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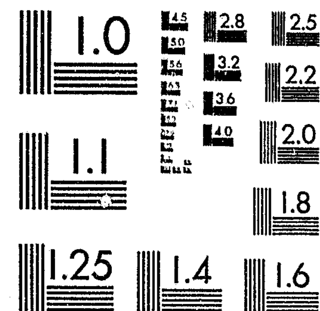

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INTERNATIONAL ASSOCIATION OF FIRE CHIEFS • INCORPORATED

"MANAGING ARSON CONTROL SYSTEMS" A STUDY OF ARSON AND ANTI-ARSON EFFORTS IN A SELECTED SAMPLE OF JURISDICTIONS

VOLUME IV
ARSON PROSECUTION

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A NOTE TO READERS

This volume is in preliminary draft form. Numerous editorial and typographical errors are therefore present. While the validity of the substance of the research is unaffected, the author's regret that limits in project resources do not presently permit the draft to be revised. We trust that its readers will be able to cope with the report's deficiencies and find its research of value.

VOLUME IV

ARSON PROSECUTION

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4. ARSON PROSECUTION

4.0 INTRODUCTION TO PROSECUTION OPERATIONS

While this study is primarily concerned with the arson investigation aspects of arson control, it cannot be complete without looking beyond to prosecution. This is so in two main regards. First, the proof of investigation is more than how many clearances were made by a particular investigator, by a unit in one year, or by comparing different clearance rates over time. These measures only measure a part of the process. Managers have to also consider the ultimate outcomes of these clearances. And, if they were eligible for prosecution, were they successfully prosecuted? If not, why not? Second, we need to consider prosecution's impact on investigation and its necessary predecessor, accurate cause and origin determination. Can (speaking theoretically) and does (speaking practically) successful prosecution inspire the investigator and cause and origin determiner to perform better? ... Does successful prosecution deter the firesetter from future criminal deeds? ... Does it discourage future firesetters and, if so, what kinds of firesetters, and to what degree? ... Does successful prosecution reflexively inspire more frequent prosecutions with greater challenges?

In many respects, these questions remain unanswered. Some of them have remained unresolved for as long as man has contemplated the rule of law, crime and punishment. Some, like the relationship between successful prosecution and its effect on investigators, seem from this study (among countless others) to be positive, though not as yet confirmed by statistical correlations. Other questions remain clouded because they admit more than one answer due to both real and ostensible differences in data collection, definition, and reporting tactics.

Despite the real difficulties in providing definitive answers to questions about the impact of investigation on prosecution and prosecution on investigation, this section will assay the available qualitative and quantitative information about these relationships in the following elements of the section:

4.1 Arson Law
4.2 Pre-Complaint Involvement
4.3 Case Documentation
4.4 Case Screening Procedures
4.5 Pre-Trial Procedures
4.6 Adult Prosecution
4.7 Juvenile Prosecution

4.1 ARSON LAW

Much has been made of the variation in arson laws from state to state. For example, it has been pointed out by many that variations include:

- definition of the terms: arson, illegal burning, malicious destruction of property, unlawful burning, aggravated arson, etc.
- punishments for different types, degrees, and severities for arson-related crimes varied widely
- different requirements to establish the crime and link a defendant to the crime as a guilty party.

That variations do exist cannot be gainsayed. That the variations account for differences in whether and how a particular case may be prosecuted and what its eventual outcome might be was clear.

But, the fact that the law in respect to arson varies then raises the interesting question of how these variations affect the investigative process and the investigation outcome. This section and its associated appendices address this question from a number of perspectives. First, this section reviews the elements and proof of arson generically and then discusses the arson-for-profit and, lastly, attempted arson proof.

Next, the arson laws of the eight jurisdictions studied are summarized in respect to their scope, intent, clarity, severity, age, utility, advantages, disadvantages, and their inter-site comparisons. A tabular summary of miscellaneous legal disincentives to arsons completes this discussion.

Next, in a state-by-state analysis, the provisions of the laws are assayed by comparison to a hypothetical set of arson events and capsulized in a tabular summary showing distinctions in terminology and sentencing limits.

For a more complete treatment of the laws related to evidence, arson investigation, sequential elements of the prosecutive process, the issues inherent, and their implication, see Appendix 5.1 which consists of discussion of:

5.1.1 Indictments and Information
5.1.2 Arrests and Warrant
5.1.3 Rights Against Self-Incrimination: Miranda
5.1.4 Proceedings Before Arraignment
5.1.5 Arraignment
5.1.6 Pleas
5.1.7 Nolle Prosequi, Dismisssal and Discontinuance
5.1.8 Defense of Insanity
5.1.9 Defense of Entrapment
5.1.10 Federal Anti-Arson and Related Statutes

ELEMENTS, PROOF AND LAW OF ARSON

Arson

1. Common Law

At common law, arson was the malicious and voluntary or willful burning of another person's house or dwelling place or outhouse appurtenant to or a parcel of the dwelling house or within the curtilage. The curtilage of the dwelling house was such space as was necessary and convenient and habitually used for family purposes. At common law, arson was an offense against the security of habitation rather than the safety of the property and it was an offense against the right of possession rather than the property itself. The offense was considered an aggravated felony and of greater enormity than any other unlawful burning because it manifested in the perpetrator a greater recklessness and contempt of human life than the burning of a building in which no human being was presumed to be.

2. Statutory Changes

Statutes generally have enlarged upon the common law definition of arson. It is within the power and judgment of the state legislatures to define arson and make it applicable to the burning of buildings and property other than dwelling houses or other houses within the curtilage, and such definitions need not conform to common law definitions so long as the statute definitely and sufficiently gives elements of the

crime. Such extensions of the definitions of the crime of arson have rested entirely upon statutory grounds and these statutes have been construed to relate not merely to security of the habitation but also to the protection of property. Changes in the common law doctrine of arson have enabled property owners to be subject to arson prosecution where they burn or set fire to their own houses. As a result of the common law doctrine that arson was an offense against the possession rather than the property, an owner who sets fire to his own house while occupying it was not guilty of arson, even though it was burned for the purpose of defrauding the insurer, such an act at common law constituting only a misdemeanor. However, statutory changes have generally been enacted making it a criminal offense to burn insured property with the intent to injure or defraud an insurer. Statutes in the various states make the offense of burning with the intent to defraud an insurer, either arson or the state legislature may declare it to be a separate and distinct offense. For example, in Ohio, arson and burning with intent to prejudice an insurer, are separate and distinct crimes not different degrees of the same crime. Haas v. State, 103 Ohio 1, 132 N.E. 158.

Statutes relating to arson frequently divide the crime of arson into different degrees and provide a heavier punishment for arson committed under certain circumstances. A more severe punishment is frequently prescribed in the case of the

burning of a dwelling house than in the case of the burning of other buildings and structures or personal property, or in the case of the burning of insured property to injure or defraud an insurer. Statutes in some cases provide for a more severe penalty when the burning takes place in the nighttime or when there is a human being in the building and this latter provision in some cases exists alone or in conjunction with a provision relating to when the burning takes place, or "where it is foreseeable that human life might be endangered." State v. Murphy, 214 La. 600, 38 So. 2d 254.

There are some Federal statutes in the area of arson. By an act of Congress, whoever within the special maritime and territorial jurisdiction of the United States willfully and maliciously sets fire to or burns, or attempts to set fire to or burn, any of the property designated in the statute is guilty of a criminal offense. Anyone who moves or travels in interstate or foreign commerce to avoid prosecution, custody, or confinement for arson, or to avoid giving testimony, is subject to fine or imprisonment. 18 USC §81; 18 USC 1073.

A necessary element of the crime of arson at common law was that the house burned be that "of another". Daniels v. Commonwealth, 172 Va. 583. Since common law arson was an offense against possession rather than property, the phrase "of another" meant in the possession of another. Thus, an owner in possession and a person in sole lawful occupancy could not be guilty of arson, although an owner out of possession

could. The requirement that the property be that "of another" has to a large extent been modified by statute. In Texas, however, the arson statute provides that a person can burn his own property and, if no insurance claim is filed, there is no crime. The present Texas statute does not take into consideration the danger to other property and lives and tax money spent extinguishing fires.

In the absence of a statute establishing a different rule, it is not sufficient to constitute the crime of arson that the fire be set near, against, or in a building; the building itself, must, to some extent, be burned. However, it is not necessary that the building be consumed or materially injured, or that any part of it be wholly consumed; it is sufficient if the fire is actually communicated to any part of the building, however small. It is not necessary that the fire continue for any particular length of time; and the offense is complete when the fire is put out or goes out by itself. Generally statutes provide that any charring of the wood of the building whereby the fiber of the wood is destroyed is sufficient. It is not necessary that the wood be in a blaze. The mere fact, however, that a building is scorched or discolored by heat without any actual ignition is not sufficient under most arson statutes.

Under most arson statutes, it is immaterial how the fire is applied or started. It may be by direct means or by setting fire to some substance which will convey the fire to the building intended to be burned, or it may be by setting fire to one build-

ing with intent that an adjacent building be burned. However, in order that the communication of fire to a building other than that to which fire was applied shall constitute arson, there must exist an intent that the fire shall be communicated to such other building.

Criminal intent is an essential element of the crime of arson, and it has been said in an arson case that intent is the purpose or design with which an act is done and that it involves the will. However, a specific intent to burn is not required under most arson statute prosecutions. Statutes in some jurisdictions provide that arson is the willful and malicious burning of or setting fire to a building "with intent to destroy it", and under such a statute an intent to destroy is an element of the offense. The same is true under state statutes which define "burn" as meaning to "consume or generally injure". In the absence of such a statute, the cases around the country are not in agreement upon whether there must be an intent to destroy.

Under state statutes, the motive with which an action is performed is not an element of the crime of arson. At common law, the same was true. Where states have statutes distinguishing arson from the offense of burning to defraud an insurer, motive becomes important where it must be shown that the intent of the burning was to defraud an insurer.

3. Indictment/Information

The power of the legislature to prescribe the forms of indictment for the prosecution of a person accused of the crimes of arson is unlimited except so far as it is restrained by constitutional provisions such as those giving the accused the right to demand "the nature and cause of the accusation against him."

In the case of arson, a single offense may be committed although several houses or articles are burned, providing only one fire is set. Consequently, an indictment for arson which charges as a single act the burning of several houses, or which charges the burning of a house as an incident to the burning of its contents, charges that one offense and is not defective for duplicity. Also, in the case of the burning of insured property to injure or defraud an insurer, where there is a single burning only one offense is involved, even though the goods were insured with two different insurance companies. Under liberal rules of pleading, an indictment or information may contain separate counts charging arson and also charging the burning of insured property to injure or defraud an insurance company, or conspiracy to commit arson, or murder resulting from arson.

In state jurisdictions, where by statute one who aids, counsels or procures another to willfully and maliciously set fire to a dwelling house is made a principal in his act and so counseling, aiding or procuring is in itself a substantive

offense, it is not improper to join in one indictment one count charging the defendant as an accessory and another charging him as a principal, and an information which charges in a single count that the accused "burned" and "procured to be burned" the building in question does not violate the rule against duplicity.

The information or indictment must give all the details of the charge necessary for the defendant to make his defense, and if it sufficiently charges the offense, but the accused requires greater detail to prepare his defense, he should ask for a Bill of Particulars. If the property burned is described in such a manner that it may apply to more than one building, a bill of particulars may be furnished, upon request or court order.

The indictment or information for the crime of arson should allege all the essential elements of the crime of arson; that is, that there was a burning, that it was done willfully and maliciously, and if a particular arson statute makes ownership or possession an element of the defense, the ownership or possession of the property burned should be stated. The name of the person accused of the crime, the time and place, when and where it is claimed that he committed the act, and a description of the property burned, should be included. In addition, some state statutes require an allegation as to the time of burning and whether the building was occupied, as well as the value of the property burned.

An indictment or information for the offense of burning insured property to injure or defraud the insurance company should allege that the accused willfully and maliciously burned or set fire to specified property which was insured at the time, and that the burning was done with an intent to injure, defraud, or prejudice the insurer. Since the guilt of a person accused of this crime does not depend upon the legal obligations arising out of the insurance policy, it is not necessary to allege facts relating to the insurance, such as that a policy was issued and delivered, or the amount of insurance or the name of the company insuring the property, or the beneficiary under the policy. However, in some state jurisdictions where it is required that there be a valid insurance policy, the indictment must contain an allegation charging that there was an insurance policy in full force and effect.

At common law, the form of indictment for arson simply charged the defendant with burning a house without alleging that it was a dwelling house, for the word "house", in the common law definition of arson, signified a dwelling house; and if at the trial it appears that the house burned was not one which could be the subject of arson, it was the duty of the court to direct the jury to acquit the defendant. An indictment or information charging statutory arson must identify the property burned and must show that it was the subject of arson as defined by the statute under which the prosecution is instituted. It is sufficient under a statute relating to the

burning of a "building" to allege the specific type of building burned. Where a statute divides arson into degrees and makes a more serious offense if the property burned is a dwelling house, the indictment should indicate which degree of the offense is being charged, and it may be necessary, in alleging the lesser offense, to specifically allege that the building was not a dwelling house or part of a dwelling house.

The identity of the property burned must be fixed with reasonable particularity in order to enable the accused to prepare his defense and plead his conviction or acquittal as a bar to further prosecution of the same offense, and this may be done by describing the property in such words as "belonging to", "the property of", "owned by", or "in possession of". a named person and an indictment or information which does not contain an allegation of ownership or of possession or any other descriptive language tending to give a building a fixed location may be insufficient. For example, in State v. Banks, 247 N.C. 745, an indictment charging the defendant with burning a warehouse, office, shop or building used in carrying on the trade of a filling station and restaurant was held to be fatally defective since there were hundreds of buildings in the county answering that description.

At common law, and under some statutes defining arson as the burning of a house "of another", an allegation of ownership of the house burned is essential and an indictment must show that the property burned is that of a person other than the

defendant. Statutes in many jurisdictions, however, make arson an offense against the safety of the property, rather than the security of the habitation by defining arson so that it is immaterial whether the property is or is not occupied or whether the property is that of the accused or of another. Under such statutes ownership may be pleaded and the real owner, respective of occupancy and a reference to ownership may be omitted entirely if the property is otherwise sufficiently identified.

Ordinarily, the value of the property burned is not an element of the crime of arson and no allegation of value is necessary. However, if the prosecution is under a statute which applies only where the property burned has a certain value or is over a certain value or which fixes punishment according to the value of the property burned or the amount of damages, value then must be alleged in the indictment.

In the absence of a statute making it a more serious offense should a burning occur in the nighttime, time is immaterial, and the indictment or information need not contain an allegation as to time. On the other hand, under a statute which makes the degree of the offense dependent upon the time when the burning took place, or upon whether a human being was staying, lodging or residing in the building, the indictment must charge the time of the burning or that there was such a being in the house at the time of the burning and words of the statute in this respect must be set out in full, though the name of the human being need not be stated.

4. Intent

The necessary elements of the crime of arson both at common law and under various state statutes require that the burning be malicious and willful. The indictment should allege that the burning was done "willfully and maliciously" and if it fails to include such an allegation it charges no crime. A failure to allege to either that the act was done willfully or maliciously will render the pleading insufficient unless the words used are found to be equivalent thereto. In the absence of statute, it is not necessary to allege in specific terms that the accused set fire "with intent to burn" for such an intent is presumed from the allegation that the burning was done willfully and maliciously.

Common law indictments employed the words "set fire to and burn" in charging arson and a similar allegation has been upheld under statutes as sufficient and not being objectionable as charging two offenses. Where a statute makes a person guilty if he "burns or causes to be burned" designated property, then an allegation in these words is sufficient, without alleging that the accused "set fire to" the property burned. In state jurisdictions where the terms "burn" and "set fire to" are regarded as synonymous it is sufficient to allege that the accused "set fire to" the building under a statute making the "burning" of a building an offense, while such an allegation is insufficient in a jurisdiction where the terms are not

regarded as synonymous. It is well-established that a variance between a pleading and the proof will be disregarded unless it is material to the offense charged or unless the accused is misled or prejudiced thereby. For example, if the allegation of ownership is not material to the offense charged, then a variance between ownership alleged and that established by the proof is not fatal. Arson statutes frequently divide arson into degrees and if the different degrees are distinguished by the conditions under which the burning occurs or by the circumstances surrounding it, a conviction will be upheld even though the accused is charged with one degree of the offense and the evidence establishes that he was guilty of another one. The rule which permits a conviction for an offense is a degree inferior to that charged in an indictment if the lesser crime is included in the greater has been applied where the lesser degree of arson is included within the degree of arson charged. But where the different degrees of the crime are distinguished by a difference in the particular act committed, a variance between the indictment and proof is material and a conviction for the lesser crime cannot be upheld under an indictment charging the greater. For example, a person charged with arson in the first degree cannot be convicted of third degree arson for willfully burning with intent to injure the insurer.

5. Corpus Delicti

The corpus delicti of the crime of arson consists of two elements: the burning of the property in question and a criminal agency as a cause of that burning, and there can be no conviction without satisfactory proof, by either direct or circumstantial evidence, not only the burning of the building or property in question, but also that someone is criminally responsible for the burning, that is, that the building was willfully and maliciously burned and did not result from natural or accidental causes. If the prosecution fails to prove either element, the accused is entitled to an acquittal as a matter of law and if a plea of not guilty is entered the prosecution must prove both the corpus delicti and the connection of the accused with the crime charged. Proof of the burning alone is not sufficient to establish the corpus delicti, for if nothing more appears, the presumption is and the law implies that the fire was a result of accident or some providential cause rather than a criminal agency or design.

Where the prosecution is for the burning of insured property to injure or defraud the insurer, it must also be shown that the property was insured at the time of the burning, and if required, that the insurance policy was enforceable. The prosecution must also prove an intent to injure or defraud the insurer. A person may be guilty of an intent to injure or defraud the insurer even though he is not to receive the

insurance money. However, in such a case the prosecution must show that the accused had knowledge that the property was insured.

Rules of procedure may, at the discretion of the trial court, be varied. Ordinarily, the corpus delicti should be the first point to which the evidence should be directed. But the order of proof usually is in the discretion of the court, and unless it clearly appears that the defendant has been prejudiced by the manner in which that discretion has been exercised, a reversal of judgment of conviction will not be justified.

After it has been proved that the property was burned, any legal and sufficient evidence may be introduced to prove that the act was committed by the accused and that it was done with criminal intent. No universal and invariable rule can be laid down as to what would amount to proof of corpus delicit of the crime of arson since the character of the evidence will depend largely upon the circumstances of each case. The corpus delicti may be proved by direct testimony of persons who witnessed the commission of the crime of arson by the testimony of an accomplice or by the extra judicial confession or admission of the defendant. However, arson is usually committed alone and in secret, and, of course, seldom can be established by direct and positive testimony and the absence of direct evidence is not a bar to conviction. The corpus delicti and the criminal agency of the defendant are matters usually proved by circumstantial evidence.

One of the common misconceptions concerning the establish-

ment of the corpus delicti is that every accidental or providential cause must be excluded. In establishing the corpus delicti, the state has met its burden where evidence is presented showing that a fire resulted from human intervention even though the evidence may be consistent with both accidental or criminal conduct. Commonwealth v. May, 301 A. 2d 368 (Penn. 1976). In most of the state jurisdictions covered by this arson study, courts have clearly stated that the prosecution need not exclude each and every accidental or providential cause to establish the corpus delicti of arson. Commonwealth v. Cockfield, 380 A. 2d 833 (Penn. 1978). It is not necessary to prove what many arson investigators have termed the "negative corpus". For example, many arson investigators have labored under the mistaken belief that they must first eliminate and exclude the negative corpus delicti or all the reasonable accidental/natural causes. Some of the accidental or natural causes that may be encountered in the investigation of a fire are as follows:

1. An electrical system in which a penny has been inserted in place of a fuse, or there exists broken or rotted insulation or overloading of circuits.
2. Electrical appliances and equipment containing defective elements. (Light bulbs covered by paper shades have been found to be a cause of fire.)
3. Leaks in gas pipes or defective stoves or heating units.

4. Careless handling or storage of painting equipment, paint, paint rags, turpentine, linseed oil or other flammable materials.
5. Overheated stoves, steam pipes or heating units. Often, investigators have found that clothing was being dried too close to an overheated stove, fireplace or open flame resulting in a fire.
6. Investigators have found that sunlight concentrated through bubbles in old glass windows creating a convex concentration of sunlight may cause fire.
7. Lightning.
8. Children playing with matches or adults who carelessly dispose of cigarette, cigar or pipe ashes.

Many investigators wrongly believe that until they have ruled out all possible accidental or natural causes, they have not established the corpus delicti for purposes of prosecution. This, as the cases cited above show, is not so. Arson investigators or fire suppression personnel who are not trained in legal or evidentiary matters relating to arson cases are laboring under an unnecessary weight that may impede or totally obstruct the successful disposition and handling of an arson case. As noted by the California Supreme Court in People v. Andrews, 44 Cal. Rptr. 941 (Cal. 1965), there is no requirement

in establishing the corpus delicti in an arson case that the prosecution explore the whole gamut of speculative possibilities as to the causes of the fire. The prosecution need not run each one down and rule them out in turn. In another California case, People v. Saunders, 110 P. 825, the prosecution showed that the fire derived from three separate points of origin. Although the prosecution did not expressly exclude every possible accidental or natural cause of the fire, the court noted that the improbablity of three separate fires arising accidentally in a building or structure was sufficient to establish the corpus delicti.

In conclusion, there is no requirement in the criminal law relating to arson that the state prove a "negative corpus delicti". Arson investigators and fire suppression personnel should be better trained in criminal procedure and evidentiary prerequisites, together with working more closely with the State Attorney's Office, in order to assure that the prosecution team does not labor under this non-existent, onerous burden.

It should be emphasized that the discussion here on corpus delicti relates primarily to the prosecution's burden of establishing that a crime was committed before being allowed to go forward on the evidence and present its case in chief. Although the evidence presented to prove the corpus delicti may be consistent with accidental or providential cause, the corpus delicti is still established. After this point, however, in going forward on its case in chief, the general rule in

most jurisdictions is that the prosecution must prove the corpus delicti beyond a reasonable doubt, otherwise the accused will be entitled to an acquittal. Where proof of the corpus delicti in the prosecution's case in chief is made by circumstantial evidence, such evidence must be established so as to exclude positively all uncertainty or doubt from the minds of the jury. 30 Am. Jur. 2d, Evidence, §1173, 1140-1142.

Proof of the incendiary origin of fire is important to an arson prosecution. There is a presumption that the fire was the result of accident or some providential cause rather than the result of the criminal design and the evidence must be presented to rebutt that presumption. The necessity of proof that the fire was of incendiary origin does not necessarily require proof that some highly combustible material was employed, although this is the usual method employed which will yield evidence. Incendiarism may be proved by positive evidence such as testimony as to the manner in which the fire burned or the presence of an odor of a flammable liquid or that combustible materials or flammable liquids or their containers were found on the premises or the presence of human footprints. It may also be shown by evidence aimed at demonstrating the improbability that the fire had resulted from accidental or natural causes. Expert opinion is admissible in arson prosecutions to establish the incendiary origin of a fire. The admissibility of expert opinion rests upon the ground that the known or provable facts may have a meaning which cannot be read except by persons

specifically qualified by skill, experience or training and study to interpret them. A qualified expert may give his opinion as to the origin of the fire where there are involved explanations and inferences not within the range of ordinary training, knowledge, intelligence and experience. Courts have recognized that in the prosecution for arson, it is not error to admit evidence of a duly-qualified, competent expert witness as to hypothetical questions submitted to him bearing upon the question of the fire being of incendiary origin. State v. Green, 254 Ia. 1379. In a recent case, People v. Sundlee, 70 Cal. App. 3rd 477, the court properly allowed the testimony of an expert describing time delay devices used to start fires, and the court allowed the expert to express the opinion that the fire involved in the particular case had been started by a sophisticated, time-delay device. The court allowed the expert's testimony where the opinion was based upon his observations at the fire site within seven minutes after the fire broke out and where, though the expert found no remains of a time-delay device, circumstances surrounding the fire supported an inference that the fire had been artificially ignited by some such device

Although expert testimony often goes directly to an ultimate issue in a criminal prosecution, the modern trend is to allow such testimony as providing facts and information to the jury which would be beyond its intelligence, knowledge, training and experience. 5 Am. Jur. 2d, Arson and Related Offenses, §49.

6. Identity

In addition to proof of the corpus delicti, the prosecution must show the criminal connection of the accused with the burning. Proof of the corpus delicti is distinct from evidence which establishes the connection of the accused with the crime, although proof of the latter fact usually establishes the former. Where the identity of the accused is in issue, proof of every fact and circumstance which tends to establish the identity of the person who set the fire is admissible. Courts have allowed into evidence testimony that the defendant was seen on the premises or in the vicinity of the fire whether before or after it occurred or if footprints were found near the burning building which correspond with the defendant's footprints. Such evidence, although not by itself sufficient to establish guilt, may be considered by a court or jury with other suspicious circumstances. Although a conviction may be had, even though there is no evidence that the accused was in a position where he could have ignited the fire, there must be something connecting him in a personal way with the actual burning.

It is generally established that a bare, extra judicial confession of guilt by one accused of a crime, uncorroborated by any other evidence, is not sufficient, but where there is some evidence aside from the admission or confession tending to show that there was a burning and that the fire was of incendiary

origin, the extra judicial confession or admission is admissible in evidence. There is a widely varying view as to the amount of corroborative evidence required. There is some authority that any evidence at all, even the slightest, tending to show that the burning was by design and not accidental, is sufficient. In People v. Jones, 123 Cal. 65 and in State v. Rogoway, 45 Or. 601, the courts held that to warrant the admission of and to corroborate the confession, the evidence as to the incendiary origin of the fire need not be as convincing as the evidence necessary to establish the corpus delicti in the absence of any confession.

The state jurisdictions generally hold to one of the following standards on the sufficiency of corroborative evidence:

1. Any evidence, however slight, is sufficient.
2. There must be independent, material and substantial evidence to corroborate an extra-judicial confession.

In any event, the above test only applies to extra-judicial confessions.

The general rule that evidence of separate and independent crimes is inadmissible to prove the guilt of a person on trial for a criminal offense operates in a prosecution for arson to exclude evidence of crimes distinct from that charged, whether or not such crimes were of a similar character. However, there is an exception to this general rule which is widely accepted by the courts. One exception is that where evidence tends to aid

in identifying the accused as the person who committed the particular crime under investigation -- by way of showing his "signature" to a crime -- such evidence is admissible in spite of the fact that it tends to show the guilt of the accused of other crimes for which he is not on trial. For example, in State v. McClard, 81 Or. 510, the reviewing court held that evidence of other burnings was admissible in prosecution for burning with intent to injure or defraud an insurance company because such evidence was presented for the purpose of showing a motive to commit the crime; to show the intent with which an act was committed; or, in the alternative, to show that the act charged was committed pursuant to a system of acts of the same character having as an end result the defrauding of an insurance company.

7. Defenses.

A person, to be guilty of the crime of arson, must have the capacity to commit a criminal act. It is generally held that there is no criminal responsibility where at the time of committing the act, the accused was laboring under such a defective reason, from disease of the mind, or other mental disfunction that he did not know the nature and quality of the act he is doing or, if he did realize the quality of the act, he did not know that he was doing wrong.

It is generally held in various state jurisdictions that a person between the ages of seven (7) and fourteen (14) is prima facie -- incapable of committing the crime of arson, although there are instances where children as young as eight (8) years of age have been found competent to commit the offense.

In some state jurisdictions, the consent or ratification of the owner will constitute a bar to prosecution of the offense of arson. In jurisdictions such as Texas, if an owner is guilty of no crime in setting fire to his own property, then a person who sets the fire with the sanction of the owner or subsequent ratification is not guilty of arson. Ratification by the owner of the burning of property after criminal proceedings have been started, however, does not lessen the crime or change its status as of the time it was committed.

The defense, double jeopardy, may not be invoked for

alleged defenses arising out of a single burning if separate and distinct crimes are involved and the same evidence will not establish both defenses. On the other hand, there may be double jeopardy if the same evidence will establish both offenses. Where the same property is involved in both charges, as for example, where one relates to the burning of a building and the other charge relates to the burning of its contents, and all the facts constituting the second offense may be proved to establish the first, acquittal upon or dismissal of the first charge bars prosectuion upon the second. But, there is no double jeopardy if this is not the case.

Under state statutes punishing as a principal one who burns or causes to be burned, or who aids, counsels or procures the burning of specified property, acquittal on one count of an indictment charging that the accused burned the property will not bar prosecution on two other separate counts that he caused the property to be burned and that he aided, counseled, and procured the burning. Also, there is no double jeopardy where one offense is for arson and the other is for the burning of insured property to injure or defraud an insurance company. The same principal holds true where one charge in an indictment is for conspiracy to burn property with intent to defraud an insurance company and the other is for the offense of burning insured property to injure or defraud the insurance company.

Arson for Profit/Insurance Fraud

1. Common Law

As previously noted, as the result of the common law doctrine that arson was an offense against the possession rather than the property, an owner who set fire to his own house while occupying it was not guilty of arson, even though it was burned for the purpose of defrauding an insurance company. It was generally held that such an act at common law constituted only a misdemeanor.

2. Statutory Enactments

The common law doctrine has been modified or eliminated in many state jurisdictions. Statutes in most states provide that a person who burns insured property with the intent to injure or defraud an insurance company is guilty whether the property belongs to himself or another person or whether the owner has ratified and consented to the act. Statutes in some jurisdictions provide that whoever willfully and maliciously burns insured property with the intent to injure or defraud the insurance company is guilty of a criminal offense. The elements of the offense of burning insured property to injure or defraud the insurance company are the willful and malicious burning of property, which at the time is insured, with the intent to charge, injure or defraud the insurance company. The overt act required is the burning, not the insuring of the property, and a burning, coupled with the intent to defraud the insurance company, constitutes the crime.

The intention is the controlling element of the crime and the property must have been burned for the specific purpose of defrauding the insurer. It differs from the offense of arson in that in arson there is no requirement that the property burned be insured or that the property be burned with the specific intent to injure or defraud the insurance company. Therefore, a person may be guilty of arson in burning insured

property with the intent to injure the insurance company.

Generally, the guilt of the accused does not depend upon the legal obligation arising out of the policy and questions of what persons were prejudiced or benefitted by this crime are entirely collateral to the prosecution itself. If the defendant intends to compel the insurance company to pay money to others, his intent to injure the insurance company is no less real than if he himself expects to receive the money.

As a general rule in most state jurisdictions, the enforceability of the insurance contract is not an element of the offense of burning insured property with the specific intent to injure or defraud an insurance company and the guilt or innocence of the accused does not depend upon the validity of the policy. It is merely sufficient that the accused believed that the policy was enforceable because the controlling element of the crime is the intention with which he acts and sets fire to or burns property and not whether he or someone else holds a legal and binding policy upon which the insurance company can be compelled to make payment if the property is destroyed or lost.

3. Corpus Delicti

Where the prosecution is for the burning of insured property to injure or defraud the insurance company, it must be shown that the property was insured at the time of the burning and, if required under state law, that the insurance policy was enforceable. The prosecution must also prove a specific intent to injure or defraud the insurance company. A person may be guilty of intent to injure or defraud the insurer even though he is not to receive the insurance money. However, in such a case, the prosecution must show that the accused had knowledge that the property was insured. To warrant a conviction for the burning of insured property to defraud an insurance company, the prosecution must prove all the elements of the crime beyond a reasonable doubt and the evidence may be sufficient to prove arson without proving the burning of insured property with the intent to defraud the insurance company.

The proof necessary to establish the corpus delicti for the burning of property to injure or defraud an insurance company will vary widely as the circumstances of each case are presented. Generally, the following leads will indicate positive circumstantial evidence that a fire was set for an insurance fraud:

1. Presence of incendiary material.
2. Multiple points of origin.

3. Location of the fire in a building, such as the roof, may indicate arson insurance fraud because many insurance adjustors will declare a fire a total loss if the roof is destroyed
4. The time of day when the fire occurs. If the fire is at night or during occasions when few persons are expected to be present, the lack of witnesses may be a circumstantial fact pointing to insurance fraud by arson.
5. If the building is vacant or undergoing renovation, these two facts may indicate insurance arson fraud.
6. If the occupants of a building have recently departed or if there is evidence that objects such as woodwork, plumbing, wiring or other objects have recently been removed, this too may point to arson insurance fraud.
7. If the property is for sale or there has been a recent sale of the building, this may indicate arson insurance fraud, particularly where the building is over-insured.
8. If fire occurs shortly prior to the expiration date of the policy or if the fire occurs immediately after insurance has been obtained or increased, these circumstances may also indicate arson insurance fraud.

C. Attempts

An attempt to commit the crime of arson may be punishable by virtue of express statutory declarations to that effect or because of a general statute embracing all attempts to commit a crime. In determining what constitutes an attempt to commit arson, a study of the principles governing attempts generally is necessary.

As a general proposition, an indictable attempt consists of two elements:

(1) An attempt to commit the crime, and
(2) A direct ineffectual act done towards its completion.

ANALYSIS OF PROPOSED STATUTORY AMENDMENTS
AND EFFECTIVENESS OF STATUTES

The state jurisdictions covered by this study currently operate under widely-varying arson statutes. Several of these states disagree sharply on what acts constitute the offense of arson. In Texas, for example, the offense of arson has not been committed if the owner has burned his house in a rural area and has not claimed insurance reimbursement. By contrast, the mere setting of a fire in a trash bin constitutes a felony in the State of Colorado because of the strict environmental laws that have been adopted. In some of the states covered by this study, the state fire marshal is provided with subpoena powers and serves in the role of a quasi-grand jury. In other jurisdictions, the fire marshal simply establishes the cause of a fire and makes related factual determinations.

Proposals for statutory revision of state arson laws usually focus on one or two comprehensive arson laws--one is the Model Arson Law originally published by the National Fire Protection Association in 1931 (adopted by 27 states); the other is the Model Penal Code adopted by the American Law Institute in 1960 (adopted by 23 states). The ten states covered in this study have adopted one of these two laws in one form or another. As noted in this report, both basic model laws suffer from a number of deficiencies, including verbose and vague language and poor treatment of related offenses.

The Alliance of American Insurers, The American Insurance Association, and the National Association of Independent Insurers have developed a new Model Arson Law, which may serve as a guide to legislators and other organizations interested in revising current arson laws and penal statutes. The new model law proposed by this group of organizations provides penalties for:

1. Engaging in acts that endanger both life and property
2. Damaging real and personal property by either fire or explosion.
3. Damaging an occupied building.
4. Conspiring to cause a fire or explosion.
5. Damaging or destroying the property of another person.
6. Damaging or destroying property to collect insurance proceeds.
7. Using fire or explosives in a reckless or negligent manner.
8. Making false reports concerning the placement of incendiary or explosive devices or other destructive substances.

9. Failing to control or report a dangerous fire.
10. Attempting to start a fire or cause an explosion.
11. Causing or risking a catastrophe, and failing to mitigate a catastrophe.
12. Possessing explosives or incendiary devices.
13. Arranging or placing explosive or incendiary devices in a building.

According to its advocates, among the advantages of the new proposed model law are the following features:

1. A majority of state legislators will find the new Model Arson Penal Code readily adaptable to the substantive and procedural criminal provisions they have already adopted.
2. The new Model Arson Penal Code provides stricter penalties for fires which result in death or injury or threaten the lives of firefighters and other innocent victims.
3. The new Model Arson Penal Law penalizes those who intentionally cause explosions or bombings.

Many state laws currently do not specifically include such destructive acts as explosions or bombings in the arson sections of their penal codes. In arson-for-profit fires, the insured property owner frequently aids, counsels, or procures a fire setter. The new Model Arson Penal Law takes this characteristic into consideration and provides greater latitude to prosecutors in prosecuting not only the arsonist, but those who hire an arsonist or participate in a conspiracy to burn or bomb.

Although the new Model Arson Penal Law addresses a number of weaknesses and disadvantages in existing statutory provisions, this law has several potential flaws of its own that are worth considering. First, the new Model Arson Penal Code was drafted by the American Law Institute, and, thus, may not be as adaptable to those states using the National Board of Fire Underwriters Model Law passed in 1948. Second, the new Model Arson Penal Law attempts to prescribe punishment to those who fail to control or report dangerous crimes--this particular provision may be unenforceable. For example, in cases of accidental fire, people may be unfairly punished for first attempting to control fires themselves and then calling the fire department after realizing the fire is out of control. Third, the new Model Arson Penal Law defines attempted arson as a felony in the third degree. A better approach would be to link the punishment for attempted arson to the severity of the offense if it had been completed, thus allowing greater fairness in punishment and greater deterrent effect.

In several state jurisdictions, model reporting and immunity laws have been enacted in order to obtain the active cooperation and assistance of insurance companies in arson investigation and prosecution. One of the major objectives of such laws is to increase the flow of information between law enforcement and investigative agencies and insurance companies. Under such laws, insurance companies are provided with immunity from civil or criminal prosecution for informing state fire marshals or other investigatory officials of fires that appear to be suspicious in origin. Specifically, such reporting and immunity laws provide the following functions:

1. Allow authorized agencies to require insurance companies to release relevant information concerning a policy holder involved in a fire loss, including history of premium payments, previous claims, scientific reports and analyses, witness statements, and investigatory files in general.

2. Require insurance companies to notify law enforcement agencies of suspicious fire losses, with such notice constituting a request for official investigation.

3. Grant immunity to insurance companies that provide information to law enforcement agencies.

4. Provide for confidentiality of information released and testimony provided in connection with prosecution of an insured.

The advantages of such reporting-immunity laws are obvious. First of all, the law permits the release of information that may be unsubstantiated in the initial phases of an investigation, but which may provide investigative leads to law enforcement authorities. Second, the new law allows the full resources of both private insurance industry groups and a law enforcement agency to be combined in a concerted program of detection and prosecution. One law review writer has referred to this as a two-pronged "wishbone offense" attack against arson. (Marvin I. Karp, The "Wishbone Offense" - A Two-Pronged Attack Against Arson, the Insurance Forum, Pages 205-214).

There are very few disadvantages to the model reporting-immunity laws. However, it has been observed that such laws permit the disclosure of unsubstantiated personal information that may impair certain privacy rights of individuals.

Other recent statutory enactments are those which amend valued policy laws to permit recovery only of the actual cash value of destroyed property. Valued policy laws were initially enacted to protect the insured after the loss of his building by prohibiting insurance companies from arguing that the building had been over-insured. The law was intended to provide for equitable premium payment by the insured and also encourage

more careful underwriting practices by insurance companies. However, one of the problems with the valued policy law is that it provides an economic incentive for the commission of arson. If the value of the building at the time of loss is less than the value written in the insurance policy, the insurer cannot argue that payment be limited to the lower value. In an arson-for-profit scheme, the owner could buy buildings that have deteriorated, deflated, or highly depreciated, and then buy insurance in amounts far exceeding the actual cash value, thus reaping enormous profit upon arson of the buildings. Another disadvantage of valued policy laws is that insurance premium rates tend to be higher in states that have adopted these laws because insurance proceeds are paid in excess of cash value.

Some states have amended or substantially changed Unfair Claims Practices Acts. Such laws were drafted and enacted to encourage timely settlement of claims and penalize insurance companies that have failed to settle losses expeditiously and fairly. Generally, a penalty is imposed upon insurance companies that do not settle claims within sixty (60) days after they have been filed by the insured. This type of law provides protection to an insurance consumer by mandating that the insurance company acknowledge and promptly pay claims. One of the problems with this law, however, is that it sometimes does not provide enough time for a thorough investigation in a suspected arson case. Insurance companies are reluctant to run afoul of the penalty provisions of this law or risk a libel suit by delaying payment of insurance claims.

In conclusion, the various state jurisdictions should consider amendments to existing laws and related property and insurance laws to increase the penal and economic disincentives in order to reduce the incidence of arson.

ARSON LAWS IN SELECTED JURISDICTIONS

Arizona

The law pertaining to arson is set forth in Chapter 17 of Arizona Revised Statutes. The Arizona laws pertaining to arson were amended by the 1977 Arizona Legislative Session, and became effective October 1, 1978. Arson laws in Arizona are divided between arsons of occupied and unoccupied structures and the crime of reckless burning.

The provisions of Sect. 13-1702, Chapter 17, Arson Revised Statutes, provide that:

> A person commits reckless burning by recklessly causing a fire or explosion which results in damage to an occupied structure, a structure or property.

Reckless burning as set forth above is a Class I misdemeanor, punishable by a term in prison for six (6) months and/or a fine of not more than One Thousand Dollars ($1,000.00).

A person commits arson of an unoccupied structure or property under Arizona law by damaging an unoccupied structure or property by knowingly causing a fire or explosion. Arson of an unoccupied structure is punishable as a Class IV felony, punishable by a term of imprisonment for a period of four (4) years or less. The Arizona statutory scheme divides arson of property into several different classes depending upon the value of the property. Arson of property is a Class IV felony if the property had a value of more than One Thousand Dollars ($1,000.00). (In a recent case, a suspect was arrested for arson of a shopping center that sustained over one million dollars in damages. Due to the limitations of the law charging him, he could only be charged with the Class IV felony type. Accordingly, the maximum punishment for this fire set was at most 4 years imprisonment.) Arson of property is a Class I misdemeanor if the property had a value of One Hundred Dollars ($100.00) or less (Sect.13-1703, Chapter 17, Arisona Revised Statutes).

It will be noted that the Arizona Arson Law referred to above makes the burning of one's dwelling place or structure or building a crime punishable by a term of imprisonment and monetary fine. This element of the common law has been eliminated under Arizona law. Under Arizona law, the essential elements of the offense of arson must show that a burning was done voluntarily by the defendant without excuse or justification and without any bona fide claim or right [State v. Scott, 118 Ariz 383, 575 P 2d 1383 (1978)].

The Arizona Statute provides that a person commits arson of an occupied structure by damaging an occupied structure by knowingly causing a fire or explosion. Arson of an occupied structure is a Class II felony, punishable by a term of imprisonment of seven (7) years or less [Sect. 13-1701(b), Chapter 17, Arizona Revised Statutes]. In addition,

under Chapter 8 of the Arizona Criminal Code, Sect. 13-803, the defendant may also be responsible for restitution in cases involving death, physical injury, or economic loss. Under this section, if a defendant is sentenced to fine, payment, and enforcement of restitution, restitution shall take priority over payment of the criminal fine to the state.

The distinction between arson of an unoccupied structure and arson of an occupied structure is based on whether the particular building was being used as a residence for human habitation or was being used merely for business or other non-residential purposes [State v. Stubba, 113 Ariz. 434, 556 P. 2d 8 (1976)].

Insurance Immunity

In July of 1979, a major statutory provision was enacted by the Arizona legislature as Sect. 20-1901, et seq., providing for immunity from liability for insurance companies for disclosure of information relative to arson or suspected arson. This statute requires mandatory reporting provisions by the insurance company (thus, improving an arson unit's data base and ability to work with insurers) and may result in insurance companies not settling potential arson claims without notice to prosecutive authorities. Another recent enactment concerning the Arizona arson situation is Sect. 44-1220, Arizona Revised Statutes, which makes it a Class V felony to make fraudulent insurance claims. In addition, Arizona has also enacted a state version of the Federal RICO Act concerning false claims, racketeering activities, extortion, and arson.

In 1979, a second enactment of significance made fraudulent insurance claims a Class V felony.

An Organized Crime Statute defined "racketeering" crimes to include false claims presented through fraud or arson. This would be a predicate offense under the Federal RICO Statute under Section 1961, Title 18, United States Code. A related statute makes the use of force in crime and conspiracies also now applicable to the crime of arson.

In 1978, arson-related deaths were covered in a felony murder statute. Murder in the first degree was defined to include death of a person in connection with arson of an occupied dwelling. Incongruously, the death of an individual in connection with arson of an unoccupied dwelling or any other structure is not a crime other than arson. The District Attorneys' Office has submitted revisions to cover this oversight; however, no action has been taken by the State Legislature. In the Assistant District Attorney's opinion, this inaction is based on the reluctance to amend legislation recently enacted because of the possible accompanying embarrassment.

California

In 1979, the California legislature amended and modified provisions of the California Penal Code pertaining to the crime of arson and the punishment thereof. Under California law, a person is guilty of arson when he willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land or property [451, California Penal Code (1979)]. Under the California Arson Law, the following definitions have been adopted in construing the laws proscribing arson:

1. Structure - Any building or commercial or public tent, bridge, tunnel or power plant.

2. Forest Land - Any brush covered land, cutover land, forest, grass lands, or woods.

3. Property - Real property or personal property other than a structure or forest land.

4. Inhabited - Currently being used for dwelling purposes, whether occupied or not. "Inhabited structure" and "inhabited property" do not include the real property on which an inhabited structure or an inhabited property is located.

5. Maliciously - wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act.

6. Recklessly - a person is aware of and consciously disregards a substantial and unjustifiable risk that his act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in this situtation [Sect. 450, California Penal Code (1979)].

   The above definition of "recklessly" basically connotes gross negligence.

Arson that causes great bodily injury is a felony punishable by imprisonment in the state prison for five (5), seven (7), or nine (9) years. Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three (3), five (5), or seven (7) years. Arson of a structure or forest land is a felony punishable by imprisonment in a state prison for two (2), four (4), or six (6) years. Arson of property is a felony punishable by imprisonment in a state prison for sixteen (16) months, two (2) or three (3) years. For purposes of the crime of arson of property, arson does not include the situtation where one burns or causes to be burned his own personal property, unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property.

One weakness noted in the provisions of Sect. 451, Californai Penal Code (1979), concerning punishment of different types of arsons is the difference in punishment between arson that causes great bodily injury and arson that causes an inhabited structure to burn. Arson that causes a great bodily injury may be punishable by a term of nine (9) years; whereas arson that causes an inhabited structure to burn will only be punishable by a term in the state prison for seven (7) years. Since the risk of great bodily injury is very real where inhabited structures (presently occupied or not) are burned, the California legislature should amend the penal code to provide as severe a penalty for arson that causes an inhabited structure to burn as arson that causes great bodily injury. The state legislature should seek to deter the burning of inhabited structures by punishment equal to arson that causes great bodily injury.

Under California law, a person is guilty of unlawfully causing a fire when he recklessly sets fire to or burns or causes to be burned any structure, forest land, or property [Sect. 452, California Penal Code (1979)]. California Penal Code on reckless burning sets forth the following penal classifications:

(a) Unlawfully causing a fire that causes great bodily injury is a felony punishable by imprisonment in the state prison for two (2), four (4), or six (6) years, or by imprisonment in the county-jail for not more than one year, or by a fine, or by both such imprisonment and fine.

(b) Unlawfully causing a fire that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for two (2), three (3), or four (4) years, or by imprisonment in the county-jail for not more that one (1) year, or by a fine, or by both such imprisonment and fine.

(c) Unlawfully causing a fire of a structure or forest land is a felony punishable by imprisonment in the state prison for sixteen (16) months, two (2) or three (3) years, or by imprisonment in the county jail for not more than six (6) months, or by a fine, or by both such imprisonment and fine.

(d) Unlawfully causing a fire of property is a misdemeanor. For purposes of this paragraph, unlawfully causing a fire of property does not include one burning or causing to be burned his own personal property unless there is injury to another person or to another person's structure, forest land, or property. [Sect. 452, Californai Penal Code (1979)]

California law also contains a provision that may prove highly useful in combatting arson by providing law enforcement personnel with another

tool for attacking the problem. The provisions of Sect. 453, California Penal Code (1979), state that every person who possesses any flammable, explosive, or combustible material or substance. . . with the intent to willfully and maliciously use such material, substance or device to set fire to or burn any . . .structure, forest land, or property.

In addition, California Penal Code (1979) provides that any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any structure, forest land or property, or who commits any act preliminary thereto, or in furtherance thereof, is punishable by imprisonment in the state prison for sixteen (16) months, two (2) or three (3) years. The placing or distributing of any flammable, explosive, or combustible material or substance, or any device in or about any structure, forest land, or property in arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of the same, shall, for the purposes of this act, constitute an attempt to burn such structure, forest land, or property.

In addition to the penal classification of fines and imprisonments set forth in the California Penal Code relating to arson, the California legislature has also imposed an additional fine on persons convicted of arson for pecuniary gain or to defraud an insurer. Under Sect. 456, California Penal Code (1979), when any person is convicted of a violation of any provision of this chapter, and the reason he committed the violation was for pecuniary gain, in addition to the penalty prescribed instead of a fine provided in subdivision (a), the court may impose a fine of twice the anticipated or actual gross gain. This provisions of subdivision (a) provide that the court impose a fine not to exceed Fifty Thousand Dollars ($50,000.00), unless a greater amount is provided by law. In cases where an arsonist burns a building anticipating a financial gain from an insurance company of One Hundred Thousand Dollars ($100,000.00), under Sect. 456(b), California Penal Code (1979), the court may impose a fine of Two Hundred Thousand Dollars ($200,000.00) against the person so convicted. This provision, along with the imprisonment terms provided should provide a definite financial and penal disincentive to persons contemplating committing the crime of arson. There are insufficient statistics and experience available at this time to indicate what impact and effect the revised California Statute passed in 1979 has had on this problem.

Maryland

Under Article 27 of the Maryland code, 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 dwelling house, or any kitchen, shop, barn, stable, or other outhouse that is parcel thereof, or belonging to or adjoining thereto common with the property of himself, or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not more than (30) years (Article 27, Sect. 6, Maryland Code). At common law, the felony of arson is the malicious burning of a dwelling house of another [Butina v. State, 242 A. 2d 819 (Md. 1968)]. The provisions of Article 27, Sect. 6, Maryland Code, enlarge the common law meaning of arson and provide that a person commits arson if he willfully and maliciously either:

1. sets fire to or burns or causes to be burned a dwelling house, as well as other property designated by statute, or

2. aids, counsels, or procures a burning.

Thus, although at common law a person not actually or constructively present who "aids, counsels, or procures a burning" is a mere accessory before the fact, under the Maryland Statute, such a person would be principal to the arson [Butina v. State, 4 Md. App. 312, 242 A. 2d 819 (1968)].

It also might be noted that the statute is directed against the burning of any dwelling house, whether the property of the person charged or another person, irrespective of whether it is occupied, the offense is against the property and ownership may properly be laid in the owner of the fee, even though another may actually occupy it as his tenant [Wimpling v. State, 171 Md. 362. 189 A. 248 (1937)]. The provisions of Sect. 6 discussed above eliminate the common law requirement that the property not be that of the accused. It might also be noted that the Maryland law providing for a sentence of thirty (30) years in the state penitentiary for arson, whether or not the structure is occupied, imposes one of the severest penalties among any of the ten jurisdictions covered by this study.

The provisions of the Maryland Arson Statutes are very similar to those of Virginia and North Carolina which enumerate in separate statutory sections the various types of structures, buildings, and habitations that it is unlawful to burn and the varying penalties provided with respect to each type of structure. Article 27, Sect. 7, Maryland Code, provides that 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 barn, stable, garage or other building, whether the property of himself or of another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill, or other building, whether the property of himself or of another; or any church, meeting house, courthouse, workhouse, school, jail, or other public building or any public place; shall be guilty of a felony and upon conviction thereof, be sentenced to the penitentiary for not more than twenty (20) years.

Article 27, Sect. 7, states that 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 barrack, cock, crib, rick, or stack of hay, corn, wheat, oats, barley, or other grain or vegetable product of any kind; or any field of standing hay or grain of any kind; or any pile of coal, wood or other fuel; or any pile of planks, boards, posts, rails or other lumber; or any streetcar, railway car, ship, boat or other watercraft, automobile or other motor vehicle; or any other personal property not herein specifically named (such property being of the value of Twenty-Five Dollars ($25.00) and the property of another person; shall upon conviction thereof, be sentenced to the penitentiary for not more than three (3) years. The provisions of Sects. 7 and 8, Article 27, Annotated Code of Maryland, reveal a legislative intent to punish differently the willful and malicious burning of different types of structures. The Maryland law provides for the severe sentence of thirty (30) years in the state penitentiary for burning a dwelling house, whether occupied or not. The lesser sentence of twenty (20) years is mandated for those who burn a church, school, or other similar building. A punishment of three (3) years in jail is provided for those who burn crops and personal property of at least Twenty Five Dollars ($25.00) in value.

Effective in 1951, Maryland also enacted a statutory provision providing for criminal penalties for those who burn goods with the intent to defraud or injure an insurer. Article 27, Sect. 9, Annotated Code of Maryland, provides that a person who willfully, and with intent to injure or defraud the insurer, sets fire or burns or causes to be burned or who aids, counsels, or procures the burning of any goods, wares, merchandise or other chattels, or personal property of any kind, whether the property of himself or of another, which shall at the time be insured by any person or corporation against loss or damage by fire; shall upon conviction thereof, be sentenced to the penitentiary for not more than five (5) years.

In Sect. 10, Article 27, Annoted Code of Maryland, the Maryland legislature has statutorily defined and provided the punishments with respect to attempts to burn different types of dwelling places and to procure the injury or defrauding of an insurance company. In this statutory section, especially Sect. 10(c), Article 27, Annotated Code of Maryland, the Maryland legislature has adopted a definition of what acts will constitute attempt. The Maryland law states that the placing or distributing of any flammable, explosive, or combustible material or substance, or any device in any building or property mentioned in the foregoing section in an arrangement or preparation with intent to eventually willfully and maliciously set fire to and burn same, or to procure the setting fire to or burning of same, shall, for the purposes of this subtitle, constitute an attempt to burn such building or property and shall carry the penalty prescribed in Subsection (a) or (b), whichever applies. This provision is very similar to the California statutory section contained in Sect. 455, California Penal Code (1979). Under Maryland law, the slightest burn of the structures make the offense complete [Heinz v. State, 34 Md. App. 612, 368 A. 2d 509 (1977)]. The Maryland law provides that the willful and malicious burning of various enumerated structures constitutes the crime of arson. Under Maryland law,

the term "willfully" has been interpreted by case law as meaning the same thing as "intentionally" [Brown v. State, 258 Md. 469, 403 A. 2d 788 (1979)]. The prosecution in an arson case need not show ill will on the part of the accused towards the owner of the structure in order to present a prima facie case [Brown v. State, 39 Md. App. 497, 388 A. 2d 130 (1978)], reversed on other grounds 285 Md. 469, 403 A. 2d 788 (1979)].

One possible weakness in Article 27, Sect. 9, Annotated Code of Maryland, dealing with arson with intent to defraud or injure an insurer, is that this statutory section appears to apply only to personal property, and not structures, buildings, or real property. That statute only deals with goods, wares, merchandise, or other chattels or personal property.

The 1978 Maryland legislature passed revisions pertaining to the investigation of arson-for-profit cases. Effective July 1, 1978, the provisions of Article 38 A., Sects. 56, 57, Annotated Code of Maryland, require the disclosure of information concerning fire loss investigations by insurance companies to fire investigators. Under the new law, a fire investigator is defined as any state, county, or municipal fire marshal, fire investigator, or other official having a legal responsibility for the investigation of fires and suppression of arson. The insurance company is defined as any company or organization licensed by or established by the state for the purpose of insuring property of any kind. Under this law, a fire investigator may request any insurance company investigating a fire loss of real or personal property to release any information in its possesion relative to that loss. The information which an insurance company is required to release is specially stated in the law to include, but not limit:

1. Any insurance policy relevant to fire loss.
2. Any application for such an insurance policy.
3. Policy premium payment records.
4. History of previous claims made by the insurer for fire loss.
5. Material relating to the investigation of the loss, proof of loss, and any other relevant material.

Under this same statute, fire investigators are required to hold information received from insurance companies in confidence until such time as its release is required pursuant to a criminal or civil proceeding. The statute protects the insurance comapny from disclosing such information by providing the company with immunity from civil or criminal liability in the absence of fraud. The insurance company, in addition to furnishing the above information upon request, also has a duty imposed upon it by statute to notify the fire investigator and furnish him with all relevant material acquired if the company has reason to suspect that a fire loss was caused by incendiary means.

The Maryland laws relating to arson provide for significant penal disincentives to those contemplating committing such a crime. In addition, recent statutory enactments, providing for mandatory insurance company

reporting procedures and immunity for insurance companies from civil or criminal liability, should facilitate the exchange of information between insurance companies andd law enforcement personnel and result in more efficient investigations of fires suspected of having an incendiary origin.

Two problems regarding arson laws in Maryland have been noted by law enforcement personnel interviewed in the course of this study. First, the crime of arson of a dwelling requires proof of malicious intent; and this is difficult to establish where the owner, for example, is the defendant and there is no insurance. The law enforcement personnel in Maryland complain of the fact that there is no appellate decision specifically defining the word "maliciously" in the arson law. It was noted in Brown v. State, 285 Md. 469, 403 A. 2d 788 (1979) that the General Assembly of Maryland has never defined malice in its role as an essential element of the crime of arson. In this same decision, the Maryland Supreme Court noted that the prosecution need not prove actual ill will on the part of the defendant to establish a prima facie case. The common-law definition of arson contained this necessary element of the crime in a malicious and willful burning. At common law and under statutes which make malice the willful necessary ingredient of the crime of arson, a particular intent or malice against a person or thing is not essential; it is sufficient to show that the accused was actuated by malicious motive and that he set fire willfully rather than negligently or accidentally. The meaning given to the word "malicious" at common law when used in defing arson is quite different from its literal, dictionary meaning. At common law, the malice need not be expressed, but may be implied, and it need not take the form of malevolence or ill will [5 Am. Jur. 2d, Arson and Related Offenses, Sect. 11]. A malicious burning is an act evidencing a design to do an intentional wrongful act toward another. It is sufficient if a person deliberately and without justification or excuse sets out to burn another's building. A person must burn his own property with malice that is with a wish to injure another person or to do a wrongful act, if the act is to be classified as arson [People v. George, 42 Cal. App. 2d 568, 109 P. 2d 404]. In State v. Dennis, 80 N.M. 262, 454 P. 2d 276, the Court stated that a statute that would permit prosecution and punishment of those using explosives to raze or destroy structures for innocent and beneficial purposes was unconstitutional. Looking at the Maryland law, it would seem that where an insured/defendant has filed a proof of loss seeking relief provided by an insurance policy or has burned his own house under circumstances that would make it readily apparent that other dwellings or structures would be damaged or injured, malice should be implied and presumed.

A second problem encountered by law enforcement personnel in prosecutions under the Maryland Arson Statute concerns whether certain common areas in a multiple dwelling such as basements, utility rooms, etc., are part of the dwelling under the code. A criminal case is currently on appeal which will provide the appellate courts of the State of Maryland with the opportunity to resolve this ambiguity in the code.

Michigan

Under Michigan law, burning is defined as setting fire to, or doing any act which results in the starting of a fire, or aiding, counseling, inducing, persuading, or procuring another to do such act or acts [Chapter X, Sect. 750.71, Michigan Penal Code]. The Michigan law is set up in a manner similar to that of the State of Maryland. Chapter X, Sect. 750.72, Michigan Penal Code, provides that any person who willfully or maliciously burns any dwelling house, whether occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage or such dwelling house or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than twenty (20) years. As noted in the review of the Maryland statutory provisions concerning arson, an examination of the Michigan code shows the following similar characteristics:

1. The Michigan law tracks the common law requirements that the burning be done "willfully or maliciously." The Michigan code differs somewhat in that the prosecutor need only show that the burning was done willfully or maliciously; the Maryland law requires the prosecution to show that the burning was done both willfully and maliciously.

2. As with the Maryland law, the Michigan Penal provisions concerning arson make the burning of a dwelling house, whether occupied or not, a crime.

3. The Michigan Penal Code eliminates the common law definition of arson that the burning be of a dwelling house of another person. Michigan law, as noted above, applies whether or not the dwelling house is owned by the person accused of the crime.

Sect. 750.73, Chapter X, Michigan Penal Code, provides for the punishment of those who burn real property other than a dwelling place. This section states basically that any person who willfully or maliciously burns any building or other real property, or the contents thereof, other than those types of properties specified in the section concerning a dwelling house, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than ten (10) years. Under this section, it is not relevant whether the property belongs to the person accused of the crime.

The provisions of Sect. 750.74, Chapter X, Michigan Penal Code, provide for penalities with respect to those who burn personal property. Under this section, any person who willfully and maliciously burns any personal property, other than that specified in the preceding sections, owned by himself or another, shall, if the value of the personal property burned or intended to be so burned is Fifty Dollars ($50.00) or less, be guilty of a misdemeanor. If the value of the personal property burned or intended to be so burned is more than Fifty Dollars ($50.00), such person

shall be guilty of a felony. The provisions of Sect. 750.74, Chapter X, Michigan Penal Code, require that the burning of personal property be done both willfully and maliciously, whereas the burning of a dwelling house or other real property or buildings need only have been done willfully or maliciously. The presence of the conjunctive term "and" in Sect. 750.74, Chapter X, Michigan Penal Code, is inconsistent with other statutory provisions in this chapter and may well result in confusion or ambiguity if prosecution is brought under that section. In light of previous Michigan statutory provisions and modern statutory revision, changes should be proposed to the Michigan legislature eliminating the conjunctive term "and" from this section.

The provisions of Sect. 750.75, Chapter X, Michigan Penal Code, provide that any person who shall willfully burn any building or personal property which shall be at the time insured against loss or damage by fire with intent to injure and defraud the insurer, whether such person be the owner of the property not, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than ten (10) years. The statutory provisions provide that the burning with intent to defraud or injure the insurance company need only be done "willfully."

The provisions of Sect. 750.77, Chapter X, Michigan Penal Code, make it a crime to prepare to burn certain structures. This statute which is very similar to those developed by California and Maryland, make it a crime for any person to use, arrange, place, devise, or distribute any inflammable, combustible, or explosive material, liquid, or substance, or any device in or about any building or property mentioned in the preceding sections of the Michigan Penal Code chapter with intent to willfully and maliciously set fire to or burn the same. Such acts constitute a misdemeanor if the value of the personal property is less than Fifty Dollars ($50.00) or if the personal property is valued at more than Fifty Dollars ($50.00) or the property burned is real property, the crime is classified as a felony. Again, it should be noted that the Michigan legislature has inconsistently used the terms "willfully" and "maliciously." In the initial arson statutory provisions, the Michigan legislature required only that the crime be done willfully or maliciously. In the statutory section dealing with arson with intent to defraud an insurer, the legislature only required the element of "willfulness" in establishing a case thereunder. Here, in Sect. 750.77, Chapter X, Michigan Penal Code, the legislature has reverted to the conjunctive form requiring both a willful and malicious burning.

The last statutory provision dealing with arson in Michigan is Sect. 750.78, Chapter X, Michigan Penal Code, which states that any person who shall willfully or negligently set fire to any prairies or grounds, to the injury or destruction of the property of any other person, shall be guilty of a felony.

Effective May 22, 1978, the State of Michigan enacted a mandatory insurance reporting and immunity law substantially similar to the law enacted by the State of Maryland that was previously reviewed. The Michigan law, enacted as Sect. 4 of Act No. 207, requires fire insurance

companies authorized to do business in the State of Michigan to furnish, upon request by a state fire marshal, information in the company's possession concerning a fire occurring in the state. Among other requested documents, the insurance company is required to furnish:

1. any insurance policy relevant to a fire loss under investigation
2. any application for an insurance policy
3. policy premium payment records for the history of previous claims made by the insured for fire losses
4. material relating to the investigation of the loss, including statements made by any person, proofs of loss submitted to the company, and other relevant evidence.

The insurance company is also required to notify the state fire marshal of any fire loss to its insurers' real or personal property that the insurance company has reason to suspect was caused by incendiary means. As with the Maryland law, the Michigan law provides that the insurance company, in the absence of fraud or malice, shall not be liable for damages in a civil action and will not be subject to criminal prosecution before an oral or written statement made or other action taken which is necessary to supply the information required pursuant to this mandatory reporting and disclosure law.

Laws - Felony Murder:

Includes arson, but must prove at least Murder II, and not just a casual relationship.

North Carolina

North Carolina is one of only four states which does not use a model arson law - the other three are Hawaii, Massachusetts, and Montana. Arson law in North Carolina is rooted in common law, and separates incendiary acts into two parts:

- Arson, defined as the willful and malicious burning of the dwelling of another; and
- Other burnings, defined as willful and wanton burning.

As of July 1, 1980, the penalties for arson and unlawful burning were changed. (The changes are summarized in Exhibit 4-1.) In general, the punishment is primarily scaled with respect to danger to human life, only secondarily with respect to property value.

Prior to the recent 1979 amendments to Article XIV, North Carolina Criminal Code, Article XV, on arsons and related offenses, the North Carolina laws set forth enumeration of prohibited arson offenses as they relate to specific types of buildings. For example, various North Carolina statutes made it an offense to burn the following types of property:

1. Burning of certain public or corporation buildings or buildings belonging to any political subdivision of the State of North Carolina. Sect. XIV - 59, Article XV.
2. Burning of school houses or buildings of educational institutions. Sect. XIV - 60, Aricle XV.
3. Burning or attempting to burn certain bridges and buildings. Sect. XIV - 62, Article XV.
4. Setting fire to churches and certain other buildings, such as outhouses, stables, granaries, mills or barns. Sect. XIV - 62, Article XV.
5. Burning of buildings or structures in the process of being constructed. Sect. XIV - 62.1, Article XV.
6. Burning of boats or barges. Sect. XIV - 63, Article XV.
7. Burning of gin houses, tobacco houses, or stables for the keeping of mules, horses, or cattle. Sect. XIV - 64, Article XV.
8. Fraudulently setting fire to dwelling houses. Sec. XIV - 65, Article XV.
9. Willful and malicious burning of personal property, whether not or to defraud an insurer. Sect. XIV - 66, Article XV.

10. Attempting to burn dwelling houses, state buildings, churches, buildings in the process of being constructed, boats, barges, gin houses, tobacco houses, etc. Sect. XIV - 67, Article XV.

The former North Carolina arson law modified the common law crime of arson by making even the burning of one's own building, dwelling place, or other structure a specific offense under the law. Under the North Carolina Arson Code, where the statute required the building be burned, an indictment charging that a fire was set was ruled not sufficient to state an offense or to support the introduction of evidence where there was allegation or subsequent proof that the wood or other material had been charged [State v. Hall, 93 N.C. 571 (1885)].

The attached table compares the state's arson laws before and after July 1980. Note the size of the fines. While larger than most other states, the fines would not approach the level of full restitution for many arson-for-profit fires.

Exhibit 4.1

ARSON LAW - NORTH CAROLINA

OFFENSE	CLASS OF FELONY	PUNISHMENT	
		Prior to 1 July 1980	After 1 July 1980
ARSON			
1st degree - burning of <u>occupied</u> dwelling	C	life	up to 50 years; or up to $25,000; or both
2nd degree - burning of <u>unoccupied</u> dwelling	D	life	up to 40 years; or up to $20,000; or both
OTHER BURNINGS			
Certain public buildings	E	2 to 30 years; and fine	up to 30 years; or up to $15,000; or both
Schoolhouses or buildings of educational institutions	E		
Certain bridges and buildings	E		
Churches and certain other buildings	E		
Building or structure in process of construction	E		
Boats and Barges	H	4 months to 10 years; and fine	up to 10 years; or up to $5,000; or both
Gin houses and tobacco houses	H		
Dwelling houses (furnished)	H		
Personal property	H		
Dwelling houses and certain other buildings (attempt)	H		
Other buildings (attempt)	H		

Ohio

Chapter 2909, Ohio Statutes Annotated, provides the statutory codifications of the crimes of arson and related offenses. Formerly, the crime of arson was addressed in the statutory provisions from the perspective of the potential harm or threat posed to buildings, structures, and habitations. The new Ohio arson statutes include the use of both fire and explosion and take note of the comparative seriousness of different offenses classified under arson based primarily on the potential for harm to persons, rather than solely upon the type of structures involved. Since in certain prosecutions for arson, the degree of the offense depends on the value of the property involved or the amount of damage, the new Ohio statutes on arson contained in Chapter 2909 set forth a section giving rules for determining the value or amount of damage.

Section 2909.02, Ohio Statutes Annotated, provides that:

> No person, by means of fire or explosion, shall knowingly (1) create a substantial risk of serious physical harm to any person; (2) cause physical harm to any occupied structure.

A person who violates this section is guilty of aggravated arson, a felony of the first degree. This section substantially broadens former Ohio law by defining the offense, not only in terms of burning an occupied structure, but also in terms of endangering any person or damaging any occupied structure by means of fire or explosion. In addition, this section represents a significant shift in emphasis from the way in which the relative severity of arson offenses was formerly determined by using the degree of danger to persons as the key factor in placing only secondary reliance on the kind of property involved and the offense.

The provisions of Section 2909.03, Ohio Statutes Annotated, provide that no person by means of fire or explosion shall knowingly cause or create a substantial risk of physical harm to any property of another without his consent; cause or create substantial risk of physical harm to any property of himself or another with purpose to defraud; cause or create a substantial risk of physical harm to the state house or a courthouse, school building, or other structure owned or controlled by the State or any of its political subdivisions, or any department, agency, or instrumentality of either, and used for public purposes. This section consolidates and expands the coverage of a number of former sections prohibiting burning property for fraudulent purposes or damaging property of another without his consent. To some extent, the offense of arson overlaps the offense of aggravated arson described in Section 2909.02, Ohio Statutes Annotated, but arson does not include the element of potential harm to persons or of an occupied structure being involved, which distinguishes arson from the more serious offense of aggravated arson. Arson is, thus, a lesser included offense to aggravated arson. It should be noted that the arson statute does not make illegal the burning of one's own property where such burning is not done with the purpose of defrauding an insurance company or does not

thereby result in a risk of physical harm to any other property. Arson is a misdemeanor of the first degree when the value of the property involved or the amount of damage is less than One Hundred Fifty Dollars ($150.00), the property involved not being a public building, and there being no fraudulent intent. Otherwise, arson not involving public buildings is a felony of the fourth degree, and arson involving public buildings is a felony of the third degree. The common law definition of arson is present to a limited extent in Section 2909.03, Ohio Statutes Annotated, the arson law. In Haas v. State, 132 N.E. 158, the Court ruled that where the owner procures another to burn the owner's building or consents to the burning thereof, such burning is not a malicious burning of the property of another in violation of this section. It has been previously noted elsewhere that except under circumstances where the burning is to raze or demolish a building for a beneficial purpose and with prior notification to the local fire department, the burning of even one's own property presents substantial risks of harm to persons and property in the community. Fire suppression personnel, unless previously notified, will have to respond to a fire call with the resulting risk of vehicular traffic accidents and fire suppression entries at the scene. In addition, society incurs a certain loss by having the property retired from the tax rolls.

Criminal Statutes

The criminal statutes against arson include:

Aggravated Arson	Ag. Persons	Felony First Degree	4-25 yrs.
Aggravated Arson	Property	Felony First Degree	4-24
Arson (more than $150)		Felony Fourth Degree	1-5
Arson (under $150)		Misdemeanor First	0-6

Insurance Immunity

Section 3737.16, Ohio Revised Code, sets forth provisions similar to the Michigan and Maryland insurance mandatory reporting and immunity laws. Section 3737.16, Ohio Revised Code, requires an insurance company to cooperate and furnish information to a fire marshal or other designated arson investigator, which is in the insurance company's possession relative to a fire loss. The insurance company is required to furnish the following information, among other relevant matters:

1. Any insurance policy relevant to a fire loss
2. Any application for such insurance policy
3. Insurance policy premium payment records
4. History of previous claims made by the insured for a fire loss

5. All material relating to the investigation of the fire loss, including statements of any person, proofs of loss, and other relevant evidence.

The insurance company has a mandatory duty imposed by statute to properly notify the fire marshal and furnish him with all relevant material required where it has reason to suspect that a fire loss to his insurer's real or personal property was caused by incendiary means. In the absence of fraud or malice, no insurance company, or person who furnishes information on its behalf, is liable for damages in a civil action or subject to criminal prosecution for any oral or written statements made.

The provisions of Section 3737.22, Ohio Revised Code, et seq., set forth the duties and powers of the fire marshal and employees under him. The provisions of Section 3737.24, Ohio Revised Code, set forth the manner in which the fire marshal and chief of the fire department of each municipal corporation may investigate the cause of fire. This statute specifically provides that "the marshal and each of his subordinates, and any other officers mentioned in this section, at any time of day or night, may enter upon and examine any building or premise where a fire has occurred, and other buildings and premises adjoining or near thereto." In light of the decision of the United States Supreme Court in Michigan v. Tyler, it is doubtful that this statutory provision is constitutional. In the Ohio Revised Code concerning the fire marshal's duties and powers, there is no requirement that the fire marshal and others under him obtain a search warrant prior to making a fire scene search and examination. If the statutory provisions are construed by Ohio Appellate Courts as calling for the acquisition of a search warrant by a neutral magistrate, the statutes will be upheld with that constitutional gloss. Otherwise, these statutory provisions are invalid and legislative attention thereto is necessary at the earliest opportunity.

In addition, the provisions of Section 3737.27, Ohio Revised Code, provide the fire marshal or any assistant fire marshal with the powers to summon and compel the attendance of witnesses to testify in relation to any matter which is a proper subject of inquiry and investigation and to produce books, papers or documents. This statutory provision in effect makes the fire marshal and his assistants members of the law enforcement community for purposes of the Miranda Decision, which requires that targets of an investigation who are to be interrogated in a custodial situation be first advised of their right to counsel, right to remain silent, etc.

The general provisions of Chapter 3737 of the Ohio Revised Code set forth those laws relating to the fire marshal of the State of Ohio. These laws provide that the state fire marshal create the arson bureau as part of his office. The chief of the arson bureau is required to be experienced in the investigation of the cause, origin, and circumstances of fires, and in the administration and supervision of subordinates. In Ohio, the chief of the arson bureau is responsible for investigating fires and prosecuting persons believed to be guilty of arson or similar crimes. The cause,

origin, and circumstances of each major fire occurring in the State of Ohio must be investigated, by statutory mandate, to determine whether the fire was the result of carelessness or design. By statute, such investigations must be commenced within two days of occurrence of the fire and are to be supervised by the state fire marshal. Local officers conducting such investigations must furnish the fire marshal with a written report within one week of commencing the investigation.

Oregon

The Oregon laws concerning arson and related offenses are set forth in Sections 164.305-335, Oregon Revised Statutes. The provisions of Section 164.315, Oregon Revised Statutes, provide that a person commits the crime of arson in the second degree if, by starting a fire or causing an explosion, he intentionally damages any building of another that is not protected property. According to Section 164.305, Oregon Revised Statutes, "protected property" is defined as any structure, place or thing customarily occupied by people, including public buildings and forest land. It will be noted that under this Oregon law, a person does not commit the offense of arson by burning property that he, himself, owns unless that property constitutes "protected property" that is customarily occupied by people. Therefore, an owner/landlord does not commit the offense of arson of the second degree if he burns his own vacant apartment building, if such building is being occupied and used as a residential apartment complex.

According to the provisions of Section 164.325, Oregon Revised Statutes, a person commits arson in the first degree if by starting a fire or causing an explosion, he intentionally damages protected property of another or any property, whether his own or another's, such act recklessly places another person in danger of physical injury or protected property of another in danger of damage.

The Oregon Revised Statutes contain the same weaknesses noted in the laws of other jurisdictions, principally retention of the common law notion that one cannot be guilty of the crime of arson by the burning of one's own property. The Oregon Revised Statutes do not expressly cover the situation where a person burns his own property with the intent to injure or defraud an insurance company. But, this provision is perhaps implicitly covered by the statute. According to the provisions of Section 164.305(2), Oregon Revised Statutes, "the property of another" is defined as property in which anyone other than the actor has no right to defeat or impair, even though the actor may also have such an interest in the property. Therefore, under the provisions of Section 164.315, Oregon Revised Statutes, a person may be guilty of arson in the second degree if he burns his own building, thereby defeating or impairing the interest that an insurance company may have in said building by virtue of having issued a policy of coverage with respect thereto.

Offense	Penalty
Arson First Degree	up to 20 years and/or $2,500
Arson Second Degree	up to 5 years and/or $2,500
Reckless Burning	up to 1 year and/or $1,000 (misdemeanor)
Criminal Mischief 1	Class C Felony same as Arson Second Degree
Criminal Mischief 2	Class A Misdemeanor same as Reckless Burning
Criminal Mischief 3	Up to 30 days and/or $250 fine

Oregon's Insurance Immunity Statute

Oregon Revised Statutes, Section 743.603, provide that no insurance company shall knowingly issue or procure any fire insurance policy upon property within the state for an amount which, together with any existing insurance coverage, exceeds the fair value of the risk insured or of the interested of the insured in the property. This Oregon law imposes a duty upon agents, insurers and insureds to see that coverage is not obtained for an amount in excess of the fair market value of the property.

Based on examination of the Oregon law and related cases, it is not known whether fair market value is defined as also including the replacement cost of the building.

Under the provisions of Section 476.270, Oregon Revised Statutes, amended 1967, insurance companies are required to report fire losses in suspicious fires, providing the names, dates, and facts surrounding any suspicious or incendiary fires. However, the Oregon Revised Statutes contain a substantial weakness in that they do not provide for civil or criminal immunity to an insurance company in making such report, in the absence of fraud or malice. The absence of such an immunity provision may deter insurance companies from making reports of fires in cases where the fire is of a suspicious origin. In any event, insurance companies are required to make a monthly record of all fire losses, showing the name of the insured, the location of the property burned, and the probable cause of the fire, the name of the insurer, the name of the adjustor, the date and time of the fire, the occupancy of the property burned, the actual value of the property burned, and the amount of insurance carried.

Pennsylvania

Under Title XVIII, Pennsylvania Consolidated Statutes, Chapter 33, a person commits a felony of the first degree if he intentionally starts a fire or causes an explosion whether on his own property or on that of another, and thereby recklessly places another person in danger of death or bodily injury. Under the Pennsylvania law, a felony of the first degree is punishable by a fine of Twenty-Five Thousand Dollars ($25,000.00) or a term in the state penitentiary not to exceed twenty (20) years, or both. Under Title XVIII, Pennsylvania Consolidated Statutes, Sect. 3301(b), a person commits a felony of the second degree if he:

(1) Starts a fire or causes an explosion with intent of destroying a building or occupied structure of another;

(2) Intentionally starts a fire or causes an explosion, whether on his own property or on that of another, and thereby recklessly places a building or occupied structure of another in danger of damage or destruction; or

(3) Starts a fire or causes an explosion with intent of destroying or damaging any property, whether his own or of another, to collect insurance for such loss.

Under Pennsylvania law, a felony in the first degree is punishable by a fine of Twenty-Five Thousand dollars ($25,000.00), a maximum prison term of twenty (20) years, or both. A felony of the second degree is punishable by a fine of Twenty-Five Thousand Dollars ($25,000.00) and a term in the state penitentiary not to exceed ten (10) years, or both. The foregoing statutory provisions were made effective on June 6, 1973, by virtue of Pennsylvania Legislative Act No. 334, Sect. 1, which was passed on December 6, 1972.

Under Pennsylvania law, a person is not guilty of a crime of arson if he starts a fire or causes an explosion with the intent of destroying his own property so long as he does not thereby recklessly place a building or occupied struture of another in danger of damage or destruction. In light of the fact that Pennsylvania law provides that both offenses are felonies of the second degree, it is difficult to understand why the Pennsylvania Legislature has not made both acts a criminal offense under the law. As previously noted in discussions concerning other state laws, notable the Texas Arson Statute, there are numerous risks involved even in situations where a person burns his own building or structure. The obvious risk is to fire suppression personnel who respond to such an event and the societal loss from the elimination of valued property from the tax rolls. In addition, the elimination of the distinction contained in Title XVIII, Pennsylvania Consolidated Statutes, Sect. 3301(b)(1)(2), between setting fire to the property of another and setting fire to one's own property and recklessly endangering the building or structure of another, will serve valuable policy considerations and aid in eliminating prosecutorial confusion on charges to be brought.

Although under Pennsylvania law a person does not commit a criminal offense if he starts a fire or causes an explosion with the intent of destroying his own building or occupied structure, as with the Texas Arson Statute, if anyone other than the actor has a possessory or proprietary interest in the building or occupied structure, then such fact eliminates the defense to the crime. Only where the other person, having a possessory or proprietary interst in the building or occupied structure, consents to the fire or explosion will the actor be relieved of criminal responsibility.

In order to prove that arson has been committed, the Commonwealth's Attorney must establish beyond a reasonable doubt that there was a fire, that it was willfully and maliciously set, and that the defendant was the guilty party. Commonwealth v. Carthon, 354 A.2d 557 [467 Pa. 73 (1976)]. In order to prove the crime of arson, it is not necessary for the Commonwealth to prove or establish a motive for the burning by the defendant. Commonwealth v. Sorge, 27 Monroe Law Review 306 (1971).

In cases where arson is accompanied by murder or the setting of a fire or explosion causes the death of a person, the underlying arson felony in a felony-murder does not merge with the charge of murder. Commonwealth v. Torbeck, 405 A. 2nd 1948 (Penn. 1979). Under Pennsylvania law, it is unclear whether proof of charring, as opposed to mere scorching or discoloration, would sustain a conviction under the Pennsylvania Consolidated Statutes. In Commonwealth v. Garrison, 364 A.2d 388, 242 Pa. Super. 509 (1976), a reviewing court held that the trial judge in an arson prosecution properly instructed the jury as to the requisite elements necessary to prove the arson charge, properly refusing to instruct that the Commonwealth had the burden to prove burning of the building and not mere scorching or discoloration. On the basis of this decision, it appears that a mere scorching or discoloration would sustain a conviction for arson in Pennsylvania.

Texas

Prior to 1979, the Texas legislature dealt with the arson statutes in the 1973 Legislative Session, in which certain laws and statutes were repealed and others recodified. Under the Texas law which was in existence in 1973, certain types of intentional burning were not made criminal. For example, the 1973 arson statutes continue some of the elements of the common law providing, for example, that a person burning his own habitation or building without intent to defraud an insurance company would not be guilty of a criminal offense. The 1973 arson statute provided that:

> A person commits an offense if he starts a fire or causes an explosion:
>
> (a) without the effected consent of the owner and with intent to destroy or damage the owner's building or habitation; or
>
> (b) with intent to destroy or damage any building or habitation to collect insurance for the damage or destruction.
>
> An offense under this statute is a felony of the second degree, unless any bodily injury less than death is suffered by any person by reason of the commission of the offense, in which event it is a felony of the first degree.

From an examination of the 1973 Texas Arson Statute, it will be noted that a person would commit no criminal offense if he destroyed or damaged his own building or habitation by reason of fire or explosion. This provision of the 1973 Texas law is very similar to the common law which did not recognize as a criminal offense the burning of a person's own property. Such statutory language failed to take into consideration the obvious risk created by the starting of a fire, whether of another or of one's own. The social damages involved include the expenditure of firefighting equipment, time, and, unfortunately, lives, and loss of tax revenues associated with the intentional starting of a fire. In Sect. 28.05, Texas Penal Statute, Title XII (1973), the law provided that there would be no defense to prosecution under the penal code if the accused had an interest in the property, if another person also had an interest in the property that the accused was not entitled to infringe, or that he infringed without the co-owner's effective consent.

Another weakness in the Texas arson statute was that it failed to take into consideration intentional burnings by an owner of property that the owner intended to raze or destroy in order to permit re-building, improvements, or the construction of new habitations or buildings. It is suggested that the arson statute should make criminal even the burning of one's own dwelling place, subject to the provision that if prior consent, permission or authorization from a law enforcement authority were obtained, where circumstances of razing, or the construction of new improvements.

In 1979, the Texas legislature addressed some of these weaknesses through the passage of a new arson statute that became effective September 1, 1979, by virtue of Chapter 588, Page 1216, of the new Texas Penal Code adopted by the 66th Texas Legislature. Under the new Texas Arson Statute, a person commits a criminal offense if he starts a fire or causes an explosion with intent to destroy or damage any building, habitation, or vehicle:

1. Knowing that it is within the limits of an incorporated city or town,
2. Knowing that it is insured against damage or destruction,
3. Knowing that it is subject to a mortgage or other security interest,
4. Knowing that it is located on property belonging to another,
5. Knowing that it has located within it property belonging to another, or
6. When he is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another.

[Sect. 28.02, 18 Texas Statutes, Title XII (1979)]

The 1979 Texas Arson Statutes provide that it is a defense to prosecution for destroying or damaging any building, habitation or vehicle knowing it is within the limits of an incorporated city or town that prior to starting the fire or causing the explosion, the person obtained a permit or other written authorization in accordance with any city ordinance regulating fires and explosions.

The 1979 Texas Arson Statutes modify the previous code which reflected elements of the common law by making it a crime to destroy one's own building, habitation or vehicle if such structure is located within the limits of an incorporated city or town. Presumably, the Texas Legislature concluded that even the burning of one's own structure, building, habitation, or vehicle within the limits of an incorporated city or town posed unacceptable risks that the fire would spread to other buildings, structures or habitations. Conversely, the legislature presumably viewed fires in rural areas as not providing the same risk of danger to other persons, habitations, buildings or structures. There are still weaknesses in the Texas Arson Statutes because the distinction drawn by the Texas legislature between urban and rural fires set by a person with intent to destroy or damage his own property ignores the fact that even in rural areas

where fire suppression personnel respond to a fire, there is a risk of injury or death to the fire suppression personnel. The provisions of Sect. 28.02(a)(2), Texas Penal Code, Title VII (1979), making it an offense to destroy any building, habitation or vehicle knowing that it is insured against damage or destruction will encompass burning of one's own property whether in urban or rural areas. One possible weakness in the new Texas Arson Statute concerning the destruction or damage of a building, habitation or vehicle, knowing that it is insured against damage or destruction, is whether such penal provision is valid where it does not include the element of intent to defraud an insurer. For example, a person may assert as a defense to prosecution under this statute that he had no intent to defraud an insurance company; filed no proof of loss with respect to the damage or destruction; or has not claimed any compensation or proceeds under a policy protecting against the damage or destruction of insured property.

The Texas Arson Statute makes an offense under Sect. 28.02 a felony of the second degree punishable by a term in the state penitentiary not less than two (2) nor more than twenty (20) years or a fine of Ten Thousand Dollars ($10,000.00), or both. If bodily injury less than death is suffered by any person by reason of an offense committed within the provisions of Sect. 28.02, such event is a felony of the first degree punishable by a life term in the state penitentiary or five (5) to ninety-nine (99) years and/or a fine of Ten Thousand Dollars ($10,000.00).

As prior to 1979, insurance companies were not authorized to share information with law enforcement agencies, the flow of information between the insurors and investigators was very restricted. Prosecutors commented that mandatory reporting of insurance data to arson investigators would have been

The State has a felony murder law that covers death occasioned in the commission of a felony. Under this statute, a case in which a firefighter dies while fighting a fire directly related to the commission of a felony could be prosecuted as a "felony murder" charge.

By judicial interpretation, a full oral confession while in custody, unless related to guilt of a crime or physical evidence, is inadmissable. State law is more restrictive than the U.S. Supreme Court re. Miranda and only recently have pre-custody statements been admissable.

One ADA noted that a frequent and vexing problem is the provision that precludes comment on testimony of an accomplice without collaboration.

The State permits consensual electronic coverage, but not Title III coverage; however, the District Attorneys are pushing for statutory authority for Title III.

Personnel in the system applauded the recent legal changes. It was the general opinion that these recent law changes should improve both the clearance and conviction rates. Investigators tended to feel that stiffer penalties (especially longer sentences) for offenses, and either statutes or regulations to cut down on over-insurance, were still needed to deter

the arson profiteers. Insurance companies could help investigators by cutting down on quick pay-out of claims on suspicious or incendiary fires. Investigators felt that closer working relationships might go further to reduce arson than mere changes in laws.

There is a five-year statute of limitations on arson.

Virginia

In several respects, the Virginia arson laws are similar to the North Carolina statutes, containing an enumeration of the various buildings and circumstances which are prohibited. For example, Virginia law prohibits the following acts:

(1) The burning or destroying of a meeting house, townhouse, courthouse, college, academy, or school house

Sect. 18.2-79, Code of Virginia

(2) Burning or destroying of building, bridge, lock, dam, or other structure

Sect. 18.2-80, Code of Virginia

(3) Burning or destroying of grain or other standing crop or personal property

Sect. 18.2-81, Code of Virginia.

(4) Setting fire to woods, fences, grasses, straw, or other things capable of spreading fire on land

Sect. 18.2-86, Code of Virginia.

The general Virginia statute on arson provides that:

> If any person, in the nighttime, maliciously burns; or by use of any explosive device or substance, maliciously destroys, in whole or in part, or causes to be burned or destroyed, or aid, counsel or procure the burning or destruction of any dwelling house or house trailer whether the property of himself or of another, or any hotel, 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, or maliciously set fire to anything, or aid, counsel or procure the setting fire to anything in the burning whereof such dwelling house, house trailer, hotel, asylum, or other house, or railroad car boat, vessel or river craft, jail or prison, shall be burned in the nighttime, he shall be guilty of a Class II felony; but if the jury or the court trying the case without a jury, finds that at the time of committing the offense there was no person in such dwelling house, hotel, asylum, or other house, or in such railroad car, boat, vessel or river craft, jail or prison, the offender shall be guilty of a Class III felony. Any such burning or destruction in the daytime, whether the building or other places mentioned in this section be occupied or not, shall be punishable as a Class IV felony.
>
> Sect. 18.2-77, Code of Virginia.

Although the foregoing statute was amended in 1977 to insert the word "hospital," in other respects it remains basically the same.

One of the weaknesses that may be noted in reviewing Sect. 18.2-77, Code of Virginia, is the distinction between the crime of arson committed in the daytime and the crime of arson committed in the nighttime, with respect to the degree of punishment imposed. Under Sect. 18.2-77, Code of Virginia, an arson committed in the nighttime is punishable as a Class II felony. A class II felony is punishable by a term in prison for life or not less than twenty (20) years. On the other hand, if the same crime is committed in the daytime whether the building or other places mentioned in the statutes is occupied, such offense is punished as a Class IV felony which is punishable by a term in the state penitentiary not less than two (2) nor more than ten (10) years. In a sense, the Virginia statute reflects part of the common law heritage of this country wherein crimes committed at nighttime are viewed more seriously because of the presumed increased risk of harm to persons or property. However, as noted in previous parts of this report, given the need recognized by most authorities to provide penal disincentive to reduce or eliminate the problem of arson and arson fraud, it makes little sense.

Virginia has a felony murder statute that, in the opinion of the District Attorney, includes arson.

Incentives and Disincentives to Committing Arson

The 1979 Arson Report to Congress, the Tauber and Abt Studies, as well as earlier commentaries, have all pointed out the need to toughen laws, remove loopholes, and take the profit out of arson through statutory means.

As the accompanying table shows, in the past several years, laws relating to arson control could be summarized by three points:

1. Criminal statutes regarding arson (with the exception of one state) have undergone revision since 1975 at least once if not several times

2. Laws providing immunity to insurance companies sharing information with fire investigators successfully passed in seven of the eight states

3. Notwithstanding the actions legislated to make the legal environment more hostile to arsonists, islands of sanctuary remain for the arson profiteer.

While the table closely shows that for every state surveyed in the study, there are one or more legislative initiatives still remaining to be adopted, it should not be taken to mean that effective deterrence awaits these actions. Indeed, the law governing arson remains only a potential until it can be enforced. In this sense, deterrence through law may be thought of as the waiting net into which law enforcement officers and officials must beat their quarry. Even the far weaker and gap-riddled arson laws of the pre-1975 era, although letting through the few, could have ensnared the many had law enforcement and fire officials beaten the bushes more thoroughly (if one assumes that there is a deterrent effect and/or a displacement effect linkage between successful enforcement and deterrence).

In sum, then, while potential disincentives can be strengthened, the present legal loopholes neither drastically interfere with investigations nor regularly undermine prosecution, as does the quality and the quantity of those actions.

Table

SUMMARY OF STATE STATUTORY DISINCENTIVES AND INCENTIVES TO COMMIT ARSON

(Source: Arson Resource Directory, USFA, 1980, p 58-60)

		B70	33	57	24	17	87	44	60
DISINCENTIVES	Insurance Immunity	1978	1976	1978	1977	1979	Pending	1979	1977
	Time Extension for Claims Settlement								
	Overinsurance Control Technique						Yes		
	State Review of Claims								
	Tax Lien			1978					
	Revision of Criminal Code dealing with Arson	1978	1976	1971	1979	1977/79	-	1975	1979
	Double Damage Reimbursement								
	Liability for Damage by Minors	Not to exceed $1,000	Not to exceed $2,000	Not to exceed $1,500	Actual or N.M.T. $5,000	Not to exceed $500	Not to exceed $300	Not to exceed $200	Not to exceed $500
	Fire Investigator's Subpoena Power		Yes		Yes				
INCENTIVES	Apparent Shortcomings in State Laws Observed during 1977-1979 State Laws	Anti-Arson Fraud provisions prior to 1978 limited anti-fraud to personal property	Burning one's own home without claiming insurance reimbursement not punishable as arson	No significant problems beyond inconsistent usage of willful & malicious and willful or malicious	Weaknesses in anti-fraud provisions, burning of a vehicle, vacant & abandoned properties, burning of one's own home & the ability of fire marshals to testify in civil proceedings	Mild anti-arson fraud sentencing & felony murder in the course of arson limited to occupied structures	Burning one's own home may not be held to be arson	Daytime and nighttime arson is distinguished	Over-reliance on specific enumeration of properties rather than blanket prohibitions against all types of property

ARSON LAWS IN THE JURISDICTIONS SURVEYED:
AN ANALYSIS AND STATE-BY-STATE COMPARISON OF HYPOTHETICAL ARSON FIRES TO THE DEGREE OF CRIME CHARGEABLE AND PUNISHMENT RANGES

In this section, the state laws in effect in 1979 will be first analyzed and then compared by reference to a set of hypothetical arson incidents. The following hypothetical arson events have been selected to illustrate the variability in state arson laws.

1. Burning of a dwelling out of spite
2. Burning of a dwelling to commit insurance fraud
3. Burning of an unoccupied dwelling out of spite
4. Burning of an unoccupied dwelling to commit insurance fraud
5. Burning of a non-residential structure
6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place
7. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure
8. Setting fire to rubbish in a dumpster when only rubbish is burned
9. Burning of woodlands
10. Burning of non-structural property resulting in damages less than ninety-nine dollars ($99.00)
11. Burning of non-structural property resulting in damages between one-hundred and a thousand dollars ($100.00-$1,000.00)
12. Burning of non-structural property resulting in damages over one-thousand dollars ($1,000.00).

Arizona

In this section, the application of Arizona arson laws will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
Pursuant to Chapter 17, Arizona Revised Statutes, Sect. 13-1702, if the building is occupied, the person is guilty of a Class II felony, punishable by a term of imprisonment of seven (7) years or less.

2. Burning of a dwelling to commit insurance fraud.
See response to Paragraph 1 above.

3. Burning of an unoccupied dwelling out of spite.
Under Arizona law, arson of an unoccupied structure is a Class IV felony, punishable by a term of imprisonment for a period of four (4) years or less.

4. Burning of an unoccupied dwelling to commit insurance fraud.
See the response to Paragraph 3 above.

5. Burning of a non-residential structure.
Pursuant to the provisions of Arizona law, this act would constitute the offense of reckless burning, punishable as a Class I misdemeanor.

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
See other response to Paragraph 5 above.

7. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure.
See the response to Paragraph 5 above.

8. Setting fire to rubbish in a dumpster when only rubbish is burned.
This would not constitute the offense of arson under Arizona law, but may be punishable as reckless burning, a misdemeanor in Arizona.

9. Burning of Woodlands.
This would be punishable as a Class IV felony if the property has a value of more than One Thousand Dollars ($1,000.00). This would be punishable as a Class I misdemeanor if the value of the woodlands burned is One Hundred Dollars ($100.00) or less. See Sect. 13-1703, Chapter 17, Arizona Revised Statutes.

10. Burning of non-structural property resulting in damages less than Ninety-Nine Dollars ($99.00).
See response to Paragraph 9 above.

11. Burning of non-structural property resulting in damages between One Hundred and One Thousand Dollars ($100.00-$1,000.00).
See response to Paragraph 9 above.

12. Burning of non-structural property resulting in damages over One Thousand Dollars ($1,000.00).
See response to Paragraph 9 above.

California

In this section, the application of California arson laws will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
Under California law, the burning of a dwelling place out of spite constitutes the crime of arson, punishable under California Penal Code, Sect. 451.

2. Burning of a dwelling to commit insurance fraud.
This is the crime of arson, punishable according to the same provisions noted in response to Paragraph 1 above.

3. Burning of an unoccupied dwelling out of spite.
Under Sect. 451, California Penal Code, the burning of an unoccupied dwelling out of spite is a felony, punishable by a term in the state prison for seven (7) years.

4. Burning of an unoccupied dwelling to commit insurance fraud.
See the response to Paragraph 3 above.

5. Burning of a non-residential structure.
This is punishable pursuant to California Penal Code, Sect. 451, in the same manner that makes the burning of a dwelling place illegal under Sect. 451, California Penal Code.

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
California law has a provision not found in the other states which provides that one who sets fire to property or a structure or commits any acts preliminary thereto or in furtherance thereof is guilty of arson, punishable by a term of imprisonment. Thus, if one sets fire to a bush with the intent to burn a dwelling, the burning of the shrubbery could be viewed as an act preliminary to the burning of the dwelling, itself, and punishable under California Penal Code provisions.

7. Setting fire to shrubbery or other material with the possibility of fire extending to a non-residential structure.
See the response to Paragraph 6 above.

8. Setting fire to rubbish in a dumpster when only rubbish is burned.
This constitutes the crime of unlawfully causing a fire of property, punishable as a misdemeanor under California law.

9. Burning of Woodlands.
The provisions of Sect. 452, California Penal Code, provide that unlawfully causing a fire of forest land is a felony, punishable by imprisonment in the state prison for sixteen (16) months, two (2) or three (3) years, or by imprisonment in the county jail for not more than six (6) months.

10. Burning of non-structural property resulting in damages less than Ninety-Nine Dollars ($99.00).
Under Sect. 456, the California Penal Code, a person convicted of setting a fire for pecuniary gain or to defraud an insurer can be punished by a term of imprisonment. The Court may also impose a fine of twice the anticipated or actual gross gain realized. Thus, under California law, regardless of the amount, a Court can impose a fine of twice the actual loss or damage. For example, in a case where an arsonist burns property anticipating a financial gain from an insurance company of One Thousand Dollars ($1,000.00), under Sect. 456(b), California Penal Code (1979), the Court may impose a fine of Two Thousand Dollars ($2,000.00) against the person so convicted.

11. Burning of non-structural property resulting in damages between One Hundred and One-Thousand Dollars ($100.00-$1,000.00).
See response to Paragraph 10 above.

12. Burning of non-structural property resulting in damages over One Thousand Dollars ($1,000.00).
See response to Paragraph 10 above.

Maryland

The application of the arson laws of the State of Maryland will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
Pursuant to Article 27, Sect. 6, Annotated Code of Maryland, a person who sets fire to a dwelling out of spite is guilty of the crime of arson and upon conviction thereof can be sentenced to the state penitentiary for not more than thirty (30) years.

2. Burning of a dwelling to commit insurance fraud.
There is no specific Maryland law governing the burning of a dwelling to commit insurance fraud as a separate crime. Article 27, Sect. 9, Annotated Code of Maryland, is concerned with fires set with intent to injure an insurer of any goods, wares, merchandise, or personal property. This statutory section does not refer to real property such as a dwelling place. In such instance, therefore, the crime of arson would be committed, but there is no substantive crime of insurance fraud.

3. Burning of an unoccupied dwelling out of spite.
Under Article 27, Sect. 7, Annotated Code of Maryland, the burning of an unoccupied dwelling out of spite constitutes the crime of arson and upon conviction of such felony, the accused may be sentenced to the penitentiary for not more than twenty (20) years.

4. Burning of an unoccupied dwelling to commit insurance fraud.
As previously noted, there is no specific Maryland provision making it unlawful to burn a dwelling, building, or other real property fixture to commit insurance fraud. The provisions of Article 27, Sect. 9, Annotated Code of Maryland, are concerned only with the burning of personal property to commit insurance fraud.

5. Burning of a non-residential structure.
The burning of a non-residential structure is covered in Article 27, Sects. 7 and 8, Annotated Code of Maryland, which makes it a felony to burn a factory, shop, church, school, storehouse, barracks, barn, motor vehicle, railway car, etc. Upon conviction of said crime of arson, the defendant can be sentenced to the penitentiary for not more than twenty (20) and not less than three (3) years.

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
The provisions of Article 27, Sect. 8, Annotated Code of Maryland, make it a violation of law punishable as arson for a person to set fire to "hay, corn, wheat, barley, standing hay or grain of any kind or any vegetable product." The sentence for violation of this provision is a term in the penitentiary not to exceed three (3) years. There is no specific statutory provision making it a violation of the Maryland arson laws for a person to set fire to a shrub. Such a criminal act would constitute malicious mischief, a misdemeanor in Maryland. If the fire actually did extend to and burn a dwelling place, a person could be prosecuted for the crime of arson if the prosecution can also show that setting fire to the shrubbery was done willfully and maliciously to set fire to or cause to be burned a dwelling house. Where the dwelling house is not actually burned, the crime of arson would not be committed.

7. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure.
The comments noted in response to Paragraph 6 above would be equally applicable here.

8. Setting fire to rubbish in a dumpster when only rubbish is burned.
Such an act would not constitute a violation of the Maryland arson laws, but would merely constitute the crime of malicious mischief.

9. Burning of woodlands.
There is no specific statutory provision of Maryland law concerning the burning of woodlands.

10. Burning of non-structural property resulting in damages less than Ninety-Nine Dollars ($99.00).
The provisions of Article 27, Sect. 8, Annotated Code of Maryland, make it the crime of arson, punishable by a term in the penitentiary not to exceed three (3) years, for a person to burn any one of a number of enumerated items of personal property or any item of personal property not specifically named being of the value of at least Twenty-Five Dollars ($25.00).

11. Burning of non-structural property resulting in damages between One Hundred and One Thousand Dollars ($100.00-$1,000.00).
See response to Paragraph 10.

12. Burning of non-structural property resulting in damages over One Thousand Dollars ($1,000.00).
See discussion of Maryland law set forth in Paragraph 10.

Michigan

The application of the arson laws of the State of Michigan will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
The provisions of Sect. 750.72, Michigan Penal Code, provide that a person burning a dwelling place out of spite commits the crime of arson, which is a felony punishable by a term of imprisonment for not more than twenty (20) years.

2. Burning of a dwelling to commit insurance fraud.
Pursuant to the provisions of 750.75, Michigan Penal Code, a person burning a dwelling to commit insurance fraud, in addition to the statutory penalty noted in Sect. 750.72, violates the provisions of 750.75, Michigan Penal Code, punishable by imprisonment in the state prison for not more than ten (10) years.

3. Burning of an unoccupied dwelling out of spite.
The burning of any dwelling house occupied or unoccupied is the crime of arson in Michigan, punishable by imprisonment in the state prison for not more than twenty (20) years.

4. Burning of an unoccupied dwelling to commit insurance fraud.
This hypothetical arson event would be treated in the same manner as described in response to Paragraph 2 above.

5. Burning of a non-residential structure.
The burning of a non-residential structure is covered by Sect. 750.73, Michigan Penal Code, which makes it a crime punishable by imprisonment in the state prison for not more than ten (10) years for any person to burn any building or other real property other than a dwelling place.

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
If the shrubbery is considered an item of personal property with a value of Fifty Dollars ($50.00) or less, the person setting fire to the shrubbery would be guilty of a misdemeanor. If the value of the shrubbery burned or intended to be so burned exceeds Fifty Dollars ($50.00) in value, the person would be found guilty of a felony in Michigan pursuant to Sect. 750.74, Michigan Penal Code. If the person set fire to the shrubbery with the intent that such fire would burn or caused to be burned a building or other property, the same penal provision set forth above would be applicable. Sect. 750.77, Michigan Penal Code.

7. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure.
See commentary on Sect. 6.

8. Setting fire to rubbish in a dumpster.
Under Michigan Penal Code provisions concerning arson, the burning of rubbish in a dumpster would not constitute the crime of arson. The provisions of Sect. 750.74, Michigan Penal Code, govern the burning of personal property. However, in order for this provision to be applicable, the rubbish would have to be the personal property of a specific person and would have to have some value. Since rubbish in a dumpter is deemed under most interpretations of common or statutory law to have been abandoned, it is unlikely that setting fire to rubbish in a dumpster would constitute the crime of arson in Michigan. Such an act would constitute malicious mischief.

9. Burning of woodlands.
Sect. 750.78, Michigan Penal Code, specifically makes it a felony for any person to willfully or negligently set fire to any woods, prairie, or grounds not his own or to permit any fire to pass from his own woods, prairie, or grounds to the property of another person.

10. Burning of non-structural property resulting in damages less than One Hundred Dollars ($100.00).
The burning of personal property or non-structural property of a value less than Fifty Dollars ($50.00) is a misdemeanor in Michigan pursuant to the provisions of Sect. 750.74, Michigan Penal Code. If the value exceeds Fifty Dollars ($50.00), the act constitutes the crime of arson, punishable as a felony.

11. Burning of non-structural property resulting in damages between One Hundred and One Thousand Dollars ($100.00-$1,000.00).
See the discussion of Michigan Penal Code provisions set forth in Paragraph 10 above.

12. Burning of non-structural property resulting in damages over One Thousand Dollars ($1,000.00).
See the discussion of the Michigan Penal Code provisions set forth in Paragraph 10 above.

North Carolina

In this section, the application of North Carolina arson laws will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
A person burning a dwelling out of spite is guilty of the felony of arson in North Carolina, punishable under Article XV, Sect. 14-58, North Carolina Code. The crime of arson is punishable by a term in the state prison, for a maximum term of life.

2. Burning of a dwelling to commit insurance fraud.
The act of fraudulently setting fire to a dwelling house for the purpose of collecting insurance proceeds is punishable as a felony under Article XV, Sect. 14-65, North Carolina Code.

3. Burning of an unoccupied dwelling out of spite.
The burning of an unoccupied dwelling out of spite is generally covered under Article XV, Sect. 14-58, North Carolina Code dealing with general arson provisions. In addition, a person who willfully and intentionally burns any building intended to be used as a dwelling house which is in the process of construction and is not presently occupied may be punished under Article XV, Sect. 14-62.1, North Carolina Code, which makes such a violation a felony.

4. Burning of an unocccupied dwelling to commit insurance fraud.
This would be punished under Article XV, Sect. 14-65, North Carolina Code, as a fraudulent burning of a dwelling house.

5. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
Under the circumstances noted, the burning of shrubbery would not constitute the crime of arson under North Carolina Code provisions unless there was additonal evidence showing that the accused, by setting fire to the shrubbery, was attempting to burn a dwelling house or other building. In that case, the accused would be guilty of violating Article XV, Sect. 14-67, North Carolina Code, punishable as a felony.

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure.
See commentary in response to Paragraph 5.

Ohio

In this section, the application of Ohio arson laws will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
A person who knowingly creates a substantial risk of serious physical harm to any person or causes any physical harm to any occupied structure, under Sect. 2909.02, Ohio Statutes, commits aggravated arson which is a felony of the first degree.

2. Burning of a dwelling to commit insurance fraud.
Under Sect. 2909.03, Ohio Statutes, a person who, by means of fire, causes or creates a substantial risk of physical harm to any property of himself or another with the purpose of defrauding another is guilty of a felony of the fourth degree. If the value of the property or the amount of physical harm involved is less than One Hundred Fifty Dollars ($150.00), the crime is punishable simply as a misdemeanor.

3. Burning of an unoccupied dwelling out of spite.
The provisions of Ohio Statutes concerning arson and related offenses do not distinguish between occupied or unoccupied structures so much as they attempt to evaluate the harm or risk of harm to persons regardless of the type of building involved. If there is a risk of serious physical harm, the crime is one of aggravated arson, punishable as a first degree felony. Otherwise, the crime involved is one of arson as a third or fourth degree felony, under Sect. 2909.03, Ohio Statutes.

4. Burning of an unoccupied dwelling to commit insurance fraud. See the response set forth in Paragraph 2 dealing with Ohio Statutes on arson.

5. Burning of a non-residential structure.
This would be punishable under Sect. 2909.03, Ohio Statutes, as arson of the fourth degree.

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
If the fire does not result in or create a substantial risk of serious physical harm or damage to the structure, the crime would be one of arson of the fourth degree, punishable as such pursuant to Sect. 2909.03, Ohio Statutes.

7. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure.
See the response set forth in answer to Paragraph 6.

8. Setting fire to rubbish in a dumpster when only rubbish is burned.
A person setting fire to rubbish in a dumpster when only rubbish is burned would be guilty of violating Sect. 2909.06, Ohio Statutes, defining criminal damaging or endangering, which is a misdemeanor of the second degree.

9. Burning of woodlands.
This would be a violation of Sect. 2909.03(A)(1), Ohio Statutes, a felony of the fourth degree.

10. Burning of non-structural property resulting in damages less than Ninety-Nine Dollars ($99.00).
Under Ohio law, Sect. 2909.11, Ohio Statutes, it is only necessary in such cases that the judge or jury find and return that the value or damage was under One Hundred fifty Dollars ($150.00) or was One Hundred Fifty Dollars ($150.00) or more. A determination of exact amount is not required and this represents a return to the simpler common law procedure in cases where value was an element. This statutory section specifies four different criteria for determining the value of property or the amount of damage. Generally, under Sect. 2909.03, Ohio Statutes, if the value of the property is less than One Hundred Fifty Dollars ($150.00), the violation of the arson provision constitutes a misdemeanor of the first degree. If the amount of damage or loss exceeds One Hundred fifty Dollars ($150.00), the crime would be a felony of the fourth degree.

11. Burning of non-structural property resulting in damages between One Hundred and One Thousand Dollars ($100.00 and $1,000.00).
See response to Paragraph 10.

12. Burning of non-structural property resulting in damages over One Thousand Dollars ($1,000.00).
See discussion of Ohio law set forth in Paragraph 10.

Oregon

In this section, the application of Oregon arson laws will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
This act will be punishable under Orgon Revised Statutes, Sect. 164.325(a), as arson in the first degree.

2. Burning of a dwelling to commit insurance fraud.
This act will be punishable under Oregon Revised Statutes, Sect. 164.325(b), as arson in the first degree which is a Class A felony.

3. Burning of an unoccupied dwelling out of spite.
This would be a violation under Oregon Revised Statutes, Sect. 164.315(1), as arson in the second degree, punishable as a Class C felony.

4. Burning of an unoccupied dwelling to commit insurance fraud.
This again would be punishable as noted in response to Paragraph 2 above.

5. Burning of a non-residential structure.
This would be punishable under Oregon Revised Statutes, Sect. 164-315(1), as arson in the second degree, punishable as a Class C felony.

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
Under Oregon Revised Statutes, Sect. 164.335(1), a person committing this act is guilty of reckless burning, punishable as a Class A misdemeanor.

7. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure.
See response to Paragraph 6 above.

8. Setting fire to rubbish in a dumpster when only rubbish is burned.
Depending upon the circumstances, a person comitting this act would be guilty of either reckless burning or criminal mischief in the third degree, punishable as a Class C misdemeanor.

9. Burning of woodlands.
Woodlands in Oregon are classified as protected property. Burning protected property in Oregon is punishable as a Class A felony under Oregon Revised Statutes, Sect. 164.325 (1)(a).

10. Burning of non-structural property resulting in damages less than One Hundred Dollars ($100.00).
If the value of the property is less than One Hundred Dollars ($100.00), the person committing such act is guilty of criminal mischief pursuant to Oregon Revised Statutes, Sect. 164.345(1), a Class C misdemeanor.

11. Burning of non-structural property resulting in damages between One Hundred and One Thousand Dollars ($100.00-$1,000.00).
Burning of non-structural property resulting in damages between One Hundred and One Thousand Dollars ($100.00-$1,000.00) is punishable under Oregon Revised Statutes, Sect. 164.354(a), as criminal mischief in the second degree, punishable as a Class A misdemeanor. This applies if the damages exceed One Hundred Dollars ($100.00), but are less than Two Hundred dollars ($200.00). Under Sect. 164.365(1), Oregon Revised Statutes, a person damaging property or burning property causing damages in the amount exceeding Two Hundred dollars ($200.00) is guilty of criminal mischief in the first degree, punishable as a Class C felony.

12. Burning of non-structural property resulting in damages over One Thousand Dollars ($1,000.00).
See the provisions of Sect. 164.365, Oregon Revised Statutes, and the response to Paragraph 11 above.

Texas

In this section, the application of Texas arson laws will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
A person burning a dwelling out of spite commits arson under Sect. 28.02, Texas Penal Code, which constitutes a felony of the second degree, unless bodily injury has resulted, in which event the crime is a felony of the first degree.

2. Burning of a dwelling to commit insurance fraud.
A person committing arson with the intent to commit insurance fraud is guilty of arson in the second degree, unless bodily injury has resulted, in which event the crime is a felony of the first degree.

3. Burning of an unoccupied dwelling out of spite.
The Texas arson statute governing second and first degree felony arson applies equally to a dwelling place, habitation, vehicle, or any building. See Sect. 28.01, Texas Penal Code, concerning definitions.

4. Burning of an unoccupied dwelling to commit insurance fraud.
See response to Paragraph 2 above.

5. Burning of a non-residential structure.
See response to Paragraph 4 above.

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
The person committing this act would probably be guilty of criminal mischief, and not arson, under the Texas Penal Code. The provisions of Sect. 28.03, Texas Penal Code, provide that one who intentionally damages or destroys the tangible property of others is guilty of a misdemeanor if the property is less than Two Hundred Dollars ($200.00); if the amount of loss or damage is Two Hundred dollars ($200.00) or more, but less than Ten Thousand dollars ($10,000.00), the person is guilty of a felony of the third degree; and if the amount of loss or damage is over Ten Thousand Dollars ($10,000.00), the person is guilty of a felony of the second degree.

7. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure.
The provisions of Texas Penal Code, Sect. 28.03, governing criminal mischief would be equally applicable to this hypothetical arson event. See also the response to Paragraph 6 above.

8. Setting fire to rubbish in a dumpster when only rubbish is burned.
Since the rubbish burned has no value or, at most, a nominal value, a person burning rubbish in a dumpster would not be guilty of any violation of Texas arson laws or Texas laws concerning criminal mischief. Such a person might be guilty of a violation of Sect. 28.04, Texas Penal Code, concerning reckless damage or destruction, which is a Class C misdemeanor. This provision would apply if the amount of pecuniary loss is less than Five Dollars ($5.00).

9. Burning of woodlands.
Under Sects. 28.01 and 28.02, Texas Penal Code, a person burning woodlands would be guilty of the offense of arson as a second degree felony.

10. Burning of non-structural property resulting in damages less than Twenty-Nine Hundred Dollars ($2,900.00).
Such action would constitute criminal mischief if the non-structural property being damaged was not a habitation, structure, vehicle, or building, as those terms are defined in Sect. 28.01, Texas Penal Code. The Texas Penal Code provides the following statutory scheme for punishment based on the dollar value of loss or damage incurred because of criminal mischief.

Dollar Value	Penal Classification
Less than $5.00	Class C Misdemeanor
More than $5.00, but less than $20.00	Class B Misdemeanor
$20.00 or more, but less than $200.00	Class A Misdemeanor
$200.00 or more, but less than $10,000.00	Felony of the third degree
$10,000.00 or more	Felony of the second degree

11. Burning of non-structural property resulting in damages between One Hundred and One Thousand Dollars ($100.00-$1,000.00).
See commentary in response to Paragraph 10 above.

12. Burning of non-structural property resulting in damages over One Thousand Dollars ($1,000.00).
See commentary in response to Paragraph 10 above.

Virginia

In this section, the application of Virginia arson laws will be considered in relation to the following hypothetical arson events:

1. Burning of a dwelling out of spite.
Under Virginia law, Article I, Sect. 18.2-77, Code of Virginia, the burning of a dwelling place out of spite is punishable as a Class II felony if committed in the nighttime and a Class IV felony if committed in the daytime. If at the time the arson is committed no person was physically present in the dwelling house, the act of arson would then be punishable as a Class III felony.

2. Burning of a dwelling to commit insurance fraud.
The burning of any dwelling to commit insurance fraud is punishable as a Class IV felony if the value of the property is more than One Hundred Dollars ($100.00). If the value of the property is less than One Hundred Dollars ($100.00), insurance fraud arson is punishable as a Class I misdemeanor under Article I, Sect. 18.2-80, Code of Virginia. If a person is present in the building at the time the arson for insurance fraud is committed, the accused can be found guilty of a Class III felony.

3. Burning of an unoccupied dwelling out of spite.
Under Article I, Sect. 18.2-77, Code of Virginia, burning of an unoccupied dwelling place in which no person is present is punishable as a Class III felony. If the burning of the dwelling occurs in the daytime, it is punishable as a Class IV felony.

4. Burning of an unoccupied dwelling to commit insurance fraud.
Under Article I, Sect. 18.2-80, Code of Virginia, a person burning an unoccupied dwelling to commit insurance fraud is guilty of a Class IV felony if the value of the property is more than One Hundred Dollars ($100.00) and is guilty of a Class I misdemeanor if the property is less than One Hundred Dollars ($100.00) in value.

5. Burning of a non-residential structure.
The burning of a non-residential structure is punishable under Article I, Sect. 18.2-80, Code of Virginia, as a Class III felony if a person is present in the non-residential structure; punishable as a Class IV felony if a person is not present and structure exceeds One Hundred Dollars ($100.00) in value; and punishable as a Class I disdemeanor if the value of the property is less than One Hundred Dollars ($100.00).

6. Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place.
Under Article I, Sect. 18.2-88, Code of Virginia, a person who intentionally, carelessly, or negligently sets fire to a shrub where there is a possibility that the burning shrub is capable of spreading fire to other lands or other property is guilty of a Class IV misdemeanor and must pay all expenses incurred in fighting the fire.

7. Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure.
This act would again be punishable as described in response to Paragraph 6 above.

8. Setting fire to rubbish in a dumpster when only rubbish is burned.
This act would not be punishable under the Virginia arson provisions.

9. Burning of woodlands.
The provisions of Article I, Sect. 18.2-86, Code of Virginia, provide that "if any person maliciously sets fire to any wood, fence, grass, straw, or other thing capable of spreading fire on land, he shall be guilty of a Class IV felony."

10. Burning of non-structural property resulting in damages less than Ninety-Nine Dollars ($99.00).
Under Article I, Sect. 18.2-81, Code of Virginia, a person burning non-structural property with a value of Ninety-Nine Dollars ($99.00) or less is guilty of a Class I misdemeanor. If the value of the property exceeds One Hundred Dollars ($100.00), the person is guilty of a Class IV felony.

11. Burning of non-structural property resulting in damages between One Hundred and One Thousand Dollars.
See response to Paragraph 10 above.

12. Burning of non-structural property resulting in damages over One Thousand Dollars ($1,000.00).
See response to Paragraph 10 above.

CONTINUED

1 OF 2

Table 4.2 COMPARING A RANGE OF HYPOTHETICAL CASES AND THEIR POTENTIAL RANGE OF SANCTIONS

	17	24	33	44	57	60	70	87
Burning of a dwelling out of spite	Arson - Felony Class II 7 yrs. or less	Arson- Felony 2nd Degree (unless bodily injury resulted) 2-20 yrs.	Aggravated Arson Arson 1st Degree 4 - 25 yrs.	Arson - Felony Class II if at night, Class IV if daytime, Class III if person inside	Arson Not to exceed 20 yrs.	Arson Up to life imprisonment	Arson 30 years	Arson Felony 1st degree Up to 20 yrs. and/or $2,500 fine
Burning of a dwelling to commit insurance fraud	Arson - Felony Class II 7 yrs. or less	1st Degree Felony - 99 years 2nd Degree Felony - unless bodily injury resulted	Arson: Felony 4th Degree 1-5 yrs.	Felony: Class IV 2-10 yrs.	Arson Not to exceed 20 yrs.	Felony Fraudulent fire setting 4 mths to 10 yrs. & fine	Arson No substantive crime of insurance fraud	Arson Felony 1st Degree
Burning of an unoccupied dwelling out of spite	Arson - Class IV Felony 4 yrs. or less	1st Degree Felony - 99 years 2nd Degree Felony - unless bodily injury resulted	If risk of serious physical harm, aggrvated arson 1st Degree; if not, Arson	Felony: Class IV 2-10 yrs.	Arson N.Mt. 20 years	Felony burning 2-30 yrs. & fine at court's discretion	Arson N.MT. 20 years	Arson 2nd Degree Class C Up to 5 yrs. and/or $2,500
Burning of an unoccupied dwelling to commit ins. fraud	Arson - Class IV Felony 4 yrs. or less	1st Degree Felony - 99 years 2nd Degree Felony - unless bodily injury resulted	3rd of 4th Degree 1-25 yrs. Arson - Felony 4th Degree	Felony: Class IV if more than $100, misdemeanor	Arson N.Mt. 20 years	Fraudulent Burning 4 mths. to 10 yrs.	No specific state statute against arson for fraud	Arson 1st Degree - up to 20 yrs. and/or $2,500 fine
Burning of a nonresidential structure	Reckless burning Class I Misdemeanor	Probably criminal mischief	Arson: 4th Degree 1-5 yrs.	Felony: Class III if person present Class IV if not	Arson N.MT. 18 years	Felony fire setting - unless evid. that accused was attempting to set fire to dwelling. If attempt to burn house, 2-30 years	Felony 3-20 yrs.	Arson 2nd Degree Up to 5 yrs. and/or $2,500 fine
Setting fire to shrubbery or other material with the possibility of the fire extending to a dwelling place	Reckless burning Class I Misdemeanor	Probably criminal mischief	Arson: 4th Degree 1-5 yrs.	Class IV Misdemeanor, pay fire fighting costs	If less than $50 Misdemeanor. If more than $50 Arson, a felony	Felony fire setting - unless evid. that accused was attempting to set fire to dwelling 14-67 if attempt to burn house 2-30 years	No specific law against burning shrub per se, malicious mischief	Either Arson 1st degree or Reckless Burning, Class A Misdemeanor

Table 4.2 (Cont'd.) COMPARING A RANGE OF HYPOTHETICAL CASES AND THEIR POTENTIAL RANGE OF SANCTIONS

	17	24	33	44	57	60	70	87
Setting fire to shrubbery or other material with the possibility of the fire extending to a non-residential structure	Reckless Burning Class I Misdemeanor	Reckless Damage, a Class C Felony 1-10 years	Arson: 4th Degree 1-5 years	Class IV Misdemeanor . pay fire fighting costs	If less than $50, misdemeanor or more than $50, a felony	Misdemeanor 60 days to 4 months and fine $50-$100	No specific law against burning shrub per se; malicious mischief	Class A Misdemeanor up to 1 year and/or $1,000
Setting fire to rubbish in a dumpster when only rubbish is burned	Reckless Burning Misdemeanor	Arson Felony 2nd Degree 2-20 years	Criminal Damaging endangering Misdemeanor 2nd Degree less than	Not punishable	Malicious Mischief	Felony Fire-setting 4 mths. to 10 years	Misdemeanor Malicious Mischief, fined up to $500 jailed up to 30 days	Reckless Burning - up to 1 year and/or $1,000 or Criminal Mischief in 3rd Degree (up to 30 days and/or $250)
Burning of woodlands	Class IV Felony if more than $1,000 damages, otherwise Class I Misdemeanor	Criminal Mis-chief 3rd Degree Felony 1-10 years	Arson: Felony 4th Degree 1-5 years	Felony Class IV 2-10 years	Felony	Felony Fire-setting 4 mths. to 10 years	No specific statutory provision: Malicious Mischief	Class A Felony in the 1st Degree up to 20 yrs and/or $2,500
Burning of non-structural property resulting in damages less than $99	Class IV Felony if more than $1,000 damages, otherwise Class I Misdemeanor	Class A or Misdemeanor to 3rd Degree Felony 1-10 years	Misdemeanor 1st Degree 0-6 years	Class I Misdemeanor	Arson Felony if more than $50; if less, misdemeanor	Felony Fire-setting 4 mths. to 10 years	Arson Not to exceed 3 years	Criminal Mischief Class C Misdemeanor
Burning of non-structural property resulting in damages between $100-$1,000	Class IV Felony if more than $1,000 damages, otherwise Class I Misdemeanor	Class A or Misdemeanor to 3rd Degree Felony 1-10 years	Felony 4th Degree 1-5 years	Class IV Felony 2-10 years	Arson Felony	Felony Fire-setting 4 mths. to 10 years	Arson Not to exceed 3 years	Criminal Mischief in 2nd Degree, a Class A Midemeanor (up to 1 yr. and/or $1,000) to Criminal Mischief in 1st Degree, Class A Fel.
Burning of non-structural property resulting in damages over $1,000	Class IV Felony if more than $1,000 damages, otherwise Class I Misdemeanor	3rd Degree Felony 1-10 years	Felony 4th Degree 1-5 years	Class IV Felony 2-10 years	Arson Felony	Felony Fire-setting 4 mths. to 10 years	Arson Not to exceed 3 years	Criminal Mischief in 1st Degree Class C Felony up to 5 yrs. and/or $2,500

4.2 PRE-COMPLAINT INVOLVEMENT

As the accompanying table (4.3) shows, pre-arrest involvement by prosecutors was characterized as infrequent in seven of the eight sites studied. Prior to 1980, only one arson unit was supported by a specially-designated arson prosecutor or prosecutorial unit. The lack of specially-designated prosecutors in the other seven sites appears to account for the infrequency of pre-arrest consultations. Only in City 87--with a unit in the District Attorney's office responsible for handling all arson cases (although the unit handled other crimes as well)--was there frequent pre-arrest consultations. This same city, 87, had the second highest number of arrests, the highest trial rate of those arrested, the second highest conviction rate, and the highest absolute number of convictions. Further, of the cases reviewed, 100% of those arrested were charged, compared to the next highest ranking percentage of 87%. By contrast, City 44, with the lowest conviction rate, had the least direct association with prosecutors. There, police made arrests and sought complaints with no interaction with the Prosecutor's Office (magistrates, not district attorneys, determining whether there was probable cause to prosecute).

In pointing out these two extremes, we imply that there is a direct relationship between pre-arrest involvement and successful prosecution. It does appear logical, however, that pre-arrest involvement with the DA's Office would be linked with having one or, at most, several prosecutors known to investigators as specialists in arson prosecution. Without a designated point of contact, investigators would have found it far harder to obtain pre-arrest consultations. If no prosecutor is so designated, it is far less likely that investigators will go to the effort or risk to seek assistance.

Yet, it is abundantly clear that arson investigators, especially those without career law enforcement backgrounds, are frequently in need of such assistance. This is true not only for questions of law, but also in terms of prosecutorial discretion and case prioritization. With the variety of crimes and degrees of seriousness associated with arson investigation, sorting out the cases to work on for the purpose of prosecution is an important aspect of results-oriented (as opposed to clearance-oriented) investigative policy. As recent American history has shown in a different context, winning the body count does not mean winning the war. In arson, the body count is clearance rates.

Investigators can increase their clearance rates by arresting persons against whom they have reasonable evidence. The arresting officer may, at the same time, know that the evidence probably is insufficient to go to trial on. Another way to increase clearance rates is to go after small-fry offenders against whom the evidence may even be sufficient, but the investigator may realize (due to its ostensible unimportance) prosecutors will dispense with in a manner that takes up as little of their resources as possible. The effect in both cases tends to contribute less to future deterrence than concentrating on cases that need to be prosecuted most, due to their potential to deter likely perpetrators, or, through publicity, to inculcate fear into potential offenders to discourage them from this form of economic or emotional reward.

Prosecutors can similarly misapply their limited resources and obtain a high conviction rate by going after minor, but iron-clad cases, while turning down tougher prosecutions of more serious cases.

What is needed, therefore, is a joint understanding of what cases need to be pursued, and with what energy. Pre-arrest consultation is the prime means for prosecution to work in concert with investigatory resources to carry out mutually agreed upon policies on a case-by-case basis.

Table 4.3 Pre-Complaint Involvement of Prosecution in Arson Investigation

70	33	57	24	17	87	44	60
Until 1979-1980 infrequent, only in "particularly complex" cases	Seldom - Until 1980 special cases only; difficult cases to be presented directly to Grand Jury	Seldom - Only in special or complicated cases	Seldom - Pre-complaint involvement is infrequent	Very infrequent, less than an estimated 5% of cases	Regularly - in some 50% of cases, it was estimated that investigators consulted DA's at all stages of the investigative process	Seldom - Unless case required presentment to Grand Jury. Prosecutor believes arson investigator should receive stronger over-sight	Seldom - As a rule, investigators do not consult with DA prior to obtaining a warrant

Pre-Complaint Involvement in City 87

All investigators maintained that they regularly consult the ADA's. The head of the DA's arson unit is available by telephone for consultation both day and night. The ADA in charge has even requested that he be notified when significant arson fires are being fought so he can respond. Two investigators noted that District Attorneys had attended fires on request. Investigators stated that typical reasons for requesting legal advice included: Miranda questions, probable cause for arrest questions, search and seizure situations, material witness warrants, issuance of Grand Jury subpoenas.

Despite this access in City 87, District Attorneys pointed out that they felt that several cases had been compromised by weaknesses in Mirandizing suspects. One investigator felt that the unit should have made better utilization of this legal resource.

The involvement of City 87's arson prosecutors in the pre-trial investigative stage is minimal and limited to cases going to Grand Jury and those or public interest.

The Assistant District Attorney estimates that fire investigators will seek legal assistance before presentation in about 50% of the cases brought before the unit.

Pre-Complaint Involvement in City 17

Fire investigators, detectives, and prosecutors developed an administrative relationship through the task force during 1978. But, two years later, at the operational level, no real relationship existed.

One investigator in City 17 reported that he had never seen a District Attorney at a fire scene, while another reported he had only seen one once since 1975 and that was a daytime fire. A third heard a District Attorney say, "no one had better call him out of bed in the middle of the night." Pre-arrest involvement by the most generous estimate was in only 5% of the cases. This may, in point, be due to the limited call-out criteria (death or arson-for-profit).

Pre-Complaint Involvement in City 33

Only in a very difficult cases -- "those that we'll be present straight to the Grand Jury" -- do investigators go directly to prosecutors to review case materials. However, the Arson Unit's Chief Investigator is unusually well-versed in evidence requirements; and his excellent relations with the District Attorney may largely compensate for any fallout from the ostensible lack of pre-arrest consultation.

Pre-Complaint Involvement in City 44

One Assistant District Attorney has tried several arson cases. He observed that the investigators seldom discuss the case prior to obtaining a warrant from a magistrate and further noted that the cases involving arson are in most instances the types that require very little investigative ability and involve mental cases and domestic problems.

Pre-Complaint Involvement in City 57

There is pre-arrest contact with the investigator only in troublesome or complicated cases. Prosecutors are not involved in legal training of Police or Fire personnel.

Pre-Complaint Involvement in City 60

A Public Safety Legal Advisor is available to investigators to advise them on proper search and seizure, need for search warrants, etc. Few cases have been brought to her attention, and she believes that this is because few of them are complicated enough to warrant her advice. From interview data, it appears that the Legal Advisor is not privy to the handling of the cases or the court dispositions.

Pre-Complaint Involvement in City 70

In particularly complex investigations, the District Attorney is utilized by the Arson Unit for consultation concerning legalities surrounding search and seizure warrants, interviews of possible suspects, and any other procedures where legal expertise is needed. This involvement may commence at some point early in the investigation and, then, utilized at strategic points during the investigation.

Since the assignment of the special arson prosecutor in early 1980, the Assistant District Attorney has further encouraged pre-arrest contact with his office in the following circumstances:

- Priority cases - fraud
- Legal questions
- Important cases
- Confessions are anticipated.

It is pertinent to note that in City 70, interpretation of Miranda-type issues is more stringent than in Federal Court and in most other state courts. Therefore, the special arson prosecutor has recommended that interviews with the defendants be held in abeyance until they are booked and processed. This includes those instances in which the defendant desires to give a statement. Under these circumstances, pre-arrest consultation might tend to be more frequent. Certainly, the need for pre-arrest consultations varied across sites due to legal requirements and constraints.

4.3 CASE DOCUMENTATION

Documenting a case for prosecutorial review has three main aspects - sound report writing, full documentation, and logically-designed formats. Prosecutors need these elements to correctly and efficiently ascertain a case's merits. Other factors present in the complex decision process that is called case screening make it difficult to single out documentation as the proximal cause of a case being accepted/rejected, won or lost, on this ground alone.

It is intuitively obvious, as well as confirmed by our field observation, that the best investigations can be jeopardized by poor case documentation. This is true for three reasons: First, the crime, itself, must be established in a manner that convinces the prosecution that the evidence satisfies the requirements of the offense. Second, the linkage of the suspect to the crime must be made to the satisfaction of the prosecutor. Third, confessions are secured in roughly 50% of the cases presented for charging consideration; this means that in the other half of the cases, the testimony of eyewitnesses, suspect's direct, and circumstantial evidence must be compellingly presented.

Each of these elements of a case's presentation may rest upon reports written by three or more fact finders. The cause and origin may be documented by a fire officer, the supplementary investigation reported by a fire investigator, with final supplements filed by a police officer or arson detective. Only the latter of these three types of contributors could be expected to have received any formal training in law enforcement report writing.

This, then, raises the possible problem that the accounts will not fully represent the case against the suspect. Almost all documentation establishing the crime and most, if not all, of the investigative reports in our study were filed by fire officers. In effect, what this means is that fire officers are preparing the documentation. Prosecutors accustomed to this work product prepared by detectives may assume that the case is weak on its merits, rather than weak because it is largely written by personnel who may be untutored and inexperienced in crime reporting.

Even today, fire and arson investigative courses tend to deal with technical, legal, or forensic issues. Case documentation requirements or simple remedial courses in report writing, together with graded practice sessions, are a negligible point of even the most modern arson course.

Only within the last few years has local law enforcement management committed significant resources to improving the quality of case documentation, through report writing classes, case management review, etc. Therefore, it is not surprising that these reforms may not have entirely reached fire investigative units. We observed that these units may be unaware of thoroughly professional case documentation standards and proficiency-strengthening programs being practiced by their counterparts in the police department.

As the table below shows, only three units routinely prepare their case documentation in a format designed to tell the story of the case in an orderly fashion and efficiently check to establish the case's state of factual corroboration. Several cities were in the process of developing such formats. This improvement seems to ensue as a natural by-product of increased feedback that occurs after the formation of an arson task force.

Table 4.4 Prosecution Report Format Requirements

70	33	57	24	17	87	44	60
None until special arson prosecutor named in 1980	No specific format required until arson task force formed & DA developed recommended format	No specific format, but a court history file made & taken to prosecutor for review	Investigator makes oral presentation to screening bureau. DA investigative file presented	Police Dept. has prosecution liaison office organized to review cases before completing and forwarding case files to DA	No formal format required. Prosecutor uses checklist to review	Magistrate reviews - no formal requirements	Arson Unit uses Police Dept. developed format

The special arson prosecutor appointed in City 70 quickly diagnosed the need for such a format even though police detectives were responsible for completing every arson investigation. The recommended contents and order are represented below:

1. Prosecution Report, listing witnesses and defendant information.

2. Copy of all complaints (police reports) and supplementals prepared by any member of the department concerning the arson.

3. Copy of the defendant's local and FBI arrest record.

4. Copy of the defendant's arrest register.

5. Copy of all office reports which were written as a result of the investigation. (These are especially important to the trial assistant since the reports usually contain detailed information not found in the original police reports. These reports are generally not discoverable by defense attorneys under the State's Rules of Procedure.)

6. Copy of all laboratory reports related to the arson.

7. Copy of all photographs taken by any laboratory technician or investigator. (These pictures have special significance in arson cases because points or origin, burn patterns, and degree of destruction are critical issues at trial.)

8. Copies of all statements, written or oral, made by a defendant.

9. Copies of all witness statements taken as a result of the investigation.

10. Copy of the Fire Investigation Report prepared by the Fire Department.

11. Copies of all search warrants and affidavits which may have been executed during the investigation.

12. Any other information which would be relevant to a prosecution, including, but not limited to, line-up photos, insurance records, land records, names of agents, corporate names, financial records, and schematic diagrams.

For purposes of preparing an indictment, the following information will be needed and should appear on the outside cover of the folder:

(a) defendant's full name
(b) defendant's sex
(c) defendant's race
(d) defendant's date of birth
(e) charge(s)
(f) victim (owner or occupant)
(g) date and time of occurrence of crime
(h) central complaint number
(i) Bureau of Identification Number of defendant
(j) preliminary hearing date (we seek indictment prior to this date)
(k) location of offense

4.4 CASE SCREENING PROCEDURES

Complaint review practice is the seam that joins investigation to prosecution. The actual procedure plays a role in the case disposition, and the screening criteria formally and unofficially applied to the case plays a part. Further, the individuals involved in presenting and reviewing the case play a decisive role in each case's outcome because of the subjective nature of the process.

Despite the centrality of this step in the process, data, such as turndown rates and reasons, are not maintained by any arson investigative unit head interviewed. And, with few exceptions, prosecutors did not maintain this data.

This lack of data regarding such a sensitive area is curious. Since police and prosecutors have traditionally wrangled over this point, keeping score by one or both parties would seem on first appearance to be a valuable indication of system effectiveness.

The lack of data may be due to a number of factors. It may be that both parties in this case do not want to keep or track this data too closely. Improper inferences might be drawn from the data if not carefully structured, accurately maintained, or sensitively analyzed. One or both units might have come under fire if arrests looked weak or prosecution appeared lax. On the other hand, the units may have found it difficult to collect the data.

With new data systems such as the "PROMIS", Prosecutors Management Information System, complaint review outcome statistics require no special effort to collect or generate. In jurisdictions with PROMIS or equivalent data systems, it becomes far easier to comparatively analyze the case screening outcomes of, say, felony arsons against other similar crimes. Fire and police agencies should find such data helpful in tracking arson case screening outcomes. In units without such systems, investigative managers (if they were so inclined) would have to manually track down each case's status or disposition.

Although one fundamental reason that better statistics are not kept is that they are difficult to maintain, something deeper may be at the root of this failure. In part, what may be surmised is that neither arson investigators nor prosecutors value complaint screening outcomes as a valid parameter for measuring either the process or the outcome of their performances. Moreover, as all arson control systems studied by us had not developed system-wide goals, objectives, or measures during those three years, it may have been premature to establish the mechanism to develop this data. Lastly, and perhaps most importantly, measuring performance and process that span two or more agencies is an uncomfortable method to those accustomed to only minding their own agency's output, rather than the overall throughput. Gathering and interpreting such data imply a concern for the arson control process as a whole, while managers and their subordinates are typically concerned with measures that are arguably more exclusively tied to and influenced by their own unit's performance. As

traditionally no one is in overall charge of the system or responsible for overseeing it as a vertically-integrated enterprise, charging practices and outcomes remains an area where friction is more prevalent than understanding.

Because these data are not routinely collected, answering questions about improvements achieved or needed in a screening process must remain qualitative in description and analysis.

Before discussing each site's review practices and special circumstances, the following table summarizes the complaint review practices and representative disposition data. Because of the differences in the case mix represented in the sample [in some jurisdictions, arrests may be composed of significantly higher percentages of non-prosecutable cases (children, mental, minor domestic circumstances)], caution must be taken in comparing one city's percentage of arrestees charged or convicted to another's. With these limitations in mind, the following points are suggested by the data:

- No obvious relationship exists between the method of complaint review and the percentage of cases charged, with the single exception that City 44's use of magistrates and the charging discretion exercised by police seem to result in fewer cases tried and fewer convictions.
- City 57 and 44 have noticeably poorer percentages of arrests, number of cases going to trial, and convictions than other cities.
- The average percentage of cases lost between charging and trial is 13%, with rates of 0% and 22% being extremes.
- The average percentage drop from charging rate to conviction rate was 26%, with the poorest performance being 43% drop, and the strongest 17%.

END