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Metamorphosis of the Law of Arson, The

John Poulos

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THE METAMORPHOSIS OF THE LAW OF ARSON

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I. INTRODUCTION

Generations of lawyers have been taught that arson was a common law felony which protected the security of the habitation, and that arson remains a felony today in all American jurisdictions by statute.¹ But even a casual

1. The statutes are cited *infra* notes 221, 223-31.

reading of a small sample of these statutes should warn us that the law of arson has changed dramatically from what it was at common law. Yet if we consult the standard works on criminal law we find little more than a few sparse paragraphs suggesting that the modern statutes have wrought changes in the common law offense.² Absent from those works is a systematic treatment of the evolution of arson, and an analysis of the modern law of that offense under the American statutes.³ In short, there are no contemporary studies that explore the metamorphosis of the common law crime into its current manifestation in the fifty American states. That is the purpose of this paper.

Part II systematically explores the crime of arson as it existed at common law. The contemporary law of arson is deeply rooted in the common law crime, and this portion of the paper marks the starting point for the analysis of the evolution of the contemporary offense; it also provides us with the standard by which we may identify and analyze the metamorphosis of arson.

Part III explores the initial change in the purpose of the common law offense. Arson, at common law, was an offense against the habitation. Its purpose was to protect the dwellers from the risks of injury or death created when the dwelling house is burned. According to the taxonomy of crime, arson at common law was an offense against the person, although it protected a narrow class of persons-dwellers in a dwelling house. And in recognition of this limited protection it was characterized as an offense against the habitation. The common law offense did not, however, protect property interests in the subject matter of the offense, a dwelling house. Part III documents the initial statutory change in the purpose of the law of arson-the expansion of the crime to protect a wide variety of property interests in addition to protecting the safety of dwellers. It is in this portion of the paper that we first see the emergence of a new form of "common law," a common statutory law of crimes in the United States which substantially differs from the ancient ancestor. This section also explains why arson is currently characterized as an offense against property in most contemporary thinking about this offense.

Part IV completes the study of the evolution of arson into its current manifestation: it is a complex crime protecting nearly any person and a wide variety of property against injury, damage, death, or destruction by fire or explosion. Today, arson must be classified as an offense against people and property in nearly every American state.

Part IV not only reveals that the purpose of the contemporary law of arson has changed from what it was at mid-century, but it also confirms that there exists today a common statutory law of arson in America which

2. *E.g.*, R. PERKINS & R. BOYCE, CRIMINAL LAW 277, 279, 282, 285, 287-88 (3d ed. 1982).

3. *Id.*

is quite unlike either the common law offense or the arson provisions of the Model Penal Code. Although, as one might expect, the contemporary law of arson bears some similarity to its common law ancestor, and it has been influenced by the Model Penal Code. Nevertheless, the statutory law of arson in the United States is surprisingly similar. And that law demonstrates, at least with respect to this offense, that there is emerging in America in these latter years of the Twentieth Century a new "common law," a common statutory law of crime.

Finally, Part V explores the details of the emerging statutory common law of arson in contemporary America, and documents how that law differs from both its common law ancestor and the arson provisions of the Model Penal Code.

But before we move into the body of the paper, a few words of caution are in order. I have excluded from this study, for treatment at a later day, the following: (1) all misdemeanor arson related offenses;⁴ (2) felony provisions relating to insurance fraud;⁵ (3) special provisions in the arson statutes pertaining to accomplice liability,⁶ and to the offense of attempted arson;⁷ and (4) felony statutes which can be committed by means other than by damaging property or endangering people by fire or explosion.⁸ In other words, this study is limited to the felony provisions in the statutes which are the modern equivalent of the common law felony of arson, regardless of the terminology used to identify those offenses.⁹

4. A number of states have arson-related misdemeanors in addition to a misdemeanor offense patterned on the common law crime of malicious mischief.

5. It is quite common to find insurance fraud provisions in the general arson statutes. This approach was used by the Model Arson Law, and the states that either enacted the Model Arson Law or substantially patterned their arson statutes upon its provisions used this approach as well. The Model Arson Law is set forth *infra* Appendix C. The states which have either enacted the Model Arson Law or have statutes with most of its salient provisions are identified *infra* note 148. The Model Penal Code's arson provisions also contain an insurance fraud provision. The Model Penal Code provisions are set forth *infra* Appendix B.

6. It is not uncommon to have special provisions pertaining to accomplice liability in the general arson statutes. This approach was also followed by the Model Arson Law. For illustrations of their use, *see infra* Appendices A and B.

7. Special provisions relating to attempt liability are frequently found in the general arson provisions of many states. This approach was also followed by the Model Arson Law. For illustrations of their use, *see infra* Appendices A and B.

8. This excludes statutory crimes which protect property from damage or destruction by a wide variety of means. This paper is solely concerned with damage or destruction inflicted or endangered by fire or explosion. There is, however, one exception. Uniquely, Hawaii has no statutory felonies which protect property only from damage or destruction caused by fire or explosion. I have, nevertheless, included the Hawaii statutes in the analysis of the statutory provisions of the fifty states.

9. The statutes do not always use the term "arson." *See, e.g., infra* notes 275-77 and accompanying text.

II. COMMON LAW ARSON

A. *Introduction to the Common Law of Arson*

Arson, at common law, was the malicious burning of the dwelling house of another.¹⁰ Like most of the other common law felonies, it was punishable by death.¹¹ Anciently, the convicted incendiary was burned to death,¹² but before Lord Hale wrote, the method of execution had been changed to death by hanging.¹³

The primary purpose of common law arson was to preserve the security of the habitation,¹⁴ to protect the dwellers within the building from injury or

10. 3 E. COKE, INSTITUTES 65-67 (1641). Coke referred to arson as the ancient felony known as the "Burning of Houses." *Id.* at 65. He offered the following definition: "Burning is a felony at the common law, committed by any that maliciously and voluntarily, in the night or day, burneth the house of another." *Id.* at 66. Coke did not use the term arson. 1 W. HAWKINS, PLEAS OF THE CROWN 105-06 (1716). "Arson is a Felony at Common Law, in maliciously and voluntarily burning the House of another by Night or by Day." *Id.* at 105; 1 M. HALE, PLEAS OF THE CROWN 566-74 (1736). "The felony of arson or willful burning of houses is described by my Lord Coke . . . to be *the malicious and voluntary burning the house of another by night or by day.*" *Id.* at 566 (emphasis in original); 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 220-28 (1st American Ed. 1772). "Arson . . . is the malicious and willful burning of the house or outhouses of another man." *Id.* at 220; 4 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 1024-28 (1865 ed.). "Arson is . . . *malicious and willful burning the house of another.*" *Id.* at 1024 (emphasis in original); R. PERKINS & R. BOYCE, *supra* note 2, at 273.

The felony of "Burning of Houses" (arson) has been traced by Hale to ancient Saxon laws. 1 M. HALE, *supra*, at 556. Pollock and Maitland state that "[t]he crime we call *arson* and which our ancestors called *baernet* was mentioned by Cnut as one of the bootless crimes; ancient law is wont to put it in the same class with 'manifest' theft. It naturally finds a place in the list of felonies. We are told that the punishment was death by burning, and we are able to vouch a case from John's day in which this punishment was inflicted, but the fully developed common law substituted the gallows for the stake." 2 E. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 492 (1895).

11. The offence of arson was denied the benefit of clergy by statute 21 Hen. VII c.1. but that statute was repealed 1 Edw. VI c.12 and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5 P. & M. c.4. which expressly denied it to the accessory: Though now it is expressly denied to the principal also, by statute 9 Geo. I. c.22.

4 W. BLACKSTONE, *supra* note 10, at 222-23.

12. 1 M. HALE, *supra* note 10, at 566.

13. *Id.*; 4 W. BLACKSTONE, *supra* note 10, at 222.

14. *E.g.*, 4 W. BLACKSTONE, *supra* note 10, at 220; *see also* State v. Toole, 29 Conn. 342 (1860); Snyder v. People, 26 Mich. 106 (1872); People v. Fisher, 51 Cal. 319 (1876); State v. Haynes, 66 Me. 307 (1876); Peinhardt v. State, 161 Ala. 70, 49 So. 831 (1909); State v. Midgeley, 15 N.J. 574, 105 A.2d 844 (1954); State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

death by fire,¹⁵ although it functioned to protect the possessory interest in the house as well.¹⁶ Of the common law felonies, it was considered to be one of the worst. Sir William Blackstone explains why this was so:

This is an offense of very great malignity, and much more pernicious to the public than simple theft: because, first, it is an offense against that right, of habitation, which is acquired by the law of nature as well as by the laws of society: next, because of the terror and confusion that necessarily attends it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public, whereas by burning the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which too it is often the cause: Since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies.¹⁷

B. *The Dwelling House*

Since burglary and arson were both offenses against the security of the habitation, they, for the most part, shared a common definition of "dwelling house." Though it is frequently said that there could be no arson of a house in which there could be no burglary, there may well have been some slight difference in the concept of the "dwelling house" between arson and burglary.¹⁸

As with the law of burglary,¹⁹ the common law defined a dwelling house as a building²⁰ occupied as a place of human habitation.²¹ What then were

15. *E.g.*, *State v. Stubba*, 113 Ariz. 434, 556 P.2d 8 (1976) (en banc) (construing a statute which made common law arson, first degree arson); *People v. Foster*, 103 Mich. App. 311, 302 N.W.2d 862 (1981); *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982); *State v. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978).

16. *E.g.*, *Williams v. State*, 177 Ala. 34, 58 So. 921 (1912); *State v. Blumenthal*, 133 Ark. 584, 136 Ark. 532, 203 S.W. 36 (1918); *State v. Martin*, 87 Neb. 529, 127 N.W. 896 (1910); *Daniels v. Commonwealth*, 172 Va. 583, 1 S.E.2d 333 (1939); see also FOSTER, CROWN LAW 113-16 (1762) (discussion of Elizabeth Harris' case).

17. 1 W. BLACKSTONE, *supra* note 10, at 220.

18. *E.g.*, *Elsmore v. The Inhabitants of the Hundred of St. Briavells*, 8 Barn. & C. 461, 108 Eng. Rep. 1114 (1828); *The Queen v. Allison*, 1 Cox C.C. 24, 25 (1843); *State v. Timbury*, 114 N.H. 763, 329 A.2d 143 (1974); 1 M. HALE, *supra* note 10, at 567; 2 EAST, PLEAS OF THE CROWN 1020 (1803).

19. For general discussions of the "dwelling house" requirement for common law burglary see W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 711-13 (1972); R. PERKINS & R. BOYCE, *supra* note 2, at 255-61.

20. There is a paucity of cases which define the necessary physical characteristics of a structure to qualify as a "building" for common law arson or burglary. It is generally agreed, however, that the structure must be enclosed by walls and

the criteria for determining whether a building was a place of human habi-

covered by a roof and erected or used as shelter for humans or personal property. See *People v. Stickman*, 34 Cal. 242 (1867). A chicken house was held to be the subject matter of burglary under a statute which used the phrase "any house." "A house, in the sense of the statute, is any structure which has walls on all sides and is covered by a roof." *Id.* at 245. Although the structure was used for the shelter of personal property, the court did not mention that requirement. The court did opine that "it was by no means clear that it would not have been burglary at common law." *Id.* at 244; *McCabe v. State*, 1 Ga. App. 719, 58 S.E. 277 (1907). A structure with a roof but no walls erected to shelter personal property was not a "house" for purposes of the statutory offense of larceny from a house. Relying, in part, on burglary and arson cases, the court said that in all of the cases "the structure . . . was not only covered by some sort of roof, but was also enclosed in some way or by some kind of material. In other words, according to those decisions, a platform covered by a roof is not enough to constitute a house, but, in addition to the platform or roof, or floor, there must be some lateral enclosure—an enclosed structure, where people live or work, or animate property is confined, or inanimate property is stored or contained." *Id.* at 721, 58 S.E. at 278; *State v. Ebel*, 92 Mont. 413, 15 P.2d 233 (1932). A shepherd's wagon used as a habitation and as a place to store personal property was a house or building within the meaning of the burglary statute. "Here we have 'a structure which has walls on all sides and is covered by a roof'-a house, a building." *Id.* at 416, 15 P.2d at 234. "This is in conformity with the general rule that a structure, to be termed a building, must have been erected for the purpose of habitation by humans or animals, or for some purpose of trade, manufacture, or the housing of goods and chattels." *Id.* at 417, 15 P.2d at 235. The court relied heavily on *Stickman*, 34 Cal. 242; *Ash v. State*, 555 P.2d 221 (Wyo. 1976), *reh'g denied*, 560 P.2d 369 (Wyo.), *cert. denied*, 434 U.S. 840 (1977). A wooden frame completely enclosed by a plastic covering was the subject matter of the law of burglary under a statute prohibiting the entry into "any building." The court said, "[g]enerally speaking . . . to support a charge of burglary at common law or under the statutes, there must be a breaking and entering, or an entering, of a building or structure enclosed by walls and a roof." *Id.* at 227 (quoting from 12A C.J.S. *Burglary* § 16, at 678 (1980)). The court, on procedural grounds, refused to decide whether that structure had to be used as shelter. See also *Regina v. Labadie*, 32 U.C.Q.B. 429 (1872) (construing the Dominion Statute of 1869 in accord).

Despite the frequent use of the phrase "mansion house" which connotes a large, stately building constructed of materials which will endure the ages, *e.g.*, *State v. Blumenthal*, 136 Ark. 532, 203 S.W. 36 (1918); 3 E. COKE, *supra* note 10, at 66-67, even the most humble structure, regardless of the materials from which it was constructed, qualified as a building for the law of arson. *State v. Jones*, 106 Mo. 302, 17 S.W. 366 (1891). The *Jones* case involved a prosecution for arson for burning a barn in which a person lived. The court observed that

[i]t matters not how rude and devoid of comforts this dwelling may be, if it is the usual sleeping place of a human being, and he is occupying it when it is feloniously burnt, the statute makes it arson in the first degree. The statute makes no distinction between the burning of a palace and the hostler's room in this respect.

Id. at 310, 17 S.W. at 368; accord *People v. Orcutt*, 1 Parker's Cr. Rep. 252 (N.Y. 1851); *Favro v. State*, 39 Tex. Crim. 452, 46 S.W. 932 (1898) (burglary—the walls and roof were made from a "wagon sheet"—the structure was, in essence, a tent.); *Ash*, 555 P.2d 221 (burglary—the walls and roof consisted of a thin plastic

tation? Although it is traditionally said that the test was whether the building

cover over a wooden frame); *Schacke v. State*, 164 Ind. App. 153, 326 N.E.2d 856 (1975). *But see* I W. HAWKINS, *supra* note 10, at 104:

From what has been said it clearly appears, that no burglary can be committed by breaking into any ground enclosed, or booth, or tent. & C. for there seems to be no colour from any authority ancient or modern, to make any offense burglary that is not done either against some house, or church

....

Id.; accord 1 M. HALE, *supra* note 10 at 557; see also 4 W. BLACKSTONE, *supra* note 10, at 226:

Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein: for the law regards thus highly nothing but *permanent* edifices; a house, or church, the wall, or gate of a town; and it is the folly of the owner to lodge in so fragile a tenement: but his lodging there no more makes it burglary to break it open, than it would to be to uncover a tilted wagon in the same circumstances.

Id. (emphasis added).

Neither Hawkins, Hale, nor Blackstone cite case law for these assertions. But even if they correctly related the common law of burglary on this subject, this may well be a point at which the common law concept of "dwelling house" for the law of arson differed from that for burglary. The law of burglary essentially sought to protect the dwellers from forcible entries into the dwelling house. Thus an intruder who crawled through an entirely open window into the dwelling house of another at nighttime with the requisite felonious intent was not guilty of burglary because there had been no breaking, no breach of the security of the habitation. Blackstone gives as the reason for this rule essentially the same reason why the breaking into a tent is not burglary: "But if a person leaves his doors or windows open, it is his own folly and negligence; and if man enters therein, it is no burglary . . ." *Id.* at 226. Since the law of arson protected against the risk of injury or death by fire, it is hard to see why the protection of the law of arson should not extend to persons who resided in tents. Unfortunately, I was unable to locate any common law case discussing this point. Not infrequently, however, American statutes do name tents as the subject matter of arson. *E.g.*, FLA. STAT. ANN. § 806.01(3) (West Supp. 1986); MINN. STAT. ANN. § 609.556(3) (West Supp. 1985); OHIO REV. CODE ANN. § 2909.01 (Page 1975).

Though the structure in question was completely enclosed by walls and a roof, was it also required to be of sufficient size to permit a person to enter the structure in the normal course of its use? Quite obviously when the issue was whether a particular building qualified as a "dwelling house" itself, the answer seemed to be "yes," for a building could not be a dwelling house unless it was also occupied as a place of human habitation. See authorities cited *supra* note 14 and *infra* notes 22-35. But what if the claim was made that the building qualified as the subject matter of arson on the theory that it was a building within the curtilage? See *infra* the text accompanying note 33. The fact that the "structure" in question was completely enclosed by walls, a floor, and a roof, and was intended or used as shelter for property would not distinguish a storage box for grain from a barn used for the storage of grain unless other criteria were used.

Although the issue does not appear to arise in the ancient cases, it has been litigated under statutes which make "buildings" or "houses" the subject matter of arson or burglary. Since the issue is not generally resolved on the basis of statutory language or unique expressions of legislative intent, those cases are relevant to our current inquiry. Under those cases, the size of the structure is crucial. The distinction

was regularly used by the occupants as a sleeping place, arguably this test reflected two general requirements, one physical and one mental: (1) there had to be physical acts of occupancy, (2) which were done with the intention of making the place "home."²² Both requirements had to concur before a

drawn is between a building (which qualifies) and a box (which does not). In *Williamson v. State*, 39 Tex. Crim. 60, 44 S.W. 1107 (1898), a header box was used to store the heads of grain as they were harvested. The box was four feet high on one side, eighteen inches on the opposite side with ends sloping from one side to the other, fourteen feet long and six feet wide. The court held that it was a "box" and not a "house" within the meaning of the Texas burglary statute. The court said:

The question here is, was this a 'house', within contemplation of the statute of burglary. We are of opinion that it was not. It is true that it had four sides, and was covered over, but it was nevertheless a box, and not a house.

All boxes which contain goods-shoes, groceries, etc.-for shipment would be houses if this box is held to be one.

Id. at 61, 44 S.W. at 1107. Although some of the cases distinguish a "box" from a "building" by simple judicial fiat, e.g., *Williamson*, 39 Tex. Crim. 60, 44 S.W. 1106; *State v. Terrell*, 55 Utah 314, 186 P. 108 (1919), others have used objective criteria for making this distinction. The West Virginia Supreme Court has ruled that "the common understanding of the meaning of a building would, at the very least, exclude a structure into which an adult human being could not enter erect and in which he would scarcely have sufficient room to turn around." *State v. Crites*, 110 W. Va. 36, 37, 156 S.E. 847, 847 (1931) (conviction for burglary of a chicken house reversed because of the failure of the prosecution to prove that it was a "building" within the curtilage under this criterion); *accord State v. Neff*, 122 W. Va. 549, 11 S.E.2d 171 (1940) (alternate holding). Other courts have suggested that the distinction between a "box" and a "building" may depend, at least in part, upon whether the structure is affixed to the soil so as to be classified as a fixture or real property as opposed to personal property. E.g., *Williamson*, 39 Tex. Crim. 60, 44 S.W. 1107 (dictum); see *Simmons v. State*, 234 Ind. 489, 499 n.5, 129 N.E.2d 121, 126 n.5 (1955).

If a jurisdiction followed the real property/personal property dichotomy to decide which "boxes" were "buildings" in the law of arson, the burning of a small bird box affixed to a pole within the curtilage would be arson (assuming that it otherwise qualified as a "building" which it might well do). Under the West Virginia rule that the building must be of sufficient size to permit an adult to enter, stand erect, and turn around, it would not be arson. The choice between the West Virginia rule and the real property/personal property rule should be made on the basis of the purpose for the curtilage rule itself.

Finally, many cases have considered the question of whether an unfinished structure is the subject matter of arson at common law. This issue is usually resolved on the basis of the rule that requires the building to be a place of human habitation. See authorities cited *supra* note 22. However, if the unfinished structure was within the curtilage of a dwelling house, then the structure would have to qualify as a building (it would have to be completed to the point of being enclosed with four walls and a roof) to be the subject matter of arson. See 3 E. COKE, *supra* note 10, at 67.

21. The authorities are cited *supra* note 14 and *infra* notes 22-35.

22. The house or building had to be a place where a person resides or dwells. Thus Hawkins explained that burning the frame of a house (meaning, no doubt, a building so incomplete that it had no walls or roof) "is not accounted arson, because

building was the subject matter of the law of arson. One without the other would not do. Thus, a structure built by the prospective dweller (or another) solely for the purpose of becoming the dweller's new home would not be the subject of arson until the prospective dweller occupied the structure (by appropriate physical acts) with the intent of making it her home at that time.²³ Physically moving furniture into a house with the intent of making

it cannot come under the word *domus*." 1 W. HAWKINS, *supra* note 10, at 105; accord 1 M. HALE, *supra* note 10, at 567-68.

In connection with the law of burglary it is frequently said that the test for determining whether a building was a dwelling house at common law was whether it was regularly used as a place to sleep by the occupants. *Rex v. Martin*, Russ. & R. 108 (1806); *Rex v. Stock*, Russ. & R. 138, 2 Leach 1015, 2 Taunt 339 (1806); *Ex Parte Vincent*, 26 Ala. 145 (1855); *Scott v. State*, 62 Miss. 781 (1885); *Carrier v. State*, 227 Ind. 726, 89 N.E.2d 74 (1949); *Marston v. State*, 9 Md. App. 360, 264 A.2d 127 (1970); *Poff v. State*, 4 Md. App. 186, 241 A.2d 898 (1968); *State v. Ferebee*, 273 S.C. 403, 257 S.E.2d 154 (1979); W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 988 (7th ed. 1967); R. PERKINS & R. BOYCE, *supra* note 2, at 256. However, occasional sleeping on the premises did not make the building a dwelling house. *Marston*, 9 Md. App. 360, 264 A.2d 127; *Scott v. State*, 62 Miss. 781 (1885); W. CLARK & W. MARSHALL, *supra*, at 988; R. PERKINS & R. BOYCE, *supra* note 2, at 256.

The problem, of course, is the difficulty of defining exactly what we mean when we call a place one's "home," the place where one lives. Surely regularly sleeping in a building is one of the clear indicia that the place is home, but is this the only test for determining whether a building is a dwelling house? The Alabama Supreme Court recognized the propriety of the sleeping test for the law of burglary because that offense could only be committed during the nighttime; and it was thus only during the nighttime that the law of burglary sought to secure the occupants from felonious intrusions into the building. *Ex Parte Vincent*, 26 Ala. at 151-52; see also *State v. Ferebee*, 273 S.C. 403, 257 S.E.2d 154 (1979). But it is not so clear that this part of burglary's dwelling house doctrine accurately reflected the common law position concerning arson. Arson could be committed at any time of the day or night. 3 E. COKE, *supra* note 10, at 66; 1 W. HAWKINS, *supra* note 10, at 105; 1 M. HALE, *supra* note 10, at 566. Hence the sleeping rule did not coincide with the protection afforded by the law of arson, for arson sought to protect the occupants from the risks of burning the dwelling at all hours. Nevertheless, the sleeping test has been accepted by some courts as the test for determining whether a building qualified as a dwelling house for purposes of arson. *E.g.*, *State v. Jones*, 160 Mo. 302, 17 S.W. 366 (1891); *People v. Orcutt*, 1 Parker's Cr. Rep. 252 (N.Y. 1851); R. PERKINS & R. BOYCE, *supra* note 2, at 280. Convictions for arson have been sustained, however, when the structure was built as a dwelling house and occupied as such though no one had ever slept in the building. *State v. Timbury*, 114 N.H. 763, 329 A.2d 143 (1974).

23. *E.g.*, *Elsmore v. The Inhabitants of the Hundred of St. Briavells*, 8 Barn. & C. 461, 108 Eng. Rep. 1114 (1828); *The Queen v. Allison*, 1 Cox C.C. 24 (1843); *State v. McGowan*, 20 Conn. 245 (1850); *Commonwealth v. Barney*, 64 Mass. (10 Cush.) 478 (1852) (dictum); *State v. Wofenberger*, 20 Ind. 242 (1863); *Stallings v. State*, 47 Ga. 572 (1873); *Dick v. State*, 53 Miss. 384 (1876); *Davis v. State*, 153 Ala. 48, 44 So. 1018 (1907); *People v. Losinger*, 331 Mich. 490, 50 N.W.2d 137 (1951); *State v. Timbury*, 114 N.H. 763, 329 A.2d 143 (1974); see also *Commonwealth v. Kingsbury*, 378 Mass. 751, 393 N.E.2d 391 (1979). The victims rented an apartment

it home (moving in) sometime later made the building a place of storage rather than a dwelling house.²⁴ And despite the fact that a guest may "move into" the guest room in a friend's house with acts quite sufficient to satisfy the physical act requirement, the room would not be the dwelling house of the guest unless the guest also intended to make the room "home," a place of permanent residence.²⁵ Though not the dwelling house of the guest, it would remain the dwelling house of the friend.²⁶ The same would be true of transient guests in a hotel or motel.²⁷ But once a person moved into a house

and took possession by securing a key and visiting the premises with the intention to live there. The victims had not moved any of their possessions into the apartment and they had never slept there. The court held that the apartment was a dwelling house for the purpose of the law of burglary. *Id.* at 755-57, 393 N.E.2d at 394-95; *State v. Matson*, 3 Or. App. 518, 475 P.2d 436 (1970). A tenant leased an apartment in Oregon, moved several items of personal property into the apartment, apparently with the intention of then making it his home, and then left to pick up his family and the remainder of his possessions in California without ever sleeping in the apartment. Between the time the tenant took possession of the apartment and his return from California, the defendant broke into the apartment. The court held that the apartment was a "dwelling house" for the purpose of the law of burglary. *Id.* at 519-20, 475 P.2d at 437; *accord* *Commonwealth v. Brown*, 3 Rawle 207 (Pa. 1832).

24. See *Marston v. State*, 9 Md. App. 360, 264 A.2d 127 (1970) (burglary); *Poff v. State*, 4 Md. App. 186, 241 A.2d 898, (1968) (burglary and storehouse breaking); *Commonwealth v. Brown*, 3 Rawle 207 (Pa. 1832) (burglary); *Moss v. State*, 574 S.W.2d 542 (Tex. Crim. App. 1978).

25. Although not apparently addressed by the cases, one would also assume that the room would be recognized as the "dwelling house" of the guest only if the guest had the permission of the friend to make the room the guest's home. This issue is only likely to arise in conjunction with the "of another" requirement discussed *infra* notes 51-66 and accompanying text.

This result would follow by force of the intent requirement documented *supra* notes 22-24 and *infra* note 28. This clearly was the rule for burglary. *E.g.*, 2 E. EAST, *supra* note 18, at 500 (burglary); R. PERKINS & R. BOYCE, *supra* note 2, at 257 (burglary).

26. *E.g.*, 2 E. EAST, *supra* note 18, at 500 (burglary); R. PERKINS & R. BOYCE, *supra* note 2, at 257 (burglary).

27. Like the situation of the guest in the guest room in the private home, this result would follow by force of the intent requirement documented *supra* notes 22-24 and *infra* note 28.

Again, under the law of burglary this was clearly the rule. *E.g.*, *Holt v. State*, 46 Ala. App. 555, 246 So. 2d 85 (1971); *People v. Carr*, 255 Ill. 203, 99 N.E. 357 (1912); *Herbert v. State*, 31 Md. App. 48, 354 A.2d 449 (1976); *Mason v. People*, 26 N.Y. 200 (1863); *People v. Bush*, 3 Parker's Cr. R. 552 (N.Y. 1857); *State v. Clark*, 42 Vt. 629 (1870); 1 M. HALE, *supra* note 10, at 556; R. PERKINS & R. BOYCE, *supra* note 2, at 257.

Nevertheless, the motel or hotel, like the guest room in the friend's house, was the subject matter of arson because it was regularly used as a place of human habitation. *E.g.*, *State v. Stubba*, 113 Ariz. 434, 556 P.2d 8 (1976). The law of burglary was in accord. *E.g.*, *Herbert*, 31 Md. App. 48, 354 A.2d 449; *Rodgers v. People*, 86 N.Y. 360 (1881); 1 M. HALE, *supra* note 10, at 557; R. PERKINS & R. BOYCE, *supra* note 2, at 257.

or room with the necessary intent, it remained that person's place of human habitation, a "dwelling house" for the purpose of the law of arson, until the premises were permanently abandoned by that dweller. Abandonment required that the dweller vacate the premises with the intent to cease using the dwelling as home.²⁸ However, temporary absence of the dweller, an absence coupled with the intent to maintain the house as "home" and return to it, did not alter the building's status as a dwelling house, for the common law did not require the dweller to be physically present in the dwelling when it was burned.²⁹

It was recognized at a very early point in the development of the law of burglary that a person could have more than one dwelling house.³⁰ As long as the dweller moved into each house (the physical acts) with the intent of making it one of the dweller's homes (the intent requirement), all were the subject matter of the law of burglary.³¹ The same was true of the law of arson.³²

Furthermore, a building did not have to be exclusively used as a place of habitation. Though it was not arson at common law to maliciously burn

28. *E.g.*, *P.P.M. v. State*, 445 So. 2d 445 (Fla. Dist. Ct. App. 1984); *State v. Warren*, 33 Me. 30 (1851); *People v. Foster*, 103 Mich. App. 311, 302 N.W.2d 862 (1981) (error to exclude testimony concerning the intent to abandon the building as a dwelling house); *State v. Clark*, 52 N.C. 167 (1859); *The Queen v. Allison*, 1 Cox C.C. 24 (1843); R. PERKINS & R. BOYCE, *supra* note 2, at 280; *see also* *Fillman v. State*, 251 A.2d 557 (Del. 1969); *Hooker v. Commonwealth*, 54 Va. (13 Gratt) 763 (1885).

The law of burglary was in accord. *E.g.*, *State v. Ervin*, 96 N.M. 366, 630 P.2d 765 (1981); the burglary cases are collected in *Annot.*, 20 A.L.R. 4th 349, 361-62 (1983); R. PERKINS & R. BOYCE, *supra* note 2, at 258.

29. *E.g.*, *Johnson v. State*, 48 Ga. 116 (1873); *State v. Warren*, 33 Me. 30 (1851); *see also* *People v. Losinger*, 331 Mich. 490, 50 N.W.2d 137 (1951), *cert. denied*, 343 U.S. 911 (1952); *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982); *State v. Gulley*, 46 N.C. App. 822, 266 S.E.2d 8 (1980); R. PERKINS & R. BOYCE, *supra* note 2, at 280-81.

The same principles governed the law of burglary. *E.g.*, *Moore v. State*, 35 Ala. App. 95, 44 So. 2d 262 (1950); *Smith v. State*, 80 Fla. 315, 85 So. 911 (1920); *Schwabacher v. People*, 165 Ill. 618, 46 N.E. 809 (1897); *Scott v. State*, 62 Miss. 781 (1885); *State v. Meerhouse*, 34 Mo. 344 (1864); *State v. Ferebee*, 273 S.C. 403, 257 S.E.2d 154 (1979); 1 M. HALE, *supra* note 10, at 556; 4 W. BLACKSTONE, *supra* note 10, at 225; R. PERKINS & R. BOYCE, *supra* note 2, at 257-58; *Annot.*, *supra* note 28, at 360-62.

30. *Resolution of Judges*, *Popham* 52, 79 Eng. Rep. 1169 (1593); 1 W. HAWKINS, *supra* note 10, at 103; 1 M. HALE, *supra* note 10, at 566; 4 W. BLACKSTONE, *supra* note 10, at 225.

31. *Moore v. State*, 35 Ala. App. 95, 44 So. 2d 262 (1950); *Schwabacher v. People*, 165 Ill. 618, 46 N.E. 809 (1897); *State v. Meerhouse*, 34 Mo. 344 (1864); *State v. Lisiewski*, 20 Ohio St. 2d 20, 252 N.E.2d 168 (1969); *State v. Berry*, 598 S.W.2d 828 (Tenn. 1980); *State v. Bair*, 112 W. Va. 655, 166 S.E. 369 (1932).

32. *People v. Losinger*, 331 Mich. 490, 50 N.W.2d 137 (1951) (by implication).

shops, stores, warehouses, barns, and similar buildings, which were not within the curtilage of a dwelling house,³³ such buildings were the subject of arson when a portion of the building was someone's dwelling house.³⁴ In that case, arson could be committed by maliciously burning any part of the building.³⁵ In other words, it was not the character of the building, such as the distinction between a commercial building and a single family residence, but its use as a home that was important.³⁶ Likewise, a single building, such as an apartment house, may contain a number of separate dwelling houses.³⁷

Finally, if all dwellers moved from the dwelling house with the intent of never returning, of abandoning the house as their home, the building would no longer be a dwelling house, the subject of the law of arson, until it was made a place of human habitation again by others.³⁸

Nevertheless, as with the law of burglary,³⁹ a building which was not itself a dwelling house could be the subject of arson if it were within the

33. See *infra* notes 39-43 and accompanying text.

34. E.g., *United States v. Cardish*, 145 F. 242 (1906); *Smith v. State*, 31 Md. App. 106, 355 A.2d 527 (1976); *State v. Janes*, 106 Mo. 302, 17 S.W. 366 (1891); *People v. Orcutt*, 1 Parker's Cr. Rep. 252 (N.Y. 1857).

In both *Cardish* and *Smith* it is said that the use of one part of the building as a dwelling house gives the character of a dwelling house to the entire building if there is internal communication between the part used for dwelling purposes and the part used for other purposes. I find no case which holds that it is not arson to burn the non-dwelling house portion of a building when there is no internal communication between the dwelling house portion and the non-dwelling house portion. Surely the curtilage doctrine may or may not apply depending upon who used the non-dwelling house portion of the building. If that portion was used by the dweller, then the non-dwelling house portion of the building would qualify as the subject matter of arson as being a building within the curtilage. But even if the non-dwelling house portion is used exclusively by a non-dweller, this type of building should be regarded in the same way as an apartment house, and it should thus be arson to burn any portion of the building for the same reason that it was arson for the dweller in an apartment house to burn her own apartment even though the fire did not spread beyond the confines of her own apartment. See *infra* text accompanying notes 59-61.

35. In addition to the authorities cited *infra* note 57, see *People v. Oliff*, 361 Ill. 237, 197 N.E. 777 (1935); *State v. Caliendo*, 136 Me. 169, 4 A.2d 837 (1939) (The lower floor, containing a business, was burned. The fire did not extend to the second floor which was used as a "dwelling house." The point was assumed, not discussed.); *State v. Meserue*, 121 Me. 564, 118 A. 482 (1922).

36. *State v. Jones*, 106 Mo. 302, 17 S.W. 366 (1891).

37. E.g., *Levy v. People*, 80 N.Y. 327 (1880); *State v. Stubba*, 113 Ariz. 434, 556 P.2d 8 (1976); See 3 E. COKE, *supra* note 10, at 64-65 (burglary); 1 W. HAWKINS, *supra* note 10, at 103; 1 M. HALE, *supra* note 10, at 556-557 (burglary); 4 W. BLACKSTONE, *supra* note 10, at 225 (burglary).

38. *The Queen v. Allison*, 1 Cox C.C. 24 (1843); *State v. Warren*, 33 Me. 30 (1851); *Hooker v. Commonwealth*, 54 Va. 763 (1855); *State v. Clark*, 52 N.C. 167 (1859); *People v. Foster*, 103 Mich. App. 311, 302 N.W.2d 862 (1981).

39. *Rex v. Clayburn*, Russ. & R. 360, 168 Eng. Rep. 845 (1818); *The King v. Gibson*, 1 Leach C.C. 357, 168 Eng. Rep. 281 (1785); *Devoe v. Commonwealth*,

curtilage of a dwelling house. Thus, a "barn, stable, cow-house, sheephouse, dairy house, milkhouse, [garage] and the like"⁴⁰ which was located within the curtilage of a dwelling house was the subject matter of arson at common law.⁴¹ The curtilage was a small area around the dwelling house⁴² which was typically, though not necessarily, enclosed by a fence or hedge.⁴³ If not enclosed by a fence or hedge, the curtilage was only the area which could have been so enclosed. Thus, a building very near the dwelling house but separated by a road was not within the curtilage.⁴⁴ Nevertheless, proximity to the dwelling house was not enough. To qualify as the subject matter of arson, the building also had to be regularly used by the occupants of the dwelling house.⁴⁵ Since the purpose of the law of arson was to protect the

44 Mass. 316 (1841); *Armour v. State*, 22 Tenn. 379 (1842); 3 E. COKE, *supra* note 10, at 64; 1 W. HAWKINS, *supra* note 10, at 104; 2 M. HALE, *supra* note 10, at 556-57; 4 W. BLACKSTONE, *supra* note 10, at 225.

40. 3 E. COKE, *supra* note 10, at 66-67; 1 W. HAWKINS, *supra* note 10, at 105 ("outbuildings" within the curtilage); 1 M. HALE, *supra* note 10, at 567 (quoting from Coke); 4 W. BLACKSTONE, *supra* note 10, at 221 (citing Hale).

41. *E.g.*, *Commonwealth v. Barney*, 64 Mass. 480 (1852); *People v. Alpin*, 86 Mich. 393, 49 N.W. 148 (1891); *State v. Sarvis*, 45 S.C. 668, 24 S.E. 53 (1896); *State v. Blumenthal*, 133 Ark. 584, 136 Ark. 532, 203 S.W. 36 (1918); *Jones v. Commonwealth*, 239 Ky. 110, 38 S.W.2d 971 (1931); *Duke v. State*, 134 Fla. 456, 185 So. 422 (1938); *Daniels v. Commonwealth*, 172 Va. 583, 1 S.E.2d 333 (1939); *State v. Ferguson*, 233 Iowa 354, 6 N.W.2d 856 (1942); *State v. Cuthrell*, 235 N.C. 173, 69 S.E.2d 233 (1952); *State v. Varsalona*, 309 S.W.2d 636 (Mo. 1958).

42. A barn 5 rods (82.5 ft.) from the house and connected to it by a lane was within the curtilage, *People v. Taylor*, 2 Mich. 250 (1851), and so was a barn that had been converted into a combination garage-work area-recreation room located 80 to 100 feet from the dwelling house. *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (1979). But a former house which had been converted into a crib for fodder, located 250-300 yards (750-900 ft.) from the dwelling house was outside the curtilage. *Jones v. Commonwealth*, 239 Ky. 110, 38 S.W.2d 971 (1931).

43. *State v. Shaw*, 31 Me. 523 (1850); *People v. Taylor*, 2 Mich. 251 (1851); *Holland v. State*, 11 Ala. App. 164, 65 So. 920 (1914).

44. *State v. Stewart*, 6 Conn. 47 (1825); *Curkendall v. People*, 36 Mich. 309 (1877). See *State v. Sampson*, 12 S.C. 567 (1879) (burglary); *State v. Neff*, 122 W. Va. 549, 11 S.E.2d 171 (1940) (burglary).

45. It is commonly said that the building must be used in connection with the dwelling house in the conduct of family affairs and for carrying on domestic purposes or employment. *E.g.*, *State v. Bugg*, 66 Kan. 668, 72 P. 236 (1903); *Jones v. State*, 70 Ohio St. 36, 70 N.E. 952 (1904); *State v. Lee*, 120 Or. 643, 253 P. 533 (1927); *Jones v. Commonwealth*, 239 Ky. 110, 38 S.W.2d 971 (1931); *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (1979).

Such statements should not be taken literally, for a building sufficiently close to the dwelling house was the subject of arson even though it was used for business purposes by the occupants of the dwelling house. *The King v. Gibson*, 1 Leach 357, 168 Eng. Rep. 281 (1785) (burglary); *Rex v. Chalking, Russ. & Ry.* 334, 168 Eng. Rep. 831 (1817) (burglary); 1 M. HALE, *supra* note 10, at 557 (burglary). The crucial question was whether the building within the curtilage was regularly used by the occupants, not the type of use, *e.g.*, family affairs and domestic purposes and employment as opposed to general business use by the dwellers.

security of the dwellers in their habitation, and since the burning of buildings within the curtilage posed nearly the same human risks as burning the dwelling house itself, buildings within the curtilage which were used by the dwellers were the subject matter of arson as well.⁴⁶ But the common law drew a sharp distinction between buildings used by the dwellers within the curtilage and any other type of property. Thus, the burning of an automobile, truck, or other personal property located within the curtilage and regularly used by the dwellers was not arson despite the similar human risks involved; and neither was it arson to burn a building physically within the curtilage if it were not used by the dwellers, but by someone else.⁴⁷ The common law judges

46. *Simmons v. State*, 234 Ind. 489, 129 N.E.2d 121 (1955) (Bobbitt, J., concurring); *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (1979).

47. *The King v. Taylor*, 1 Leach 49, 168 Eng. Rep. 127 (1759); *Graham v. State*, 40 Ala. 659 (1867); *O'Daniel v. State*, 188 Ind. 477, 123 N.E. 241 (1919); *State v. Schenk*, 100 N.J. Super. 122, 241 A.2d 267 (1968); 1 M. HALE, *supra* note 10, at 568.

And, of course, it was not arson to burn a building which was outside the curtilage which did not otherwise qualify as a dwelling house. *E.g.*, *State v. Stewart*, 6 Conn. 47 (1825); *Curkendall v. People*, 36 Mich. 309 (1877); *Jones v. Commonwealth*, 239 Ky. 110, 38 S.W.2d 971 (1931).

The cases seldom discuss the reasons for extending the protection of the law of arson to buildings within the curtilage. One can pose three risks associated with burning buildings within the curtilage: (1) the risk that fire will spread to the dwelling house itself, because the building being burned, within the curtilage, is so physically close to the dwelling house (a rationale that emphasizes the physical proximity requirement of the curtilage rule), *McClaine v. Territory*, 1 Wash. 345, 25 P. 453 (1890); (2) the risk that the dwellers will respond to the fire and try to put it out, and thereby be subjected to the risk of being burned (a rationale that emphasizes the use requirement of the curtilage rule for it is their property that is being burned); and, in a similar vein, (3) the risk that the dwellers will actually be in the building when it is burned (a rationale that also emphasizes the use requirement of the curtilage rule). Of course, none of these rationales are mutually exclusive and they all support the *inclusion* of buildings within the curtilage as the subject matter of arson. But only the first rationale (the risk that fire will spread to the dwelling house itself) clearly supports the *exclusion* of buildings as being the subject matter of arson when they are too distant to pose a risk of fire spreading to the dwelling. Buildings that are physically close enough to pose a substantial risk to the dwelling house (i.e., buildings within the physical curtilage) are excluded from the protection of the law of arson when they are not used by the occupants of the dwelling house, yet these buildings pose the same risk that the fire may spread to the dwelling house because they are physically within the curtilage. As a rule of *exclusion*, the use requirement is thus in tension with the physical proximity requirement. If the risk is substantial, the dwellers may well respond to the fire and attempt to extinguish it, thereby subjecting themselves to the very risk that the law of arson should protect them against. Yet it would not. The third rationale (the risk that the dwellers may be physically present in the buildings within the curtilage) justifies a rule of exclusion only if one values the lives of the dwellers higher than the lives of those who may be present in the building physically within the curtilage though unconnected with the dwelling house. Again, as a rule of exclusion, the use requirement may well produce purely

would not extend the law of arson so drastically. That task was left to the legislature.⁴⁸

There was, however, one arguable exception to the curtilage rule: the "burning of a barn," according to Lord Coke, "being no parcel of a mansion house, is no felony: any yet if there be corn or hay within it, the burning thereof is felony, though the barn be not part of a mansion."⁴⁹ It is highly doubtful that Coke's statement accurately reflected the *common law*.⁵⁰

arbitrary results. Why then did the common law adhere to the use requirement of the curtilage rule? Unless the law of arson was changed to prohibit the burning of any building (or personal property) which posed a substantial risk to the occupants of all buildings, some arbitrary distinction had to be drawn. And since the judges apparently did not believe they had the authority to so drastically extend the concept of arson, they adhered to the ancient curtilage rule, a rule founded on tradition which was heavily supported by the law of burglary. In burglary, the curtilage rule appeared to work well enough. Burglary protected the dwellers from nocturnal felonious entries, and the judges could easily believe that the dwellers would only venture out into the night to protect their property from the "midnight terror" in buildings both physically close and used by them. The uncritical acceptance of the curtilage rule for the law of arson thus was capable of producing more arbitrary results in the law of arson than in the law of burglary.

It is not, therefore, surprising, that the legislatures of every American jurisdiction have rendered the curtilage rule obsolete by changing the definition of the property and the risks protected by the modern law of arson.

48. The modern legislative response to the crime of arson is considered *infra* beginning with the text accompanying note 273.

49. 3 E. COKE, *supra* note 10, at 67. Coke also states that "the ancient authors extended this felony, further then (sic) houses, viz. to stacks of corn, wagons or carts of coal, wood or other goods." *Id.* This is no indication that Coke thought these statements to be accurate descriptions of the common law. By 1716, when Hawkins wrote his treatise, the extension mentioned but not approved by Coke had been rejected. Hawkins wrote:

out-buildings, as barns, and stables, adjoining thereto, and also barns full of corn, whether they be adjoining to any house or not, are so far secured by law, that the malicious burning of them is arson But it seems that at this day the burning of the frame of a house, or of a stack of corn, etc., is not accounted arson

1 W. HAWKINS, *supra* note 10, at 105. Twenty years later, Sir Matthew Hale wrote that "the burning of a stack of corn was no felony by the common law." 1 M. HALE, *supra* note 10, at 568. Hale agrees with Coke's statement about the burning of a barn containing hay or corn. *Id.* at 567; accord 4 W. BLACKSTONE, *supra* note 10, at 221.

Edward East expressed doubt that it was ever arson at common law to burn a stack of corn, but he approved Coke's statement concerning a barn containing hay or corn. 2 E. EAST, *supra* note 18, at 1020. Sir William Russell also asserts that a single barn in a field containing hay or corn was the subject matter of arson. 4 W. RUSSELL, *supra* note 10, at 1024.

50. All of the commentators mentioned *supra* note 49, except Russell, simply rely on Coke's statement as the foundation for this exception. Coke cites no authority in its support. In 1531, over a century before Lord Coke wrote, the burning of a

C. *Of Another*

Since the primary purpose of the law of arson was to protect the physical safety of the inhabitants of the dwelling house, the "of another" requirement meant that the dwelling house had to be in the possession of someone other than the incendiary.⁵¹ Accordingly, an owner could be guilty of common law arson by burning a dwelling house in the possession of someone else, as where a landlord burned a house occupied by tenant,⁵² or where an owner burned a dwelling in the possession of any other person.⁵³ And, of course, the burning of a dwelling house by the person in actual possession of the

barn containing corn was made felony by the statute of Henry VIII, c.1, f.3. On the available evidence, it is impossible to tell whether this statute was declaratory or amendatory of the common law. It is also impossible to tell whether Coke was relying upon that statute for his statement that the burning of barns containing hay or corn was *felony*. Though too much can be made of the fact that Coke did not say the "burning of houses" (arson), as he frequently refers to the common law felony he is discussing as "felony".

Russell is apparently the first commentator to cite a case in support of the free standing barn exception: Barnham's Case, 4 Coke 20a, 76 Eng. Rep. 908 (1602) (not cited by Coke). But it is equally unclear whether this civil case relies on the 1531 statute or the common law. See also R. PERKINS & R. BOYCE, *supra* note 2, at 281.

On the other hand, Pollock and Maitland state that "already in 1220 we find the burning of a barn that was full of corn treated as felony." 2 F. POLLOCK & F. MAITLAND, *supra* note 10, at 490. If this statement is accurate, Henry's statute may have simply confirmed the common law result, and Coke's statement would reflect the ancient common law position.

In any event, in 1670 a statute was enacted making it a felony to burn any barn at nighttime. 22 & 23 Car. 2, ch. 7, § 2. And modern statutes generally include any barn as the subject matter of arson. See *infra* text accompanying notes 438-41, 445-48.

51. In addition to the authorities cited *supra* note 10, see *The King v. Breeme*, 1 Leach 220, 168 Eng. Rep. 213 (1780); *State v. Fish*, 27 N.J.L. 323 (1859); *Snyder v. People*, 26 Mich. 106 (1872); *Heard v. State*, 81 Ala. 55, 1 So. 640 (1886); *People v. DeWinton*, 113 Colo. 403, 45 P. 708 (1896); *Commonwealth v. Bruno*, 316 Pa. 394, 175 A. 518 (1934); *State v. Beckwith*, 135 Me. 423, 198 A. 739 (1938); *State v. Varsalona*, 309 S.W.2d 636 (Mo. 1958); *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982); see also Annot., 17 A.L.R. 1168 (1922).

52. *Rex v. Harris*, FOSTER, CROWN LAW 113, 168 Eng. Rep. 56 (1753); *Erskine v. Commonwealth*, 8 Va. (Gratt.) 624 (1851); *State v. Toole*, 29 Conn. 342 (1860); *Snyder v. People*, 26 Mich. 106 (1872); 2 E. EAST, *supra* note 18, at 1023; 4 W. RUSSELL, *supra* note 10, at 1027.

53. *State v. Tennery*, 9 Iowa 436 (1859); *Commonwealth v. Gentzler*, 15 Pa. 934 (1906).

The possession of the person other than the owner did not have to be "rightful" possession. "Wrongful" possession would do. *Rex v. Wallis*, 1 Moody 344, 168 Eng. Rep. 1297 (1832); see *Sullivan v. State*, 5 Ala. 47 (5 Stew. & P. 175) (1834) (a person who adversely possessed a dwelling house could not commit arson by burning it).

premises was not common law arson.⁵⁴ For the same reason, it was not arson for one occupant to burn a dwelling house which was shared with another when both possessed the entire building.⁵⁵ For example, if a wife burned the dwelling house in which she, her husband and her family resided, it was not arson at common law.⁵⁶

Thus far the "of another" requirement has been the same for arson and burglary.⁵⁷ In one respect, however, there was a material difference. When a single building is divided into more than one dwelling house, even though they may be joined by a common hall, and one of the dwelling units is broken and entered under the requisite circumstances, a burglary is com-

54. *The King v. Spalding*, 1 Leach 218, 168 Eng. Rep. 211 (1780); *Rex v. Pedley*, 1 Leach 242, 168 Eng. Rep. 224 (1782); *Proberts' Case*, 2 E. EAST, *supra* note 18, at 1030 (1799); *State v. Fish*, 27 N.J.L. 323 (1859); *State v. Sandy*, 25 N.C. 570 (1843); *State v. Hannett*, 54 Vt. 83 (1881); *State v. Young*, 139 Ala. 136, 36 So. 19 (1904); *Kopczynski v. State*, 137 Wis. 358, 118 N.W. 863 (1908); 4 W. RUSSELL, *supra* note 10, at 1027.

At least one case has drawn the distinction, so apparent in the law of larceny, between custody and possession. Thus where the defendant was classified as a "servant," the burning of the house occupied by himself and his family, but provided him by the master, was held to be arson. *Rex v. Gowen*, 1 Leach 246 (1786). *Gowen* is explainable on other grounds, and it has not been followed. The case would seem to be wrong on principle. *Gowen* is noted in 4 W. RUSSELL, *supra* note 10, at 1027 and in 2 E. EAST, *supra* note 18, at 1027.

55. The rule was different if the building was divided into a number of separate dwelling houses, such as an apartment house. See *infra* text accompanying note 58. The rule here under discussion applies to joint-occupants of a single dwelling house. In addition to the authorities cited *infra* note 56, see *State v. Haynes*, 66 Me. 306 (1876). In *Haynes*, a mother and daughter jointly resided in a dwelling house. The mother and daughter procured another to burn it. The court held that it was not arson at common law. *Id.*; *Shepherd v. People*, 19 N.Y. 537 (1859) (recognizing the common law rule, but construing a statute to reach the opposite result); R. PERKINS & R. BOYCE, *supra* note 2, at 283. *Contra State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982). The *Shaw* court stated:

While there is some authority in the older cases from other jurisdictions to the contrary, we find the need for protection from willful and malicious burning of a dwelling house so compelling that we hold that the common law arson requirement that the dwelling burned be that of 'another' is satisfied by a showing that some other person or persons, together with the defendant, were joint occupants of the same dwelling units.

Id. at 338, 289 S.E.2d at 331 (footnote omitted).

56. *Snyder v. People*, 26 Mich. 106 (1872); *Kopczynski v. State*, 137 Wis. 358, 118 N.W. 863 (1908). But, of course, if the wife is separated from the husband (living in a different dwelling house), the wife can be guilty of arson if she burns the husband's dwelling house. *Id.*; *Frazier v. State*, 16 Ohio App. 8 (1922). *Contra Rex v. Marsh*, 1 Moody 182, 168 Eng. Rep. 1233 (1828) (This case was based upon the now rejected notion of the legal unity of man and wife.).

57. A joint occupant cannot commit burglary of the jointly possessed dwelling house. *E.g.*, *Commonwealth v. Clarke*, 66 Va. 908 (1874); R. PERKINS & R. BOYCE, *supra* note 10, at 262.

mitted only of the premises actually entered.⁵⁸ Hence, the nocturnal breaking and entering of a single apartment "of another" in an apartment house was burglary only of the apartment entered. It was not burglary of the apartments within the building that were not entered, and she could not be guilty of burglarizing her own apartment, for it was not the dwelling house "of another." But under the law of arson, if one tenant in an apartment house burned his own apartment, even if the fire were totally contained within that single apartment unit, the tenant was guilty of arson.⁵⁹ The theory was explained by the North Carolina Supreme Court:

[T]he main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned. Where there are several apartments in a single building, this purpose can be served only by subjecting to punishment for arson any person who sets fire to any part of the building.⁶⁰

Of course, for this rule to apply, the building had to have been occupied as a dwelling house. Thus, a hotel *owner* could not be convicted of arson at common law for burning a portion of her hotel building when the rooms were rented only to transient guests.⁶¹

Although the purpose of the law of burglary and arson is to protect the security of the habitation,⁶² these two bodies of law protect dwellers from very different risks. Burglary protects against the evils associated with felonious nocturnal breakings and enterings,⁶³ whereas arson protects against

58. *E.g.*, R. PERKINS & R. BOYCE, *supra* note 10, at 284.

59. *Levy v. People*, 80 N.Y. 327 (1880); *Shepherd v. People*, 19 N.Y. 537 (1859); *State v. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978); R. PERKINS & R. BOYCE, *supra* note 2, at 284; *see also State v. Young*, 153 Mo. 445, 449-50, 55 S.W. 82, 83 (1900) (construing a statute making it arson in the first degree to burn "any dwelling house in which there shall be at the same time some human being" as being satisfied when dwellers were physically present in other apartments when the defendant burned a separate apartment).

60. *State v. Jones*, 296 N.C. 75, 77-78, 248 S.E.2d 858, 860 (1978).

61. *State v. Parrish*, 205 Kan. 33, 468 P.2d 150 (1970) (under a statute requiring the burning of "property of another"). If the building was burned by a third person it was, however, arson at common law because a hotel was a "dwelling house" of the owner of the hotel. *See* authorities cited *supra* note 27 and accompanying text.

62. This is why the "dwelling house" requirement is nearly the same for both crimes.

63. *E.g.*, *Smart v. State*, 244 Ind. 69, 190 N.E.2d 650 (1963):

It is evident that the offense of burglary at common law was considered one aimed at the security of the habitation rather than against property. That is to say, it was the circumstance of midnight terror aimed toward a man or his family who were in rightful repose in the sanctuary of the home, that was punished, and not the fact that the intended felony was successful. Such attempted immunity extended to a man's dwelling or mansion house has been said to be attributable to the early common law principle that a man's home is his castle. The jealousy with which the law guarded against

human dangers created when the dwelling house is burned.⁶⁴ The burglary of one apartment does not necessarily pose a similar risk to dwellers in other apartments in the same building. But the burning of any portion of a building endangers all of its occupants. One of the principal purposes of the law of arson was to prevent such risks by deterring people from burning "dwelling houses."⁶⁵ The interests protected by the law of arson thus called for a rule different from the rule which served the interests of the law of burglary.⁶⁶

D. Burning

Burning. Putting of fire into any part of a house, whereby that part burneth. For it is necessary, that there be a burning, but it is not necessary, that all or any part be wholly burnt, nor that the fire hath any continuance, but the intent only sufficeth not. As if one put fire into any part of a house, and it burneth not, this is not felony, for the words of the indictment be, *incendit, et combussit*. Again, if it doth burn, though it goeth out of itself, it is felony.⁶⁷

Thus, arson protected dwellers against the burning of the dwelling house itself and the burning of a *building* within the curtilage. And though some-

any infringement of this ancient right of peaceful habitation is best illustrated by the severe penalties which at common law were assessed against a person convicted of burglary, even though the enterprise, except for the essential elements of breaking and entering a mansion house or dwelling house at night with intent to commit a felony therein, was unsuccessful.

Id. at 72-73, 190 N.E.2d at 652 (quoting Annot., 43 A.L.R.2d 831, 834-35 (1955)); *accord* Kanaras v. State, 54 Md. App. 568, 460 A.2d 61 (1983); *State v. Celli*, 263 N.W.2d 145 (S.D. 1978) (quoting from *Smart*).

64. See authorities cited *supra* notes 14-15.

65. This rationale was not extended to situations in which two separate dwelling houses were situated very close but were not actually attached (so that they could not be characterized as a single building with multiple dwellings). As long as only one building was burned, it was arson only of the building actually burned regardless of the severity of the risk that the fire would spread to the other. See 1 M. HALE, *supra* note 10, at 568-69.

If the adjoining building was also burned, it could be arson if the *mens rea* element was also satisfied.

66. Unlike burglary, which required nocturnal acts, arson could be committed at any time of the day or night. *Curran's Case*, 48 Va. (7 Gratt.) 619, 619 (1850); see also authorities cited *supra* note 10. And unlike larceny, the value of the property burned was of no importance to a charge of arson at common law. This was because arson primarily sought to protect the safety of the inhabitants, not the interests in the property destroyed. *Clark v. People*, 2 Ill. 117 (1833); *Ritchey v. State*, 7 Blackf. 168 (Ind. 1844); *McClaine v. Territory*, 1 Wash. 345, 25 P. 453 (1890).

67. 3 E. COKE, *supra* note 10, at 66; 1 W. HAWKINS, *supra* note 10, at 106 (semble); 1 M. HALE, *supra* note 10, at 568-69 (semble); 4 W. BLACKSTONE, *supra* note 10, at 222 (semble); 2 E. EAST, *supra* note 18, at 1020 (accord); 4 W. RUSSELL, *supra* note 10, at 1024-25.

what similar risks were created when property within the dwelling was burned, the burning of property which was not a dwelling house (or a building within the curtilage, wherever situated) constituted the common law misdemeanor of malicious mischief,⁶⁸ not arson.⁶⁹ It was sufficient, however, for common law arson if any portion of the dwelling house itself was burned, no matter how small, no matter how insignificant to the structural integrity of the building.⁷⁰ As long as what burned was permanently incorporated into the

68. W. CLARK & W. MARSHALL, *supra* note 22, at 978-82; R. PERKINS & R. BOYCE, *supra* note 2, at 282, 405-413. Malicious mischief was a crime against property interests. See *infra* text accompanying notes 117-21.

69. Commonwealth v. Francis, 1 Thacher C.C. 240 (Mass. 1830) (setting fire to a boat in a building is not arson unless some portion of the building burns); Dedieu v. People, 22 N.Y. 178 (1860) (burning personal property within a dwelling house is insufficient unless some portion of the building burns); Graham v. State, 40 Ala. 659 (1867) (burning a bale of cotton in a building when no portion of the building is burned is not arson); State v. Levesque, 146 Me. 351, 81 A.2d 665 (1951) (rubbish fire in cellar not arson unless some portion of the building burns).

70. Commonwealth v. Van Schaack, 16 Mass. 104 (1819). (Defendant placed a coal of fire on the sill of the dwelling house. The sill was burned for about six inches, and the fire spread to a board, part of the exterior of the house, burning it to the extent of eighteen inches in length and seven inches in width. The court held it was arson. "It is impossible to draw the line of distinction between the burning in this case and that which should consume a greater part, or the whole, of a dwelling house. . . . If any part of a dwelling house, however small, be consumed by fire, the offense is complete." *Id.* at 105); People v. Butler, 16 Johns. 203, 204 (N.Y. 1819) (The burning of two or three of the kitchen stairs was a sufficient burning of the dwelling house for arson at common law. It is not necessary that the house should be absolutely consumed or burned.); People v. Haggerty, 46 Cal. 355, 356 (1873) (The burning of any part of the building, however small, completes the offense of arson. A spot on the floor was charred and that was held sufficient.); State v. Braathen, 77 N.D. 309, 315, 43 N.W.2d 202, 207 (1950) (There was a "burning and charring" of the wood of some of the interior before the fire was extinguished. That was sufficient for arson. It is not necessary that the building should be consumed or materially injured. The burning of any portion, however small, suffices.); Hinkley v. State, 389 S.W.2d 667, 668 (Tex. Crim. App. 1965) (the charring of wood siding in an area of roughly 12 inches square suffices for arson); Fulford v. State, 8 Md. App. 270, 259 A.2d 551 (1969).

About twenty-four inches by four inches of the window frame had been burned. While it was a metal frame, the paint had been burned completely off. In addition, the venetian blind, which the trial judge found as a fact to be a permanent fixture and a part of the building, was burned and the cords which held the venetian blind were totally burned. Without deciding whether the venetian blind was or was not a permanent fixture, the burning of the window frame was sufficient to establish a burning. If there is the slightest burning of any part of the building, the offense is complete.

Id. at 273-74, 259 A.2d at 553.; State v. Oxendine, 305 N.C. 126, 130-31, 286 S.E.2d 546, 548-49 (1982). A witness testified that there were dark or burned patches over the wall, and that the wallpaper was burned. Defendant argued that this was an insufficient burning of the building for arson. Affirming the conviction for arson,

structure of the building, it was a burning of the building itself.⁷¹ Hence it was arson to burn the floor,⁷² the baseboards,⁷³ interior walls,⁷⁴ wallpaper affixed to a wall,⁷⁵ ceilings,⁷⁶ window frames,⁷⁷ the paint from an interior window frame,⁷⁸ interior stairs,⁷⁹ thresholds and doors,⁸⁰ the eaves over win-

the court said:

It is difficult to perceive how dark, *burned* patches could appear on a wall absent the prior incidence of at least minor charring of that wall's substantive material. Defendant's . . . argument that the presence of burnt wallpaper in the dwelling had no rational tendency to indicate the charring of the building's structure simply defies good sense and logic. Wallpaper affixed to an interior wall is unquestionably a part of the dwelling's framework. If the wallpaper is burning, it would perforce suggest that the house is also burning. Hence we hold that where, as here, the evidence discloses that the wallpaper in a dwelling has been *burned*, it completely substantiates the [burning] element of arson.

Id.; 286 S.E.2d at 548-49 (1984) (emphasis in original); see also Annot., 28 A.L.R. 4th 483 (1984) (collecting many of the modern cases).

71. Although very few cases have considered the point, it is apparently governed by the law of fixtures, the law which determines when personal property becomes real property by being incorporated into the realty. Thus in *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982), the court said in note 3, "Once it is affixed to the house, wallpaper is generally immovable and permanently attached thereto and as such becomes part of the realty." *Id.* at 130 n.3, 286 S.E.2d at 548 n.3. For definitions of fixtures, real estate, and real property, see BLACK'S LAW DICTIONARY 574, 1096, 1137 (5th ed. 1979); BALLENTINE'S LAW DICTIONARY 480, 1059 (3d ed. 1969); see also 1 THOMPSON ON REAL PROPERTY §§ 6, 55 (Grimes ed. 1980)." In *Fulford v. State*, 8 Md. App. 270, 273-74, 259 A.2d 551, 553 (1969), the court apparently used the same line of reasoning with respect to the paint on the window frame. And though the trial court in *Fulford* used the law of fixtures to hold that the venetian blinds were a part of the building, the appellate court, finding that it was sufficient to burn all of the paint off of the metal window frame, did not reach the question of whether the blinds were part of the building. In *State v. Nielson*, 25 Utah 2d 11, 12, 474 P.2d 725, 726 (1970), the court held that an acoustical tile ceiling is an integral part of the building for the law of arson.

72. *State v. Sandy*, 25 N.C. 570 (1843); *People v. Haggerty*, 46 Cal. 355 (1873); *Luke v. State*, 49 Ala. 30 (1873); *State v. Witham*, 281 S.W. 32 (Mo. 1926); *State v. Schenk*, 100 N.J. Super. 122, 241 A.2d 267 (1968).

73. *State v. Schenk*, 100 N.J. Super. 122, 241 A.2d 267 (1968).

74. *People v. Simpson*, 50 Cal. 304 (1875); *Kehoe v. Commonwealth*, 149 Ky. 400, 149 S.W. 818 (1912).

75. *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982).

76. *State v. Nielson*, 25 Utah 2d 11, 474 P.2d 725 (1970) (an acoustical tile ceiling); *People v. Oliff*, 361 Ill. 237, 197 N.E. 777 (1935) (ceiling, floor, and a wall).

77. *State v. Spiegel*, 111 Iowa 701, 83 N.W. 722 (1900); *Rogers v. State*, 102 Tex. Crim. 331, 277 S.W. 664 (1925) (exterior).

78. *Fulford v. State*, 8 Md. App. 270, 259 A.2d 551 (1969).

79. *People v. Butler*, 16 Johns. 203 (N. Y. 1819).

80. *State v. Spiegel*, 111 Iowa 701, 83 N.W. 722 (1900) (interior doors); *Crow v. State*, 136 Tenn. 333, 189 S.W. 687 (1916) (exterior door); *State v. Pisano*, 107 Conn. 630, 141 A. 660 (1928) (threshold and exterior screen door).

dows,⁸¹ exterior walls,⁸² the roof,⁸³ the floor of a porch,⁸⁴ and, of course, any portion of the frame of the house.⁸⁵

What then was meant by "burning"? The common law required the *actual combustion* of a portion of the material of which the dwelling house was composed. Or to put it another way, there had to be an ignition of the material by the application of an external heat source.⁸⁶ In the parlance of the street, some part of the material had to be destroyed or consumed by fire.⁸⁷ And in the language of the law, many courts said that a "charring" of the material was necessary.⁸⁸ "Combustion," "ignition," "destroyed or consumed by fire," and "charring" were all synonymously used to describe the common law "burning" requirement. On the other hand, damage from heat insufficient to cause combustion or ignition (or the synonymous terms) was not a "burning." Thus, if the material were only discolored by heat, singed, scorched, or damaged by smoke, there was no arson.⁸⁹ But once the

81. *Washington v. State*, 290 Ala. 344, 276 So. 2d 587 (1973).

82. *Commonwealth v. Van Schaack*, 16 Mass. 105 (1819); *Hinkley v. State*, 389 S.W.2d 667 (Tex. Crim. App. 1965); *State v. Kelso*, 617 S.W.2d 591 (Mo. Ct. App. 1981); *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982).

83. *Commonwealth v. Tucker*, 110 Mass. 403 (1872) (shingles burned in two places).

84. *State v. Witham*, 281 S.W. 32 (Mo. 1926).

85. *Jones v. Commonwealth*, 271 Ky. 647, 113 S.W.2d 7 (1938) (floor joists); *State v. Caliendo*, 136 Me. 169, 4 A.2d 837 (1939) (floor joists).

86. *E.g.*, *State v. Taylor*, 45 Me. 322, 329 (1858) ("It is not necessary, to constitute arson, that any part of the building should be consumed. *If there is actual ignition of any part, however small, though the fire immediately go out of itself, the offence is committed.*") (emphasis added); *State v. Spiegel*, 111 Iowa 701, 704, 83 N.W. 722, 723 (1900) ("The rule of these cases is that if there is *actual ignition*, and the fiber of the wood or other combustible material is charred, and thus destroyed, even in small part, the burning is complete.") (emphasis added).

Ignition, in turn, is the point at which the oxidation produced by the heat source (fire) becomes self-sustaining (meaning that it will continue rapid oxidation when the external heat source is removed).

Surely the process of oxidation is one of degree, but the common law drew the line at ignition.

87. *E.g.*, *Graham v. State*, 40 Ala. 659 (1867); *People v. Haggerty*, 46 Cal. 354 (1873); *State v. Spiegel*, 111 Iowa 701, 83 N.W. 722 (1900); *State v. Schwartz*, 35 Del. 418, 166 A. 666 (1932).

88. *E.g.*, *People v. Oliff*, 361 Ill. 237, 197 N.E. 777 (1935); *State v. Schenk*, 100 N.J. Super. 122, 241 A.2d 267 (1968); *Hinckley v. State*, 389 S.W.2d 667 (Tex. Crim. App. 1965); *State v. Nielson*, 25 Utah 2d 11, 474 P.2d 725 (1970); *State v. Kelso*, 617 S.W.2d 591 (Mo. Ct. App. 1981); *Annot.*, 28 A.L.R. 4th 482, 488-89 (1984) (collecting many of the American cases).

89. *E.g.*, *Regina v. Russell, Car. & M.* 541, 174 Eng. Rep. 626 (1842); *Graham v. State*, 40 Ala. 659 (1867); *State v. Hall*, 93 N.C. 571 (1885); *Honey v. State*, 112 Tex. Crim. 439, 17 S.W.2d 50 (1929); *Annot.*, 28 A.L.R. 4th 482, 489-90 (1984).

As properly used by the cases, "singed" or "scorched" means damage caused by the application of heat insufficient to cause "combustion" or "ignition" (or the

material began to burn, once it was ignited, there was no requirement that it burn for any substantial period of time. Liability attached the instant the burning began, and it made no difference whether the fire was immediately extinguished or went out by itself.⁹⁰ Nor was it necessary for the material ever to be ablaze; the only requirement was that it burn — smoldering would do.⁹¹

Finally, the manner by which the arsonist caused the dwelling to burn was equally of no importance as long as all of the elements of the crime were met. Any method of applying heat to the dwelling which caused it to burn, regardless of how unique or exotic it was, sufficed for arson.⁹² Even an explosive would suffice, so long as the house burned rather than first being torn apart by the blast.⁹³ And it made no difference whether the burning was caused by directly applying the source of heat to the dwelling, or by more indirect methods. For example, although it was not arson to burn one's own dwelling house (or any other building not within the curtilage of the dwelling house of another except, of course, one's own apartment in an apartment house), if one did so under circumstances which created an extremely high risk of burning another dwelling house (or another building within its curtilage) and the adjoining building was burned, it was arson of the adjoining building,⁹⁴ provided the act was done with the necessary *mens rea*.

other synonymous terms). Because these terms are also frequently used to include minor "burning" (which was sufficient for arson at common law), they inject ambiguity into some of the cases. Nevertheless, when the issue is presented, courts generally adhere to the common law definition.

A person who sets fire to material which forms part of a dwelling house without burning it (e.g., discoloring, singeing, or scorching it, or perhaps producing no damage at all) would be guilty of attempted arson if the other requirements of that offense are met.

90. *Bennett v. State*, 201 Ark. 237, 144 S.W.2d 476 (1940); *Mary v. State*, 24 Ark. 44 (1862); *State v. Schwartz*, 35 Del. 418, 166 A. 666 (1932); *State v. Morris*, 98 N.J.L. 621, 121 A. 290 (1923); 4 W. BLACKSTONE, *supra* note 10, at 222; 3 E. COKE, *supra* note 10, at 66; 1 W. HAWKINS, *supra* note 10, at 106.

91. *Graham v. State*, 40 Ala. 659 (1867); *People v. Haggerty*, 46 Cal. 354 (1873); *Woolsey v. State*, 30 Tex. App. 343, 17 S.W. 546 (1891).

Thus in *State v. Schenk*, 100 N.J. Super. 122, 241 A.2d 267 (1968), testimony that "the floor woodwork was starting to smolder," coupled with evidence that an investigating officer "found charred debris . . . on the floor, . . . and the baseboard and the floor were also damaged" was sufficient to prove a burning for a charge of arson. *Id.* at 127, 241 A.2d at 269.

92. E.g., *Overstreet v. State*, 46 Ala. 30 (1871); *State v. Lockwood*, 24 Del. (1 Boyce) 28, 74 A. 2 (1909).

93. *Nelson v. State*, 125 Tex. Crim. 80, 66 S.W.2d 312 (1933); *Landers v. State*, 39 Tex. Crim. 671, 47 S.W. 1008 (1898); see also *Fannin v. State*, 128 Tex. Crim. 185, 80 S.W.2d 992 (1935) (opinion on rehearing); *Johnson v. State*, 96 Tex. Crim. 216, 257 S.W. 551 (1923).

94. *People v. Hiltel*, 131 Cal. 577, 63 P. 919 (1901); *Combs v. Common-*

E. *The Mens Rea of Arson: "Maliciously"*

"Arson was one of the earliest felonies in which the mental element was stressed. By Bracton's day it seems to have been well settled that to convict for arson proof must be had that the burning was with evil design (*mala conscientia*); a burning caused by negligence was not arson."⁹⁵ But by Coke's time the *mens rea* of arson had evolved from the requirement of an evil design, in the sense of "a motive of malevolence, desire to injure, or general ungodliness,"⁹⁶ to the enduring common law definition of the mental element of this offense: a burning which was done "maliciously and voluntarily."⁹⁷ Coke's terse explanation of the mental element of arson quite clearly assumes the reader will understand that an intentional burning will suffice for arson. He thus concentrates on the possibility of committing arson unintentionally:

The law doth sometime imply, that the house was burnt maliciously and voluntarily. As if one intend to burn the house of A only, and not the house of B. And yet in burning the house of A, the house of B is burnt; in this case the burning of the house of B is felony, because it proceeded of the malicious and voluntary burning of the house of A. And the event shall be coupled to the cause, which was voluntary, and malicious. . . .⁹⁸

In the preceding paragraph, Lord Coke excluded from arson burnings "done by mischance, or negligence."⁹⁹ Arson could thus be committed intentionally or unintentionally in Coke's time so long as the arsonist's mental culpability was more than "negligence." Coke's rationale for unintentional arson was that the law sometimes *implies* that it was malicious and voluntary. What was meant by "implied malice" and when it would be implied were not explained. If what he meant was malice "implied in law," then liability would

wealth, 93 Ky. 313, 20 S.W. 221 (1892); *State v. Hill*, 55 Me. 365 (1868); *Commonwealth v. Andrews*, 155 Mass. 68, 28 N.E. 1124 (1891) (burning to defraud insurer); 3 E. COKE, *supra* note 10, at 66; 1 W. HAWKINS, *supra* note 10, at 106; 1 M. HALE, *supra* note 10, at 568; 4 W. BLACKSTONE, *supra* note 10, at 221; 2 E. EAST, *supra* note 18, at 1019; 4 W. RUSSELL, *supra* note 10, at 1026; *see also* *Regina v. Price*, 9 Car. 6 P. 729, 173 Eng. Rep. 1029 (1841).

95. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1002 (1932).

96. *Id.* at 1003.

97. 3 E. COKE, *supra* note 10, at 66. The commentators after Coke either borrowed his description or rephrased it as "maliciously and willfully." *See* definitions cited *supra* note 10.

"The malice which is a necessary element in the crime of arson need not . . . take the form of malevolence or ill will . . ." *State v. Pisano*, 107 Conn. 630, 632, 141 A. 660, 661 (1928); *accord* *Commonwealth v. Lamothe*, 343 Mass. 417, 179 N.E.2d 245 (1961).

98. 3 E. COKE, *supra* note 10, at 66.

99. *Id.*; *accord* 1 M. HALE, *supra* note 10, at 569; 1 HAWKINS, *supra* note 10, at 106; 2 E. EAST, *supra* note 18, at 1019; 4 W. BLACKSTONE, *supra* note 10, at 222; *see also* *Morris v. State*, 124 Ala. 44, 27 So. 336 (1899).

be based upon a felony-arson theory, similar to the common law felony-murder rule.¹⁰⁰ In Coke's example, the burning of B's house was caused by the arson of A's house. Hence the culprit would be guilty of two counts of arson; intentional arson of A's house and unintentional arson of B's house, the conviction for the arson of B's house would be based upon a felony-arson theory. Certainly, Coke used words which suggested such a theory.¹⁰¹ On the other hand, he may have meant that malice was implied "in fact"—the culprit's conduct gave rise to sufficient factual inferences to support a finding of guilt. Was this the reason he wrote that "the law doth *sometime* imply that the house was burnt maliciously or voluntarily"? If this was what he meant, then there was no felony-arson rule, but liability was imposed on a yet unarticulated legal theory, a theory based on neither intent nor negligence. How then was a culprit held liable for an unintentional arson?

100. For a general discussion of the common law felony murder rule, see W. LAFAVE & A. SCOTT, *supra* note 19, at 545-61; R. PERKINS & R. BOYCE, *supra* note 2, at 61-72.

101. His emphasis on the voluntary and malicious nature of the burning of A's house indicates that the initial burning was arson, a felony, and B's house was burned as a result of this felonious act.

One can also construct a theory of transferred intent from Coke's use of the term "the event shall be coupled to the cause, which was voluntary, and malicious." 3 E. COKE, *supra* note 10, at 67.

Indeed, Hawkins writes that:

[I]f one maliciously intending only to burn the house of A happen thereby to burn the house of B, it is certain that he may be indicted as having maliciously burned the house of B, for where a felonious design against one man misses its aim, and takes effect upon another, it shall have the like construction as if it had been leveled against him who suffers by it.

1 W. HAWKINS, *supra* note 10, at 106. This, of course, is an explanation based upon the theory of transferred intent.

In a similar vein, Professors Perkins and Boyce read Hale's statement ("But if A have a malicious intent to burn the house of B and in setting fire to it burns the house of B and C or the house of B escapes by some accident, and the fire takes in the house of C and burneth it, then A did not intend to burn the house of C, yet in law it shall be said the malicious and willful burning of the house of C, and he may be indicted for the malicious and willful burning of the house of C." (citing the passage from Lord Coke set forth in the text)) as an application of the doctrine of transferred intent. R. PERKINS & R. BOYCE, *supra* note 2, at 923. Professors LaFave and Scott, though not relying upon Coke and Hale, make a similar statement that this factual situation correctly invokes the doctrine of transferred intent. W. LAFAVE & A. SCOTT, *supra* note 19, at 253.

The doctrine of transferred intent is quite frequently an alternate theory in a fact pattern which raises a wanton and willful disregard theory. These two theories are not inconsistent and they frequently, though not inevitably, reach the same result. Be this as it may, it is clear that the so called doctrine of transferred intent is quite distinct from the common law felony murder rule. W. LAFAVE & A. SCOTT, *supra* note 19, at 243-44 (1972); R. PERKINS & R. BOYCE, *supra* note 2, at 921-24. A discussion of the doctrine of transferred intent is beyond the scope of this paper as it has nothing to do with the law of arson *per quod*.

The answer came with the passage of time. The evolution of the common law theory of liability for unintentional arson took many years, years in which great ambiguity and confusion prevailed, a condition that persists today in many jurisdictions that adhere to the common law.¹⁰² The first answer came with the rejection of the "implied-in-law" theory of malice. The common law courts thus have generally refused to apply a felony-arson rule.¹⁰³ Instead, when clearly faced with the issue of arson liability for an

102. Compare, e.g., *Brown v. State*, 285 Md. 469, 403 A.2d 788 (1979) with *Brown v. State*, 39 Md. App. 497, 388 A.2d 130 (1978) (the same case decided by the Maryland Court of Special Appeal and the Maryland Court of Appeals).

103. *Regina v. Faulkner*, 13 Cox CC. 550 (1877); R. PERKINS & R. BOYCE, *supra* note 2, at 276.

Occasionally, commentators will suggest that there is a felony-arson rule, but the cases upon which they rely do not support that position. Perhaps the most influential was Joel Prentiss Bishop. In his eighth edition he wrote (1) that liability for arson could be based upon the accidental burning of a house "while endeavoring to do some other wrong, . . . provided the wrong he intends is of sufficient magnitude." 2 J. BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* 9 (8th ed. 1892). And, (2) "*A fortiori*, if one intending to burn the house of a particular person accidentally burns another's, he commits the offense; or doubtless he does in all cases where his intent is to do an act which is a felony." *Id.* He relies on *Lusk v. State*, 64 Miss. 845, 2 So. 256 (1887) for the first statement, and the quote from COKE'S *INSTITUTES* (see *supra* text accompanying note 67), together with East's statement (2 E. EAST, *supra* note 18, at 1019) which essentially repeats Coke's words. As we have seen, Coke's statement is wonderfully ambiguous, and East's adoption of it adds nothing. *Lusk* is simply incorrectly cited by Bishop. The portion of the opinion upon which he relies referred to the liability of a conspirator for the acts of his co-conspirator which are "the natural and probable consequences" of the target offense. *Lusk*, 64 Miss. at 850, 2 So. at 257. The statement did not refer to the liability of a perpetrator for arson. No reported case cites *Lusk* on the issue of a perpetrator's liability. Instead they all cite *Lusk* for the liability of conspirators for the acts of a co-conspirator. E.g., *Martinez v. State*, 413 So. 2d 429 (Fla. Dist. Ct. App. 1982); *Forman v. State*, 220 Miss. 276, 70 So. 2d 848 (1954). Since Bishop offered no principled argument in favor of a felony-arson rule, and he cites no authority in support of that doctrine, his statement is entitled to little weight.

Dean Justin Miller also wrote that there was a felony-arson rule in J. MILLER, *HANDBOOK OF CRIMINAL LAW* 327 (1934). In addition to Bishop, and the authorities upon which Bishop relied, he cites one case, *Colbert v. State*, 125 Wis. 423, 104 N.W. 60 (1905).

In *Colbert* the defendant intentionally burned building A. The fire spread to buildings B and C. Convicted of the arson of building C as well, the defendant argued on appeal that she did not willfully burn building C. The Court replied, "The statute only requires that the first building shall be maliciously and willfully set on fire and that by the burning thereof the dwelling of another shall be burned. It is not required that the malicious intent to burn the dwelling house shall exist." *Id.* at 431, 104 N.W. at 64. The court cited no authority. Except for the last sentence, everything that the court said and did is perfectly consistent with both the implied-in-fact theory and the felony-arson theory (implied-in-law). Indeed, the last sentence, in context, seems to mean no more than the defendant does not have to intend to burn each building actually burned (as long as the burning of the first house sufficiently endangered the

unintentional burning, the courts have adopted the implied-in-fact malice theory, a theory which is usually referred to as wantonness or wanton arson.

Wanton arson is committed when a person intentionally does an act (such as starting a fire or burning a house) under circumstances in which the act creates a very high risk of burning the dwelling house of another, when the actor knew of that risk and yet did the risk-taking act despite that knowledge.¹⁰⁴ Returning to Coke's example, the metaphor upon which all thinking about unintentional arson has been based, it is nearly the paradigm of wanton arson. If we add to Lord Coke's facts the circumstance that the burning of A's house created a very high danger that other dwellings in the area would also burn (B's house), and this risk was known to the culprit when the initial fire was started, we have a perfect case of wanton arson.¹⁰⁵

other houses that were burned as well). Nevertheless, no subsequent reported case has interpreted *Colbert* as creating a felony-arson rule.

Finally, CORPUS JURIS SECUNDUM states that there is a felony-arson rule. The statement is as follows: "If a person sets fire to or burns a house while engaged in the commission of a felony, he is guilty of arson, even though he did not intend to set fire to or destroy the house." 6A C.J.S. *Arson* § 7, at 224 (1975). Two cases are cited in support of this statement: *Luke v. State*, 49 Ala. 30 (1873), and *People v. Fanshaw*, 137 N.Y. 68, 32 N.E. 1102 (1893). *Luke* is an intentional burning case. The supposed felony-arson rule was not involved in that case. The court quotes from Bishop in a *dictum* statement. *Fanshaw* involved a question of statutory construction: whether an intent to destroy the building intentionally burned was required for first degree arson. The court held that it was not. In the course of the opinion the court cites Bishop ("but it has been said that if a person set fire to or burn a house while engaged in the commission of a felony, it is arson, though there was no intent to set the fire or burn the building" *Id.* at 76, 32 N.E. at 1104) and concludes that the legislature has rejected Bishop's statement. This case certainly does not support a felony-arson rule.

It should be noted that in addition to the absence of cases which clearly support a felony-arson rule (except, perhaps, for *Colbert*), each of the cases discussed by these commentators refers only to arson-arson situations (with the exception of Bishop's wholly unsupported first statement). Other than Bishop's unsupported statement about unlawful acts, there is no authority that I can find which even remotely suggests that any felony other than arson will do. Thus there is not the slightest hint of a murder-arson rule, or a burglary-arson rule, or a rape-arson rule, etc.. If there was a special rule for arson, it was not a felony-arson rule, but a rule which stated that if one commits arson of building A, she will be liable in arson for all other buildings burned as well. This is a very different statement.

In addition, in each of the arson-arson situations mentioned above, liability can be based on the implied-in-fact malice theory, the theory of wanton arson discussed below. See *infra* text accompanying notes 104-08.

104. *E.g.*, *Isaac's Case*, 2 E. EAST, *supra* note 18, at 1031; *Proberts' Case*, *id.*, at 1030 (*dictum*); *Regina v. Harris*, 15 Cox C.C. 75 (1882); *State v. Laughlin*, 53 N.C. 354 (1861); *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (1979) (*dictum*); *DeBettencourt v. State*, 48 Md. App. 522, 428 A.2d 479 (1981); *R. PERKINS & R. BOYCE*, *supra* note 2, at 276-77; 3 TORCIA, *WHARTON'S CRIMINAL LAW* 270 (14th ed. 1980); see also *United States v. Acevedo-Velez*, 17 M.J. 1 (C.M.A. 1983).

105. See quote *supra* note 97.

Perhaps it was because of the need for these additional facts that Lord Coke said that liability is "sometimes" implied. In any event, wantonness became the accepted common law theory for imposing arson liability on an actor who unintentionally burned a dwelling.¹⁰⁶ It should be noted here, however, that wantonness was not limited to situations in which the fire was started under circumstances amounting to arson.¹⁰⁷ Assuming all of the other elements of wanton arson were met, all the actor needed to do was perform an intentional act which created a very high risk of the burning of a dwelling house. Hence wanton arson might be predicted on the burning of one's own dwelling house,¹⁰⁸ or the burning of grass on the actor's property, and similar acts which would not themselves be arson at common law.

Although the *mens rea* of arson is generally described as "maliciously," accompanied by either "willfully" or "voluntarily,"¹⁰⁹ the latter words add nothing to the concept of "malice." Hence it is entirely accurate to define arson at common law as the *malicious* burning of the dwelling house of another.¹¹⁰ Of course, since either intentional burnings or wanton burnings may be subject to legal justification or excuse, the *mens rea* of arson at common law would exclude all forms of justification or excuse in the definition of the malicious state of mind.¹¹¹ To summarize, the *mens rea* of arson, "malice", is composed of two distinct mental states:¹¹² (1) intentional burning without justification or excuse;¹¹³ and (2) wanton burning without

106. See authorities cited *supra* note 104.

107. In other words, wanton arson is not an arson-arson rule (see *supra* note 103) cloaked in different language. Neither is it coextensive with the doctrine of transferred intent discussed *supra* note 101, for the doctrine of transferred intent required an act and intent which would, except for the property actually burned, otherwise qualify for arson.

108. Isaac's Case, 2 E. EAST, *supra* note 18, at 1031; see also 4 W. BLACKSTONE, *supra* note 10, at 221; 1 M. HALE, *supra* note 10, at 568;

109. See authorities cited *supra* note 10. In addition, many of the American statutes have used similar phrases. United States v. Acevedo-Velez, 17 M.J. 1 (C.M.A. 1983) (listing the statutes).

110. Malice in the law of arson at common law is exactly the same as malice in the law of murder. DeBettencourt v. State, 48 Md. App. 522, 428 A.2d 479 (1981); accord R. PERKINS & R. BOYCE, *supra* note 2, at 274.

111. E.g., United States v. Acevedo-Velez, 17 M.J. 1 (C.M.A. 1983); State v. Scott, 118 Ariz. 383, 576 P.2d 1383 (Ariz. Ct. App. 1978); *In re Appeal in Pima County Juvenile Action No. J-37390-1*, 116 Ariz. 519, 570 P.2d 206 (Ariz. Ct. App. 1977); State v. Dunn, 199 N.W.2d 104 (Iowa 1972); State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975).

112. E.g., Lipschitz v. People, 25 Colo. 261, 53 P. 1111 (1898); Kellenbeck v. State, 10 Md. 431 (1857); Commonwealth v. Cooper, 264 Mass. 378, 162 N.E. 733 (1928); Tuller v. State, 8 Tex. App. 501 (1880).

113. E.g., People v. Long, 2 Edm. Sel. Cas. 129 (N.Y. 1849); State v. Pisano, 107 Conn. 630, 141 A. 660 (1928) (malice means deliberately and without justification or excuse); Dorroh v. State, 229 Miss. 315, 90 So. 2d 653 (1956); Commonwealth v. Lamothe, 343 Mass. 417, 179 N.E.2d 245 (1961) (same, quoting *Pisano*); Jillson v.

justification or excuse.¹¹⁴ Later we will see how the common law notion of malice for the law of arson has changed in some jurisdictions to accommodate statutory changes in the law of arson.¹¹⁵

III. THE EVOLUTION OF ARSON AS AN OFFENSE AGAINST PROPERTY

A. *Statutory Development in England*

As we have seen, arson at common law protected dwellers from the risk of being killed or injured by a malicious burning of the dwelling house and buildings within its curtilage. And to that extent arson protected the dwellers' *possessory* property interest in these buildings as well. But the protection of that property interest was purely incidental to the protection afforded the dweller. In short, common law arson, like common law burglary, was classified not as a crime against property, but as a special form of crime against the person, an offense against the habitation of individuals.¹¹⁶ All other property at common law, whether a nonqualifying building or any other type of property whatsoever, was protected against injury or destruction from malicious burnings by the common law offense against property known as the misdemeanor of malicious mischief.¹¹⁷ But the crime of malicious mischief¹¹⁸

Commonwealth, 461 S.W.2d 542 (Ky. Ct. App. 1971) (*semble*); State v. White, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976) (For a burning to be arson at common law it had to be "willful and malicious" which meant "voluntarily and without excuse or justification."); State v. O'Farrell, 355 A.2d 396 (Me. 1976); State v. Nelson, 17 Wash. App. 66, 69, 561 P.2d 1093, 1095 (1977) ("At common law, specific intent to burn a particular thing or to injure a particular person was unnecessary, it being sufficient to show that there was a general malice or intent to burn some structure."); State v. Scott, 118 Ariz. 383, 385, 576 P.2d 1383, 1385 (1978) ("'Willfully' means intentionally as distinguished from accidentally or involuntarily and 'maliciously' means that state of mind which actuates conduct injurious to others without lawful reason, cause, or excuse."); People v. Tanner, 95 Cal. App. 3d 948, 955, 157 Cal. Rptr. 465, 469 (1979) ("It has consistently been held, however, that 'when related to the crime of arson, the word 'malice' denotes nothing more than a deliberate and intentional firing of a building . . . as contrasted with an accidental or unintentional ignition thereof; in short, a fire of incendiary origin.'"); State v. Doyon, 416 A.2d 130, 135 (R.I. 1980) ("We adhere . . . to the common law mandate that the mental state for the crime requires only that the defendant intended to do the proscribed act . . ."); Dean v. State, 668 P.2d 639 (Wyo. 1983) (*semble*); R. PERKINS & R. BOYCE, *supra* note 2, at 276-77; 3 Torcia, *supra* note 104, at 270; *see also* DeBettencourt v. State, 48 Md. App. 522, 428 A.2d 479 (1981).

114. The authorities are cited *supra* note 104.

115. *See infra* text accompanying notes 574-91.

116. *E.g.*, 4 W. BLACKSTONE, *supra* note 10, at 220; R. PERKINS & R. BOYCE, *supra* note 2, at 246.

117. *See* 4 W. BLACKSTONE, *supra* note 10, at 243; R. PERKINS & R. BOYCE, *supra* note 2, at 282, 405.

118. The misdemeanor of malicious mischief is commonly defined as the malicious destruction of, or damage to, the property of another. *E.g.*, W. CLARK & W. MARSHALL, *supra* note 22, at 978; R. PERKINS & R. BOYCE, *supra* note 2, at 405.

could be perpetrated by any means which caused property to be physically damaged or destroyed, whether it be by the application of mechanical force,¹¹⁹ fire,¹²⁰ or some other mechanism.¹²¹ Nevertheless, when the means used to damage or destroy property is fire, there is frequently a very substantial risk that nearby property will also be involved, and, as Blackstone pointed out in connection with arson,¹²² the destruction of property by fire deprives the community of the further use of the property burned.¹²³ The question then arises as to whether the misdemeanor sanction imposed by the law of malicious mischief is an adequate deterrent and a just punishment for this form of malicious behavior.

Long before the common law of England began to exert its influence on the law of crimes in the New World, the English Parliament concluded that a felony sanction was needed to protect certain property, property unprotected by the law of arson, from being burned. Each offense was a felony punishable by death. For example, in 1531, nearly a century before Lord Coke wrote the Institutes, the burning of a barn containing corn or grain was made a felony.¹²⁴ Seventy years later it was made a capital offense to willfully and maliciously burn, cause to be burned, or aid, procure, or consent to the burning of any barn or stack of corn or grain in Cumberland, North-cumberland, Westmorland, or Durham.¹²⁵ In 1670 the nocturnal burning or destroying of any ricks or stacks of corn, hay or grain, barns or other houses

119. *E.g.*, *Funderburk v. State*, 75 Miss. 20, 21 So. 658 (1897) (shooting a bullet through the door of a house); *Gill v. State*, 85 Ga. App. 584, 69 S.E.2d 804 (1952) (denting the side of a car by throwing a rock against it); *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968) (accord).

120. *See* authorities cited *supra* note 117.

121. *E.g.*, *State v. Buckman*, 8 N.H. 203 (1836) (polluting another's well).

122. *See supra* note 17 and accompanying text.

123. Of course, property can be destroyed by means other than fire. But when the risk to other property caused by fire is coupled with fire's tendency to destroy the property (rendering it nearly a complete economic loss to society), in the context in which the destruction of some forms of property (dwelling houses) is a felony punishable by death, Parliament's response seems predictable.

124. 23 Hen. 8, ch. 1, § 3 (1531). This act imposed the death penalty without benefit of clergy (except for persons in holy orders), for willfully burning any barn containing any grain or corn, or for abetting, procuring, helping, maintaining or counseling of or to any such offense.

The impact of this act on the doctrine of benefit of clergy is the subject of *supra* note 11. And *see supra* note 50 for speculation that this act may have been the source of Coke's statement that the burning of a barn containing "corn or hay within it, the burning is felony, though the barn be not part of a mansion house." 3 E. COKE, *supra* note 10, at 67.

Quite clearly this provision of the statute was aimed at the protection of the subject property. The statute is probably the inspiration for the "barn burning" statutes widely enacted in the United States in the last century.

125. 43 Eliz. ch. 13, § 2 (1601).

or buildings or kilns was made a felony,¹²⁶ and in 1722, the infamous Waltham Black Act was enacted by Parliament.¹²⁷ Under the Waltham Black Act it was a capital offense for any person to *set fire to* any house, barn or outhouse, to any hovel, cock, mow or stack of corn, straw, hay or wood.¹²⁸ Other legislation followed which made it an arson-like offense to set the following types of property on fire: "any mine, pit, or delph of coal or cannel-coal,"¹²⁹ "mills,"¹³⁰ ships of war, on float or in the process of building, arsenals, magazines, dock yards, victualing offices or any of the buildings located therein or belonging thereto,¹³¹ and to any ship or vessel whatsoever.¹³² In 1803, it became a nonclergyable felony to willfully set on fire, with the intent to injure or defraud any person, *any* house, barn granary, hop-oast, malthouse, stable, coach-house, outhouse, mill, warehouse, or shop.¹³³ In 1812 the same punishment was provided for burning or setting on fire any building, engine or erection used or employed in the carrying on or conducting of any trade or manufacture.¹³⁴

The 1803 Act was extremely important for it marked the first time in the law of England that it became unlawful, indeed a nonclergyable felony, to burn one's own house or other described building when done with the specified purpose in mind. Until then, the statutes noted above had been read as supplementing the common law crime of arson and, for the most

126. 22 & 23 Car. 2, ch. 7 (1670).

127. 9 Geo. 1, ch. 22. The act is extensively discussed in 1 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 49-79 (1948).

In the course of that discussion, Sir Leon observed that the Waltham Black Act greatly influenced subsequent legislation, and "it was directly responsible for the enactment of a number of capital laws It remained in force for a whole century, despite frequent attempts to abrogate it." *Id.* at 78.

All of the provisions of the Black Act, except those relating to setting fire to property and to maliciously shooting at a person, which remained capital offenses, were replaced in 1823. 4 Geo. 4, Ch. 54 (1823).

128. Despite the use of the language "set fire to," the Black Act, according to Sir Leon, "did not go beyond the rules laid down by the common law." 1 L. RADINOWICZ, *supra* note 127, at 69-70 n.62. Thus, there had to be an actual burning of the subject matter, and the burning had to be maliciously and willfully done. *Id.* Quite obviously, however, the Act covered property not protected by the common law crime of arson.

129. 10 Geo. 2, ch. 32, § 6 (1737).

130. 9 Geo. 3, ch. 29, § 2 (1769).

131. 12 Geo. 3, ch. 24 (1772).

132. 33 Geo. 3, ch. 67, § 5 (1793). This statute extended the provisions of the 1772 act, which applied only to war ships, to include any ship or vessel. In 1799, Parliament also enacted a statute which made it a non-clergyable felony to set fire to any of the works of the Port of London or to any vessel lying in the port. 39 Geo. 3, ch. IXIX (1799).

133. 43 Geo. 3, ch. 58 (1803).

134. 52 Geo. 3, ch. 130, § 1 (1812).

part, the concepts of common law arson were used to interpret those acts.¹³⁵ Thus, despite the language of the various enactments, until the 1803 statute one could burn her own dwelling and the buildings within its curtilage without committing arson or a related felony offense so long as the fire did not spread to another's buildings.¹³⁶ All of this was changed by the 1803 Act, provided the dweller burned her house with the intent to injure or defraud any person.¹³⁷

Thus by the beginning of the nineteenth century it was a capital felony in England to maliciously burn a wide variety of property which was unprotected by the common law crime of arson. Furthermore, unlike common law arson which was primarily concerned with the safety of the dwellers in their dwelling houses, these statutory offenses¹³⁸ had as their goal the protection of property. Though these statutory offenses are not strictly arson, for that term most appropriately applies to the common law felony, it was common to refer to all crimes that protected property from injury or damage by fire or explosion,¹³⁹ as arson, and to think of these offenses collectively as offenses against property.¹⁴⁰ Thus, the English thinking about arson changed drastically from a special offense against the person (by protecting the hab-

135. See 4 W. RUSSELL, *supra* note 10, at 1025-55; see also authority cited *supra* notes 126-28.

136. E.g., *Proberts' Case*, 2 E. EAST, *supra* note 18, at 1030; *The King v. Spalding*, 1 Leach 218, 168 Eng. Rep. 211 (1780); *The King v. Breeme*, 1 Leach 220, 168 Eng. Rep. 213 (1780).

137. Sir Leon analyzes the judicial interpretation of many of these enactments in 1 L. RADZINOWICZ, *supra* note 127, at 688-94.

Many of these statutes are also commented upon in 4 W. RUSSELL, *supra* note 10, at 1025-55.

138. Indeed, most of the various "arson" offenses were consolidated into the Malicious Damage Act of 1861. 24 & 25 Vict., ch. 97 (1861). But, of course, common law arson remains a serious felony in every statutory scheme adopted in every common law jurisdiction, and to that limited extent, arson remains a crime against "the habitation," a special form of crime protecting the person of the dweller.

In 1971, most of the provisions of the Malicious Damage Act were replaced by the elegant provisions of the Criminal Damage Act, 1971, ch. 48.

139. Damage or destruction of property by explosion was not within the scope of arson at common law unless the explosion caused the building to burn. See *supra* note 93. The Malicious Damage Act of 1861 covered injury or damage by explosion, 24 & 25 Vict., ch. 97, § 9, but in connection with the explosion offense, the primary concern was with the safety of persons, unlike the fire provisions. Many American jurisdictions include explosion with fire in their arson statutes and treat these means in exactly the same way. See *supra* notes 317-24 and accompanying text.

140. See, e.g., 4 W. RUSSELL, *supra* note 10, at 1024-25. Thus Turner, in KENNY'S OUTLINES OF CRIMINAL LAW (19th ed. 1966), writes that "arson was at common law the only case in which *damage to property was a criminal offense.*" *Id.* at 249. The book speaks of "Arson Under Statutes," *id.* at 250, and the entire discussion of arson at common law and under the statutes appears in the chapter dealing with "Offences Against Property." *Id.* at 237, 249-53.

itation and buildings within the curtilage) to an offense which principally protected property. Furthermore, as one would expect, except for the retention of common law arson, the statutes were drawn in such a way as to give little or no consideration to the human risks involved with fire, for they were, after all, now property offenses.

B. *The American Arson and Related Statutes at the Middle of the Twentieth Century.*

The English experience with common law arson and its statutory variations heavily influenced the development of the law of arson in the United States.¹⁴¹ Indeed, many, if not most, American states at one time, with the exception of the statutory equivalent of common law arson, considered arson an offense against property; and though there was considerable variation among the states, the property protected by the arson statutes was frequently similar to the property protected under the English statutes enacted in the first half of the nineteenth century.¹⁴²

141. In many of the American cases cited in Part I of this paper, English authority is relied on to resolve the issue pending before the court.

142. See, e.g., the statutes of the following American jurisdictions:

(1) Alaska. In 1913 the territorial laws of Alaska concerning arson consisted of 6 sections. Section 1911 essentially covered common law arson. Section 1912 prohibited the willful and malicious burning of specified public buildings, steamboats, ships, or vessels, and certain named commercial buildings. All other buildings, together with certain other specified structures were covered by Section 1913. Section 1915 made it a felony to willfully and maliciously burn certain named personal property (e.g., a pile of lumber, a stack of hay, growing grass, etc.) And Section 1916 prohibited insurance fraud in connection with "any property whatever" which was insured. Only the first two sections actually classified the crime as arson, but each of these sections imposed a felony sanction. None of the sections purported to protect people rather than property from the risk of injury or destruction of fire. Compiled Laws of the Territory of Alaska, 1913 (Gov't. Printing Office, 1913) (This statute is reproduced *infra* App. C.)

(2) Colorado. In 1883, Colorado had a single arson provision. It was a felony, and it treated common law arson exactly the same as the burning of any other building, including other houses, specified public buildings, boats and other water craft, and bridges (when the bridge was of the value of fifty dollars). The General Statutes of the State of Colorado, Section 749 (1883). Although the Colorado statute did not include a wide variety of property, by formally treating common law arson as the equivalent of the burning of a boat or a bridge (valued at \$50.00), Colorado was principally concerned with the preservation of the property, not the protection of persons.

(3) Indiana. The Indiana statutes in effect in 1881 were some of the most extreme examples of the statutory conversion of arson into an offense *exclusively* against property. There was a single felony offense which encompassed common law arson and many of the statutory variants adopted by the English Parliament. There was also a misdemeanor offense which applied to persons who "maliciously or wantonly"

The arson laws of North Carolina best illustrate how closely some of the American jurisdictions followed the common law of arson, and the gen-

set fire to any woods, grass, crops and the like (Section 1928). Unlike the territory of Alaska which essentially preserved common law arson as the most serious arson offense (*see infra* App. A) Indiana thus formally treated common law arson in the same manner as it did the burning of named items of personal property of the value of \$25.00 or more. Although the last sentence of the statute was addressed to the situation in which a person is killed as a result of the arson, this provision amounted to nothing more than a restatement of the felony-murder rule which specified that a killing of any human being during the crime of arson was murder in the first degree. Revised Statutes of Indiana, § 1904 (1881).

Since the Indiana statute is such a clear illustration of the transformation of arson into an offense primarily against property, its provisions are worth quoting:

1927. Arson. 26. Whoever willfully and maliciously burns or attempts to burn any dwelling-house or other building, finished or unfinished, occupied or unoccupied, whether the building be used or intended for a dwelling-house or for any other purpose; or any boat, wharf-boat, watercraft, or vessel, finished or unfinished; or any bridge, whether wholly within this State or not; or any cord-wood in a pile; or any rick, stack, or shock of grain, hay, or straw; or any grain not severed from the ground; or any fence, or whatever material constructed; or the material intended for the construction of any such hose, building, boat, bridge, or fence; or any tank-bark, tree, timber, or lumber; or any railroad-car or a water-tank connected with a railroad—the property so burned being of the value of twenty dollars or upwards, and being the property of another, or being insured against loss or damage by fire; and the burning or attempt to burn, being with intent to prejudice or defraud the insurer,—is guilty of arson, and, upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one years nor less than one year, and fined not exceeding double the value of the property destroyed. And should the life of any person be lost thereby, such offender shall be deemed guilty of murder in the first degree, and shall suffer death or be imprisoned in the State prison during life.

1928. Burning woods, prairies, etc. 27. Whoever maliciously or wantonly sets fire to any woods, or to any thing growing or being upon any prairie or grounds, not his own property; or maliciously or wantonly permits any fire to pass from his own prairie or grounds, to the injury or destruction of the property of any other person,—shall be fined not more than one hundred dollars nor less than five dollars, to which may be added imprisonment in the county jail not exceeding thirty days.

It should be noted, however, that the Indiana statute was not faithful to the early nineteenth century English scheme, for common law arson remained an offense against the person in England under those statutes. Not so in Indiana.

(4) The Territory of Iowa. The arson statute in effect in the Territory of Iowa in 1839 (the statute was passed at the first session of the Legislative Assembly of the Territory) was very similar to the Indiana statute and thus provides nearly as good an example of the treatment of arson as an offense against property. There was a single section covering arson, and it applied to the willful and malicious burning of any

dwelling house, malt house, office, shop, barn, stable, storehouse, stillhouse, factory, mill, pottery, or other building, the property of any other person, or any church, meeting house, school house, state house, courthouse, work

eral pattern of the English statutory arson offenses.¹⁴³ Although other Amer-

house, jail, or other public building, or any boat or other water craft, or any bridge on any public highway

The Statute Laws of the Territory of Iowa, Code of Criminal Jurisprudence, Section 26 (1839).

(5) North Carolina. See *infra* note 143.

(6) Washington Territory. In 1862, Washington Territory had three sections relating to unlawful burnings. Section 40 covered not only common law arson, but nearly the same buildings and vessels specified in Sections 1911, 1912 and 1913 of the statutes of the Territory of Alaska. Section 41 covered essentially the same personal property enumerated in Section 1915 of the Alaska territorial statute. Section 42 covered situations in which a dwelling house or building was burned by the owner and the dwelling house or building of another was burnt or injured by fire. Unlike Alaska, Washington did not include an insurance fraud section in the chapter dealing with offenses against property. In addition, under Section 40 "should the death of any person ensue therefrom, known to be occupying or present on said premises, at the time such premises are willfully set fire to, the offender, on conviction thereof, shall be deemed guilty of murder in the first degree." This provision is a special application of the felony-murder rule, and had little to do with the crime of arson other than to make explicit in the arson statute what was already provided for in the statute defining murder in the first degree in Section 12 of the Territorial Laws. Statutes of Washington Territory, §§ 12, 40, 41 and 42 (1863).

(7) Wyoming. The 1931 Wyoming arson statute appears to be patterned upon the Indiana statute. There is some slight difference in the language of the two statutes. The Wyoming statute embraces more property on the subject of arson than the Indiana statute, and thus it too represents an extreme example of the treatment of arson as an offense against property:

32-301. Arson defined. Whoever willfully or maliciously burns or attempts to burn any dwelling house or other building or any structure, finished or unfinished, occupied or unoccupied, whether the same be used or intended for a dwelling house or other purpose; or any bridge, or any cord wood in a pile; or any rick, stack or shock of grain, hay or straw; or any grain not severed from the ground; or any fence of whatever material composed; or the material for the construction of any such house, building, structure, bridge or fence; or any timer or lumber; or any railroad car or water tank or windmill; or any sheep wagon or tent, whether used for a dwelling place or other purpose; or any oil derrick or rig; or any threshing machine, farm machinery, automobile or motor trucks, implements; the property so burned being of the value of twenty dollars or upwards, and being the property of another; or being insured against loss or damage by fire, and the burning or attempting to burn being with the intent to prejudice or defraud the insurer, is guilty of arson, and shall be imprisoned in the penitentiary not more than twenty-one years, and should the life of any person be lost thereby such offender shall be deemed guilty of murder in the first degree and shall suffer death but the jury may qualify their verdict by adding thereto "without capital punishment," and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor, for life.

Wyoming Revised Statutes, 1931, Section 32-301 (1931).

143. There are twelve arson offenses (excluding the typical special attempt statutes which also appear in the North Carolina scheme) in Article 15 ("Arson and

ican states continue to conceive of arson as an offense against property¹⁴⁴ (except, perhaps, for common law arson), North Carolina alone continues to adhere to the early nineteenth century English model.¹⁴⁵

Other Burnings”) of Chapter 14 (“Criminal Law”) of the General Statutes of North Carolina. N.C. GEN. STAT. §§ 14-1.1, -58 to -63, -66 (1981). Section 14-58 provides that “there shall be two degrees of arson as defined at the common law.” The distinction between first and second degree arson is made on the basis of whether the dwelling house was “occupied” or “unoccupied” at the time of the burning. Sections 14-58.1 and 14-58.2 extended first degree arson to the willful and malicious burning of any mobile home or manufactured-type house or recreational trailer home which is likewise occupied at the time of the burning. (As to the need for this statute to clarify the common law, *see supra* note 20.) And it is a Class E felony, which carried a punishment of imprisonment up to 30 years, or a fine or both (§ 14-1.1) to “wantonly and willfully set fire to or burn or caused to be burned” the following buildings or structures: (1) specified public buildings owned or occupied by named governmental entities (§ 14-59); (2) school buildings owned, leased or used by public or private schools, colleges or educational institutions (§ 14-60); (3) various types of bridges, “fire-engine” houses, and rescue squad buildings (§ 14-61); (4) uninhabited houses, church buildings, various private buildings used for specified purposes of any building, structure or erection used or intended to be used in carrying on any trade or manufacture, “*whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person*” (§ 14-62); (5) buildings and structures in the process of construction which are intended to be used for indicated purposes (§ 14-62.1); (6) ginhouses or tobacco houses (§ 14-64); and (7) a dwelling house set fire to or burned by the dweller (whether that person is the owner or not) or a building designed or intended as a dwelling house set fire to or burned by the owner “*for a fraudulent purpose.*” (§ 14-65). In addition, it is a class H felony (punishable by imprisonment of up to 10 years, or a fine or both — as of January 1, 1985) (§ 14-1.1) to “wantonly and willfully set fire to or burn or cause to be burned” (1) any boat, barge, ferry or float, without the consent of the owner thereof, unless the consent is given for an unlawful or fraudulent purpose (§ 14-63); and (2) specified types of personal property and “personal property of any kind,” whether insured or not, when done “with intent to injure or prejudice the insurer, the creditor or the person owning the property, or any other person, whether the property is that of such person or another.” (§ 14-66).

144. *See infra* notes 221-31 and accompanying text.

145. Although the North Carolina courts have recognized that common law arson (§ 14-58) protects against danger those who might be in the dwelling house which is burned, *State v. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978); *State v. Wyatt*, 48 N.C. App. 709, 269 S.E.2d 717 (1980), (quoting *Jones* 296 N.C. at 77-78, 248 S.E.2d at 860), they have acknowledged that the statutory arson offenses protect property. *See State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982); *State v. White*, 288 N.C. 44, 215 S.E.2d 557 (1975), *vacated on other grounds*, 291 N.C. 118, 229 S.E.2d 152 (1976); One might be tempted to argue that the division of common law arson into two degrees on the basis of whether “the dwelling burned was occupied at the time of the burning,” N.C. GEN. STAT. § 14-58, reflects concern for the protection of lives rather than the protection of property and thus North Carolina should be classified as a jurisdiction in which persons as well as property are protected by the law of arson. But my criteria for deciding whether the offense if designed primarily to protect persons over property is whether the offense has been expanded

The apex of arson as a property crime in America was reached in the middle years of the current century. Drawing upon the English and American experience with arson as a property offense, in 1948 the National Board of Fire Underwriters published the "Model Arson Law."¹⁴⁶ The "Model Arson Law" was the most influential factor in the development of the law of arson before the publication of the Model Penal Code.¹⁴⁷ By the 1960's the arson law of 44 states was either patterned upon the Model Arson Law or contained many of its salient features.¹⁴⁸

to protect against risks to people that were not protected at common law. Since North Carolina gives no more recognition to the person endangering aspects of arson than did the common law, I classify North Carolina as a property protecting jurisdiction.

146. The "Model Arson Law" was published in 1948. See INSURANCE COMMITTEE FOR ARSON CONTROL, CURRENT ARSON ISSUES: A POSITION PAPER 7 (1983) (not 1953 as is suggested in MODEL PENAL CODE AND COMMENTARIES § 220.1 comment 1, at 7 (1980)).

147. MODEL PENAL CODE AND COMMENTARIES § 220.1 comment 1, at 7 has been expanded to take into account the risks to people. North Carolina gives no more recognition to the person endangering aspects of arson than did the common law. Here North Carolina is classified as a property protecting jurisdiction.

148. Alabama (ALA. CODE §§ 13-2-20 to -2-28 (1977) (repealed 1978)); Alaska (ALASKA STAT. §§ 11.20.010-.070 (1977) (repealed 1978)); Arizona (ARIZ. REV. STAT. ANN. §§ 13-231 to -235 (1956) (repealed 1978)); Arkansas (ARK. STAT. ANN. §§ 41-501 to -507 (1964) (repealed 1975)); California (CAL. PENAL CODE §§ 447a-450a (West 1955) (repealed 1979)); Colorado (COLO. REV. STAT. §§ 40-3-1 to -3-4 (1963) (repealed 1971)); Connecticut (CONN. GEN. STAT. ANN. §§ 53-82 to -87 (West 1958) (repealed 1969)); Delaware (DEL. CODE ANN. tit. 11, §§ 351-357 (1953) (repealed 1971)); Florida (FLA. STAT. ANN. §§ 806.01-.06 (West 1965) (amended 1974)); Georgia (GA. CODE ANN. §§ 26-2208 to -2211 (1933) (amended 1968)); Idaho (IDAHO CODE §§ 18-801 to -804 (1948) (repealed 1971, but re-enacted 1972)); Illinois (Criminal Code of 1961, tit. III, art. 20, § 20-1 (Arson), ILL. ANN. STAT. ch. 38, § 20-1 (Smith-Hurd 1964) (amended 1967, supplemented 1977)); Indiana (IND. CODE ANN. §§ 10-301 to -306 (Burns 1956) (repealed 1976)); Iowa (IOWA CODE ANN. §§ 707.1-.4 (West 1946) (repealed 1978)); Kansas (Act of March 13, 1935, ch. 157, 1935 Kan. Sess. Laws 240 (repealed 1969)); Kentucky (KY. REV. STAT. ANN. §§ 433.010-.040 (Baldwin 1963) (repealed 1974)); Maine (ME. REV. STAT. ANN. tit. 17, §§ 151-153, 155-157 (1964) (repealed 1967)); Maryland (MD. ANN. CODE art. 27, §§ 6-10 (1957)); Massachusetts (MASS. GEN. LAWS ANN. ch. 266, §§ 1, 2, 5, 5A (West 1959)); Michigan (MICH. COMP. LAWS §§ 750.71-.77 (1979)); Minnesota (Act of Apr. 21, 1953, ch. 602, 1953 Minn. Laws 705) (repealed 1976)); Mississippi (MISS. CODE ANN. §§ 97-17-1 to -17-11 (1972)); Missouri (Mo. REV. STAT. §§ 560.010-.035 (1959) (repealed 1977)); Montana (MONT. REV. CODE ANN. §§ 94-502 to -506 (Smith 1947) (repealed 1974)); Nebraska (NEB. REV. STAT. §§ 28-504.01 to -504.05 (1943) (repealed 1979)); Nevada (NEV. REV. STAT. §§ 205.010-.030 (1963) (amended 1975)); New Hampshire (N.H. REV. STAT. ANN. §§ 584:1-.5 (1968) (repealed 1971)); New Jersey (N.J. STAT. ANN. §§ 2A:89-1 to :89-4 (1953) (repealed 1979)); New Mexico (N.M. STAT. ANN. §§ 41-501 to -505 (1941) (repealed 1963)); North Carolina (N.C. GEN. STAT. §§ 14-58 to -67.1 (1981)); North Dakota (N.D. CENT. CODE §§ 12-34-01 to -34-04 (1960) (repealed 1973)); Ohio (OHIO REV. CODE ANN. §§ 2907.02-.06 (Page 1953)); Oklahoma (OKLA. STAT. ANN. tit. 21, §§ 1401-1404 (West 1983)); Oregon (OR. REV. STAT. §§ 164.010-

Since the Model Arson Law was prepared by an organization which represented the fire insurance industry, not surprisingly it treats arson as an offense against property though it also includes common law arson within its terms.¹⁴⁹ Hence it does not make explicit reference to the life-endangering qualities of the burning, nor does its classification scheme implicitly recognize the importance of such risks. Instead, it divides the burning offenses into four categories *depending upon the type of property burned*. Except for the insurance fraud section, an offense is committed when "Any person . . . willfully and maliciously sets fire to or burns or causes to be burned" the property described in the section.¹⁵⁰ Section 1 covers dwelling houses and buildings within its curtilage, though the phrase used by the statute refers to specified buildings "or other outhouse that is parcel thereof, or belonging to or adjoining thereto."¹⁵¹ Thus far Section 1 codifies common law arson, but the section makes an important modification by adding "whether the property of himself or another."¹⁵² This latter phrase casts aside one of the criteria by which common law arson assured that it was an offense against the security of the habitation.¹⁵³ Section 1 of the Model Arson Law thus prevents the dweller from burning his or her dwelling house though the person lives in the house alone. By eliminating the "of another" requirement of common law arson, the Model Arson Law gives at least equal importance to the protection of the property interest in the dwelling (e.g., the property rights of the landlord when the tenant burns a house occupied by the tenant alone). A violation of Section 1 carries a sentence of imprisonment for not less than

.080 (1965)); Pennsylvania (PENN. STAT. ANN. tit. 18, §§ 4905-4908 (Purdon 1963) (repealed 1972)); Rhode Island (R.I. GEN. LAWS §§ 11-4-2 to -4-6 (1956) (amended 1980)); South Carolina (S.C. CODE ANN. §§ 16-311 to -314, 16-319 to -320 (Michie 1962) (amended 1982)); South Dakota (S.D. CODIFIED LAWS ANN. §§ 22-33-1 to -33-7 (1967) (amended 1972)); Tennessee (TENN. CODE ANN. §§ 39-501 to -506 (1955) (amended 1967)); Utah (UTAH CODE ANN. §§ 76-6-1 to -6-5 (1953) (repealed 1973)); Vermont (VT. STAT. ANN. tit. 13, §§ 502-506 509 (1974)); West Virginia (W. VA. CODE §§ 61-3-1 to -3-5 (1984)); Wisconsin (Wis. STAT. ANN. §§ 943.02-.05 (West 1958)); Wyoming (WYO. STAT. §§ 6-121 to -125 (1957) (renumbered as §§ 6-7-101 to -7-105 (1977) (repealed 1982)).

149. Although there was some variation in the arson statutes of the states listed *supra* note 148, all of those states (with the frequent exception of common law arson) treated arson as an offense against property. In other words, the statutory scheme did not contain provisions (either explicit or implicit) which sought to protect persons in situations in which they were *not protected* by common law arson.

150. Sections 1, 2, 3 of the Model Arson Law are so worded. The "insurance fire" section, Section 4 of the Model Arson Law, makes it a crime for "any person" to "willfully and with intent to injure or defraud the insurer set[] fire to or burn[] or cause[] to be burned" the subject personal property. MODEL ARSON LAW §§ 1-4 (1948) (reprinted *infra* App. A).

151. *Id.* § 1.

152. *Id.*

153. See *infra* text accompanying notes 468-90.

two nor more than twenty years.¹⁵⁴ Section 2, in nearly comprehensive terms, prohibits the burning of other buildings not covered by Section 1 and a "public bridge."¹⁵⁵ Like Section 1, the subject matter of the section is a building or bridge "whether the property of himself or of another."¹⁵⁶ A violation of Section 2 is punishable by imprisonment from not less than one nor more than ten years.¹⁵⁷ Section 3 prohibits the burning of specified personal property "or any other personal property not herein specifically named" when it is of the value of "twenty-five dollars or more and the property, in whole or in part, of another person."¹⁵⁸ A violation of Section 3 is punishable by imprisonment for not less than one nor more than three years.¹⁵⁹ Finally, Section 4 punishes any person who "willfully and with intent to injure or defraud the insurer" sets fire to or burns or causes to be burned specified classes of personal property and "personal property of any kind, whether the property of himself or another, which is insured against loss or damage by fire."¹⁶⁰ A violation of Section 4 is punishable by imprisonment for not less than one nor more than five years.¹⁶¹

The Model Arson Law thus prohibits (a) the burning of all buildings or any public bridge, whether the property of the arsonist or another, (b) the burning of any personal property of the value of \$25 or more and the property, in whole or in part, of another, and (c) the burning of all insured personal property, whether it is the property of the arsonist or another, when done with the intent to injure or defraud the insurer.

Compared to the common law offense, the Model Arson Law was similar and different in the following ways:

1. It apparently retains the common law *mens rea* requirement for all arson except the insurance fraud offense.¹⁶²
2. It arguably also retains the common law notion of burning.¹⁶³

154. MODEL ARSON LAW § 1.

155. *Id.* § 2.

156. *Id.*

157. *Id.*

158. *Id.* § 3.

159. *Id.*

160. *Id.* § 4. The Model Arson Law, as do many of the contemporary statutes, also classified persons who aid, counsel or procure the prohibited burning as principals rather than as accessories before the fact. It also contained a special attempt provision which provides, in principal part, that a person who prepares the subject property for burning is guilty of attempted arson. *Id.* § 5. Similar provisions are common in contemporary arson legislation. A discussion of the law of parties and the law of attempt pertaining to arson is beyond the scope of this paper.

161. *Id.* § 4.

162. *Id.* §§ 1-3. Problems with the *mens rea* requirement under the Model Arson Law and similar statutes are discussed *infra* text accompanying notes 574-91.

163. *Id.* §§ 1-4. For a discussion of the meaning of the terms "set fire to or burn," the language used in the Model Arson Law, see *infra* text accompanying notes 280-96.

3. It greatly expands the subject matter of arson from dwelling houses and buildings within the curtilage to all buildings (regardless of the property interest the arsonist may have in the building) and all personal property of another valued at \$25 or more;¹⁶⁴ and with reference to the insurance fraud offense, any insured personal property.¹⁶⁵ It contains a provision relating to insurance fraud.¹⁶⁶

4. It abolishes the common law "of another" requirement for dwelling house and buildings within the curtilage.¹⁶⁷ And while it does not use that concept for other buildings,¹⁶⁸ it is used in modified form in the general personal property provision.¹⁶⁹ The insurance fraud section, of course, abolishes the "of another" requirement as well.¹⁷⁰

5. It divides the arson offenses into four categories for the purpose of assessing different punishments (a term of years) applicable to each category whereas common law arson was not divided into different categories. All arson was thus punishable by death at common law.¹⁷¹

6. Finally, while common law arson protected dwellers from the human risks associated with fire, the Model Arson Law is primarily designed to protect property. Hence it makes no explicit reference to life-endangering circumstances and, except for the preservation of the common law offense, its architecture does not implicitly recognize the importance of such human risks. Instead, arson is graded in severity according to the type of property burned.

IV. THE MODERN SYNTHESIS: ARSON AS AN OFFENSE AGAINST PERSONS AND PROPERTY

A. *Developments before the Model Penal Code*

During the middle years of the current century not all American jurisdictions adopted the prevalent view that arson was essentially and, except for common law arson, only an offense against property. A small minority

164. MODEL ARSON LAW §§ 1-3.

165. *Id.* § 4.

166. *Id.*

167. *Id.* § 1.

168. *Id.* § 2.

169. *Id.* § 3. It is modified by providing that the subject matter is property, in whole *or in part* of another person. This would mean that an automobile which is subject to a security interest could be the subject of arson under the statute. See *People ex rel. Van Meveren v. District Court*, 619 P.2d 494 (Colo. 1980) (en banc).

170. MODEL ARSON LAW § 4.

171. *Id.* §§ 1-4.

of states, six in number,¹⁷² remained, in varying degrees, more faithful to the common law's conception of arson as an offense which protected people (albeit a small class of people) from the risk of death or injury by fire.¹⁷³ In each of these states, in addition to protecting property (as was done in the great majority of American jurisdictions) the arson laws expanded the class of people protected against the risk to life or limb caused by an unlawful burning of property beyond that afforded by the common law. In other words, they extended the common law's protection to those who would not have been so protected by the common law offense and by so doing they furthered the concept of arson as a crime designed to protect people while also adopting the majority's conception of arson as a property offense.¹⁷⁴ In

172. The states were Hawaii, Louisiana, New York, Texas, Virginia and Washington. The law of each of these states is discussed *infra* text accompanying notes 175-88.

173. The small class of people designed to be protected by common law arson, of course, were the inhabitants of a dwelling house.

174. The property protected by the arson statutes of these jurisdictions was similar to the classes of property protected in the majority of American states. For example, in 1955 the statutes of Hawaii divided the "burning offenses" into four categories. First and second degree arson dealt with common law arson, that portion of the common law offense which was committed in the *nighttime* (which implicitly suggests that there is an increased danger to persons asleep in the dwelling house at night for the fire may spread before protective action can be taken) and when "there is at the time of the burning any occupant or inmate" in the dwelling house (an implicit requirement which more closely assures that people may actually be at risk by the fire). First degree arson was punishable by life imprisonment with or without the possibility of parole. HAWAII REV. STAT. §§ 263-2, -3 (1955) (repealed 1972) (1972 Hawaii Sess. Laws ch. 9, § 1.) Second degree arson was all other common law arson and was punishable by imprisonment for life or for any number of years. HAWAII REV. STAT. § 263-4 (1955). Although first and second degree arson in Hawaii, taken together, simply cover common law arson, the division of that offense into two degrees depending upon the implicit risk demonstrates this state's concern for the protection of people. But it is in the "malicious burning" offense (an offense which is not called arson, but differs only in the subject matter of the crime) where the concern for the personal safety of persons other than the inhabitants of dwelling houses was extended beyond the scope of the common law. A person who burned a thing, whether that of the offender or of another person, with intent to injure another, or without any legal or justifiable motive or object, *and with a reckless disregard of the life, or personal safety, property, or legal rights, or interests of another, where the same are obviously, immediately and imminently endangered* by the burning

was guilty of malicious burning. *Id.* § 263-5 (emphasis added). In turn, the malicious burning offense was divided into three degrees. A nighttime burning of any building, vessel or structure whatsoever, "or its contents,

or any portion thereof, whether partly or wholly his own or that of another, *by the burning of which another might be injured*, where the building, vessel or structure with the contents of the building, vessel or structure is of the value of \$1,000 or more, is guilty of malicious burning in the first degree,

these jurisdictions arson was a more complex crime than in the majority of American states. These minority states synthesized the two views of arson, the common law concern for personal safety and the statutory concern for property, into a new offense which protected both persons and property in various circumstances. Arson protected against expanded human risks and property risks caused by the unlawful burning of property in various circumstances. And as we shall see later, this view prevails in most American states today.

Before examining those these states that expanded the protection of people from the risks of injury or death by their arson statutes, it is worth summarizing how the common law protected people from the hazards of unlawful burnings. The common law did not use criteria which explicitly referred to life or limb endangering circumstances as an element of the crime. For example, the common law did not explicitly prohibit unlawful burnings in situations in which it was foreseeable that human life might be endangered. Instead, the danger to the inhabitants of dwelling houses was implicit in the common law's definitions of "dwelling house" and "of another." These two elements generally worked in tandem to assure that arson protected the inhabitants of a place of human habitation from the risks associated with burning the building.

Rather than using implicit criteria alone to extend the protection of the common law offense, each of the six minority jurisdictions (in varying degrees) relied upon explicit criteria as well. Hawaii expanded the scope of human protection by criminalizing a malicious burning of any building, vessel or structure, or its contents, whether wholly or partially owned by the arsonist or another, when "*by the burning of which another might be injured.*"¹⁷⁵ Louisiana's statute, which was a model of simplicity, punished as aggravated arson the intentional setting fire to "any structure, water craft, or moveable,

and shall be imprisoned for life at hard labor, or any number of years.

Id. § 263-7 (emphasis added).

A daytime burning under the same circumstances, or when the value of the building, vessel or structure together with its contents valued at between \$500 and \$1,000, was second degree malicious burning. *Id.* § 263-8. Third degree malicious burning was a burning which would have been either first or second degree except the total value of the property was less than \$500, or where certain other property was burned when the burning did not endanger another person. Third degree malicious burning was punishable by fine or imprisonment at hard labor for not more than five years. *Id.* § 263-9. The fourth burning offense, which was divided into degrees, was an insurance fraud provision. *Id.* § 263-10.

The Hawaii statutes thus covered nearly all property protected in majority view jurisdictions and, in addition, expanded the scope of the class of people protected far beyond that provided by the common law offense (essentially, people endangered by the burning of any "building, vessel, or structure or its contents). In addition, see *infra* text accompanying note 175.

175. *Id.* §§ 263-7 to -8.

whereby it is foreseeable that human life might be endangered.”¹⁷⁶ A second offense, called simple arson, prohibited the intentional setting fire to “any property of another, without the consent of the owner” (unless the burning constituted aggravated arson).¹⁷⁷ New York divided arson into three degrees.¹⁷⁸ What would have been arson at common law was arson in the first or second degree depending upon the time of the burning and the presence of a human being in the dwelling when it was burned. If the burning was in the nighttime and there was a person in the dwelling when it was burned, it was first degree arson, otherwise it was arson in the second degree.¹⁷⁹ But New York also sought to protect persons from the risks of fire who were not in dwelling houses by providing that it was arson in the first degree to willfully burn or set on fire, in the nighttime “a car, vessel, or other vehicle, or a structure or building other than a dwelling house, wherein to the knowledge of the offender, there is, at the time a human being.” If the burning occurred in the daytime or if the property in question was ordinarily occupied at night by a human being, although no human being was present when it was burned, it was second degree arson.¹⁸⁰ In Texas arson was “the willful burning of any house.”¹⁸¹ Owners were generally permitted to burn their house except when the house was within a town or city, “or when there is

176. LA. REV. STAT. ANN. § 14:51 (West 1986). Section 14:51 also applied to intentional damage by explosion, and aggravated arson was punishable by imprisonment at hard labor for not less than six nor more than twenty years. *Id.*

177. *Id.* § 14:52. “In aggravated arson, danger to human life is the essential element, whereas in simple arson it is damage to property. The usual enumerations, classifications and definitions have been curtailed. Distinctions between dwellings and non-dwellings, night and day, and movable and immovable property have been eliminated.” *Id.* (reporter’s comment); accord Morrow, *The Louisiana Criminal Code of 1942-Opportunities Lost and Challenges Yet Unanswered*, 17 TUL. L. REV. 1, 13, 20 (1942). Not surprisingly, the Louisiana Supreme Court has so held. *State v. Murphy*, 214 La. 600, 38 So. 2d 254 (1948).

In addition, arson with intent to defraud was prohibited by LA. REV. STAT. ANN. § 14:53.

178. N.Y. PENAL LAW OF 1909 §§ 220-24 (McKinney 1944).

179. *Id.* §§ 220-21.

180. *Id.* Burning to prejudice or defraud an insurance company was also second degree arson, as well the nocturnal burning of an uninhabited building adjoining or within the curtilage of an inhabited building in which there was a person present. (It is not clear whether this provision did more than restate the common law curtilage rule varied by the time of the burning and the presence of a person in the building when it was burned. If either of these two factors were missing, it was third degree arson.) *Id.* §§ 222-23. The burning of any other “vessel, car, or other erection” which was not arson in the first or second degree, or the burning of any personal property of another of the value of \$25.00 or more was also arson in the third degree. *Id.* § 223.

181. TEX. PENAL CODE ANN. art. 1304 (Vernon 1953). A house was defined as “any building, edifice, or structure enclosed with walls and covered whatever may be in the material used for building.” *Id.* art. 1305.

apparent danger by reason of the burning thereof, that the life or person of some individual . . . will be endangered."¹⁸² Like most American jurisdictions, Texas also extended arson (called "other willful burning") to cover a wide variety of property.¹⁸³

In Washington it was first degree arson to burn "or set on fire in the nighttime the dwelling house of another, or any building in which there shall be at the time a human being,"¹⁸⁴ or "to set any fire manifestly dangerous to any human life."¹⁸⁵ The Washington statutes also expanded the subject matter of arson to protect property unprotected by the common law offense.¹⁸⁶ Finally, although the Virginia statutes protected persons from fire risks who were not protected by common law arson, this expanded protection was achieved by means somewhat less explicitly related to life or limb endangering circumstances than the criteria used in the other five minority jurisdictions. Arson was divided into three levels of severity. The criteria used to distinguish among these three categories were (1) the type of property burned (e.g., any dwelling house or house trailer, any hotel, asylum, or other house in which persons usually dwell or lodge, and any railroad car, boat or vessel, or river craft in which persons usually dwell or lodge, or any jail or prison as opposed to other specified property); (2) the time of the burning (nighttime as opposed to daytime); and (3) whether *there was a person actually present in the property when it was burned*.¹⁸⁷ Virginia also followed the English legislative developments of the nineteenth century and expanded arson to protect a wide variety of property as well.¹⁸⁸

Thus by the middle of the Twentieth Century all American states used the crime of arson to protect property, whereas the common law offense protected only the dwelling house and buildings within its curtilage purely as a consequence of the protection afforded the dweller. And though all American states protected against essentially the same human risks covered

182. *Id.* art. 1312. There were other exceptions as well which are not pertinent to this inquiry. This exception expanded the common law's protection because (1) one could burn her own dwelling house at common law without felony liability, even if it endangered the life or person of someone as long as the dwelling house of another was not burned (or a building within the curtilage); and (2) it expanded the subject matter so that the burning of any building, not just dwelling houses, could invoke liability under these circumstances.

183. *E.g.*, Article 1318 (burning buildings other than houses, hay, grain, lumber and the like of another); Article 1319 (ships, vessels and boats in which another has an interest); Article 1320 (bridges); Article 1321 (a woodland or prairie of another); Article 1321a (woods, forest, cut over, brush, range or grassland belonging to another); Article 1322 (insured personal property). *Id.* arts. 1318-22.

184. WASH. REV. CODE ANN. § 9.09.010(1) (1961).

185. *Id.* § 9.09.010(2).

186. *Id.* §§ 9.09.020, .050.

187. VA. CODE §§ 18.2-77 to -82 (1975).

188. *Id.*

by common law arson, six states expanded the scope of the arson offense to protect persons other than the occupants of a dwelling house or of a building within its curtilage. In these six states, arson was an offense against *both persons and property*, but in the remaining forty-four arson was a crime against the habitation and property alone. This was the context in which the Model Penal Code was drafted and finally published.¹⁸⁹

B. *The Model Penal Code*

The fire provisions of the Model Penal Code were patterned upon the minority view, the view that statutory arson should protect people from the risk of death or injury beyond that afforded by common law arson. Indeed, we are told that the drafters of the Code selected "a course intermediate between the New York and Louisiana approaches" in the drafting of the Model Penal Code offense.¹⁹⁰ But unlike that minority, which also protected various types of property from damage or destruction by the felony sanction of statutory arson,¹⁹¹ the Model Penal Code treats the destruction or damage of the tangible property of another which does not implicitly or explicitly endanger people as a felony (called criminal mischief) only if the actor purposely causes pecuniary loss in excess of \$5,000.00, or a substantial interruption or impairment of specified public services.¹⁹² The destruction or damage of all other tangible property of another by fire is a misdemeanor under the Code similar to the common law misdemeanor of malicious mischief.¹⁹³ To the extent that the Code protects property by the misdemeanor sanction, the Code more closely resembles the common law scheme than the statutory plans then existing in Hawaii, Louisiana, New York, Texas, Washington and Virginia (the minority view states), though they are all deeply rooted in the rationale of common law arson.

There are three felony fire provisions of the Model Penal Code,¹⁹⁴ although only the most egregious offense is called "arson."¹⁹⁵ The other two are known

189. Section 220.1 of the American Law Institute's Model Penal Code was initially considered at the Institute's May 1960 meeting. A.L.I. PROCEEDINGS 431-46 (1960). It was approved at that meeting, *id.* at 446, and again as part of the Proposed Official Draft at the Institute's May 1962 meeting. A.L.I. PROCEEDINGS 226-27 (1962).

190. MODEL PENAL CODE AND COMMENTARIES § 220.1 comment 2, at 9.

191. See *supra* text accompanying note 174.

192. MODEL PENAL CODE § 220.3(2) (1962).

193. MODEL PENAL CODE AND COMMENTARIES § 220.3 comment 1, at 41 ("this offense is derived from the common law misdemeanor of malicious mischief").

194. MODEL PENAL CODE §§ 220.1(1) (a felony of the second degree), 220.1(2) (a felony of the third degree), 220.3(1)(a), (2).

195. *Id.* § 220.1(1).

as “reckless burning or exploding,”¹⁹⁶ and “criminal mischief.”¹⁹⁷ “Arson” and “reckless burning” occur only when the fire (or explosion) (1) is ignited for the purpose of destroying a “building or occupied structure of another;” (2) is ignited for the purpose of destroying or damaging any property, whether his own or another’s, to collect insurance for such loss (but it is an affirmative defense that “the actor’s conduct did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury”);¹⁹⁸ or (3) places another person in danger of death or bodily injury, or which places a building or occupied structure of another in danger of damage or destruction regardless of where the fire is started.¹⁹⁹ In view of the affirmative defense to the insurance fraud-arson offense, “arson” and “reckless burning” achieve their goal of protecting persons by limiting the object of the fire to either a building or occupied structure of another, or by seeking to prevent fires which are proved to endanger such buildings or occupied structures, or the life or limb of another person.

The “building or occupied structure” criteria, like the common law analog — the definition of “dwelling house,” is based on the belief that there is a substantial probability that these structure will be occupied at the time of the fire and thus life and limb will thereby be endangered.²⁰⁰ In addition, extraordinary rescue efforts may well be undertaken when the fire endangers a place where people might be present.²⁰¹ There are, of course, equivalent risks attendant upon any fire though the probability that the risk will materialize into actual death or bodily injury is lower with other categories of property. Unwilling to use the second degree felony sanction to suppress or punish such low risk behavior, the line was drawn between buildings or occupied structures and all other types of tangible property.²⁰² There was an additional reason for drawing this line; it also functioned to protect “specially cherished property” as opposed to all property.²⁰³ On the other hand, since the essence of the offenses of “arson” and “reckless burning” under the Code is the suppression of and punishment for such risk taking behavior,²⁰⁴ the Code also makes it a felony to start a fire (with the requisite *mens rea*) which endangers the life or limb of another person or endangers a building or occupied structure of an-

196. *Id.* § 220.1(2). Today most American jurisdictions use the law of arson to protect against risks associated with the burning or exploding of certain property. See *infra* text accompanying notes 317-24. The Model Penal Code follows the same approach. MODEL PENAL CODE § 220.1(1).

197. MODEL PENAL CODE § 220.3(1)(a), (2).

198. *Id.* § 220.1(1)(a)-(b).

199. *Id.* § 220.1(2)(a)-(b).

200. MODEL PENAL CODE AND COMMENTARIES § 220.1 comment 5, at 18-19.

201. *Id.* at 19.

202. *Id.* comment 2, at 9-10 .

203. *Id.* comment 5, at 18-19. The common law definition of dwelling house functioned in essentially the same way.

204. See *id.* Part II §§ 220.1-230.5, at 1.

other.²⁰⁵ Here the criteria is explicit rather than implicit. And with this explicit criteria the fire may be started on any property whether the actor's or not. Of course, the fire must actually endanger people or the specified property to suffice.

Quite obviously the Model Penal Code provisions extend personal protection from the risks associated with fire well beyond the common law offense. This was achieved by the use of an expanded definition of the object of the fire (a building or occupied structure as opposed to a dwelling house), and by criminalizing the starting of any fire which recklessly endangers another person or a building or occupied structure. On the other hand, it differed from the arson laws of most American states which were in force at the time the Code was promulgated in the following respects.

(1) The principal purpose of the crimes of "arson" and "reckless burning" under the Code is to protect people from the risk of death or bodily injury caused by fire, whereas the majority of American states did not materially expand such personal protection beyond that afforded by common law arson.²⁰⁶ The six minority view states did expand such personal protection but not to the same extent as did the Model Penal Code's provisions.²⁰⁷

(2) The burning of property which was not a building or occupied structure and which did not recklessly endanger the life or limb of another person or a building or occupied structure is a misdemeanor under the Code called "criminal mischief." This offense is similar to the misdemeanor of malicious mischief at common law, with two narrow exceptions: when the actor purposely causes pecuniary loss in excess of \$5,000.00, or the fire (or explosion) causes a substantial interruption of specified public services. If either of these exceptions is present, the offense is a felony of the third degree (the same degree of felony as "reckless burning" under the Code). Otherwise it is a misdemeanor, petty misdemeanor or infraction depending upon other circumstances.²⁰⁸ The offense of "criminal mischief," like malicious mischief at common law,²⁰⁹ is not limited to damaging tangible property of another by fire. Other means will do as well.²¹⁰ All American states at the time the Code was promulgated protected a wide range of property with their arson laws and related felony offenses. In the majority of states arson was a crime against the habitation and against property.²¹¹ In the minority of states, arson was a crime against persons and property,²¹² but, like the majority, the arson laws and related felony offenses which had as their goal the protection of property also

205. MODEL PENAL CODE § 220.1(2).

206. See *supra* text accompanying notes 146-61.

207. See *supra* text accompanying notes 172-88.

208. MODEL PENAL CODE § 220.3.

209. See *supra* text accompanying notes 68, 117-21.

210. MODEL PENAL CODE § 220.3.

211. See *supra* text accompanying notes 146-61.

212. See *supra* text accompanying notes 172-88.

protected a wide range of property. Not so with the Model Penal Code.

(3) The "arson" and "reckless burning" provisions of the Model Penal Code abandon the common law conception of arson as requiring that the subject matter of the offense be actually burned.²¹³ Instead, under the Code "arson" or "reckless burning" is committed when a fire is started with the requisite *mens rea*. The Code thus makes "arson" and "reckless burning" into a type of inchoate offense which would have been punishable at common law as an attempt, which was a misdemeanor.²¹⁴ No American state treated arson and its related crimes as a type of inchoate offense at the time the Code was published. Instead, the common law requirement of a "burning" was used in the vast majority of states.²¹⁵ The principal conduct prohibited by the modern arson statutes and the Model Penal Code is discussed in Section V below.²¹⁶

(4) Finally, the *mens rea* of "arson" and "reckless burning" under the Code substantially differs from the common law's requirement of malice. And the arson and related laws of the great majority of states at the time the Code was published used, for the most part, the common law *mens rea* requirement of malice, although there was some variation in the wording of the statutes.²¹⁷ The *mens rea* requirement of arson and the related felony offenses in the modern statutes and the Model Penal Code is discussed in section V below.²¹⁸

C. *The Modern Synthesis After the Publication of the Code*

One of the principal purposes for the Model Penal Code project was to stimulate the systematic re-examination of the substantive criminal law in the United States.²¹⁹ The Code has been "stunningly successful" in accomplishing this goal.²²⁰ Although no American state has adopted the Model Penal Code's provisions on arson, reckless burning, and criminal mischief, the process of rethinking the substantive criminal law which the Code fostered has resulted in a dramatic change in the arson statutes between mid-century and the close of the 1984 legislative sessions in the states. What was the minority position is quite clearly the majority position today, for forty-one American states have

213. MODEL PENAL CODE § 220.1(1)-(2); MODEL PENAL CODE AND COMMENTARIES § 220.1 comment 1, at 9 & comment 3, at 14-15.

214. See *supra* note 213.

215. See *supra* text accompanying notes 146-61; *infra* text accompanying notes 276-94; *infra* Appendix A.

216. See *infra* text beginning at note 278.

217. See *supra* text accompanying notes 95-115; *supra* text accompanying notes 146-61; *infra* text accompanying notes 574-91.

218. See *infra* text beginning at note 571.

219. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

220. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1140 (1978).

now expanded the personal protection of their arson statutes well beyond that afforded by the common law while at the same time (unlike the Model Penal Code provisions) they generally also protect a wide range of property.²²¹ Con-

221. ALA. CODE §§ 13A-7-41 to -7-43 (1982 & Supp. 1985); ALASKA STAT. §§ 11.46.400, .410 (1978); ARIZ. REV. STAT. §§ 13-1703 to -1704 (Supp. 1985); ARK. STAT. ANN. §§ 41-1902 to -1903 (1977 & Supp. 1983); CAL. PENAL CODE §§ 451-452 (West Supp. 1986); COLO. REV. STAT. §§ 18-4-102 to -4-105 (1978); CONN. GEN. STAT. ANN. §§ 53a-111 to -114 (West 1985); DEL. CODE ANN. tit. 11, §§ 801-803 (1979); FLA. STAT. ANN. § 806.01 (West Supp. 1986); GA. CODE ANN. §§ 26-1401 to -1403 (1983); HAWAII REV. STAT. §§ 708-820 to -821 (1976); Criminal Code of 1961, tit. III, art. 20, §§ 20-1 (Arson), 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, §§ 20-1, 20-1.1 (Smith-Hurd 1977 & Supp. 1986); IND. CODE ANN. § 35-43-1-1 (Burns 1985); IOWA CODE ANN. §§ 712.1-.3 (arson in the third degree, the residuary arson offense in Iowa, is an aggravated misdemeanor, § 712.4) (West 1979 & Supp. 1986); KAN. STAT. ANN. §§ 21-3718 to -3719 (1981); KY. REV. STAT. §§ 513.020-.060 (1985); LA. REV. STAT. ANN. § 14:51-.53 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985); MINN. STAT. ANN. §§ 609.561-.563, .576 (West Supp. 1985); MO. REV. STAT. §§ 569.040-.055 (1978); MONT. CODE ANN. §§ 45-6-102 to -6-103 (1983); NEB. REV. STAT. §§ 28-502 to -505 (1979); NEV. REV. STAT. §§ 205.010-.030 (1985). Though the Nevada arson statutes are patterned upon the Model Arson Law, amendments have extended the protection to persons, though modestly, beyond that afforded by the Model Arson Law. Accordingly, Nevada is included with these states for this purpose though elsewhere in this paper Nevada remains classified as a Model Arson Law state. N.H. REV. STAT. ANN. § 634:1 (1974); N.J. STAT. ANN. § 2C:17-1 (West 1982); N.M. STAT. ANN. §§ 30-17-5 to -17-6 (1984); N.Y. PENAL LAW §§ 150.00-.20 (Supp. 1986); N.D. CENT. CODE §§ 12.1-21-01 to -21-02 (1985); OHIO REV. CODE ANN. §§ 2909.02-.03 (Page Supp. 1985); OKLA. STAT. ANN. tit. 21, § 1401 (West 1983). Oklahoma, like Nevada, adopted the Model Arson Law and then amended the arson provisions to extend the personal protection of its arson statutes beyond that afforded by the Model Arson Law. Accordingly, Oklahoma is included in this list of states. Nevertheless, because of its basic adherence to the provisions of the Model Arson Law, Oklahoma is also classified as a Model Arson Law State elsewhere in this paper. OR. REV. STAT. ANN. §§ 164.315, .325 (1985); 18 PA. CONS. STAT. ANN. tit. § 3301 (Purdon 1983); R.I. GEN. LAWS §§ 11-4-2 to -4-7 (Supp. 1985). Rhode Island also has a misdemeanor offense which is called "Arson-Seventh degree." R.I. GEN. LAWS § 11-4-8 (1981); S.C. CODE ANN. §§ 16-11-110, -125, -130, -140, -150 (a felony for a second offense), -170 (a felony/misdemeanor), -190 (Law. Co-op. 1985). South Carolina adopted most of the provisions of the Model Arson Law, along with a number of other unique provisions. Like Nevada and Oklahoma, South Carolina has, however, extended the personal protection of its arson statutes well beyond that afforded by the Model Law. Nevertheless, since it yet maintains many of the salient features of the Model Law, South Carolina is classified with the Model Arson Law states elsewhere in this paper. S.D. COMP. LAWS ANN. §§ 22-33-1 to -33-4, -33-10 (1979 & Supp. 1985); TENN. CODE ANN. §§ 39-3-201 to -3-206 (1982). Tennessee adopted the Model Arson Law. Although Tennessee still uses many of the salient features of that Model Law, it has been substantially altered by amendments and supplemented with more modern provisions. TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1986); UTAH CODE ANN. §§ 76-6-102 to -6-103 (1978); VA. CODE §§ 18.2-77 to -82, -86 (1982); WASH. REV. CODE ANN. §§ 9A.48.020-.48.040, .48.060 (West 1977 & Supp. 1985); WYO. STAT. §§ 6-3-101 to -3-103 (1983). Wyoming also

versely, at the midpoint of the current century, forty-four states had either adopted the Model Arson Law or had statutes which contained most of its salient provisions.²²² By 1984, only eight states remained fully committed to the principles set forth in the Model Arson Law. These states are Idaho,²²³ Maryland,²²⁴ Massachusetts,²²⁵ Michigan,²²⁶ Mississippi,²²⁷ North Carolina,²²⁸ Vermont,²²⁹ and West Virginia.²³⁰ In addition, although not apparently patterned upon the Model Arson Law, the arson statutes of Wisconsin similarly do not extend the personal protection of their arson offenses beyond that afforded by the common law, while extending protection from fire damage to any building of another or any property of another over the value of \$100, and any property of another from damage by explosion regardless of its value.²³¹

Before analyzing the general contours of the modern statutory law of arson, it is worth noting how the new American majority of states expanded personal protection beyond that afforded by the common law. Three of the forty-one states, Arizona,²³² Nevada,²³³ and Oklahoma,²³⁴ do so by defining

has a misdemeanor provision which is known as fourth degree arson. *Id.* § 6-3-104. These forty-one states also include the six states which comprised the minority at mid-century. These six minority states (Hawaii, Louisiana, New York, Texas, Virginia and Washington) adhere to this position today, although there have been amendments to their statutes in some instances.

222. *See supra* note 148.

223. IDAHO CODE §§ 18-801 to -804 (1979).

224. MD. CRIM. LAW CODE ANN. art. 27, §§ 6-11 (1982 & Supp. 1984).

225. MASS. GEN. LAWS ANN. ch. 266, §§ 1 to 13A (1970).

226. MICH. COMP. LAWS §§ 28.266, .275 (1981).

227. MISS. CODE ANN. §§ 97-17-1 to -13 (1973).

228. N.C. GEN. STAT. §§ 14-58 to -67.1 (1981). Although North Carolina adheres more closely to the common law as modified by the English legislation of the Nineteenth Century than any other American jurisdiction (*see supra* text accompanying note 143), its legislative scheme is sufficiently similar to the Model Arson Law as a pattern for their arson legislation. Indeed, the Model Arson Law itself was patterned upon the English statutory development of arson in the Nineteenth Century and the statutes of North Carolina were faithful to the English tradition.

229. VT. STAT. ANN. tit. 13, §§ 501-509 (1974 & Supp. 1985).

230. W. VA. CODE §§ 61-3-1 to -8 (1984).

231. WIS. STAT. ANN. §§ 943.02-.03 (West 1982). The statutes also contain insurance fraud provisions. *Id.* §§ 943.02(1)(b), .04. The difference in the treatment of the means used to damage personal property, fire or explosion, arguably does reflect a concern for personal risks, but not so in connection with fire.

232. ARIZ. REV. STAT. ANN. § 13-1704(A) (Supp. 1985).

233. NEV. REV. STAT. tit. 15, § 205.010 (1985). First degree arson is committed when a person "willfully and maliciously sets fire to or burns . . . any dwelling house or other structure, whether occupied or vacant, or any mobile home or other personal property which is occupied by one or more persons . . ." *Id.* (emphasis added).

234. OKLA. STAT. ANN. tit. 21, § 1401 (West 1983) ("Any person who willfully and maliciously sets fire to or burns or by the use of any explosive device or substance destroys . . . any building or structure or contents thereof, inhabited or occupied by one or more persons . . . shall be guilty of arson in the first degree . . .") (emphasis added).

the subject matter of the offense in such a way as to implicitly include risks to people. For example, Arizona's most serious arson offense is committed when a person "intentionally and unlawfully" damages "an *occupied structure* by knowingly causing a fire or explosion."²³⁵ In turn, an occupied structure is defined as "any structure . . . in which one or more human beings either is or is likely to be present or so near as to be in equivalent danger at the time the fire or explosion occurs. The term includes any dwelling house, whether occupied, unoccupied or vacant."²³⁶ Furthermore, the Arizona statute gives a broad definition to the term "structure."²³⁷

A second group of states, twelve in number, extend the scope of personal protection afforded by their arson laws with the use of criteria which more explicitly define person endangering circumstances associated with the fire, but do not expand the subject matter of the person protecting provisions beyond the subject matter of the property protecting provisions.²³⁸ Although there is

235. ARIZ. REV. STAT. ANN. § 13-1704 (West Supp. 1985).

236. *Id.*

237. "'Structure' means any building, object, vehicle, watercraft, aircraft, or place with sides and a floor, separately securable from any other structure attached to it and used for lodging, business, transportation, recreation or storage." *Id.* § 13-1701(4).

The South Dakota statute comes very close to the approach used by Arizona, Nevada, and Oklahoma. It is first degree arson in South Dakota to intentionally set fire to or burn "any occupied structure, *knowing the same to be occupied at the time . . .*" S.D. COMP. LAWS ANN. § 22-33-1 (1979) (emphasis added). Had the italicized language been omitted, the South Dakota statute would have been included here. But I have treated the italicized language as requiring the structure to be actually occupied at the time it is burned, and this additional requirement aligns South Dakota with the majority discussed below. See *infra* notes 245, 249, 256, and accompanying text.

238. ALA. CODE §§ 13A-7-41 to -7-43 (1982 & Supp. 1985); DEL. CODE ANN. tit. 11, §§ 801-803 (1979); HAWAII REV. STAT. §§ 708-820 to -821 (1976); Criminal Code of 1961, tit. III, art. 20, §§ 20-1 (Arson), 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, §§ 20-1, 20-1.1 (Smith-Hurd 1977 & 1986); IOWA CODE §§ 712.1-.3 (1985); KAN. STAT. ANN. §§ 21-3718 to -3719 (1981); KY. REV. STAT. §§ 513-020 to -060 (1985); LA. REV. STAT. ANN. §§ 14:15-:53 (West 1974 & Supp. 1985); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985); S.C. CODE ANN. §§ 16-11-110, -125, -130, -140, -150, -170, -190, -200 (Law. Co-op. 1985); TENN. CODE ANN. §§ 39-3-201 to -3-206 (1982).

In addition, the provisions of the Alaska arson statutes fall into this same pattern *if* the major portion of the property protecting provisions in that state are taken into consideration. Alaska protects only "buildings" *as property* by the law of arson. ALASKA STAT. §§ 11.46.400, .410 (1983). Other property is protected from damage from the use of "widely dangerous means" or by any means (including fire) by the felony provisions of the criminal mischief statutes. *Id.* §§ 11.46.480 ("criminal mischief in the first degree"); 11.46.482 ("criminal mischief in the second degree"). In this respect, Alaska falls somewhere in between Hawaii and the remaining eleven states cited in the first paragraph of this note.

Hawaii differs from all of the other states in that it does not protect either

considerable variation in the wording of the individual statutes, these person-endangering circumstances fall into three categories. The first is the actual or probable presence of another person in the property at the time of the occurrence. Seven states use this person-endangering circumstance.²³⁹ The second is the risk of death, bodily injury, or property damage created by the actor's conduct. Six states use this circumstance.²⁴⁰ The third and final explicit criterion is the fact that some other person was injured or killed by the actor's conduct. Four states use this criterion.²⁴¹ The first of these person-endangering circum-

person or property from injury or damage from fire or explosions alone. *See supra* note 8. HAWAII REV. STAT. §§ 708-820, -821 (1976). The Alaska property protecting provisions, except for "buildings," are thus similar to the property protecting provisions (and the person protecting provisions as well) used by Hawaii.

239. ALA. CODE § 13A-7-41 (1982) ("(1) Another person is present in such building at the time, and (2) The actor knows that fact, or the circumstances are such as to render the presence of a person therein a reasonable possibility."); DEL. CODE ANN. tit. 11, § 803 (1979) ("(1) He knows that another person not an accomplice is present in the building at the time; or (2) He knows of circumstances which render the presence of another person not an accomplice therein a reasonable possibility."); Criminal Code of 1961, tit. III, art. 20, § 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, § 20-1.1 (Smith-Hurd Supp. 1986) ("he knows or reasonably should know that one or more persons are present therein . . ."); IOWA CODE § 712.2 (West) ("is property in which the presence of one or more persons can be reasonably anticipated"); KAN. STAT. ANN. § 21-3719 (1981) ("committed upon a building or property in which there is some human being"); KY. REV. STAT. § 513.020 (1985) ("(a) The building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied . . ."); TENN. CODE ANN. § 39-3-201 (1982) ("(1) He knows or reasonably should know that one or more persons are present therein . . .").

240. Six states use this criterion, either in addition to another criterion or alone. ALA. CODE § 13A-7-42 (Supp. 1985):

(d) A person commits the crime of arson in the second degree if he intentionally starts or maintains a fire or causes an explosion which damages property in a detention facility or a penal facility . . . with reckless disregard (because of the nature or extent of the damage caused or which would have been caused but for the intervention of others) for the safety of others.

Id.; ALASKA STAT. § 11.46.400 (1983) ("and by that act recklessly places another person in danger of serious physical injury. For purposes of this section, 'another person' includes but is not limited to fire and police service personnel or other public employees who respond to emergencies, regardless of rank, functions, or duties being performed."); HAWAII REV. STAT. § 708-820 (1976) ("if he intentionally damages property and thereby recklessly places another person in danger of death or bodily injury"); IOWA CODE § 712.1 (1985) ("Provided, that where a person owns said property which the defendant intends to destroy or damage, or which the defendant knowingly endangers . . . where the act was done in such a way as not to unreasonably endanger the life or property of any other person the act shall not be arson."); LA. REV. STAT. ANN. § 14:51 (West 1974) ("whereby it is foreseeable that human life might be endangered"); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985) ("which recklessly endangers any person or the property of another").

241. Four states use this criterion either alone or in conjunction with one of

stances, of course, explicitly achieves essentially the same result as the person endangering subject matter definition used by Arizona, Nevada and Oklahoma (the states that use implicit criteria alone). As we have seen, these three states define the subject matter of the offense or the target of the actor's conduct with reference to the probable presence of persons within the property when it is burned. The idea is, of course, that it is dangerous to people who may be in such property if the property is burned. When the person endangering circumstance of the actual or probable presence of a person in the property is used, it does not define the subject matter or the target of the actor's conduct, but describes a circumstance which must be proven to establish guilt. Although the person endangering subject matter and the person endangering circumstances relate to essentially the same concept, there is a difference in the way they function depending, of course, on their respective provisions.²⁴² On the other hand, they can function in precisely the same way.²⁴³

The final and largest group of states use both person endangering subject matter similar to the criteria used by Arizona, Nevada, and Oklahoma (which

the other two criteria. Criminal Code of 1961, tit. III, art. 20, § 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, § 20-1.1 (Smith-Hurd Supp. 1986) (“(2) any person suffers great bodily harm, or permanent disability or disfigurement as a result of the fire or explosion or (3) a fireman or policeman who is present at the scene acting in the line of duty, is injured as a result of the fire or explosion.”); KY. REV. STAT. § 513.020 (1985) (“Any other person sustains serious physical injury as a result of the fire or explosion or the firefighting as a result thereof.”); S.C. CODE ANN. § 16-11-110 (1985) (“which results, either directly or indirectly, in death or serious bodily injury to any person”); TENN. CODE ANN. § 39-3-201 (1982) (“(2) Any person suffers serious bodily injury as a result of the fire or explosion; or (3) A fireman or policeman who is present at the scene acting in the line of duty suffers serious bodily injury”).

242. For example, California uses a person endangering subject matter, in part, to differentiate the person protecting offenses from the property protecting offenses. See *infra* note 247. Under the California definition, a “structure” need not be actually occupied if it is currently being used for dwelling purposes. Under such a provision, the proof would be similar to the proof required for the common law offense. On the other hand, the person endangering circumstance in Alabama requires: (a) that a person actually be present in the building and (b) that the actor either knew that fact or “the circumstances are such as to render the presence of a person therein a reasonable possibility.” See *supra* note 239. Obviously this explicit person endangering circumstance is far narrower than the implicit criterion used in California. The California statute is aimed at a broader range of risks which may or may not materialize, whereas the Alabama statute addresses an actual risk when the actor has culpable mental state with respect to that risk.

The culpable mental states required by these statutes are discussed *infra* beginning with the text accompanying note 573.

243. For example, the person endangering circumstance used in Louisiana (when it is foreseeable that human life might be endangered, see *supra* note 240) would seem to cover the burning of every “inhabited structure” within the California definition (see *infra* note 247), if not more. The limitations are imposed by the scope of protection afforded and the means used to extend that protection.

define the subject matter of the offense or the target of the actor's conduct in such a way as to be aimed at the protection against human risks caused by fire)²⁴⁴ and person endangering circumstances similar to the twelve states that only use those criteria to extend the personal protection of their arson statutes. Twenty-six of the forty-one states use this technique.²⁴⁵ In these states, the actual or probable presence of a person in the property at the time of the occurrence is used to define the person endangering subject matter. For example, in Arkansas it is arson for a person to start a fire or cause an explosion with the purpose of destroying or otherwise damaging "an occupiable structure that is the property of another person."²⁴⁶ In California "arson that causes an inhabited structure or inhabited property to burn" is a middle level felony in the arson scheme.²⁴⁷ The examples from the Arkansas and California statutes

244. See *supra* notes 232-37 and accompanying text.

245. ARK. STAT. ANN. §§ 41-1902 to -1903 (1977 & Supp. 1985); CAL. PENAL CODE §§ 451, 452 (West Supp. 1986); COLO. REV. STAT. §§ 18-4-102 to 4-105 (1978); CONN. GEN. STAT. ANN. §§ 53a-111 to -114 (West 1985); FLA. STAT. ANN. §§ 806.01, .031 (West Supp. 1986); GA. CODE ANN. §§ 26-1401 to -1403 (1983); IND. CODE ANN. § 35-43-1-1 (Burns Supp. 1985); MINN. STAT. ANN. §§ 609.561 to .563 (West Supp. 1985); MO. REV. STAT. §§ 569.040, .055 (1979); MONT. CODE ANN. § 46-6-103 (1983); NEB. REV. STAT. § 28-502 to -504 (1979); N.H. REV. STAT. ANN. § 634:1 (1974 & Supp. 1983); N.J. STAT. ANN. § 2C:17-1 (West 1982); N.M. STAT. ANN. §§ 30-17-5, -17-6 (1984); N.Y. PENAL LAW §§ 150.00-.20 (McKinney 1975 & Supp. 1986); N.D. CENT. CODE §§ 12.1-21-01 to -21-02 (1985); OHIO REV. CODE ANN. §§ 2909.02, .03 (Page Supp. 1984); OR. REV. STAT. §§ 164.315, .325 (1985); 18 PA. CONS. STAT. ANN. § 3301 (Purdon 1983); R.I. GEN. LAWS § 11-4-2 to -4-8 (1981 & Supp. 1985); S.D. CODIFIED LAWS ANN. §§ 22-33-1 to -33-4, .33-10 (1979); TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1985); UTAH CODE ANN. §§ 76-6-102, -6-103 (1978); VA. CODE §§ 18.2-77 to -82, -86, -87 (1982); WASH. REV. CODE ANN. §§ 9A.48.020-.48.060 (West 1977 & Supp. 1985); WYO. STAT. §§ 6-3-101 to -104 (1977).

246. ARK. STAT. ANN. § 41-1902(1)(a) (Supp. 1983). In turn, an "occupiable structure" is defined as follows:

- (1) "Occupiable structure" means a vehicle, building or other structure:
 - (a) where any person lives or carries on a business or other calling; or
 - (b) where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or
 - (c) which is customarily used for overnight accommodation of persons; whether or not a person is actually present. Each unit of an occupiable structure divided into separately occupied units it itself an occupiable structure.

ARK. STAT. ANN. § 41-1901(1) (1977).

247. CAL. PENAL CODE § 451(b) (West Supp. 1986). The California arson statutes also contain the following definitions:

In this chapter, the following terms have the following meanings:

- (a) "Structure" means any building, or commercial or public tent, bridge, tunnel, or powerplant.

...

- (c) "Property" means real property or personal property, other than a structure or forest land.
- (d) "Inhabited" means currently being used for dwelling purposes whether

illustrate the use of the person endangering subject matter approach. This approach is used to protect against the risks of death or injury to persons within the target or damaged property in eighteen of the twenty-six states using both the person endangering subject matter and circumstances approaches. In these eighteen states the actual or probable presence of people within the property in question is dealt with only by the use of this implicit criteria.²⁴⁸ Person endangering circumstances are then used to protect persons not connected with the subject matter of the offense. In the remaining eight states, the actual or probable presence of people within the target or damaged property are protected by the use of both approaches.²⁴⁹

In the eight states which use both approaches for the protection of people within the building burned two patterns emerge. In the first scheme, the person endangering subject matter approach is used to protect people in one subsection of the statute. With reference to property in which people are not normally present, person endangering circumstances are then used. The Florida statutes provide a good example. In Florida it is arson in the first degree to "willfully and unlawfully, by fire or explosion" damage "(a) [a]ny dwelling, whether occupied or not, or its contents; (b) [a]ny structure, or contents thereof, where persons are normally present, such as: jails, prisons, or detention centers, [or] hospitals . . .; or (c) [a]ny other structure that he knew or had reasonable grounds to believe was occupied by a human being."²⁵⁰ In addition to Florida, Utah²⁵¹ and Washington²⁵² use a similar scheme.

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.

CAL. PENAL CODE § 450(a), (c), (d) (West Supp. 1986).

248. ARK. STAT. ANN. §§ 41-1902 to -1903 (1977 & Supp. 1985); CAL. PENAL CODE §§ 451-452 (West Supp. 1986); COLO. REV. STAT. §§ 18-4-102 to -4-105 (1978); GA. CODE ANN. §§ 26-1401 to -1403 (1983); IND. CODE ANN. § 35-43-1-1 (Burns 1985); MO. REV. STAT. §§ 569.040 -.055 (Vernon 1979); MONT. CODE ANN. § 45-6-103 (1985); NEB. REV. STAT. §§ 28-502 to -505 (1979); N.H. REV. STAT. ANN. § 634:1 (1974 & Supp. 1983); N.J. STAT. ANN. § 2C:17-1 (West 1982); N.M. STAT. ANN. §§ 30-17-5 to -17-6 (1984); N.D. CENT. CODE §§ 12.1-21-01 to -21-02 (1985); OHIO REV. CODE ANN. §§ 2909.02-.03 (Page Supp. 1984); OR. REV. STAT. ANN. §§ 164.315, .325 (1985); 18 PA. CONS. STAT. ANN. § 3301 (Purdon 1983); R.I. GEN. LAWS §§ 11-4-2 to -4-8 (1981 & Supp. 1985); TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1985); WYO. STAT. §§ 6-3-101 to -3-103 (1977).

249. CONN. GEN. STAT. ANN. §§ 53a-111 to -114 (West 1985); FLA. STAT. ANN. §§ 806.01, .031 (West Supp. 1986); MINN. STAT. ANN. §§ 609.561-.563, .576 (West Supp. 1985); N.Y. PENAL LAW §§ 150.00 -.20 (McKinney 1975 & Supp. 1986); S.D. CODIFIED LAWS ANN. § 22-33-1 to -33-4 (1979); UTAH CODE ANN. §§ 76-6-102 to -6-103 (1978); VA. CODE §§ 18.2-77 to -82, -86 (1982); WASH. REV. CODE ANN. §§ 9A.48.020-.060 (West 1977 & Supp. 1985).

250. FLA. STAT. ANN. § 806.01(1)(a)-(c) (West Supp. 1986).

251. UTAH CODE ANN. §§ 76-6-103(1), 76-6-104(1)(a)-(b) (1978).

252. WASH. REV. CODE ANN. § 9A.48.020(1)(a) (Supp. 1986).

In the second scheme used in the remaining five states (Connecticut,²⁵³ Minnesota,²⁵⁴ New York,²⁵⁵ South Dakota²⁵⁶ and Virginia²⁵⁷) the subject matter of the person protecting provisions are defined in person endangering terms, but person endangering circumstances, which are more specific, aggravate that offense. Connecticut uses this approach. The subject matter of arson in the first and second degree is the same. A "building" is defined as "in addition to its ordinary meaning, includes any watercraft, aircraft, trailer, sleeping car, railroad car, other structure or vehicle, or any building with a valid certificate of occupancy."²⁵⁸ But for first degree arson the building must be "inhabited or occupied or the person has reason to believe the building may be inhabited or occupied."²⁵⁹

The second person endangering circumstance, the risk of death or injury to persons or property created by the actor's conduct, is used in eighteen of the twenty-six states to expand the scope of personal protection.²⁶⁰ This criterion, though differently worded in the statutes, is used essentially in the same way as in the states which only use the person endangering subject matter.²⁶¹

Finally, nine of these twenty-six states use a variant of the person endangering circumstance, a risk that has indeed materialized: whether a person has been injured or killed by the actor's conduct.²⁶²

Looking back over the forty-one states that have expanded the personal protection of their arson laws, they may be summarized as follows:

253. CONN. GEN. STAT. ANN. § 53a-111(a)(1) (West 1985).

254. MINN. STAT. ANN. § 609.561(2)(a)-(b) (West Supp. 1986).

255. N.Y. PENAL LAW §§ 150.15(a)-(b), .20(1) (McKinney Supp. 1986).

256. S.D. CODIFIED LAWS ANN. 22-33-1 (1979).

257. VA. CODE §§ 18.2-77 to -80 (1982).

258. CONN. GEN. STAT. ANN. § 53a-100(A)(1) (West 1985).

259. *Id.* § 53a-111(A)(1).

260. ARK. STAT. ANN. § 41-1902(1)(c) (Supp. 1985); COLO. REV. STAT. § 18-4-105 (1978); CONN. GEN. STAT. ANN. § 53a-111(a)(4) (West 1985); GA. CODE ANN. § 26-1401(a)(5) (1983); IND. CODE ANN. § 35-43-1-1(a)(2) (Burns 1985); MO. REV. STAT. § 569.040(1) (1979); MONT. CODE ANN. § 45-6-102(1)(a)-(b), 103(1)(b) (1985); NEB. REV. STAT. § 28-502(1)(a)-(b) (Supp. 1984); N.H. REV. STAT. ANN. § 634:1(III)(b) (1974 & Supp. 1983); N.J. STAT. ANN. § 2C:17-1(a)(1), -1(b)(1) (West 1982); N.D. CENT. CODE § 12.1-21-02(1)(a), -21-02(2) (1985); OHIO REV. CODE ANN § 2909.02(A)(1), .02(A)(3) (Page Supp. 1985); OR. REV. STAT. ANN. § 164.325(1)(b) (1985); 18 PA. CONS. STAT. ANN. § 3301(a)(1)(i) (Purdon 1983); R.I. GEN. LAWS § 11-4-2 (Supp. 1985); TEX. PENAL CODE ANN. § 28.02(a)(6) (Vernon Supp. 1986); WASH. REV. CODE ANN. § 9A.48.020(1)(a) (West Supp. 1986); WYO. STAT. § 6-3-103(a)(i) (Supp. 1985).

261. The jurisdictions are cited *supra* notes 232-37.

262. CAL. PENAL CODE §§ 451(a), 452(a)-(d) (West Supp. 1986); CONN. GEN. STAT. ANN. § 53a-111(a)(2) (West 1985); GA. CODE ANN. § 26-1401(a)(5) (1983); IND. CODE ANN. § 35-43-1-1(a)-(b) (Burns 1985); MINN. STAT. ANN. § 609.576(a) (West Supp. 1986); N.M. STAT. ANN. §§ 30-17-5(B), -17-6 (1984); N.Y. PENAL LAW § 150.20(1)(a)(i) (McKinney Supp. 1986); R.I. GEN. LAWS § 11-4-2 to -4 (Supp. 1985); TEX. PENAL CODE ANN. § 28.02(c) (Vernon Supp. 1986).

1. *Criterion One. The actual or probable presence of a person in the property burned.* Thirty-six of the forty-one states use this criterion alone or in conjunction with other criteria.²⁶³ Of these thirty-six, twenty-nine use it as either an implicit criterion by using it to define the person endangering subject matter, or as partly a subject matter definition and partly explicit, as a person endangering circumstance.²⁶⁴ The remaining seven states use it only as a person endangering circumstance.²⁶⁵ Five of the forty-one states do not use this criterion at all.²⁶⁶

2. *Criterion Two. The risk of death or bodily injury created by the actor's conduct.* Twenty-four of the forty-one states use this criterion as a person endangering circumstance.²⁶⁷ Four of these twenty-four use it as the sole person

263. ALA. CODE § 13A-7-41 (1982); ARIZ. REV. STAT. ANN. § 13-1704 (Supp. 1985); ARK. STAT. ANN. § 41-1902 (Supp. 1985); CAL. PENAL CODE §§ 451-452 (West Supp. 1986); COLO. REV. STAT. § 18-4-102 (1978); CONN. GEN. STAT. ANN. § 53a-111 (West 1985); DEL. CODE ANN. tit. 11, § 803 (1979); FLA. STAT. ANN. § 806.01 (West Supp. 1986); GA. CODE ANN. § 26-1401 (1983); Criminal Code of 1961, tit. III, art. 20, § 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, § 20-1.1 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-43-1-1 (Burns 1985); IOWA CODE ANN. § 712.2 (West Supp. 1985); KAN. STAT. ANN. § 21-3719 (1981); KY. REV. STAT. § 513.020 (1985); MINN. STAT. ANN. § 609.561 (West Supp. 1986); MO. REV. STAT. §§ 569.040-.050 (1979); MONT. CODE ANN. § 45-6-103 (1985); NEB. REV. STAT. § 28-502 (Supp. 1984); NEV. REV. STAT. § 205.010 (1985); N.H. REV. STAT. ANN. § 634:1 (1974 & Supp. 1983); N.J. STAT. ANN. § 2C:17-1 (West 1982); N.M. STAT. ANN. §§ 30-17-5 to -17-6 (1984); N.Y. PENAL LAW §§ 150.15-.20 (McKinney Supp. 1986); N.D. CENT. CODE § 12.1-21-01 (1985); OHIO REV. CODE ANN. § 2909.02 (Page Supp. 1984); OKLA. STAT. ANN. tit. 21, § 1401 (West 1983); OR. REV. STAT. ANN. § 164.325 (1985); 18 PA. CONS. STAT. ANN. § 3301 (Purdon 1983); R.I. GEN. LAWS § 11-4-2 (Supp. 1985); S.D. CODIFIED LAWS ANN. § 22-33-1 (1979); TENN. CODE ANN. § 39-3-201 (1982); TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1986); UTAH CODE ANN. § 76-6-103 (1978); VA. CODE §§ 18.2-77 to .2-80 (1982); WASH. REV. CODE ANN. § 9A.48.020 (West Supp. 1986); WYO. STAT. § 6-3-101 (1977).

264. These states are cited *supra* notes 232-34, 245.

265. These states are cited *supra* note 239.

266. ALASKA STAT. §§ 11.46.400-.410, .430 (1983); HAWAII REV. STAT. §§ 708-820 to -823 (1976); LA. REV. STAT. ANN. §§ 14:51-.53 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985); S.C. CODE ANN. §§ 16-11-10, -11-110 (Law. Co-op. 1985) (the implicit criterion used is essentially the common law definition of dwelling house and thus it does not enlarge the personal protection of the common law).

267. ALA. CODE § 13A-7-42(d) (Supp. 1985); ALASKA STAT. § 11.46.400 (1983); ARK. STAT. ANN. § 41-1902(1)(c) (Supp. 1985); COLO. REV. STAT. § 18-4-105 (1978); CONN. GEN. STAT. ANN. § 53a-111(a)(4) (West 1985); GA. CODE ANN. § 26-1401(a)(5) (1983); HAWAII REV. STAT. § 708-820 (1976); IND. CODE ANN. § 35-43-1-1(a)(2) (Burns 1985); IOWA CODE ANN. § 712.1 (West 1979); LA. REV. STAT. ANN. § 14:51 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985); MO. REV. STAT. § 569.040(1) (1979); MONT. CODE ANN. § 45-6-102(1)(a)-(b), -6-103(1)(b) (1985); NEB. REV. STAT. § 28-502(1)(a)-(b) (1979); N.H. REV. STAT. ANN. § 634:1(III)(b) (1974 & Supp. 1983); N.J. STAT. ANN. § 2C:17-1(a)(1), -1(b)(1) (West 1982); N.D. CENT. CODE § 12.1-21-02(1)(a), (2) (1985); OHIO REV. CODE ANN. § 2909.02(A)(1),

endangering criterion,²⁶⁸ and the remaining twenty use it in conjunction with a person endangering subject matter.²⁶⁹

3. *Criterion Three. Another person was injured or killed by the actor's conduct.* Twelve states use this criterion in the same way as a person endangering circumstance.²⁷⁰ Seven of these twelve use it in conjunction with criterion one;²⁷¹ four use it along with the other two criteria,²⁷² and the state of South Carolina uses it alone.²⁷³

In this manner the forty-one states that comprise the new American majority have expanded their arson laws to protect people from the human risks associated with the conduct of the arsonist.²⁷⁴

(A)(3) (Page Supp. 1985); OR. REV. STAT. ANN. § 164.325(1)(b) (1985); 18 PA. CONS. STAT. ANN. § 3301(a)(1)(i) (Purdon 1983); R.I. GEN. LAWS § 11-4-2 (Supp. 1985); TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1986); WASH. REV. CODE ANN. § 9A.48.020(1)(a) (West Supp. 1986); WYO. STAT. § 6-3-103(a)(i) (Supp. 1985).

268. These states are Alaska, Hawaii, Louisiana, and Maine. Their statutory provisions are cited *supra* note 267.

269. Of course, these are all of the states listed *supra* note 267 with the exception of Alaska, Hawaii, Louisiana, and Maine. See *supra* note 268.

270. CAL. PENAL CODE §§ 451(a), 452(a), (d) (West Supp. 1986); CONN. GEN. STAT. ANN. § 53A-111(a)(2) (West 1985); CRIMINAL CODE OF 1961, tit. III, art. 20, § 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, § 20-1.1 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-43-1-1(a)-(b) (Burns 1985); KY. REV. STAT. § 513.020 (1985); MINN. STAT. ANN. § 609.576(a) (West Supp. 1986); N.M. STAT. ANN. §§ 30-17-5(B), -17-6 (1984); N.Y. PENAL LAW § 150.20(1)(a)(i) (McKinney Supp. 1986); R.I. GEN. LAWS § 11-4-2, -4-3, -4-4 (Supp. 1985); S.C. CODE ANN. § 16-11-110 (Law. Co-op. 1985); TENN. CODE ANN. § 39-3-201(a)(2) (1982); TEX. PENAL CODE 28.02(c) (Vernon Supp. 1986).

271. These states are California, Illinois, Kentucky, Minnesota, New Mexico, New York, and Tennessee. Their statutory provisions are cited *supra* note 270.

272. These states are Connecticut, Indiana, Rhode Island, and Texas. Their statutory provisions are cited *supra* note 270.

273. S.C. CODE ANN. § 16-11-10 (Law. Co-op. 1985).

274. In addition, two states use a risk to property which is not inherently person endangering. IOWA CODE ANN. § 712.1 (West 1979) ("endanger the . . . property of any other person"); ME. REV. STAT. ANN. tit. 17-A, § 802(1)(B)(2) (1983 & Supp. 1985) ("which recklessly endangers . . . the property of another").

Arson for hire is an aggravating criterion in three states. CONN. GEN. STAT. ANN. § 53a-112(a)(2) (West 1985) ("a fire or explosion was caused by an individual hired by such person to start such fire or cause such explosion"); IND. CODE ANN. § 35-43-1-1(3)(b) (Burns 1985) ("A person who commits arson for hire commits a class B felony."); OHIO REV. CODE ANN. §§ 2909.02-.03 (Page Supp. 1985) ("through the offer or acceptance of an agreement for hire or other consideration").

Finally, in New York, the means by which the fire or explosion is caused is one of the criteria that distinguishes first from second degree arson. N.Y. PENAL LAW § 150.20(1)(a) (McKinney Supp. 1986) ("when . . . such explosion or fire is caused by an incendiary device propelled, thrown or placed inside or near such building or motor vehicle").

V. THE MODERN LAW OF ARSON

The metamorphosis of the law of arson from the common law's conception of the offense as a crime against the habitation, to a crime which also widely protects property, and finally into a complex offense that protects people as well as property, is not the only change wrought by most modern statutes. There have been many other changes in arson as it was at common law. Although the modern statutes vary considerably in their specific detail, the basic elements of the offense are similar in the majority of American states. For example, while all state except Hawaii²⁷⁵ and Massachusetts²⁷⁶ use the term arson in the description of at least one of the felony burning offenses, the other felony burning offenses are frequently called by another name.²⁷⁷ Nevertheless, the substantive offenses, regardless of their name are generally similar in many, if not most, of their important features. It is to these common features that we now turn.

A. *The Prohibited Conduct*

1. Burning

The conduct prohibited by common law arson was the act of "burning," causing the actual ignition of any portion of the material of which the dwelling

275. In Hawaii all of the crimes which cause damage to property, and which put people at risk, are lumped together in an offense called "criminal damage to property." It is divided into four degrees. The term "arson" does not appear in the statutes. HAWAII REV. STAT. § 708-820, -823 (1976).

276. The word "arson" never appears in the Massachusetts felony statutory scheme. MASS. GEN. LAWS ANN. ch. 266, § 1 ("Dwelling houses; burning or aiding in burning"), § 2 ("Meeting house; burning or aiding in burning"), § 5 ("Wood and other property; burning or aiding in burning"), § 7 ("Woods; wanton or reckless injury or destruction by fire"), § 8 ("Injury by fire; negligent use"), and §10 ("Insured property; burning with intent to defraud") (West 1970).

277. *E.g.*, Alabama: The felony burning offenses are divided into arson in the first and second degree. ALA. CODE §§ 13A-7-41 to -7-42 (1982). Arson in the third degree is a class A misdemeanor. *Id.* § 13A-7-43. Arkansas: The most serious burning offense is called "[a]rson." ARK. STAT. ANN. § 41-1902 (1977 & Supp. 1983). The remaining felony offense is called "[r]eckless burning." *Id.* § 41-1903. Illinois: The two felony offenses are known as "arson," Criminal Code of 1961, tit. III, art. 20, § 20-1, ILL. ANN. STAT. ch. 38, § 20-1 (Smith-Hurd 1977) and "aggravated arson." *Id.* § 20-1.1, ILL. ANN. STAT. ch. 38, § 20-1.1 (Smith-Hurd Supp. 1986). Indiana: The felony offense of arson is divided into class A, B, C, and D felonies. IND. CODE ANN. § 35-43-1-1 (Burns 1985). Montana: The felony offenses are "[n]egligent arson," MONT. CODE ANN. § 45-6-102 (1983), and "[a]rson." *Id.* § 45-6-103. North Dakota: The felony offenses are known as "arson," N.D. CENT. CODE § 12.1-21-01 (1985), and "endangering by fire or explosion." *Id.* § 12.1-21-02. Washington: The three felony burning offenses are known as "[a]rson in the first degree," WASH. REV. CODE ANN. § 9A.48.020 (West Supp. 1985), "[a]rson in the second degree," *Id.* § 9A.48.030, and "[r]eckless burning in the first degree." *Id.* § 9A.48.040.

house was composed.²⁷⁸ Thus, a culprit who lights a fire in a dwelling by burning items of personal property is not guilty of common law arson unless the house itself is burned.²⁷⁹ And this is true regardless of the high risk of death or injury created by such a fire. Have the statutes modified this result? Or to put it another way, have the statutes expanded the arson offense to include such dangerous conduct?

a. The "Set Fire to or Burn" Statutes

This question initially arose under The Waltham Black Act, one of the principle statutes in the development of statutory arson in England.²⁸⁰ The act provided that any person who "shall *set fire to* any house, barn or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay or wood . . . shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy."²⁸¹ Surely the phrase "set fire to any house" can be interpreted to include our culprit's conduct,²⁸² but that was not the interpretation placed upon that phrase by the English judges. They held it to mean nothing more and nothing less than the "burning" element of common law arson. The English burning statutes which followed The Waltham Black Act were given the same interpretation,²⁸³ and thus our culprit committed no felony under The Waltham Black Act or the subsequent English legislation.

As we have seen, the English experience with common law and statutory arson heavily influenced the development of the law of arson in the United States.²⁸⁴ Not surprisingly then the wording of The Waltham Black Act and its progenitors found its way, albeit sometimes in modified form, into the American statutes. Indeed, the Model Arson Law used the quite similar phrase "sets fire to or burns or causes to be burned," and the Model Arson Law or statutes that contained most of its salient provisions were in effect in forty-four states at mid-century.²⁸⁵ Despite the prevalence of this language, there is a paucity of cases on the issue of whether the phrase "sets fire to" expanded

278. See *supra* notes 67-94 and accompanying text.

279. See *supra* note 69 and accompanying text.

280. See *supra* text accompanying notes 124-40.

281. 9 Geo. I, c.22, from 15 Pickering's Statutes At Large 88, 89 (1975).

282. The phrase "*set fire to*" may be interpreted, for example, to mean "apply fire to" or "set fire against," depending upon which word one wants to emphasize, without straining the language used in the phrase. Coupling either interpretation with the word "burn," (which would signify the common law concept) by the use of the disjunctive "or" could well lead to the interpretation that the legislative intent was to expand the scope of the common law offense.

283. The authorities are cited *supra* notes 128, 136, and 137. In addition, see the discussion in *State v. Dennin*, 32 Vt. 158 (1859) and A. CURTIS, *THE LAW OF ARSON* 103-04 (1936).

284. See *supra* text accompanying notes 141-45.

285. See *supra* text accompanying note 148.

the common law offense or was merely synonymous with the word "burn," which signified the common law requirement. Nevertheless, within these few cases there was nearly an even division of authority during the middle years of the current century. Alabama and Maine interpreted the phrase "sets fire to" synonymously with "burn,"²⁸⁶ whereas Arkansas, North Carolina, and Virginia held to the contrary.²⁸⁷ There are Maryland cases adopting both positions.²⁸⁸

Since fifteen states still use the phrase "sets fire to or burns" in their arson statutes, the issue remains alive today.²⁸⁹ In view of the ambiguity of the phrase, and the conflicting canons of statutory construction which support either view,²⁹⁰ the choice must be made on some other basis.

Common law arson required that the actor's conduct inflict some harm on the subject matter of the crime by means of fire. The harm required was a "burning" of the dwelling house. But fire can inflict harm on buildings in ways other than by burning. And the circumstances in which other types of

286. *Graham v. State*, 40 Ala. 659 (1867); *Benbow v. State*, 128 Ala. 1, 29 So. 553 (1900) (*semble*); *State v. Taylor*, 45 Me. 322 (1858).

Subsequent enactments in both Alabama and Maine have abandoned the law announced in *Graham*, *Benbow*, and *Taylor*.

Alabama subsequently abandoned the old "set fire to or burn" provision, under which *Graham* and *Benbow* were decided, for a "damage" provision. ALA. CODE §§ 13A-7-41 to -7-43 (1982 & Supp. 1985). As to the modern damage provisions in general, see *infra* text accompanying notes 297-311.

Maine abandoned the "set fire to or burn" provision for an inchoate offense patterned upon the provisions of the Model Penal Code. ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985). As to the modern inchoate offenses in general, see *infra* text commencing with note 312.

287. *Mary v. State*, 24 Ark. 44 (1862); *State v. Hall*, 93 N.C. 571 (1885); *Howel v. Commonwealth*, 46 Va. (5 Gratt.) 664 (1848).

288. *Compare Cochrane v. State*, 6 Md. 400 (1854) (not synonymous) and *Borza v. State*, 25 Md. App. 391, 397, 335 A.2d 142, 146 (1975) (The use of "'sets fire to' as an alternative to 'burns' frees this law from ancient rigidity of the arson laws when it comes to the term 'burn.'") (quoting from *Cochrane*) with *Hines v. State*, 34 Md. App. 612, 368 A.2d 509 (1977) (the phrase "sets fire to or burns" used in Article 27, Section 7 requires a burning as at common law).

289. CAL. PENAL CODE §§ 451-452 (West Supp. 1986); COLO. REV. STAT. §§ 18-4-102 to -4-105 (1978); IDAHO CODE §§ 18-801 to -803 (1979); MD. CRIM. LAW CODE ANN. §§ 6-9, 11 (1982 & Supp. 1984); MASS. GEN. LAWS ANN. ch. 266, §§ 1, 2, 5, 10 (West 1970); MICH. COMP. LAWS §§ 28.266 (definition of "burn"), 28.267-.270, .275 (1981); MISS. CODE ANN. §§ 97-17-1, -17-3, -17-5, -17-7, -17-11 (1973); NEV. REV. STAT. §§ 205.010-.040 (1985) (defining "set fire to" to mean "whenever any part thereof or anything therein shall be scorched, charred or burned"); N.C. GEN. STAT. §§ 14-59 to -67.1(1981); OKLA. STAT. ANN. tit. 21, §§ 1401-1403 (West 1983); S.C. CODE ANN. §§ 16-11-110, -11-130, -11-140, -11-170 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 22-33-1 to -33-4, -33-10 (1979 & Supp. 1985); VT. STAT. ANN. tit. 13, §§ 502-504, 506, 507 (Supp. 1985); VA. CODE § 18.2-77, -79, -81, -86 (1982); W. VA. CODE §§ 61-3-1 to -3-3, -3-5 (1984).

290. See *infra* note 311.

harm are inflicted by fire may be as endangering to persons and property as the minimal ignition required by the common law standard. For example, if our culprit's fire (which consisted of the burning of personal property within the dwelling) caused extensive smoke which not only damaged the building but endangered the lives of the dwellers, it would not amount to arson at common law. Instead, the culprit would be guilty of attempted arson, a misdemeanor at common law.²⁹¹ Yet the dwelling was damaged and the lives of the dwellers were endangered in nearly the same way it would have been damaged and lives would have been endangered if the dwelling's wallpaper had actually ignited and the fire then went out. It may well have been fortuity, blind luck, that made the difference between the felony of arson, and the misdemeanor of attempted arson.²⁹² One reaction, of course, would be to change the law of arson to provide a like penalty for attempted arson in these circumstances. In that event, our culprit would be given the same punishment based upon a different characterization of the offense (attempted arson rather than arson), but that option would not be available to a judge. That choice belongs solely to the legislature in our American common law system. We simply do not grant judges the power to change punishments set by the legislature for a given crime. That is the province of the legislature alone. If the two situations create the same risks, risks that the law of arson is designed to suppress and punish, and if the result of the fire is essentially the same type of injury to property that the law of arson seeks to suppress and punish, why should we fail to treat these two instances the same? The better view would reach the same result in both cases; it would treat like cases alike. This could easily be accomplished by interpreting the phrase "sets fire to" as expanding the conduct prohibited by the statute to include any damage to the building caused by fire. The more recent cases do conclude that the phrase expands the arson offenses to include situations in which the actor "starts a fire," but there is an insufficient common law burning.²⁹³ Indeed, in the two states which supported the view that the phrase was synonymous with the common law requirement (Alabama and Maine), the rule has been abrogated by statute.²⁹⁴ Thus the only currently authoritative cases support the expansion view, and it

291. Attempt was a misdemeanor at common law. R. PERKINS AND R. BOYCE, *supra* note 2, at 613.

292. I do not mean, of course, to suggest that fortuity is the only difference between guilt of the target offense and an attempt to commit the offense. But it is generally recognized that a culprit is guilty of an attempt if she has performed the last act necessary to accomplish the target offense but the act is unsuccessful. *See, e.g.,* W. LAFAVE & A. SCOTT, *supra* note 19, at 431-38.

293. *People v. Mentzer*, 163 Cal. App. 3d 482, 209 Cal. Rptr. 549 (1985); *Lynch v. State*, 175 Ind. App. 111, 370 N.E.2d 401 (1977); *Borzo v. State*, 25 Md. App. 391, 335 A.2d 142 (1975). *But cf. Hines v. State*, 34 Md. App. 612, 363 A.2d 509 (1977).

294. *See supra* note 286.

is clearly the modern trend of authority today.²⁹⁵ But what type of conduct is or should be prohibited in those jurisdictions which adopt an expansive view of the phrase "set fire to or burns" will be discussed below.²⁹⁶

b. The Damage Statutes

During the modern metamorphosis of arson into a complex crime protecting against both human and property risks, both the traditional phrase "sets fire to or burns" and the common law's "burning" requirement have been abandoned in all but the above fifteen states.²⁹⁷ In the majority of the remaining American states, twenty-three in number, the statutes have replaced "sets fire to or burns" or simply "burns," with "damages," or sometimes "damages or destroys," by means of fire.²⁹⁸ Under these statutes the actor

295. See *supra* notes 287, 292.

Arkansas has also changed its statutory provisions in a way which makes *Mary v. State*, 24 Ark. 44 (1862), irrelevant today, but in Arkansas the statutory change clearly expands the protection well beyond that afforded by the common law. Hence the spirit of *Mary* is carried forward by the statute. See *infra* note 313.

In Michigan, one of the fifteen states which still uses the "sets fire to" or "burns" formulation, the statutory definition of the term "burn" seems to adopt the modern trend. MICH. COMP. LAWS § 28.266 (1981).

296. See *infra* text accompanying notes 310-11.

297. See *supra* note 289. In eight of these fifteen states (Idaho, Maryland, Massachusetts, Michigan, Mississippi, North Carolina, Vermont, and West Virginia) arson has remained largely as it existed in the majority of states at mid-century, an offense against the habitation and against property as exemplified by the Model Arson Law. These statutory provisions are cited *supra* notes 223-30.

The remaining seven states which still adhere to this formulation have all expanded arson to protect both human and property risks. These states are California, Colorado, Nevada, Oklahoma, South Carolina, South Dakota, and Virginia. See *supra* note 289 (for the statutes in these states). Two of these states (California and Virginia) have adopted an expansive interpretation of the phrase so that the prohibited conduct extends beyond the common law's burning requirement. See *supra* notes 287 and 293. In the remaining states I could find no authority on the subject. To be consistent with the expansion of the offense to protect more human risks, one would expect these states to adopt readily the modern interpretation of the phrase.

298. ALA. CODE §§ 13A-7-41 to -43 (1982 & Supp. 1985); ALASKA STAT. §§ 11.46.400-.410 (1983); ARIZ. REV. STAT. §§ 13-1703 to -1704 (Supp. 1985); DEL. CODE ANN. tit. 11, §§ 801-803 (1979); FLA. STAT. ANN. § 806.01 (West Supp. 1986); GA. CODE ANN. §§ 26-1401 to -1403 (1983); HAWAII REV. STAT. §§ 708-820 to -821 (1976); Criminal Code of 1961, tit. III, art. 20, §§ 20-1 (Arson), 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, §§ 20-1, 20-1.1 (Smith-Hurd 1977 & Supp. 1986); IND. CODE ANN. § 35-43-1-1 (Burns 1985); KAN. STAT. ANN. §§ 21-3718 to -3719 (1981); LA. REV. STAT. ANN. §§ 14:51-.53 (West 1974 & Supp. 1985); MINN. STAT. ANN. §§ 609.561-.563, .576 (West Supp. 1985); MO. REV. STAT. §§ 569.040-.055 (1979); MONT. CODE ANN. §§ 46-6-102 to -103 (1983); NEB. REV. STAT. §§ 28-502 to -505 (1979); N.H. REV. STAT. ANN. § 634:1 (1974 & Supp. 1983); N.Y. PENAL LAW §§ 150.00-.20 (McKinney 1975 & Supp. 1986); OR. REV. STAT. ANN. §§ 164.315-.325 (1985); R.I. GEN. LAWS §§ 11-4-2 to -7 (1981 & Supp. 1985) (Rhode Island also has a

must cause some physical harm to the subject matter of the crime by the use of fire,²⁹⁹ or to put it in more operational terms, the fire must cause some change (injury) to the building which lowers its value or impairs its usefulness.³⁰⁰ Thus it is arson under the damage statutes if the fire "scorches" the paint on the building,³⁰¹ or causes smoke damage to the building,³⁰² although neither would suffice as a burning at common law.³⁰³ But, of course, any burning at common law would constitute damage under the damage statutes as well.³⁰⁴ The principal effect of these damage statutes then is to extend arson liability to those rather infrequent situations in which there is some actual injury to the building which is caused by the fire but there is no "burning." Thus in our hypothetical situation in which the culprit lights a fire (by burning items of personal property) but no portion of the building is burned, there would be guilt of arson under one of these damage statutes only if some actual physical injury was caused to the building (i.e., smoke damage). If there was no such "injury" or "damage" to the building, there would be no arson.³⁰⁵

misdemeanor offense which is called "Arson-Seventh degree." R.I. GEN. LAWS § 11-4-8 (1981.); TENN. CODE ANN. §§ 39-3-201 to -206 (1982); UTAH CODE ANN. §§ 76-6-102 to -103 (1978); WASH. REV. CODE ANN. §§ 9A.48.020-.040, .48.060 (West 1977 & Supp. 1985); WIS. STAT. ANN. §§ 943.02-.04 (West 1982). A statute which uses "damages" alone should receive the same interpretation as a statute which uses the phrase "damages or destroys" for quite obviously a building that has been destroyed also has been damaged.

See *infra* note 313 for a discussion of the inchoate states with damage provisions.

299. Indeed, the Ohio statute uses the phrase "physical harm," instead of damage. And the Arizona statute defines "damage" as "any physical or visual impairment of any surface." ARIZ. REV. STAT. ANN. § 13-1701(1) (West 1978).

300. The Washington statute defines "damage" in the following terms: "'Damages', in addition to its ordinary meaning, includes any charring, scorching, burning, or breaking, or agricultural or industrial sabotage, and shall include any diminution in the value of any property as a consequence of an act." WASH. REV. CODE ANN. § 9A.48.010(1)(b) (1977).

It is not common to have a statutory definition of "damage." See, e.g., *Bateman v. State*, 408 So. 2d 194, 197 (Ala. Crim. App. 1981) (dictum) ("[i]t appears that [the arson statute] does require some actual harm or injury to the building which diminishes or impairs its value.").

Although I can find no New York case on point, the Practice Commentaries to the Consolidated Laws of New York Annotated state: "The arson sections of the Revised Penal Law all speak of 'damage' to a building, i.e., an injury that lowers the value of the building or that impairs its usefulness." N.Y. PENAL LAW § 105.10, Practice Commentaries at 89 (McKinney 1975).

301. *State v. McVeigh*, 213 Kan. 432, 439, 516 P.2d 918, 925 (1973) (the injuries were "comparatively minor and largely restricted to smoke and scorching damage"); *State v. Hohnstein*, 213 Neb. 296, 328 N.W.2d 777 (1983).

302. See *infra* notes 305, 307-09 and accompanying text.

303. See *supra* note 89 and accompanying text.

304. E.g., *State v. Simmons*, 680 S.W.2d 308 (Mo. Ct. App. 1984); *State v. Kelso*, 617 S.W.2d 591 (Mo. Ct. App. 1981).

305. E.g., *Bateman v. State*, 408 So. 2d 194 (Ala. Crim. App. 1981) (dictum); *K.R.M. v. State*, 360 So. 2d 806 (Fla. Dist. Ct. App. 1978).

The culprit's liability would be for attempted arson in one of these states.

At this point we should return to the states which give an expansive interpretation to the words "set fire to," in their statutes which describe the prohibited conduct as an actor who "sets fire to or burns" the subject property. Although these states reject the "sets fire to" language as being synonymous with the common law burning requirement, the cases all adopt a "damage" standard similar to the twenty-three states that have adopted it by statute.³⁰⁶ Thus, in one of these states, an actor is guilty of arson if he "sets fire to" the building and the fire causes a scorching or blistering of paint which was an integral part of the structure,³⁰⁷ smoke damage, or even water damage caused by extinguishing the fire,³⁰⁸ and from damage caused to the building by the heat from the fire.³⁰⁹ Thus in one of these jurisdictions, a person is guilty of arson if the fire either "damages" or "burns" the subject property.

Why should the phrase "sets fire to" be limited to situations in which the building is damaged? As we have seen, this language could be construed to mean set fire against or in the building,³¹⁰ and if the phrase is so interpreted the conduct prohibited by the statute would be the setting of a fire in or against the building and nothing more. No damage would be required. But no case has embraced such an expansive interpretation of the phrase "sets fire to," for it is too great a departure from the common law conception of the crime. Aside from the question of the actor's *mens rea*, the only distinction between an attempt to commit arson and arson is the actual physical damage to the building. If a fire is set, but there is no damage to the building, it would be attempted arson both at common law and under the damage statutes. And though it would be *possible* for a judge to interpret a "sets fire to" statute so as to require no damage to the building, that interpretation would inevitably conflict with the state's attempt provisions. A judge simply cannot correlate the law of arson with the law of attempt under that interpretation. And if canons of statutory construction mean anything, the judge should construe the statute so as to complement, not conflict with the state's attempt statutes.³¹¹ Furthermore, this interpretation would be a drastic departure from the principles of the common law, too drastic to impute this change to the legislature by the use of such an ambiguous phrase. If the law of arson is to invade the province of the law of attempt in such a way, it is a matter better left to the legislature.

306. See *supra* note 298.

307. Lynch v. State, 175 Ind. App. 111, 116, 370 N.E.2d 401, 404 (1977).

308. Borza v. State, 25 Md. App. 391, 335 A.2d 142 (1975).

309. People v. Mentzer, 163 Cal. App. 3d 482, 209 Cal. Rptr. 549 (1985) (the heat from the fire caused discoloration and buckling, cracking and chipping of the marble floor and plaster walls of the mausoleum, although they did not "burn" under the common law definition).

310. See *supra* note 282 and accompanying text.

311. E.g., 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.02 (4th ed. 1984).

2. Arson as an Inchoate Offense

Although no case has interpreted an ambiguous statute so as to abolish the requirement that there be some fire damage to property, the legislatures in the remaining twelve states³¹² have so provided by statute.³¹³ In these states the conduct prohibited by their arson statutes is the starting of a fire with a specified *mens rea* with respect to given property. The actor's conduct need not cause any actual harm to the property which is the target of the actor's incendiary acts.³¹⁴ For example, "A person commits arson," in Arkansas, "if he starts a fire . . . with the purpose of destroying or otherwise damaging: (a) an occupiable structure that is the property of another person; or . . . (c) any property, whether his own or that of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person . . ."³¹⁵

In a jurisdiction following this statutory pattern, our culprit would be guilty of arson provided the *mens rea* requirement is met. Under this same

312. Since the reader may have lost count, I will recount the positions of the other thirty-eight states: fifteen states have "sets fire to or burns" statutes, *see supra* note 289, and twenty-three states have damage statutes. *See supra* note 298.

313. ARK. STAT. ANN. §§ 41-1902 to -1903 (1977 & Supp. 1983); CONN. GEN. STAT. ANN. §§ 53a-111 to -114 (West 1985); IOWA CODE ANN. §§ 712.1-.3 (West 1979); KY. REV. STAT. §§ 513.020-.060 (1985); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985); N.J. STAT. ANN. § 2C:17-1 (West 1982); N.M. STAT. ANN. §§ 30-17-5 to -6 (1984); N.D. CENT. CODE §§ 12.1-21-01 to -02 (1985); OHIO REV. CODE ANN. §§ 2909.02-.03 (Page Supp. 1984); 18 PA. CONS. STAT. ANN. § 3301 (Purdon 1983); TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1985); WYO. STAT. §§ 6-3-101 to -103 (1977).

Four states have both damage provisions and inchoate offenses in their statutory arson scheme: Montana: The statutes use the damage approach for arson, MONT. CODE ANN. § 45-6-103 (1983), but "negligent arson" is an inchoate offense. *Id.* § 45-6-102. New Mexico: Aggravated arson is a damage statute, N.M. STAT. ANN. § 30-17-6 (1984), but "arson and negligent arson" are inchoate crimes *Id.* § 30-17-5. Ohio: Both aggravated arson, OHIO REV. CODE ANN. § 2909.02 (Page 1975 & Supp. 1984), and arson, *Id.* § 2909.03, use both approaches within the same section. Rhode Island: The first degree arson statute uses the inchoate approach, at least in part, R.I. GEN. LAWS 11-4-2 (1981 & Supp. 1985), whereas arson in the second degree, *Id.* § 11-4-3, third degree, *Id.* § 11-4-4, fourth degree, *Id.* § 11-4-5, and sixth degree, *Id.* § 11-4-7 are damage statutes.

New Mexico and Ohio are classified as inchoate states because more of their provisions are inchoate in nature, whereas Montana and Rhode Island are classified as damage states for the same reason. However, the traditional provisions in New Mexico and Ohio use the modern "damage" approach to the description of the prohibited conduct.

314. *Commonwealth v. Garrison*, 242 Pa. Super. 509, 364 A.2d 388 (1976); *see Beltran v. State*, 593 S.W.2d 688 (Tex. Crim. App. 1980); *Romo v. State*, 593 S.W.2d 690 (Tex. Crim. App. 1980); *Hamilton v. State*, 678 S.W.2d 90 (Tex. Ct. App. 1984).

315. ARK. STAT. ANN. § 41-1902(1)(a)-(b) (Supp. 1983).

assumption, the culprit would be guilty of attempted arson in the remaining thirty-eight states (harm states).

The abolition of the requirement that a "burning" or "damage" be caused to the subject property by fire transforms arson into an attempt like offense. Part of the law of "attempted arson" is thus converted into the offense of arson. This is the position taken by the arson offenses in the Model Penal Code.³¹⁶ And quite obviously the states that have turned arson into an inchoate offense have been heavily influenced by its provisions. Like the Model Penal Code's arson provisions, these states use the law of arson to suppress and punish the use of fire to endanger people and property well beyond the protection afforded by the common law. And though nearly all of the "damage" statutes have the same goal, the Model Penal Code and the states that follow its inchoate approach seek to achieve that goal at the moment the fire is started rather than when the fire causes damage to the property in question. On the other hand, the damage statutes rely on their attempted arson law to achieve that goal.

A legislature should make its choice between a damage statute and the formulation of arson as an inchoate offense largely on the basis of whether a person who risks harm should be treated precisely the same way as a person who inflicts harm. Since this question goes to the very heart of the justification for the distinction between "completed" and "inchoate" offenses, further discussion of this issue must await another day.

3. Exploding

At common law it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast.³¹⁷ This tradition was carried forward into the Model Arson Law which was so influential during the middle years of the current century. Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb. Accordingly, the Model Penal Code and the arson statutes of forty states now include explosions in their arson statutes.³¹⁸ These forty states include the twenty-three that use the

316. MODEL PENAL CODE AND COMMENTARIES § 220.1 comment 3, at 14-15.

317. See *supra* note 93 and accompanying text.

318. MODEL PENAL CODE § 330.1. These forty states are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. The statutory provisions in each of these states are identified *infra* notes 319-21.

Accordingly, the only states that do not cover damage by explosion in their arson laws are California, Idaho, Maryland, Massachusetts, Michigan, Nevada, North Carolina, South Dakota, West Virginia, and Vermont. See *infra* note 323.

"damage" standard for fire inflicted injuries,³¹⁹ the twelve states that treat arson as an inchoate offense,³²⁰ and five states that adhere to the traditional formulation of arson, an actor who "sets fire to or burns" the subject property.³²¹ The inclusion of explosions within the concept of arson does not require a change in the description of the prohibited conduct in either the "damage" or the "inchoate" states. The concept of damaging and endangering by an explosion is the same as damaging, or risk taking, by fire. Not so in the "sets fire to or burns" states. In these five states, the prohibited conduct is described in terms of an explosion causing "damage" or "destroying" the subject property. These states thus adopt a "damage" approach with reference to the injury of the subject property by explosions while adhering to the traditional formulation for fires.³²² Nine of the ten states that do not include damage by explosion as arson have retained their statutes which were patterned upon the Model Arson Law. They are all states which use the "sets fire to or burn" formulation of the conduct prohibited by their arson laws.³²³ Although the one remaining state,

319. See *supra* note 298 and accompanying text.

320. See *supra* note 313 and accompanying text.

321. COLO. REV. STAT. §§ 18-4-102 to -104 (1978); MISS. CODE ANN. § 97-17-3 (1973) (There is, however, only one arson provision in Mississippi that includes damage by an explosion, and that applies only to the damage of any "state-supported school building" by an explosion. *Id.* The remainder of the Mississippi arson provisions apply only to fire, and they are worded in accordance with the "sets fire to" approach of the Model Arson Law. *Id.* §§ 97-17-1, -17-5, -17-7, -17-9, -17-11, -17-13.); OKLA. STAT. ANN. tit. 21, §§ 1401-1404 (West 1983); S.C. CODE ANN. §§ 16-11-110 (1985) (However, the remainder of the South Carolina felony arson provisions apply only to fires and are worded in terms of "sets fire to, burns, or causes to be burned," the familiar language of the "sets fire to" approach of the Model Arson Law. *Id.* §§ 16-11-130 to -11-150 (second offense), -11-190.); VA. CODE §§ 18.2-77 to -81 (1982).

322. See *supra* note 321.

323. IDAHO CODE §§ 18-801 to -804 (1979); MD. CRIM. LAW CODE ANN. §§ 6-8 (1982) (Maryland has supplemented the Model Arson Law with additional provisions. *Id.* §§ 9, 10A, 11.); MASS. GEN. LAWS ANN. ch. 266, §§ 1, 2, 5, 10 (West 1970) (The Massachusetts version of the Model Arson Law divides the sections differently. There are minor changes in some of the provisions, and there is at least one supplementary provision. *Id.* § 7.); MICH. COMP. LAWS §§ 28.267-270 (1984) (There are also two clearly supplementary provisions. *Id.* §§ 28.273 (burning of woods and prairies), 28.275 (setting fire to mines and mining materials); NEV. REV. STAT. §§ 205.010-.030 (1985) (However, Nevada has modified its Model Arson Law provisions to expand the personal protection afforded by its arson statutes. See *supra* note 221 and accompanying text.); N.C. GEN. STAT. §§ 14-58, -58.2, -59 to -62, -62.1, -63 to -66, -67.1 (1981) (Strictly speaking, North Carolina is not a Model Arson Law State. See *supra* notes 141-46 and accompanying text. Nevertheless, since the Model Arson Law was based upon the English statutory development, as were the arson laws of North Carolina, North Carolina is included here.); S.D. CODIFIED LAWS ANN. §§ 22-33-1 to -4, -10 (1979 & Supp. 1985) (South Dakota, like Nevada, has altered the basic structure of its arson laws, which were apparently patterned upon the provisions of the Model Arson Law, to expand the personal protection afforded by its arson

California, has recently revised its arson provisions, it is the only state to enact new arson legislation after the publication of the Model Penal Code which has not included damage by explosion as arson.³²⁴

Before moving on to the statutory changes in the subject matter of arson, a summary of the conduct prohibited by the modern statutes may be helpful.

1. Fifteen states continue to describe the conduct prohibited by their arson statutes with the phrase "sets fire to or burns."³²⁵ Although there was a nearly even division of authority at mid-century on the issue of whether the phrase "sets fire to" was synonymous with "burns," the only viable remaining authority, and the modern trend, holds that the phrase "sets fire to" means "damages" by means of fire.³²⁶ This judicial interpretation makes these statutes mean essentially the same as the statutory scheme that prevails in the majority of states, the "damage" by fire description of the prohibited conduct.

2. Twenty-three states have abandoned the traditional formulations of the conduct prohibited by the arson statutes. These states describe the prohibited conduct as an actor who "damages" or sometimes "damages or destroys" specified property by means of fire.³²⁷ Under these statutes, "damage" means any physical injury to the property or, to put it differently, the fire must cause some change or injury to the property which lowers its value or impairs its usefulness.³²⁸ Thus injury to property caused by fire, which would not meet the "burning" standard of the common law offense, such as scorching, smoke, water (used to extinguish the fire) or heat damage, is sufficient for arson in these states.³²⁹

3. The Model Penal Code converts arson into an inchoate offense by abolishing the harm requirement.³³⁰ Under the Code, there is then no requirement that the actor's incendiary action cause any damage to property or, of course, that the property "burns." The prohibited conduct is simply the starting of a fire with a specified *mens rea* toward specified property. Twelve states have followed the Model Penal Code by altering most of their statutes to convert arson into an inchoate offense.³³¹ Nevertheless, under the Code, and in these twelve states, a fire must actually be started by the actor to incur arson liability. If the actor does not start a fire, he is guilty, if at all, of attempted arson. This approach to the law of arson emphasizes the risk taking aspects of the

statutes. *See supra* note 221 and accompanying text.); VT. STAT. ANN. tit. 13, §§ 502-506 (Supp. 1985) (Vermont has at least one supplementary provision: *Id.* § 507 (burning forests).); W. VA. CODE §§ 61-3-1 to -5 (1984).

324. CAL. PENAL CODE §§ 450-452 (West Supp. 1986).

325. *See supra* note 289 and accompanying text.

326. *See supra* notes 307-09 and accompanying text.

327. *See supra* note 298.

328. *See supra* notes 299-300 and accompanying text.

329. *See supra* notes 301-03, 307-09 and accompanying text.

330. *See supra* note 316 and accompanying text.

331. *See supra* note 313 and accompanying text.

actor's incendiary (or explosive) conduct rather than the harm it caused. In addition five states have at least one arson offense which is an inchoate offense.

4. Though it was not arson at common law to damage or destroy property by an explosion unless the explosion caused the property to burn before it was destroyed by the blast, the Model Penal Code and the majority of states prohibit such conduct by their arson statutes.³³² Except for the states that treat arson as an inchoate offense, the states which include explosions in their arson laws adopt a damage standard for that means of committing arson.³³³ In other words, the conduct prohibited by those arson statutes is the actor's causing an explosion which "damages," or "destroys" the subject property. In the "inchoate" states, it is an actor who causes an explosion with the specified *mens rea* toward a specified type of property.

B. *The Subject Matter*

At common law the subject matter of the law of arson was a dwelling house (of another) or a building within its curtilage.³³⁴ But the modern statutes have greatly altered this element of the law of arson in two respects. First, in the states which define arson as an inchoate offense, there is technically no subject matter of the crime, for these statutes have, of course, abolished the physical harm requirement. The gravamen of these statutes is the risk to persons and property created by the actor's use of fire (or explosives). Since the role of property is somewhat different under these statutes, the states with inchoate arson offenses will be discussed in section (b) below.³³⁵ Significant changes have been made, however, in the subject matter of the law of arson in the remainder of the states as well.

1. The Subject Matter of Arson in the Majority of States (The Harm Jurisdictions)

As we have seen in the majority of the states, thirty-eight in number,³³⁶ the common law conception of arson as an offense which prohibits an actor from inflicting harm on a subject matter has been retained. But the definition of the subject matter of arson has been greatly expanded. The first change was aimed at expanding the crime into an offense which protected property as well as an offense against the habitation. Arson as an offense against property reached its apex in the United States during the middle years of the current

332. See *supra* note 318 and accompanying text.

333. See *supra* notes 319-21 and accompanying text.

334. See *supra* text accompanying note 10. The "dwelling house" and curtilage rule at common law are discussed *supra* text accompanying notes 18-50.

335. See *infra* text beginning at note 378.

336. See *supra* notes 325-29 and accompanying text.

century when the statutes of forty-four states had either enacted the Model Arson Law (which epitomizes arson as an offense against the habitation and property) or most of its salient provisions. But following the publication of the Model Penal Code, there was a flurry of legislative activity aimed at changing the law of arson into an offense which also protected people from the risks caused by fires and explosions. Today, forty-one states have arson statutes which have metamorphosized arson into a complex offense against both person and property.³³⁷

The expansion of arson into an offense which protects property was achieved by the simple expedient of expanding the subject matter of the offense by statute. And, as we have seen above, the redefinition of the subject matter has also been used to expand the personal protection of the arson offenses as well. Though this technique, the use of a person endangering subject matter, is frequently coupled with the use of other criteria, the person endangering circumstances, to achieve that result.³³⁸

These two distinct uses of the subject matter of arson, one for the purpose of expanding the crime's protection of people against the risks of death or injury caused by fire (or explosion) may cause a degree of confusion when the arson statutes of one state are compared with the similar laws of another state. An example is in order.

As we have seen, the common law of arson protected only dwellings and buildings within the curtilage as an incident of the protection of the dwellers within the habitation.³³⁹ The modern statutes, discussed below, generally extend protection to all buildings.³⁴⁰ Their inclusion in the modern law of arson serves two distinct, but related goals. The arson law protects buildings as a property offense, and, with additional definitions of buildings (as when, for example, the building is a "dwelling") or when certain circumstances exist with any building (as when it is occupied and the fire endangers the occupants) the law of arson also is an offense against persons. In either or both cases the common law offense is expanded by the modern statutes. In all states except Maine, the contemporary statutes contain several arson offenses which vary in the severity of their punishment.³⁴¹ It is in these grading distinctions that one clearly sees the difference between the arson provisions aimed at protecting *property* (which are generally punished less severely) and the provisions which have as their goal the protection of *people* from the risks of death or injury from fires or explosions. For example, under Idaho's current version of the Model Arson Law, it is first degree arson (punishable by imprisonment for not less than two nor more than twenty years) to burn any "dwelling house" or any "kitchen, shop,

337. See *supra* note 221.

338. See *supra* notes 244-62 and accompanying text.

339. See *supra* text accompanying notes 14-16.

340. See *infra* notes 355-62 and accompanying text.

341. See *infra* text accompanying notes 788-804.

barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto”³⁴² In essence this is the common law’s protection of dwelling houses and buildings within curtilage. On the other hand, the burning “*of any building or structure of whatsoever class or character . . . not included or described in the preceding section*” (the first degree arson provisions) is arson in the second degree (punishable by not less than one nor more than ten years imprisonment).³⁴³ Under this scheme, the principal thrust of first degree arson is the protection of the people whereas second degree arson primarily protects the property interests in other buildings. Thus Idaho, aside from the protection afforded to personal property, defines the subject matter of arson as dwellings, buildings within the curtilage, and all other buildings.

In a state that uses its arson laws to give greater protection to people than is provided in Idaho, mention of the dwelling house and the curtilage rule is frequently omitted. Instead, for example, both the person protecting offense (first degree arson) and the property protecting offense (second degree arson) use the same subject matter description, a “building.” The distinction between first and second degree arson depends upon the life or limb endangering circumstances attendant upon the fire rather than the type of property which is the subject matter of the two separate arson provisions, first and second degree arson. Thus, in Alabama it is first degree arson to damage a building by fire (or explosion) when: “(1) Another person is present in such building at the time, and (2) the actor knows that fact, or circumstances are such as to render the presence of a person therein a reasonable possibility.”³⁴⁴ But it is arson of the second degree if those circumstances do not exist.³⁴⁵ In Alabama, it will always be arson for another to burn a dwelling house or a building within its curtilage, but whether it is first degree (the person protecting provisions) or second degree (the property protecting provisions) arson depends upon the existence of the additional circumstances. But if one were simply to compare the Idaho statute with the Arkansas statute, dwelling houses are explicitly part of the subject matter of arson in Idaho, but they are implicitly part of the subject matter in Alabama. Further, while the burning of a dwelling house is always first degree arson in Idaho, it is first degree arson in Alabama only if the attendant circumstances are present (which they probably are in nearly every case). Nevertheless, dwelling houses are part of the subject matter of arson in both states.

But the problem which arises with the use of general or specific terms is not the only ground for potential confusion. The definition of the same word or phrase used in the arson statutes of different states may vary depending upon whether it is used for purposes of expanding the personal protection or

342. IDAHO CODE § 18-801 (1979).

343. *Id.* § 18-802.

344. ALA. CODE § 13A-7-41 (1982).

345. *Id.* § 13A-7-42 (Supp. 1985).

the property protection of the crime, and with the extent of coverage to both person and property afforded by the statute. For example, the highest arson offense in Arizona is committed by "intentionally and unlawfully damaging an occupied structure" by fire (or explosion).³⁴⁶ A "structure" is defined as "any building, object, vehicle, watercraft, aircraft or place with sides and a floor, separately securable from any other structure attached to it and used for lodging, business, transportation, recreation or storage."³⁴⁷ And an "occupied structure" means any structure (as so defined) "in which one or more human beings either is or is likely to be present or so near as to be in equivalent danger at the time the fire or explosion occurs. The term includes any dwelling house, whether occupied, unoccupied or vacant."³⁴⁸

New Hampshire, like Arizona, defines its highest arson offense as damaging an "occupied structure" by fire (or explosion),³⁴⁹ and an "occupied structure" is defined to mean "any structure, vehicle, boat or place adapted for overnight accommodations of persons, or for carrying on business therein, whether or not a person is actually present."³⁵⁰ The damaging of any other type of property (so long as the damage exceeds \$1,000) by fire (or explosion) with the requisite *mens rea* is a lesser arson offense in New Hampshire.³⁵¹ Quite obviously the definition of the term "occupied structure" in Arizona varies considerably from the definition used in New Hampshire. For example, it would not be the highest arson offense in New Hampshire to place a bomb in a private automobile and to blow it up while it is driven down the road (so long as it was not "adapted for overnight accommodation of persons or for carrying on business therein," and surely most automobiles would not come within that definition). However, the property interest in the car would be protected under the concept of "the property of another" in New Hampshire, so the culprit would be guilty of the lesser felony provided the act was committed with the requisite *mens rea*.³⁵² In Arizona, however, our bomber would be guilty of arson in the first degree.³⁵³

Despite the fact that (1) different terms in the arson statutes may include the same subjects (the comparison between the Idaho and the Alabama statutes), and (2) the same terms may not include the same subjects (the comparison between the Arizona and New Hampshire statutes), general patterns do emerge from the statutes in these thirty-eight states. These general patterns are discussed below.³⁵⁴

346. ARIZ. REV. STAT. ANN. § 13-1704 (Supp. 1985).

347. *Id.* § 13-1701(4) (1978).

348. *Id.* § 13-1701(2).

349. N.H. REV. STAT. ANN. § 634:1(II) (1974).

350. *Id.* § 635:1(III).

351. *Id.* § 634:1(III).

352. *Id.*

353. ARIZ. REV. STAT. ANN. §§ 13-1701(2)-(4), -1704 (1978 & Supp. 1985).

354. Indeed, the remainder of this paper is devoted to this discussion.

a. Dwellings, Buildings, Structures, and other Real Property

No American jurisdiction confines its arson laws to the burning (or exploding) of dwelling houses or buildings within the curtilage. However, the concepts of the dwelling house and the curtilage rule are still important as grading concepts in several states today.³⁵⁵ Thirty-six of the thirty-eight states expressly provide that "buildings"³⁵⁶ or "structures,"³⁵⁷ or sometimes both³⁵⁸ are the subject matter of arson. Although the term "structure" is a more general term than "building" (all buildings are structures, but not all

355. See *infra* notes 822-25 and accompanying text.

356. ALA. CODE §§ 13A-7-41 to -43 (1982 & Supp. 1985); ALASKA STAT. §§ 11.46.400-.410 (1983); DEL. CODE ANN. tit. 11, §§ 801-803 (1979); KAN. STAT. ANN. §§ 21-3718 to -3719 (1981); MD. CRIM. LAW CODE ANN. §§ 6-11 (1982 & Supp. 1986); MICH. COMP. LAWS §§ 28.267-.270, .273, .275 (1981); MINN. STAT. ANN. §§ 609.561-563, .576 (West Supp. 1986); MISS. CODE ANN. §§ 97-17-1 to -13 (1973); NEB. REV. STAT. §§ 28-502 to -505 (1979); N.Y. PENAL LAW §§ 150.00-.20 (McKinney 1975 & Supp. 1986); N.C. GEN. STAT. §§ 14-58 to -66 (1981); WIS. STAT. ANN. §§ 943.02-.04 (West 1982).

357. ARIZ. REV. STAT. §§ 13-1703 to -1704 (Supp. 1985); CAL. PENAL CODE §§ 451-452 (West Supp. 1986); FLA. STAT. ANN. § 806.01 (West Supp. 1986); GA. CODE ANN. §§ 26-1401 to -1403 (1983); LA. REV. STAT. ANN. §§ 14:51-.53 (West 1974 & Supp. 1986); MONT. CODE ANN. §§ 45-6-103 (1985); NEV. REV. STAT. §§ 205.010-.030 (1985); N.H. REV. STAT. ANN. § 634:1 (1974 & Supp. 1983); S.D. CODIFIED LAWS ANN. §§ 22-33-1 to -4, -33-10 (1979 & Supp. 1985); UTAH CODE ANN. §§ 76-6-102 to -103 (1978).

358. COLO. REV. STAT. §§ 18-4-102 to -105 (1978); IDAHO CODE §§ 18-801 to -804 (1979); Criminal Code of 1961, tit. III, art. 20, §§ 20-1 (Arson), 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, §§ 20-1 to -1.1 (Smith-Hurd 1977 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 266, §§ 1, 2, 5, 7, 8, 10 (1970); MO. REV. STAT. §§ 569.040-.055 (1979); OKLA. STAT. ANN. tit. 21, §§ 1401-1404 (West 1983); OR. REV. STAT. ANN. §§ 164.315-.325 (1985); R.I. GEN. LAWS §§ 11-4-2 to -7 (1981 & Supp. 1985) (Rhode Island also has a misdemeanor offense which is called "Arson-Seventh degree." *Id.* § 11-4-8 (1981).); S.C. CODE ANN. §§ 16-11-110, -11-125, -11-130, -11-140, -11-150 (a felony for a second offense), -11-170 (a felony/misdemeanor) -11-190 (Law. Co-op. 1985); TENN. CODE ANN. §§ 39-3-201 to -206 (1982); VT. STAT. ANN. tit. 13, §§ 502-507 (Supp. 1985); VA. CODE §§ 18.2-77 to -82, .2-86 (1982); WASH. REV. CODE ANN. §§ 9A.48.020-.040, .060 (West 1977 & Supp. 1985); W. VA. CODE §§ 61-3-1-3, -5 (1984).

Neither Hawaii nor Indiana expressly use the terms "building" or "structure" in their arson statutes. Hawaii uses the single term "property" over a given value. HAWAII REV. STAT. §§ 708-820 to -823 (1976). In turn, "property" is broadly defined to include "any . . . personal property, real property . . . or article of value of any kind." *Id.* § 708-800(15).

The Indiana statutes describe the subject matter of arson as a "dwelling of another," "property of any person," or "property of another person . . . if the pecuniary loss is at least \$250.00." IND. CODE ANN. § 35-43-1-1 (Burns 1984). Quite obviously buildings and structures are the subject matter of "criminal property damage" in Hawaii and of arson in Indiana if they are dwellings or worth more than \$250.00.

structures are buildings) and is therefore capable of being construed to include such objects as bridges, dams, powerplants and the like, objects would not usually fall within the conception of a building under common law arson, the statutory definition of the two words do not generally differ all that much. Each is typically included within the statutory definition of the other, and both frequently, though not invariably, include such items of personal property as vehicles, trailers, railway cars, aircraft, watercraft, and tents, either generally or under certain conditions.³⁵⁹ Although an occasional statute

359. *E.g.*, ALA. CODE § 13A-7-40(1) (1982):

BUILDING. As used in this article, such term means any structure which may be entered and utilized by persons for business, public use, lodging or the storage of goods, and includes any vehicle, railway car, aircraft or watercraft used for the lodging of persons or for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall not be deemed a separate building.

Id. ALASKA STAT. § 11.81.900(6)(3) (1983):

'[B]uilding,' in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business; when a building consists of separate units, including apartment units, offices, or rented rooms, each unit is considered a separate building.

Id. ARIZ. REV. STAT. § 13-1701(2), (4) (West 1978):

'Occupied structure' means any structure as defined in paragraph 4 in which one or more human beings either is or is likely to be present or so near as to be in equivalent danger at the time the fire or explosion occurs. The term includes any dwelling house, whether occupied, unoccupied or vacant 'Structure' means any building, object, vehicle, watercraft, aircraft or place with sides and a floor, separately securable from any other structure attached to it and used for lodging, business, transportation, recreation, or storage.

Id. ARK. STAT. ANN. § 41-1901(1) (1977):

'Occupiable structure' means a vehicle, building or other structure: (a) where any person lives or carries on a business or other calling; or (b) where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or (c) which is customarily used for overnight accommodation of persons; whether or not a person is actually present. Each unit of an occupiable structure divided into separately occupied units is itself an occupiable structure.

Id. CAL. PENAL CODE § 450(a), (c)-(d) (West Supp. 1986):

'Structure' means any building, or commercial or public tent, bridge, tunnel, or powerplant.
'Property' means real property or personal property, other than a structure or forest land.

'Inhabited' means 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.

Id. DEL. CODE. ANN. tit. 11, § 222(1) (1979):

'Building', in addition to its ordinary meaning, includes any structure, vehicle or watercraft. Where a building consists of 2 or more units separately secured or occupied, each unit shall be deemed a separate building.

Id. FLA. STAT. ANN. § 806.01(3) (West Supp. 1986):

As used in this chapter, 'structure' means any building of any kind, any

will include bridges, or dams, or powerplants either in the definition of a "structure,"³⁶⁰ or as one of the subject matters set forth in the statute,³⁶¹ the more common practice is to include this type of real property by the use of the generic phrases "any real or personal property," or "any property," both of which will be discussed below.³⁶²

b. Personal Property

Although common law arson did not protect personal property from being burned or damaged by fire, the arson statutes of twelve of the thirty-eight states make *any personal property* the subject matter of arson so long as the value of the property, or the amount of the damage inflicted, exceeds a given amount (which ranges from a low of \$25.00 to a high of \$1,000.).³⁶³

enclosed area with a roof over it, any real property and appurtenances thereto, any tent or other portable building, and any vehicle, vessel, watercraft, or aircraft.

Id. MINN. STAT. ANN. § 609.556(3) (West Supp. 1985):

'Building,' in addition to its ordinary meaning includes any tent, watercraft, structure or vehicle that is customarily used for overnight lodging of a person or persons. If a building consists of two or more units separately secured or occupied, each unit shall be deemed a separate building.

Id. NEB. REV. STAT. § 28-501 (1979):

As used in this article, unless the context otherwise requires, building shall mean a structure which has the capacity to contain, and is designed for the shelter of man, animals, or property, and includes ships, trailers, sleeping cars, aircraft, or other vehicles or places adapted for overnight accommodations of persons or animals, or for carrying on a business therein, whether or not a person or animal is actually present. If a building is divided into units for separate occupancy, any unit not occupied by the defendant is a building of another.

Id. WASH. REV. CODE ANN. § 9A.48.010(a)(5) (West 1977):

'Building' has the definition in RCW 9A.04.110(5), and where a building consists of two or more units separately secured or occupied, each unit shall not be treated as a separate building. And § 9A.04.110(5): 'Building,' in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

Id.

360. *E.g.*, CAL. PENAL CODE § 450(a) (West Supp. 1986), discussed *supra* note 359.

361. MASS. GEN. LAWS ANN. ch. 266, § 2 (West 1970); N.C. GEN. STAT. § 14-61 (1981); TENN. CODE ANN. § 39-3-203 (1982); Va. Code § 18.2-80 (1982).

362. See *infra* text following note 364.

363. GA. CODE ANN. § 26-1403 (1983); IDAHO CODE § 18-803 (1979); MD. CRIM. LAW CODE ANN. § 8 (1982); MASS. GEN. LAWS ANN. ch. 266, § 5 (West 1970); MISS. CODE ANN. § 97-17-7 (1972); NEV. REV. STAT. § 205.020 (1985); R.I. GEN. LAWS § 11-4-5 (Supp. 1985); S.C. CODE ANN. § 16-11-140 (Law. Co-op. 1976); TENN. CODE ANN. § 39-3-203 (1982); VT. STAT. ANN. tit. 13, § 504 (Supp. 1985); VA. CODE § 18.2-81 (1982); W. VA. CODE § 61-3-3 (1984).

In addition, North Carolina protects any personal property regardless of its value if the actor burns that property with the intent "to injure or prejudice . . . the person owning the property or any other person."³⁶⁴

c. Any Real or Personal Property or any Property

Each of the states considered in their section uses a comprehensive phrase, such as "any real or personal property" or "any property," to describe the subject matter of at least one of the felony arson offenses. Since there is no overlap between these states and the thirteen states that use "personal property" (together with "dwelling, building or structure"), the comprehensive description states also provide similar protection to personal property. However, the comprehensive description of property used by these states also includes "real property." In all, except for Hawaii, the term "dwelling," "building," or "structure" is also used to define the subject matter of arson but that term is either used for emphasis, or as a grading distinction, to distinguish between a greater and lesser arson offense.³⁶⁵

There are eighteen states that use one or the other of these comprehensive phrases to describe the subject matter of at least one of the felony arson offenses. With reference to their personal property coverage, there is a monetary minimum on the value of the personal property or the amount of the damage caused to qualify as a felony in thirteen of the states.³⁶⁶ In the remaining five states, any personal property regardless of its value or the extent of the damage will do.³⁶⁷ Again with reference to personal property only, if the thirteen states which include "any personal property" as the

364. N.C. GEN. STAT. § 14-66 (1981).

365. See *infra* notes 374-77.

366. ARIZ. REV. STAT. ANN. § 13-1703 (Supp. 1985) (more than \$100 in value); COLO. REV. STAT. § 18-4-103 (1978) (if damage is \$100 or more); HAWAII REV. STAT. § 708-821(b) (1976) (damages in an amount exceeding \$500); Criminal Code of 1961, tit. III, art. 20 § 20-1 (Arson), ILL. ANN. STAT. ch. 38, § 20-1 (Smith-Hurd 1977) (personal property having a value of \$150 or more); IND. CODE ANN. § 35-43-1-1 (Burns 1985) (pecuniary loss of at least \$250); MICH. COMP. LAWS §§ 28.268-.269 (1981) (value of personal property is more than \$50); MINN. STAT. ANN. § 609.563 (West Supp. 1986) (value of more than \$300); NEB. REV. STAT. § 28-504 (1979) (damages of \$100 or more); N.H. REV. STAT. ANN. § 634:1 (III)(c) & (d) (1974 & Supp. 1983) (pecuniary loss in excess of \$1,000); OKLA. STAT. ANN. tit. 21, § 1403 (West 1983) (personal property worth not less than \$50); S.D. CODIFIED LAWS ANN. § 22-33-3 (1979) (of a value in excess of \$25); UTAH CODE ANN. § 76-6-102 (1978) (if the damage exceeds \$5,000); WIS. STAT. ANN. §§ 943.02-.03 (West 1982) (property of any value by explosion, of the value of \$100 or more by fire).

367. CAL. PENAL CODE § 451 (West Supp. 1986); KAN. STAT. ANN. § 21-3718 (1981); LA. REV. STAT. ANN. § 14:52 (West 1986) (damage of \$500 or more); MO. REV. STAT. § 569.055 (1979); WASH. REV. CODE ANN. § 9A.48.030 (1977).

subject matter of arson³⁶⁸ are added to the states that include personal property in a comprehensive phrase such as "any real or personal property" or "any property,"³⁶⁹ thirty-one of the thirty-eight states that require harm to be inflicted on the subject matter of the offense extend protection to any personal property as long as it also meets a monetary criterion in the majority of those states. The remaining seven states either protect only specified personal property, or do not protect it at all. Six of these seven, Alabama, Delaware, Florida, Montana, New York, and Oregon, protect specified personal property by virtue of their respective definitions of "building" or "structure," or in connection with their contents.³⁷⁰ Except for New York, these states do not otherwise protect personal property by the felony sanctions of their arson statutes.³⁷¹ New York includes, in addition, motor vehicles in the subject matter of arson.³⁷² The sole remaining state, Alaska, makes it a felony to burn (or explode) any personal property only if it endangers another person.³⁷³

With respect to real property, each of these eighteen states using the comprehensive phrases "any real or personal property" or "any property"

368. The thirteen states are identified *supra* notes 363-64.

369. These states are identified *supra* notes 366-67.

370. ALA. CODE § 13A-7-40(1) (1982): "Building" includes any *vehicle, railway car, aircraft or watercraft* used for the lodging of persons or for carrying on business therein. The felony arson provisions only protect "buildings." *Id.* §§ 13A-7-41 to -42 (1982 & Supp. 1985).

DEL. CODE ANN. tit. 11, § 222(1) (1979): "Building," in addition to its ordinary meaning, includes any structure, *vehicle, or watercraft*. The felony arson provisions only protect "buildings." *Id.* §§ 801-803.

FLA. STAT. ANN. § 806.01 (West Supp. 1986): "Structure means . . . any *vehicle, vessel, watercraft, or aircraft*." (emphasis supplied). The felony arson provisions apply only to dwellings or structures or *their contents*. *Id.*

MONT. CODE ANN. § 45-2-101(40) (1985): "'Occupied structure' means any building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business, whether or not a person is actually present." The felony arson provisions (along with two inchoate offenses discussed *infra* notes 408-12) apply only to occupied structures. *Id.* §§ 45-6-102 to -103.

N.Y. PENAL LAW § 150.00(1) (McKinney Supp. 1986): "'Building,' in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein." See *infra* text accompanying note 371.

Although Oregon uses the phrase "protected property" rather than "building or structure," that phrase is defined in essentially the same way. "Protected property" means any *structure, place or thing* customarily occupied by people . . . " OR. REV. STAT. 164.305(1) (1985) (emphasis supplied). The felony sanction of arson protects only "protected property" and "buildings" in Oregon. *Id.* §§ 164.315, -325. Although "any property" may be the subject of arson, it is arson only if the fire (or explosion) endangers either people or "protected property." *Id.* § 164.325. Thus other property, as property, is not protected in Oregon.

371. See citations *supra* note 370.

372. N.Y. PENAL LAW §§ 150.05-.20 (McKinney Supp. 1986).

373. ALASKA STAT. §§ 11.46.400-410 (1983).

protect real property as the subject matter of at least one felony arson offense. But with respect to real property, all of these states (except Hawaii) also describe a "dwelling," a "building," or a "structure" as the subject matter of arson as well.³⁷⁴ Hence the arson laws in these states protect (1) dwellings, or buildings, or structures (or more usually, because of the definition used, all three); (2) any other real property (such as water towers, windmills, bridges, dams, and the like); and (3) any personal property (though it must meet certain monetary criteria in fourteen of the eighteen states).

In the thirteen states which comprehensively protect personal property, but not real property, their arson statutes include (1) dwellings, or buildings, or structures (or more usually, because of the definitions used, all three); and (2) any personal property (but in the majority of these states only if specified monetary criteria is met).³⁷⁵ In addition, five of these thirteen states protect specified items of real property, (such as bridges and dams),³⁷⁶ and seven extend protection to such items of real property as forests, woods, and standing crops.³⁷⁷ But none comprehensively include all items of real property as the subject matter of arson.

2. States with Inchoate Offenses³⁷⁸

As we have seen before, the principal thrust of the Model Penal Code's arson provisions is the protection of people against the risks of injury and death created by unlawful fires and explosions.³⁷⁹ And the drafters of the Code extended their protection beyond that afforded in the harm states by converting arson into an inchoate offense. The Model Penal Code offenses are committed when the actor purposely "starts a fire or causes an explosion" either with the further purpose of "destroying a building or occupied struc-

374. See *supra* notes 366-67 and accompanying text.

375. See *supra* notes 363-64 and accompanying text.

376. MD. CRIM. LAW CODE ANN. § 7 (1982 & Supp. 1985) (piers, wharfs, & public bridges); MASS. GEN. LAWS ANN. ch. 266, § 2 (West 1970) (bridges, locks, dams, flumes, and tanks); N.C. GEN. STAT. § 14-61 (1981) (bridges); TENN. CODE ANN. § 39-3-203 (1982) (bridges and railroads); VA. CODE § 18.2-80 (1982) (bridges, locks, dams, or other structures).

377. MASS. GEN. LAWS ANN. ch. 266, § 5 (West 1970); NEV. REV. STAT. § 205.020 (1985); R.I. GEN. LAWS § 11-4-7 (Supp. 1985); S.C. CODE ANN. § 16-11-140 (Law. Co-op. 1985); TENN. CODE ANN. § 39-3-203 (1982); VT. STAT. ANN. tit. 13, § 507 (Supp. 1985); VA. CODE § 18.2-81 (1982).

378. Included here are the twelve states which define their basic arson offense as an inchoate crime. As indicated below (*see infra* text accompanying notes 402-07), several of these states also define one of their offenses as a traditional result, or harm, crime. On the other hand, while five "harm states" define their basic arson offense in the traditional way, they also define one of their remaining arson offenses as an inchoate crime. See *infra* notes 408-12 and accompanying text. The criterion used to classify these states is the principal thrust of their basic arson offenses.

379. See *supra* text accompanying notes 190-93.

ture of another" (or any property to collect insurance for such loss) or which recklessly "places another person in danger of death or bodily injury" or "places a building or occupied structure of another in danger of damage or destruction."³⁸⁰ In either case the offense is committed when the fire is started or the explosion is caused with the requisite purpose or which endangers persons or buildings or occupied structures.³⁸¹

In a harm state, the property must be either "burned" or "damaged" before the crime of arson is committed. A culprit who throws gasoline on a dwelling house, lights a match, and then changes her mind commits arson under the Model Penal Code, but attempted arson in the majority of states, for they adhere to the harm concept.³⁸² If the culprit changed her mind just before the match was lit, she would be guilty of attempted arson in all American states. Thus the inchoate provisions of the Model Penal Code convert only a portion of the law of attempted arson into arson. In one sense, the Model Penal Code has shifted the emphasis from the requirement of burning or damage to a similar, but perhaps less perplexing problem: when is a fire started? Be that as it may, there is no traditional subject matter of these inchoate provisions. Instead there is either (1) property which is the target of the actor's incendiary (or explosive) conduct, or (2) persons or property which are recklessly endangered by such conduct. In either case the function of the target property, or the person or property endangered is precisely the same: they define the risks the creation of which the arson offenses seek to punish and suppress. Of course, the subject matter of the arson offense in the harm states functions in essentially the same way, but our traditional ways of thinking about arson as a "result crime" suggests that separate treatment of the target and endangered property may be required.³⁸³ In addition, *people* are the direct concern in the Model Penal Code's "Reckless Burning or Exploding" provisions, whereas they were never the direct concern of the common law offense.³⁸⁴ Instead, they were implicitly and indirectly protected at common law, and in the harm states which have expanded the personal protection of arson, people are protected only after property is "burned" or "damaged."³⁸⁵

Finding it "difficult to distinguish the burning of property from other methods of property destruction reached by more generally applicable of-

380. MODEL PENAL CODE § 220.1(1)-(2).

381. The primary purpose behind the use of buildings or occupied structures as the target of the offense or the property endangered is to implicitly protect people. See *supra* text accompanying notes 200-05.

382. See *supra* text accompanying notes 278-79, 289-90, 297-305.

383. MODEL PENAL CODE § 220.1(2).

384. Although arson protected the dwellers in the habitation, it did so *indirectly* by virtue of the definition of the subject matter of the offense—a "dwelling house." See *supra* notes 18-50 and accompanying text.

385. *Id.*; see *supra* text accompanying notes 280-311.

fenses," the drafters of the Model Penal Code exclude property from the protection of the Code's arson provisions, except when the prospect of danger to human life is involved.³⁸⁶ In short, the Code does not use the arson provisions to protect property as property. Property is protected as an implicit means of protecting people (or protecting against insurance fraud).³⁸⁷ That is, of course, the reason for limiting the target property or the property endangered to "a building or occupied structure of another."³⁸⁸

Before moving on to a consideration of the nature of the property which may either be a target of the actor's conduct or endangered thereby, one further point should be made. If in one of these states the target property or the property (or person) endangered is actually damaged (or injured), quite obviously the offense is committed if the fire (or explosion) which caused the damage (or injury) were accompanied with the necessary *mens rea*.

Twelve states have patterned their arson laws, at least in substantial part, on the Model Penal Code's concept of arson as an inchoate offense.³⁸⁹

386. MODEL PENAL CODE AND COMMENTARIES § 220.1 comment 5, at 21.

387. As indicated in the introduction, a discussion of arson insurance fraud is beyond the scope of this paper. See *supra* note 5.

388. MODEL PENAL CODE § 220.1(1)-(2).

389. ARK. STAT. ANN. §§ 41-1902 to -1903 (1977 & Supp. 1983) (§ 41-1903 contains two damage provisions in subsections (b) and (c)); CONN. GEN. STAT. ANN. §§ 53a-111 to -113 (West 1985) (§ 53a-113 is a damage statute); IOWA CODE ANN. §§ 712.1-.3 (West 1979) (these are all inchoate provisions); KY. REV. STAT. §§ 513.020, .040, .060 (1985) (§ 513.040 is a damage provision. § 513.060 is an insurance fraud provision, and though such provisions are beyond the scope of this paper, it is mentioned here because it too is a damage provision.); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985) (this is entirely an inchoate provision); N.J. STAT. ANN. § 2C:17-1 (West 1982) (this is entirely an inchoate offense); N.M. STAT. ANN. §§ 30-17-5 to -6 (1984). § 30-17-5(A) is an inchoate offense ("arson") whereas subsection (B) (negligent arson) is a damage provision. § 30-17-6 (aggravated arson) is also a damage statute. Because the basic arson offense (§ 30-17-5(A)) is an inchoate provision, I have classified New Mexico as an inchoate state. Since I have no empirical data as to the frequency with which the various provisions are violated, I could have easily classified New Mexico as a harm state. Nevertheless, I have selected as the criterion of choice whether the basic provision, arson as opposed to "aggravated" or "negligent" arson, is inchoate or not. Under that criterion New Mexico is an inchoate state. N.D. CENT. CODE §§ 12.1-21-01 to -02 (1985) (§ 12.1-21-02(c) is a damage provision, whereas the remainder of that section (subsections (a) & (b)), are inchoate provisions as is all of § 12.1-21-01); OHIO REV. CODE ANN. §§ 2909.02-.03 (Page Supp. 1984) (§ 2909.02(A)(2) is a damage provision. The remainder of that section contains inchoate provisions. Section 2909.03 is an equal blend of inchoate and harm provisions.); 18 PA. CONS. STAT. ANN. § 3301 (Purden 1983) (the section creates only inchoate offenses); TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1985) (this section contains only inchoate offenses); WYO. STAT. §§ 6-3-101 to -103 (1977) (§ 6-3-102 is an inchoate insurance fraud provision, but it is included here because of its inchoate nature. § 6-3-103(a)(ii) is a property damage provision, but the re-

Of these twelve states, eleven define the basic offense in terms of an actor who starts a fire or causes an explosion with the intent of (or with the purpose of) damaging or destroying property (the target of the actor's conduct). In nine of the eleven states "buildings" or "structures" are at least one of the target properties (and sometimes the only target property).³⁹⁰ Like the states which use "buildings" or "structures" as the subject matter of their traditional harm statutes, these terms typically include the other, and such items of personal property as vehicles, watercraft, aircraft, trailers, sleeping cars, and the like.³⁹¹ Two states, Arkansas and New Mexico, include (along with buildings or structures) any property,³⁹² and that comprehensive phrase is the only description of the target of this inchoate offense in Iowa and Maine, which of course, covers "buildings" and "structures" as well.³⁹³ Arkansas and North Dakota also include vital public facilities within their description of the target of the actor's conduct.³⁹⁴ Finally, New Jersey uniquely makes "another person" the target of the actor's incendiary (or explosive) conduct.³⁹⁵ Seven of these eleven states include personal property as the target of their attempt-like offense beyond the specific items of property included within the definition of the terms "buildings" or "structures." These are the states with the comprehensive "any property" description of the target of their attempt-like offense, and states which use a similar phrase limited to personal property (generally with a monetary requirement as well).³⁹⁶

remainder of this section (subsection (i)) is an inchoate provision as is all of § 6-3-102.).

For reasons converse to those which caused me to classify New Mexico as an inchoate state, I classified Montana as a harm state. But the classification of Montana as a harm state is surely so close that it could have been easily classified either way. I simply chose to classify Montana as a harm state. *See infra* note 408 for the inchoate provisions in Montana.

390. These are the states listed *supra* note 389 with the exception of Iowa and Maine. As to these two states, see *infra* note 393. The Texas statute uses the phrase "building, habitation, or vehicle." TEX. PENAL CODE ANN. 28.02(a) (Vernon Supp. 1985). Ohio is the only state that uses an endangering type inchoate offense as its basic inchoate arson crime. *See supra* note 389.

391. *E.g.*, CONN. GEN. STAT. ANN. § 53a-100(a) (West 1985); KY. REV. STAT. § 513.010 (1985); N.J. STAT. ANN. § 2C:18-1 (West 1982); OHIO REV. CODE ANN. § 2909.01 (Page 1975 & Supp. 1984); WYO. STAT. § 6-1-104(v)-(xi) (1977).

392. ARK. STAT. ANN. § 41-1901 (1977); N.M. STAT. ANN. § 30-17-5 (1984) (This statute also specifically mentions bridges, utility lines, fences, or signs, but the value of the "thing" damaged or destroyed must be over \$100 to be a felony).

393. IOWA CODE ANN. § 712.1 (West 1979); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985).

394. ARK. STAT. ANN. §§ 41-1901(4), -1902(d), -1903(c) (1977 & Supp. 1983); N.D. CENT. CODE §§ 12.1-21-01 to -02(1)(b) (1985).

395. N.J. STAT. ANN. § 2C:17-1(a) (West 1982) ("A person is guilty of aggravated arson . . . if he starts a fire or causes an explosion, whether on his own property or another's: (1) Thereby purposely or knowingly placing another person in danger of death or bodily injury")

396. ARK. STAT. ANN. §§ 41-1901(2), -1902(b)-(c) (1977 & Supp. 1983); Iowa

Nine of these twelve states also include an "endangering" statute, a statute which prohibits an actor from endangering people or property by fire (or explosion),³⁹⁷ which is substantially similar to the "Reckless Burning or Exploding" provisions of the Model Penal Code.³⁹⁸ In all of these states, risks to people are specifically mentioned,³⁹⁹ buildings or structures are described in five,⁴⁰⁰ and any property of another or any personal property is protected from such conduct in four states.⁴⁰¹

But in seven of the states in which arson is predominately an inchoate offense, the traditional definition of arson as an offense requiring harm is used for at least one of the arson offenses.⁴⁰² The subject matter of these

CODE ANN. §§ 702.14, 712.1 (West 1979); ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985); N.M. STAT. ANN. § 30-17-5 (1984); N.D. CENT. CODE § 12.1-21-02 (1985); OHIO REV. CODE ANN. § 2909.03 (Page Supp. 1984); 18 PA. CONS. STAT. ANN. § 3301(d)(2) (Purdon 1983).

397. ARK. STAT. ANN. §§ 41-1902(1)(c), -1903 (1977 & Supp. 1983); CONN. GEN. STAT. ANN. §§ 53a-111(a)(4), -112(A), -114 (West 1985); IOWA CODE ANN. §§ 712.1-.3 (West 1979); ME. REV. STAT. ANN. tit. 17-A, § 802(B)(2) (West Supp. 1985); N.J. STAT. ANN. § 2C:17-1(a)(1), -1-(b)(1) (West 1982); N.D. CENT. CODE § 12.1-21-02(1)(a)-(b) (1985); OHIO REV. CODE ANN. §§ 2909.02(A)(1), (3), .03 (Page Supp. 1984); 18 PA. CONS. STAT. ANN. § 3301(a)(1)(i), (c)(2), (d)(1)-(2) (Purdon 1983); WYO. STAT. § 6-3-103(a)(i) (1977).

398. MODEL PENAL CODE § 220.1(2).

399. See *supra* note 397.

400. CONN. GEN. STAT. ANN. § 53a-114 (West 1985) ("Recklessly places a building of another . . . in danger of destruction or damage."); N.J. STAT. ANN. § 2C:17-1(b)(2) (West 1982) ("Thereby recklessly placing a building or structure of another in danger of damage or destruction."); N.D. CENT. CODE § 12.1-21-02(b) (1985) ("Places an entire or any part of a building or inhabited structure of another . . . in danger of destruction."); OHIO REV. CODE ANN. §§ 2909.02(A)(2) (occupied structure), .03(A)(3) (certain named public buildings) (Page Supp. 1984); 18 PA. CONST. STAT. ANN. § 3301(a)(1)(ii), -(c)(1), -6(c)(2), -(d)(1) (Purdon 1983) ("A . . . building or structure of another.").

401. IOWA CODE ANN. §§ 712.1, .3 (West 1979) (the value of the personal property must exceed \$500); ME. REV. STAT. ANN. tit. 17-A, § 802(B)(2) (West Supp. 1985) (no monetary qualification); OHIO REV. CODE ANN. § 2909.03(2)-(4) (Page Supp. 1984) (no monetary qualification); 18 PA. CONS. STAT. ANN. § 3301(d)(2) (a value of \$5,000 or more).

The Arkansas and North Dakota statutes also protect "vital public facilities." ARK. STAT. ANN. §§ 41-1901(4), -1902(d), -1903(c) (1977 & Supp. 1983); N.D. CENT. CODE § 12.1-21-02 (b) (1985).

402. ARK. STAT. ANN. § 41-1903 (1977 & Supp. 1983) (the reckless burning offense is part inchoate (subsection (a)), and part harm (subsections (b) & (c))); CONN. GEN. STAT. ANN. § 53a-113 (West 1985) (arson in the third degree: recklessly "causes destruction or damage to a building"); KY. REV. STAT. § 513.040 (1985) (arson in the third degree: "wantonly causes destruction or damage to a building of his own or of another"); N.M. STAT. ANN. § 30-17-5(B) (1984) (negligent arson: "causing the death or bodily injury of another; or damaging or destroying a building or occupied structure of another"), *id.* § 30-17-6 (aggravated arson: "damaging . . . any bridge, aircraft, watercraft, vehicle, pipeline, utility line, communication line or struc-

non-inchoate offenses are similar to the subjects used in the states where the traditional definition prevails.⁴⁰³ They are buildings or structures in five of the seven states,⁴⁰⁴ a vital public facility is added in Arkansas,⁴⁰⁵ additional property is set forth in the New Mexico statute,⁴⁰⁶ and two states, North Dakota and Wyoming, include any property of another in excess of a given amount.⁴⁰⁷ It is unclear why these states have chosen to use the traditional definition of arson in these instances.

Conversely, five or perhaps six of the states that generally use the traditional definition of arson (as a harm offense) also define one of their arson crimes as an inchoate offense.⁴⁰⁸ With the exception of Tennessee, which uses

ture, railway structure, private or public building, dwelling or other structure, causing a person great bodily harm"); N.D. CENT. CODE § 12.1-21-02(c) (1985) (endangering by fire or explosion: "causes damage to property of another constituting pecuniary loss in excess of two thousand dollars"); OHIO REV. CODE ANN. §§ 2909.02(2) (Page Supp. 1984) (aggravated arson: "cause physical harm to any occupied structure"), *id.* § 2909.03 (an equal blend of inchoate and damage provisions: "cause, or create a substantial risk of, physical harm"); WYO. STAT. § 6-3-103(a)(ii) (1977) (third degree arson: "with criminal negligence . . . destroys or damages any property of another which has a value of two hundred dollars . . . on more").

403. See *supra* text beginning at note 334.

404. ARK. STAT. ANN. § 41-1903(b) (1977); CONN. GEN. STAT. ANN. 53a-113 (West 1985); KY. REV. STAT. § 513.040 (1985); N.M. STAT. ANN. § 30-17-5(B), -17-6 (1984); OHIO REV. STAT. ANN. § 2909.02(2), .03(3) (Page Supp. 1984).

405. ARK. STAT. ANN. § 41-1903(c) (1977). Although North Dakota also protects "vital public facilities" by its arson laws, it does so only with its inchoate provisions. See *supra* note 394.

406. N.M. STAT. ANN. § 30-17-6 (1984).

407. N.D. CENT. CODE § 12.1-21-02(c) (1985); WYO. STAT. § 6-3-103(a)(ii) (1977).

408. COLO. REV. STAT. § 18-4-105 (1978) (fourth degree arson: "A person who knowingly or recklessly starts or maintains a fire or causes an explosion, on his own property or that of another, and by so doing places another in danger of death or serious bodily injury or places any building or occupied structure of another in danger of damage"); MONT. CODE ANN. § 45-6-102(1)(a) (1985) (Negligent arson: "[P]urposely or knowingly starts a fire or causes an explosion, whether on his own property or of another, and thereby negligently places another person in danger of death or bodily injury") The section also has a misdemeanor provision covering endangering the property of another. *Id.* § 45-6-103(b) (arson: "When, by means of fire or explosives, he knowingly or purposely . . . (b) places another person in danger of death or bodily injury"); R.I. GEN. LAWS § 11-4-2 (Supp. 1985) (arson-first degree: "Any person who knowingly causes . . . or creates by means of fire or explosion, a substantial risk of serious physical harm to any person or damage to any building the property of himself or another . . . which is occupied or in use"); TENN. CODE ANN. § 39-3-204 (1982) (setting fire with intent to burn—"if any person set fire to any material or thing, with intent to burn any building, boat or other subject matter of arson"); WASH. REV. CODE ANN. § 9A.48.020(1)(a), .020(1)(c) (West Supp. 1985) (arson in the first degree: knowingly and maliciously: "(a) causes a fire or explosion which is manifestly dangerous to any human life, including firemen . . . (c) causes a fire or explosion in any building in which there

the target variation of the inchoate offense,⁴⁰⁹ the provisions in these states are of the endangering variety.⁴¹⁰ Of the states with the "endangering" type statute, all name the danger to people as one of the objects of the statute,⁴¹¹ and in addition to the risk to persons, three or four states use the concept of a risk to a building or occupied structure.⁴¹²

Tennessee exclusively uses the target type of inchoate offense,⁴¹³ and Montana uses the same unique approach used by New Jersey when it defines arson, in part, as "knowingly or purposely . . . placing another person in danger of death or bodily injury" by means of fire or explosives.⁴¹⁴

The rationale of the use of these inchoate offenses by states that generally adhere to the traditional definition of arson is clear enough. They wish to extend the personal protection of their arson laws to situations in which human risks are created but harm has not been inflicted on one of the subject matters specified in one of their traditional arson offenses. This purpose can be gleaned from the description of what is protected by these statutes: people

shall be at the time a human being who is not a participant in the crime").

Although the New Hampshire statute is ambiguous, that state may also have an inchoate provision of the endangering variety. N.H. REV. STAT. ANN. § 634:1(III)(b) (1974) reads as follows: "The actor purposely starts a fire or causes an explosion on anyone's property and thereby recklessly places another in danger of death or serious bodily injury, or places an occupied structure of another in danger of damage" While there is no particular ambiguity in this wording, the ambiguity arises because of the construction of the entire section. Section 634:1(I) gives the basic definition of arson: "A person is guilty of arson if he knowingly starts a fire or causes an explosion which unlawfully damages the property of another." Subsections II, III, and IV of Section 634:1 *grade* the arson liability described in subsection I. If these subsections simply divide the arson liability described in subsection I, then all of the circumstances described in subsections II, III, and IV require that the fire or explosion damage the property of another. If this is so, then subsection III(b) requires that the purposely set fire or explosion (a) be on anyone's property, (b) but it must damage the property of another, and (c) thereby recklessly endanger another or the specified property. An example may be in order. These requirements would be fulfilled if the culprit knowingly burned the victim's automobile (thus damaging the property of another) while it was parked on the street (on public property) dangerously close to the victim's house, which was ignited by the blaze (endangering an occupied structure). Nevertheless, I have treated this provision as an inchoate offense though I find no cases addressing this issue. A court, however, could easily hold that this is a "harm" provision. Although I am inclined toward the harm interpretation, I later mention New Hampshire as having an inchoate provision, out of an abundance of caution.

409. TENN. CODE ANN. § 39-3-204 (1982).

410. The statutes are cited *supra* note 408.

411. These four states are Colorado, Montana, Rhode Island, and Washington. The statutes are cited *supra* note 408.

412. The three states are Colorado, Rhode Island, and Washington. The statutes are identified *supra* note 408. If the New Hampshire statute is construed to be an inchoate offense, then there are four states. See *supra* note 408.

413. The statutes are cited *supra* note 408.

414. The statutes are cited *supra* note 408.

and buildings or occupied structures. Why these states have not fully embraced the inchoate approach to arson is, however, less than clear.

Since twelve states have patterned their arson laws, at least in substantial part, on the Model Penal Code's concept of arson as an inchoate offense, have these states also followed the Code's conception of arson as essentially a crime which protects people, not property? Of these twelve states only Arkansas, Connecticut, and New Jersey fail to protect property interests against the risks of damage or destruction by fire.⁴¹⁵ Indeed these three states more closely follow the Model Penal Code than any other American state. But, since Arkansas and Connecticut also use the traditional harm definitions for at least one of their arson offenses and New Jersey does not,⁴¹⁶ New Jersey comes closer to the Model Penal Code's provisions, yet there are still substantial differences between the two.⁴¹⁷ Nevertheless, as does the Model Penal Code, all three of these states protect property by their felony arson offenses only incidentally to the protection of human risks associated with that property. Not so with the remaining nine states.

In Maine, the arson statute reflects no special interest in the protection of human risks over property risks. They are treated essentially the same, they are subject to the same punishment and all property of another is protected.⁴¹⁸ Likewise, the Texas statute, though it protects only limited types of property, draws no distinction between those provisions of the statute aimed at protecting property and those aimed at protecting people.⁴¹⁹ Iowa,⁴²⁰ Kentucky,⁴²¹ and Ohio⁴²² protect persons with their first degree or aggravated arson offenses, and property with their lesser degree or (simple) arson offenses. There is, however, a difference in the scope of the property protection afforded by the arson law in these three states. Iowa's second degree arson statute protects against endangering buildings, structures, real property of any kind, standing crops, and personal property which exceeds \$500.00 in value,⁴²³ whereas the Kentucky second and third degree arson statutes apply only to buildings.⁴²⁴ On the other hand, the Ohio (simple) arson statute

415. ARK. STAT. ANN. §§ 41-1902 to -1903 (1977 & Supp. 1983); CONN. GEN. STAT. ANN. §§ 53a-111 to -113 (West 1985); N.J. STAT. ANN. § 2C:17-1 (West 1982).

416. *See supra* note 402 and accompanying text.

417. New Jersey, for example, uses a person as the target of one of the arson offenses. *See supra* note 395 and accompanying text. The Model Penal Code contains no similar provision.

418. ME. REV. STAT. ANN. tit. 17-A, § 802 (West 1983 & Supp. 1985).

419. TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1985) (buildings, habitations, or vehicles in the specified situations).

420. IOWA CODE ANN. §§ 712.1-.3 (West 1979).

421. KY. REV. STAT. §§ 513.020-.040 (1985).

422. OHIO REV. CODE ANN. §§ 2909.02-.03 (Page Supp. 1984).

423. IOWA CODE ANN. § 712.3 (West 1979).

424. KY. REV. STAT. §§ 513.030-.040 (1985).

applies to any property of another and to certain specified public buildings.⁴²⁵

New Mexico protects people endangering property (e.g., occupied structures) in the same section that protects the "property of another," bridges, utility lines, fences or signs. And as long as the value of the thing "damaged or destroyed" is valued at over \$1,000, they are all punished as a third degree felony.⁴²⁶ While North Dakota does treat person endangering conduct more seriously than property endangering conduct,⁴²⁷ it is a felony to damage the property of another if the loss is in excess of \$2,000.⁴²⁸ Pennsylvania protects uninhabited buildings, unoccupied structures, and any personal property of another having a value of \$5,000 or more from the risks created by reckless fires and explosions.⁴²⁹ Finally, Wyoming's third degree arson statute protects "any property of another which has a value of two hundred dollars . . . or more."⁴³⁰

Thus, unlike the Model Penal Code, seven of the nine inchoate states (Maine, Iowa, Ohio, New Mexico, North Dakota, Pennsylvania, and Wyoming) protect a wide range of property. Although the remaining two states (Kentucky and Texas) protect fewer types of property than the other seven inchoate states, they nonetheless differ substantially from the Model Penal Code's single minded person endangering approach to arson.⁴³¹

Since the common law curtilage rule functioned to include buildings which were not dwellings as the subject matter of arson, one can only understand the demise of that rule by first reflecting on the modern statutory changes in the subject matter of arson. But before moving on to a discussion of the current status of the curtilage rule, a summary of the changes in both the traditional and the inchoate states should therefore be helpful.

1. Although the subject matter of the common law offense was a dwelling house, all American states have expanded the subject matter of their arson offenses to include a wide variety of property.⁴³²

2. That expansion had as its purpose either the extension of the crime to protect property interests, or the expansion of the protection afforded to people from the risks of death or bodily injury attendant upon fires or explosions, or both.⁴³³ The minority of states currently confine their arson offenses to protecting a limited class of people (the inhabitants of dwelling

425. OHIO REV. CODE ANN. 2909.03 (Page Supp. 1984).

426. N.M. STAT. ANN. § 30-17-5A(3) (1984). It is a fourth degree felony if the property is valued at over \$100 but not more than \$1,000. *Id.* at 5(2). If it is below \$100, it is a misdemeanor. *Id.* at 5(1).

427. Compare N.D. CENT. CODE § 12.1-21-01 (1985) with *id.* § 12.1-21-02.

428. N.D. CENT. CODE § 12.1-21-02(c) (1985).

429. 18 PA. CONS. STAT. ANN. tit. 18, § 3301(d) (Purdon 1983).

430. WYO. STAT. § 6-3-103(a)(ii) (1977).

431. See *supra* text accompanying notes 190-218.

432. See *supra* notes 339-40, 355-77, and accompanying text.

433. See *supra* notes 232-62, 338-45, and accompanying text.

houses, as did the common law) but they protect a wide variety of property interests. These are the states which have patterned their legislation on the Model Arson Law. This result has been achieved through the redefinition of the subject matter of the offense to include, in addition to dwelling houses and buildings within the curtilage, all buildings or structures, and personal property above a certain monetary value.⁴³⁴ On the other hand, the majority of states, while also expanding the protection to property interests in the same manner as the minority, have also extended the protection afforded to persons beyond that recognized by the common law by either using a person endangering subject matter for its person protecting arson offenses, or person endangering circumstances, or both, to extend the personal protection of their felony arson provisions.⁴³⁵ A fewer number of the states which have extended the personal protection of the arson statutes have done so by using either a person endangering subject matter or person endangering circumstances, but not both.⁴³⁶

The property protecting offenses are distinguished from the people protecting offenses in all American states by the presence or absence of special person endangering qualities of the subject matter and frequently, but not inevitably, by the requirement of person endangering circumstances. For example, a person protecting offense will have a subject matter such as "inhabited" or "occupied" buildings or structures whereas the property protecting offense will have as its subject matter buildings or structures. A person protecting offense may also be created by using person endangering circumstances in connection with a subject matter which does not include any enhanced human risks, such as when the actor knows that another person is in a *building or structure* at the time of the burning.

3. Despite the fact that different terms in the various arson statutes may include the same subjects (because one term is more general than the other), and that the same term may not include the same subjects (because of unique statutory definitions), general patterns do emerge from the statutes in the thirty-eight harm states.⁴³⁷

4. In thirty-six of the thirty-eight harm states "buildings" or "structures," or sometimes both, are the subject matter of at least one of the felony arson offenses.⁴³⁸ The two remaining states use a comprehensive definition which would include all buildings and structures, however defined.⁴³⁹

5. In addition to the use of "buildings" or "structures," eighteen of the harm states use a comprehensive phrase such as "any real or personal

434. See *supra* notes 222-231, 338-43, and accompanying text.

435. See *supra* notes 219-22, 244-62, and accompanying text.

436. See *supra* notes 232-43 and accompanying text.

437. See *supra* note 353 and accompanying text.

438. See *supra* notes 356-62 and accompanying text.

439. See *supra* note 358.

property” or “any property” to describe the subject matter of at least one of the felony arson offenses.⁴⁴⁰ Other states frequently include such items of real property as bridges, dams, powerplants, timber and the like either within the definition of “structure” or as an enumerated subject matter in the arson statute itself.⁴⁴¹

6. Thirty-one of the thirty-eight harm states extend felony arson protection to any personal property, but there is a monetary minimum on the value of the personal property or the amount of the damage caused in a majority of these states.⁴⁴² The remaining seven states either protect only specified personal property, or do not protect it at all.⁴⁴³ But as seen above, it is not uncommon for certain items of specified personal property to be included within the definition of a “building” or “structure,” and a few states include the contents of specified buildings or structures as the subject matter of arson as well.⁴⁴⁴

7. In all eleven of the inchoate states which use an attempt-like arson offense as their basic arson crime, “buildings” or “structures” are at least one of the target properties.⁴⁴⁵ In nine of these eleven they are enumerated in the statute. When these terms are specifically mentioned in the statute, like the harm states, they are typically defined to include the other term, and such items of personal property as vehicles, watercraft, aircraft, trailers, sleeping cars, and the like.⁴⁴⁶ In the remaining two states, buildings and structures (and other property) are included within the comprehensive phrase “any property.”⁴⁴⁷ In addition to “buildings” and “structures,” two more of these eleven states also use the comprehensive “any property” terminology, several states include “vital public facilities,” and one state, New Jersey, uniquely makes “another person” the target of the actor’s conduct.⁴⁴⁸

In seven of the nine states which protect property as property, personal property is also included as one of the targets of the attempt-like offense.⁴⁴⁹ But, again like the harm states, several states include specific items of personal property as part of their definition of “building” or “structure.”⁴⁵⁰

440. See *supra* notes 366-68 and accompanying text.

441. See *supra* notes 358-62 and accompanying text.

442. See *supra* notes 368-69 and accompanying text.

443. See *supra* notes 370-73 and accompanying text.

444. *Id.*

445. Although there are twelve inchoate states, see *supra* note 389, Ohio does not use an attempt-like statute. See OHIO REV. CODE ANN. §§ 2909.02-.03 (Page Supp. 1984); see *supra* notes 389-95 and accompanying text.

446. See *supra* note 390-91 and accompanying text.

447. See *supra* note 392 and accompanying text.

448. See *supra* notes 394-95 and accompanying text.

449. See *supra* notes 414-17, 431, and accompanying text.

450. See *supra* note 391 and accompanying text.

8. Nine of the twelve states which use the inchoate approach to arson include an endangering statute in their arson provisions.⁴⁵¹ In all of these states risks to people are specifically mentioned, buildings or structures are described in five, but any property of another or any personal property above a given amount is protected from endangering conduct in only four states.⁴⁵²

In the five or six harm states with endangering provisions, all name the danger to people as one of the objects of the statute, while four or five also seek to suppress and punish conduct which risks person endangering property—occupied buildings or structures.⁴⁵³

9. The inchoate states have largely patterned their offenses on the Model Penal Code which does not protect property as property. The primary purpose of the Model Penal Code's arson provisions is to protect persons and prevent insurance fraud.⁴⁵⁴ Although all of the inchoate states have patterned their arson provisions after the Model Penal Code, only three states follow the code to the extent that they do not protect property as property.⁴⁵⁵ Seven of the remaining nine, like the majority of harm states, protect the property interests in a wide variety of real and personal property (there are usually monetary criteria for the personal property), but the remaining two states protect fewer types of property.⁴⁵⁶

10. Although the inchoate states generally tend to protect slightly fewer property interests than do the harm states, the principal distinction between the harm states and the inchoate states does not lie in drastic differences between the subject matter of the arson offense in the traditional state and the target of the attempt-like offense in the inchoate state. Instead it is in the difference between the traditional states' subject matter definition and the endangering statutes. People are never the enumerated subject matter in a harm state, whereas they are commonly mentioned in endangering type statutes in both the inchoate states⁴⁵⁷ and the harm states which supplement their traditional approach with endangering statutes.⁴⁵⁸

C. *The Modern Status of the Curtilage Rule*

As we have seen above, dwelling houses were the primary subject matter of arson at common law.⁴⁵⁹ But a building, not itself a dwelling, was also

451. See *supra* note 397.

452. See *supra* notes 399-401.

453. See *supra* notes 408-12 and accompanying text.

454. See *supra* notes 190-218 and accompanying text.

455. See *supra* notes 415-17 and accompanying text.

456. See *supra* text accompanying note 431.

457. See *supra* notes 397-99 and accompanying text.

458. See *supra* notes 410-11 and accompanying text.

459. See *supra* text accompanying notes 10, 18-38.

the subject matter of arson if it was within the curtilage of a dwelling house.⁴⁶⁰ The curtilage rule thus operated to define a secondary subject matter of common law arson, buildings within the curtilage. There are two reasons for characterizing a building within the curtilage as a secondary subject matter. First, the application of the rule was entirely dependent upon the existence of a dwelling house at the time of the fire. If the house in question did not qualify as a dwelling in exactly the same way required if it were burned, then the curtilage rule was inapplicable. For example, if the prior dwellers moved from the dwelling with the intent of abandoning the house as "home," and the house stood vacant when a detached garage was willfully and maliciously burned by a complete stranger, it would not be arson at common law despite the fact that it was located only a few feet from the house (the proximity requirement), and despite the fact that it was used by the prior dwellers as a place in which to shelter the family automobile and to wash the family clothes (the use requirement).⁴⁶¹ Secondly, the focal point of the geographic proximity requirement of the curtilage rule was the dwelling house itself. For a building to qualify as the subject matter of arson, it had to be sufficiently close to the dwelling house, not another building within the curtilage.⁴⁶² In other words, the curtilage rule could not be used to include a building which was quite distant from the dwelling on the theory that it was within the curtilage of a building which was, in turn, within the curtilage of a dwelling house. Given the rationale of the curtilage rule, the protection of dwellers from nearly the same risks which would be created if the dwelling house itself was burned, the curtilage rule made sense as a rule of inclusion, as a rule that extended the protection of the law of arson. But the curtilage rule also operated as a rule of exclusion. A building which was physically close enough to a dwelling to qualify under the proximity requirement was nonetheless not within the curtilage if it was not used by the dwellers, but by someone else. Thus the burning of a building only a few feet away which was used by someone other than the dweller was not arson on the theory of the curtilage rule, even though the fire created an extreme risk of burning the dwelling.⁴⁶³ Similarly, the burning of items of personal property which were physically located very near the dwelling was not arson, despite the very high risk which might well be created, and despite the daily use of the item by the dweller, for only *buildings* within the curtilage would do.⁴⁶⁴

Given the underinclusive nature of the personal protection afforded by the curtilage rule, and the common law's failure to protect such valued property as property, it is not surprising that all modern legislation extends

460. See *supra* text accompanying notes 39-50.

461. See *supra* text accompanying notes 28, 38, 40-46.

462. See *supra* text accompanying notes 42-44.

463. See *supra* text accompanying notes 45-47.

464. See *supra* text accompanying note 47.

the subject matter of arson to include all buildings and similar structures (at least "of another") wherever situated, by whomever used, and for whatever purpose.⁴⁶⁵ The curtilage rule was thus rendered completely obsolete as a principle which included some buildings within the subject matter of arson, and excluded others and any other type of property.

Nonetheless, the spirit of the curtilage rule, insofar as it sought to suppress the risks of death or bodily harm to the dwellers caused by the burning of a building within the curtilage, survives in many jurisdictions in statutes which define one of the greater arson offenses in terms of causing a fire or explosion that endangers a building or occupied structure.⁴⁶⁶ Though, of course, these statutes extend that personal protection well beyond the persons protected by the curtilage rule at common law (dwellers within the dwelling).

And though the curtilage rule is no longer used to define the subject matter of arson, a statutory equivalent of that rule is still used in some states to determine whether the burning of a particular building is arson of a greater or lesser degree. This distinct but related rule is discussed below in the section of grading the modern arson offenses.⁴⁶⁷

D. *Of Another*

1. The Harm States

a. The Model Arson Law Approach

The primary purpose of common law arson was to protect the physical safety of the *inhabitants* of a dwelling house.⁴⁶⁸ And since it was the inhabitants' possession of the dwelling house which formed the causal link between the burning of the dwelling and their exposure to the risks of death or bodily harm created by the fire, the "of another" requirement meant that the dwelling house had to be in the possession of someone other than the incendiary.⁴⁶⁹ The ownership of the building was irrelevant. For example, if a landlord rented a house to a tenant, as long as the tenant continued to dwell there, the tenant could burn down the dwelling without guilt of common law arson.⁴⁷⁰ Conversely, if the landlord burned the house, she would be guilty of arson. And if the tenant moved out and the house was vacant while the landlord was searching for another tenant, the house was unprotected by the

465. See *supra* text accompanying notes 438-39, 445, 452.

466. See *supra* text accompanying notes 397-401.

467. See *infra* text accompanying notes 828-830.

468. See *supra* text accompanying notes 14-17.

469. See *supra* text accompanying notes 51-56.

470. Protecting the dweller from her own incendiary acts, of course, was not regarded as necessary or appropriate. All felonies at common law were directed at the safety of the person, habitation, or property of some person other than the actor.

law of arson until it became the dwelling house of the next person to take possession with the necessary intention of making the place his home. If the building were burned before that occurred, again it was not arson for it was not the dwelling house of another at the time of the fire.⁴⁷¹

It was thus the "of another" requirement which guaranteed that common law arson would remain a special offense against the person, against the inhabitants of dwelling houses, though it was commonly classified as an offense against the habitation.⁴⁷² And as long as the "of another" requirement was retained, arson would remain primarily an offense against the person. There was, however, a property interest which was protected by common law arson, but it was purely secondary, incidental to the protection of the dwellers, and that was the inhabitants' *possessory interest* in the dwelling house. If arson were to protect additional property interests in the dwelling, then the "of another" requirement would need to be abolished or substantially altered.

Indeed when in accordance with the presumed necessities of the time, the legislatures in England and the United States transformed arson into an offense which also widely protected property, that result was accomplished by expanding the subject matter of arson, and by abolishing the "of another" requirement for various arson offenses.⁴⁷³ The Model Arson Law is the paradigm of this approach.⁴⁷⁴ As we have seen above, forty-four American states at mid-century had adopted a version of the Model Arson Law or their legislation contained most of its salient provisions.⁴⁷⁵

The Model Arson Law divided the arson offenses into three distinct categories for the purpose of assessing different punishments. The highest offense was the willful and malicious burning of "any dwelling house" and buildings which were, in essence, within the common law curtilage rule.⁴⁷⁶ Although there was no substantial change in the subject matter between this offense and the common law's subject matter, it abolished the "of another" requirement with the language "whether the property of himself or of another."⁴⁷⁷ With this simple change, the Model Arson Law's highest arson offense protected the property interest in the dwelling while at the same time retaining the common law's protection of the inhabitants from the risks of death or injury from fires.⁴⁷⁸ Returning to the example of the rental house, it is arson under this section for the tenant to burn the dwelling house and

471. See *supra* text accompanying notes 21-24, 28-29, 38.

472. See *supra* text accompanying notes 51-66.

473. See *supra* text accompanying notes 116-48, 336-38.

474. The Model Arson Law (1948) is reproduced *infra* Appendix A.

475. See *supra* text accompanying notes 146-48.

476. See *supra* text accompanying notes 151-54.

477. MODEL ARSON LAW *infra* App. A, § 1.

478. *E.g.*, *Wimpling v. State*, 171 Md. 362, 189 A. 248 (1937).

for the landlord to do so as long as it remains a dwelling house. Although the landlord would have been equally guilty under the common law and the statutory provision, the tenant would be guilty only under the statute. The abolition of the "of another" requirement has thus transformed arson into an offense which protects the proprietary interest of the landlord as well as the possessory interests of the tenant. Though never mentioned in the cases, a slight increase in the personal protection afforded to the inhabitants was arguably also achieved. As we have seen, a husband did not commit arson when he burned the dwelling in which he and his wife lived though she did not participate in here husband's act and was injured in the fire.⁴⁷⁹ Under this provision of the Model Arson Law, the wife's safety is protected against the husband's acts for it is arson for a co-tenant to burn the dwelling house under such a provision.⁴⁸⁰

If, in our example of the rental house, the tenant moved out and the house was burned by the landlord in disgust because she could not find another renter, it would not be arson at common law for the property was no longer a dwelling house. So too it would not be the highest arson offense under the Model Arson Law for that offense has as its subject matter a "dwelling house" (and buildings within the curtilage) and the building in question was no longer a dwelling house at the time of the fire.⁴⁸¹

But the Model Arson Law also prohibited the burning of any barn, stable, garage or other building, whether the property of himself or another, not a parcel of a dwelling house.⁴⁸² Under this provision our landlord would arguably be guilty of arson, though an offense of intermediate severity, for even those who owned and possessed buildings free and clear were apparently prohibited from burning them under this provision of the Model Arson Law. The Model Arson Law thus expanded arson to cover buildings which were not the subject matter of arson at common law, and by failing to use the "of another" requirement the primary protection is given to the property interest in these buildings. To be sure, this provision also protects people who may happen to be in those buildings when they are burned by the incendiary, but since there is nothing about these buildings to suggest that people will be frequently endangered by their burning (unlike dwellings), and because the offense is punished less severely than the offense which obviously protects people (the highest arson offense), the personal protection is essentially incidental to the protection of the property interests in the buildings.⁴⁸³ With this offense, the common law priorities have been reversed. Buildings

479. See *supra* text accompanying notes 52-56.

480. This follows, of course, from the fact that any person who burns the dwelling is liable once the "of another" requirement is abolished.

481. MODEL ARSON LAW, *infra* App. A.

482. *Id.* § 2.

483. *Id.*

are primarily protected as property whereas people receive only incidental protection.

But one of the remarkable effects of omitting the "of another" requirement is that it prevents owners of all of the possessory and proprietary interests in these buildings from burning them as well. They too are prevented from burning their property, unless the *mens rea* requirement is interpreted in such a way as to alter this result.⁴⁸⁴

Finally, the Model Arson Law further expanded the scope of arson as an offense against property by extending protection to all personal property "of another" over the value of \$25.00.⁴⁸⁵ Here the common law's "of another" requirement was used to restrict the protection afforded to property interests in personal property. Although there are apparently no cases in point on this issue, a lessee in possession of personal property over the value of \$25.00 could burn it with impunity for the "of another" requirement, as shown above, referred to possession of another, not ownership of another.⁴⁸⁶ The Model Arson Law may have had as its goal permitting owners to burn their personal property at will, but preventing others from doing so. If this is so, then the common law's "of another" requirement should not have been used because it would only permit an owner who was also in possession of the property to burn it, and it permitted the possessor of such property to harm or defeat the proprietary interests of others in the property with impunity. The problem, of course, was with the uncritical acceptance of a common law rule that was designed to assure that arson was an offense protecting personal interests not property interests. Surely the use of the common law "of another" requirement was inappropriate for use with a property offense, unless, of course, the goal was to protect only possessory interests in such personal property. There is no evidence that this was the limited goal of the personal property protecting offense in the Model Arson Law.

But the complete omission of the "of another" requirement in the personal property offense, such as was done with dwellings and buildings within the curtilage (the highest offense under the Model Arson Law) and other buildings (the intermediate offense under the Model Arson Law), would create another set of difficulties. These difficulties are best seen by analyzing the effect of the omission of the "of another" requirement for the higher Model Arson Law offenses. Since the purpose of those provisions was the protection of the proprietary and possessory property interests in building⁴⁸⁷

484. Some states have construed the *mens rea* of the offense to permit owners in possession to burn their property when no other person is harmed or endangered. See *infra* text accompanying notes 584-89.

485. MODEL ARSON LAW, *infra* App. A, § 3.

486. See *supra* text accompanying note 51. The Model Law did not provide for a definition of the phrase "of another" different from that used at common law.

487. *E.g.*, *Wimpling v. State*, 171 Md. 362, 189 A. 248 (1937).

from willful and malicious burnings, the "of another" requirement would have been inappropriate. As we have seen by its omission an owner in possession of a building could not burn it either (at least as the statute is written).⁴⁸⁸ Why such owners should be prevented from burning their buildings in all circumstances is unclear. Surely a legislature might well want to prevent owners in possession from burning buildings in circumstances which endangered persons or other property, but if that were the goal, the statute is grossly overinclusive for it prevents burnings in all circumstances. On the other hand, if the goal is to preserve all buildings as a societal resource, the provision would be well related to that goal, but it is doubtful whether such a drastic alteration of the law of property was meant by this provision. Furthermore, the Model Arson Law only prevented "setting fire to or burning" the buildings.⁴⁸⁹ Other forms of destruction, such as explosion or simply demolishing the building by tearing it down, were not addressed. Thus the use of the "of another" requirement for personal property, and the omission of the qualification in the "building" provisions of the Model Arson Law allow for rather bizarre results. It would be even more bizarre to omit it from the personal property protecting offense.

Nevertheless, the great majority of states at one time used similar, if not identical, provisions, and today thirteen of the thirty-eight harm states continue to adhere to a version of the Model Arson Law or their arson statutes reflect a modified version of the same scheme.⁴⁹⁰

488. It is possible to allow an "owner" to burn her property without guilt of arson through an interpretation of the *mens rea* requirement. This result is discussed *infra* text accompanying notes 584-89.

489. MODEL ARSON LAW, *infra* App. A, § 2.

490. IDAHO CODE §§ 18-801 to -803 (1979); MD. CRIM. LAW CODE ANN. §§ 6-8 (1982); MASS. GEN. LAWS ANN. ch. 266, §§ 1-2, 5 (West 1970 & Supp. 1986) (Massachusetts has additional felony arson provisions not found in the Model Arson Law: § 7.); MICH. COMP. LAWS §§ 28.267-.269, .271 (1981) (Michigan also has a special provision for spouses and felony arson provisions not found in the Model Arson Law. *Id.* § 28.273, .275); MISS. CODE ANN. §§ 97-17-1, -17-3, -17-5, -17-7 (1973) (Mississippi has additional felony arson offenses not found in the Model Arson Law. *Id.* § 97-17-13.); NEV. REV. STAT. §§ 205.010, .020, .95 (1985); Nevada, however, has a unique and somewhat ambiguous provision: "To constitute arson it shall not be necessary that another person than the defendant should have had ownership in the building or structure set on fire." NEV. REV. STAT. § 205.050 (1985). Since it is arson to burn a building or structure "whether the property of himself or of another" (*id.* §§ 205.010, .015), apparently this provision simply emphasizes that the word "property" includes title (ownership) and possession. The North Carolina states exemplify legislation upon which the Model Arson Law was based: N.C. GEN. STAT. §§ 14-58, -58.1, -58.2, -59, -60, -61, -62, -62.1, -63, -64, and -66 (1983); OKLA. STAT. ANN. tit. 21, §§ 1401-1403 (West 1983).

Because of the adoption of a new first degree arson statute in 1980, Rhode Island's first degree arson statute does not resemble Section 1 of the Model Arson Law. Nevertheless, the remaining felony arson provisions contain many of the salient

b. The Remaining Harm States

Although the remaining twenty-five states have substantially different arson provisions, the influence of the Model Arson Law is evident in the architecture of their statutes. Like the Model Arson Law, each of these states divide arson into several levels of severity. Some of the provisions are aimed at protecting persons and others at protecting property. Generally, the most severely punished offense protects persons, while the lesser offenses protect buildings or structures and personal property *as property*.⁴⁹¹

i. The Person Protecting Offenses

With respect to the *person protecting* offenses in these states, the common law's "of another" requirement could have been used, for the purpose of that requirement was to assure that arson protected the personal safety of the inhabitants (the possessor) of the dwelling house. As we have seen, the property interests in the structure were of no great concern to the common law of arson. Since each of these states have expanded the personal protection of their arson laws, that result could have been achieved by simply expanding the subject matter from "dwellings of another" to any occupied building or structure of another. But the problem with this approach is that it does not protect people from the risks of death or bodily harm caused when a person in possession burns his own property. People who would not be protected in those circumstances are the occupants, joint possessors of the structure, and those who might be drawn to the fire for public safety reasons. If, for example, the structure is a public theatre, the lessee of the theatre could burn it during a performance without being guilty of arson. Quite obviously such behavior creates very serious risks of death or great bodily harm, but the "of another" requirement would prevent the application of the arson statute from protecting the *occupants* from the *possessor's* acts.

Partly, no doubt, because of the limited personal protection afforded by the simple use of the "of another" requirement coupled with an expanded

features of the Model Arson Law. R.I. GEN. LAWS: §§ 11-4-2, -4-3, -4-5 (1981 & Supp. 1985). There is an additional felony arson provision not found in the Model Arson Law in Rhode Island: *id.* § 11-4-7. S.C. CODE ANN. §§ 16-11-110, -11-140 (Law. Co-op. 1985).

Because of Tennessee's adoption, in 1979, of an aggravated arson provision (TENN. CODE ANN. § 39-3-201 (1982)), this offense does not resemble the Model Arson Law, but the remaining arson offenses in Tennessee are nearly identical to Sections 2 and 3 of the Model Law. *Id.* §§ 39-3-201 to -203 (1982). Tennessee has additional arson offenses not found in the Model Arson Law. *Id.* §§ 39-3-204, -206, -209, -210. VT. STAT. ANN. tit. 13, §§ 502-504 (Supp. 1985). Vermont also has felony arson provisions not found in the Model Arson Law. *Id.* §§ 502, 507; W. VA. CODE §§ 61-3-1 to -3 (1984).

491. See *infra* text accompanying notes 805-10.

definition of the subject matter, only two states, Colorado⁴⁹² and Wisconsin,⁴⁹³ use this approach. Both states do, however, protect a joint possessor of the property by altering the definition of "of another" so as to include a proprietary or possessory interest in any other person which the actor has no right to defeat.⁴⁹⁴

Since occupants or other people on the property are not protected from the incendiary (or explosive) acts of the owner in possession of the property under the approach used in Colorado and Wisconsin, four states use a subsection similar to the provision found in those two states (including the expanded definition of "of another"), but add another subsection to cover situations in which any property is burned in circumstances which endanger other persons.⁴⁹⁵ For example, one of the person protecting offenses in Indiana is violated when a person, "by means of fire or explosive, knowingly or intentionally damages: (1) a dwelling of another person without his consent; [or] (2) property of any person under circumstances that endanger human life."⁴⁹⁶

Four states, Georgia,⁴⁹⁷ Indiana,⁴⁹⁸ Montana,⁴⁹⁹ and New Hampshire,⁵⁰⁰ use a variant of this approach. Like Colorado and Wisconsin, and in general accord with the Model Penal Code, these states have also altered the definition of "of another" to include a proprietary or possessory interest in any other person.⁵⁰¹ To that extent, these states also protect the property interest of the owner against the incendiary acts of the possessor of the property.

But a majority of nineteen of these twenty-five harm states follow another path.⁵⁰² They eliminate the "of another" requirement completely. In-

492. COLO. REV. STAT. § 18-4-102 (1978). *But cf. id.* § 18-4-105 (a person endangering provision similar to that used in the inchoate states).

493. WIS. STAT. ANN. § 943.02(1) (West 1982).

494. Although these provisions are more relevant to the property protecting offenses, they are not so limited by the statutes of either state. COLO. REV. STAT. § 18-4-101(3) (1978); WIS. STAT. ANN. § 943.02(2) (West 1982).

495. *See infra* notes 496-500.

496. IND. CODE ANN. § 35-43-1-1(a) (Burns 1985).

497. GA. CODE ANN. § 26-1401(a) (1983).

498. IND. CODE ANN. § 35-43-1-1(a) (Burns 1985).

499. MONT. CODE ANN. § 45-6-103(1) (1983).

500. N.H. REV. STAT. ANN. § 634:1(II) (1974 & Supp. 1983).

501. GA. CODE ANN. § 26-401(j) (1983); IND. CODE ANN. § 35-41-1-23 (Burns 1985); MONT. CODE ANN. § 45-2-101(55) (1983); N.H. REV. STAT. ANN. § 637:2(IV) (1974 & Supp. 1983).

In addition to using general provisions similar to the foregoing states, Florida, though eliminating the "of another" requirement, also makes the damaging of "any dwelling, whether occupied or not, or its contents" the subject of its highest arson offense. FLA. STAT. ANN. § 806.01 (West Supp. 1986).

502. ALA. CODE § 13A-7-41 (1982); ALASKA § 11-46-400 (1983); DEL. CODE ANN. tit. 11, § 803 (1979); HAWAII REV. STAT. § 708-820 (1976); Criminal Code of 1961, tit. III, art. 20, § 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, § 20-1.1

stead they rely upon an expanded definition of the subject matter together with specified person endangering circumstances, circumstances in which danger to other persons is to be anticipated. In essence, they recognize that the goal of protecting persons can be furthered by dropping the "of another" requirement in favor of a single, all encompassing provision. For example, unless the goal of the Indiana statute also is to protect the proprietary and possessory interests of other people in "a dwelling of another" (because of the expanded statutory definition of "of another"), the elimination of subsection (1) of that statute will retain the same person protecting coverage in a single provision better tailored to its goal.⁵⁰³ This would be true, however, only if the damaging of "a dwelling of another" is held to "endanger human life" under subsection (2). But this would always seem to be so. The arson offense which primarily protects the person in Alabama, for example, is first degree arson. That offense is committed when a person "intentionally damages a building" by starting a fire or causing an explosion when: "(1) Another

(Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-41-1-1 (Burns 1984); KAN. STAT. ANN. § 21-3719 (1981); LA. REV. STAT. ANN. § 14:51 (West 1974 & Supp. 1985); MINN. STAT. ANN. § 609.561 (West Supp. 1985); MO. REV. STAT. § 569.040 (1979); NEB. REV. STAT. § 28-502 (1979); N.Y. PENAL LAW §§ 150.15, .20 (McKinney 1975 & Supp. 1986); OR. REV. STAT. ANN. § 164.325 (1985); S.D. CODIFIED LAWS ANN. § 22-33-1 (1979 & Supp. 1985); UTAH CODE ANN. § 76-6-1-3 (1979); VA. CODE § 18.2-77 (1982); WASH. REV. CODE ANN. § 9A.48.020 (West Supp. 1985).

California defines its person protecting offense as the burning of any structure, forest land or property that causes great bodily injury or that causes an inhabited structure or inhabited property to burn. CAL. PENAL CODE §§ 451(a)-(b), 452(a)-(b) (West Supp. 1986). The "of another" concept is not used.

503. IND. CODE ANN. § 35-43-1-1 (Burns 1985):

(a) A person who, by means of fire or explosive, knowingly or intentionally damages:

(1) A dwelling of another person without his consent;

(2) Property of any person under circumstances that endanger human life; or

(3) Property of another person without his consent if the pecuniary loss is at least five thousand dollars [\$5,000];

commits arson, a Class B felony. However, the offense is a Class A felony if it results in either bodily injury or serious bodily injury to any person other than a defendant.

(b) A person who commits arson for hire commits a Class B felony. However, the offense is a Class A felony if it results in bodily injury to any other person.

(c) A person who, by means of fire or explosive, knowingly or intentionally damages property of any person with intent to defraud commits arson, a Class C felony.

(d) A person who, by means of fire or explosive, knowingly or intentionally damages property of another person without his consent so that the resulting pecuniary loss is at least two hundred fifty dollars [\$250] but less than five thousand dollars [\$5,000] commits arson, a Class D felony.

Id.

person is present in such building at the time, and (2) the actor knows that fact, or the circumstances are such as to render the presence of a person therein a reasonable possibility."⁵⁰⁴ Although the scope of the person endangering circumstance in the Alabama statute is different from the Indiana arson provisions, the Alabama statute illustrates the unitary approach followed by the majority. In these majority jurisdictions the personal protection of these statutes is expanded (over the common law offense) in two ways: first, all people, regardless of their connection to the property (whether possessors, owners, or others) are prevented from burning it under the specified circumstances; and second, because the definition of the property or the circumstances of the actor's conduct (or both) create a substantial risk of injury to people. Insofar as property protection is to be afforded by the law of arson, property protecting provisions can easily be added. And they are in each of the twenty-five states except New Hampshire.⁵⁰⁵ Insofar as a traditional harm offense is concerned, this is by far the better solution for it protects everyone connected with the subject property from whomever might damage the property by fire or explosion. Of course, the scope of the protection will depend upon the description of the subject matter and the person endangering circumstances. Finally, Arizona defines its person protecting offense by the simple expedient of expanding the subject matter from the common law "dwelling house of another" to "an occupied structure."⁵⁰⁶ This approach is, of course, similar to the person protecting provision of the Model Arson Law, and is subject to the same criticism.⁵⁰⁷ Arizona is not classified with the Model Arson Law states because it greatly extends the scope of personal protection and its remaining provisions are quite unlike the Model Law.

When these nineteen states are added to the thirteen states that have laws based on, or similar to, the Model Arson Law, we see that thirty-two of the thirty-eight states have abandoned the common law's "of another" requirement for their person protecting offense although the thirteen Model Arson Law states only slightly extend the personal protection of that offense.

ii. The Property Protecting Offenses

Ironically, it is with reference to the property protecting offenses in the twenty-five harm states (which do not follow the Model Arson Law or have similar provisions) that one finds a substantial division of views as to how

504. ALA. CODE § 13A-7-41 (1982).

505. N.H. REV. STAT. ANN. § 634:1 (1974 & Supp. 1983). Instead, New Hampshire protects property, as *property*, by the offense of criminal mischief. *See id.* § 634:2.

506. ARIZ. REV. STAT. ANN. § 13-1704 (Supp. 1985).

507. *See supra* text accompanying notes 474-81.

the "of another" phrase is used. The Model Arson Law did not use the "of another" requirement for the property offense which protected buildings, but it was used with reference to the protection of personal property.⁵⁰⁸ And as we have seen, the result was that buildings were over protected (for owners could not burn them even though the property interest of others were not involved and the burning did not endanger persons or other property), and personal property was under protected (once the decision was made to protect personal property with the felony sanction of arson because a possessor could harm the property interests of the owner without incurring arson liability). How has this changed?

Since New Hampshire does not use its felony arson provisions to protect property as property⁵⁰⁹ there are twenty-four harm states that have provisions which differ from the Model Arson Law.

In four of the twenty-four states, Arizona,⁵¹⁰ California,⁵¹¹ Florida,⁵¹² and Virginia,⁵¹³ the subject matter of arson is not generally limited to the property of another. Since the felony arson provision which protects property in Florida is limited to "any structure, whether the property of himself or another," the Florida statute uses essentially the same approach as the intermediate level offense in the Model Arson Law;⁵¹⁴ and, of course, it therefore has the same difficulties.⁵¹⁵ In the remaining three states nearly every type of real and personal property is protected regardless of who owns or possesses it.⁵¹⁶ Here the Model Arson Law's treatment of buildings as a property offense (the intermediate level offense) is extended to include the personal property protecting provisions as well. Owners cannot burn the subject property even when it neither harms the property interests of others, nor endangers persons or other property. There is one exception here. In California, it is not arson for a person to burn "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."⁵¹⁷

Conversely, in Louisiana the property protecting offense applies to "any property of another" and there is no statutory definition of that phrase.⁵¹⁸ The Louisiana property offense is thus fraught with the same problems as

508. See *supra* text accompanying notes 482-90.

509. See *supra* note 505.

510. ARIZ. REV. STAT. ANN. § 13-1703 (Supp. 1985).

511. CAL. PENAL CODE §§ 451(b)-(d), 452(b)-(c) (West Supp. 1986).

512. FLA. STAT. ANN. § 806.01(2) (West Supp. 1986).

513. VA. CODE §§ 18.2-79 to -81, -86 (1982).

514. See *supra* note 512.

515. See *supra* text accompanying notes 482-84.

516. See *supra* notes 510-11, 513.

517. CAL. PENAL CODE §§ 451(d), 452(d) (West Supp. 1986) (Section 452(d) is a misdemeanor offense).

518. LA. REV. STAT. ANN. § 14:52 (West 1986).

the personal property protecting offense (the lowest level offense) in the Model Arson Law.⁵¹⁹

Rather than simply choosing between the use of the common law "of another" device (as did Louisiana) or conversely eliminating it (as did Arizona, California, Florida and Virginia), the great majority of states (nineteen of the twenty-four states) (1) permit an owner to burn her property when it neither harms the property interests of another, nor endangers persons or sometimes other property, and (2) prohibit a possessor of property from burning it when it interferes with the property rights of some other person.⁵²⁰ Two different, though related, techniques are used to achieve this result.

The most prevalent device is to make only *property of another* the subject matter of the offense, but that phrase is given a very different meaning than it had at common law. In the twelve states that use this approach, *property of another* means property in which anyone other than the actor has a possessory or proprietary interest which the actor has no right to defeat or impair, even though the actor may also have such an interest in the property.⁵²¹ There is, however, some variation in these states as to whether a lien or security interest qualifies as a legal or equitable interest,⁵²² and two of these states, Minnesota⁵²³ and Wisconsin,⁵²⁴ use this approach for one of their property protecting offenses, but not the other.

The second approach to this problem, which is used in the remaining seven states, is to define the subject matter of the property protecting provisions

519. See *supra* text accompanying notes 485-86.

520. These nineteen states are listed *infra* notes 521, 525-34.

521. COLO. REV. STAT. §§ 18-4-101(3), -4-103 to -104 (Supp. 1985); HAWAII REV. STAT. §§ 708-800(16), -821 to -822 (1976); Criminal Code of 1961, tit. III, art. 20, § 20-1 (Arson), ILL. ANN. STAT. ch. 38, § 20-1 (Smith-Hurd 1977); IND. CODE ANN. §§ 35-41-1-2, -43-1-1(a)(3), -43-1-1(d) (Burns 1985); KAN. STAT. ANN. § 21-3718(a) (1981); MINN. STAT. ANN. §§ 609.556(2), .563 (West Supp. 1985); MONT. CODE ANN. §§ 45-2-101(55), -6-102(b) (1985) (an inchoate provision in this harm state, see *supra* text accompanying note 406); OR. REV. STAT. ANN. §§ 164.305(2), .315 (1985); S.D. CODIFIED LAWS ANN. §§ 22-33-3, -33-9 (1979 & Supp. 1985); UTAH CODE ANN. §§ 76-6-101(1), -6-102(b) (1978); WIS. STAT. ANN. § 943.02(1)(a), .02(2) (West 1982).

Georgia reaches somewhat the same result by providing that the subject property be "of another without consent or in which another has a security interest including, but not limited to, a mortgage, lien, or a conveyance to secure debt without the consent of both." GA. CODE ANN. §§ 26-1402 to -1403 (Supp. 1985).

522. Compare HAWAII REV. STAT. § 708-800(15) (1976) with GA. CODE ANN. §§ 26-1402 to -1403 (Supp. 1985); see also *State v. Phillips*, 99 Wis. 2d 46, 298 N.W.2d 239 (Wis. Ct. App. 1980).

523. Compare MINN. STAT. ANN. § 609.562 (West Supp. 1985) with *id.* § 609.563.

524. Compare WIS. STAT. ANN. § 943.02(1)(a) (West 1982) with *id.* §§ 943.02(1)(c), .03.

as *any property*, but an affirmative defense is provided if (1) no person other than the actor has a possessory or proprietary interest in the property damaged; or if other persons have those interests, all of them have consented to the actor's conduct; and (2) the actor's sole intent was to destroy or damage the property for a lawful and proper purpose. Alabama,⁵²⁵ Alaska,⁵²⁶ Delaware,⁵²⁷ Missouri,⁵²⁸ Nebraska,⁵²⁹ and Washington⁵³⁰ use this approach. However, the Missouri⁵³¹ Nebraska,⁵³² and Washington⁵³³ statutes do not use the affirmative defense for all of their property protecting provisions. In addition, although New York also uses this approach, the New York statute also requires that the actor have no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage other property which is the subject matter of arson in New York.⁵³⁴ A similar result is reached in the other affirmative defense states by virtue of their other arson provisions.⁵³⁵

2. The Inchoate States

There are twelve states which use the Model Penal Code's inchoate approach to arson in at least one of their basic arson offenses.⁵³⁶ With respect to the person protecting provisions in these twelve states, essentially the same approaches are used as are found in the thirty-eight traditional harm states. Like the majority of those states, eight of the twelve inchoate states eliminate the "of another" requirement in their person protecting provisions.⁵³⁷ In-

525. ALA. CODE §§ 13A-7-42 to -43 (1982 & Supp. 1985).

526. ALASKA STAT. § 11.46.410 (1983).

527. DEL. CODE ANN. tit. 11, §§ 801-802 (1979).

528. MO. REV. STAT. § 569.050 (1979).

529. NEB. REV. STAT. § 28-503 (1979).

530. WASH. REV. CODE ANN. §§ 9A.48.040, .48.060 (West 1977).

531. Compare MO. REV. STAT. § 569.050 (1979) with *id.* § 569.055.

532. Compare NEB. REV. STAT. § 28-503 (1979) with *id.* § 28-504(2).

533. Compare WASH. REV. CODE ANN. § 9A.48.030 (West 1977) with *id.* §§ 9A.48.040 and 9A.48.060.

534. N.Y. PENAL LAW §§ 150.05, .10 (McKinney 1975 & Supp. 1986).

535. In the other states it would be arson in the first degree (the person protecting offense) and the affirmative defense is not available to first degree arson, but only to the property protecting offenses. However, the wording of the statutes, and the detail vary considerably. See the authorities cited *supra* notes 525-30.

536. See *supra* note 389.

537. CONN. GEN. STAT. ANN. § 53a-113 (West 1985); IOWA CODE ANN. § 712.2 (1983); KY. REV. STAT. § 513.020 (1985); ME. REV. STAT. ANN. tit. 17-A, § 802(1)(B)(2) (1983 & Supp. 1985); N.M. STAT. ANN. § 30-17-6 (but this is a damage type statute in this inchoate state, see *supra* note 313), 30-17-5B (1984); OHIO REV. CODE ANN. § 2090.02 (Page Supp. 1984) (Section 2909.02(2) is actually a harm provision while the remainder of the section is inchoate, see *supra* note 313.); TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1985); WYO. STAT. §§ 6-3-101, -103(a)(i) (1983).

stead, they use one or more enumerated person endangering circumstances which are tailored to protect people from the risks created by fires and explosions aimed at various types of target property, and in some states, a person endangering definition of the target property is used as well.

In three of the remaining four states the person protecting provisions use the "of another" requirement (but with the new statutory definition of that phrase), but they also include a provision which would subject possessors and sole owners of property to arson liability if they burn or explode property and thereby endanger persons or specified property of another.⁵³⁸ These three states thus follow the example set by the Model Penal Code.⁵³⁹

North Dakota is the only inchoate state to adhere to the common law's "of another" requirement in its definition of the target of the actor's conduct.⁵⁴⁰ It is, of course, subject to the same criticism as the traditional harm states that adhere to this view.⁵⁴¹

As we have seen above, nine of the twelve inchoate states also protect various property interests with their felony arson provision.⁵⁴² How does the "of another" concept fair in these nine states with respect to the property protecting provisions? Interestingly enough, a slight majority of these states, five in number, use the "of another" requirement in essentially the same way that the Model Arson Law used that concept in its personal property protecting provisions (the lowest arson offense in the Model Arson Law) to define the target of the actor's conduct in their property protecting offenses.⁵⁴³

Two states, Maine and Pennsylvania,⁵⁴⁴ also use the "of another" requirement. But unlike the five states just mentioned, they define "property of another" to mean property in which a person other than the actor has an interest which the actor has no authority to defeat or impair, even though the actor may also have an interest in the property.⁵⁴⁵ This approach is essentially the same as that used by twelve of the traditional harm states.⁵⁴⁶

538. ARK. REV. STAT. ANN. §§ 41-1902(a), (c), -1903 (1977 & Supp. 1985); N.J. STAT. ANN. § 2C:17-1(a)(1)-(2), -1(b)(1)-(2) (West 1982); 18 PA. CONS. STAT. ANN. tit. 18, § 3301(a)(1)(i)-(ii), (c)(1)-(2) (Purdon 1983).

539. See *supra* text accompanying notes 194-99.

540. N.D. CENT. CODE § 12.1-21-01 (1985).

541. See *supra* text accompanying notes 492-93.

542. See *supra* text accompanying note 415.

543. N.M. STAT. ANN. § 30-17-5(A) (1984); N.D. CENT. CODE § 12.1-21-02(C) (1985); OHIO REV. CODE ANN. § 2909.03(1), .03(3), .03(4) (Page Supp. 1984); TEX. PENAL CODE ANN. § 28.02(4), .02(5) (Vernon Supp. 1985); WYO. STAT. § 6-3-103(a)(ii) (1983).

544. ME. REV. STAT. ANN. tit. 17-A, §§ 352(4), 802 (1964 & Supp. 1984); 18 PA. CONS. STAT. ANN. § 3301(j) (Purdon 1983).

545. See *supra* note 544.

546. See *supra* text accompanying notes 521-24.

Kentucky reaches essentially the same result by creating a defense to its property protecting provision which is essentially the same as the affirmative defenses used in the seven harm states already mentioned.⁵⁴⁷ Finally, though couched in terms of an exception rather than a defense, Iowa uses a similar provision to exclude from arson liability a person who acts with the consent of the owner, and "where the act was done in such a way as not to unreasonably endanger the life or property of any other person."⁵⁴⁸

The current status of the "of another" requirement may be summarized as follows:

1. In the thirteen harm states that have enacted the Model Arson Law or which have statutes that contain many of its salient features, the "of another" requirement has been eliminated, except for the personal property protecting provisions (which is the lowest in severity).⁵⁴⁹ Since the common law "of another" requirement was created for the purpose of assuring that common law arson remained an offense which protected the safety of the dwellers within the habitation, the common law requirement is not well suited to a property protecting offense. Both the use and the omission of the common law "of another" requirement produces bizarre results.⁵⁵⁰ A statutory response is clearly called for.

2. In the person protecting provisions of the remaining twenty-five harm states, the majority eliminate an "of another" requirement and further the person protecting goal by expanding the subject matter (sometimes defined in person endangering terms) and by using person endangering circumstances.⁵⁵¹ The scope of these person protecting provisions (who is protected and under what circumstances) varies, of course, according to the particular wording of the statute, and there is variation among the statutes in these states.⁵⁵²

A minority of six states retain an "of another" requirement which, unlike the common law conception of the phrase, is defined by statute to include a possessory or proprietary interest in any other person which the actor has no legal right to defeat (though there is some variation among the definitions).⁵⁵³ Four of these states also use an additional provision which is similar to the single provision used by the majority jurisdictions.⁵⁵⁴ And one state, Arizona, simply uses a person endangering definition of the subject matter in conjunction with the abolition of the "of another" requirement (with all of the problems of that approach).⁵⁵⁵

547. KY. REV. STAT. §§ 513.030, .040 (1985); *see supra* text accompanying notes 525-35.

548. IOWA CODE ANN. § 712.1 (West 1979).

549. *See supra* notes 476-90 and accompanying text.

550. *Id.*

551. *See supra* notes 502-07 and accompanying text.

552. *Id.*

553. *See supra* notes 492-501 and accompanying text.

554. *See supra* notes 495-501 and accompanying text.

555. *See supra* notes 506-07 and accompanying text.

3. With reference to the property protecting provisions of the twenty-four harm states which protect property, but that do not follow the Model Arson Law, the great majority (nineteen of the twenty-four) (a) permit owners to burn their property when it neither harms the property interests of another, nor endangers persons or sometimes other property; and (b) prohibit possessors of property from burning it when it interferes with the property rights of some other person.⁵⁵⁶ Twelve states accomplish this result by defining the subject matter of the property protecting offense as "property of another," but that phrase does not mean "in the possession of another" as it did at common law. Instead, it is defined by statute to mean property in which anyone other than the actor has any possessory or proprietary interest which the actor has no legal right to defeat. Although, as to be expected, there is some variation in the definition among the various states.⁵⁵⁷

The remaining seven states describe the subject matter of the property protecting offenses as "any property" (or a similar term), but provide that it is an affirmative defense that (a) no person other than the actor has a possessory or proprietary interest in the property damaged, or if other persons have such interests, all of them have consented to the actor's conduct; and (b) the actor's sole intent was to destroy or damage the property for a lawful and proper purpose. Again, there are variations among the states as to the exact scope of the defense.⁵⁵⁸

In a minority of four states, the property protecting offense is not limited to the property of another.⁵⁵⁹ Conversely, one state, Louisiana, describes the subject matter of the property protecting offense as "any property of another."⁵⁶⁰

4. The "of another" requirement is treated by the inchoate states in much the same way as in the harm states with respect to the people protecting offenses. The majority (eight of the twelve) do not use the "of another" requirement.⁵⁶¹ Instead, like the majority of harm states, they use one or more enumerated person endangering circumstances and sometimes a person endangering definition of the target property is used as well. Occasionally both are used.⁵⁶²

The minority (three of the twelve), like the minority of harm states, use two provisions. One provision describes the target as the property of another (but with the new statutory definition of that phrase), and the second is substantially similar to the single provision used by the majority of states.⁵⁶³

556. See *supra* note 520 and accompanying text.

557. See *supra* notes 521-24 and accompanying text.

558. See *supra* notes 525-35 and accompanying text.

559. See *supra* notes 510-17 and accompanying text.

560. See *supra* notes 518-19 and accompanying text.

561. See *supra* note 537 and accompanying text.

562. *Id.*

563. See *supra* notes 538-39 and accompanying text.

It subjects sole owners of the property and possessors to arson liability if they burn or explode property and thereby endanger persons or specified property of another.

Only one state, North Dakota, uses the common law "of another" requirement.⁵⁶⁴

5. Nine of the twelve inchoate states also protect property with at least one of their felony arson offenses.⁵⁶⁵ Incongruously, five of these states use the "of another" requirement apparently in accordance with its common law meaning (as did the Model Arson Law).⁵⁶⁶ Two more states use the "of another" requirement, but define that phrase in accordance with the modern statutory definition mentioned above.⁵⁶⁷ Of the two remaining states one uses a unique provision,⁵⁶⁸ and one uses the affirmative defense approach.⁵⁶⁹

6. The common law "of another" requirement has clearly outlived its usefulness. It is incongruously used in the personal property protecting provisions of a minority of states. These are the states which continue to adhere to the Model Arson Law; and it is also used by a slight majority of the inchoate states that protect property.⁵⁷⁰ In these inchoate states, the provision appears to be a remnant from prior statutes which were patterned upon the Model Arson Law.⁵⁷¹ The common law "of another" requirement is used by only North Dakota for a person protecting provision.⁵⁷²

The modern (majority) approach to the person protecting offenses is to abandon the common law concept and replace it with either a person endangering subject matter, or person endangering circumstances, or both.

The modern (majority) approach to the property protecting offenses is to use one or the other of the following techniques: a modern concept of "of another" created by statute, or a statutorily created affirmative defense. Both of these modern techniques avoid the problems associated with either the use or the omission of the common law "of another" requirement for the property protecting offenses.

564. See *supra* notes 540-41 and accompanying text.

565. See *supra* notes 542-43 and accompanying text.

566. See *supra* note 543 and accompanying text.

567. See *supra* notes 544-46 and accompanying text.

568. See *supra* note 548 and accompanying text.

569. See *supra* note 547 and accompanying text.

570. See *supra* note 566 and accompanying text.

571. In each of these inchoate states the Model Arson Law, or a statute with most of its salient provisions, was enacted and in effect during the middle years of the Twentieth Century. See *supra* notes 141-48 and accompanying text. This history, no doubt, influenced the inchoate provisions when the Model Arson Law was replaced with statutes patterned upon the Model Penal Code.

572. See *supra* notes 540-41 and accompanying text.

E. *The Mens Rea of Modern Arson*

“Malice” was the *mens rea* of arson at common law. As seen above, there is a “malicious” burning when the actor either intentionally or wantonly burns property without justification or excuse.⁵⁷³ Has the common law’s *mens*

573. See *supra* text accompanying notes 95-115.

Although a general discussion of the justifications or excuses applicable to arson is beyond the scope of this paper, the “defense” of consent should be briefly mentioned. In a state in which the subject matter of arson is the property of another, and the common law concept of “of another” is used, an actor who burns the subject property at the request of the possessor of the property is not guilty of arson. The theory here is that under the applicable rules of accomplice liability, since the possessor could burn the property with impunity, the actor who burns the property at the possessor’s request cannot be guilty as well. *E.g.*, *Heard v. State*, 81 Ala. 55, 1 So. 640 (1887); *Annot.*, 54 A.L.R. 1236 (1928). Some cases, however, indicate that the lack of consent of the possessor is an element of the offense which must be proved by the prosecution beyond a reasonable doubt in every case. *E.g.*, *State v. Lastrapes*, 443 So. 2d 652 (La. Ct. App. 1983). Occasionally, a statute will use the “of another” requirement and will speak of “of another without his consent.” *E.g.*, GA. CODE ANN. § 26-1401 (1983); IND. CODE ANN. § 35-43-1-1(a)(1) (*Burns* 1985). Arguably, in Georgia and Indiana lack of consent is an element of the “of another” requirement. Quite generally the statutes are silent on this issue, as are the statutes cited above in this note.

Aside from the question of insurance fraud and accomplice liability, the consent of the “other” (whether at common law or under one of the statutory definitions of that term) should be treated as a defense in the sense that the defendant bears the burden of interjecting that issue. This is the approach used in those states which solve the “of another” problem with the statutory affirmative defense. See *supra* notes 525-35 and accompanying text. Of course, the consensual burning would have to be done in circumstances that did not violate some other statute which prevents the burning of the property in question by all persons in given circumstances (such as when it endangers other persons), if there is such a statute in the state in question.

Professors Perkins and Boyce suggest that the mental element must be phrased to exclude mitigation, in addition to justification and excuse. They suggest that a mitigated burning, a burning caused by adequate provocation during the heat of passion, should not be arson. R. PERKINS & R. BOYCE, *supra* note 2, at 276 n.27. The professors cite no authority for the proposition nor does there seem to be any. In view of the historical development of the offense of voluntary manslaughter, their assertion seems quite untenable. The rule of provocation created a lesser homicide offense, voluntary manslaughter, which was punished less severely than murder. But the common law did not create a lesser arson crime. If the rule of provocation operated to mitigate arson to an existing offense, what was the lesser offense? One possibility would be the common law misdemeanor of “malicious mischief.” If an actor burned the dwelling house of another because he or she was “adequately provoked” to do so by the dweller’s provocation, the common law judges could have invoked the rule of provocation and found the actor guilty of the misdemeanor of malicious mischief. In this way they could have avoided creating a new felony (as they did for “voluntary manslaughter”), and they could have used the existing mis-

rea requirement been carried forward into the statutes? If not, how has the mental element of arson changed?

1. The Harm States

a. "Willfully and Maliciously" or Similar Uses of the Term "Malice"

The Model Arson Law uses the common law phrase "willfully and maliciously" to describe the mental element of its three arson provisions,⁵⁷⁴ and ten of the states with arson statutes either identical with or substantially similar to the Model Arson Law use that same phrase.⁵⁷⁵ In addition, Michigan describes the *mens rea* of two of its arson offenses with the common law phrase willfully *and* maliciously, but for two others the mental element is described as willfully *or* maliciously.⁵⁷⁶ On the other hand, Virginia uses the word "maliciously" alone in all of its arson provisions.⁵⁷⁷ Since the addition of the word "willfully" adds nothing to the common law concept of malice, each of the statutes in these twelve states should be interpreted alike if the statutory phrase enacts the common law *mens rea* for these arson

demeanor of malicious mischief as the lesser arson offense. There are two obvious problems with this suggestion. Professors Perkins and Boyce suggest that the rule of provocation is applicable to arson because the *mens rea* of that offense ("malice") is essentially the same as the *mens rea* for murder ("malice"). *Id.* at 856-61. But since the misdemeanor of malicious mischief likewise uses the *mens rea* of "malice," *id.*, the suggestion that the rule of provocation (mitigation) applies to all offenses which use a "malicious" mental state means that the actor would not be guilty of malicious mischief as well. Indeed, Professor Perkins and Boyce argue that the rule of provocation does apply to the crime of malicious mischief as well. *Id.* at 408-13. With this analysis, an actor who commits arson under the rule of provocation would be acquitted of both arson and malicious mischief. In other words, if the rule of provocation is held to apply to both arson and malicious mischief, then it operates as a complete defense in the arson context, but only as a device to grade criminal behavior in the law of homicide. The second problem, of course, is one of policy. Why should the rule of provocation be applied outside of the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson.

574. MODEL ARSON LAW, *infra* App. A., §§ 1-3.

575. IDAHO CODE § 18-801 to -803 (1979); MD. CRIM. LAW CODE ANN. §§ 6-8 (1982); MASS. GEN. LAWS ANN. ch. 266, §§ 1, 2, 5 (West 1970); MISS. CODE ANN. §§ 97-17-1, -3, -5, -7, -13 (1973); NEV. REV. STAT. §§ 205.010, .015, .020 (1985); OKLA. STAT. ANN. tit. 21, §§ 1401-1403 (West 1983); S.C. CODE ANN. §§ 16-11-110, -140, -170 (Law. Co-op. 1985); TENN. CODE ANN. §§ 39-3-202, -3-203, -3-206 (1982) (Tennessee, however, has abandoned the Model Arson Law formulation for aggravated arson in favor of a modern damage provision. *Id.* § 39-3-201.); VT. STAT. ANN. tit. 13, §§ 502-504, 507 (Supp. 1985); W. VA. CODE §§ 61-3-1 to -3-3 (1984).

576. MICH. COMP. LAWS §§ 28.267 (willfully or maliciously), .268 (willfully or maliciously), .269 (willfully and maliciously), .275 (willfully and maliciously) (1981).

577. VA. CODE §§ 18.2-77, -79 to -81 (1982).

offenses.⁵⁷⁸ And it is commonly thought that these statutes do employ the common law concept of malice.⁵⁷⁹

“Malice” for common law arson, as it was for murder at common law, consisted of two different mental states: (1) intentional burnings without justification or excuse, and (2) wanton or wanton and willful burnings without justification or excuse.⁵⁸⁰ And the cases do hold, without exception, that an intentional burning of the *property of another* without justification or excuse is a malicious burning under these statutes.⁵⁸¹ There are so few cases of wanton burnings without justification or excuse under these or similar statutes and they are so ambiguously decided that the question of whether a wanton burning is sufficient seems unresolved in most of these states.⁵⁸² Nevertheless, in view of the history of arson, the legislative use of the common law expression, and the similarity in the culpability between those who wantonly burn and those who burn intentionally,⁵⁸³ the statutory phrase “willfully and maliciously” should be interpreted in accordance with the common law.⁵⁸⁴ But what should be the result in these Model Arson Law

578. See *supra* notes 109-10 and accompanying text.

579. *DeBettencourt v. State*, 48 Md. App. 522, 428 A.2d 479 (1981); R. PERKINS & R. BOYCE, *supra* note 2, at 277.

580. See *supra* notes 109-15 and accompanying text.

581. *E.g.*, *State v. Scott*, 118 Ariz. 383, 576 P.2d 1383 (Ariz. Ct. App. 1978) (under the Arizona version of the Model Arson Law, since repealed); *In re Appeal in Pima County Juvenile Action No. J-37390-1*, 116 Ariz. 519, 570 P.2d. 206 (Ariz. Ct. App. 1977); *People v. Tanner*, 95 Cal. App. 3d 948, 157 Cal. Rptr. 465 (1979) (under the California version of the Model Arson Law, since repealed); *State v. Dunn*, 199 N.W.2d 104 (Iowa 1972); *State v. O'Farrell*, 355 A.2d 396 (Me. 1976) (under Maine's version of the Model Arson Law, since repealed); *Commonwealth v. Lamoth*, 343 Mass. 417, 179 N.E.2d 245 (1961); *State v. Nelson*, 17 Wash. App. 66, 561 P.2d 1093 (1977) (under a prior statute similar to the subsequently promulgated Model Arson Law); *Dean v. State*, 668 P.2d 639 (Wyo. 1983) (under Wyoming's version of the Model Arson Law, since repealed).

582. See, *e.g.*, *People v. Hitel*, 131 Cal. 577, 63 P. 919 (1901); *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (1979) (dictum); *DeBettencourt v. State*, 48 Md. App. 522, 428 A.2d 479 (1981); *People v. Fanshawe*, 137 N.Y. 68, 32 N.E. 1102 (1893) (under a prior statute similar to the subsequently promulgated Model Arson Law); see also *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660 (1982) (under a statute describing the mental element as “wantonly and willfully” burning).

Nevada has a unique statutory provision which covers the typical situation in which arson liability is predicated on a wanton arson theory:

Whenever any building or structure which may be the subject of arson in either the first or second degree shall be so situated as to be manifestly endangered by any fire and shall subsequently be set on fire thereby, any person participating in setting such fire shall be deemed to have participated in setting such building or structure on fire. NEV. REV. STAT. § 205.045 (1985).

583. See *infra* text accompanying notes 592-95 for a discussion of the similarity between the two mental states.

584. See *DeBettencourt v. State*, 48 Md. App. 522, 428 A.2d 479 (1981); *United*

states when an owner in possession burns her building, and no other person is either injured or endangered by the act? Since each of these states has abolished the "of another" requirement for all buildings, the definition of the physical part of the crime (the *actus reus*) includes such conduct. Does the use of the common law *mens rea* of arson require a different result?

Suppose that an owner in possession burns her dwelling house, in which she resides alone, in a fit of disgust with the plumbing in the house. No other person is in or near the dwelling and the house is located in the middle of a large lush irrigated pasture on the actor's ranch. Also assume that no other property is endangered nor is any other person put at risk by the fire. In one of these Model Arson Law states the actor would have performed the physical part (the *actus reus*) of the crime of arson. If the common law *mens rea* of arson, which is applicable in these Model Arson Law states, is simply an intentional burning without justification or excuse, our actor would be guilty of arson. It has been so held by the Maryland Court of Special Appeals,⁵⁸⁵ though the case was later reversed by the Maryland Court of Appeals.⁵⁸⁶ The problem with describing common law arson's malice requirement as an intentional burning without justification or excuse is that it isolates the mental state from the physical part of the crime. It was not the intentional burning of property that was the crime at common law, but the intentional burning of the dwelling house *of another*. The definition of the subject matter of the crime (a dwelling house) worked in tandem with the "of another" requirement to make arson "a more serious offense than other crimes involving the burning of property *because of the possibility that those who reside in the dwelling will be killed in the fire.*"⁵⁸⁷ Arson was an offense against people, albeit a special class of people—the dwellers; and the common law *mens rea* required intentional risk taking, risks that the inhabitants of the dwelling would be killed or injured by the fire. Thus when the actor is charged with one of the people protecting arson offenses, unless the actor's burning of her own dwelling constituted intentional risk taking with respect to the life or limb of others in or near the dwelling when it was burned, the common law *mens rea* would be absent. Not surprisingly, the few cases that have considered this point have so held, though the basis for their decision is not always clearly articulated.⁵⁸⁸ Nevertheless, based on the foregoing anal-

States v. Acevedo-Velez, 17 M.J. 1 (C.M.A. 1983); R. PERKINS & R. BOYCE, *supra* note 2, at 277.

585. Brown v. State, 39 Md. App. 497, 388 A.2d 130 (1978), *rev'd*, 285 Md. 469, 403 A.2d 788 (1979).

586. Brown v. State, 285 Md. 469, 403 A.2d 788 (1979).

587. People v. Foster, 103 Mich. App. 311, 316, 302 N.W.2d 862, 864 (1982) (emphasis added).

588. People v. Tanner, 95 Cal. App. 3d 948, 157 Cal. Rptr. 465 (1979); De Bettencourt v. State, 48 Md. App. 522, 428 A.2d 479 (1981).

The intentional risk taking that satisfied the common law offenses did not extend

ysis, they are correct in principle. Thus, our owner in possession should not be guilty of the person endangering element of the highest arson offense in these Model Arson Law states. What of the property protecting provisions of these laws? It should be emphasized here that the owner in possession of the property has burned only her own property. The fire has not spread to the property of others. If the fire had spread so that the dwelling house of another (or the expanded subject matter under the statutes) was burned, the case is easily resolved by the traditional analysis.

Since the common law offense protected property only as an incident to the personal protection afforded to the dweller, the common law *mens rea* did not involve intentional property risk taking. But since the statutes in these states all provide for property protecting offenses, the legislative use of the common law *mens rea* phrase should be interpreted to extend the concept of malice to include an intent to harm or endanger the property interests of others as well. Again, the few cases on this point have concluded that malice, for this purpose, includes an intention to harm the property interests of others.⁵⁸⁹ Although these cases reach their result by emphasizing that the statute uses the words "willfully *and* maliciously" in the conjunctive, they are again correct in principle. Whether wanton risk taking concerning the property interests of another will suffice as a malicious state of mind has not been decided. The dictum statements in the cases, however, indicate that it is a sufficient mental state under these Model Arson Law statutes.⁵⁹⁰ Finally, the highest courts in two states have held that statutes which prevent an owner from burning her own property in circumstances in which there is neither an intent to harm or endanger the persons or property of others is an unconstitutional interference with an owner's property interests.⁵⁹¹

Before moving to the *mens rea* requirement under the remaining statutes, it is important to recognize here why the common law *mens rea* of arson, "malice," included the concept of a wanton burning without justification or excuse.⁵⁹² As we have just seen, an intentional burning of a dwelling house

to the risk of public safety personnel being injured in the fire. Otherwise all fires of any size would have involved the same mental state. *See* *Brown v. State*, 285 Md. 469, 403 A.2d 788 (1979); *People v. Foster*, 103 Mich. App. 311, 302 N.W.2d 862 (1982).

589. *People v. George*, 42 Cal. App. 2d 568, 109 P.2d 404 (1941); *Love v. State*, 107 Fla. 376, 144 So. 843 (1932); *Brown v. State*, 285 Md. 469, 403 A.2d 788 (1979); *DeBettencourt v. State*, 48 Md. App. 522, 428 A.2d 479 (1981).

590. *See* *People v. George*, 42 Cal. App. 2d 568, 109 P.2d 404 (1941); *Love v. State*, 107 Fla. 376, 144 So. 843 (1932); *DeBettencourt v. State*, 48 Md. App. 522, 428 A.2d 479 (1981).

591. *State v. Dennis*, 80 N.M. 262, 454 P.2d 276 (1969); *State v. Spino*, 61 Wash. 2d 246, 377 P.2d 868 (1963) (en banc); *see also* *People v. George*, 42 Cal. App. 2d 568, 109 P.2d 404 (1941) (construing the California version of the Model Arson Law (since repealed) so as to avoid the constitutional argument); *State v. Leach*, 282 S.C. 178, 318 S.E.2d 267 (1984) (semble).

592. *See supra* notes 95-115 and accompanying text.

was in essence intentional risk taking with the life and limb of the inhabitants of the dwelling house. But it was the risk taking that was sought to be suppressed and punished, for that risk did not have to materialize for guilt of arson. Thus the inhabitants could all be temporarily absent when the dwelling was burned and yet it was arson.⁵⁹³ As so conceived, the concept of wanton arson is nearly the same idea. It required an intentional act which created a very high risk of burning a dwelling house, which risk was known by the actor and disregarded when the actor performed the risk taking act. The only real difference between the two mental states (intentional risk taking and wanton risk taking) is (1) that the intentional actor does the act for the purpose of burning the dwelling which created the risk of death or injury to the dwellers whereas the wanton actor acts in callous disregard of it; and (2) the risk of death or injury to the dwellers is more serious (more likely to materialize) when the intentional actor burns the dwelling house than when the wanton actor starts a fire which creates a very high risk that the dwelling house will be burned, and it is in fact, burned. The common law judges regarded a person who acted in such callous disregard of such an extreme risk of death or injury to another as the moral equivalent of the person who intended that result. Hence the law of arson was the same in this respect as the law of murder.⁵⁹⁴ And for precisely these reasons, the states which use the common law formulation of the *mens rea* of arson should use the wanton state of mind as well. Whenever the courts in these Model Arson Law states have been directly presented with this issue, they have so ruled.⁵⁹⁵

There are two additional states which use the concept of malice in their statutory schemes, but their provisions are so different that they cannot now be considered Model Arson Law states. California defines its highest arson offense's *mens rea* as "willfully and maliciously"⁵⁹⁶ and its remaining arson offense as "recklessly."⁵⁹⁷ Washington uses the phrase "knowingly and maliciously"⁵⁹⁸ for its two highest arson offenses and "recklessly" for its remaining felony offense.⁵⁹⁹ The California courts have held that the statutory phrase "willfully and maliciously" includes an intentional burning in the situation in which the property intentionally burned is the property of some other person.⁶⁰⁰ There is no reason to suspect that the Washington statute will be read differently. Since both statutes are recent enactments, the question of whether wanton burnings are included within the term "malice" is

593. See *supra* note 29 and accompanying text.

594. See *supra* notes 579-80 and accompanying text.

595. See *supra* note 582 and accompanying text.

596. CAL. PENAL CODE § 451 (West Supp. 1986).

597. *Id.* § 452.

598. WASH. REV. CODE ANN. §§ 9A.48.020, .030 (West 1977 & Supp. 1986).

599. *Id.* § 9A.48.040.

600. *People v. Green*, 146 Cal. App. 3d 369, 194 Cal. Rptr. 128 (1983).

an open question in both states.⁶⁰¹ Since neither state uses the "of another" requirement (either in its common law conception or as revised by most statutes) or the affirmative defense approach,⁶⁰² it is unclear whether it is arson in California and Washington for a person to intentionally burn property which neither harms nor endangers persons or the property of others.⁶⁰³ The offenses in both of these states which use the "reckless" *mens rea* will be discussed below.⁶⁰⁴

Finally, since North Carolina uses common law arson for the burning of dwelling houses,⁶⁰⁵ the common law *mens rea* is alive and well in reference to that offense. The remaining arson provisions, in North Carolina uses the phrase "wantonly and willfully," and the cases have interpreted that phrase to have substantially the same meaning as the common law *mens rea* of malice.⁶⁰⁶

b. Intentionally or Purposely

In the remaining twenty-three of the thirty-eight harm states, the statutes have abandoned all reference to the common law *mens rea* of malice. Instead, they have either apparently or obviously been influenced by the *mens rea*

601. See *People v. Green*, 146 Cal. App. 3d 369, 194 Cal. Rptr. 128 (1983) (with reference to the burning of the personal property-the opinion is completely opaque).

602. The statutes are identified *supra* notes 596-99. The "of another" issue is discussed at the text beginning *supra* note 468, and the affirmative defense approach is discussed beginning *supra* note 520.

603. The California statutes are confusing on this point inasmuch as they both contain the following statement: "For purposes of this paragraph arson of property does not include one burning or causing 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." CAL. PENAL CODE §§ 451(d), 452(d) (West Supp. 1986). Since the California statutes do not contain a similar statement with reference to the burning of structures or forest land, there is a good argument that owners of such property are prohibited from burning their own property in all circumstances. Yet the statute requires a malicious *mens rea*, and prior California authority would indicate that it is not a malicious burning if an owner burns her own property neither endangering nor intending to endanger other persons or the property of someone else. See California authorities cited *supra* notes 588-89. There is nothing in the statute to refute this notion and the statutory definition of malice is too ambiguous to do more than create an apparent ambiguity on this issue. See CAL. PENAL CODE § 450(e) (West Supp. 1986).

604. See *infra* text accompanying notes 651-68.

605. *E.g.*, *State v. White*, 291 N.C. 118, 229 S.E.2d 152 (1976); *State v. White*, 288 N.C. 44, 215 S.E.2d 557 (1975); *State v. Long*, 243 N.C. 393, 90 S.E.2d 739 (1956); see also *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982); *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982); *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982).

606. *E.g.*, *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660 (1982).

provisions of the Model Penal Code. Although none of these states have adopted the inchoate approach to arson, in the spirit of the Model Penal Code they have all simplified the mental elements of their arson offenses.

It is generally agreed that intentional consequences are those which "(a) represent the very purpose for which an act is done (regardless of likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire)."⁶⁰⁷ Thus an actor *intentionally damages* property when he either acts for the very purpose of damaging that property or when he acts under circumstances in which damage to the property is substantially certain.

Thirteen states require that the defendant act *intentionally* for their basic felony arson offenses.⁶⁰⁸ Twelve of the thirteen describe the *mens rea* as intentionally damaging property (by fire or explosion), whereas South Dakota, the remaining state, requires that the actor "intentionally sets fire to or burns or causes to be burned" the property in question.⁶⁰⁹

Although a wanton burning of a dwelling house of another (without justification or excuse) was part of the common law's concept of malice, a wanton burning sufficed as malice not because it could not be distinguished from intention, but because these two distinct mental states were regarded as nearly equally reprehensible.⁶¹⁰ Since both mental states require the actor's awareness of either the certainty (with the substantial certainty type of intent) or the high probability (wantonness) of the result, the distinction between a wanton burning and an intentional burning of the "substantially certain variety" lies in the difference in the magnitude of the risk involved.⁶¹¹ A result is substantially certain to occur when it is the "known inevitable concomitant"⁶¹² of the act in question, or to put it in other words, it is

607. W. LAFAVE & A. SCOTT, *supra* note 19, at 196; R. PERKINS & R. BOYCE, *supra* note 2, at 835.

608. ALA. CODE §§ 13A-7-41 to -7-42 (1982 & Supp. 1985); ALASKA STAT. §§ 11.46.400, .46.410 (1983); ARIZ. REV. STAT. ANN. §§ 13-1703 to -1704 (Supp. 1985) (Arizona also includes the word "unlawfully." Whether this means anything more than without justification or excuse, in view of the statutory definition of the mental state, is unclear. *See infra* notes 642-49 and accompanying text.); DEL. CODE ANN. tit. 11, §§ 802-803 (1979); HAWAII REV. STAT. §§ 708-820 to -821(b) (1976); LA. REV. STAT. ANN. §§ 14:51-:52 (1986); MINN. STAT. ANN. §§ 609.561-.563 (West Supp. 1985); NEB. REV. STAT. §§ 28-502 to -504 (1985); N.Y. PENAL LAW §§ 150.10-.20 (McKinney Supp. 1986); OR. REV. STAT. ANN. §§ 164.315, .325 (1985); S.D. CODIFIED LAWS ANN. §§ 22-33-1 to -33-3 (1979 & Supp. 1986); UTAH CODE ANN. §§ 76-6-102 to -103 (1978 & Supp. 1986); WIS. STAT. ANN. §§ 943.02-.03 (West 1982).

609. S.D. CODIFIED LAWS ANN. § 22-33-1 to -33-3 (1979).

610. MODEL PENAL CODE AND COMMENTARIES § 210.2 comment 4, at 21; R. PERKINS & R. BOYCE, *supra* note 2, at 858; *see also supra* notes 591-92 and accompanying text.

611. R. PERKINS & R. BOYCE, *supra* note 2, at 858-61; MODEL PENAL CODE AND COMMENTARIES § 2.02 comment 3, at 236 n.13 and § 210.2 comment 4, at 21.

612. Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 655-56 (1917).

something that is "bound to happen,"⁶¹³ something that is "practically certain" to occur.⁶¹⁴ On the other hand, a lesser degree of probability that the result will occur, a lesser risk that the actor's conduct will actually cause the result, will suffice for wanton conduct.⁶¹⁵ Thus if as a result of the actor's conduct it is "substantially" or "practically" certain that the subject property will be burned, the actor knew this at the time, and the conduct caused the property to burn, the actor would have intentionally burned the property. But if instead of being substantially certain, the actor's conduct created a very high risk, the person engaged in that risk taking conduct, and the property was burned, the actor would have wantonly burned the property.

Since these statutes require an *intentional* burning, and since wanton burnings are not included within the generally accepted notion of intent, wanton burnings would not ordinarily suffice. However, in nine of these twelve states the statutory definitions of "intent" not only clearly eliminate wanton burnings, but they also limit the concept of intent to the situation in which the person acts for the very purpose of burning the property in question.⁶¹⁶ In these nine states, with reference to the arson provisions which require intent, neither wanton behavior nor acting in circumstances in which it is substantially or practically certain that the actor's conduct will cause a burning (and it is known to the actor) will do.

The remaining four states which use "intentional" conduct for their basic arson offenses do not define "intent" so restrictively. Rather than confining it to the act-for-the-purpose-of-achieving-the-result variety of intention, three states apparently define "intent" in accordance with the generally accepted view—"intent" includes both the person who acts for the purpose of causing the result, and the person who acts knowing that the result is virtually certain to occur, though there is some doubt here.⁶¹⁷ Ne-

613. R. PERKINS & R. BOYCE, *supra* note 2, at 835 n.56.

614. MODEL PENAL CODE AND COMMENTARIES § 2.02 comment 3, at 236-37 n.13.

615. R. PERKINS & R. BOYCE, *supra* note 2, at 858-59.

616. ALA. CODE § 13A-2-2(1) (1982); ALASKA STAT. § 11.81.900(1) (1983); ARIZ. REV. STAT. ANN. § 13-105(5)(a) (1978); DEL. CODE ANN. tit. 11, § 231(a) (1979); HAWAII REV. STAT. § 702-206(1) (1976); N.Y. PENAL LAW § 15.05(1) (McKinney 1975); OR. REV. STAT. § 161.085(7) (1985); S.D. CODIFIED LAWS ANN. § 22-1-2(1)(b) (1979 & Supp. 1986); UTAH CODE ANN. § 76-2-103(1) (1978).

617. Minnesota and Wisconsin use exactly the same definition: "Intentionally means that the actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result." MINN. STAT. ANN. § 609.02(3) (West 1964); WIS. STAT. ANN. § 939.23(3) (West 1982).

Louisiana's provision is even more ambiguous:

Criminal intent may be specific or general: . . . (2) General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as

braska, the fourth state, does not use a statutory definition of intent. Presumably, this generally accepted view will prevail in that state as well.

All thirteen states have thus drastically altered the *mens rea* of their arson offenses from what it was at common law. Since nine of the twelve use the intentional *mens rea* for all of their arson offenses, unintentional burnings are not arson in those states. Thus, although a wanton burning of a dwelling house was a capital offense at common law, and the wanton burning of a building is arson in the Model Arson Law states, it is not a felony arson offense in Alabama, Alaska, Hawaii, Louisiana, Nebraska, Oregon, South Dakota, Utah, and Wisconsin.⁶¹⁸ However, Delaware,⁶¹⁹ Minnesota,⁶²⁰ and New York⁶²¹ also use a felony offense which is based upon the mental state known as "recklessness," but those offenses will be discussed below.⁶²²

In addition, ten of the twelve intention states do use a mental element in addition to the basic requirement of an intent to damage or burn in connection with their person endangering offenses.⁶²³ Since this additional requirement is similar to the requirements in other states, it will be discussed below.⁶²⁴

Finally, since each of these states uses either a statutory definition of the phrase "property of another" or an affirmative defense which makes it clear that an owner can burn her property when it neither harms nor endangers others (or their property),⁶²⁵ an actor in one of these states can intentionally burn her own property in those circumstances without arson liability.

reasonably certain to result from his act or failure to act.

LA. REV. STAT. ANN. § 14:10 (West 1986). However, in the absence of qualifying provisions, the terms "intent" and "intentional" have reference to "general criminal intent." *Id.* § 14:11.

The Reporter's Comments to subsection 11 suggest that arson is a "general criminal intent" crime in Louisiana. *Id.* (Reporter's Comment). This apparently means that the Louisiana definition of "intent" or "intentionally" comports with the generally accepted definition.

618. The statutes are cited *supra* note 607.

619. DEL. CODE ANN. tit. 11, § 801 (1979).

620. MINN. STAT. ANN. § 609.576 (West Supp. 1986). The Minnesota statute uses the phrase "culpable negligence." Although the statutes do not define that phrase, the Minnesota Supreme Court has held that "culpable negligence," as used in the Minnesota second-degree manslaughter statute, has the same meaning as the Model Penal Codes's definition of "recklessness." *State v. Frost*, 342 N.W.2d 317, 319-20 (Minn. 1983). There is no reason to suspect that the identical phrase in the arson statute will be interpreted differently.

621. N.Y. PENAL LAW § 150.05 (McKinney Supp. 1986).

622. See *infra* text accompanying notes 651-68.

623. See *infra* notes 671-93 and accompanying text.

624. See *infra* text beginning at note 669.

625. See *supra* notes 520-35 and accompanying text.

c. Knowingly

The Model Penal Code divides the generally accepted definition of "intent" or "intentionally," into two separate categories of mental culpability. A person who acts for the purpose of achieving a particular result acts "purposely" with respect to that result,⁶²⁶ and a person who acts under circumstances in which the result is substantially certain to occur from the actor's conduct acts "knowingly" with respect to that result.⁶²⁷ Under the generally accepted definition of "intent," a person who acts either "purposely" or "knowingly" acts intentionally, but the Model Penal Code does not use that term.⁶²⁸

As we have seen above, eight of the twelve states which use the intentional mental state in their arson statutes define it in the same way the Model Penal Code defines "purposely."⁶²⁹ Since the remaining four states that use the mental state "intentionally" use it in accordance with the generally accepted definition, in the parlance of the Model Penal Code these intentional arson offenses can be committed either "purposely" or "knowingly."

Seven states, however, define their basic arson offenses as knowingly setting fire to or knowingly damaging property.⁶³⁰ Four (Colorado, Illinois, Missouri and New Hampshire) define the mental state of "knowingly" either identically with, or in substantially similar terms to, the Model Penal Code provision.⁶³¹ The remaining three states do not use a statutory definition of this mental state.⁶³² Since a person who acts "purposely" also acts "knowingly,"⁶³³ in at least four of these seven states the *mens rea* of their basic arson offenses is the same as the states which use the conventional concept of "intention."⁶³⁴ In other words, the concepts are the same, but the terminology is different. In addition, Tennessee uses the mental state of "know-

626. MODEL PENAL CODE § 2.02(2).

627. *Id.*

628. MODEL PENAL CODE AND COMMENTARIES § 2.02 comment 2, at 23-24.

629. Compare the statutory definitions cited *supra* note 615 with MODEL PENAL CODE § 2.02(a).

630. These states are Colorado, Georgia, Illinois, Kansas, Missouri, New Hampshire, and Rhode Island. Their statutes are cited *infra* notes 630-31.

631. COLO. REV. STAT. § 18-1-501(6) (1973); Criminal Code of 1961, tit. II, art. 4, §§ 4-4 (Intent), 4-5 (Knowledge), ILL. REV. STAT. ch. 38, §§ 4-4, -5 (1969); MO. REV. STAT. § 562.016(3) (1979); N.H. REV. STAT. ANN. § 626:2(II)(b) (1974).

632. See GA. CODE ANN. §§ 26-603 to -606 (1983); KAN. STAT. ANN. §§ 21-3201, -3202 (1981); State v. Lassley, 218 Kan. 752, 545 P.2d 379 (1976); R.I. GEN. LAWS §§ 11-4-2 to -7 (1981 & Supp. 1985).

633. E.g., MODEL PENAL CODE § 2.02(5); State v. Sunday, 187 Mont. 292, 609 P.2d 1188 (1980).

634. The four states are Colorado, Illinois, Missouri, and New Hampshire. See *supra* note 630.

ingly” damaging property for its person protecting offense, first degree arson, but there is no statutory definition for that term.⁶³⁵

Of these seven states, one, Colorado, also uses a “reckless” mental state for one of its lesser arson offenses,⁶³⁶ two, New Hampshire and Rhode Island, use an inchoate offense,⁶³⁷ and five, in addition to knowingly damaging or starting a fire, require another mental state with reference to the person endangering circumstances contained in their arson provisions designed to protect people.⁶³⁸

It bears repetition here that a person who acts wantonly does not act knowingly, for a wanton mental state requires a lesser degree of probability that the consequence will be caused by the actor’s conduct than does “knowingly” (a virtual or substantial certainty).⁶³⁹ Furthermore, the statutory definitions of the “knowing” mental state exclude the concept of wantonness.⁶⁴⁰ Thus, in these seven states, a wanton burning is not arson under one of the arson provisions which requires a “knowing” state of mind.

Although two additional states (Indiana and Montana) use both “*knowingly*” or “*purposely*” as the mental states for their basic arson offenses (defined in accordance with the Model Penal Code),⁶⁴¹ since a person who acts purposely also acts knowingly within the statutory definition of those terms, nothing is gained by the addition of the “purposely” state of mind except emphasis.⁶⁴² In addition, Montana uses several inchoate provisions⁶⁴³ which will be discussed below.⁶⁴⁴

Finally, Florida describes the *mens rea* of its arson offense as “willfully and unlawfully.” Although the term “willfully” usually means little more

635. TENN. CODE ANN. § 39-3-201 (1982).

636. COLO. REV. STAT. § 18-4-105 (1973). The mental state of “recklessness” is considered *infra* text beginning at note 651.

637. N.H. REV. STAT. ANN. § 634:1(III)(b) (1974 & Supp. 1983); R.I. GEN. LAWS § 11-4-2 (Supp. 1985).

The *mens rea* of the inchoate offenses is discussed *infra* text beginning at note 699.

638. GA. CODE ANN. § 26-1401(5) (1983); Criminal Code of 1961, tit. III, art. 20, § 20-1.1(a) (Aggravated Arson), ILL. ANN. STAT. ch. 38, § 20-1.1(a) (Smith-Hurd Supp. 1986); MO. REV. STAT. § 569.040 (1979); N.H. REV. STAT. ANN. § 634:1(II)(b) (1974 & Supp. 1983); TENN. CODE ANN. § 39-3-201 (1982).

639. See *supra* text accompanying notes 613-14.

640. See *supra* text accompanying notes 615-16.

641. Indiana actually uses the phrase “knowingly or intentionally.” IND. CODE ANN § 35-43-1-1 (Burns 1985). But “intentionally” is defined in terms of the Model Penal Code’s definition of “purposely,” as is “knowingly.” *Id.* § 35-41-2-2(a), -41-2(b).

Montana uses the phrases “purposely or knowingly” (MONT. CODE ANN. § 45-6-102 (1985)), and “knowingly or purposely” (*id.* § 45-6-103), and both terms are defined in accordance with the Model Penal Code. *Id.* § 45-2-101(33), -2-101(58).

642. MODEL PENAL CODE § 2.02(5); see *State v. Sunday*, 187 Mont. 292, 609 P.2d 1188 (1980).

643. MONT. CODE ANN. §§ 45-6-102, -103(b) (1985).

644. See *infra* text accompanying notes 700, 718-22.

than "intentionally,"⁶⁴⁵ the Florida courts have interpreted the phrase "*willfully and unlawfully*"⁶⁴⁶ to mean something quite different from a standard reading of the phrase "*intentionally* (willfully) and *without justification or excuse* (unlawfully)."⁶⁴⁷ As shown above, Florida is one of the few states that does not use the "malice" concept, but that also defines the physical part of the crime in such a way as to apparently prohibit owners in possession from burning their own property.⁶⁴⁸ The Florida courts have interpreted "unlawfully" to "mean something more than the mere burning of one's own property without any danger or damage to others or the property of others, *nor intent to inflict such damage.*"⁶⁴⁹ Since the Arizona statutes use the similar phrase, "intentionally and unlawfully,"⁶⁵⁰ and, like Florida, Arizona purports to prevent owners in possession from burning their property under all circumstances,⁶⁵¹ perhaps the Arizona statute will be read in the same way.⁶⁵²

Florida also uses a *mens rea* component for its people protecting provision in addition to the basic *mens rea* requirement that the defendant act willfully and unlawfully. This provision will be discussed below with other similar provisions.⁶⁵³

d. Recklessly

Three of the harm states supplement their basic arson offenses with a felony defined in terms of "recklessness." These states are California⁶⁵⁴ and

645. MODEL PENAL CODE AND COMMENTARIES § 2.02(8) at 248-49 and § 2.02 comment 10; *see Love v. State*, 107 Fla. 376, 144 So. 843 (1932); *Brown v. State*, 285 Md. 469, 403 A.2d 788 (1979); R. PERKINS & R. BOYCE, *supra* note 2, at 875-77.

646. Before the amendment in 1979, the statute read "willfully and maliciously." FLA. STAT. ANN. § 806.01 (West 1976).

647. The term "unlawfully" is seldom treated as a positive *mens rea* concept. It is generally used to indicate a lack of legal justification or excuse for the intentional act. Thus the term generally means "without justification or excuse." *See, e.g., State v. Janvrin*, 122 N.H. 75, 441 A.2d 1144 (1982); ARIZ. REV. STAT. ANN. § 13-105(30) (1978); *see infra* note 649.

648. *See supra* notes 512-15 and accompanying text.

649. *State v. Mayle*, 406 So. 2d 108, 109 (Fla. Dist. Ct. App. 1981) (emphasis added), *petition denied*, 419 So. 2d 1200 (Fla. 1982); *accord State v. Wall*, 445 So. 2d 646 (Fla. Dist. Ct. App. 1984).

650. ARIZ. REV. STAT. ANN. §§ 13-1703, -1704 (Supp. 1985).

651. *See supra* notes 510-17 and accompanying text.

652. Unlike Florida, however, the Arizona Code defines both "intentionally" and "unlawfully." Intentionally means "purposely," ARIZ. REV. STAT. ANN. § 13-105(5)(a) (1978), and unlawfully "means contrary to law or, where the context so requires, not permitted by law." *Id.* § 13-105(30) (1978). Hence, the argument is somewhat more difficult to make in Arizona. It should be noted here, however, that the Arizona statutory definition of "unlawfully" is declaratory of the generally accepted meaning of that phrase. *See supra* note 644 and accompanying text.

653. *See infra* notes 684-85 and accompanying text.

654. CAL. PENAL CODE § 452 (West Supp. 1986) ("recklessly sets fire to or burns or causes to be burned").

Washington,⁶⁵⁵ which use "malice" for their basic offenses, and Delaware,⁶⁵⁶ which uses the "intentional" mental state for its basic provision. It is a felony under these statutes to "recklessly" set fire to or burn, or damage property.⁶⁵⁷ In turn "recklessness" is defined in accordance with the Model Penal Code's definition of that culpable mental state.⁶⁵⁸ In essence, "recklessness" is advertent criminal negligence, an act which creates a substantial, and unjustifiable risk of burning (or exploding), when the risk is known by the actor and disregarded, in circumstances which constitute a gross deviation from the standard of conduct that a reasonable person would observe in the situation. "Recklessness" is distinguished from "wantonness" by the difference in the magnitude of the risk created by the defendant's act which she knowingly disregards.⁶⁵⁹ Indeed, when the Model Penal Code uses the mental state of "wantonness," it speaks of "*extreme recklessness*," which makes the point well.⁶⁶⁰ A person who knows of the extreme risk and acts in disregard of that risk manifests the extreme indifference to the burning that marked the lower limits of the common law felony — a wanton burning.⁶⁶¹ A person who acts "recklessly," however, acts with the knowledge that she is creating a far lesser risk, though that risk is a gross deviation from the norm. "Recklessness," differs from "knowledge" (or the substantially-certain-to-occur variety of intent) in that the former requires only gross risk taking whereas the latter requires indifference to a result which will occur to a virtual certainty.⁶⁶² Although the differences between "knowledge" (a practical certainty), "wantonness" (extreme risk taking), and "recklessness" (gross risk taking), are really a matter of degree, the common law only imposed arson liability on those who acted intentionally (in the sense of both purposely and knowingly, to use the modern terminology) and those who acted wantonly.⁶⁶³ Criminal negligence, recklessness, would not suffice.⁶⁶⁴

Minnesota, which uses the "intentional" culpable mental state for its basic arson offenses,⁶⁶⁵ also breaks with the common law tradition: it has an arson related felony which is defined in terms of "culpable negligence." Thus a person who is "culpably negligent in causing a fire to burn or get

655. WASH. REV. CODE ANN. § 9A.48.040 (1977) (recklessly damages).

656. DEL. CODE ANN. tit. 11, § 801 (1979) (recklessly damages).

657. See *supra* notes 651-53.

658. CAL. PENAL CODE § 450(f) (West Supp. 1986); DEL. CODE ANN. tit. 11, § 231(c) (1979); WASH. REV. CODE ANN. § 9A.08.010(c) (1977); MODEL PENAL CODE § 2.02(2)(c).

659. E.g., MODEL PENAL CODE AND COMMENTARIES § 210.2 comment 4, at 21-22.

660. *Id.*

661. See R. PERKINS & R. BOYCE, *supra* note 2, at 879-80.

662. E.g., W. LAFAVE & A. SCOTT, *supra* note 19, at 216.

663. See *supra* notes 95-115 and accompanying text.

664. See *supra* note 99 and accompanying text.

665. See *supra* note 607 and accompanying text.

out of control" which results in damage or injury to another, "and as a result thereof a human being is injured and great bodily harm incurred is guilty of [a felony]. . . ."666 The Minnesota courts have interpreted the phrase "culpable negligence" to mean, in essence, criminal negligence.⁶⁶⁷

Finally, New York's arson statute, when using the *mens rea* of recklessness, requires that the actor recklessly damage a building or motor vehicle by *intentionally* starting a fire or causing an explosion.⁶⁶⁸ New York thus differs from California, Delaware and Washington in that New York requires that the fire be intentionally started or the explosion intentionally caused whereas a recklessly started fire (or explosion) which damages property will suffice in the latter states.⁶⁶⁹

With reference to the harm provisions in the remaining thirty-four states which adhere to the traditional view of arson, the view that the offense requires the infliction of harm upon a subject matter, recklessness is not used. The actor must maliciously, or intentionally (purposely) or knowingly damage the subject property, depending upon the jurisdiction in question. It is not uncommon, however, for a state to provide for misdemeanor liability based upon reckless damage by fire or explosion.⁶⁷⁰

Insofar as the majority of states confine felony liability to intentionally (purposely) or knowingly damaging property, they exclude from felony liability those who burn wantonly, as well as those who do so recklessly. In the minority of states, the states that adhere to the "malicious" mental state of the common law, all except the person who recklessly damages property by fire or explosion is subject to such liability. Only a small minority of four states use the "recklessness" infliction of damage for a felony arson provision. And of course, in these states, a person who burns wantonly is guilty under the reckless burning provisions.⁶⁷¹

e. Culpability Requirements Beyond Those Necessary for Initial Arson Liability

Although a detailed discussion of both the people protecting provisions of the modern arson statutes and their grading schemes is beyond the scope

666. MINN. STAT. ANN. § 609.576 (West Supp. 1986).

667. *E.g.*, State v. Beilke, 267 Minn. 526, 127 N.W.2d 516 (1964) (defining the phrase "culpable negligence" as it is used in the Minnesota second degree manslaughter statute).

668. N.Y. PENAL LAW § 150.05 (McKinney Supp. 1986) (emphasis added).

669. *See supra* text accompanying notes 651-55. As to the construction of the New York statute, *see, e.g.*, People v. Keech, 121 Misc. 2d 368, 467 N.Y.S.2d 786 (1983).

670. *E.g.*, ALA. CODE § 13A-7-43 (1982); ARIZ. REV. STAT. ANN. § 13-1702 (West 1978); MO. REV. STAT. § 569.060 (1979); OR. REV. STAT. ANN. § 164.335 (1985); UTAH CODE ANN. § 76-6-104 (1978).

671. *See supra* notes 651-61, 665-66, and accompanying text.

of this paper, culpability requirements in addition to and different from⁶⁷² those necessary for basic arson liability are frequently used both to assure that persons will be protected against the risks attendant upon fires and explosions, and to grade the various arson offenses. And as we noted above, there is a close relationship between the lines which are drawn to separate the people protecting offenses from the property protecting provisions, and the lines used to grade offenses.⁶⁷³ This is because we generally regard risking the life or limb of persons or injuring them as far more reprehensible than taking such risks with property.

Fourteen of the thirty-eight harms states use a culpability requirement in addition to the mental state with which the act of burning or damaging must be done to define at least one of their highest arson offenses. In an additional three states the statutes are so ambiguous that it is unclear whether an additional culpable mental state is required. This offense is also a people protecting offense in each of these states.

Three states, Delaware,⁶⁷⁴ New Hampshire,⁶⁷⁵ and South Dakota,⁶⁷⁶ require that the actor "know" of a particular circumstance, and each of these states defines that culpability requirement as does the Model Penal Code.⁶⁷⁷ New Hampshire requires that the actor know the building was an occupied structure,⁶⁷⁸ and South Dakota that the structure was occupied at the time.⁶⁷⁹ The Delaware statute, which exemplifies this general approach, is somewhat different:

A person is guilty of arson in the first degree when he *intentionally* damages a building by starting a fire or causing an explosion *and* when:

- (1) He *knows* that another person not an accomplice is present in the building at the time: *or*
- (2) He *knows* of circumstances which render the presence of another person not an accomplice therein a reasonable possibility.⁶⁸⁰

672. In many of the modern codes, the prescribed culpability requirement applies to all material elements of the offense unless a contrary intention appears. MODEL PENAL CODE § 2.02(4). Similar provisions exist in many states. See *infra* note 706 and accompanying text.

673. See *supra* text accompanying notes 339-44.

674. DEL. CODE ANN. tit. 11, § 803 (1979).

675. N.H. REV. STAT. ANN. § 634:1(II) (1974).

676. S.D. CODIFIED LAWS ANN. § 22-33-1 (1979).

677. DEL. CODE ANN. tit. 11, § 231(b) (1979); N.H. REV. STAT. ANN. § 626:2 (II)(b) (1974). Although the New Hampshire definition of "knowingly" apparently does not include the act-with-a-virtual-certainty variety of intent, the remainder of the definition is in accordance with the Model Penal code, and it is that definition which applies to the additional mental state here in question. S.D. CODIFIED LAWS ANN. § 22-1-2(1)(c) (1979).

678. See *supra* note 672. Since the New Hampshire statute uses the "knowingly" mental state for the act, arguably this is not a different mental state; but since the statute spells it out I have included it here.

679. See *supra* note 673.

680. DEL. CODE ANN. tit. 11, § 803 (1979).

Four states, Alaska,⁶⁸¹ Hawaii,⁶⁸² Missouri,⁶⁸³ and Oregon,⁶⁸⁴ require that the intentional damage to the subject matter *recklessly* endanger persons, or, in Oregon, persons or "protected property." The Alaska statute provides a good example of this approach.

(a) A person commits the crime of arson in the first degree if the person *intentionally* damages any property by starting a fire or causing an explosion and by that act *recklessly* places another person in danger of serious physical injury. For purposes of this section, "another person" includes but is not limited to fire and police service personnel or other public employees who respond to emergencies, regardless of rank, functions, or duties being performed.

(b) Arson in the first degree is a class A felony.⁶⁸⁵

Finally, each of these states defines "recklessly" in accordance with the Model Penal Code.⁶⁸⁶

The additional culpability requirement in the final group of states is not so easily characterized. In each of these states it is sufficient for the highest arson offense if the actor (1) knew or (2) should have known of some additional person endangering circumstance, as, for example, another person was in the building at the time the actor intentionally or knowingly damaged it.⁶⁸⁷ Furthermore, there is considerable variation in the wording of the al-

681. ALASKA STAT. § 11.46.400 (1983).

682. HAWAII REV. STAT. § 708-820 (1976).

683. MO. REV. STAT. § 569.040 (1978).

684. OR. REV. STAT. § 164.325 (1985). "Protected property" is defined to mean "any structure, place or thing customarily occupied by people, including 'public buildings' . . . and 'forest land.'" *Id.* § 164.305(1).

685. ALASKA STAT. § 11.46.400 (1983) (emphasis added).

686. *Id.* § 11.81.900(3); HAWAII REV. STAT. § 702-206(3) (1976); MO. REV. STAT. § 562.016(4) (1979); OR. REV. STAT. § 161.085(9) (1985).

687. ALA. CODE § 13A-7-41 (1982) (the actor knows another person is present in such building at the time "or the circumstances are such as to render the presence of a person therein a reasonable possibility"); FLA. STAT. ANN. § 806.01(1)(c) (West Supp. 1986) (any other structure that he knew or had reasonable grounds to believe was occupied by a human being); Criminal Code of 1961, tit. III, art. 20, § 20-1.1(a)(1), ILL. ANN. STAT. ch. 38, § 20-1.1(a)(1) (Smith-Hurd Supp. 1986) (he knows or reasonably should know that one or more persons are present therein); MINN. STAT. ANN. § 609.561(2)(a) (West Supp. 1985) (another person who is not a participant in the crime is present in the building at the time and the defendant knows that, or the circumstances are such as to render the presence of such a person therein a reasonable possibility); NEB. REV. STAT. § 28-502(1) (1979) (when another person is present in the building at the time and either (a) the actor knows that fact, or (b) the circumstances are such as to render the presence of a person therein a reasonable probability); N.Y. PENAL LAW §§ 150.15, .20(1) (McKinney Supp. 1986) (these provisions are substantially similar to those in Minnesota); TENN. CODE ANN. § 39-3-201 (1982) (he knows or reasonably should know that one or more persons are present therein).

ternative requirement to knowledge, the requirement that the defendant should have known of some additional person endangering circumstance.⁶⁸⁸ It does seem clear, however, that one of the recognized subjective states of mind (e.g., purposely, knowingly or recklessly) is not required. Should some other form of culpability be required in these states? Negligence, criminal or civil? Or should the culpable mental state end with the "knowledge" requirement?

Although there is some variation in the statutes, the New York provision exemplifies this approach:

A person is guilty of arson in the second degree when he *intentionally* damages a building or motor vehicle by starting a fire, when (a) another person who is not a participant in the crime is present in such building or motor vehicle at the time, and (b) the defendant *knows* that fact or *the circumstances are such as to render the presence of such a person therein a reasonable possibility*.

Arson in the second degree is a class B felony.⁶⁸⁹

At common law the definition of the subject matter, a "dwelling house," assured that, to borrow the phrase from the New York statute, the presence of a person in the property burned was "a reasonable possibility." The common law offense thus protected people by its definition of the subject matter.⁶⁹⁰ The New York statute, however, applies to any "building or motor vehicle." The statute defines these terms in the following way:

As used in this article, 1. "Building", in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall not be deemed a separate building.

2. "Motor vehicle", includes every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven invalid chairs being operated or driven by an invalid, (b) vehicles which run only upon rails or tracks, and (c) snowmobiles as defined in article forty-seven of the vehicle and traffic law.⁶⁹¹

To convert Section 150.15 into a person protecting offense, the New York legislature decided not to define the entire subject matter, as did the common law and as do many modern statutes, in terms of property which inherently created risks to people. Thus "motor vehicles" were included in the subject matter of arson, and there is nothing about the definition of "motor vehicles" which relates specifically to personal risks. Instead it decided to use either the presence of a person which is *known* to the actor, or the fact that there is a reasonable possibility that someone is present when the property

688. See *supra* note 684.

689. N.Y. PENAL LAW § 150.15 (McKinney Supp. 1986) (emphasis added).

690. See *supra* notes 14-16, 18, and accompanying text.

691. N.Y. PENAL LAW § 150.00 (McKinney Supp. 1986).

is burned. The actual presence of a person, of course, is not required. If the intent of the "reasonable possibility" provision in Section 150.15 is to modify the subject matter of the offense, the argument is stronger that no actual subjective mental state may be required.⁶⁹² On the other hand, its presence in the same clause specifying one of the culpable mental states, "knowledge" that a person is present, suggests that it is the actor's subjective perspective that is important rather than an objective determination that there was a "reasonable possibility" that a person was in the building. Since a person who burns a building when there is a "reasonable possibility" of another being present therein is treated in precisely the same way as a person who burns the building "knowing" that another is present, the phrase should be interpreted to mean that a subjective state of mind is required. The actor must be shown to have knowledge of facts which lead her to conclude that there is a reasonable possibility that another is present. Here the word "reasonable" would not import a purely objective standard, but would serve to exclude *all possibility* of a person being present, a standard which could never be met. On the other hand, objective liability, facts which would lead a reasonably prudent person to understand that there is a possibility of another being present in the building when it is intentionally burned cannot be rejected as absurd. All we can say now is that the question of whether an additional mental state is required for conviction of this offense and, if so, what it may be is very ambiguous and the resolution of this issue must await another day.

Finally, the highest arson offense in Georgia, Louisiana, and Washington raise similar questions. In Georgia first degree arson can be committed in a variety of ways. One of which is by knowingly damaging any building (or other specified property) "under such circumstances that it is reasonably foreseeable that human life might be endangered."⁶⁹³ Intentionally setting fire to or damaging by explosion "any structure, watercraft, or moveable whereby it is foreseeable that human life might be endangered"⁶⁹⁴ is aggravated arson in Louisiana. And arson in the first degree is committed in Washington if a person "knowingly and maliciously: (a) [c]auses a fire or explosion which is manifestly dangerous to any human life, including fireman; or . . . (b) [c]auses a fire or explosion in any building in which there shall be at the

692. *Id.* § 150.15 provides as follows:

A person is guilty of arson in the second degree when he *intentionally* damages a building or motor vehicle by starting a fire, when (a) another person who is not a participant in the crime is present in such building or motor vehicle at the time, and (b) the defendant *knows* that fact or the *circumstances are such as to render the presence of such a person therein a reasonable possibility.*

Id. (emphasis added).

693. GA. CODE ANN. § 26-1401(a)(5) (1983).

694. LA. REV. STAT. ANN. § 14:51 (West 1974 & Supp. 1985).

time a human being who is not a participant in the crime"⁶⁹⁵ Although the wording of these provisions does not as strongly suggest that a mental element is required, as does the New York statute, these provisions are less than clear, and the cases have yet to discuss these issues.⁶⁹⁶

Before moving on to the *mens rea* requirements in the inchoate states, the position of the thirty-eight harm states may be summarized as follows:

1. Seven states do require a mental state which is different from the mental state for the act prohibited by the statute: three require "knowledge,"⁶⁹⁷ and four require "recklessness."⁶⁹⁸
2. Seven more states use the mental state of "knowledge," but it is ambiguous whether there is an additional mental state for the alternative provision to the knowledge requirement.⁶⁹⁹
3. Three states use language which is ambiguous as to whether a mental state is required and, if so, what that mental state would be.⁷⁰⁰
4. The remaining twenty-one harm states do not, at least on the face of their statutes, require a mental state that is different from the mental state prescribed for the act prohibited by the statute in question.⁷⁰¹

2. The Inchoate States

The offenses in the inchoate states fall into two distinct patterns: (1) statutes with an architecture which is essentially the same as an attempt statute; and (2) endangering statutes. Not all of the inchoate states, however, use both types of provisions.⁷⁰² In addition, four or five harm states use an endangering type offense, and one, Tennessee, uses an attempt-like statute. These inchoate provisions will be considered below.⁷⁰³ All of the inchoate states except one (Ohio) use an attempt-like statute as their basic arson offense.

695. WASH. REV. CODE ANN. § 9A.48.020 (1977). Washington has no provisions similar to MODEL PENAL CODE § 2.02(3)-(4).

696. A challenge that the phrase "manifestly dangerous to any human life, including fireman" is unconstitutionally vague and uncertain was rejected in *State v. Leverage*, 23 Wash. App. 33, 594 P.2d 949 (1979). The question of the *mens rea* requirement for that circumstance was not mentioned.

697. See *supra* notes 671-77 and accompanying text.

698. See *supra* notes 678-83 and accompanying text.

699. See *supra* notes 684-89 and accompanying text.

700. See *supra* notes 690-93 and accompanying text.

701. See *supra* note 670 and following text.

702. Eleven of the twelve inchoate states use the target-type offense as the basic arson provision. Ohio is the only inchoate state that does not use a target-type inchoate offense. See *supra* notes 389-96 and accompanying text. Nine of the twelve inchoate states also use an endangering type inchoate statute. See *supra* notes 397-401 and accompanying text.

703. See *supra* notes 408-14 and accompanying text.

a. The Attempt-like Statutes

These statutes all require the actor to intentionally, or purposely or knowingly, (depending on the state in question) start a fire or cause an explosion for the purpose of achieving a particular result or knowing that a particular result will happen.

Since the Model Penal Code is the inspiration for the inchoate arson offense, not surprisingly, eight of the twelve inchoate states define the culpable mental states used in their arson provisions in essentially the same way as does the Model Code.⁷⁰⁴ There is, however, a difference in terminology. Although six of these states describe the mental state as "intentionally," the definitions of that culpable mental state in these statutes make it abundantly clear that they are restricting it to the Model Code's "purposely" requirement.⁷⁰⁵ The remaining two states use "purposely" as defined in the Code.⁷⁰⁶

704. ARK. STAT. ANN. § 41-203 (1977); CONN. GEN. STAT. ANN. § 53a-3(11)-(14) (West Supp. 1985) (Only a portion of the Model Penal Code's concept of "knowingly" is used. Connecticut does not appear to use the substantially-certain-result variety of intent, what the Model Penal Code also calls "knowingly."); KY. REV. STAT. § 501.020 (1985) (The Kentucky Statute is similar to Connecticut's definition of "knowingly," but the terminology with respect to recklessly and negligently are quite different. What Arkansas, Connecticut, and the Model Penal Code call "recklessly" and "negligently," Kentucky labels "wantonly" and "recklessly."); ME. REV. STAT. ANN. tit. 17-A, §§ 35(1)-(4) (1983); N.J. STAT. ANN. § 2C:2-2(b) (West 1982); 18 PA. CONS. STAT. ANN. § 302(b) (Purdon 1983).

In addition, the Texas definitions of "intent" or "intentionally" generally agree with the Model Penal Code's definition of "purposely," and the same is true of "recklessly" and "criminal negligence." TEX. PENAL CODE ANN. § 6.03 (Vernon 1974). The Texas definition of "knowledge" is substantially different in one crucial respect. While the Model Penal Code and the states identified above in this note define "knowingly" with respect to a result in terms of when the actor knows that it is *practically certain* that his conduct will cause such a result, Texas defines knowingly as follows: "A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is *reasonably certain* to cause the result." *Id.* § 6.03(b) (emphasis added). This definition makes "knowingly" difficult, if not impossible, to distinguish from recklessness.

North Dakota's attempt-like inchoate offense uses the phrase "with intent to destroy." N.D. CENT. CODE § 12.1-21-01 (1985). Intent is, in turn, defined as acting for the purpose of achieving a result, what the Model Penal Code calls "purposely." *Id.* § 12.1-02-02. So too the North Dakota definitions of "recklessly" and "negligently" are largely consistent with the Model Penal Code's definition of those terms. But North Dakota's definition of "knowingly" does not embrace the act-with-a-practical-certainty concept, what the Model Penal Code calls "knowingly." *Id.* The North Dakota arson statutes do not use the "knowingly" culpable mental state so that the distinction does not affect the law of arson in North Dakota.

705. CONN. GEN. STAT. ANN. § 53a-3(11) (West Supp. 1985); KY. REV. STAT. § 501.020(1) (1985); ME. REV. STAT. ANN. tit. 17-A, § 35(1) (West 1983); N.D. CENT. CODE § 12.1-02-02(1)(a) (1985); 18 PA. CONS. STAT. ANN. § 302(b)(1) (Purdon); TEX. PENAL CODE ANN. § 6.03(a) (Vernon 1974).

706. ARK. STAT. ANN. § 41-203(1) (1977); N.J. STAT. ANN. § 2C:2-2(b)(1) (West 1982).

Nevertheless, despite this difference in terminology, the structure of the basic arson offense in each of these states is essentially the same. It is well illustrated by the Kentucky statute:

- (1) A person is guilty of arson in the second degree when he starts a fire or causes an explosion with intent to destroy or damage a building: (a) Of another; or (b) Of his own or of another, to collect or facilitate the collection of insurance proceeds for such loss.
- (2) In any prosecution under this section, it is a defense that: (a) No person other than the defendant had a possessory or proprietary interest in the building, or, if other persons had such an interest, all of them consented to the defendant's conduct; and (b) The defendant's sole intent was to destroy or damage the building for a lawful purpose.
- (3) Arson in the second degree is a Class B felony.⁷⁰⁷

The Kentucky statute also illustrates a problem with all of these statutes. Since they do not specify a mental state with respect to the act proscribed by the statute, the starting of a fire or the causing of an explosion, is a mental state required? If so, what mental state? Under the Model Penal Code approach used in these states, the initial question should be easily answered. The fire must be started or the explosion must be caused with a culpable mental state. This follows from the Code's requirement that when the culpability sufficient to establish a material element of an offense is not otherwise prescribed by law, such element is established if a person acts "purposely," "knowingly," or "recklessly."⁷⁰⁸ In this respect, the Code arguably codifies the common law position.⁷⁰⁹ More decisively, there is a provision similar to the Model Penal Code's requirement in seven of the eight states, including Kentucky.⁷¹⁰ In the remaining state, Connecticut, the force of the common law should reach the same result. But does this mean that one can *recklessly* start a fire or cause an explosion "with intent to destroy or damage a building," to use the phrase from the Kentucky statute? It is nearly impossible to think of how this could be done. And the same difficulty exists with the use of the "knowingly" mental state.

707. KY. REV. STAT. § 513.030 (1985).

708. MODEL PENAL CODE § 2.02(3). "When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto." *Id.*

709. MODEL PENAL CODE AND COMMENTARIES § 2.02 comment 5, at 244; see G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 64-65 (2d ed. 1961); Turner, *The Mental Elements in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31 (1936).

710. ARK. STAT. ANN. § 41-204(2) (1977); KY. REV. STAT. §§ 501.030(2), .040 (1985); ME. REV. STAT. tit. 17-A, § 34(1) (1983); N.D. CENT. CODE § 12.1-02-02(1)(e) (1985); N.J. STAT. ANN. § 2C:2-2(c) (West 1982); 18 PA. CONS. STAT. ANN. § 302(c) (Purdon 1983); TEXAS PENAL CODE ANN. § 6.02(c) (Vernon 1974).

The requirement of purpose for which the fire was started or the explosion was caused most logically suggests that the fire must be purposely set as well. The statute which requires the use of "purposely," "knowingly," or "recklessly" applies only when the statute does not require a different mental state and the "purposely" mental state seems to be necessary in each of these eight states. But there is an additional reason for this result. The Code, and a statute in most of these states, provides that when a culpable mental state is prescribed for the commission of an offense, without distinguishing among the material elements of the offense, that prescribed culpable mental state applies to all material elements of the crime, unless a contrary purpose plainly appears.⁷¹¹ Since the fire or explosion must be set or caused for the purpose of destroying or damaging the specified property, the argument is compelling that the fire must be purposely set or the explosion purposely caused.

There is also, of course, an additional culpable mental state requirement under these statutes. In each, the fire must be set or the explosion must be caused for the *purpose* of (though the actual language is "with the intent to" in six of the states)⁷¹² destroying or otherwise damaging specified property. We have alluded to this property before as the "target" property.⁷¹³ It is the target property because the actor must *purposely* start a fire or cause an explosion with the *purpose* of damaging or destroying that property. The basic structure of the inchoate arson offense thus involves two culpable mental states: purposely or "intentionally" performing the act proscribed by the offense (starting a fire or causing an explosion) with a specific purpose in mind (damaging or destroying the property). The actor is guilty when the act is purposely performed with the requisite purpose in mind. No damage or destruction need occur, though the actor is equally guilty if his purpose is achieved.⁷¹⁴ This is, of course, the dis-

711. The Code provides that "[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears." MODEL PENAL CODE § 2.02(4).

There are substantially similar provisions in seven of the eight states: ARK. STAT. ANN. § 41-204(1) (1977); CONN. GEN. STAT. ANN. § 53a-5 (West 1985); KY. REV. STAT. § 501.030(2) (1985); ME. REV. STAT. ANN. tit. 17-A, § 11 (1983); N.J. STAT. ANN. § 2C:2-2(c.) (West 1982); N.D. CENT. CODE § 12.1-02-02(3) (1985); 18 PA. CONS. STAT. ANN. § 302(d) (Purdon 1983).

712. "Intentionally," as we have seen above, is defined in each of these states to mean "purposely." See *supra* note 702 and accompanying text.

713. See *supra* notes 335, 379-83, and accompanying text.

714. Just as a conviction for an attempt to commit a crime is permissible when the proof shows that the target offense has been committed, so too with the target type arson offense and with even greater reason. See W. LAFAYE & A. SCOTT, *supra* note 19, at 451-52.

tinguishing feature between an inchoate offense and a traditional harm offense for the latter requires that the burning or damaging be done, whereas the inchoate offense does not. The question of whether there are additional mental states which are used in the inchoate provisions protecting persons and used to divide the arson offenses into various levels of severity will be discussed below.

Before we turn to the four remaining inchoate states, the inchoate provision in Tennessee should be noted here. Tennessee uses an attempt-like inchoate offense. It requires an "intent to burn" specified property; and thus, under the foregoing argument, the fire must be intentionally set with the intent to burn the specified property.⁷¹⁵

Three of the four remaining inchoate states, though they use exactly the same structure for their inchoate provisions, use a different culpable mental state. Rather than requiring the actor to start the fire or cause the explosion "purposely" for the "purpose" of damaging or destroying the target property, Iowa uses the mental states of "intentionally or knowingly."⁷¹⁶ Thus it is arson in Iowa for a person to cause a fire or explosion "in or near any property with the intent to destroy or damage such property, or with the knowledge that such property will probably be destroyed or damaged."⁷¹⁷ Following the analysis set forth above,⁷¹⁸ arson in Iowa requires two culpable mental states: the actor must (1) *intentionally* or *knowingly* cause a fire or explosion with (2) the *intent* to destroy or damage or with the *knowledge* that such property will probably be destroyed or damaged.

In New Mexico arson consists of "maliciously or willfully starting a fire or causing an explosion with the purpose of destroying or damaging" specified property.⁷¹⁹ Admirably, the New Mexico statute articulates the

715. TENN. CODE ANN. § 39-3-204 (1982).

716. The new Iowa Code, adopted in 1976 (1976 Iowa Acts ch. 1245), does not define the culpable mental states of "intentionally" or "knowingly." Presumably they will be read consistently with the definition of "purposely" and "knowingly" in the Model Penal Code for that is arguably the new American meaning of these terms. One can glean the intention to use these words in accordance with the typical use of the word "intentionally" for "purposely," since most state which have adopted the Model Penal Code approach have used the term "intentionally" but defined it to mean "purposely." See *supra* notes 649, 701. Furthermore, if "intentionally" is construed in accordance with the generally accepted meaning of that word, then the word "knowingly" is either redundant or must be given a rather odd interpretation for "intentionally" customarily includes "purposely" and "knowingly." See *supra* text accompanying note 702.

717. IOWA CODE ANN. § 712.1 (West 1979).

718. See *supra* text accompanying notes 705-09.

719. N.M. STAT. ANN. § 30-17-5(A) (1984). For the meaning of the term "maliciously" or "willfully," see *supra* text accompanying notes 574-95 (emphasis supplied).

culpable mental states necessary for this inchoate offense. And in a very similar vein, a person is guilty of first degree arson in Wyoming "if he *maliciously* starts a fire or causes an explosion *with intent to destroy or damage an occupied structure.*"⁷²⁰

The remaining inchoate state, Ohio, uses only offenses which endanger property. These "endangering" offenses will be considered next.

b. Endangering Property by Fire or Explosion

The endangering offense differs from the attempt-like offense discussed above in one crucial respect: the actor need not be attempting to purposely achieve a goal (or "knowingly" in a few states) of damaging or destroying property. With the endangering offense the actor simply starts a fire or causes an explosion that places persons or property at risk. The structure of this offense then is (1) a culpable mental state with respect to starting a fire or causing an explosion which, (2) with a culpable mental state, endangers persons or property.

Although there are differences in terminology, six of the inchoate states and two harm states require that the fire or explosion be started or caused "purposely," and that the fire or explosion "recklessly" endanger persons or property.⁷²¹ There are two principal differences in terminology. Most of these states describe the culpable mental state with which the fire must be set or the explosion caused as "intentionally,"⁷²² though that term is defined to mean "purposely" in the parlance of the Model Penal Code.⁷²³ And, though Montana (a harm state with inchoate provisions) uses the word "negligently,"⁷²⁴ that term is defined in accordance with the Model Penal Code's definition of "recklessness."⁷²⁵

720. WYO. STAT. § 6-3-101 (1977) (emphasis supplied).

721. ARK. STAT. ANN. § 41-1903 (1977) (purposely-recklessly. Arkansas also has an attempt-like offense which uses the additional culpability requirement of negligently.) *Id.* § 41-1902(1)(c). CONN. GEN. STAT. ANN. § 53a-113 (West 1985) (intentionally (purposely)-recklessly); MONT. CODE ANN. § 45-6-102 (1983) (a harm state with this inchoate offense: purpose or knowingly-negligently (recklessly)); N.H. REV. STAT. ANN. § 634:1(b) (1974 & Supp. 1983) (a harm state with this arguable inchoate offense: purposely-recklessly); N.J. STAT. ANN. § 2C-17-1(b) (West 1982) (purposely-recklessly); N.D. CENT. CODE § 12.1-21-02 (1985) (intentionally (purposely)-recklessly); 18 PA. CONS. STAT. ANN. § 3301(a)(1) (Purdon 1983) (intentionally (purposely)-recklessly); *id.* at 3301(c)(2) (intentionally (purposely)-recklessly); *id.* at 3301(d) (intentionally (purposely)-recklessly); TEX. PENAL CODE ANN. § 28.02(a)(b) (Vernon Supp. 1986) (intent (purpose)-recklessly).

722. See the parentheticals accompanying each of the statutes set forth *supra* note 718. The first term is the word used in the statute, the parenthetical term is the Model Penal Code equivalent terminology.

723. See *supra* note 701.

724. MONT. CODE ANN. § 45-6-102 (1983).

725. *Id.* § 45-2-101(37).

Wyoming differs from the majority of the states by imposing liability when the fire or explosion which is "intentionally" started or caused endangers property in a criminally negligent manner (rather than "recklessly").⁷²⁶ "Criminal negligence" in Wyoming is defined in accordance with the Model Penal Code's concept of "negligence."⁷²⁷

Ohio principally relies upon the inchoate endangering offense for its basic arson provisions. Any person in Ohio, who "by means of fire or explosion, shall knowingly . . . cause or create a substantial risk of" specified harm is guilty of arson.⁷²⁸ The mental state of "knowingly" is given a very different meaning in Ohio than it is in the Model Penal Code and the majority of states which use that term. Instead of awareness that a consequence will be caused by his act to a "substantial" or "practical" certainty, the Ohio definition requires only that "he is aware that his conduct will probably cause a certain result."⁷²⁹ But this unique and ambiguous use of the term "knowingly" is not the only difficulty with the Ohio scheme for it is also unclear whether the "knowing" mental state applies to both the setting of the fire or the causing of the explosion, and the harm created by the actor's conduct.

Maine, the last of the inchoate states with an endangering provision, requires the fire or explosion to "recklessly endanger" person or property. Unlike the majority of states with endangering provisions, the Maine statute is silent regarding whether the fire or explosion must be purposely or knowingly set or caused.⁷³⁰ But as we have seen above, the statute probably requires that the fire or explosion be "recklessly" set or caused as well.⁷³¹

Finally, Colorado, Rhode Island and Washington, although they are harm states, use endangering offenses with the opposite form of ambiguity. The Colorado offense requires that the actor "knowingly or recklessly" start a fire or cause an explosion "and by so doing places another in danger of death or serious bodily injury."⁷³² Rhode Island requires that the fire or explosion be "knowingly" set or caused and that it "creates a substantial risk" of specified harm,⁷³³ and in Washington, that a person "knowingly and maliciously" cause a fire or explosion "which is manifestly dangerous to any human life, including firemen."⁷³⁴ In these states, as opposed to Maine, the culpable mental state for the act is defined by the statute, but the statute is silent as to the mental state required for the

726. WYO. STAT. § 6-3-103 (1977).

727. Compare *id.* § 6-1-104(iii) with MODEL PENAL CODE § 2.02(d).

728. OHIO REV. CODE ANN. § 2909.03 (Page Supp. 1984).

729. *Id.* § 2901.22(B) (Page 1975).

730. ME. REV. STAT. ANN. tit. 17-A, § 802 (1983 & Supp. 1985).

731. See *supra* text accompanying notes 705-08.

732. COLO. REV. STAT. § 18-4-105 (1978).

733. R.I. GEN. LAWS § 11-4-2 (Supp. 1985).

734. WASH. REV. CODE ANN. § 9A.48.020(1)(a) (Supp. 1985).

risk. Here, however, the answer seems even clearer. There is nothing wrong at all with "knowingly or recklessly" starting a fire or purposely doing so for that matter. What the statutes seek to suppress and punish is the knowingly or recklessly endangering of persons or property, and these statutes will, no doubt, be so construed.⁷³⁵

It should be noted here, however, that three of the inchoate states do not use endangering statutes, but confine their inchoate provisions to the attempt-like variety;⁷³⁶ and Ohio uses only the endangering type statute, though its provisions are quite unique.⁷³⁷

In contrast with the common law, these inchoate states have drastically altered the *mens rea* required for the arson offenses. The common law offense used the *mens rea* of "malice" and then only for the act of burning. In the majority of the inchoate states the act must be done "purposely" and it must be done with a "purpose" to produce a specified harm. The person who wantonly burns, or even a person who "knowingly" burns, both of whom would act with "malice" at common law, commit neither an attempt-like nor an endangering-type inchoate felony arson offense in the majority of these inchoate jurisdictions. The person who wantonly starts a fire which wantonly endangers people or property would be guilty of a felony arson offense only in Maine, and perhaps in Ohio, as far as the inchoate states are concerned, and, with reference to the harm states, under the inchoate provisions of Colorado.⁷³⁸ In the remaining states, however, some other charge may be available.⁷³⁹

c. Additional Culpability Requirements for Attempt-like Inchoate Offenses

For obvious reasons, none of the endangering-type inchoate offenses have additional culpability requirements.⁷⁴⁰ Do any of the attempt-like statutes, statutes which require the actor to purposely start a fire or cause an explosion for the purpose of damaging or destroying specified property, require additional culpability for their highest arson offense (or for any

735. See text accompanying notes 705-08 for a similar argument with respect to the attempt-like statutes.

736. The states are Iowa, Kentucky, and New Mexico. The statutes of these three states are cited *supra* note 313.

737. See *supra* notes 725-26 and accompanying text.

738. Although the common law offense did not directly address the concept of endangering people, this was the reason that the offense was confined to the burning of "dwelling houses." The wanton act of burning the dwelling house in turn wantonly endangered the dwellers.

739. *E.g.*, 18 PA. CONS. STAT. ANN. § 3304 (Purdon 1983) (criminal mischief).

740. This is because it is difficult to conceive of an additional culpability requirement for an act which *recklessly* endangers people or property.

other)? Only the Arkansas statutes use one of the standard culpability requirements: if a person (purposely) starts a fire or causes an explosion with the purpose of destroying or otherwise damaging any property, she is guilty of the highest arson offense "if the act thereby *negligently* creates a risk of death of serious physical injury to any person."⁷⁴¹

The Connecticut and Kentucky statutes impose first degree arson liability when the *actor* intentionally (defined to mean purposely in both states) starts a fire or causes an explosion with the intent to destroy or damage a building, and the actor "*has reason to believe* the building may be inhabited or occupied."⁷⁴² This phrase creates an additional subjective mental state which must be proved before guilt is established. Finally, the Iowa first degree arson statute requires that "the presence of one or more persons can be reasonably anticipated."⁷⁴³ Does the requirement impose purely objective liability? This is, of course, the same problem we have seen with similar provisions in the harm states, and we should expect the same solution for the same reasons.⁷⁴⁴ Nevertheless, fewer of the inchoate states use additional culpability requirements for their higher arson offenses, usually the person protecting provisions, than do the harm states. Fourteen harm states clearly required some additional culpability requirement and three, though their statutes are ambiguous, arguably do so,⁷⁴⁵ whereas only three of the inchoate states use an additional culpability requirement with respect to their attempt-like provisions, and one is ambiguous on this point. But the majority of states in both categories have no such additional requirements.

Before moving on to the final topic of this paper, a consideration of the grading schemes used in the modern statutes, the *mens rea* requirements under these statutes may be summarized as follows:

1. The common law *mens rea*, "malice," consisted of two distinct mental states: the *intentional* burning and the *wanton* burning of the dwell-

741. ARK. STAT. ANN. § 41-1902(1)(c) (Supp. 1985). This provision so substantially overlaps with the reckless burning provision as to create a substantial ambiguity in the Arkansas statutory scheme. Suppose that the actor has a valuable item of personal property which he wishes to burn. He takes the property into his back yard and "purposely" sets the property on fire. It is a hot, dry day in the summer and a high wind is blowing. Sparks from the fire land on the roof of a neighbor's house and the roof catches on fire. The neighbor, who is taking a nap in an upstairs bedroom, is seriously burned in the fire. With this hypothetical in mind, *compare id.* § 41-1902(c) *with id.* § 41-1903(1)(a).

742. CONN. GEN. STAT. ANN. § 53a-111(a)(1) (West 1985) (emphasis supplied) (This is only one of the ways of committing first degree arson in Connecticut.); KY. REV. STAT. § 513.020(1)(a) (1985) (emphasis supplied) (This too is only one of the ways of committing first degree arson in Kentucky.).

743. IOWA CODE ANN. § 712.2 (West 1979).

744. *See supra* text accompanying notes 684-90.

745. *See supra* text accompanying notes 694-97.

ing house *of another*.⁷⁴⁶ The common law concept was adopted by the Model Arson Law, and ten states which have either enacted the Model Law or patterned their statutes after that law.⁷⁴⁷ In addition, two statutes use a variant of the common law terminology, but the common law conception of the malice appears to apply in those two states as well.⁷⁴⁸ Finally, North Carolina still uses the common law offense, and the other statutory crimes in that state have been interpreted to use essentially the common law *mens rea*.⁷⁴⁹

Quite understandably, there is little problem in any of these states with intentional burnings of the property *of another*. And though there are extraordinarily few cases which present the issue of wanton burnings, wanton burnings of the property of another are generally recognized as being malicious burnings in these states.⁷⁵⁰ A problem has arisen, however, because all of these states have abolished the common law "of another" requirement. Responding to the situation in which an owner intentionally burns her property in circumstances in which neither other persons nor other property is damaged or endangered, the courts have held that the burning is not "malicious," and hence it is not arson.⁷⁵¹ Though the opinions assume that such a burning was "malicious" at common law, they have concluded, for a variety of reasons, that the *statutory phrase* requires an intent to injure or endanger other persons or property.⁷⁵² These cases reach the correct result, but they are mistaken with respect to the assumption that this interpretation of the statutory phrase differs from the common law concept of malice.

Two states, California and Washington, use the concept of malice in the definition of the mental state necessary for at least one felony arson offense as a result of recent enactments, but the meaning of that concept in both states is less than clear.⁷⁵³

Nevertheless, it is indisputable that a reckless burning is not a malicious burning in any of these states; and, as we have seen, reckless burnings were not malicious burnings at common law.

2. The common law *mens rea* has been clearly abandoned in the remaining thirty-five states.⁷⁵⁴ There is no felony arson offense in any of these states which is defined in terms of the culpable mental state of

746. See *supra* text accompanying notes 580-82.

747. See *supra* text accompanying notes 574-75.

748. See *supra* text accompanying notes 576-79.

749. See *supra* text accompanying note 605.

750. See *supra* notes 582-84 and accompanying text.

751. See *supra* note 588 and accompanying text.

752. See *supra* notes 588-91 and accompanying text.

753. See *supra* notes 596-603 and accompanying text.

754. See *supra* text following note 605, and *supra* notes 699-700 and accompanying text.

“wantonness.” Three states, however, do have a felony arson offense which uses the “reckless” state of mind, and thus a wanton burning would suffice for this felony.⁷⁵⁵ But in the vast majority of the American states (thirty-two of thirty-five), the wanton burning or damaging of property, which would have been the capital felony of arson if the property burned was a dwelling house at common law, would not be arson in any degree.⁷⁵⁶ Although it might well be arson in one of the inchoate states summarized below.

3. Although malice at common law also required the absence of justification and excuse for both intentional and wanton burnings, the modern statutes usually do not speak of an absence of justification and excuse.⁷⁵⁷ It is assumed in the statutory scheme. Two states, however, use the term “unlawfully” in the statutory description of the mental element of their basic arson offenses. This word is generally thought to mean nothing more than the absence of justification and excuse. But one of these states, Florida, has construed that term to permit an owner to burn her property when no other person had an interest in the property and the burning did not endanger the safety or property of another person.⁷⁵⁸ In this respect, the word “unlawfully” has been construed to reach the same result as the term maliciously, in the modern statutes.⁷⁵⁹

Commentators have suggested that the concept of mitigation, borrowed from the common law of murder (another common law felony which was defined in terms of the malicious state of mind) is applicable to arson.⁷⁶⁰ No American statute specifically provides for the use of the “rule of mitigation” for arson, and I find no American cases which support that view as a common law principle.⁷⁶¹

4. In the twenty-three harm states which do not use the term “malice” in their description of the culpable mental state of arson (fifteen states use this term, thirteen in accordance with its common law meaning), their statutes have been influenced by the *mens rea* provisions of the Model Penal Code. In accordance with the Model Penal Code, they have all simplified the mental elements of their arson offenses.

5. Thirteen (of the twenty-three) harm states require that the defendant act intentionally for their basic arson offenses.⁷⁶² Twelve describe the *mens rea* as intentionally damaging the subject property by fire or explosion,

755. See *supra* text accompanying notes 651-61.

756. See *supra* text following note 667.

757. See *supra* note 643.

758. See *supra* text accompanying notes 642-49.

759. *Id.*

760. See, e.g., *supra* note 573.

761. *Id.*

762. See *supra* text accompanying notes 606-08.

and one requires that the actor "intentionally sets fire to or burns or causes to be burned" the subject property.⁷⁶³

Nine of these thirteen states define the term "intentionally" restrictively to mean the act-for-the-purpose-of-achieving-a-result variety of intent, what the Model Penal Code calls "purposely."⁷⁶⁴ In these states, a person who acts in circumstances in which the burning or damaging is a virtual or substantial certainty does not act "intentionally" (purposely). *A fortiori* a person who wantonly burns is not guilty as well. Of course, this too is a radical departure from the common law *mens rea* of "malice."

Why these states have chosen to restrict the mental state of their basic arson offense to the "purposeful" culpable mental state is less than clear.

The remaining three and perhaps four states which use the "intentional" mental state use it in its generally accepted form: (a) the act-for-the-purpose-of-achieving-the-result variety of intent; and, (b) the act-knowing-to-a-virtual-certainty-that-the-result-will-be-caused variety of intent.⁷⁶⁵ This is exactly how the intentional burning component of malice was defined for the *mens rea* of arson at common law.⁷⁶⁶ Of course, a wanton burning is not an intentional burning in these states either.

6. The act-knowing-to-a-virtual-certainty-that-the-result-will-be-caused variety of intent is defined in the Model Penal Code as the culpable mental state of "knowingly."⁷⁶⁷ Seven states define their basic arson offenses as knowingly setting fire to or knowingly damaging property,⁷⁶⁸ and four of these seven states define the term in substantial accordance with the Model Penal Code definition.⁷⁶⁹ The remaining three states offer no statutory definition of the term,⁷⁷⁰ although it will probably be interpreted to mean the "virtual certainty" variety of intent. Since three or four of the states that use the intentional *mens rea* use that term in its generally accepted sense, a person who acts "knowingly" is guilty of arson in those states. Finally, two states expressly use "knowingly" or "purposely" as the mental states for their basic arson offenses (defined in accordance with the Model Penal Code).⁷⁷¹ These two states, albeit with different terminology, thus use the intentional mental state in its generally accepted form. Thus twelve or thirteen states have felony arson offenses which can be committed "knowingly."

763. *Id.*

764. *See supra* text accompanying note 615.

765. *Id.*

766. *See supra* text accompanying notes 95-97, 625-26.

767. *See supra* text accompanying notes 625-26.

768. *See supra* text accompanying note 629.

769. *See supra* text accompanying note 630.

770. *See supra* text accompanying note 631.

771. *See supra* text accompanying notes 632-33.

7. Only three of the harm states supplement their basic arson offenses with a felony defined in terms of "recklessly" burning or damaging property,⁷⁷² and one state has a felony arson offense which uses inadvertent criminal negligence as its culpable mental state.⁷⁷³ Neither recklessness nor negligence was sufficient for arson at common law.⁷⁷⁴

8. Fourteen of the thirty-eight harm states use a culpability requirement in addition to the mental state with which the act of burning or damaging must be done to define at least one of their people protecting offenses, which is also the highest arson offense in each state.⁷⁷⁵ "Knowingly" and "recklessly" are the two most commonly used additional culpable mental states, and they refer to the person endangering circumstances such as "knowing that a person is in the property" which is intentionally damaged by fire (or an explosion), or "intentionally damag[ing] any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury."⁷⁷⁶

In some of the statutes, however, there is considerable ambiguity as to whether an additional culpable mental state is needed with respect to the person endangering circumstances and, if so, what it is.⁷⁷⁷

9. All but one of the inchoate states use attempt-like offenses as their basic arson crimes. The attempt-like statutes all require that the actor intentionally, purposely, or knowingly (depending on the state in question) start a fire or cause an explosion for the purpose of achieving a particular result or knowing that a particular result will happen.⁷⁷⁸ The basic structure of these inchoate arson offenses thus involves two culpable mental states. For example, *purposely* starting a fire or causing an explosion for the *purpose* of damaging property. Although most of these statutes do not specify the mental states with which the fire must be started or the explosion caused, most logically it must be done with the same mental state required for the target of the actor's conduct—"purposely" in our example.⁷⁷⁹

There are twelve states which use inchoate provisions for their basic arson offenses, and eleven of these twelve use the attempt-like statute as their basic arson offense.⁷⁸⁰ Eight of these eleven define the mental states used in their statutes in accordance with the Model Penal Code, although

772. See *supra* text accompanying notes 652-55.

773. See *supra* text accompanying notes 662-64.

774. See *supra* note 99 and accompanying text.

775. See *supra* text following note 670.

776. See *supra* text accompanying notes 671-83.

777. See *supra* text accompanying notes 684-93.

778. See *supra* text accompanying note 699.

779. See *supra* text accompanying notes 700-711.

780. See *supra* note 699.

there is a difference in terminology in six states.⁷⁸¹ These six use the “intentional” mental state, though it is defined to mean “purposely” in the parlance of the Model Penal Code.⁷⁸² The two remaining states use the Model Penal Code terminology.⁷⁸³ Hence, though six states use “intentionally,” all eight of these states mean “purposely.” The three remaining states have unique mental states which have not been clearly defined in the statutes or clarified by the courts.⁷⁸⁴

10. Nine of the inchoate states use an “endangering” statute, a statute which prohibits an actor from endangering people or property by fire or explosion. The structure of these offenses requires two distinct mental states: (a) a culpable mental state with respect to starting a fire or causing an explosion which, (b) with a culpable mental state, endangers persons or property. Although there are differences in terminology, six of the inchoate states and two harm states that have endangering offenses require that the fire or explosion be started or caused “purposely,” and that the fire or explosion “recklessly” endanger persons or property.⁷⁸⁵ The principal difference in terminology is that while most of these states use the term “intentionally” it is defined by statute to mean “purposely” in accordance with the Model Penal Code’s definition.⁷⁸⁶ One state also uses different terminology for the endangering element (“negligently”), but that term is statutorily defined in accordance with the Model Penal Code’s definition of “recklessly.”⁷⁸⁷ The remaining five states with an endangering offense use unique mental states which do not contribute to a general understanding of the contemporary law of arson.⁷⁸⁸

11. For obvious reasons, none of the endangering-type inchoate offenses have additional culpability requirements. Only three of the inchoate states use an additional culpability requirement with respect to their attempt-like provisions, and one is ambiguous on this point. One of these states uses a “negligence” culpable mental state⁷⁸⁹ and the other two use the same unique subjective provision—when the actor “has reason to believe” the building may be inhabited or occupied.⁷⁹⁰ Thus, far fewer of the inchoate states use an additional culpability requirement in connection with the person endangering circumstances than do the harm states.

781. See *supra* text accompanying note 701.

782. See *supra* text accompanying note 702.

783. See *supra* text accompanying note 703.

784. See *supra* text accompanying notes 713-17.

785. See *supra* text accompanying notes 718-22.

786. See *supra* text accompanying notes 719-20.

787. See *supra* text accompanying notes 721-22.

788. See *supra* text accompanying notes 725-32.

789. See *supra* text accompanying note 738.

790. See *supra* text accompanying notes 739-41.

F. *Grading the Arson Offenses*

The common law did not grade arson into various levels of severity. There was a single arson offense, and all found guilty of that felony were automatically punished by a sentence of death.⁷⁹¹ But in a larger sense, there was a crude grading scheme. If a person maliciously burned the property of another, it was either arson or the misdemeanor of malicious mischief depending upon whether it was a dwelling house or some other type of property.⁷⁹² Grading in this larger sense exists in every modern statutory scheme, for every American state has both arson and "malicious mischief" statutes which may be committed by fire as well as by other means.⁷⁹³

But, with one exception,⁷⁹⁴ every American state also divides arson into various categories or "degrees" for the purpose of assessing different punishments. The range is from a low of two⁷⁹⁵ to a high of seven different felony categories.⁷⁹⁶ Most of the states, however, have either two (18),⁷⁹⁷

791. See *supra* text accompanying notes 11-13.

792. See *supra* text accompanying notes 68-69.

793. See MODEL PENAL CODE AND COMMENTARIES § 220.3 comments 1-8, at 41-58 (listing many of the modern statutes); see also R. PERKINS & R. BOYCE, *supra* note 2, at 406-13 (for a discussion of the common law offense). Of course, the statutes vary in both their name and content.

794. See *infra* note 798.

795. See *infra* note 794.

796. See *infra* note 800.

797. ALA. CODE § 13A-7-41 (1982 & Supp. 1985) (arson in the first degree); *id.* § 13A-7-42 (arson in the second degree); ALASKA STAT. § 11.46.400 (1983) (arson in the first degree); *id.* § 11.46.410 (arson in the second degree); ARK. STAT. ANN. § 41-1902 (1977 & Supp. 1983) (arson); *id.* § 41-1903 (reckless burning); FLA. STAT. ANN. § 806.01(1) (West Supp. 1986) (first degree arson); *id.* § 806.01(2) (second degree arson); HAWAII REV. STAT. §§ 708-820 (1976) (criminal property damage in the first degree); *id.* § 708-821 (criminal property damage in the second degree); Criminal Code of 1961, tit. III, art. 20, §§ 20-1 (Arson), 20-1.1 (Aggravated Arson) ILL. ANN. STAT. ch. 38, § 20-1, 20-1.1 (Smith-Hurd 1977 & Supp. 1986); IOWA CODE ANN. § 712.2 (West 1979) (arson in the first degree); *id.* § 712.3 (arson in the second degree); KAN. STAT. ANN. § 21-3718 (1981) (arson); *id.* § 21-3719 (aggravated arson); LA. REV. STAT. ANN. § 14:51 (West 1974 & Supp. 1985) (aggravated arson); *id.* § 14:52 (simple arson); MONT. CODE ANN. § 45-6-102 (1983) (negligent arson); *id.* § 45-6-103 (arson); N.H. REV. STAT. ANN. § 634:1(II) (1974 & Supp. 1983) (class A felony); *id.* § 634:1(II) (class B felony); N.J. STAT. ANN. § 2C:17-1(a) (West 1982) (aggravated arson); *id.* § 2C:17-1(b) (arson); N.D. CENT. CODE § 12.1-21-01 (1985) (arson); *id.* § 12.1-21-02 (endangering by fire or explosion); OHIO REV. CODE ANN. § 2909.02 (Page Supp. 1984) (aggravated arson); *id.* § 2909.03 (arson); OR. REV. STAT. ANN. § 164.315 (1985) (second degree arson); *id.* § 164.325 (first degree arson); TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1985) (first and second degree arson); UTAH CODE ANN § 76-6-102 (1978) (arson); *id.* § 76-6-103 (aggravated arson); Wis. STAT. ANN. § 943.02 (West 1982) (arson of buildings, damage of property by explosives-class B felony); *id.* 943.03 (arson of property other than building-class E felony).

three (22),⁷⁹⁸ or four (7)⁷⁹⁹ grades of *felony arson* offenses.⁸⁰⁰ Maine does

798. ARIZ. REV. STAT. ANN. § 13-1703 (Supp. 1985) (arson of an unoccupied structure or property-class 4 or 5 depending on value); *id.* § 13-1704 (arson of occupied structure-class 2); DEL. CODE ANN. tit. 11, § 801 (1979) (arson in the third degree); *id.* § 802 (arson in the second degree); *id.* § 803 (arson in the first degree); GA. CODE ANN. § 26-1401 (1983) (arson in the first degree); *id.* § 26-1402 (arson in the second degree); *id.* § 26-1403 (arson in the third degree); IDAHO CODE § 18-801 (1979) (arson in first degree); *id.* § 18-802 (arson in second degree); *id.* § 18-803 (arson in third degree); KY. REV. STAT. § 513.020 (1985) (arson in the first degree); *id.* § 513.030 (arson in the second degree); *id.* § 513.040 (arson in the third degree); MD. CRIM. LAW CODE ANN. § 6 (1982 & Supp. 1984) (dwelling or adjoining building); *id.* § 7 (barn, garage, etc.); *id.* § 8 (burning personal property of another); MASS. GEN. LAWS ANN. ch. 266, § 1 (West 1970) (dwelling house); *id.* § 2 (meeting houses); *id.* § 5 (woods and other property); MICH. COMP. LAWS § 28.267 (1981) (burning dwelling houses); *id.* § 28.268 (burning of other real property); *id.* § 28.269 (burning of personal property); MINN. STAT. ANN. § 609.561 (West Supp. 1985) (arson in the first degree); *id.* 609.562 (arson in the second degree); *id.* § 609.563 (arson in the third degree); MISS. CODE ANN. § 97-17-1 (1973) (arson in the first degree-burning dwelling house or out building); *id.* § 97-17-3 (arson in the first degree-state supported school buildings); *id.* 97-17-5 (arson in the second degree-other buildings or structures); *id.* 97-17-7 (arson in the third degree-personal property); MO. REV. STAT. § 569.040 (1979) (arson in the first degree); *id.* § 569.050 (arson in the second degree); *id.* § 569-055 (knowingly burning or exploding); NEB. REV. STAT. § 28-502 (1979) (arson in the first degree); *id.* § 28-503 (arson in the second degree); *id.* 28-504 (arson, third degree); NEV. REV. STAT. § 205.010 (1985) (first degree arson); *id.* § 205.015 (second degree arson); *id.* § 205.020 (third degree arson); N.M. STAT. ANN. § 30-17-5 (1984) (arson and negligent arson); *id.* § 30-17-6 (aggravated arson); OKLA. STAT. ANN. tit. 21, § 1401 (West 1983) (arson in the first degree); *id.* § 1402 (arson in the second degree); *id.* 1403 (arson in the third degree); 18 PA. CONS. STAT. ANN. § 3301(a) (Purdon 1983) (arson endangering persons); *id.* § 3301(b) (arson endangering property); *id.* § 3301(d) (reckless burning or exploding); S.D. CODIFIED LAWS ANN. § 22-33-1 (1979 & Supp. 1985) (first degree arson); *id.* § 22-33-2 (second degree arson); *id.* 22-33-3 (third degree arson); VT. STAT. ANN. tit. 13, § 502 (Supp. 1985) (first degree arson); *id.* § 503 (second degree arson); *id.* § 504 (third degree arson); VA. CODE § 18.2-77 (1982) (burning or destroying dwelling house-class 2, 3, or 4 felony); *id.* § 18.2-79 (burning or destroying meeting house-class 3 or 4 felony); *id.* § 18.2-80 (burning or destroying other building or structure-class 3 or 4 felony); *id.* § 18.2-81 (burning or destroying personal property-class 4 felony or misdemeanor); *id.* § 18.2-82 (burning by person committing a felony-class 4 felony); WASH. REV. CODE ANN. § 9A.48.020 (West 1977 & Supp. 1985) (arson in the first degree); *id.* § 9A.48.030 (arson in the second degree); *id.* § 9A.48.040 (reckless burning in the first degree); W. VA. CODE § 61-3-1 (1984) (arson in the first degree); *id.* § 61-3-2 (arson in the second degree); *id.* § 61-3-3 (arson in the third degree); WYO. STAT. ANN. § 6-3-101 (1977) (first degree arson); *id.* § 6-3-102 (second degree arson); *id.* § 6-3-103 (third degree arson).

799. COLO. REV. STAT. § 18-4-102 (1978) (first degree arson); *id.* § 18-4-103 (second degree arson); *id.* § 18-4-104 (third degree arson); *id.* § 18-4-105 (fourth degree arson); CONN. GEN. STAT. ANN. § 53a-111 (West 1985) (arson in the first degree); *id.* § 53a-112 (arson in the second degree); *id.* § 53a-113 (arson in the third degree); *id.* § 53a-114 (reckless burning); IND. CODE ANN. § 35-43-1-1 (Burns Supp. 1985) ((a)-(b)-class A felony, (c)-class C felony, (d)-class D felony); N.Y. PENAL LAW § 150.05 (McKinney Supp. 1986) (arson in the fourth degree); *id.* § 150.10 (arson

not grade arson,⁸⁰¹ Rhode Island has five categories,⁸⁰² and California has seven.⁸⁰³ Although there is no uniformity in the terminology used for the grading schemes, the most common is to call the various grades of arson "degrees" and to rank them ordinally (e.g., first, second, and third degree). Well over one-half of the states (twenty-seven) do so.⁸⁰⁴ The remaining twenty-two states either use labels such as "arson and aggravated arson" (6)⁸⁰⁵ or "arson" and "reckless" or "negligent arson" (4),⁸⁰⁶ or

in the third degree); *id.* § 150.15 (arson in the second degree); *id.* § 150.20 (arson in the first degree); N.C. GEN. STAT. § 14-58 (1981) (first degree arson-class C felony, second degree arson-class D felony); *id.* § 14-58.2 (first degree arson); *id.* § 14-59 (class E felony); *id.* § 14-62 (class E felony); *id.* § 14-62.1 (class E felony); *id.* § 14-63 (class H felony); *id.* § 14-64 (class H felony); *id.* § 14-66 (class H felony); S.C. CODE ANN. § 16-11-110 (Law. Co-op. 1985) (first degree arson), (B) (second degree arson), (C) (third degree arson); *id.* § 16-11-130 (no degree mentioned but is punished by one to three years in prison); *id.* § 16-11-150 (no degree mentioned but a second offense is a felony); *id.* § 16-11-170 (same)); TENN. CODE ANN. § 39-3-201 (1982) (aggravated arson); *id.* § 39-3-202 (setting fire to building or structure-three to twenty-one years); *id.* § 39-3-203 (setting fire to property-one to ten years); *id.* § 39-3-204 (setting fire with intent to burn-one to five years); *id.* § 39-3-206 (willfully and maliciously setting fire-same).

800. This analysis omits felony provisions which relate to insurance fraud, special provisions concerning attempted arson, and misdemeanor arson offenses. In at least one state, there is a separate felony provision for insurance fraud, for attempted arson, and for misdemeanor arson offenses. R.I. GEN. LAWS § 11-4-4 (1981 & Supp. 1985) (arson-third degree-an insurance fraud offense); *id.* § 11-4-6 (arson-fifth degree-a special attempt provision); *id.* § 11-4-8 (arson-seventh degree-a misdemeanor offense). It is uncommon for a state to have a separate insurance fraud provision which is assigned a different punishment. *See, e.g.,* NEB. REV. STAT. § 28-505 (1979). But this offense is graded in the same way as third degree arson, so its omission creates no distortion of the grading scheme presented in this paper. However, states which follow the Model Arson Law typically have, as did the Model Law, a separate specialized attempt offense. In states which call their various grades "degrees," such a provision is frequently called "fourth degree arson." Those statutes have been omitted from this analysis and that omission does cause some distortion. *E.g.,* IDAHO CODE § 18-804 (1979) (fourth degree arson-an attempted arson statute). In the analysis used in this paper, arson in Idaho is divided into *three* degrees because the attempt provisions are beyond the scope of this paper.

801. ME. REV. STAT. ANN. tit. 17-A, § 802 (1983 & Supp. 1984).

802. R.I. GEN. LAWS § 11-4-2 (1981 & Supp. 1985) (first degree arson); *id.* § 11-4-3 (second degree arson); *id.* § 11-4-5 (fourth degree arson); *id.* § 11-4-6 (fifth degree arson); *id.* § 11-4-7 (sixth degree arson). Third degree arson is an insurance fraud offense and is therefore omitted from this study. *See supra* note 797.

803. CAL. PENAL CODE § 451 (West Supp. 1986) (four felony categories); *id.* § 452 (three felony categories and one misdemeanor category).

804. These states are: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Washington, West Virginia, Wyoming. *See supra* notes 794-96 for the citations to the statutes of these twenty-seven states.

805. Illinois, Kansas, Louisiana (simple and aggravated arson), New Jersey,

rely on descriptive titles and specify the punishment affixed to each provision (12).⁸⁰⁷

With respect to the distinction between arson offenses which have as their purpose the protection of people as opposed to the protection of property, forty-one states describe their highest arson offense ("first degree arson," "aggravated arson," or "arson," to use the common labels) as exclusively a person protecting offense.⁸⁰⁸ In the remaining eight states the highest arson offense is not used exclusively to protect people. In three it is also used to suppress and punish insurance fraud,⁸⁰⁹ in three more it is used to suppress and punish insurance fraud and to protect a special category of property,⁸¹⁰ and in one to protect a special category of property, in addition to people.⁸¹¹ Only in Wisconsin can one discern no special interest in protecting people over property in the highest arson offense.⁸¹²

In the majority of states the grades of arson lower than the highest offense are used generally to protect various types or categories of prop-

Ohio, and Utah. *See supra* notes 794-800 for the citations to the statutes of these six states.

806. Arkansas (arson and reckless arson), Montana (arson and negligent arson), North Dakota (arson and endangering-a reckless offense), New Mexico (arson, negligent arson, and aggravated arson). *See supra* notes 794-800 for the citations to the statutes of these four states.

807. Arizona, California, Indiana, Maryland, Massachusetts, Michigan, New Hampshire, Pennsylvania, Tennessee, Virginia, Wisconsin. *See supra* notes 794-800 for the citations to the statutes of these eleven states.

North Carolina uses several degrees of arson and this descriptive label approach. *See supra* note 796 for the citation to the North Carolina statute.

808. In forty-one states, the highest grade offense can *only* be committed when there is some harm or danger to persons created or inflicted by the actor's conduct. This may be expressed in the statute through the subject matter or through a description of the harm or danger, or both.

Thirteen states express harm or danger to persons only through the description of the *subject matter* of the arson offense: Arizona, Colorado, Idaho, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, Oklahoma, West Virginia, and Wyoming.

Twenty-three states express harm or danger through the *description of an endangering circumstance* (alone or with an endangering subject matter): Alabama, Arkansas, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, and Virginia.

Six states use both an endangering subject matter and a *description* of endangering circumstances. When *either* is satisfied, the act qualifies for the highest offense: Florida, Minnesota, Montana, Oregon, South Carolina, and Utah.

See supra notes 794-800 for the citations to the statutes of these forty-one states.

809. These states are Connecticut, Georgia, and Washington. *See supra* notes 795-96 for the citations to the statutes of these three states.

810. These three states are Arkansas, New Jersey and North Dakota. *See supra* note 794 for the citations to the statutes of these three states.

811. R.I. GEN. LAWS § 11-4-2 (Supp. 1985).

812. WIS. STAT. ANN. § 943.02 (West 1982).

erty, or to suppress and punish insurance fraud, or to suppress and punish reckless risk taking which endangers persons or property (or all three).⁸¹³

The criteria used to grade the various arson offenses vary considerably in their specific detail. It is also not uncommon for one or more criterion to be used either alone or in conjunction with another in making a sorting decision. In other words, there may be and usually are several alternative ways of violating a particular arson offense, and more than one criteria may be necessary as well. For example, a person is guilty of a felony of the first degree in Pennsylvania if she intentionally starts a fire and (1) thereby recklessly places another person in danger of death or bodily injury, or (2) commits the act with the purpose of destroying or damaging an inhabited building or occupied structure of another.⁸¹⁴ On the other hand, if she intentionally starts a fire but recklessly places an inhabited building or occupied structure of another in danger of damage or destruction, she is guilty of a felony of the second degree.⁸¹⁵

But despite the variance in the detail and differences in how the various criteria are combined to grade the actor's behavior, general patterns do emerge from these arson statutes. Although no state may use all or even most of the criteria listed below, these are the commonly used criteria to grade the arson offenses:

1. *The actual,⁸¹⁶ probable,⁸¹⁷ or possible⁸¹⁸ presence of another person in the property at the time of the fire (or explosion).* This criterion is generally used to distinguish the highest arson offense (the person protecting offense) from the lower offenses.⁸¹⁹

2. *Whether the actor's conduct resulted in actual physical injury to or the death of another person.*⁸²⁰ This criterion is generally used in the same manner as the first criterion.⁸²¹

813. See, e.g., 18 PA. CONS. STAT. ANN. § 3301(c)-(d) (Purdon 1983).

814. *Id.* § 3301(1)(i)-(ii).

815. *Id.* § 3301(c)(2). A person can commit this offense by also intending to damage or destroy a building or unoccupied structure of another. *Id.* § 3301(c)(1). Or by insurance fraud. *Id.* § 3301(c)(3).

816. E.g., ALA. CODE § 13A-7-41(a)(1) (1982); CONN. GEN. STAT. ANN. § 53a-111(a)(1) (West 1985); MINN. STAT. ANN. § 609.561(2)(a) (West Supp. 1985); MO. REV. STAT. § 569.040 (1979); NEB. REV. STAT. § 28-502 (1979); N.Y. PENAL LAW § 150.15(a) (McKinney Supp. 1986); UTAH CODE ANN § 76-6-103(b) (1978); WASH. REV. CODE ANN. § 9A.48.020(c) (Supp. 1985).

817. E.g., FLA. STAT. ANN. § 806.01(1)(b) (West Supp. 1986) (where persons are normally present).

818. E.g., N.Y. PENAL LAW. § 150.15 (McKinney Supp. 1986) (or the circumstances are such as to render the presence of such a person therein a reasonable possibility); MINN. STAT. ANN. § 609.561(2)(b) (West Supp. 1985) (semble).

819. See, e.g., the statutes cited *supra* notes 813-15.

820. E.g., CAL. PENAL CODE §§ 451(a), 452(a) (West Supp. 1986); CONN. GEN. STAT. ANN. § 53a-111(a)(2) (West 1985); Criminal Code of 1961, tit. III, art. 20, §

3. *Whether another person or property was physically endangered by the actor's conduct.*⁸²² Again, this criterion is generally used to distinguish the highest arson offense (the person protecting offense) from the lower.⁸²³ But it is sometimes also used to establish a lower person protecting offense as well.⁸²⁴

4. *Whether the property which is the subject matter or the target of the offense is inhabited,*⁸²⁵ *occupied*⁸²⁶ *or used as a dwelling*⁸²⁷ *(or any*

20-1.1(2) (Aggravated Arson), ILL. ANN. STAT. ch. 38, § 20-1.1(2) (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-43-1-1(a)(3) (Burns Supp. 1985); KY. REV. STAT. § 513.020(b) (1985); N.M. STAT. ANN. § 30-17-6 (1984); S.C. CODE ANN. § 16-11-110(A) (Law. Co-op. 1985); TENN. CODE ANN. § 39-3-201(2)-(3) (1982); TEX. PENAL CODE ANN. § 28.02(c) (Vernon Supp. 1985).

821. For example, all of the statutes cited *supra* note 817 use this criterion to define, at least in part, the most egregious arson offense.

822. *E.g.*, ALASKA STAT. § 11.46.400 (1983) (recklessly places another person in danger of serious physical injury); ARK. STAT. ANN. § 41-1902(c) (Supp. 1983) (negligently creates a risk of death or serious physical injury to any person); CONN. GEN. STAT. ANN. § 53a-111(4) (West 1985) (at the scene of such fire or explosion a peace officer or firefighter is subjected to a substantial risk of bodily injury); GA. CODE ANN. § 26-1401(5) (1983) (it is reasonably foreseeable that human life might be endangered); HAWAII REV. STAT. § 708-820 (1976) (thereby recklessly places another person in danger of death or bodily injury); LA. REV. STAT. ANN. § 14:51 (West Supp. 1985) (whereby it is foreseeable that human life might be endangered); MO. REV. STAT. § 569.040 (1979) (thereby recklessly places such person in danger of death or serious physical injury); 18 PA. CONS. STAT. ANN. § 3301(a)(1)(i) (Purdon 1983) (*semble*); *id.* § 3301(c)(2) (recklessly places an inhabited building or occupied structure of another in danger of damage or destruction); TEX. PENAL CODE ANN. § 28.02(a)(6) (Vernon Supp. 1985) (when it will endanger the life of some individual or the safety of the property of another).

823. *E.g.*, the statutes cited *supra* note 819 all are for the highest arson offense except for 18 PA. CONS. STAT. ANN. § 3301(c)(2) (Purdon 1983).

824. *E.g.*, N.D. CENT. CODE § 12.1-21-05 (1985) (endangering by fire or explosion); 18 PA. CONS. STAT. ANN. § 3301(d) (Purdon 1983) (reckless burning or explosion).

825. CAL. PENAL CODE §§ 451(b), 452(b) (West Supp. 1986) (inhabited structure or inhabited property); CONN. GEN. STAT. ANN. § 53a-111(a)(1) (West 1985) (inhabited or occupied); KY. REV. STAT. § 513.020(1)(a) (1985) (the building is inhabited or occupied); N.D. CENT. CODE § 12.1-21-01 (1985) (building or inhabited structure); OKLA. STAT. ANN. tit. 21, § 1401 (West 1983) (inhabited or occupied); 18 PA. CONS. STAT. ANN. § 3301(a)(1)(ii) (Purdon 1983) (inhabited building or occupied structure).

826. *E.g.*, ARIZ. REV. STAT. § 13-1704 (Supp. 1985); ARK. STAT. ANN. § 41-1902 (Supp. 1983); COLO. REV. STAT. § 18-4-102 (1978); MONT. CODE ANN. § 45-6-103(1)(a) (1983); N.H. REV. STAT. ANN. § 634:1(II) (1974); OR. REV. STAT. ANN. § 164.325(1)(a) (1985); S.D. CODIFIED LAWS ANN. § 22-33-1 (1979); WYO. STAT. § 6-3-101 (1977).

827. *E.g.*, FLA. STAT. ANN. § 806.01(a) (West Supp. 1986); IDAHO CODE § 18-801 (1979); IND. CODE ANN. § 35-43-1-1(1)(a)(1) (Burns Supp. 1985); MD. CRIM. LAW CODE ANN. § 6 (1982); MASS. GEN. LAWS ANN. ch. 266, § 1 (1970); MICH. COMP. LAWS § 28.267 (1981); MINN. STAT. ANN. § 609.561(1) (West Supp. 1985); MISS.

combination of these factors). This criterion, of course, includes a "dwelling house" at common law, its modern equivalent, and all types of buildings and structures in which one would expect another is likely to be present, such as office buildings, public buildings, stores, and the like. It is patterned upon the common law's use of dwelling houses as the subject matter of arson, and is used because of the implicit danger to people created by its damage or destruction by fire or explosive. This criterion, too, is generally used to distinguish between the highest arson offense, and the lower offenses (in which case the building would not be a dwelling, or it would be uninhabited or unoccupied).⁸²⁸ States which adopted or patterned their statutes on the Model Arson Law use a statutory equivalent to the common law curtilage rule to define the subject matter of their highest arson offense.

5. *Whether the property is an especially important type of property to the general public, such as a vital public facility, a bridge, dam, tunnel, power plant, school building, or similar "public property."*⁸²⁹ This criterion is used both to grade the property protecting offenses, and occasionally to grade the actor's conduct into the highest arson offense. It is not, however, a widely used criterion.⁸³⁰

6. *The type of property burned, damaged, destroyed or endangered by fire (or explosion) other than property covered by criteria 4 and 5 above.*⁸³¹ With this criterion, whether the property is a building, structure,

CODE ANN. § 97-17-1 (1973); NEV. REV. STAT. § 205.010 (1985); N.C. GEN. STAT. § 14-58 (1981); S.C. CODE ANN. § 16-11-110(B) (Law. Co-op. 1985); VT. STAT. ANN. tit. 13, § 502 (Supp. 1985); WASH. REV. CODE ANN. § 9A.48.020(1)(b) (Supp. 1985); W. VA. § 61-3-1 (1984).

828. The statutes cited *supra* notes 822-24 are all for the highest degree of arson in the respective state.

829. *E.g.*, ARK. STAT. ANN. § 41-1902(a) (Supp. 1983) (a vital public facility); CAL. PENAL CODE § 451(c), 452(c) (West Supp. 1985) ("structure" includes bridges, tunnels, and powerplants); MISS. CODE ANN. § 97-17-3 (1973) (state supported school building); N.C. GEN. STAT. § 14-59 (1981) (public buildings); N.D. CENT. CODE § 12.1-21-01 (1985) (vital public facility); OR. REV. STAT. ANN. § 164.325(1)(a) (1985).

830. For examples of the use of this criterion to grade the property offense, see the following statutes: *compare* CAL. PENAL CODE § 451(b) with § 451(c), and § 452(b) with 452(c) (West Supp. 1986); *compare* MASS. GEN. LAWS ANN. ch. 266, § 2 with § 5 (1970).

For examples of the use of this criterion to grade the actor's conduct into the highest arson offense, see the following statutes: ARK. STAT. ANN. § 41-1902(a) (Supp. 1983); N.D. CENT. CODE § 12.1-21-01 (1985).

831. *E.g.*, CAL. PENAL CODE §§ 451(c), 452(c) (West Supp. 1986); IDAHO CODE §§ 18-802, -803 (1979); MD. CRIM. LAW CODE ANN. §§ 7, 8 (1982); MASS. GEN. LAWS ch. 266, §§ 2, 5 (1970); MICH. STAT. ANN. §§ 28.268, .269 (1981); MISS. CODE ANN. §§ 97-17-7, -17-13 (1973); NEV. REV. STAT. §§ 205.015, .020 (1985); N.C. GEN. STAT. §§ 14-62, -63, -66 (1981); OKLA. STAT. ANN. tit. 21, §§ 1402, 1403 (West 1983); S.C. CODE ANN. §§ 16-11-110(c), -11-140 (Law. Co-op. 1985); TENN. CODE ANN. §§ 39-3-202, -3-203 (1982); VT. STAT. ANN. tit. 13, §§ 503, 504 (Supp. 1985); VA. CODE §§ 18.2-80, .2-81 (1982); W. VA. CODE §§ 61-3-2, -3-3 (West 1982).

other (or any) real property, forest land, specified kinds of personal property (e.g., vehicles, aircraft, vessels, etc.), or other personal property may determine the grade of the arson offense. This criterion is used not only to grade the various arson offenses aimed at protecting property interests, but is sometimes used to distinguish between felony and misdemeanor provisions as well.⁸³² The Model Arson Law uses this as the exclusive criterion for grading between its intermediate and lowest offenses.⁸³³ This is not one of the most widely used criterion.

7. *The value of property burned, damaged, destroyed or endangered, or the amount of the damage inflicted by the actor's conduct.*⁸³⁴ This criterion is used to distinguish misdemeanor offenses from the felony arson offenses;⁸³⁵ and, more unusually, to grade among the felony offenses which protect property interests.⁸³⁶

8. *The culpable mental state with which the actor burned, damaged or destroyed the property, or the mental state with which the actor set the fire*

832. *E.g., compare* CAL. PENAL CODE ANN. § 452(c) with § 452(d) (West Supp. 1986); *compare* IOWA CODE ANN. § 712.3 with 712.4 (West 1979).

833. MODEL ARSON LAW, *see infra* App. A, §§ 2, 3.

834. *E.g.,* ARIZ. REV. STAT. ANN. § 13-1703(B) (Supp. 1985) (value of property over \$100); HAWAII REV. STAT. § 708-821(b) (1976) (felony-damages property in amount exceeding \$500); IDAHO CODE § 18-803 (1979) (property of the value of \$25); IND. CODE ANN. § 35-43-1-1(a)(3), -1(d) (Burns Supp. 1985) (when pecuniary loss is at least \$250); IOWA CODE ANN. § 712.3 (West 1979) (value over \$500); LA. REV. STAT. ANN. § 14:52 (West 1974) (damage amounts to \$500 or more); MD. CRIM. LAW CODE ANN. § 8(c) (1982) (damage in excess of \$1,000); MASS. GEN. LAWS ANN. ch. 266, § 5 (1970) (value in excess of \$25); MICH. COMP. LAWS § 28.269 (1981) (value of \$50 or more); MINN. STAT. ANN. §§ 609.562, .563 (West Supp. 1985) (\$300 or more); MISS. CODE ANN. § 97-17-7 (1973) (value of \$25); NEB. REV. STAT. § 28-504(2)-(3) (1979) (damages amount to \$100 or more); NEV. REV. STAT. § 205.020 (1985) (value of property over \$100); N.H. REV. STAT. ANN. § 634.1 (1974 & Supp. 1983) (pecuniary loss in excess of \$1,000); N.M. STAT. ANN. § 30-17-5 (1984) (value of property over \$100); N.D. CENT. CODE § 12.1-21-02 (1985) (damage in excess of \$2000); OKLA. STAT. ANN. tit. 21, § 1403 (West 1983) (property worth not less than \$50); 18 PA. CONS. STAT. ANN. § 3301(d)(2) (Purdon 1983) (endangering property having a value of \$5,000 or more); R.I. GEN. LAWS § 11-4-5 (Supp. 1985) (value in excess of \$100); S.C. CODE ANN. § 16-11-140(6) (Law. Co-op. 1985) (other personal property of the value of \$25); S.D. CODIFIED LAWS ANN. § 22-33-3 (1979) (value in excess of \$25); TENN. CODE ANN. § 39-3-203 (1982) (value in excess of \$25); UTAH CODE ANN. § 76-6-102 (1978) (damage in excess of \$5,000); VA. CODE §§ 18.2-80, .2-81 (1982) (specified property or property of the value of \$200 or more); VT. STAT. ANN. tit 13, § 504 (Supp. 1985) (value not less than \$25); W. VA. CODE § 61-3-3 (1984) (value in excess of \$50); WYO. STAT. § 6-3-103 (1977) (damage in excess of \$200).

835. *See* authorities cited *supra* note 831.

836. *E.g.,* N.M. STAT. ANN. § 30-17-5 (1984). It is not uncommon for states to grade among the misdemeanor offenses based upon the value of the property damaged. *E.g.,* COLO. REV. STAT. § 18-4-105 (1978); UTAH CODE ANN. 7-6-102(2) (1978).

or caused the explosion which endangered people or property. With this criterion,⁸³⁷ the more culpable the mental state (e.g., purposely as opposed to recklessly), the higher the arson offense will be.⁸³⁸ But no state uses more than two basic categories of culpable mental states to grade arson offenses; and, when the culpable mental state is used to grade offenses, the critical culpable mental states are usually acting “purposely” for the higher offenses as opposed to acting “recklessly” for the lower offenses.⁸³⁹ Most states, however, do not grade on the basis of the culpable mental state with which the person acted. Instead, the prescribed mental states are used for all felony arson offenses.⁸⁴⁰

9. *In a minority of jurisdictions a mental state in addition to the mental state with which the act must be performed is required in some instances for guilt of the highest arson offense.*⁸⁴¹ However, no state requires an additional mental state for the general property protecting offenses.⁸⁴²

10. *Miscellaneous criteria:* A very few states use such additional factors as (a) the means used by the actor to damage, injure, or endanger;⁸⁴³ (b) the

837. See *supra* text beginning with note 573.

838. E.g., compare CAL. PENAL CODE § 451 with § 452 (West Supp. 1986).

839. E.g., compare CAL. PENAL CODE § 451 with § 452 (West Supp. 1986).

840. E.g., ALA. CODE §§ 13A-7-41 to -7-43 (1982 & Supp. 1985); ARIZ. REV. STAT. ANN. §§ 13-1703, -1704 (Supp. 1985); DEL. CODE ANN. tit. 11, §§ 801-803 (1979); FLA. STAT. ANN. § 806.01 (West Supp. 1986); GA. CODE ANN. §§ 26-1401 to -1403 (1983); IDAHO CODE §§ 18-801 to -803 (1983); Criminal Code of 1961, tit. III, art. 20, §§ 20-1 (Arson), 20-1.1 (Aggravated Arson), ILL. ANN. STAT. ch. 38, § § 20-1, 20-1.1 (Smith-Hurd 1977 & Supp. 1986); IND. CODE ANN. § 35-43-1-1 (Burns Supp. 1985); IOWA CODE ANN. §§ 712.1-.3 (West 1979); KANSAS STAT. ANN. §§ 21-3718, -3719 (1981); LA. REV. STAT. ANN. §§ 14:51, :52 (West 1974 & Supp. 1985); MD. CRIM. LAW CODE ANN. §§ 6-8 (1982 & Supp. 1984); MASS. GEN. LAWS ANN. ch. 266, §§ 1-2, 5 (1970); MICH. COMP. LAWS §§ 28.267-.269 (1981); MISS. CODE ANN. §§ 97-17-1 to -17-7 (1973); MO. REV. STAT. §§ 569.040-.055 (1979); NEV. REV. STAT. §§ 205.010, .015, .020 (1985); NEB. REV. STAT. §§ 28-502 to -504 (1979); OHIO REV. CODE ANN. §§ 2909.02, .03 (Page Supp. 1984); OKLA. STAT. ANN. §§ 1401-1403 (West 1983); ORE. REV. STAT. ANN. §§ 164.315, .325 (1985); R.I. GEN. LAWS §§ 11-4-2 to -4-7 (1981 & Supp. 1985); S.C. CODE ANN. §§ 16-11-110, -11-140 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 22-33-1 to -33-3 (1979 & Supp. 1985); TEXAS PENAL CODE ANN. § 28.01 (Vernon Supp. 1985); UTAH CODE ANN. §§ 76-6-102, -6-103 (1978); VT. STAT. ANN. tit. 13, §§ 502-507 (Supp. 1985); VA. CODE §§ 18.2-77, .2-79, .2-80, .2-81; W. VA. CODE 61-3-1 to -3-3 (1984); WIS. STAT. ANN. §§ 943.02, .03 (West 1982).

841. See *supra* notes 669-93 and accompanying text.

842. *Id.*

843. E.g., N.Y. PENAL LAW § 150.20 (McKinney Supp. 1986) (first degree arson can be committed by the use of an “incendiary device” or an “explosive”). Compare WIS. STAT. ANN. § 943.02(c) with § 943.03 (West 1982) (the damaging of any property of another by means of “explosives” is a class B felony whereas it is a class E felony to damage any property (other than a building) by means of fire).

locale of the incident;⁸⁴⁴ (c) whether the damage, injury, or endangering was pursuant to a contract for hire;⁸⁴⁵ and (d) the time of day.⁸⁴⁶

VI. CONCLUSION

Little but the roots of common law arson remain. But unseen, hidden beneath the surface of our time, it shapes our basic conception of arson today. And, occasionally, like Latin does for the linguist, its past wisdom counsels us on the arson problems of our day.

We have witnessed the metamorphosis of arson from the narrow, common law felony which protected the safety of dwellers into an offense which protected property interests, and, finally, into its current manifestation—an offense which widely protects people and property from the risks of injury or damage caused by fire or explosion. Not surprisingly, the elements of the common law offense rarely had sufficient elasticity to withstand the demands of a new age, and thus were abandoned for new formulations of the basic concepts or for new concepts altogether.

The first to go, of course, was the subject matter of the offense. When property protection became one of the principal goals of arson, that goal could only be attained by expanding the subject matter of the newly conceived crime. And when the protection of people from the risks attendant upon fires and explosions became another of the crime's principal goals, the subject matter of the newly created people protecting offenses was changed again. Today, though not in every state, there may be differences in the description of the subject matter between the property offenses and the people protecting offenses. In the latter it is common to find a person endangering subject matter, whereas in the former buildings, structures, other types of real property, and personal property are protected in varying degrees, although there is more similarity in the coverage than one might have thought at first blush. With these changes in the subject matter wrought to expand the offense to protect persons and property, the common law curtilage rule became moribund, and it was buried along with the subject matter of the common law offense, a dwelling house of another.

But with the evolution of arson as an offense designed to protect a broader class of people than the inhabitants of dwelling houses, and to

844. *E.g.*, ALA. CODE § 13A-7-42(d) (Supp. 1985) (detention facility or a penal facility); CAL. PENAL CODE §§ 451(e), 452(e) (West Supp. 1986) (prisons and similar detention facilities); S.D. CODIFIED LAWS ANN. § 22-33-10 (Supp. 1985) (a place of confinement); TEXAS PENAL CODE ANN. § 28.02(a)(1) (Vernon Supp. 1985) (within the limits of an incorporated city or town without the necessary permit); *id.* § 28.02(a)(4) (located on property belonging to another).

845. *E.g.*, IND. CODE ANN. § 35-43-1-1(1)(b) (Burns West Supp. 1985); OHIO REV. CODE ANN. § 2909.02(3) (Page Supp. 1984).

846. Virginia is the only state to use this criterion. VA. CODE § 18.2-77 (1982).

protect property as property, the "of another" requirement had outlived its usefulness as well. That common law concept, completely ill-suited for a property protecting offense and too limiting for a person protecting offense, has been abandoned in all but a small handful of states. For the property protecting offenses we have created two new concepts. The first was to borrow the common law phrase "of another," but its meaning was changed from a simple requirement that the subject matter of the offense be in the possession of someone other than the arsonist into the modern statutory meaning of that term: that no person other than the arsonist have a proprietary or possessory interest in the property burned, damaged, or destroyed which the arsonist has no legal right to defeat. The second technique used to define the scope of the protection afforded to property is the statutory creation of an affirmative defense, a new form of justification, which substantively operates to achieve nearly the same result as the modern statutory definition of the "of another" requirement. There are, of course, important procedural differences between these two approaches.

Although the common law "of another" requirement could have been used in the newly created people protecting offenses, offenses which have embraced the common law's concern with protecting people from the hazards of fire, it has been abandoned for the person protecting offenses as well except, again, in a small handful of states. It has been replaced by two different techniques. The first was simply to change the subject matter of the offense so that the class of people in or on the property is expanded. This technique has been referred to as the use of "*person endangering property*." For example, a change from "dwelling houses" to "occupied buildings or structures" expands the protected class from dwellers to anyone who might happen to be in a building or structure which is burned, damaged, or destroyed. This change is really nothing more than tampering with the common law element to achieve an expanded goal. But a more innovative technique was discovered which liberates us completely from the common law's subject matter orientation. This was, of course, the creation of the concept of the "*person endangering circumstances*," circumstances which make the fire or explosion dangerous to people (or to person endangering property). This new technique can be used to protect people from the hazards of fires or explosions associated with the burning of any property. And states that wish to protect everyone from such risks generally describe the person protecting offense as damaging "any property" by fire or explosion which "places another person in danger of serious physical injury." Which of the techniques are used, either separately or in tandem, and the scope of their respective provisions varies in the states depending upon the breadth of the class of people the legislature wishes to protect, the received traditions in that state, and the prevailing art of statutory construction.

The only concern of the common law offense was the danger created by fire. But with Alfred Nobel's discovery of dynamite during the nineteenth

century, miscreants had a new means of endangering people and property which did not amount to arson at common law, and this despite the similarities of the risks created by explosions. The common law "burning" requirement could not be stretched that far. And so the statutes began to change the nature of the conduct prohibited by the arson offenses as well. Today, the majority of American states include damage or destruction by explosions as conduct prohibited by the law of arson.

But this was not the only change in the conduct prohibited by the modern statutes from the days of the common law. The common law offense required a *burning* of the dwelling by fire, and nothing less would do. If the fire set by the culprit were extinguished or failed of its own accord without first burning the dwelling, it was not arson regardless of any other damage caused by the fire. Smoke damage and damage caused to the structure by the water used to quench the fire did not therefore suffice for arson. Partly to fill this gap and partly because of the need to describe how an explosion injures the property, for clearly a "burning" will not do, the majority of statutes today describe the prohibited conduct not as a burning but as "damaging" or "damaging or destroying" the subject property by fire or explosion. And though a minority of states use the older statutory phrase taken from the infamous Waltham Black Act and repeated in the Model Arson Law—language which prohibited "setting fire to or burning" the subject property—the modern cases tend to interpret this phrase as though it prohibited one from "damaging" the subject property; it remains an open question in many of the states adhering to this older view.

But if one conceives of arson as an offense which should be used primarily to protect people from the risk of fire (or explosions), as did the common law, rather than as an offense which primarily protects property interests, as did the Model Arson Law, then why is arson tied to the burning or damaging of property at all? Why should we not free ourselves of the common law's requirement that harm be inflicted (by a burning) on the subject property? Why not punish and suppress risk taking by fires or explosions before any harm is caused? The drafters of the Model Penal Code saw no reason to adhere to the common law conception of arson. They created arson after the law of attempt and the common law felony of burglary. Arson became an attempt-like offense under the Model Penal Code, which is supplemented with a provision that seeks to suppress and punish the endangering of property as well. But the spirit of the common law and our attitudes about the general law of attempt have caused most states to reject the inchoate approach suggested by the Model Code. Only twelve states use inchoate provisions for their basic arson statutes, though a handful do supplement their traditional approach with a single inchoate arson provision.

Surely there is something lost to the ear of the courtroom listener when words like "malicious" are replaced by sterile terms such as "intentionally,"

“purposely” or “knowingly,” but that is the result in the majority of American courtrooms today. The common law *mens rea* of malice survives at best in only thirteen states, and a scant two more use the phrase in newly enacted legislation, though it is doubtful that the common law concept is what the legislature had in mind in those two states.

A new Latin is emerging for the criminal law of America. It is the language of the Model Penal Code. Soon lawyers may view the language of the common law as does the linguist ancient Greek. But just as Latin without Greek is unthinkable, so the language of the Model Penal Code is the child of the common law. And as the language of the common law grows old and is buried in the superseded books, more states join what is now the American majority in the use of the culpable mental states recommended in the Model Penal Code for the modern law of arson. In the majority of the states today the crime is committed either “purposely” or “knowingly” in accordance with the Code’s definition, though there is some difference in the terminology. Many of the states prefer the term “intentionally” to the Code’s “purposely” though there is not the slightest difference in the concept they describe.

But terminology is not the only difference in the thirty-five to thirty-seven states that have abandoned the common law’s malicious state of mind. No longer can arson be committed with the common law’s concept of a *wanton* burning. Simply put, a wanton burning is no longer a felony in the majority of states. Indeed, only three states clearly retain the common law’s “wanton” *mens rea* for a felony arson offense. Unfortunately, one can find neither explanation nor justification for this choice. In the three states in which a contrary result is clearly reached, it is by force of a felony provision which makes a *reckless* burning or exploding arson. And, of course, a wanton burning is a reckless burning in everyone’s conception of recklessness.

Another modern innovation is the use of a mental state in addition to the mental state with which the property was burned or damaged, and in addition to the mental state for which the fire was started or the explosion caused in the inchoate states. This additional mental state is a requirement with respect to the person endangering circumstances in a minority of the American states which use this device. But as we have seen not all states that use the person endangering circumstance technique require additional mental state in connection with that element of the offense. Quite clearly, however, the architecture of these new inchoate arson offenses differs drastically from the structure of common law arson.

Finally, all American states except Maine divide arson into various levels of severity, usually called degrees of arson, for the purpose of assessing different punishments. There was no such need at common law for the offense was narrowly defined, defined to cover only a narrow band of risks created by fire; and all felonies were then punished by an automatic sentence of death. But the modern arson statutes have extended the arson offenses

to cover a wide range of risks and damages to person and property unprotected at common law. Our conceptions of proper punishment indicate that a person who risks property should not be treated as equally culpable, as deserving of the same punishment, as a person who risks the life or limb of a fellow human being. Therefore, we protect against personal risks and property risks and determine the punishment allotted to each by dividing arson into various degrees or levels of severity.

First degree arson, the highest level of severity, is generally reserved as the people protecting offense, whereas second and the lower degrees are the property protecting offenses. But as we have seen, there is considerable variation among the states, and it is not uncommon to have several person protecting offenses and several property protecting offenses which are graded differently.

Despite these differences, there is a striking similarity in the modern statutory law of arson throughout the United States. Though deeply rooted in the common law and heavily influenced by the Model Penal Code, the law in a majority of American states resembles neither today. What we see here is the emergence of a modern statutory common law of arson. A common law made by legislatures not judges. A common law produced not by the adoption of a Model Law, as it was at mid-century, but by the labors of individual legislatures throughout the United States. And presumably it is a common statutory law for the same reasons that the judicial process in England and America produced the "common law." But whether that speculation is true, and whether the same patterns follow for the other common law felonies, must remain questions to be pondered another day.

We have now finished our odyssey of the law of arson. As we look back over the path we have come, surely we must admit that Coke, Hale, and Blackstone would hardly recognize that the modern law of arson was the product of the common law they knew so well. Almost everything but the name has changed, and sometimes not even that remains.

APPENDIX A

THE MODEL ARSON LAW

Section 1. Burning Dwellings

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, whether the property of himself or of another, shall be guilty of arson; and, upon conviction thereof, be sentenced to imprisonment for not less than two nor more than twenty years.

Section 2. Burning Buildings Other than Dwellings

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 bridge, shall, upon conviction thereof, be sentenced to imprisonment for not less than one nor more than ten years.

Section 3. Burning Other Property

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 street car, railway car, ship, boat or other water craft, automobile or other motor vehicle; or any other personal property not herein specifically named; (such property being of the value of twenty-five dollars or more and the property, in whole or in part of another person) shall, upon conviction thereof, be sentenced to imprisonment for not less than one nor more than three years.

Section 4. Burning to Defraud Insurer

Any person who willfully and with intent to injure or defraud the insurer sets fire to 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 imprisonment for not less than one nor more than five years.

Section 5. Attempt to Burn Buildings or Property

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 of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall upon conviction thereof, be sentenced to imprisonment for not more than two years or fined not to exceed one thousand dollars, or both such fine and imprisonment.

The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an 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 same shall, for the purposes of this act constitute an attempt to burn such building or property.

APPENDIX B

MODEL PENAL CODE

SECTION 220.1

Arson and Related Offenses

(1) *Arson*. A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of:

(a) destroying a building or occupied structure of another; or

(b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss. It shall be an affirmative defense to prosecution under this paragraph that the actor's conduct did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury.

(2) *Reckless Burning or Exploding*. A person commits a felony of the third degree if he purposely starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly:

(a) places another person in danger of death or bodily injury;

or

(b) places a building or occupied structure of another in danger of damage or destruction.

(3) *Failure to Control or Report Dangerous Fire*. A person who knows that a fire is endangering life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when he can do so without substantial risk to himself, or to give a prompt fire alarm, commits a misdemeanor if:

(a) he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire; or

(b) the fire was started, albeit lawfully, by him or with his assent, or on property in his custody or control.

(4) *Definition*. "Occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present. Property is that of another, for the purposes of this section, if anyone other than the actor has a possessory or proprietary interest therein. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.

APPENDIX C

THE EVOLUTION OF THE LAW OF ARSON IN ALASKA

A. 1913 to 1957: *Alaska Comp. Laws Ann.*

§§ 65-5-1 to 65-5-7 (1948)

§ 65-5-1. Arson: Burning dwelling house of another. That if any person shall willfully and maliciously burn any dwelling house of another, or shall willfully or maliciously set fire to any building owned by himself or another, by the burning whereof any dwelling house of another shall be burned such person shall be deemed guilty of arson, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than ten nor more than twenty years. [ALASKA COMP. LAWS ANN. 1913, § 1911; [hereinafter ACLA] ACLA 1933, § 4789]

§ 65-5-2.—Burning other buildings or boat. That if any person shall willfully and maliciously burn any church, courthouse, townhouse, meeting house, asylum, college, academy, schoolhouse, prison, jail, or other public building erected or used for public uses, or any steamboat, ship, or other vessel, or any banking house, warehouse, express office, storehouse, manufactory, mill, barn, stable, shop, or office of another, or shall willfully and maliciously set fire to any building or boat owned by himself or another, by the burning whereof any edifice, building, boat, or vessel mentioned in this section shall be burned such person shall be deemed guilty of arson, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than five nor more than fifteen years. [ACLA 1913, § 1912; ACLA 1933, § 4790]

§ 65-5-3. Burning buildings other than those in §§ 65-5-1, 65-5-2, or bridges, etc. That if any person shall willfully and maliciously burn any building whatsoever of another other than those specified in sections 65-5-1 and 65-5-2, or shall willfully and maliciously burn any bridge, lock, dam or flume of another, or erected or used for public uses, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years. [ACLA 1913, § 1913; ACLA 1933, § 4791]

§ 65-5-4. Offense by married woman. That the preceding sections of this chapter shall each extend to and include a married woman who may commit

either of the crimes therein specified, though the property burned or set on fire may belong wholly or in part to her husband. [ACLA 1913, § 1914; ACLA 1933, § 4792]

§ 65-5-5. Burning lumber, hay, etc. That if any person shall willfully and maliciously burn any pile or parcel of boards or other lumber, timber, or wood; or any stack of hay, grain, or other vegetable product, or any hay, grain, or other vegetable product severed from the soil, but not stacked; or any growing grass or grain, or other growing vegetable product of the soil not his own, such person shall be deemed guilty of a crime, and upon conviction thereof, if the property burned shall exceed in value thirty-five dollars, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; but if the property burned shall not exceed the value of thirty-five dollars, such person, upon conviction thereof, shall be punished by imprisonment in the Federal jail not less than one month nor more than one year, or by fine not less than twenty-five nor more than one hundred dollars, or by both such fine and imprisonment in the discretion of the Court. [ACLA 1913, § 1915; am L 1927, ch 23, § 1, p 51A 1933, § 4793]

§ 65-5-6. Burning insured property. That if any person shall willfully burn or in any other manner injure or destroy any property whatever which is at the time insured against loss or damage by fire or other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of such person or of any other, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than three nor more than seven years. [ACLA 1913, §1916; ACLA 1933, § 4794]

§ 65-5-7. "Dwelling house" defined. That any building is deemed a "dwelling house" within the meaning of the sections of this act defining the crime of arson any part of which has usually been occupied by any person lodging therein. [ACLA 1913, § 2088; ACLA 1933, § 5066]

B. 1957 to 1978 (The Model Arson Law years): Alaska Stat.

§§ 11.20.010 to 11.20.070 (1962)

Sec. 11.20.010. First degree arson. A person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of a dwelling house, whether occupied, unoccupied or vacant, or a kitchen, shop, barn, stable or other outhouse that is a part of a dwelling, or belongs to or adjoins a dwelling, whether his property or the property of another, is guilty of arson in the first degree, and upon conviction is punishable by imprisonment for not less than two nor more than 20 years. [§ 65-5-1 ACLA 1949; am §1 ch 141 SLA 1957]

Sec. 11.20.020. Second degree arson. A person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of a building or structure of any kind, whether his property or the property of another, not included or described in § 10 of

this chapter, is guilty of arson in the second degree, and upon conviction is punishable by imprisonment for not less than one nor more than 10 years, or by a fine of not more than \$5,000, or by both. [§ 65-5-2 ACLA 1949; am § 2 ch 141 SLA 1957]

Sec. 11.20.030. Third degree arson. A person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of personal property of another of the value of \$100 is guilty of arson in the third degree, and upon conviction is punishable by imprisonment for not less than one nor more than three years, or by a fine of not more than \$3,000, or by both. [§ 65-5-3 ACLA 1949; am § 3 ch 141 SLA 1957]

Sec. 11.20.040. Offense by married woman. Sections 10-30 of this chapter extend to and include a married person who commits any of the crimes specified, though the property burned or set on fire belongs wholly or in part to the other spouse. [§ 65-5-4 ACLA 1949; § 76 ch 127 SLA 1974]

Sec. 11.20.050. Fourth degree arson. A person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of a building or property mentioned in §§ 10-40 of this chapter, or who commits an act preliminary to an attempt, or in furtherance of an attempt is guilty of arson in the fourth degree, and upon conviction is punishable by imprisonment for not less than one nor more than two years, or a fine not to exceed \$1,000, or by both. [§ 65-5-5(a) ACLA 1949; am § 4 ch 141 SLA 1957]

Sec. 11.20.060. Attempted arson defined. The placing or distributing of a flammable, explosive or combustible material or substance, or a device in a building or property mentioned in §§ 10-50 of this chapter in an arrangement or preparation with intent to eventually, willfully and maliciously set fire to or burn, or to procure the setting fire to or burning of the building or property is, for the purposes of this chapter, an attempt to burn the building or property. [§ 65-5-5(b) ACLA 1949; am § 4 ch 141 SLA 1957]

Sec. 11.20.070. Burning to defraud insurer. A person who willfully and with intent to injure or defraud the insurer sets fire to or burns or attempts to set fire to or burn or who causes to be burned or who aids, counsels or procures the burning of a building, structure or personal property, whether his property or the property of another, which at the time is insured against loss or damage by fire, is guilty of a felony, and upon conviction is punishable by imprisonment for not less than one no more than five years, or by a fine of not more than \$3,000, or by both. [§ 65-5-6 ACLA 1949; am § 5 ch 141 SLA 1957]

C. *1978 to 1986 (to date): Alaska Stat.*

§§ 11.46.400 to 11.46.450 (1983)

Sec. 11.46.400. Arson in the first degree. (a) A person commits the crime of arson in the first degree if the person intentionally damages any property

by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury. For purposes of this section, "another person" includes but is not limited to fire and police service personnel or other public employees who respond to emergencies, regardless of rank, functions, or duties being performed.

(b) Arson in the first degree is a class A felony. [§ 4 ch 166 SLA 1978; am § 1 ch 39 SLA 1983]

Sec. 11.46.410. Arson in the second degree. (a) A person commits the crime of arson in the second degree if the person intentionally damages a building by starting a fire or causing an explosion.

(b) In a prosecution under this section, it is an affirmative defense

(1) that no person other than the defendant had a possessory, proprietary, or security interest in the building or that all persons having such an interest consented to the defendant's conduct; and

(2) that the sole intent of the defendant was to damage or destroy the building for a lawful purpose.

(c) Arson in the second degree is a class B felony. [§ 4 ch 166 SLA 1978]

Sec. 11.46.430. Criminally negligent burning. (a) A person commits the crime of criminally negligent burning if with criminal negligence the person damages property of another by fire or explosion.

(b) Criminally negligent burning is a class A misdemeanor. [§ 4 ch 166 SLA 1978]

Sec. 11.46.450. Failure to control or report a dangerous fire. (a) A person commits the crime of failure to control or report a dangerous fire if the person knows that a fire is endangering life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when the person can do so without substantial personal risk, or to give a prompt fire alarm if

(1) the person knows that the person is under an official, contractual, or other legal duty to prevent or combat the fire; or

(2) the fire was started by the person, with the person's consent, or on property in the person's custody or control.

(b) Failure to control or report a dangerous fire is a class A misdemeanor. [§ 4 ch 166 SLA 1978]