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FLA. STAT. § 806.01: FLORIDA ARSON LAW—THE EVOLUTION OF THE 1979 AMENDMENTS

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The Florida Arson Law, which became effective on June 1, 1979, is a significant departure from both common law arson and prior Florida arson laws. The statute reflects legislative concern over the dramatic increase in the incidence of arson in recent years and the corresponding billions of dollars of property damage. The new Florida law deals with the arsonist firmly. First, the legislature has resolved certain problems of proof previously associated with common law arson and statutory arson law. Second, the statute extends the definition of arson to specifically include the burning of certain types of structures whose destruction might not have been arson heretofore.

Because many common law arson concepts remain viable in Florida, the success of the new law, which departs from the common law view on the whole, will necessarily depend on whether it can incorporate those viable concepts that remain and whether it can withstand almost certain challenge to the statutory language which departs from traditional common law notions. This comment will examine the relationship of the new Florida Arson Law to applicable common law and will analyze the legislative intent behind the statutory changes.

I. COMMON LAW AND EARLY STATUTORY CONCEPTS

Common law arson in Florida was defined as "the willful and malicious burning of the dwelling house of another." Because arson was viewed as a crime against the security of habitation rather than as a crime against the property itself, a dwelling house was the only type of structure whose burning could be arson. Recognizing that a fire set to certain outbuildings could extend to the dwelling and thereby endanger that habitation, the common law

1. Ch. 79-108, §§ 1, 2, 1979 Fla. Laws 470 (codified at Fla. Stat. §§ 806.01, .111 (1979)).
2. From 1964 to 1977 the number of incendiary and suspicious fires in the United States more than tripled. In addition to the billions of dollars in property damage caused annually by arson, one estimate places indirect costs at $10 billion as a result of tax losses and higher insurance premiums. New Tactics in the Battle Against Fires for Profit, U.S. News & World Rep., September 5, 1977, at 31.
expanded the arson definition to include buildings within the curtilage of the dwelling house.\textsuperscript{5} \textit{Sawyer v. State}\textsuperscript{6} illustrates the early Florida position on arson. In \textit{Sawyer}, the defendant set fire to a house owned by his father so that his father could collect the resulting insurance proceeds. The court noted that the state alleged ownership rather than physical possession of the house in the information charging the defendant with arson.\textsuperscript{7} The court rationalized that the allegation of mere ownership failed to show the house as a place of habitation for human occupancy; absent an allegation of physical possession, the house could not have been characterized as a dwelling. Thus, no arson had been alleged under the common law definition.\textsuperscript{8} The defendant's conviction was accordingly reversed.

Under the common law rationale of the \textit{Sawyer} court, the occupant of a burned house was considered its true owner instead of the person owning legal title.\textsuperscript{9} Under this rule, landlords could have been found guilty of arson if they burned their own property while the dwelling was occupied by tenants. Tenants, on the other hand, would not have been found guilty of arson for burning the rental house in which they resided because a tenant would be considered the owner of the property under the common law rule.\textsuperscript{10}

Historically, Florida's arson laws have generally adhered to the common law concepts. The first statutory arson law in Florida, however, did depart from the common law. In that statute, the legislature deleted the traditional requirement that the arsonous act be aimed toward the property of another.\textsuperscript{11} Despite the broad defi-

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5. Cohn, \textit{Convicting the Arsonist}, 38 J. CRIM. LAW 286 (1947). Although the term has been the subject of many varied judicial interpretations, curtilage was generally defined by an Alabama court to be "the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes." \textit{Holland v. State}, 65 So. 920 (Ala. Ct. App. 1914). In \textit{Holland} a burned "buggy shelter" was determined to be outside the curtilage because of its separation from the dwelling by a public highway. The court then decided that the question of whether an outbuilding was within or outside of the curtilage need not go to the jury but could be decided by the court as a matter of law. \textit{Id.} For an excellent discussion of early judicial determinations of the status of various outbuildings, see A. \textit{Curtis}, \textit{supra} note 4, at §§ 18-27.

6. 132 So. 188 (Fla. 1931).

7. \textit{Id.} at 193.

8. \textit{Id.} Although the court held that a house converted to uses other than human habitation would lose dwelling status, it noted that a temporary absence coupled with an intent to return would not result in such a loss. \textit{Id.}

9. \textit{See id.; see also A. \textit{Curtis} supra, note 4, at § 3.}


11. This law provided: "Section 1. Whoever wilfully and maliciously burns the dwelling house, or any building adjoining such dwelling house, or wilfully and maliciously sets fire to
nition of arson provided by this early law, Florida courts have been unable to decide whether the burning of one's own property is arson. For instance, the court in *Hicks v. State*\(^\text{12}\) noted in dicta, "It may be that a person cannot be punished under this section for burning his own dwelling house . . . but that question . . . will not now be decided." In another case, *Love v. State*,\(^\text{13}\) the Florida Supreme Court considered the constitutionality of a statute which specifically stated that a person burning any dwelling house would be guilty of arson, whether the house "was property of himself or another."\(^\text{14}\) The court upheld the constitutionality of the statute but stated that "the mere burning, per se, of one's own property is not made a crime."\(^\text{15}\) According to the court, whether one is guilty of arson for burning his own property depends on whether the fire is set with a willful and malicious intent.\(^\text{16}\)

Both the common law\(^\text{17}\) and the new Florida statute presumes that all fires are caused by accident, negligence, or natural causes. To overcome this presumption the state has to prove that the fire was the result of some willful and malicious intent.\(^\text{18}\) The *Love* court noted that this type of intent was present in "an act done with a condition of mind that shows a heart regardless of social duty and bent on mischief, evidencing a design to do an intentional wrongful act toward another, or toward the public, without any legal justification or excuse . . . even though [the dwelling] belonged to the perpetrator."\(^\text{19}\)

The requirement of willfulness only means that the alleged ar-

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\(^{12}\) 29 So. 631, 632 (Fla. 1901). Hicks was charged under ch. 4, § 2426, 1892 Fla. Laws 783 (current version at Fla. Stat. § 806.01 (1979)), which contained language virtually identical to the first Florida law relating to arson.

\(^{13}\) 144 So. 843 (Fla. 1932).

\(^{14}\) *Id.* (quoting ch. 15603, § 1, 1931 Fla. Laws 1047 (current version at Fla. Stat. § 806.01 (1979))).

\(^{15}\) 144 So. at 843-44.

\(^{16}\) *Id.* at 844.

\(^{17}\) See, e.g., Williams v. State, 54 S.E. 661, 661 (Ga. 1906); Giles v. State, 96 S.E.2d 317, 318-19 (Ga. Ct. App. 1956); Sims v. State, 79 S.E. 1133, 1134 (Ga. Ct. App. 1913). See also Flynn, Proof of the Corpus Delecti in Arson Cases, 45 J. Crim. Law 185, 186 (1954). Although the presumption may carry greater weight in more populated areas, where a fire is more likely to be accidental, nevertheless, the presumption holds for fires in less populated areas. A. CURTIS, supra note 4, at § 282.


\(^{19}\) 144 So. at 844.
sonist must have started the fire intentionally.\textsuperscript{20} Such an intent is almost always established by a thorough arson investigation and the expert testimony of the investigator.\textsuperscript{21} Maliciousness, on the other hand, may be much harder to establish. While a willful intent to burn is directed against a piece of property, the word "malice" conveys a sense of ill feeling toward a person.\textsuperscript{22} Some courts have avoided the problem of proving a malicious intent by inferring malice whenever the state proves that the fire was started intentionally.\textsuperscript{23} Courts theorize that since property must be occupied to constitute arson, the arsonist's intentional act of setting a dwelling on fire allows an inference of malice against the occupant.\textsuperscript{24}

Despite the boldness displayed by the \textit{Love} court in defining malice,\textsuperscript{25} its opinion typifies the confusion which has plagued courts since the advent of statutory arson. The \textit{Love} court stated that sufficient evidence existed to indicate that Love had burned his own insured property and concluded that the evidence might support a charge of burning to defraud an insurer.\textsuperscript{26} The court chose to reverse Love's arson conviction, however, on the grounds that the evidence was insufficient to prove that the defendant had a malicious intent to commit arson.\textsuperscript{27}

\begin{footnotesize}
\begin{enumerate}
\item[20.] Cohn, \textit{supra} note 5, at 287; see State v. Mutschler, 212 N.W. 832 (N.D. 1927). A recent Washington case, State v. Nelson, 561 P.2d 1093, 1095 (Wash. Ct. App. 1977), noted that specific intent is not an element of arson. Thus, a general intent or guilty knowledge that the act committed was wrong is all that is required.
\item[21.] See Gwertzman, \textit{Arson and Fraud Fires}, 12 \textit{FORUM} 827, 829-35 (1977). Gwertzman points out several factors which would indicate that a fire has been intentionally set: (1) quick headway of a fire in a modern building; (2) proof of multiple origins of the fire; (3) color of the smoke, which may indicate the use of a combustible material not normally kept in the building; and (4) color of the flame which would show the fire's intensity and indicate what type of accelerant, if any, was used. \textit{Id.} at 829.
\item[22.] A. \textit{CURTIS}, \textit{supra} note 4, at § 71.
\item[23.] See, \textit{e.g.}, Morris v. State, 27 So. 336 (Ala. 1900). The Morris court affirmed the defendant's conviction of arson and held that, although malice is an essential ingredient of proof, its presence will be presumed from the deliberation of the act and it need not be specifically proven. \textit{Id.} at 337. See also Cohn, \textit{supra} note 5, at 287; Stevens, \textit{Evidence of Arson and Its Legal Aspects}, 44 \textit{J. CRIM. LAW} 817, 819 (1954).
\item[24.] See Morris v. State, 27 So. 336 (Ala. 1900); see also A. \textit{CURTIS}, \textit{supra} note 4, at § 71.
\item[25.] 144 So. at 843-44.
\item[26.] \textit{Id.} at 844. Ch. 15602, 1931 Fla. Laws 1046 provided: "Section 1. BURNING TO DEFRAUD THE INSURER—Any person who wilfully and with intent to injure or defraud the insurer sets fire to or burns . . . any building, structure or personal property . . . whether the property of himself or of another . . . shall be guilty of a felony . . . ." (current version at \textit{FLA. STAT.} § 817.233 (1979)). At present, the crime of burning to defraud an insurer is only a third degree felony. Thus, if the state fails to prove the requisite intent, the defendant is given a less severe punishment.
\item[27.] 144 So. at 843. The holding in King v. State, 199 So. 38 (Fla. 1940), emphasizes the
\end{enumerate}
\end{footnotesize}
A severe disparity exists between the *Love* court's holding and the obvious legislative intent that those who burned their own property be subjected to an arson conviction under certain conditions. In 1975, the First District Court of Appeal in *Gould v. State* relied on *Love* to reverse an arson conviction, stating that substantial evidence to prove maliciousness was lacking. The court concluded that even though Gould had hired a person to burn his house in order to defraud his insurer, the evidence was insufficient to prove that Gould had a malicious intent to commit arson. The continuing problem exemplified by *Love* and *Gould* led the 1979 Florida Legislature to remove malicious intent as an element of statutory arson.

The problem of defining arson also arises in the context of the arsonous destruction of institutions, particularly jails or prisons. At common law the burning of institutions generally did not constitute arson. If, however, someone other than an inmate occupied a jailhouse as a dwelling, a valid case of arson would exist. Gradually, a variety of statutory provisions were enacted which established that the burning of jails could be arson. Often a statute would simply forbid the burning of "a building," thus circumventing the common law rule that the burned structure must be a dwelling. Since the language of these provisions was similar to

[separate nature with which the two crimes have been traditionally viewed. King had been tried and acquitted of arson prior to the filing of the information charging him with burning to defraud, the conviction of which he appealed. He claimed his acquittal of arson prohibited the state from filing the subsequent charge because it put him in double jeopardy. The court, noting that the crimes were separate and distinct, found no possibility of double jeopardy and affirmed his conviction. *Id.* at 40.]

27. *Id.* See also King v. State, 199 So. 3d (Fla. 1940); D'Allessandro v. Tippens, 133 So. 332 (Fla. 1931).
28. Fla. Stat. § 806.01 (1979). The alleged arsonist must act "willfully and unlawfully" as opposed to "willfully and maliciously."
29. *A. Curtis,* supra note 4, at §§ 32-34.
30. *See id.; Crow v. State, 189 S.W. 687, 688 (Tenn. 1916) (construing a Tennessee statute).* The first Florida law which deviated from the traditional notion was enacted in 1868. It read: "Section 2. Whoever wilfully and maliciously burns in the night time a meeting house, church, court house, town house, college, academy, jail, or other buildings erected for public use... shall be punished by imprisonment in the State penitentiary..." Ch. 1637, subch. 4, 1868 Fla. Laws 70 (current version at FLA. STAT. § 806.01 (1979)).

Although no Florida court has discussed the issue, early cases from other states were divided as to whether a person who set fire to a jail in order to escape possessed the requisite intent to commit arson. The advent of statutory arson induced most courts to find intent to commit arson when such a burning occurred. *See A. Curtis,* supra note 4, at § 61 nn.27 & 28. The Texas case of Smith v. State, 5 S.W. 219 (Tex. Ct. App. 1887), is indicative. In *Smith* a prisoner set fire to the ceiling and roof of a jailhouse. The Texas court held that
that of the basic arson statute, the problem of proving malicious intent remained.

A basic requirement at common law and in most jurisdictions today is that some actual damage must result from a burning for arson to exist.\textsuperscript{33} Most courts have interpreted this rule as requiring that the fire consume some part of the building.\textsuperscript{34} Florida attempted to eliminate the damage issue early on with a statute stating: "Any person who wilfully and maliciously sets fire to or burns or causes to be burned . . . any dwelling . . . shall be guilty of Arson, in the First Degree . . . ."\textsuperscript{35} The court in \textit{Hurst v. State}\textsuperscript{36} rationalized that this statute was written to forbid two different acts: "burning" and "setting fire to." The defendant in \textit{Hurst} challenged his conviction on the grounds that the state had failed to show that he had both set fire to the building and had caused it to burn. The Florida Supreme Court affirmed the trial court's decision stating that "the proof of the commission of either act would be sufficient to warrant conviction."\textsuperscript{37}

In light of the common law rule that the fire must damage the structure itself, setting fire to personal property contained in a building could not constitute arson unless the fire spread to the building.\textsuperscript{38} As the Alabama Supreme Court noted in \textit{Washington v. State}, "It is a cardinal principle of the law of arson that some part of the building must actually be burned or consumed, in order for the offense to be complete."\textsuperscript{39} Under the enunciated rule, the \textit{Washington} court held that evidence of even the slightest burning of a window sill was sufficient to take the case to the jury.\textsuperscript{40}

A similar problem may arise where a building is damaged by a bomb but is not actually burned. Since the result does not meet the traditional burning requirement, the bombing could not be considered arson. In order to avoid this difficulty, many states have statutorily defined arson to include injury to property resulting

\begin{footnotesize}
34. See id.
35. Ch. 15603, § 1, 1931 Fla. Laws 1047 (emphasis added) (current version at FLA. STAT. § 806.01 (1979)).
36. 160 So. 355 (Fla. 1935).
37. Id. at 356.
38. See, e.g., Washington v. State, 276 So. 2d 587, 589 (Ala. 1973); see also A. CURTIS, supra note 4, at § 85-88; Stevens, supra note 23, at 819.
40. Id. Although more common law oriented, the Alabama law contains some language similar to the Florida Law recently amended. See ALA. CODE tit. 13, § 2-20 (1977).
\end{footnotesize}
from the use of an explosive regardless of whether the building ac-
tually burns. Florida's first law dealing with explosives—the pre-
cursor of the 1979 law—stated that whoever had the requisite will-
ful and malicious intent and "by fire or explosive damages any
structure" would be guilty of arson.

The requirement that the fire actually damage the building, the
distinction between the crimes of burning to defraud and arson,
and the requirement of proving malicious intent, have all been tra-
ditionally troublesome in an evidentiary context. These problems
of proof have led to a low arrest and conviction rate for intention-
ally set fires. In response, the 1979 Florida Legislature passed one
of the most comprehensive arson laws in the nation. Despite the
legislature's attempt to partially abandon the common law, it re-
 mains to be seen if the new law can divorce itself from many of the
common law concepts which have been firmly entrenched in the
case law, and judicial attitudes.

II. FLORIDA ARSON LAW

The 1979 Florida Arson Law is a conglomeration of amendments
to the statutes relating to arson and fire bombs. This section will
discuss these amendments in an effort to analyze the intent behind
their enactment. The new Florida Arson Law has three distinct
sections: first degree arson, second degree arson, and a section

Stat. § 806.01 (1979).
42. Ch. 74-383, § 26, 1974 Fla. Laws 1240 (current version at Fla. Stat. § 806.01 (1)
(1979)).
43. The subsection on first degree arson states:
   (1) Any person who willfully and unlawfully, by fire or explosion, damages or
   causes to be damaged:
      (a) Any dwelling, whether occupied or not, or its contents;
      (b) Any structure, or contents thereof, where persons are normally present,
      such as: Jails, prisons, or detention centers; hospitals, nursing homes, or other
      health care facilities; department stores, office buildings, business establish-
      ments, churches, or educational institutions during normal hours of occupancy; or other
      similar structures; or
      (c) Any other structure that he knew or had reasonable grounds to believe was
      occupied by a human being,
   is guilty of arson in the first degree, which constitutes a felony of the first degree,
   punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
44. The subsection on second degree arson states:
   (2) Any person who willfully and unlawfully, by fire or explosion, damages or
   causes to be damaged any structure, whether the property of himself or another,
   under any circumstances not referred to in subsection (1), is guilty of arson in the
   second degree, which constitutes a felony of the second degree, punishable as pro-
concerning fire bombs. The changes which the legislature made to the sections concerning first and second degree arson will be considered in detail first. Many of the concerns which motivated the legislators to amend the first degree arson section are reflected in the section on second degree arson as well.

One of the most significant changes in the 1979 first degree arson law is the deletion of the requirement that the alleged arsonist act "maliciously." In place of malicious intent, the statute requires that the arsonist act willfully and unlawfully to cause the damage. By making this substitution the legislature hoped to avoid the troublesome prosecutorial problem of proving legal malice.

45. The section on fire bombs states:

1) Any person who possesses, manufactures, transports, or disposes of a fire bomb with intent that such fire bomb be willfully and unlawfully used to damage by fire or explosion any structure or property is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2) For the purposes of this section:
   (a) "Disposes of" means to give, give away, loan, offer, offer for sale, sell, or transfer.

   (b) "Fire bomb" means a container containing flammable or combustible liquid with a flash point of 200° Fahrenheit or less, having a wick or similar device capable of being ignited or other means capable of causing ignition; but no device commercially manufactured primarily for the purpose of illumination, heating, or cooking shall be deemed to be such a fire bomb.

3) Subsection (1) shall not prohibit the authorized use or possession of any material, substance, or device described therein by a member of the Armed Forces of the United States or by firemen, police officers, peace officers, or law enforcement officers so authorized by duly constituted authorities.

46. The deletion of the requirement of malice, along with all the other changes to the first degree arson subsection, can be seen clearly in the 1979 Session Laws:

1) Any person who willfully and unlawfully maliciously, by fire or explosion explosive, damages or causes to be damaged:
   (a) Any dwelling, or its contents whether occupied or not;

   (b) Any structure or contents thereof, where persons are normally present, such as: jails, prisons, or detention centers; hospitals, nursing homes or other health-care facilities; department stores, office buildings, business establishments, churches, educational institutions during normal hours of occupancy; or other similar structures; or

   (c) Any other structure that he knew or had reasonable grounds to believe was occupied by a human being, is any structure, whether the property of himself or another, knowing, or with reasonable grounds to believe, that a human being is in the structure, shall be guilty of arson in the first degree, which constitutes a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Ch. 79-108, § 1, 1979 Fla. Law 470 (codified at Fla. Stat. § 806.01(1) (1979)).
statutory change also addresses the problem of a person who sets fire to a structure, but only with the intent of collecting on the resulting insurance payment. Heretofore, such a wrongdoer could not be guilty of arson. Recalling Love v. State, the defendant who damages his building through an unlawful act—setting the fire for the purpose of insurance fraud—can now be convicted as an arsonist since the need to show malice has been eliminated.

Although malicious intent is no longer an element of arson, courts applying the new law must now determine just what intent is required by the use of the term “unlawfully.” Florida has used the terms “unlawfully” and “unlawful” in several criminal statutes; however, the terms have rarely been challenged for vagueness. In Carter v. State the Florida Supreme Court considered a constitutional challenge to an abortion statute, which provided punishment for an individual who unlawfully administered drugs or unlawfully used any instrument “with intent to procure miscarriage of any woman.” The court refused to conclude that the statute’s use of the word “unlawfully” was ambiguous or that its use resulted in a deprivation of due process. The court rationalized that a sufficient explanation of the term could be found through interpretation of another section of the statute relating to homicidal abortion. In a later challenge to the same statute on similar grounds, the court again refused to find the use of the term “unlawfully” unconstitutional. It should be noted, however, that the

48. For text of statute, see note 43 supra. Prior to the enactment of the 1979 Florida Arson Law, one court attempted to define unlawful intent. In Jones v. State, 3 So. 2d 388, 389 (Fla. 1941), the prosecution alleged that the defendant had unlawfully and willfully burned a dwelling. The then-current arson statute, however, required that an arsonous burning be done willfully and maliciously. The Florida Supreme Court held that the prosecution’s error was not fatal, stating that “The substitution of words in drafting an information of synonymous meaning to those appearing in the statute will not render the information fatally defective.” Id. at 390.


50. 155 So. 2d 787 (Fla. 1963).


52. 155 So. 2d at 788-89. See Ch. 71-136, § 718, 1971 Fla. Laws 839 (repealed 1972) which provided that any person who performed abortions in the absence of risk to the mother’s life and which resulted in the death of the mother or quick child would be guilty of manslaughter.

defendant's conviction was overturned. Although the trial court instructed the jury as to the statutory definition of abortion, it failed to instruct the jury as to the meaning of the term "unlawfully." The court stated: "The instruction of the trial court left the jury without a standard of lawfulness or unlawfulness with which to assess the acts of the Appellants."

The rationale emerging from these cases may limit the effectiveness of the 1979 Florida Arson Law. The legislature did not indicate that any other statutory section was to be used when interpreting the terminology of the new law. One Florida legislator, speaking in favor of eliminating the malice requirement, told the legislature immediately before the bill's passage that the use of the word "unlawfully" was intended to require the state to prove that a defendant has "no legitimate purpose for" the burning or damage. Unfortunately, this intention was not manifested in the statute itself.

The intent of the legislature and the decisions of the Florida case law are in conflict. The statement of legislative intent implies that the burden is upon the state only to show that the accused had no legitimate purpose for burning the property. The Carter decision, meanwhile, seems to indicate that in the absence of standards of lawfulness or unlawfulness specified in the statute, the state will have to prove that the act causing the damage is specifically forbidden by law.

The substitution of the term "explosion" for the term "explosive" in the sections on both first and second degree arson indicates a legislative attempt to eliminate technical evidentiary problems associated with proving that an incendiary device was an

54. Id. at 859. The court in Carter had supplied the necessary instruction as to the meaning of "unlawful."

55. Fla. S., tape recording no. 1 of proceedings (May 8, 1979) (on file with Secretary) (statements of Senator Spicola). The original bill submitted to the floor used the phrase "knowingly and unlawfully." Senator Barron opposed the use of these terms; he felt that such language eliminated the requirement of criminal intent in arson. The law as it passed is a compromise between the two positions. Fla. S. Jour. 352 (Reg. Sess. 1979). See Fla. S., tape recording no. 3 of proceedings (May 3, 1979) (on file with Secretary) (statements of Senator Barron).

56. The state could present closely related laws to indicate what constitutes an unlawful burning, including: Fla. Stat. § 806.13 (1979) (criminal mischief); Fla. Stat. § 817.233 (1979) (burning to defraud the insurer). Although malice is no longer required to prove arson, if the state uses the criminal mischief statute to show an unlawful act, malice will nevertheless have to be demonstrated. It reads: "(1) A person commits the offense of criminal mischief if he willfully and maliciously injures or damages by any means any real or personal property belonging to another." Fla. Stat. § 806.13(1) (1979) (emphasis added).
This proof requires the use of expert analysis and testimony to establish a definite chemical composition. Therefore, proof of arson by explosive is impossible if nothing remains of the incendiary device. Use of the term “explosion,” on the other hand, merely implies a sudden change of a physical nature, an event easily within the comprehension of the jury which does not give rise to difficult evidentiary problems.

The legislature broadened the arson definition further by inserting a clause into the first and second degree sections which suggests that a direct causal connection is no longer necessary for an individual to be an arsonist. Now, a conviction for arson can be sustained where the individual causes damage to occur, regardless of whether he actually set the fire himself. This new rule will affect two situations. The first situation is where an individual hires another person to set fire to a structure. A charge of arson against the person hiring the “torch” would have failed to result in a conviction under past laws which restricted an arson conviction to the person who actually set the fire. Under the 1979 law, the procurers would now be considered to have “caused the damage” by vir-

57. Interview with Raymond Marky, Assistant Attorney General, Office of the Florida Attorney General, Criminal Appeals Division (Jan. 11, 1980). Mr. Marky worked closely with the arson law’s sponsors and with the staff of the Florida Senate Judiciary-Criminal Committee in refining the language of the law and testified at the committee hearings as to its meaning. His assistance with the preparation of this comment is greatly appreciated.

58. An explosion is “a violent expansion or bursting that is accompanied by noise and is caused by a sudden release of energy from a very rapid chemical reaction, from a nuclear reaction, or from escape of gases or vapors under pressure . . . .” WEBSTER’s THIRD NEW INTERNATIONAL DICTIONARY 802 (1971). “Explosive” is defined by Florida law as “any chemical compound or mixture that has the property of yielding readily to combustion or oxidation upon the application of heat, flame or shock, and capable of producing an explosion and commonly used for that purpose . . . .” FLA. STAT. § 633.021(1) (1979); see id. at §§ 552.081(2), 790.001(5).

59. Fla. S., tape recording no. 1 of proceedings, note 47 supra (statements of Senator Spicola). Notice that Florida had a provision in an old law which included the phrase “or causes to be burned.” Ch. 15603, § 1, 1931 Fla. Laws 1047 (current version at FLA. STAT. § 806.01(1) (1979)). Although no court ruled on the validity of that clause in a situation where one party hires another to burn a building, the drafters of the new law clearly intended that the language “causes to be damaged” address such a situation.

60. See, e.g., Gould v. State, 312 So. 2d 225 (Fla. 1st Dist. Ct. App. 1975). The court in Gould held the evidence was insufficient to support a charge of arson against the defendant who had hired another person to burn his house. Although the court reversed the conviction because the state had failed to prove the defendant had acted maliciously, the situation is applicable. A similar problem would have been arisen under the 1975 arson law which stated that, “Any person who willfully and maliciously, by fire or explosive, damages any structure . . . shall be guilty of arson in the first degree . . . .” Ch. 75-298, § 18, 1975 Fla. Laws 1088 (emphasis added) (current version at FLA. STAT. § 806.01(1) (1979)).
tue of their procurement and thus, could be charged with arson.\textsuperscript{61} This extension of arson to procurers seems unnecessary considering that Florida’s principals and accessories law makes anyone a principal of the first degree who “aids, abets, counsels, hires, or otherwise procures” another person to commit a crime.\textsuperscript{62} Perhaps other reasons for including the new clause were the wish to identify the person hiring the professional “torch” as an arsonist and the fear that many juries would have difficulty in relating the arson and the principal statutes. The second situation in which a person might now be convicted of arson arises when a fire or an incendiary device fails to inflict direct damage to a structure but indirectly causes smoke or water damage. Although a mere smoke discoloration was not arsonous damage under early laws,\textsuperscript{63} the new statute indicates that proof of such damage could now support an arson conviction.

Still another change in the first and second degree arson sections focuses on the occupancy requirement for a dwelling. Under the old statute, the state was required to prove that the person setting the fire had reasonable grounds to believe that the dwelling was occupied by a human being.\textsuperscript{64} Borrowing from common law, the 1979 arson law presumes that a dwelling is a place of habitation and therefore, that the burning of a dwelling is a first degree felony, irrespective of the arsonist’s belief or knowledge that the house was unoccupied at the time the arson occurred.\textsuperscript{65}

Common law precedent is certain to play a role in the construction of the dwelling definition. During the legislative process, it was suggested that the term “dwelling” be statutorily defined; however, since the term “dwelling” already has an established common law meaning through judicial interpretation of arson and burglary statutes, this suggestion was withdrawn.\textsuperscript{66} It is difficult to

\textsuperscript{61} See note 43 supra.

\textsuperscript{62} \textsc{Fla. Stat.} § 777.011 (1979).

\textsuperscript{63} \textit{See} \textsc{Honey v. State}, 17 S.W.2d 50 (Tex. Crim. App. 1929); \textit{see also} \textsc{A. Curtis}, supra note 4, at § 83; \textsc{Stevens}, supra note 23, at 818.

\textsuperscript{64} Under the prior law, no one could be convicted of arson unless he or she damaged a structure “knowing, or with reasonable grounds to believe, that a human being is in the structure . . . .” \textsc{Ch. 75-298, § 18, 1975 Fla. Laws 1088} (current version at \textsc{Fla. Stat.} § 806.01 (1979)).

\textsuperscript{65} The section makes the willful and unlawful burning of a dwelling first degree arson “whether occupied or not.” \textsc{Fla. Stat.} § 806.01(1)(a) (1979).

\textsuperscript{66} \textit{Proposed Amendments to the Florida Arson Law: Hearing before the Senate Judiciary-Criminal Committee on SB 68 & 25, 1979 Florida Legislature,} (Reg. Sess. 1979); \textsc{Fla. S.}, Committee on Judiciary-Criminal, tape recording of proceedings at side 3 (April 16, 1979) (on file with Committee) (discussion of SB 68 & 25) (statements of Senator Dunn and
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determine precisely when a home gains or loses the status of a
dwelling. Although the temporary absence of an occupant from a
house does not result in a loss of dwelling status, at that uncertain
moment when the absence becomes more than temporary, the for-
mer residence ceases to be dwelling. In addition, damage to an
unfinished building is not considered arson until the building be-
comes a dwelling. A new house, however, need not be totally com-
pleted to be considered a dwelling. Again, the problem is in deter-
mining the precise moment when a building may become a legal
object of arson. These concepts have been vital in Florida's com-
mon law and they are sure to affect the outcome of at least some of
the cases brought under the new law.

The remainder of the amendments to the first degree arson sec-
tion consider the enormous risk to human life which is created by
fires in certain types of structures. Consequently, the new law
identifies certain high risk buildings whose burning constitutes
first degree arson. Often these high risk buildings are those with a
high probability of human occupancy. The 1979 arson law specifi-
cally provides that the burning of certain institutions, such as jails,

67. See, e.g., Johnson v. State, 188 So. 2d 61 (Fla. 3d Dist. Ct. App. 1966) (house was
held not to be a dwelling because absence of owner who was confined to a mental hospital
was more than temporary).

68. See Williams v. State, 132 So. 186 (Fla. 1930); see also A. CURTIS, supra note 4,
at § 40.

69. See Williams v. State, 132 So. 186 (Fla. 1930). The court in Williams found a portion
of an early Florida arson statute unconstitutional because of its inconsistency with the com-
mon law notion that an unfinished building is not a dwelling house for arson purposes. Id. at
187-88.

70. Interview with R. Marky, note 57 supra.

71. See text of FLA. STAT. § 806.01(1) (1979), note 43 supra. First degree arson is a fel-
ony of the first degree and is punishable by a maximum of thirty years imprisonment or for
life in the case of a habitual offender. FLA. STAT. §§ 806.01(1), 775.082(3)(b), 775.084(4)(a)(1)
(1979).
hospitals, nursing homes, or health care facilities, will be first degree arson. Office buildings and certain commercial establishments, churches, and schools are also included because of high probability of occupancy.\textsuperscript{72} All of these high risk buildings contain areas from which escape is difficult. Accordingly, in such a building a fire produces a great likelihood of death or personal injury. As with dwellings, the legislature removed the burden from the state to prove that the alleged arsonist had reasonable grounds to believe that the burned structure was occupied.\textsuperscript{73}

The term "structure," as used in both the first and second degree sections of the arson law, has been given an expanded meaning by the 1979 amendments. Significant additions to the structure category include watercraft, tents or other portable buildings, real property, and any other attached appurtenances.\textsuperscript{74} These inclusions solved many problems with the prior law. First, although a vessel had previously been included as a structure, legislators were concerned that the term would be used to refer only to large ocean-going ships and not to a smaller watercraft such as a power boat.\textsuperscript{75} Second, inflatables, tents and other non-roofed portable structures were not previously included in the law. Last, under the old law the burning of either temporary or permanent appurtenances to real property, such as covered but unenclosed patios or pavilions, was not considered arson.\textsuperscript{76}

In keeping with this notion that the first degree arson law should address risk to human life without regard to the type of building burned, section 806.01(1)(c) automatically labels the burning of any unincluded structure first degree arson if the perpetrator "had reasonable grounds to believe [it] was occupied by a human be-

\textsuperscript{72} FLA. STAT. § 806.01(1)(b) (1979). See text of statute at note 43 supra.
\textsuperscript{73} See note 46 supra.
\textsuperscript{74} The statute defines a structure as "any building of any kind, any 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." FLA. STAT. § 806.01(3) (1979). Before the amendment, "structure" had a narrower definition as it encompassed only "any building of any kind and any enclosed area with a roof over it, vehicle, vessel or aircraft." Ch. 74-383, § 26, 1974 Fla. Laws 1240 (current version at FLA. STAT. § 806.01(3) (1979)).
\textsuperscript{75} Testimony before the Senate Judiciary-Criminal Committee suggested that the term "structure" "include the term ‘watercraft’ because it was felt [by the drafters] that ‘vessel’ might refer solely to ocean-going ships and not to a pleasurecraft." Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings at side 2 (April 5, 1979) (on file with Committee) (discussion of SB 68 & 25) (testimony by Shelia McDevitt, Aide to Senator McClain).
\textsuperscript{76} Interview with R. Marky, note 57 supra. Note that under the previous law the roofed area must have been enclosed. See note 74 supra.
ing.” Significantly, the drafters established that the state need prove only a reasonable belief that the building was occupied rather than actual knowledge. For instance, if the building in question was an abandoned warehouse and if it was generally believed that vagrants frequently used the warehouse as a shelter or that it was regularly patrolled by a security guard, the burning or bombing of that building would constitute first degree arson.78

Another important amendment to the first degree arson section provides that damage by fire or explosion to the contents of dwellings and other specified structures now constitutes arson.79 This amendment is a radical departure from the common law and all past Florida arson statutes and will be particularly useful in prosecuting prisoners who start fires in their cells. Most often these fires are set to the contents of a jail cell—mattress material or clothing—but due to the nature of materials used to construct jails and the quick reactions to extinguish the fires, the actual jail cells sustain no damage.80 Under common law and prior statutory law, this situation could not be an act of arson;81 the risk to human life, however, is immense. For instance, the burning of a foam rubber mattress pad produces a deadly gas which has been known to spread immediately throughout the jail or prison block and cause death or severe injury.82 The obvious impossibility of escape for people confined in jails in such a situation presents a high probability of death or bodily harm.83 Hospitals, nursing homes,

77. FLA. STAT. § 806.01(1)(c) (1979).
78. Abandoned tenement houses, long past qualifying as a dwelling, have presented similar problems. Interview with R. Marky, note 57 supra.
79. FLA. STAT. § 806.01(1)(a), (b) (1979). Mr. Marky, in an address to the Senate Judiciary-Criminal Committee noted an incident involving a fire bomb which was thrown through a window in the house of Florida Supreme Court Justice Adkins. Because the bomb landed on a bed and was quickly extinguished, the structure was unharmed. Under the previous arson law, no charges could have been brought. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings, note 66 supra (testimony of Raymond Marky).
80. Interview with R. Marky, note 57 supra.
82. In 1975, an inmate of the Seminole County Jail in Sanford, Florida, set fire to several foam rubber mattress pads which were stacked outside of his cell. The burning foam rubber produced deadly cyanide gas which killed eleven inmates and a guard. Bureau of Fire Investigation file number 17-75-22. In a similar occurrence, an inmate of the Martin County Jail in Stuart, Florida, set fire to a foam rubber mattress pad in his cell. The Stuart fire caused four deaths. Bureau of Fire Investigation file no. 42-72-08.
83. The seriousness of such a situation is exemplified by fires which occurred in a state road prison facility in Jay, Florida, and in the Winter Park Jail in Winter Park, Florida, respectively. The 1967 Jay prison fire destroyed the wooden structure in less than four minutes and killed thirty-seven of the fifty-one inmates. Bureau of Fire Investigation file number 33-67-05. The Winter Park fire, which occurred in 1976, caused such intense heat that
and various other crowded public buildings are similarly identified as high risk structures. Therefore, the legislature established that the burning of their contents is first degree arson as well.84

Unfortunately, the “contents” provision does not extend to the subsection dealing with other structures which an arsonist could reasonably believe to be occupied by a person.85 Although this subsection is grammatically linked to the one immediately preceding it and was probably meant to incorporate the contents clause found in the preceding subsection, the record is barren of expressions showing legislative intent or assumptions regarding incorporation. An argument could be made that by categorically including the clause in two subsections but not the third, the legislature intended to specify that the burning of contents in only those structures identified in the first two subsections could constitute arson.86 Given the legislative intent that first degree arson covers situations which pose a risk to human life, the omission of the contents clause from the final subsection was apparently a legislative oversight and ought to be corrected to obviate possible misconstruction by the courts.

The second degree arson section addresses the willful and unlawful damaging of property by fire or explosion under circumstances not covered by the first degree arson section. As with first degree arson, the state only has to prove that a defendant has committed a willful and unlawful act which led to the damage.87 The law still states that arson can occur regardless of “whether [the damaged]
property [belongs to] himself or another” as did the 1975 law.\textsuperscript{88} Accordingly, property owners could be found guilty of arson for burning their own property with a showing of a willful and unlawful intent to do harm to another.\textsuperscript{89} As with first degree arson, when charging the crime the state should request jury instructions relating to both the arson statute and any other statute by which the jury could be guided regarding the standards of unlawfulness.

Lastly, the 1979 amendments to the arson law also included changes in the fire bomb section. The law now makes possession, manufacture, transportation, or disposal of a fire bomb a felony of the third degree.\textsuperscript{90} As in the other sections, the state is relieved of the burden of proving malice. The prosecution must show that an accused willfully and unlawfully intended that the device cause damage. The fire bomb section corresponds with the rest of the new arson law by removing the requirement that the intent be one to burn; that section now provides that an intent to use the device “to damage by fire or explosion any structure or property” will suffice.\textsuperscript{91} Finally, the definition of the term “fire bomb” was amended to eliminate the requirement that it be constructed of a breakable container and to remove camp stoves and heaters from the scope of the definition.\textsuperscript{92}

\textsuperscript{88} FLA. STAT. § 806.01(2) (1979).
\textsuperscript{89} The arguments presented to justify the amendment to “willfully and unlawfully” for first degree arson applied to the amendment to second degree arson as well. Thus, in contrast to the malicious intent which the prosecution failed to show in Love v. State, 144 So. 843 (Fla. 1932), where the defendant was alleged to have burned his own property, an alleged arsonist could be convicted of either first or second degree arson under the new statute upon a showing of an unlawful intent.
\textsuperscript{90} FLA. STAT. § 806.111(1) (1979). For text of statute, see note 45 supra. Such a crime carries a possible penalty of imprisonment for five years or ten years for a habitual offender. FLA. STAT. at §§ 775.082(3)(d), .084(4)(a)(3) (1979).
\textsuperscript{91} FLA. STAT. § 806.111(1) (1979). “Structure” is a substitution for “building.”
\textsuperscript{92} FLA. STAT. § 806.111(2); see also Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings at side 3 (April 16, 1979) (on file with Committee) (discussing of SB 68 & 25). “The old law described a fire bomb as a . . . breakable container. [S]ome types of containers such as oil cans or plastic containers . . . may break or may not break. They just serve the purpose of a fire bomb.” Id. (testimony of Donald Steverson, Chief, Bureau of Fire Investigation, Division of the State Fire Marshall, Florida Department of Insurance).

An earlier version of the law created a presumption that “[t]he possession, manufacture, transportation, or disposal of any fire bomb shall be prima facie evidence that the person” engaged in those activities intended that the device would be used unlawfully. Committee on Judiciary-Criminal, Proposed Committee Substitute for SB 68, § 2 (offered and amended at April 16, 1979 meeting). The presumption was discarded for fear of an attack on its constitutionality. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (April 16, 1979) (on file with Committee) (discussing of SB 68 & 25) (remarks of Senator Spicola; testimony of Raymond Marky).
III. Conclusion

Arson was estimated recently to be the cause of thirty percent of all fires in the United States and to involve as many as sixty percent of all fires in some metropolitan locations. Many structures are intentionally set afire in anticipation of collecting insurance proceeds. This problem is not new, and courts applying common law concepts of arson have been woefully unsuccessful in their attempts to bring the arsonist to justice. The problem, however, does not lie entirely with the judiciary. Since the advent of statutory arson, many legislatures have failed to adequately consider the application of common law concepts, and the result has often been a negation of the arson statute's effect. The 1979 Florida Arson Law attempts to remedy these problems.

The new arson law eliminates malice as an element of arson. This change is likely to aid in the conviction of persons who heretofore might have been charged only with insurance fraud. In prosecuting under the new law, the state should take care to ensure that the jury is properly instructed as to the standards of unlawfulness of the act which led to the burning. The legislative intent that the risk to human life be minimized is also of great importance. The addition of language which makes the burning of the contents of structures arson exemplifies this concern.

The arson statute is certain to encounter challenges because of its departure from common law concepts; however, the strong legislative intent to broaden arson and to encompass acts of destruction which result in both monetary loss and danger to human life should be given great weight. If the courts respond as the legislature has intended, great strides will have been made toward discouraging arson, and especially arson for profit.

94. Id.