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## Arson Investigations and the Fourth Amendment

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such a manner that evidence of course of dealing between contractual parties and the usages of their trade is fundamentally necessary to "complete" the agreement and thus fulfill the parties' expectations, the impact of such extrinsic evidence in interpreting the express terms of the writing, if not anticipated and dealt with, may prove "unsettling if not disastrous." Therefore, businessmen will have to re-examine the standardized writings upon which they have successfully relied in the past, in light of the UCC's treatment of course of dealing and usages of trade as tools of contractual interpretation.

DAVID MARK KELSO

## ARSON INVESTIGATIONS AND THE FOURTH AMENDMENT

In its prohibition against unreasonable searches and seizures, the fourth amendment<sup>1</sup> protects the individual's right of privacy from arbitrary intrusions by the state. The meaning of the word "unreasonable" in this amendment has been the focal point of a substantial amount of litigation, and the Supreme Court has played an important role in shaping its definition.<sup>2</sup> In regard to searches of the home, recent Supreme Court decisions have set forth the proposition that all warrantless searches are unreasonable<sup>3</sup> unless they are conducted by consent<sup>4</sup> or are incident to a lawful arrest.<sup>5</sup> Evidence gathered from a warrantless search of the home, not within the purview of the two previously mentioned exceptions, will be suppressed through the application of the fourth

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<sup>1</sup>U.S. CONST. amend. IV, which provides:

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

<sup>2</sup>*Ker v. California*, 374 U.S. 23, 33 (1963); *United States v. Rabinowitz*, 339 U.S. 56, 83-84 (1950) (Frankfurter, J., dissenting).

<sup>3</sup>*Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>4</sup>*Bumper v. North Carolina*, 391 U.S. 543 (1968). In this case the consent exception to the warrant requirement was recognized, but the facts did not support a finding that consent had been given. For a case where the exception was recognized, and the facts supported a showing of consent, *see, e.g., United States v. Malo*, 417 F.2d 1242 (2d Cir. 1969), *cert. denied*, 397 U.S. 995 (1970).

<sup>5</sup>*Chimel v. California*, 395 U.S. 752 (1969); *cf. Agnello v. United States*, 269 U.S. 20 (1925). *See also, La Fave, Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire"*, 8 CRIM. L. BULL. 9 (1972), for a survey of the various exceptions to the exclusionary rule.

amendment exclusionary rule.<sup>6</sup> However, in two recent cases<sup>7</sup> involving prosecutions for arson, state courts refused to suppress evidence gained from warrantless searches, neither of which seemed to come within the scope of the exceptions. This discussion will focus on the two cases in an effort to ascertain whether their respective approaches can be reconciled with fourth amendment precedent.

The cases, *Bennett v. Commonwealth*<sup>8</sup> and *State v. Vader*,<sup>9</sup> are almost identical from a factual standpoint.<sup>10</sup> In each case there was a fire in the home of the defendant, and the authorities, immediately suspicious of arson,<sup>11</sup> arranged an extensive investigation by an expert after each fire had been extinguished.<sup>12</sup> In neither case was a search warrant obtained,<sup>13</sup> nor was there a finding that consent had been given to search the premises. As a result of evidence obtained from these searches, each party was charged with arson.<sup>14</sup> In *Bennett*, the defendant was convicted after a

<sup>6</sup>*Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616 (1886). The essence of the exclusionary rule is that evidence obtained by federal or state officials in violation of the fourth amendment search and seizure provisions is inadmissible in either state or federal criminal proceedings. 8 WIGMORE, EVIDENCE § 2184a (McNaughton rev. 1961).

<sup>7</sup>*Bennett v. Commonwealth*, 212 Va. 863, 188 S.E.2d 215 (1972); *State v. Vader*, 114 N.J. Super. 260, 276 A.2d 151 (1971). A third case, *State v. Rees*, 258 Iowa 813, 139 N.W.2d 406 (1966), might also be included in this discussion because of its factual similarity to the two cases which will be examined here. However, *Rees* was a close decision (5-4), and it was based primarily upon *Frank v. Maryland*, 359 U.S. 360 (1959), which has since been overruled by *Camara v. Municipal Court*, 387 U.S. 523 (1967). For these reasons there are serious doubts as to the vitality of *Rees* as precedent at the present time. Therefore, it has been omitted from consideration in this article.

<sup>8</sup>212 Va. 863, 188 S.E.2d 215 (1972).

<sup>11</sup>114 N.J. Super. 260, 276 A.2d 151 (1971).

<sup>10</sup>212 Va. at 864-65, 188 S.E.2d at 216-17; 276 A.2d at 152.

<sup>11</sup>In *Bennett*, a police officer sent out to direct traffic at the scene of the fire smelled a "strong petroleum-like odor," emanating from the fire. Also, this same policeman and a fellow officer found a plastic picnic jug, containing a petroleum based liquid, in the yard of the defendant while making a "preliminary investigation" of the fire. 212 Va. at 864, 188 S.E.2d at 216. In *Vader*, it was stated that the authorities were suspicious of arson, but no specific reason for this suspicion was given. 276 A.2d at 152.

<sup>12</sup>In *Bennett*, the day after the fire was extinguished an investigation was made by a state deputy fire marshal who was an expert at the investigation of arson. 212 Va. at 865, 188 S.E.2d at 217. In *Vader*, an expert arson investigator, summoned by the Highland Park police, performed an investigation four days after the fire was extinguished. 276 A.2d at 152.

<sup>13</sup>In *Vader*, the police had obtained a warrant for a search which they made prior to the search by the arson expert. This warrant had lapsed, however, by the time the arson investigator made his search, and it was the evidence from his search that seemed most critical to the State's case. 276 A.2d at 152.

<sup>14</sup>In *Bennett*, it must be noted that objection was made to the admission of other evidence besides the testimony of the state fire marshal. The other evidence was a jug containing a petroleum based liquid seized by policemen conducting a "preliminary investi-

motion to suppress evidence had been denied at the trial level;<sup>15</sup> this conviction was affirmed by the Virginia Supreme Court.<sup>16</sup> In *Vader*, a motion to suppress evidence was granted by the trial court,<sup>17</sup> but an intermediate New Jersey appellate court reversed the order and remanded the case for trial.<sup>18</sup> Even though the two courts faced similar fact situations in these cases, they employed markedly different approaches in disposing of the legal problem of suppression of evidence.

### Bennett v. Commonwealth: *Arson Investigations as Administrative Searches*

In *Bennett*, the Virginia court was significantly influenced by the fact that the search in that case was authorized by the State Corporation Commission and Fire Hazards Law.<sup>19</sup> This being the case, the court reasoned that the search in *Bennett* was administrative in nature and was also one of the types of warrantless searches permitted by the Supreme Court decision, *Camara v. Municipal Court*.<sup>20</sup>

*Camara*<sup>21</sup> is the controlling decision in the area of administrative inspections—those inspections which are linked to a regulatory scheme for the protection of the public health, safety, or morals. In *Camara*, the defendant faced prosecution under a city housing code for refusing to admit a housing inspector charged with enforcement of the city's occupancy laws.<sup>22</sup> The defendant had demanded that the officer obtain a warrant before conducting the search, but the state court ruled that no

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gation" at the time of the fire. 212 Va. at 863-64, 188 S.E.2d at 216. The trial court's admission of this evidence was affirmed by the Virginia Supreme Court on the basis of the "plain view" doctrine and the emergency search exception to *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967). 212 Va. at 865, 188 S.E.2d at 217. For the purposes of this article, this ruling is not under challenge. Instead, this article will focus on the admission of the state fire marshal's testimony, which was the bulwark of the Commonwealth's case.

<sup>15</sup>212 Va. at 863, 188 S.E.2d at 216.

<sup>16</sup>*Id.* at 866, 188 S.E.2d at 218.

<sup>17</sup>276 A.2d at 152.

<sup>18</sup>*Id.* at 153. In *Vader*, the trial court issued an order prior to trial suppressing the evidence from the arson investigator's search. The State appealed this decision, pursuant to leave granted. Therefore, since there had been no trial previous to the appellate court's decision, it is uncertain whether the accused was finally convicted. However, the previously suppressed evidence seemed most unfavorable to his defense, as it consisted primarily of testimony by the arson expert and photographs taken by him while conducting his examination of the accused's premises. 276 A.2d at 152.

<sup>19</sup>212 Va. at 865-66, 188 S.E.2d at 217-18, citing VA. CODE ANN. §§ 27-56, -58 (Repl. Vol. 1969).

<sup>20</sup>212 Va. at 866, 188 S.E.2d at 218.

<sup>21</sup>387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967). The *See* case was the companion of *Camara*, and its effect was to extend fourth amendment protection to business premises where administrative searches were involved.

<sup>22</sup>387 U.S. at 525-27.

warrant was necessary, since inspections of this nature did not come within the purview of the fourth amendment.<sup>23</sup> The Supreme Court reversed, holding that an individual is entitled to fourth amendment protection where administrative searches are involved.<sup>24</sup> The rule laid down in *Camara* requires a search warrant for the execution of administrative inspections, except in cases of consent<sup>25</sup> or emergency.<sup>26</sup>

The initial question arises as to whether either of the two exceptions to the *Camara* rule was available to justify the warrantless search in *Bennett*. The Virginia court did not directly confront this problem in its opinion, but instead rather summarily concluded:

Jessop's [the fire marshal's] daytime entry, without force, under the authority of the statute was such a permissible inspection as was contemplated by *Camara* and does not violate the Fourth Amendment rights of the defendant.<sup>27</sup>

A review of the facts in *Bennett* indicates that neither ground was available for allowing the circumvention of the warrant requirement. There was no evidence of a consent search, nor did the Commonwealth seek to justify the lack of a warrant on this ground.<sup>28</sup> As for the emergency search exception, there was little evidence that the search was necessary for the protection of the public safety. When the fire marshal made his search the fire had already been extinguished for several hours, a situation which suggests that there was little danger to the public safety at the time of his inspection.<sup>29</sup> Furthermore, there was no evidence of explosives or other volatile materials on the premises, a condition which has justified immediate, warrantless searches in other cases where fires were involved.<sup>30</sup> Therefore, if the warrantless search in *Bennett* could not be brought under either exception, the *Camara* rule seems to apply fully: the fire marshal's search should have been accompanied by a warrant. Since a failure to procure a warrant violated the fourth amendment, the conclusion seems inescapable that the evidence thereby obtained was unconstitutional.

In response to this argument, however, the Virginia court stated that

<sup>23</sup>237 Cal. App. 2d 128, 46 Cal. Rptr. 585 (1965).

<sup>24</sup>387 U.S. at 534, 540.

<sup>25</sup>*Id.* at 528-29.

<sup>26</sup>*Id.* at 539.

<sup>27</sup>212 Va. at 866, 188 S.E.2d at 218.

<sup>28</sup>Brief for Appellee at 3-4, *Bennett v. Commonwealth*, 212 Va. 863, 188 S.E.2d 215 (1972).

<sup>29</sup>The fire in *Bennett* was extinguished during the night of October 27, 1969. The investigation by the fire marshal in that case was conducted during the daylight hours of the following day. 212 Va. at 864-65, 188 S.E.2d at 216.

<sup>30</sup>*Romero v. Superior Court*, 266 Cal. App. 714, 72 Cal. Rptr. 430 (1968); *cf.* *State v. Cohn*, 347 S.W.2d 691 (Mo. 1961).

"*Camara* did not concern an issue of suppression of evidence, it arose from a criminal prosecution for refusal of admission to the inspector."<sup>31</sup> The court did not elaborate on its reading of *Camara* any further than this statement, but the intimation was that it interpreted *Camara* to hold only that a homeowner has a right under the fourth amendment to refuse a warrantless administrative inspection of his premises and an immunity from prosecution for asserting this right. The Virginia court implied that the question of suppression of evidence, in regard to constitutionally forbidden administrative searches, was left open by *Camara* since the Supreme Court did not specifically address the issue in that case.<sup>32</sup> An extension of the *Bennett* court's reading of *Camara* leads to the following result: had the inspector in *Camara* gained entry without consent, cited the defendant for substantive housing code violations, and then used evidence from his inspection to support a conviction, the Supreme Court would not necessarily have applied the exclusionary rule to the fruits of this warrantless search and thereby have voided the conviction. That *Camara* made no explicit rulings on suppression of evidence is true,<sup>33</sup> but that it did not implicitly extend the exclusionary rule to evidence seized from constitutionally forbidden administrative searches is subject to serious question,<sup>34</sup> especially when that decision is considered with respect to the entire body of fourth amendment case law.

To better understand the full effect of *Camara*, it is useful first to consider that decision from a historical perspective. In extending the fourth amendment right of privacy to the area of administrative searches, *Camara* overruled an earlier Supreme Court decision, *Frank v. Maryland*.<sup>35</sup> This decision<sup>36</sup> had been predicated on a civil-criminal distinction in regard to searches and seizures.<sup>37</sup> The Court had held that searches for the evidence of crime posed a threat to the fourth amendment right of privacy and, therefore, would be subject to a warrant requirement, except in certain cases where exigent circumstances were present.<sup>38</sup> In contrast, since civil or administrative searches touched only on the periphery of the right of privacy, no warrants would be required for the

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<sup>31</sup>212 Va. at 866, 188 S.E.2d at 218.

<sup>32</sup>*Id.*

<sup>33</sup>See Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1332 (1967).

<sup>34</sup>See cases cited note 42 *infra*; Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1342-48 (1967).

<sup>35</sup>387 U.S. at 528.

<sup>36</sup>*Frank v. Maryland*, 359 U.S. 360 (1959).

<sup>37</sup>*Id.* at 365-67.

<sup>38</sup>*Id.* at 265. In speaking of the fourth amendment protections against official intrusions aimed at the gleanings of evidence for a criminal prosecution, the Court noted that "evidence of criminal action may not, save in very limited and closely confined situations, be seized without a judicially issued search warrant." *Id.*

execution of these searches.<sup>39</sup> *Camara* abolished this civil-criminal distinction in ruling that administrative searches

are significant intrusions upon the interests protected by the Fourth Amendment, [and] that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual

. . . .<sup>40</sup>

Until *Camara*, the application of the exclusionary rule had also followed the civil-criminal distinction.<sup>41</sup> Therefore, since *Camara* marked the demise of the distinction, there is a certain logic implicit in that decision demanding that the exclusionary rule be extended to the administrative area, even though the decision itself did not specifically speak to the point. Furthermore, cases decided subsequently to *Camara* have recognized that the exclusionary rule applies to evidence seized in a constitutionally forbidden administrative search.<sup>42</sup>

Additionally, it must be noted that the policy considerations which buttress the exclusionary rule dictate that its scope be extended to include the area of administrative searches. Essentially, the exclusionary rule provides the individual with a remedy for fourth amendment violations by government officials.<sup>43</sup> The Court has asserted for a variety of reasons that the rule is the only practicable remedy. The most universally cited of these arguments is that the rule serves as a deterrent to unreasonable searches and seizures on the part of government officials by rendering evidence obtained from such searches of no value in a criminal prosecu-

<sup>39</sup>*Id.* at 366-67. In speaking of the fourth amendment's application to civil (administrative) searches, the Court noted:

But giving the fullest scope to this constitutional right to privacy, its protection cannot be here invoked. The attempted inspection of appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. . . . No evidence for criminal prosecution is sought to be seized.

*Id.* at 366.

<sup>40</sup>387 U.S. 523, 534 (1967).

<sup>41</sup>See Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1319-23, 1332-36, 1342-48 (1967).

<sup>42</sup>*United States v. Alfred M. Lewis, Inc.*, 431 F.2d 303 (9th Cir.), *cert. denied*, 400 U.S. 878 (1970); *United States v. Thriftmart*, 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970); *United States v. J.B. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969), *aff'g* 294 F. Supp. 65 (E.D. Ark. 1969); *United States v. Hammond Milling Co.*, 413 F.2d 608 (5th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970); *United States v. Kendall Co.*, 324 F. Supp. 628 (D. Mass. 1971); *Finn's Liquor Shop, Inc. v. State Liquor Authority*, 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584, *cert. denied*, 396 U.S. 840 (1969); *cf.* *People v. Moore*, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968) (dicta); *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

<sup>43</sup>*Mapp v. Ohio*, 367 U.S. 643, 650-57 (1961); *Wolf v. Colorado*, 338 U.S. 25, 28-33 (1949).

tion.<sup>44</sup> Second, the exclusionary rule is necessary for the protection of judicial integrity by preventing the courts from discrediting themselves through the use of illegally seized evidence.<sup>45</sup> A third argument points to the rule's asserted definite constitutional origin, arising out of an interrelation between the fourth amendment's prohibition of unreasonable searches and seizures and the fifth amendment's prohibition against self-incrimination.<sup>46</sup> In recent years this last justification seems to have been carried beyond its original scope. In *Mapp v. Ohio*,<sup>47</sup> the Court took the view that the exclusionary rule had acquired the status of an intrinsic constitutional doctrine embodied solely in the fourth amendment, the fifth amendment no longer being necessary to support its existence. The Court analyzed the relationship of the two amendments as follows:

The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.<sup>48</sup>

If in fact the exclusionary rule is a constitutional doctrine arising out of either the fourth amendment alone, or out of the fourth and fifth amendments taken together, then its extension to administrative searches would be inevitable.<sup>49</sup> Likewise, the arguments in support of the rule as a

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<sup>44</sup>*Mapp v. Ohio*, 367 U.S. 643, 648 (1961); *Weeks v. United States*, 232 U.S. 383, 392 (1914). *But see* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970), where the author claims that there is no empirical evidence to support the proposition that the exclusionary rule deters unlawful searches and seizures by law enforcement officers. *Id.* at 667.

<sup>45</sup>*Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In his famous dissent in *Olmstead*, Mr. Justice Brandeis stated:

Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

*Id.* at 485.

<sup>46</sup>*Mapp v. Ohio*, 367 U.S. 643, 662 (Black, J., concurring); *Boyd v. United States*, 116 U.S. 616, 633 (1886). In *Boyd*, Mr. Justice Bradley stated that he was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." 116 U.S. 616, 633.

<sup>47</sup>367 U.S. 643 (1961).

<sup>48</sup>*Id.* at 657.

<sup>49</sup>The idea that the exclusionary rule is a constitutional doctrine has not received universal support from the Supreme Court. Chief Justice Burger has been particularly critical of this approach and has voiced his sentiments in several dissenting opinions. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 414-15 (1971) (Burger, C.J., dissenting); *Coolidge v. New Hampshire*, 403 U.S. 443, 492-93 (1971) (Burger, C.J., dissenting in part and concurring in part).

deterrent to unreasonable searches and as a guardian of judicial integrity seem just as applicable to a constitutionally forbidden administrative search as they do to a constitutionally forbidden criminal search;<sup>50</sup> the need for deterrence and for protection of judicial respect is no greater in one case than in the other. Moreover, since either type of search by governmental officials presents the same potential harm to the individual's right of privacy, a distinction between the two would seem to be anomalous: the exclusionary rule would apply only to one situation, although constitutional violations would be present in both. Fourth amendment protection, it is submitted, should turn on more consequential matters than the difference between a state fire investigator and a policeman.<sup>51</sup>

*Bennett v. Commonwealth: The Administrative Search Classification as a Misnomer*

From the foregoing discussion one may conclude that in order for the *Bennett* decision to maintain its validity from the standpoint of fourth amendment search and seizure doctrine, it is necessary to find that the search in that case was of an *administrative* nature and that a civil-criminal distinction still exists in regard to application of the exclusionary rule. On the contrary, if it were found that the search in that case were one directed primarily toward discovering evidence of crime, the *Bennett* approach to the issue of suppression of evidence would be eroded further. If this were the case, the application of the exclusionary rule could hardly be avoided, even if a civil-criminal distinction were still recognized in determining its employment.

An examination of certain sections of the Virginia State Corporation Commission and Fire Hazards Law<sup>52</sup> tends to show that the type of investigation authorized by that statute, and upon which the court in *Bennett* relied, is actually an investigation for evidence of crime, rather than an administrative investigation. The basic provisions of the Virginia statute authorize the appointment of fire marshals,<sup>53</sup> the investigation of fires,<sup>54</sup> and the power on the part of fire marshals to enter

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<sup>50</sup>See *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1342-48 (1967).

<sup>51</sup>See *District of Columbia v. Little*, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950), where Judge Prettyman commented:

To say a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.

<sup>52</sup>VA. CODE ANN. §§ 27-56, -58, -59, -67, -70 (Repl. Vol. 1969).

<sup>53</sup>*Id.* §§ 27-67, -70. For the text of § 27-70, see note 56 *infra*.

<sup>54</sup>*Id.* § 27-56, which provides in part:

burned premises at any time in order to conduct an investigation.<sup>55</sup> In addition, however, fire marshals are granted the same investigatory powers as police officers<sup>56</sup> and the authority to set into motion criminal prosecutions whenever their investigations into the origin of fires produce sufficient evidence of arson.<sup>57</sup> These sections when taken as a whole evince a rather comprehensive plan for the investigation and prosecution of arson. In effect, the code seems to grant fire marshals the specific authority to assume what would normally be a function of the police in this particular area. It would logically follow that fire marshals should be subject to the same rules of search and seizure, including the exclusionary rule.

This conclusion was reached by the Indiana Supreme Court in the case of *State v. Buxton*,<sup>58</sup> where the court did apply the exclusionary rule. *Buxton* is almost identical to *Bennett* from both a factual<sup>59</sup> and statutory standpoint.<sup>60</sup> In *Buxton*, during a warrantless search of the defendant's

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The Commission shall examine, or cause examination to be made, into the origin and circumstances of all fires occurring in this State. . . .

<sup>55</sup>*Id.* § 27-58, which provides in part:

The Commission, and such person or persons as it may appoint, shall have authority at all times . . . to enter upon and examine any building or premises where any fire has occurred. . . .

<sup>56</sup>*Id.* § 27-70, which provides:

The Commission is authorized to appoint deputy State fire marshals, who shall, in addition to the powers now conferred by law, exercise the same powers and perform the same duties as city and town fire marshals, as provided in §§ 27-31 to 27-35, and shall have the same police powers as a sheriff in the investigation and prosecution of all cases of alleged arson and of other cases of fires alleged to involve criminality.

In 1972, § 27-70 was amended to the following form:

The Commission is authorized to appoint a chief arson investigator and assist arson investigators, who shall have the same police powers as a sheriff in the investigation and prosecution of all offenses involving fires, fire bombings, bombings, attempts, threats to commit such offense, false alarms relating to any such offense, possession and manufacture of explosive devices, substances and fire bombs.

*Id.* (Supp. 1972). The section in its rewritten form clearly discloses the fact that arson investigations are intended to be searches of a criminal rather than an administrative nature.

<sup>57</sup>*Id.* § 27-59, which provides in part:

If the Commission shall be of opinion, after investigation as to the cause or origin of any fire, that there is sufficient evidence to charge any person with the crime of arson, or with incendiary burning of property, it shall cause such person to be arrested and charged with such offense, and shall furnish to the Commonwealth's attorney of the city or county all such evidence, together with the names of witnesses, and all information obtained by it, including a copy of all pertinent and material testimony taken by it touching such offense.

<sup>58</sup>238 Ind. 93, 148 N.E.2d 547 (1958).

<sup>59</sup>148 N.E.2d at 548.

<sup>60</sup>IND. ANN. STAT. §§ 20-802, -805, -808 (Repl. Vol. 1964). The most significant sec-

fire-wrecked premises by a state fire marshal, a policeman, and an insurance investigator, the policeman discovered a hot plate, a pile of torn newspapers, and a gunny sack soaked in fuel oil.<sup>61</sup> The seizure of this evidence led to the defendant's arrest and trial for arson.<sup>62</sup>

When considered in comparison with *Bennett*, the *Buxton* case is instructive for two reasons. First, the Indiana court correctly classified the fire investigation authorized by statute in that case as a criminal rather than a civil search. Since no warrant was obtained prior to its inception, the court found the search to be violative of the state constitution, and evidence obtained as a result was declared inadmissible.<sup>63</sup> Secondly, the court suggested an approach which may be taken in upholding the constitutionality of state fire laws which authorize entry into buildings where fires have occurred but include no warrant provisions. The approach taken by *Buxton* was to engraft a warrant requirement upon the statute,<sup>64</sup> a judicial legislative move that seems mandatory in order that constitutional conflicts may be avoided. Not to incorporate a warrant requirement into state fire inspection laws would bring them into conflict with the basic constitutional mandate that in all but a few exceptional cases "a neutral and detached magistrate"<sup>65</sup> is to make the determination

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tion of the three previously mentioned is § 20-808, which sets out in part:

The state fire marshal or his deputies may, in addition to the investigation made by any of his assistants, at any time investigate as to the origin or circumstances of any fire occurring in this state.

. . . .

The state fire marshal or his deputies or any of his assistants may at all reasonable hours enter any building, property or premises within his jurisdiction for the purpose of making an inspection or investigation which, under the provisions of this act or any law which may have been or may be from time to time enacted requiring the fire marshal to enforce or carry out, he or they may deem necessary to be made.

<sup>61</sup>148 N.E.2d at 548.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 549.

<sup>64</sup>*Id.* at 551-52.

<sup>65</sup>*Johnson v. United States*, 333 U.S. 10, 13-14 (1948), where the Court remarked:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

as to whether a search by government officials should be allowed. The proposition that the authorization of searches is a subject of judicial inquiry<sup>66</sup> is implicit in the American constitutional belief in separation of powers. Determinations as to the reasonableness of searches and seizures are not to be left to the legislature or the police.<sup>67</sup>

The effect which *Bennett* will have on future search and seizure cases in Virginia, particularly in regard to those involving arson, is uncertain.<sup>68</sup> However, if such a case should ever arise again, perhaps the Virginia court should look to the reasoning of *State v. Buxton* for guidance and abandon the administrative search rationale of *Bennett*.

#### *State v. Vader: Habitability as the Test for Zones of Privacy*

In *State v. Vader*, the second arson investigation case where a warrantless search was allowed, the intermediate New Jersey court did not discuss a civil-criminal distinction. In that case police were actively involved in the search, and thus the search would have been difficult to classify as administrative in nature.<sup>69</sup> Instead, the court focused upon whether the defendant's home was entitled to fourth amendment protection since it had been rendered uninhabitable by fire.<sup>70</sup> In concluding that it was not entitled to such protection the court reasoned:

The basic purpose of the Fourth Amendment is the protection of an individual's privacy and the security of his home. Here, the premises had been rendered uninhabitable by a fire. All utilities had been disconnected. No one was occupying the house, the doors and windows of which were broken. The fire was of suspicious origin and had resulted in the death of a child. Under these circum-

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<sup>66</sup>See *Katz v. United States*, 389 U.S. 347, 356-57 (1967); *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963); *McDonald v. United States*, 335 U.S. 451, 456 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

<sup>67</sup>*Id.*

<sup>68</sup>The reason for the uncertainty on this point is that since the events in *Bennett* transpired, the General Assembly passed a statute providing for the issuance of search warrants to fire marshals when entry to burned premises is refused and there is "good cause or suspicion" of arson. VA. CODE ANN. § 27-32.1 (Supp. 1972). The provisions of this statute are not mandatory on the fire marshal, however, so there still exists the possibility that a warrantless search might be made in the future. If this were to occur, *Bennett* would serve as controlling precedent, and even though such a search might be violative of *state law*, the evidence would not be excluded. *Hall v. Commonwealth*, 138 Va. 727, 735, 121 S.E. 154, 161 (1924). Moreover, the defendant would not be entitled to the statutory damages remedy for an unlawful search, since this provision has been held to apply only to searches which are also violative of federal constitutional standards. VA. CODE ANN. § 19.1-88 Repl. Vol. 1969), construed in *Carter v. Commonwealth*, 209 Va. 317, 320, 163 S.E.2d 589, 592 (1968).

<sup>69</sup>276 A.2d at 152.

<sup>70</sup>*Id.*

stances, the prompt, on-the-scene investigation of the fire by the authorities did not infringe on defendant's right of privacy or the security of his home and was not a Fourth Amendment search requiring a search warrant.<sup>71</sup>

The test which the court employed for determining when an individual is entitled to fourth amendment protection in regard to searches of the home is one of "habitability": only when a house is habitable is it entitled to fourth amendment protection. The current Supreme Court test for determining protected zones of privacy was formulated in *Katz v. United States*<sup>72</sup> where the Court focused upon whether or not there had been a violation of the privacy upon which the defendant "justifiably relied."<sup>73</sup>

The Court in *Katz*, abandoning the trespass doctrine as the test for determining the scope of fourth amendment protection, adopted a test more capable of dealing with the multifarious situations arising out of modern life where privacy is invaded.<sup>74</sup> The Court's test, an attempt to find a standard which would bear a rational relation to the right sought to be protected,<sup>75</sup> has been phrased in terms of whether there has been a violation of "a reasonable expectation of freedom from governmental intrusion"<sup>76</sup> shown by the defendant.

The question arises whether "habitability" is compatible with the test for determining protected zones of privacy set out in *Katz*. It is submitted that the narrow, categorical nature of the *Vader* test prevents it from bearing an altogether rational relation to the right which it seeks to protect. A finding that premises are uninhabitable is treated as conclusive on the question of the defendant's expectation of privacy as to those premises.<sup>77</sup> The *Katz* test is more in harmony with the right that is being protected and thus provides a sounder doctrine.

To illustrate the weaknesses of the *Vader* test it is helpful to examine the recent California case, *Swan v. Superior Court*,<sup>78</sup> where a form of the

<sup>71</sup>*Id.*

<sup>72</sup>389 U.S. 347 (1967).

<sup>73</sup>*Id.* at 353.

<sup>74</sup>*Id.* at 352-53. See also Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1 (1971).

<sup>75</sup>389 U.S. at 350-53.

<sup>76</sup>*Mancusi v. De Forte*, 392 U.S. 364, 368 (1968). See *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>77</sup>As examples of unsatisfactory results which would ensue if "habitability" were to prevail as the test for constitutionally protected zones of privacy, fourth amendment protection would be unconditionally denied to the individual whose home was under construction but not yet habitable, or the individual whose home was rendered uninhabitable by disaster. These results do not seem consistent with the "expectation of privacy" that the individual may attach to his home.

<sup>78</sup>8 Cal. App. 3d 392, 87 Cal. Rptr. 280 (1970).

*Katz* test was applied. This decision is particularly relevant to *Vader* because of its factual similarity. In *Swann*, the defendant's home was gutted by fire and as a consequence was rendered totally uninhabitable.<sup>79</sup> Several days after the fire, the defendant boarded up the doors and windows in order to keep vandals from removing some personal property which remained on the premises.<sup>80</sup> Subsequent to these acts, the police executed a warrantless search of the premises, in which they found evidence of arson, the crime with which the defendant was later charged.<sup>81</sup>

The California court ruled that the evidence obtained from this search was inadmissible, having been acquired in violation of the fourth amendment.<sup>82</sup> The court dismissed habitability as a standard for determining an individual's right to privacy<sup>83</sup> and stated that the test was "whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion."<sup>84</sup> In applying its test to the facts, the court in *Swann* was of the opinion that the defendant had disclosed a reasonable expectation of privacy when he boarded up his premises and this expectation had been violated by the police search.<sup>85</sup> From the standpoint of "habitability," however, the fact that the premises were boarded up did not make them any more habitable. Therefore, on the basis of practical application, the *Vader* test appears irreconcilable with the prevailing standard for zones of privacy.<sup>86</sup>

On the other hand, it could be argued that even *Swan* was overly rigorous in its emphasis on an affirmative act from the defendant to demonstrate an expectation of privacy. Where the *Katz* test is applied to searches of the home it would seem that no affirmative act would be necessary on the part of the property owner to manifest such an expectation of privacy. Instead, there seems to be a sound basis for recognizing a presumption that the home is of itself included within the protection of

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<sup>79</sup>*Id.* at 394-96, 87 Cal. Rptr. at 281-82.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.* at 394-95, 87 Cal. Rptr. at 281.

<sup>82</sup>*Id.* at 396-97, 87 Cal. Rptr. at 282-83.

<sup>83</sup>*Id.* at 396, 87 Cal. Rptr. at 282.

<sup>84</sup>*Id.*, quoting *People v. Edwards*, 71 Cal. 2d 1096, 458 P.2d 713, 715, 80 Cal. Rptr. 633, 635 (1969).

<sup>85</sup>*Id.* at 396, 87 Cal. Rptr. at 282.

<sup>86</sup>It seems that the primary defect with "habitability" as a standard for determining fourth amendment protection where arson investigations are involved is that it should not be the only factor to receive consideration. Other factors which seem to bear on an expectation of privacy are: the amount of personal property remaining on the premises, the extent of destruction caused by the fire, the possibility of danger to the community from the fire, and affirmative acts on the part of the individual demonstrating the existence, or lack thereof, of any expectation of privacy. It is suggested that courts consider these other factors along with "habitability" in determining whether fire-damaged premises are entitled to fourth amendment protection.

the fourth amendment. Not only does the very nature of the property suggest that one may expect privacy there,<sup>87</sup> but the fourth amendment explicitly states that the people have a right to be secure in their *houses* from unreasonable searches and seizures.<sup>88</sup> Furthermore, the Supreme Court has stated that, except where exigent circumstances exist, all searches of *private property* must be supported by a warrant.<sup>89</sup> Thus, even though the accused in *Vader* performed no affirmative act to demonstrate an expectation of privacy, his home should nevertheless have been entitled to fourth amendment protection from a warrantless search. The presumption of fourth amendment protection of the home is so substantial that it should be overcome only by a showing through some act on the part of the owner that he no longer has an expectation of privacy.

#### *A Search for Policy Considerations to Justify Warrantless Arson Investigations*

In both *Bennett* and *Vader* it appears that the courts avoided fourth amendment precedents and employed rather contrived means to circumvent the exclusionary rule. From the approaches taken by the two courts the inference may be drawn that each opinion was directed toward achieving the same end, namely, the vindication of warrantless searches in cases of arson. If this were indeed the objective of the two courts, inquiry must be made to determine whether or not there are any policy arguments which justify such an exception to the normal rules of search and seizure in the investigation of crime.

Recurrent throughout several of the cases examined is the argument by the state that the requirement of a warrant in arson cases would greatly frustrate law enforcement efforts in this area.<sup>90</sup> In *Bennett*, it was argued that the warrant requirement would be unfeasible in regard to fire investigations, since a search of the premises would first be necessary in most cases before any basis for probable cause could be established.<sup>91</sup> If no basis for probable cause were available, then the fire marshal would be totally foreclosed from making a search. He would not be able to perform his duties under the statutes, and the legislative scheme would become a nullity.<sup>92</sup> Because of the plausibility of this argument, it be-

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<sup>87</sup>*Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>88</sup>U.S. CONST. amend. IV, the provisions of which are set out in full in note 1 *supra*.

<sup>89</sup>*Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

<sup>90</sup>*State v. Buxton*, 238 Ind. 93, 148 N.E.2d 547, 550-51 (1958); Brief for Appellee at 8-9, *Bennett v. Commonwealth*, 212 Va. 863, 188 S.E.2d 215 (1972).

<sup>91</sup>Brief for Appellee at 8-9, *Bennett v. Commonwealth*, 212 Va. 863, 188 S.E.2d 215 (1972).

<sup>92</sup>*Id.* It must be noted that in a great many arson cases law enforcement officers would not be compelled to resort to the warrant procedure to make a search. Where there is a burning of *the property of another* the victim of the fire would most likely consent to a

comes necessary to ascertain whether arson investigations should be made one of the general exceptions to the fourth amendment warrant requirement.

Where exceptions are made to the warrant requirement, the Supreme Court has ruled that the following test must be applied to the type of search excepted:

[T]he question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.<sup>93</sup>

In the past exceptions allowed by the Court, *there has existed probable cause to search*, but the warrant requirement itself was excused on other grounds.<sup>94</sup> It appears that to grant a blanket exception to arson investigations, irrespective of probable cause, would be inconsistent with precedent and would amount to the undermining of an important fourth amendment principle.

In many arson investigation cases, however, there is often sufficient evidence to provide a basis for probable cause and the issuance of a search warrant; the problem is merely one of failure of the inspector to procure one. Both *Vader* and *Bennett* seem to fall into this category.<sup>95</sup> Since the Supreme Court has created exceptions to the warrant requirement where probable cause has existed, the question arises as to whether arson investigations conducted without warrants but with the existence of objective probable cause might also qualify. Where exceptions have been allowed, the warrant requirement has been excused because the time involved in obtaining a warrant would frustrate the governmental purpose: evidence could have been destroyed<sup>96</sup> or removed,<sup>97</sup> or an immediate search was

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search. Only where a party is suspected of burning *his own property* would it be likely that consent would be withheld.

<sup>93</sup>*Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). See also *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

<sup>94</sup>*Chimel v. California*, 395 U.S. 752, 762-63 (1969); *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

<sup>95</sup>In *Vader*, the police had procured a warrant to search on a day previous to the investigation by the arson expert. This warrant had expired when the latter search was conducted, but there was no reason to believe that another warrant could not have been obtained. 276 A.2d at 152. As regards *Bennett*, see note 11 *supra*.

<sup>96</sup>*Chimel v. California*, 395 U.S. 752, 762-63 (1969) (search of area under immediate control of a party incident to his arrest); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (taking blood sample to determine intoxication immediately after arrest because of rapid dissipation of alcohol level in blood stream).

<sup>97</sup>*Carroll v. United States*, 267 U.S. 132, 153 (1925) (immediate search of car for contraband goods due to probability that car could be removed from jurisdiction by time a warrant was obtained).

necessary for the self-protection of the law enforcement officer involved.<sup>98</sup> No similar exceptional circumstances exist in the case of arson investigations. Therefore, the consistency of establishing an exception, in spite of the existence of probable cause in fact, would be questionable.

In many arson cases it must be noted that there will not be evidence readily available to support a finding of probable cause. However, the state may perfect its case through various means. Observations by policemen or firemen<sup>99</sup> on the scene of the fire may be one source which will provide the state with the necessary evidence to make out a showing of probable cause. Reports by insurance investigators<sup>100</sup> also may be of help to the police, provided there is no collusion,<sup>101</sup> and finally, hearsay evidence may be used to establish probable cause.<sup>102</sup> From the foregoing discussion, it appears that the problems facing law enforcement officers in conducting arson investigations in compliance with the fourth amendment are not as critical as the state may assert.

### Conclusions

After examining the problems involved in conducting arson searches within fourth amendment guidelines, no substantial reason can be found for granting these inspections a special exemption from the established rules of search and seizure. Arson investigations are essentially no different from any other investigations for crime in that warrantless investigations in this area pose the same potential threat to the right of privacy. Neither the *Bennett* case nor the *Vader* case, however, gives any recognition to this important consideration. Instead, the two cases seem to involve contrived formulations for avoiding the exclusionary rule. Perhaps in their unorthodox approaches to the problem of suppression of evidence, the two cases reveal some underlying dissatisfaction with the exclusionary rule. It is true that the outcome of applying the rule is often overly

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<sup>98</sup>*Terry v. Ohio*, 392 U.S. 1, 20-27 (1968) (search of persons engaged in suspicious activities and believed to be armed); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (search of area in which a dangerous suspect is likely to hide while in "hot pursuit" of suspect).

<sup>99</sup>*See Romero v. Superior Court*, 266 Cal. App. 714, 72 Cal. Rptr. 430 (1968); *State v. Cohn*, 347 S.W.2d 691 (Mo. 1961); 51 IOWA L. REV. 1105, 1109-10 (1966).

<sup>100</sup>*See Stone v. Commonwealth*, 418 S.W.2d 646 (Ky. 1967), *cert. denied*, 390 U.S. 1010 (1968). *Stone* was based primarily upon *Burdeau v. McDowell*, 256 U.S. 465 (1921), which held that information obtained as the result of a search by a private individual is not subject to fourth amendment sanctions on search and seizure. For information on the subject of how fire insurance companies may avoid payment of policies where the insured is suspected, but not convicted of arson, see Polk, *Arson and Related Defenses in Civil Actions Under Fire Insurance Policies*, 1967 INS. L.J. 645.

<sup>101</sup>*See Abel v. United States*, 362 U.S. 217, 226 (1960); *Lustig v. United States*, 338 U.S. 74, 78-79 (1949).

<sup>102</sup>Annot., 10 A.L.R.3d 359 (1966).