THE FOURTH AMENDMENT AT FIRE SCENES

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I. INTRODUCTION

A burning building requires two responses. The first is the extinguishment of the fire by firefighters.[1] The second is the determination of the cause of the fire by a fire investigator.[2] The second response generally necessitates an intrusion into the confines of the burned building.[3] The owner of the burned structure may or may not be present, and may or may not invite such an intrusion. It is the collision of the community's need to determine the cause of the fire with the owner's privacy rights that has created certain rules and exceptions under the Fourth Amendment of the Constitution.

The United States Supreme Court decreed rules and exceptions for fire investigations in the two cases, *Michigan v. Clifford*[4] and *Michigan v. Tyler*.[5] The rules can be summarized as follows:

- A fire victim/property owner generally retains a privacy right in the premises, thereby implicating the warrant clause of the Fourth Amendment.[6]
- A burning building is an exigent circumstance which allows firefighters to enter the building without a warrant to suppress the blaze.[7]

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1. *See generally* INTERNATIONAL FIRE SERVICE TRAINING ASSOCIATION, ESSENTIALS OF FIRE FIGHTING 401–06 (Michael A. Wieder et al. eds., 3d ed. 1999) [hereinafter IFSTA, ESSENTIALS OF FIRE FIGHTING].
2. *See generally* JOHN D. DEHAAN, KIRK'S FIRE INVESTIGATION 127–29 (4th ed. 1997).
3. *See id.* at 127–29, 147–87 (detailing indicators on a building's interior which reflect fire behavior).
4. 464 U.S. 287 (1984) (plurality decision).
5. 436 U.S. 499 (1978).
6. *See id.* at 506.
7. *See id.* at 509.

- Once the firefighters enter a building, they may seize evidence that is in plain view.[8]

- "Fire officials," which include firefighters and fire investigators, do not need a warrant to remain in a fire-damaged building for a reasonable period of time "to investigate the cause of a blaze after it has been extinguished."[9]

- Fire officials may seize evidence in plain view without a warrant while conducting their examination within the reasonable time period.[10]

- If fire officials must leave the premises due to hazardous or other conditions that severely hinder their investigation, they may return without a warrant after those conditions have abated on the theory that such re-entry is a continuation of the initial permissible intrusion.[11]

- If re-entry is not a reasonable continuation of the initial entry, an administrative warrant is required for entry to determine the cause of the fire, or a criminal warrant is required for entry to investigate a possible crime or to locate and gather evidence of a crime.[12]

- Evidence seized in plain view under exigent circumstances or pursuant to an administrative warrant may be used to support probable cause for the issuance of a criminal warrant.[13]

As discussed in this Article, the Court's designation of both firefighters and fire investigators as "fire officials" fails to recognize the fact that fire investigators are often law enforcement officers.[14] By allowing warrantless investigations merely because the personnel work for a fire department rather than a police department, the Court inadvertently may have created an "arson scene" exception to the Fourth Amendment, an exception not accorded to other criminal investigations.[15]

This Article discusses the separate duties of firefighters and fire investigators and reviews courts' historical application of the Fourth Amendment to warrantless entries, searches, and seizures at fire scenes. Case law review shows a tendency by the courts not to acknowledge or recognize that the separate duties

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8. *See id. See also* Horton v. California, 496 U.S. 128, 137 (1990) (plain view requirements).

9. *Tyler*, 436 U.S. at 510.

10. *See id.*

11. *See id.* at 511.

12. *See* Michigan v. Clifford, 464 U.S. 287, 294, 297 (1984) (plurality decision); *Tyler*, 436 U.S. at 511–12.

13. *See Clifford*, 464 U.S. at 294. *See also* United States v. Finnigin, 113 F.3d 1182, 1186 (10th Cir. 1997) (stating that plain view discovery of explosives during fire fighting provided probable cause to support a search warrant to explore remainder of premises for other explosives).

14. *See supra* notes 44–45 and accompanying text.

15. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 395 (1978) (rejecting the concept of a "murder scene exception" where homicide detectives entered a murder scene and conducted a four-day warrantless search). *See generally* James Marshall Costan, Comment, *Arson Investigations and the Fourth Amendment*, 30 WASH. & LEE L. REV. 133, 148 (1973) (arguing against the creation of an arson exception).

of firefighters and fire investigators require different treatment of firefighters and fire investigators under the Fourth Amendment. Finally, the Article suggests that a better understanding of these separate duties requires that the Fourth Amendment provisions apply equally to fire investigators and police officers. In order to properly analyze the current state of the law, it is first necessary to understand the nature and realities of both firefighting and fire investigation.

A. The Firefighter's Duties

The warrant requirement of the Fourth Amendment applies to any nonconsensual entry and search of property by a governmental official,[16] including firefighters.[17] A fire, however, is a recognized exigency that removes the need for firefighters to obtain a search warrant before entering a burning building.[18]

Firefighters are not specifically trained to conduct in-depth investigations to determine the origin and cause of a fire.[19] However, because firefighters are the first persons on the fire scene, they are expected to assist in determining the cause of the fire.[20]

Due to their presence while the fire is burning, firefighters observe matters vital to a fire investigation. For example, firefighters may observe people leaving the scene,[21] the intensity or color of the flames,[22] the condition of entry

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16. *See Clifford*, 464 U.S. at 291–92; Camara v. Municipal Court, 387 U.S. 523, 528–29 (1967).

17. *See* Michigan v. Tyler, 436 U.S. 499, 506 (1978). *See also* Rose v. State, 586 So. 2d 746, 752 (Miss. 1991) (stating that volunteer firefighters are also subject to Fourth Amendment requirements).

18. *See Clifford*, 464 U.S. at 293; *Tyler*, 436 U.S. at 509.

19. *See* Steigler v. Anderson, 496 F.2d 793, 797 (3d Cir. 1974) (citing United States v. Green, 474 F.2d 1385, 1388 (5th Cir. 1973)). *See also* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491 ("Seldom does the fire company take time to help determine the fire cause."). The International Fire Service Training Association ("IFSTA") is a non-profit educational association which develops training materials for fire services. Organized in 1934, its manuals are now the official teaching texts for most states in the United States and provinces in Canada.

20. *See Green*, 474 F.2d at 1388 ("[T]he investigation of an actual fire is logically and factually inseparable from the fireman's job of suppressing the blaze."). *See also Tyler*, 436 U.S. at 510 (stating that fire officials are charged with both extinguishing fires and finding their causes, but refraining from specifically differentiating between firefighters and investigators); IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491–97; INTERNATIONAL FIRE SERVICE TRAINING ASSOCIATION, INTRODUCTION TO FIRE ORIGIN AND CAUSE 6 (Richard Hall & Cynthia Brakhage eds., 2d ed. 1997) [hereinafter IFSTA, FIRE ORIGIN AND CAUSE].

21. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 493. *See, e.g.*, State v. Coomer, 485 N.E.2d 808, 809 (Ohio Ct. App. 1984) (noting that police officer at fire scene observed person leave the scene).

22. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 493–95 (stating that color and intensity of flames can be an indication of the presence of ignitable liquids, such as gasoline, etc.). *See, e.g.*, Waters v. State, 331 S.E.2d 893, 894–95 (Ga. Ct. App. 1985); State v. Dajnowicz, 204 N.W.2d 281, 282 (Mich. Ct. App. 1972); State v. Cohn, 347 S.W.2d 691, 694 (Mo. 1961); People v. Jorgensen, 333 N.W.2d 725, 725 (S.D. 1983).

places,[23] and the inappropriate condition or lack of personal possessions or furniture.[24] Firefighters may also detect odors of ignitable liquids.[25] While firefighters are in a building to extinguish a fire, they may discover incriminating evidence in plain view that might not be constitutionally discoverable by law enforcement officers who arrive after the fire is extinguished.[26] The firefighters have a responsibility to document these matters,[27] secure the scene,[28] and preserve evidence.[29]

Because state fire marshals or local fire investigators may be unable to promptly appear at fire scenes, the importance of firefighters' understanding of the protection and preservation of evidence can be crucial.[30] There are times when fire

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23. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 493–95 (stating that indications of forcible entry, locked or unlocked entryways, and coverings over windows that might delay discovery of a fire, are all items that may be seen by firefighters and be obliterated or obscured by the time investigators arrive). *See also* Sloane v. State, 686 N.E.2d 1287, 1289 (Ind. Ct. App. 1997).

24. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 495–96 (stating that firefighters may be able to note whether furniture or personal possessions appear to be missing, or whether furniture appears to be inferior to what would be expected, indicating possible substitution by an arsonist; observations which may be lost to the investigators, since such possessions may be consumed by the fire). *See, e.g.*, *Sloane*, 686 N.E.2d at 1289 (discussing observation of rearranged furniture and blocked entry); State v. Showalter, 427 N.W.2d 166, 167 (Iowa 1988) (noting observation that no clothing or personal effects were on premises); Commonwealth v. Jung, 651 N.E.2d 1211, 1214 (Mass. 1995) (missing pictures); Rose v. State, 586 So. 2d 746, 749–50 (Miss. 1991) (no personal possessions).

25. *See* DEHAAN, *supra* note 2, at 141; IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 494.

26. *See* Michigan v. Tyler, 436 U.S. 499, 509 (1978). *See, e.g.*, United States v. Urban, 710 F.2d 276, 277 (6th Cir. 1983) (discussing the observation of fireworks and explosive chemicals by firefighters immediately after fire suppression); United States v. Green, 474 F.2d 1385, 1386 (5th Cir. 1973) (discussing the observation of metal counterfeiting plates made by firefighters during fire suppression); Mazen v. Seidel, 940 P.2d 923, 924 (Ariz. 1997) (discussing discovery of marijuana plants by firefighters); State v. Loh, 914 P.2d 592, 600 (Mont. 1996) (stating that firefighters may seize evidence of arson that is in plain view in a burning building,); State v. Bell, 737 P.2d 254, 256 (Wash. 1987) (discussing discovery of marijuana plants by firefighters).

27. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491–92; IFSTA, FIRE ORIGIN AND CAUSE, *supra* note 20, at 12.

28. *See* DEHAAN, *supra* note 2, at 143; IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 497; IFSTA, FIRE ORIGIN AND CAUSE, *supra* note 20, at 13–14.

29. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 497. To protect and preserve evidence, there are two factors that the firefighter should remember: (1) "[g]uard the evidence where it is found, untouched and undisturbed, to preserve the chain of custody"; and (2) "[p]roperly identify, remove, and safeguard evidence that cannot be left at the scene of the fire." *Id.* at 472.

30. Of course, the firefighter's main duty is to suppress the fire. If the suppression is done promptly, that alone can be instrumental in protecting and preserving evidence by stopping the destruction inherently caused by the blaze. *See* NATIONAL FIRE PROTECTION ASSOCIATION, NFPA 921: GUIDE FOR FIRE AND EXPLOSION INVESTIGATIONS, § 9-3.4 (1998) [hereinafter NFPA 921]. *See also* DEHAAN, *supra* note 2, at 128 ("[Firefighters are] often the first witnesses on the scene and have enormous control over the fate of all types of evidence at the scene").

investigators do not arrive until hours after the fire is suppressed,[31] and the investigation itself may not begin until weeks after the fire.[32]

Because of this potential delay in the arrival of a fire investigator, firefighters are encouraged to note matters that indicate the cause of the fire.[33] The greater the delay between the fire and the arrival of the investigator, the greater the importance of the information obtained by the firefighters.[34] Due to the destruction caused by both the fire and the firefighters' fire suppression activities, much of that information would be lost if not documented by the firefighters.[35]

When extinguishing a fire, firefighters perform extensive "overhaul" of a fire scene.[36] Overhaul is the partial or complete removal of interior walls and ceilings to prevent the possibility that the fire may rekindle[37] in unseen portions of the structure.[38] Although the prevention of rekindling is important, such overhauling and removal of personal items and debris, commonly known as "salvage,"[39] should be performed only to the extent necessary for fire suppression or detection, so that the fire investigation is not compromised.[40] Firefighters

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31. *See* Michigan v. Clifford, 464 U.S. 287, 289–90 (1984) (plurality decision) (discussing investigator's arrival six hours after firefighters had left scene); People v. Essa, 380 N.W.2d 96, 97 (Mich. Ct. App. 1986) (describing instance where investigator arrived an hour and a half after firefighters had departed); People v. Rammouni, 345 N.W.2d 637, 637 (Mich. Ct. App. 1984) (discussing investigator's arrival approximately five hours after fire had been suppressed); Bennett v. Commonwealth, 188 S.E.2d 215, 217 (Va. 1972) (discussing arrival of fire investigator the morning after the fire). *See also* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491 ("Investigators are seldom present while the firefighters fight the fire, perform overhaul, and interview occupants and witnesses for report information.").

32. *See* DEHAAN, *supra* note 2, at 127–28.

33. *See id.* at 128, 144–45; IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 492.

34. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491–92.

35. *See* DEHAAN, *supra* note 2, at 128; IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491–92; NFPA 921, *supra* note 30, § 6-2.2.

36. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 496.

37. "Rekindle" is "[a] return to flaming combustion after apparent but incomplete extinguishment." NFPA 921, *supra* note 30, § 1-3.

38. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 469 ("Overhaul is the practice of searching a fire scene to detect hidden fires or sparks which may rekindle and to note the possible point of origin and cause of fire."). *See also id.* at 453; Romero v. Superior Court, 72 Cal. Rptr. 430, 431 (Ct. App. 1968) (defining overhaul as searching out any hidden fires); State v. Milashoski, 471 N.W.2d 42, 44 (Wis. 1991) (stating that overhaul is performed to make sure that the fire is completely extinguished). Overhaul can be so devastating that it destroys valuable evidence of arson.

39. A salvage operation consists of "procedures allied to fire fighting that aid in reducing fire, water, and smoke damage during and after [a] fire." IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 453.

40. *See id.* at 496; DEHAAN, *supra* note 2, at 128; IFSTA, FIRE ORIGIN AND CAUSE, *supra* note 20, at 12–13; NFPA 921, *supra* note 30, §§ 9-3.4.2, 9-3.4.2.1 (1998). Although not defined in NFPA 921, the text states that overhaul operations should be done in a systematic manner to preserve as much of the fire scene as possible. *See id.* § 9-3.4.2.2.

increasingly are trained to delay the salvage operations until after the investigation is complete, so that evidence will not be destroyed.[41]

B. The Fire Investigator's Duties

Despite the expected involvement of firefighters in the initial stage of determination of the fire's cause, the thorough investigation of most suspicious fires is beyond a firefighter's training and requires the intervention of the fire investigator.[42] Every state grants state or local fire investigators the power to enter buildings and investigate arsons, subject to constitutional restraints.[43] Nine states

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41. *See* DEHAAN, *supra* note 2, at 128; IFSTA, FIRE ORIGIN AND CAUSE, *supra* note 20, at 13; IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 496. *See also* NFPA 921, *supra* note 30, §§ 9-3.4.2.3, 11-7.2 (stating that salvage operations of moving and removing contents from the fire scene should be avoided until documentation, reconstruction, and analysis is complete). *But see* Mazen v. Seidel, 940 P.2d 923, 927 (Ariz. 1997) (stating that discovery of marijuana by firefighters during suppression activities was justified, in part, by fact that firefighters could have removed it from the building and deposited it outside as part of their salvage operations).

42. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 496.

43. *See* ALA. CODE §§ 36-19-2, 36-19-4, 36-19-5 (1991) (granting power to state fire marshal, municipal fire and police chiefs, marshals, mayors, and sheriffs); ALASKA STAT. § 18.70.075 (Michie 1998) (granting power to municipal fire departments to enter buildings, but mandating that Department of Public Safety handle investigations); ARIZ. REV. STAT. §§ 9-500.01 (1996), 41-2163, 41-2164 (1999) (granting power to state fire marshal and municipal fire department arson investigators); ARK. CODE ANN. §§ 12-13-105, 12-13-107, 12-13-111 (Michie 1995), 14-53-112 (Michie 1998) (state fire marshal and municipal fire marshals); CAL. HEALTH & SAFETY CODE § 13107 (West Supp. 1999) (state fire marshal); COLO. REV. STAT. ANN. § 18-1-901 (West 1999) *as amended by* 1999 Colo. Legis. Serv. 145 (West) (fire arson investigators appointed by municipal fire chief and approved by local sheriff or police chief); CONN. GEN. STAT. ANN. §§ 29-302, 29-310, 29-311 (West 1990 & Supp. 1999) (state and local fire marshals and municipal fire and police departments); DEL. CODE ANN. tit. 16, §§ 6607, 6701A, 6704 (1995) (state fire marshal and municipal fire departments); D.C. CODE ANN. § 4-317.1 (Supp. 1999) (fire chiefs and marshals); FLA. STAT. ANN. §§ 633.01 (effective until Jan.1, 2001), 633.03 (effective Jan. 1, 2001) (West 1996 & Supp. 1999) (state fire marshal); GA. CODE ANN. §§ 25-2-12.1, 25-2-22, 25-2-22.1 (Harrison 1998) (state safety fire commissioner and municipal fire marshals); HAW. REV. STAT. §§ 132-1, 132-5 (1993) (county fire chiefs); IDAHO CODE § 41-257 (1998) (state fire marshal and fire chiefs); 20 ILL. COMP. STAT. ANN. 2905/2, 425 ILL. COMP. STAT. ANN. 25/6 (West 1993) (state fire marshal and municipal fire chiefs); IND. CODE ANN. §§ 22-14-2-8, 36-8-17-7 (Michie 1995 & Supp. 1998) (state fire marshal and municipal fire departments); IOWA CODE ANN. §§ 100.1, 100.2 (West 1996) (state fire marshal and municipal fire chiefs); KAN. STAT. ANN. § 31-137 (1993) (state fire marshal and municipal fire chiefs); KY. REV. STAT. ANN. §§ 227.220, 227.240, 227.270, 227.370 (Banks-Baldwin 1995 & Supp. 1998) (state fire marshal, municipal fire departments, sheriffs, and deputy marshals); LA. REV. STAT. ANN. §§ 40:1563, 40:1566 (West 1992 & Supp. 1999) (state fire marshal, municipal fire chiefs, parish sheriffs, and town marshals); ME. REV. STAT. ANN. tit. 25, § 2394 (West 1988) (municipal fire inspectors); MD. ANN. CODE art. 38A, §§ 7(c)(2), 8(f) (Supp. 1998) (state fire marshal, who may also appoint employees of municipal fire departments as deputy state fire marshals); MASS. GEN. LAWS ANN. ch. 148, §§ 2, 3, 4 (West 1981 & Supp. 1998) (state fire marshal and municipal fire chiefs); MICH. STAT. ANN. § 4.559(32) (Law. Co-op. 1997) (department of state police's arson strike force); MINN. STAT. ANN. § 299F.04 (West Supp. 1999) (state fire marshal, municipal fire

chiefs, or, if no local fire department, mayors and town clerks); MISS. CODE ANN. § 45-11-1 (1993 & Supp. 1999) (state fire marshal); MO. REV. STAT. §§ 320.202, 320.220, 320.225, 320.230, 320.250 (1994) (state fire marshal and municipal fire chiefs); MONT. CODE ANN. §§ 50-63-101, 50-63-201, 50-63-202 (1997) (department of justice, municipal fire chiefs, and county sheriffs); NEB. REV. STAT. §§ 81-502, 81-506, 81-511, 81-512 (1996 & Supp. 1998) (state fire marshal, municipal fire chiefs, or, if no local fire department, mayors, town clerks, and county commissioners); NEV. REV. STAT. ANN. §§ 477.014, 477.030 (Michie 1994) (state fire marshal, who may appoint municipal fire chiefs, fire marshals, police officers, and building code inspectors, and in small counties may delegate to local government); N.H. REV. STAT. ANN. §§ 21-P:12, 154:7-a (1988 & Supp. 1998) (state fire marshal and municipal fire departments); N.J. STAT. ANN. §§ 15:8-4, 40A:14-7.1 (West 1984 & Supp. 1999) (municipal fire departments' arson investigation units and volunteer fire departments); N.M. STAT. ANN. §§ 59A-52-8, 59A-52-9, 59A-52-10 (Michie Supp. 1997) (state fire marshal); N.Y. GEN. MUN. LAW §§ 204-c, 204-d (McKinney 1999) (municipal fire chiefs); N.C. GEN. STAT. § 58-79-1 (1999) (attorney general, state bureau of investigation, municipal fire chiefs, county fire marshals, and county sheriffs); N.D. CENT. CODE §§ 18-01-02, 18-01-06, 18-01-07 (1997) (municipal fire chiefs, or, if no local fire department, city auditor or rural fire protection district secretary); OHIO REV. CODE ANN. §§ 3737.22, 3737.24 (Anderson 1997 & Supp. 1998) (state fire marshal, municipal fire chiefs, and municipal fire prevention officers); OKLA. STAT. ANN. tit. 74, §§ 314, 316 (West 1995 & Supp. 1999) (state fire marshal, municipal fire chiefs, sheriffs, or, if no local fire department, mayors); OR. REV. STAT. §§ 476.030, 476.060, 476.070, 476.210 (1997 & Supp. 1998) (state fire marshal, municipal fire marshals, municipal fire chiefs, or, if no local fire department, marshals, sheriffs, and constables); 16 PA. CONS. STAT. ANN. § 6104 (West 1956) (county fire marshals); 53 PA. CONS. STAT. ANN. §§ 14526, 37104 (West Supp. 1998) (city fire marshals); R.I. GEN. LAWS §§ 23-28.2-4, 23-28.2-9, 23-28.2-11 (1997) (state fire marshal, who may approve municipal fire chiefs as assistant deputy state fire marshals); S.C. CODE ANN. §§ 23-9-40, 23-9-220 (Law. Co-op. 1989 & Supp. 1998) (state fire marshal and state arson control program); S.D. CODIFIED LAWS §§ 34-29B-5, 34-29B-8 (Michie 1994) (state fire marshal and municipal fire departments); TENN. CODE ANN. §§ 68-102-102, 68-102-108, 68-102-111, 68-102-130, 68-102-144 (1996) (commissioner of department of commerce and insurance, acting as state fire marshal, municipal fire marshals, municipal fire chiefs, or, if no local fire department, mayors); TEX. GOV'T CODE ANN. §§ 417.004, 417.007, 417.008 (West 1998) (state fire marshal, who may delegate to municipal fire marshals); TEX. LOC. GOV'T CODE ANN. § 352.013 (West 1999) (county fire marshals); UTAH CODE ANN. §§ 53-7-103, 53-7-104, 53-7-210, 53-7-211 (1994) (state fire marshal and municipal fire departments); VT. STAT. ANN. tit. 20, §§ 2681, 2831, 2863, 2921 (1987 & Supp. 1998) (state fire marshal and municipal fire departments); VA. CODE ANN. §§ 27-15.1, 27-17, 27-31, 27-32.1, 27-34, 27-34.1, 27-36, 27-56, 27-60 (Michie 1997 & Supp. 1999) (department of state police arson investigations and municipal fire marshals); WASH. REV. CODE ANN. §§ 48.48.030, 48.48.060 (West 1999) (state director of community development, state director of fire protection, municipal fire chiefs, sheriffs and county fire marshals); W. VA. CODE §§ 29-3-11, 29-3-12, 29-3A-1, 29-3A-3 (1999) (state fire marshal and municipal fire departments); WIS. STAT. ANN. § 165.55 (West 1997 & Supp. 1998) (state fire marshal, department of justice, municipal fire chiefs, or, if no local fire department, city mayors, village presidents, and town clerks); WYO. STAT. ANN. § 6-3-108 (Michie 1999) (state fire marshal, municipal fire departments, sheriffs, police, and state insurance commissioner); P.R. LAWS ANN. tit. 25, §§ 331c, 331h (Supp. 1995–1996) (Puerto Rico Firefighter Corps chief); V.I. CODE ANN. tit. 23, § 551 (1993) (Virgin Islands Fire Services arson prevention and investigation unit).

grant complete law enforcement powers to fire investigators, allowing them to enforce all criminal laws, arson and otherwise.[44] Thirty-three states grant fire investigators a limited law enforcement power, restricted solely to their activities surrounding an arson investigation.[45] The remainder of the states and protectorates

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44. *See* ALA. CODE §§ 36-19-1, 36-19-2 (1991) (state fire marshal, municipal fire and police chiefs, marshals, and sheriffs); ARK. CODE ANN. §§ 12-8-106, 12-13-104, 12-13-105, 12-13-106, 12-13-107 (Michie 1995 & Supp. 1998) (Arkansas State Police has power and authority of state fire marshal to investigate all crimes, including arson); IOWA CODE ANN. §§ 80.9, 100.1 (West 1996 & Supp. 1999) (State Department of Public Safety is assigned all law enforcement duties, including arson cases); KY. REV. STAT. ANN. §§ 227.220, 227.275 (Banks-Baldwin 1995 & Supp. 1998) (arson investigators are employees of state police); MINN. STAT. ANN. § 299F.058 (West Supp. 1999) (state arson strike force); MONT. CODE ANN. § 50-63-201 (1997) (department of justice); N.C. GEN. STAT. §§ 58-79-1, 58-79-5 (1999) (attorney general enforces all criminal laws in arson investigations); OR. REV. STAT. § 476.110 (1997) (department of state police enforces all criminal laws in arson investigations); R.I. GEN. LAWS § 12-7-21 (1994 & Supp. 1998), 23-28.2-14 (1997) (state fire marshal, who may approve municipal fire chiefs to be assistant deputy state fire marshals).

45. *See* ARIZ. REV. STAT. §§ 9-500.01, 41-2163 (1999) (state fire marshal and arson investigators designated by municipal fire departments); ARK. CODE ANN. §§ 14-53-112 (Michie 1998) (municipal fire marshals); CAL. PENAL CODE § 830.3 (West Supp. 1999); CAL. HEALTH & SAFETY CODE § 13103 (West Supp. 1999) (state fire marshal); COLO. REV. STAT. ANN. § 18-1-901 (West 1999) (fire arson investigators appointed by municipal fire chief and approved by local sheriff or police chief); CONN. GEN. STAT. ANN. §§ 29-302, 29-310 (West 1990) (Department of Public Safety Commissioner serves as state fire marshal); DEL. CODE ANN. tit. 16, §§ 6701, 6706 (1995) (municipal fire companies may appoint members as fire police); FLA. STAT. ANN. § 633.14 (West Supp. 1999) (state fire marshal); GA. CODE ANN. § 25-2-9 (Harrison 1998) (state fire marshal); IDAHO CODE § 41-257 (1998) (state fire marshal and fire chiefs); 20 ILL. COMP. STAT. ANN. 2910/1, 2905/2, 425 ILL. COMP. STAT. ANN. 25/7 (West 1993 & Supp. 1999) (state fire marshal); IND. CODE ANN. §§ 22-14-2-4, 22-14-2-8 (Michie 1997 & Supp. 1998) (state fire marshal and state fire marshal arson investigators); KAN. STAT. ANN. § 31-157 (1993) (state fire marshal and municipal fire department personnel who have been certified by the state fire marshal); LA. REV. STAT. ANN. §§ 40:1563, 1568 (West 1992 & Supp. 1999) (state fire marshal and municipal arson investigators); ME. REV. STAT. ANN. tit. 25, § 2396 (West Supp. 1998) (state fire marshal); MD. ANN. CODE art. 38A, §§ 7, 8 (Supp. 1998) (state fire marshal, who may appoint municipal fire department personnel as arson investigators); MICH. STAT. ANN. §§ 4.559(1), (2), (32) (Law. Co-op. 1997) (state fire marshal and state arson strike force unit); MO. REV. STAT. § 320.230 (1994) (state fire marshal); NEV. REV. STAT. ANN. §§ 289.250, 477.014, 477.030 (Michie 1994 & Supp. 1997) (state fire marshal and arson investigators); N.H. REV. STAT. ANN. § 21-P:4 (1988 & Supp. 1998) (state fire marshal); N.J. STAT. ANN. §§ 15:8-4, 40A:14-7.1 (West 1984 & 1993) (state fire marshal, state and municipal arson investigation units; volunteer fire departments only until police arrive); N.M. STAT. ANN. § 59A-52-19 (Michie 1997) (state fire marshal); N.Y. GEN. MUN. LAW § 209-c (McKinney 1999) (fire police deputized by municipal fire departments); OHIO REV. CODE ANN. §§ 3737.22, 3737.24, 3737.26 (Anderson 1997 & Supp. 1998) (state fire marshal); OKLA. STAT. ANN. tit. 74, § 324.9 (West 1995 & Supp. 1999) (state fire marshal); S.C. CODE ANN. §§ 23-9-220, 23-9-230 (Law. Co-op. 1989) (state arson control program investigators); TENN. CODE ANN. §§ 68-102-144, 68-102-149 (1996) (state fire marshal and municipal arson investigators); TEX. GOV'T CODE ANN. §§ 417.004, 417.006, 417.007 (West 1998) (state fire marshal, who may commission police officers to act as arson investigators); UTAH CODE ANN. §§ 53-7-105, 53-7-210 (1994) (state fire marshal); VA.

require fire investigators to contact the police whenever evidence of arson is discovered.[46]

Therefore, fire investigators have law enforcement powers, including the power to arrest a suspect, in the majority of the states. This seems to indicate that a focus of any fire investigation is to search for criminal evidence.[47]

In order to better understand the overall duties of fire investigators, one must look both to fire investigation sources as well as the underlying facts in applicable cases. The National Fire Protection Association ("NFPA") has promulgated qualification standards for fire investigators.[48] NFPA 1033 provides minimum job performance requirements for fire investigators,[49] and describes requirements for scene examination, scene documentation, evidence collection and preservation, interview and interrogation, and post-incident investigation.[50]

There is no specific reference to the legal requirements of searches and seizures in NFPA 1033. The ability to conduct a search and seizure, at least of fire debris, appears to be presumed by NFPA 1033.[51] In NFPA 1033, the fire investigator is directed to "inspect/evaluate" the scene to determine the cause and origin of the fire.[52]

CODE ANN. §§ 27-15.1, 27-34.2, 27-34.2:1, 27-56 (Michie 1997) (department of state police arson investigators, local fire marshals, municipal fire chiefs, and municipal fire officers-in-charge); WASH. REV. CODE ANN. § 48.48.060 (West 1999) (state director of community development and state director of fire protection); W. VA. CODE § 29-3-12 (1999) (state fire marshal); WIS. STAT. ANN. §§ 165.55, 165.70 (West 1997 & Supp. 1998) (department of justice arson investigators); WYO. STAT. ANN. §§ 6-1-104, 6-3-108 (Michie 1999) (state fire marshal arson investigators). *See, e.g.*, United States v. Green, 474 F.2d 1385 (5th Cir. 1973) (stating that because state statute authorized arson investigator to seize counterfeiting plates, actual seizure by secret service agent was permissible); Mazen v. Seidel, 940 P.2d 923, 927 (Ariz. 1997) (stating that Arizona statute conferred only limited law enforcement powers to arson investigators such that drug seizures, etc. were not available to arson investigators, yet police officers could seize drugs without a warrant).

46. *See* ALASKA STAT. § 18.70.090 (Michie 1998); CONN. GEN. STAT. ANN. §§ 29-302, 29-310, 29-311 (West 1990); D.C. CODE ANN. § 4-301 (1994 & Supp. 1999); HAW. REV. STAT. §§ 132-1, 132-4 (1993); MASS. GEN. LAWS ANN. ch. 148, §§ 2, 3 (West 1981 & Supp. 1999); MISS. CODE ANN. § 45-11-1 (1993 & Supp. 1999); NEB. REV. STAT. §§ 81-502, 81-508 (1996 & 1998); N.D. CENT. CODE §§ 18-01-02, 18-01-09 (1997); 16 PA. CONS. STAT. ANN. §§ 6104, 6105 (West 1956 & Supp. 1999); S.D. CODIFIED LAWS § 34-29B-8 (Michie 1994); VT. STAT. ANN. tit. 20, § 2869 (1987); P.R. LAWS ANN. tit. 25, §§ 331c, 331h (Supp. 1998); V.I. CODE ANN. tit. 23, § 551 (1993).

47. One of the most oft-cited treatises in this area repeatedly asserts that every fire scene should be treated as a crime scene and that the possibility of arson in a fire scene should always be investigated. *See* DEHAAN, *supra* note 2, at 3–4, 127, 143, 394.

48. *See* NATIONAL FIRE PROTECTION ASSOCIATION, NFPA 1033: PROFESSIONAL QUALIFICATIONS FOR FIRE INVESTIGATOR (1993) [hereinafter NFPA 1033].

49. *See id.* §§ 1-1, 1-2.

50. *See id.* §§ 3-2 to 3-7.

51. *See id.* § 3-4.

52. *See id.* § 3-2.1. A fire investigator should conduct both an exterior and interior survey, examining, removing, and preserving fire debris. *See id.* §§ 3-2.3, 3-2.4, 3-2.7. Preservation of evidence includes placing it into appropriate containers and marking the containers to maintain the chain of custody. *See id.* §§ 3-4.1, 3-4.3, 3-4.4, 3-4.5.

NFPA 921, entitled *Guide for Fire and Explosion Investigations*, is a comprehensive manual which establishes "guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents."[53] According to NFPA 921, the fire investigator's first duty at a fire scene is to determine the point of origin of the fire.[54] The investigator's next duty is to investigate and determine the cause of the fire.[55] It is at this point that evidence of ignitable liquids,[56] such as gasoline or lighter fluid, or remnants of incendiary devices[57] may be found that could indicate an intentionally-set or "incendiary" fire.[58] This is also the time when the investigator makes observations of the scene or reviews those observations documented by the firefighters.[59]

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53. *See* NFPA 921, *supra* note 30, § 1-2. NFPA 921 gives fire investigators discretion to conduct their investigations differently than suggested therein. "Deviations from these procedures, however, are not necessarily wrong or inferior but need to be justified." *Id.* § 1-2. *Accord id.* § 11. The need to justify any such deviation has become even more crucial since the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which requires that expert testimony meet standards of scientific reliability, at least in federal jurisdictions. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993). *See also* FEDERAL EMERGENCY MANAGEMENT AGENCY, INITIAL FIRE INVESTIGATION, STUDENT MANUAL § 5-3 (Dec. 1995) [hereinafter FEMA]. The guidelines provided in NFPA 921, if followed, should meet the standards of *Daubert*, which means that any deviations must also be shown to have the same scientific reliability.

54. *See* NFPA 921, *supra* note 30, § 2-1. In order to determine the area of origin, the investigator should begin with the area of least damage and move toward the area or areas of greatest damage. This obviously requires examination of both the exterior and interior of the building. *See id.* §§ 11-3, 11-4. Once the general area of origin has been located, based upon patterns caused by smoke, fire, heat, and possibly ignitable liquids, the investigator can locate the precise point of origin where the fire initially started. *See id.* § 11-1.

55. *See id.* §§ 2-1, 12-1. It is during this phase that the investigator should determine whether the cause of the fire was accidental, natural (acts of God), intentional (incendiary), or undetermined. *See id.* §§ 12-2 to 12-2.4.

56. *See id.* § 17-2.7.3 (explaining that the presence of ignitable liquids may indicate a fire was incendiary, especially when they are found in areas in which they are not normally expected).

57. Incendiary devices can be as complex as electrically-wired, time-delayed instruments or as simple as placing a burning cigarette inside a matchbook. *See id.* §§ 17-2.7 to 17-2.7.2.

58. *See id.* § 12-2.3 (describing an incendiary fire as one deliberately ignited under circumstances in which the person knows that the fire should not be ignited). Often, an arsonist will start a fire in more than one place to increase the chances of a successful burn. The existence of multiple points of origin is a major indicator of an incendiary or intentional fire, since it is highly unlikely that an accidental fire (electrical, combustion) will start in more than one place. However, an accidental fire legitimately could appear to have multiple origins, which may be caused by such factors as transfer of fire through metal parts (conduction), fire rising to another level of a building, falling debris, transfer of heat (convection), or overloaded electrical wiring. In all of these cases, however, a thorough investigation should reveal an initial point of origin that led to multiple fires. The existence of multiple fires, after ruling out accidental or natural causes, leads to a determination that the fire was started intentionally. *See id.* § 17-2.1.

59. *See id.* §§ 17-3 to 17-3.6 (stating that observations may include conditions of entry ways, apparent removal or substitution of furniture and other contents, damaged or

The entry into a building to accomplish these duties necessitates a determination of whether and when a warrant is needed. To understand the underpinnings of this determination, it is necessary to review the genesis of the current state of the law.

II. THE CONSTITUTIONAL GENESIS—HEALTH AND SAFETY INSPECTIONS

A. Frank v. Maryland *(1959)*

In 1958, a challenge was brought against the Baltimore City Health Department, whose inspector found evidence of possible rodent infestation in the basement of Aaron Frank's house. A Baltimore ordinance allowed health and safety inspectors to enter residences to inspect for suspected nuisances; it imposed a criminal fine upon residents who refused to grant such entry.[60]

In *Frank v. Maryland*, Justice Frankfurter embraced the constitutional protections against officially-sanctioned invasion of citizens' homes.[61] The Court stressed that two protections emerge from the constitutional prohibition against such home invasions. First is the right to be safe from intrusion—the right to refuse entry by government officials unless it is made under proper authority of law.[62] Second is the right to resist unauthorized entry which is made in order to obtain information that may be used to further the deprivation of life, liberty, or property.[63]

Nonetheless, the Supreme Court held that the Baltimore ordinance did not infringe upon the constitutional right to privacy.[64] The ruling was based upon 200 years of Maryland precedent which allowed warrantless entries for the sole purpose of protecting community health through the abatement of public nuisances, despite the state's constitutional provisions forbidding warrantless searches.[65] The Court held that neither federal nor state constitutional safeguards were implicated by the ordinance, since it only required a person to do that which he was otherwise required to do, i.e., conform to minimum community standards

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disabled alarms or sprinkler systems, or intentional sabotage). Evidence may also indicate that the fire was started to conceal other crimes such as burglary or homicide. *See id.* § 17-4.2.

60. *See* Frank v. Maryland, 359 U.S. 360, 361 (1959) (citing BALTIMORE, MD., CODE art. 12, § 120 (1959)). The ordinance did not allow actual entry, but only the power to request such entry. *See id.*

61. *See id.* at 362–63.

62. *See id.* at 365.

63. *See id.*

64. *See id.* at 366–67. Justice Frankfurter obtained his majority judgment with Justice Whittaker's concurrence, in which Justice Whittaker concluded that the inspector's request and the ordinance's procedures did not amount to an unreasonable search. *See id.* at 373–74 (Whittaker, J., concurring).

65. *See id.* at 367–71.

of health and well-being.[66] The Court further noted that the inspector had no actual right to force entry if the resident refused the request.[67]

Justice Douglas' dissent in *Frank v. Maryland* objected to the majority's dilution of "the right of privacy which every homeowner had the right to believe was part of our American heritage."[68] The dissent then reaffirmed that warrantless searches are allowed only in exceptional circumstances, one of which includes a burning building.[69]

B. Early State Court Decisions on Warrantless Fire Scene Entries

During roughly the same time period as *Frank*, a small number of state appellate courts addressed warrantless searches in fire investigations. One of these cases, *State v. Buxton*,[70] was decided in 1958, at about the same time that the *Frank* inspection occurred.[71] In *Buxton*, two fire investigators entered a burned restaurant without a warrant and discovered evidence of arson.[72] The state appealed the trial court's suppression of the evidence, arguing that state law authorizing fire investigators to enter premises to investigate fires legitimized the entry. The Supreme Court of Indiana, in affirming the suppression, refused to interpret a statute to allow warrantless entries for criminal investigative purposes.[73]

Two state cases decided after the *Frank* decision upheld warrantless entries in situations similar to that in *Buxton*, with only one of them citing to *Frank* as authority.[74] In *State v. Cohn*, the Missouri Supreme Court upheld a warrantless

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66. *See id.* at 366. *But see* State v. Buxton, 148 N.E.2d 547, 551 (Ind. 1958) (addressing a similar statute, prior to the *Frank* decision, and holding that the entry was not a mere civil inspection but a criminal investigation requiring a search warrant).

67. *See Frank*, 359 U.S. at 366–67. The Court's statement that it relied on the Maryland precedents suggests that an ordinance allowing a forced warrantless entry would be authorized by such precedents. However, in light of Justice Frankfurter's statement that the Court's decision was based, in part, on the fact that the ordinance did not authorize actual entry, the state-based precedents would not have convinced the Court to create an exception for warrantless entries in such cases. *But see* State v. Rees, 139 N.W.2d 406, 413 (Iowa 1966) (relying heavily on *Frank* and holding that initial investigative entry and discovery of evidence by fire investigator was authorized by statute, making it not only lawful, but the equivalent to obtaining a search warrant), *overruled by* State v. Hansen, 286 N.W.2d 163, 167 (Iowa 1979).

68. *Frank*, 359 U.S. at 374 (Douglas, J., dissenting).

69. *See id.* at 380 (Douglas, J., dissenting). Justice Douglas' statement demonstrates that a fire exigency had Fourth Amendment acceptance by 1958. The dissent in *Frank* also contributed to the confusion raised in the majority's decision about whether this case involved the right of a warrantless entry or merely a request for entry. Justice Douglas chose to discuss the constitutional abhorrence of warrantless searches of private homes, despite the fact that no warrantless entry occurred. *See id.*

70. 148 N.E.2d 547 (Ind. 1958).

71. The Baltimore city health inspector requested entry to Mr. Frank's residence on February 27, 1958. *See Frank*, 359 U.S. at 361.

72. *See Buxton*, 148 N.E.2d at 548.

73. *See id.* at 552.

74. *See* State v. Rees, 139 N.W.2d 406, 409 (Iowa 1966) (citing Frank v. Maryland, 359 U.S. 360, (1959)); State v. Cohn, 347 S.W.2d 691 (Mo. 1961).

entry on the basis that firefighters have a license to enter a burning building, and the seizure by the firefighters or the police of evidence found in plain view is proper to protect the public safety.[75] In the second case, *State v. Rees*, the Iowa Supreme Court relied upon *Frank* in upholding a warrantless entry by fire investigators based upon the same type of statute that had been rejected by *Buxton* as providing a basis for warrantless entries at fire scenes.[76] In *Rees*, the court held that the statute allowing a fire investigator to enter and examine all fire scenes was the equivalent of a criminal search warrant.[77]

C. *The Overruling of* Frank *(1964) and the Need for Administrative Warrants*

The diverse interpretations of similarly-worded inspection statutes addressed by the supreme courts of Indiana, Iowa, and Missouri waited years before receiving some clarification from the United States Supreme Court. In fact, the *Frank* decision allowed warrantless entries based upon similar inspection statutes to be upheld throughout the country for nearly a decade.[78] The Court did not revisit the issue until 1967, in *Camara v. Municipal Court*[79] and *See v. City of Seattle*.[80] Both cases involved city ordinances similar to the one in *Frank*.[81] The Court chose to use the two cases in tandem to address warrantless entries in both residential (*Camara*) and commercial (*See*) properties.[82] As in *Frank*, no actual entry occurred in either *Camara* or *See*.[83] In each case, the tenants refused the requests for entry and they were both charged with misdemeanors under the same procedure used by the Baltimore health inspector in *Frank*.[84] Despite the obvious similarity between these cases and *Frank*, the Court in *Camara* noted that the increase since 1959 of urban blight and the corresponding increase in

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75. *See Cohn*, 347 S.W.2d at 695.

76. *See Rees*, 139 N.W.2d at 409.

77. *See id.* at 413.

78. In *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), the issue came before the Court, but did not receive sufficient votes for review. When probable jurisdiction was noted, four of the Justices expressed their view that *Frank* should be reaffirmed, *see* 360 U.S. 246, 249–50 (1959) (Clark, J., mem.), despite Justice Brennan's protestations that the Justices' views should not be aired prior to argument. *See id.* at 246–48 (Brennan, J., mem.). Because Justice Stewart did not participate in the decision, the Court affirmed an Ohio Supreme Court decision upholding an ordinance similar to that upheld in *Frank*, with an equally divided 4-4 vote. In a break from the Court's tradition in such affirmances *ex necessitate*, the four "dissenting" justices, led by Justice Brennan, filed their own opinion criticizing the *Frank* holding. *See Price*, 364 U.S. at 275–76. *See also Rees*, 139 N.W.2d at 409.

79. 387 U.S. 523 (1967). *Camara* involved a San Francisco housing code and a public health inspector. *See id.* at 525–26.

80. 387 U.S. 541 (1967). *See* concerned a Seattle fire code and a representative of the city's fire department. *See id.* at 541–42.

81. *See Camara*, 387 U.S. at 526–27; *See*, 387 U.S. at 542–43.

82. *See Camara*, 387 U.S. at 526; *See*, 387 U.S. at 542.

83. *See Camara*, 387 U.S. at 525–27; *See*, 387 U.S. at 541–42.

84. *See Camara*, 387 U.S. at 525–27; *See*, 387 U.S. at 541–42.

governmental attempts to deal with this blight through inspection techniques necessitated a renewed examination of this issue.[85]

Ultimately, the Court adopted Justice Douglas' dissent in *Frank*, holding that the Fourth Amendment prohibits prosecution of a person who merely refuses a request for a warrantless inspections.[86] The Court, in weighing competing public and private interests in such cases, determined that, before inspecting a commercial property or after a request for entry to inspect a residence has been refused, an administrative warrant should be obtained in order to fulfill "the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy."[87]

The concept of an "administrative warrant" was chosen over a "criminal warrant," because the governmental interests justifying the official intrusions on constitutionally protected interests are different.[88] In a criminal investigation, a search warrant requires probable cause that contraband will be found in a specific place.[89] In an administrative search, the concern is to secure city-wide compliance with minimum standards.[90] The administrative search is considered neither personal in nature nor aimed at the discovery of a crime; therefore, it involves "a relatively limited invasion of the urban citizen's privacy."[91]

The Court in *Camara* reiterated that warrantless entries are permissible only in emergency situations.[92] The Court also pointed out that health, housing, and fire code inspections generally do not involve any compelling urgency to

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85. *See Camara*, 387 U.S. at 525.

86. *See id.* at 540; *See*, 387 U.S. at 542. Each case was determined by a 6-3 majority.

87. *Camara*, 387 U.S. at 539. The Court in *See* did not reach the issue of whether a refusal to inspect was a prerequisite to obtaining an administrative warrant for a commercial property, because surprise may be a crucial factor in inspecting commercial properties and the standards of reasonableness may differ from those applicable to residential properties. *See See*, 387 U.S. at 545 n.6. Subsequently, the Court, in an opinion by Justice Douglas, strengthened these rulings by upholding certain federal statutes that allowed treasury agents to enter and inspect liquor stores without warrants and provided for monetary forfeitures by those retailers that refused entry. The Court did not allow warrantless entries upon refusal, stating that the forfeiture was the sole sanction available for the refusal to allow entry. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72, 76–77 (1970).

88. *See Camara*, 387 U.S. at 534–35; *See*, 387 U.S. at 543–44. This was a conclusion reached earlier by Justice Douglas in the *Frank* dissent when he suggested that while a health official should need a warrant for health inspections, such a warrant may not require the level of justification that a criminal investigation warrant would merit. *See* Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting).

89. *See Camara*, 387 U.S. at 534–35; *See*, 387 U.S. at 543–44.

90. *See Camara*, 387 U.S. at 534–35; *See*, 387 U.S. at 543–44.

91. *Camara*, 387 U.S. at 537. Although an administrative warrant does not require the detailed probable cause of a criminal investigation warrant, it still involves an impartial judicial review, thereby removing the decision making authority from the person in the field attempting to enforce the ordinance. *See* NFPA 921, *supra* note 30, § 5-2.3.3 (1998).

92. *See Camara*, 387 U.S. at 539.

inspect at a particular time or place, thereby precluding the use of a warrantless entry.[93]

III. A DECADE OF FIRE INVESTIGATIONS WITHOUT SUPREME COURT DIRECTION (1967[94]–1978)

Having resolved the constitutional issues surrounding routine inspections for health, safety, and fire code enforcement, the lower courts then had to apply constitutional standards to post-fire examinations with virtually no Supreme Court guidance with regard to criminal investigations. The only lights in this uncharted wilderness, *Camara* and *See*, were repeatedly dimmed by lower courts as being inapplicable to post-fire investigations. The majority of these courts found the administrative warrant requirement of *Camara* and *See* inapplicable to the post-fire intrusion of a fire investigator.[95] These courts believed that administrative warrants were limited to routine and general inspections of an entire area for the purpose of ensuring general compliance with safety codes, rather than a post-fire investigation of a specific location.[96]

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93. *See id.* Justice Clark wrote a single dissenting opinion, 387 U.S. 541, 546 (1967) (Clark, J., dissenting), for both *Camara* and *See* that was joined by Justices Harlan and Stewart. The dissent criticized the majority's decision to eradicate hundreds of city ordinances that were based on precedents dating back to colonial days, "jeopardizing thereby the health, welfare, and safety of literally millions of people." *Id.* at 547. The dissent reiterated the *Frank* holding that health and safety inspections were not governed by the Fourth Amendment and had not been so for over 150 years. *See id.* at 549.

94. The bulk of the appellate cases involving post-fire investigations arose after 1967, with only a handful occurring prior to that. *See, e.g.*, State v. Rees, 139 N.W.2d 406 (Iowa 1966) (upholding warrantless entry); State v. Cohen, 347 S.W.2d 691 (Mo. 1961) (same); State v. Buxton, 148 N.E.2d 547 (Ind. 1958) (overturning warrantless entry). *See supra* text accompanying notes 70–77.

95. A few courts tried to justify the intrusions under the *Camara* and *See* reasoning. In a case close in time to the *Camara* and *See* decisions, the Virginia Supreme Court held that a warrantless investigation conducted by two police officers during and after a fire that resulted in the discovery of a jug containing kerosene was an "inspection" occurring during an emergency and was not, therefore, in violation of those Supreme Court cases. *See* Bennett v. Commonwealth, 188 S.E.2d 215, 217 (Va. 1972). *But cf.* Costan, *supra* note 15, at 136 (criticizing the *Bennett* decision). The Virginia Supreme Court also held that the "inspection" conducted by a fire investigator the following day in the building was authorized by a state statute allowing him to enter upon any premises to determine cause and origin and was, therefore, a permissible warrantless inspection under *Camara* and *See*. *See Bennett*, 188 S.E.2d at 218. *But see* State v. Dajnowicz, 204 N.W.2d 281, 284 (Mich. Ct. App. 1972) (stating that *Camara* applied to post-fire investigations, but search warrant needed for all entries after day of fire). *See also* Steigler v. Anderson, 496 F.2d 793, 796 (3d Cir. 1974) ("Regardless of state authority, the acts of state officials are judged by federal standards when fourth amendment violations are claimed."); Kassner v. Fremont Mut. Ins. Co., 209 N.W.2d 490, 492 (Mich. Ct. App. 1973) (civil case excluding evidence because warrantless fire investigation was a *Camara*-type inspection and administrative warrant should have been obtained).

96. *See Steigler*, 496 F.2d at 796–97; United States v. Gargotto, 476 F.2d 1009, 1013 (6th Cir. 1973); United States v. Green, 474 F.2d 1385, 1388–89 (5th Cir. 1973); People v. Kulick, 225 N.W.2d 709, 712 (Mich. Ct. App. 1974); State v. Felger, 526 P.2d

All of the lower court cases accepted the underlying doctrine that warrantless searches were *per se* unreasonable.[97] Additionally, all agreed that the existence of a fire is an exigent circumstance, allowing firefighters to enter a building to suppress a fire without the need to obtain a warrant.[98]

As discussed *infra*, the majority of these courts relied upon the following theories to uphold warrantless entries in fire investigations:

- Absence of Privacy Expectations Caused by Uninhabitability
- Abandonment of Privacy Expectations
- Stepping into the Shoes of the Firefighters
- Independent Exigencies
- Statutory Authority
- Consent

*A. Examples of Post–*Camara *and* See *Theories*

1. Uninhabitability: Absence of Privacy Expectation Due to Fire Damage

In 1967, the United States Supreme Court, in *Katz v. United States*, held that the Fourth Amendment applies to any property to which a person has a reasonable expectation of privacy.[99] While conceding this constitutional principle, some courts circumvented *Katz* and upheld warrantless intrusions by fire investigators under the theory that a property owner no longer had a reasonable expectation of privacy in fire-damaged premises.

As an example, in *State v. Vader*, the New Jersey Court of Appeals confronted a warrantless entry that occurred three days after the fire.[100] Despite the attenuation from the original exigency, the court held that the warrantless entry did not constitute a "search" because the fire had rendered the home "uninhabitable" and, therefore, no privacy expectation remained in the premises.[101] In a far-reaching extension of the uninhabitability doctrine, the Montana Supreme Court in *State v. Murdock* upheld a warrantless entry in a partially burned building on the

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611, 615 (Or. Ct. App. 1974). *But see* Michigan v. Clifford, 464 U.S. 287 (1984) (plurality decision); Michigan v. Tyler, 436 U.S. 499 (1978) (stating that after exigency has ended, entry to determine cause and origin requires administrative warrant).

97. *See* Katz v. United States, 389 U.S. 347, 357 (1967); *Steigler*, 496 F.2d at 795; *Gargotto*, 476 F.2d at 1012.

98. *See, e.g.*, *Steigler*, 496 F.2d at 795 (stating that in addition to suppression activities, seeking out and rescuing trapped occupants, ventilating the building after the fire is under control, searching for any smoldering fires, and cleaning up prior to departing are not searches under the Fourth Amendment).

99. *See Katz*, 389 U.S. at 352–59.

100. *See* State v. Vader, 276 A.2d 151, 152 (N.J. Super. Ct. App. Div. 1971).

101. *See id. See also* People v. Bailey, 202 N.W.2d 557, 560 (Mich. Ct. App. 1972) (addressing situation where house and contents were destroyed by fire and no longer suitable for any person, thereby vitiating privacy expectations). *But see* Kassner v. Fremont Mut. Ins. Co., 209 N.W.2d 490, 492 (Mich. Ct. App. 1973) (criticizing the *Bailey* ruling).

basis that interests of public safety in investigating and determining incendiary fires predominated over any right to privacy.[102]

However, the California Court of Appeals in *Swan v. Superior Court* reached an opposite result in a situation where the premises were uninhabitable.[103] Because the investigation occurred ten days after the fire and after the owner had boarded up the house, the court held that the owner retained a reasonable expectation of privacy and, therefore, a warrant was required.[104] The court found that despite the home's uninhabitability, the owner demonstrated his privacy expectation by boarding up the entryways.[105]

2. Abandonment of Expectation of Privacy

The most common example of abandonment is when the occupant leaves the property, demonstrating an intent not to return. In *State v. Felger*, the fire investigator initially received consent from the tenant/suspect to enter the burned apartment.[106] Subsequently, the tenant never lived in the apartment and never attempted to return. Thereafter, the landlord gave consent to the investigator and officers to enter the premises again.[107] The court held that the Fourth Amendment did not apply because the premises had been abandoned, thereby eliminating any expectation of privacy.[108] Additionally, the court stated that subsequent entries by the investigator were merely continuations of the first entry and thereby justified.[109]

Some courts believed that a finding of uninhabitability required an additional inquiry into whether the owner had abandoned the uninhabitable building. For example, in *People v. Dajnowicz*, the Michigan Court of Appeals held that despite the house being "gutted" by fire, the Fourth Amendment applied unless it was shown that the owner intended to abandon his expectation of

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102. *See* State v. Murdock, 500 P.2d 387, 391 (Mont. 1972). *See also*, State v. Kulick, 225 N.W.2d 709, 712 (Mich. Ct. App. 1974).

103. *See* Swan v. Superior Court, 87 Cal. Rptr. 280, 282 (Ct. App. 1970).

104. *See id.* at 282.

105. *See id.*

106. *See* State v. Felger, 526 P.2d 611, 613 (Or. Ct. App. 1974).

107. *See id.* at 613–14.

108. *See id.* at 615. The abandonment issue became important because the tenant denied at trial that he had initially given consent. *See id.* at 613. The court also held that *Camara* and *See* had no application to the case because it was not a routine and general inspection. *See id.* at 615.

109. *See id.* The statement was apparently dictum; the court stated that it need not reach the issue of whether a warrant was needed for the subsequent entries because of the tenant's abandonment. *See id. See also* State v. Scott, 576 P.2d 1383, 1386 (Ariz. Ct. App. 1978) (noting that other courts had upheld repeated entries and citing to *Felger* and *Bennett*); People v. Patrick, 355 N.E.2d 224, 229 (Ill. App. Ct. 1976) (upholding the continuation of investigation because it focused on cause and origin, despite fact that investigator discovered evidence of arson); People v. Kulick, 225 N.W.2d 709, 712 (Mich Ct. App. 1974) (upholding continuation of initial valid search); State v. Cohn, 347 S.W.2d 691, 695 (Mo. 1961) (stating that return for further inspection the day after an initial lawful entry "is of no legal significance"). *But see* People v. Ramsey, 77 Cal. Rptr. 249, 255 (Ct. App. 1969) (holding that first entry by investigators after firefighters had departed was not a valid continuation).

privacy.[110] In *Castle v. State*, the Florida Court of Appeals upheld a warrantless entry during which a firefighter seized evidence in plain view.[111] The court stated that, while the parties had not raised the issue of abandonment, it would have upheld a warrantless entry on the additional basis that the owner had involuntarily abandoned the premises.[112]

3. Stepping Into the Shoes of the Firefighters

Generally, federal courts upheld warrantless entries on a theory that investigators "stepped into the shoes" of firefighters and could seize items under the plain view doctrine as it then-existed under *Coolidge v. New Hampshire.*[113] In *United States v. Green*,[114] the fire investigator arrived after the fire was extinguished, but before clean-up operations were completed. While the firefighters assisted the investigator in his attempt to determine the cause of the fire, one of the firefighters discovered numerous metal plates. The investigator believed them to be counterfeiting plates and contacted the United States Secret Service.[115] A secret service agent arrived while the firefighters were still present and entered into the burned building without a warrant. The agent then took custody of the plates as each was handed to him by one of the firefighters.[116]

The defendant appealed his conviction of federal possession of counterfeiting plates, claiming a Fourth Amendment violation based on the warrantless seizure of the plates.[117] The Fifth Circuit stated that the responsibilities of firefighters and fire investigators are inseparable and that the former could not leave a scene until the latter had determined that the fire was completely extinguished.[118] Because of these inter-related duties, the Fifth Circuit held that

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110. *See* People v. Dajnowicz, 204 N.W.2d 281, 285 (Mich. Ct. App. 1972). *See also* Swan v. Superior Court, 87 Cal. Rptr. 280, 282 (Ct. App. 1970) (concluding that existence of personal effects in uninhabitable house and owner's boarding up of entryways showed no abandonment).

111. *See* Castle v. State, 305 So. 2d 794, 796 (Fla. Dist. Ct. App. 1974), *aff'd*, 330 So. 2d 10 (Fla. 1976).

112. *See id.* The abandonment issue was probably not raised by the parties because the "involuntariness" was caused by the death of one of the owners in the fire and the hospitalization of the other owner. *See id. But see Dajnowicz*, 204 N.W.2d at 283 (stating that hospitalization of owner which prevented him from objecting could be grounds to invalidate a search based on an abandonment theory).

113. 403 U.S. 443 (1971), *modified in* Horton v. California, 496 U.S. 128, (1990). Under *Coolidge*, an item in "plain view" could be seized if the initial intrusion on the premises was justified by a warrant or an exigent circumstance and the item was "inadvertently" discovered. *See id.* at 469–471.

114. 474 F.2d 1385 (5th Cir. 1973).

115. *See id.* at 1386.

116. *See id.* at 1387.

117. *See id.* at 1386.

118. *See id.* at 1388–89. The court concluded that a firefighter was not trained in determining whether a doused fire was capable of being rekindled and that the decision could be made only by an investigator. Similar reasoning was applied by New York's highest court in *People v. Calhoun*, 402 N.E.2d 1145, 1148 (N.Y. 1980). These conclusions were oversimplified and inaccurate, since fire investigators usually are called to fire scenes

requiring the investigator to obtain a warrant to make this determination was a "self-evident absurdity."[119] Having reached this conclusion, the court determined the counterfeiting plates seizable under the plain view doctrine.[120] The court held that the secret service agent's seizure was permissible because the invasion of privacy created by the fire investigator's lawful intrusion was not increased by the presence of other law enforcement officers.[121]

In *Steigler v. Anderson*,[122] the fire investigator called the local police to seize certain evidence that he believed indicated evidence of arson. The Third Circuit held that the fire investigator's warrantless presence was justified by the exigent circumstances of the fire and that the police stepped into the shoes of the fire investigator, thereby justifying their warrantless seizure of the evidence.[123] The Third Circuit's holding was based on the "senselessness" of the police officer's need to obtain a search warrant when the fire investigator already was legally on the scene.[124] The Court went on to state that the owner of the premises had lost any reasonable expectation of privacy once the fire investigator discovered the items in plain view during his investigation.[125]

In *United States v. Gargotto*,[126] the court discussed a similar rationale. Again, the fire investigator arrived after the fire was extinguished, but while the firefighters were present. The fire investigator seized papers that he believed might lead to identification of the arsonist. The Sixth Circuit held that the investigator did

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only when the cause is undetermined or when arson is suspected, as was the case in *Green*. The fire investigator is called in to determine origin and cause, not whether a fire is extinguished. Therefore, in the many determinable or non-suspicious fires, firefighters are able to determine, through their overhaul operations, whether a fire is completely extinguished. See *supra* note 38, for a discussion of what overhaul entails.

119. *See Green*, 474 F.2d at 1389. The court highlighted that this was not a *Camara/See* situation because this type of investigation was not a routine and general inspection. *See id. See also* Steigler v. Anderson, 496 F.2d 793, 796–97 (3d Cir. 1974); United States v. Gargotto, 476 F.2d 1009, 1013 (6th Cir. 1973).

120. *See Green*, 474 F.2d at 1389. The court determined that the *Coolidge* requirement of plain view was met because the investigator was legally on the premises due to the exigent circumstances of the fire hazard and the plates were inadvertently discovered while sifting through the debris to determine the cause of the fire. *See id.*

121. *See id.* at 1390. "Once the privacy of a dwelling has been lawfully invaded, to require a second officer...to secure a warrant before he enters the premises to confirm that the seized evidence is contraband and to take custody of it is just as senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant...." *Id. See also* United States v. Brand, 556 F.2d 1312, 1317 (5th Cir. 1977) (stating that later arrivals may join their colleagues even though the exigent circumstances justifying the initial entry no longer exist).

122. 496 F.2d 793 (3d Cir. 1974). In *Steigler*, the fire investigator was apparently on the scene while the fire was still burning and remained on site afterwards to investigate the cause of the fire. *See id.* at 794.

123. *See id.* at 797–98. Another factor noted by the court in justifying the exigent circumstances was the presence of highly flammable containers, requiring their immediate seizure and removal. *See id.* at 797 n.12.

124. *See id.* at 798.

125. *See id.*

126. 476 F.2d 1009 (6th Cir. 1973).

not need a warrant because the fire had been recently extinguished and firefighters were still present.[127] The court held that the papers were legally seized under the *Coolidge* plain view doctrine.[128] The fact that the papers subsequently were given to agents of the Internal Revenue Service did not alter the legality of the seizures, because "evidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that for which it was originally taken."[129]

During this time period, the majority of state courts followed reasoning similar to their federal counterparts, generally upholding warrantless entries in fire investigations. The Virginia Supreme Court held that officers who arrived while firefighters were present were rightfully on the premises and that the seizure of evidence found in plain view did not violate the Fourth Amendment.[130] An Arizona appellate court ruled that a fire marshal did not need to obtain a warrant to enter a fire scene for an arson investigation when police already were legally on the premises.[131]

One of the few tribunals rejecting the legal theory of stepping into the shoes of the firefighters was the California Court of Appeals in *People v. Ramsey*.[132] In *Ramsey*, a police officer, looking for stolen vehicles reported to him by firefighters, entered a fire-damaged building without a warrant.[133] The court refused to uphold the warrantless entry on the belief that the officer's subsequent entry was not a continuation of the firefighters' lawful entry, despite the fact that the firefighters had seen the vehicles.[134]

4. Independent Exigencies

One of the most justifiable types of warrantless searches occurring in the aftermath of a fire is entry necessitated by an emergency separate from that of the initial fire exigency. The most common of these involves the existence of

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127. *See id.* at 1013.

128. *See id.*

129. *Id.* at 1014. The case was remanded, however, for an evidentiary hearing to determine whether exigent circumstances allowed the seizure of items taken from drawers and, if not, whether the papers seized in plain view could be segregated from those seized from the drawers. *See id.* at 1014–15. On appeal from the remand, the Sixth Circuit upheld the trial court's findings that the warrantless seizures were justified due to the ongoing overhaul and salvage operations that would have destroyed the evidence during the time it would have taken to obtain a warrant. *See* United States v. Gargotto, 510 F.2d 409, 411 (6th Cir. 1974).

130. *See* Bennett v. Commonwealth, 188 S.E.2d 215, 217 (Va. 1972). *See also* Romero v. Superior Court, 72 Cal. Rptr. 430, 434 (Ct. App. 1968) (finding no distinction between firefighters and police officers when both are at the fire scene for a unified purpose).

131. *See* State v. Standsberry, 560 P.2d 1258, 1262 (Ariz. Ct. App. 1976).

132. 77 Cal. Rptr. 249 (Ct. App. 1969).

133. *See id.* at 251–52.

134. *See id.* at 255. *Cf.* People v. Dajnowicz, 204 N.W.2d 281, 285–86 (Mich. Ct. App. 1972) (disallowing subsequent warrantless entry by fire investigator because search had turned into criminal investigation).

explosive materials at a fire scene. For example, in cases where the fire was sparked by an explosion, the post-*Camara* courts uniformly allowed warrantless entries and seizures of criminal evidence seen in plain view in order to safeguard flammable materials and to allow discovery of any other potential explosives that could reignite a fire.[135]

An additional exigency at fire scenes involves the search by a law enforcement officer for potential victims immediately after the fire. During such searches, the officer may discover incriminating evidence, either of arson or a separate crime. In *People v. Connolly*, the Illinois Supreme Court upheld a police officer's plain view discovery of evidence pertaining to a murder on the basis that the officer was in the building assisting firefighters in searching for possible victims.[136]

5. Statutory Authorization

Following *Frank*, *Camara*, and *See*, many courts found that statutory authorization to conduct inspections for origin and cause permitted warrantless entries at fire scenes.[137] Some of these courts relied on the theory that such statutory authorization did not constitute a "search," thereby not implicating the Fourth Amendment.[138] Other courts found the statutory authorization to be constitutionally permissible by finding that a fire investigation was not aimed at any particular person or was not conducted to determine evidence of a crime, but rather was performed to make an objective determination of fire origin and cause.[139] Some courts went so far as to equate statutory authorization with a search warrant, thereby eradicating any need for a warrant if the investigator relied upon the inspection statute.[140]

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135. *See Romero*, 72 Cal. Rptr. at 433; State v. Cohn, 347 S.W.2d 691, 695 (Mo. 1961).

136. *See* People v. Connolly, 303 N.E.2d 409, 412 (Ill. 1973). In *Connolly*, the fire that created the initial exigency and the resulting need to locate possible victims was started by a tear gas canister the police had thrown into the house. *See id.* at 411.

137. This concept was ultimately rejected by the United States Supreme Court. *See* Michigan v. Clifford, 464 U.S. 287 (1984) (plurality decision); Michigan v. Tyler, 436 U.S. 499 (1978).

138. *See* State v. Felger, 526 P.2d 611, 615 (Or. Ct. App. 1974); Bennett v. Commonwealth, 188 S.E.2d 215, 217 (Va. 1972).

139. *See* People v. Patrick, 355 N.E.2d 224, 229 (Ill. App. Ct. 1976); People v. Kulick, 225 N.W.2d 709, 712 (Mich. Ct. App. 1974). One commentator suggests that the differentiation between an "objective" determination of cause and a criminal investigation is still a valid method of determining whether an entry is a *Camara*-type inspection or a criminal search. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT 515 (3d ed. 1996) (stating that inspection is not accusatory in nature because it focuses on nature and origin of fire and not on the question of who may have set the fire).

140. *See* State v. Rees, 139 N.W.2d 406, 413 (Iowa 1966); State v. Murdock, 500 P.2d 387, 391 (Mont. 1972); *Felger*, 526 P.2d at 615. *But see* Steigler v. Anderson, 496 F.2d 793, 796 (3d Cir. 1974) (regardless of state authority, the acts of state officials are judged by federal standards when Fourth Amendment violations are claimed); People v. Dajnowicz, 204 N.W.2d 281, 283 (Mich. Ct. App. 1972) (refusing to follow *Rees* because it

6. Consent

A search warrant is unnecessary if a person with the proper authority, actual or apparent, gives valid consent.[141] In *Bailey v. People*, warrantless re-entries at a fire scene were found lawful because they were based upon the occupant's invitation to enter.[142] A more difficult situation exists when there is no objection to a warrantless entry into a fire scene. While lack of an objection may not be meant by the occupant as granting consent,[143] one court relied on such silence to justify a warrantless entry.[144]

IV. *MICHIGAN V. TYLER*[145] (1978): AN ATTEMPT TO SET GUIDELINES

After more than a decade of lower court interpretations of the Fourth Amendment as applied to governmental entries at fire scenes, the U.S. Supreme Court provided some guidance in 1978 in *Michigan v. Tyler*. The case provided the Court with a number of issues common to fire investigations, including the inability to conduct an immediate investigation due to post-fire conditions and the ultimate warrantless entry and seizure of incriminating evidence.

Near midnight on January 21, 1970, a fire started at a furniture store known as Tyler's Auction. By 2:00 A.M. the fire had been suppressed and the firefighters were watering down the smoldering embers. The fire chief, whose duty was to determine the cause of the fire, called a police detective. The detective arrived at 3:30 A.M., entered the building without a warrant, and took photographs. Because the smoke and steam were too thick to complete an investigation, the detective suspended his activities. The firefighters left the scene around 4:00 A.M. Approximately five hours later, the assistant fire chief, whose job was to determine the origin of the fire, and the same police detective entered the premises, again without a warrant. They discovered suspicious burn marks on the carpet and stairways. They left, but later returned and removed pieces of the carpet and sections of the stairs as evidence. Twenty-six days later, a state arson investigator entered the premises without a warrant. He took photographs and removed additional pieces of evidence from the building's interior.[146]

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relied on *Frank*, which was overruled by *Camara*). The special concurrence in *Felger* also questioned the concept that statutory authority takes precedence over constitutional limitations. *See Felger*, 526 P.2d at 616 (Schwab, C.J., dissenting).

141. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227–28 (1973).

142. *See* Bailey v. People, 493 F.2d 1218, 1220 (6th Cir. 1974).

143. *See, e.g.*, State v. Buxton, 148 N.E.2d 547, 548 (Ind. 1958) (disallowing warrantless entry where occupant neither consented nor objected to entry, and failing to consider such silence in determination).

144. *See* People v. Kulick, 225 N.W.2d 709, 710, 713 (Mich. Ct. App. 1974). *But see Buxton*, 148 N.E.2d at 548 (suppressing evidence—prior to *Camara*—where suspect neither consented nor objected).

145. 436 U.S. 499 (1978).

146. *See id.* at 501–03.

At trial, the defendant's attorney unsuccessfully sought to exclude all of the seized evidence.[147] The Michigan Supreme Court created a bright-line rule that fire investigators need a warrant once the firefighters leave the premises, unless consent is obtained.[148] Applying this rule, the Michigan Supreme Court held that all warrantless entries occurring after the firefighters' initial 4:00 A.M. departure violated the Fourth and Fourteenth Amendments.[149] On petition to the United States Supreme Court, the State of Michigan argued that no privacy expectation should exist as a matter of law in an arson-damaged building.[150]

The Supreme Court affirmed the Michigan Supreme Court's grant of a new trial.[151] The Court, however, did not adopt the bright-line rule that a warrant is required once the firefighters depart. Instead, the Court created a more flexible rule that a firefighters' entry to fight a fire requires no warrant and, once in the building, fire officials may remain on the scene for a reasonable time to pursue their investigation.[152] Nonetheless, the Court was adamant that a person does not lose the right to privacy in a building destroyed by fire.[153] The Court underlined the flaw in the petitioner's contention that an arson-damaged building lost all privacy expectations[154] by stating:

> [T]here is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately.... [E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.[155]

The Court further noted that even though a fire victim's privacy ultimately may have to yield to the vital social objective of ascertaining the cause

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147. *See id.* at 501.

148. *See* People v. Tyler, 250 N.W.2d 467, 477 (Mich. 1977).

149. *See id.* at 476.

150. *See Tyler*, 436 U.S. at 504.

151. *See id.* at 511–12.

152. *See id.* at 511. The rule, while flexible, was artificial because it presumed that a fire investigator is akin to a firefighter.

153. *See id.* at 505. The Court analogized this retention of the right to privacy to its earlier decision in *Camara* by saying that even situations that affect the public safety and require the intervention of health, fire, or building inspectors do not eliminate the privacy and security of individuals against arbitrary invasions by government officials. *See id.* at 504–05.

154. The Court demolished the State of Michigan's major assumption in a two-fold analysis. First, the Court noted that Michigan's argument presupposed that innocent fire victims who did not start the blaze did not retain their right of privacy; and second, a fire victim accused of arson is presumed innocent so that a subsequent conviction could not be used *ex post facto* to justify admission of evidence seized in a warrantless entry and search. *See id.* at 505–06.

155. *Id.* at 506 (quoting Camara v. Municipal Court, 387 U.S. 523, 528–29 (1967)).

of a fire, a magistrate's impartial review will prevent harassment by keeping the invasion to a minimum.[156] Therefore, "official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment."[157]

The Court then held that warrantless entries may be legal in exigent circumstances when there is a compelling need for official action and no time to obtain a warrant.[158] The Court held that a burning building creates an exigent circumstance, thereby allowing a warrantless entry by firefighters.[159] The Court further held that firefighters may seize evidence of arson that is in plain view.[160]

In language that perpetuated the melding of fire investigator and firefighter into one entity, the Court stated that prompt determination of a fire's origin may be necessary to prevent its recurrence through the detection of continuing dangers, such as faulty wiring or a defective furnace, and to preserve evidence from intentional or accidental destruction.[161]

The Court ruled that, following the extinguishment of the fire, "fire officials" need no warrant to remain in a building for a "reasonable time" to investigate the cause of a blaze and to seize any evidence that is in plain view.[162] While the Court did not specifically define the term "fire official," the Court included within the title both firefighters and fire investigators.[163] The Court understood that a "reasonable time" could vary with the circumstances. As an example to guide future determinations, the Court noted that the complexities of a fire could extend the reasonable time period.[164] The Court said that, in determining what constitutes a reasonable time to investigate, "appropriate recognition must be given to the exigencies that confront officials serving under these conditions, as well as to individuals' reasonable expectations of privacy."[165] The Court thus discarded the Michigan Supreme Court's bright line rule that warrantless entries are unconstitutional once the firefighters depart[166] and noted that determination of

156. *See id.* at 507–08. The Court noted that in authorizing an investigatory fire search, there are a number of factors a magistrate may consider, including an inquiry into the number of prior entries, the scope of the search, the time of day when the search is proposed to occur, the lapse of time since the fire, the continued use of the building and the owner's efforts to secure it against intruders. *See id.* at 507.

157. *Id.* at 508. This portion of the Court's holding was decided by a 5-3 majority. Justice Brennan did not participate in the consideration or decision.

158. *See id.* at 509. This portion of the Court's decision supporting an exigency for fire investigations was supported by a 7-1 majority.

159. *See id.*

160. *See id.*

161. *See id.* at 510.

162. *See id.*

163. *See id.*

164. *See id.* at 510 n.6. One example of such a complexity provided by the Court was a single-family dwelling versus a multifamily apartment complex. *See id.*

165. *See id.* at 510.

166. Justices White and Marshall, in their partial concurrence and dissent, believed that the bright line drawn by the Michigan Supreme Court requiring a criminal warrant as soon as the last fire truck leaves the scene was a correct application of exigent circumstances and would provide firefighters and investigators with less confusion in exercising their roles and knowing when to get a warrant. *See id.* at 515–16 (White, J.,

the fire's cause and detection of continuing dangers are duties that extend beyond the time that a fire is extinguished and the fire fighting operations have ceased.[167]

Applying these conclusions to the facts, the Court held that the investigators' subsequent early morning re-entry was an "actual continuation" of the first entry and thus constitutionally permissible.[168] The Court allowed this "continuation" because: (1) the investigators left the scene due to their inability to see, and (2) the subsequent re-entry was no different than if the investigators had remained on the premises until the smoke and steam had cleared.[169] The majority held, however, that the subsequent re-entries that occurred days after the fire were too detached from the initial exigent circumstances to justify warrantless entry.[170] The Court ruled that, absent a valid continuation, subsequent re-entries to determine the cause of a fire would require a *Camara/See* administrative warrant,[171] while re-entries for the purpose of finding probable cause or gathering evidence for possible prosecution required the traditional showing of probable cause to obtain a criminal warrant.[172]

In reaching this conclusion, the Court, instead of analyzing the separate duties of those who fight fires and those who investigate them, treated the two groups equally as "fire officials."[173] The Court extended the logical exigency of a burning building, which allows firefighters to enter a property without a warrant, to allow investigators to enter and even re-enter a building after the fire is extinguished to search for evidence of a possible crime.

In his partial concurrence, Justice Stevens opined that the warrant clause in the Fourth Amendment does not countenance administrative search warrants and that such a warrant does not make an otherwise unreasonable search reasonable.[174] Justice Stevens believed, however, that in lieu of a warrant, entry would have been permissible if the investigators had given or reasonably attempted to give prior notice to the property owner.[175] None of the other justices joined in Justice Stevens' partial concurrence.[176]

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concurring in part and dissenting in part) ("[O]nce the fire has been extinguished and the firemen have left the premises, the emergency is over. Further intrusion on private property can and should be accompanied by a warrant indicating the authority under which the firemen presume to enter and search."). But see *infra* notes 346, 348 and accompanying text for a discussion of the potential abuse of this "bright line" rule.

167. *See id.* at 510. Origin and cause determinations often occur after the departure of the firefighters. *See* DEHAAN, *supra* note 2, at 127–28. The issue then becomes whether an exigency still exists. *See* Costan, *supra* note 15, at 147–48.

168. *See Tyler*, 436 U.S. at 511. This portion of the Court's decision was supported by five Justices.

169. *See id.*

170. *See id.* at 511. The majority vote on this issue was 6-2.

171. *See id.*

172. *See id.* at 511–12.

173. *Id.* at 510.

174. *See id.* at 513 (Stevens, J., concurring).

175. *See id.* at 513–14 (Stevens, J., concurring).

176. *But see* LAFAVE, *supra* note 139, at 521 (asserting that Justice Stevens' position is now accepted by a majority of the Court).

On the other end of the spectrum, Justice Rehnquist's dissent argued that the warrant clause had no application to a case such as this which, in his view, was a routine, regulatory inspection of commercial premises.[177] He believed that the only applicable test was whether the searches were reasonable.[178] He concluded that all of the entries and re-entries were reasonable without the need for a warrant or prior notice to the owner.[179]

V. THE LOWER COURTS' APPLICATION OF *TYLER* (1978–1984)

Under *Tyler*, the lower courts were required to determine: (1) if exigent circumstances supported a warrantless investigation; (2) if the time period in which an investigator pursued a warrantless search was reasonable; and (3) whether a re-entry was a continuation of an initial lawful entry. As discussed in this section, most post-*Tyler* courts had little trouble finding that exigent circumstances existed to justify a warrantless entry. The courts seized on *Tyler*'s continuation theory to uphold warrantless entries by fire investigators who did not arrive at the fire scene until after the firefighters had departed,[180] a clear departure from *Tyler*'s facts and holding.[181]

In order to analyze the historical development of the law in this area, this portion of the Article focuses on two of the *Tyler* factors: (1) reasonable time of investigation; and (2) subsequent entries as continuations of the initial lawful entry.

A. Reasonable Time of Investigation

Under *Tyler*, the first issue that courts have to consider is the reasonableness of the time spent by the investigators at the fire scene. The lower courts generally had little trouble finding such reasonableness. For example, in

177. *See Tyler*, 436 U.S. at 516 (Rehnquist, J., dissenting).

178. *See id.*

179. *See id.* at 516–18.

180. *See* Shaffer v. State, 640 P.2d 88, 91–92 (Wyo. 1982) (discussing arrival of fire investigator seven hours after firefighters departed); People v. Holloway, 426 N.E.2d 871, 873 (Ill. 1981) (discussing arrival of fire investigator seven and a half hours after firefighters' departure); People v. Calhoun, 402 N.E.2d 1145, 1146 (N.Y. 1980) (concluding investigator's arrival four hours after firefighters' departure was lawful because whether investigator arrives before or after such departure is only a formality); State v. Olsen, 282 N.W.2d 528, 529–530 (Minn. 1979) (discussing arrival of fire investigator two hours after firefighters departed).

181. In *Tyler*, the fire chief arrived on the scene while the firefighters were still present. *See Tyler*, 436 U.S. at 502. The continuation theory was created to allow the fire chief to return at a later time when the conditions had improved. *See id.* at 511. *Tyler* specifically stated that entries occurring after this point required a warrant. *See id.* In the Court's subsequent case on this issue, however, this fact became unimportant, because the fire investigator first arrived at the scene an hour after the firefighters' departure. *See* Michigan v. Clifford, 464 U.S. 287, 290 (1984) (plurality decision). Because of the different fact situation, *Clifford* refined *Tyler* by holding that when reasonable privacy expectations remain in a burned building, a warrant is required once the fire is out and the firefighters and police have departed. *See id.* at 293, 297.

Schultz v. State,[182] the fire investigator entered the fire scene before the fire was completely extinguished. The Alaska Supreme Court found that the ninety minutes spent in investigating the fire was within the reasonable time approved by *Tyler*.[183] Because the entry was found to be lawful, all items photographed and seized in plain view were admissible against the defendant at his trial.[184] The New York Court of Appeals, in *People v. Calhoun*,[185] upheld an investigation occurring four hours after the firefighters had departed. In doing so, the court both misinterpreted *Tyler*'s reasonable time factor[186] by holding that the fire investigator's arrival was within a reasonable time after the firefighters' departure,[187] and erroneously held that the fire investigator's entry was linked to or part of the firefighters' entry because the firefighters might have been unable to determine whether the fire was actually extinguished.[188]

B. Continuation of Initial Entry

In *Tyler*, the Court allowed a subsequent re-entry as a continuation of the initial entry where the investigation had been suspended because of dangerous or unworkable conditions.[189]

1. Continuations Upheld

Despite *Tyler*'s requirement that the fire investigator arrive while the firefighters are still present, some lower courts upheld a continuation when the "re-entry" was actually the investigator's first entry long after the fire exigency had passed, and often after the departure of firefighters.[190] In *Shaffer v. State*,[191] the Wyoming Supreme Court upheld the initial entry of investigators seven hours after the firefighters had left the scene[192] on the basis that a "re-entry" can be made by someone other than those that made the initial entry, who in this case were the

182. 593 P.2d 640 (Alaska 1979).
183. *See id.* at 643.
184. *See id.*
185. 402 N.E.2d 1145 (N.Y. 1980).
186. *See* discussion *supra* note 181.
187. *See Calhoun*, 402 N.E.2d at 1149.
188. *See id.* at 1148. As discussed earlier, firefighters are more than qualified to determine when a fire is extinguished. *See supra* note 31 and accompanying text. *See also* 4 LAFAVE, *supra* note 139, at 516 ("[I]t might well be argued that if the firemen have departed they have thereby manifested that they are satisfied that the fire is completely out and that the cause of the fire, even if still unknown, is not such as to make likely a resumption of the fire."). As a side note, the court of appeals relied on a different section of an earlier edition of LaFave's search and seizure treatise to uphold the warrantless entry on the ground that the suspect's privacy expectation was not breached because the purpose of the entry was to determine origin and cause rather than criminal evidence. *See Calhoun*, 402 N.E.2d at 1149. Suffice it to say that the observation of criminal evidence occurred almost immediately upon the start of the "origin and cause investigation." *Id.* at 1146–47.
189. *See Tyler*, 436 U.S. at 511.
190. *See supra* text accompanying note 181.
191. 640 P.2d 88 (Wyo. 1982).
192. A small contingency of firefighters remained for the sole purpose of securing the scene pending the arrival of the investigator. *See id.* at 91–92.

firefighters.[193] Despite the difference in facts and holding from *Tyler*, the *Shaffer* court held that this "re-entry" fell within the proscriptions of the Fourth Amendment as defined in *Tyler*.[194]

The court in *Calhoun v. State* misconstrued *Tyler*'s separate discussions of "reasonable time" and "continuation" and, instead, combined the two into the novel but incorrect concept that a continuation must occur within a reasonable time after the departure of the firefighters.[195]

Similarly, the South Dakota Supreme Court in *State v. Jorgensen*[196] held that the actual presence of firefighters is irrelevant in a fire investigation and that the investigator's entry approximately three hours after the fire was extinguished "was not so temporally removed" as to render it an invalid continuation of the firefighters' earlier exigent entry.[197]

In *United States v. Calabrass*,[198] during a routine search for victims after the fire was extinguished, firefighters discovered apparent volatile chemicals and drug paraphernalia. A narcotics detective was summoned and entered the premises without a warrant four hours after the firefighters' initial observation of the potentially illegal evidence. All of the evidence was seized and removed from the premises. At trial, the evidence was admitted and the defendant was convicted of conspiracy to manufacture PCP among other offenses.[199] The Second Circuit justified the lapse of time between the entries of the firefighters and the narcotics detective partially on the basis that the former had no knowledge of narcotics or volatile drug chemicals; therefore, the narcotics detective's arrival was necessary to safely remove them.[200]

2. Continuations Disallowed

However, some courts refused to find *Tyler* continuations in similar situations. In *Passerin v. State*, the Delaware Supreme Court refused to uphold a subsequent entry as a continuation which occurred twenty-four hours after the fire had been extinguished and twenty-one hours after the investigator's initial entry.[201]

193. *See id.* at 95.
194. *See id.* at 96.
195. *See* Calhoun v. State, 402 N.E.2d 1145, 1149 (N.Y. 1980).
196. 333 N.W.2d 725 (S.D. 1983).
197. *Id.* at 727–28.
198. 607 F.2d 559 (2d Cir. 1979).
199. *See id.* at 560–62.
200. *See id.* at 564. The Second Circuit went so far as to say that the narcotics detective was supervising the fire investigation, even though it was clear that he was there solely to investigate the presence of the suspected drugs. In *Calabrass*, the court mentioned that at some vague time after the fire, it was determined that an explosion caused by some of the chemicals had started the fire. *See id.* at 561. That determination, which would be relevant to the origin and cause determination, was not the basis for the seizure of the drug evidence. Only the dissent noted this discrepancy, but the dissenting judge focused on the issue of abandonment, thereby removing the right of privacy. Believing that *Tyler* was inapplicable, the dissent would have sent the case back to the trial court for a hearing on the abandonment issue. *See id.* at 565–66 (Oakes, J., dissenting).
201. *See* Passerin v. State, 419 A.2d 916, 923 (Del. 1980).

The court determined that the tardy return was "clearly detached from the initial exigency and warrantless entry," and could not reasonably be considered as a continuation of the investigator's first entry.[202]

The Illinois Supreme Court in *People v. Holloway* also refused to bootstrap a subsequent entry by fire investigators into a continuation unless the State could show that the subsequent entry was in furtherance of an investigation that was promptly begun in response to the exigency created by the fire itself.[203] Because the State was unable to make such a showing, the court declined to find a warrantless continuation when investigators returned to the scene the following day without the occurrence of a new exigency.[204]

In *United States v. Hoffman*,[205] while removing a smoldering mattress after the fire was extinguished, a firefighter discovered a sawed-off shotgun. Instead of removing it from the premises, he left it in the bedroom. Approximately thirty minutes later, a police officer who had no involvement in the fire suppression or fire investigation, entered the premises without a warrant for the specific purpose of seizing the weapon.[206] The Ninth Circuit found that the fire had been suppressed and that the exigency of the fire had disappeared.[207] Thus, the court found that no exigent circumstances existed when the officer arrived and his purpose for entering to seize the shotgun exceeded the permissible scope of the firefighters' lawful intrusion to suppress the fire.[208] More importantly, the Ninth Circuit held that while a fire victim may lose his right of privacy in order to suppress a blaze and to determine its origin and cause, that same fire victim does not lose the right of privacy such that other government officials can enter the same premises for other purposes simply because fire personnel are lawfully on the premises.[209] The *Hoffman* court refused to accept the concept that the presence of the officer was a mere extension of the firefighters' entry.[210]

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202. *Id.*

203. *See* People v. Holloway, 426 N.E.2d 871, 875–76 (Ill. 1981).

204. *See id.* (ruling on reasonable expectation of privacy in damaged property).

205. 607 F.2d 280 (9th Cir. 1979).

206. *See id.* at 282.

207. *See id.* at 283.

208. *See id.* at 283–84. The court noted that the officer had probable cause to believe that the premises contained evidence of a criminal act, but that a warrantless entry could not be made on probable cause alone. *See id. See also* People v. Rammouni, 345 N.W.2d 637, 637–38 (Mich. Ct. App. 1983). In *Rammouni*, the court found an impermissible investigation where fire investigators arrived five hours after fire suppression, no exigency existed, and the sole purpose of entry was to find criminal evidence. *See id.* at 638. The court would have required the investigators to get a warrant, even if they had been present during the fire and the firefighters had discovered evidence of arson. *See id.* at 637–38. The dissent argued that under *Tyler*, a warrant probably would not have been required during the time of the fire, even if arson was suspected. *See id.* at 638 (Kelly, P.J., dissenting).

209. *See Hoffman*, 607 F.2d at 284. The court relied upon the language in *Tyler* stating that fire victims retain privacy expectations despite the destruction of some or all of their property. *See id.* at 284–85 n.2 (citing Michigan v. Tyler, 436 U.S. 499 (1978)).

210. *See id.* at 285. The court also refused to consider a claim of "inevitable discovery" because it was not raised by the government in the trial court. *See id.* at 286.

*C. Post–*Tyler*: Additional Justifications for Warrantless Entries*

Despite *Tyler's* attempt to set guidelines, a number of cases after *Tyler* based their decisions, in whole or in part, on concepts that upheld pre-*Tyler* warrantless entries. As discussed below, these included statutory authority, independent exigencies, and consent.

1. Statutory Authority

Of these earlier concepts, the one that should have been eliminated by *Tyler* was that statutory authority to enter a building for inspections and investigations provides a basis for a warrantless entry. Although *Tyler* certainly diluted, if not eliminated, fire investigators' reliance for warrantless entries upon state inspection statutes,[211] both the Supreme Court of Minnesota[212] and the Wisconsin Court of Appeals[213] approved warrantless entries done solely for the purpose of investigation of the cause of a fire pursuant to the statutory inspection provisions. On the other hand, the Iowa Supreme Court refused to allow statutory authorization to take the place of a search warrant.[214]

2. Independent Exigencies

In *United States v. Calabrass*,[215] where a narcotics detective entered a fire scene after being called by firefighters, the court found that the detective was present to preserve drug evidence from intentional or accidental destruction and that there was a continuing danger due to the chemicals' volatility.[216] The court also noted that prompt action was necessary and that neither the owner nor the occupants could be found.[217] The court then completed its justification of the warrantless seizure by determining that the evidence was found in plain view under *Coolidge*.[218]

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211. While not specifically ruling on the issue, *Tyler* clearly discerned the difference between the entry of an inspector to perform a routine periodic inspection and that of an investigator searching for criminal evidence. *See Tyler*, 436 U.S. at 504–05.

212. *See* State v. Olsen, 282 N.W.2d 528, 532 (Minn. 1979) (upholding a warrantless search, in part, on statutory authorization to investigate cause of fire).

213. *See* State v. Monosso, 308 N.W.2d 891, 895 (Wis. Ct. App. 1981).

214. *See* State v. Hansen, 286 N.W.2d 163, 166–67 (Iowa 1979) (overruling its earlier decision in State v. Rees, 139 N.W.2d 406, 413 (Iowa 1966)).

215. 607 F.2d 559 (2d Cir. 1979). See *supra* notes 198, 200 and accompanying text for further discussion of the case.

216. *See Calabrass*, 607 F.2d at 563–64. (choosing not to discuss the possibility that the premises could have been evacuated and secured until a warrant was obtained). *See also Olsen*, 282 N.W.2d at 531–32 (Minn. 1979) (upholding entry by fire investigators after departure of firefighters based, in part, on presence of flammable chemicals which had to be removed for public safety).

217. *See Calabrass*, 607 F.2d at 564.

218. *See id.* at 564 n.3. The court conceded that the narcotics detective's "discovery" of the drug paraphernalia and chemicals could not have been inadvertent, as was required under Coolidge v. New Hampshire, 403 U.S. 443 (1971), but the initial officer's discovery was inadvertent and he was thus entitled to request help from

The Sixth Circuit in *United States v. Urban*[219] came to the same conclusion. In *Urban*, after the fire was extinguished, the firefighters discovered thousands of firecrackers and explosive materials. About an hour later, ATF agents and members of the police bomb squad and the arson investigation unit entered the building without a warrant. The bomb squad members reached the conclusion that there was no danger of explosion, and secured the house until morning. The following morning, approximately seven and one half hours after they had departed the house, the agents and officers re-entered the house without a warrant and removed the evidence.[220] The Sixth Circuit noted that a warrant is not required if the delay in obtaining one would gravely endanger human life.[221] The Sixth Circuit held that the existence of the explosive chemicals fell precisely within *Tyler*'s permissive investigation to detect continuing dangers and to preserve evidence from intentional or accidental destruction.[222] The court agreed that the fire exigency itself did not give the peace officers the right to enter the premises, but it held that the firefighters had the right to delegate such "render safe" operations to ATF, giving them the right to enter as a continued response to the exigency created by the fire.[223] The court rejected the argument that a warrant should have been required once the house was secured because the chemicals had already been seen by the officers in plain view when they initially entered the premises under the belief that there might be an immediate danger.[224]

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appropriate personnel. *See id.*

219. 710 F.2d 276 (6th Cir. 1983).

220. *See id.* at 277.

221. *See id.* at 278 (citing Warden v. Hayden, 387 U.S. 294, 298 (1967)).

222. *See id.* (citing Michigan v. Tyler, 436 U.S. 499, 510 (1978)). As one lower court noted, however, a case involving volatile or explosive materials in a suspected fire scene actually may not be controlled by *Tyler* or *Clifford* since the existence of such materials may create an exigency independent from the fire. *See* United States v. Clark, 617 F. Supp. 693, 697 (E.D. Pa. 1985), *aff'd*, 791 F.2d 922 (3d Cir. 1986) (upholding warrantless entry based on a report of smoke coming from house). Although no fire was found in that case, the discovery of a methamphetamine lab with volatile chemicals created a new exigency justifying the seizure of chemicals. *See id. See also* People v. Avalos, 251 Cal. Rptr. 36, 38–39 (Ct. App. 1988) (holding that illegal methamphetamine laboratory discovered by firefighters creates a potential exigency independent of that created by a fire).

223. *See Urban*, 710 F.2d at 279 (citing with approval United States v. Calabrass, 607 F.2d 559, 563 (2d Cir. 1979) (noting the similar factual situation)).

224. *See Urban*, 710 F.2d at 279–80. The court further found that the subsequent re-entry to remove the chemicals was nothing more than a continuation of the first entry, made after the adverse conditions had cleared, and permitted by *Michigan v. Tyler*, 436 U.S. 499 (1978). The dissent believed that, at a minimum, *Tyler* would have required an administrative warrant, if not a criminal warrant, for the entry on the following morning to remove the chemicals. *See Urban*, 710 F.2d at 281 (Jones, J., dissenting). Because of the lengthy delay between the departure of the officers and their return the following morning, as well as the determination that no danger existed during that period, the dissent believed that the "exigency" was gone. *See id.* at 283 n.6 (Jones, J., dissenting). The dissent found no reason why a telephonic warrant, at the very least, could not have been obtained in that nearly eight-hour delay. *See id.* at 283 n.6 (Jones, J., dissenting).

3. Consent

As in pre-*Tyler* cases, the issue of consent continued to be a viable exception to the warrant requirement. In *State v. Girdler*, where a fire killed a suspect's wife and child, the Arizona Supreme Court concluded that consent negated any need for a warrant. In *Girdler*, a co-owner of the burned house allowed a deputy fire marshal to conduct a post-fire search of the house. Based on the evidence obtained during the consent search, a search warrant was obtained to conduct further searches of the residence. The co-owner's consent was found to be valid, removing the need for a warrant and legitimizing the subsequent re-entries and searches.[225]

VI. *MICHIGAN V. CLIFFORD*:[226] CLARIFYING DOUBT OR SOWING CONFUSION?[227]

Michigan v. Tyler involved commercial property and left uncertainty as to whether the Court would treat a private residence more restrictively.[228] It became clear to the Court that the lower court decisions after *Tyler* were not only divergent but may have expanded *Tyler*'s scope.[229] Hence, in *Michigan v. Clifford*, involving a private residence, the Court's specific purpose was "to clarify doubt that appears to exist as to the application" of the *Tyler* decision.[230] Although it is debatable whether *Clifford* provided much clarification,[231] it is the last word from the Court in this area. The facts in *Clifford* were summarized by the court as follows.

On October 18, 1980, a fire started in the Clifford home while the Clifford family was out of town. The firefighters arrived at 5:42 A.M. and departed the scene at 7:04 A.M. During the suppression activities, firefighters found a fuel can in the basement, removed it and placed it outside on the driveway. Suspecting arson,

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225. *See* State v. Girdler, 675 P.2d 1301, 1304–05 (Ariz. 1983).

226. 464 U.S. 287 (1984) (plurality decision).

227. While the four-Justice plurality in *Clifford* believed that it clarified doubt about *Tyler*, *see* 464 U.S. at 289, the four-Justice dissent believed that the decision, instead, "sow[ed] confusion broadside." *Id.* at 306 (Rehnquist, J., dissenting).

228. 436 U.S. 499 (1978). *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 598–99 (1981) (stating that privacy expectation in commercial property is significantly different from sanctity accorded to a home); Payton v. New York, 445 U.S. 573, 589–90 (1980) (concluding that an arrest in the house is too substantial an invasion to allow without a warrant, absent exigent circumstances, even when accomplished under statutory authority and when probable cause is clearly present, and citing with approval to *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978)).

229. As an example, the Court denied certiorari in 1982 in a case that appeared to expand *Tyler* to the point where a fire investigator could search the entire house, including non-fire damaged areas, based upon the investigator's "right" to determine the cause of the fire. *See* State v. Monosso, 308 N.W.2d 891, 895 (Wis. Ct. App. 1981), *cert. denied*, 456 U.S. 931 (1982). The Court did, however, grant certiorari in a different case the following year. *See* Michigan v. Clifford, 459 U.S. 1168 (1983).

230. *Clifford*, 464 U.S. at 289.

231. The leading opinion was a four-Justice plurality, since Justice Stevens' concurring vote was based on a legal theory not espoused by the other four. *See id.* at 652–53 (Stevens, J., concurring in judgment).

the fire department assigned arson investigators to the case at approximately 8:00 A.M. Because the investigators were involved in other investigations, they did not arrive at the Clifford home until 1:00 P.M. Upon their arrival, the investigators learned from a neighbor that the Cliffords previously instructed their insurance agent to board up the house and had further informed the neighbor that they would not be returning that day. The investigators noticed the fuel can in the driveway and seized it. At approximately 1:30 P.M., the investigators, without a warrant, entered the Clifford residence and began their fire investigation. They smelled the odor of gasoline, found two additional fuel cans in the basement and ultimately determined that the fire started in the basement. The investigators then conducted a thorough warrantless search of the two-story house. During this expansive search, the investigators discovered that pictures had been removed from the walls and that electronic video equipment had been taken away prior to the fire.[232]

The trial court refused to suppress the evidence based on its determination that the search was justified by exigent circumstances.[233] The Michigan Court of Appeals, in an unpublished decision, reversed the trial court, holding that there were no exigent circumstances to substantiate any of the searches.[234] In its petition for certiorari, the State of Michigan conceded that there were no exigent circumstances to justify the search, but argued that all investigations into the origin and cause of a fire should be considered as reasonable searches under the Fourth Amendment and should be allowed without the need for probable cause.[235] The Court declined to create such a rule, reaffirming its holdings in *Tyler* and *Camara* that a nonconsensual entry and search of property is governed by the warrant requirements of the Fourth and Fourteenth Amendments.[236]

A. Clifford*'s Three-Prong Test*

The Court stated that the constitutionality of a warrantless, nonconsensual entry into fire-damaged premises normally turns on the following three-pronged test:

(1) Whether there are legitimate Fourth Amendment privacy interests in the fire-damaged premises.[237] The test to determine such privacy

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232. *See id.* at 289–91.

233. The Detroit Fire Department Arson Division policy sanctioned such a search as long as the owner was not present, the premises were open to trespass, and the search occurred within a reasonable time of the fire. *See id.* at 289.

234. *See id.*

235. *See id.* at 291. The state contended that all post-fire searches should be judged solely under the reasonableness clause of the Fourth Amendment without regard to the warrant clause. Brief for Petitioner at 18, 23, 29, Michigan v. Clifford, 464 U.S. 287 (plurality decision) (1984) (No. 82-357). *See also* Michigan v. Tyler, 436 U.S. 499, 516 (1978) (Rehnquist, J., dissenting) (espousing a similar argument).

236. *See Clifford*, 464 U.S. at 291–92.

237. *See id.* at 292. The Court noted that privacy expectations will vary depending upon: (1) the type of property; (2) the amount of fire damage; (3) the prior and continued use of the premises; and, possibly, (4) the owner's efforts to secure it against intruders. *See id.* at 292.

expectations is an objective one: "whether the expectation is one that society is prepared to recognize as reasonable."[238]

(2) Whether any exigent circumstances justify the intrusion regardless of any reasonable expectation of privacy.[239] The Court repeated its holding from *Tyler* that a burning building creates an exigency justifying a warrantless entry by fire officials to battle the blaze.[240] The Court further clarified its previous holding by unequivocally stating that the determination of the cause and origin of a fire serves a compelling public interest, thereby negating the warrant requirement.[241] The Court continued to apply its definition of "fire officials," as it did in *Tyler*, to include both firefighters and fire investigators.[242] In reaffirming *Tyler*, the Court held that where reasonable expectations of privacy remain in a fire-damaged property, however, a warrant is generally required for any subsequent entry after the fire has been extinguished and fire and police officials have left the scene, unless there are additional exigencies justifying warrantless re-entries.[243]

(3) "Whether the object of the search is to determine the cause of the fire or to gather evidence of a criminal activity."[244] If the primary purpose is to determine the origin and cause of a fire, an administrative warrant is required.[245]

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238. *Id.* (citing Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring)).

239. *See id.* at 292–93.

240. *See id.* at 293.

241. *See id.* The Court noted that the aftermath of a fire presents additional exigencies that obviate the delay otherwise necessary in obtaining a warrant or obtaining consent, citing to *Tyler*'s holding that the danger of rekindling or preservation of evidence from destruction justify warrantless entries after a fire is extinguished. *See* Michigan v. Tyler, 436 U.S. 499, 510 (1978).

242. *See Clifford*, 464 U.S. at 293. The Court correctly noted that firemen fighting a fire do not normally remain within a building and that the inherent dangers of a burning building may prevent entry until the fire is extinguished. The Court then continued to confuse the roles of firefighters and fire investigators by expecting that the generic "fire officials" would ascertain the cause of the fire, requiring entry and re-entry. *See id.* at 293 n.3. The reality, even around the time of *Clifford*, was that firefighters, in undetermined or non-accidental fires, would leave the origin and cause determination to investigators, many of whom were certified peace officers. *See* INTERNATIONAL FIRE SERVICE TRAINING ASSOCIATION, FIRE CAUSE DETERMINATION 12–14 (1st ed. 1986) [hereinafter IFSTA, FIRE CAUSE DETERMINATION]. *See also* 4 LAFAVE, *supra* note 139, at 508 (stating that a fire inspection is distinguishable from entry for purposes of firefighting).

243. *See Clifford*, 464 U.S. at 293 & n.3. Generally, the continuing presence of firefighters, at least during the initial stages of the investigations, was the touchstone to uphold a warrantless entry. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 497. *See also supra* note 181 and accompanying text. The problem arose in the many instances where firefighters departed before the investigators arrived, requiring the courts to wrestle with the concepts of "reasonable time" and "continuations." *See, e.g.*, State v. Grant, 620 N.E.2d 50, 60 (Ohio 1993) (allowing fire investigators' arrival and warrantless entry after departure of firefighters on the ground that "courts have sustained warrantless searches into the cause of fires conducted within a few hours of firefighters' leaving the scene").

244. *Clifford*, 464 U.S. at 292–94.

245. *See id.* at 294 (stating that to obtain an administrative warrant, the "fire officials need show only that a fire of undetermined origin has occurred on the premises,

On the other hand, if the purpose of the search is to gather evidence of criminal activity, a criminal search warrant must be obtained based upon probable cause.[246]

Clifford again validated Supreme Court precedent allowing the seizure of any evidence that might be found in plain view, whether during a valid warrantless entry, an administrative warrant entry, or a criminal warrant entry.[247] Such evidence seized in a warrantless entry or based on an administrative warrant may be used to establish probable cause for obtaining a criminal warrant.[248] Once the cause of the fire has been determined, the search may not be expanded to gather evidence of criminal activity without a criminal warrant.[249]

Having defined the parameters of fire investigation, the Court directed its attention to the facts of the case by examining the first search in the basement, and the second in the remainder of the house.[250]

1. Clifford*'s Application of the First Prong*

In regard to both searches, the Court, in applying the first prong, found that the Cliffords had not lost their reasonable expectation of privacy in their burned residence.[251] The Court noted, however, that there may be cases in which the results of a fire may be so devastating that no reasonable privacy interests would remain, despite the owner's subjective privacy expectations.[252]

2. Clifford*'s Application of the Second Prong*

The Court proceeded to the second prong of the test, the existence of an exigent circumstance. The Court expounded on this part of the test in order to

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that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time").

246. *See id.*

247. *See id.* at 294–95 (citing Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971)). The *Clifford* Court overruled the Ninth Circuit's holding in *United States v. Hoffman*, 607 F.2d 280 (9th Cir. 1979), that would have disallowed a firefighter's discovery of evidence made during the fire suppression or salvage activities. *See Clifford*, 464 U.S. at 294 n.6 ("In searching solely to ascertain the cause, firemen customarily must remove rubble or search other areas where the cause of fires are likely to be found. An object that comes into view during such a search may be preserved without a warrant.").

248. *See Clifford*, 464 U.S. at 294–95.

249. *See id.* at 294.

250. *See id.* at 295.

251. *See id.* The factors highlighted by the Court in finding that privacy rights still existed were: (1) much of the house remained undamaged by the fire; (2) personal belongings remained in the house; and (3) the Cliffords had arranged for the boarding of their house to secure it from trespassers. *See id.*

252. *See id.* at 292. The uninhabitability theory perpetuated by many courts after *Tyler* was significantly criticized. *See* State v. Hansen, 286 N.W.2d 163, 166 (Iowa 1979); 4 LAFAVE, *supra* note 139, at 512; Costan, *supra* note 15, at 144. However, even the critics seemed to agree that severe fires could result in a de facto abandonment of one's privacy expectations. *See Hansen*, 286 N.W.2d at 166.

discuss residential privacy rights, because the state had conceded that there were no exigent circumstances.[253]

The Court noted that this case did not involve a continuation of the initial entry, as in *Tyler*, because there was no initial departure due to hazardous conditions and because the Cliffords' request to board up the house served as an intervening act, precluding a continuation argument.[254] The Court then differentiated this case from *Tyler* by noting that privacy interests are especially strong in a private residence.[255] Because of the heightened privacy interests in a home, the Court held that when a homeowner makes a reasonable effort to secure the fire-damaged home after the fire has been extinguished and fire and police units have left the scene, any subsequent searches must be conducted pursuant to a warrant, consent, or a new exigency.[256]

3. Clifford's Application of the Third Prong

Turning to the third prong, the Court ruled that because the investigators determined that the fire started in the basement, the subsequent search of the second floor of the house could have had no other purpose than to gather evidence of the crime of arson.[257]

Having constitutionally applied the three-prong analysis, the Court held the warrantless searches of both the basement and the upstairs area were invalid.[258] The basement search was invalid because the Cliffords retained their right of privacy, there were no exigencies, and the subsequent entry to determine the cause of the fire was not authorized by an administrative warrant.[259] The upstairs search was invalid because its sole purpose was to gather evidence of a crime, thereby necessitating a criminal warrant.[260] The Court also noted that, even if the basement search was valid, a subsequent search of the upstairs would have required a criminal warrant, because the scope of the basement search was purportedly to determine the fire's cause and, once the cause was determined, the investigators could not expand the scope of the search without a warrant.[261]

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253. *See Clifford*, 464 U.S. at 296.

254. *See id.*

255. *See id.* at 296–97.

256. *See id.* at 297. The Court reiterated that an administrative warrant would suffice if the subsequent re-entry was solely to determine the cause of the fire. The Court further noted that there may be instances where a person's privacy interest must yield to public safety, such as the search of apartments near or adjacent to a fire-damaged apartment to insure that the fire does not pose a danger to the remainder of the complex. *See id.* at 297 n.8.

257. *See id.* at 297.

258. *See id.* at 295–96.

259. *See id.* at 297–98.

260. *See id.*

261. *See id.* at 297–98. Assuming the basement search had been valid, the investigators then could have used the evidence obtained in the basement to attempt to show probable cause for a criminal warrant. Nonetheless, "[a]n administrative search into the cause of a recent fire does not give fire officials license to roam freely through the fire victim's private residence." *Id.* at 298.

Because it had been seized by the firefighters while they were still on the scene, the fuel can found in the driveway, previously excluded by the Michigan Court of Appeals, was the only piece of evidence admissible against the defendant.[262]

While Justice Stevens provided the crucial concurring vote to create a majority, Stevens' rationale had no relationship to that of the plurality. Consistent with his partial concurrence in *Tyler*,[263] Justice Stevens believed that a warrantless entry would be constitutionally permissible whenever: (1) the owner had been given sufficient advance notice to allow the owner or the owner's agent to be present, or (2) the investigator had made a reasonable effort to provide such advance notice.[264] As in *Tyler*, no other Justices joined in Justice Stevens' notice theory.[265] Justice Stevens would have adopted Justice White's concurrence in *Tyler* that a warrant should be required whenever the firefighters have left the scene.[266]

Justice Rehnquist's dissent, joined by Chief Justice Burger and Justices Blackmun and O'Connor, argued that exigent circumstances justified the basement search, but that the subsequent search of the remainder of the house required a criminal warrant.[267] Applying the rationale in *Tyler*, the dissent believed that the basement search was an actual continuation of the firefighters' entry.[268] The dissent also attacked the plurality's ruling that a home should be accorded more privacy rights than a commercial building.[269] The dissent also believed that the *Camara/See* decisions, while maintaining their validity for routine inspections, were not applicable to post-fire investigations conducted within a reasonable time of a fire.[270] The dissent opined that a property owner would be unlikely to oppose

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262. *See id.* at 299.

263. Michigan v. Tyler, 436 U.S. 499, 513–14 (1978) (Stevens, J., concurring).

264. *See Clifford*, 464 U.S. at 303 (Stevens, J., concurring). As Justice Stevens stated in *Tyler*, he also believed that an administrative warrant did not meet the Fourth Amendment's Warrant Clause. *See id.* at 303 n.5.

265. Nonetheless, one commentator relied upon a portion of the *Clifford* dissent to conclude that "a majority of the Supreme Court is of the view that no warrant is required for a with-notice post-fire inspection into the cause of a fire." 4 LAFAVE, *supra* note 139, at 521.

266. *See Clifford*, 464 U.S. at 301 (Stevens, J., concurring). *See also supra* note 166 and accompanying text.

267. *See id.* at 306 (Rehnquist, J., dissenting).

268. *See id.* (Rehnquist, J., dissenting). The dissent believed it was a continuation because the firefighters had seized the fuel can during the fire and placed it outside for the investigators to examine upon their arrival. This rationale allowed the dissent to approve of the later investigation by the fire investigators occurring hours after the firefighters' departure. In order to place the facts of this case under the *Tyler* umbrella, the dissent assumed that the removal of the can was performed as an investigatory action, when it may have been nothing more than a normal salvage operation, in order to classify the fire investigator's entry as a re-entry and, therefore, a continuation of the first "investigation" activities.

269. *See id.* at 307 (Rehnquist, J., dissenting).

270. *See id.* at 308 (Rehnquist, J., dissenting). Unfortunately the dissent, like the plurality in *Clifford* and the majority in *Tyler*, confused the duties of firefighters and fire investigators. In an effort to justify a continuing exigency sufficient to allow warrantless entries by late-arriving investigators, the dissent assumed that only the investigators were

an investigation solely to determine the fire's cause.[271] In reaching this conclusion, the dissent analogized the intrusion of an investigator into a fire victim's home as equivalent to the permissible entry of firefighters, medical officials, or insurance investigators into a fire scene.[272] This portion of the dissent seems to perpetuate and solidify the majority's melding of exigent firefighter functions with those of subsequent criminal fire investigations.[273]

VII. CONSTITUTIONAL APPLICATIONS SINCE 1984

Whether because of the "clarification" of *Clifford* or the nature of the times in which the decisions were made, many courts after *Clifford* upheld warrantless entries and seizures of incriminating evidence from fire scenes. Because the legal concepts used by post-*Clifford* courts to uphold warrantless entries and searches at fire scenes often differed little from those used before *Clifford*, it is instructive to review the continuing use in those cases of the concepts discussed earlier in this Article. Such a review leads to the conclusion that, despite the *Clifford* and *Tyler* attempts to clarify the law in this area, the lower courts' analyses of such cases have not differed greatly from that of pre-*Tyler* cases. This apparent lack of development in applying the Fourth Amendment to fire investigators may be anchored in the continuing judicial dearth of information and understanding of the precise role of fire investigator and how that role differs from that of firefighter. The post-*Clifford* cases discussed below highlight this lack of development toward treating fire investigators differently from firefighters.

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capable of determining whether a building would rekindle and assessing the effectiveness of local building codes in preventing and limiting the spread of fire. *See id.* at 308–09 (Rehnquist, J., dissenting). In fact, firefighters are eminently trained in post-fire salvage and overhaul operations such that they can unilaterally determine whether a building may rekindle. IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 469–72. *See also* State v. Bell, 737 P.2d 254, 256 (Wash. 1987) (noting that as a part of common practice, firefighters are assigned to check for smoldering embers that might rekindle a fire). Further, while a determination may be made about whether a building code violation contributed to the origin and cause of a fire, the dissent failed to show how that determination creates an exigent circumstance justifying a warrantless entry.

271. *See Clifford*, 464 U.S. at 308 (Rehnquist, J., dissenting).

272. *See id.* at 309 (Rehnquist, J., dissenting). The dissent also sought justification in believing that the Detroit Fire Department's policy on intrusion by fire investigators was reasonable under the circumstances because the owners were not present and the building still was open to trespassers, despite the fact that the Cliffords had requested their insurance company to take steps to secure the building. *See id.* at 309 n.2 (Rehnquist, J., dissenting). Finally, the dissent dismissed Justice Stevens' viewpoint by stating that the failure to give notice to the Cliffords did not significantly advance the purposes of the exclusionary rule. *See id.* at 310–11 & n.4 (Rehnquist, J., dissenting).

273. *See id.* at 293 (reaffirming, by plurality, *Tyler's* recitation that "fire officials" can investigate a fire scene for a reasonable time without a warrant).

A. Warrantless Entries

1. The Shoes of the Firefighters

Prior to *Tyler*'s creation of the continuation exception to the warrant requirement at fire scenes, a number of lower courts[274] validated warrantless entries at fire scenes on the theory that the police or fire investigators were merely "stepping into the shoes of the firefighters," whose initial entry was authorized by exigent circumstances.[275] Philosophically, *Tyler*'s continuation exception also seems to be rooted in the concept of "stepping into the firefighters' shoes." Under both concepts, the investigators began their investigations after the firefighters had entered the fire scenes.[276] While it seems that the continuation theory espoused in *Tyler* and *Clifford* should have replaced the older concept of "stepping into the firefighters' shoes," a number of courts after *Clifford* continued to rely upon the older concept to uphold warrantless entries at fire scenes.

For example, in *State v. Bell*,[277] the firefighters, while checking the attic for smoldering embers that might rekindle a fire, observed what appeared to be marijuana plants. Rather than removing the plants, however, the firefighters called in the assistant fire marshal, who, after seeing them, called in members of the sheriff's office. When the sheriff's deputies arrived, a "human chain" of deputies and firefighters removed the plants.[278] All of the entries were accomplished without a warrant. The Washington Supreme Court, citing *Tyler* and *Clifford*, upheld the warrantless entry of the firefighters as being pursuant to a fire exigency.[279] The court also upheld the firefighters' discovery of the plants under the plain view doctrine.[280] The Court then held that the warrantless entry and seizure by the sheriff's deputies were permissible because they stepped into the shoes of the firefighters,[281] thereby concluding that the property owner no longer has a right of privacy in an area where one officer is already legally present.[282] Hence, the

274. *See supra* notes 113–34 and accompanying text.

275. *See supra* notes 113–34 and accompanying text.

276. In *Tyler* and *Clifford*, the investigators did not enter the scenes to begin their investigations until several hours after the firefighters' departure. *See Tyler*, 436 U.S. at 501–02 (five hours); *Clifford*, 464 U.S. at 289–90 (six hours).

277. 737 P.2d 254 (Wash. 1987).

278. *See id.* at 256. Sheriff's officers and firefighters stood in line handing 87 to 90 marijuana plants one to the other from the attic to a vehicle outside. *See id.*

279. *See id.* at 257. (citing Michigan v. Tyler, 436 U.S. 499 (1978) and Michigan v. Clifford, 464 U.S. 287, (1984) (plurality decision)).

280. *See id.* at 258–59. One of the grounds on which the court justified its application of the plain view doctrine was inadvertent discovery, which was a part of the test in 1987, but was subsequently omitted from the test in *Horton v. California*, 496 U.S. 128, 137 (1990).

281. *See Bell*, 737 P.2d at 259. The court held that the sheriff's deputies' entry was not a second intrusion, but merely a completion of what the firefighters already were authorized to accomplish due to their permissible presence at the scene. *See id.* at 260. *Cf.* State v. Newcome, 534 N.E.2d 370, 372–73 (Ohio Ct. App. 1987) (validating the discovery of drugs and weapons which were found by firefighters during suppression activities and turned over to police).

282. *See Bell*, 737 P.2d at 259. *See also* People v. Harper, 902 P.2d 842, 845–46 (Colo. 1995) (validating fire investigator's discovery of marijuana during origin and cause

subsequent presence of a deputy fire marshal, an arson investigator, and numerous sheriff's deputies was also permissible under the Fourth Amendment, provided that their intrusion did not extend beyond that of the firefighters.[283] The concurring opinion disagreed, stating that stepping into the shoes of the firefighters was not a proper exception to the warrant requirement.[284] The concurrence, while believing that the property owner did not lose the expectation of privacy merely because the firefighters were lawfully on the premises, stated that the seizure should be lawful under a new exception to the Fourth Amendment of completing "what those already on the scene would be justified in doing."[285]

Similarly, in *Mazen v. Seidel*, the Arizona Supreme Court upheld the seizure of marijuana plants that initially were seen by firefighters but subsequently were removed by agents of the police department and Drug Enforcement Administration.[286] Relying upon the Washington decision in *State v. Bell* and rejecting the conclusion of the Ninth Circuit in *United States v. Hoffman*,[287] the court ruled that the police officers could step into the shoes of the firefighters, provided they did so while the firefighters were still on the scene and could seize items seen in plain view.[288] The dissent noted that the majority's decision conflicted with *Hoffman*, and created an odd dichotomy that a suspected arsonist in

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investigation and upholding actual seizure by police due to lawful entry of fire investigator).

283. *See Bell*, 737 P.2d at 259–60. The "directed discovery of evidence to an officer already justifiably on the premises by another officer who has discovered that evidence in plain view does not taint the initial inadvertent discovery." *Id.* at 259 n.5. *See also* United States v. Finnigin, 113 F.3d 1182, 1185 (10th Cir. 1997) (stating that subsequent separate entries of ATF agents, state fire marshal, and police bomb squad, were all continuations of initial entry by firefighters and did not require a warrant).

284. *See Bell*, 737 P.2d at 263 (Pearson, C.J., concurring) (pointing out that a logical extension of the majority's argument would be to open one's home to "the tax assessor and the marines").

285. *Id.* at 264 (Pearson, C.J., concurring). The concurrence agreed that the firefighters' presence and plain view observations were valid, and the fact that the firefighters asked the sheriff's deputies to assist them in the seizure would justify their warrantless entry. *See id.* at 264–65 (Pearson, C.J., concurring).

286. *See* Mazen v. Seidel, 940 P.2d 923, 929–30 (Ariz. 1997). An unusual fact in this case is that the firefighters *and* the fire investigator may have left the scene by the time the officers seized the contraband. *See id.* at 926 n.2. *See also* Mazen v. Seidel, No. 1 CA-SA 95-0355, 1996 WL 254814 (May 16, 1996), *vacated*, 940 P.2d 923 (Ariz. 1997). (check)

287. 607 F.2d 280 (9th Cir. 1979). See *supra* notes 205–10 and accompanying text for a discussion of *Hoffman*. The court in *Hoffman* refused to allow subsequent entries by law enforcement officers to serve as an extension of the firefighters' entry without independent exigent circumstances. *See id.* at 284–85.

288. *See Mazen*, 940 P.2d at 927–28. While the *Hoffman* Court had ruled that police officers who were not lawfully on the premises must obtain a warrant even if they had seen the contraband, the Arizona Supreme Court held that, since the firefighters still were on the scene, the police's seizure was nothing more than seizing contraband which the firefighters "could have carried out and laid at [the police officers'] feet." *Id.* at 927. *See also* People v. Glance, 257 Cal. Rptr. 522, 527–28 (Ct. App. 1989) (stating that provided the police personnel do not extend the scope of the firefighters' entry, the police officers' presence does not increase the invasion of privacy created by the firefighters).

Arizona could receive different constitutional treatment depending on whether his prosecution was in federal or state court.[289]

2. Privacy Expectations

a. Fire Damage

In *Clifford*'s discussion of the level of privacy expectations in fire-damaged premises, the plurality stated that some fires may cause such devastation that no reasonable privacy interests would remain.[290] Relying on this single comment, a number of courts seemingly circumvented the Fourth Amendment by ruling that the fire damage was so extensive that the owners had lost all reasonable expectations of privacy.[291] Of these cases, only one involved a complete destruction of the premises.[292] Because the remainder of these cases concerned only partially damaged property, some of the courts relied upon *Clifford*'s other factor that the owners did not take precautions to protect their homes to support their holdings.[293] In situations where homes were partially burned, some courts held that the owners lost their rights of privacy in the burnt-out areas.[294] Not only is this illogical, but also it directly contradicts *Clifford*, which specifically held that "reasonable privacy expectations may remain in fire-damaged premises."[295]

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289. *See Mazen*, 940 P.2d at 930 (Moeller, J., dissenting). The dissent interpreted *Tyler*, *Clifford*, and *Hoffman* to allow police officers on the scene to assist in fire control or in cause and origin determination, but that any intent on the part of officers to seize contraband exceeded the initial intrusion and should not be constitutionally allowed without a warrant or exception to the warrant clause. *See id.* at 931–33 (Moeller, J., dissenting). Because the dissent found no lawful purpose for the officers' presence, it believed that the plain view doctrine should not apply. *See id.* (Moeller, J., dissenting). The dissent also applied a restrictive reading of the Arizona arson investigator statutes, *see* ARIZ. REV. STAT. §§ 9-500.01, 41-2163 (1996), by holding that the officers could not factually or legally step into the firefighters' shoes because Arizona arson investigators are allowed to exercise their peace officer duties only for arson purposes, and that drug seizures have nothing to do with arson investigations. *See Mazen*, 940 P.2d at 932 (Moeller, J., dissenting). *Cf. Mazen*, 940 P.2d at 927 n.4 (interpreting ARIZ. REV. STAT. § 9-500.01 (1996) to mean that the "primary" duty is the investigation of arson, thereby leaving open the question as to the extent of arson investigator's other duties under the statute).

290. *See* Michigan v. Clifford, 464 U.S. at 287, 292 (1984) (plurality opinion).

291. *See* Pervis v. State, 353 S.E.2d 200, 201 (Ga. Ct. App. 1987); People v. Zeisler, 465 N.E.2d 1373, 1375 (Ill. App. Ct. 1984); Null v. State, 690 N.E.2d 758, 761 (Ind. Ct. App. 1998); State v. Lowther, 434 N.W.2d 747, 755 (S.D. 1989); Davis v. State, 840 S.W.2d 480, 487 (Tex. Crim. App. 1992).

292. *See Pervis*, 353 S.E.2d at 201.

293. *See Zeisler*, 465 N.E.2d at 1375 (finding that suspect made no effort to secure premises, despite fact that personal property remained and owner had returned home while fire was raging, where investigators had immediately taken control of premises); *Lowther*, 434 N.W.2d at 755 (finding no indication that suspect made any attempts to secure premises, despite fact that suspect was detained for questioning prior to search and thereby prevented from taking such action); *Davis*, 840 S.W.2d at 487.

294. *See Zeisler*, 465 N.E.2d at 1375; *Null*, 690 N.E.2d at 761.

295. *Clifford*, 464 U.S. at 292.

However, the Iowa Supreme Court refused to uphold a fire investigator's entry even though the firefighters were still present, because the court found that the entry clearly was for the purpose of searching for evidence of arson.[296] The court noted that simply because a fire occurred does not give investigators carte blanche to investigate after the fire is extinguished.[297]

b. Abandonment

Regardless of *Clifford*, abandonment always remains a viable exception to the warrant requirement. In *State v. Milashoski*,[298] the Wisconsin Supreme Court upheld a post-fire warrantless seizure of containers by volunteer firefighters, some of whom were police officers, which turned out to contain volatile chemicals. The court upheld the seizure because the owner had abandoned his privacy expectations when he denied any claim to the container and any knowledge of its contents.[299]

3. Independent Exigencies

Similarly, warrantless entries at fire scenes continue to be valid if exigencies, aside from the fire itself, exist.[300] In *State v. Loh*, the Montana Supreme Court upheld a police officer's seizure of marijuana plants that were in plain view while the officer was looking for fire victims in a home.[301]

The Ninth Circuit held in *United States v. Martin* that an entry by a police officer into a smoking apartment to search for possible victims was a valid warrantless entry.[302] The Ninth Circuit also upheld, as exigent circumstances, subsequent entries by police and National Guard personnel based on fear of further explosions or possible fire.[303]

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296. *See* State v. Showalter, 427 N.W.2d 166, 171 (Iowa 1988).

297. *See id.* at 170. *See also* Costan, *supra* note 15, at 147–48 (explaining that no exigencies exist in a fire investigation).

298. 471 N.W.2d 42 (Wis. 1991).

299. *See id.* at 47.

300. *See, e.g.*, People v. Avalos, 251 Cal. Rptr. 36 (Ct. App. 1988). In *Avalos*, the court found that the discovery of a methamphetamine lab in a burned building created an imminent possibility of a future fire, but instead of validating a warrantless search on that basis, the court held that such exigency was a factor to consider in determining whether the warrantless entry was a continuation of the firefighters' initial entry. *See id.* at 39.

301. *See* State v. Loh, 914 P.2d 592, 601 (Mont. 1996). This case was a little clearer, since the police officers arrived at the fire scene before the fire department and entered the home to locate possible victims and, while doing so, saw the marijuana and seized it.

302. *See* United States v. Martin, 781 F.2d 671, 674 (9th Cir. 1985).

303. *See id.* The court also held that weapons and explosives observed in plain view were properly seized. *See id.* at 676.

4. Consent

Consent, as well, remains a viable exception in post-*Clifford* cases. In *People v. Essa*,[304] the Michigan Court of Appeals invalidated a warrantless entry by a fire investigator which occurred an hour and a half after the firefighters departed.[305] The court also ruled, however, that a second search based on the suspect's consent was valid, despite the fact that the suspect was not told of the initial warrantless entry.[306]

B. Continuations of Lawful Entries

With virtual unanimity, courts have continued to rely upon *Clifford* and *Tyler* in upholding subsequent re-entries as continuations of the initial firefighters' entry.[307] In *State v. Burge*,[308] the fire investigator, who was a volunteer firefighter, did not enter the fire scene after it was extinguished at 8:45 P.M., due to smoke and darkness. Instead, he returned at 3:00 P.M. the following day to begin the investigation.[309] The Louisiana Court of Appeals held that mere lapse of time is not the most important factor in determining whether a re-entry should be considered a continuation of the firefighters' lawful entry.[310] In the face of an argument that a fire investigator should begin as soon as it is light enough to see, the court stated that an investigator did not have to begin the investigation at daybreak, especially in small communities where the investigators may be volunteers and unable to respond quickly to fire scenes due to their regular employment.[311]

In *United States v. Mitchell*,[312] fire investigators entered a scene after the fire was extinguished. After seizing carpet samples and sections of stair risers, the investigators departed due to darkness and water on the floor. Approximately twelve hours later, a different fire investigator re-entered the scene without a warrant and completed the investigation, seizing additional flooring sections.[313] The First Circuit found that re-entry by a different investigator was a *Clifford*-

304. 380 N.W.2d 96 (Mich. Ct. App. 1985).

305. *See id.* at 99. Oddly, the Court of Appeals' ruling was based in part on Justice Stevens' concurrences, noting that the investigator's failure to attempt to give reasonable notice to the owners would not have been futile in this case. *See id.* at 98–99. The Court also mistakenly stated that the plurality agreed with Justice Stevens on the requirement of notice as a substitute for a warrant. *See id.*

306. *See id.* at 99. The court held that the failure to inform the suspect of the first search did not make the evidence "fruit of the poisonous tree," as long as the consent was a voluntary act of free will. *See id.*

307. *See supra* note 276 and accompanying text for a discussion of continuation versus stepping into the firefighters' shoes.

308. 449 So. 2d 196 (La. Ct. App. 1984).

309. *See id.* at 197.

310. *See id.* at 200.

311. *See id.*

312. 85 F.3d 800 (1st Cir. 1996).

313. *See id.* at 802.

countenanced continuation of the first lawful entry due to the inability to complete matters because of unfavorable conditions.[314]

The United States District Court in Tampa, Florida took the continuation concept one step further in *United States v. Veltmann*.[315] In *Veltmann*, the investigators left shortly after their initial entry, alleging that it was dark, smoky, and hazy. Anticipating a return, they had the police post a guard to secure the premises. The investigators returned the next morning and seized additional evidence.[316] The district court upheld the second entry as a continuation of the first entry, ruling that the investigators had manifested their intent to continue the investigation by posting a guard.[317]

In *People v. Avalos*, the firefighters had discovered evidence of a methamphetamine lab, which was seized by law enforcement officers who entered less than an hour after the fire had been extinguished.[318] This subsequent warrantless entry was upheld as a continuation of the firefighters' earlier lawful entry based on the possibility of a new fire because of the chemicals' volatility.[319]

In *Commonwealth v. Smith*,[320] the investigator did not enter the building until twelve hours after fire suppression because the scene was dark and the entry was blocked by heat and dripping water. The investigator entered the building during daylight hours without a warrant, conducted his investigation, and discovered incriminating evidence.[321] The court held that the cause of a fire remains undetermined until an investigator discovers its origin.[322] Hence, the court held that the warrantless entry twelve hours later was a *Tyler*-type continuation, because it occurred at the first reasonable opportunity.[323]

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314. *See id.* at 805. *See also* Romano v. Home Ins. Co., 490 F. Supp. 191 (N.D. Ga. 1980).

315. 869 F. Supp. 929 (M.D. Fla. 1994), *aff'd*, 87 F.3d 1329 (11th Cir. 1996) (unpublished table decision).

316. *See id.* at 930–31.

317. *See id.* at 933. The court did suppress evidence that was not in plain view and that was clearly seized for criminal investigative reasons.

318. *See* People v. Avalos, 251 Cal. Rptr. 36, 37 (Ct. App. 1988).

319. *See id.* at 39. In a somewhat confusing blend of continuation and independent exigency theories, the court held that the re-entry was a continuation of the firefighters' original entry. Rather than stopping at this point, the court proceeded to include as a factor in the continuation determination the exigent circumstance that the volatile chemicals created a danger of a future fire. *See id.*

320. 511 A.2d 796 (Pa. 1986).

321. *See id.* at 797.

322. *See id.* at 801. A more accurate statement is: "Generally, if the origin of a fire cannot be determined, the cause cannot be determined." NFPA 921, *supra* note 30, § 11-1.

323. *See Smith*, 511 A.2d at 801. The court also noted that it was reasonable and prudent to delay the investigation until daylight. *See id.* at 802. *Cf.* State v. Burge, 449 So. 2d 196, 200 (La. Ct. App. 1984) (noting that the first reasonable opportunity to investigate for volunteer fire investigator may be after his or her regular employment ends). The court in *Smith* initially seemed to be saying that a continuation is reasonable until a cause is determined. *See Smith*, 511 A.2d at 802. Such a theory could indefinitely extend the investigation period beyond the reasonable time theory countenanced by the Supreme

The Tenth Circuit held in *United States v. Finnigin* that subsequent entries by the ATF and the police bomb squad, while the fire investigator was on the scene, were valid continuations.[324] The Ohio Supreme Court in *State v. Grant* followed *Clifford* by upholding warrantless entries by fire investigators who arrived after the firefighters had left the scene on the basis that the homeowners had taken no steps to secure their property.[325]

VIII. A CONSTITUTIONAL NEED FOR A DIFFERENT STANDARD

The Supreme Court has grappled mightily and sincerely with applying the Fourth Amendment to fire investigators, whom it apparently considers as equivalent to their fire fighting colleagues.[326] The Supreme Court's grouping of firefighters and fire investigators into a generic category of "fire officials" overlooks the fact that most fire investigators in this country are law enforcement officers or are authorized by statute to be certified as law enforcement officers.[327] Because a fire investigator's duty is not to suppress a fire, but to determine its origin and cause, gather criminal evidence, and arrest an arson suspect,[328] the determination of origin and cause by fire investigators is often inseparable from the gathering of criminal evidence.[329] The reasoning of *Tyler* and *Clifford*, however,

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Court. The *Smith* court then seemed to retract its reasoning by saying that a fire does not extend an investigation for all time, and on the facts of the case, limited its holding to the twelve-hour period. *See id.*

324. *See* United States v. Finningan,113 F.3d 1182, 1185 (10th Cir. 1997). *See also* United States v. Echegoyen, 799 F.2d 1271, 1280 (9th Cir. 1986) (upholding subsequent entry by narcotics detectives after fire department's entry as valid continuation).

325. *See* State v Grant, 620 N.E.2d 50, 60 (Ohio 1993). The court also noted, probably correctly, that such warrantless entries were "almost uniformly" sustained. *Id.*

326. This inability to treat fire investigators as law enforcement officers may stem, in part, from the failure of the litigants to present a complete factual appellate record as to the differences between firefighters and fire investigators. As an example, in its brief on writ of certiorari in *Clifford*, the State of Michigan did not discuss any differentiation between firefighters and fire investigators and actually sought to combine the two positions. Its brief argued for an extension of the *Tyler* continuation doctrine to allow an initial entry by an investigator hours after the firefighters had departed as a "continuation" of the lawful entry of the firefighters. Brief for Petitioner at 32–34, Michigan v. Clifford, 464 U.S. 287 (1984) (No. 82-357). In support of this position, the petitioner threw down the gauntlet by brazenly challenging the Court to overrule *Camara*, *See*, and *Tyler*. *See id.* at 5–9. The Court perhaps succumbed to the state's attempt to blur the two roles when it incorrectly referred to the firefighter's job, rather than the investigator's job, as determining the fire cause and searching for criminal evidence. *See Clifford*, 464 U.S. at 298 n.9 ("In many cases, there will be no bright line separating the *firefighters'* investigation into the cause of a fire from a search for evidence of arson." (emphasis added)).

327. *See supra* notes 44–45 and accompanying text.

328. *See* DEHAAN, *supra* note 2, at 3, 4, 127, 394. *But see* Commonwealth v. Smith, 511 A.2d 796, 801 (Pa. 1986) (declining to ascribe critical importance to fire investigator's suspicion of arson and refusing to convert fire investigation into a criminal search).

329. *See* Costan, *supra* note 15, at 140–41. *See also Clifford*, 464 U.S. at 298 n.9 ("In many cases, there will be no bright line separating the firefighters' investigation into the cause of a fire from a search for evidence of arson.").

allows courts to perpetuate the fiction that a fire investigator is no different than a firefighter or code inspector.[330]

The Court's decisions in *Tyler* and *Clifford* are based on three assumptions that simply do not mesh with the reality of a fire investigation. The Court's first assumption is that an exigency continues to exist for fire investigators, because only they can determine whether a fire is actually extinguished.[331] As discussed earlier, this reasoning is faulty because a firefighter is qualified to douse a fire and to determine whether it may rekindle.[332] The Court's second assumption is that a fire investigator is specifically trained to determine whether building code violations may have contributed to the fire and, therefore, should be allowed a warrantless entry to check for such violations.[333] This argument is difficult to support because no fire exigency exists to justify a warrantless post-fire code violation inspection.[334] Further, the alleged need for such an inspection could not possibly create an independent exigency because the arriving fire units are trained to prevent any electrical sparks or gas leaks by requesting the appropriate disconnection of all such utilities to the burning building.[335] The Court's third assumption is that an exigency exists to preserve evidence from intentional or

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330. *See, e.g.*, United States v. Mitchell, 85 F.3d 800, 803 n.3 (1st Cir. 1996) (approving seizure of evidence under *Tyler*, where fire investigator entered building after fire was extinguished for stated purpose of determining cause and origin, and took carpet samples and sections of stair risers that were later used as evidence at trial); Franklin v. State, 502 So. 2d 821, 825 (Ala. Crim. App. 1986) (allowing use of arson evidence discovered during warrantless search because primary object of investigation was cause and origin, not gathering of criminal evidence); Waters v. State, 331 S.E.2d 893, 898 (Ga. 1985) (Beasley, J., dissenting) (criticizing warrantless search when it appeared that fire investigator's purpose was to conduct criminal investigation); Commonwealth v. Jung, 651 N.E.2d 1211, 1218 (Mass. 1995) (noting that administrative warrant was sufficient, despite suspicion of arson, because the exact cause was still unknown); State v. Coomer, 485 N.E.2d 808, 810 (Ohio 1984) (referring to members of the arson task force, whose sole function is to investigate fires, as firefighters); *Smith*, 511 A.2d at 801 (adopting "fire official" classification, and noting that investigator's suspicion of arson was irrelevant since firefighters were still on scene); *id.* at 804 (Zappala, J., dissenting) (stating that it was improper to allow investigator to conduct warrantless search to determine cause and origin when investigator suspected arson and the exigency was no longer present); State v. Moretti, 521 A.2d 1003, 1007 (R.I. 1987) (allowing warrantless seizure under *Tyler* and *Clifford*, despite fact that firefighters informed investigator of arson evidence, because firefighters were still on scene); 4 LAFAVE, *supra* note 139, at 525–26 (a post-fire inspection is directed at the nature and origin of the fire and not on the question of who may have set the fire).

331. *See* Michigan v. Tyler, 436 U.S. 499, 510 (1978).

332. *See* sources cited *supra* note 30. *See also* 4 LAFAVE, *supra* note 139, at 516.

333. *See Tyler*, 436 U.S. at 510.

334. A failure to comply with fire codes can cause or contribute to a fire or explosion. *See* NFPA 921, *supra* note 30, §§ 5-6.2, 19-9.2. Determining whether such a factor contributed to a fire or explosion, however, would occur as a part of the post-fire investigation into the origin and cause. *See* NFPA 921, *supra* note 30, § 17-4.4.

335. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 410–17. *See also* Rose v. State, 586 So. 2d 746, 749 (Miss. 1991) (noting that standard operating procedures include disconnecting all gas and electrical service to the premises); State v. Hoffman, 567 A.2d 1134, 1135 (R.I. 1990) (stating that gas main was shut off to prevent explosion).

accidental destruction.[336] Usually, the fire investigator arrives long after the fire suppression, overhaul, and salvage.[337] By the time the investigator arrives, whatever evidence is remaining certainly can wait for the issuance of a search warrant, similar to any crime scene.[338]

Generally, after the fire is extinguished no exigency remains to justify the investigator's presence as suggested by the Court.[339] Firefighters routinely make initial determinations that fires are "accidental," "providential," or "incendiary."[340] In many jurisdictions, fire investigators are only called out on suspicious fires.[341] Generally, fires that appear to be intentionally set require the assistance of the investigators.[342] Therefore, the mere presence of an investigator often indicates a criminal investigation.[343]

Once the fire is extinguished, regardless of whether firefighters are still present, there should no longer be an exception to the warrant requirement, unless some new exigency appears.[344] The Supreme Court's holding that the initial fire exigency continues to exist as long as the firefighters are still on the scene[345] creates an opportunity for obvious abuse of the Warrant Clause.[346] As a specific

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336. *See Tyler*, 436 U.S. at 510.

337. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491.

338. *See, e.g., Rose*, 586 So. 2d at 754 (noting that partially destroyed home retained strong privacy interests and concluding that no exigency or reasonable time to conduct warrantless investigation remained when investigator arrived four hours after extinguishment of fire and after firefighters had checked for rekindling).

339. *See* 4 LAFAVE, *supra* note 139, at 516; Costan, *supra* note 15, at 147–48.

340. "Accidental" means unintentional, which can include such things as faulty wiring, or a carelessly thrown burning cigarette. "Providential" or "natural" pertains to acts of God, such as lightning. "Incendiary" means an intentional act. *See supra* note 55 and accompanying text.

341. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491.

342. *See id.* at 497.

343. *See* DEHAAN, *supra* note 2, at 4, 127, 394.

344. One court came up with an additional, although probably illusory, exigency when there was no fear of rekindling by allowing a warrantless entry due to the fear of additional structural collapse caused by the fire. *See* State v. Hoffman, 567 A.2d 1134, 1137 (R.I. 1990). This "exigency" seems illusory because it could be used at any fire scene to avoid the necessity of obtaining a warrant. Although a fire-damaged building may be unsafe due to the fire-weakened condition of the building itself, that should not create an exigent circumstance, since it will not become any more unsafe during the time a warrant is obtained.

345. *See* Michigan v. Clifford, 464 U.S. 287, 293 (1984) (plurality decision); Michigan v. Tyler, 436 U.S. 499, 511–12 (1978).

346. An argument could be made that the fire exigency should continue throughout the period of overhaul. *See* State v. Moretti, 521 A.2d 1003, 1007 (R.I. 1987) (noting that prior to overhaul operations, investigator discovered incriminating evidence in the area being examined for cause and origin). *But see* State v. Wilson-Bey, 572 A.2d 372, 376 (Conn. 1989) (allowing admission of incriminating items found while searching for victims, ventilating the premises, and overhauling, because these activities occur throughout the premises). In theory, this makes sense because the purpose of overhaul is to prevent rekindling. *See, e.g.*, United States v. Gargotto, 510 F.2d at 409, 411 (6th Cir. 1975) (noting that fire captain could not have ordered firefighters to desist from overhaul to wait for a warrant because of the danger of water damage and loss or destruction of the evidence and

example, firefighters are trained that investigators may need to obtain warrants once the last firefighter leaves the scene.[347] In order to avoid this potential need for a warrant, however, the International Fire Service Training Association and the National Fire Academy recommend that at least one firefighter remain at the scene of a possible arson until the investigator arrives, regardless of the status of the fire.[348] Further, the determinations by courts of a reasonable time during which the investigator can remain and of re-entry as a continuation of the first lawful entry are subjective and not confined to any specific period of time.[349] Such unrestrained latitude is not accorded to police officers at crime scenes.[350] This liberal application of the Fourth Amendment creates potential abuse in cases where an investigator may not have probable cause to obtain a warrant but is allowed to rely on the right to investigate for fire cause and origin to obtain entry.[351]

To avoid this subjectivity and potential abuse, a warrant should be obtained in all post-fire investigations unless consent is given or an independent exigent circumstance exists. The argument that a property owner may attempt to remove incriminating evidence while the investigator is obtaining a warrant is one

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the need for the firefighters to prevent further outbreak of fire). *See also Tyler*, 436 U.S. at 510 (stating that prompt determination of fire's origin may be necessary to preserve evidence from intentional or accidental destruction). In practice, such an exception creates additional chances of abuse, because firefighters are trained to ensure delay of overhaul until after the investigation is conducted. *See* FEDERAL EMERGENCY MANAGEMENT AGENCY, INITIAL FIRE INVESTIGATION SM 6-11 (Dec. 1995). Thus, if overhauling can be delayed, there is no exigency.

347. *See* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 491.

348. *See id.*; FEDERAL EMERGENCY MANAGEMENT AGENCY, INITIAL FIRE INVESTIGATION SM 6-12 (Dec. 1995). *See also* Davis v. State, 344 S.E.2d 730, 732 (Ga. Ct. App. 1986) (describing how fire department, with knowledge of suspected arson, kept two firefighters on scene for eight hours after danger was over to secure scene for arrival of fire investigators, who then collected incriminating evidence). It is unlikely that a similar level of abuse could be attributed to the situation where an investigator asks the firefighters to suspend extinguishing the fire to conduct an investigation, because firefighters' main duty is to put out fires. They would not cease their firefighting operations simply to allow the fire investigator to get around the Fourth Amendment. The potential for abuse may increase, however, once the fire is out and the only concern at that point is to catch the criminal.

349. The Justices conceded that the determination of these issues would vary on the facts of the cases. *See Clifford*, 464 U.S. at 298 n.9, 309 n.1, (Rehnquist, J., dissenting); *Tyler*, 436 U.S. at 510 n.6. *See also Tyler*, 436 U.S. at 515–16 (White, J., concurring) (stating that validating some re-entries and invalidating others will make it difficult to predict how a court will view a particular re-entry); United States v. Mitchell, 85 F.3d 800, 805 (1st Cir. 1996) (ruling that re-entry by a different fire investigator 12 hours after the first entry was a continuation); United States v. Veltmann, 869 F. Supp. 929, 933 (M.D. Fla. 1994) (deeming warrantless entries by police personnel 6 hours after fire a continuation, based in part on the fact that police had posted a guard to secure the house, yet had chosen not to obtain a warrant), *aff'd*, 87 F.3d 1329 (11th Cir. 1996) (unpublished table decision). It has also been noted by a legal commentator that *Clifford*'s various factors are somewhat unclear and difficult to apply. *See* 4 LAFAVE, *supra* note 139, at 520. *See also supra* note 346 and accompanying text.

350. *See* Mincey v. Arizona, 437 U.S. 385, 395 (1978).

351. *See* Commonwealth v. Smith, 511 A.2d 796, 804 (Pa. 1986) (Zappala, J., dissenting).

that could be raised at any crime scene in which a police officer has to obtain a warrant.[352] In any other crime scene, the police easily resolve this dilemma by posting other police officers at the scene to maintain security while a warrant is obtained.[353]

If the investigator does not have articulable facts to support probable cause and the sole purpose is to determine the origin and cause of the fire,[354] an administrative warrant is appropriate.[355] The administrative warrant should not be used as a pretext for the discovery of criminal evidence, because the investigator certainly will be looking for evidence of arson.[356] If, prior to or during the origin and cause determination, an investigator obtains probable cause to believe that a crime has occurred, the investigator should obtain a criminal warrant.[357]

Thus, there should be no difference between the warrant requirement imposed on a police officer at a crime scene to gather criminal evidence and that of a fire investigator at a fire scene to obtain evidence of an arson.[358] No longer would

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352. *See* 4 LAFAVE, *supra* note 139, at 514; Costan, *supra* note 15, at 148.

353. *See* Segura v. United States, 468 U.S. 796, 798 (1984) (stating that peace officer has the absolute right to secure a residence while waiting for a search warrant to arrive). *See also* IFSTA, ESSENTIALS OF FIRE FIGHTING, *supra* note 1, at 497 ("The most efficient and complete efforts to determine the cause of a malicious and incendiary fire are completely wasted unless the building and premises are properly secured and guarded until the investigator has finished evaluating the evidence exactly as it appears at the scene.").

354. An origin and cause investigation must be considered as a routine inspection by a fire investigator, thus placing it under the *Camara/See* doctrine. *See* 4 LAFAVE, *supra* note 139, at 514. In those states in which the fire investigator has no peace officer powers, an administrative warrant possibly could be the only type of warrant needed, since the gathering of criminal evidence would be left to the police authorities who would be expected to obtain a criminal warrant.

355. The administrative warrant should be limited to the area sought to be examined for origin and cause. *See* Commonwealth v. Jung, 651 N.E.2d 1211, 1218 (Mass. 1995) (finding administrative warrant that sought search of "entire structure" to be overbroad and invalid).

356. *See* DEHAAN, *supra* note 2, at 4, 127, 394. *See also* Abel v. United States, 362 U.S. 217, 226 (1960) ("The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts.").

357. Evidence of probable cause can be based on information gathered from firefighters' observations or gathered during an entry based on exigency or an administrative warrant. *Cf.* Moretti v. State, 521 A.2d 1003, 1004 (R.I. 1987) (noting that prior to investigator's warrantless entry, which was upheld, firefighters detected odor of gasoline and irregular burn patterns, indicative of arson); Sloane v. State, 686 N.E.2d 1287, 1289, 1293 (Ind. Ct. App. 1997) (allowing warrantless entry by investigator under *Clifford* and *Tyler* despite information conveyed by firefighters as to evidence of arson). In those states in which the investigator has no police powers, the police authorities should be immediately notified.

358. *See* Costan, *supra* note 15, at 147–48. *See also* Commonwealth v. Smith, 511 A.2d 796, 807 (Pa. 1986) (Zappala, J., dissenting) (stating that investigator was clearly searching for criminal evidence).

the arbitrary fact that a firefighter might be standing around in the vicinity be sufficient to justify a warrantless entry.[359]

The approach suggested in this Article is more restrictive than the Supreme Court's, acknowledges the realities of a fire scene, and, most importantly, places the fire investigator at a fire scene in the same constitutional position as a police officer at a crime scene. The current state of the law denigrates, although unintentionally, the role of the fire investigator to that of a mere code inspector.[360] The bottom line is that many fire investigators are law enforcement officers,[361] yet the courts do not treat them as such. Not only would it be constitutionally correct to apply Fourth Amendment warrant requirements to fire investigators as they are applied to police officers, but also it would raise the awareness of fire investigators to treat each scene as a legitimate crime scene.[362] In this way, the privacy interests of the property owner, both innocent and guilty, are preserved, and the fire investigation can proceed without any uncertainty as to whether the investigator is rightly on the property, whether a re-entry was a legitimate continuation, or whether a hindsight decision that a warrant should have been obtained may result in the reversal of a conviction.[363]

359. *See supra* note 348 and accompanying text.

360. *See, e.g.*, 4 LAFAVE, *supra* note 139, at 525–26 (stating that even if evidence of arson is being pursued, fire investigators should keep their inspection "unintrusive" by directing their attention to the damaged premises rather than the occupants).

361. *See supra* notes 44–45 and accompanying text.

362. *See* DEHAAN, *supra* note 2, at 4, 127, 394.

363. *See* Michigan v. Clifford, 436 U.S. 287, 515–16 (1984) (White, J., concurring in part and dissenting in part) (noting that continuation rule will make it difficult for investigators to predict how a court will view a particular re-entry, which might result in the exclusion of evidence because of the failure to obtain a warrant).