly is that all men are honest. Where fraud is charged, it must affirmatively be proved by clear and convincing testimony. It cannot be established on mere suspicion." *Id.* at 598, 195 N.E. at 426. They went on, however, to say that "[f]alse swearing in a proof of loss in order to void the insurance policy must be willful and with intent to deceive and defraud the insurer. (cites omitted)." *Id.* This, although true, is confusing, when stated seemingly as part of the burden of persuasion. The United States Supreme Court had spoken earlier in an oft-cited opinion on this subject. *Clafin v. Commonwealth Ins. Co.*, 110 U.S. 81 (1884). The Court held that "if the matter were material and the statement false, to the knowledge of the party making it, and willfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts." *Id.* at 95. *Clafin* reflects the current majority position where a "false swearing" defense has been raised.

297. Mr. Justice Shaw had dissented in the *Weininger* case on purely jurisdictional grounds. 359 Ill. at 600, 195 N.E. at 426.

298. 371 Ill. 360, 21 N.E.2d 297 (1939).

299. *Id.* at 366, 21 N.E.2d at 300. See discussion in pt. IV(D)(2) *infra*.

300. 371 Ill. at 361, 21 N.E.2d at 298.

301. *Id.* at 364, 21 N.E.2d at 299.

and the loss, *vel non*, of life or liberty.³⁰² There was no consideration of the applicability of the traditional fraud standard of "clear and convincing evidence," nor of the bases used to justify that standard.

The general rule in Illinois, as expressed by the vast majority of cases, is that fraud must be proven by "clear and convincing evidence."³⁰³ By focusing on allegations of "crime" rather than "fraud," however, the *Sundquist* case changed this rule as to arson-related claims in Illinois. Defenses in such cases may be proven only by a "preponderance of the evidence."³⁰⁴ This variance from the general rule is questionable, as a more fraudulent practice than "false swearing" in a proof of loss is difficult to imagine. Further, because of the lack of precision in *Sundquist*, the distinctions between standards of proof of "false swearing" and incendiarism remain cloudy.

The rule as to standard of proof in arson-related cases is far from consistent in jurisdictions other than Illinois. However, there is usually a more logical distinction recognized between those cases where the fraud of "false swearing" is alleged, and those where the defense of "arson" is raised. More often than not, "false swearing" involves "clear and convincing evidence,"³⁰⁵ and the defense of

302. *Id.* at 365, 21 N.E.2d at 299-300.

303. See *Sajich v. Sajich*, 128 Ill. App. 2d 432, 262 N.E.2d 11 (1970); *Turzynski v. Libert*, 122 Ill. App. 2d 352, 259 N.E.2d 295, *cert. denied*, 401 U.S. 975 (1970); *Maxwell v. McWilliams*, 145 Ill. App. 155, 171 (1908); ("clear, satisfactory and persuasive"); *Crocker v. Manley*, 164 Ill. 282, 296, 45 N.E. 577, 581 (1896) ("clear and irrefragable"); *Walker v. Hough*, 59 Ill. 375, 380 (1871) ("strongest and most cogent").

But see *American Hoist & Derrick Co. v. Hall*, 110 Ill. App. 463 (1903), *aff'd*, 208 Ill. 597, 70 N.E. 581 (1904); *Merchant's Nat'l Bank v. Lyon*, 185 Ill. 343, 56 N.E. 1083 (1900); *Kingman & Co. v. Reinemer*, 166 Ill. 208, 46 N.E. 786 (1897).

304. *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 349 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975); *L & S Enterprises Co. v. Great Am. Ins. Co.*, 454 F.2d 457, 460 (7th Cir. 1971); *Esquire Restaurant, Inc. v. Commonwealth Ins. Co.*, 393 F.2d 111, 114 (7th Cir. 1968); *Commerce Union Bank v. Midland Nat'l Ins. Co.*, 53 Ill. App. 2d 229, 239, 202 N.E.2d 688, 693 (1964). Illustrative of the confusion which has resulted from *Sundquist*, the *L & S Enterprises Co.* and *Esquire Restaurant, Inc.* cases cited *Sundquist* as authority for applying the "preponderance of the evidence" standard in false swearing cases, and the *Honeycutt* and *Commerce Union Bank* cases cited it as authority for the standard of proof applicable to the defense of "arson."

The rule favoring the "preponderance" standard of proof has seen infrequent exception. See, e.g., *Jay-Bee Realty Corp. v. Agricultural Ins. Co.*, 320 Ill. App. 310, 319, 50 N.E.2d 973, 979 (1943), which relied upon the rule established in *Weininger*. See note 296 *supra*.

305. E.g., *Woods v. Ins. Co. of Texas*, 146 F. Supp. 82 (D. Alas. 1956); *Castoldi v. Hartford County Mut. Fire Ins. Co.*, 21 Conn. Sup. 265, 154 A.2d 247 (1959); *Liverpool & London & Globe Ins. Co. v. Stuart*, 67 Ga. App. 184, 19 S.E.2d 822 (1942); *cf.* *Carpenter v. Union Ins.*

"arson" involves merely a "preponderance."³⁰⁶ Even in courts outside Illinois, however, a certain clarity often is found wanting.³⁰⁷

A typical problem arose with the 1967 case of *Greenberg v. Aetna Insurance Co.*,³⁰⁸ which resulted in a creative and satisfactory interpretation of Pennsylvania law in this area by the Third Circuit Court of Appeals.³⁰⁹ In *Greenberg*, the trial court had lumped "arson" and "false swearing" into one fraudulent act, and required "clear and convincing evidence." The Pennsylvania Supreme Court, fighting the trial judge's broadsword with their own, declared that "the criminal act need only be established by a fair preponderance of the evidence."³¹⁰ No attempt to differentiate between the two defenses was made.

There was an unexpected consequence to this holding. In *Ratay v. Lincoln National Life Insurance Co.*³¹¹ a suit involving a life insurance policy, the Third Circuit had ordered a new trial because of an erroneous instruction as to the standard of proof of fraud. The jury had, by a fair preponderance of the evidence, denied recovery to a

Soc'y of Canton, Ltd., 284 F.2d 155 (4th Cir. 1960). In *Carpenter*, the court expressly characterized incendiarism as an act of fraud, and as such, was to be proven by clear and convincing evidence. *Id.* at 162.

306. *E.g.*, *Don Burton, Inc. v. Aetna Life & Cas. Co.*, 575 F.2d 702 (9th Cir. 1978); *Miele v. Boston Ins. Co.*, 288 F.2d 178 (8th Cir. 1961); *Baltimore-American Ins. Co. v. Pecos Mercantile Co.*, 122 F.2d 143 (10th Cir. 1941); *Klayman v. Aetna Cas. & Sur. Co.*, 501 P.2d 750 (Colo. App. 1972); *Swindle v. Maryland Cas. Co.*, 251 So. 2d 787 (La. App.), *writ denied*, 259 La. 885, 253 So. 2d 217 (1971); *Quast v. Prudential Property & Cas. Co.*, 267 N.W.2d 493 (Minn. 1978); *Raphitis v. St. Paul Fire & Marine Ins. Co.*, 86 S.D. 491, 198 N.W.2d 505 (1972).

307. A good example is *C-Suzanne Beauty Salon, Ltd. v. Gen. Ins. Co.*, 574 F.2d 106 (2d Cir. 1978). The court noted that, in New York, "fraud must be proved by clear and convincing evidence." *Id.* at 112 n.9. This was in the context of a comment on the trial judge's erroneous "preponderance" charge to the jury. However, this case involved both defenses of "arson" and "false swearing." The language in the court of appeals' decision seems to indicate, although not clearly, that the "preponderance" charge related only to the allegation of arson. This, conceivably, could have had nothing to do with the "proof of loss fraud" about which the court of appeals was speaking. In other words, the court of appeals may have underestimated the trial judge's methodology. Although there is no indication of this in the opinion, the trial judge may have, consistently with what seems to be the majority view on the subject, charged the jury to use the "preponderance" standard to determine the issue of incendiarism, and the "clear and convincing" standard for the fraudulent claim of loss. The court of appeals nowhere suggests, along the lines of *Carpenter*, 284 F.2d at 162, that in New York arson itself is deemed an act of "fraud" for standard of proof purposes.

308. 427 Pa. 494, 235 A.2d 582 (1967).

309. It was ultimately resolved in *Ratay v. Lincoln Nat'l Life Ins. Co.*, 405 F.2d 286 (3d Cir. 1968).

310. 427 Pa. at 496, 235 A.2d at 584.

311. 378 F.2d 209 (3d Cir.), *cert. denied*, 389 U.S. 973 (1967).

widow under this defense. The new trial was to be determined, if against the widow, by "clear, precise and indubitable" evidence.³¹² Before the new trial, however, the *Greenberg* decision was handed down, and the district court, agreeing that it might require the original charge to be made again, certified the order in favor of the insurance company for appeal. The Third Circuit, in light of *Greenberg*, drew a very fine line on the meaning of "fraud." A distinction was seen between the making of a contract, and a claim of loss under a contract.³¹³ Where the fraud of "false swearing" is involved, the validity of the insurance contract itself is not called into question;³¹⁴ the policy by its terms vitiates any liability of the insurer where a material misrepresentation is made. Only, therefore, where there is an allegation of fraud in the "making of a contract" would the standard of "clear and convincing evidence" apply. Under this rule, the most frequent perpetration of fraud in arson cases—excessive claims for property lost to fire—would need only be proved by a fair preponderance of the evidence.

This is a desirable result. Such a rule would simplify the duty of charging the jury, since in most cases the burden of persuasion would be the same for all defenses.³¹⁵ Moreover, the significance of the "clear and convincing" standard would be reduced. This in itself would be provident, due to the glaring imperfections of the standard, and would be especially desirable for the difficult question of what constitutes a "fraud," *vel non*, where the act of arson is suspected.

D. Defenses Available to the Insurer

1. *The Common Law Arson Defense*

Many methods of properly denying payment to insureds following fire losses are delineated in the Standard Fire Policy. A legitimate

312. 378 F.2d at 212.

313. 405 F.2d at 289.

314. Traditionally, rescission or cancellation of a contract has required evidence which is clear and convincing. The issue often arises in cases which involve the parol evidence rule, and the standard serves as a further support for the integrity of written contracts.

315. Of course, this would not be true in every case. For example, if an insured, in bad faith and with fraudulent intent, fails to disclose a material fact to the insurer, this can be used as a defense to payment on the policy. Presumably, in such a case the relevant burden of persuasion would be "clear and convincing evidence." For such a case, see *Sebring v. Fidelity-Phenix Fire Ins. Co.*, 255 N.Y. 382, 174 N.E. 761 (1931); *New York Bowery Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 359 (N.Y. 1837).

defense to the claims of insureds which is not included specifically in the statute is the common law defense of arson. The insurer must prove that the fire was ignited by, or that its ignition was procured or encouraged by the insured.³¹⁶ If this is successfully done, liability to the insured is completely vitiated.

A typical case involving the arson defense requires a large amount of circumstantial evidence,³¹⁷ and the essential issues are usually questions of fact. A favorable jury selection, therefore, is often the greater part of the battle. Arson cases are appealed, if at all, usually to determine whether or not the jury's decision was "against the manifest weight of the evidence."³¹⁸ A great obstacle to the elimination of arson for profit is the fact that a successful defense on the grounds of arson requires a tremendous amount of investigation and trial preparation.³¹⁹ A great deal of the appropriate subject matter of the investigation is likely to have burned up.

A clear understanding of the essentials of a prima facie case is presented by a comparison of two Seventh Circuit cases.³²⁰ In *L & S Enterprises Co. v. Great American Insurance Co.*,³²¹ the district court had not allowed the arson defense to go to the jury. Following a jury verdict for the insured, the decision was affirmed by the court of appeals. In *Gregory's Continental Coiffures & Boutique v. St. Paul Fire & Marine Insurance Co.*,³²² the defense of arson again was stricken by the district judge.³²³ On appeal, the Seventh Circuit

316. For a discussion of the law concerning recovery by a party who was not the actual arsonist, see pt. IV(E) *infra*.

317. Such evidence is generally admissible. See *Don Burton, Inc. v. Aetna Life and Cas. Co.*, 575 F.2d 702, 706 (9th Cir. 1978) and cases cited therein.

318. *Lykos v. American Home Assurance Co.*, 452 F. Supp. 533, 536 (N.D. Ill. 1978). Another common ground for appeal, however, as is suggested by the discussion in pt. IV(C) *supra*, is the validity of the judge's instruction to the jury.

319. There are quite a few helpful articles on the procedures involved. To name a few: *Gwertzman, Arson and Fraud Fires*, 12 THE FORUM 827 (1977); *Carmick, Investigation of an Arson Defense*, 11 THE FORUM 493 (1976); *McGuire, The Defense of Arson in a Suit Under an Insurance Policy—Discovery and Trial Preparation*, 11 THE FORUM 507 (1976); *Karp, Preparation for the Trial of an Arson Case*, 11 THE FORUM 514 (1976); *Holloway, Defense of Arson and Fraud Claims*, 39 INS. COUNSEL J. 72 (1972).

320. These two cases, decided approximately four and one half years apart, feature two judges in common, and the same attorney for the plaintiff-insureds. Both cases were appealed to the Seventh Circuit from the United States District Court for the Northern District of Illinois, Eastern Division.

321. 454 F.2d 457 (7th Cir. 1971).

322. 536 F.2d 1187 (7th Cir. 1976).

323. *Id.* at 1188. In this case, the insurer also interposed a defense of fraud in the "proof

vacated the judgment of the district court, and remanded for a new trial with the arson defense to go to the jury. The similarities and differences between the facts presented in each case are enlightening. There are always many explanations available to justify differing results from similar fact patterns. Nevertheless, the importance of certain items of evidence may readily be seen. These items are those typically of importance in all arson defenses.

In *L & S Enterprises* the evidence to prove that the fire was intentionally set was the weak link. Potentially damaging evidence of charring patterns, "streamers" of flame,³²⁴ and the odor of fuel was offered. A fireman determined that the cause of the fire was "suspicious."³²⁵ However, the Bureau of Fire Investigation dropped its investigation and an official noted that the fire was possibly innocent. Both plaintiffs had alibis for the time of the fire's origin. An "alibi" was irrelevant in the *Gregory's* case. The plaintiff, in fact, was out of the country at the time of the fire. But the plaintiff was directly linked to the purchase of plastic drums, found after the fire on the premises, which had contained the gasoline used to accelerate the fire.

In addition to the incendiary origin of the fire and the plaintiff's connection thereto, an essential consideration in almost any arson case is the financial condition of the insured. Such information will frequently provide proof of motive for the arson.³²⁶ In *L & S Enterprises*, the company had been losing money since its inception. The market for the services proffered (slot car racing) was also in a state of decline. There was no question but that a financial gain would be realized by virtue of a fire. Mitigating these circumstances, however, was the testimony that the plaintiffs had other income, and regarded the burnt-out company as a "hobby."³²⁷ In *Gregory's* the financial outlook was equally bleak. The court there seemed to stress the extensive debts the plaintiff company had accumulated.

of loss." This defense was also withdrawn from the jury by the district judge, and the Seventh Circuit vacated this decision on appeal. *Id.* at 1192.

324. 454 F.2d at 458. "Streamers," also known as "trailers," are paths across the floor of a building which have been doused with some kind of accelerant, in order to spread a fire from its point of ignition to other areas of the premises. For a discussion of this and similar topics, see Gwertzman, *Arson and Fraud Fires*, 12 THE FORUM 827, 828-32 (1977).

325. 454 F.2d at 458.

326. *But see* note 328 *infra*.

327. 454 F.2d at 458.

In a remarkably high percentage of cases, the arsonist failed to create the appearance of a breaking-and-entering, thereby leaving damaging evidence of fully secured premises at the time the fire began. At that point, access to the premises becomes highly relevant. In both *L & S Enterprises* and *Gregory's* the doors and windows were apparently locked, and no evidence of forcible entry was offered. In each case possession of the keys was considered along with potential motive. This limited access weighed heavily against the plaintiff in *Gregory's*, even though he was clearly nowhere near the scene of the conflagration.

These three factors are the essential elements of the defense of arson.³²⁸ In these particular circumstances, the different result probably could be attributed to the slightly closer connection made between the plaintiff and the instrumentalities of the incendiarism. This direct evidential link between the alleged arsonist and the accelerant is not absolutely necessary, nor even is the "opportunity" to arrange for the fire a required element of the defense.³²⁹ For each case there is a slightly different pattern of evidence to be emphasized with the three major elements in mind. A great deal of circumstantial evidence, otherwise of considerably low relevance, is admissible. Judges are usually aware of the fact—as is oft-quoted—that "[t]he chance that there will be a motion picture of the arsonist in the act of setting the dynamite is most unlikely."³³⁰

2. The "Fraud or False Swearing" Defense

There is an array of technical defenses available to the insurer which, unlike the "arson" defense, have been written into the Standard Fire Policy. Assertion of one of these defenses serves to com-

328. The three elements are summarized as follows: "(a) that the fire was intentionally set, (b) that the insured had the *opportunity* to set the fire or have it set, and (c) that the insured had a *motive* for doing so." Karp, *Preparation for the Trial of an Arson Case*, 11 THE FORUM 514, 514 (1976). See also *Boone v. Royal Indem. Co.*, 460 F.2d 26 (10th Cir. 1972). "Motive" is less and less restricted to a determination of financial hardship. The deterioration of urban areas has created a climate for profit from arson which occurs to people not necessarily themselves in dire financial straits. The purchase price actually paid for certain buildings can frequently be arranged at a significantly reduced amount from what the insurance policy will pay. Taylor Address, *supra* note 264, at 5-6.

329. *Elgi Holding, Inc. v. Ins. Co. of North America*, 511 F.2d 957 (2d Cir. 1975). There, following a jury verdict for the insurance company, the court said that the evidence at trial "which established that the fire was incendiary in nature and that [the insured] had a motive to cause it" was sufficient to uphold the verdict. *Id.* at 959.

330. *Boone v. Royal Indem. Co.*, 460 F.2d 26, 29 (10th Cir. 1972).

pletely vitiate liability to the insured. The first to appear in the 165 Lines is, broadly, the "fraud or false swearing" defense. It provides that,³³¹

[t]his entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

This provision presents the insurance company with a good alternative means of defeating an arsonist's claim, particularly when the fire itself was cleverly and successfully perpetrated. Theoretically, any purposefully fraudulent statement, regardless of how minor, will entirely vitiate liability on the contract.³³² The fraud or false swearing can even be committed recklessly to effect the same result.³³³ It is unnecessary that the swearing be under oath.³³⁴ As this harsh rule is intended as a deterrent to those who seek to defraud insurance companies, an unsuccessful attempt to commit such fraud will also void the policy.³³⁵

This provision, despite its unquestioned validity, offends some weighty characteristics of the common law. Forfeitures are abhorred. Public policy favors the insured. Most of all, the law presumes that all persons are honest.³³⁶ Given all of these maxims, an innocent representation which is inaccurate will not be allowed to void the policy.³³⁷ Courts are frequently found to presume the legal version of two possible, contrary interpretations of the facts. There is great receptivity to various and innovative means of ex-

331. N.Y. INS. LAW § 168(6), lines 1-7 (McKinney 1966).

332. Such would seem a logical conclusion from the phrasing of the Standard Policy. There, willful concealments and misrepresentations are differentiated from "fraud or false swearing," and the requirement of materiality is applied only to the former. This subtlety is not frequently observed in the cases, and "materiality" has become an essential element of the defense generally. Rather than distinguishing between them, concealments and misrepresentations are usually simply labelled a form of fraud or false swearing. See 5A APPLEMAN ON INSURANCE § 3587 nn.81 & 82 (1970) [hereinafter cited as APPLEMAN].

333. *Smith v. Insurance Co. of North America*, 213 F. Supp. 675, 682 (M.D. Tenn.), *aff'd in part and rev'd on other grounds sub nom. Trice v. Commercial Union Assurance Co.*, 334 F.2d 673 (6th Cir. 1963).

334. *American Diver's Supply & Mfg. Corp. v. Boltz*, 482 F.2d 795, 798 (10th Cir. 1973); *Mercantile Trust Co. v. New York Underwriters Ins. Co.*, 376 F.2d 502, 505 (7th Cir. 1967).

335. 376 F.2d at 505.

336. *Weininger v. Metropolitan Fire Ins. Co.*, 359 Ill. 584, 598, 195 N.E. 420, 426 (1935).

337. 5A APPLEMAN, *supra* note 332, § 3583.

plaining at trial the reason that a proof of loss was erroneously compiled. On the other hand, proof of "intent" is virtually always difficult, and these suits are decided in a civil context, with no threat of loss of life or liberty involved. Therefore, it was established in the landmark case of *Clafin v. Commonwealth Insurance Co.*³³⁸ that, if a material matter were involved, and the statement in the proof of loss were known by the insured to be false, then the intent to deceive would be "necessarily implied."³³⁹ The Supreme Court announced that in such circumstances "the law presumes every man to intend the natural consequences of his act."³⁴⁰ This leaves the insured had manifested as true was actually false; this falsity involved a "material" issue; and the insured knew that it was not true, or was so ignorant of its truth or falsity that reasonable efforts to discover the truth should have been, but were not made.³⁴¹

The central issue is where "innocent mistake" ends and "fraud" begins. Properly, this is a question for the trier of fact. However, beyond some point of variance between what has been claimed and what has been proved, "fraud" has occurred as a matter of law, and liability to the insured-defrauder no longer exists.³⁴² One court has phrased it as the boundary line between good and bad faith on the part of the insured,³⁴³ but this does little more than restate the question.

To consider the actual percentage difference in the claim of loss from that proved at trial is helpful when the case is at one of the extremes. It has been noted that when the variance is above 1,000

338. 110 U.S. 81 (1884).

339. *Id.* at 95.

340. *Id.*

341. This will vary among jurisdictions. In Michigan there is a fourth requirement that the misrepresentation be made "with the intention that the insurer would act upon it." *West v. Farm Bureau Mut. Ins. Co.*, 63 Mich. App. 279, 282, 234 N.W.2d 485, 487 (1975) (pursuant to statute), *rev'd on other grounds*, 402 Mich. 67, 259 N.W.2d 556 (1977). See also NEB. REV. STAT. § 44-358, specifying that insurance policies may only be voided if, *inter alia*, "such breach shall . . . contribute to the loss."

For a survey of the law regarding overvaluation in the proof of loss, see 16 A.L.R.3d 774 (1967).

342. *Tenore v. Am. and Foreign Ins. Co. of N.Y.*, 256 F.2d 791 (7th Cir.), *cert. denied*, 358 U.S. 880 (1958). The court cited COOLEY, BRIEFS ON THE LAW OF INSURANCE 5864 (2d ed. 1927): "there is a point where the question of fraud or false swearing becomes one of law, and beyond which the insured cannot be heard to say that his intent was innocent." 256 F.2d at 793.

343. *Yates v. State Farm Fire & Cas. Co.*, 417 F.2d 766, 767 (5th Cir. 1969).

percent, fraud as a matter of law is almost always found; when the variance is less than 100 percent, it is usually presumed to be an innocent mistake.³⁴⁴ For the majority of cases, however, very little reliance should be placed on the percentages alone.³⁴⁵ A good example of how courts will vary is presented by *Morgan v. Badger Mutual Insurance Co.*³⁴⁶ The insured filed a claim of loss in the amount of \$95,000, and the jury returned a verdict for him in the amount of \$33,000.³⁴⁷ The district court held that for a businessman to swear that each item has been counted and valued, and then to deny the existence of fraud in light of the jury's conclusion, "defies credulity."³⁴⁸ The court concluded that the existence of fraud "is clearly the only logical inference that can be drawn."³⁴⁹ The case was reversed, and remanded for a new trial. At the new trial the jury returned with a verdict for \$35,400 plus a response to a specific interrogatory to the effect that they believed the insured to be innocent of any fraud.³⁵⁰ The trial judge accepted the jury's findings,³⁵¹ and the case was affirmed by the Fifth Circuit Court of Appeals.³⁵²

Some courts have devised their own terminology for this distinction. "Gross overvaluation" has been used.³⁵³ Similarly, another

344. 16 A.L.R.3d 781 (1967). *E.g.*, *Newman v. Fireman's Ins. Co.*, 67 Cal. App. 2d 386, 154 P.2d 451 (1944), wherein the insured claimed losses of \$4,000 to his house and \$8,000 to the contents thereof, and reliable evidence was presented at trial that the actual losses respectively were \$750 and \$200. The appellate court decided that "an inference of intentional falsity was more reasonably consistent with the facts than an inference of good faith." *Id.* at 399, 154 P.2d at 458. At the other extreme is *Buffalo Ins. Co. v. Amyx*, 262 F.2d 898 (10th Cir. 1958). In this case the insured reported her loss at approximately \$30,000. The jury found the reasonable value of the property destroyed to be \$15,231. The court affirmed the jury's finding for the insured on the question of "good faith and honest belief" as to the value of the property burned. *Id.* at 901. *See also* cases cited in Annot., 16 A.L.R.3d §§ 17[b], 20, at 774. (1967).

345. It is true, however, that, theoretically, "[o]vervaluation raises a presumption of fraud in proportion to the excess." *Stebane Nash Co. v. Campbellsport Mut. Ins. Co.*, 27 Wis. 2d 112, 124, 133 N.W.2d 737, 745 (1965). The point is that other factors are involved as well.

346. 181 F. Supp. 496 (N.D. Fla. 1960), *rev'd and remanded*, 192 F. Supp. 249 (N.D. Fla. 1961), *aff'd*, 313 F.2d 783 (5th Cir. 1963).

347. 181 F. Supp. at 499.

348. *Id.* at 500.

349. *Id.*

350. 313 F.2d at 784-85.

351. *Id.* at 785. Contributing to the natural suspicion that the determination of fraud as a matter of law is an arbitrary process is the fact that the trial judge on remand was the same one as in the original trial.

352. *Id.* at 788.

353. *Gregory's Continental Coiffures & Boutique v. St. Paul Fire & Marine Ins. Co.*, 536

court suggested that the presumption of fraud was made conclusive when the amount claimed and the amount proved are "grossly disparate, and the explanation tendered is so unreasonable or fantastic that it is inescapable that fraud has occurred."³⁵⁴

The most reliable method of proving "fraud or false swearing" is probably to highlight a qualitatively distinct mistake in the proof of loss, which could have been due to a fraudulent intent. Unless the claim is excessive, a quantitative variance in dollar amount alone is usually insufficient. In *Tenore v. American and Foreign Insurance Co. of New York*,³⁵⁵ there was a large disparity between the monetary values of the loss claimed and the loss proved.³⁵⁶ But the insured made the additional mistake of allowing his claim of loss to exactly reflect the wholesale price of new merchandise, purportedly to replace his old, deteriorated merchandise. Given these two factors, fraud as a matter of law was much more visible. There could be no "innocent mistake" such that all the old goods were valued just at wholesale.³⁵⁷ Nonetheless, some courts can find even qualitative variations from the truth to be merely "careless oversights,"³⁵⁸ not necessitating a holding of "fraud."

F.2d 1187, 1192 (7th Cir. 1976). Actually, this test was used to justify presenting the question of fraud to the jury after the trial judge had ruled insufficiency of evidence as a matter of law.

354. *Saks & Co. v. Continental Ins. Co.*, 23 N.Y.2d 161, 165-66, 242 N.E.2d 833, 835, 295 N.Y.S.2d 668, 671-72 (1968). The presumption of fraud would arise when the insured "can only prove a small percentage of his claimed loss." *Id.* at 165, 242 N.E.2d at 835, 295 N.Y.S.2d at 671. At this point, therefore, the insured has the burden of coming forward with a sound explanation for the gaps in his evidence.

355. 256 F.2d 791 (7th Cir.), *cert. denied*, 358 U.S. 880 (1958).

356. The insured had claimed approximately \$78,000 for damages done by fire to his stock of firearms. Those that were burned had almost without exception been cracked, sawed-off, or simply were very old and of questionable value. The jury returned a verdict for \$20,000. 256 F.2d at 792-93.

357. Another example of a "qualitative" difference between the proof of loss and the evidence at trial is found in *Lykos v. American Home Assurance Co.*, 452 F. Supp. 533 (N.D. Ill. 1978). The insured had averred losses of \$39,000 for "business interruption." The evidence showed that the business was losing approximately \$3,000 net per month. *Id.* at 536. The dollar figure disparity is relatively insignificant in relation to the total amount claimed, but such "mistakes" can hardly be presumed to be "inadvertent." The jury award in this case was reversed. *Id.* at 537.

358. *C-Suzanne Beauty Salon, Ltd. v. General Ins. Co. of America*, 574 F.2d 106, 111 (2d Cir. 1978). The insured had neglected to disclose the existence of a security interest in the insured property. *See also* *L & S Enterprises Co. v. Great Am. Ins. Co.*, 454 F.2d 457 (7th Cir. 1971). There a \$900 loss, claimed by the insured was actually attributable to a subsidiary. The insignificance of the amount, despite its questionable inclusion, must have been an important factor.

There are many other examples of misrepresentations which can serve to vitiate liability other than gross overvaluation of loss. One of the essential elements of the fraud defense, however, which the insurance company must prove, is "materiality." Misrepresentations which have been deemed "material" are the cause of the fire;³⁵⁹ the existence of unnamed, possibly suspicious, cointerested parties;³⁶⁰ the alleged existence of a sprinkler system;³⁶¹ and the insured's activities on the day of the fire, and the identity of any guests he may have had, even though no arson was alleged in the case.³⁶² Courts are likely to view "materiality" relatively broadly, because the purpose of the "fraud and false swearing" defense is to insure truthfulness in the proof of loss. This is necessary, as the United States Supreme Court said, to enable the insurance companies "to decided upon their obligations, and to protect themselves against false claims."³⁶³

3. *The "Cooperation Clause"*

The defense of "fraud or false swearing" is made more effective by the section in the Standard Fire Insurance Policy which requires the insured, following the filing of the sworn loss claimed, to submit to examination by the insurance company.³⁶⁴ The requirement is

359. *Esquire Restaurant, Inc. v. Commonwealth Ins. Co.*, 393 F.2d 111 (7th Cir. 1968). The court therein said that "the proof of loss statements about the cause of the fire . . . , relied upon by defendants as false, were so clearly material that the jury did not need a separate definition of 'material fact' in order to follow Instruction O [dealing with the 'false swearing' defense]." *Id.* at 115.

360. *Sebring v. Fidelity-Phenix Fire Ins. Co.*, 255 N.Y. 382, 385, 174 N.E. 761, 762 (1931).

361. *Allstate Ins. Co. v. National Tea Co.*, 25 Ill. App. 3d 449, 460, 323 N.E.2d 521, 528-29 (1975). The insurance contract was voided even though the misstatements were made in good faith. Here, the court utilized a "mutual mistake" rationale. It is interesting to note that eleven years earlier the same court had held the failure to inform the insurer of pending condemnation proceedings not to be a "material" misrepresentation. *Di Leo v. United States Fidelity & Guar. Co.*, 50 Ill. App. 2d 183, 192, 200 N.E.2d 405, 409 (1964).

362. *Edmiston v. Schellenger*, 343 So. 2d 465, 467 (Miss. 1977). The result in this case was not changed by the fact that, two and one half years after the event, the insured corrected the misrepresentation to the insurance company. The court rationalized that "materiality should be judged at the time of the misrepresentation, not at the time of the trial." *Id.* at 467.

363. *Claffin v. Commonwealth Ins. Co.*, 110 U.S. 81, 95 (1884).

364. N.Y. INS. LAW § 168(6), lines 113-22 (McKinney 1966). This provision reads as follows:

The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and

enforced by the fact that the insured forfeits any right to recovery if there is a breach of the contractual duty of "cooperation."³⁶⁵ In order to invoke this provision to defeat an insured's recovery, the requirement of an examination under oath, plus all the relevant details must be carefully and thoroughly described.³⁶⁶ This includes the manifestation that the insurance company *demand*s such an interview, and is not simply "requesting" one.³⁶⁷

The traditional rule with regard to the "cooperation clause" is that if the insured violates the requirements of the clause, the policy is voided and the duty to indemnify no longer exists.³⁶⁸ This violation can include attending the examination, but failing to answer certain relevant questions.³⁶⁹ There is some authority, which is rather negligible, that the insured can pick and choose answers in a

subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Id.

365. OSTRANDER, FIRE INSURANCE § 172 (2d ed. 1897). It is suggested that the forfeiture only become effective upon prejudice to the insurer, in the case of reasonable delay. This is offered as a safeguard to the rights of those falsely accused of criminal arson. 5A APPLEMAN, *supra* note 332, § 3549 (Supp. 1978). This view has not found much support in the case law. See Taylor Address, *supra* note 264, at 15. *Contra*, C-Suzanne Beauty Salon v. General Ins. Co. of America, 574 F.2d 106 (2d Cir. 1978). See note 384 *infra*.

366. Citizens' Ins. Co. v. Herpolsheimer, 77 Neb. 232, 109 N.W. 160 (1906), required the time and place of the examination to be specified, as well as the identity of the person authorized to conduct it. For a further discussion, see Gwertzman, *Arson and Fraud Fires*, 12 THE FORUM 827, 843-44 (1977).

367. 574 F.2d at 111. The plaintiff-insured was informed that the insurance company "requested" an examination. Because the plaintiff had not decided whether or not suit would be brought, his attorney notified the defendant that he would not attend the examination. The right to bring a suit at some later time was reserved in this letter. A few days before the statute of limitations had run, the plaintiff brought suit. *Id.* General Insurance moved for summary judgment on the basis of the violation of the "cooperation clause." The district judge denied the motion, but ordered the plaintiff to submit to the sworn examination. General Insurance was allowed the opportunity to renew the motion if prejudice could be shown by the delay. The court later found that no prejudice had been shown. The court of appeals affirmed this procedure. Although the equivocal nature of the defendant's notice of the examination was considered, the decision was also based on more general considerations. *Id.*

368. Gross v. United States Fire Ins. Co., 71 Misc. 2d 815, 337 N.Y.S.2d 221 (Sup. Ct. 1972). One of the protections built into this harsh rule, however, is that the insured is entitled to have an attorney present at this examination who may object on legal grounds to any questions where such grounds are available. *Id.* at 817, 337 N.Y.S.2d at 224.

369. Kisting v. Westchester Fire Ins. Co., 416 F.2d 967 (7th Cir. 1969).

limited manner, by seeking a protective order following each individual incriminating question.³⁷⁰ The requirement of full disclosure of relevant information at the examination is not changed by the existence of an indictment,³⁷¹ nor by the insured's promise to make arrangements for the examination when the criminal proceedings come to a conclusion.³⁷² The majority rule seems to be that if a material issue is left unanswered, the contract obligation of cooperation has been breached and the contract is void.³⁷³

This is not, however, the absolute rule in all jurisdictions at all times. Courts have devised other tests to determine whether the "cooperation clause" has been satisfied. One court changed the standard for effective compliance with the "cooperation clause" by adding two conditions.³⁷⁴ The condition is breached if discrepancies in the insured's answers are not only material, but also "made in bad faith . . . and prejudicial in effect."³⁷⁵

In *C-Suzanne Beauty Salon, Ltd. v. General Insurance Co.*,³⁷⁶ the

370. See *Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.*, 518 F.2d 671 (2d Cir. 1975). There, the court refused to grant an injunction to postpone the examination until after criminal charges were determined. It was said in this regard that "the requirement of his appearance alone in no way violates his due process rights. Only after the incriminating question is asked, is he in a position to assert his immunity and seek a protective order." *Id.* at 674. However, the court later in the opinion notes that "[w]hether the insured can successfully assert its Fifth Amendment rights if it sues upon the policy, is another question which is not now before us." *Id.* at 675 n.1. The court then cites two cases which rejected plaintiffs' arguments that the due process clause protected them from the necessity of answering, while maintaining their suit. The view that fifth amendment rights may be protected simultaneously with a successful action for insurance proceeds lacks any significant support in the case law.

In fact, one court has expressly determined that the dictates of the standard fire policies do not represent "state action," and therefore no fifth or fourteenth amendment rights are subjected, in this context, to judicial enforcement. *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975). The court here decided that the purposes of the "cooperation clause" were not to further the arson investigations of law enforcement officials, but rather to provide for uniformity among insurance policies written in the state. Therefore, "the state has not been involved in either compelling the questioning or imposing the economic consequences for a refusal to answer to a sufficient extent to invoke Fifth Amendment protection." *Id.* at 55.

371. *Hickman v. London Assurance Corp.*, 184 Cal. 524, 195 P. 45 (1920); *Restina v. Aetna Cas. & Sur. Co.*, 61 Misc. 2d 574, 306 N.Y.S.2d 219 (Sup. Ct. 1969); cf. *Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.*, 518 F.2d 671 (2d Cir. 1975).

372. 61 Misc. 2d 574, 306 N.Y.S.2d 219 (Sup. Ct. 1969).

373. *Clafin v. Commonwealth Ins. Co.*, 110 U.S. 81 (1884).

374. *Union Assurance Soc'y, Ltd. v. Garver*, 223 Md. 412, 164 A.2d 879 (1960).

375. *Id.* at 416, 164 A.2d at 881. For use of a "good-bad faith" test, see *Mulkey v. United States Fidelity & Guar. Co.*, 243 S.C. 121, 126-27, 132 S.E.2d 278, 283 (1963).

376. 574 F.2d 106 (2d Cir. 1978). See note 367 *supra*.

court relied on language from an earlier New York Court of Appeals case, *Happy Hank Auction Co. v. American Eagle Fire Insurance Co.*,³⁷⁷ holding that to void the policy the insured must be guilty of "a 'willful and fraudulent withholding of information.'"³⁷⁸ The court also included the "materiality" requirement, utilizing the language of another early New York Court of Appeals decision.³⁷⁹ It was there stated that recovery could not be defeated on the basis of "technical or unimportant omissions or defects in the performance by either party."³⁸⁰ Undoubtedly the court intended both of these considerations, fraudulent intent and materiality, to represent the law in New York. *Happy Hank* reaches the same conclusion.³⁸¹ This divergence from the majority interpretation of the cooperation clause is predicated on the court's abhorrence of forfeitures.³⁸²

One lower New York court, borrowing from common law principles, applied a new feature for the first time to the "cooperation clause" defense: "[T]he New York courts will not permit a party who places the legality of his conduct in issue to unfairly prejudice his adversary by asserting the privilege."³⁸³ The "privilege" to refuse to answer questions at an insurance company examination may shield a plaintiff-insured from incrimination, but not at the expense of the defendant in a civil suit. Therefore, the "privilege" is available, under this rule, to non-party witnesses; this, however, may be of little consequence as the insurance company can only compel the insured, upon threat of avoiding liability, to submit to an examination. In essence, this is a "prejudice" test,³⁸⁴ which has an equitable amount of "materiality" built into it. Presumably, a non-material

377. 1 N.Y.2d 534, 136 N.E.2d 842, 154 N.Y.S.2d 870 (1956).

378. 574 F.2d at 110 (citing language from *Happy Hank*, at 1 N.Y.2d at 539, 136 N.E.2d at 844, 154 N.Y.S.2d at 873). This requirement sounds very much like the "bad faith" test of *Union Assurance Soc'y, Ltd. v. Garver*. See note 375 *supra*.

379. 574 F.2d at 110.

380. *Porter v. Traders' Ins. Co.*, 164 N.Y. 504, 509, 58 N.E. 641, 642-43 (1900).

381. 1 N.Y.2d at 539, 136 N.E.2d at 844, 154 N.Y.S.2d at 873.

382. 574 F.2d at 110.

383. *Cronk v. Cayuga County Patrons' Fire Relief Ass'n*, 90 Misc. 2d 945, 948, 396 N.Y.S.2d 587, 589 (Sup. Ct. 1977).

384. The trial court in *C-Suzanne Beauty Salon, Ltd.* had employed a "prejudice" test, but, because of the unusual circumstances of the case, had placed the burden of going forward with the proof on the insurance company. 574 F.2d at 111. The court of appeals could not let it rest, however, with a "prejudice to the insurer"-type test, and felt compelled to add "materiality" and "fraudulent intent" as well. See notes 378-79 *supra* and accompanying text.

omission would not be so significant, by definition, as to "prejudice" the insurer. This case has also received favorable comment elsewhere.³⁸⁵

The question of "materiality" is usually a matter of fact.³⁸⁶ Of course, there are some subjects which are so obviously material that disclosure thereof can be compelled as a matter of law.³⁸⁷ Production of documents may be subjected to the same "materiality" tests.³⁸⁸

Due to the mandatory language in which the "cooperation clause" is couched,³⁸⁹ the provisions of this clause are usually applied to the letter.³⁹⁰ There seem to be at least two ways for an insured to avoid the examination requirement altogether: disappearance, with no imputable knowledge of the fire,³⁹¹ and deportation.³⁹² Short of these rather draconian alternatives, a person fearing criminal sanctions is well advised either to argue the immateriality of the concealed facts, or suffer the loss of the insurance proceeds.

4. The "Increase of Hazard" Defense

Another technical defense to a claim for fire insurance proceeds is the "increase of hazard" clause.³⁹³ This has been described as, *inter alia*, a non-disapprobatory method of penalizing the commission of a crime.³⁹⁴ In an effort to avoid accusing a plaintiff of incen-

385. See Taylor Address, *supra* note 264, at 15.

386. 1 N.Y.2d at 539, 136 N.E.2d at 844, 154 N.Y.S.2d at 873.

387. See, e.g., Taylor v. Fireman's Fund Ins. Co., 306 So. 2d 638 (Miss. 1975). There, material omissions included source of the fire, insured's financial condition, and the financing of title to the house.

388. E.g., two frequently requested documents are tax returns and bank deposit figures. Production, *vel non*, of these items, where the insured's own financial records have allegedly been destroyed in the fire, have sometimes been regarded as a matter of fact on the issue of cooperation clause compliance. Happy Hank Auction Co. v. American Eagle Fire Ins. Co., 1 N.Y.2d at 539, 136 N.E.2d at 843, 154 N.Y.S.2d at 873. On other occasions, failure to provide such documentation has been held a "material" breach as a matter of law. Southern Guar. Ins. Co. v. Dean, 172 So. 2d 553 (Miss. 1965).

389. See note 220 *supra*.

390. This is meant literally as well as figuratively. At least one author has commented upon the significance of the "s" at the end of the word "examinations" in line 116 of the Standard Fire Policy. Taylor Address, *supra* note 264, at 15. In other words, an insurer is expressly not limited to a single examination of the insured.

391. Nicolai v. Transcontinental Ins. Co., 61 Wash. 2d 295, 378 P.2d 287 (1963).

392. Roberto v. Hartford Fire Ins. Co., 177 F.2d 811 (7th Cir. 1949).

393. N.Y. Ins. Law § 168(6), lines 28-32 (McKinney 1966). Lines 28-32 provide that: "Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured. See 5 APPLEMAN, *supra* note 332, §§ 2941-48.

394. Taylor Address, *supra* note 264, at 14.

diarism, a juror will be able to act on his suspicions to deny recovery based on a technical "increase of hazard." The increase must have occurred between the time the policy was entered into and the time of the fire; the insurance company can not have been made aware of this "increase," remain silent, continue to collect premiums, and then expect the clause to vitiate liability.³⁹⁵ Except, perhaps, in an extreme case, the "increase" refers to that which is practiced regularly over time, and not simply an isolated occurrence or act.³⁹⁶ The question as to whether the increase of hazard is to result in the forfeiture of recovery is usually one of fact.

Although the statutes in each state may vary to a minor degree, most follow the example of the New York Standard Fire Policy.³⁹⁷ The test for identifying an "increase of hazard" is clearly spelled out there: liability is defeated where the hazard is "increased by any means within the control or knowledge of the insured."³⁹⁸ In some states, other tests are expressly required by statute.³⁹⁹ Peculiar inter-

395. *Garcy Corp. v. Home Ins. Co.*, 353 F. Supp. 329 (N.D. Ill. 1973); *Briney v. Tri-State Mut. Grain Dealers Fire Ins. Co.*, 254 Iowa 673, 117 N.W.2d 889 (1962).

396. *Gorton v. Phoenix Ins. Co.*, 339 F. Supp. 241 (D. Mass. 1972); *Charles Dowd Box Co. v. Fireman's Fund Ins. Co.*, 351 Mass. 113, 218 N.E.2d 64 (1966). See also Note, *The Increase-of-Hazard Clause in the Standard Fire Insurance Policy*, 76 HARV. L. REV. 1472, 1472-73 (1963).

397. See note 220 *supra*.

398. N.Y. INS. LAW § 168(6), lines 31-32 (McKinney 1966). See also 5 APPLEMAN, *supra* note 332, § 2941 n.30 and accompanying text. Probably due to a lack of clarity by Mr. Justice Brandeis in *St. Paul Fire & Marine Ins. Co. v. Bachmann*, 285 U.S. 112 (1932), the clause is often held to require an increase within the "knowledge and control" of the insured as opposed to the disjunctive form used in the Standard Fire Policy. See, e.g., *Di Leo v. United States Fidelity & Guar. Co.*, 50 Ill. App. 2d at 191, 200 N.E.2d at 409. In *Bachmann*, Brandeis uses "knowledge and control" seven times and "knowledge or control" four times. (emphasis supplied). Such uses appear almost indiscriminate. However, the insurer "alleged" that the acts were within the insured's knowledge and control (emphasis supplied). 285 U.S. at 114. Perhaps this was the higher standard the insurer ill-advisedly attempted to meet, and not the easier burden disjoining the levels of involvement. Brandeis later cites the trial judge's instruction, employing "or" as the correct form. *Id.* at 118. This must be seen as the controlling principle. The mistake in *Di Leo*, however, is quite understandable in the circumstances. For a catalogue of cases supporting the *Di Leo* result, see *Am. Mfrs. Mut. Ins. Co. v. Wilson-Keith & Co.*, 247 F.2d 249, 259 (8th Cir. 1957).

399. E.g., IOWA CODE ANN. §§ 515.101, 515.102 (1949): A policy condition "shall not prevent recovery . . . if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss." A clause in a fire insurance policy requiring only the traditional knowledge and control of the means of increasing the hazard was held, in Iowa, to be "inoperative." *Hawkeye Chem. Co. v. St. Paul Fire & Marine Ins. Co.*, 510 F.2d 322 (7th Cir. 1975). The same test, in essence, was judicially required in South Carolina. *Boatwright v. Aetna Ins. Co.*, 1 Strob. (S.C.) 281 (1847).

pretations of the standard test do appear occasionally. A Florida court, intending that the insurer's liability be vitiated if the hazard were materially increased, require, instead, that the change effect "a material and substantial increase in hazard."⁴⁰⁰ A recent federal district court decision, in dictum only, characterized the defense as available when "the insured performs acts which are reasonably calculated to increase the risk and which he knows or should know will increase the risk."⁴⁰¹ The inclusion of "calculation" (presumably, "intent to defraud") in the requirements of the "increase of hazard" clause is clearly erroneous.⁴⁰² Otherwise, the clause would simply be coextensive with the "fraud and false swearing" defense.

A curious theory, which has long existed in many different forms, is the idea that this defense is also available for an increase of the "moral hazard."⁴⁰³ In purest form, such an increase occurs when the

400. *Smith v. Peninsular Ins. Co.*, 181 So. 2d 212, 214 (Fla. App. 1965). This language was taken from 8 *COUCH*, *supra* note 249, § 37:695:

A provision avoiding insurance because of an alteration in the situation or circumstances which would increase the risk contemplates such alteration as would materially and substantially enhance the hazard, as viewed by a person of ordinary intelligence, care, and diligence. A mere trifling increase will not avoid the policy; rather, there must be a substantial and material increase, such as the insurer, in view of the terms of the policy, could not reasonably be presumed to have contracted to assume.

Because "material" and "substantial" are used together, one would normally be led to believe that they meant different things. But as the increase is described in the second sentence above, it is clear that the "materiality" test (*i.e.*, was the change "material" enough so that if the insurers were given the opportunity, they would enter the insurance contract on different terms) is sufficient to vitiate liability, *vel non*. Although this relatively minor method of phrasing is not likely to cause much confusion, it may have played a significant role in influencing the decision in *Cabella v. Travelers Indem. Co.*, 248 So. 2d 539 (Fla. App. 1971). For further discussion of the *Smith* case, see 19 A.L.R.3d 1326 (1968).

401. *Plaza Equities Corp. v. Aetna Cas. & Sur. Co.*, 372 F. Supp. 1325, 1331 (S.D.N.Y. 1974).

402. See *Security Mut. Cas. Co. v. Affiliated FM Ins. Co.*, 471 F.2d 238, 243 (8th Cir. 1972). The *Plaza Equities Corp.* court's mistake is, at least, understandable. Their reliance was placed upon *Brooks Upholstering Co. v. Aetna Ins. Co.*, 276 Minn. 257, 149 N.W.2d 502 (1967). In that case, the "intentional" language was used because there was a Minnesota statute (Minn. Stat. § 65.011, subd. 11) which limited the suspension of insurance coverage with regard to the use of, *inter alia*, sprinkler systems. The *Brooks* court determined that if the insured intended to turn the system off, and leave it off, this may have been sufficient, considering the "increase of hazard" clause, to supersede the statute.

Secondly, the *Plaza Equities Corp.* court's phrasing might, if liberally viewed, be seen as requiring nothing more than "regular" acts, *i.e.*, not simply the occurrence of a single, negligent act, causative of the damage.

403. See, *e.g.*, *Knowles v. Dixie Fire Ins. Co. of Greensboro, N.C.*, 177 La. 941, 149 So. 528 (1933).

insured loses any substantial interest in protecting the property from damage.⁴⁰⁴ Given the existence of a fire insurance policy, this loss is usually seen as equivalent to an affirmative interest in the destruction of the property.⁴⁰⁵ This doctrine constitutes an exception to the general rule that the "hazard" which has been increased must be physical in nature.⁴⁰⁶

Conditions which have triggered the "moral hazard" defense have included financial difficulties, and the inability to put the building to its intended use.⁴⁰⁷ These rationales for the utilization of the "moral hazard" defense, however, are against the greater weight of the modern authority.⁴⁰⁸ At least one jurisdiction has determined that to procure additional insurance covering the same property as is already adequately insured constitutes "increase of moral hazard" as a matter of law.⁴⁰⁹ The reasoning behind this rule is that insurance coverage in excess of the value of the property is an invitation to arson; a profit motive is introduced by the additional insurance. Although courts may be more likely to find an "increase in hazard" by the fact that the insured premises are used for illegal purposes, there is no necessary relation between the two.⁴¹⁰

Triers of fact may be reluctant to formally accuse a person of arson, even in a civil context. "Moral hazard" may be an appropriate defense in such circumstances. The jury, for example, may

404. *Nemojeski v. Bubolz Mut. Town Fire Ins. Co.*, 271 Wis. 561, 564, 74 N.W.2d 196, 198 (1956). For a discussion of whether mortgages, liens, and other encumbrances constitute increases of the moral hazard so as to avoid a fire insurance policy, see 56 A.L.R.2d 419 (1957).

405. 271 Wis. at 564, 74 N.W.2d at 197.

406. The majority rule on this point is stated in *Esbjornsson v. Buffalo Ins. Co.*, 252 Minn. 269, 275-76, 89 N.W.2d 893, 898 (1958).

407. *Future Realty, Inc. v. Fireman's Fund Ins. Co.*, 315 F. Supp. 1109 (S.D. Miss. 1970). The court, no doubt, was also greatly influenced by the suspicious circumstances surrounding the fire.

408. *Charles Stores, Inc. v. Aetna Ins. Co.*, 490 F.2d 64, 68-69 n.4 and accompanying text (6th Cir. 1974); *United States v. Illinois FAIR Plan Ass'n*, [1975] FIRE & CAS. CASES (CCH) 1145 (N.D. Ill.). The court in *Illinois FAIR Plan* ruled that the increase of hazard defense was only available following changes in the "use" of the property, and not after changes "in the mental or moral state of the insured." The opinion continues that "the increased risk against which the clauses guard is that the property will burn and not that the insured will burn it. (cite omitted)." *Id.* at 1146.

409. *Great Am. Ins. Co. v. Merchants & Mfrs. Mut. Ins. Co.*, 423 F.2d 1143, 1145 (6th Cir. 1970); *Shouse v. Indiana Lumbermens Mut. Ins. Co.*, 254 F. Supp. 989 (S.D. Ohio 1964), *aff'd per curiam*, 361 F.2d 969 (6th Cir. 1966).

410. *Boston Ins. Co. v. Read*, 166 F.2d 551 (10th Cir. 1948); *Phoenix Ins. Co. v. Haney*, 108 So. 2d 227 (Miss. 1959).

view the evidence as overwhelming that the insured at least knew how and when the fire started, and probably had something to do with the incendiarism. This defense may make available a tempered expression that the insured should not be allowed to recover. The theory is that the insured was there, could have prevented the conflagration, and by not doing so, increased the risk that damage would be done.⁴¹¹ The failure to act is the "moral" breach. The interpretation of the language in the Standard Fire Policy is tortured, but "moral hazard" theory developed as a flexible standard. It is one that should be used sparingly, if at all.

The defense of "increase of hazard" is often used in unusual cases where the judge or one of the adversaries specifically wants to avoid proving something which, although obvious, might for one reason or another be difficult to prove. In *Wilson v. Concordia Farmers Mutual Insurance Co.*,⁴¹² the judge declined to explore the rights of an "innocent" co-owner of property on the grounds that her apparent knowledge of the incendiarism precluded her recovery on "increase of hazard" grounds.⁴¹³ In *Balen Developing Corp. v. American Home Assurance Co.*,⁴¹⁴ the court pointed out that even where the "vacancy" defense⁴¹⁵ is unavailable because of a clause in the insurance policy itself, "abandonment" may constitute an "increase of hazard" so as to defeat recovery.⁴¹⁶ Clearly, the defense can be used very flexibly, based upon the exigencies of each individual case.

5. *The "Vacant or Unoccupied" Defense*

Vacancy or unoccupancy of the insured property, typically for a period in excess of sixty days,⁴¹⁷ is a technical defense for the insurance company in a suit for payment on the policy. This defense varies only slightly among jurisdictions. Like the "increase of haz-

411. See, e.g., *Collins v. Firemen's Fund Ins. Co.*, 296 F.2d 562 (7th Cir. 1961); *Pueppka v. Iowa Mut. Ins. Co.*, 165 Neb. 781, 87 N.W.2d 410 (1958).

412. 479 S.W.2d 159 (Mo. App. 1972).

413. *Id.* at 161.

414. [1975] FIRE & CAS. CASES (CCH) 825 (N.Y. Sup. Ct. Kings Co.).

415. See pt. IV(D)(5) *infra*.

416. [1975] FIRE & CAS. CASES (CCH) at 828-29.

417. N.Y. INS. LAW § 168(6), lines 28-35 (McKinney 1966). Lines 28-35 state that: "[u]nless otherwise provided in writing added hereto the Company shall not be liable for loss occurring . . . (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days." A period of thirty or ninety days is occasionally specified, usually in a rider to the policy.

ard" clause,⁴¹⁸ a breach of this provision will provide the insurer with a complete defense to payment on the policy. The policy, however, is not voided following the breach. The provision acts merely to "suspend the insurance and the policy coverage may be revived by compliance with its terms before loss."⁴¹⁹ In order to take advantage of this defense, the insurer need not return or offer to return premiums paid during the period of vacancy or unoccupancy.⁴²⁰

"Vacant" is generally defined to mean "empty or deprived of contents or without inanimate objects."⁴²¹ The second term, "unoccupied," deals with the human use of the insured building, and varies with each insured and each building. "It should be construed with reference to the nature and character of the building for the use contemplated by the parties."⁴²² When, as in the New York Standard Fire Policy,⁴²³ the words are used in the disjunctive, they are never regarded as synonymous or complimentary,⁴²⁴ although they may commonly mean the same thing to a layperson. Although such provisions in insurance policies, where ambiguous, must always be construed in favor of the insured, there seems to be a greater tendency toward leniency for homeowner-insureds,⁴²⁵ and a stricter

418. The two defenses occasionally overlap. In *Future Realty, Inc. v. Fireman's Fund Ins. Co.*, 315 F. Supp. 1109, 1116 (S.D. Miss. 1970), the court used unoccupancy as one of the factors to be considered as to whether or not the plaintiff-insured has "increased the risk." Unoccupancy has been held, however, not to be equivalent to increase of hazard as a matter of law, although it may be a consideration for the trier of fact. *Knoff v. United States Fidelity & Guar. Co.*, 447 S.W.2d 497 (Tex. Civ. App. 1969).

419. *Knight v. United States Fidelity & Guar. Co.*, 123 Ga. App. 833, 834, 182 S.E.2d 693, 695 (1971).

420. *Dunton v. Connecticut Fire Ins. Co.*, 371 F.2d 329, 331 (7th Cir. 1967).

421. 123 Ga. App. at 835, 182 S.E.2d at 695. See also 8 COUCH, *supra* note 249, § 37: 845, 848. See *Belgrade v. National Am. Ins. Co.*, 204 Cal. App. 2d 44, 47, 22 Cal. Rptr. 21, 22, where the court upheld the jury's verdict based on a finding of vacancy, on the basis of "how sparsely the house was furnished."

422. 123 Ga. App. at 835, 182 S.E.2d at 695.

423. See note 220 *supra*.

424. 123 Ga. App. at 835, 182 S.E.2d at 695.

425. See, e.g., *Drummond v. Hartford Fire Ins. Co.*, 343 S.W.2d 84 (Mo. App. 1960). In this case, the all-important "purpose of the premises" test as to "occupancy," *vel non*, was deemphasized, although the insured could conceivably have triumphed anyway. But the court said that the terms of the policy "might be satisfied where one 'is there possessio pedis, such as a caretaker or watchman.'" *Id.* at 87. Such a change from the "use contemplated by the parties" for the insured building would never maintain the insurance in force for business premises. "Storage" is almost always insufficient to show "occupancy." 4A APPLEMAN, *supra* note 332, § 2840. However, storage of clothing and furniture in an apartment was sufficient for "occupancy" even though no one was living in the apartment. *Burrell v. Seguros America*

interpretation as to insured businesses.⁴²⁶

Usually the "vacant or unoccupied" clause contemplates some change in the use of the insured premises. The majority rule is that if the insurance company can be imputed with knowledge of the vacancy prior to entering into the policy agreement, it waives this defense, at least as to the known violation of the clause.⁴²⁷ Occasionally this result is not reached unless there is an expectation that the premises will remain vacant beyond the period permitted by the clause.⁴²⁸

The length of time beyond which the property cannot remain vacant or unoccupied without forfeiting the insurance coverage is sixty days in the Standard Fire Policy.⁴²⁹ This period begins to run at the time of issuance of the policy.⁴³⁰ Even where the statutory requirement exists, the sixty day feature can be changed, to the point of removing the clause altogether, by a rider to the policy.⁴³¹ An insignificant amendment to the policy will not begin the sixty day period anew.⁴³² After a first fire, the new sixty day period will not begin to run with respect to a potential second fire until after the insurer has finalized its plans for the building.⁴³³

Banamex, S.A., 316 So. 2d 177 (La. App. 1975). Where a home was insured, the misrepresentation as to the occupation by tenants of the insured premises was held immaterial. *Old Colony Ins. Co. v. Garvey*, 253 F.2d 299 (4th Cir. 1958).

426. "Storage" of business-related articles does not indicate that the building was occupied. *Dunton v. Connecticut Fire Ins. Co.*, 371 F.2d 329, 330 (7th Cir. 1967). Where a hotel and tavern were no longer operating, and the premises were put up for sale, with heating still on, and the liquor license maintained, the court held that the building was "unoccupied" as a matter of law. *Kern Hotel & Tavern, Inc. v. Home Ins. Co.*, 30 Ill. App. 3d 196, 332 N.E.2d 197 (1975).

427. *Travelers Fire Ins. Co. v. Bank of New Albany*, 146 So. 2d 351 (Miss. 1962); *Stuart v. United States Fire Ins. Policy*, 18 N.C. App. 518, 197 S.E.2d 250 (1973).

428. *Conley v. Queen Ins. Co.*, 256 Ky. 602, 76 S.W.2d 906 (1934).

429. See note 220 *supra*.

430. *Kolivera v. Hartford Fire Ins. Co.*, 8 Ill. App. 3d 356, 290 N.E.2d 356 (1972). Remarkably, there is a case where fire destroyed the insured premises more than sixty days after "issuance," but less than sixty days after delivery of the policy to the insured. The court said that the time requirement should start running at the point of delivery. *Hurst v. Donegal & Conoy Mut. Fire Ins. Co.*, 224 S.C. 188, 78 S.E.2d 189 (1953).

431. *Brannan v. Republic Ins. Co.*, 495 P.2d 1144, 1146 (Colo. App. 1972).

432. *Thatcher v. Reliance Ins. Co.*, 226 A.2d 919 (Del. Super. 1967). Here, one of the insureds merely deleted his name from the policy, having assigned his right in the property to the other insured under the policy. All other conditions, by the terms of the General Endorsement, were to "remain the same." *Id.* at 920. The court felt that beginning a new period (in this case, ninety days) would not accurately reflect the intent of the parties. *Id.* at 925.

433. *DeVanzo v. Newark Ins. Co.*, 44 A.D.2d 39, 353 N.Y.S.2d 29 (1974). The insurer, in

E. Cointerested Parties

Serious, bona fide losses usually attend an arson; any number of innocent people may have legitimately suffered harm from the fire. Such people, in addition to the arsonist, may have an insurable interest in the damaged property. The rights of those who are in no way culpable for the acts of incendiaryism should be protected as a matter of public policy. Where the evidence links the arsonist to the insured plaintiff only to the extent of co-ownership, the plaintiff will be allowed to recover for the loss.⁴³⁴ However, as the relationship and interest become closer, the law becomes less clear as to a right of recovery.

The fact that the arsonist and the plaintiff are or were married has frequently been considered. It is likely that the courts will be somewhat more lenient toward a close relationship other than marriage.⁴³⁵ The traditional rule is that an innocent spouse of the arsonist cannot recover for damage done to the jointly owned or community property.⁴³⁶ If the arson can fairly be characterized as a

New York, has a thirty day period in which to decide whether to exercise the option to repair, replace, or rebuild the property damaged by fire. That period was simply added to the sixty day "vacant or unoccupied" limit, even though the insurer had decided not to repair the building, as the plaintiff could "not be sure of its disinclination" to repair until the thirty days had elapsed. *Id.* at 43, 353 N.Y.S.2d at 32.

434. *Varano v. Home Mut. Fire Ins. Co.*, 164 Pa. Super. 228, 63 A.2d 97 (1949). The plaintiff and the arsonist were joint owners of a two-family home, and maintained separate insurance policies. No evidence was proffered connecting the plaintiff to the incendiary act.

435. *See, e.g., Hoyt v. New Hampshire Fire Ins. Co.*, 92 N.H. 242, 29 A.2d 121 (1942). Here, the plaintiff was a cotenant in common, and a coinsured with the arsonist. Although it is not stated in the opinion, it is highly likely that they were also relatives. Nevertheless, the court cited a policy preference for insurance policies to be construed as "several," unless clearly and specifically made "joint." *Id.* at 244, 29 A.2d at 123. Hence, a broader right of recovery was allowed. An innocent remainderman of a trust, who was also the wrongdoer's son, was allowed recovery, plus the additional amount of his father's life estate in the trust income. *Mercantile Trust Co. v. New York Underwriters Ins. Co.*, 376 F.2d 502 (7th Cir. 1967). If, however, the court finds evidence of a conspiracy, the treatment of the insured conspirator will be as harsh as that of the arsonist. *Nathan v. St. Paul Mut. Ins. Co.*, 251 Minn. 74, 86 N.W.2d 503 (1957).

Contra, Williams v. Fire Ass'n of Philadelphia, 193 So. 202 (La. App. 1939), where the act of one spouse for another was held to be no different from any other agential act. *Id.* at 204.

436. *California Ins. Co. v. Allen*, 235 F.2d 178 (5th Cir. 1956); *Home Ins. Co. v. Pugh*, 51 Ala. App. 373, 286 So. 2d 49 (1973) (dictum); *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Klemens v. Badger Mut. Ins. Co. of Milwaukee*, 8 Wis. 2d 565, 99 N.W.2d 865 (1959). The rule is the same if the parties are separated, *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511 (Tex. Civ. App. 1952), or divorced, *Jones v. Fidelity & Guaranty Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952). This result was justified by the

"joint enterprise" in behalf of both spouses, the court will deny recovery to both.⁴³⁷

There seems to be a trend against the traditional rule. In Wisconsin, a court granted reformation of a policy to delete the arsonist-wife's name and allowed the husband to recover.⁴³⁸ A New Jersey case recently held that the interest in the property, or the rights and obligations under the contract of insurance are not material to the right, *vel non*, of an innocent, insured spouse to recover.⁴³⁹ What did concern the court was the liability specifically for the arson or fraud. It was held that whether the property interest was joint or several, the responsibility for the fire was, at least in this case, several.⁴⁴⁰ This focus upon liability for the fire itself was utilized by the Supreme Judicial Court of Maine, even though it may have worked a small benefit in favor of the arsonist.⁴⁴¹ As there has always been a

fact that the rights and obligations under the policy were "joint" when entered into, and no change was made subsequent to the divorce.

437. *Wilson v. Concordia Farmers Mut. Ins. Co.*, 479 S.W.2d at 161. Here, both spouses acted together to remove the possessions from the house. After the fire, the husband acted for both in signing and filing the proof of loss. Although neither of these cited characteristics evince conspiratorial motives, as the couple was in the process of moving into a new house, a "joint enterprise" was found. One commentator has suggested that this particular theory calls for an investigation into the projected longevity of the marriage at the time of the fire. See Taylor Address, *supra* note 264, at 9.

438. *Shearer v. Dunn County Farmers Mut. Ins. Co.*, 39 Wis. 2d 240, 159 N.W.2d 89 (1968). Under the facts of the case, this was clearly the equitable result. The husband was the sole owner of the property, and the wife's name was added to the policy only pursuant to a Farmers Home Administration mortgage agreement. The court concluded, however, by declining to deny recovery to an insured spouse when the arson could not be imputed to him or her. In an attempt to liberalize this area of the law, the court said that "[m]arried people are still individuals and responsible for their own acts. Vicarious liability is not an attribute of marriage." *Id.* at 249, 159 N.W.2d at 93.

439. *Howell v. Ohio Cas. Ins. Co.*, 130 N.J. Super. 350, 327 A.2d 240 (1974).

440. *Id.* at 354, 327 A.2d at 242.

441. *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329 (Me. 1978). The husband and wife had purchased a home, giving a real estate mortgage to a bank as security for the unpaid purchase price. Following the fire and pursuant to the terms of a mortgage clause in the policy, the insurer paid \$15,872 to the bank for the property loss to the extent of their interest. Previously, the husband, who intentionally ignited the fire, had agreed to convey his interest in the property to the plaintiff-wife to avoid creditors. *Id.* at 331 n.4. The court did not attempt to determine the validity of this transaction. In either event, however, the husband was still potentially liable on the note to the bank, which was paid by the insurer. The court, perhaps realistically, did not suggest subrogation as a solution to this problem. Instead, the court said that the plaintiff's recovery would not benefit the husband "to an extent that violates public policy." *Id.* at 332. A clear distinction was made between that which was paid to the bank and that paid to the plaintiff. The resolution of this apparent inequity, if such were possible, was left to the retrial. Repayment of the note could reasonably

strong policy against any direct or indirect benefit flowing to wrongdoers from their improper acts, however, the court took every precaution to limit this effect.

Where arson is committed by one of the interested parties in a corporation, the liability of the insurer will depend upon the status, powers, and duties of the arsonist. Clearly, unless otherwise agreed, if the owner were the arsonist, the insurer would not be liable to the owner, nor to another cointerested party whose rights of recovery were derivative to those of the owner-insured.⁴⁴² A part owner may, by his incendiary act, defeat recovery for the corporation,⁴⁴³ but, generally, recovery will be allowed, with care being exercised not to enrich the arsonist.⁴⁴⁴ The corporation was denied recovery in one case where the fire had been set by the general manager, who was also an officer and director.⁴⁴⁵ Language in a jury instruction to the effect that a corporate plaintiff could recover "even if one of its officers set the fire unless he was the sole owner," was apparently affirmed,⁴⁴⁶ but this simplistic methodology is nowhere else applied.

A number of different tests have developed to determine whether a corporation may recover when the fire was set by a person with some interest in the corporation. One case provided that an insurer would not be liable where the incendiary was acting "with the

be seen to benefit the plaintiff as well as her husband, the arsonist. Therefore, the court, at retrial, might well decide to reduce the insurer's liability commensurate at least with the gain sustained by the plaintiff.

442. *General Elec. Credit Corp. v. Aetna Cas. & Sur. Co.*, 437 Pa. 463, 263 A.2d 448 (1970). As conditional vendor of personalty to the insured-arsonist, the plaintiff in this case sought recovery under the standard mortgage clause or pursuant to a special lender's loss payee clause purportedly agreed upon at issuance. *See also Imperial Kosher Catering, Inc. v. Traveler's Indem. Co.*, 73 Mich. App. 543, 252 N.W.2d 509 (1977), where recovery was denied to a corporation due to the incendiarism of one or both of the principal shareholders.

443. *Kimball Ice Co. v. Hartford Fire Ins. Co.*, 18 F.2d 563 (4th Cir. 1927). In this case, however, there were many contributing factors to this result. For a discussion, *see* notes 447-54 *infra* and accompanying text.

444. *See* 18 *Couch, supra* note 249, § 74:670.

445. *Oswaldo Varane, Inc. v. Liberty Mut. Ins. Co.*, 362 Mass. 864, 284 N.E.2d 923 (1972). It is probable that the court was strongly influenced by the fact that the principal stockholder in the corporation was the arsonist's wife. *See also Northern Assurance Co. v. Rachlin Clothes Shop*, 32 Del. 406, 125 A. 184 (1924).

446. *Esquire Restaurant, Inc. v. Commonwealth Ins. Co. of N.Y.*, 393 F.2d 111, 115 (7th Cir. 1968). The court said that because of this instruction, it was necessary to determine who "were the actual stockholders on the date of the fire." *Id.* The court's instruction on this issue was then affirmed. The court, therefore, seemed to give tacit approval to this "test" of the right of recovery in the corporate context. No support for this position was cited in the opinion, however.

authorization, knowledge or ratification of the corporation."⁴⁴⁷ A recent case permitted recovery based upon a test meaning essentially the same thing: the arsonist's acts were found outside of the insured's "procurement, privity, or asset."⁴⁴⁸ The most frequently used method, however, of determining liability is to consider primarily who will be the beneficiary of the insurance proceeds. Perhaps the most sensible statement of this rule is the very inclusive one set forth in *Miller & Dobrin Fur Co., Inc. v. Camden Fire Insurance Co. Ass'n.*⁴⁴⁹ The alleged arsonist was an officer, director, and one of the principal stockholders in the corporation. Recovery was denied following a three-pronged test: first, the arsonist would "substantially benefit" from the payment; second, this person "dominated the affairs" of the corporation; and third, the other cointerested parties had allowed him to take this control.⁴⁵⁰ These considerations are implicit in another more simply stated test wherein "the basic function of the court is to see that no one takes advantage of his own wrong . . . either directly or indirectly."⁴⁵¹ In one case, it was apparent that the arsonist himself could not benefit by the payment of insurance proceeds.⁴⁵² Therefore, the court suggested another test, molded from criminal law principles, that a principal cannot recover having "authorized, consented to, advised, aided or encouraged" his agent's incendiary acts.⁴⁵³ Primarily on the basis that a principal will not be assumed to have "authorized" a criminal act, recovery under the policy was permitted. One case has

447. *Charles Stores, Inc. v. Aetna Ins. Co.*, 428 F.2d 989, 992 (5th Cir. 1970). The alleged arsonist was a vice president and director of the insured corporation.

448. *Owl & Turtle, Inc. v. Travelers Indem. Co.*, 554 F.2d 196, 199 (5th Cir. 1977). For this language, the court relied upon 18 *Couch*, *supra* note 249, § 74:699.

449. 55 N.J. Super. 205, 150 A.2d 276 (1959).

450. *Id.* at 213, 150 A.2d at 280. This rule, perhaps, could be seen as dictum, as the court later came to the conclusion that the alleged arsonist was really a member of a partnership, rather than a stockholder in a corporation. *Id.* at 223, 150 A.2d at 286. The rule with regard to partnerships is quite different from that regarding corporations. Incendiarism committed or procured by a partner will defeat all other partners' rights of recovery. The difference, simply, is that "copartners are agents one for the other, which is not the case with stockholders of a corporation." *Kimball Ice Co. v. Hartford Fire Ins. Co.*, 18 F.2d 563, 567 (4th Cir. 1927). This rule is well-settled, a different result being reached only where it was shown that the arsonist-partner burned property used by the partnership, which was owned exclusively by the innocent partner. *Hartford Fire Ins. Co. v. Clark*, 258 Ala. 141, 61 So. 2d 19 (1952).

451. *Erlin-Lawler Enterprises, Inc. v. Fire Ins. Exch.*, 267 Cal. 2d 381, 385, 73 Cal. Rptr. 182, 185 (1968).

452. *Nuffer v. Insurance Co. of North America*, 236 Cal. 2d 349, 45 Cal. Rptr. 918 (1965).

453. *Id.* at 355, 45 Cal. Rptr. at 922.

suggested a stricter test where the evidence adduces a fraudulent motive in the procurement of the insurance policy.⁴⁵⁴ This distinction, however, has not subsequently been made.

The law is well settled as to the mortgagee's right to recover insurance proceeds following the mortgagor's breach of the policy conditions. The result turns entirely on the type of mortgage clause signed. There are two predominant types: "simple, loss-payable" or "open" mortgage clauses; and "union" or "standard" mortgage clauses.⁴⁵⁵ Under the former, the mortgagee's rights are "derivative" to those of the mortgagor,⁴⁵⁶ are "payable as interests may appear,"⁴⁵⁷ and the insurer is not liable to the mortgagee if there is no liability to the mortgagor-insured.⁴⁵⁸ The more frequently adopted clause is the "standard" mortgage clause, which, in effect, creates a separate contract of insurance between the insurer and the mortgagee.⁴⁵⁹ Pursuant to this clause, the mortgagee can recover from the insurer despite the wrongful "acts or neglect" of the mortgagor.⁴⁶⁰ This legal right also extends to the mortgagee's assignee.⁴⁶¹

There is some authority to the effect that a standard mortgage clause only protects mortgagees of real property, or personal property so innately annexed to the property as to be "bound" thereto.⁴⁶²

454. *Kimball Ice Co. v. Hartford Fire Ins. Co.*, 18 F.2d 563, 565-66 (4th Cir. 1927).

455. For complete discussions of this topic, see 43 AM. JUR. 2d *Insurance* §§ 765-70 (1955); 24 A.L.R.3d 435 §§ 1-5 (1969).

456. *State Securities Co. v. Federated Mut. Implement & Hardware Ins. Co.*, 204 F. Supp. 207, 222 (D. Neb. 1960), noting that to allow persons to profit from their "rascality," even indirectly, is *contra bonos mores*. *Id.* at 218.

457. *Tri-State Ins. Co. v. Ford*, 120 F. Supp. 118, 123 (D.N.M. 1954). However, the "as interests may appear" language may also be found in "union" or "standard" mortgage clauses, wherein the right of recovery of the mortgagee is preserved. See, e.g., *National Commercial Bank v. Jamestown Mut. Ins. Co.*, 70 Misc. 2d 701, 334 N.Y.S.2d 1000 (Sup. Ct. 1972).

458. 43 AM. JUR. 2d *Insurance* § 767 (1955). The rule has also been stated that this mortgage clause "makes the mortgagee merely 'an appointee to collect the insurance money due to the insured in case of loss, and such mortgagee must claim in the right of the insured, and not in his own.'" *Insurance Co. of North America v. Gulf Oil Corp.*, 106 Ga. App. 382, 384, 127 S.E.2d 43, 45 (1962).

459. *Vormelker v. Oleksinski*, 40 Mich. App. 618, 199 N.W.2d 287 (1972); *MFA Mut. Ins. Co. v. Huddleston*, 459 S.W.2d 104 (Mo. App. 1970); *First Fed. Sav. and Loan Ass'n v. Nichols*, 33 A.D.2d 259, 306 N.Y.S.2d 542 (4th Dep't 1970); *Old Colony Co-op Bank v. Nationwide Mut. Fire Ins. Co.*, 114 R.I. 289, 332 A.2d 434 (1975). The liability under this "separate contract," of course, is only to the extent of the mortgage debt. 459 S.W.2d at 106.

460. 43 AM. JUR. 2d *Insurance* § 769 (1955).

461. *Mobile Construction Co. v. Phoenix Ins. Co.*, 119 Ill. App. 2d 329, 256 N.E.2d 149 (1970).

462. *Landford v. Public Fire Ins. Co.*, 282 Mass. 323, 185 N.E. 21 (1933); *Wilcox v. Mut.*

Creditors or conditional vendors of personalty are protected, instead, by "lender's loss payable clauses."⁴⁶³ Such clauses will typically subject mortgagees to the same conditions as those of "open" or "loss payable" mortgage clauses.⁴⁶⁴ The courts taking exception to this "rule" have, perhaps, consistently outnumbered the adherents.⁴⁶⁵ Even if this rule once represented the weight of authority, the current trend is clearly against it.⁴⁶⁶

These rules have been modified in some states by statute to give further protection to mortgagees.⁴⁶⁷ At the same time, there is growing recognition of the part played by mortgages in arson for profit schemes.⁴⁶⁸ "Straw" mortgages provide a relatively safe financial interest in property slated for destruction. Many arsonists also have an interest in the corporation which becomes the mortgagee. If the arsonist is caught, it is at least possible that his company may recover for the fire. Therefore, the statute in aid of mortgagees may be unwise encouragements. Instead of offering the luxuries of ignorance or conspiracy to prospective mortgagees, perhaps their right

Fire Ins. Co., 81 Minn. 478, 84 N.W. 334 (1900); *Spangler v. Union Nat'l Mount Joy Bank*, 125 Pa. Super. 31, 35, 189 A. 541, 542 (1937).

463. 437 Pa. 463, 263 A.2d 448 (1970). See note 442 *supra*.

464. Taylor Address, *supra* note 264, at 7.

465. *Motors Sec. Co. v. Aetna Ins. Co. of Hartford*, 17 So. 2d 316 (La. App. 1944), where chattel mortgagee of an automobile was allowed to recover, despite the arson of the mortgagor. See also *Piedmont Fire Ins. Co. v. Fidelity Mortgage Co.*, 250 Ala. 609, 35 So. 2d 352 (1948); *Aetna Life & Cas. Co. v. Charles S. Martin Distrib. Co.*, 120 Ga. App. 133, 169 S.E.2d 695 (1969) (where conditions specifying personal property were included in agreement); *Hartford Fire Ins. Co. v. Associates Capital Corp.*, 313 So. 2d 404 (Miss. 1975); *Great Am. Ins. Co. v. Southwestern Fin. Co.*, 297 P.2d 403 (Okla. 1956); *Georgia Home Ins. Co. v. Golden*, 127 Tex. 93, 91 S.W.2d 695 (1936).

466. *J.B. Kramer Grocery Co. v. Glens Falls Ins. Co.*, 497 F.2d 709 (8th Cir. 1974); *Citywide Knitwear Processing Co., Inc. v. Safeco Ins. Co. of America*, 36 N.Y.2d 717, 367 N.Y.S.2d 485, 327 N.E.2d 638 (1975). For a discussion of this development, see Taylor Address, *supra* note 264, at 7-8.

467. See, e.g., TEX. INS. CODE ANN. art. 6.15 (Vernon 1963); MISS. CODE ANN. § 5695 (1956). These statutes have been interpreted to mandate standard mortgage clause provisions in fire insurance policies. *Georgia Home Ins. Co. v. Golden*, 127 Tex. 93, 91 S.W.2d 695 (1936); *Employers Mut. Cas. Co. v. Standard Drug Co.*, 234 So. 2d 330 (Miss. 1970).

468. See MASSACHUSETTS ARSON PREVENTION TASK FORCE, REPORT 20 (Dec. 15, 1978). Two suggestions made in this report to involve mortgage institutions in the fight against arson-fraud are: property tax payments should be "escrowed by the mortgagee and be paid by the owner in monthly installments with his mortgage payments . . . and [m]ortgage companies should be regulated . . . in the same manner as other lenders." *Id.* at 21. Also noting the mortgagee as a potential arson beneficiary are: Gwertzman, *Arson and Fraud Fires*, 12 THE FORUM 827, 827-28 (1977); 124 CONG. REC. S7994 (daily ed., May 22, 1978) (quoting article from the Washington Post, May 8, 1978).

of recovery should be limited by statute, rather than broadened.⁴⁶⁹ The field is, at least, ripe for study and reconsideration.

V. Conclusion

It is indisputable that arson for profit is a large and growing problem. There is a community of opinion which favors the imposition of a more extensive duty to combat this problem upon the fire insurance companies.⁴⁷⁰ This is an economic conclusion which must take into account profit rates and levels of premiums. Aside from these issues, the public policy of a private organization acting in the nature of a law enforcement agency must be examined.

As a private litigant, an insurance company has certain benefits unavailable to public agencies. An insurer needs no search warrant to investigate the premises of an attempted arson-fraud,⁴⁷¹ while an officer or agent of the police is constrained by the cases interpreting the fourth amendment to the U.S. Constitution.⁴⁷² The constitutional mandates of access to counsel, and protection against involuntary "confessions," do not always limit the techniques of investigative agents of private companies. Where such rights are violated by the police, the "fruits" of such tactics may still be available in the civil forum.⁴⁷³ The criminal defendant has the benefit of the sixth amendment compulsory process and confrontation clauses not available to plaintiffs in civil cases.⁴⁷⁴ An insured-plaintiff can be

469. For two suggested changes, see note 468 *supra*. One potential restriction, as yet unconsidered, is to statutorily mandate standard mortgage protection, *unless* the insurer can show that the mortgagee was or reasonably should have been aware of major health or building code violations or other technical defenses (*e.g.*, insured's misrepresentation, increase of hazard, or vacancy or unoccupancy) at the time the mortgage was procured. If such evidence is proffered, the mortgagee's rights should then become derivative upon those of the mortgagor-insured. This, of course, involves issues far beyond the scope of this Comment, and much inquiry is needed before the feasibility of such a statute is assured.

470. See, *e.g.*, PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SEN. COMM. ON GOVERNMENTAL AFFAIRS, ROLE OF THE INSURANCE INDUSTRY IN DEALING WITH ARSON-FOR-PROFIT, 10-13 (February 1979).

471. *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 348-49 (7th Cir. 1975).

472. *Michigan v. Tyler*, 436 U.S. 499 (1978); *United States v. Gargotto*, 510 F.2d 409, 411 (6th Cir. 1974). Such constraint is imposed at least following the commencement of an official arson investigation.

473. *Terpstra v. Niagara Fire Ins. Co.*, 26 N.Y.2d 70, 256 N.E.2d 536, 308 N.Y.S.2d 378 (1970). A confession, given to police in violation of the plaintiff-insured's sixth amendment rights under *Escobedo v. Illinois*, 378 U.S. 478 (1964), was ruled admissible if voluntarily made. 26 N.Y.2d at 73, 256 N.E.2d at 537, 308 N.Y.S.2d at 380.

474. U.S. CONST. amend. VI.

compelled to testify at trial, whereas a criminal defendant is often shielded by the fifth amendment privilege.⁴⁷⁵ Two important rights available to insurance companies but not to prosecutors are the right to request a trial by jury, and a limited right to choose the forum for the trial.⁴⁷⁶ Certain rules of evidence result in more liberal admission of evidence in a civil action than will occur in a criminal case.⁴⁷⁷ Despite the admissibility of most circumstantial evidence, the greatest hinderance to a prosecutor is the task of meeting the "beyond a reasonable doubt" standard. An insurer need only establish the case by preponderating or "clear and convincing" evidence.⁴⁷⁸

The benefits of private litigation to deter arson-fraud are not exclusively legal in nature. Arson has often been described as falling into the no man's land between police and fire department responsibility.⁴⁷⁹ Each investigative agency frequently assumes that some other agency will pursue the time consuming task of compiling evidence for an arson case. The district attorney's office is frequently understaffed, and access to the funds necessary to special investigations is often difficult. Immediate financial resources are usually available to the insurance company. Although the policy of investigating criminal activity according to the dictates of the profit motive may be questionable, the insurer would be far more likely to succeed in its goals, for purely practical, financial, and procedural

475. U.S. CONST. amend. V.

476. See Karp, *The Wishbone Offense: A Two-Pronged Attack Against Arson* (paper presented at the A.B.A. Annual Meeting, New York, 1978), p. 11. Regarding choice of forum, the author gives the example that a non-resident insurance company may elect to remove the case to federal court, given the criteria for diversity jurisdiction. *Id.*

477. The insured as plaintiff can be compelled to take the stand. Thereafter, the "witness's" credibility may be attacked with evidence of prior convictions for felonies. See FED. R. EVID. 609(a). A criminal defendant in an arson case who has previously been convicted of arson will probably elect not to take the stand, all other things being equal. The prior record, therefore, will probably be inadmissible. Similarly, witnesses may be cross-examined as to other "specific instances of conduct." FED. R. EVID. 608(b). This can include, of course, prior fires for which insurance payments were received. See *Swindle v. Maryland Cas. Co.*, 251 So. 2d 787, 791 (La. App. 1971). Such evidence is often used to establish motive or common plan, e.g., *Fifty States Management Corp. v. Pub. Serv. Mut. Ins. Co.*, 67 Misc. 2d 778, 787, 324 N.Y.S.2d 345, 356 (Sup. Ct. 1971); cf. *Hawks v. Northwestern Mut. Ins. Co.*, 93 Idaho 381, 461 P.2d 721 (1969). This rationale for admissibility is also available in the criminal trial context.

478. See pt IV(C) *supra*.

479. See, e.g., ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION, *ARSONS: A REPORT TO THE ILLINOIS GENERAL ASSEMBLY 25-26* (May 1978).

reasons, than would the government in its prosecution.

There are many reasons why insurance companies should not form the vanguard of the movement against arson-fraud. The criminal justice system would certainly suffer if incendiarism became permissible according to the whims of private companies. Even if the duty to investigate were forced upon insurers, such regulations could be evaded in innumerable ways. Distorted settlement arrangements would inevitably result.

The plaintiff bar would quickly assert the "bad faith refusal to pay insurance proceeds" weapon against insurance companies that perform law enforcement functions.⁴⁸⁰ Punitive damages are allowed for an insurer's breach of "an implied covenant of good faith and fair dealing."⁴⁸¹ This cause of action may not exist in the states having "penalty statutes,"⁴⁸² which, however, achieve essentially the same result. Protection for insureds is supplemented by the Model Unfair Claims Practice Settlement Act, which has been enacted in more than half of the states.⁴⁸³ There is always the threat, as well, of an insured's suit for defamation.⁴⁸⁴ If there is a trend in this area, it is toward greater rights for plaintiff-insureds. Clearly this trend could not continue simultaneously with an increasingly strict assertion of the insurer's defenses against an arsonist.

A more abstract argument against investing insurance companies with the primary duty to deter arson is that the duty is not rightfully

480. For competing views, see Alan G. Miller, *Recovery Beyond Property Policy Limits—A Plaintiff View*, 11 THE FORUM 523 (1976); Houser, *First Party Claims For More Than Insurance Policy Limits—A Defendant's Viewpoint*, 11 THE FORUM 529 (1976). For an attorney's point of view, see Langdon & Sytsma, *The Duty of Good Faith and Fair Dealing and the Pre-Adjudicatory Role of the Insurance Company Advocate*, 45 INS. COUNSEL J. 309 (1978).

481. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 574, 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, 485 (1973). Here the actual "bad faith" was the insurer's alleged attempt to subject the insured to criminal prosecution. The insurer's claims adjuster gave misinformation to the Los Angeles Fire Department arson investigator and the insured was charged with arson. Before the preliminary hearing, the insured failed to submit to an examination under the "cooperation clause" of the policy. The insurer thereupon denied liability. At the preliminary hearing, the charges were dropped for lack of probable cause.

482. Such statutes allow additional recovery (as a percentage of the claim) for a "vexatious or unreasonable refusal or delay of payment." See Miller, 11 THE FORUM at 527-28. For an example of such a statute, see ARK. STAT. ANN. § 66-3238 (1966); TEX. INS. CODE ANN. art. 3.62 (Vernon 1963).

483. Houser, 11 THE FORUM at 534-35 n.13 and accompanying text.

484. See, e.g., *Greenberg v. Aetna Ins. Co.*, 427 Pa. 511, 235 A.2d 576 (1967). The defamatory statement, of course, can not have been in the judicial setting, or it is privileged. *Id.* at 515, 235 A.2d at 578.

theirs. Arson is a crime which, to an even greater degree than most crimes, threatens the safety and disrupts the security of the populace. The public at large should be compelled to finance the war on crime, not the specific victims of each crime. "Arson" can not fairly be viewed as a cost of owning property to be distributed, by premium payments, among the community of property owners.⁴⁸⁵ The threat of arson has become too pervasive to support such a conclusion.

Surely no one would argue that insurers should entirely supplant the public authorities in the dilemma of arson. A subcommittee of the United States Senate Committee on Governmental Affairs has recommended the enforcement of certain procedures where a larger role for fire insurers was found to be in the public interest.⁴⁸⁶ Some of these recommendations are rather innocuous, and are already substantially being pursued.⁴⁸⁷ Others present serious difficulties. Insurance industry representatives have responded, stressing the public interest in low premiums, and current privacy and fair claims laws.⁴⁸⁸ The Alliance of American Insurers has already proposed a

485. The insurance industry funded, however, a private arson investigation team, under the auspices of the National Board of Fire Underwriters, until 1970. This void has since been partially filled by the Insurance Crime Prevention Institute, also supported by the insurance companies. See NAT'L FIRE PREVENTION AND CONTROL AD., U.S. DEP'T OF COMMERCE, ARSON: AMERICA'S MALIGNANT CRIME 9 (1976):

486. See note 470 *supra*. The recommendations are as follows:

- (1) Insurers should require routine risk reviews prior to coverage, including property inspection and background checks on applicants.
- (2) Insurers should scrutinize current policy on claims challenge, develop effective arson investigation teams, and make more frequent civil challenges on arson fraud.
- (3) Companies should develop in-house investigative expertise and be prepared to pursue arson investigations.
- (4) Insurers should work together with government officials toward modifying privacy laws and fair claims practice laws.
- (5) Companies should require claims adjusters to have better arson investigation training.
- (6) Companies should investigate the possibility of serious corruption in the ranks of claims adjusters.
- (7) Companies should retain and share information on the number, value, and location of all arsons and suspicious fires, as well as information concerning the owners of such properties. And
- (8) Insurance industry representatives should be afforded an opportunity to testify at public hearings to present evidence concerning measures being taken to materially reduce the criminal attractiveness of arson-for-profit.

487. *Id.* (recommendations (3), (4), and (8)).

488. See Letter of C. Robert Hall, Vice President of the Nat'l Ass'n of Independent Insurers, entitled "Arson-for-Profit and the Insurance Industry: Villain or Victim?"

model "Arson Reporting Immunity Bill."⁴⁸⁹ Variations of this proposal have been passed as legislation in a number of states.⁴⁹⁰ The most troublesome requests made of insurance companies are those involving the most expense, *i.e.*, pre-underwriting investigation, and thorough use of the common law arson and technical defenses in civil actions. It is clear that there will be no increased insurance industry involvement in these areas without the consequential costs.

Cost, not surprisingly, is a significant obstacle to effective prosecution of the crime of arson. One of the most difficult aspects of the arson prosecution is the proof of the crime itself. Upgrading the seriousness of the offense may have some minimal deterrent effect. A more plausible method of curbing the rising arson rate, however, would be to improve the investigatory potential of the appropriate law enforcement agencies. The power over the necessary purse strings rests with the budget officers of the agencies, and, ultimately, with elected public officials.

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489. *Alliance of American Insurers, Property Loss Research Bureau, Model Legislation, Arson Reporting Immunity Bill (January 9, 1978).

490. The number of states with such legislation is increasing at a rapid rate. However, the earlier statutes are as follows: 1977 Conn. Pub. Acts 139; 27 GA. CODE ANN. § 92A 734.1 (1978); ILL. ANN. STAT. ch. 73, § 1153 (Smith-Hurd Supp. 1978); ME. REV. STAT. tit. 25, § 2402 (Supp. 1978); Md. House Bill 370, *eff.* July 1, 1978; N.Y. INS. LAW § 336 (McKinney 1966); 2C N.C. GEN. STAT. § 69-7.1 (Supp. 1977); OHIO REV. CODE ANN. § 3737.16 (Page Supp. 1978); TEX. INS. CODE ANN. tit. 14, § 5.46 (Vernon Supp. 1978); Wis. Sen. Bill 377 (1977). See Taylor Address, *supra* note 264, at 21 n.3.

491. Pts. I, II, & III prepared by Anne Winslow Murphy; pts. IV & V prepared by Andrew Maneval.

