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CRIMINAL LAW—STATE OF CONNECTICUT v. JOYCE: WHO GETS BURNED BY THE WARRANTLESS SEARCH OF FIRE-DAMAGED CLOTHING?

Andrew S. Golden

CRIMINAL LAW—*STATE OF CONNECTICUT V. JOYCE*: WHO GETS BURNED BY THE WARRANTLESS SEARCH OF FIRE-DAMAGED CLOTHING?

INTRODUCTION

Under the community caretaking function, police frequently collect and store personal property that is exposed to possible loss, damage, or theft.[1] Upon discovering property in danger of such perils, police often confiscate and hold the property until it can be returned to its proper owner. Because this acquisition is in no way intended to collect evidence of crime, but simply to protect the public's property, the police are not required to obtain a warrant before seizing the property.[2] Once such property is seized under the community caretaking function, it is less clear what limits should be placed upon the police regarding the property, and whether a warrant is required to permit the search of such property.[3]

State v. Joyce[4] raised just such an issue. In *Joyce*, the Connecticut State Police secured a fire victim's burnt clothing pursuant to their community caretaking function. Without procuring a warrant, the police then shipped the clothing to a state forensic laboratory for chemical analysis, which showed traces of gasoline on the victim's clothing. At trial, the defendant was convicted of arson in the first degree,[5] from which he appealed, claiming that the court erred in failing to exclude the evidence of gasoline traces, evidence which resulted from an illegal, warrantless search. The Connecticut Appellate Court affirmed the lower court's conviction and certiorari

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1. *See, e.g.*, State v. Tully, 348 A.2d 603, 609 (Conn. 1974) (for purpose of safekeeping, police permitted under community caretaking function to confiscate a guitar from an abandoned parked car).

2. Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (searches that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" fall under the police's community caretaking function, and are not subject to the Fourth Amendment's warrant requirement).

3. *See, e.g.*, Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 460 n.107 (1990) (explaining that no warrant is required for inventory searches because such searches fall under the police's community caretaking function).

4. 639 A.2d 1007 (Conn. 1994).

5. *See infra* note 93 and accompanying text.

was granted by the Connecticut Supreme Court. The court was required to determine whether the police, having lawfully obtained custodial possession of the defendant's burnt clothing, nevertheless were required under article first, section 7 of the Connecticut Constitution[6] to obtain a search warrant before performing a chemical analysis on the clothing.[7] The court held that a search warrant was indeed required.[8]

The concern in *Joyce* focused upon whether the defendant possessed an interest in the burnt clothing protected by article first, section 7 of the Connecticut Constitution.[9] Analyzing this issue, the Connecticut Supreme Court concentrated on whether the defendant maintained a reasonable expectation of privacy in the burnt clothing.[10]

The controversy presented in *Joyce* had never been addressed by the Connecticut Supreme Court nor by any other state or federal court. Thus, the *Joyce* opinions raise novel and interesting questions regarding a person's expectation of privacy. For example, does the damaged nature of the burnt clothing render it unprotected? Specifically, is burnt clothing analogous to curbside garbage, which can never be the object of a legitimate expectation of privacy no matter what steps the "owner" took to manifest such an expectation?[11] Is burnt clothing analogous to a burned-out building, which generally receives constitutional protection as long as an expectation of privacy is manifested in the burnt remains by the owner?[12] Is burnt clothing analogous to illegal contraband, which can never itself be the object of a legitimate expectation of privacy

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6. CONN. CONST. art. first, § 7 provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Id.

7. *Joyce*, 639 A.2d at 1009.

8. *Id.* at 1017.

9. *See supra* note 6.

10. *Joyce*, 639 A.2d at 1013 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (establishing a two part subjective/objective test to determine whether an individual exhibits a reasonable expectation of privacy). See *infra* part I.B for a discussion of the *Katz* test.

11. *See, e.g.*, State v. DeFusco, 620 A.2d 746, 753 (Conn. 1993) (narcotics defendant had no reasonable expectation of privacy in garbage he placed at curbside for pickup).

12. *See, e.g.*, State v. Zindros, 456 A.2d 288, 296-97 (Conn. 1983) (lessee of building sufficiently demonstrated that he still possessed legitimate expectation of privacy in building eleven days after it was destroyed by fire), *cert. denied*, 465 U.S. 1012 (1984).

because it is the instrument of a crime?[13] Finally, assuming that none of the above categorical characterizations disqualifies a defendant's constitutional protection, does the defendant relinquish his expectation of privacy via abandonment when the burnt clothing is left behind at the accident scene and secured by the police under the community caretaking function?[14] This Note will analyze and critique the *Joyce* decision in an attempt to provide an answer to these questions.

Part I of this Note provides a brief overview of the *Katz v. United States*[15] test. It also explains how the *Katz* test has been applied in three related Connecticut Supreme Court cases.[16]

Part II presents the facts of *Joyce* and examines the reasoning behind the decisions of the Connecticut Appellate Court[17] and the Connecticut Supreme Court.[18] Particular attention is paid to the divergence between the majority and dissenting opinions of the Connecticut Supreme Court decision regarding the defendant's expectation of privacy.

Part III analyzes *Joyce* in terms of the four narrow questions presented above. Specifically, it evaluates whether the defendant's burnt clothing is most analogous to garbage, burned-out buildings, or illegal contraband, and whether the defendant, regardless of any categorical protection, nevertheless abandoned any expectation of

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13. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 123 (1984) (test that indicates the presence of cocaine does not violate legitimate expectation of privacy); United States v. Place, 462 U.S. 696, 707 (1983) (no expectation of privacy in marijuana detected by dog sniff); Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) (noting that society is not prepared to recognize an expectation of privacy in incriminating evidence).

14. *See, e.g.*, Abel v. United States, 362 U.S. 217, 241 (1960) (after defendant had checked out of hotel, papers discovered in wastebasket of his room were not protected by Fourth Amendment); State v. Mooney, 588 A.2d 145, 159 (Conn.) (stating that abandonment requires the relinquishment of an expectation of privacy), *cert. denied*, 502 U.S. 919 (1991). *See also* Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFF. L. REV. 399, 400 (1970) ("[W]here one abandons property, he is said to bring his right of privacy therein to an end . . . ."); David H. Steinberg, Note, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 DUKE L.J. 1508, 1529 (1992) ("One cannot manifest a reasonable expectation of privacy in an item once it has been abandoned.").

15. 389 U.S. 347 (1967).

16. State v. DeFusco, 620 A.2d 746, 750 (Conn. 1993) (*Katz* test applied to curbside garbage); *Mooney*, 588 A.2d at 152 (*Katz* test applied to abandoned property); State v. Zindros, 456 A.2d 288, 294 (Conn. 1983) (*Katz* test applied to burned-out building), *cert. denied*, 465 U.S. 1012 (1984).

17. State v. Joyce, 619 A.2d 872 (Conn. App. Ct. 1993).

18. State v. Joyce, 639 A.2d 1007 (Conn. 1994).

privacy he may have possessed in the clothing, leaving it devoid of any constitutional protection.

Finally, this Note concludes that an expectation of privacy in burnt clothing is similar to that of a burned-out building in that the severity of the burnt condition plays a significant role in determining whether society will consider an expectation of privacy in the remains reasonable; that the defendant in *Joyce* indeed possessed a legitimate expectation of privacy in the burnt clothing; and that a search warrant should have been procured before the chemical analysis was performed. In sum, because the defendant in *Joyce* possessed a protected interest in his burnt clothing, the Connecticut Supreme Court made the correct decision to exclude all evidence obtained through a warrantless search.

I. BACKGROUND

A. *Balancing State and Federal Constitutional Protection*

It is well established that an individual state, when interpreting its own state constitution, can make use of federal precedents that are logically reasonable and persuasive.[19] Consistent with this practice, the Connecticut Supreme Court has repeatedly chosen to look to federal precedent when deciding cases interpreting the liberties afforded to its citizens by the Connecticut Constitution.[20] Thus, in evaluating the constitutional issue raised in *State v. Joyce*, the Connecticut Supreme Court elected to utilize the same analytical framework that would be used under the United States Constitution.[21] The court, however, pointed out that the adoption of such a framework does "not compel [it] . . . to reach the same outcome that a federal court might reach when the methodology is applied to a particular set of factual circumstances."[22]

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19. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983); *see also* Justice William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977):

> [S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

Id.

20. *Joyce*, 639 A.2d at 1013.

21. *Id.* at 1012.

22. *Id.* at 1012 n.12. While the United States Constitution sets a minimum national level of guaranteed individual rights, its assertions have never been interpreted as maximum levels that may not be exceeded by a particular state's constitution. Thus,

B. *A Reasonable Expectation of Privacy*

In its 1967 landmark decision, *Katz v. United States*,[23] the United States Supreme Court determined that the government's electronic eavesdropping of a telephone call Katz made from a public phone booth violated his Fourth Amendment rights.[24] The Supreme Court reasoned that the Fourth Amendment protects what a person intends to preserve as private[25] and that the defendant, Katz, had intended the phone call he made to be a private conversation heard only by himself and the person he had called.[26] The Court further determined that Katz's privacy expectation was objectively reasonable, since most people making a call from inside a telephone booth with the doors pulled closed would expect their conversation to be private.[27] Katz's reliance on this expectation of privacy was thereby justifiable and required the Constitution's protection accordingly.[28] Thus, the Court created a subjective/objective judicial requisite for Fourth Amendment protection, requiring

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individuals may be afforded more protection in a particular circumstance under their state constitution where similar rights would not exist under the United States Constitution. *See* Cologne v. Westfarms Assocs., 469 A.2d 1201, 1206 (Conn. 1984) (holding that a group of individuals was afforded access to private shopping center property to engage in free speech under the Connecticut Constitution even though no similar right is afforded by the United States Constitution). The Connecticut Supreme Court, therefore, is free to grant its citizens a higher level of protection by interpreting the provisions of the Connecticut Constitution more broadly than the United States Supreme Court has under the United States Constitution. *See also* State v. Geisler, 610 A.2d 1225, 1231 (Conn. 1992); Symposium: *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985).

For a historical analysis of the Connecticut Constitution, aimed at assisting attorneys in bringing state constitutional claims in Connecticut courts, *see generally* Justice Robert I. Berdon, *An Analytical Framework for Raising State Constitutional Claims in Connecticut*, 14 Q.L.R. 191 (1994).

23. 389 U.S. 347 (1967). Katz was charged with transmitting wagering information by telephone in violation of federal statute. Without obtaining a warrant, the FBI obtained evidence of Katz's telephone conversations through the use of an electronic listening and recording device, which had been secretly attached to the outside of the public telephone booth from which Katz placed the calls. *Id.* at 348.

24. The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

25. *Katz*, 389 U.S. at 351-52.

26. *Id.* at 352.

27. *Id.*

28. *Id.* at 353.

"[f]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[29] Unless both prongs of this test are satisfied, the individual possesses no legitimate expectation of privacy over the property in question, and no rights are violated by a warrantless search or seizure of such property.[30]

In 1993, the Connecticut Supreme Court, in *State v. DeFusco*,[31] adopted the *Katz* test to interpret and apply article first, section 7 of the Connecticut Constitution.[32] The Connecticut Supreme Court formulated a factor analysis to determine whether the defendant possessed a reasonable expectation of privacy in garbage he had placed by the curbside for collection. The court assessed: (1) whether the defendant manifested a subjective expectation of privacy with respect to the property; and (2) whether that expectation is one that society would consider reasonable.[33] By framing its analysis in this way, the court established a new methodology for applying article first, section 7 of the Connecticut Constitution.[34]

C. *Applying the* Katz *Test*

After deciding *Katz*, the United States Supreme Court faced the challenge of applying the new rule to a myriad of factual possibilities.[35] As more and more situations were evaluated under *Katz*, distinct categories of what would and would not receive protection under the Fourth Amendment began to emerge. For example, the United States Supreme Court held that individuals' expectations of privacy in garbage[36] and open fields[37] fail the *Katz*

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29. *Id.* at 361 (Harlan, J., concurring).

30. *Id.*

31. 620 A.2d 746, 750 (Conn. 1993).

32. See *supra* note 6 for language of CONN. CONST., art. first, § 7.

33. *Defusco*, 620 A.2d at 750.

34. *Id.* ("Although we have never addressed the proper standard for determining the applicability of article first, § 7, neither party contests the appropriateness of using the *Katz* test in this case."); *see also* Mitchell S. Brody, *Developments in Connecticut Criminal Law: 1992-1993*, 68 CONN. B.J. 37, 37-38 (1994) (commenting on the *DeFusco* court's interpretation of article first, § 7).

35. *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1 (2d ed. 1987); Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647 (1988).

36. *See* California v. Greenwood, 486 U.S. 35, 40-41 (1988) (holding that no reasonable expectation of privacy exists in one's trash placed at the curbside); Jon E. Lemole, Note, *From Katz to Greenwood: Abandonment Gets Recycled from the Trash Pile—Can Our Garbage Be Saved from the Court's Rummaging Hands?*, 41 CASE W. RES. L. REV. 581 (1991).

test and are categorically beyond the scope of the Fourth Amendment's protection. Similarly, the Court refused to grant protection to certain instruments of crime or contraband, such as guns[38] or cocaine,[39] reasoning that they failed to meet the *Katz* requirements. These types of property interests will not be protected under the Fourth Amendment regardless of the steps the individual takes to demonstrate that he or she possessed an expectation of privacy. By contrast, the Court determined that some property, such as fire-damaged buildings,[40] would receive constitutional protection only if the homeowner *actively manifested* some measure of seeking privacy. These types of property interests differ from the categorically excluded ones in that they are denied Fourth Amendment protection because the privacy expectation has not been subjectively manifested by the particular defendant.

The Connecticut Supreme Court has similarly created categorical applications of the *Katz* test through its own case law. Three Connecticut cases are particularly relevant to the controversy raised in *Joyce*, each meriting its own analysis.

1. *State v. Zindros*[41]

On February 12, 1977, a fire caused extensive damage to a building leased by the defendant, Georgios Zindros.[42] The defendant operated a pizza parlor from within the building, but the fire rendered it unfit to conduct business. Eleven days after the fire, a warrantless search of the burned-out premises produced incriminating evidence of arson against the defendant.[43]

The Connecticut Supreme Court determined that the defendant still possessed a reasonable expectation of privacy in the build-

37. *See* Oliver v. United States, 466 U.S. 170, 179 (1984) (holding that society has no interest in protecting the privacy of property located in an open field setting); James Leonard, Note, *Criminal Procedure*—Oliver v. United States: *The Open Fields Doctrine Survives* Katz, 63 N.C. L. REV. 546 (1985).

38. *See* Rakas v. Illinois, 439 U.S. 128 (1978) (holding that society is not prepared to recognize as reasonable an expectation of privacy in incriminating evidence), *reh'g denied*, 439 U.S. 1122 (1979).

39. *See* United States v. Jacobsen, 466 U.S. 109, 123 (1984) (holding that a field test which checks specifically for the presence of illegal drugs, but reveals no private facts about the individual, does not violate any legitimate expectation of privacy).

40. *See* Michigan v. Clifford, 464 U.S. 287 (1984) (holding that a search directed at determining the cause of a fire of a building requires a search warrant if the owner's expectation of privacy in the building remains after the fire).

41. 456 A.2d 288 (Conn. 1983), *cert. denied*, 465 U.S. 1012 (1984).

42. *Id.* at 291.

43. *Id.* at 291-93.

ing at the time of the search.[44] The court reasoned that the defendant had not abandoned the property[45] and that the building's burned-out and boarded-up condition did not divest him of a reasonable privacy expectation.[46] The court further explained that, during the eleven day period following the fire, the defendant had manifested an ongoing privacy expectation by securing the premises each time he visited it.[47] Additionally, the court considered the value of the personal property left on the premises[48] and the defendant's intention to repair the premises and reopen the business.[49]

2. *State v. Mooney*[50]

The defendant, David Mooney, was a homeless person arrested for murder on August 5, 1987.[51] Later that night, the police searched several of the defendant's possessions, including a duffel bag and a closed cardboard box, which they found unattended under a highway bridge abutment that the defendant had been using as a home.[52]

The Connecticut Supreme Court addressed the issue of whether a homeless person could possess a reasonable expectation of privacy in property left unattended.[53] The court concluded that the expectation of privacy in a closed duffel bag and box required the same special protection provided to "closed containers."[54] The court was unpersuaded that the defendant had forfeited such rights by abandoning the property under the bridge, since the facts suggested that the police were well aware that the defendant regarded

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44. *Id.*

45. *Id.* The court defined abandonment as "a question of fact . . . [that] implies a voluntary and intentional renunciation, but the intent may be inferred as a fact from the surrounding circumstances." *Id.* at 296 (quoting Pizzuto v. Newington, 386 A.2d 238, 240 (Conn. 1978)).

46. *Id.*

47. *Id.*

48. *Id.* (approximately $6750 worth of equipment remained functional inside the damaged building).

49. *Id.*

50. 588 A.2d 145 (Conn.), *cert. denied*, 502 U.S. 919 (1991).

51. *Id.* at 150.

52. *Id.* at 150-51.

53. *Id.* at 154.

54. *Id.* The court explained that "society has traditionally afforded a high degree of deference to expectations of privacy in closed containers because such an area is normally intended as a repository of personal effects." *Id.* at 160. *See* United States v. Chadwick, 433 U.S. 1, 11 (1977) (holding that a reasonable expectation of privacy existed in a closed footlocker loaded onto a vehicle).

the site under the bridge as his home.[55]

3. *State v. DeFusco*[56]

On October 12, 1990, police officers found illegal narcotics inside the home of Paul DeFusco.[57] The search was performed pursuant to a warrant issued upon an affidavit describing suspicious items that police officers had obtained from garbage placed at the curbside outside the defendant's home.[58]

The Connecticut Supreme Court found that the defendant did not possess a reasonable expectation of privacy in garbage placed by the curbside for collection.[59] The court reasoned that when the defendant placed the garbage at the curb, he left the garbage widely susceptible to invasion from a variety of intruders, such as municipal workers, antique collectors, bottle or coupon redeemers, snoops, vagrants, and animals, and therefore maintained no reasonable expectation of privacy in the garbage.[60] Thus, the defendant could not legitimately expect his curbside garbage to remain free from examination, and the police were not required to obtain a warrant before searching through it or seizing it.[61]

D. *Burden of Proving an Unconstitutional Search*

Under both the United States and Connecticut constitutions,[62] in order to be entitled to the constitutional protection against unreasonable searches, a defendant must prove that he or she possessed a reasonable expectation of privacy in the item searched, and that this expectation was one that society would recognize as reasonable.[63] It is the defendant's burden to demonstrate that both prongs of the test were satisfied, and that a warrant, therefore, should have been procured.[64] Whether the defendant has estab-

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55. *Mooney*, 588 A.2d at 159-60.

56. 620 A.2d 746 (Conn. 1993).

57. *Id.* at 748.

58. *Id.*

59. *Id.* at 753.

60. *Id.* at 752 (citing California v. Greenwood, 486 U.S. 35, 40-41 (1988) (prior to *DeFusco*, the United States Supreme Court reached a nearly identical holding when presented with a set of facts)).

61. *Id.* at 753. *See also Greenwood*, 486 U.S. at 41.

62. *See supra* note 22 and accompanying text.

63. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); State v. Pittman, 553 A.2d 155, 157 (Conn. 1989).

64. State v. Brown, 503 A.2d 566, 569-70 (Conn. 1986). The United States Supreme Court, however, has created some well-delineated exceptions to the warrant

lished a reasonable expectation of privacy must be determined on a case by case basis,[65] which mandates a factual inquiry into all the relevant circumstances.[66]

II. *STATE V. JOYCE*[67]

A. *Statement of Facts*[68]

At approximately 4:00 p.m. on January 29, 1990, fire-fighters and paramedics responded to a report of a fire at 125 Maple Street, East Haven, Connecticut.[69] Emergency medical technician Charles Licata arrived at the location to find the residence in flames and the defendant, Wallace Joyce, standing waist deep in a nearby river, apparently severely burned.[70] Licata assisted Joyce out of the river and onto its embankment. Joyce was seriously injured, with first, second, and third degree burns covering 42 percent of his body.[71]

To best treat Joyce's wounds and prevent infection, Licata decided to cut off the smoldering clothing that remained on Joyce's body.[72] Licata laid the charred remains of clothing on the ground and immediately proceeded to clean and dress Joyce's wounds and provide appropriate emergency first-aid. Joyce was then transported by ambulance to Yale-New Haven Hospital.[73]

Following the ambulance's departure from the scene of the

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requirement. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent exception); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest exception); Dyke v. Taylor Implementing Mfg. Co., 391 U.S. 216 (1968) (plain view search exception); Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances exception); Carroll v. United States, 267 U.S. 132 (1925) (automobile search exception). For a more detailed summary on the warrant requirement and its exceptions, see Darrel C. Waugh, Note, *Developing Guidelines in Fourth Amendment "Clothing Cases" After* United States v. Butler, 16 W. NEW ENG. L. REV. 289, 291-95 (1994).

65. State v. Reddick, 541 A.2d 1209, 1213 (Conn. 1988).

66. State v. Mooney, 588 A.2d 145, 152, (Conn.), *cert. denied*, 502 U.S. 919 (1991).

67. 639 A.2d 1007 (Conn. 1994).

68. The statement of facts presented in this section was compiled by interweaving the records presented respectively in the Connecticut Supreme Court opinion, *State v. Joyce*, 639 A.2d 1007 (Conn. 1994), and the Connecticut Appellate Court opinion, *State v. Joyce*, 619 A.2d 872 (Conn. App. Ct. 1993). While the factual records in these two opinions are consistent with one another, each provides significantly more detail than the other in particular sections. In an attempt to minimize confusion to the reader, footnotes have been provided to mark switches from one source to the other.

69. *Joyce*, 619 A.2d at 874. The property formerly had been owned by the defendant's father, who approximately nine months previously had passed away leaving a life tenancy in the house to the defendant's sister and her son. *Id.* at 874 n.2.

70. *Id.* at 874.

71. *Joyce*, 639 A.2d at 1009.

72. *Joyce*, 619 A.2d at 875 n.5.

73. *Joyce*, 639 A.2d at 1009-10.

fire, East Haven Police Detective Bruce Scobie, acting under the police's community caretaking function,[74] secured Joyce's clothing, placed it in the trunk of his cruiser, and brought it to the police department.[75] Scobie later testified that he took possession of the clothing so that it "wouldn't be stolen or lost."[76]

Licata and East Haven Police Detective Paul Hemingway accompanied Joyce to the hospital in the ambulance.[77] Along the way, Licata briefly questioned Joyce regarding the fire.[78] Joyce indicated that he had gone to the house "to check on something," that he had "opened the door," and that "there had been an explosion."[79] He could not recall whether he had been blown from the house or whether he ran into the river.[80]

After they arrived at the emergency room of the hospital, Hemingway questioned Joyce.[81] Joyce repeated the information he had told Licata while in the ambulance earlier.[82] Hemingway continued to interrogate Joyce, but Joyce's medical condition left him unable to respond.[83] Hemingway informed Joyce's wife, who had been called to the hospital and was present for the questioning, that the police "had [Joyce's] burnt clothing and wallet," which she could pick up at the East Haven Police Department.[84]

Later that night, at the police department, detectives Scobie

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74. In 1973, the United States Supreme Court determined that the police have a duty to protect property exposed to possible loss, damage, or theft. *See* Cady v. Dombrowski, 413 U.S. 433, 441 (1973). The Court characterized this duty as the police's "community caretaking function." *Id.* In such instances, it becomes unnecessary for the police to obtain a warrant before confiscating such property and holding it in custodial possession until it can be returned to the original owner.

The Connecticut Supreme Court adopted the policy of "community caretaking" in 1974. *See* State v. Tully, 348 A.2d 603, 608 (Conn. 1974). Connecticut's policy was borrowed directly from *Cady*: "'Local police officers . . . frequently . . . engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id.* at 609 (alteration in original) (quoting *Cady*, 413 U.S. at 441).

75. *Joyce*, 619 A.2d at 875.

76. *Id.*

77. *Joyce*, 639 A.2d at 1010.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Although Joyce's wife picked up the wallet the next day, no attempt was ever made by either Joyce or his wife to retrieve the clothing until just prior to Joyce's trial when the motion to suppress evidence was made. *Id.* at 1009.

and Hemingway inventoried Joyce's clothing and wallet.[85] The officers then dried, tagged, bagged, and stored Joyce's property in a closet at the police station.[86] The trial court found that in taking custody of Joyce's clothing, the police had acted appropriately pursuant to their community caretaking function.[87]

The following day, January 30, 1990, as a result of ongoing investigation, Joyce became an arson suspect.[88] Detective Scobie then gave Joyce's unclaimed clothing to Fire Marshall Frederick Brow, who immediately transported it to the state forensic laboratory in Meriden for chemical testing.[89] Brow did not obtain a search warrant before ordering the chemical analysis of the clothing.[90]

At the forensic laboratory, gas chromatography analysis revealed traces of gasoline on Joyce's clothing.[91] Carpet and wood samples taken from the house by police also tested positive for the presence of gasoline.[92] The clothing was later returned to the East Haven police department.

After extended hospitalization, Joyce was charged with two counts of arson in the first degree under Connecticut General Statutes sections 53a-111(a)(3) and 53a-111(a)(4).[93] Prior to trial, Joyce

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85. *Id.* at 1010.

86. Both Scobie and Hemingway claimed that, at this point, Joyce was not suspected of starting the fire. Scobie explained that his intention in securing the clothing was to return it to its owner, and that he had been following "customary procedure for safekeeping property." *Id.*

87. *Id.* (citing State v. Tully, 348 A.2d 603, 608-09 (Conn. 1974)). The *Joyce* court pointed out that neither party challenged this finding on appeal. *Id.*

88. *Id.* The record is unclear as to what change in circumstance led to Joyce's becoming a suspect between January 29 and January 30, 1990.

89. *Id.* Brow actually delivered Joyce's clothing to the laboratory in two separate trips. For reasons that do not appear in the record, Joyce's undershirt and dungarees were left out of the first conveyance of clothing and were transported separately, by Brow, two days later. *Id.*

90. *Id.* A search warrant was obtained several days later to seize Joyce's pickup truck, which had been parked a short distance from the scene of the fire. *Id.*

91. *Id.* At trial, the head of the chemistry department at the state forensic laboratory, Jack Hubball, presented the exact scientific method used on Joyce's clothing. Hubball explained that the distillation procedure used in the analysis involved heating Joyce's clothing to vaporize all organic materials and separating the vapor into individual chemical compounds by their distinct boiling points. Computer printouts of the identified compounds were then compared with the signature patterns of known organic substances. The signature pattern of gasoline was identified as present in Joyce's shirt, shoes, socks, and jeans. *Id.*

92. *Id.* at 1010 n.3.

93. *Id.* at 1009. CONN. GEN. STAT. § 53a-111 (1995) provides in pertinent part:

(a) A person is guilty of arson in the first degree when, with intent to destroy or damage a building, as defined in section 53a-100, he starts a fire or causes

moved to suppress the results of the chemical analysis of his clothing, but the court rejected the motion.[94] A jury convicted Joyce of arson in the first degree in violation of section 53a-111(a)(4) and acquitted him of the charge under section 53a-111(a)(3).[95] Joyce was sentenced to a twelve year jail term, suspended after four years, fined $5,000, and placed on five years probation.[96] On appeal, the Connecticut Appellate Court affirmed the conviction, with one judge dissenting.[97]

B. *The Connecticut Appellate Court's Decision*

1. The Majority Opinion

Writing for the majority, Judge O'Connell first recognized that the Fourth Amendment protects an individual's expectations of both "freedom from unreasonable searches and freedom from unreasonable seizures."[98] Thus, the court divided Joyce's claim into the following sub-issues: (1) whether Joyce's clothing was illegally seized; and (2) whether transporting the clothing to the state forensic laboratory or conducting a chemical analysis of it once present at the laboratory constituted an illegal search.[99]

In analyzing whether the clothing was illegally seized, the court first established that the police originally obtained the clothing in a legal manner, pursuant to their community caretaking function.[100] Having found that the police had legal custodial possession of the clothing, the majority next reasoned that no warrant was needed before transferring it to the forensic laboratory, because such a re-

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> an explosion, and . . . (3) such fire or explosion was caused for the purpose of collecting insurance proceeds for the resultant loss; or (4) at the scene of such fire or explosion a peace officer or firefighter is subjected to a substantial risk of bodily injury.

Id.

94. *Joyce*, 639 A.2d at 1009.

95. *Id.* See *supra* note 93 for the language of the statute.

96. *Id.*

97. State v. Joyce, 619 A.2d 872 (Conn. App. Ct. 1993) (Heiman, J., dissenting).

98. *Id.* at 876 (citing Horton v. California, 496 U.S. 128, 133 (1990); United States v. Jacobsen, 466 U.S. 109, 113 (1984)). Because the defendant did not make any arguments specifically under the Connecticut Constitution, the appellate court chose to analyze his complaint exclusively under the United States Constitution. *Id.* at 876 n.7.

99. *Joyce*, 619 A.2d at 876. The court relied on the United States Supreme Court's definitions of search and seizure. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.* (quoting *Jacobsen*, 466 U.S. at 113).

100. *Id.* at 876 (citing State v. Tully, 348 A.2d 603, 608-09 (Conn. 1974)); see *supra* note 74 for an explanation of the community caretaking function.

quirement would place an "unwieldy burden" on the police that could not be justifiably balanced by any "concomitant benefit to the owner of the property."[101] Thus, the court concluded that no illegal seizure had taken place.[102] The court reasoned that transferring the clothing to the laboratory created no additional interference with Joyce's possessory interest in the clothing.[103] More specifically, since Joyce was never denied access to the clothing, the court determined that the police did not restrict his right to exercise dominion and control over the clothing.[104]

To begin the next step of determining whether the chemical analysis of Joyce's clothing constituted an illegal search, the majority asserted that it is not enough that the defendant possess an expectation of privacy, but that he must actually exhibit this expectation.[105] Thus, the majority opined that although Joyce may have maintained ownership of his clothing while the police held it in custody, he failed to exhibit the necessary expectation of privacy after the police took possession of it. The court reasoned that "[m]ere ownership . . . does not demonstrate a reasonable expectation of privacy," and that a person may "retain a property interest in an item, but nonetheless . . . relinquish his or her reasonable expectation of privacy in the object."[106]

The court recognized that a reasonable expectation of privacy is usually presumed in the clothing people wear, but the court determined that this presumption does not apply to clothing that is so badly damaged by fire that it is "no longer usable as clothing."[107] The court also asserted that an erosion of privacy necessarily resulted from the fact that the clothing had been removed from Joyce's body without his resistance and left in a public place until secured by the police.[108] Based on these arguments, the court concluded that Joyce "had no reasonable expectation of privacy in his

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101. *Joyce*, 619 A.2d at 876. The court asserted that to hold otherwise would result in a policy where, regarding property in the lawful possession of the police, "a seizure would arise each time something happens to that property thereby requiring a new warrant." *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 877 (citing Katz v. United States, 389 U.S. 347, 361 (1967)) (defendant exhibited a privacy expectation by closing the doors to the phone booth); *see supra* note 29 and accompanying text.

106. *Joyce*, 619 A.2d at 877 (quoting State v. Mooney, 588 A.2d 145, 158 (Conn.), *cert. denied*, 502 U.S. 919 (1991)).

107. *Id.* at 877-78.

108. *Id.* at 878 (citing Wagner v. Hedrick, 383 S.E.2d 286 (W. Va. 1989)).

clothing."[109]

The court concluded that even if there had been a seizure and Joyce had exhibited an expectation of privacy, the chemical analysis of the clothing would not have constituted a search.[110] Relying on *United States v. Jacobsen*,[111] the court concluded that such a "minimally intrusive examination of the remnants of [Joyce's] clothing to determine whether it contained an accelerant was not a search within the meaning of the [F]ourth [A]mendment ."[112]

2. The Dissenting Opinion

In his dissenting opinion, Judge Heiman disagreed with the majority's determination that transferring the clothing to the forensic laboratory to administer a chemical analysis did not constitute a seizure for which a warrant should have been required.[113] Although he agreed that the community caretaking function allowed the police to secure Joyce's clothing initially,[114] Judge Heiman asserted that transferring the clothing to the laboratory effectively ended the police's community caretaking services and constituted an unlawful seizure.[115] He stated that the community caretaking function "cannot be used as a ruse or as a substitute for obtaining a warrant in order to seize an item for investigatory purposes."[116]

Such a seizure, which the dissent argued created an interference with Joyce's possessory interests, required a warrant. Thus, the dissent concluded that the absence of such a warrant created a warrantless seizure for investigatory purposes, and that Joyce's

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109. *Id.* The court noted that its analysis was not intended to suggest that the expectation was one which society would recognize as reasonable. That issue was not brought up in Joyce's appellate brief and was not addressed by the appellate court. *Id.* at 878 n.14.

110. *Id.* at 878-79.

111. 466 U.S. 109, 123 (1984) (stating that a search under the Fourth Amendment requires revealment of some private facts about an individual); *see infra* note 136 and accompanying text.

112. *Joyce*, 619 A.2d at 878. Addressing additional issues argued on appeal, the appellate court majority opinion further held that: (1) the trial court was correct in refusing to admit evidence of arson against Joyce's nephew on grounds of relevancy, *id.* at 880-81; and (2) there was sufficient evidence to support a conviction against Joyce, *id.* at 882-83. These two issues were not addressed by the Supreme Court of Connecticut and are outside the scope of this Note.

113. *Id.* at 883 (Heiman, J., dissenting).

114. *Id.* See *supra* note 74 for explanation of the police's community caretaking function.

115. *Joyce*, 619 A.2d at 883.

116. *Id.*

Fourth Amendment rights had been violated.[117]

C. *The Connecticut Supreme Court's Decision*[118]

The Connecticut Supreme Court granted Joyce's petition for certiorari limited to the following issue: "In the circumstances of this case, were the police, while lawfully in custodial possession of the defendant's clothing, required by either the federal or state constitution to obtain a warrant before transferring the clothing to a state laboratory and subjecting it to chemical analysis?"[119]

1. The Majority Opinion

In order to decide whether the results of the chemical analysis of Joyce's clothing should have been suppressed under Connecticut's exclusionary rule,[120] the court was required to decide: "(1)

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117. *Id.* at 884-85. The dissent also criticized the majority's argument that Joyce failed to exhibit an expectation of privacy over the clothing, considering the particular factual circumstances of the case. Judge Heiman characterized it as "somewhat disingenuous and Orwellian" to reason that an accident victim relinquishes his expectation of privacy over clothing that is removed from his person by police and medical personnel, or that the same victim should be required to reassert his expectation of privacy while laying in a hospital bed recovering from a life-threatening accident. *Id.* at 883 n.3.

118. State v. Joyce, 639 A.2d 1007 (Conn. 1994).

119. *Id.* at 1009 n.2. The court suggested that numerous federal opinions have held that the United States Constitution's Fourth Amendment prohibits police from freely searching undamaged property in their community caretaking custody. *See, e.g.*, Walter v. United States, 447 U.S. 649, 654 (1980) (citing *Ex parte* Jackson, 96 U.S. 727 (1877)). However, the *Joyce* court noted that neither the United States Supreme Court, nor any federal circuit, had ever addressed the type of facts presented in *Joyce*, where in addition to being held under the community caretaking function, the property in question was damaged as well. *Joyce*, 639 A.2d at 1011 n.6. Nevertheless, because Joyce claimed a violation of the Connecticut Constitution as well as the United States Constitution, the court stated that its decision only reached the state claim, but not the federal claim. *Id.*

As was noted by the Connecticut Court of Appeals, Joyce failed to analyze and outline his state constitutional claim in his appellate brief. Under such circumstances, the *Joyce* court reaffirmed that it is not bound to review the state claim. *Id.* at 1011-12 (citing State v. Birch, 594 A.2d 972 (Conn. 1991)). The Supreme Court of Connecticut, however, has never precluded itself from reviewing a state constitutional claim omitted in an appellate brief and reasoned that it may do so under the appropriate circumstances. Thus, the *Joyce* court concluded that, under the circumstances of this case, it was appropriate to review the defendant's state constitutional claim. *Id.* at 1012.

120. Connecticut's exclusionary rule is a judicially created policy which prevents the use of evidence that the police obtained in violation of article first, § 7 of the Connecticut Constitution. State v. Dukes, 547 A.2d 10, 17-21 (Conn. 1988) (recognizing such a policy is an effective remedy for enforcement of the constitutional protection against unconstitutional searches and seizures."). *See also* Bruce R. Lockwood, Note, *Connecticut Search & Seizure Law: The Connecticut Supreme Court Should Adopt a Good Faith Exception to the Exclusionary Rule to Article First, Section 7, of the Connect-*

whether there was a reasonable expectation of privacy in the clothing; (2) whether the testing of the clothing at the state laboratory constituted a search; and (3) if so, whether the circumstances of this case fall within a recognized exception to the warrant requirement."[121]

Writing for the majority, Justice Berdon explained that in order to determine whether Joyce had a reasonable expectation of privacy in the clothing, a two-part subjective/objective test must be satisfied, evaluating both whether Joyce manifested a subjective expectation of privacy regarding the clothing and whether society would consider that expectation reasonable.[122]

Justice Berdon's opinion first stated that Connecticut case law has consistently held that a person generally possesses a reasonable expectation of privacy in clothing that he or she wears.[123] The State advanced several arguments, each asserting that the facts of this case created an exception to this general rule and that Joyce's reasonable expectation of privacy had been extinguished, but the *Joyce* majority was unpersuaded by these arguments.[124]

The majority also rejected the State's argument that if the defendant possessed an expectation of privacy, such an expectation was forfeited because he failed to exhibit any manifestation of it.[125] The majority reasoned that to require Joyce to have exhibited his expectation of privacy while he "lay in the hospital near death"

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icut Constitution, 13 BRIDGEPORT L. REV. 387, 388 (1993) (contrasting the Connecticut exclusionary rule with the federal exclusionary rule).

121. *Joyce*, 639 A.2d at 1012-13. For the purposes of its analysis, the court assumed that the police possessed sufficient probable cause at the time of the chemical analysis that Joyce had started the fire. *Id.* at 1013.

122. *Id.* at 1013 (citing State v. DeFusco, 620 A.2d 746, 750 (Conn. 1993) (applying two part subjective/objective standard for determining whether defendant possessed a reasonable expectation of privacy in his garbage placed at the curbside)).

123. *Id.* (citing State v. Mooney, 588 A.2d 145, 155 (Conn.) (police were entitled to seize a homeless person's unattended possessions upon probable cause and preserve them while securing a proper search warrant, but the warrantless search of these possessions was a violation of Fourth Amendment rights), *cert. denied*, 502 U.S. 919 (1991)).

124. *Id.* For example, the State argued that Joyce's conduct of saturating his clothes with gasoline removed any expectation of privacy he may have possessed in them because such conduct exhibited no intent to keep such incriminating evidence private. The majority dismissed this argument, and stated that article first, § 7 protects all citizens, regardless of whether they are intentionally concealing crimes. *Id.* at 1013-14.

The State also argued that any odor of gasoline emanating from Joyce's clothing would eradicate his expectation of privacy, but the majority dismissed this argument since no witnesses had testified that they had smelled gasoline in the clothing. *Id.* at 1014 n.14.

125. *Id.* at 1014.

would be unreasonable and that Joyce's inactivity in no way manifested any intention to surrender his expectation of privacy.[126] The majority concluded that Joyce had "merely left his property behind him, more or less of necessity, making no attempt to discard it or disassociate it from himself."[127]

Justice Berdon additionally refuted an argument, raised later by Justice Callahan in dissent, that defendant's reasonable expectation of privacy in the clothing was necessarily diminished because it was so badly burned and damaged.[128] Justice Berdon reasoned that the physical condition of personal property is immaterial to the ownership of the property and thus irrelevant to whether a suspect possesses an expectation of privacy over such property.[129] The majority found that "[a]lthough the items of clothing tested at the state laboratory were unusable as clothing and reduced to rags, they were still [Joyce's] rags."[130] The court relied upon *State v. Zindros*,[131] which held that the burnt condition of a building following a fire did not diminish an arson suspect's reasonable expectation of privacy in the building.[132] Thus, by analogy, the majority concluded that Joyce did possess a reasonable expectation of privacy in the burnt clothing, thereby entitling him to the protection of the warrant requirement.[133]

Justice Berdon next asserted that the chemical analysis of the clothing performed at the state laboratory constituted a search.[134] He explained that the elaborate process involved in gas chromatography, as evidenced by the detailed testimony of the head of the chemical department at the forensic laboratory, uncovered "private facts" about Joyce.[135] Justice Berdon distinguished such a personal

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126. *Id.* at 1014 n.13 (citing *Mooney*, 588 A.2d at 159-60 ("[N]o element of conduct manifesting a temporary intent to relinquish an expectation of privacy . . . [and] of course, no contrary intent can be inferred from the fact that the police arrested [Mooney] and thus prevented him from returning . . . that night.")).

127. *Id.* at 1014 (quoting State v. Philbrick, 436 A.2d 844, 855 (Me. 1981) (holding that the defendant, who was injured, did not abandon his expectation of privacy in his knapsack when he unintentionally left it behind at the accident scene)).

128. *Id. See infra* notes 146-149 and accompanying text.

129. *Joyce*, 639 A.2d at 1014.

130. *Id.* The court further illustrated this point by noting that Joyce's wristwatch was later found undamaged inside the pocket of his burned shirt. *Id.* at 1014 n.15.

131. 456 A.2d 288 (Conn. 1983), *cert. denied*, 465 U.S. 1012 (1984).

132. *Id.* at 295-96. See *infra* note 152 for further discussion of *Zindros*.

133. *Joyce*, 639 A.2d at 1015.

134. *Id.*

135. To illustrate the "personal nature" of such private facts, the head of the chemistry department of the state forensic laboratory included documentation that the

type of analysis from the field test for cocaine in *United States v. Jacobsen*,[136] which revealed no private facts about the defendant. In addition, Justice Berdon found that, unlike the field test in *Jacobsen*, which indicated the presence of only one substance (cocaine), the chemical analysis performed in *Joyce* was capable of detecting "the presence and identity of many organic substances."[137] Thus, the majority concluded that the chemical analysis of the clothing did constitute a search under article first, section 7 of the Connecticut Constitution.[138]

Finally, Justice Berdon asserted that the search performed on Joyce's clothing could not have been performed legally without a warrant.[139] The majority relied on the established notion that the state constitutional preference requires the police to procure a warrant prior to performing a search.[140] Furthermore, warrantless searches are *per se* unreasonable unless they fall within one of a few specifically established exceptions.[141] Such exceptions are primarily limited to the acknowledged interests in protecting the safety of the police, the safety of the public, or in preventing the destruction of evidence.[142] The majority determined that no exception permitted the warrantless search of Joyce's clothing.[143]

In sum, finding that (1) Joyce possessed a reasonable expecta-

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gas chromatography detected the presence of "an organic material in the defendant's underwear that was not an accelerant." *Id.* at 1015 n.16.

136. 466 U.S. 109, 123 (1984) (holding that a field test which specifically checks for the presence of cocaine, but reveals no private facts about the individual, violates no legitimate expectation of privacy and, therefore, does not constitute a "search" under the Fourth Amendment).

137. *Joyce*, 639 A.2d at 1015 n.17.

138. *Id.* at 1015.

139. *Id.*

140. *Id.* Such a preference is designed to reflect the goal of "protecting citizens from unjustified police intrusions by interposing a neutral decisionmaker between the police and the object of the proposed search." *Id.* (citing State v. Diaz, 628 A.2d 567 (Conn. 1993)).

141. *Id.* at 1016. *See also* State v. Blades, 626 A.2d 273, 278 (Conn. 1993). *See generally* Robert M. Bloom, *Warrant Requirement - The Burger Court Approach*, 53 U. COLO. L. REV. 691 (1982) (stating that the language of the Fourth Amendment of the United States Constitution creates a strong presumption of requiring a warrant).

142. *Joyce*, 639 A.2d at 1016 (citing State v. Miller, 630 A.2d 1315 (Conn. 1993)). *See generally* H. Patrick Furman, *The Exigent Circumstances Exception to the Warrant Requirement*, 20 COLO. LAW. 1167, 1168 (1991).

143. *Joyce*, 639 A.2d at 1016. In a motion to suppress evidence acquired through a warrantless search, the state bears the burden of proving that the particular facts fit into an exception to the warrant requirement. *Id.* at 1016 n.19 (citing State v. Copeland, 530 A.2d 603 (Conn. 1987)). In *Joyce*, the State argued that the "evaporative properties of gasoline" created an exigent circumstance for a warrantless search. *Id.* at 1016 n.19. However, because this argument was not presented to the trial court, the

tion of privacy in his clothing, (2) the chemical analysis of the clothing constituted an unreasonable search, and (3) the circumstances of the case did not fall under a recognized exception to the warrant requirement, the majority concluded that "the chemical analysis of [Joyce's] clothing should have been suppressed as the result of a warrantless search unsupported by exigent circumstance or any other recognized exception to the warrant requirement."[144] Accordingly, the court reversed the judgment of the Appellate Court and remanded the case for a new trial.[145]

2. The Dissenting Opinion

Justice Callahan dissented from the majority opinion because he determined that Joyce did not possess a "reasonable expectation of privacy in the burnt remnants of his clothing."[146] The dissent opined that "any expectation of privacy that [Joyce] may have had in his clothing was diminished by virtue of their condition and their treatment."[147] Justice Callahan reasoned that an expectation of privacy in clothing necessarily diminishes when it has been severely burned and left along a public road.[148] Furthermore, even if Joyce had manifested that he *himself* possessed an expectation of privacy in his burnt clothing, such an expectation would not be recognized *by society* as reasonable.[149]

The dissent criticized the majority's use of *State v. Zindros*.[150] Justice Callahan agreed with the holding in *Zindros*, concluding that a person's expectation of privacy in property does not disappear merely because the property becomes damaged.[151] However, he distinguished the facts of *Joyce* from those of *Zindros*. The *Zindros* court based its conclusion on the facts that Zindros secured and locked the building each time he left it and continued to store valuable merchandise in the building despite its burnt condition.[152]

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majority declined to consider it. *Id.* at 1016 (citing State v. Reagan, 546 A.2d 839 (Conn. 1988), *cert. denied*, 559 A.2d 1139 (1989)).

144. *Joyce*, 639 A.2d at 1017.

145. *Id.*

146. *Id.* at 1017 (Callahan, J., dissenting).

147. *Id.*

148. *Id.*

149. *Id.*

150. 456 A.2d 288 (Conn. 1983), *cert. denied*, 465 U.S. 1012 (1984).

151. *Joyce*, 639 A.2d at 1017 (citing *Zindros*, 456 A.2d at 295-96).

152. *Id.* at 1017-18 (citing *Zindros*, 456 A.2d at 295-96). Zindros had leased the premises in question, which he utilized as a pizza parlor. After the fire, Zindros said he wished to keep the premises because he intended to repair the premises and reopen his business. No action was taken by the owner of the premises to terminate Zindros'

Therefore, although damaged by fire, the building was still functional as a storage place for Zindros' personal belongings. The dissent contrasted this with the facts of *Joyce*, in which the fire had left the clothing unusable[153] and no evidence whatsoever existed that Joyce had expressed or exhibited an interest in the burnt remains.[154]

The dissent further asserted that Joyce's clothing was left on the side of a public road, readily accessible to the public and law enforcement personnel, and that such abandonment "can amount to a loss of any justified expectation of privacy."[155] Thus, the dissent argued that Joyce's actions, or more specifically, his lack of action, resulted in the effective abandonment of his clothing and, accordingly, the forfeiture of his expectation of privacy in the clothing.[156]

Justice Callahan additionally argued that Joyce did not retain a privacy expectation in his burnt clothing "merely because a police officer, rather than a passerby, happened to retrieve the remnants from the roadside."[157] The dissent relied on *State v. DeFusco*,[158] which held that whether or not an expectation of privacy is objectively reasonable "cannot, logically, depend on the source of the intrusion on his or her privacy."[159]

Finally, the dissent maintained that the fact that the clothing constituted incriminating evidence did not by itself create an expectation of privacy in the clothing.[160] Justice Callahan relied upon *Rakas v. Illinois*,[161] in which the United States Supreme Court

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lease, which was paid in full through the end of the month. Zindros testified that he felt he had a right to be on the premises since his rent was paid and that he intended to keep other people out of the building unless they had first gained his permission to enter. *Zindros*, 456 A.2d at 296.

153. *Joyce*, 639 A.2d at 1017-18 (citing State v. Joyce, 619 A.2d 872, 875 n.6 (Conn. App. Ct. 1993)).

154. *Id.* at 1018. The dissent pointed out that Joyce did exhibit a subjective expectation of privacy once the trial began and the results from the chemical analysis were to be introduced into evidence. *Id.* Judge Callahan contrasted this with the fact that Joyce's wallet was retrieved from the police by his wife the day after the fire, clearly exhibiting an immediate expectation of privacy in the wallet. *Id.* at 1018 n.1.

155. *Id.* at 1018 (quoting LAFAVE, *supra* note 35, § 2.6 (Supp. 1994)).

156. *Id. See, e.g.*, Sullivan v. District Court of Hampshire, 429 N.E.2d 335, 338-39 (Mass. 1981) (hospital employee retained no reasonable expectation of privacy in jacket left in public canteen area).

157. *Joyce*, 639 A.2d at 1018.

158. 620 A.2d 746 (Conn. 1993).

159. *Id.* at 753.

160. *Joyce*, 639 A.2d at 1018.

161. 439 U.S. 128 (1978), *reh'g denied*, 439 U.S. 1122 (1979).

noted that society is not prepared to recognize as reasonable a defendant's subjective expectation of privacy in incriminating evidence.[162] Thus, even if Joyce did possess a subjective expectation of privacy, such an expectation is not one which society would recognize as reasonable. In sum, Justice Callahan concluded that Joyce's privacy expectations failed the two prong *Katz* test,[163] and that, accordingly, no warrant should have been required, the search should have been ruled proper, and the evidence from the chromatography should have been admitted.

III. LEGAL ANALYSIS

Both the majority and the dissent in *Joyce* agreed that in order to determine whether an individual possessed a legitimate expectation of privacy, the particular facts of the case must demonstrate that (1) the individual manifested a subjective expectation of privacy and (2) that the expectation is one which society is prepared to recognize as reasonable.[164] The justices of the Connecticut Supreme Court disagreed, however, when they applied the facts in *Joyce* to this rule.

In the most general sense, the majority and dissent disagreed on whether the defendant possessed a protected interest in the burnt clothing.[165] Justice Berdon asserted that the defendant did possess a reasonable expectation of privacy with respect to the clothing,[166] while Justice Callahan claimed that he did not.[167] The justices' opinions diverged on three distinct issues.

First, Justices Berdon and Callahan disagreed as to whether fire-damaged clothing removed from a burn victim's body and left behind at the accident site should be categorically excluded from the protection of article first, section 7. In other words, is Joyce's burnt clothing more analogous to garbage, which can never be the object of a legitimate privacy expectation, regardless of the steps

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162. *Id.* at 143 n.12 (citing Katz v. United States, 389 U.S. 347, 361 (1967)).

163. See *supra* note 29 and accompanying text for discussion of the two prongs of the *Katz* test.

164. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); State v. DeFusco, 620 A.2d 746, 750 (Conn. 1993).

165. The majority and dissent did not disagree that the chemical analysis amounted to a search, and that no exception to the warrant requirement was applicable. These issues, therefore, are not discussed.

166. *Joyce*, 639 A.2d at 1016-17.

167. *Id.* at 1017.

taken by the person in order to manifest a privacy expectation,[168] or to a fire-damaged building, which warrants constitutional protection as long as a legitimate expectation of privacy is demonstrated?[169]

Second, the justices disagreed as to whether a privacy interest in clothing that is damaged in an arson related fire is necessarily lost because the clothing is used as an instrument of crime. In other words, is gasoline saturated clothing analogous to contraband, which can never itself be the object of a legitimate expectation of privacy due to its criminal character?[170]

Finally, assuming that neither of the above categorical characterizations disqualified any legitimate expectation of privacy in the clothing, Justices Berdon and Callahan disagreed as to whether Joyce nonetheless had abandoned the clothing, thereby forfeiting any privacy expectations he may have possessed in it.[171]

A. *Whether Burned Clothing Should Be Categorically Excluded from the Protection of Article First, Section 7*

1. Is Burnt Clothing Analogous to Garbage?

In *State v. DeFusco*,[172] the Connecticut Supreme Court held that a defendant did not have a reasonable expectation of privacy in garbage placed at the curbside for collection.[173] The court reasoned that when garbage is placed at the curb, it generally becomes widely susceptible to invasion from a variety of intruders, such as municipal workers, antique collectors, bottle or coupon redeemers, snoops, vagrants, and animals.[174] Given this common knowledge of

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168. *See, e.g.*, *DeFusco*, 620 A.2d at 753 (no reasonable expectation of privacy in garbage placed at the curbside for pickup).

169. *See, e.g.*, State v. Zindros, 456 A.2d 288, 296-97 (Conn. 1983) (holding that the lessee of a building sufficiently demonstrated that he still possessed a legitimate expectation of privacy in the building eleven days after it was destroyed by fire), *cert. denied*, 465 U.S. 1012 (1984).

170. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 123 (1984) (holding that a test that indicates the presence of cocaine does not violate a legitimate expectation of privacy); Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) (noting that society is not prepared to recognize an expectation of privacy in incriminating evidence).

171. *See, e.g.*, State v. Mooney, 588 A.2d 145, 159 (Conn.) (stating that abandonment of an expectation of privacy requires the relinquishment of that expectation in the object in question), *cert. denied*, 502 U.S. 919 (1991); State v. Philbrick, 436 A.2d 844, 854-55 (Me. 1981) (holding that an injured defendant did not abandon his expectation of privacy in his knapsack when he unintentionally left it behind at the accident scene).

172. 620 A.2d 746 (Conn. 1993).

173. *Id.* at 753.

174. *Id.* at 752 (citing California v. Greenwood, 486 U.S. 35, 40 (1988) (prior to

the high susceptibility of such property to invasion, the Connecticut Supreme Court determined that individuals cannot possess a reasonable expectation of privacy in their curbside garbage.[175]

Although the argument was not directly addressed by the opinions in *Joyce*, it is worth noting that Joyce's burnt clothing, left on the side of a public road, was susceptible to the same invasions outlined by the court in *DeFusco*. Specifically, prior to being picked up by the police, the discarded clothing was readily available to intrusion by either passersby or animals.

To argue that the clothing's susceptibility to invasion was enough to divest the defendant of a reasonable expectation of privacy, however, misapplies *DeFusco*. The language used by the *DeFusco* court states that its holding applies to "garbage placed at the curb for collection."[176] The fact that the property was located at the curbside, therefore, provided notice to others that it was indeed garbage.[177] The *DeFusco* court stated, in fact, that changes in the location of the garbage would raise issues beyond the scope of its holding.[178] Thus, the fact that Joyce's clothing was not placed at the curbside, nor any other location that, by itself, would categorize the property as garbage, distinguishes it from the property in

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DeFusco, the United States Supreme Court reached a nearly identical holding when presented with a set of facts)).

175. *Id.* at 753. The New Jersey Supreme Court, in contrast, has held that curbside garbage should receive protection against warrantless police searches. *See* State v. Hempele, 576 A.2d 793, 804 (N.J. 1990) (holding that individuals may reasonably possess a different expectation of privacy with respect to police as compared to other intruders).

The California Supreme Court similarly held in favor of a warrant requirement in People v. Krivda, 486 P.2d 1262 (Cal. 1971) (en banc) (holding that an individual possesses a reasonable expectation that police officers will not rummage through their garbage without a warrant), *vacated*, 409 U.S. 33 (1972), *reh'g denied*, 409 U.S. 1068 (1972), but its decision has been weakened by an amendment to the California Constitution which limits a criminal defendant's protection against unreasonable searches and seizures to the level afforded by the federal constitution. *See* Gerald F. Uelmen, *The California Constitution After Proposition 115*, *in* 3 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 33, 40 (1990).

A minority of states have required warrants as a result of unique constitutional provisions. *See, e.g.*, State v. Boland, 800 P.2d 1112, 1115 (Wash. 1990) (en banc) (holding that a warrantless search of trash violated article first, § 7 of the Washington Constitution, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law"). Warrants have also been required due to the particular circumstances of the case presented. *See, e.g.*, State v. Tanaka, 701 P.2d 1274 (Haw. 1985) (warrant required when police trespassed across individual's property to seize garbage).

176. *DeFusco*, 620 A.2d at 752.

177. *Id.* at 748.

178. *Id.* at 752.

DeFusco. In addition, the physical appearance of the property in question in *DeFusco*, i.e., closed plastic bags, could leave little doubt to a passerby that the intent was to throw it away. The appearance of the burnt clothing in *Joyce*, however, afforded a less clear indication of the owner's intentions to an observer. In other words, the burnt appearance did not necessarily indicate that the clothing was intended to be garbage. For example, an individual may place great sentimental value on burnt clothing as a memento of some significant event, such as the survival of a fire or the death of a loved one. To this "sentimental owner," the burnt condition of the clothing certainly does not render the property as garbage.

Therefore, although susceptible to the same types of invasions, the distinct locations of the property in question, the dissimilar physical characteristics, and the uncertainty of its value to its owner removes the burnt clothing from the exception allowing the warrantless search and seizure of garbage. Burnt clothing may indeed be reduced to little more than garbage, but nonetheless it is distinct from the Connecticut Supreme Court's intended meaning of "garbage" in *DeFusco*.[179]

2. Is Burnt Clothing Analogous to a Fire-Damaged Building?

The most significant divergence between the majority and dissenting opinions in *Joyce* surrounds whether the burnt and damaged condition of the clothing necessarily diminished any expectation of privacy that Joyce may have possessed in them. In other words, can an individual reasonably possess a legitimate expectation of privacy in burnt clothing?

Justice Berdon answered this question in the affirmative, placing greater significance on the property interest in the clothing than on its condition.[180] In other words, the *Joyce* majority essentially equated ownership of property with an expectation of privacy, suggesting that Joyce's ownership of the burnt clothing was dispositive of the argument that its burnt condition did not diminish Joyce's reasonable expectation of privacy over it. This argument, however, is a *non sequitur*. Courts have held, for example, that a person who possesses an ownership interest in a particular piece of property

179. *See, id.* at 752-53.

180. State v. Joyce, 639 A.2d 1007, 1014 (Conn. 1994) ("Although the items of clothing . . . were unusable as clothing and reduced to rags, they were still the defendant's rags."). *Id.*

does not necessarily possess a reasonable expectation of privacy in that same property.[181] For example, individuals never possess a reasonable expectation of privacy in property located in open fields,[182] regardless of the person's ownership interest in the property. Ownership is only one of many factors to consider when evaluating an expectation of privacy in property. Therefore, Justice Berdon's emphasis on ownership seems misplaced, and the more appropriate question is whether the clothing falls under a categorical exception where no reasonable expectation of privacy can be recognized.

In *State v. Zindros*, the Connecticut Supreme Court held that an individual maintained an expectation of privacy in a burned-out building.[183] The *Joyce* majority relied on *Zindros* to show that fire damage does not diminish an individual's expectation of privacy in that property.[184] Such a broad application of *Zindros*, however, was heavily criticized by the *Joyce* dissent.[185] Justice Callahan distinguished *Zindros* from *Joyce* by arguing that the damaged building in *Zindros* was still useful as a storage facility.[186] Furthermore, Zindros manifested his expectation of privacy in the building after the damage occurred by continuing to lock the building each time he left it.[187] In contrast, the clothing in *Joyce* was rendered unusable[188] by the fire, and Joyce did nothing to exhibit any expectation of privacy in the clothing.[189]

The burnt clothing in *Joyce* is more analogous to the burnt

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181. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 106 (1980); United States v. Thomas, 864 F.2d 843, 845 (D.C. Cir. 1989); State v. Mooney, 588 A.2d 145, 158 (Conn.), *cert. denied*, 502 U.S. 919 (1991). For a discussion on how property rights are related to Fourth Amendment rights, see Steinberg, *supra* note 14, at 1521-23.

182. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 179 (1984) (United States Supreme Court held that society has no interest in protecting the privacy of property located in an open field setting); *Mooney*, 588 A.2d at 152.

183. 456 A.2d 288, 295-96 (Conn. 1983), *cert. denied*, 465 U.S. 1012 (1984). *See supra* note 152 and accompanying text.

184. *Joyce*, 639 A.2d at 1014-15. A related issue arose recently State v. Bernier, No. CR 1871493 (Conn. Super. Ct. Dec. 22, 1995), *reprinted in* 2 CONN. OPS. 98 (January 29, 1996), in which the Connecticut State Police, without procuring a search warrant, used a trained dog to detect accelerants in charred floor sections of the defendant's fire-damaged home. The judge, relying heavily on *Joyce*, found that the State violated the defendant's reasonable expectation of privacy in his living room floor. *Id.* For a discussion of how *Bernier* relates to *Joyce*, *see generally* Lucia J. Wolgast, *Seize But Don't Test Without a Warrant*, 2 CONN. OPS. 89 (January 29, 1996).

185. *Joyce*, 639 A.2d at 1017-18 (Callahan, J., dissenting).

186. *Id.* at 1018.

187. *Id.* See *supra* note 152 for a description of the facts of *Zindros*.

188. State v. Joyce, 619 A.2d 872, 875 (Conn. App. Ct. 1993).

189. *Joyce*, 639 A.2d at 1018.

building in *Zindros* than Justice Callahan suggested. In his description of Joyce's clothing as "no longer usable as such,"[190] Justice Callahan was probably referring to its lack of usefulness as a wearable garment. However, this characterization of the "use" of clothing may have been too narrow. For example, clothing may additionally be used for the temporary storage of one's personal belongings, such as money, keys, handkerchiefs, etc. Indeed, the defendant's shirt, in *Joyce*, albeit burnt and torn, contained a working wristwatch in its pocket when entered into evidence at trial.[191] Thus, although damaged (and presumably no longer wearable), the clothing still offered a valuable use to the defendant as a personal depository. This is similar to the burnt building in *Zindros*, which in the words of Justice Callahan, "was being used as a depository for [Zindros'] personal property."[192]

Of course, even clothing's potential use as storage could be lost if it were severely or totally burned severely.[193] For example, if clothing is reduced to a mere pile of ashes, it would seem unreasonable to argue that such "clothing" retained any practical use. Such complete destruction seems analogous to the uselessness that is frequently attached to completely incinerated buildings. For example, in *Michigan v. Clifford*,[194] Justice Powell stated that as long as the reasonable expectations of privacy remained in a burnt building, a search of such a fire-damaged building required a warrant.[195] Justice Powell's initial caveat suggests that this rule would not apply absent an expectation of privacy in the building. A building reduced to a pile of ashes, therefore, would not receive protection under *Clifford*; any claim of an expectation of privacy would be deemed unreasonable.[196]

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190. *Id.* (Callahan, J., dissenting). Consistent with Justice Callahan's description, the trial court had described the clothing as "torn [and] unusable" at the motion to suppress hearing. *Joyce*, 619 A.2d at 875 n.6.

191. *Joyce*, 639 A.2d at 1014 n.15.

192. *Id.* at 1018 (Callahan, J., dissenting). In *Zindros*, the defendant continued to store approximately $6750 worth of merchandise in the burned out building. State v. Zindros, 456 A.2d 288, 296 (Conn. 1983), *cert. denied*, 465 U.S. 1012 (1984).

193. However, as discussed previously, even severely burned clothing could retain some sentimental value to its owner despite its lack of "practical usefulness."

194. 464 U.S. 287 (1984).

195. *Id.* at 292-93. *See also*, Michigan v. Tyler, 436 U.S. 499, 511-12 (1978) (requiring a warrant to search burned-out house anytime after the initial entry to extinguish the fire).

196. *See* LAFAVE, *supra* note 35, § 10.4 ("fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, regardless of the owner's subjective expectations").

In sum, a burned-out building seems to become divested of an expectation of privacy when it is so badly burned that it ceases to exist as a building. Accordingly, it follows that clothing also becomes divested of an expectation of privacy when it ceases to exist as clothing. In his dissent in *Joyce*, Justice Callahan argued that the clothing was burned to a point of uselessness,[197] but a broader viewpoint of clothing's potential uses suggests that it may not have been.[198]

B. *Whether an Expectation of Privacy in Clothing That Is Damaged in an Arson Related Fire Is Necessarily Lost Because the Clothing Is Used as an Instrument of Crime*

In the final words of his dissent, Justice Callahan stated that "an expectation of privacy does not attach to property merely because it may constitute incriminating evidence."[199] Although the *Rakas v. Illinois* holding was intended to apply to a defendant's standing,[200] Justice Callahan's attempt to equate *Joyce* with *Rakas* raises an interesting question: Is gasoline saturated clothing analogous to contraband, which can never itself be the object of a legitimate expectation of privacy due to its instrumentality to a crime?[201]

Although the gasoline saturated clothing in this case was similar to illegal drugs due to its value as evidence of criminal activity, the parallel ends there. Unlike drugs, Joyce's clothing itself was not the instrument of any crime. Presumably, Joyce did not intend to use his clothing to facilitate an illegal act, i.e., burn the house down. It is much more likely that gasoline, which was used to burn the house, spilled onto the clothing accidently. Thus, while the gasoline may have been an instrument of crime, Joyce's clothing was not. Accordingly, Joyce's clothing was not divested of its constitutional protection due to any criminal instrumentality.

Similarly, the term "contraband" itself indicates a significant

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197. *See supra* note 190 and accompanying text.

198. *See supra* note 191 and accompanying text.

199. State v. Joyce, 639 A.2d 1007, 1018 (Conn. 1994) (Callahan, J., dissenting) (citing Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)) (noting that society is not prepared to recognize as reasonable an expectation of privacy in incriminating evidence).

200. *Rakas*, 439 U.S. at 143 n.12.

201. The United States Supreme Court has determined that an individual cannot possess an expectation of privacy in illegal contraband itself. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 123 (1984) (a test which indicates the presence of cocaine does not violate a legitimate expectation of privacy); United States v. Place, 462 U.S. 696, 707 (1983) (no expectation of privacy in cocaine detected by canine sniff).

distinction between it and gasoline soaked clothing. Simply possessing contraband is illegal. Possession of gasoline soaked clothing, in contrast, is not. Automobile mechanics, for instance, certainly spill gasoline on their clothing on occasion, but possession of such property in no way indicates criminal activity. Simply stated, gasoline is not contraband. Thus, the gasoline saturated clothing in *Joyce* is clearly distinguishable from the cocaine in *United States v. Jacobsen*[202] and *United States v. Place*,[203] and the guns in *Rakas v. Illinois*,[204] all of which the Supreme Court determined incapable of being the object of a legitimate expectation of privacy.[205] Thus, even if the gasoline contained in the clothing indicates criminal behavior, such an intimation does not divest the clothing's owner of an expectation of privacy in it.

C. *Whether Joyce Forfeited His Expectation of Privacy Through Abandonment*

To test whether property has been abandoned, it must be determined whether the owner or possessor relinquished his expectation of privacy in the property.[206] Once abandonment is established, the law holds that no warrant is required for the police to search or seize the property.[207] As previously discussed, the clothing in *Joyce* was not divested of Joyce's expectation of privacy by virtue of its location or condition. The question remains, however, whether Joyce relinquished his expectation of privacy by some other factual circumstance.

First, Joyce may have relinquished his expectation of privacy when he allowed his clothing to be removed from his body. In *Hester v. United States*,[208] the United States Supreme Court stated that no warrant is required for the police to seize property that is "aban-

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202. *Jacobsen*, 466 U.S. at 123.

203. *Place*, 462 U.S. at 707.

204. *Rakas*, 439 U.S. at 143 n.12.

205. *See supra* note 201.

206. *See* State v. Mooney, 588 A.2d 145, 158-59 (Conn.), *cert. denied*, 502 U.S. 919 (1991). See *supra* part I.C.2 for detailed discussion of *Mooney*.

207. *See, e.g.*, Abel v. United States, 362 U.S. 217, 241 (1960) (holding that defendant's papers discovered in the wastebasket of his vacated hotel room were not protected by the Fourth Amendment). *See also* Steinberg, *supra* note 181, at 1529 ("One cannot manifest a reasonable expectation of privacy in an item once it has been abandoned."); Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFF. L. REV. 399, 400 (1971) ("[W]here one abandons property, he is said to bring his right of privacy therein to an end . . . .").

208. 265 U.S. 57 (1924) (Fourth Amendment did not prohibit police from secur-

doned" by a defendant.[209] *Hester*, however, is distinct from *Joyce* in two significant ways. First, Joyce's clothing was removed in order to treat an injury. Thus, the intention in removing the clothing was not to rid Joyce of his property, but to attend to his wounds.[210] Second, Joyce's clothing was removed by a third party,[211] not by Joyce himself.[212] Although Joyce was apparently conscious and did not resist the removal of his burnt clothing by paramedics,[213] it seems a stretch to argue that he made a cognizant decision to relinquish any expectation of privacy he may have had in his clothing.[214] In this way, *Joyce* is similar to *State v. Philbrick*,[215] in which the Supreme Judicial Court of Maine held that an accident victim did not forfeit his reasonable expectation of privacy in his unintentionally abandoned knapsack. The *Philbrick* court reasoned that the defendant had not intended "to discard it or disassociate [the knapsack] from himself."[216] In the same way, Joyce did not *intend* to disassociate his burnt clothing from himself either. Accordingly, he did not forfeit, or abandon, his expectation of privacy in the clothing.

An alternative argument for abandonment, raised in Justice Callahan's dissent, is that Joyce did not exhibit any interest in the burnt clothing until the laboratory results were about to be introduced into evidence.[217] Thus, Joyce in no way manifested a subjective expectation of privacy. It seems unfair, however, to apply this argument in this case, because public policy brands it unreasonable to require a person to affirmatively manifest an expectation of pri-

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ing a bottle after suspect dropped it), *overruled on other grounds by* United States v. Oliver, 657 F.2d 85 (6th Cir. 1981).

209. *Id.* at 58 ("[T]here was no seizure in the sense of the law when the officers examined the [property] after it had been abandoned.").

210. State v. Joyce, 619 A.2d 872, 875 n.5 (Conn. App. Ct. 1993). The paramedic who treated Joyce explained that the burnt clothing was removed to prevent it from sticking to the open blisters and third degree burns and to prevent infection from the dirty lake water.

211. *Id.* at 875.

212. *Contra Hester*, 265 U.S. at 58 ("The defendant's own acts, and those of his associates, disclosed the [property].").

213. *Id.*

214. The *Joyce* majority rejected the State's abandonment argument on grounds of public policy, noting that it would be unreasonable to require Joyce to express some expectation of privacy when his clothes were being removed from his body by paramedics for medical reasons or while he lay in the hospital immediately thereafter. State v. Joyce, 639 A.2d 1007, 1014 n.13 (Conn. 1994).

215. 436 A.2d 844, 855 (Me. 1981).

216. *Id.*

217. *Joyce*, 639 A.2d at 1018 (Callahan, J., dissenting).

vacy in his property while in a hospital recovering from injury.[218]

Justice Callahan's argument becomes more plausible, however, in light of the fact that Joyce not only failed to manifest a privacy expectation while in the hospital, but also during the months following his release and right up until the moment of trial.[219] Ultimately, however, this argument must fail, for the legality of a search cannot depend upon what happens after the search has concluded. To allow this would create a standard impossible for police to follow and would thus undermine the warrant requirement. The Connecticut Supreme Court imposes a strong preference for warrants, reflecting a goal of "protecting citizens from unjustified police intrusions by interposing a neutral decisionmaker between the police and the object of the proposed search."[220]

CONCLUSION

The defendant in *Joyce* did indeed possess a protected interest in the burnt clothing under article first, section 7 of the Connecticut Constitution. In determining whether the "owner" of burnt clothing maintained a legitimate expectation of privacy, burnt clothing is analogous to a burned-out building in that the severity of the damage is significant in evaluating whether the owner possesses an expectation of privacy in the remains of the clothing. It is distinguishable from garbage in that the physical condition or location of the burnt clothing does not necessarily divest its owner of any possible legitimate expectation of privacy. Thus, barring the total destruction of the clothing, which would make any expectation of privacy objectively unreasonable, or the absolute relinquishment of any subjective expectation of privacy by the owner, article first, section 7 requires the police to obtain a warrant before they can

218. In his dissent to the appellate court decision, Judge Heiman went as far as to label such a requirement "Orwellian." State v. Joyce, 619 A.2d 872, 883 n.3 (Conn. App. Ct. 1993) (Heiman, J., dissenting).

219. *Joyce*, 639 A.2d at 1018 (Callahan, J., dissenting). Justice Callahan bolsters his argument by noting that although no attempt was made to pick up the clothes from the police station, Joyce's wife did pick up his wallet the day after the accident. *Id.* at 1018 n.1. Presumably, Justice Callahan's argument infers that Joyce's wife's failure to pick up the burnt clothing while she was already at the police station retrieving her husband's other personal property constituted an abandonment of the clothing on Joyce's behalf. However, while such an abandonment argument does possess a logical flow, it nonetheless rests on a far broader application of third party consent than the United States Supreme Court has warranted. *See* United States v. Matlock, 415 U.S. 164 (1974).

220. *Joyce*, 639 A.2d at 1015 (quoting State v. Miller, 630 A.2d 1315, 1324 (Conn. 1993)).

submit burnt clothing to chemical analysis. The damaged nature of the clothing does not render it unprotected.

This rule holds true even when police legally secure burnt clothing in a lawful manner pursuant to their community caretaking function. The community caretaking function provides the police with only limited custodial rights and cannot be used as a substitute for procuring a valid warrant. Thus, when the police in *Joyce* transported the clothing to the forensic laboratory for chemical analysis, they effectively removed their caretaking hats and replaced them with those of criminal investigators. The Connecticut Constitution requires a search warrant to be procured before such investigatory activities may take place, and the police's failure to do so must result in the suppression of such evidence.

Andrew S. Golden